

Between Law and Diplomacy:
International Dispute Resolution in the Long Nineteenth Century

By

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Abstract

From late in the eighteenth century through World War I, states increasingly resolved their differences through arbitration; entering into over 1000 agreements to address past controversies and provide for future disputes. Rather than relying entirely on traditional diplomatic methods, states responded to the practical needs of an increasingly complex, commercial, and bureaucratic world. They used mechanisms with some legalistic components; although these procedures remained under political control. Arbitration never prevented a war; the efforts of the Anglo-American peace movement, later augmented by continental activities and the rise of the international legal community, had but small and indirect effects. While appearing responsive to the new influence of public opinion, states only made agreements to arbitrate that were highly controlled and which typically encompassed only relationships and parties for whom war was already quite unlikely. Western powers also extensively used arbitral agreements to resolve and protect their imperial interests, both formal and informal.

The traditional historiography of this field has been skewed by its emergence out of that peace movement, with its millennial, liberal, Eurocentric, and juridical biases. As a result, the significance of the Vienna settlements in launching the modern arbitral process has been overlooked, the Jay Treaty and the “*Alabama Claims*” case have been mythologized, the distinctive role of Latin American states has been sidelined, and the meaning of the Hague Conferences has been misunderstood.

States are political animals and their “states’ system” was effective in using arbitration as a shared tool while preserving their essential political discretion and managing their domestic and international publics.

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To My Parents
Sine Qua Non.

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Chapter 1: Introduction

In September, 1914, as the British Expeditionary Force in northern France was reeling under the advances of the German Schlieffen Plan, Sir Edward Grey, the Foreign Secretary, took a break from the war and curtly telegraphed Sir Cecil Spring-Rice, his Ambassador in Washington: “You are authorized to sign the Peace Commission Treaty at once.”¹ In terms of urgency as well as subject matter, it seems like a strange priority, even without knowing what was in store for Britain and the world over the following four years. However, by 1914, the peace and arbitration movement, then almost 100 years old, had acquired enough prestige, connections, and momentum to push states’ men forward despite the latest descent into war. The Peace Commission initiative, sponsored by U.S. Secretary of State William Jennings Bryan, had achieved great success in just a year and a half. It claimed a lineage embodied in the arbitration programs of the Hague Peace Conferences of 1899 and 1907, the Dogger Bank Commission of 1905 and a string of agreements, tribunals and actions stretching back to the Anglo-American Jay Treaty of a hundred and twenty years earlier. The U.S. Senate, no friend to international engagements, had approved a batch of eighteen of Bryan’s treaties a month earlier, even as American eyes turned towards Europe and new fronts in the war blossomed into Serbia and German East Africa.²

¹ Grey to Spring-Rice, September 4, 1914, FO414/240/89.

² Holt, *Treaties Defeated*, 245

Thus, despite the onset of the War the long-accumulated inertia of arbitration did not stop. Even as late as 1917, Germany and the neutral Netherlands agreed to arbitrate the internment of two German U-boats found in Dutch territorial waters, and this joint commission was one of ten arbitration agreements that occurred during the War.³ But, in an important sense, the War marked the end of the formative era in what we now see as modern international dispute resolution and public international arbitration in particular. The mood and modes of dispute resolution that followed under the auspices of the League of Nations were notably different. The postwar ‘strengthening’ of the arbitration process was a response to the perceived ‘failure’ of pre-War arbitration by embedding it within the overall League structure and endowing it with new rules and moral force. Yet, the War did not mark the failure of “arbitration” (even if a disparate set of practices, hopes, and rhetoric could be so simply reified). Despite the mythology, the use of objective, balanced, or neutral decision-making to resolve pre-existing international disputes was rarely effective as a war preventative; its use, while widespread, was only starting to gain traction in addressing significant issues; and the usefulness of its progress was notable only from a longer-term perspective than that afforded from a trench in Flanders.

A century later, we may take that longer-term perspective. Recasting the story of arbitration—indeed, reconsidering the common understanding of the term—shows how states accumulated and maintained their power amid the challenges of the nineteenth century globalization of economics and culture (and despite the efforts of idealists and lawyers to constrain it). Today’s version of the battle between absolutism and liberalism is complicated by dramatically accelerated globalization. And it is not surprising that the study of “global governance” is almost as commonplace as its subject: the vast and growing web of organizations,

³ SMH# 1014. There were also two other arbitrations which were commenced and concluded during the war: a Dutch claim against the Greek government in Smyrna and a treaty interpretation issue that arose between Britain and France. SMH# 1015, 1016.

regulations, procedures, and forums which exist and operate beyond the domestic purview of states. However, normal “liberal” or “neo-liberal” framing of these issues characterizes power allocation along a public-private axis and makes little accommodation for the creation of shared governmental power centers (e.g., arbitral commissions and tribunals) which (at least seem to) oppose unbridled state sovereignty but which do not directly enhance personal liberty.⁴ Whether these commissions and tribunals justify seeing globalization as an ally of liberalism or merely as an adaptation of state power to a broader context can help us see (and perhaps design) the shape of the state and the states’ system going forward.

The stories that follow place nineteenth century public international arbitration—both as a goal and a practice—amid the mainlines of history over the past two hundred years: the rise of nation and the state, the changing nature and practice of international relations, and the preservation of deeply-rooted ideals amid the hard edges of our times. However, they remind us that the characterization of historical phenomena depends in great measure on where we base our perspective; we may consider the evolution of public international arbitration during the long nineteenth century either as a failure or as a success, depending on whether our frame of reference was imprinted by the Great War or stretches into the twenty-first century. Whether the initiatives, events, and proposals embodying the practices of dispute resolution from 1794 to 1914 should be seen as a historical dead end or the early harbingers of some form of global state must be left to historians generations hence.

This study examines states’ decisions to enter into agreements to resolve disputes and the domestic and international circumstances in which they did so. These episodes, selected from over 1000 agreements to arbitrate from 1794 through 1914, show that arbitration and its variants

⁴ Mitzen, *Power in Concert*, 3.

were essentially political exercises of delegated state power to meet the increased complexities of government and globalized relations. The conventional story has positioned arbitration as an alternative to war and the increasing resort to arbitration as a process of gradual state enlightenment and submission to moral, liberal, and democratic pressures to prevent war. In the view of arbitration advocates and others, the solution to the problem of war was to domesticate the states system, both in the sense of ‘taming’ it and making the international system more like a domestic/constitutional/“rule of law” system. In the period leading up to World War I, this critique was the premise of arbitration efforts and its inability to prevent the War was the premise of the more rigorous and extensive model which underlay the League of Nations. However, while held up—by both advocates and detractors—as something distinct from “normal” intercourse of states, arbitration was merely diplomacy in quasi-judicial robes. This range of pacific dispute resolution mechanisms never escaped the control of states, their representatives (“states’ men”) and their shared culture for managing international relations (the “states’ system”). This continued political control remained despite an increasingly legalized discourse, promoted by peace advocates and international lawyers. Arbitration was a tool selected for its administrative convenience and for the admiration—in both domestic and international political contexts—that states and states’ men received from appearing liberal and pacific in an increasingly democratic era. Even the many turn-of-the-century agreements by which states made advance commitments to arbitrate future disputes did not represent moral “progress” as a means of war prevention. Rather, they were a result and representation of a shared political understanding that war between such states--arising from either a specified set of issues or generically--was already so far from decision makers’ moral or economic interests as to be unthinkable. A state’s risk of foregoing the option of war was, thus, already immaterial. The

commitment to arbitrate was, therefore, a symptom of the change in the international environment, not a cause.

This introductory chapter outlines my principal arguments and the events and developments which support them, including not only a redefinition of “arbitration,” but also a recharacterization of aspects of many familiar (and some unfamiliar) aspects of nineteenth century diplomatic history. Because our conventional understanding of these issues originated from within the movement to promote arbitration, I also explore and critique the role of peace advocates and the historiography they engendered. I then propose some implications of my views for our current understanding of international law and relations, as well as their connection to recent (and more venerable) trends in historical writing. Finally, I clarify my research methodology and provide an overview of the study’s chapter structure.

In the actual practice of European states, the use of arbitration was initially driven by the great Congresses: Paris (1814), Vienna (1815), Paris (1815), Paris (1856), and Berlin (1878).⁵ The spread of arbitration in the last quarter of the century was due to the stability of the European system (at least on the Continent) and the management of imperial issues. The peace movement struggled for almost sixty years, from its founding in the aftermath of the Napoleonic Wars to its rebirth in the early 1870s for intellectual cohesiveness and political presence, played only an incidental and marginal role. Thereafter, the increased prominence of the peace movement and its informal alliance with the emerging international legal community was built on a mythology surrounding the “*Alabama Claims*” case and anachronistic characterizations of the 1794 Jay Treaty and other antecedents. To the extent it represented an effective domestic political force in those states which accommodated an increasingly democratic political culture (Britain, France, and the United States), states’ men were able to meet its concerns by adopting

⁵ The extensive state practice which originated in Latin America will be explored in Chapters 5 and 8.

juridical forms and language for international dispute resolution and apply them in relationships and situations (both past events and forward-looking commitments) in which war was not an issue other than in rabble-rousing speeches and jingoistic press reports. This constrained form of arbitration, which excluded issues for which a state could claim its national “independence”, “integrity, “honor,” or “vital interests” were at stake, was adopted at the first Pan-American Conference in Washington in 1890 and at the Hague Conferences in 1899 and 1907 and in many bi-lateral agreements in the early twentieth century. This approach exalted form over substance and led to efforts to create some process to apply to significant disputes, which culminated in William Jennings Bryan’s Peace Commission initiative in 1913-14 alluded to above.

Throughout the period, states retained complete control over the use and structure of international dispute resolution agreements and mechanisms. These devices were never allowed to apply to critical political and military issues. States ensured that they retained a monopoly on the waiver of their self-perceived sovereignty. Even the most famous cases, such as the Jay Treaty (1794), the “*Alabama* Claims” (1873), the Venezuela Boundary (1897) and the Alaska Boundary (1903)—all (not coincidentally) involving the United States and Great Britain—were framed in a narrow way through “normal” diplomatic processes so as to be neutralized as a risk to the states’ system. In other words, the ad hoc diplomatic process leading up to the quasi-judicial process was managed in a way that the critical issues were retained within the diplomatic purview and not released to the lawyers until the political process was satisfied. Similarly, the Hague Conventions and its progeny were allowed to flourish only because they contained exceptions ensuring states ultimate discretion as to whether to proceed with a case. The promotion of judicialized arbitration by peace and international legal groups thus made progress and success only on a very narrow field left them by states’ men.

States' men viewed certain issues as critical means of preserving state "sovereignty" (or at least their model of sovereignty) and therefore inappropriate for arbitration. Under this model, derived from interpretations of the structure of the international system since the Peace of Westphalia in 1648, each state was equal, independent of the other and not subject to any limitations on its freedom of action. In the eyes of states' men, to accept arbitration, i.e. the risk of an adverse third-party decision, and to agree in advance to abide by that decision, was to derogate that model. This often produced a visceral reaction, typified by Lord John Russell, then (1865) Prime Minister of Great Britain, who refused to consider arbitration in what was to become the "*Alabama Claims*" case, telling Gladstone (then his Chancellor of the Exchequer) that "I feel that England would be disgraced for ever if such questions were left to the arbitration of a foreign Gov't."⁶ As the positivism replaced natural law as the foundation of the law of nations/international law, *raison d'etat* was unconstrained as the basis of international action.⁷ This was the crux of the challenge facing arbitration advocates and international lawyers from the beginning of their respective efforts. From this perspective, in the practice of diplomacy, the insistence by states' men on exempting from these forms of dispute resolution issues of vital national interest and honor might be seen as preserving their own scope of political action and their conceptualization of state sovereignty in the face of those pressures of law and public opinion which sought to alter the nature of diplomacy in the states' system.

Drawn along, reluctantly, by that public pressure and their own world weariness and war wariness, by the end of the century they *appeared to accommodate* the demand for "arbitration" at the Hague and in the flourishing of agreements that followed, even while constraining this

⁶ Russell to Gladstone, September 17, 1865, Gladstone Papers, BL 44292/178.

⁷ Of course, this is not to say that states didn't compromise or even agree to arbitrations on many topics and issues. But states' men did so secure in the their epistemological model and in the implicit appreciation that any de facto derogations were determined by the realities of power on the ground and their own assessments of their state's long-term interests.

practice to the fringes of international relations. It was not that states' men were against peace (even if they dismissed the efforts of the "public" to interject themselves into the subtleties of diplomacy). Indeed, diplomats saw their mission as preserving the peace. They were willing to use arbitration and commissions where they were useful; so long as they could constrain the scope and power of these mechanisms. In the context of individual cases, this became increasingly frequent as the century passed, reflecting the increased complexity and quantity of the issues states' men were called upon to address. These same complexities and uncertainties made *commitments* to arbitrate more risky to important state interests and therefore they rebuffed attempts to shift disputes to these more "objective" and "neutral" modes.

Thus, the efforts of the peace and law communities to produce a fruitful juridical avenue for the settlement of disputes proved sterile. Beginning in the last decade of the nineteenth century, conventions were signed by the score; but they were used only for secondary and clearly focused matters. They were unable to deal with those existential issues of identity and security which were more closely tied to essential national concerns, harder to grasp and address, and more instrumental in driving the great powers towards war in 1914. We may trace this epistemic disconnect back to their Protestant (and, to some degree, millennialist) roots. As a result, the problem of the influence of the peace movement and its inability to recognize and deal with the nature of the state and the states system was more than historiographic.

The slow pace of the development of dispute resolution mechanisms was decried at the time by those who hoped they would lead to the end of war as a tool of international relations. Arbitration advocates paid little attention to the fact that international dispute resolution agreements and their implementation, read broadly, were an expression of modernity, governmentality and "sovereignty." Contrary to the discourse promoted by the peace

movement, the bulk of dispute resolution agreements were a set of tools for administration, post-war clean-up and management of domestic public perceptions of diplomatic issues. While, at least conceptually, each such delegation of state power constituted a waiver of its “sovereignty” (in that the state stipulated its acceptance of a potentially adverse decision as to the matter to be resolved), the practical effect was minimized by the diplomatic neutralization of any material risk to important state interests. In essence, there was no overlap between matters that might have sparked a war and those that were actually sent to arbitration. The delegation of secondary issues to mechanisms outside the “normal” course of diplomatic relations as an alternative to war reflected the increased complexity of international relations and the struggle of often tiny diplomatic establishments to manage a greater range and volume of issues; often with complex commercial, financial, technological and cultural facets. It was, in short, a manifestation of the modern process of bureaucratization of the state which both Mill and Weber addressed.⁸ We can also see the development of dispute resolution mechanisms was a reaction in part to the increased complexity of diplomacy, including increased demands on the time and attention of a body of personnel in each of the foreign ministries which were constantly battling their treasuries for additional resources and the burgeoning of issues such as boundary and claims matters which were beyond the traditional capabilities of the elites who dominated the diplomatic ranks throughout the nineteenth century. The negotiation of an arbitration commission was a sufficiently unusual matter that it was likely less controversial a matter of gaining resources on an ad hoc basis than increasing the on-going staffing of a legation or ministry. Thus, while the emergence of the modern foreign ministry has been well covered in the literature, the means by

⁸ As one simple example, the correspondence of the British Foreign office increased from 6,000 pieces in 1829 to 111,000 in 1905. Steiner, *Foreign Office and Foreign Policy*, 3. Beetham, *Bureaucracy*, 1-29, outlines the historical theoretical models, citing John Stuart Mill’s *Considerations on Representative Government* (1861) and Max Weber’s *Economy and Society* (1922).

which international relations was conducted has not been considered in this light.⁹ Dispute resolution, in this way, as well as in terms of its increasingly commercial and imperial subject matters, and its shift to a legal/juridical mode, reflects those aspects of modernity which have been regularly seen in other aspects of European cultural development during this period.

In the middle of the nineteenth century, the peace movement began to shift from its religious roots and idealistic stance towards more substantive engagement with political processes. At its earliest stages, the peace movement placed its faith in the logic of its argument for peace, believing that education of a wider public would be sufficient to change the nature of state practice regarding peace and war. Their realization, towards the middle of the century, that this would not be sufficient, coincided with (and likely contributed to) the greater perceived role of “public opinion,” especially in the more “democratic” and “liberal” states of the U.S., Britain, and France. How this “public opinion” was manifested and understood by states’ men, as well as the degree to which it was an effective force in changing national policy are issues beyond the scope of this study, other than to note that it is an issue that must be approached with considerable caution. Public opinion in the nineteenth century might best be seen as a rubric covering the projection by states’ men and leading thinkers of their perception of the political views (expressed and inferred) of the press, and more-or-less organized products of larger groups of non-elites. It should, in no way, be conflated with data (*qua* polling) or status in a particular electorate; being more in the nature of a *gestalt* or *zeitgeist* as seen through the lens of those to whom those views were addressed or for whom they were fodder for their own views. Nor should public opinion be reified; particularly in any sort of quasi- or proto-democratic sense. Indeed, its importance lies at least as much in the fact that it was, in a way redolent of the

⁹ See Lauren, *Diplomats and Bureaucrats*, 34-44 for a discussion of the changing nature and environment of diplomacy. On the specifics of the British Foreign Office, see Steiner, *Foreign Office and Foreign Policy*.

“general will,” *referred to* either as a support or a constraint in discussions of substantive issues. The problem is that we can’t quite be sure whether those who claimed public opinion as either friend or foe were looking through a window or at a mirror when they were talking. In any event, it cannot be well compared to the mechanisms—journalistic, polling, and electoral—which characterize current practice in those and other similar states.¹⁰

The increased public/political role of the peace movement led to a connection with an emerging international legal community whose disciplinary biases resulted in an emphasis on juridical modes of international dispute resolution. The promotion of this late nineteenth century "arbitration" program produced a historiography which ignored non-judicial modes of dispute resolution and of limiting the power of individual states. In other words, a legal and historical orientation towards positivism also deterred focus on longer, slower, less visible processes of inter-national acculturation and accommodation as means of improving international relations. Further, the fundamentally different perspectives of the peace movement and more aggressive international lawyers on the one side and the domain of diplomacy/sovereignty and *raison d’etat* on the other, made it extremely difficult for diplomats and other states’ men to take peace advocates seriously; and their derogatory and condescending comments appear regularly in the dispatches and memoranda. The increased use of arbitration that occurred, most notably, in the context of Anglo-American relations, got as far as it did only because of cultural commonality, the alignment of broad strategic interests (the great rapprochement of the late nineteenth century) and parallel domestic political cultures which required governments to at least appear to take interest group pressures into account. This is not to assert that every diplomat was a war-monger or peace hater; there were many advocates of extending the scope and range of dispute resolution

¹⁰ See generally, Thompson, “Idea of ‘Public Opinion.’”

mechanisms, but, despite their lofty rhetoric, they were only ready to do so in controlled contexts.

Tensions within the liberal project of the nineteenth century underlay the disconnect between peace aspirations and state practice. The liberal premise was the limitation of state power in order to preserve individual liberty. That limitation could come from a variety of sources--the people (individually, in groups or collectively), the dispersal of power within various components of the state via constitutionalism, or even from other states. Any of these would effectively undermine the postulate of sovereignty which animated states' men. While the peace movement did not speak in terms of limiting sovereignty, it effectively sought to limit the state's power to go to war by imposing some other (peaceful) process of dispute resolution.¹¹ Similarly, they did not understand that the use of the term "sovereignty" (and related concepts of national honor and vital interests) by states' men in their diplomatic dealings was essentially anti-liberal and was of the same. Their understanding was skewed by two factors: a naiveté regarding the power and resilience of the state, which deflected and deferred their program, and an overly narrow focus on international law (enforced by judicial processes) as the means by which state power could be controlled. As a result, they failed to understand that states could and did co-opt the very tools and mechanisms which they promoted and thus neutralize the threat to state power and the states' system.

The nature of arbitration was also misunderstood because of the mid-century debate over the nature of international law that occupied theorists of the period. The English theorist, John Austin famously rejected the notion that international law was "law" because it couldn't be

¹¹ Their promotion of world government was not concerned with the threats to liberty implicit in that consolidated entity.

enforced.¹² At the same time, states' men regularly referred to the "public law of Europe," a concept which sounded more in the shared expectations of diplomatic elites and from which the domestic frameworks of judges and enforcement were clearly absent. The promotion of arbitration by peace and international legal groups was, effectively, an attempt to populate the international system with traditional domestic concepts of law, while the states system was quite comfortable with a notion of law that was considerably more amorphous than domestic models of precise (or even judge-made) rules which were enforced by the power of the state. Even as Austin's characterization of international law (which conflicted with the looser, traditional concepts of natural law and a general sense of order inherent in older approaches of international law and in diplomatic contexts) was debated, its rigid and positivistic model became embedded in the very definitions of the terms "arbitration," "sovereignty," and "law" to which the peace movement and international legal community aspired. By pushing international law towards this goal and urging the juridical resolution of all international disputes, advocates of arbitration sought, in effect, to define their way out of the problem. They thought that states could be made to waive their diplomatic discretion/*raison d'etat* and submitting war-threatening issues to arbitration; they sought an international law that was enforceable and Austinian. In so doing, they underestimated the resilience and dexterity of states' men. For the latter, the "public law of Europe" was "law" enough. Over time, they conceded the forms and language of arbitration, meeting the demands of "public opinion." Arbitration advocates grew to be satisfied with the forms and language, but didn't get close to constraining states' men's freedom of action. Their repeated claims of progress made it impossible for them to see that their goal remained far from

¹² Austin, *Province of Jurisprudence*, 146-7, 201-24, said that the presence of a sovereign over the international community with an effective power of enforcing decisions and principles was a prerequisite to his definition of "law."

sight. Thus, public international arbitration in the long nineteenth century never really succeeded in the way its advocates hoped.

Contemporary Historiography

The historiography of arbitration is marked by an extensive set of compilations and dedicated studies in both the popular and scholarly arenas in the latter part of the nineteenth century and continuing throughout the formative period of the League of Nations' Permanent Court of International Justice in the inter-war period of the twentieth century. Thereafter, until the recent resurgence of interest in the history of international law (a period of about sixty years), there were virtually no scholarly or popular treatments. The central problem presented by these works is that they were marked less by scholarly analysis than by an advocacy of arbitration, particularly the desire to demonstrate the robust history of the concept and thus its practicality of use in the diplomacy of the era. At this introductory stage, I will confine my discussion to an overview of the key historiographical problems, leaving to the next chapter (on the scope of arbitration) a review of the various methodological issues associated with the compilations and to Chapter 7 a further assessment of the works produced during the period.

Early peace advocates promoted arbitration in only a vague and abstract sense of some peaceful alternative to war. By late in the nineteenth century, the coalescence of the concept of arbitration into a few specific models coincided with a more historical orientation and the rise of the "social sciences" which led to the compilation of recent examples as an important part of their demonstration of practicality. This policy-oriented history was combined with the influence of the emerging international legal profession and the liberal/progressive mentality of the period to focus the perspective and definition of arbitration on a juridical process. This was exacerbated by the use of arbitral decisions as sources of substantive international law. As a result, the

historiography of arbitration became centered around those proceedings which appeared to have a quasi-judicial structure.

The evolution of the term “arbitration” illustrates the interaction of legal concepts and diplomatic practices during this era. Its historiography has suffered from being embedded in a liberal narrative of progress, American exceptionalism, and from a bias which cast the nominal regularity, rationality and transparency of court-like proceedings as the standard against which to evaluate the evolution of a complex, murky, and usually political process. The alleged shortcomings of this judicial view of arbitration were said to reflect the defects of the pre-World War I system of international relations. Yet, despite the appropriation of the concept of “arbitration” by the peace movement and international lawyers as a central exhibit in their effort to seize control over the decision for war—the crux of the states’ system—in fact, the various means of international dispute resolution have been tools of convenience, expediency, and the manipulation of domestic and international political situations by states and states’ men. Thus, the perception of failure of quasi-judicial arbitration, seen as part of Europe’s pell-mell descent into World War I, actually had more to do with the artificial hopes of those who sought a set of limitations on state power in law, public opinion, and “common sense” than with the expectations and plans of those states’ men for whom the arbitration models of the peace movement were never more than a distraction and the practical use of dispute resolution mechanisms were but an incidental aid in the resolution of secondary issues.¹³ Indeed, it may well have been the peace movement and international lawyers’ juridical models of dispute resolution crowded out debate on more flexible, pragmatic, and political versions and prevented the latter from being more prominent and effective in addressing larger issues of international

¹³ Against this melancholy, defeatist view of arbitration, we could write an alternative interpretation, one in which the puncturing of hopes were but temporary set-backs in a longer-term progress towards a restructuring of the states’ system still in progress.

relations. But even within this narrower characterization, arbitration, it could be argued, failed much earlier, and repeatedly.

The problems of bias and overly-narrow focus in nineteenth century historiography were further skewed in the twentieth. There was a desire, implicit in the establishment of the League of Nations as a “new” means of solving the problems of international relations, to denigrate past practices of statecraft. In addition, the rigidities of historical specialization have cast the stories of the peace movement, the rise of modern international law and the subtleties of diplomacy into different fields preventing the development of a more holistic, if complex, perspective.¹⁴ In particular, by narrowing the scope of activities considered as peace-making to adjudicatory arbitrations, the advocates of peace and international law sought to exclude what many might consider the *necessary* political aspect of joint international activity.

The use of 'shared sovereignty' mechanisms of governmentality such as executory commissions and joint administrative bodies was not seen as relevant because, in their focus on preventing war, the peace movement failed to recognize the breadth of inter-governmental relationships as an alternative means to limit the power of individual states, promote confidence in shared relationships, and build structures that were also designed to resolve disputes long before they could threaten international peace.

¹⁴ International lawyers have struggled with the notion of arbitration, much like recent political “science,” in trying to stuff a square peg of logic and an orthogonal model of state sovereignty into the round hole of diplomatic practice and international politics. Verzijl, *International Law in Historical Perspective*, 8:72, despite his work in writing a massive, multi-volume historical perspective on international law is dismissive of pre-World War I history; since it was only at that time that “properly speaking,” the “idea of submission to the judgment of an impartial third party became more firmly rooted.” Ibid. 8:73. His periodization and definitions make clear that only a juridical model of arbitration meets his ideal and that political and practical considerations are to be ignored.

Another shortcoming of the traditional historiography has been its eurocentrism.¹⁵

Arbitration is actually a story that has encompassed initiatives and contributions from around the world, global commerce, and imperial entanglements. In fact, Latin American countries were parties to over forty percent of all agreements from 1794-1914. Even diplomatic contemporaries, until late in the century, gave little attention to these precedents and their influences. This was due in part to the lack of status and prestige accorded those peripheral states and partially to the fact that their quasi-federalist affinity for general arbitration regimes was quite alien to the core European diplomatic view of dispute resolution mechanisms as pragmatic solutions rather than aspirational recitations and partially due to the fact that the frequency of their formal effectiveness was typically matched by the frequency of armed conflict between the states that had just proclaimed their devotion to peace. This did not stop Western states from pressing these same Latin American states into using specific adjudicatory arbitrations late in the century as an expression of informal imperialism and the extension of Western legal principles for the benefit of their own commercial interests. But while early twentieth century writers took note of the Latin American initiatives throughout the nineteenth century, these activities have received little attention since, in either English or Spanish, much less any connection to larger questions of alternate (i.e. non-western) conceptions of international relations.¹⁶

¹⁵ For example, the principal compilations and studies of the period ignore or give short shrift to Bowring's pioneering agreements and the bulk of the Latin American initiatives. See Moore, *History and Digest*; Lapradelle, *Recueil des arbitrages*; Darby, *International Tribunals*; Stuyt, *Survey of International Arbitrations*. This may have been due to a perspective that valued European projects as the sole source of 'civilization' or the desire to persuade Europeans to advance the arbitration agenda by emphasizing their own precedents.

¹⁶ See, e.g., Alvarez, "Latin America" and Andre, *L'arbitrage obligatoire*, 63-79, and Quesada, *Arbitration in Latin America*, which date from the Hague era. The only recent treatments, which are somewhat cursory, are Caminos, "Latin American Contribution;" Dominguez, "Boundary Disputes;" Esquirol, "Latin America;" Grandin, "Liberal Traditions;" Howard, "Local and Central American Context;" and Obregon, "Completing Civilization."

Definitions and Terminology

We are creators, tools, and sometimes prisoners of the words we use and the meanings they carry. This study uses some terms in particular ways which are important to express. Other terms, less problematic semantically, still require justification.

“Dispute Resolution” and “Arbitration”

As we shall see, the term “arbitration” has been used to cover a wide range of ideas and practices which has complicated both contemporary and historical descriptions. Thus, it is essential to specify what is meant by “international dispute resolution” and by “arbitration” as used in this study, in prior studies and by practitioners. Indeed, the distinctly rigorous sense of arbitration as a quasi-judicial process that emerged in its late nineteenth century period of historicization has skewed our understanding both of arbitration’s origins and of the realities of international relationships throughout the nineteenth and twentieth centuries. This narrower definition is a product of the rise of the modern mode of international law (and lawyers) and that community’s desire to capture arbitration as a rational, apolitical, and “legal” means of dispute resolution and distance itself from both the complexities and apparent atavisms of contemporary diplomacy and the practicalities of governmental administration.¹⁷ This has left us with a historically inaccurate conception of arbitration as something wholly separate from other means of international cooperation, including international organization.

For purposes of this paper, “international dispute resolution” encompasses means of resolving disputes between states through a decision by someone other than the states involved or their direct and formal agents (diplomats). Disputes, whether between two people claiming a place in line, two dogs marking turf, or two countries seeking to gain or preserve power,

¹⁷ For one of the extremely rare studies that accommodates this broader sense of the term, see Poignand’s 1904 dissertation, “De l’Evolution de l’idee.”

territory, honor, or money have traditionally been resolved through violence or communication (which may, of course, imply a threat of violence). The rise of organized communities often has brought a third method: decision by a third party acknowledged and empowered by the two antagonists; typically premised on an implicit social contract which may include procedures and rules of decision designed to secure a resolution of the dispute (often denominated as “justice.”). In this way, international dispute resolution should be seen as a step towards shifting the relationship of the two parties (here countries), from status to contract. I don’t wish to lean too heavily on this analogy from Maine, since he described a situation within an established (implicitly contractual) community.¹⁸ Still, the voluntary derogation of the self-defined status of sovereignty to a constraint of that unlimited power inherent in a treaty—particularly an arbitration agreement—does resonate along the same lines. Chapter 7 elaborates on the connection of this development to the emergence of modern international law.

Still, we need to recall that the meaning of “arbitration” as a historical label evolved over the period we are considering. It began as a generic term indicating some means (other than war or normal diplomacy) as a means of settling differences between states. Implicit in this understanding was the sense that a specific dispute had already arisen and that diplomacy had demonstrated an inability to resolve the matter to the satisfaction of both parties. It evolved to indicate a particular mode of international dispute resolution, one characterized by quasi-judicial procedures and parameters. From the perspective of the twentieth century, this more formalized structure evolved into specific channels, arising under the aegis of the League of Nations, the United Nations or other global or regional organizations and arbitration is now seen as an intermediate (primitive) step along the road to judicial determinations, both logically and historically.

¹⁸ Maine, *Ancient Law*.

The flourishing of several types of international dispute resolution in the long nineteenth century marks an important shift in the nature of international relations. War and diplomacy have traditionally been the two ways in which disputes were resolved. In each case, the appearance of sovereignty was preserved until the issue was decided and the result of the contest of power (expressed either militarily or politically) was crystallized in a peace treaty which shifted money, territory, rights and commitments for future behavior which then constituted the new shape of the states-system. And, while war is relatively easily recognized and distinguishable by its reversion to violence, the significance of dispute resolution lies in its distinction from diplomacy. The critical element is the degree to which the decision resolving the issue in dispute is formally separated from the unfettered discretion of the two states involved, particularly since states almost always chose to comply with the arbitral decision.

International dispute resolution mechanisms studied here were different from diplomacy in several key respects. First, some aspect of each state's sovereignty (often a claim to territory or money) was willingly (consciously/rationally) put at risk in the state's decision to accept the (unknown) outcome of the decision. Second, there was some distance inserted between the states involved and the decision making process; i.e., unlike a diplomatic negotiation, the decision process was not under the state's direct control. Third, in addition to the traditional focus on specific complaints and disputes, the issues submitted were often defined only generally (such as "interpretation of questions arising under the other articles of this agreement," establishing a boundary between points 'A' and 'B' "consistent with the requirements of justice and international law," or "allocating the debts of the Monte Napoleon"). Finally, these issues were no longer confined to historical events, but could include disputes projected to arise in the course of addressing issues of joint concern. For these reasons, modes of diplomacy, such as "inquiry,"

“conciliation,” “mediation,” or “good offices” in which third parties have become involved in discussions between the parties play only a tangential and illustrative part in this study.

Particularly since, in each case, there was no sense of formal commitment or compulsion with regard to their outcome, however useful they might be and each state retained its entire discretion to participate, negotiate and settle the dispute (or not).

The fact that the decision-making process was to occur at some distance from the direction of each state’s senior political/diplomatic mechanisms and mentalities was essential to this fundamental change in the practice of international relations. This distancing could manifest through the process of selecting the decision maker or establishing the parameters under which the decision maker would render their decision. Over the period, we will see a set of lengthy, slow, and irregular shifts. There was an evolution from using other heads of state as the decision maker to employing jurists and other civil servants. We will see a move from mixed commissions populated by the parties’ nationals to the dispute to multi-member bodies comprised primarily or solely of nationals of other states. We will see the standardization of procedures and, most importantly, the increasing specification of the rules of decision. Each of these developments contributed to a reduced role for the states-parties in determining the outcome of the decision. This loss of power—of sovereignty—towards some external basis marked a basic change in the nature of the state and the states system. At the same time, we will see examples of how, usually through informal mechanisms, state power was injected more directly into the decision-making process than either contemplated at the time or recognized afterwards.

The use of these mechanisms also carried some semantic baggage from the traditional usage of arbitration in domestic contexts. There, its extra-ordinary nature as an extra-judicial

dispute resolution process, i.e., a process outside of the normal sovereign-established mechanisms, was regularly applied in commercial and labor relations disputes.¹⁹ Royal judgements were a central aspect of domestic sovereignty, from which domestic arbitration represented some distance. The use of the term internationally was thus appropriate, since the international plane, by definition, was outside the model of sovereignty.

When a state ceded, in a specified situation, the willingness to submit to the judgment of another, it gave up some portion of its sovereignty. The fact that such submissions were not enforceable by anything close to the organized mechanisms of judicial administration and use of force normal in a domestic situation was, in an important sense, beside the point. A sovereign's submission was a speech act with inherent value and meaning. This is contrary, of course, to Austin's famous critique of international law, which defined law as an *enforceable* principle. But his modernistic dichotomy of enforceability *vel non* was itself part of a project to solidify the state as the integral locus of power; and so his exclusion of extra- or supra- national law was rather more tautological than it seems. "Sovereignty" as was most typically used in discussions about either arbitration in general or as applied in particular cases, invoked the mythology of Bodin, whose absolutist model of domestic power distribution was transformed by Vattel into a parallel absolute independence of external power.²⁰ Vattel's *Droit des Gens* was the leading treatment of the law of nations of the eighteenth century and was likely familiar to all the leading statesmen at least through the first half and the expositors of the new international law in the latter half of the nineteenth century.

¹⁹ Born, *International Commercial Arbitration*, Vol. 1, 20-59 provides a good global historical overview. See also, Allen, "Origins of Industrial Conciliation," and Cornish, et al. *History of the Laws of England*, Vol. 11, 773-6 on English labor-management and merchants' practices, respectively.

²⁰ See Beaulac, *The Power of Language*, 151 ff., for a detailed critique of the mythology of sovereignty and the "Westphalian system." and an analysis of Vattel.

Even without delving into the complexities of the nature of power, such a model of the states-system was thoroughly undercut by the Vienna system, even for the leading powers.²¹ Indeed, the common reference to the “public law of Europe” thereafter was testament to the limitations of the theoretical model. In diplomatic parlance, therefore, the preservation/promotion of the model of “sovereignty” thus became a substitute for acknowledging the complexities and limitations of a state’s real scope of freedom.²² Promoting that model was important because it was more manageable than the reality of operating in a world of limits, whether due to other *de facto* modes of power, the “public law of Europe,” or an arbitral agreement. Indeed, it may have been precisely because of these constraints that the idealized concept became more central to the rhetoric of diplomacy and domestic politics.²³ This mythology thus became the basis for opposition to any derogation of the absolutist model; that is to say, a conclusion rather than an argument which in the context of a potential arbitration, stated simply, would run “I don’t want my state to take the risk of losing this case or accede to setting a precedent which may haunt my state in some future case.”

As noted above, our frame of reference should not be limited to situations where the third-party resolving a dispute was a judge in any formal sense or even someone who was “legally” trained. Such a definitional constraint was a product of the historical process which we will examine and was not a necessary factor in most arbitrations prior to the late nineteenth century. Rather than relying on a “legal” characterization at this definitional stage, the key attribute of the third party (and in some cases, multiple third parties) was some combination of objectivity, neutrality, and rationality; which were sometimes assumed and sometimes grounded

²¹ See e.g., Schroeder, *Transformation*, and most recently Mitzen, *Power in Concert*.

²² Osiander, *States System*, 3.

²³ While it is crucial to remember that the “public law of Europe” was quite distant from our own concepts of “law” (even international “law”); as we shall see in Chapter 4, the Vienna system can claim considerable parentage for the modern practice of arbitration.

in an oath to act fairly. Indeed, characterized as a bureaucratic process of delegation by (often) overworked, generalist, aristocratic/elite diplomats, we can see the importance of technical/professional expertise, whether legal, financial, commercial, or geographical as a trigger in these modes of dispute resolution. This process was also an aspect of the broader nineteenth century political and social phenomenon in which “expertise” and “professionals” gained a greater role and increasingly became a source of legitimacy.

By the same token, we need to look beyond disputes which have already arisen at the time the parties decided or agreed to proceed to this objective mode of resolution. Thus, anticipatory agreements, whether limited to specific issues or areas, or generally covering a broad range of the two parties’ relationship, were an important part of the evolution which we will explore. Of equal importance is the inclusion of modes of dispute resolution which have often been characterized as modes of international “organization.”²⁴ In several significant senses, these were mechanisms for resolving disputes in an area which was expected to generate disagreements between the parties and where the parties recognized that the nature of their relationships would be more intensive or extensive than prior inter-state practice. The interests of the various states could encompass trade, strategic, psychological or military components. Thus, for example, the “Octroi” regime for managing certain issues relative to the navigation of the Rhine river, established between Napoleonic France and the still-extant Holy Roman Empire and further developed under a regime sanctioned at the Congress of Vienna provided mechanisms for dispute resolution within their structures. But, even more importantly for our definitional purposes, they represented an understanding shared by the parties that the focused nature of the rules to be established and enforced under those regimes would generate disputes between those parties which would be treated as what we now characterize as administrative or executive,

²⁴ This issue is taken up further in Chapter 7.

as compared with a judicial, function. But it would be a mistake, historical and in principle, to start with a Montesquieuan “separation of powers” analytic framework here. While such notions were certainly known throughout this period, these were borderlands, in which rigid lines were rarely seen, particularly in the international context where widely differing notions of government prevailed.

At the same time, it is important to exclude the resolution of differences by diplomatic means.²⁵ An apology, an adjustment, a draft order for gold bars or a willingness to forget a perceived transgression have all been used to resolve disputes between states. Negotiated solutions are a perennial of human culture. What is significant about the phenomenon under study here is that the parties agreed to let someone else decide and agreed to abide by that third party’s decision. The revival of this mode of dispute resolution, at the end of the eighteenth century and its evolution up to World War I, including willingness to accept or acquiesce to an adverse decision, illuminates the changing nature of states and the states system as increasingly influenced by nationalism, the public sphere, the culture of law and the complexity of modern governmentality.

Thus, for our purposes, international dispute resolution encompasses mixed tribunals, joint commissions, arbitral boards—groups and individuals of whatever name—whose purpose was to act in between the conflicting interests of states. These were efforts to move a dispute or issue outside the bounds of the “political” in both the practical and Schmittian senses of that term. Neither the nature of the issue in dispute, whether a private claim, an unclear boundary, or a matter of treaty interpretation, nor whether the decision to arbitrate was made with regard to a

²⁵ I have also excluded consideration of consular courts, typically a manifestation of informal imperial power and extra-territorial jurisdiction, but which also could be also be seen as a type of intergovernmental structure for dispute resolution, set up in anticipation of a class of disputes arising between citizens of two states.

specific existing situation, a class of past or future disputes, or across the range of the relationships of two or more states, would exclude a particular instance from the purview of our story. Since the evolution of these methods illustrates the changing nature of the diplomatic process and the impact of legal, public and bureaucratic forces, our focus is on this decision to enter into arbitration or other similar dispute resolution mechanism, to put one's state interest at risk to the choice of another. The results of that process, the actual decisions and specific rules of decision, often couched as principles of an emerging international law, as well as the arguments over the substance of a dispute, whether in public debates, or in diplomatic or legal commentary, will be of concern only insofar as they create or affect the environment for later dispute resolutions.

"Public" "International" Arbitration

In light of the scope of international dispute resolution, it is important to clarify some of its limiting parameters and why several ancillary areas will not be addressed. Since this is a study of the nature of the state and the states system, arbitration between private individuals, either on an international or domestic level, will not be considered.²⁶ This practice, which burgeoned with the expansion of global trade and finance starting in the late nineteenth century, invokes issues of state sovereignty only in a tangential way and while the growth of private international arbitration is an interesting and important subject from the perspectives of commercial relationships and substantive law, it carries (despite the necessary involvement of governments

²⁶ Wetter, *International Arbitral Process*, for example, devotes his entire five volume treatise to the premise that public and private arbitration are essentially the same and other extended treatments of international arbitration make at least a nod in this direction. See, e.g., Born, *International Commercial Arbitration*. While this may be useful from a procedural perspective, the interactions of the two (certainly until the twentieth century) were incidental. Indeed, the very premise of similarity is indicative that the modern view is quasi-judicial in nature.

in sanctioning the rules and procedures) little of political import. In this context, we must acknowledge that many of the incidents of public international arbitration represent a state's taking up the claim of one of its nationals against the alleged improprieties of another state. However, these cases rise to our attention precisely because the states involved chose to clothe these disputes in the robes of diplomacy, and because they engaged the diplomatic machinery of the states' system they were no different from those whose origins were exclusively state-to-state. These disputes have usually arisen because of the alleged breach of a contract between a private entity of one nationality and another state or because the 'defendant state' has failed in some duty owed to such an entity, under a quasi-tort theory.²⁷

It is worth emphasizing that the substantive nature of the claim is usually not of concern here; it is only when a type of claim, such as a duty allegedly particularly owed to foreign nationals/merchants/investors, implicates an asymmetrical relationship between the states involved, that the substance becomes noteworthy. Thus, the use of arbitration in situations where, for example, state revenues were pledged to support foreign bonds or the property of a Western merchant was harmed allegedly due to a local "civil disturbance" which allegedly gave rise to a duty by the local government to protect foreigners, might be seen as the use of an arbitration mechanism to remove the case from the jurisdiction of the local courts to tribunals which were seen as more objective/civilized/appropriate (or otherwise more favorable to the Western power). From our perspective, it was the political and diplomatic considerations—on both sides—that might illuminate the nature of the local state's sovereignty and its standing vis-a-vis the other state in the overall states system that makes this situation significant.

²⁷ Thus, by way of contrast, the "mixed arbitral tribunals" which flourished in the aftermath of World War I, addressed disputes between two private parties of different nationalities. Those tribunals were effectively created to substitute for the domestic judicial systems whose jurisdiction was problematic whether because of the post-War turmoil or because they were instruments of states whose very existence was either new or radically transformed by the war.

In the interests of simpler writing and reading, I will rarely use the full term “public international arbitration,” and will generally refer just to “arbitration,” noting where necessary if some other adjectives are appropriate (e.g. “domestic” or “private international”).

The terminology in this field is a semantic mess. Language developed through the eighteenth century used “nation” to describe what we now call a “state.” “States” in a federal system are quite different from those which operate at a higher plane. “Nation” now carries with it the linguistic baggage of nineteenth century nationalism. For some purposes, “state” does not include empire. The nice neutral term “polity” seems too abstract and archaic for a work of history. What was commonly called the “law of nations” exclusively (at least in English) into the twentieth century has been overtaken by Bentham’s coining of “international law” since the 1780s. So, with due apologies for any residual confusion, in this paper (other than in quotes and as expressly noted), the term “state” will be used for a political entity which operates at the highest level, with plausible claims to what is called “sovereignty,” as discussed above. The relationship between states will be described as “international” and, in deference to recent historiographical trends, phenomena which occur above and beyond the state will be called “transnational.”

The Long Nineteenth Century

This study covers the period from 1794 through World War I. While arbitration has a lengthy history, going back to the ancient Greeks, as well as a notable flourishing during the European Middle Ages and early modern period, the practice fell into disuse during the eighteenth century. The causes of this decline and revival can, without further research, only be the subject of speculation. What is clear and widely recognized is the fact of the revival in the

course of the U.S.- British agreement of 1794, the so-called “Jay Treaty.” We shall trace its continual influence in subsequent diplomatic practice and public commentary throughout the nineteenth century.

The termination of the study at World War I is a more problematic choice. Certainly the pre-War history of arbitration had a strong influence on the development of the Permanent Court of International Justice (“PCIJ”), established under the League of Nations Covenant and, later, the United Nations’ International Court of Justice (“ICJ”); the flourishing of private international arbitration following the First War is another legacy. Yet, in several senses, the establishment of the League marked a change in the structure of international cooperation and relations more broadly. Its institutionalization of intergovernmental relationships was a quantum step from nineteenth century roots, whether in many of the joint commissions noted in this study or the more well-known international organizations, such as the Universal Postal Union or International Telegraphic Union. In terms of the peace movement, this institutional framework became the primary focus of activity, supplanting the pre-War efforts for arbitration. More directly, the shift from the “stand-by” and ad hoc nature of the arbitration arrangements established under the Hague Conferences to an ongoing body, comprised of “Judges” elected by the League, not the states party to a particular dispute, changed the nature of the process in both its legal and political character. Finally, World War I also represented a hiatus in the practice of arbitration as well. As will be explored in more detail in Chapter II, the war years saw the number of arbitrations plummet to levels not seen since the 1830s. As a result, the War marked, in several essential ways, the end of an era in public international arbitration. At the same time, these post-War steps, including organizations, agreements, and activities that arouse controversy even today,

have been built on these earlier foundations, whether solid or not. The War forced a greater shift in the dialectic on these issues; but there was no *tabula rasa* here.

My use of language in this work has been guided by a desire to use plain language and to define what I mean by the key terms I use:

- An “agreement” includes treaties, conventions, protocols, and a host of other diplomatic synonyms.
- “Domestic” means the law or political organization within a state; notwithstanding the common use of the term “municipal” in international legal writing.
- A “national,” as a noun, includes both subjects of monarchies and citizens of republics.
- A “tribunal” means a panel, commission, court, or other decision-making individual or group. It is comprised of “arbitrators,” often including one or more “umpires” who are those decision-makers who are not nationals or other representatives of the parties.

Umpires are usually independent “3d party” sovereigns, states’ men, or jurists who are vested with the power and duty to resolve the likely differences between national arbitrators.

- A “state” means an independent political entity; Spain, not South Dakota.
- “Western” means European or American, in the context of cultural, commercial, or legal imperialism. “Local” will be used for those groups and states which were indigenous or which, in imperialism studies, were otherwise considered as part of the “periphery.”

I have used these terms in the interest of simplicity and without, I hope, importing with them a variety of semantic baggage.

“States’ men” and the “states’ system”

At the same time, I have used two unusual terms in order to make an essential point about the relation of law, peace, and international relations. I will generally use the term “states’ men” to refer to those political leaders and diplomats whose represented states and in an important sense saw themselves as upholding a state-based system of power across the world. These men, regardless of nationality or their place in their respective domestic political spectra, were typically motivated by an affinity for a conception of international relations similar, if perhaps more fundamental, to the ‘legitimacy’ which elites saw as the premise of both domestic and international politics in the aftermath of the Revolutionary and Napoleonic Wars. They sought to maintain a manageable world and for this certain cultural norms were essential; particularly a set of “civilized,” regularly organized, political entities who, at least in terms of language and procedure, were equal and “sovereign.”²⁸ Their shared culture as international elites was as important as any a national or nationalistic outlook. Regardless of the realities of power differentials, manifested through economic or military coercion, for them, the formal integrity of each state was to be preserved. The ordinary term “statesmen” carries a connotation of distinction/honorability/nobility which is beside my point.

As a group, and generally, these international political players while intelligent and diverse in many ways, were the instruments of the “states’ system.”²⁹ Again, I have sought to move away from the variety of formulations used to describe, in some generic way, the collective group of states. My point is that the structure and culture of international relations was

²⁸ Whether international lawyers, other internationalists and the experts who led the early international organizations should be included in this category is an interesting question.

²⁹ For a slightly different take on this concept, see Osiander, *States System of Europe*.

of, by, and for states.³⁰ Their epistemological ability to tolerate non-state actors was dubious. At least part of their collective purpose was self-preservation, individually and collectively. My concept differs from that advanced by Bull. His model of a system of states is considered from what might be called a sociological perspective, assessing the degree to which states' relationships are sufficiently developed to be called a "system" or a "society."³¹ In contrast, my use of the term "states' system" is intended to connote that the system is of, by, and for the states; that the members' awareness of the benefits of their participation is manifested in their joint and their parallel actions vis-à-vis other (actual or aspirational) states which have as part of their goal the preservation and enhancement of the system. In this way, I agree with and extend Gong's invocation of states' sensibility of 'clubbiness' and his emphasis on the role of law—culturally, as well as in terms of process and substance—as a central value of that group.³² He focuses on the standards of admission; I emphasize their goal of maintaining the integrity of their shared values, particularly the value of being a 'sovereign' state. Further, my "states' system" is not intended to encompass all states across the globe; rather it refers to the principal European powers, with the increasing inclusion of the United States and, at the end of the century, Japan. In making these terminological distinctions, I recognize that I brush dangerously close to the semantic morass known as "sovereignty." While this term ranks high in the list of concepts whose use exceeds their definition, it is important to make clear that, as a practical matter, sovereignty is most commonly used as a synonym for "power." Bodin's description of absolute sovereignty has been merely a model, a construct which was nearly always compromised, split,

³¹ Bull, *Anarchical Society*, 9-10.

³² Gong, *The Standard of 'Civilization,'* xi, 14.

divided, or dispersed.³³ Yet it was a model that, if unrelated to the real world, was frequently invoked by states' men and publicists throughout the period, at least as something which could not or should not be compromised. Already by the first half of the nineteenth century, "it seemed obvious that there were restrictions on sovereignty, and natural to experience sovereigns always already enmeshed in a system of rules."³⁴

In the context of arbitration, the agreement to arbitrate (i.e. the expression of the willingness of a state to enter into agreements under which it promises to abide by the decisions of those not fully under its control) represents a breach of this model of sovereignty and an acknowledgment that, regardless of their rhetorical usefulness, idealized models of absolute sovereignty did not function well in the real world of international relations, particularly in the nineteenth century where the nature and scope of diplomacy was changing. International lawyers and political theorists have struggled to 'square the circle' and reconcile ideas of sovereignty with arbitral practices; but the decision to arbitrate operates at two distinct levels. At a formal level, a "sovereign" state cannot be required to enter into an arbitration or to accept its adverse result. However, at a functional level, sovereignty is compromised. A state's willingness to do so, in practical terms, is the result of its free and "sovereign" determination that to do so is preferable to the alternatives (either the indefinite continuation of antagonism or risking the "arbitrament of war"). Thus, we can see the growth in arbitration as the result of two well-recognized developments in the nature of nineteenth century international relations. First was the increase in interdependence at a practical level, particularly in terms of commercial and cultural relationships. Second, the increasing influence of "public opinion," particularly of the

³³ Most writers on the subject fail to make clear whether they are addressing sovereignty as "power", in which it is susceptible of all manner of division and demarcation, or as binary situation (a state either is or is not "sovereign").

³⁴ Kennedy, "International Law," 401.

"democratic" variety which sometimes reduced the viability of war as a public policy and, more importantly for our purposes, imputed a standard of rationality and good faith into the public dealings of states. The tension between the theoretical model and practical politics has been particularly acute in the context of anticipatory commitments to arbitrate (more so than in agreements to arbitrate past events). Such a commitment reflects an understanding by a state that its participation in an arbitral regime, whether bilateral or multilateral, is in its long-term interests as part of the states' system.

As we will see, the increasingly regularized structures of arbitration and the growth of anticipatory commitments to arbitrate over the period have invoked the methods and language of law. Thus it is no surprise that the tension between law and sovereignty, first enunciated by Montesquieu,³⁵ was exacerbated in the context of late nineteenth century arbitration, particularly given the increasing pressure on untrammelled state power from liberal ideas and practices from which the development of arbitration cannot be separated.³⁶

Implications for Sovereignty and the States' System

The recharacterization of the history of arbitration has fundamental implications for the definition of fields of international relations, peace, international law, international organizations, and their historiography. It undercuts the bright lines which theorists and historians have relied upon to isolate their fields. Salisbury, an acute practitioner of diplomacy throughout the last third of the nineteenth century, was alive to the uses and benefits of the arbitral process. Peace advocates Sir John Bowring and John O'Sullivan were more influential as diplomats than when working within the peace movement. International law and international lawyers have mostly remained tools of their governments, whether they were employed formally as such or not.

³⁵ Montesquieu, *The Spirit of the Laws*, Bk. 26, Ch. 16.

³⁶ Robson, "Vital Interests," 39.

The actual practice of entering into arbitration agreements in the long nineteenth century shows that the current tensions and ambiguities in the nature of the states' system are not new. Indeed, the nature of the state and of the states' system continue to be highly dynamic. Structures of power are morphing into new forms: devolution in Scotland and Spain, the creation of the European Central Bank, the World Trade Organization, and the International Criminal Court, the quasi-recognition of Palestine and the transnational, semi-dispersed/coordinated Al-Qaeda, to take but a few examples. The revised states' system which emerged in the aftermath of World War I was a reaction to the perceived inadequacies of the arbitration project of the pre-war decades. The resulting efforts to 'shoe-horn' states, international law, and international organizations into a simplistic model of state sovereignty has continued to produce tensions and conflicts, whether tied to straight lines on maps or complex voting structures in, e.g., the European Union. Much of this has been accompanied recently by considerable hand-wringing, not least in the academy, over the demise of "sovereignty" or at least of its myth. The proper scope of state power was the implicit subject of the debates over arbitration in both domestic and international fora. Agreements to arbitrate particular cases reveal the willingness of states' men to risk an adverse third party decision which would have to be complied with or disavowed (I.e., to accept a real limitation on state power. Idealized models of "sovereignty" continue to fail in light of how states and states' men have actually worked.

But sovereignty has always been a construct, a tool for social organization.³⁷ As a politico-legal concept, it has sought to crush, dismiss or ignore those other forms of social power

³⁷ Kennedy, "International Law," 403-6, notes that in the late nineteenth century, international law focused on sovereignty as having a coherence and regularity, when in fact it was diffuse and differentiated; perhaps more for the convenience of international lawyers and their models.

which affect humans.³⁸ Within a social grouping, the distribution of power through the varieties of federalism, “separation of powers,” tax farming, or other modes has been more or less conscious and more or less voluntary. At the international level, similarly, tributary schemes, suzerainty, extraterritorial jurisdiction, mandates, trusteeships, protectorates, and spheres of influence have all been vehicles for one state to formally exercise some degree of power over another state or society. So, there is no such ‘thing’ as sovereignty and its invocation has been more a rhetorical demonstration of the insecurity of states’ men over the loss of their state’s underlying power and status or a claim they use to extend it rather than substantive argument against entering into an arbitration agreement or other international arrangement. Attempts to distinguish between law and politics at the international level are and have been based on a false dichotomy. States have never submitted to “legal” control except where “international law” is the expression of an underlying power structure; and efforts to formalize legal control always run short of the pace of economic, military, and technological change. It is difficult to imagine Russia complying with an arbitration order that it pay \$50 billion for expropriating Yukos Oil while it is snubbing the U.S. and E.U. over its incursion into the sovereignty of the Ukraine.³⁹

The significance of arbitration is that it has been a means by which states have *appeared* to submit to international law; but in fact they have merely invoked a legal format in which their dispute can be resolved without risk to the continued maintenance of their nominal “sovereignty.” The arbitral space—characterized by a quantity of process, objectivity and self-denial of absolute sovereign authority—has lain between law and sovereignty. In light of the evolution of international law and international organization, the history of arbitration raises questions as to 1) why and how modern Western culture values the appearance of “legality” at

³⁸ Fukuyama, *Origins of Political Order*; *Political Order and Political Decay*. Mann, *The Sources of Social Power*, Vols. 1 & 2.

³⁹ *Hulley Enterprises Ltd. v. Russian Federation*, PCA AA226, July 18, 2014.

the international level and 2) whether we accurately understand and can describe the current modes of law-tinged international relations.

Arbitration has been seen as part of the progress of international law or, for some, even a universal state. Of course, such a path is hardly inevitable. Despite claims of “progress,” the *ad hoc* nature of most arbitrations (even those of a more institutionalized structure and on-going duration), as well as the vagaries of the evolution of international politics has made clear that each such step is no guarantee of a second. Characterizing the extent to which individual arbitrations have led to further political or cultural alignment or integration has depended as much on the period considered and the assessor’s current issues and concerns. For example, the ups-and-downs of the U.S.-British relationship over the period have provided a rich range of perspectives on this point, e.g., from the highly energized animosity which dominated during the Venezuelan Boundary crisis in 1895-7 to the close cooperation which led to the Commissions for Samoa just three years later. Similarly, the precedential value of the Franco-German cooperation in the Napoleonic era in the “Octroi” Rhine River scheme was estimated differently in the 1930s than in the run-up to the European Communities in the 1950s. Even more striking has been the relationships among Central American countries who, for a time, seemed to flip-flop from war to arbitration agreement to war to plans for unification and back to another war. From this perspective, the characterization of arbitration as a failure seems to have been cemented at Versailles, as alternate modes of international cooperation, governance, and dispute resolution were brought to the fore, only to be discarded, revised and revived following World War II.⁴⁰ Arbitration’s shift in the twentieth century to the fringes of international dispute resolution in favor of institutionalized and juridical processes appears to have cast its nineteenth century

⁴⁰ Mazower, *Governing the World*, 120-3, 135, discusses the rejection of American legalism by Wilson, Smuts, and Robert Cecil among other major shapers of the League.

evolution as an irrelevancy rather than as a foundation and has disguised its contributions to understanding not only the nature of diplomatic practice and the states system of the nineteenth century, but also the strands of continuity to their present incarnations.

The instability of the international system since the demise of the ‘short twentieth century’ has made clear the anomalous nature of the “bi-polar” Cold War world system in which the power of the United States and the Soviet Union suppressed the discretion/sovereignty of virtually all other states even as the superpowers found it useful to maintain the appearance of sovereignty among their allies/clients.⁴¹ The early twenty-first century has brought to the fore frequent, dynamic, and dramatic illustrations of complexity and fluidity of the state and the states’ system; for example:

- “nation-building” has proved to be a longer-term project than its advocates in Africa, Afghanistan, Iraq had predicted,
- separatist movements from Timor, Quebec, Scotland, Catalonia, to Islamic West China have flourished,
- the disintegration of the Soviet Union and Yugoslavia have spawned new and challenged polities, and
- the number and strength of inter-governmental/supranational institutions—from the WTO to international criminal courts—has shifted power from traditional formulations.

All these have made it increasingly difficult to ignore fundamental issues about the states’ system, including whether the “sovereign state” is the end of history, a contingent creation, or an evolutionary stage.⁴² Historiographically, while a wide range of historical studies have considered aspects of shifts in the states’ system over the past twenty-five years under the rubrics of “The World and the West” or “The Clash of Civilizations,” less attention has been paid to the nature of the state within those contexts. Since the old primacy of diplomatic history

⁴¹ This built upon the Manichean framing of the states’ system that dominated World War II and the historiography that grew out of it.

⁴² See Fukuyama, *Political Order and Political Decay*, for a more extensive treatment of this set of issues.

collapsed, only recently has “international” or “transnational” history revived to bring new perspectives to this field.

Thus, the debate over whether arbitration or other modes of international or supranational constraints on state action were inconsistent with a state’s “sovereignty” are perhaps better seen as arguments over whether the extant legal/political model *should* incorporate those constraints. Most academic discussions of the concept miss the mark by treating the issue as objective and semantic, rather than moral and political. Similarly most popular and political arguments about sovereignty are dominated by expressions of feelings and aspirations about the extent of the state’s power, rather than a consideration of what the state and the international system should be. The problem of sovereignty is that it was defined as independence or lack of a superior but always within a universe (often implicitly) defined in legalistic or formal political terms (and usually—such as in Bodin—only in the domestic sphere, not that of the states’ system). For example, theories of sovereignty have never taken into account other modes of power—such as moral, economic, and psychological—which by definition don’t fit within the norms and forms of law and politics.⁴³ This study thus serves as a precatory tale, although less as to particular modes of international dispute resolution than as to the problematic nature of the discourse about the states’ system.⁴⁴

Historiographic Context

This study uses the history of public international dispute resolution or, more precisely, the history of the decisions of states to enter into such processes, as a vehicle to examine the changing practice of diplomacy, the meaning of sovereignty, and the nature of the states system across the long nineteenth century. It is not a legal history or diplomatic history; although it leans

⁴³ On which, see Mann, *The Sources of Social Power*, Vol. 1.

⁴⁴ Bosco, *The Federal Idea*, 8.

on both of those sub-disciplines in an attempt to bridge disciplinary gaps in the literature. It participates in several ongoing strands of recent historical work: the history of international law, the complicated nature of national sovereignty, the recasting of international history, and the recognition of the international nature of intellectual history.

Diplomatic history and the study of foreign policy cannot continue to ignore legal aspects as they have traditionally.⁴⁵ While this is particularly true beginning in the late nineteenth century; even state practice in the early century partook of legal concepts and practices. I argue below that arbitration agreements not only solved real problems for states, but that these problems were less legal than political. Similarly, we must look to the actual practices and mechanics of states, not just the grand diplomatic gestures and “significant” policy issues.⁴⁶ Nowhere are these points more clear than in the context of the Vienna/Paris post-Napoleonic settlements. Generations of diplomatic historians (and some political scientists) have debated the meaning and significance of the “Congress system,” but the debate as to whether those events marked a change in the nature of international relations has been confined to the major geopolitical issues of the era—e.g., Poland, intervention, the Holy Alliance—and have ignored the underpinnings (such as the many arbitration agreements) which built relationships, practices, and confidence among the Great Powers.⁴⁷ This is similarly true for the other principal diplomatic developments, including the “*Alabama* Claims,” the Berlin Congress of 1878, and the Venezuela Boundary dispute.

⁴⁵ This is the central argument in Dudziak, “Legal History as Foreign Policy History.”

⁴⁶ Benton, *Search for Sovereignty*, is a fine recent exemplar of this approach.

⁴⁷ See, e.g., Ikenberry, *After Victory*; Richardson, “Concert of Europe.”

Further, the history of international law and legal practices must be grounded in the domestic and international politics of the time.⁴⁸ Even discussions of the Hague Conferences from the perspective of “international law” often seem to strive to ignore the underlying political forces. Recent work has sought to address this gap, both in terms of reconstituting diplomatic history as international history, with a more critical eye,⁴⁹ and repositioning international law as a product of culture and politics.⁵⁰ At the same time, the rich tradition of diplomatic history, provides an essential foundation for understanding the political context in which the international disputes that became the subject of arbitration arose, and cannot be dispensed with.⁵¹

There are several other ways to characterize the gaps to the examination of which this study seeks to contribute: the need for an international perspective on the nature of the state, peace history which has focused on social and organizational issues rather than substance, international relations scholars whose models remain distant from the intricacies and particularities of state practice, and the limited extent of recent work on the history of international law.

Charles Tilly was not the first, but was among the more forceful advocates of the view that the evolution of the state has been an essential aspect of the modern world and a necessary focal point for modern historians. His perspective on state formation, however, was almost exclusively domestic in orientation. Similarly, recent treatments of political thought (e.g. Pocock

⁴⁸ The traditional doctrinal approach epitomized by Nusbaum, *Concise History*, and Alexandrowicz, “The Role of Treaties,” pretends that diplomacy and military power are irrelevant. On the other hand, Grewe’s *Epochs of International Law*, which fully engages with the diplomatic environment is somewhat deterministic and, for arbitration, superficial.

⁴⁹ See, e.g., Armitage, *Foundations of International Thought*, Bell, “Introduction,” Keene, *International Political Thought*, and Mazower, *Governing the World*.

⁵⁰ See, e.g., Anghie, *Imperialism*, Kennedy, “International Law,” Koskenniemi, *Gentle Civilizer*, and Sylvest, “*Foundations*.”

⁵¹ See, e.g., Anderson, *Rise of Modern Diplomacy*, Bourne, *Britain*, Hinsley, *Power*, Perkins, *Great Approchement*, Schroeder, *Transformation*.

and Skinner) have neglected external perspectives on the state. David Armitage has urged a fresh examination of the history of international thought/theory and has called for intellectual history on an international scale.⁵² The difficulty as Duncan Bell points out, is that one must mine deeply in unusual places to find the building blocks of such perspectives.⁵³ Thus, I have sought to extract from publicists and parliamentarians the implications of their arguments for the nature of sovereignty and the states-system. On the other hand, while others, such as Lauren Benton, have emphasized the interconnectedness of domestic and international perspectives on state formation, international legal historiography has yet to fully engage with this relationship.⁵⁴ The notion of “sovereignty” has received more scrutiny from the contemporary political science perspective than historically.⁵⁵ Even there, the primary focus has been the Westphalian system, the so-called arrangements of political entities in the age of European absolutism. My argument that arbitration remained a tool of state power throughout the long nineteenth century highlights first, the means—at a granular level—by which states’ men relinquished state control/sovereignty, but only in certain limited and controlled circumstances and second, that they had no truck with the fundamental change in the nature of the states-system implicit in the efforts of the peace

⁵² Armitage, *Foundations of International Thought*, 2-7. The only comprehensive attempt in this area is Knutsen, *History of International Relations Theory*, which is woefully sparse on the long nineteenth century.

⁵³ Bell, “Victorian Visions.”

⁵⁴ Benton, *Law and Colonial Cultures*, 21.

⁵⁵ Much of the recent analysis, spearheaded by Krasner, *Sovereignty*, has been made within the context of the ‘realism’ debate in IR circles over the past fifty years, has usually been applied only abstractly or at a level of high geopolitical strategy and has not been grounded in the specifics of international diplomatic practice, at least insofar as the nineteenth century is concerned. However, inroads have been made on several fronts, including Adelman, *Sovereignty and Revolution* and Beaulac, *Power of Language*. Still, the nineteenth century seems to remain relatively untouched between the early modern/Westphalian discussions and the twentieth century. See, e.g., Hinsley, *Sovereignty*.

movement, even as they became more subtle in their apparent endorsement and accommodation of its efforts late in the period.⁵⁶

The history of the peace movement, on the other hand, has barely noticed (as did the movement itself) the actual practice of arbitration, focusing instead on sociological, organizational and superficial intellectual perspectives. The work of Curti and Brock for the U.S. and Ceadel for Britain have built on a long foundation and have provided comprehensive coverage of the players and the groups, but with little attention to the substance of what they advocated.⁵⁷ Similarly, Van der Linden's exhaustive compilation of activities up to the 1870s is primarily descriptive and other, continental focused works are as idiosyncratic as those movements themselves.⁵⁸ Hinsley is significant for (almost uniquely) placing the peace movement in the context of international relations, even if his factual treatment of arbitration is spotty.⁵⁹

Scholars of international relations have paid some attention to dispute resolution, but rarely have ventured back prior to the First World War with regard to arbitration or more generally. Their efforts to model the patterns of state relationships have failed to come to grips with the culture, personalities and specific circumstances in which these situations have arisen. As a result, they have offered little insight into the evolution of state practices. Nor have they engaged with the increased complexity of international relations in the era, particularly the vast increase in commercial and financial dealings, the global scope, or the rise of professionalization

⁵⁶ However, Foucault's concept of governmentality remains useful in exploring the ways in which the evolving nature of states interacted with private parties. It has not been applied in the international context. See Neumann, "'The International' as Governmentality."

⁵⁷ Brock, *Pacifism*. Ceadel, *Semi-Detached Idealists*. Ceadel, *Origins of War Prevention*. Curti, *American Peace Crusade*. Curti, *Peace or War*.

⁵⁸ Van der Linden, *The International Peace Movement*. Grossi, *Le pacifisme europeen*. Chickering, *Imperial Germany*. Clinton, "The French Peace Movement."

⁵⁹ Hinsley, *Power*.

and expertise in decision making (evidenced not least in the emergence of modern international law in the later third of the century).⁶⁰

A critical reassessment of the history of international law has been underway for the past two decades, with considerable insights which have described international law as a component of the Western imperial project; part of a larger effort to unpack international law of its eurocentrism.⁶¹ However, since law is, by nature, acutely aware of its historical antecedents, the bulk of the legal treatments of arbitration prior to this recent stage have lacked much, if any analytic weight, especially since they typically seem to pretend that politics and diplomacy did not exist as the essential context for the principles and procedures they have parsed. Even more general recent historical treatments of arbitration have been cursory.⁶² So, there is a need to reconnect international law and international relations, which this study seeks to address.⁶³

More generally, this study seeks to synthesize all of these various (sub-) disciplines, tying practice to patterns, law to politics, and idealism to diplomatic reality. It recognizes the need to go beyond description to critique in the hope of illuminating the evolving nature of the state in the nineteenth century.

Methodology

Since the purpose of this project is to assess the evolution of the causes and rationales of the decisions of states to resolve disputes outside of normal diplomatic channels, I have looked primarily to the diplomatic records of the principal states involved, the public discussions about

⁶⁰ For example, model-based political science assessments of dispute resolution typically have made little attempt at periodization, much less any fine-grained consideration of the period and parties involved. See, e.g., Alee, “Legitimizing Dispute Settlement,” and Gent, “Effectiveness of International Arbitration.”

⁶¹ Anghie’s pioneering work, *Imperialism, Sovereignty*, has been reflected, *inter alia*, in Hobson, *Eurocentrism*, and Fassbender and Peters, *Oxford Handbook*.

⁶² See, e.g., Langhorne, “Arbitration: The First Phase,” and Roelofson, “The Jay Treaty,” and “International Arbitration.”

⁶³ Orakhelashvili, “International Law, International Politics,” 328-9.

those decisions and the supplemental material of the states' men involved in making them (such as correspondence and speeches). I have focused on developments in the United States and Great Britain because their activity in this area (jointly and severally) was the most extensive, their domestic peace movements were the most active, and their shared political and legal culture proved to be the most influential across the period. The normal limitations of language, time and space, and archival availability have prevented me from extending the coverage more globally to the full range of the over 100 states involved; but even beyond those constraints, I have sought to highlight those agreements which were novel, influential, or particularly illuminating.

It is hardly surprising (indeed, it is one of the crucial aspects of the development of the phenomenon) that, until late in the nineteenth century, few states' men demonstrated any particular consciousness of the nature of their procedural choices and preferences in dispute resolution. As a result, my treatment, especially for the earlier part of the century, relies on the interpretation of a thinner archival record. If the "*Alabama Claims*" case of the 1870s did nothing else, it raised arbitration and dispute resolution to the level of being an ordinary and normal part of the diplomatic dialogue and part of the conscious (and, therefore, more documented) decision-making process in states' management of foreign relations. That increased consciousness did not necessarily manifest in increased clarity and explicitness, however; and, even in letters marked "private," diplomatic records remained a bastion of circumlocution.

Plan of the Study

Since I am not yet ready to offer a fully 'wiki'-fied, hypertextual presentation of the incidents, themes, ideas, and participants in this complex story, I have fallen back on an organizational structure that is predominantly chronological in nature. Still, since an essential aspect of the story is the intertwining of often disparate groups and practices, this model has been

tempered by the use of chronologically overlapping, but thematically distinct, chapters. However, before getting into the story itself, Chapter 2 presents the results of the project of compilation of an integrated list of dispute resolution agreements and a series of analyses which consider the practices of the long nineteenth century, noting their variations and developments from geographic perspectives, in terms of the subject matter of the arbitration, significant procedural developments and the changing nature of dispute resolution. While this is not a rigorous statistical treatment (nor, for reasons discussed there, is one appropriate), the focus of this chapter is on the broad patterns shown by the numbers.

The narrative begins in Chapter 3, with a discussion of the ‘pre-history’ of modern arbitration and an explanation as to why and how the practice was revived in the course of the negotiations leading to the Jay Treaty of 1794, which was then carried forward in a limited number of cases over the following twenty years. However, I challenge the notion of the uniqueness and “Americanness” of this conventional starting point of modern arbitration. Rather, as I argue in Chapter 4, the significant developments in the practice of arbitration which occurred in the aftermath of the resolution of the Napoleonic Wars; principally at the diplomatic conferences in Vienna and Paris in 1814 and 1815 provide a more substantive foundation for the practice of dispute resolution which followed through the century. In particular, they led, in terms of practices, personnel and principles, into a set of British-inspired arbitration arrangements relating to the policing of the slave trade. Other examples, through the middle of the century are then reviewed. In Chapter 5, I show how arbitration was considered during the (coincidental) rise and evolution of the peace movement in Europe and the U.S. (and, distinctively, in Latin America) in the period from 1815 thru 1870 and the difficulties faced by the peace movement in affecting state actions during this time.

The early 1870s marked the start of a period of significant development which is addressed in Chapters 6, 7, and 8. The “*Alabama Claims*” case was the most noteworthy example of arbitration at the time and since, but its nature and significance have been misunderstood, as shown in Chapter 6. Thereafter, (but not coincidentally) the international legal movement flourished with significant steps in terms of both culture, organization and substance occurring at this time, both on its own and in connection with a revived peace movement. Chapter 7 places these developments in the context of professionalism and internationalism and shows how this led to the start of the campaign for “compulsory arbitration” or general arbitration agreements which dominated public debate in the 1890s. Chapter 8 looks at dispute resolution from a global perspective. Arbitration was also a tool of empires and its use spread as European powers began to interact more across the globe. Similarly, the peace movement expanded beyond its Anglo-American foundations to engage a range of Europeans and others. These developments led to a more focused study of arbitration and some mode of self-consciousness grew to be part of the arbitration efforts in a variety of forums.

Chapter 9 shows how the campaign for “compulsory arbitration”, particularly in legislative forums, created a foundation for and a parallel to the work across Europe which crystallized at the two Hague Conferences in 1899 and 1907; which, in turn, created their own mythology and flurries of activity. Finally, I conclude by synthesizing these developments and showing how arbitration sheds light on the changing nature of diplomacy, states, and the states system in the run-up to and since World War I.

Chapter 2: The Scope of Dispute Resolution

One of the first surprises in this project was the difficulty in getting a handle on the scope of the activity to be studied. Anecdotal references to various notable arbitrations prior to the first Hague Conference in 1899 are sprinkled throughout both European and American surveys and in more focused works of diplomatic and international legal history: usually the “*Alabama Claims*,” perhaps the Jay Treaty, the Venezuela Boundary dispute, or the Delagoa Bay crisis. As arbitration was the subject of considerable activity and advocacy during the last quarter of the nineteenth century and the years leading up to World War I, there were many studies at that time (as discussed in detail in Chapter 7) which sought to reflect the rich (and, for the author, inspirational) history of arbitration, often through compilations of past practices. Since the early part of the twentieth century, however, attention has waned and there had been only one on-going effort to capture the historical record of what has become a burgeoning field of contemporary international legal practice.¹ A cursory review revealed that there were frequent differences among these various sources and, without daring to undertake the Augean project of building a complete list from scratch (i.e. from a review of the diplomatic archives of the various states involved), I have compiled a list from this range of earlier scholarly works, supplemented by other references as they have appeared in the course of my broader research.²

One of the more striking results of examining the overall chronology of arbitration agreements has been a clear pattern of linkage to major international conferences established at Paris/Vienna in 1814-5, continued at Paris in 1856, Berlin in 1878, the Congo Conference of

¹ Stuyt, A.M., *Survey of International Arbitrations, 1794-1938*, Hague: Nijhoff (1939); 2d ed. (1794-1970), Hague: Sijthoff (1972); 3d ed. (1794-1989), (1990).

² See Appendix. The challenges of the current compilations have long been recognized. Gross, “*Ways and Means*,” 57 [1949].

1884-5 and the Hague in 1899. These conferences also usually established multiple adjudicatory proceedings as well, indicating that the growth of dispute resolution agreements overall was driven as much by the ‘clean-up’ of issues following a war as by any sense of war prevention. These patterns imply a role and significance of arbitration considerably different from what the peace movement and arbitration advocates have portrayed.

This project has produced a list comprising over 1000 instances of arbitration agreements from 1794 through World War I; a list almost twice as long as that of any other compilation. By way of illustration, Darby’s 1904 edition included 540 examples and Stuyt’s latest (1990) notes over 320, of which 80 are not found in the Darby list.³ To some degree, this reflects the different definitions and areas of focus of these two works. For example, Darby counted agreements to arbitrate that resulted in a specific proceeding, so that multiple issues delegated to multiple proceedings in a single treaty were counted as one. He also included domestic commissions which allocated internationally negotiated settlement amounts. Finally, his count stopped in 1903. Agreements to arbitrate which did not directly result in a specific proceeding, such as those including a compromissory clause or a general arbitration agreement were not included. Darby, the long-time Secretary of the London Peace Society, viewed his project as a source of information about the history of arbitration, and the bulk of it is taken up with excerpts of proposals and discussions of arbitration, with an appendix summarizing specific agreements and cases, principally during the nineteenth century. His list, therefore, was constructed as an argument for the effectiveness and rich history of the judicially-oriented processes. Thus, there was virtually no overlap with Lange’s collection of general arbitration agreements and compromissory clauses from 1914,⁴ Cory’s 1932 study of compulsory arbitration,⁵ and

³ Darby, *International Arbitration, International Tribunals*,

⁴ Lange, *L’arbitrage obligatoire en 1913*.

surprisingly little with Manning's 1910 study of Latin American arbitration agreements.⁶ It is difficult to account for many of the absences in both the general surveys and less ambitious works. Verzijl's massive study of the history of international law discusses dispute resolution at some length, but in an anecdotal manner.⁷ Langhorne's relatively recent tabular analysis of the 1870-1914 period omits dozens of examples even within his focus on *compromis*.⁸

The principal studies upon which I have relied to construct this compilation have typically built on their predecessors. Often published in several editions over the course of years or decades, they have brought their coverage of arbitrations forward and filled in lacunae. Alexander Stuyt first published his *Survey of International Arbitration* in 1939. It was later updated through 1970 (1972) and 1989 (1990) and is the only recent treatment of the subject.⁹ Darby's *International Arbitration, International Tribunals : a collection of the various schemes which have been propounded, and of instances in the nineteenth century*, the earliest comprehensive study, was published in four editions, the final being issued in 1904.¹⁰ Each of these studies have drawn extensively from late nineteenth century treatises on arbitration: John Basset Moore, La Fontaine, Descamps, and Lapradelle and Politis.¹¹ All of these have looked in turn to several of the standard diplomatic references sources of the period, particularly treaty

⁵ Cory, *Compulsory Arbitration*.

⁶ Manning, *Arbitration Treaties*.

⁷ Verzijl, *International Law in Historical Perspective*.

⁸ Langhorne, "Arbitration: The First Phase, 1870-1914."

⁹ Stuyt, *Survey of International Arbitrations*, 1st (1939), 2d (1972) & 3d (1990) eds.

¹⁰ Darby, *International Arbitration, International Tribunals*, 4th ed.

¹¹ Moore, *History and Digest*. La Fontaine, *Pasicrisie Internationale*. Descamps, *Essai*. Lapradelle, *Recueil des arbitrages internationaux*.

compilations.¹² In addition, several other studies of arbitration provided multiple items to be included.¹³

In this chapter, I discuss the patterns and trends in this surprisingly large collection of actions by states to submit their differences to some more-or-less independent decision-maker. These patterns provide insights into the nature and use of dispute resolution mechanisms, whether on a chronological, geographical, procedural or subject matter basis. I also note some significant caveats in drawing conclusions from these statistical assessments; cliometrics is a dangerous game. Nonetheless, considering the frequency (an average of one every six weeks for 125 years), this compilation provides a basis for some important understanding of the phenomenon.

The first of these caveats is historiographic. During the “*Alabama* claims” arbitration, Bancroft Davis, the U.S. Agent, submitted a list of 23 American arbitration precedents, starting with the Jay Treaty in 1794 and continuing through 1866.¹⁴ In contrast, by my count, the list of arbitrations during that period might well come to more than 40. Lord Russell, the Lord Chief Justice of England gave a speech on arbitration in 1896, in which he noted that there had been 60 actual arbitrations between 1815 and 1895; my estimate is more than three times as large.¹⁵ I point this out not to criticize Mr. Davis’ or Lord Russell’s research, nor to attempt to divine their criteria for inclusion, but merely to illustrate the wide range of interpretations possible in compiling the story of international dispute resolution during the long nineteenth century. As

¹² *BFSP*, (various). *FRUS* (various). Hertslet *Map of Africa; Map of Europe; Compilation*. Malloy, *Treaties, Conventions*. Martens,

¹³ Verzijl, *International Law in Historical Perspective*. Ralston, *International Arbitration*. United Nations, *Reports of International Arbitral Awards*.

¹⁴ FO5/1304/183, “Memorandum, prepared by Bancroft Davis of US Delegation, of Precedents of Arbitrations,” May 8, 1871.

¹⁵ Lord Russell, “International Law and Arbitration.” “There have been since 1815 some sixty instances of effective International Arbitration. To thirty-two of these the United States have been a party and Great Britain to some twenty of them.”

noted in the introduction, the study of arbitration flourished during the late nineteenth and early twentieth centuries, often by those who sought its more extensive application. As advocates, they had their reasons, in addition to the ‘normal’ problems of research, for the inclusions or exclusions of particular incidents in their lists, compilations and analyses. As a result, this assessment is based on a compilation of compilations, both recent and from the late nineteenth and early twentieth centuries; as well as some stray references picked up along the way. The list is not (in all likelihood) exhaustive. The gaps in each of the compilations studied ensure enough humility on that score. Some of the differences are due to questions of interpretation and definition; some scholars have sought to list agreements to arbitrate, others have listed only arbitrators’ decisions. Some had a geographic focus, others thematic and still others procedural. Beyond this variation, many of the authors, particularly those of the late nineteenth and early twentieth centuries were compiling their lists as part of an advocacy effort to promote the broader use of arbitration; so their objectivity is suspect. However, even the late twentieth century scholars show a wide range in their selections and, unfortunately, fail to adequately explain the basis for their inclusions.¹⁶ Finally, limitations of language and research have led to many omissions. In short, even where there are enough “data points” on which to base a close analysis, all that I would argue for is the perception of some broad patterns and trends; even if the vagaries and contingencies of international relations mock claims of great precision or accuracy.

Information from these sources was compiled in a database, supplemented by references from a wide range of materials consulted in the course of my broader research. For each case, I identified (where possible) the following categories of information:

- Date of Arbitration Agreement

¹⁶ See, e.g., Langhorne, “Arbitration: The First Phase, 1870-1914.”

- Date of Arbitration Decision
- Parties
- General scope of Arbitration Agreement: Claim, Boundary, Sovereignty, Management or general arbitral regime
- Subject matter of the case
- Name or type of arbitrator
- Results of the Arbitration, including finding, award and implementation
- Immediate and supporting sources of information about the case

I then queried the database to extract a variety of information either presented in this Chapter or included in the course of the remainder of the project. The complete list is in Appendix I.

For the purposes of this study, I have divided the 1000+ agreements to arbitrate or otherwise engage in international activity to resolve disputes by geographic region, agreement type, and (where applicable) functional type and subject matter.

Each of the three agreement-type categories is characterized by a different set of answers to four questions. First, had the subject dispute already arisen or was the dispute resolution mechanism set up in anticipation of future disagreements between the parties. Second, was the scope of the topic(s) covered by the agreement specified as to a particular case or issue, a class of issues or did it comprehensively cover the relations of the parties. Third, were the rules of decision to be applied generic or specified. Fourth, what type of governmental functions were primarily involved in the handling of the dispute(s): adjudicatory, executive or legislative. I selected these criteria because they illuminate the issues explored in this project: the nature and application of arbitration as a tool of states in resolving their differences and the historiographical bias towards juridical mentalities in arbitration.

General arbitration agreements were comprehensive commitments to refer all future disagreements of the parties to arbitration. These agreements ranged from the simplest and vaguest statements (which might well be seen as more aspirational than substantive) to definitive agreements that invoked the jurisdiction of the Permanent Court of Arbitration under the 1899

Hague Convention. Typically, the rules of decision were generic, consistent with their open-ended nature, and often just made reference to principles of international law and equity. These were framework agreements that often required the parties to agree to a case-specific *compromis* which would provide details on the rules of decision and procedures to be followed by an adjudicatory-type tribunal. Exceptions, exclusions, and reservations were commonly used to shape the scope of these agreements. However, since the intent of the parties was to make a commitment of some breadth or at least create the appearance of making such, this group stands for the awareness of the individual states of the concept of third-party dispute resolution, in contrast to the category of *compromis* which, particularly until late in the nineteenth century, may well have been motivated by localized or *ad hoc* considerations.

A **compromissory clause** (a recognized term by the late nineteenth century) was included in a substantive agreement between the parties, such as a Treaty of Friendship, Commerce, and Navigation, or an Extradition Agreement. The use of a compromissory clause was a much narrower commitment than a general arbitration agreement. Under this clause all or a specified subset of disagreements that might arise in the future as to the interpretation and application of the agreement would be referred to an adjudicatory arbitration. The rules of decision were typically generic and a further *compromis* was sometimes provided for to trigger an adjudicatory-type proceeding.

A *compromis* is a term in use at least since early modern times to describe an agreement to refer a specific matter to an adjudicatory-type arbitration.¹⁷ This is the largest category and the one most commonly connoted by the term ‘arbitration.’ By its nature, a *compromis* dealt with a dispute which had already arisen; although there was a great variety as to the specificity of the

¹⁷ The term is from the latin root “com-promissum”: a double promise to arbitrate a commercial dispute and to pay a penalty if the arbitration agreement was breached. Born, *International Commercial Arbitration*, I:25.

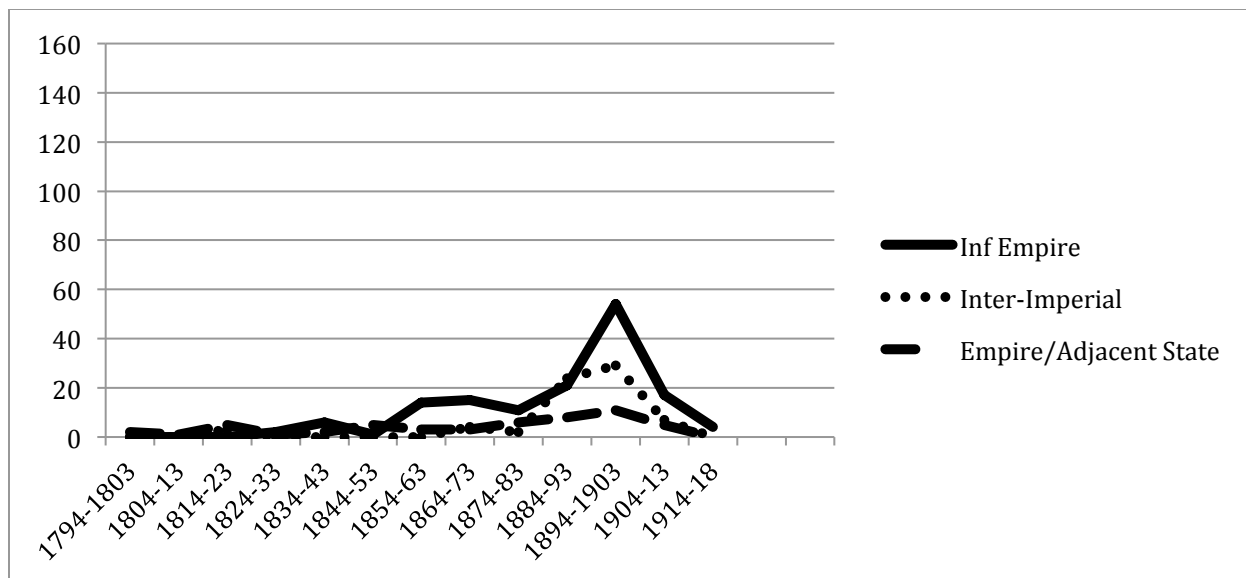
rules of decision to be applied, ranging from cases where there were no rules to considerable detail as to the selection of decision-makers, evidence to be considered and possible outcomes to be determined. Examples of issues arising in this group include claims commissions or questions of treaty interpretation.

The functional type refers to what I have called either adjudicatory or executory function. **Adjudicatory** agreements include those typically called arbitrations, in which either a past dispute (as specified in the *compromis*) or defined class of projected future dispute (as defined in either a compromissory clause or general arbitration agreement) is submitted for decision based on some set of facts and principles. The facts may be those submitted by the parties or may be collected and ascertained in some other manner by the decision-maker. There may, but need not be a specification or expectation that the decision maker will be legally trained. The rules of decision in such situations may be specified in detail (at least in the *compromis*).

I have divided the subject matter of the agreements into five categories: claims, boundary, sovereignty, managerial and general or treaty interpretation. The category of **claims** principally includes the determination of private pecuniary claims by the nationals of one state against the government of the other state (and may include agreements settling “mutual” claims, i.e., where both sides have claims against the other). These typically have stemmed from some sort of state action (or omission) which has allegedly harmed the interests or property of the nationals of the other state. In other, less frequent, cases, the claims are against private parties but state responsibility, at least to some degree, has been implied (often due to an alleged inadequate local system of justice), thus raising the dispute to the international level. There are also cases where the claim is made on behalf of a state directly. While the many **Boundary** issues are in the nature of a claim to territory; they are premised on division of contested land, usually with

agreed upon end-points to a boundary line and their resolution, often involving some combination of treaty interpretation and surveying, is distinct. Such cases have required the fixing of lines demarcating the territorial jurisdiction and sovereignty of the two states involved. Where these lines are specified in some degree in the *compromis*, such agreements tend to be classed as implementary, since the scope of discretion devolved down to the boundary commissioners is usually quite limited.¹⁸ **Sovereignty** issues include those where some non-territorial rights of the two states are involved, such as riparian access rights and rival claimants to a throne. These, too, might be seen as a variety of claims cases, but because of their usually politically charged nature and the absence of ordinary contract, tort, or property issues, I have distinguished them as well. In the case of managerial agreements, the commissioners are typically charged with the administration of a particular project, such as the distribution of assets or claims from a now defunct principality or collecting customs revenues in order to pay the debts due to foreign lenders. These may be short-term or indefinite in scope. **Management** issues entail an ongoing administration of a project, either ad hoc or permanent. Finally, **general or treaty interpretation** agreements require a determination of some unknown dispute, arising from differing interpretations of a specific treaty (as in compromissory clauses) or some range or the entire range of the two states' relationship.

¹⁸ Cukwarah, *Settlement of Boundary Disputes*, 27, 78-85, 125.

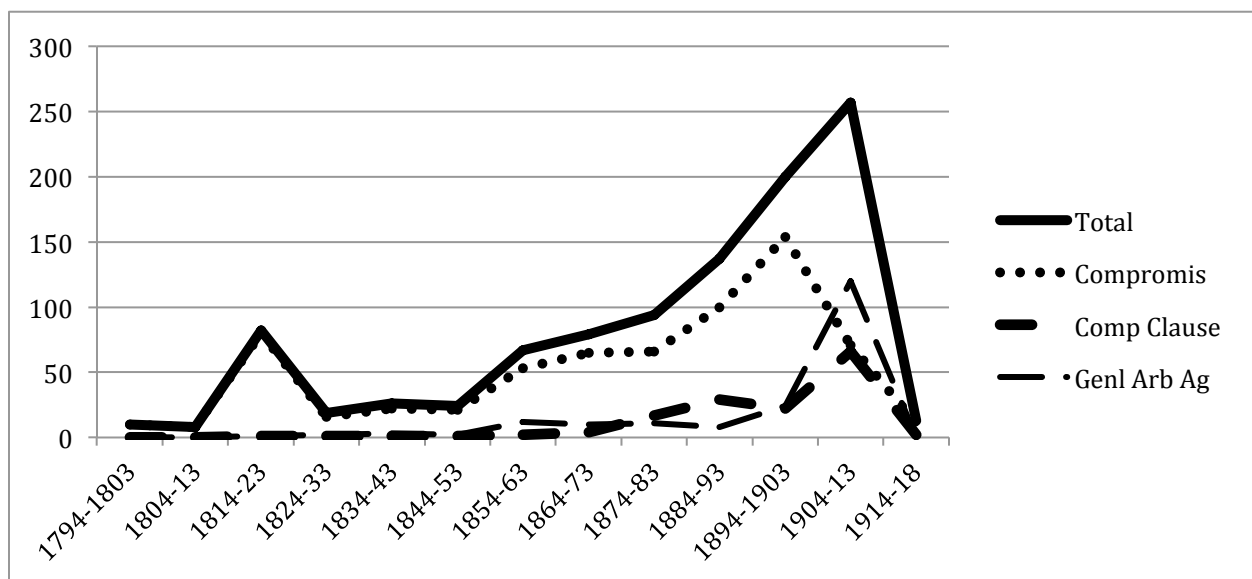


I have also examined the roster from other perspectives. As discussed in more detail below, bi-lateral arbitration agreements can be seen as vehicles for the spread of a Westernized international law to a global arena. In that context, I have noted when agreements can be characterized as a component of “informal empire,” usually invoked by Western powers to protect the commercial interests of their nationals in other (especially Latin American) states. On the other hand, there have been many arbitrations which have sought to define or demarcate boundaries as between one power’s colonial territory and another’s or between such a territory and an adjacent independent state.

Of course, these categorization schemes are artificial and offered for convenience in supporting the arguments in this paper. Indeed, not only is there no inherent ‘bright line’ between, e.g., an executory agreement and a *compromis*. One purpose of the broader perspective taken in this project has been to bring out the historical context of the most famous cases and eras as well as showing similarities and overlaps of different classifications of agreements and cases that have been lost in more tightly defined studies.

Chronological Development

Within my study's general time frame of 1794-1918, the total number of arbitration agreements rose consistently (with the exception of a spike driven by the activity at Vienna and Paris in 1814-6). There was an average of less than one arbitration agreement each year from 1794 to 1813. During the period from 1817-39 the average was just under 2 per year. By the 1850s, the average was up to over 6 per year and by the peak period (1890-1910) there were more than 14 arbitration agreements entered into in an average year.



Indeed, from a numerical perspective, a more apparent periodization of the entire arbitration endeavor would look more like three phases of development: 1794-1855, 1856-89 and 1890-1913. As a reflection of a comprehensive total, this does not match with traditional characterizations of the evolution of the peace movement, the initiation of modern international law or of diplomatic history. But, perhaps, that is the point; the growth likely reflects a range of additional factors, including increased global trade, imperial expansion and consolidation, changes in the nature of the state and international governmentality, as well as the factors

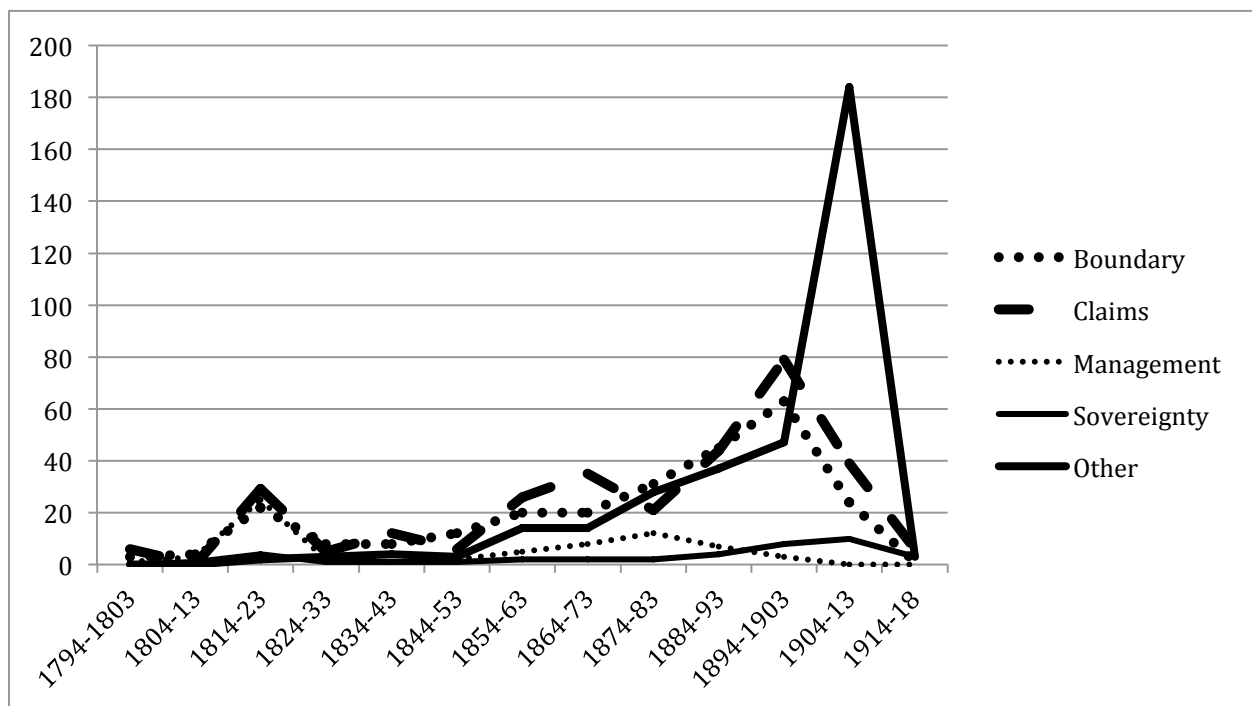
typically considered (adjusted by some period of implementary lag). Thus, these patterns support the central argument of this study that arbitration agreements were effective tools of state power and activity, not a means of war prevention. Other than the distinctive circumstances associated with the Paris and Vienna post-Napoleonic Congresses, the overall level of agreements remained relatively low and stable through the first half of the century, with real growth beginning in the 1850s. This is contrary to several analyses which have pointed to the “*Alabama Claims*” as the driving force behind arbitration agreement growth in the last quarter of the century.¹⁹ That period, to be sure, was marked by a continuation of the upward swing, with an overall peaking of activity during the decades of the 1890s and 1900s, before declining just prior to the War. However, the growth in from the 1870s to 1880s was pretty much in line with both prior and subsequent periods, so it is difficult to see a notable or immediate effect quantitatively from this single event.

The pattern (and the Paris/Vienna exception) applies to both executory and adjudicatory arbitration agreements. In general, there is some consistency between the growth rates for adjudicatory and executory agreements across the period until the turn of the twentieth century when executory agreements begin to fall, while adjudicatory agreements continue to increase until the start of the war. Interestingly, general arbitration agreements began and stayed a predominantly Latin American phenomenon until late in the century. There were only seven such agreements prior to 1856 when their occurrence began to become regular; although the most dramatic growth awaited the implementation of the Hague Conference structures in the new century.

¹⁹ The fame of this case has led many historians to assume that it was a cause of later arbitrations. In fact, the decade following the “*Alabama Claims*” decision saw a relative decline in adjudicatory agreements. While its mythology was substantial, its causal effect at a distance of 20 or 30 years is certainly suspect. See Chapter 6, *infra*.

Subject Matter Patterns

Even taking the narrower and more traditional definition of arbitration agreements as those which I have classified as “adjudicatory,” typically dealing with claims and boundaries, the annual average remained below one into the 1850s. There was steady growth thereafter, culminating in an average of more than seven arbitration agreements per year during 1890-1910. An uptick occurred in the 1880s, probably reflecting not only the eventual impact of the “*Alabama*” precedent but also the promotion of arbitration by the peace and legal communities as well as increased international commercial activity in the context of economic or informal empires.



Within the claims category, there were only seven agreements prior to the end of the Napoleonic Wars, which produced 12 such agreements. Thereafter, claims agreements ran at an average of less than one per year thru the mid-1860s, then at a rate of three per year thru 1890;

when the peak period (1890-1910) saw an average of over five per year. Overall, there were a total of over 300 claims-based agreements during the period, almost one-third of the total.

There were about 260 boundary-related agreements during the period, which averaged just under one per year through 1870, when the average jumped to almost 4 per year. Of this group almost 70 were between two European-based empires addressing an issue between two of their colonies, almost all of which occurred after 1870. A slightly smaller group were between a European-based empire and its colonial neighbor (including a lengthy series between the U.S. and Canada); however, these were more evenly spread across the whole period. The pre-1870 period was dominated by the resolution of intra-European boundary issues, especially during and following the Napoleonic Wars. Boundaries in Latin America, Africa, and Asia were the subject of a total of only 25 agreements before 1870 but of 139 thereafter.

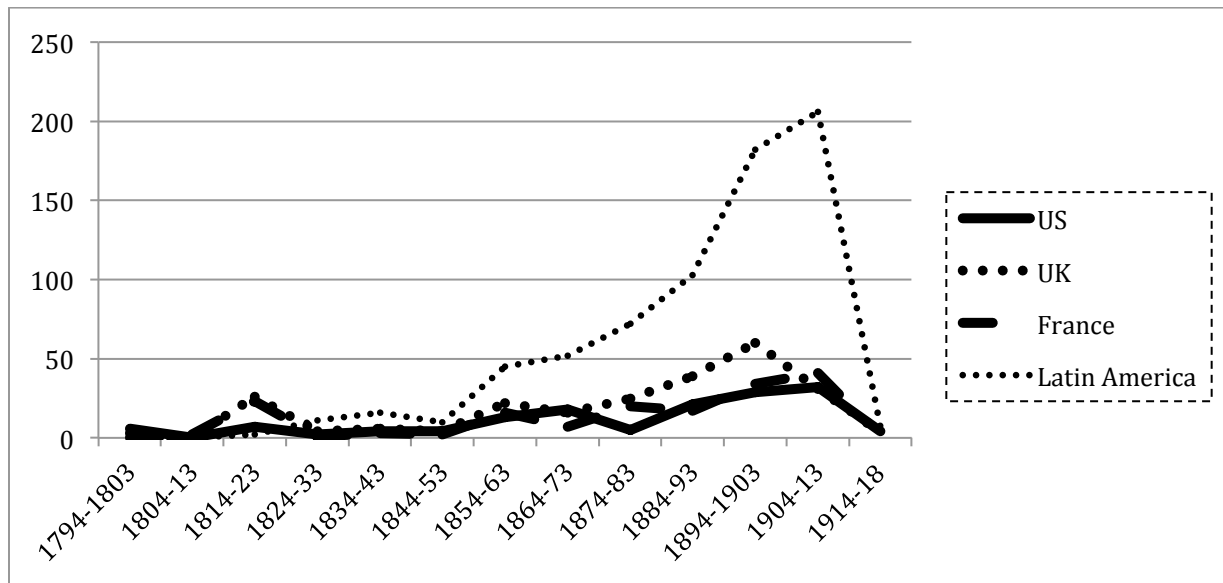
General arbitration agreements began with that between Columbia and Peru in 1829, although Chile and Peru included a compromissory clause in an 1823 Treaty.²⁰ They were rare in the first half of the century (only 8 through 1856), then turned into a steady, if thin, stream (predominantly from Latin America) for the duration of the century. In the aftermath of the First Hague Conference and the first two Pan American Conferences in 1889-90 and 1901-2, however, they blossomed. Of the total of 189 throughout the whole period, more than two-thirds were signed between 1901 and 1910; as will be explored in Chapter 10. The growth in compromissory clauses was similar, if less dramatic. There were fifteen up to 1875, when they became a regular occurrence. Of the total of 146, the post-Hague flurry generated a notable, if less startling, 40%. Of course, the bulk of the agreements remained *compromis*. Over the entire period, there were over 670, or two-thirds of the total. With the exception of the post-Napoleonic

²⁰ Columbia/Peru, SMH# 110; Chile/Peru, SMH# 100. And, while its “international” status is arguable, the restructuring of the German Confederation in 1820 included a provision preserving the Diet’s traditional function of dispute resolution between members. SMH# 96.

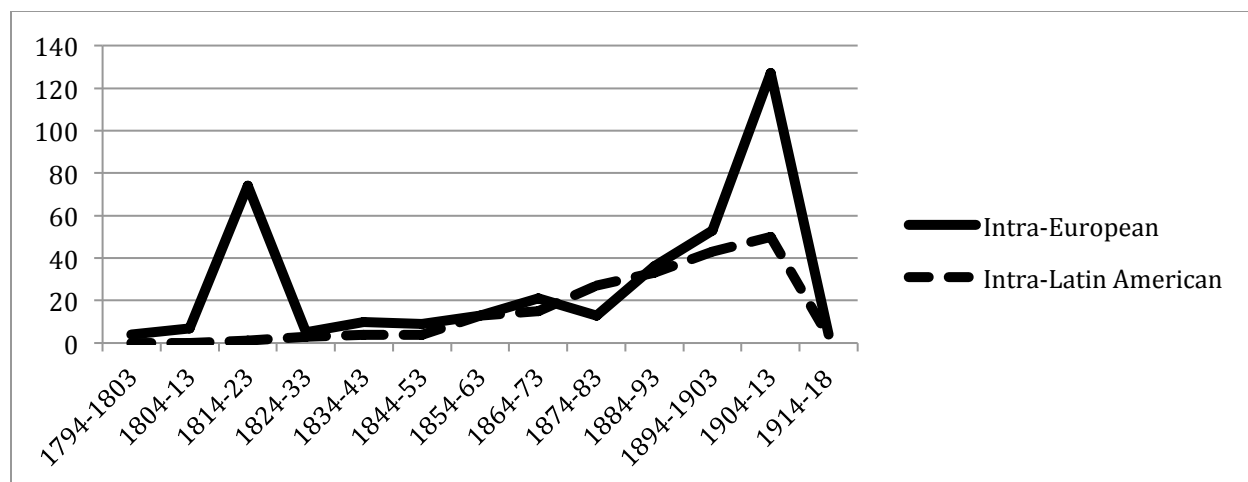
bulge, there was a steady growth through the end of the century, followed by a tapering in the twentieth. Its not clear whether this can be attributed to a shift in attention following the first Hague Conference; although it does seem to reflect a decline in the handling of imperially-related issues.

Significantly, there does not appear to be any positive correlation between initial general arbitration agreements and compromissory clauses on the one hand, and specific implementing *compromis* between those pairs of countries. Indeed, if anything, there is a dearth of these ‘second shoes.’ I suspect that this is due to states’ proclivity to enter into such initial agreements with states with whom either good relations already existed, or it was unlikely, for reasons of distant geography or limited commercial connections, for a significant number of disputes to arise. In other words, such initial agreements were a symptom, rather than a cause, of peace. Before the Hague Conference, only 14 *compromis* were entered into within ten years of the parties’ previous general arbitration agreement, less than two percent of the total. By the same token, virtually every *compromis* after the Hague could claim to have been compliant with/inspired by its endorsement of arbitration; still there were only 14 invocations of its formal mechanism of the Permanent Court of Arbitration among the almost 140 *compromis* during that time.

Geographic Patterns



In terms of national participation, Great Britain was a party to 240 agreements, almost one-quarter of the total, followed by France with 167 and the U.S. with almost 150 agreements. However, the most remarkable geographic insight was the leading role of Latin American countries, with over 700 participations as a group over the period. This includes almost 200 agreements between two or more Latin American states, several of which were multi-party general arbitration projects. However, the Latin American practice received little contemporary attention from either other diplomats, the public or arbitration advocates. Intra-European agreements account for over one-third of the total, almost twice as many.



These can be tied to the settlement of major European conflicts, such as the Napoleonic and Crimean Wars, as well as the post-Hague frenzy. In contrast, the agreements between European/Western Powers on the one hand and Latin American states on the other can most often be linked to claims for the destruction of Western-owned property and to the settlement of boundaries between Latin American states and adjacent European empires. Substantively, as we shall see, British and American practices proved to be the most revealing, not only due to the availability of their archives, but also because their rich strain of joint agreements, as well as their relative power in a global context. More than for any other states, what Britain and the U.S. did mattered, both as participants and as role models for both diplomats and, sporadically, for peace activists. In contrast, the French practice, while larger than the U.S., has proved to be more derivative than instructive. Further, more than forty percent of its pre-1880 agreements were in the context of joint action by “The Powers”, either at the close of the Napoleonic Wars or in addressing aspects of the Eastern Question. Britain was its most frequent arbitral partner, especially in the later part of the century, as inter-imperial issues were resolved. Otherwise its participation was generally undistinguished. The same could be said, at an even less active level, of the other European Great Powers. I have labeled as products of “informal empire” almost 150

agreements establishing procedures to compensate Western property owners for damage resulting from either action on the part of peripheral governments or the failure of those governments to prevent damage arising in the course of a local uprising/civil war/revolution. These were relatively infrequent until the 1850s, when they began to average a bit over one per year, followed by a bulge of over 50 during 1894-1903. Of course, in this context as in others, the precedent was set by agreements between the U.S. and Great Britain. Indeed, the Jay Treaty can be looked upon as principally addressing claims for British property lost to American actions and for clarifying imperial borders. Overall, these two states entered into a total of 46 agreements, the highest pair count. Well over half of these involved Britain qua imperator, rather than issues or interests that arose directly from Great Britain itself, and a full quarter were due to the adjacency of British North America/Canada and the U.S. We will explore several of these cases in detail below, not only because they illuminate the nature of the dispute resolution process, but also because they were seen to be significant cases at the time and their resolution was claimed to be a harbinger of general international practice.

Procedural Questions

In terms of the arbitral process, whether established in specific *compromis* or set out in general agreements, I have seen only broad and gradual developments. However, there are several noteworthy aspects. These include the characteristics of the decision maker and the extent of detailed rules of procedure or evidence to be applied. While the use of mixed commissions dates back to early modern practice, it was secondary to referrals to heads of state until well into the nineteenth century. Indeed, heads of state were used in several twentieth

century cases.²¹ While the use of heads of state declined particularly later in the nineteenth century, they were invoked more often for boundary and sovereignty issues than for claims. Where some sense of state or dynastic dignity was involved the broader phenomenon of increased recognition of expertise was slower to take hold. Still, it is doubtful that heads of state were engaged in the substantive details of particular cases, relying instead on their existing governmental structures and domestic experts until it was time to apply an appropriate political overlay to the decision. However, the increased technical expertise required and the recognition that heads of state would inevitably rely on experts seems to have contributed to the decline in naming them as arbitrators. In this context, the emergence of a more coherent international legal profession late in the nineteenth century reinforced both the expectation and specification of expertise in the decision-maker, reinforced by a sense of juridical neutrality with which this group clothed itself. Under the rubric of mixed commissions, the early part of the century was marked by a variety of approaches, particularly to the selection of the determinative “umpire;” with both random selection from among the parties’ nationals, specification to a named third party, and delegation to a third party to choose an umpire among the methods used. Later in the century, the most notable development, likely spurred by the structure of the tribunal which addressed the “*Alabama Claims*,” was a shift from a single third-party umpire as part of a larger panel otherwise split between nationals of the disputants, to a tribunal most if not all of which was comprised of third party nationals. This process crystallized at the Hague Conference in 1899 as the idea of a standing court, long part of the dialogue about arbitration, began to influence specific agreements by states. After the Hague Conference, it became ordinary merely

²¹ For example the German Emperor was asked to resolve a border issue between Bolivia and Chile in 1904 (SMH# 766), The U.S. and Mexican Presidents were to jointly handle disputes arising under several central American general arbitration agreements in 1906 and 1907. (SMH## 839, 841, 859), and the Russian Tsar was to handle a potential boundary dispute between Serbia and Bulgaria under a 1912 agreement (SMH# 1003).

to refer an dispute to the Permanent Court of Arbitration whose principal benefit was an established set of rules and members. The process of increasing specification of rules of procedure and evidence took its most marked step with the British-drafted claims convention with France signed in Paris in 1815, as explored in some detail in Chapter 4. Thereafter, it became ordinary for *compromis* to include such provisions and, not surprisingly, the practice in general arbitration agreements followed as that type of agreement became actively discussed in Europe late in the century. Here, the work of international lawyers was most evident, as explored in Chapter 7, with the Institute de droit international's model of 1875 being the most influential.

Conclusion

This chapter has provided a general statistical perspective on the evolution of arbitration agreements. While some of the implications are perhaps more indicative than definitive, they raise interesting questions and challenge the narrow and biased conventional historiography. The scope of dispute resolution agreements from 1794-1918 has proven to be surprisingly large. The drivers of *compromis* have been more connected to the great conferences and the clean-up of wars than to the issues of war prevention which peace advocates envisioned. Similarly, while advocates of general arbitration agreements and compromissory clauses predicted that these frameworks would handle the subsequent disputes between the parties, there is little evidence of correlation; the former just didn't have a great effect. Other noteworthy implications include the surprisingly large role played in several ways by Latin American states, the muted impact of the "Alabama Claims" case as a spur to other agreements, and the large role of formal and informal empires in driving the use of these agreements.

As a tool of state practice, the growth of arbitration agreements reflected the changing nature and scope of diplomatic relations across the long nineteenth century. The increase in

global trade, commerce, and finance drove a greater need for governmental involvement on behalf of their nationals doing business in other countries. The expansion of empires meant that the ambiguities of boundaries outside of Europe needed to be resolved. These general diplomatic developments utilized arbitration as a means of handling disputes which traditional diplomatic corps were not staffed to handle.

Chapter 3: The Jay Treaty: A False Start?

The Treaty between the United States and Great Britain of 1794, commonly known as the Jay Treaty, has been usually seen as the starting point of modern public international arbitration.¹ While it was the first arbitration agreement between independent states since early in the eighteenth century and contained some innovations; the treaty represents a continuation of traditional diplomatic practices more than a break, and the product of the shared Anglo-American legal culture of the eighteenth century rather than an invention by the new republic. Further, its problematic implementation and limited influence over the twenty years that followed stand more as a discouragement to the use of arbitration than an endorsement. Nonetheless, the Jay Treaty was routinely cited as a milestone by arbitration advocates and nineteenth and twentieth century commentators. In this chapter, I argue that the conventional historiography has been biased and superficial in terms of the Treaty's history, context, and effectiveness.

Moreover, the Treaty's iconic status as the modern re-start of arbitration has overshadowed the arbitration agreements and commissions established at the post-Napoleonic peace conferences as a more extensive, comprehensive, and effective starting point, as laid out in Chapter 4. Its enshrinement, beginning in the late nineteenth century, was more a product of the desire to create a modern (at least sufficiently recent) foundation for the practice of juridical commissions as dispute resolution mechanisms. Its apparent 'Americanness' fit in with the hopes

¹ "Treaty of Amity, Commerce and Navigation," November 19, 1794, Malloy, *Treaties, Conventions*, I: 590-606. See, e.g., Allain, *Century of International Adjudication*, 15; Cory, *Compulsory Arbitration*, xx; Dreyfus, *L'arbitrage international*, 156; Grewe, *Epochs of International Law*, 517; Lapradelle & Politis, *Recueil des arbitrages*, xxix; Moore, *International Adjudications*, I:x; Nussbaum, *History of the Law of Nations*, 213; Nys, *Le Droit international*, 74; Oppenheim, *International Law*, II:34; Phillipson, *Two Studies*, 29; Schwarzenberger, "Present Day," 715-7; Stuyt, *Survey*; Van Vollenhoven, *The Three Stages*, 42.

of those who saw arbitration as a mode of international relations that would break with traditional European diplomatic culture and practice. Its convenience overshadowed the facts of its birth and legacy. It was thus an integral part of the invented historiography of arbitration of that latter period.

The Pre-History of Arbitration

The use of arbitration, or something much like it, has been commonly traced back to the practices of the Greeks in the 7th century BC. Less necessary in Roman times, there are records of its regular (if intermittent) use in medieval and early modern Europe.² The lack of a states' system on the European model has deterred the detection of comparable practices outside of European history, but it is likely that some comparable form of dispute settlement among political entities did exist in a variety of pre-modern contexts. In this section, I will review the history and historiography of the earlier European practice in order to address the lapse in the practice during the eighteenth century and to understand how the earlier practice was used by subsequent historians in their analyses and arguments.³

Arbitration in the middle ages and the sixteenth and seventeenth centuries addressed the same types of questions (primarily boundaries and sovereignty claims, although far fewer commercial matters) as did later practice. Similarly, there were a variety of decision-making processes, including some mixed commissions (with and without umpires), but mostly single head-of-state decisions (especially by the Pope or Emperor).⁴ Vattel even commended the Swiss for their practice of committing to arbitration in advance as to certain issues; a practice, via what

² See generally Verzijl, *International Law in Historical Perspective*, 8:71 ff.

³ Verzijl, *International Law in Historical Perspective*, 8:182-4, 213-4 discusses the specialized studies in this regard. Significantly, none of these date before 1895 and few others pre-date World War I; so, they were likely of little impact on the period under discussion. His review of the substance of pre-17th century cases is at 8:184-214.

⁴ Schwarzenberger, "Present Day Relevance," 731, notes the precedent for mixed commissions in the Anglo-Dutch 1654 agreement and the Anglo-French Treaty of Utrecht of 1713.

would be come to be called “compromissory clauses,” that was revived to a considerable extent in the late nineteenth century.⁵ However, even more than for the long nineteenth century, historical compilations have varied widely in what agreements and activities they have included and the archives are thinner, so it is difficult to get a clear picture.⁶ Arbitration was part of the settlement processes in the great peace treaties of Nijmegen in 1678 and Rijswick in 1697.⁷ The last noted arbitration in the eighteenth century was part of the British-Spanish Asiento of 1713 which provided for the joint appointment of “Judges-Conservators” to oversee the implementation of and issues arising under this agreement governing the slave trade to the exclusion of the normal local authorities.⁸ The overall similarity of ideas, practices, structures, and results between the earlier period (at least as reported) and those of the nineteenth century is striking; as is the difference in volume, rationale, context, and the sense of improvement that pervades the latter.

In their eagerness to build a case for the venerability and distinguished antecedents for arbitration in the late nineteenth century, historiographers of that period were remarkably catholic in their collections and characterizations. There was little differentiation between the state practice and the intellectual history of arbitration as an aspect of international relations and the political theory of that earlier time. Fragments and ruminations from many of the leading thinkers of the early modern era were mined to furnish the historical legitimacy of the late

⁵ Vattel, *Law of Nations*, 277.

⁶ While most recent writers have looked to Novacovitch’s *Les Compromis et les arbitrages internationaux due XIIIe au XVe siècle* of 1905 for coverage of the middle ages; he, in turn, relied on Dreyfus, *L’arbitrage International* of 1892 and Dumont’s *Corps Universel Diplomatique*, of 1726.

⁷ Darby, *International Tribunals*, 265-70.

⁸ See Darby, *International Tribunals*, 263-4. However, Moore, *History and Digest*, V:4833, cites the 1718 Treaty of Passarowitz between the Emperor and the Sultan as including both a proto-compromissory clause and the use of commissioners to determine boundaries and Roelofsen, “*The Jay Treaty*,” 205-7, notes that a dispute between the Emperor and the States-General over the status of the Ostend Company in the 1720s had some appearance of an arbitration, but was not binding on the parties.

nineteenth century arbitration movement. Any plan for peace or speculation about any sort of supra/multi-national confederation was fair game; Kant, St. Pierre, Sully, Montesquieu, Voltaire, Leibniz, Henri IV, Rousseau, and Bentham were all recruited for the cause, as well as the principally-cited authorities on the law of nations of the era, including Grotius, Pufendorf, and Vattel. Virtually every treatise on arbitration from the late 1870s onward made some nod in this direction, and the number of volumes devoted solely to the historical perspective was substantial.⁹ What was lacking was any assessment of the feasibility, either historically or contemporaneously, of the schemes proposed. This inability to construct an express model of the relationship between intellectual proposals and state practices was, importantly, reflective of the idealism which was the fundamental problem of the nineteenth century arbitration advocates; of whom these authors were typically a part and for whom they principally wrote. It is ironic that this historiography, constructed in an era which sought to ground international dispute resolution on detailed legal principles and procedures common to the codification mentality of that era, typically avoided precision in their invocation of these antecedents. For example, Vattel, the most influential writer on the law of nations in the eighteenth century, set out the parameters of arbitration as he saw them in that particular combination of description and prescription which is common to treatments of this topic.¹⁰ He endorsed arbitration, and considered it an ordinary and useful means of dispute resolution, as well as fully consistent with the law of nature. Likely reflecting prior complications in the history of dispute resolution which he had studied, he paid close attention to ensuring that the arbitrators were given clear and detailed guidance on the matter to be resolved, and that their decisions were both supportable and politically reasonable if they were to be respected by the parties. However, as one commentator has noted, Vattel's

⁹ See Chapter 7, *infra*.

¹⁰ Vattel, *Law of Nations*, 277-8.

eliding of the shift from a Grotian natural law foundation towards a world defined by distinct sovereign states really undercut a reading of his endorsement of arbitration as a broadly useful tool.¹¹ Indeed, the revived practice of the nineteenth century, which represented a continuing battle between state sovereignty and the ‘rule of law’ (whether natural or positive), shows that states’ men, often wrapping themselves in Vattel, effectively confined arbitration and other dispute resolution mechanisms to issues in which they had neutralized any threat to that sovereignty.

The reason for the lapse in practice from 1713 is not clear and later commentators have offered little by way of explanation. Having examined the factors which drove the practices and ideas of the nineteenth century, there is no obvious or simple rationale for the (lack of) developments of the eighteenth. At the end of the eighteenth century, Martens thought that the lack of enforceability was the principal cause of the decline; presumably in an age of absolutism.¹² Among current historians, M.S. Anderson, attributes the demise of medieval arbitration to the decline in the power of the popes, both inside and outside of the Catholic states; along with a concurrent rise in “national consciousness” which precluded putting “dynastic and national prestige” at risk.¹³ Certainly, this would fit as an international aspect of an era in which absolutist conceptions of the state were on the rise domestically. From this perspective, those few arbitrations from the middle of the seventeenth century to the early part of the eighteenth can be seen merely as remnants of an earlier practice from which the gap to the revival at the Jay Treaty is longer than conventionally described. Roelofsen’s recent (2012) treatment of this issue endorses the analysis of Lingens’ work in German that argues that the Jay Treaty was less of a

¹¹ Van Vollenhoven, “Three Stages.”

¹² Martens, *Precis*, 318. Lapradelle and Politis, *Recueil des arbitrages*, I:xxx, sound a similar note.

¹³ Anderson, *Rise of Modern Diplomacy*, 206; however, Roelofsen, “Jay Treaty,” 209, considers arbitration viable until well into the eighteenth century.

break with early modern practice than conventionally understood, and only attained that status late in the nineteenth century.¹⁴ Anderson's perspective is difficult to square with the flourishing of arbitration in the late nineteenth century, the apogee of nationalism and "national consciousness." However, recasting it slightly to emphasize concepts of "glory" and "honor" which might be said to characterize the foundation of the early modern states system does provide a framework within which a post-enlightenment shift towards a modern mode of conscious analysis and management of state affairs might make such risks more tolerable.

In any event, since this study is confined to the issues of how and why the use of arbitration re-started and grew, we must defer any more definitive answer to this quandary to scholars of early modern European law and diplomacy. Still, we cannot leave this period without noting the presence of an active practice of arbitration for domestic commercial disputes that continued in England, France, the German lands, and elsewhere, with precedents dating back to Roman time and continuing throughout our period.¹⁵ This is particularly true in English legal practice, with statutory structures addressing the use of arbitration in commercial and labor contexts, as well as the frequent use in common law cases, especially under Lord Mansfield, the leading English jurist of the late eighteenth century.¹⁶ These practices may well have influenced the particulars of arbitral structure and procedure.

The Jay Treaty

Seemingly from the beginning, the story of Anglo-American diplomacy has been marked by a consistent practice of deferring the resolution of issues, so that the same questions of borders, rights and claims seem to recur. Referring issues to arbitration has sometimes been the

¹⁴ Roelofsen, "International Arbitration," 155, citing Karl-Heinz Lingens, *Schiedsgerichtbarkeit und Jus Publicum Europaeum 1648-1794*. Berlin: Dunker und Humblot, 1988.

¹⁵ Born, *International Commercial Arbitration*, 20-51. He also notes the vibrant commercial arbitration tradition in China and particularly in Moslem-influenced areas. Ibid. 52-6

¹⁶ Oldham, *English Common Law*, 68-72.

escape route from this diplomatic “merry-go-round;” but it has sometimes (where unsuccessful) been part of the process by which issues remained open. Following the settlement of the American Revolutionary War, a variety of issues remain unresolved or unimplemented and new ones appeared. Anglo-American relations in the decade since the Peace Treaty of Paris in 1783 remained fraught with uncertainties, tensions, complicating developments and a vigorous residuum of ill-feeling.¹⁷ Unresolved border issues, commercial clashes in the interior, the Atlantic, and the Caribbean, as well as war-related claims on both sides, filled the diplomatic agenda of the young republic and its former parent. But both were soon increasingly concentrated on Spanish entanglements and, later, the French disruptions that would lead to a quarter-century of a war that would dwarf the American struggle for independence. From the U.S. perspective, Great Britain loomed large, both commercially and politically; from London, the new country was a notable, but not significant factor in the global imperial mix.

Informal discussions during 1791-4 did not make much progress in the dynamic diplomatic environment, complicated by contention within American domestic politics. Jay’s appointment as envoy came with a lengthy list of issues to be addressed, the principal ones relating to commerce and the continued presence of British forts on the northern border of the U.S. Among the secondary items on the list were 1) the unresolved state of the border north of Maine, where the 1783 Treaty’s reference to the St. Croix River ran into ambiguities as to precisely which river was meant, 2) the uncertain geography at the head of the Mississippi River with implications for British access, 3) the inability of British merchants to gain satisfactory treatment for their claims arising in the course of losses and confiscations during the American Revolutionary War, and 4) the claims of American merchants for losses to British naval seizures.

¹⁷ The standard works are Bemis, *Jay’s Treaty*, from the diplomatic perspective and Combs, *The Jay Treaty*, covering the American domestic political context.

And, significantly, while Jay's written instructions addressed the substance of the issues; there was no indication of any particular procedure to be used to resolve them.

At an international level, arbitration had not been used for almost a century. But the mechanism was well known to Jay. As an apprentice lawyer in the 1760s, he had studied with Benjamin Kissim, a prominent New York attorney. When Kissim was named to the New York Provincial delegation to a joint commission to resolve a long-running boundary dispute with New Jersey in 1769, Jay was named the Chief Clerk of the Commission.¹⁸ While the Commission was not successful in agreeing on a solution,¹⁹ it gave the young Jay considerable exposure to the law and practices of such settlement commissions which were an established part of the British inter-colonial dispute resolution tradition.²⁰ Moreover, his familiarity with the law of nations was demonstrated by the presence of Vattel and Pufendorf, the leading treatises of his day, in his library.²¹ It is beyond the scope of this study to assess the degree to which this English practice was derived exclusively from domestic (feudal) precedents, or if it also drew upon medieval and other early modern international practices. Perhaps, as a practical matter, there is no real distinction between these two given the overall nature of relations between early modern "states." The key point, however, remains that this technique was used in a context in which a sovereign existed and in which he sought to delegate the resolution of the dispute among two effectively equal (while independent) sub-entities. The possibility of an appeal to the Privy Council on an inter-colonial dispute, makes these circumstances different from those of the

¹⁸ Monaghan, *John Jay*, 271.

¹⁹ Stahr, unlike other biographers, thinks it likely that Jay "learned the weakness of such commissions...." Stahr, *John Jay: Founding Father*, 27. Compare Monaghan, *John Jay*.

²⁰ Smith, *Appeals*, 462-3, notes this colonial lineage and reviews the specifics of the case at 417-53. The boundary was not finalized until well into the nineteenth century following further extensive proceedings. Birkner, "New-York-New Jersey," 98, citing Schwartz, *The Jarring Interest: New York's Boundary Makers 1664-1776*. Albany: 1979, 81.

²¹ Johnson, *John Jay: Colonial Lawyer*, 114.

“international” situation by the presence of a sovereign who, presumably, had enforcement powers. Nonetheless, if one leaves the enforcement issue to the side, then the use of commissions to resolve these disputes among nominal equals certainly would parallel the international practice of the medieval and early modern; and lay a clear precedent for its use in international contexts in the nineteenth century.

Following a successful legal practice, Jay became a leader during and after the Revolution, helped to negotiate the Peace Treaty with Great Britain in 1783, and was named the new country’s first Secretary for Foreign Affairs under the Articles of Confederation and the first Chief Justice of the United States under the new Constitution. It was while serving in that post that Washington and Secretary of State Edmund Randolph selected him to ease tensions on a variety of issues with Great Britain in 1794. Given his standing, it is not surprising that his formal instructions were minimal; nor that he saw little need for regular approvals from Philadelphia while the negotiations were underway.²² This paucity of documentation was matched on the British side, since the Foreign Minister, Lord Grenville, handled the negotiations personally and retained few records of his plans and concerns.

In addition to his early legal activities, as a diplomat, Jay apparently considered suggesting the use of arbitration to the British in the course of the 1782 negotiations in Paris, but this was not formally proposed at the time.²³ While Secretary for Foreign Affairs in 1785, he recommended to Congress that it allow him to negotiate a mixed commission arbitration solution to the unsettled problem of the northeastern border, a proposal that Washington endorsed to Congress following the ratification of the Constitution in 1790.²⁴ Thus, once it was clear how much progress he could make on the major issues in 1794, Jay may have been eager to show

²² Bemis, *Jay’s Treaty*, 320.

²³ Monaghan, *John Jay*, 271.

²⁴ Ibid.

something for his efforts and seems to have reverted to form and suggested the use of mixed commissions to Grenville for the two border problems and the sets of war-related claims on the two sides.²⁵

So, at one level, there seems to be considerable evidence supporting Jay's proclivity towards arbitration. But the detailed negotiating history with regard to the claims and boundary issues makes this problematic. While Jay had arrived in London in the spring of 1794, there were no signs of significant progress in the negotiations until Grenville prepared his "Project of Heads of Proposals to be made to Mr. Jay" sometime in August.²⁶ Jay's letter back to Washington on August 5 indicates that there had been substantive discussions before then however. As to the British claims (eventually included in Article VI), Jay told Washington that they "should be repaired by the United States, by decision of mutual commissioners."²⁷ But it is as likely that the commission idea originated with the British. In a July 23 letter to John Nutt (the representative of British merchants who had lodged claims with the Foreign Office over the years since the War) Grenville inquired as to their preference for a settlement as between a liquidated amount set by negotiation or a method of reopening U.S. courts to those claims, with some type of appeal by a process to be set by those negotiations.²⁸ Shortly thereafter, section II of the "Project" did contain a proposal for a commission to hear appeals from what British claimants felt was an unfair hearing on their claims in American courts. Since such an appellate structure would have presented insuperable difficulties under the new American Constitution, it

²⁵ Bemis, *Jay's Treaty*, 270. Combs, *The Jay Treaty*, 149.

²⁶ See, e.g., Stahr, *John Jay: Founding Father*, 321-4. The Grenville document is undated, but is bound in the Foreign Office files between documents dated August 19 and 24. FO 95/512/141.

²⁷ Jay to Washington, August 5, 1794, Jay papers ID 10630, accessed, August 16, 2013, <http://www.wapp.cc.columbia.edu/ldpd/jay/item?mode=item&key=columbia.jay.10630>.

²⁸ Grenville to Nutt, FO 95/512/79.

seems highly unlikely that such a proposal would have originated with Jay, the incumbent Chief Justice.

In addition, Section I of Grenville's Project suggested the use of a joint commission to handle the mapping of the boundary issues. In Jay's response to this draft, he noted that with regard to the Northwestern boundary issue:

Individuals differing about boundaries depending on the course or extent of brooks or streams, settle questions of that kind by actual surveys. States usually and with good reason do the same—Why be content with delusive conjectures and Probabilities, when absolute certainty can be had. Let a survey be accurately made by joint Commissioners, and at joint expense.”²⁹

Grenville, unsurprisingly, thought this made sense.³⁰ But Jay's own reference to prior state practice belies any attribution of originality on his part. Following his review of Grenville's Project and additional discussions, Jay prepared a full draft of the agreement.³¹ It was here that the specifics concerning the Commissions' procedure were first laid out, for which it is sensible to assign Jay credit. These provisions included the requirement that oaths be taken by the Commissioners and the specification of the scope of evidence to be taken.³²

Yet, at another level, the common (but American-led) late nineteenth century attribution of the revival of arbitration to John Jay and (more generically the United States), while rooted in this historical precedent, seems to be more a case of exalting national form over legal

²⁹ Jay to Grenville, September 4, 1794, FO 95/512/210.

³⁰ Grenville, in his private notes, September 5, 1794, FO95/512/219, saw the only objection to this solution as “delay”, and recognized that Jay's proposal for commissaries “does not appear ill adapted to obtain ...doing strict justice between the parties, according to existing Treaties and the Laws of Nations”

³¹ September 30, 1794, FO 95/512/242, .

³² Apparently, a more detailed treatment of Commission evidentiary issues was prepared by Loughborough, the Lord Chancellor, but it was not taken up by Jay and Grenville. See Jay to Randolph, November 19, 1794, Jay Papers ID 4338, <http://wwwapp.cc.columbia.edu/ldpd/jay/image?key=columbia.jay.04338&p=4> , accessed August 16, 2013.

substance.³³ There is no doubt that the extensive legal training which John Jay received in New York (including some reading in the law of nations) was, effectively, that of an English lawyer.³⁴ His experience on the staff of the New York-New Jersey boundary commission was as a colonial subject of the King and, while his revival of the arbitration methodology occurred when he was acting on behalf of the newly-independent United States, he did so in the context of resolving a dispute with Great Britain, whose familiarity with this practice was, obviously, no less than his. Overall, it is difficult to see what exactly was uniquely American (as compared with Greater British) about Jay's promotion of arbitration. Even the 1777 Articles of Confederation, which provided for its Congress to set up an arbitration procedure for resolving boundary disputes between States, was strongly influenced by continental models.³⁵ It is significant that the iconic status of the Jay Treaty in terms of arbitration was not noted until a hundred years later. A review of the principal international legal treatises of the nineteenth century—including those by the

³³ See Bemis, *Jay's Treaty*, passim, Combs, *The Jay Treaty*, 149-57, Monaghan, *John Jay*, 271. John Basset Moore was a leading American champion of international law from the late nineteenth century through his service as a member of the Hague Permanent Court of Arbitration before World War I and of the League's Permanent Court of International Justice afterwards. He wrote extensively on arbitration during his career, including the six-volume *History and Digest of the International Arbitrations to which the United States has been a Party*. Moore, in his 1896 historical introduction (based on a translation from Merignhac), places the development of arbitration in a Whiggish historical framework. While he notes that arbitrations were more frequent during the middle ages, but attributes their subsequent decline to the "warlike" nature of absolutism. Moore, *International Arbitration*, 4. He draws an implicit comparison with the practice of the new (more enlightened and liberal) United States as a champion of arbitration, starting with the Jay Treaty and continuing particularly with the resolution of disputes with Great Britain throughout the nineteenth century. The Jay Treaty thus became a convenient founding myth for those late nineteenth and early twentieth century advocates of arbitration who built on Moore's legal/liberal/modern trope.

³⁴ Monaghan, *John Jay*, 271

³⁵ Articles of Confederation, Art. IX, Sec. 2. Hendrickson, *Peace Pact*, notes that Dutch, German, Swiss and Italian confederations were models for this early American approach. According to Ralston, *International Arbitration*, 190, in the only case handled under these provisions, the tribunal held unanimously for Pennsylvania in a territorial dispute with Connecticut. Whether this process of the pre-Constitutional American States, was an "inter-national" as compared with a domestic process is certainly debatable.

American Wheaton—paid little attention to this (or most other aspects) of the treaty.³⁶ It was not until Moore’s dedicated treatise and compilation of American arbitrations in 1898 that the primacy of Jay and his treaty were proclaimed. This was then turned into the apotheosis of enlightened progress by the European scholars Lapradelle and Politis in 1905.³⁷

What, then do the actual provisions of the agreement show? There were four proceedings established under the Treaty. Article IV dealt with the Northwestern boundary and the rights to access the Mississippi, Article V with the Northeastern boundary, Article VI set up a mechanism to address the claims of British nationals arising from the War and Article VII established another commission to hear the claims of American property owners against the British government.³⁸ Significantly, most commentators view only the procedures under Articles V, VI, and VII to have been arbitrations.³⁹ Certainly, while it called for joint activity, the implementers of Article IV were not called “Commissioners” but, rather, were cast in the role of fact finders who, in certain circumstances were to jointly refer issues to their governments to be settled, not in terms of “justice, equity and the law of nations,” as the rule of decision was stated in the other cases, but according to “Justice and mutual Convenience,” a standard which seems rather more pragmatic in nature. The treatment of the Northeastern boundary under Article V, however, was nominally the type of mixed commission with which Jay was familiar and which had many antecedents in earlier European practice. It arose in part from the difficulties and ambiguities

³⁶ Roelofsen, “Jay Treaty,” 203, notes that none of the editors of the multiple editions of Vattel and F. Martens paid any attention to the Jay Treaty and Schwarzenberger, “Present Day,” 716, finds the same for the principal nineteenth century treatise writers, such as Wheaton, Lorimer, Twiss, Phillimore, Maine and G.F. Martens.

³⁷ Schwarzenberger, “Present Day,” 717 and Lapradelle and Politis described it as “a capital act which cleanly separates ancient mistakes from modern practices.” *Recueil des arbitrages internationaux*, I:xxix. They attributed the revival to “the liberal aspirations of a great republic recently constituted” and saw it as the source of a series of procedures which ran until 1831. Ibid. I:xxx.

³⁸ It also encompassed a small number of claims by British merchants for their maritime losses during the War.

³⁹ Verzij, *International Law*, 274; Schwarzenberger, “Present Day,” 717.

inherent in eighteenth century cartography; particularly where applied in wilderness areas. But there were political complications as well as the two states were mindful of regions of potential settlement and the military implications of geographic allocations. Thus, the commissioners were empowered to retain surveyors to gather facts ‘on the ground’ which could be factored into the commissioners’ decision. In the event, as we shall see, neither of these commissions were able to finally resolve their respective boundary disputes. The Northeastern boundary, in particular, was revisited during the Ghent negotiations twenty years later and several more times during the nineteenth century.

Article VI dealt with private British commercial claims that had arisen up to and during the American Revolutionary War. British commercial interests had long expressed their concern with their perceived inability to get a fair hearing in American courts regarding their claims for property destroyed or taken during the war. The distances involved, as well as anxieties over an unfriendly political environment were both cited in the voluminous documentation submitted to the British Foreign Office. There was no clear solution and they were worried that the passage of time would evaporate their claims. Jay, as an experienced trial attorney and Federal Judge was certainly sensitive to these issues as well as to the likelihood of judicial prejudice in state courts. In an early letter to Grenville, he suggested that “a mode of Proceeding as summary and little expensive may be devised, as circumstances and the peculiar Hardship of these cases may appear to permit and require.”⁴⁰ The result was one of the true innovations of this treaty: the adaption of the concept of a mixed commission to address commercial claims. Moreover, these were not just claims of the national of one state arising from the acts of the other state. Such claims were plausibly cognizable under international law and their treatment by means of some sort of arbitration was unusual enough. Here, however, the matter became a subject of international law

⁴⁰ FO 95/512/104, n.d. [late July/early August 1794].

and therefore amenable to treatment by a treaty between the states because of the implied failure of the United States to provide for fair and reasonable access to its domestic judicial system. The Article VI commission thus became, in effect, a jointly convened court to hear cases that would have ordinarily been heard in the State or Federal Courts of the United States.

The Jay Treaty has long been celebrated as the founding of modern international arbitration, but its historiographic handling has been generic; rarely getting past the fact of the modern re-start of the concept or the extension of the mixed commission concept to pecuniary claims.⁴¹ In fact, it was more valuable as a precedent than the arbitration historians of the late nineteenth century recognized. In ceding an aspect of its domestic judicial power to Great Britain in this context, the U.S. cracked open the door to shared governmentality, and laid the foundation for the many means of dispute resolution —through management and executory commissions and the exercise of judicial power over ordinary private disputes—of the type states were increasingly engaged in on a domestic basis as their remit expanded. In contrast, the mixed commission created under Article VII of the Jay Treaty was to handle American claims against actions by the British Government, not wrongs done by private British nationals. So, it contained no new premise for action under common notions of international law. It otherwise mirrored the handling of the British claims under Article VI and shared the novelty of the use of a mixed commission for handling claims.

In terms of process and rules, the Jay Treaty Commissions established several key precedents that were to be standard for most subsequent arbitrations. Nevertheless, in terms of the later trend towards juridicalization for which the Treaty's paternity has been frequently

⁴¹ However, a Polish-Prussian mixed commission was apparently established in 1657 to handle commercial claims and a French treaty with Hamburg in 1769 created a similar commission. Neufeld, *International Protection*, 17, 62. And Roelofsen, "The Jay Treaty," 202, argues that by medieval times, arbitration had already acquired a "distinct 'quasi-judicial' character and this probably became more pronounced in early modern times."

claimed, they present a mixed bag. These precedents included the nature and use of umpires, oaths for the commissioners, very high level principles concerning the taking of evidence, and substantive rules of decision. These points are significant for what they indicate about the nature and purpose of the arbitrations in the eyes of their authors, as well as their precedential value for later arbitrations; but it is difficult to read too much into these procedural parameters as to any intent on the part of Jay and Grenville to recast the nature of dispute resolution. On the other hand, most of the commissioners *were* lawyers, but this did not set a clear precedent for the subsequent incidents.⁴²

As to umpires, the classic forms of arbitration in the medieval and early modern periods were conducted by the Pope or Holy Roman Emperor, who held some superior status to the two disputing states, or to some third party peer, another King or appropriate noble, who, in theory, would act objectively in resolving the dispute. While, as noted above, there had been some use of multi-member commissions in the seventeenth and eighteenth centuries, they had been of two types, either an umpire appointed by a third party or a mixed commission made up entirely of the representatives of the two disputants.⁴³ The Jay Treaty Commissions (at least those regarding the Northeastern Boundary and the two claims) were different. They were comprised of one or two representatives of each party and a final umpire to be selected by those named representatives; or, in the (likely and eventual) case that the two sides did not agree, then the umpire would be selected by lot. Significantly, and unlike most later arbitrations, the Jay Treaty did not provide for those umpires to be nationals of third parties. And, in the event, the choices of the two sides were of their own nationals. As a result, in practice, the selection by lot determined the nationality of the umpire and, unsurprisingly, the likely substantive judgment in many specific

⁴² Schwarzenberger, "Present Day," 721.

⁴³ Ibid. 731, n. 69, 71; this latter form ended up being more in the nature of a negotiation by delegation rather than an arbitration.

cases. Such an approach indicates a preference for a clear and final decision rather than an objective one; an aspect at odds with the goals and historiography a century later.

On the other hand, the requirement of oaths of fairness and good faith, the reference to reliance on principles of justice and equity and the law of nations were each intended to shift the premise of the dispute resolution from the politicized world of diplomatic negotiations to a quasi-judicial context. The extent to which this effort was successful in practice, at least in the case of the Jay Treaty proceedings, seems somewhat doubtful. For example, the British Commissioners under Article VII had repeated recourse to Lord Chancellor Loughborough for legal guidance, including, ironically, a question as to whether Commissioners should take guidance from the government that appointed them. The Lord Chancellor was unequivocal in directing them to make up their own minds.⁴⁴ But, as we shall see, this issue of the *appearance* of objective decisions under the rule of law has been an important element in arbitrations since then, as well as in setting the terms of reference for the description (historical and contemporary) of the process.⁴⁵

The Legacy of the Jay Treaty

Over the twenty years from the Jay Treaty to the end of the Napoleonic Wars, arbitrations were established in a variety of circumstances:

- 1) between the U.S. and Spain in three agreements (1795, 1802, and 1819),
- 2) between Austria, Russia, and Prussia in the course of the partition of Poland in 1796-7,
- 3) in eight intra-European agreements addressing issues caused by those Wars,
- 4) the U.S. and Britain in the Treaty of Ghent, ending the War of 1812, and
- 5) in two other cases.

⁴⁴ Moore, *History and Digest*, I:327.

⁴⁵ From this perspective, Jay was faced with a delicate balance between animating the commissions with sufficient judicial character (with which he was most familiar) to meet the nominal objectivity purpose of the arbitration, without running afoul of U.S. Constitutional difficulties; particularly the reservation of judicial power to U.S. Constitutional Article III courts. This issue was to reappear, e.g., with regard to the slave trade tribunals which were discussed later in the nineteenth century, see Kontorovich, "Constitutionality," 64, and discussion in chapter 4, *infra*.

These situations show that arbitration was used in imperial contexts early on in the century, the influence of the initial Jay Treaty mechanisms, and the early use of arbitrations for non-adjudicatory purposes. Together, they illustrate not only that there was no clear juridical model of arbitration, but that it began its “modern” career as a flexible tool of state practice and diplomacy.

The most immediate progeny of Jay’s treaty was the U.S. agreement with Spain in 1795, which also invoked arbitration to address both boundaries and claims issues, but used less specific procedures, undercutting the Jay Treaty’s precedential role.⁴⁶ One of its principal concerns was the boundary between American Georgia and Spanish Florida. Article II of the treaty set out a general boundary line and Article III provided for each party to designate a Commissioner and a Surveyor to mark and record the precise line. No provision was made for disagreements between the two sides, particularly the designation of an umpire; so, unlike the Jay Treaty, it had more of a flavor of an administrative or implementary action.⁴⁷ This was likely due to the fact that 1) the two boundary issues addressed in the Jay Treaty had already been the subject of controversy, 2) the parties’ knowledge of the local geography was less certain, and 3) that there were known strategic and commercial consequences to the precise line to be drawn. Consequently, in terms of the territorial issue, this was no carbon copy; on the other hand, there are many phrases that replicate the Jay model.

The treaty with Spain also addressed a series of claims by American nationals that had arisen in the course of the early phases of the French Revolutionary Wars. Again, these were

⁴⁶ Treaty of San Lorenzo, Treaty of Friendship, Limits, and Navigation Between Spain and The United States; October 27, 1795, Malloy, *Treaties, Conventions*, 2:1640-9.

⁴⁷ This language was replicated in the 1819 agreement between the two countries when Spain ceded Florida to the U.S. and the boundary had to be redrawn to reflect this. Treaty of Friendship, Cession of the Floridas, and Boundaries, February 22, 1819. Malloy, *Treaties, Conventions* 2: 1651-8.

much more recent claims whose total value was undoubtedly but a fraction of the amounts at stake in the Jay Treaty. As a result, while there were procedural provisions in Article XXI, there was no specification of an oath and the procedure was considerably less detailed. This likely reflected the absence of a set of shared precedents and judicial procedures which would have enabled the British and American Commissioners to operate more consistently than their later Spanish and American counterparts. In each case, the rules of decision invoked justice, equity and the law of nations. In 1802, the U.S. and Spain set up a commission to resolve claims on both sides arising primarily from one party's interference with the others merchant shipping in the course of the Napoleonic Wars. This Commission never functioned, however, and it was cancelled in the 1819 Agreement. At that time, most claims were absolved and cancelled or left to the U.S. Government to pay the claims of its merchants.

The partition of Poland was the most significant development in international relations in the 1790s outside of the French Revolutionary Wars. As Austria, Russia, and Prussia jockeyed for territory and strategic positioning, they made three attempts to resolve their mutual issues outside of normal diplomatic channels. In 1796, Catherine the Great arbitrated between Austria and Prussia in establishing their new border between their Polish territories. This led to the 1797 Treaty of St. Petersburg which established a joint commission to allocate responsibility for the pre-partition debts of Poland and another to handle some pre-existing Polish noble bankruptcies.⁴⁸ These steps were significant, perhaps as important as those in the Jay Treaty (although no more successful)⁴⁹ because they represented the first modern use of joint administrative action; i.e. they were arbitrations of an executory nature, designed to address

⁴⁸ Treaty of St. Petersburg. Darby, *International Tribunals*, 771 #5,6.

⁴⁹ It seems that the first was more of a mediation than an independent decision by Catherine. The second was not finally resolved until a negotiated settlement was incorporated into the Final Act of the Congress of Vienna in 1815. The third appears to have succeeded.

issues whose scope had been demarcated but whose specifics were not determined, unlike the more classic adjudicatory nature of claims review or boundary settlement.

Among the provisions in the panoply of conventions, armistices, and treaties solemnly entered into to mark the start of various breaks that punctuated the Napoleonic wars, four boundary commissions and three administrative structures were set up as well as an adjudicatory selection between two rival claimants to the Cassel archives after that principality was dissolved. Three of the boundary matters were settled by Commission, but all were later revisited in the course of the 1815 resolution of the overall conflict.⁵⁰ One, echoing earlier practice and illustrating the faint separation between intra-imperial and inter-national situations, was determined by the Austregal tribunal within the German Confederation.⁵¹

More interesting were the administrative structures set up as states and jurisdictions were being shuffled during the war. The dissolution of certain ecclesiastical states in the Rhenish states led to the creation of a fund to indemnify the former rulers. The fund was overseen by a special commission.⁵² Most famously, France and the Holy Roman Empire (in one of its last significant acts) joined forces to establish and enforce navigation rules on the Rhine River.⁵³ Finally, an 1811 convention formalized a joint commission between Austria and Saxony to manage the Wieliczka salt mines on an ongoing basis.⁵⁴ These administrative panels were the precursors of the operating intergovernmental organizations of today where, the rigid concepts of borders and jurisdiction collided with geographic realities of pragmatic questions of day-to-day management. These executory commissions were established to address the disputes and differences that were inevitable when two (more-or-less) equal partners shared effective power.

⁵⁰ Darby, *International Tribunals*, #320, 321, 322.

⁵¹ Stuyt, *Survey of International Arbitrations*, #8.

⁵² Darby, *International Tribunals*, #223.

⁵³ Paris Convention of August 15, 1804, Art 123. See Darby, *International Tribunals*, #224.

⁵⁴ Darby, *International Tribunals*, #225.

They were tools of governmentality, of the expression of power by the state—in these cases two states—to manage their business and their regulation of private activity that was to be the emerging hallmark of the nineteenth century state. The mechanism of the mixed commission (with or without an umpire) was no different than that used in adjudicatory arbitrations, but their effect, in terms of efficacious handling of disputes, of freeing the overburdened central administration of each participating state from the aggravation of these matters, and of building confidence in a model of shared international responsibility, were equally effective.

Two other early proceedings are worth noting. In the mid-war shuffling of imperial territories, the British took control of the formerly Dutch colony at Bernagore, outside of Calcutta in 1813. They established a joint commission to ascertain the net revenues generated by the colony as a basis for an annual British compensatory payment.⁵⁵ Another 1813 agreement between Russia and Persia designated a commission to finalize a border. This commission was not successful and war broke out again a decade later.⁵⁶ These agreements showed the global reach of the Napoleonic wars; the former as a result of the British seizure of Dutch territories when they were allied with France, the latter arose out of a conflict fostered by the French attempts to engage with Persia against Russia. For our purposes, they were the first steps towards the global use of arbitration, particularly in inter-imperial conflicts; a practice which flourished towards the end of the century.

Chronologically, the final group of arbitrations in this early period to be examined are those which were established in the Treaty of Ghent in 1814 between Britain and the U.S. to address four boundary matters.⁵⁷ The boundary commissions were identical in terms of

⁵⁵ Darby, *International Tribunals*, #231.

⁵⁶ Treaty of Gulistan, (1813), Aitchison, *Collection of Treaties*, X:10 and App. p. x.

⁵⁷ Treaty of Peace and Amity, December 24, 1814, Malloy, *Treaties, Conventions*, I: 612. Verzijl, *International Law in Historical Perspective*, VIII: 278-80 has the most concise summary of results.

organization and procedure. The Treaty made two improvements on the process set up in the Jay Treaty. First, there was express provision for one or more commissioners ‘walking-out’ as happened following the earlier treaty, but the situation did not arise here. More importantly, instead of using a national commissioner, chosen by lot, as the umpire, under the Ghent language the Commissioners were to write up their opinions with reasons and submit them to a third party (a monarch or state) for a final decision. It seems clear that this was a response to the unhappy post-Jay results. In the event, Ghent results ran the gamut from straightforward to convoluted. One Commission (under Article VI) reached a unanimous decision, another (under Article IV) negotiated a compromise, a third (under Article VII) reached partial agreement and proposed a compromise that was not accepted by the two Governments. This issue, the boundary north of Michigan, Wisconsin, and Minnesota, was not finally settled until the Webster-Ashburton Treaty of 1842. Finally, the Commission under Article V addressing the Northeastern boundary, was unable to reach agreement and the matter was referred to the King of the Netherlands in 1827. His decision, issued in 1831, was not accepted by the parties and the matter was not closed until the 1842 Treaty; likely demonstrating the rudimentary drafting of the relevant treaty language at this early stage in the evolution of arbitration agreements.⁵⁸ So, in addition to highlighting the glacial pace of dispute resolution, the Ghent boundary Commissions again showed only one clear success out of four. Yet, from a legal perspective, this was improvement. Prior experience had informed the follow-on decision of the two states. The process of refining and adjusting the arbitration process would continue, as we shall see, and would become part of the sense of progress which informed the arbitration movement later on.

⁵⁸ King and Graham, “Origins of Modern International Arbitration,” 46.

In general, it appears that the use of arbitration to resolve these disputes was an American initiative.⁵⁹ Secretary of State Monroe urged the U.S. team was urged in this direction in the summer of 1814, long before the discussion in Ghent turned substantive.⁶⁰ The Americans suggested the use of these commissions in their note to the British when the issues were finally joined in November and, in doing so, they expressly referenced the Jay Treaty Commissions precedent.⁶¹ The British negotiators accepted this proposal with only one material change; they proposed the eventually-adopted shift from selecting the commissions' umpires by lot (as had been done in the Jay Treaty) to using the third party umpire method.⁶² The overall flow of diplomatic discussions at Ghent was characterized by reactivity to military activity in the Anglo-American conflict and the broader European political and military developments during the later stages of the Napoleonic Wars. In the final agreement, virtually all of the issues which led to the War of 1812 were put to the side. The use then, of arbitration to address these four long-standing boundary issues was a combination of enabling each side to claim some substantive progress and the inability of the negotiating teams in Ghent to address the specifics of those four issues.

The interpretation of the Jay Treaty, in particular, the extent of British liability for compensating Americans for their loss of slaves during the war, led to yet another series of arbitrations which illustrated, in a single situation, the range of decision-making methods. Once this interpretative question arose, the two sides agreed to defer to the decision of a third party

⁵⁹ However, the British did consider proposing a mixed commission to handle the claims of some of their merchants then located in the West Florida (i.e. Mississippi) area. Bathhurst to British negotiators, July 28, 1814, FO 5/101/21. This issue was not actively pursued.

⁶⁰ Monroe to Adams and Bayard, June 23, 1814, suggested the appointment of commissioners to "with full power to adjust on fair and equitable considerations...." RG 59, Roll M77/2.

⁶¹ American note to the British Negotiators, November 10, 1814, #6 "propose[d] the reference of the whole subject [of boundaries] to Commissioners, and they present accordingly Five Articles drawn on the principle formerly adopted by the two Powers for settling the questions reflecting the River St. Croix." RG 59, Roll 36/1.

⁶² British negotiators to Castlereagh, November 29, 1814, FO 5/102/154.

sovereign.⁶³ The Russian Tsar was chosen and he ruled in favor of the United States on the principle of liability, which led to the need to determine the precise values and numbers of the slaves involved.⁶⁴ Under this agreement, the British and Americans each selected a “Commissioner” and an “Arbitrator”. If the four of them could not agree on a valuation, then the Russian Ambassador to the U.S. was to decide the matter. Then, the two Commissioners would determine the facts of each specific claim. If they could not agree, then one of the two Arbitrators (selected by lot) would decide the matter. This treaty interpretation issue thus led to a five-stage proceeding, but it was not enough to resolve the dispute, which was finally concluded by the liquidation of the American claims for a fixed amount in 1826.⁶⁵

Conclusion

The Jay Treaty has left us both significant precedents and a considerable mythology. In reviving the arbitration process after almost a hundred years, in the two decades of diplomatic upheaval that followed, the detailed practices and procedures of the Jay Treaty sometimes found echoes in British, American or others’ negotiations and agreements. But it was far from a rigid template and many variations can be found that leave it as a significant, but not dominant, influence.⁶⁶

Nonetheless, the specifics of the Treaty have been overshadowed by its late nineteenth century enshrinement as an (and prior to the “*Alabama Claims*,” *the*) exemplar of arbitration.

The mythology consisted of two principal points: its nature as the restart of arbitration after the

⁶³ Convention Respecting Fisheries, Boundary and the Restoration of Slaves, October 20, 1818, Malloy, *Treaties, Conventions*, I:631.

⁶⁴ Convention for Indemnity under Award of Emperor of Russia as to the True Construction of First Article of the Treaty of December 24, 1814, July 12, 1822, Malloy, *Treaties, Conventions*, I:634.

⁶⁵ Convention Relative to Indemnity for Slaves, November 13, 1826, Malloy, *Treaties, Conventions*, I: 641.

⁶⁶ For example, the Jay Treaty commissions were comprised solely of the nationals of the two states involved. While this was repeated in the Ghent Treaty commissions, the use of third party nationals was a regular part of the post-Napoleonic War commissions.

hiatus of the eighteenth century and its success in resolving disputes.⁶⁷ As we have seen, the arbitration process did not spring, Athena-like, full-grown from the brow of John Jay. Still less was it attributable to novel/modern/enlightenment-engendered thinking or a new approach to international relations from that newest of nations: the United States. It found its roots in Jay's practical experience as a trial attorney and a participant in an ordinary British imperial process of inter-provincial dispute settlement. The British nature of these legal concepts and practices made it sensible to Grenville and the British government, to the extent that they advanced their own comparable ideas, sometimes in advance of Jay.

More importantly, at least two and perhaps all three of the Jay Treaty arbitrations were failures; two did not resolve the disputes they were charged with and the third effectively conducted an informal negotiation instead of arbitrating. It proved to be a false foundation upon which a mythology of judicial regularity, arbitral success, and Anglo-American progress was later to be built. The Northeast boundary commission, under Article V, supposedly the simplest of the four questions, was decided by a unanimous vote, but only after it was determined that a majority would suffice. Once the third commissioner was selected (by lot), the final decision, which appeared to have been a compromise resulting from negotiations, was approved by all three.⁶⁸ As an example of an impartial and objective determination of the issue, this result seems dubious; on the other hand it was a final resolution of the issue proposed.

The claims of British merchants, to be heard under Article VI, were never arbitrated. The two sides vehemently disagreed about the standard of adequacy for normal legal remedies for the British claimants which the British saw as an American effort effectively eviscerating the

⁶⁷ Among those who have perpetuated this myth without apparent investigation or support for their claims are Grewe, *Epochs of International Law*, 517; Hudson, *International Tribunals*, 3, who called the Jay Treaty Commissions "eminently successful" which "gave impetus to a revival of the judicial process of arbitration..." and Janis, *America and the Law of Nations*, 39-40.

⁶⁸ Moore, *History and Digest I*, 28, LaPradelle & Politis, *Recueil des arbitrages internationaux* I:11.

Article. The American Commissioners, fearing an adverse decision due to the selection (by lot) of a British fifth Commissioner who they saw as being unduly influenced by one of the primary British Commissioners, withdrew, preventing a quorum. Discussions to clarify the applicable legal standard started up in both capitals, but no progress was made. Finally, the American claims, under Article VII were, in a sense, held hostage as a result of the American behavior in the Article VI Commission. Here, the British Commissioners, citing legal complications, but in all likelihood acting in reprisal to the U.S., also walked out in 1799.

At least by 1799, it was clear that these mixed claims commissions weren't working. Negotiations, particularly in London, passed desultorily, delayed by British distraction with the Napoleonic Wars and domestic political changes. The two sides couldn't even agree on what the problem was. Finally, the U.S. proposed to liquidate the Article VI claims with a lump sum payment and to have the Article VII commission restart its work.⁶⁹ This was ultimately accepted by the British and the Article VII arbitration eventually reached decisions in over 500 specific cases.⁷⁰ The discussion of these Commissions and their problems make clear that from the perspective of both sets of diplomats, it was a very short step from apparently ordinary domestic arbitrations to the type of state-to-state proceedings at issue here.⁷¹

Yet the Jay Treaty was successful at an essential diplomatic goal: deferral. Issues of secondary significance and less urgency were "addressed" and their stakeholders could be told

⁶⁹ Rufus King, the American Minister in London, who handled the negotiations intimated as much in his dispatch of April 22, 1800, RG 59, M30/6. However, he later attributed the idea to the British. King to Madison (Secretary of State), Oct 16, 1801, RG59, M30/7.

⁷⁰ Convention Regarding Articles 6 and 7 of the Jay Treaty and Article 4 of the Definitive Treaty of Peace signed at London January 8, 1802. Malloy, *Treaties, Conventions*, I:610. The U.S. agreed to pay £600,000 for the Article VI claims.

⁷¹ For example, Lord Loughborough, the Lord Chancellor, endorsed the lump-sum negotiated solution, saying that "he never knew an arbitration which did not come to something of this sort." King to Timothy Pickering (Secretary of State), June 6, 1800, RG59, M30/6. King himself saw the same type of tactics at work as in arbitrations between individuals. King to Pickering, October 11, 1799, RG 59, M30/6

that their governments were responsive to their concerns. And, while there is no indication that negotiators (of the Jay Treaty or since) were dismissive of those issues, much less wished them to be ignored; still there was little sense of regret that these or many later arbitrations did not work.⁷² Good faith efforts were made to implement the Jay Treaty provisions, but it was more important that the larger commercial and political relationships continued without the risk of rupture due to minor causes. As a result, we can see the Jay Treaty as setting an important precedent—at least at the level of practicality and expediency—without invoking grand principles of law, international relations or civilizational progress.⁷³

In the context of the 15 arbitrations which followed over the next 20 years, the problem of failure remained significant. At least seven were not successful which, when taking into account the executory nature of several and the incomplete diplomatic records on others, yields a failure rate of well over half. As important, however, was the dominance of the commission method, with only one agreement providing for a head of state to make the initial arbitration determination. Further, while there were signs of procedural and structural evolution, as evidenced by the move to third party arbitrators following the Jay Treaty's mis-step, the post-Ghent slave valuation proceedings reverted (unsuccessfully) to traditional methods.

The U.S. was not a leading player on the international stage until well into the second half of the nineteenth century and its choice of diplomatic methods (even had the Jay Treaty been a useful or cited precedent) had relatively little impact. As we will see in Chapters 5, 6, and 9,

⁷² The discussions leading up to the 1802 Treaty did not reflect any disparagement of the arbitration process in general or in the structure of the Jay Treaty provisions. The best evidence of this is the revival of the Article VII Commission and the mention (not taken up until the Ghent Agreement twelve years later) of extending the mixed commission approach to extend the boundary line drawing through the Bay of Passamaquoddy (bordering Maine). See King to Madison, December 31, 1801, RG59, M30/7.

⁷³ However, Lint, *Early American Conceptions*, 142, argues that seen more broadly, the Jay Treaty represented more a reflection of the Anglo-American power differential than any endorsement of international legal sensibilities.

American affinity for arbitration was spotty at best until at least the end of the century.

Diplomatic practice was driven by the European Great Powers and it is to their precedents and methods that we now turn.

Chapter 4: The Emergence of Dispute Resolution as a Tool of Modern Diplomacy

If the Jay Treaty is a problematic touchstone of modern arbitration, we need to look elsewhere. I argue in this chapter that the oft-disparaged diplomatic episode: The Congress of Vienna (and its predecessor/successor meetings in Paris in 1814-5) is a better starting point. Not, of course, in the grand machinations of Talleyrand and Metternich, the shuffling of principalities and the restoration of as much of the Ancien Regime as they could manage, but in the infrastructure of diplomacy. Arbitration as a tool of modern international relations emerged, as with many other aspects of modernity, at the end of the eighteenth and beginning of the nineteenth centuries in response to the new modes and contexts—increased commercialization, globalization and bureaucratization—of diplomatic relations. It did not arise out of a vacuum, of course; the practices of the medieval and early modern era, even if attenuated, were known to diplomatic practitioners. However, there is no indication, nor any reason to believe that the development of the modern peace movement (which also dates to the immediate post-Napoleonic War era) had any connection with this mode of international relationship; nor did the Jay Treaty provisions have more than a marginal effect. The diplomatic focus was pragmatic and, with the exception of some developments in Latin America noted in Chapter 5, were unencumbered by grand principles or ideals. Further developments in both process and legalization were haphazard for the next half century, when the handling of the “*Alabama* Claims” case set a standard which increased awareness of dispute resolution mechanisms and inspired legal and peace communities to refine models of procedure.

In this chapter, we will see that modern international dispute resolution made major advances in the post-Napoleonic diplomatic conferences, not only in terms of the number and

scope of issues covered, but also in terms of diplomatic intent and mechanisms used. Further, there is a clear line from these decisions to state practice in this area throughout the first two-thirds of the nineteenth century, particularly in the context of suppressing the Atlantic slave trade.

Rebuilding Europe

In the twenty years following the Jay Treaty, arbitration had been invoked a total of 16 times under agreements involving 16 countries, often addressing what proved to be interim arrangements amidst the tumult of the Napoleonic Wars. The end of those Wars brought the opportunity to resolve long-simmering issues, re-draw the map of Europe and put the whole framework of international relations on a new footing and entailed over 70 arbitration agreements.¹ In the course of the negotiations, first in Paris in 1814, then in Vienna and again in Paris in 1815, we can see major changes in the nature and use of dispute resolution mechanisms across the full range of their subjects: boundaries, claims, treaty interpretation, administration and sovereignty. For example, the executory commissions established to administer navigation issues on the Rhine and Danube Rivers were the beginnings of what was to become international organizations. The revisiting of claims adjudications agreements between the first and second Treaties of Paris were a pivot point in the development of detailed treaty provisions governing joint commissions. The negotiations at Vienna and Paris, in particular, marked the beginning of a pattern which shows a spike in the usage of arbitration agreements at major multi-lateral conferences. This was due to a combination of factors: the nature of the negotiating process, the “top-heavy” presence of senior diplomats (sovereigns, prime ministers and foreign ministers), or the range of issues usually addressed at such sessions.

¹ SMH## 19-97.

One of the marked innovations of this period reflected fundamental changes in the nature and practice of European diplomacy. As Schroeder noted, “the central make-or-break questions of the peace settlement [was] how to temper state power through consensus and law.”² One method was the use of multi-lateral commitments as a tool of enforcement and stability. Of course, alliances were hardly new, nor their embodiment in treaties either before or at the end of a war; but the sense of a joint oversight of post-war Europe, particularly that forged by Castlereagh at Chaumont and which he and Metternich fostered at Paris and Vienna, was qualitatively different. In terms of arbitrations, the effects can be seen in two particular ways. At a simpler level, the widespread use of eleven multi-lateral agreements, especially those conveying a sense of purpose on behalf of the “Powers” vis-a-vis a common adversary is certainly notable.³ But of greater significance was the use of this model beyond the resolution of claims and redrawing of borders into the sphere of executory arbitrations to carry forward the work of the specific Congresses on an on-going basis. Together with the more detailed procedural structures for adjudicatory arbitrations, this period marked a new view of the nature of government and joint government action which has continued since. In this section, we will mark out these changes—procedural and political—and explore their extension into new areas of diplomatic activity. We will see how the intransigence of the French in handling British war claims led to a major step forward in the specification of Commission procedures. We will see that border changes not only had to be determined with precision, marked on both the ground and in maps, but also that their implementation required a variety of administrative and implementary changes, from claims to asset and liability allocation to newly shared management of river systems.

² Schroeder, *Transformation*, 539.

³ We will see this again at Paris in 1856 and Berlin in 1878, for example, in Chapters 5 and 8, *infra*, for example.

The post-Napoleonic settlements also marked, on a grander and more well-known scale, a change in the structure of European politics. The creation of the Congress system represented a positive step (in both a moral sense and in terms of expressed intentionality) in the evolution of the balance-of-power perspective on that system. The determined (not to say brusque) manner with which the ‘great’ powers dealt with the rest of Europe carried with it a sense that 1) those ‘great’ powers would be better off for the common management and stability of Europe (otherwise they wouldn’t have sat down together), 2) that these benefits would likely flow, over time and in the aggregate, to the other nations of Europe as well, 3) that since they had just spent twenty-five years fighting to prevent a hegemon, a collective management was the only alternative, and 4) this sense of shared responsibility for multi-national issues led (necessarily and sometimes implicitly) to the abridgment of that sense of absolutist “sovereignty” which had theretofore been conceived. This was the “public law of Europe.” And it manifested in the partition of Poland, the reconfiguration of the Netherlands, and many other well-known diplomatic outcomes. It was this same spirit of shared management that led to the solution of dozens of diverse, if less prominent issues. Some dated from before the Wars, some from the nature of war, some from the decisions at the Congresses; some looked forward and some looked backwards. However, in their nature and their spirit, they were part of the same process and perspective on how international relations was to be structured.⁴ Conventional surveys of nineteenth century European diplomatic history emphasize the limited duration of the Congress system, often citing its effective demise by the Congress of Verona (1822) if not earlier. Other

⁴ Roelofsen, “International Arbitration,” 163, argues that this reflected the “restoration of legalism” that was part of the broader political currents of the time.

histories trace a line through Paris (1856) and Berlin (1878, 1885), at least for the grand issues of the period.

Without addressing whether, at the level of high diplomacy, this approach to multi-lateral issues was part of the path that led to World War I or was a dead-end of proto-European integration, we can still note that the legacy of Paris/Vienna/Paris remained vital throughout the century in terms of the tools of international relations which these conferences sanctioned to address a variety of problems.⁵ Mazower and others have pointed out that no standing bureaucratic structure emerged from this process.⁶ But even a “thin layer of institutionalization” can mark shared intention and joint activity.⁷ Arbitral agreements and joint commissions constituted these structures and institutions although they were, by their nature, short-term in focus and precedential in effect. In an environment in which nationalism meant jealously guarded self-perceptions of “sovereignty,” any delegations of dispute resolution power to some third party had to be well-constrained. Nonetheless, the increase in international commerce and finance, the spread (and clash) of imperial interests, and the rise of non-European states meant that more disputes would arise that could not easily be handled by traditional diplomatic means. In particular, the comprehensive nature of the settlements at Paris and Vienna, intentionally designed to give all states a stake in supporting the outcome, meant that secondary issues could not always be addressed in detail; a practice that would continue at later Congresses.⁸

⁵ See, e.g., Mazower, *Governing the World*, 3-12. International law historians are beginning to pay more attention to their implications as well; but not enough. Simpson, “International Law in Diplomatic History,” 35-6.

⁶ Mazower, *Governing the World*, 94. There was *one*. See Chapter 3, *infra*.

⁷ Mitzen, *Power in Concert*, 2.

⁸ See Ikenberry, *After Victory*, 80-116.

Castlereagh, Claims, and Commissions

Robert Stewart understood that the effective use of power, in the real world, had to be exercised through agents, delegates, and representatives. In November, 1815, he was in Paris. Again. Ready to sign the definitive set of agreements to re-establish Europe. Again. He had spent 500 out of the previous 700 days away from the (often) disputatious Parliament and the (usually) supportive cabinet which, under the invalided King George III and his Prince Regent son, ran what most people considered to be the most powerful empire on earth. His Majesty's Principal Secretary of State for Foreign Affairs was, himself, such an agent; indeed, the most powerful agent of that most powerful empire that itself was constituted on the principle of the delegation of power. Yet, with a small entourage, Stewart (generally referred to as Lord Castlereagh) understood that there were limits on what he could accomplish. His predecessor, Lord Grenville, had negotiated face-to-face with John Jay twenty years earlier. But during his first trip to Paris, in the train of the Allied armies victorious over Napoleon first the first time, he had to rely on his cabinet colleague, Lord Bathurst in London, to oversee indirectly most of the issues in the contentious negotiations with the Americans in Ghent. Castlereagh had had his hands full with Czar Alexander, Prince Talleyrand, and Prince Metternich as they tried to stamp out the firestorm which Napoleon had unleashed across Europe for the previous fifteen years. In Paris, in 1814, they could briefly catch their breath and come to terms to restore stability (and a monarchy) to France, and settle the myriad issues which had arisen in the aftermath of the war which had caused the greatest disruption to the international system in Europe's history. They had done so (mostly) and then completed their work in Vienna the next winter and spring. Then, Napoleon's return from Elba had thrown everything into a cocked hat. Well, fortunately, not everything. There would be no revisiting of the Polish-Saxon "Rubik's Cube," or the reconstruction of a political system for the German Lands. Yet there was enough to devour over

four months of negotiation in the summer and fall in Paris, 1815. Talleyrand's diplomatic tour-de-force in Vienna had salvaged the borders and treasury of a newly-restored Bourbon France. The price for its failure to prevent Napoleon from re-igniting the war was to be substantial. The Allies were doubly angry, doubly exhausted and, after Vienna had settled most other problems, France was the only target on the board. Borders were cut back and reparations were ordered; a French army disbanded and an occupying army had to be installed and maintained. So, it was not until late in the negotiation process that Castlereagh could turn some portion of his attention to the less dramatic issue of British commercial claims against France. Castlereagh enjoyed extremely wide discretion during all of these negotiations. Even on the most significant issues, he received only general guidance (often out of date in the fast-paced military and political situation) from Lord Liverpool, the Prime Minister, and minimal interest from other parts of the Cabinet. Nor was there much sense that the Foreign Office in London provided much support. Castlereagh, along with his chosen deputies and clerks, had to handle everything themselves.⁹

These were not just the usual types of claims arising from property damaged in the course of the war. First, they encompassed damage to British property and rights in France which had occurred since January, 1793, the designated start of hostilities. Second, they included not just the normal classes of personal property, ships, and real property that might have been taken by any of the intervening French governments, but also a variety of financial instruments in favor of British creditors which the French governments had issued in the course of raising capital to meet its various financial exigencies prior to that date, including perpetual and life annuities, as well as, most likely, ordinary debt instruments.¹⁰

⁹ See Webster, *Cambridge History of Foreign Policy*, II:462-6.

¹⁰ Convention between Great Britain and France, concluded in conformity with the IXth Article of the Principal Treaty, relative to the Examination and Liquidation of the Claims of the Subjects of His

In Paris the first time, Castlereagh had to address this “most bothersome and difficult concern.”¹¹ He finally secured the French agreement to pay these claims subject to their validation by a mixed commission. The treaty provided that the commission (without an umpire) would examine “the claims of his Britannic majesty's subjects upon the French government, for the value of the property, moveable or immoveable, illegally confiscated by the French authorities, as also for the total or partial loss of their debts or other property, illegally detained, under sequester since the year 1792.”¹² For his part, the King of France engaged to act “in the same spirit of justice which the French subjects have experienced in Great Britain.” The brevity of these provisions is striking. Unlike prior British practice under the Jay Treaty, there were no oaths required of the commissioners, the number of commissioners was not even fixed, nor were there rules of evidence or due dates, nor, most remarkably, any rules of decision, not even a mention of ‘principles of justice and equity.’ Perhaps the British thought that the carrot of their forgiveness of French debts for the cost of maintaining their prisoners of war (which was conditioned on the resolution of these British claims) would suffice to ensure prompt action.¹³

It didn’t work. The French found all manner of reasons why the process could not move forward. To be sure, two wars and three changes of government might well be considered justification for bureaucratic delay. But, in late 1815, the British mood was not so forgiving. The “nation of shop-keepers” would get its due in the end. While there was some activity in the 1814 Commission,¹⁴ a leading group of creditors, working with Lord Harrowby, himself a former Foreign Minister and a friend of Castlereagh, sought to ensure that the process would work much

Britannic Majesty against the Government of France, See especially Articles I-V. November 20, 1815. BFSP, 1815-1816, 342.

¹¹ Castlereagh to Lord Liverpool (Prime Minister), May 23, 1814, FO92/4/149

¹² Treaty of Paris, May 30, 1814, Fourth Additional Articles between Great Britain and France, Article IV, Hertslet, *Map of Europe*, 21.

¹³ Castlereagh to Liverpool, May 23, 1814, FO92/4/149

¹⁴ Robinson (King’s Advocate) to Castlereagh, December 29, 1814, FO83/2264/110.

more smoothly this time. The frustrating experience of the previous year-and-a-half was applied to a new approach.¹⁵ We might describe this new approach as legal/technocratic; it was detailed and reflected consideration and inclusion of domestic British judicial practice. It was less negotiated by amateurs than it was designed to work.

The new agreement, signed November 20, 1815, was dedicated to the treatment of British claims and contained 18 articles and ran 3500 words.¹⁶ Clearly reflecting substantial legal drafting, the new provisions broke out the claims (previously lumped together under the 1814 agreement as “debts or other property, illegally detained, under sequester since the year 1792”) into six classes and provided the parameters for the recovery of each. The specificity of these parameters, particularly including standards of evidence sufficient to support a claim and calculations to handle the intervening changes in currency valuation. A panel of four commissioners was to examine each claim under principles of evidence and, if not agreed, then an umpire would be selected by lot from a list of two “Arbitrators” designated by each party for that purpose. An additional mixed commission was to handle the reserved funds contributed by the Government of France for the payment of adjudicated claims. All commissioners were to have sworn to act justly, faithfully and impartially. Finally, the British occupation of Guadeloupe and Martinique was not to be terminated until the whole process was completed. As an indication of the total value of the claims involved, the Treaty stipulated that 3.5 million francs as the initial deposit to be made by the French government, subject to additional contributions as the Commissioners determined.

¹⁵ These frustrations were noted in some detail in a *Times* report on the issue, which also remarked that “A commission must of course be nominated to make the necessary estimates of [the claims’] value; and it would be very desirable that the persons appointed to that office should have an intimate knowledge of the subject.” *Times* (London), November 14, 1815, 3.

¹⁶ Convention between Great Britain and France, concluded in conformity with the IXth Article of the Principal Treaty, relative to the Examination and Liquidation of the Claims of the Subjects of His Britannic Majesty against the Government of France, November 20, 1815. BFSP, 1815-1816, 342.

Unfortunately, there is no record in the Foreign Office archives, nor those of the Crown's Law Officers, nor those of the British mission in Paris, which sheds much light on the origin of this detailed language. No lawyer is known to have been attached to the mission. There is nothing in the backgrounds of the principals of the British delegation (Castlereagh, Wellington, Planta (Castlereagh's private secretary), Charles Stewart (Castlereagh's half-brother), and the Earl of Aberdeen) to indicate any expertise in this area.¹⁷ The language was unlike that in the standard domestic arbitration treatises of the period. So the source of this detailed commercial litigation language remains uncertain. We do know that Lord Harrowby, on behalf of a group of affected creditors, had corresponded with Castlereagh in Paris, urging attention to these issues and going into considerable detail on some of the problems associated with the liquidation of the claims; for which Castlereagh expressed his appreciation as he reported the results of the negotiations.¹⁸ Interestingly, Castlereagh addressed the issue of the Commissions, noting:

I should have been glad to have got rid of a Mixed Jurisdiction [i.e., a mixed arbitration commission], but this could only have been done by accepting a fixed sum in discharge of the demands in mass and to attempt to propose or agree to a compromise of this nature was more than either Party could venture, admitting the defect of the Principle. I don't know that we could have guarded it better.

The creditors were likely wary of the Commission process, given their experience under the 1814 Treaty (and the spotty Jay Treaty record as well); but, in the event, Castlereagh felt that case-by-case findings by the mixed panel was necessary. This was his only direct comment on the question of commissions, but it may well reflect some sense on Castlereagh's part of the huge complexities and variations associated with the claims (as discussed in Harrowby's letter)

¹⁷ Bartlett, *Lord Castlereagh*, 138. This is consistent with Webster's assessment as well. Webster, *Foreign Policy of Castlereagh*, I: 492. Woodbine Parish, Castlereagh's clerk, went on to become Chargé in Buenos Ayres and negotiate an arbitration agreement there in 1829.

¹⁸ Harrowby to Castlereagh, October 13, 1815, Harrowby Papers. Castlereagh to Harrowby, November 25, 1815, FO139/31/86. There was also considerable correspondence from the British creditors to the Foreign Office providing details on the claims and suggesting how to value them.

and an unwillingness to engage with the details of assessing the value of claims based on agreements more than 25 years old which were written before the inflation and varying currency exchange rates of the war years, and of the relative treatment, for example, of life annuities versus perpetual annuities.

Thus, while we don't know who initiated these dramatic changes in the British practice of arbitration commissions, we do know when and we may suspect why. Indeed, despite his detailed involvement in the discussions on this particular convention, Castlereagh's regular reports back to London on the status of negotiations made no mention of the handling of British claims until October 24, after more than three months in Paris and less than a month before everything wrapped up.¹⁹ Castlereagh was eager to be done; not only was he exhausted by the pace and intensity of the talks, he was mindful that the Allies would continue to draw British subsidies until the agreements were signed. This pressure likely contributed generally to the desire to delegate unresolved issues to other times and places.²⁰ In the parallel agreement covering the comparable but lesser claims of all the Allies, the structure and language echoed that of the British-dedicated arrangement, but it was considerably less detailed.²¹ Otherwise, there were no comparable changes in the many other commission processes set up under the 1814 Paris and 1815 Vienna agreements. The most recent prior international practice, at Ghent,

¹⁹ Castlereagh to Liverpool, October 24, 1815, FO92/29/156. According to the *Times*, The convention "which concerns the interests of the British subjects was directed in the smallest details by Lord Castlereagh himself, with a degree of care and perseverance which cannot be sufficiently commended in a Minister who has to bear such weight of the most important concerns of state." *Times* (London) December 27, 1815, 2.

²⁰ Indeed, Castlereagh noted in his letter to Harrowby, November 25, 1815, FO139/31/86, that "This question had given me more personal labor than all the State concerns would and although I was obliged to take the responsibility of the decision into my own hands I have been to frame my course between this conflicting extremes of French Commissaries & English Claimants."

²¹ Convention between Great Britain, Austria, Prussia, and Russia, and France, relative to the Claims of the Subjects of the Allied Powers upon France. — Signed at Paris, 20 November, 1815; Article V. BFSP, 1815-1816, 321.

was much more comparable to the Jay Treaty in tone and style. So, we might well surmise that it was the British merchant and financial interests in London that spurred this change and arranged for the legal drafting of provisions to be inserted by Castlereagh's team in Paris.

The Law Officers of the Crown were regularly consulted by the Foreign Office with regard to a variety of interpretive issues under both the 1814 and 1815 agreements. Their opinions shed some light on the curious legal/constitutional status of the Commissions which carry some implications for how the Commissions were seen (at least by the British) in an international context. For example, the Law Officers were of the view that the Commissions had no power under the Treaty to affect the legal status of issues (such as title to property) that were between British subjects.²² But, the next year they emphasized that the Commissions' functions were "not of a political nature."²³ The Commissions seemed to be 'neither fish, nor fowl,' at least from the British perspective, which makes some sense. Indeed, the Commissioners were first referred to in this period as "commissary judges," a neologistic characterization that illustrates their mixed status (as delegates of the executive power) and function (as dispute adjudicators). While later commentators have sought to cast the practice of arbitration as a legalistic or quasi-judicial function, the rigidity of such a classification has been an anachronism; born from a late nineteenth century desire to escape the perils of political ambiguities and the volatility of *raison d'etat*.

The handling of the British claims was distinctive in terms of the specificity of its procedures and its impact on subsequent arbitration mechanisms. In contrast, the arbitrations of the medieval and early modern period or even the Jay Treaty Commissions had nothing of the sense of intention, consideration, and teleology of this later example. Previously, a practice or

²² Robinson to Castlereagh, December 21, 1815, FO83/2264/217.

²³ Robinson to Castlereagh, October 9, 1816, FO83/2264/340

approach could appear, fall by the wayside and reappear in some other situation decades later with no pattern. Even the innovations of the Jay Treaty were not standardized in the twenty years following. To be sure, its detail was rarely matched, but its influence could be readily seen in the next batch of arbitrations—relating to the slave trade—and thereafter. An unknown hand drafted the document which Castlereagh brought to closure with Talleyrand's successor Richelieu that November. It was not his most renowned diplomatic triumph, but it was a pivot point in the evolution of arbitrations.

Administering the Settlements

In light of the bewildering roster of agreements signed in Paris in 1814 and 1815 and in Vienna in 1815 and the lengthy negotiations involved in all three sessions, it is surprising to see that there were many issues that were not definitively resolved (or, perhaps the conferences had reached their respective points of diminishing returns?). Some required engaging with specific 'on-the-ground' facts, some were beyond the knowledge of the plenipotentiaries and their small staffs, and some involved local political sensitivities. Still, in tone and purpose, they should be seen as a reflection of the larger factors driving the creation of post-war Europe.²⁴ In addition to the claims issues noted above, there were about 70 commissions, arbitrations and processes established in the course of implementing the post-war settlement agreements. They addressed boundary, claims, and other financial issues, sovereignty questions and an early example of a general arbitral regime. They oversaw the implementation of military and logistical aspects of the settlements. Overall, they show that 1) the idea of mixed commissions straddled what we have come to see as adjudicatory proceedings and executory/implementary proceedings, 2) the

²⁴ For example, Metternich's aide Friedrich Gentz, a student of Kant and "a great enthusiast for the development of the public law of Europe and international cooperation" greatly aided Castlereagh in the drafting of specific proposals about the post-war structure. Bartlett, *Lord Castlereagh*, 157

treatment of these issues was more about their delegation downward to lower level functionaries in an increasingly complex political bureaucratic environment than it was about whether they would best be handled through “judicial” processes, and 3) dispute resolution was as much about cleaning up after a war as preventing one. More fundamentally, they demonstrate a broad recognition that the changing nature of government, evident in the increased organization and complexity of domestic administrations throughout the eighteenth century, was intersecting with a recognition of the increasingly inter-national nature of many of these problems. At the highest level, this was one way in which the Congress System can be characterized, notwithstanding its episodic conferences and dwindling effects over the century that followed. At a more prosaic level, however, the many regimes established in the course of the 1814-5 peace conferences represent the powers’ efforts to conduct their affairs in a conscious and organized way, but to do so jointly in light of the multi-national interests involved.

To be sure, the majority of these projects encompassed activities that lasted only months or a few years. Only the Rhine River regime, noted more fully below, took on institutional trappings of what might be called a permanent nature. Still, these groups, which we have denominated “executory” should be seen as an intermediary step, emerging from statements of rights and duties of states in treaty provisions and moving towards standing entities and formal organizations. In this way they can be seen as a parallel to adjudicatory commissions as an intermediary step between diplomacy and international courts. In each case, the later stage is marked by a more dedicated formal document, detailed procedures and institutional apparatus.²⁵

²⁵ The history of “international organization,” in parallel to that of “international arbitration,” has been created in a silo. The principal early works have used the more easily demarcated formal institutional documentation as the criterion for inclusion. None pay attention to any early intergovernmental projects other than the Rhine Commission and they generally see the creation of the International Telegraph Union in 1865 as the start of international organization. See Lyons, *Internationalism in*

Boundaries and their implications. It is a commonplace that these conferences “re-drew the map of Europe.” It is hard to think of a state on the continent whose borders were the same at the end of 1815 as they had been at the end of 1813, much less of 1791. It is less commonly considered how this happened, at least at the level below the grand diplomatic tussling that occurred among the principals in Paris and Vienna. In some cases, old boundaries were restored and many lines were never moved. However, there were dozens of shifts of territories within Europe and many new lines needed to be established. Prior to the upheaval, there were only three modern instances of joint boundary drawing. Two involved demarcating the boundaries of the new American state, lines that to be found and fixed amid the wilderness of the New World.²⁶ Otherwise, the partition of Poland in 1796 had given rise to the only case in the more populated and well-established regions of Europe;²⁷ and, in 1809 and 1810 there were three (what turned out to be interim) boundary commissions.²⁸ However, during 1814-6, there were 19 such projects established; four established by the U.S.-British settlement at Ghent and 15 across Europe.

France, Spain, Austria, Russia, Prussia, the Netherlands, Sardinia, Switzerland, Savoy, Geneva, Hanover, Nassau, Saxony and Bavaria were each parties in the European group. Two agreements date from the initial settlement in Paris in 1814, ten from Vienna, the redrawing of French borders after Waterloo generated another commission and there were two ‘clean-up’ procedures after the main settlements.²⁹ Each of these were supplementary commissions, since the general terrain was well known and reasonably detailed maps were available. But beyond the

Europe. Reinsch, *Public International Unions.* Woolf, *International Government*, and Chapter 7, *infra.*

²⁶ SMH## 2, 5.

²⁷ SMH# 6.

²⁸ SMH## 12, 13, 14; There was also a Russian-Persian boundary Commission established in 1813. SMH# 17.

²⁹ Paris: SMH## 20, 33; Vienna: SMH## 38, 43, 47, 49, 52, 54, 55; Later: SMH## 66, 81, 89.

new lines were new responsibilities. The latest division of Poland required agreements on shared management between Prussia, Russia and Austria covering tariffs, canals, and the on-going governance of the Free City of Krakow.³⁰ The expansion of Prussia into non-contiguous territories to the West of its heartland necessitated arrangements governing military roads between those domains.³¹ Compensation sometimes had to be calculated and paid for the transfer of territory (ranging from the Rhine to Switzerland to Pomerania to Calcutta) as part of complex overall settlements.³²

River Management. The Congress of Vienna devoted considerable attention to the issue of the management and navigation of the principal rivers in western Europe which ran through multiple countries. At Talleyrand's request, a subcommittee was dedicated to establishing principles and governance procedures for the Rhine, Necker, Maine, Moselle, Meuse, and Scheldt rivers. The subcommittee included France (Dalberg), Britain (Clancarty), Prussia (Hardenberg) and Austria (Wessenberg) and, while Russia declined to participate, representatives of Holland and the relevant German principalities were included.³³ The subcommittee's proposals were adopted without change in the final acts, with general principles promoting the free navigation of rivers included in the main treaty and specific rules for each of the rivers attached in annexes.³⁴ The five named rivers (other than the Rhine) were subjected to treaty provisions which, structurally, differed from traditional practice only in the multi-national nature of their imposition. The regime for the Rhine differed, not only because of its commercial importance, but because there was already an administrative structure in place.

³⁰ SMH## 38-46, 52.

³¹ SMH## 68, 69.

³² SMH## 19, 56, 58, 59, 61.

³³ Chamberlain, *Regime of International Rivers*, 175.

³⁴ Hertseltt, *Map of Europe*, I: Articles 108-17

Indeed, regulations for the Rhine had been included in treaties since early in the fifteenth century, but, as borders shifted during the Napoleonic Wars, the French pressured the relevant German entities for a change.³⁵ Driven by the revolutionary administrative zeal and aversion to the privileges and complexities of the ‘Ancien Regime’ which impeded riparian development and navigation, the French created a model of free access in conjunction with the Arch-Chancellor of the fading remnants of the Holy Roman Empire in 1803-5.³⁶ Under the agreement, “the ‘Octroivertrag’ dramatically reformed the previously anarchic Rhine tolls and established a truly innovative joint Franco-Imperial administration covering the river from Switzerland to the Dutch border.”³⁷ The result was a structure that would not only police the river and its toll collections, but also manage the physical works necessary to ensure its navigability and commercial usefulness. Even more importantly for our purposes, the “Octroi” represented a multi-nationally selected regime that oversaw a director-general, four inspectors (two selected by each side) and locally-selected toll agents.³⁸ The five senior administrators were charged with implementing the substantive provisions of the treaty and also acted as a court of appeals for complaints about the specific toll impositions made by the local toll agents.

This combination of executive and adjudicatory powers was unprecedented. From the perspective of rule-making or ‘legislative’ powers, the director-general was invested with the ability to propose regulations subject to review by the states directly in what was, in effect, a permanent diplomatic process. However, both structurally and operationally, the Octroi’s quasi-judicial power was comparable to the claims commissions previously established under the Jay Treaty (and earlier European practice as well). It could be equally well described as a mixed

³⁵ Chamberlain, *Regime of International Rivers*, 152, 158.

³⁶ Spaulding, “Revolutionary France,” 214-5, shows the details of the evolution of this entity during the various negotiations and treaties during this period.

³⁷ Ibid. 215.

³⁸ Ibid. 216.

commission with two commissioners nominated by each party and a single jointly-selected umpire.³⁹ This demonstrates that the full range of governmental functions were present in a structure which was generally ignored by later historians of “arbitration.” Moreover, embedding this type of authority in a forward-looking regime represented a standing treaty commitment by France and the Empire to “arbitrate” disputes.

The Vienna subcommittee, under the leadership of Prussia’s Wilhelm von Humboldt, made this structure permanent as the “Central Commission for Navigation of the Rhine.”⁴⁰ The Commission, now composed of France, Holland, Prussia and several other German principalities, retained quasi-judicial appellate powers. Indeed, they were expanded in a curious and significant way under the 1815 regulations.⁴¹ Decisions of the nationally-selected local toll agents became appealable, in the first instance, to local courts, with further appeals possible to local appeals courts and the Commission. However, the local judges were charged with acting impartially and according to the Treaty and Commission rules and they were granted protection from local interference, with a provision that they could not lose their places “except by condemnation after judicial action.” The Commission’s judicial appellate powers were regularly exercised, hearing 277 cases from 1832 through 1911.⁴² From one perspective, this was a remarkable international intrusion into the local judiciary structure; made even more so by the addition of criminal jurisdiction for these courts in 1868.⁴³ From another perspective, it shows

³⁹ Indeed, Chamberlain, *Regime of International Rivers*, 166, argues that since the effective administrative powers were vested in an executive director, the commission’s powers “were purely judicial.”

⁴⁰ Spaulding “Revolutionary France,” 220.

⁴¹ Hertslett, *Map of Europe*, I: 81, Appendix 16b Art 8.

⁴² Chamberlain, *Regime of International Rivers*, 247.

⁴³ Under subsequent agreements in 1831 and 1868, and despite the withdrawal of France following its loss of Alsace and Lorraine in 1870, the Commission grew in function and scope and a version of it remains active today. Treaty of Mayence (1831) Articles 81-8, BFSP 1830-1:1076 (1833) , Treaty of Mannheim (1868). Chamberlain *Regime of International Rivers*, 246.

that the international community was willing to engage in a variety of approaches to the mixture of functions and “jurisdictions” and the lack of rigid models which existed at the time. The differences between the Rhine structure (as well as the Danube structure created in 1856, which looked to the Rhine precedent) on the one hand and the mixed commissions set up, on the other hand, under the Jay Treaty, Ghent or other post-Napoleonic agreements were not material. It was only when arbitration histories were written late in the entry that certain precedents were included as foundational for a juridical mode of dispute resolution and the balance were discarded.

Military Issues

Peace did not mean instant demobilization. Prisoners of war had to be exchanged and the bills for their maintenance during their captivity had to be settled up.⁴⁴ French military equipment and supplies were divvied up between the victors and, while the ratios were settled in Paris salons, the inventories had to occur in the field and in shipyards and depots across France.⁴⁵ The military occupation of France was one of the major consequences of the revised settlement in late 1815. While Wellington oversaw much of the process for the Allies, there were myriad issues regarding the transfer of control of military facilities as well as other arrangements for the long-term garrisoning of Allied troops.⁴⁶ The details of these implementations took months to work out and required both administrative and political acumen on the part of both the French and the various victorious Allies.

Political Issues

The fixing of boundaries did not end the complications of settling the structure of Europe after the Wars. Simplistic concepts of territorial sovereignty were insufficient to reflect the

⁴⁴ SMH## 26, 34.

⁴⁵ SMH# 23.

⁴⁶ SMH## 76, 77.

complexities of the negotiations. New relationships needed to be worked out between, for example, Prussia and Bavaria on the eastern bank of the Rhine where territories had been shuffled and between Austria and Hesse-Darmstadt regarding Mainz and Westphalia.⁴⁷ The Swiss cantons of Tessin and Uri had to redefine their relationship under Article 81 of the Final Act in Vienna, as did Berne and Basel under Article 77.⁴⁸ Competing claims to the French border town of Boullion had to be sorted out between Rohan and the Auvergne.⁴⁹ In all these cases the nature of government had to be newly defined between the locally affected polities under the auspices of the Great Powers who had guaranteed the stability of all European arrangements.

Judging the Slave Trade

The long-term British campaign against slavery and the slave trade had made only limited progress at Paris and Vienna, despite Britain's leading role in those negotiations. A declaration calling for the abolition of the slave trade was adopted, but it merely called on the signatories to take further action.⁵⁰ Castlereagh felt that he had bigger fish to fry and that imposing a moral position on either former allies or enemies was not likely to be successful.⁵¹ In fact, this lack of progress was one of the principal criticisms which Castlereagh and the Government faced during Parliamentary scrutiny of the treaties. In addition, the domestic legal basis under which the British government had set its navy upon the suspected slave-trading vessels had been undercut by a court decision in 1817.⁵² In the years that followed, however, he took up the issue in bi-lateral discussions, arranging the negotiation of agreements over the next

⁴⁷ SMH## 24, 84, 85.

⁴⁸ SMH## 36, 72.

⁴⁹ SMH## 70, 83.

⁵⁰ *Hansard*, 1st ser., vol. 32 (February 2, 1816) cols. 200-1.

⁵¹ *Bey, Castlereagh*, 219-20, 367, 388-94.

⁵² *Le Louis*, 165 Eng. Rep. 1464.

ten years with Spain, Portugal/Brazil, and the Netherlands. Additional, but unsuccessful, efforts were made with France, Prussia and others and, until the 1860s, with the United States.

What made the Spanish, Portuguese/Brazilian, Dutch and, eventually, American agreements significant for our purposes was their reliance on mixed commissions to evaluate the (primarily British) naval seizure of apparent slave trade vessels.⁵³ Over the course of more than 50 years, these Commissions heard more the 600 cases and freed almost 80,000 slaves.⁵⁴ It was essential to these counter-parties that, at the very least, they not appear to be entirely subject to British domination, either in terms of treaty negotiations or in terms of effective control of the Atlantic. These commissions, particularly the Anglo-Spanish and Anglo-Brazilian panels, heard far more cases than virtually all other arbitration tribunals over the course of the nineteenth century.⁵⁵ While we will not examine their individual rulings; their origin, nature, and jurisdiction highlight the degree to which the parties (and the British in particular) used these processes to advance their national goals under the aegis of shared “sovereignty” and how the creation of these nominally neutral tribunals enabled both states involved in each case to claim the rubrics of objectivity and legality. Their structures and processes were reflections of what had transpired in Vienna and Paris. Their operation strengthened the patterns of cooperation in international dispute resolution and, perhaps, of international human rights protection.

Most importantly, the slave trade commissions established a set of precedents for forward-looking dispute resolution. Procedurally, they were more comparable to the oft-used adjudicatory commissions for claims and boundaries which addressed issues which had already

⁵³ While establishing the right of the Royal Navy to seize suspected slave traders was the essential tool enshrined in the treaties, the provisions for the mixed tribunals were “a most material Provision,” and the next most important. Castlereagh to Arthur Wellesley, July 24, 1817, FO72/196.

⁵⁴ Over 95% of the seizures were made by the Royal Navy. Bethell, *Mixed Commissions*, 83-4.

⁵⁵ Martinez, “Anti-Slavery Courts,” 595-602 provides a detailed analysis of the case load of the various Commissions.

arisen; in fact, they seemed much like international courts of admiralty. In terms, however, of the way they were designed to address issues and claims which had not yet arisen, they were more similar to the executory/administrative commissions created to address upcoming question, e.g., in the context of European rivers. As a result, while they predated the debates over general arbitration regimes by several decades, they were an important building block towards that major development.

Domestic political pressures, the endorsement of the Vienna Declaration against slavery, and experience under the revised British-French Claims Commission combined to frame the proposal for the slave trade commissions and by 1816, Great Britain had determined to move forward, pursuing discussions with Spain, Portugal, France and the U.S.⁵⁶ By this time, Castlereagh may well have been encouraged by the reports of the British Commissioners under the revised and detailed procedures for handling claims against France as a model for the use of mixed commissions.⁵⁷ In his negotiation authorization to the British Ambassador to Spain, Henry Wellesley, he included a “Project” for a treaty and noted “It is also provided that the Vessel so detained shall be adjudged before a Mixed Tribunal of the two Nations. In creating such a Tribunal we have followed the Precedent of the enclosed Convention, which has been found to work perfectly well in disposing of the more complicated Questions to which it is applicable.”⁵⁸ In 1817, Great Britain entered into treaties addressing 1) claims for earlier seizures of Portuguese ships engaged in the slave trade, 2) the further prohibition of the slave trade by Britain and Portugal and establishment of commissions to address seizures going forward, and 3) further

⁵⁶ Castlereagh had made the same point to John Quincy Adams two weeks earlier. Adams Diary, December 23, 1816. http://www.masshist.org/jqadiaries/large.cfm?pageid=jqad30_112, accessed August 17, 2013. Murray, *Odious Commerce*, 68 and Van Niekerk, “British, Portuguese” Pt. 2 p. 197 (following him), erroneously attribute the precedent to the still-born 1814 version of the Treaty of Paris.

⁵⁷ Commissioners to Castlereagh, February 22, 1816, FO27/141.

⁵⁸ Castlereagh to Wellesley, January 10, 1817. FO72/196/5.

prohibition of the slave trade by Britain and Spain and establishment of commissions to address seizures going forward.⁵⁹ Under these agreements, each powers' navy was empowered to seize vessels suspected of being engaged in the slave trade and commissions were established to review these seizures, determine their propriety under their respective treaties. These commissions sat in Freetown, Sierra Leone and at Rio de Janeiro for the Portuguese Treaty and at Havana for the Spanish Treaty. An additional commission was established at London to handle claims regarding seizures of Portuguese vessels prior to the establishment of their two on-going Commissions.

The four on-going commissions were charged with determining the "legality of the Detention of such Slave Vessels as the Cruizers of both Nations shall detain" under the agreement and were guided by detailed regulations. They could condemn the ship and liberate the slaves if the seizure was deemed valid and make provision for compensation if the seizure was deemed improper. However, they had no personal jurisdiction over the Captain, crew or owners, who had to be dealt with by their national courts. Indicative of the increasingly formal, legalistic and bureaucratic nature of the process, the length of the Commissions' Regulation exceeded that of the treaty itself and was twice that of the instructions to the Naval officers regarding captures. Each Commission was to consist of two nationally-named participants called "Commissary Judges" who were to assess the compliance of the seizure with the Treaty requirements and, in the event of a disagreement, they were to draw, by lot, the name of one of

⁵⁹ Additional Convention to the Treaty of the Twenty Second of January, 1815, between His Britannic Majesty and His Most Faithful Majesty, for the purpose of preventing Their Subjects from engaging in any illicit Traffic in Slaves, July 28, 1817, FO 93/77/15, Appendix 3, Regulation, Article I. The Treaty with Spain was substantially identical. Treaty between His Britannic Majesty and His Catholic Majesty for the Abolition of the Slave Trade by the latter, and for preventing their Subjects from engaging in any illicit Traffic in Slaves. September 23, 1817, FO 93/99/11, Appendix 3, Regulations, Article I.

the two nationally-named “Commissioners of Arbitration” who would render a dispositive ruling.⁶⁰

A comparable agreement with the Netherlands was signed in 1818.⁶¹ And, following Brazilian independence from Portugal, a British-Brazilian treaty completed the initial set.⁶² So, by the late 1820s, there were eight on-going commissions. A later agreement with Portugal in 1842 which expanded the prohibited slave trading zone added five further commissions.⁶³ However, agreements with the Argentine Confederation, Bolivia, Chile, the Dominican Republic, Ecuador, Haiti, and Uruguay were signed in 1839-51 providing the same structure, but each of these states waived the right not only to establish mixed commissions on their own territory, but to nominate commissioners to sit in the mixed commission established by the British in Sierra Leone and only two cases were heard.⁶⁴

In light of the relative size of the respective navies and the centrality of the abolitionist movement in Britain, and despite the Treaty’s express emphasis on its reciprocal nature, the commissions’ purpose was effectively to protect the merchant shipping of Spain and Portugal from the excessive zeal of the British Navy and the commissions can be seen as a necessary concession on the part of the British to gain the agreement of the other states as to the use of the Royal Navy in the prevention of the slave trade.⁶⁵ Indeed, in 1831, when France was finally persuaded to enter into an anti-slave trade agreement, it saw mixed commissions as inadequate to

⁶⁰ Ibid. Appendix 3, Regulation, Article 3.

⁶¹ Convention between the Netherlands and the United Kingdom, May 4, 1818, BFSP V: 125-43

⁶² Treaty between the Empire of Brazil and the United Kingdom, BFSP XIV: 609-12

⁶³ Treaty between the Kingdom of Portugal and the United Kingdom, July 3, 1842. The surviving documentation from these commissions in the U.K. National Archives is voluminous and appears to offer fertile ground for additional research.

⁶⁴ Hertslett, *Complete Collection*, 16:443, lists all the slave trade treaties.

⁶⁵ See generally, Bethell, “Abolition,” 17. Castlereagh was sensitive to this and wanted the Spanish that the “Mixed Tribunal” would ensure that their vessels would not be unduly interfered with. Castlereagh to Wellesley, Jul 24, 1817, FO72/196/116.

protect its sovereignty. Its concern with unbridled British naval power led it to insist on using French national courts as the review mechanism, to which Britain, keen to add French territories to its anti-slavery campaign, acquiesced.⁶⁶ While in other circumstances, the commitment of such issues to the ordinarily used British Admiralty Courts might have been substantively sensible, here the political requirement was for a mixed tribunal, under jointly-settled procedures, to review the facts and the conduct of the British Navy's actions. Indeed, one result of Britain's attempt to have slavery declared as "piracy" (which it did most formally at the Congress of Aix-la-Chapelle in 1818) would have been to allow for Admiralty jurisdiction directly in such cases.

For political and pragmatic reasons, the mixed commissions had relatively little direct effect on the slave trade, being more of an adjunct to the deterrent effect of the British Navy than an effective tribunal.⁶⁷ The use of the French Treaty model, which did not make use of mixed commissions, for the British agreements with a variety of Latin American countries in the 1830s and 40s may be further indication of this.⁶⁸ In contrast, early agreements with Arab leaders sanctioned the use of their local courts, but later agreements, commencing in the 1840s, shifted jurisdiction directly to British Vice-Admiralty courts.⁶⁹ Not using the mixed tribunals may be indicative of the British assessment of their effectiveness or of their disparaging view of their 'semi-barbarian' judicial systems. Nonetheless, as an integral part of the implementation of the abolitionist program, especially through their information gathering and emancipation-management duties, it seems likely that members of the peace movement (which had a notable

⁶⁶ Keene, "Case Study," 322. Hertslet, *Complete Collection*, 4:112

⁶⁷ Bethell, "Abolition," 127. Martinez. "Anti-slavery Commissions," 602-21, highlights several major problems, both legal and practical in the operation of the Commissions as part of the overall anti-slave trade regime. See also Van Niekerk, "British, Portuguese," Pt. 3, for a discussion of the sparse operations of the Commissions at Cape Town.

⁶⁸ Keene, "Case Study," 322.

⁶⁹ Ibid. 324.

overlap with the abolitionist community) were aware of these commissions and might have viewed them as exemplars of bilateral international cooperation.⁷⁰ However, the slave trade commissions and, indeed, many of the commissions set up in the aftermath of the Napoleonic wars did not fit the “standard model” of arbitration as a means of preventing a pending specific dispute from turning into open conflict between the two states, they were not really recognized as arbitral mechanisms. The states, by subjecting a class of issues to joint adjudication and management prior to a specific case arising were, in fact, acting more effectively in preventing conflict and dispute than the standard post-facto model accommodated. It didn’t look exactly like some people’s idea of arbitration, but it did the job. From the perspective of the states it was a useful tool; from the perspective of the peace and arbitration movement, it seems to have been invisible.

The processes established by the relevant treaties show the hybrid judicial/executory scope of the powers of the various Commissions as well as illuminate the close consideration given by the British and the several counter-parties in the course of the treaty negotiations and their political parameters. In particular, the structure and practices of the Commissions showed that they were far from models of judicial independence while disposing of cases of a type that had been and would again become routinely judicial.⁷¹

The slave trade Commissions all followed what was by then a familiar model derived from the Jay Treaty Commissions. Two Commissioners (one named by each side) would hear a

⁷⁰ However, no record of their awareness could be found in the limited and idea-oriented publications of that era. There seems to have been little recognition of these examples until Darby in the 1890s. Darby, *International Tribunals*, 286-93.

⁷¹ The Commissions were entitled variously: Courts of Mixed Commission, Mixed Courts, Mixed Commission Courts, Mixed Courts of Arbitration, or Mixed Courts of Justice. However, by the time the British-American Treaty was signed in 1862, the Commissioners had come to be called “Judges.” Treaty for the Suppression of African Slave Trade, April 7, 1862, Art. IV. Malloy, *Treaties, Conventions* I:674.

case and, in the event of divergence, would choose by lot one Arbitrator from a panel of two (again, one named by each side). Thus, despite Castlereagh's description to Adams, there were no third parties involved. In practice, unlike the Jay Treaty, this structure did not prevent the Commissions from operating.⁷² Once the Arbitrator had decided, no appeal was possible.

Each Commission was subject to a detailed set of regulations, annexed to its governing treaty, another result of the British disappointment with its initial experience with the post-War French claims process. However, beyond these general rules, the British Commissioners and Arbitrators frequently looked to the Foreign Office and the Law Officers of the Crown for interpretive guidance.⁷³ While that guidance may have been, as in the case of the Jay Treaty, to act fairly according to the terms of the agreement, we may suspect that the Commission structure thus cannot be called entirely independent and objective (although the detailed records of the Commissions and the related records of the Colonial Office might shed further light on this).⁷⁴ Further, many of the Commissioners, Arbitrators and even the advocates (called "Proctors") were not lawyers, indicative of the less rigid sensibility of the period.⁷⁵ Thus, it is particularly important not to import any pre-established notions of judicial regularity to these proceedings.

The Commissions had to evaluate whether the vessel was properly seized (in terms of the nationality of the ship's flag, its geographic location at the time and the presence of either actual slaves or, in some cases, slave handling equipment). If so, it would condemn the vessel and non-

⁷² In fact, Bethell, "Mixed Commissions," 87, notes that the Arbitrators "usually—but by no means always—agreed with their" Commissioner. Martinez, 580 ff. discusses the complications of operating these tribunals in colonial and tropical settings.

⁷³ In 1819, the Foreign Office issued a detailed memorandum fleshing out these regulations. 1820-1 BFSP 25-49. The Cape Town Commission under the Anglo-Portuguese Treaty also adopted local supplementing regulations. Van Niekerk, "British, Portuguese," Pt. 3, 409.

⁷⁴ See both Loughborough in the earlier case, Chapter 3, *supra*, and Castlereagh here, Bethell, *Abolition*, 130, quoting Castlereagh to Thomas Gregory, February 19, 1819. Martinez, "Anti-Slavery Courts," 592-4, reviews the type of guidance the British Commissioners received.

⁷⁵ Bethell, "Mixed Commissions," 85. It is likely that the bulk of these appointments were patronage positions of the Foreign Office.

slave cargo, turn the crew over to the government of the ship's flag for further proceedings under that country's laws, and to oversee the emancipation of any slaves released. If the ship were deemed improperly taken, its owners would be granted compensation from the seizing (i.e., British) government.⁷⁶ Consistent with the practice established under the Paris version of the French claims Convention, the Commissioners were formally empowered to administer oaths, and utilize the normal range of judicial administrative powers.⁷⁷ However, unlike the prior claims commissions where burdens of proof were murky, these panels typically first heard whether the seizing Navy's agent could make out a plausible ("prima facie") case for the seizure under the treaty provisions, then the ship's owner's agent had the burden to show that the seizure was improper. This evidentiary procedure certainly contributed to the likelihood of condemnation.⁷⁸

The slave trade commissions showed that an essential purpose of arbitrations—whether adjudicatory or executory—was to share the sovereign power of one state among two or more. In this case, the scope of British domestic judicial authority, even as augmented by the incorporation of certain doctrines and principles of international law, was inadequate to meet its moral and political goals in suppressing the "odious commerce" in slaves. By joining with the other state's power with that state's consent, Britain could extend its principles and goals to encompass the nationals and ships of that other state. From the perspective of the counter-party,

⁷⁶ Additional Convention to the Treaty of the Twenty Second of January, 1815, between His Britannic Majesty and His Most Faithful Majesty, for the purpose of preventing Their Subjects from engaging in any illicit Traffic in Slaves, July 28, 1817, FO 93/77/15. The Treaty with Spain was substantially identical. Treaty between His Britannic Majesty and His Catholic Majesty for the Abolition of the Slave Trade by the latter, and for preventing their Subjects from engaging in any illicit Traffic in Slaves. September 23, 1817, FO 93/99/11.

⁷⁷ Compare Convention between Great Britain and France, concluded in conformity with the IXth Article of the Principal Treaty, relative to the Examination and Liquidation of the Claims of the Subjects of His Britannic Majesty against the Government of France, See especially Articles I-V. November 20, 1815. BFSP 1815-1816, 342.

⁷⁸ Van Niekerk, "British, Portuguese," Pt. 2, 205.

by agreeing to forego its exclusive jurisdiction over its own people and their property, it could make use of superior British naval power in the Atlantic, as well as gain the political good will of the most powerful state extant. Further, by presenting such agreement as an act of compliance with the British “request,” it could gain some insulation from domestic complications associated with this waiver of its own “sovereignty.”

The British initiative for anti-slave trade treaties extended the scope of British naval power and provided legal sanction for the Navy’s activities. The domestic judicial ruling that the Government could not extend that power by the unilateral device of declaring that slavery was ‘piracy’ and thus activating pre-existing domestic jurisdiction in its admiralty courts (and the Royal Navy) had blocked the first effort. “To force the way to the liberation of Africa, by trampling on the independence of other states in Europe” as Sir William Scott said in 1817, was unacceptable.⁷⁹ Nonetheless, from a practical perspective, it was necessary that that independence be curtailed. The British commitment to legality ensured that this was accomplished through the acceptance of these limitations by the other states through formal treaties. As one commenter has noted, “In these treaties vulnerable regimes traded a bit of national sovereignty for British financial aid, military protection, and commercial benefits.”⁸⁰ Regardless of the methods involved, the shape of sovereignty shifted, at least for these states and arbitral tribunals were the means by which this was accomplished.

This reading of the slave trade tribunals is best seen in the last of such treaties signed by the British. In the course of negotiations that lasted over forty years, the British pursued American participation in their model. Long after the other principal Atlantic powers—Spain, Portugal and Brazil, and the Netherlands—had agreed, America held out. It did so not because of

⁷⁹ Quoted in Bethell, *Abolition* 16. See also Martinez, *Anti-Slavery Courts*, and Mason, “Keeping Up Appearances,” 815.

⁸⁰ Mason, “Keeping Up Appearances,” 813.

any special affinity for the slave trade, but from a historically-rooted aversion to British maritime power and perceived difficulties with the loss of constitutional protections for its citizens inevitable in the transfer of judicial authority to a tribunal that was outside of the American model. Indeed, the perceived affronts to its people, property, and pride which had arisen through the exercise of British naval power for the impressment of sailors from American vessels and from the disruption of “neutral” American trade during the long Napoleonic Wars were a principal cause of the War of 1812. The settlement of that conflict at Ghent in 1814, as we have seen, did not solve those concerns and their memory was still fresh when Britain first broached the idea of sanctioning the use of its naval power vis-a-vis American ships suspected of engaging in the slave trade in 1816.⁸¹

The U.S. and Britain had already joined in the Ghent agreement with a declaration against the slave trade, but as with the Vienna declaration, it had no teeth. Castlereagh's proposed addition of a naval authorization governed by an arbitration process was not, to the then U.S. Minister in London, John Quincy Adams, taken as the start of an official proposal and there is no record of his reporting the idea back to Monroe and Madison. Just over a year later, however, the new U.S. Minister, Benjamin Rush, reported to Adams, now Secretary of State, that Castlereagh had raised the issue again, adding the precedential weight of the commissions under the Treaty of Ghent and, later in 1818, Castlereagh directly proposed that the U.S. join the slave trade policing system.⁸²

As Kontorovich explicates in considerable detail, American problems with this scheme were not just political. Cabinet debates made clear that the Monroe administration was concerned that the tribunals proposed by the British would not afford Americans the

⁸¹ John Quincy Adams [then U.S. Minister to Great Britain], Diary, December 23, 1816, http://www.masshist.org/jqadiaries/large.cfm?pageid=jqad30_112, accessed August 17, 2013.

⁸² Rush to Adams, February 14, 1818, Rush to Adams, June 24, 1818. RG59, M30/17.

constitutional protections embodied in Article III and the Fourth, Fifth and Sixth Amendments. This concern was for more than defendant-specific rights, it went to the constitutional nature of the American system in which “sovereignty” remained with the “people” and Congress’ power to create courts was limited under Article III. To create a court outside of Article III—a mixed tribunal with the British that had direct power over Americans and their property—was seen as beyond the power of the United States government.⁸³ Thus, in addition to the problematic history of the British-American maritime relations, the mixed arbitral tribunal proposed by the British was seen as an unacceptable derogation of U.S. sovereignty.

In the Webster-Ashburton Treaty of 1842, the two countries did agree that the U.S. would join the anti-slave trade effort, at least to the extent of committing a naval force to patrol in the South Atlantic; but that was far as the Americans would go.⁸⁴ However, by the 1860s, the political environment had radically changed. Impressment was a fleeting historical problem and the Union needed to maintain as close ties to the British as it could manage so as to avoid the latter throwing in with the Confederacy. To say that it became expedient to disregard the constitutional concerns of a generation earlier seems plausible enough.⁸⁵ A narrowing of the Commission’s proposed jurisdiction to exclude potential criminal law concerns provided the legal basis for distinguishing the past rejection and the Treaty was signed in 1862 to great

⁸³ Kontorovich, “Constitutionality of International Courts,” 64. This was the same problem which led to Jay’s rejection of the British proposal for mixed commissions to sit as appellate bodies over U.S. courts in cases regarding the claims of British creditors.

⁸⁴ Convention as to Boundaries, Suppression of Slave Trade, and Extradition. August 9, 1842. Malloy, *Treaties, Conventions* I:650.

⁸⁵ Milne, “Lyons-Seward Treaty,” provides an interesting account of Seward’s rationale and machinations behind the 1862 Treaty which make clear that American participation was motivated by diplomatic and domestic political factors and offers no support for any American commitment to an arbitration process.

acclaim on both sides.⁸⁶ It proved to be a failure, however, since the tribunals it established never heard a single case and the tribunals were abolished by subsequent agreement in 1870.⁸⁷

But the issue of the legal jurisdiction of the commissions as potentially infringing the domestic sovereignty of a signatory state had been raised from the beginning. It was a sticking point with France which did not sign an enforcement agreement until 1831.⁸⁸ This agreement allowed for the other party's naval forces to "visit" the suspected ships, but they had to bring them back to the territory of that ship's country for judicial review under national courts.⁸⁹ In addition, back in 1818, in the context of the Portuguese and Spanish agreements, the Law Officers of the Crown had opined that British domestic legislation would be necessary to empower the commissioners to obtain oaths and subject violators to perjury laws and to give domestic legal effect to condemnation determinations made by the Commissioners.⁹⁰ This indicates that such commissions, while initially conceived under international agreement, were also to be given municipal legal status.⁹¹ Stated differently, British domestic judicial power was to be extended internationally in the context of slave trade violations. And, while these tribunals were denominated as "Commissions" under the treaty and the implementing statute, they were for most purposes multi-member jointly-constituted judicial courts, although of limited

⁸⁶ Kontorovich, "Constitutionality of International Courts," 97-8.

⁸⁷ Milne, "Lyons-Seward Treaty," 516. Van Niekerk, "British, Portuguese and American, Pt.3," 427-35, provides considerable detail on the Commission set up in Cape Town which, too, heard no cases.

⁸⁸ King, "Latin American Republics," 394. Mexico, Venezuela and New Granada, similarly retained the right to use national tribunals. Ibid. 410. As did Denmark, Sardinia, the Hanse towns, the Two Sicilies, Austria, Prussia and Russia, Van Niekerk, "British, Portuguese and American, Pt.1," 19 n. 77, whose slave trading was of such a small magnitude that the British were likely not particularly concerned with the details of post-seizure practice.

⁸⁹ French British Treaty of November 30, 1831, BFSP 18: 641

⁹⁰ January 23, 1818, FO 83/2343/4-6.

⁹¹ This is further clarified in their opinion letter of June 8, 1819, FO 83/2343/15-6, describing the Commission's acts as "judicial". Indeed, on November 2, 1819, the Law Officers described the position to be filled at the Sierra Leone branch of the Commission as a "Commissary Judge." FO 83/2343/19.

jurisdiction.⁹² The substance of their work, the interpretation of treaty provisions and their application to the facts of particular cases involving naval seizure, looked no different from that of other courts. In the British case, the Commissions under the Spanish and Portuguese treaties were also co-located with each other, as well as the long-established Vice-Admiralty Court in Sierra Leone. Yet, for example, in response to Castlereagh's request in 1819, the Law Officers further clarified the status of the Commissions and took the view that the Commissions lacked any "criminal" jurisdiction.⁹³

From an overall perspective, the use of mixed commissions solved a set of problems faced by the British (and their treaty partners). The problems arose at the intersection of domestic law, international law, international relations and the practicalities of the slave trade. The commissions—a quasi-judicial means to a quasi-political end—served their purpose until changes in these circumstances made their purpose moot. In 1816, the peacetime seizure of other nationals' ships on the high seas was found to be improper without some basis for believing them to be pirates,⁹⁴ the invocation of mixed tribunals under the combined jurisdiction of the seizing naval power and the flag of the seized vessel a few months later was not likely coincidental. Indeed, in 1839, after extensive and frustrating negotiations with the Portuguese over revising and expanding the scope of their anti-slave trade treaty, Lord Palmerston took the extraordinary step of pushing through a recalcitrant Parliament a bill authorizing the navy to seize and British courts to review the seizure of Portuguese suspected slave traders outside the scope of the existing treaty (and in probable breach of international law).⁹⁵ Ultimately, in 1845, the British

⁹² The implementing statute was 58 Geo. III c. 36 & 85.

⁹³ Castlereagh to Law Officers (& reply), March 2 and 9, 1819, FO83/2343/9-14.

⁹⁴ Van Niekerk "British, Portuguese and American, Pt.1," 7-15; Martinez, "Antislavery Courts," 568. Some jurisdiction remained in the normal British Admiralty Courts in this area, especially as to British or stateless vessels. See Van Niekerk, "British, Portuguese and American, Pt.2," 209-13.

⁹⁵ Bethell, "Britain, Portugal," 778-84.

government decided to redefine "piracy" to include slavery, so that the well-established British Admiralty courts could hear the seizure cases. They increasingly did so, to the extent that the mixed commissions' case load dropped notably thereafter and faded away with the decline of the slave trade until the Commissions were all abolished by 1872.⁹⁶

More broadly, implicit in the American constitutional concerns was an appreciation of the mixed commission vehicle as a hybrid of international and domestic jurisdiction. This was apparent in the use of judicially-oriented language (John Quincy Adams, among others, referred to "mixed courts") and their analysis under Article III of the U.S. Constitution which addresses the "judicial power of the United States," which also presaged the more formal legalization of the arbitration process. Considered from another perspective, however, the flourishing and routine acceptance of mixed tribunals later in the nineteenth century can be seen as a manifestation of the recognition that any purported dichotomy between domestic and international matters was blurred, necessitating institutional arrangements to match the reality of global economic and political life of that era.

In this way, these slave trade commissions were thus materially different from the joint claims commissions established under either prior practice or their more common subsequent use because they were acting jointly for the two states involved, implementing a principle of shared public law and not resolving a nominally routine claim of a private party either against another private party or against a state.⁹⁷ Thus, they should be seen as an extension of (at least nominally joint) state power—albeit in a noble cause—in a framework which, while nominally adjudicatory, was more in the nature of a police power and one which certainly had nothing to do

⁹⁶ Bethell, "Mixed Commissions," 93.

⁹⁷ It is arguable whether these treaties can usefully be seen, as Martinez argues, *Antislavery Courts*, as implementing "human" rights or acting on behalf of the subject slaves. However we might characterize them, it is doubtful that they were seen in this way at the time.

with the cause of resolving differences between states. Indeed, the many subsequent Law Officers opinions addressing a wide range of issues under the treaties makes clear that these Commissary Judges were taking direction from the Foreign Office; i.e. they were exercising a function that could be characterized as much as executive as judicial.⁹⁸

From another perspective there remains a problem in terms of the consistency of the U.S. position. Treaties in 1794, 1795, 1802, and 1814 had expressed an American agreement to (if not championship of) the use of mixed commissions to handle the claims both by and against Americans arising on U.S. Territory. Indeed, in the same Cabinet meeting in which Castlereagh's 1818 proposal was rejected, the U.S. government considered the use of mixed commissions with regard to claims arising under the acquisition of Florida.⁹⁹ It is difficult to understand how the U.S. government could have told its citizens that their claims could have been extinguished under the finding of a non-Article III mixed commission while at the same time arguing that the same type of tribunal could not have found against American property.

Other Early Examples

There were just under 100 agreements in the forty years following the wrap-up of the Napoleonic conflicts; i.e., about 2.5 per year (as compared with about one per year from the Jay Treaty to 1814). While there were no striking developments during this phase, negotiations and agreements laid the foundation for state practice later in the century. Most notably, the geographic scope broadened to reflect the emergence into the European framework of international society of new states, including the independence movement in Latin America, which will be considered in the next chapter, as well as other states, some of which had escaped the Ottoman orbit and others which had been in existence for some time, but whose level of

⁹⁸ See, e.g., Robinson (King's Advocate) to Canning, April 3, 1823. FO 83/2343/110-1.

⁹⁹ Kontorovich, "Constitutionality of International Courts," 75, nn 163-4.

“civilization” was arguable. The geographic subjects of these agreements began to reflect a global (and often imperial) scope.¹⁰⁰ The following fifteen years (1856-70), up to the framing of the “*Alabama Claims*” proceeding, saw another 100 or so agreements, a rate of over 6 per year. The end of the Crimean War, particularly the Paris Peace Conference in 1856, provides a convenient mark since it spawned eight agreements to address a variety of issues and took the first public step by diplomats towards acknowledging some value in dispute resolution. But whether this nod, driven more by idealism than the realities of international relations, had much effect on the growth of specific agreements is dubious, most were continuations of the pragmatic trends from Paris and Vienna in 1814-5. Thus, the hallmarks of this period were incremental developments: the first use of these mechanisms in new places and to some new factual situations, the Latin American beginnings of general arbitration agreements, the continued marginal effectiveness of the peace movement. Some seeds were planted which later bore fruit, but there was not much action above the surface.

Seeds of the Future

The birth of new states and new interactions with old polities broadened the geographic scope of international dispute resolution agreements. The first eight nominally non-European agreements (excluding Latin America) were actually the product of imperial influence, with agreements brokered by Britain and utilizing British imperial agents as the decision makers.¹⁰¹

¹⁰⁰ Before 1838, only one agreement—a British-Dutch Commission established to value a Dutch colony near Calcutta transferred to Britain in the post-Napoleonic clean-up (SMH #19) nominally went beyond the European/Atlantic/American region.

¹⁰¹ In 1838, Britain arranged to formalize its power to allocate sovereignty over a portion of the Sind between the Maharaja of Lahore and the Shah of Afghanistan. SMH #123. In 1843, an Anglo-Russian mixed Commission set the boundary between Turkey and Persia. SMH #143. An Anglo-Zulu Mixed Commission was also used to fix the Zulu-Natal boundary in that year. SMH #145. In 1850, the British again used a mixed commission, this time with certain tribes in the Gambia, to set a boundary. SMH # 161. In 1859, Lord Canning, the Governor-General of India was named to determine the sovereignty of Zanzibar and its hinterland as between two indigenous claimants. SMH # 203. In 1869, Transvaal and the Orange Free State agreed to have the British Lieutenant Governor of Natal set a

Indeed, one of these was the product of an agreement between Britain and Persia under which the Persian government agreed to let Britain decide disputes between itself and either Herat or Afghanistan, two polities that were not formally party to this agreement. Thus, Britain while nominally advancing the rule of law in international affairs, was unencumbered by its lack of formal authority over these two areas adjacent to the Raj negotiate on their behalf. These eight instances illustrate the murky state of sovereignty in imperial borderlands and the British practice of harnessing legal forms to the service of its political goals. Britain was on the receiving end of this practice in the Venezuelan Boundary Dispute of the 1890s, when the U.S. asserted management of the interests of Venezuela to force Britain to the arbitration table, as discussed more fully below. The Russian Empire, too, utilized these tools; as early as 1813 establishing a joint commission with Persia to fix a boundary.¹⁰²

This period also saw the initial use of dispute resolution mechanisms to advance the commercial and financial interests of informal empire. Another means by which international law was shaped to these ends was the projection of European/Western legal norms of property protection into the (often unsettled) domestic affairs of states on the periphery.¹⁰³ British and other European/Western states pursued their nationals' economic interests when, for example, monopolies or other state-issued concessions were cancelled or otherwise infringed.¹⁰⁴ Similarly, the doctrine that states had an international law duty to protect the persons and property of

disputed portion of their boundary. SMH# 278. In 1870, a British general from India was again asked to fix two boundaries, one between Afghanistan and Persia, the other between Kelat and Persia. SMH## 282, 283.

¹⁰² SMH# 17. In addition, in 1835, the Russian Tsar was apparently charged with choosing the successor to the Persian throne. SMH# 121. Whether this was an *international* arbitration, properly called, is doubtful.

¹⁰³ This aspect is more fully explored in Chapter 8, *infra*.

¹⁰⁴ For example, Britain and the Kingdom of the Two Sicilies agreed to an arbitration over the latter's cancellation of a sulphur monopoly in 1840. SMH# 133. See also the treatment of the Suez Canal Co. SMH# 239.

foreign nationals from civil unrest was frequently reflected in specific treaties.¹⁰⁵ These principles, while nominally bilateral, were effectively a means of extending the power and norms of European/Western governments into peripheral contexts. The use of arbitration thus represented the integration of legal principle and its implementation in a manner similar to the use of extraterritorial jurisdiction during this period.¹⁰⁶ We will explore the complications and implications of these issues more fully below in the context of their flourishing late in the century, but the initial examples occurred in mid-century.

A pair of British arbitrations in Latin America in 1829 and 1830 shows the gradual nature of the development of thinking about arbitration and its procedures. Other than the Anglo-American string and the post-Napoleonic surge, the use of arbitration and mixed commissions was sparse in the early part of the century. The war between Brazil and Buenos Ayres (now Argentina) in the late 1820s provided the opportunity for privateers for both combatants to seize British merchant shipping. In 1828, Woodbine Parish, the British Charge d’Affaires in Buenos Ayres secured an agreement for a local commission to investigate and compensate the ship owners. Parish, who had been a clerk on Castlereagh’s staff in Paris thirteen years before, didn’t feel “sufficiently authorized to propose a mixed Commission”, but he was quickly, if gently advised that such an approach “would have been preferred by H.M. Govt” and a Commission of three Buenos Ayreans and two British merchants was appointed in 1829 (all named by the Buenos Ayrean government).¹⁰⁷ Meanwhile, in Rio de Janeiro, a similar problem took a more convoluted route to a similar end. Again, the British were reactive. In 1828, both the French and the U.S. agreed with the Brazilians on the use of mixed commissions to resolve their respective

¹⁰⁵ See e.g., SMH## 189, 194, 221.

¹⁰⁶ See Horowitz, “International Law and State Transformation.”

¹⁰⁷ Parish to Aberdeen, November 8, 1828, FO6/23/278-302. Duglass (Parliamentary Undersecretary in the Foreign Office) to Parish, February 27, 1829, FO6/26/1 (Draft). Parish to Aberdeen October 10, 1829, FO6/27/177-82.

maritime claims.¹⁰⁸ In February, 1829, Lord Ponsonby, the British Ambassador, forwarded to the Brazilians a similar proposal, drafted in consultation with (i.e. most likely by) the local British merchant community.¹⁰⁹ However, the Buenos Aryeen Mixed Commission was unable to resolve the claims and a further agreement in 1830 established a new mixed Commission, operating under a more detailed set of procedures and applying “the General rules and practice according to the Law of Nations.”¹¹⁰ Given the similar factual basis of these two sets of claims, overlapping time frames, and the connections between the British legations in Rio and Buenos Ayres, what is remarkable about these two agreements is their difference and the lack of coherence and uniformity of approach emanating from the Foreign Office. There was no sense of regularity or evolution of process from the recent Slave Trade Tribunal agreements; although the Brazilian agreement did echo Castlereagh’s claims commission treaty of 1815; its 20 articles with detailed rules and providing for the establishment of a 2+2 mixed commission with split decisions to be resolved by the British Ambassador and Brazilian Foreign Minister. And, while the Buenos Aryeen situation was ultimately resolved by a mixed commission sitting in London, the fact that the Foreign Office did not insist on such an approach from the outset indicates that notions of impartiality and shared sovereignty were not yet part of the furniture when it came to arbitration in the first half of the century.

¹⁰⁸ However, the agreement with the U.S. was not finalized until 1842 when the U.S., waving the flag of ‘civilized’ practice and noting that all other countries had long since settled their claims, finally prevailed on Brazil to resolve the matter. William Hunter (U.S. Minister in Brazil) to A. de Souza Oliveira Cristobal (Brazilian Minister of Foreign Affairs) August 20, 1842, RG59 M121/14.

¹⁰⁹ Ponsonby to Aberdeen, September 22, 1828, FO31/50/149-51. Ponsonby to the Marquis of Arcaty (Brazilian Foreign Minister), February 6, 1829, FO31/60/104-116. Agreement between Great Britain and Brazil, relative to the Settlement of British Claims, signed May 5, 1829, BFSP (1830-31) 18:689-91.

¹¹⁰ Convention between Great Britain and Buenos Ayres, for the Settlement of British Claims, July 19, 1830. BFSP (1830-1) 18:685-90.

In another example, the U.S.- Mexican Claims agreement of 1839 was the first intersection of the early Latin American general enthusiasm for arbitration with the Anglo-American tradition which grounded such arrangements in detailed provisions for rules and procedures.¹¹¹ While the two countries had earlier established a boundary commission, its implementation had been delayed.¹¹² The negotiations over the claims had extended over a lengthy period and faced complications in Mexico over the final ratification.¹¹³ American frustration with the Mexican government—as to both the underlying claims and the ratification delays—was quite palpable. The result was a detailed set of provisions governing the arbitration. On the other hand, it is clear that Mexico had taken the initiative with regard to using a mixed commission as the means of settlement.¹¹⁴ Similarly, and again despite the early Americo-centrist historiography, in the 1848 Treaty of Guadeloupe-Hidalgo, it was Mexico who proposed and overcame American governmental opposition to what was the first general arbitration agreement to which a state outside Latin America was a party.¹¹⁵ Curti's review of these episodes, which undercuts what he called "pacifist propaganda" which has been part of the subsequent historiography, also shows that the American peace movement had no effect on the process. Nonetheless, it sought to leverage the result in promoting arbitration generally. For example, Elihu Burritt, a leading U.S. peace advocate, when promoting the 1848 Universal Peace Congress in Britain, cited the precedent to then Prime Minister Lord John Russell (whose views on arbitration we will see in some detail concerning the "*Alabama* claims" below). Russell was

¹¹¹ SMH# 126.

¹¹² Molloy, *Treaties, Conventions*, I:1082, 1084, 1098.

¹¹³ John Forsyth (Secretary of State) to Francisco Pizarro Martinez (Mexican Minister to the U.S.), April 21, 1838, RG59 M99/69. See also Coxe, *Review*.

¹¹⁴ Francisco Pizarro Martinez to John Forsyth, December 23, 1837, RG59 M54/2. He said that Mexico was ready "to commit to the judgment of a friendly power the decision upon those claims upon which they cannot come to a determination, provided the United States themselves agree to this." There was no prior reference to a commission in the negotiations.

¹¹⁵ SMH# 153. Curti, "Pacifist Propaganda."

reported as offering to give “the most serious consideration” to such a proposal in the Anglo-American context.¹¹⁶

The 1837-9 negotiations were also the occasion for the U.S. to clarify its view of arbitration generally. The U.S., through two secretaries of state, twice rejected a Mexican proposal to have the governments involved in directing the tribunal in the substance of its work, seeing it as “a sort of joint judicial tribunal....”¹¹⁷ The U.S. also repeatedly rejected efforts by Mexico to expand the scope of the proceeding to include political questions, in an early invocation the ‘national dignity’ exception that was to become standard late in the century.¹¹⁸ Both of these positions show that, from the American perspective at least, the nature of the arbitration process was premised on some degree of distance between ordinary political/diplomatic processes and the resolution of the specified issues, even if those issues had been specified through that political/diplomatic process itself. In any event, it was a process to be managed by the existing state diplomatic machinery. This distancing, in terms of both formal relations and a lack of enthusiasm for the concept was to continue, as we shall see below. It is not clear to what degree we can attach much precision to the American use of the term “judicial.” Certainly, Mexican political processes were looked down on as unstable and unreliable, so the invocation of third-party involvement was likely seen as some remedy.¹¹⁹ On the other hand, when the Mexican Government sought to raise issues about the Commission’s decisions and expand the scope of its works, Daniel Webster reasserted the American “judicial” characterization in order to prevent the re-opening of the claims, to protect what he saw as the

¹¹⁶ Curti, *American Peace Crusade*, 170. However, we might be a bit skeptical about both Russell’s candor and Burritt’s realism in accepting this statement.

¹¹⁷ Forsyth to Martinez, September 1, 1838, RG59 M99/69.

¹¹⁸ Forsyth to Martinez, September 5 and 21, 1838, RG59 M99/69 reserving those issues as affecting “the national character” to resolution by diplomatic negotiation.

¹¹⁹ See generally, Coxe, *Review*.

judicial determination of the Commission's authority to address those claims, and to preserve the diplomatic nature of the process underlying the agreement to establish a Commission.¹²⁰

Of course, not every claim for private economic loss was an exercise of an informal imperial power. Such claims arose from a wide variety of circumstances, ranging from (allegedly) overzealous local naval commanders to the transfer of sovereignty over a territory. Still, in most cases, beyond the intractability of the particular problem within normal diplomatic channels, the essential element was the claimant's inability to access or lack of confidence in the local judicial process. This might have been due to general suspicion of the reliability and integrity of the local courts, particularly since the local government was seen as responsible for the damages complained of, or legal impediments to suing the sovereign defendant. Actually, claims for ordinary private contract disputes or torts were relatively rare. In almost all cases, the theory was a breach of an international legal duty on the part of a government.¹²¹

While the development of the general arbitration agreement and the compromissory clause owe their main line of development to the Latin American countries, the evolving configuration of the German lands provided an important linkage between the medieval and modern practices. Many of the political rearrangements involved in establishing the post-imperial Germanic Confederation were determined at the Congress of Vienna in 1815, but a variety of implementary issues remained and were not resolved until 1820. This included the reconstruction of the Diet which included all the members of the Confederation and the revival

¹²⁰ From his perspective, the Commission's "right and duty, therefore, like those of all other judicial bodies, are, to determine upon the nature and extent of its own jurisdiction as well as to consider and decide upon the merits of the claims which might be laid before it. ... From the moment of the ratification of this Convention, the claims ceased to be subjects of negotiation and became subjects for adjudication." Webster to Pedro F. del Castillo and Joaquin Velasquez de Leon, January 21, 1842, RG59 M99/69.

¹²¹ Although the Jay Treaty addressed such claims. See also SMH## 167, 217, 231, 263-5. The theory was that a "civilized" state was obligated to provide an adequate local judicial process.

of the Austragal Tribunal.¹²² Under the 1820 Agreement, disputes between members were to be mediated under the auspices of the Diet, but if that were not successful, then the Diet would be obliged to refer the matter to the Austragal Tribunal for resolution.¹²³ The disputants could also go directly to the Tribunal or make other arbitral arrangements. The Supreme Courts of members near the disputants were the preferred venues for such disputes and, where chosen, they were empowered to use their normal rules and member governments were advised not to interfere in the judicial process. Even though the “international” status of this structure is arguable, this was a model (as was the U.S. Supreme Court) of inter-state dispute resolution whose adaptability from a federal to an international context was frequently cited in the historiography of arbitration. As we shall see in Chapter 5, this “domestic analogy” was both attractive and problematic; typically because it was invoked without considering the vast domestic effort involved in creating the domestic political culture upon which those institutions rested.

Paris, 1856 (Part I)

The conclusion of the Crimean War brought all the Powers together for the first time in decades. The Treaty of Paris of 1856 represented full joint European engagement with the “Eastern Question,” the decline of the Ottoman Empire which would strew diplomatic land-mines for the following 60 years. As these issues arose later in the century, they provided a range of opportunities for dispute resolution mechanisms of various types, as we shall see in Chapter 7. The plenipotentiaries at the Paris conference also made some significant steps towards the development of substantive international law in the area of maritime commerce and conflict, and

¹²² The term “Austragal” was derived from the German word for decision and its use as an organ of arbitration in this context was derived from the tribunal established under the Holy Roman Empire in 1495. Turner, *Analysis*, 165.

¹²³ Final Act of the Ministerial Conferences held At Vienna to complete and consolidate the Organization of the Germanic Confederation. Signed at Vienna, May 15, 1820. Articles XX-XIV. Hertslet, *Map of Europe*, 1: 645-6. SMH# 96.

gave a vague nod towards the peace movement, as will be discussed in the next section. At an immediate and pragmatic level of governmentality, however, only one step was taken at this time; the regulation of the Danube.

The situation was comparable to that of the Rhine in two ways. First, interest was driven by both economic and political developments. As trade (especially British) in the Danube increased and boundary changes during the early nineteenth century led to increased Russian control at mouth of river, Danube-related issues were part of the contributory tensions leading up to the Crimean War. In fact, preservation of free navigation was one of the four points around which Britain, France, and Austria joined in pressuring Russia in the diplomacy leading up to the war.¹²⁴ Second, the principles of free navigation, sanctioned for the Rhine and other western rivers at Vienna in 1815 had become a well established precedent. Implicit in these principles was an acknowledgement of a shared responsibility for the management of a common asset within the context of differing national cultures and interests. The interrelationship of these cultures and interests meant that disputes would be inevitable, continuous and wide-ranging; necessitating a set of mechanisms to manage them among the several riparian states. However, the specifics of geography, economics, politics were different in the Danube and the resulting structure bore only limited resemblance to the Octroi Commission and its descendants.¹²⁵

The British proposed a Rhine-like structure as early as 1850; and a “syndical authority” was urged by a joint message from the British, French and Austrians to Russia in 1854.¹²⁶ Russia viewed this term as implying a delegation of the parties’ “sovereignty” to the joint administration (which it saw as focused on commercial and technical issues) and opposed it. The

¹²⁴ Chamberlain, *Regime of International Rivers*, 35.

¹²⁵ Additional commissions with varying structures and powers were established for the Elbe (1821), Po (1849), Pruth (1866), Congo rivers (1885). See generally Chamberlain, *Regime of International Rivers*.

¹²⁶ Krehbiel, “European Commission,” 39, citing BFSP 44:439

problem was solved by removing the term but not changing the scope of the Commission.¹²⁷

British pressure for its own participation on the Commission was forceful and eventually successful which heightened Russian concerns about the proposals for the neutralization of the region and the operational and extraterritorial powers on the part of the Commission. This diplomatic exchange shows that the states involved were aware that they were opening novel models of multinational jurisdiction and administration in which the precise shape of the powers delegated were negotiable which would determine the handling of future legal and operational disputes. In this case, the Crimean War intervened prior to the definitive resolution of the negotiations, but the pre-war principles were adapted as the basis of the relevant provisions of the 1856 Treaty of Paris.¹²⁸

Under Articles XV-XIX of that agreement, the Vienna principles of free navigation were made applicable to the Danube as “a part of the Public Law of Europe” under the “Guarantee” of the Powers.¹²⁹ Two commissions were established, a “European Commission,” comprised of the Powers, to clear the mouths of the river to ensure its navigability and impose tolls to recover the costs of those works. This was intended to be a temporary body, lasting only two years at which time its powers were to be assumed by a permanent “Danube River Commission” composed of the riparian states and principalities as a regulatory and policing body as well as overseeing the maintenance of the waterway itself. However, the latter group was never constituted and the powers were effectively retained by the European Commission indefinitely.¹³⁰ Significantly, the Commission was to operate by majority rule and could not be dissolved without unanimous

¹²⁷ Krehbiel, “European Commission,” 40-41, citing BFSP 45: 68-78.

¹²⁸ Ibid. 42-3

¹²⁹ Hertslet, *Map of Europe*, 2:1257-9.

¹³⁰ As to the problems of the riparian commission, see Lyons, *Internationalism in Europe*, 61. Under a series of agreements, the European Commission was extended through the time of World War I, Krehbiel, “European Commission,” 45-7, and it was reconstituted in 1918 and again in 1948 to reflect the evolving political structure of Europe.

consent. Regulations adopted by the European Commission in 1865 empowered administrative and operational functions of the Commission and created limited quasi-judicial powers in the Commission's senior administrators, subject to appeal to the Commission as a whole.¹³¹ Thus, the Russian fears of creating an uncontrollable entity, which we might term "sovereign" at least in limited circumstances, and their concerns that they were being treated in a way reminiscent of the Turks and other quasi-imperial subjects seem to have been well founded.

Conclusion

International dispute resolution mechanisms were well developed prior to the fabled "*Alabama Claims*" case. They were well rooted in medieval and early modern diplomatic practice and their revival which began at the end of the eighteenth century advanced steadily in the context of the new sense of international law and the cohesiveness of the states' system as embodied at Vienna. While not a common part of international relations, neither were they extraordinary. Their use reflected the needs of states and the diplomatic system to resolve issues that were not amenable to determination at high-level conferences, for reasons of expertise, local familiarity, distance and the 'band-width' of senior diplomats. In this way, they were a manifestation of the changing nature of the state and the delegation of issues was an instance of governmentality in an increasingly complex world. While many instances have been excluded from the historiography of "arbitration," this reflects an anachronistic 'bright line' between "judicial" and "political" decision-making that was typically glossed over until late in the century.

During this period all the major types and formats of dispute resolution mechanisms were established and, although there was no organized (or *de facto*) consensus on procedures, the

¹³¹ Krehbiel, "European Commission," 51.

commitment to some degree of separation from the normal diplomatic/political process was evident. Commissions began to outnumber the invocation of sovereigns as decision-makers. Rules of decision and procedure were being considered and written down. Cases were being decided and, usually, complied with. A tool of modern statecraft was emerging. All this occurred without much connection to the parallel advocacy of “arbitration” by the peace movement of the early and mid-century. It is to this phenomenon that we now turn.

Chapter 5: Great Aspirations: The Early Peace Movement

Despite this record of considerable inter-governmental activity and specific accomplishment with regard to the peaceful settlement of international disputes, substantially more attention has been given to the public peace movements (principally British and American) of the early nineteenth century, characterizing them as the well-springs of the arbitration movement which blossomed late in the century. These early peace groups were crusading against war and (although they would not have seen themselves in this way) were challenging the fundamental nature of the modern state and the states' system. However, it was one thing to declaim against war and educate people to its evils and wholly another to affect states' diplomatic, political, and military decisions. Political effectiveness required political engagement and actionable proposals; and the shift from an idealized opposition to war towards dealing with specific disputes and governments in the context of diplomatic and legislative processes was bound to be a problematic journey. From the 1820s to the 1850s, both the British and American peace movements made this journey by overlapping and slightly different routes.

Our understanding of their paths has been colored by subsequent writings both from within and about the peace movements. The nobility and purity of early peace efforts made them central to the historiography that emerged in the late nineteenth century as a more political and multi-faceted peace movement claimed historical sanction for its progress. Yet that appearance of progress depended on an interpretation of the polemics and practicalities of late nineteenth century political and diplomatic elites that partook of that same millennial optimism that characterized peace workers from the beginning.

Similarly, the emerging polities of Latin America's early nineteenth century endorsement of arbitration as a means of regulating international relations implied a conception of statehood that was different from that of their Spanish parent and its continental counterparts. Republican, revolutionary, and fraternal (verging on the federal); they sought an international relationship which was a far cry from one based on the simple and comprehensive model of sovereignty espoused in Bodin or Vattel. Rather, both were rooted in a sense of state limitation; the peace movement seeing the state and its affinity for war as anti-Christian and anti-democratic, the Latin American states seeing the state as a more malleable unit within an international system that accommodated the expression of power on a shared basis. Neither group spent much time engaging with political theory and, for different reasons, neither had more than a marginal effect on the theory and practice of the European powers and the U.S. Indeed, it was only to the extent that the peace community shifted away from its vague and idealized opposition to war and engaged in the political processes, both domestic and international, that it was to have any impact prior to the last few decades of the century. So, too, the Latin American states, while they were pioneers and active participants in arbitration agreements throughout the century, were unable to gain enough international standing that their practice was recognized in European discussions until these debates had achieved their own critical mass and Latin American states were able to participate in the international conferences with the U.S. and European powers at the turn of the century.

We will review these early steps, ending in the early 1870s, with the roughly simultaneous Alabama Claims" case, the creation of the international legal movement, and Henry Richard's successful effort to gain British Parliamentary endorsement of arbitration as a matter of national policy. Subsequently, we will see the peace movements, on both national and

international levels, in a variety of specific situations late in the century in which they were major players in domestic political and diplomatic discussions.

Early Peace Concepts

Organized peace movements arose more or less simultaneously at the end of the Napoleonic Wars, in both Britain and the United States.¹ Predominantly religious in origin, and with a greater focus on popular education and moralizing against war than on directly affecting or even addressing the decisions of their respective governments (much less those of other governments), these groups laid a foundation for a movement that gained robustness in fits and starts throughout the century. Others have traced the development of the peace movement in considerable detail, with considerable focus on the impact of individual leaders, organizational differences, and substantive priorities.² To avoid getting bogged down in organizational and doctrinal detail, we will look at the peace movement as a whole, at least at a national, if not international level. Thus, our focus here is to assess its definition, promotion and reaction to the use of specific cases of arbitration as illustrated in the publications and correspondence of the principal organizations and their leaders. These show that, despite their common point of origin in the ending of the Napoleonic Wars, there was a wide gulf between the movements' concept of arbitration and the practice of states during this period. Indeed, it was only as the peace

¹ Prior to the 1840s at least, peace activities on the Continent and elsewhere were sporadic and, for our purposes, inconsequential. See Van Der Linden, *The International Peace Movement*. Ceadel cogently argues that it was a combination of geopolitical position, religious traditions and domestic political culture that enabled peace movements to develop in Britain and the U.S. Ceadel, "Semi-Detached," 21-2.

² The principal studies in the extensive literature on the peace movements include Beales, *History of Peace*; Brock, *Pacifism in the United States*; Ceadel, *Origins of War Prevention, Semi-Detached Idealists*; Curti, *American Peace Crusade*; Hinsely, *Power and the Pursuit of Peace*; Laity, *The British Peace Movement*; Marchand, *The American Peace Movement*; Martin, *Pacifism*; and Van der Linden, *The International Peace Movement*.

movements shifted towards political engagement and policy implementation that they even seemed to pay attention to states' practices. Finally, and unsurprisingly, this shift towards political engagement (which emerged in some surprising ways and places) was the premise for the peace movements' only substantive effect in the early and middle parts of the century.

While there was considerable activity throughout the earlier parts of the nineteenth century on both sides of the Atlantic (continental efforts prior to the later part of the century were minimal and there were no apparent comparable efforts elsewhere in the world), until the leadership of British movement was effectively assumed by Richard Cobden in the 1840s little tangible progress occurred. Indeed, it was his efforts to bring the issues of peace and arbitration more forcefully into the sphere of political activity and parliamentary debate that mark a turning point in the peace community's role and, in effect, its creation as a political movement. In this effort, his natural talents were engaged in particular by the manifesto published by the American William Jay (son of the eponymous treaty writer) and the trans-Atlantic energy of Elihu Burritt, both based on the work of the early American peace leader William Ladd, who was inspired by Bentham and the elder Mill in particular.³ Cobden's more marked intervention into the burgeoning British public sphere was a key premise in the movement's extension into the Continent, the creation of a more robust *international* peace movement, and the beginnings of a substantive dialogue with statesmen that produced real, if marginal, developments.

The religious roots of the peace movement reflect not just devotion to Christian precepts, but provided a language in which anti-state sentiments were expressed. This anti-state sensibility was not merely a continuation of a temporal (i.e. political) contest dating back to the Investiture controversy of the middle ages and the prominence of Papal arbitration efforts into the early

³ Hinsley, *Power*, 93-5

modern era, but was an argument that was logically prior to the conception of a temporal state.⁴

The primacy of compassion over politics as a mode of organizing human affairs necessarily encompassed a subordination of the state (& the nation) and the states' system's standard method of resolving disputes (war) to god's will (natural law) as manifested in what evolved into international law and the principle of arbitration. In this way, the peace movement represented not only an alternative to nationalism, but to statism. Thus, it faced a tension in which it simultaneously had to oppose a positivist conception of international law which, on the one hand, was entirely state-based and rely on natural law formulations and, on the other, look to states to resolve their differences amicably.

Such complex analysis seems far from the minds (or at least the words) of those who, inspired by the vast destruction and turmoil unleashed by the Revolutionary and Napoleonic Wars in Europe and the related War of 1812 in the U.S., sought to articulate their opposition to war, based primarily on their reading of scripture and other religious writings and tenets. Traditional religious opposition to war had taken many forms, including protests, refusing to serve in the military, and opposing taxes. These steps were premised on a desire to promote public behavior consistent with personal conscience; affecting state action was a secondary goal at most. Indeed, the idea that individuals could and should affect state action was just emerging in this era and the progress of the peace movement over the following century was both constitutive and reflective of the development of *national* consciousness/citizenship and a "public" with an "opinion," that marked the nineteenth century, particularly in Britain, the U.S., and France.⁵

⁴ Crabtree, *Holy Nation*.

⁵ I am grateful to Sarah Crabtree for her characterization of the nature of the religious roots of the peace movement.

The earliest public expressions of this sentiment, appearing almost simultaneously on both sides of the Atlantic, were thus personal statements and were only in the vaguest sense political. These writings, whether in pamphlets, letters, or periodicals, remained focused on the articulation of the problem of war from a moral, religious, or (occasionally) economic perspective and did not move beyond criticism to solutions of any kind. There was no sense of the nature of the international system beyond some general references to the new Congress System and its Holy Alliance variant. Even where arbitration was mentioned, as it was from time to time, it is clear that its meaning was generic, not specific; it was merely another word for any mode of the 'peaceful settlement of disputes.' For example, the leading peace publication in the U.S. in the formative years of the movement was the *Friend of Peace*, issued periodically during 1815-21, expressed a profound revulsion to the practice of war in general and the recent European upheavals in particular, without any orientation towards solving this problem. While rich in historical discussions; other than a rare allusion to the Jay Treaty, there were no references to any prior practice of arbitration; nor of any practical diplomatic steps, beyond general references to the Holy Alliance.⁶ An article in the *North American Review* in 1817, in an unusual expression of peace sentiments outside of a dedicated publication, merely referred to ideas noted in previous centuries for some type of international tribunal or confederation as a decision maker for international disputes.⁷ The *Harbinger of Peace*, successor to the *Friend* published from 1828-31, gave limited coverage of the pending arbitration process under which the Emperor of Russia was to fix the eastern boundary between the U.S. and British Canada, but

⁶ The historiography is replete with 'post hoc, ergo proper hoc' analyses of the influence of the Jay Treaty. See, e.g., Ralston, *International Arbitration*, 191-3, and Lyons, *Internationalism in Europe*, 310. There is little indication that there was general awareness, much less understanding, of the Jay Treaty in the peace movement on either side of the Atlantic in the first 50-70 years after it was signed.

⁷ "The Friend of Peace," *North American Review*, 6:16 (Nov. 1817) 25-45.

even here its stance was more an endorsement of any method of peaceful resolution of international issues than of a particular mode.⁸

In the U.S., it was not until 1828 that William Ladd, the leader of the newly consolidated American Peace Society (“APS”), shifted the tone of discussion towards the question of *how* war was to be avoided. His conception was drawn from a variety of early modern proto-federalist European concepts, the ideas of Noah Worcester, and the writings of Bentham and James Mill, with the practical example of the American federalist system as an exemplar.⁹ Ladd called for a “Congress of Nations” to establish principles of international law to be reflected in a general treaty and a “Court of Nations” which was administer those principles in disputes brought to it by the two disputing states. Ladd refined his thinking over the following twelve years, eventually producing a comprehensive treatment in 1840, which Europeans generally referred as “the American Plan.”¹⁰ Yet, it would be too much to call it a “plan,” rather than a concept for discussion. Indeed, Ladd himself saw the Congress and Court proposal as “the end, not the beginning” of the peace groups’ work and premature in the “present state of society” without considerable effort to rally public opinion to engage the political machinery of states.¹¹ From the traditional perspective of the peace societies, this was the long, slow and necessary work of education through speeches, pamphlets, and journals that would incrementally change society and eventually triumph. Ladd, however, went beyond the substantive advance in his Congress and Court proposal to initiate an engagement with the political process. His efforts led to

⁸ *Harbinger of Peace*. I:2 (June 1828) 25; I:10, (Feb. 1829) 222; I:11 (March 1829) 241.

⁹ See generally, Curti, *American Peace Crusade*, 55-60. As to Bentham and Mill, see Hinsley, *Power*, 94. The Bentham essay on International Law, although written in 1789, was not published until 1843. Hinsley asserts that the influence on Ladd was indirect, via James Mill’s *Essay on the Law of Nations* (1825). A key aspect of the American system, the supremacy of the Federal government over the States, especially its judicial power, had been established only as recently as 1819 in the landmark case of *McCulloch vs. Maryland*, 17 U.S. 316 (1819).

¹⁰ Curti, *American Peace Crusade*, 55. Ladd, *Essay*.

¹¹ Ladd (the editor and unsigned author of the *Harbinger of Peace*), I:12 (April, 1829) 265.

resolutions adopted by the legislature of the Commonwealth of Massachusetts in 1837 and 1838 urging the U.S. President to negotiate treaties based on Ladd's concepts.¹² Similar petitions were sent to Congress but gained no traction there.¹³ British peace advocates saw Ladd's proposal as unrealistic.¹⁴ Ladd's editorship of the APS' *Advocate of Peace* from 1837-41 made it a vehicle for the evolving articulation of his Congress and Court proposal.¹⁵ This long-term and idealistic perspective also meant that this leading journal of the leading American peace group paid virtually no attention to the practical world of diplomacy. The occasional coverage of the U.S.-British boundary arbitration was the exception; but even here, the *Advocate* claimed that this peaceful handling of the dispute marked a new stage in international progress over the prior fifty years, omitting any mention of the Jay Treaty that, forty-four years earlier, first established a mixed commission to resolve this problem.¹⁶

The peace movement in Britain, while founded slightly later than the organizations in the U.S., moved more directly towards political engagement; operating, as it did, in an environment characterized by a more robust public sphere and a political culture which had already accommodated the loosely affiliated abolitionist movement and other reform efforts.¹⁷ Ceadel describes the intellectual underpinnings of this development as being grounded in a broader shift from an early modern approach which combined a fatalism about war and a series of policy concepts which sought some sort of restoration of a coherent Europe/Christendom towards a more modern sense of human causation in the context of an international structure of sovereign

¹² Curti, *American Peace Crusade*, 56.

¹³ Ladd, *Essay*, 84-9.

¹⁴ Curti, *American Peace Crusade*, 59.

¹⁵ The *Advocate of Peace* operated under various editorial direction and formats from 1834 to 1920.

¹⁶ *Advocate of Peace* II, 8 (Oct. 1838) 114.

¹⁷ Ceadel, *Origins*, 19, 23.

states.¹⁸ Still, religious politics in early nineteenth century Britain deterred the peace movement there from a more overtly political role.¹⁹ However, by the 1820s, a change began to be manifested in published comments within the British peace community that addressed specific international issues and their circulation to various European rulers. For example, in the context of the Greek independence effort and Spanish revolutionary activities, there were calls for “arbitration,” which, however unspecified, implicitly recognized the validity of these movements and their emerging status in the international sphere from which the Ancien Regime was passing.²⁰ As early as 1821, there was a discussion of the problem of how to enforce arbitral decisions in the absence of some supra-national authority.²¹ In 1824, the *Herald* reprinted a letter from 1811 calling for a “National Court of Arbitration” and rhetorically inquired whether such a proposal had ever been acted upon.²² Substantively, despite traditional proto-federalist ideas for a collective international action and the recent experience of the major powers at Vienna and Paris, there were concerns that multi-lateral projects were too ambitious and that bi-lateral action, as most recently evidenced by the Anglo-American agreements at Ghent, were more likely to be successful.²³ Indeed, from 1832, the London Peace Society had “turned itself into a pressure group. This overtly political role was made possible above all by a new domestic environment in which governments made concessions and reform campaigns burgeoned.”²⁴ But it was not until late in the decade, that Ladd’s Congress and Court proposal gained some recognition. The extensive cross-fertilization of the the British and American peace publications led to its regular

¹⁸ Ibid., 64.

¹⁹ Ibid., 259, 268.

²⁰ Ibid., 269.

²¹ *Herald of Peace*, II (1821) 345.

²² *Herald of Peace*, III (n.s.): 1777-8, reprinting a pseudonymous letter originally published by the “*Monthly Magazine*” on July 1, 1811 (Vol. XXXI: 526). This appeared to be the first reference to a specific mode of generally handling arbitration cases.

²³ Ceadel, *Origins*, 269-71.

²⁴ Ibid., 280.

inclusion in the *Herald* and it was included in petitions to Parliament.²⁵ Ladd's multilateral approach envisioned participation by a range of states much broader than the Great Powers who dominated the "Congress (of Vienna)" system. This dilution of power, together with a codified international law, signified an approach to dispute resolution (and a conception of international relations) which had been imagined in the eighteenth century (nor achieved until the twentieth).

Jay, Cobden, and Political Engagement

The early 1840s saw significant developments which changed the emphasis and tactics of the peace movement on both sides of the Atlantic. The death of Ladd did not mark the end of his Congress and Court proposal, but it was superseded as the primary focus of American efforts by the 1842 publication of William Jay's treatise on *War and Peace*.²⁶ By the mid-1840s, Elihu Burritt rose to prominence in the American peace community and leveraged that role to strengthen ties with the British movement and continental efforts as well. His commitment to substantive action marked a different direction than that previously taken by the American peace leadership. The General Peace Convention, convened by the London Peace Society in June, 1843 marked an organizational and propaganda milestone which was followed by increased internationalization (i.e. europeanization) of the movement as evidenced by a series of Peace Congresses on the continent from 1848-50 and culminating with one in London in 1851 coinciding with the Great Exhibition of that year. However, Louis Napoleon's 1852 coup, the Crimean War of 1853-6 and the U.S. Civil War the following decade drastically undercut the energy and support for peace activities in Europe, Britain, and America which was only revived

²⁵ See, e.g., Ladd's editorial in September, 1836, calling on the British peace society to engage in practical steps and not just to circulate exhortations. *Herald of Peace*, Sept. 1836, (I (3d n.s.): 33-8). The Petition to the House of Commons regarding a boundary dispute with the U.S. was made in April, 1839. *Herald of Peace*. July 1839, (I (4th n.s.): 319-21).

²⁶ Jay, *War and Peace*. Jay, a New York lawyer and reformer, was the son of the author of the Treaty of 1794.

in the early 1870s. Despite this overall ebb-and-flow of the peace movement, the central legacy of this era was political engagement in both substantive and tactical terms.

Most of Jay's 1842 essay was an attack on war that combined moral fervor and economic statistics. Historical examples ranged from ancient Egypt to a review of the Revolutionary and Napoleonic Wars that found all states involved guilty of perfidy and wanton and gratuitous destruction. His passionate articulation of Enlightenment rationality and objectivity criticized states' evaluating their own claims and interests.²⁷ In this, Jay's analysis of the causes and evils of war broke no new ground. In terms of a solution, however, Jay departed from the millennial idealism of his predecessors in the peace movement; building on the accepted critique that Ladd's proposal of a general and comprehensive solution to war was only a long-term hope. Not only did he propose an international court to resolve disputes among nations, but he urged an incrementalist approach, starting with the United States and France. He went on to propose specific language for inclusion in their next treaty:

It is agreed between the contracting parties that if, unhappily, any controversy shall hereafter arise between them in respect to the true meaning and intention of any stipulation in this present treaty, or in respect to any other subject, which controversy cannot be satisfactorily adjusted by negotiation, neither party shall resort to hostilities against the other; but the matter in dispute shall, by a special convention, be submitted to the arbitrament of one or more friendly powers; and the parties hereby agree to abide by the award which may be given in pursuance of such submission.²⁸

Jay noted that there was limited (if encouraging) precedent for this immediately implementable, treaty-based approach.²⁹ In Jay's view, this approach (what I have called a general arbitration agreement) would redound to the benefit of the parties and their international prestige. It would also be a model for similar steps by other states. He argued that the only

²⁷ Ibid., 31.

²⁸ Ibid., 81-82.

²⁹ Ibid., 82; citing Vattel and Swiss federal practice.

possible objection to his proposal was potential ineffectiveness which could be averted by public insistence. Furthermore, he recognized that specifying rules and procedures was unimportant if the willingness to engage in such a process were present.³⁰

Jay was the first to lay out specific treaty language and to frame the issue in immediate and practical steps. His proposal resonated on both sides of the Atlantic. Elihu Burritt, the mid-century stalwart of the American peace movement who worked both in the U.S. and Europe, endorsed it and made sure it was well known in Britain. Charles Sumner, the renowned orator and peace advocate, who later was to Chair the Senate Foreign Relations Committee, carried the flag for the concept in his statements for peace in the 1850s and 1860s.³¹ Beyond the immediate impetus to action on the part of the peace movements and its citation by innumerable later peace publications however, the language of Jay *films* was to inspire the treaties negotiated by John Bowring in the 1860s, the first European-signed general arbitration agreements.³² In more immediate terms, following the urging of the American Peace Society, the London group made its initial foray into the political arena in 1839, petitioning Parliament to avoid war with the U.S. over a Canadian boundary dispute.³³ The 1843 Peace Convention endorsed both Ladd's and Jay's proposals, seeing Jay's as a major and feasible step towards Ladd's long-term vision.³⁴ Still, there were criticisms and debates throughout the 1840s. For example, J.P. Blanchard found

³⁰ Ibid., 90-6.

³¹ Sumner, *The War System*, 61.

³² For example, Article 24 of the Spanish-Hawaiian Treaty of 1863 provides "If from a concurrence of unfortunate circumstances, differences between the contracting parties should cause an interruption of the relations of friendship between them and that after having exhausted the means of an amicable and conciliatory discussion the object of their mutual desire should not have been completely attained, the arbitration of a third power equally the friend of both shall, by a common accord, be appealed to, in order to avoid by this means a definitive rupture."

³³ Carter, *Development of Cobden's Thought*, 70. This turn towards political engagement was in part a product of the 1832 political reforms which began to open the electoral process and facilitated a variety of "reform" efforts. Ceadel, *Origins of War Prevention*, 280.

³⁴ *Advocate of Peace* V:10 (Oct. 1843) 118.

Jay's proposal impracticable since its specific and ad hoc nature would give states greater concerns and more opportunities to curtail the broad arbitral concept and Burritt thought that bilateral agreements to arbitrate were unlikely in the absence of an agreed-upon international code.³⁵ Nonetheless, the Jay proposal remained at the center of the peace movement's agenda for decades. Indeed, a significant portion of the peace movement conformed not only to its substance, but also its focus on specific steps to be taken by states, as the premise for political action. This attribute was certainly attractive to its most significant adherent, Richard Cobden, who was also wary of intrigue and corruption in permanent international institutions drawn from Europe's diplomatic elites.³⁶

The range of Cobden's policy positions—for which liberalism is as good a rubric as any—were all of a piece. Free trade, reduced taxation, disarmament, and arbitration, were all designed to improve society and, for that, a reduction in the power and intrusiveness of the state was a prerequisite. The amalgam of states (what I have called the 'states' system') was marked by aristocratic considerations, social rigidity, and balance of power diplomacy was an integral part of the same problem from his perspective. State action (other than in the cause of reform) was problematic and limitations on state discretion, particularly as to war and trade, were to be encouraged. Cobden's role as a distinctive pivot point in our story comes not merely from his perception and support of these ideas, but from his hard-won political *nous* which drove concrete steps towards his long-term vision for society. Thus, his adherence to and leadership of the Peace movement marked a critical step in the latter's movement into the political arena—both parliamentary and popular.

³⁵ Blanchard, J. P., "On the Congress of Nations," *Advocate of Peace*, I:2 ns (1849) 39. Ceadel, *Origins of War Prevention*, 294.

³⁶ Ceadel, *Origins of War Prevention*, 294. citing Carter, "Development of Cobden's Thought." 95; and Cobden to Joseph Sturge [a leader of the British movement] September 12, 1848, Cobden papers BL 43,656.

The shift in the focus of the peace movement from the ethereal to the political was an essential step in both the evolution of that movement and of international dispute resolution.³⁷ Cobden was both a leader and a symbol of this change, but he was far from the only source of the change.³⁸ Indeed, he engaged with the peace movement as it was continuing its long-term debate between an absolutist aversion to all forms of war and a view that while abhorring war at least accommodated it in cases of self-defense (what Ceadel has termed the pacifist-*pacifist* dichotomy).³⁹ This debate was the source of considerable ideological and organizational turmoil in the peace movement on both sides of the Atlantic throughout much of the nineteenth century. It is not surprising that both Cobden and Jay were associated with the latter stance, since the incrementalist approach implicit in Jay's model was fully consistent with Cobden's priority on making progress in the real world rather than fixating on ultimate goals without addressing the intervening political realities.⁴⁰ This explains some of Cobden's rationale in eschewing extensive organizational involvement with the British peace movement, whose leadership remained predominantly pacifist.⁴¹

Richard Cobden came late to an active involvement in the British peace movement, having spent most of his considerable energy and intellect in the 1830s and 1840s opposing the Corn Laws and promoting free trade generally. Indeed, his work in the peace movement during this time was ancillary to his central concerns.⁴² Still, his renown made him invaluable in the peace effort and his role as thought leader in Parliament ensured his influence. His ability to bridge the idealized world of the peace movement with the hard realities of Parliamentary and

³⁷ Beales, *History of Peace*, 8, overstates the impact on the peace movement as making it "thoroughly" practical. Idealistic strains remained vigorous well into the twentieth century.

³⁸ Nicholls, "Richard Cobden," 363.

³⁹ Ceadel, *Thinking about Peace and War*.

⁴⁰ Ceadel, *Origins of War Prevention*, 350-1.

⁴¹ *Ibid.* 354.

⁴² Howe, "Introduction," II:xxv. Ceadel, "Cobden," 192.

diplomatic processes helped steer the movement towards a much more pragmatic approach. Indeed, he was wary of efforts to establish an international court, which was seen as a long-term goal. He wrote often with Joseph Sturge, a leader of the British peace movement and in 1848 urged a focus instead on arbitration and disarmament: “They are practicable, & will I hope be to a large extent realized in our day—But the only way to make your principles triumph is by entering the arena of politics & doing as you did in your anti-slavery efforts—You must make yourself troublesome in the [electoral process].”⁴³ Further, he favored the use of experts as arbitrators, rather than monarchs and supported the development of a set arbitration procedure.⁴⁴

Beyond the substance of what the peace community advocated, the key from Cobden’s perspective was to engage in the political process. In an international context, as Jay had proposed, he was keen on inserting arbitration provisions into treaties, where they could affect states’ relationships. He recognized that the U.S. and Great Britain were the two most likely parties to enter into such an agreement, because they were “after all, the only two countries in which public opinion can be brought to bear directly on the governments....”⁴⁵ He also saw their joint influence on the international community as the most effective way to get other states to do likewise. Such conceptions and considerations were a long way from the ideas and motivations of the peace movement in its first quarter century. They were the product, Ceadel argues, of a burgeoning middle class and and post-1848 political stability.⁴⁶ Cobden was able to leverage the flourishing of the British peace movement—its more-popular meetings, its more-read publications, its more-signed petitions—to bring a pro-arbitration motion to the floor of the House of Commons in 1849, the high-water mark of the movement in terms of its effectiveness

⁴³ Cobden to Sturge, September 12, 1848, *Cobden Letters*, II:60.

⁴⁴ Carter, “Development of Cobden’s Thought,” 96-8.

⁴⁵ Cobden to Sturge, June 21, 1849, *Cobden Letters*, II:134-5.

⁴⁶ Ceadel, *Origins of War Prevention*, 414.

prior to the 1870s. This effort represented a balancing act between the popularity and energy of the pacifist wing of the peace movement and the parliamentary disdain for utopian thinking.⁴⁷ It was necessary in order to bring arbitration forward as a political and diplomatic policy, to make it, in Cobden's terms "a practical question."⁴⁸

Practicality did not ensure success. The resolution was debated in the house on June 12, 1849 and received 81 votes in favor and 176 votes against; a creditable, if not decisive, showing. The debate was marked on both sides by moderation. The resolution urged the Government invite negotiations with foreign powers to agree "in the event of an future misunderstanding which cannot be arranged by amicable negotiation to refer the matter in dispute to the decision of arbitrators."⁴⁹ In supporting his motion, Cobden railed against war, but more for economic than for religious reasons. He acknowledged the Congress and Court proposal but put it (and its enforcement issues) aside. He focused on resolving British issues with the U.S. and with France, the two most culturally aligned powers. He endorsed arbitration, with a preference for appointed commissioners than for neutral monarchs as the arbitrators. He recited the successful history of recent arbitrations with a particular focus on British-American arrangements.⁵⁰ Palmerston's reply in opposition was cordial; endorsing the sentiment, but warning of the risks. He spoke of British manliness and pride in defense of rights and property and was wary of putting at the risk of foreigner's discretion any vital British interest.⁵¹ And so, the question was joined. The outcome was no surprise, the issues were not much different than those debated in the peace societies or even in American legislatures or Congress in the previous ten or twelve years; but the question was squarely put, by a leading member of the House, and was responded to

⁴⁷ Ibid. 430-1.

⁴⁸ Cobden to Sturge, 15 June 1849, reprinted in the *Herald of Peace* (July 1849) 333.

⁴⁹ *Hansard*, 3d ser., vol. 106 (June 12, 1849), cols. 53-121.

⁵⁰ Ibid.

⁵¹ Ibid.

seriously by the Prime Minister. As a propaganda or ‘moral’ victory, it was substantial. And, even as we may see it as a precedent for future governmental agreements, at the same time, the notion of state preservation —of “vital” interest— remained protected; another precedent with a long run ahead of it. Later, as the U.S. and Great Britain were negotiating what became the Claims Convention of 1853 and the 1854 Fisheries Agreement, Cobden again urged Sturge to focus on the practicalities and to use the negotiations as the basis for a meeting with Lord Clarendon, the Foreign Secretary, to promote the insertion of arbitration clauses. It is not clear that such a meeting occurred, but the agreements that were finally negotiated by the two countries did establish commissions to resolve issues within their respective purviews.⁵² There was at least correlation, if not causation.

Paris, 1856 (Part II)

In the early 1850s, despite a range of anti-war activities, the peace movement in Britain made no headway in derailing Palmerston’s intervention in the Russo-Turkish conflict. Indeed, its failure to prevent the largest war between Waterloo and World War I was a major setback to the various organizations in terms of finances, membership, and political presence from which they took twenty years and a new generation of leadership to recover.⁵³ Once the war started, Cobden, more attuned to political realities than other peace movement leaders, urged them to not press for arbitration. “Otherwise people will say we are more bent on the triumph of our theories than in putting an end to the horrors of this war....”⁵⁴ Whether his advice was followed, there is little sign of the peace movement’s impact on public debate for the duration of the war. The resulting peace conference, however, saw the only arguably significant pro-arbitration step prior

⁵² SMH## 167, 171.

⁵³ Ceadel, *Semi-Detached*, 40-54.

⁵⁴ Cobden to Sturge, November 30, 1855; *Cobden Letters*, III:170.

to the “*Alabama* Claims” case fifteen years later; although in fact, it is not clear how much credit the movement might plausibly claim. When the plenipotentiaries of the Powers gathered in Paris in the winter of 1856, they were focused on stabilizing the relationship between the Russian and Ottoman Empires and put to bed decades of diplomatic maneuvering which had culminated in the bloody Crimean War. The treaty ending the war was signed on March 30, 1856. Among the Treaty provisions was an assertion by the Powers as a group of a right to intervene, by mediation, should future disputes arise between Turkey and Russia.⁵⁵ This was a normal diplomatic practice, expressing, in this context, the continuation of the Congress system.

The mediation provision in Article VIII of the Treaty provided, however, a springboard for something more. Following the signature of the main agreements, the Congress continued to meet to address a variety of ancillary issues. The last substantive order of business was a proposal by the British Foreign Minister, Lord Clarendon, to expand the scope of the mediation provision to cover all issues facing the parties.⁵⁶ Despite his informal advance discussion of this proposal with the other parties and his assurances that the statement represented no threat to national honor or independence, a battery of concerns and reservations were immediately raised.⁵⁷ The upshot was a statement by the Plenipotentiaries “expressing in the name of their Governments, the view that States, between whom a serious disagreement arose, before appealing to arms, would have *recourse, as far as circumstances permitted, to the good offices of a friendly Power.*”⁵⁸ What Clarendon asked for and got was a far cry from even a commitment to mediation.⁵⁹ What was adopted was a resolution (not even a formal or signed agreement), merely

⁵⁵ Gourdon, *Histoire de Congrès de Paris*, 10

⁵⁶ Protocol 23, April 14, 1856, in Gourdon, *Histoire de Congrès de Paris*, 124

⁵⁷ Henderson, *Pacifists of the Fifties*, 335-40. Baumgart, *The Peace of Paris*, 168. Palmerston to Clarendon, April 18, 1856, FO27/1167/214.

⁵⁸ Gourdon, *Histoire de Congrès de Paris*, 126. (Emphasis added)

⁵⁹ Clarendon to Palmerston, quoted in Frick, “Henry Richard,” 310.

something vague and ‘verbal,’ noted in the daily Protocol summarizing the Conference’s discussions. It was not a binding agreement of the parties, subject to those significant (eviscerating?) exclusions of national self-determination; it was a “wish” or “*voeu*” of the delegates. It did not look to arbitration even in a vague sense, much less something binding or judicial; but only to invoking the ‘good offices’ of a friendly power. Clarendon later reported that “The discussion was conducted in a most friendly spirit but the general feeling was that the Congress should confine itself to the expression of an opinion favourable to the principle of mediation and not enter into any positive engagement upon the subject.”⁶⁰

From another perspective, however, it was the first “official” recognition and endorsement of the concept of using a means of dispute resolution by a group of senior European diplomats. And, while there is no record of its direct implementation, it served well as a hoary antecedent for later generations of advocates of peace and arbitration. Immediately afterwards, the peace movement in Britain not only claimed credit but heaped praise on this development, calling it an “immense gain.”⁶¹ The sentiment was echoed in the U.S. where the American Peace Society proclaimed: “Here is an advance, greater than had been made for ages before, towards actually superseding the sword in the intercourse of nations, and providing in part a rational, peaceful process for the adjustment of their difficulties. It is a result far beyond our expectations....”⁶² After its battering in the course of the Crimean War, the British peace movement was, in Martin Ceadel’s words, “understandably keen to find an achievement which might partially offset the two years of vilification it had suffered.”⁶³

⁶⁰ Clarendon to Palmerston, April 15, 1856, FO27/1169/163, reporting on the final day of the conference.

⁶¹ *Herald of Peace*, No. 72 (June 1, 1856) 61-6. Manchester Guardian, May 6, 1856, describing the steps taken towards arbitration as “the one great end attained by the treaty of Paris....”

⁶² *Advocate of Peace*, XII:6 (June, 1856) 83, reprinting the Annual Report of the American Peace Society.

⁶³ Ceadel, *Semi-detached*, 54.

But there was very little here to crow about. While Clarendon did run his plan past Palmerston as part of his regular communications with London, Palmerston's approval was generic and unelaborated; which certainly would not have been the case if there was anything meaningful on the table.⁶⁴ Nor did Palmerston's authorization even acknowledge the fact that a large group of representatives of the peace movement had come to him only a few weeks earlier to encourage the inclusion of a mandatory arbitration clause in the treaty.⁶⁵ Following that likely inconclusive meeting, a peace delegation, led by Henry Richard, then just a Congregationalist minister who had become Secretary of the Peace Society, went to Paris to ask the same of the plenipotentiaries there. There is no evidence that they gained any support regarding arbitration, but they met with Clarendon on March 25.⁶⁶ According to Richard, Clarendon received the delegation cordially and acknowledged his endorsement of both the use of arbitration in several past cases and his desire to prevent war, but he was wary of the feasibility of real changes in the nature of the states' system.⁶⁷ He later apparently facilitated the delegation's contacts with other plenipotentiaries and his protocol initiative for "good offices" followed just a few weeks later.⁶⁸ The delegation thought that Clarendon was ready to promote an arbitration clause, but they were wrong.⁶⁹ According to Clarendon, he was merely acting "to satisfy public opinion in England."⁷⁰ The other plenipotentiaries recognized this as one motivated by Clarendon's domestic political

⁶⁴ Palmerston to Clarendon, April 18, 1856, FO27/1167/214. Indeed, it would be quite amazing otherwise. Palmerston, whose aggressiveness in the 1850 Don Pacifico Affair brought turmoil to both European and British Parliamentary politics, could hardly have been an enthusiast of any real limitation on state power. While one arbitration was used in the course of settling the Don Pacifico imbroglio, it was confined to one minor after-the-fact aspect. SMH# 246.

⁶⁵ March 14, 1856. See Frick, "Henry Richard," 299, Ceadel *Semi-Detached* 53.

⁶⁶ Ceadel *Semi-Detached* 54. Clarendon didn't mention this visit in his dispatches back to Palmerston.

⁶⁷ Frick, "Henry Richard," 302-3, quoting from Richard's Journal of March 25, 1856.

⁶⁸ Ibid. 306, quoting from Richard's Journal of April 4, 1856.

⁶⁹ Ibid. 308, quoting Joseph Sturge to Cobden, April 9, 1856, Cobden Papers.

⁷⁰ Clarendon to Palmerston, March 31, 1856, cited in Baumgart 169. There is some circumstantial evidence that Clarendon harbored some pro-arbitration and anti-war sentiments. Newton, *Lord Lyons*, quotes Clarendon to Lyons, January 26, 1870, that disarmament "is no new subject to me, but one which I have long had at heart...."

concerns and friendliness towards the British peace movement.⁷¹ They were willing to acquiesce once the arbitration concept had been sufficiently watered-down both as to means (“good offices”) and commitment (none, merely a ‘*voeu*’). Finally, Clarendon was sure to protect the traditional concept of national honor, stressing that even with regard to mediation, “no Government would compromise its honor or its interests *by consenting to listen to the opinions of one or more friendly Powers* before it actually engaged in war.”⁷² This language, that Lord John Russell would echo just a few years later during the “*Alabama Claims*” negotiations, shows that Clarendon intended no meaningful constraint on state action. Nonetheless, the Paris declaration was thereafter often cited and usually overstated.⁷³ It marked a high point in a low tide of the apparent influence of the peace movement in mid-century, when even to be acknowledged in an official diplomatic document with the most noncommittal of nods was a basis for extensive self-congratulations at the time and regular recitation in the annals of arbitration thereafter. The actual effect of the delegates’ declaration on states’ behavior is nowhere recorded.

The Long Tail of the Peace Movement

Throughout the nineteenth century, in both the U.S. and Britain, peace groups were fluid in their strength, membership and focus. The list of individuals associated with them in one manner or another is remarkable in its range and those who supported these groups were often active in abolition, temperance, labor, free trade, and a range of other liberal and radical causes.

⁷¹ Baumgart, *The Peace of Paris*, 170, cites the dispatches of the Russian, Austrian, and Piedmontese delegates. See also Henderson, *Pacifists of the Fifties*, 337-8.

⁷² Quoted in Bourne, *Foreign Policy of Victorian England*, 84 (emph. added).

⁷³ For example, early in the “*Alabama Claims*” dispute, both Prime Minister Russell and Chancellor of the Exchequer Gladstone misread the scope of the Treaty requirements. Gladstone to Russell, September 2, 1865, BL 44292/164, Russell to Gladstone, September 17, 1865, BL 44292/178. Hawaiian Foreign Minister Wyllie similarly over-read the Paris actions. Similarly, U.S. Senator Sumner’s 1872 resolution endorsing arbitration told the Senate that the Paris Congress had “formally recognized” and recommended arbitration. S. Misc. Doc. No. 165, 42d Cong., 2d sess., May 31, 1872.

These connections were multiplied by trans-Atlantic communications, continental interactions, and the Peace Congresses of the 1840s and 1850s which brought supporters together on a regular basis. As a result, it is difficult to keep track of the influence of these groups, particularly as individuals evolved in their connections, careers and beliefs. Nonetheless, it would be wrong to confine an assessment of the impact of the peace movement to its primary groups and leaders, since, as shown in both British and American cases, long-time members of the movement continued to carry the flame as diplomatic insiders. John O'Sullivan, the American Minister to Portugal in the 1850s was unsuccessful in shifting American policy on arbitration, but the Englishman Sir John Bowring, representing the Kingdoms of Hawaii and Siam in the 1860s had a considerable effect on arbitration treaty practice. In fact, these two, who combined the roles of peace advocate and states' man, were as effective as any of the leaders of the peace movement in engaging and affecting the practice of states until the end of the century. Their efforts demonstrate that the ideas, arguments and beliefs engendered in the respective peace movements, particularly William Jay's focus on immediate treaty implementation of arbitration commitments, did have real world effects; however indirect, circuitous, and surprising they might be.

Born into a provincial dissenting family in 1792, Bowring came to London in 1811 as a clerk for a local firm and pursued an often-successful commercial career.⁷⁴ Through a connection, he was introduced to Jeremy Bentham in 1820 (with whom he became closely linked, eventually becoming the editor of Bentham's papers). He got involved in liberal politics and international affairs and was active in a variety of reform efforts.⁷⁵ He was also elected Foreign Secretary of the Peace Society in 1820, where he served for three years until he

⁷⁴ This biographical summary is drawn from Rosen, "John Bowring."

⁷⁵ Bentham, *Principles of International Law*. Bowring's annotations of a copy of Bentham's study of International Law show a familiarity with that field as well.

apparently felt uncomfortable with its absolute pacifist stance, although he remained as an active member at least into the 1840s.⁷⁶ Commercial problems led him to seek a government appointment and he worked in several different positions under both Tory and Whig administrations in the 1820s and 1830s. After a variety of activities he entered Parliament in 1835, resigning in 1849 to become Consul in Canton and eventually Governor of Hong Kong in 1854, where he launched the Second Opium War.⁷⁷ While still in London, he was active in free trade groups, participated in the first international Peace Congress in 1843, and worked with several other peace groups in Britain and France.⁷⁸ It was as an MP that Bowring, inspired by William Jay's concept (as promoted by Sturge) of including a general arbitration clause in treaties, was the first to propose to Parliament that Britain adopt such a policy.⁷⁹ Cobden referred to him as an "old friend."⁸⁰

It was a combination of these experiences—a strong liberal bent, engagement with the pro-arbitration peace movement, and diplomatic experience and contacts—that enabled Bowring to implement this idea upon his return to Britain; although in a somewhat roundabout manner. Acting as a diplomatic representative in Europe on behalf of several Pacific countries in the 1860s, he negotiated eight agreements containing similar arbitration clauses; each of which included a commitment to seek third party arbitration of any differences that could not be amicably negotiated by the signatories. His work was instrumental in spreading the scope and concept of arbitration as a general component of international relations from his early years in the peace movement, and from transforming it from generalized conception into practical

⁷⁶ Conway, "Bowring and Peace," 346. He was responsible for Bentham joining the organization as well. Id. 354. Van der Linden, *International Peace Movement*, 203-4.

⁷⁷ Conway, "Bowring in Government Service," 31-3.

⁷⁸ Conway, John Bowring," 348.

⁷⁹ Curti, *American Peace Crusade*, 190.

⁸⁰ Cobden to Edgar Bowring (son), August 5, 1855, *Cobden Letters* III:144.

application. He leveraged his position in an effort to bring the concept of general arbitration commitments to mainstream European diplomacy for the first time; beyond their usual appearance on a case-specific basis. Specifically, he represented the Kingdom of Hawaii in negotiating a comprehensive treaty with Belgium (1862), Italy (1863), Spain (1863), and Switzerland (1864) in which the two countries agreed to third party arbitration in principle where “after having exhausted the means of a friendly and conciliatory discussion, they should not arrive at the conclusion that they mutually wish for...”⁸¹ A few years later, he represented the Kingdom of Siam in a set of similar agreements with Belgium (1868), Italy (1868), Austria-Hungary (1869) and Sweden and Norway (1869).⁸² Notably, unlike the 1863 model, the general arbitration clause in these later agreements contains an express commitment to be bound by the result of the third party decision. These compulsory arbitration provisions were unique for the time (outside of Latin America) and remain the only examples of such provisions subscribed by European countries prior to 1880.⁸³ In addition, these general arbitration commitments were part of broader commercial agreements. The Belgian treaty also included a compromissory clause which was specific to individual merchandise import valuation issues, to be handled by the local

⁸¹ Hawaiian Islands- Belgium, Treaty of Amity, Commerce and Navigation, Brussels, October 14, 1862, Article 26, BFSP 52:521. Hawaiian Islands – Italy, Treaty of Friendship, Commerce and Navigation, Paris, July 22, 1863, Article 24, BFSP 60:397. Hawaiian Islands-Spain Treaty of of friendship commerce and navigation, October 29, 1863, Article 24. BFSP 62: 1004-12 (1871-2).

⁸² Belgium- Siam Treaty of Friendship and Commerce, London, August 29, 1868, BFSP 59: 405-417 (1868-9). Italy-Siam Treaty of Commerce and Navigation, London, October 3, 1868, Article 27, BFSP 60:773. Austria-Hungary - Siam Treaty of Commerce, Bangkok, May 17, 1869, Article 26, BFSP 61:1308. This agreement while signed by senior members of the Thai Government, was not signed by Bowring, but the language is clearly replicated on his earlier negotiations. Siam-Sweden and Norway Treaty of Friendship, Commerce and Navigation, May 18, 1868, Article 25, in U.S. Tariff Commission, *Handbook of Commercial Treaties*; see also BFSP 69:1135-46.

⁸³ At which time the Italian-Roumanian Consular Agreement included a compromissory clause SMH# 949. However, Bellaire, “Etude Historique,” 16 and the London Peace Society, *Facts and Illustrations*, 49 refer to a 1870 Spanish-Uruguayan agreement to similar effect.

consul and government official as a de facto appeal board from disputes between the importing merchant and the customs service with a further judicial umpire.⁸⁴

Bowring came to this project through a long-standing, if somewhat obscure, relationship with Robert Crichton Wyllie, a Scottish physician-turned-trader who, having made his fortune in Latin America in the 1830s, returned to London and moved in reform circles during 1830-42.⁸⁵ It was there, most likely, that he established contact with Bowring. By 1845, Wyllie had arrived in Honolulu and become Minister for Foreign Affairs for the Kingdom of Hawaii, a post he was to occupy for the next twenty years.⁸⁶ Their paths had reconnected by 1859 when correspondence between the two reveals Wyllie's appreciation of Bowring's prior counsel over the course of their extensive correspondence.⁸⁷ Wyllie thereupon recruited Bowring to act as Hawaii's "commercial plenipotentiary" in Europe to secure the island nation's relationships with the principal powers and help it maintain its independence between the competing Pacific imperialisms of Britain, France, and the U.S.⁸⁸

Wyllie's commission to Bowring included a draft of treaties which he hoped would be the basis of Bowring's negotiations. While the draft made no direct mention of arbitration, clearly Wyllie was alive to recent developments in European diplomacy. The draft of Article 2 of these projected treaties of friendship, commerce and navigation included the following language:

⁸⁴ See also London Peace Society, *Facts and Illustrations*, 48-9 and Bowring, *Autobiographical Recollections* 27.

⁸⁵ Raeside, "Journals and Letter Books," 87.

⁸⁶ Taylor, "Intrigues, Conspiracies and Accomplishments," 16-8.

⁸⁷ Wyllie to Bowring, November 16, 1859, Bowring Papers. The Wyllie-Bowring correspondence had been going on for many years. Kuykendall, *The Hawaiian Kingdom*, 55.

⁸⁸ Wyllie to Bowring, January 19, 1860, April 25, 1860, Bowring Papers. "Our Sovereign believes that of all men in Europe, you are the best qualified to obtain the acquiescence of the British and French Governments, and, in one word, of all civilized and Phylanthropic Governments, in the Equal, just and uniform policy which He desires to pursue in His Own independent Government for the good of all Foreign nations and of His Own Subjects; and He hopes, that having the great advantage of being formally known to both Governments and being of great eminence for your knowledge and experience as a Statist and Statesman, as well as of great and universal benevolence, you will condescend to make the attempt."

“If any differences of any kind or on any ground whatever, hereafter arise between the two nations, peace and friendship shall not be interrupted between them, until all hopes of settling such differences amicably agreeably to the provisions consecrated in the Protocol of Paris dated 14th April 1856, shall have vanished.”⁸⁹ However, he may not have had the most sophisticated understanding of the Paris arrangements, over-reading the mediation protocol discussed in the previous section as a binding commitment of the Powers to arbitration. In fact, Wyllie later argued that Hawaii’s adherence to the provisions of the Treaty of Paris regarding privateers and neutral shipping should entitle it to invoke the protection that he inferred from this aspect of the Paris Protocol.⁹⁰ Nonetheless, regardless of the accuracy of Wyllie’s reading of these European developments, this initiative makes clear that the sentiment behind the insertion of arbitration provisions in the agreements negotiated by Bowring were not entirely the latter’s creation, but rather were at least in part responsive to direction from Honolulu. Hawaiian foreign policy goals in the 1850s were focused on securing a guaranteed neutrality with support from the key powers: Britain, France, and the U.S through a “general political treaty,” and particularly resolving some nagging issues with France.⁹¹ It is likely that Wyllie’s stance—whether proposals based on the Paris Protocol or support for Bowring’s arbitration language—were indicative of his desire to reduce the risk of precipitate action by the major powers; a justifiable fear in the era of Palmerston and Louis Napoleon.

⁸⁹ Wyllie to Bowring, April 25, 1860, Bowring Papers. Prior Hawaiian treaties contained no such provisions. See Hawaii-Sweden/Norway Treaty of April 5, 1855 and Hawaii-France treaty of October 29, 1857, enclosed in Wyllie to Bowring, December 29, 1860, Bowring Papers.

⁹⁰ Wyllie to Bowring, February 27, 1861 and March 8, 1861, Bowring Papers.

⁹¹ Kuykendall, *The Hawaiian Kingdom*, 54-7. Bowring’s effort to secure individual commercial treaties was seen as a step towards that arrangement.

Bowring's principal targets for Hawaiian agreements were thus France and Great Britain, but these proved tough nuts to crack.⁹² Bowring then decided that he could make better progress on behalf of Hawaii by establishing some precedents with less complex players. Thus, during a trip around the continent in 1862, he wrote to Wyllie indicating a plan to secure a treaty with Belgium as a "stepping stone to more important resolutions elsewhere...."⁹³ Two weeks later, in Brussels, he was clearly focused on negotiating an arbitration provision as a general means of dispute resolution not only as a valuable goal in itself, but also as an example that "can and ought be of great influence hereafter."⁹⁴ But he was concerned about Belgium's willingness to be the first European power to adopt a general arbitration agreement. Even after he had secured diplomatic agreement for such a clause, he was unsure as to whether the King would approve, noting "Belgium would I know in this case certainly follow the example of the Great Powers, but whether the King will have the courage to take the initiative remains to be seen."⁹⁵ But the King did agree and Bowring could move forward.⁹⁶ His progress was not as fast as he would have liked, however. While, a few days later, Bowring did secure a similar treaty with the Netherlands, the Dutch insisted that treaty contain no comparable arbitration clause.⁹⁷ Bowring reported that "The Hollanders are rather proud of their maritime standing & their plenipotentiaries argued to me that they could not be expected having a considerable fleet to be

⁹² Bowring's efforts with France were stifled by bureaucratic resistance within the Foreign Ministry and British negotiations were hampered by the fact that, as a British subject, Bowring would not be recognized by the Foreign Office as the plenipotentiary of a foreign power. *Ibid.*

⁹³ Bowring to Wyllie, September 8, 1862, Bowring Papers.

⁹⁴ Bowring to Wyllie, September 22, 1862, Bowring Papers.

⁹⁵ Bowring to Wyllie, September 30, 1862, Bowring Papers.

⁹⁶ Hawaii-Belgium Treaty of Amity, Commerce and Navigation, Brussels, October 14, 1862. Parry, *Consolidated Treaty Series*, 126:329-37, BFSP LII: 521.

⁹⁷ Hawaii -Netherlands, Treaty of Amity, Commerce and Navigation, The Hague, October 16, 1862. Parry, *Consolidated Treaty Series* 126:343-8; BFSP LII:729.

the first to consent to the Treaty recognition of so important a principle.”⁹⁸ They did informally agree to utilize arbitration, however, on a case-by-case basis.

Accomplishment of a further part of Bowring’s main goal for the Hawaiians was to take the rest of the decade. Bowring met with the envoys of Prussia and of Italy when he was there to meet with Napoleon III and his Foreign Minister in November 1862. The treaty with the Italians was signed in the summer of 1863.⁹⁹ It contained arbitration language which duplicated that which he had worked out with the Belgians. A few months later, his final treaty for Hawaii, with Spain, also included the identical provision.¹⁰⁰ However, these agreements were not ratified until 1869 and 1870, respectively. Long-running discussions with the Swiss finally bore fruit in 1864 (with some variations in language).¹⁰¹ And, despite Bowring’s efforts in Paris and later in London, there were no such agreements with France or Britain. Wyllie’s ultimately terminal illness in 1865 most likely put an end to the Hawaiian sponsorship of arbitration and the goal of a general political arrangement died as well, but Bowring’s efforts to promote arbitration continued. Building on his previous relationships and language, Bowring, now representing the King of Siam (with whom he had negotiated a treaty in 1855 on behalf of the British when he was Governor of Hong Kong), secured similar, but not identical, general arbitration agreement language with Belgium and Italy in 1868.¹⁰² He followed this up with another pair of similar agreements in 1869 with Austria-Hungary and Sweden/Norway.¹⁰³

⁹⁸ Bowring to Wyllie, October 17, 1862, Bowring Papers.

⁹⁹ Hawaii-Italy, Treaty of Friendship, Commerce and Navigation, Paris, July 22, 1863, BFSP 60:397.

¹⁰⁰ Hawaii-Spain, Treaty of Friendship, Commerce and Navigation, London, October 29, 1863, BFSP 62: 1004-12 (1871-2).

¹⁰¹ Hawaii-Switzerland, Treaty of Friendship, Establishment, and Commerce, July 20, 1864. Bowring to Varigny, December 1, 1867, Bowring Papers, enclosing the finally-ratified agreement.

¹⁰² Siam-Belgium, SMH# 274; Siam-Italy, SMH# 272.

¹⁰³ Siam-Austria-Hungary, SMH# 281; Siam - Sweden/Norway, SMH# 270.

However, regardless of the degree to which these proposals were born of Bowring's long association with the peace movement or the needs of a small and obscure state not to be overrun by European great power politics, it seems clear that Bowring held the goal of peaceful arbitration as an improved basis of international relations firmly in mind and was aware of the significance of his diplomatic initiative. He told French Foreign Minister Drouyn de Lhuys in November, 1862 that he was aware that he was "asking much for a mighty power" to make such a commitment, "but the honor of [such a step] would be in proportion to the condescension..." and its adoption by France would "form a memorable era in the annals of Diplomacy."¹⁰⁴ After a meeting at the Foreign Office in London in February, 1863, Bowring reported that Russell was wary of arbitration commitments in general, but was willing to discuss the Hawaiian proposal with his colleagues. Bowring argued that the British endorsement of the general arbitration approach "might be of the highest value in the political world." And he assured Wyllie that this approach would "contribute to the fame and permanency of your nation."¹⁰⁵

Despite his pioneering efforts, Bowring received little acclaim from historians of or his former colleagues in the peace movement.¹⁰⁶ In the U.S., his work for arbitration on behalf of both Hawaii and Siam was praised fulsomely but only once, in 1868.¹⁰⁷ In London, the *Herald of Peace* cited the ratification of the Hawaii-Spain treaty in 1870 with an unadorned and brief notice of the language in the agreement of which the journal was "glad to be informed."¹⁰⁸ Just before he died, in 1872, Bowring wrote one last article for the *Herald*.¹⁰⁹ He noted his own treaties as steps along the way to an improved structure of international relations, citing his

¹⁰⁴ Bowring to Drouyn de Lhuys, November 25, 1862, Bowring Papers.

¹⁰⁵ Bowring to Wyllie, February 28, 1863, Bowring Papers.

¹⁰⁶ Bonfils, *Manual de droit*, 680, is typical; citing the Belgium-Hawaii and Belgium-Siam treaties as if they were a Brussels initiative.

¹⁰⁷ *Advocate of Peace* (November, 1868) 161.

¹⁰⁸ *Herald of Peace*, No. 240 (June 1, 1870) 76.

¹⁰⁹ *Herald of Peace*, No. 269 (November 1, 1872) 141-3.

mentor, Bentham, as well as recent developments towards strengthening international law generally. The *Herald* finally recognized the implications of his efforts a month later in Bowring's obituary, noting: "it should be remembered, to his honour, that no practical diplomatist has hitherto shown so persevering and faithful a determination to carry out, in actual political negotiations, the principle of International Arbitration."¹¹⁰ The only contemporary 'scholarly' recognition came from the Spanish legislator, Marcoatu in 1877.¹¹¹ Nonetheless, at a practical level, the impact of the Bowring clauses continued. The language of the Hawaiian-Italian Treaty bears a close resemblance to that used by Italy in its treaties with Burma in 1871 and Abyssinia in 1883.¹¹² Thus, it is particularly surprising that Bowring is barely mentioned in the otherwise hagiographic accounts of the evolution of arbitration agreements. Perhaps the shadow of his military/imperial activities in China in the 1850s rendered him unfit as a role model, perhaps the fact that neither Britain nor France were parties to the agreements he secured pushed his efforts even out of the footnotes. In any event, in the context of the peace movement's decades-long project, his role as a peace advocate who actually secured the commitment of eight different states should have placed him in the front ranks.

¹¹⁰ *Herald of Peace*, No. 270 (December 1, 1872) 160. Bowring, who first appeared in the *Herald* in 1822 with two sonnets to peace, *Herald of Peace*, Vol. 1 (n.s.) (April, 1822) last appeared in 1887 with more peace poetry! *Herald of Peace*, No. 459 (October, 1887) 281.

¹¹¹ Marcoatu, *Internationalism*, 36.

¹¹² Treaty of Friendship, Cooperation and Navigation between Burma and Italy Art. XVII, signed at Mandalay, March 3, 1871. Reprinted in Ba, "Diplomatic Documents." Treaty of Friendship and Commerce between Ethiopia (Shoa) and Italy, Art. XV, signed at Ancober, May 21, 1883. Parry, Consolidated Treaty Series, 162:114, (Trans. Pierro Scaruffi). "Should there ever rise between the Italian government and that of the Scioa any conflict that could not be resolved through amicable negotiations, such conflict shall be submitted to the arbitration of a neutral and friendly power chosen jointly by the two parties, or of a referee chosen by common consent. The sentence shall in any case accepted and recognized by both parties."

A Frustrated Visionary

On September 14, 1814, British naval forces themselves en route to attack New Orleans (later foiled by the fabled march of General Andrew Jackson) set upon the American privateer *General Armstrong* lying in the harbor of Fayal, in the (neutral) Portuguese Azores Islands.¹¹³ The U.S. saw this as a breach of Portuguese duty of neutrality and claimed reparations. However, the Portuguese disagreed and the claim languished for almost forty years. In the meantime, Americans accrued a variety of more ordinary commercial and maritime claims against a Portuguese empire which was well into a decline accelerated by its political upheavals of the early nineteenth century. By the late 1840s, American diplomatic and commercial pressures led to more serious negotiations for handling these claims. In 1850, the Portuguese finally agreed to liquidate all the claims (after unsuccessfully suggesting arbitration), except the *General Armstrong* claim, which they insisted be determined by a third party umpire.¹¹⁴ The Americans relented and proposed Louis Napoleon (the President of France) as the umpire.¹¹⁵ A convention was finally signed in 1851 and Louis Napoleon (three days before converting his office to “Emperor”) ultimately ruled in favor of Portugal.¹¹⁶

So far, this story, other than amusing connections to dramatic moments and notable personalities of nineteenth century history, would appear to have little to show for itself in terms of the development of arbitration. The resolution of claims in this manner was, to be sure, relatively rare at this time. The ordinary claims were effectively resolved by the regular payment of the Portuguese indemnity which followed the agreement. Louis Napoleon’s decision was not

¹¹³ Roosevelt, *The Naval War of 1812*, II: 68-72.

¹¹⁴ Clayton (U.S. Secretary of State] to Figaniere (Portuguese Chargé in Washington), April 30, 1850, and May 30, 1850, RG59, M99/80.

¹¹⁵ Webster to Figaniere, September 5, 1850, RG59, M99/80.

¹¹⁶ BFSP 45: 463.

destined to become a landmark of the international law of neutral rights and duties. What is remarkable is what happened afterwards.

In 1854, the Pierce administration named John L. O’Sullivan as the American Minister in Lisbon.¹¹⁷ A former journalist and Democratic Party activist, O’Sullivan was best known as the author of the phrase “manifest destiny” to describe the future path of American growth and expansion. In his new position, he became responsible for reviewing all the relevant files and ensuring the regular payment of the indemnity installments. An ambitious fellow with the ability to think broadly, he was the first government official to propose a general arbitration scheme, and, unlike the traditional approach of the peace movement, couched his arguments in the context of diplomatic and commercial realities.¹¹⁸ Yet, O’Sullivan was no stranger to the peace movement, having (unsuccessfully) introduced resolutions in the New York State Assembly in 1841 in support of William Ladd’s Congress and Court of Nations concept.¹¹⁹ A dozen years later, there was no hint of millennial pacifism or even war prevention in his approach. It was pragmatic and its very pragmatism marks it as a hallmark in the development of arbitration. To be sure, the peace movement in the U.S. had begun a shift from promoting arbitration in general terms as part of its anti-war rhetoric to a more politically engaged dialogue. However, there is no evidence that it had gained any traction within the government at this time or for a considerable period to come.

O’Sullivan prefaced his proposal by observing that the usual diplomatic practice was to accumulate small unresolved matters to the point that their irritation sparked the claimants’ state to press for some general resolution. In the meantime, these issues would have cast a pall over

¹¹⁷ See generally, Sampson, *John L. O’Sullivan*.

¹¹⁸ O’Sullivan’s proposal was laid out in a lengthy dispatch to U.S. Secretary of State William Marcy, January 17, 1855, RG 59, M43/15.

¹¹⁹ Curti, *American Peace Crusade*, 60. Sampson, *John L. O’Sullivan*, 234.

routine efforts to promote commerce and general good relations between those states. He thus suggested that states—specifically starting with the U.S. and Portugal—should set up a permanent arbitration regime for handling these types of matters. He was not fixated on procedure, allowing for either mixed commissions or individual third party umpires, but did suggest that distinguished third-party diplomats or jurists, located outside either of the contending parties' territory, would make the best arbitrators. O'Sullivan, long before the issue of national honor and dignity as exceptions to broad arbitral schemes was debated, recognized the need to exclude issues "such as might involve elements which no nation can permit to be either arbitrated or discussed." He was sensitive to the relative political power of the two states, offering rationales for both the weak and strong to benefit from his approach.¹²⁰

O'Sullivan's conceptualization of arbitration implicitly recognized the changing nature of commerce and diplomacy in the middle of the century. He identified the problematic results of a state attaching its prestige and self-image to what would have been a commercial dispute which would have been routine if it had happened domestically and he sought to normalize the handling of those disputes within an international structure. He was attuned to the increasing number of such cases, a result of the global increase in trade and political relationships. In his proposal to his superiors in Washington, he appealed to the precedents both of international arbitration generally, the recent U.S.-Portuguese arrangement with which he was most familiar, and to the then-current handling of American and British claims under one of their periodic house-

¹²⁰ O'Sullivan to Marcy, January 17, 1855, RG 59, M43/15. "In the case of a powerful nation, neither would its officials feel safe in indulging in arbitrary conduct in individual cases, nor its government in making protests for refusing redress, on the calculation that we would not press them to any really troublesome length, tending to jeopard the tranquility of our omnipresent commerce, on small personal questions of this nature. In the case of a weak one, they would no longer feel still more secure in the strength of that very weakness; nor would they have it constantly in their power, as now, to compel us either to leave the wrongs of our citizen unredressed for years & generations, or to assume the attitude, not the less unpleasant because it may at times be necessary, of threat & force directed against an unequal antagonist."

cleanings.¹²¹ He saw such an initiative on the part of the United States as a way “to add to the already noble record of the diplomacy of our country, that on which should appear an American reform of the general irregular and unsatisfactory practice in this respect;” an argument that reflected his prior association with the idealistic peace movement.

The Pierce Administration definitively rejected O’Sullivan’s proposal. Secretary of State William Marcy was quite clear in disapproving of the notion of general arbitration regimes and arbitration in general.¹²² “The practical operations of such a mode of adjustment so far as it has been tried in cases where this government is concerned, do not commend the measure to much favor,” he noted. Marcy cited a range of proceedings in which the U.S. had come out the loser (not least of which was the decision of Louis Napoleon), including the 1831 decision of the King of the Netherlands on the U.S.-Canadian boundary, the Mexican-U.S. Claims Commission of 1839 (on which Marcy had unhappily served), as well as the recent U.S.-British claims process. Marcy’s list was, of course, skewed. He made no mention of those cases which were favorable to the U.S.; nor of those where, as we have seen, an arbitration process failed to reach any resolution at all. It wasn’t clear whether he attributed the adverse decisions to prejudice or lack of intellect on the part of the decision-makers.

Thus, the visionary O’Sullivan ran into the reactive Marcy and the matter rested there.¹²³ The idea of standardizing and regularizing the processes of diplomatic relations did not overcome Marcy’s distasteful personal experience. Marcy, however, overcame his antipathy

¹²¹ At that time, the U.S.-British Claims Convention of 1853, Moore, *History and Digest* I: 391-425; BFSP 42:34, 44-29, was the most current of a lengthy series of agreements that stretched from the Jay Treaty through the Treaty of Washington (1871) and to at least 1910.

¹²² Marcy to O’Sullivan, May 12, 1855, RG59, M77/134.

¹²³ It is not clear that O’Sullivan would have characterized himself in this way. He saw arbitrations as an ordinary part of the international relations process. “Mixed Commission for the settlement of boundary lines, are natural enough for us, and may perhaps be regarded as a chronic if not normal institution, to keep progressive geography up to the mark....” O’Sullivan to Marcy, August 1, 1855, RG59, M43/15.

towards arbitration at least to the degree of proposing it to Britain in the context of their dispute over the interpretation of the Clayton-Bulwer Treaty in 1856.¹²⁴ In this way, Marcy was not an atypical states' man. His consideration of issues and disputes was ad hoc, more driven by the probabilities of winning a particular case than simplifying the nature of diplomacy. Regularization would limit state discretion and a predictable process would not guarantee a favorable result.

Thus, while the U.S. later sought to trumpet its historical commitment to arbitral regimes, the idea of a general arbitration agreement was not to be heard again from inside the diplomatic corps until the peace movement's promotion of the idea began to gain traction in the 1880s via its public work and legislative responsiveness helped push the Executive Branch to address with the issue. The peace movement's commitment to public education and its slow shift towards engaging the political sphere on behalf of its arbitration beliefs left it with few means of changing diplomatic practice from the inside. O'Sullivan and Bowring were the exceptions.¹²⁵

The Bowring and O'Sullivan stories show that clearest impact of the British and American peace movements on states' practices were highly indirect and visible only in the long-term. Neither had much effect on their own state; but each raised important issues about the nature of the dispute resolution process. Each sought to advance their underlying ideals by couching them in terms relevant to states' men; this, more than the offices they occupied,

¹²⁴ *Manchester Guardian*, June 16, 1856. The British had previously suggested the use of arbitration to solve this dispute several times; but, not wishing to look weak, they did not press their position, and seemed to be talking at cross-purposes with the Americans on this issue. Bourne, *Britain and Balance of Power*, 181, 185, 198.

¹²⁵ In the event, there were no further arbitrations between the U.S. and Portugal until 1890. O'Sullivan, for whom the Lisbon post was his last official employment, leveraged a relationship with David Dudley Field, the leading American law codifier, and did show up in Geneva in 1874 as part of the American group at the second conference of the International Law Association, where he again pushed for generalized arbitration solutions to international disputes. ILA, *Report* 111. Sampson, *John O'Sullivan*, 233-4.

distinguish them from their co-believers. For European states and the U.S., it would not be until the end of the century that the state of international relations would seem sufficiently tamed and the domestic political benefits of appearing to embrace arbitration would combine to make regularized arbitration a serious topic. Thus, it is difficult (especially for O'Sullivan) to find any clear impact on the long-term development of the peace movements or on state practice, but their efforts show that there were other paths than the education/propaganda/public opinion route which the core group of arbitration advocates took.

The Latin American Initiative

The diplomatic history of nineteenth century Latin America has usually been seen, per Canning, as an adjunct to the great stories of great power politics in Europe or as the subject of U.S. or British informal empire.¹²⁶ Legal history has been no different.¹²⁷ However, in terms of arbitration, the countries of Latin America have loomed much larger because of their broad interpretation of the concept, the amount of intra-regional activity, and agreements with the great powers which manifested the latter's informal empires.¹²⁸ While intersecting, from time to time, with European arbitration practice beginning in the middle of the century, Latin American arbitration was a major focal point by the end of the period with the Venezuelan Boundary dispute of the 1890s and the Venezuelan claims and revenue situation at the turn of the century

¹²⁶ George Canning, "I called the New World into existence to redress the balance of the Old." Speech to the House of Commons.. *Hansard*, 2d ser., vol.16 (12 December 1826), col. 397. For a general overview of Latin American diplomatic history, see Davis, *Latin American Diplomatic History*. For a more detailed treatment of British informal empire, see Cain and Hopkins, *British Imperialism*.

¹²⁷ See Lorca, "Eurocentrism."

¹²⁸ Still, we need not go as far as Caminos, "Latin American Contribution," 161, who attributes the spread of arbitration to the Latin American precedents. It is not likely that the early examples were known and understood in European chanceries, but, simply put, there is no evidence either way. Even if they were known, we would need some documentation which would clearly support such a genealogy.

being the most notable examples.¹²⁹ This increased prominence, likely leveraged by the United States as a phalanx to its own increased global role, was demonstrated by the inclusion of 17 Latin American delegations to the Second Hague Conference in 1907, despite their exclusion (save Mexico and Brazil) from the First. In this section, we will examine the initial efforts towards arbitration following shortly upon Latin American independence in the 1820s and consider their treatment of adjudicatory arbitration as part of a broader integrative/federalist agenda. In later chapters we will turn to the on-going practice of arbitration agreements throughout the century, before addressing the ways in which the arbitration of European and U.S. claims against Latin American governments was used as an expression of informal imperial power by the claimant's governments, and finally, the burst of activity following the Hague Conferences as a culmination of these various strands and stages.

A Different View of International Relations

Almost from the inception of independent Latin American states in the 1820s, the nature of their international relations has been markedly different from that typically associated with European models. Sharing a common Spanish heritage, these states felt an affinity that, while not as developed or formalized as what evolved to become the United States, colored their view of how they should interact.¹³⁰ They also saw themselves as part of the enlightened republican tradition rooted in both the American and French Revolutions which lent itself to the creation of a proto-liberal view of international relations which included a concept of “American public law” not all that far from the “European public law” that was common in post-Vienna

¹²⁹ Both cases are discussed in Chapter 8, *infra*.

¹³⁰ Grandin, *Liberal Tradition*, 82.

discussions.¹³¹ From another perspective however, their efforts, represent the same aspirational view of international relations that animated the European and North American peace movements. The principal difference was that it was Latin American states' men who articulated these aspirations in the course of their written diplomatic agreements; a stance which would not appear on the European and North American scene until late in the century. One early twentieth century Latin American jurist characterized it as a product of "the lyric vein" of the early independence era.¹³² This distinctiveness should be neither remarkable nor surprising. However, political developments in Latin America were typically ignored or downplayed in Europe and the U.S. for three reasons: 1) the view of this region from Europe and the U.S. as a shared periphery in a range of (mostly) informal empires, 2) the lack of domestic stability and the frequency of conflicts during the period, and 3) the absence of any developed theoretical underpinning.¹³³ However, Latin American states provided a different approach to treaty practice and the resolution of individual international disputes which belies their traditional treatment as passive auxiliaries to the dominant powers from the North.¹³⁴ The lack of attention to Latin American practice is particularly notable given that its precedents met the goals of a consortium of peace movements in the U.S., Britain, and Europe that was vocal but, until the end of the century, usually politically ineffective.

¹³¹ Ibid. 70. Lorca, "International Law in Latin America," 290.

¹³² Alvarez, "Latin America and International Law," 302.

¹³³ Adelman, "Liberalism and Constitutionalism," argues for recognizing the Eurocentricism of traditional perspectives on nineteenth century Latin American political history. Allain's denigration of the early Latin American agreements is typical of this attitude. Allain, *Century of International Adjudication*, 13-6.

¹³⁴ At the same time, the Latin American arbitration tradition can be seen as a manifestation of defensive modernism. In particular, those states' invocation of international law in general and arbitration was a means of constraining the superior military and diplomatic power of the West and, in this way comparable to the motivations of the Kingdom of Hawaii noted, *supra*.

The first demonstration of this different approach can be seen as early as 1823 when Chile and Peru signed the first treaty in modern times that expressly provided for the arbitration of disputes arising from that agreement.¹³⁵ Such compromissory clauses were also included in the Bolivian-Peru agreement of 1831, a claims settlement agreement between Columbia, Ecuador and Venezuela in 1838 and three Chilean treaties with European powers in the 1850s.¹³⁶ Indeed, other than the Bowring treaties discussed in the next section, Latin American states were party to every compromissory clause agreement signed through 1868. This anticipatory approach to dispute resolution—agreeing beforehand to arbitrate—was exactly what peace advocates in Britain and America were clamoring for during this period to no avail.¹³⁷

Compromissory clauses were a commitment to arbitrate on a relatively narrowly-defined set of issues. A comprehensive commitment, what I call a “general arbitration agreement,” which was the focal point of much agitation late in the century, especially as between the U.S. and Great Britain, was also pioneered in Latin America. 54 such agreements were signed world-wide before the great Hague Conference of 1899 was convened. Of these 48 were signed by Latin American states, beginning in 1829 by Columbia and Peru and, again leaving the Bowring treaties to the side, the only such agreement that was not between two Latin American states was an ill-fated 1883 pact between Italy and Abyssinia.¹³⁸ Of course, the frequency of these Latin American agreements seems uncomfortably correlated with the frequency of the wars and border clashes that marked that region up through the 1880s.¹³⁹ Still, it is a testament that the diplomatic culture so doggedly stuck with at least the aspiration to the peaceful settlement of disputes.

¹³⁵ SMH# 100.

¹³⁶ SMH##113, 124, 166, 173, 184.

¹³⁷ The peace groups seem, however, do not appear to have paid attention to these treaty developments.

¹³⁸ SMH## 110 (Columbia/Peru), 399 (Italy/Abyssinia).

¹³⁹ Dominguez, *Boundary Disputes*, 21.

This culture was deeply rooted and it persevered despite the unsettled nature of the Latin American states' system. It was closely linked with the combination of interests across local elites and military efforts that marked independence era as an expression of commonality against Spain. In 1822, Bolivar himself called for Latin American states to cooperate to deal with the issues that the newly-separated republics faced.¹⁴⁰ A Congress convened in Panama in 1826 which included almost all the Spanish-speaking states and produced a "Treaty of Union, League, and Perpetual Confederation."¹⁴¹ This was first major attempt to unify the former colonial provinces and it failed for a variety of reasons, with only Gran Columbia ratifying the agreement. There was a long list of later attempts at some sort of federation or union, some of which were effective for a limited period, others of which were still-born. Together with the arbitration agreements, they show a continuing effort on the part of leaders of different Latin American states at different times during the century to overcome the boundaries and regional rivalries which were the legacy of Spanish colonial administration as the foundation of establishing modern polities. It was this fraternal sense, I suggest, that underlay a willingness to commit to a peaceful solution of disputes between states which, if not often honored in the event, at least expressed a sense of how states should seek to behave.¹⁴²

This principle was also manifested in the course of the arbitration of specific issues (although only occasionally as the implementation of a general arbitration agreement). Latin American states were regular participants in arbitration agreements beginning in the 1820s, but, as we shall see, primarily in an informal imperial context. Despite the broad and repeated commitment to arbitrate, there were only 41 intra-regional arbitrations before 1890 (out of over

¹⁴⁰ Lockey, *Pan-Americanism*, 290-2. Quesada, *Arbitration in Latin America*, 2.

¹⁴¹ International American Conference, *Historical Appendix IV*: 112.

¹⁴² This sensibility continued throughout the century. The late nineteenth century constitutions of five different states included endorsements of international arbitration as a component of national policy. Quesada, *Arbitration in Latin America*, 125.

400 globally). It was in the period from 1890 to the beginning of the War that Latin America became recognized as a global player in international law in general and in terms of arbitration in particular. This was due to the momentum that had built up since 1873 for a more coherent and positivist approach to international law generally, as well as to the emergence of at least one notable scholar (Carlos Calvo) of international law from this region. The Pan American Conference was a landmark in this regard, as we shall see in the next section, and the prominence of Latin American states led to their inclusion in the second Hague Conference in 1907. Another notable result of this period was the first standing international court, the Central American Court of Justice, which was in existence from 1907-18, heard ten cases arising from the five states in Central America who had agreed to establish it and submit to its jurisdiction.¹⁴³ These projects were the culmination of 80 years of effort and have been well-discussed in the literature; so I will not dwell on them here.¹⁴⁴

The Arbitration Discourse in an Imperial Context

The idea that international law has been an important mechanism in the imperial tool box is not a new one; not only as a means of expressing the rationale of the civilizing process, but also as a context of defensive modernization. European expressions of international law have also had to take into account the implications of exploration, competition, and the accommodation of alien or barbarian peoples into its evolving doctrines. However, political entities on the periphery have rarely been seen as innovators and actors in these stories. This section highlights the role of Latin American states in utilizing international law, and arbitration

¹⁴³ Hudson, "Central American Court of Justice."

¹⁴⁴ See, e.g., Scott, "Closing," Caminos, "Latin American Contribution," Hudson, "Central American Court of Justice," and *International Tribunals*.

concepts and procedures in the course of their dealings with European and North American formal and informal empires.

Given the rich background in endorsing arbitration principles, it is not surprising that Latin American states sometimes sought arbitration as a means of resolving disputes with states outside the region. In fact, while the history of arbitration was traditionally presented mostly as the story of Anglo-American initiatives, it was the Mexicans who sought to add arbitration to the Treaty of Guadalupe-Hidalgo in 1848.¹⁴⁵ While the Mexicans and the U.S. had agreed to a boundary commission under an 1828 treaty, the 1848 agreement was the first time the United States became a party to a general arbitration agreement.¹⁴⁶ Specifically, Article XXI provided that

If unhappily any disagreement should hereafter arise between the Governments of the two republics [they] promise to each other that [if] they should not be enabled to come to an agreement, a resort shall not, on this account, be had to ... hostility of any kind... until the Government of that which deems itself aggrieved shall have maturely considered... whether it would not be better that such difference should be settled by the arbitration of commissioners appointed on each side, or by that of a friendly nation. And should such course be proposed by either party, it shall be acceded to by the other....

Indeed, as early as 1837, the Mexican government had proposed the use of arbitration to resolve a number of long-pending claims between the two countries.¹⁴⁷ In another case, following riots in Panama City in 1856, the United States claimed considerable reparations on behalf of its nationals. After some frustrating diplomatic discussions, the government of New

¹⁴⁵ The claim that the provision was inspired by recent proposals made by the U.S. peace movement have been effectively debunked by Curti, "Pacifist Propaganda." The treaty is at Malloy, *Treaties, Conventions*, I:1107.

¹⁴⁶ Malloy, *Treaties, Conventions*, I: 1082.

¹⁴⁷ Francisco Pizarro Martinez (Mexican Minister to US) to John Forsyth (Secretary of State) proposing "to commit to the judgment of a friendly power the decision upon those claims upon which they cannot come to a determination, provided the United States themselves agree to this." December 23, 1837. RG 59 M54/2.

Grenada, early in 1857 authorized the resolution of this matter by arbitration and a treaty was signed later that year providing for a mixed commission and a Prussian umpire.¹⁴⁸ Finally, in one of the most famous arbitration proceedings of the pre-War period, it was Venezuela which repeatedly proposed arbitration as a solution to the long-simmering dispute with Great Britain over the boundary with British Guiana. The British initially rejected the proposal and the arbitration only went forward upon the jingoistic intervention of the United States in 1895-6.¹⁴⁹ A few years later, after defaulting on debt to German, British, and Italian creditors and with European warships seizing the Venezuelan Navy, lobbing shells at two coastal locations, and moving towards a blockade, and with international confrontation in the streets of Caracas, Venezuela again appealed to an arbitral procedure.¹⁵⁰ The Venezuelan arbitration proposal, which was finally agreed to while the blockade was being enforced, resulted in a series of mixed commissions to hear the various claims.¹⁵¹ Not only do these cases undermine the historiographical tendency to see the metropolises as driving the creation and utilization of international legal principles and methods, but they illustrate an important aspect of the broader use of arbitration during this period, namely that it was often the politically and militarily weaker state that invoked arbitration, since it had more to fear from further diplomatic pressure or the risk of war. Indeed, in the latter Venezuelan case, arbitration had finally fulfilled its promise as a tangible alternative to war.

¹⁴⁸ The riots occurred on April 15, 1856. Herran (New Grenadan Minister) to Cass (Secretary of State), Jul 21, 1857, citing New Granadan statute of June 18, 1857. U.S. New Grenada Claims Convention of September 10, 1857, Malloy, *Treaties, Conventions*, II:319.

¹⁴⁹ The Venezuelan government had proposed arbitration as early as 1881. De Rojas (Venezuelan minister to Paris) to Granville (British Foreign Secretary), February 21, 1881, FO420/170/217-8. The complete story is well covered in Campbell, *Great Britain and the United States*, Humphreys, "Anglo-American Rivalries," James, *Richard Olney*, and Mowat, *Diplomatic Relations*.

¹⁵⁰ Mitchell, "Height of the German Challenge," 196-7.

¹⁵¹ These 'routine' arbitral procedures were effective; it was only a later dispute among the various claimants that resulted in one of the first cases to be heard in the then new Permanent Court of Arbitration in 1903. See Chapter 9, *infra*.

But beyond this nominal success lies the question of why these states chose to offer arbitration rather than revive or extend normal diplomatic processes. I suggest that resort to this increasingly common discourse of quasi-judicialized and regularized (I am wary of calling it “legal”) proceedings met the needs of both parties in ways that traditional diplomacy could not. First, from the perspective of the imperial powers, it enabled the extension of their procedural norms which reinforced their property claims and capitalist modes in these informal peripheries.¹⁵² Second, from the perspective of the Latin American states, it allowed the often weak and contested incumbent governments to point to an “objective” third party as the source of the (expected) adverse decision and thus reduce any local opposition, even while clothing themselves—domestically and internationally—in the robes of civilized and legalistic states. In this way, their embracing of international legal concepts and practices was a form of defensive modernization.

Even the First Pan American Conference of 1890, usually seen as the product of U.S. hegemony, should, from the perspective of arbitration issues, be seen as the site of Latin American assertion of its own views and concerns. Under the leadership of Secretary of State James Blaine, the U.S. advanced a broad agenda that encompassed a customs union, commercial agreements, standardization and harmonization, and political doctrines. The U.S. also advanced a proposal for a hemispheric arbitration regime, including a commitment that all states agree in advance to arbitration. The Argentinian delegation preempted the U.S. proposal with one of their own and a furious verbal battle ensued, following which the U.S. backed down and the conference finally approved a draft treaty which first, allowed states to decline to enter into arbitration if necessary to protect their national honor or independence, and second, negated U.S.

¹⁵² Another example of this expansive mentality can be seen in the mixed commissions which the British established with several states to oversee the suppression of the slave trade. See Chapter 4, *supra*.

attempts to have all hemispheric issues come before an arbitration tribunal based in Washington, with other procedural and structural provisions which Latin American states reasonably viewed as skewed towards their northern neighbor.¹⁵³ This incident presents a curious case in which Latin American fear of U.S. domination trumped not only their own shared tradition in arbitration agreements, but also their interest in using a quasi-legal structure of arbitration to blunt the pressure of a more powerful adversary. Further, despite the fact that the treaty was only ratified by one state and therefore never went into force, it remained a potent model of a more limited arbitral scheme and one which we can see reflected in the global Hague Conference Agreement of 1899.

When reviewing the list of 139 specific property and commercial claims cases that were submitted to arbitration between Latin American states and those outside the region during the period from 1823 thru 1914, what is most striking is that the Latin American states were the claimants in only a few of these cases; even under those agreement which were denominated “mutual claims,” typically few if any claims from Latin American nationals were presented. Frequently there is reference to a domestic upheaval, civil war or over-aggressive local officials as the cause of the damages alleged by the European (most commonly British or French) or American claimants. While this difference may be a product of the disparity in investment and local commercial presence, I suspect it is as much reflective of the lack of confidence in local judicial processes in the Latin American states and the difficulties in securing actual compensation for losses that occurred in a variety of circumstances. Further, relatively few of these claims are for ordinary commercial losses. In most cases they were based on actions (or omissions) of the Latin American governments, such as maritime seizure, breach of authorized monopoly or concession agreement, or failure to maintain the peace. Thus, we can see the

¹⁵³ McGann, “Argentina,” 145-8.

regular use of arbitration procedures as a means of extending the reach of Western legal principles and, through the use of mixed commissions and (often) Western umpires, some sense of the judicial procedures that were common in the metropolises; i.e., claims arbitrations could serve as a variety of extraterritorial jurisdiction, at least on an ad hoc basis. From another perspective, however, they can be seen as means by which Latin American governments (often freshly installed following domestic upheaval) could separate themselves (in the eyes of both domestic elites and Western investors and merchants) from the alleged irregularities which occasioned the claims. So, beyond any substantive principles of international law which may have arisen through these cases,¹⁵⁴ the utilization of arbitration by Latin American states facilitated the integration of legal norms, the familiarity with international legal principles and the discourse of a juridical process. This, in turn, colored the evolution of their sense of how states should relate to each other.

Conclusion

This chapter would be unnecessary if we were to consider arbitration solely in terms of specific agreements to settle particular disputes. But, notwithstanding the realities of international power in the first half of the nineteenth century, there was more to the story. Activities at the periphery—whether of British or American domestic politics or of the international “states’ system”—need to be taken into account and not just for the sake of comprehensiveness. Not only do they highlight alternative ideas and avenues of development, the vagaries of the archival record make it difficult to eliminate intellectual lineages. As such, they belong somewhere between the occasional footnote to which “realist” international relations and diplomatic analyses have consigned them and the glorious “historical” constructs of the later

¹⁵⁴ See the discussions of the Calvo and Drago doctrines, Chapters 8 and 9, *infra*.

peace movement.¹⁵⁵ Ideas were broached and precedents established which, if not ineluctably linked to the apotheoses at the Hague in 1899 and 1907, certainly conditioned the ground upon which they were built and provided an intellectually coherent perspective from which to characterize the increase of states' particularly arbitral actions later in the century.

These developments should be seen not only as examples of the expansion of the public sphere and the burgeoning of civil societies in nineteenth century Europe and America, but also as a illustration of opposition to the solidification of the states' system. The Latin American states had a different model of that system, even if imperfectly implemented. The British and American peace movements, once they moved from a vague sense of the state as something beyond "an aggregation of individuals," began to engage with and seek a world in which state power was constrained.¹⁵⁶ Their principal problem was a practical one: how to engage with that incumbent and solidifying model of international relations and secure a fundamental change. The greatest progress was secured by the deepest involvement; but it was no simple matter to gain power and influence while maintaining their moral integrity and global visions.

¹⁵⁵ Generic references to the influence of the peace movement on the development of international law, see, e.g., Lynch, "Peace Movements," 198, really don't tell us much about how and why their impact was significant.

¹⁵⁶ Beales, *History of Peace*, 90.

Chapter 6: The “Alabama Claims”

The “Alabama Claims” case, including British responsibility for the disruption of Union commerce during the American Civil War, the subsequent diplomatic entanglements culminating in the agreement to arbitrate in the 1871 Treaty of Washington, and the ultimate judgment of the Geneva Tribunal in 1872, was the most notable incident of public international arbitration; certainly prior to World War I, and perhaps ever. At the time and since, it has been held out as the exemplar of a liberal and rational diplomacy, a triumph of law and a harbinger of a new era of the peaceful resolution of international disputes.¹ Yet, closer examination reveals that the process was always within the political control of states and states’ men and that it was more a role model of bombastic diplomacy and extra-judicial maneuverings packaged to placate public pressures. It was tremendously successful example of myth-making, whose hollowness undermines the entire late-nineteenth century arbitration movement and belied the proud claims of publicists and historians of a shared British and American leadership in modern diplomacy.

The episode arose out of the alleged laxity of the British Government in allowing the Confederacy to construct ships which were then used to raid Union commerce during the latter part of the U.S Civil War. Notorious at the time, the predations of the *Alabama* (& some additional ships) became a *cause celebre* following the North’s triumph in 1865. The situation was fraught with political and legal complexities, the post-war negotiations between the British and American governments ran six years and faced more than the usual number of

¹ The centrality of the case in demonstrating the “progress” of international arbitration and as a marker of an era of expanded arbitral activity has been proclaimed by Allain, *Century of International Adjudication*, 17; Anderson, *Rise of Modern Diplomacy*, 254; Beales, *History of Peace*, 139; Janis, *America and the Law of Nations*, 132; Moore, *History and Digest*, 1:652-3; Moore, *U.S. and International Arbitration*, 71. Others have been more skeptical. Ralston, *International Arbitration*, 198-9, more presciently, called it “a greater triumph for diplomacy than for arbitration....” See also, Ceadel, “Alabama.”

complications, and the *denouement* of this episode—the proceedings of the arbitration tribunal in Geneva—was highly problematic. From this morass of legal, cultural, political, diplomatic, and financial circumstances our goal is to extract those aspects which illuminate our central questions: how did the decision to arbitrate arise? How did the arbitration work and what did it accomplish? And what did the historiography of the “*Alabama Claims*” tell us about the later path of arbitration? What we will see is that the “*Alabama Claims*” case said more about managing popular democracy’s effects upon foreign policy processes than about the value of maritime commerce during the U.S. Civil War and more about the creation of a modern mythology—by those involved in peace, international law and diplomacy—than about the actual settlement of disputes among nations. In terms of diplomatic negotiations, the role of international law and lawyers, the trans-Atlantic peace community, and public debates, the “*Alabama*” case showed the distance between the theory of and hopes for arbitration on the one hand, and the expediency, contingency and essentially political nature of the process on the other. We will begin with a summary of the factual and legal bases of the case, followed by an exploration of the diplomatic negotiations during and after the Civil War which circled around the potential arbitration of the case and then turn to the actual arbitration proceeding. Finally, we will explore the myth of the *Alabama Claims* and their impact on the development of arbitration for the balance of the nineteenth century.

The Tortuous Negotiations

In early 1862, a shipyard in Liverpool began building a ship. Its purpose and purchaser were secret. In fact, despite disclaimers, it was built pursuant to an agreement with agents of the

Confederacy, destined to become the C.S.S. *Alabama*.² During the construction, the Union discovered the plans for the ship and U.S. Minister to London, Charles Francis Adams, protested, repeatedly and with increasing factual support, that the British Government was obligated under both its own statutes and principles of international law to prevent the completion and delivery of the ship to the Confederacy. The British Foreign Minister, Lord John Russell, repeatedly rejected Adams' demands, although he finally agreed to have the Law Officer of the Crown determine whether the Government should seize the ship. However, before they issued their opinion authorizing seizure (delayed because the Queen's Advocate, Sir John Harding, had a nervous breakdown that particular weekend), the ship escaped Liverpool, was transferred to the Confederacy, armed and crewed, and set loose upon Union merchant shipping. The *Alabama* was an extremely successful raider, sinking or capturing over 60 ships in less than two years, until she was sunk by the Union Navy in June 1864.

Adams' protest was based on the British Foreign Enlistment Act which prohibited providing aid to a state in a war in which Britain was neutral. This 1819 statute was broadly consistent with principles of international law on the duties of a neutral state. The legal question which Lord John Russell faced, was whether the evidence presented to him by Adams was sufficient to trigger the seizure of the ship. The question which subsequently arose in diplomatic negotiations and at the Geneva Tribunal was whether the British Government had acted responsibly in enforcing its statute and whether the statute was as rigorous as the principle of international law in implementing the duties of neutral states. However, particularly in the mid-nineteenth century, we must take great care in conceptualizing "international law." As we will see in Chapter 7 below, at this time international law was far from the level of specificity as we

² In fact, there were several ships involved in this case. Neither their construction, nor their naval operations are material to our concerns, and will not be recounted here.

know it today. Outside of specific treaty commitments (which were not applicable in this matter), it consisted primarily of the consensus of those writers on the topic who were well regarded by other writers (and the few practitioners) in the field. Indeed, we were just at the outset of the debate which was to go well into the next century as to whether international law was the product of natural law or was only those principles “positively” ascribed to by states. One of the critical steps in the resolution of the “*Alabama* claims” was adoption by the U.S. and Britain of substantive principles governing the duties of neutral states in these circumstances (another was the tightening of the British Foreign Enlistment Act in 1870).

Of course, this matter did not arise in a political vacuum. While there were major diplomatic developments in Europe during the 1860s, the American Civil War had engaged the attention and interests of the British Government and people. And, although antislavery sentiments remained strong in Britain, certainly during the early stages of the War, it was seen primarily through an economic and political lens. The formal British recognition of the state of belligerency between the Union and Confederacy (which led to Britain’s neutral status) was widely seen in the Union as antagonistic and representing a barely submerged desire to see an independent Confederacy, whose cotton could feed British textile mills. In this light, it was (and is) easy to imagine a British Government turning a blind eye towards the construction of a Confederate naval raider.

Adams’ exasperation with Russell and the British Government turned to anger as the reports of the *Alabama*’s raids flowed in; but he retained a remarkable composure in his official communications on this topic which continued through the end of the War. As early as October, 1863, he conveyed the views of the Lincoln administration and Secretary of State Seward that in order to resolve this dispute “there is no fair and just form of conventional arbitrament or

reference to which we shall not be willing to submit...”³ In fact, this was not the first dispute with the British for which the Lincoln Administration had suggested arbitration as a solution. In 1861, the *Trent* affair had raised temperatures on both sides and Seward had pushed for arbitration before discovering that the other European states agreed with the British and that the U.S. had to back down unilaterally.⁴ Still, Russell deferred any substantive response to Adams, but privately, he had already struggled with the problem. Seven months earlier, Russell had written to Lord Lyons, the British Minister in Washington:

The outcry in America about the ... Alabama is much exaggerated, but I must feel that her roaming the ocean with English guns and English sailors to burn, sink, and destroy the ships of a friendly nation, is a scandal and a reproach. I don't know very well what we can do, but I should like myself to refer the question of indemnity to an impartial arbiter....

and promised to revisit the issue when the outcome of the War was clear.⁵ In fact, in 1865, when actually considering what to say to Adams, Russell's actual objection seems to have been much more narrow than the principle of arbitration or even the “honor” of the British Government in this case. In a letter to Gladstone, he indicated that he was concerned with finding a favorable (or at least impartial) decision maker who would not find for the U.S. solely on the basis of British power and wealth.⁶

When he finally replied formally, in late 1865, Russell adopted a more combative tone that colored much of the negotiations that followed. He acknowledged the American arbitration

³ The language was Seward's, which Adams incorporated in his note to Russell. Seward to Adams, October 6, 1863, RG59 M77/78. Adams to Seward, October 23, 1863, RG59 M30/80, enclosing Adams to Russell, October 23, 1863.

⁴ Witt, *Lincoln's Code*, 168-9.

⁵ Russell to Adams, October 26, 1863, RG59 M30/80. Russell to Lyons, March 28, 1863, in Newton, *Lord Lyons*, I, 99.

⁶ “But if we want to refer to any such Powers the questions whether we have to pay five, ten or twenty millions I have no doubt that arbiters would say ‘England is the tyrant of the seas – she is very rich- let her pay twenty millions—it will do her good’” Russell to Gladstone, September 17, 1865, Gladstone Papers, BL 44292/178.

proposal, but dismissed it as inconsistent with “the dignity and character of the British Crown and the British nation.”⁷ In so doing, he conflated two issues and muddled the waters for years to come. First, he rejected the idea that the U.S. or any foreign body should judge British compliance with its own Foreign Enlistment Act. While not well worded, this was a sensible response for the simple reason that a domestic statute could not give rise to an international duty. However, whether Britain complied with its own domestic statute and whether that statute and the British Government’s enforcement of it met the international legal standard (about which the two sides were nominally arguing) were two distinct issues. Russell went on to further implicitly reject the very concept of international law by arguing that whether the British Government had met an international legal standard with regard to the duty of neutral states could not be submitted to any decision-maker. Russell also made the situation more difficult of resolution by invoking the “honor” of Her Majesty’s Government and equating its alleged breach of duty with “bad faith.”⁸ As we shall see, the exclusion of “national honor” from the scope of arbitration has been a frequent and defining issue in the development of this practice and Russell’s vigorous defense of this exclusion highlighted the problematic nature of such a claim; i.e., it is entirely self-defined and thus essentially preserves the complete discretion of a “sovereign” state. Finally, Russell offered to submit to arbitration any issues arising out of the War on “which the two Powers shall agree.”

⁷ Russell to Adams, August 30, 1865, FO115/435/128. Given the British treatment of other states in terms of arbitration proceedings, this argument is rather more a statement of power than of law.

⁸ Gladstone, then Chancellor of the Exchequer, took issue with Russell’s tone and analysis, even if he agreed (at this point in time) that arbitration was inappropriate, noting that “It seems to me, after the Conferences of Paris in 1856, that a great responsibility is involved in refusing arbitration, unless and until we are perfectly assured in our own minds that the demand for it is, in Parliamentary language, simply ‘frivolous and vexatious.’” Gladstone to Russell, September 2, 1865, Gladstone Papers BL Add MS 44292/164. But Russell would have none of it, defending a sovereign dignity to which all states aspired, telling Gladstone that “I feel that England would be disgraced for ever if such questions were left to the arbitration of a foreign Gov’t.” Russell to Gladstone, September 17, 1865, Gladstone Papers, BL 44292/178.

From one perspective, even at this early stage of discussions, the feasibility of arbitration was acknowledged on both sides and that all that remained was the details of the scope and terms of reference to the arbitrators. A few years later, with a change in British Administration, this would be true; but at this time, Russell was merely throwing a sop to Adams.⁹ Indeed, the idea of submitting this issue to arbitration had already been floated in public. Thomas Balch, an American attorney who had privately suggested this approach to President Lincoln, published a call for arbitration in the Spring of 1865.¹⁰ In September of that year, Francis Lieber, author of the code of military conduct for the Union Armies, wrote to Secretary of State Seward also urging arbitration of the case.¹¹ When Russell published his response to Adams later that year, the *Times* predicted and the *Daily News* urged that arbitration by mixed commission be used to resolve the matter.¹² But there was to be no further action for a while. Adams would return to the U.S. and the British Administration would change before the issue was taken up again.

There was no coherent reconciliation of Russell's views that the upshot of the Alabama affair was a "scandal" with his ultimate unwillingness to use arbitration (even though he privately considered it). A psychologist might speculate that his vigorous response stemmed from guilt, but we have no specific evidence. As we will see, his defense of his and the national "honor" continued for the duration of the dispute. In any event, it was left to the new,

⁹ Adams to Seward, September 8, 1865, RG 59, M30/86.

¹⁰ Balch met with Lincoln in November, 1864. Lincoln was friendly, but skeptical; calling it "a very amiable idea, but not possible just now, as the millennium is still a long way off." T.W. Balch, *Alabama*, 42-3. His article was published in the *New York Tribune* in May 1865. Ibid. 45-9.

¹¹ Lieber to Seward, September 17, 1865, reprinted in the *Advocate of Peace*, November, 1865 360-4. Reale, *L'Arbitrage International*, 35, argues that Balch's concept did not gain any real traction until Lieber endorsed it.

¹² The (semi-official) *Times* acknowledged this as a negotiating stance, predicting that a claims commission "will ultimately be accepted as the most satisfactory method of adjusting the outstanding claims between the two nations." *The Times* (London), October 13, 1865, 8. The *Daily News* noted "It has often been a subject of regret with statesmen and jurists that there should exist no recognized tribunal before which questions of such momentous consequence can be argued and determined. For the sake of peace and civilization it would be well if such a tribunal could be called into existence." *The Daily News*, October 13, 1865; enclosed in Adams to Seward, October 14, 1865, RG 59, M30/86.

Conservative administration to take up the issue after it assumed office in mid-1866. A signal that a new approach might be tried is found in the *Times* later that year, when it endorsed arbitration of the *Alabama* dispute, citing both the fallacies of Russell's national honor and legal arguments, as well as the underlying foreign policy benefits of improved relations with the U.S. and the risk (that Adams and others had already noted) that Britain would actually benefit from a strict compliance with the international law rule regarding neutrals' duties.¹³ One month later, Lord Stanley, the new Foreign Minister took the step that Russell was unwilling to do. He agreed to arbitration of the claims in principle, subject to the specification of the terms of reference and the selection of a neutral umpire.¹⁴

In an alternate reality, the diplomatic story of the "*Alabama Claims*" might have effectively ended here; with Stanley's signal leading to discussions over the following few months to iron out details, followed by a mixed commission, an award and a payment. Russell's prideful response would have been a brief delay in the resolution of this matter shortly after the Civil War ended which would have been applauded by the peace movement in both countries, but not raised to the Pantheon of Dispute Resolution. However, in the event, it took another 4 ½ years and three diplomatic initiatives to reach the stage of a definitive arbitral agreement. The detailed story has been covered in considerable detail ever since, and will only be noted here insofar as it sheds light on the nature, purpose, and process of arbitration.¹⁵

Following this initial British truculence, the diplomatic process from 1867 to early 1872 was a tale of (primarily) American intransigence, table-pounding, and insertion of unrelated issues which complicated the process of agreeing on the terms of arbitration. It included demands for the cession of Canada, a formal British State apology, and the payment of the

¹³ *The Times* (London), "The Relations of Great Britain and the United States," October 30, 1866, 6.

¹⁴ Stanley to Lord Bruce (British Minister to Washington), November 30, 1866, (No. 106, FO414-31/30).

¹⁵ Cook, *Alabama Claims*, is the standard treatment.

“indirect costs” of the Alabama’s disruption of Union commerce, such as for the extension of the War by several years, with estimates presented in the billions of dollars. It featured signed-but-unratified treaties, spats between the State Department and its Ministers in London, between the Senate and President, and between Britain and Canada.¹⁶ There were the complications of multiple administrations in both Washington and London and British struggles with pride and reactions to its changing diplomatic environment in Europe. However, the essential point was that from 1866 on, arbitration was the agreed-upon solution. From the British perspective, they made clear that they would never admit they were wrong in allowing the Alabama to be built in and escape from Liverpool. They were, however, willing to accept a decision by a third party that they had done so.¹⁷ The Americans seized upon the implicit admission of British responsibility to pursue their agenda in a way that, if not elegant, was entirely ordinary from a diplomatic perspective. They did so from a position of increasing confidence and self-assertion that turned the tone of the diplomatic relationship. From Adams’ initial suggestion, the American stance became increasingly one of deferral of British arbitration suggestions and adding issues to the diplomatic mix. Both sides repeatedly cited “public opinion” as the basis for standing their ground. This raises broad questions about the nature of “public” opinion in each of these not-exactly-democracies where symbiotic relationships between elected officials, political elites, and the press made both the “public” and its “opinion” quite difficult to identify. For the Americans,

¹⁶ Not the least of the ironies in this episode was the fact that Charles Sumner, Chairman of the Senate Foreign Relations Committee, threw many rhetorical and substantive obstacles in the way of arbitration and other settlement proposals. This was the same man who, in the 1840s was the darling of the American Peace movement for his stirring calls for the replacement of war by arbitration. This evolution from idealist to partisan states’ man illustrates the distance between the mid-century peace movement and the realities of state practice. Compare Sumner’s 1849 speech, *War System*, with his Senate speech on April 13, 1869, reprinted in Balch, *Alabama Arbitration*, 96-107. In particular, Sumner, as Senator, was a vociferous champion of the so-called “indirect claims” which threatened to derail the entire arbitration process in 1871-3. See also, Cook, *Alabama Claims*, 157-62.

¹⁷ Hamilton Fish Diary, John Bassett Moore typescript, September 15, 1870, September 18, 1870, January 9, 1871. Fish Papers.

that “public opinion” seems to have been driven much more by substantive issues that were often ancillary (i.e., Canadian annexation or fisheries, Irish-American politics) which melded into a generic anti-British stance, but was still centered on resentment of the apparent British ‘tilt’ towards the Confederacy during the War. On the British side, the sentiment was primarily focused on deprecation of apparent American high-handedness. In neither case was arbitration *per se* a central issue.

In February, 1871, the two parties finally agreed to convene a diplomatic conference to frame solutions for all the major outstanding issues between them. However, even this process was fraught with artifice and disingenuity. Because of the convolutions of the negotiations so far, the British felt that they could not again be seen to ask for an arbitration of the Alabama issues, “so it was arranged that the British should propose a commission to settle the Canadian disputes, and the United States should agree, provided the [*Alabama*] claims were included....To make it more convincing the dates of the letters were altered.”¹⁸

The “Joint High Commission” met in Washington from March through May, 1871. In addition to the “*Alabama* Claims,” it addressed British claims arising from the Civil War, the San Juan Islands boundary at the western edge of the continent, access to Canadian fisheries, and Canadian access to American markets. The result was the Treaty of Washington which created four arbitral procedures.¹⁹ In keeping with the increasingly common trend, only one procedure, the San Juan Boundary, relied upon a head of state (the Emperor of Germany) as the decision maker; the others were mixed commissions. The general claims, and fisheries compensation commissions utilized a fairly standard 1+1+1 structure. These other proceedings were successful

¹⁸ Cook, *Alabama Claims*, 166 n.38. citing Sir Jonathan Rose (unofficial British emissary to Washington) to Granville, February 1 and 2, 1871, FO5/1298.

¹⁹ Treaty of Washington, May 8, 1871. Malloy, *Treaties, Conventions*, I: 700. A fifth, a mixed commission to evaluate individual claims if the Geneva Tribunal chose only to establish liability, was never utilized. Art. X

and generally unremarkable, so we will not pursue them. However, the “Alabama Claims” was to be heard by what became known as the Geneva Tribunal, a distinctive 1+1+3 structure; i.e., one member named by each party and one member named by each of three third parties.

Perhaps the most significant aspect of the Treaty of Washington and the one most illustrative of the underlying nature of arbitration was the determination of the rules of decision to be applied by the Geneva Tribunal. These were the so-called “Three Rules” which specified the nature of a neutral state’s obligations. While these rules were formally acknowledged not to have been “in force” at the time of the *Alabama* incident (whatever ‘in force’ meant in the context of nineteenth century international law), they were specified as providing the standard by which the Geneva Tribunal was to assess the conduct of the British Government at the time. And, while they were never formally acknowledged as such, even in internal British diplomatic correspondence, it is clear that the acceptance of these particular rules effectively determined the outcome of the arbitration on the issue of liability.²⁰ This was the compromise between the American demand for British admission of liability and the British insistence not only that there be a third-party source of the determination, but that the discretion of the arbitrators be limited.²¹ The rule of law, however constrained, could be pointed to as being “responsible” for the result, and those very constraints would ensure that national “honour” was not besmirched. It was the price that Britain paid for the resolution of the matter.²²

²⁰ Allen, *Anglo-American Relationship*, 514; Bingham, “Alabama Claims Arbitration,” 23. Ralston, *International Arbitration*, 198.

²¹ Atlay, *Victorian Chancellors*, 408, stresses how Chancellor Palmer (later Lord Selbourne) persuaded Gladstone and the Cabinet to accept the Rules “rather than submit to the whim of the arbitrators any question affecting good faith or honour.”

²² Lord John Russell, in his attack on the treaty in the House of Lords, characterized the British agreement to the rules “looks like paying a sort of tribute in order to buy peace.” *Hansard*, 3d ser., vol. 206 (June 7, 1871), col. 1825.

While the negotiators went to great lengths to specify the “Three Rules,” and the terms by which they would be applied in Geneva and advanced to become a general standard of international law thereafter, the second most significant outcome of the Treaty of Washington was the absence of any express treatment of the claim by the U.S. that Britain be responsible for the “indirect” costs of the Alabama raids.²³ This is particularly surprising in light of the prominence of this issue during the diplomatic negotiations and domestic political debates (especially in the U.S.) and the grandiose size of some estimates of these claims. It is impossible to tell the degree to which each side was aware at the time of the ambiguity raised by the lack of express language on this issue, it is clear that both sides later thought that they had prevailed in preserving their position in the Treaty.²⁴ The British Government had taken the view that the idea of consequential damages was not sanctioned in international law and that it could not be liable for such claims. Moreover, they had repeatedly emphasized that they would never agree to risk an arbitration over the huge sums (\$2 billion was mentioned by Senator Sumner at one point). From the American perspective, these were real costs resulting from British negligence (or malevolence); they were also an excellent point from which the U.S. could argue that the cession of Canada would be appropriate compensation. Nonetheless, the absence of express language addressing these claims enabled the British to believe that they were no longer on the table even as the absence of an express exclusion enabled the U.S. to believe that the claims remained viable. There was considerable domestic political energy on this issue in both countries and the Governments, after nine years of diplomatic wrangling, may have each felt that it was better to

²³ The “indirect claims advanced in the American filing to the Tribunal included lost shipping fees for cargos carried on British ships due to fear of loss, increased insurance payments, and, most significantly, the costs of the Civil War extending longer than it might otherwise have. United States, *Argument*.

²⁴ Cook, *Alabama Claims*, 208-16, makes the case for Fish’s disingenuity.

get through to a signed and ratified arbitration agreement and deal with the ambiguity later. They came within a whisker of being wrong.

As the diplomats went home and the lawyers began to prepare their briefs for the Tribunal, there was considerable excitement in the peace community about the viability of arbitration. The American Civil War and the British role in the Crimean War had eviscerated their respective peace movements. On the American side, while the number of their notices of arbitration around the world had picked up a bit in the 1860s, there was no special attention apparently paid to the regular public airings of the inter-governmental negotiations on the *Alabama* matter.²⁵ The British peace movement was more attuned to the process, with regular updates, but little apparent engagement with the issue. Indeed, prior to the announcement of the Treaty of Washington in the spring of 1871, there was no indication of either contacts with the respective governments or any general public campaigns. Nonetheless, the announcement of the treaty became the basis of a wholesale regeneration of the movement. The American Peace Society convened a “jubilee” to celebrate what it considered “one of its greatest victories,” and drew the largest crowd ever to attend a peace event in the U.S. to date.²⁶ No similar activity took place in Britain.

Geneva: A Deceptive Triumph

Even before it reached its judgment in favor of the United States in 1872, the Geneva Tribunal was hailed as the definitive example of the effectiveness of the arbitration process in averting war and in ushering in the rule of law in the context of the international system. As we have seen, its gestation was hardly a model of diplomatic effectiveness or expedition, or of

²⁵ The Lieber letter to Seward of 1865 was published. The *Advocate of Peace*, the leading U.S. organ of the peace movement, only made two other references to the issue before the arbitration tribunal was established.

²⁶ *Advocate of Peace*, January, 1872, 1-2.

public candor. Nor did this process result in an opportunity for a even a quasi-judicial proceeding. The two parties merely relegated to a show trial the production of a decision whose outcome was virtually pre-determined. Indeed, the *Alabama* case, rather than demonstrating the efficacy of an expanded role for juridical dispute resolution, confirmed the continuation effectiveness of state power. States would condone the use of arbitration only for matters whose scope had been carefully circumscribed both as to their political risk and impact and as to the specific nature of the issue to be decided. As we now reach the actual arbitral process in Geneva, we will see that this idealized paradigm was, in fact, even more problematic.

The first indicator that the Tribunal was less than judicial in orientation was in the selection of the Member for the United States. Britain had named its Lord Chief Justice, Alexander Cockburn. Brazil, Italy and Switzerland had each chosen seasoned diplomats or legal scholars. The U.S. selected Charles Francis Adams who, while perhaps its most distinguished diplomat, had been a central participant in the very dispute under scrutiny. It would be comparable to the United States nominating Colin Powell to an international arbitration panel concerning the American invasion of Iraq in 2003. The appointment caused a considerable stir in Britain as indicative of a biased process; but there was little to be done. Cockburn, too, had already taken a clear stance on the issues prior to the case beginning. Thus, while off-setting partisanship might not be too troublesome (and likely was merely the norm for parties' appointments to mixed commissions), the notoriety of Adams' situation was remarkable.

Of much greater significance was the method by which the cancellation of the arbitration was avoided. According to the procedural rules laid down in the Treaty, the U.S. was to submit its primary argument on December 15, 1871 and the British response was due on June 15, 1872. Over the Christmas holidays, the British Government and public discovered that the U.S. had

made an extensive and vigorous argument that the indirect claims were included in the arbitration which some claimed justified the payment of over \$2 billion. In response to one of the first resulting British protestations, U.S. Secretary of State Hamilton Fish told the British Minister that the U.S. would not withdraw its argument but “would be content to see the indirect claims rejected” by the Tribunal.²⁷ In the ensuing diplomatic flurry continually engaging diplomats in both Washington and London, cancellation of the arbitration was repeatedly suggested, but there was no agreement on the amount Britain might pay and besides, for Fish, it was important for domestic political reasons that Britain be seen to have taken the next steps towards compromise.²⁸ A few days later, he told the British Minister that he didn’t think the claim had much merit.²⁹ As negotiations to salvage the arbitration continued, Fish even asked Adams, as a member of the Tribunal, to pre-announce his aversion to the American claim.³⁰ During April and May, the voice of public opinion on both sides spoke. Charles Sumner, lion of the pre-War American peace movement, now in the Senate, vigorously opposed backing down and Lord John Russell introduced a motion in the House of Lords attacking the entire arbitration.³¹ In May an agreement was finally struck to add a clarification to the treaty under which the indirect claims would be disposed of with due acknowledgement of the U.S. belief that they were due. The Senate, however, insisted on changes which the British would not accept, and the attempts to patch up the settlement collapsed.³²

Thus, as the date for the reconvening of the Tribunal approached, it seemed that diplomacy had failed; the U.S. would maintain its claim and that the British side would refuse to

²⁷ Cook *Alabama Claims*, 218, citing Fish Diary February 3, 1872.

²⁸ *Ibid.*, 219, citing Fish Diary, February 4 & 6, 1872.

²⁹ *Ibid.*, 221, citing Fish to Schenk [U.S. Minister to London], April 16, 1872.

³⁰ *Ibid.*, 223-4, citing Adams Diary, April 19 & 24, 1872, and Fish Diary April 20, 1872.

³¹ On Sumner, see Cook, *Ibid.*, 230. On Russell, see Cook, *ibid.*, 229, and *Hansard*, 3d ser., vol. 206 (12 June 1871) cols. 1823-901.

³² Cook, *Alabama Claims*, 229-32.

proceed with the arbitration. On June 15, the Tribunal re-convened, but the British declined to go forward and asked for an adjournment. The Tribunal then recessed for the weekend. In a frenzy of activity involving lawyers and diplomats from both countries, as well as both Adams and Lord Chief Justice Cockburn, over the following four days, they agreed that the Tribunal would, *apparently spontaneously*, decide that the indirect claims could not be heard. This decision, later perceptively described by the *Economist* as a “coup d’etat of the arbitrators,” was accepted a few days later by both sides officially and the arbitration continued on the narrower and agreed upon scope.³³ In September, 1872 the Tribunal issued its award in favor of the United States in the amount of \$15.5 million.³⁴

From Adams’ diary, it appears that he played the central role in this process. He feared that the Senate’s rejection of the treaty amendment in May would lead to further significant delays that might completely undermine not only the Tribunal for the Alabama Claims, but also the entire Treaty of Washington and the arbitration process as a concept. He was also concerned that his wife would not agree to return to Geneva the following year, even if the process was restarted. Finally, he recognized that neither party could be seen to make the first concession on the indirect claims issue. The other members of the Tribunal were equally opposed to an adjournment.³⁵ Thus, he contrived to propose what he frankly described as an “extrajudicial” solution and have the Tribunal take the initiative and exclude the indirect claims. His diary makes clear that the Tribunal, when it adopted this plan was fully cognizant of its “extrajudicial”

³³ “The Geneva Arbitration,” The *Economist*, (London) June 29, 1872, P. 797. Cook 233-6. It is likely that the *Economist* was speaking only of the result of the Tribunal’s action and that they did not know anything of the behind-the-scenes machinations.

³⁴ A copy of the decision can be found at United Nations, *Reports of International Arbitral Awards*, 39:125-34. The money was paid to the U.S. on September 9, 1873. The receipt (as of 1936) was still hanging on the wall at Downing Street. Nevins, *Hamilton Fish*, 566.

³⁵ Cook, *Alabama Claims*, 236.

nature.³⁶ Since Adams was not a judge (although Lord Cockburn was), and the public expectations of the arbitration process by the early 1870s had not yet reached a stage where the full trappings of judicial regularity would have been expected, the significance of his characterization lies not in any contemporaneous deception, much less any formal breach of propriety, but in revealing the underlying *political* nature of the arbitration process in this case and, therefore, the problematic mythology which subsequently arose.

As might be expected, the behind-the-scenes machinations leading up to the Tribunal's announcement on June 19 were not publicized at the time.³⁷ Indeed, there are only the barest hints of it in the diplomatic correspondence on both sides. The first public mention of the issue was a masterpiece of legal elision and understatement. Caleb Cushing, one of the American counsel, reviewed the entire situation in 1873 and, as to this issue, merely noted that "consultations took place between the Counsel of both sides and the respective Agents...and, with more or less formality, among the Arbitrators...."³⁸ There were vague rumors of machinations and allegations of corruption of the Tribunal by the Americans or Russians, but nothing materialized.³⁹ The first publication of this aspect of the story came in 1893 in Bancroft Davis' review of his experiences at Geneva.⁴⁰ This revelation, which has since been noted by Moore (1896), Hackett (1911), and Cook (1975), is indicative of the isolation of different strands

³⁶ Adams Diary, June 17, 1872. Adams used this specific term several times in his unusually comprehensive discussion of this situation in mid-June, 1872. The fact that even Cook blithely summarizes this aspect of Adams' diary in a phrase, is typical of the pervasiveness of the overarching mythology of the case's success.

³⁷ The *Times* cited Adams as the "true benefactor" of both countries in resolving this matter, although, since it did not provide any details on the behind-the-scenes process, we cannot tell if this was merely due to his assumed role in eliminating his own country's indirect claims or whether more was known than was said about his actual involvement as the author of the Tribunal's action. *Times* (London) June 28, 1872.

³⁸ Cushing, *Treaty of Washington*, 69.

³⁹ Manchester Guardian, June 22, 1872.

⁴⁰ Davis, *Mr. Fish*, 98-102. This was confirmed on the British side in 1898 by Roundell Palmer, the British counsel in the case. *Memorials*, I:236-7. Adams' Diary was not published until the 1950s.

of the historiography of this field.⁴¹ From the perspective of diplomatic history, this interesting incident was not shocking and has been regularly alluded to. However, in terms of judicial regularity and as a model of arbitration, the behavior of both the parties' representatives and the members of the Tribunal was problematic. Diplomatic histories have described the incident as "extra-judicial;" international lawyers, historians and advocates of arbitration have air-brushed it away, leaving only the formal proceedings and award.⁴²

Yet, given the central role that the "*Alabama* claims" has played in every study and most discussions of arbitration since its resolution, this gap in the historical analysis needs to be closed. The participants on both sides knew they were acting outside of any sense of judicial propriety. This is not an indictment, but an appreciation of the actual nature of the arbitration process in the middle of the nineteenth century. The later constructs of that history, including those written not so many years later, have sought to build an edifice of juridical objectivity, neutrality, and fairness. In their desire to suppress war and constrain states' discretion to act in their self-determined self-interest, they have created a mythology of the rule of law. In fact, the *Alabama* case demonstrates more clearly and in more detail than any other incident that the effort to separate the legal from the political remained aspirational. States would pursue their interests, their "honor," and their domestic political stability regardless of legal niceties. Diplomatic appearances would be preserved and, indeed, created. For example, in the aftermath of the Tribunal's exclusion of the indirect claims, the *Manchester Guardian* praised the decision, but noted that neither party "would probably have agreed beforehand to be bound by, or

⁴¹ Moore, *History and Digest*, I: 643-5; Hackett [Assistant to U.S. Counsel in the case], *Reminiscences*; Cook, *Alabama Claims*.

⁴² Cook, *Alabama Claims*, 233-40 provides the most comprehensive reconstruction. Nevins, *Hamilton Fish*, 546-50, provides an accurate, if shorter treatment. Mowat, for example in his 1925 review of British-U.S. relations, noted that Adams had led the resolution of the problem, but made no mention of the back room machinations of the parties, counsel and Tribunal members. Mowat, *Diplomatic Relations*, 219.

consented to invite, [the Tribunal's] decision."⁴³ In fact, the two states not only had done so, but had conspired to do so! Arbitration was thus no different than other aspects of diplomacy in terms of its use as a tool to enable states' men to preserve and enhance how they were perceived for their individual and collective amour-propre, political standing and national pride.

On the other hand, the efforts made to preserve the appearance of legal regularity was some indication of a change in mentalite, as least insofar as states' men felt that their perceived responsiveness to public opinion would be enhanced by the impression of legality, regularity, and propriety. From this perspective, the efforts of the peace movement to educate the populace about war and peace, together with a variety of other messages communicated by the state and society, were likely on the right track, even if their pedagogic effect cannot be historically assessed. Similarly, whether the "public" understood states' men's messages or whether states' men understood anything coherent under the rubric for "public" opinion is probably not verifiable. So, all we can say is that the language that was used *did* change, reflecting a change in beliefs about the value of appearing legalistic; and perhaps that was enough. As we shall see in the next section, it certainly seems to have been enough to help launch the "*Alabama*" on a mythic voyage of popular acclaim.

The Myth of the "Alabama Claims"

Ladies and Gentlemen!...the first International Tribunal at Geneva has finished its work; this means that a war between two nations, or what would have been worse—a war against the future, has been prevented; that a hundred thousand Americans and as many Englishmen have to thank this day that they are alive. The Alabama Question has been settled not to the advantage of America, but of justice, not to the injury of England, but for the good of future generations. Does

⁴³ Manchester *Guardian*, June 28, 1872.

our Spanish friend still believe that wars are unavoidable?...To-day, as an Englishman, I ought to feel depressed, but I feel proud on account of my country, as an Englishman always does, you know; but to-day I have a right to be so, for England is the first European Power which has appealed to the verdict of honorable men, instead of to blood and iron.

—A character in *Samvetskal*, by August Strindberg ⁴⁴

International law today is usually dry stuff and its appearance in popular culture or even awareness is quite rare. Even the 2014 arbitration award of \$50 billion against Russia for breach of international investment treaties brought by certain investors only flashed throughout the headlines for a couple of days.⁴⁵ So much so that it is difficult to imagine the widespread reaction to the resolution of the Geneva Tribunal in the late summer of 1872. Newspaper coverage, if not immediate, was global.⁴⁶ The decision was saluted in speeches in legislatures around the world. It was featured in British music halls⁴⁷ and memorialized (also in verse) by

⁴⁴ August Strindberg, *Samvetskal* (1884), translated as “The German Lieutenant,” Claude Field trans., London: Laurie (1915)

⁴⁵ *Hulley Enterprises v. Russian Federation*, PCA Case No. AA 226, July 18, 2014.

⁴⁶ *Madras Mail*, September 17, 1872, 2. *Panama Star and Herald*, October 1, 1872, 2.

⁴⁷ “Have you in the papers read,
Of the Alabama claim,
How a naughty Yankee boy,
Tried to play his little game?
How he sent his Ma bill,
Thinking her it would annoy,
On his parent to impose,
What a very naughty boy!”

The opening lines of Frank W. Green’s seven page musical score: “The Alabama Claims, or How the Little Bill was Settled, a Comic Medley, showing what Yankee Doodle asked & What he Got.” (1872), BL H.2345./4997-4998.

Roundell Palmer, British counsel in the case.⁴⁸ Of course, the peace community was rhapsodic and the word “arbitration” was on everyone’s lips. Strindberg captured the nobility of spirit, the yearning for peace, and the idealism that characterized the discussions of the day. That he thought it worth including in a story written some years later is remarkable demonstration of the *zeitgeist*. The anxious wrestling with legal principles and documents, the diplomatic desperation, interspersed with multiple rounds of talks and negotiations were either forgotten or never seen outside a very small group of participants on the two sides.

The reaction in the British press to the decision was a combination of resignation and relief; there was little hand-wringing over the £3 million award and more attention was given to the implications for the future of the duties of neutrals during wartime and the implications for British shipbuilding and maritime commerce. *The Observer* noted that, given the framework established by the ‘Three Rules,’ the actual arbitration was merely “to register a foregone conclusion.” In its view the process showed that arbitration had to be premised on situations where both parties had agreed to find a peaceful solution and was thus effective only within “very narrow” limits and not as a general panacea for war.⁴⁹ *The Times* was more encouraging, if portentous, seeing the case as one in which Britain sacrificed its pride to lay a “good foundation” for “future generations”; and criticized both “enthusiasts” and “skeptics” of the practice in the

⁴⁸ “In the City of noises, where Freedom rejoices
All through the long summer to drive away sleep,
There is played a new drama, ‘tis called ‘Alabama’,
Or, ‘How the world’s peace Arbitration shall keep.’
Whether feeble or strong, it is certainly long,
And the actors are numerous, some great and some small:
I will run through them lightly, and sketch very slightly,
Under signs of dumb letters, the features of all.”

The opening lines to an unnamed verse by Roundell Palmer (later, as Lord Selborne, Lord Chancellor of Great Britain) Selborne Papers, Lambeth Palace Library, MS2502 (undated, but probably 1886).

⁴⁹ *The Observer* (London), September 15, 1872.

abstract.⁵⁰ Overall, the case made arbitration “more fashionable” in Britain.⁵¹ In the U.S., the reaction ranged from satisfaction to celebration. The American Peace Society viewed it as “the grandest triumph of Christian civilization,” which showed the “practicability of a general application of the principal of Arbitration.”⁵² The sentiment in the British peace movement was similar, if more muted in tone; the instigation to action, however, was more direct.⁵³

Henry Richard’s Motion

Among the celebrants of the “successful” award of the Geneva Tribunal was Henry Richard, for over twenty years the Secretary of the London Peace Society and, since 1868, a Liberal MP for Wales. Having struggled to keep the peace movement going in the difficult years during and after the Crimean and American Civil Wars, Richard sought to build on the revival of interest in arbitration occasioned by the revulsion against the atavism of the Franco-Prussian War and the inspiration of the Alabama decision.⁵⁴ For several years, he had worked on securing a vote in Parliament endorsing arbitration, building on Richard Cobden’s noble, if unsuccessful, motion of 1849. In August, 1871, he gave notice of his intent to introduce such a motion, but the apparent near-disaster of the indirect claims issue in 1872 had darkened the view of arbitration among the British political class and led Richard to defer the formal proposal of his motion.⁵⁵ In the afterglow of Geneva, he had his chance. Following the Geneva Award, the entire (and increasingly class-diverse) British peace movement was energized in support. During 1872 and the first half of 1873, meetings were held across the country, sermons were preached and

⁵⁰ The *Times* (London), “We have lived to see many strange things, but.”, September 19, 1872, p.9.

⁵¹ Ceadel, “Alabama,” 112. However, there was some disparagement of the process, particularly the selection of the three ‘neutral’ arbitrators, whose qualifications the British questioned. This dealt a “severe, if only temporary, blow to the general principle of International Arbitration.” Atlay, *Victorian Chancellors*, 410.

⁵² “The uses of the Geneva Arbitration,” *Advocate of Peace*, October, 1872, Pp. 221-2.

⁵³ Ceadel, “Alabama,” 101.

⁵⁴ Ceadel, “Alabama,” 109

⁵⁵ Laity, *British Peace Movement*, 53.

petitions and letters (with more than one million signatures) were circulated and submitted to the Gladstone government and MPs of every stripe.

On July 8, 1873, Richard introduced his motion calling upon the Government open discussions “with Foreign Powers with a view to further improvement in International Law and the establishment of a general and permanent system of International Arbitration.” It was in a way, a step backwards from Cobden’s specific proposal to insert arbitration clauses in each treaty, but by calling for a general system of arbitration, it expanded the vision for arbitration’s possibilities. Richard’s speech reiterated the by-then usual critique of excess armaments and war mentality, it reviewed a lengthy list of “successful arbitrations” to date, culminating in the Geneva Award.⁵⁶ Gladstone opposed the motion, arguing not against arbitration per se, but against a broad invocation of it, rather than letting arbitration be used on an ad hoc basis and grow incrementally in there international system. He stressed the difficulties of getting states to agree to arbitrate in the abstract and of enforcement of arbitral awards. The House was not well attended that evening and Gladstone’s forty-five minute rebuttal (brief for him) was not especially hard-hitting. Still, everyone was stunned when the motion was approved by a vote of 98-88.⁵⁷

Gladstone’s stance in this debate reflected the challenges that arbitration presented to political leaders and the difficulty of characterizing a liberal as a “states’ man.” Gladstone had notably admonished Lord John Russell over the latter’s summary dismissal of Adams’ arbitration proposal back in 1865. And, upon becoming Prime Minister in 1868, Gladstone had continued the Conservatives’ willingness to negotiate an arbitration agreement and it was ultimately his decision that sanctioned the agreement reflected in the Treaty of Washington and the

⁵⁶ *Hansard*, 3d series, vol. 217, (July 8, 1873), cols. 52-73.

⁵⁷ *Ibid.* cols. 73-93.

perseverance with that agreement during the delicate days of the dispute on the “indirect claims.”⁵⁸ These pro-arbitration positions were to be expected of someone who spoke regularly about the importance of the “public law of Europe” and sought consensual solutions to many of the diplomatic issues of the day. In doing so, he took a large step away from Russell’s focus on “national honor,” towards solving international disputes in a civilized and regularized way, without engaging with who was wrong and who was right.⁵⁹ Yet, Gladstone’s opposition to Richard’s Motion in 1873 and a parallel skepticism towards Cremer’s Motion in 1893 make clear that neither his endorsement of arbitration in either specific cases nor as a general principle, drove him to eliminate the discretion which he thought necessary for each state to maintain in the course of diplomatic practice.⁶⁰

The overall impact of Richard’s motion was potent as a symbol but of no immediate effect. Even its symbolic value had to be crafted out of the dubious facts of mustering less than 100 “ayes” (out of more than 600 MPs) one evening on an un-whipped vote. From the long-term progressive perspective of the peace movement, however, this incremental step was enough. Both the *Economist* and the *Times*, among other papers, criticized the motion as unrealistic and ill-considered in the light of international realities.⁶¹ Gladstone’s opposition reflected an administration which found arbitration of use, but in highly selective circumstances. Granville,

⁵⁸ Ceadel, “Alabama,” 104. It is quite clear that Gladstone was fully engaged in the issues. Gladstone to Granville, October 20, 1870, PRO 30/29/58 and Ramm, *Political Correspondence* I:145; April 8, 1871, PRO 30/29/59. and Ramm, *Political Correspondence*, I: 236. Ripon de Grey to Gladstone, March 20, 1871, BL 45314. His files were replete with *Alabama*-related documents. See, e.g., BL 44619/29, 62, 87, 98, 120; BL 44620/48, 94.

⁵⁹ Matthew, *Gladstone*, 186-8.

⁶⁰ *Hansard*, 4th ser., vol. 13 (June 16, 1893) cols.1249-59. Gladstone constantly sought a balance between pragmatism and a view that “that international politics had entered upon a morally progressive age in which conscience could not only be applied to foreign policy, but in which ethical norms of interstate conduct were gaining a general acceptance.” Schreuder, “Gladstone,” 97.

⁶¹ “Mr. Richard’s Motion,” *The Economist*, July 12, 1873, p. 835. “The Government are unlucky in evening sittings,” *The Times* (London), July 9, 1873, 9.

the Foreign Secretary, fairly oozed condescension in drafting a reply for the Queen (the motion was formally a request to the monarch) that promised to continue to promote arbitration “when it shall seem likely to be attended with advantage.” In his cover note to the Queen, he offered a response to what he called “the (foolish) address of the House of Commons on Arbitration. The Cabinet thought it the best way of treat it, if your Majesty approves.”⁶² No warmer welcome was to be found from the Conservatives, where the not-yet-illustrious Marquis of Salisbury compared arbitration to “competitive examinations and sewage irrigation [as] one of the famous nostrums of the age, [upon which] future ages will look with pity and contempt.”⁶³ Nonetheless, the success of Richard’s motion gave peace movements across the world a ‘top-up,’ and it was the start of a lengthy and continuous effort to engage legislative support for arbitration across Europe, Britain and the U.S. over the following thirty years. Richard found himself in high demand as a speaker both at home and abroad as a standard-bearer for a politically engaged peace movement.

Conclusion

While the Civil War was still going on, Richard Cobden had estimated the actual damages caused by the *Alabama* at the same £3 million that was awarded by the Tribunal more than seven years after his death.⁶⁴ Charles Francis Adams proposed resolution of the issue by arbitration in 1863 while the Alabama’s depredations were still on-going. Lord John Russell agreed in principle that arbitration would be appropriate in private in 1863 and publicly in 1865. Clearly, the concept and principle of arbitration as a means of peacefully resolving this dispute

⁶² Earl of Granville to Queen Victoria, July 11, 1873, PRO 30/29/36.

⁶³ Hansard, 3d ser., vol. 39 (March 3, 1873), col. 1171. Twenty years later, as an experienced Prime Minister and Foreign Minister, Salisbury was later to make extensive use of arbitral regimes.

⁶⁴ *The Times* (London), “It is now more than six and a half years,” May 13, 1869, 8. The sum represented about 3% of the British national government budget and 5% of the U.S. national government budget in 1873.

between the U.S. and Britain was not the problem and its achievement seems a dubious cause of great acclaim as the leading example of this method. That it became so shows not only the shared success of states' men, peace advocates, and international lawyers in constructing a set of useful mythologies around the case, but illuminates as well the semantic and epistemic distance between these groups; they were talking past each other. This was more than the inevitable and abstract distance between theory and practice. The "*Alabama* Claims" shows, more than any other example of arbitration prior to World War I, that

- 1) arbitration could not function except as the product of diplomatic negotiations between two states,⁶⁵
- 2) the difficulty of setting the terms of reference for the arbitration was directly related to the dispute's significance, complexity, and political entanglements of "national honor," or "vital interests", i.e., to the likelihood that war would arise from the dispute, and
- 3) the functioning of the arbitration process was inherently political and could not be isolated as an idealized juridical process.

The epistemic distance between arbitration advocates and states' men is reflected in the subjects and nature of the issues which they addressed. The former were eager to demonstrate the venerable history of arbitration and its conceptual feasibility and to promote procedural solutions to the structure and operations of the arbitral process.⁶⁶ The diplomatic negotiations, whether ambassadorial or in the Joint High Commission, were focused on the scope of issues to be included in the arbitration and the substantive rules of decision. Arbitration advocates rarely engaged with these latter issues and states' men would deal with the procedural issues only secondarily. The stance of Lord John Russell did not oppose arbitration in practice (he had endorsed it on several prior occasions); his aversion was rooted in a sense of personal and national pride which contained no small portion of the arrogance with which one might characterize the British Empire in the middle and late nineteenth century. The case may have

⁶⁵ Martin Ceadel makes a similar assessment. Ceadel, "*Alabama*," 108.

⁶⁶ As shown by the interventions of Balch and Lieber.

marked an underlying shift in Anglo-American relations from contention punctuated variously by agreements or wars from 1770-1870 to amicability punctuated by disagreements thereafter; but the choice of arbitration was a result of both sides' underlying assessment of their international situation, not the cause of it.⁶⁷

Where the two groups aligned was in celebrating the *apparent* success of the arbitral process. The notoriety of the underlying events, the lengthy duration of the diplomatic negotiations, and the contention over whether arbitration should or could be used all combined to make this case distinctively public. Politicians of the era were increasingly sensitive to their public appearance, making the nature of the settlement process itself a valuable political asset in asserting "statesmanship" and "civilized" international dispute resolution. Arbitration advocates, who had only a tangential connection to the entire proceeding, were eager to claim at least momentum for their cause. The use of international adjudication was sanctioned and as long as states' men controlled the process, it was no threat to their sovereignty and discretion. In terms of actual state practice, however, there was little effect. The number of *compromis* entered into in the decade after the Treaty of Washington was about the same as in the previous decade (and would have been only half that but for the burst of activity stemming from the 1878 Congress of Berlin). Overall, the growth in *compromis* only began in the mid-1880s and it was not until the 1890s that they regained the prominence provided by the "*Alabama Claims*."

⁶⁷ Jenkins, *Gladstone*, 356. Allen, *Anglo-American Relationship*, 517.

Chapter 7: Law, History, and Progress

Arbitration advocates were energized by the “successful” conclusion of the “*Alabama* Claims” and reaction to the wars of German unification. While this did not translate into any changes in state practice in the following decade or so, a revived and broadened peace movement found some degree of common cause with the newly emerging community of international legal scholars and overlapped with the increasingly organized international life that encompassed both governments and societies that would eventuate in the surge of arbitration agreements over the quarter-century beginning in the mid-1880s. The ideas and proposals that were the shared subjects of these overlapping groups partook of what we have come to call “liberalism” and reflected a range of “modern” sensibilities, particularly the idea of “progress”, its concomitant need for a historical foundation, and the simultaneous invocation of the state as the foundation of order and concerns with its potential for untrammelled power.

The combination of positivism and professionalism in late nineteenth century international legal circles created both a history and a project of international law which was rationalized and which sought a sharp distinction from the fluid, murky, and political nature of diplomatic practice of arbitration. The emerging international law community, in conjunction with the peace movement, sought an idealized, rational and controllable mode of dispute resolution. In doing so, it drew on the efforts of earlier domestic and international practitioners, the updated principles of substantive international law derived from the classic theorists, and the public energy spurred by the peace movement. The international legal community did not fully usurp the project of arbitration, but injected analysis, organization, professionalization and process. The result was a

more refined tool, one that positioned international jurists as the fiduciaries of an international trust.

A critical premise of this project was the belief that just as liberal constitutionalism was a necessary limit on the power of the state within the domestic sphere, its counterpart, international law, would similarly serve to constrain the impulses of the state on a global level.¹

Internationalism was manifested simultaneously in the discourse of the elites, the organization of the public sphere on a trans-national basis, and the emergence of international organizations.

Amid the solidification of nationalism as the essential principle of social organization, arbitration was a key component of an alternative vision in which conflicting national interests could be managed. At the same time, the strengthening role of the state required even those who were wary of it to work through its channels and run the risk of co-optation. In this chapter we will see how these intersections created the premises and models for the doomed push for arbitration that marked the end of the century.

The Nature and History of International Law

International law in the twenty-first century is much more refined, institutionalized, and, one might say, domesticated than it was in what Martti Koskenniemi calls its ‘rise-and-fall’ period (from the 1870s to the 1960s); and radically more so when compared with international legal thought before then.² Indeed, the use of the term “law” to describe this early body of ideas and principles is highly problematic and not merely in the Austinian semantic which reserved “law” for a set of enforceable rules. For example, such phrases as “the public law of Europe,” which today brings to mind the vast body of European Union regulations and which ninety years

¹ See generally, Pinder, “Federal Idea.”

² Koskenniemi’s *Gentle Civilizer of Nations* (2006) is a ground-breaking approach to the ideas, practices and—as he calls them—the sensibilities of this area upon which I have been glad to draw.

ago connoted the Versailles settlements, referred to a set of (more-or-less) shared principles and sensibilities arising out of the post-Napoleonic arrangements, but hardly codifiable in their essence. As we have seen, it was at the Paris and Vienna peace conferences in 1814 and 1815 that the use of agreed-upon dispute resolution mechanisms first blossomed, the first permanent international organization was institutionalized and the arrangements for the management of Europe were first written out at length. What was called *jus gentium* or the law of nations (“international law” was Bentham’s neologism of the late 18th century) was comprised much more of private writers’ attempts to reconcile state practice and the relatively few treaties in place with principles of natural law.

It is from these continental writers of the seventeenth and eighteenth centuries—Grotius, Pufendorff, and Vattel principally—that we can best approximate a common understanding of what states and states’ men thought of how international relations (another later construct) could be regularized in the first half of the nineteenth century. Subsequent studies, many of which were done within the late nineteenth century arbitration movement, have fleshed out our understanding of state practice in dispute resolution in medieval and early modern Europe. Simultaneously, the conscious consideration of international law more broadly in late nineteenth century Europe and America spawned a plethora of treatises which sought to synthesize these traditions with the newly expanding scope of international relations, new ideas about law, and evolving state practice.

Nineteenth century scholars were not working from a blank slate. As we saw in Chapter 3, arbitration had a long history prior to its “revival” in the 1794 Jay Treaty, including Greek, Roman, medieval, and early modern practices; and these provided the subject matter for early international legal scholars. Many of the procedures that were reconstructed in the nineteenth

century can be found in some form during this period, including the use of mixed commissions, jurists as well as sovereigns and, of course, the Pope, as arbiters. Indeed, the use of multi-member arbitration panels was common, distinguished from the modern practice by their use of an even-numbered set of decision-makers, often without an umpire, which “indicated the conviction that the desired objective should be a decision which was not only formally unambiguous, but also substantively satisfying and therefore likely to be durable in character.”³

In an era when basic concepts and principles were still being explored and natural law was still the defining trope of proto-international law, it is not surprising that the early writers did not focus on the methods of dispute resolution in any detail. Grotius’ seminal work addressed arbitration only twice. First, he noted its Greek roots and links to Roman practice and Christian traditions. He then recommended its use in seventeenth century Europe, emphasizing the finality of an arbitrator’s decision and the lack of appeal or external enforceability in the international context.⁴ Grotius sought to validate the concept, not any specifics; and he cited no recent practice, despite the active use of arbitration in the Netherlands.⁵ In 1672, Pufendorf said that states had a natural law duty to seek amicable solutions to disputes (including arbitration) before resorting to war; but he noted that arbitration, in practice, often followed the resort to arms.⁶

Vattel’s 1758 *Law of Nations* proclaimed its adherence to natural law principles but it arguably set the stage for the positivism of the nineteenth century through his elevation of state discretion and power.⁷ The most influential international law authority through the first half of

³ Grewe, *Epochs of International Law*, 100.

⁴ Grotius, Book 2, Chap. 23, Sec. 8. Book 3, Chap. 20, Sec. 46.

⁵ Verzijl, *International Law in Historical Perspective*, VIII: 207-218.

⁶ Grewe, *Epochs of International Law*, 264, citing Pufendorf, *De iure natureae et gentium libri octo*, 1672, Part 5, Ch 13, s.2, 3.

⁷ Vattel, *Le Droit des Gens ou les Principes de la Loi Naturelle*, London (1758). See Carty, “19th Century Textbooks,” xiii. The natural law-positivism dichotomy has been the central thread in nineteenth century international legal historiography (but see Koskenniemi, *Gentle Civilizer*, 4). Arbitration, as a

the nineteenth century, Vattel's treatment of arbitration went beyond that of Grotius and Pufendorf, providing endorsement without much in the way of recent example.⁸ While far from comprehensive, he offered much more by way of a digest of a few of the issues and contingencies that might arise in the course of an arbitration. He described arbitration as a "very reasonable method" of resolving those disputes between states which don't affect the security of the state. He encouraged compliance with arbitral decisions made within the scope of the *compromis*, in the absence of corruption or patent partiality. These were the points most typically cited by later arbitration advocates in their compilation of positive precedents. More fundamentally, however, in outlining the scope of what issues a state might submit to arbitration, Vattel distinguished between "certain" and "doubtful" cases, noting that a more powerful state could pursue or defend a "clear" claim "without submitting it to arbitration." He was careful not to endorse the resort to force in the first instance, and sought to cajole states into accommodation, but since he provided no guidance as to how to determine whether an issue was "certain" or "doubtful" (either objectively or subjectively), he created (or at least sanctioned) a larger space for state discretion.⁹ Similarly, he raised the distinction between "essential" and "less important" issues, sanctioning the rejection of arbitration where an "essential right," national independence or liberty was at stake.¹⁰

Vattel's concept of a *society* of states existing within a state of nature produced a tension which he resolved by prioritizing states over natural law, laying the foundation for an international law in which commentators were passive recorders of states' actions and

procedural device, however, seems to be outside this debate, at least directly, since natural law never really addressed such issues (although it easily accommodated arbitration) and there does to appear to have been any difference on key arbitration issues between advocates of either position. Arbitration thus offers a different historiographic angle on the development of international law in this time frame.

⁸ Vattel, *Le Droit des Gens*, Vol I, Sec. 329, Pp. 519-21.

⁹ Ibid. Sec. 331, p. 522.

¹⁰ Ibid. Sec. 332, Pp. 522-4.

international law treatises were attempts to rationalize those behaviors. Vattel's view of state sovereignty thus became the touchstone for the rejection of arbitration in his elevation of national discretion and self-definition of what became to be called "vital interests" and their exclusion from the scope of arbitral commitments. This concept may arguably have been distorted by Lord John Russell in the "*Alabama Claims*," but as we shall see, it remained a central issue in the arbitration debate well past the Hague Conferences and through the post-World War I regimes. Within American legal and political debates, there is a phrase: "The Constitution is not a suicide pact," which argues that even within a highly-structured rule-of-law regime, the state retains a primal right of self-preservation.¹¹ How much stronger is that argument in the "anarchical society" of international relations? Since, in Vattel's view, "there was no satisfactory basis for the binding nature of international law, [...] when resort was had to the use of force, the jurist had no choice but to accept that each side had a lawful cause."¹² This was the rock which the peace movement sought to erode through its promotion of arbitration. It is no wonder that Vattel was highly influential with nineteenth-century states' men; nor is it surprising that arbitration advocates quoted him selectively.

The sparse coverage of arbitration in international legal works continued well into the nineteenth century as treatises gradually evolved towards textbooks. Not only were the number of pre-*Alabama compromis* relatively few (about 3.5 per year from 1794-1873), but as these writers became increasingly juridical in their perspective and the number of publications not coincidentally increased, the inherently political nature of arbitrations made arbitral decisions of

¹¹ The formulation comes from Justice Jackson's dissent in *Terminello v. City of Chicago*, 337 U.S. 1, 36 (1949). The concept, dating from Jefferson, is more fully explored in Posner, *Not a Suicide Pact*.

¹² Carty, "19th Century Textbooks," xiv.

less significance in describing the substance of later nineteenth century international law.¹³ As we have seen, the peace movements in both Britain and the United States had been relying on the well-established nature of arbitration as one of their foundational arguments almost from the beginning of their advocacy efforts. However, both their coverage and their analysis of these precedents—whether historical or contemporary—was anecdotal, cursory, and biased. Even the legal teams in the Foreign Office and State Department, who compiled lists of precedents in connection with their arguments in the “*Alabama Claims*,” drew mostly on their own hard-to-access archives and presented a far from comprehensive treatment.¹⁴ The two most noted mid-century British international law authors, Manning and Phillimore, who marked the “renaissance period of international law” in Britain, paid no attention at all in their treatises.¹⁵ Thus, by 1870, the comprehension and discussion of arbitration as a means and source of international law was minimal. However, as noted below, this had begun to change even as the “*Alabama Claims*” case was being hashed out.

Between Governments and Peace Movements

It was not until the resurgence and internationalization of the peace movement, the growth of the international legal movement, and the mythology of the “*Alabama Claims*” combined that the study of arbitration exploded in the 1870s. It is impossible to disentangle these developments into any causal framework; they all fed on each other. The broader upsurge in

¹³ Carty, “19th Century Textbooks,” passim. Indeed, the premise of Carty’s dissertation is that nineteenth century international law textbooks themselves were the critical source of the development of the substance of international law. Ibid. xviii-xxiv.

¹⁴ The U.S. list, prepared in the context of the Treaty of Washington negotiations, included only 23 items from 1794 thru 1866. Memorandum of Precedents of Arbitrations, May 5, 1871; prepared by Bancroft Davis. FO5/1304/183. A British list of mediations prepared in the aftermath of the 1878 Berlin Congress by Lord Tenterden is similarly limited. June 19, 1880. PRO 30/29/361. Given the often chaotic state of departmental archives and their reliance on the recollections of long-serving staffs, their ability to be comprehensive was certainly limited.

¹⁵ Sylvest, “International Law,” 18. Manning, *Commentaries*. Phillimore, *Commentaries Upon International Law*.

arbitration scholarship from the 1870s to the first World War will be discussed below; at this point, the distinctive contributions of the emerging international legal movement deserve attention. Both the subject and the composition of that movement was international. It partook of a general (European) movement called “internationalism” which flourished during this era and encompassed intergovernmental organizations, international associations of national scientific, cultural and advocacy groups, as well as a broader mentality which positioned itself in opposition to the nationalisms which also flourished at this time.¹⁶ It also was influenced by two other related developments. The first was the initiative for codification of law in general and of international law in particular; the second was the emergence of and organized study of social sciences. Both of these children of the Enlightenment brought with them a belief that man, through organized, rational, and rationalized thought could advance his civilization and that the clear expression of legal principles could foster the progress of both domestic and international society. As Koskenniemi notes, late nineteenth century international law was “a project for subordinating all the world under law....a project for progress, for a global modernity—the dream of the entire world one day resembling Europe’s idealized image of itself.”¹⁷ In this way, international law furnished a discourse by which states could more clearly recognize the value of compliance with its norms. The increase in the number and complexity of treaties increased the demands on chanceries and embassies in terms of both the volume and detail related to their negotiation. This increased prominence and routinization also likely reinforced the norm of compliance and shifted the locus of state discretion to the decision to enter into such agreements. In terms of arbitration this was manifested in the preservation of a standardized ‘escape clause’ tied to “vital interests.”¹⁸ This idealized image and its counterpart found expression in two organizations: the Institut de

¹⁶ Lyons, *Internationalism in Europe*. Reinsch, *Public International Unions*.

¹⁷ Koskenniemi, “A History,” 944.

¹⁸ Orakhelashvili, “Nineteenth Century Life,” 451.

Droit International (“IDI” or, in English, the Institute of International Law, “IIL”) and the International Law Association (“ILA”). Their overlapping histories and purposes advanced the cause of arbitration and illustrate the complexities it faced in the later nineteenth century.

It is not surprising that there was a direct link between the formation of the British Association for the Promotion of Social Sciences in London in 1866, Francis Lieber, famous German-American creator of the code of war, David Dudley Field, the American jurist and codifier, and Gustave Rolin-Jaequemyns, the Belgian founder of the *Revue de Droit International*.¹⁹ In the aftermath of the Franco-Prussian War, Rolin-Jaequemyns implemented a concept initially advanced by Lieber to gather a small group of international jurists to study and try to articulate the consensual principles of international law outside the context of formal governmental involvement. Elihu Burritt, the American peace advocate who worked extensively on both sides of the Atlantic, and James Miles, Secretary of the American Peace Society, similarly urged international lawyers into action in 1871.²⁰ But the Burritt/Miles vision differed from that of Lieber and Rolin-Jaequemyns. Burritt’s original conception for what became the ILA was a mass popular congress to promote a code of international law which was to have been drawn up by a small group of international jurists (a concept that eventuated in the IDI). Lieber, Rolin-Jaequemyns and others were opposed to trying to pressure governments in this way to adopt a substantive code.²¹ So, there was some tension between the two nascent groups in spite of/because of their overlapping goals and membership. The Institut de droit international was convened by Rolin-Jaequemyns in Ghent in September 1873 as a “scientific” (and not an “official” or governmental) organization, limited in size and by invitation only, to define and

¹⁹ Abrams, “Emergence of International Law Societies,” 364-78, and Koskenniemi, *Gentle Civilizer*, 39-47, give a detailed account of these circumstances and relationships.

²⁰ Abrams, “Emergence of International Law Societies,” 364.

²¹ *Ibid.*

advance the principles of international law and become “the organ of the legal conscience of the civilized world.”²² A month later, in Brussels, the ILA was formed, which, while there was a some overlap in membership, was a larger and more open group, including many peace advocates and a substantial American contingent, with a broader orientation to promote international law and arbitration with the public and with governments.

The IDI at its first meeting commissioned a study of arbitration for discussion in the future.²³ The ILA, however, moved directly into adopting a policy statement on the topic. Its general endorsement of arbitration as “just and reasonable” was unremarkable, but there were two noteworthy aspects which were hotly debated. The first controversy was whether arbitration should also be characterized as an “obligatory” on states in a dispute. The group decided to include the obligation, but could not agree whether it was a legal or merely moral obligation. The IDI also debated whether certain types of issues should be excluded from the scope of this “obligation.” This was the question of “vital interests.” There were many advocates of a blanket requirement, some on principle, seeking to clearly limit the discretion of states to choose to go to war, others based on the difficulty of drafting a workable exclusion language. What emerged was an acknowledgment that any exceptions (of an unspecified nature) would be rare and should only be invoked after extensive negotiation and consideration.²⁴ The champion of preserving exceptions was Montague Bernard, the British international law professor who was legal advisor in the Treaty of Washington negotiations, with support from Swiss and Italian jurists; the peace advocates, such as Henry Richard, and French and Belgian jurists tended to push for a broader scope for arbitration.

²² IDI Constitution, Art. I. in Scott, *Resolutions*. Koskenniemi points out that the French word “conscience” ambiguously translates as either “conscience” or “consciousness” giving either a rationalistic or ethical connotation. *Gentle Civilizer*, 41, 51.

²³ Scott, *Resolutions*, 1-7.

²⁴ ILA Conference Report, 1873, Pp. 25-44.

In 1874, the IDI reviewed a proposed set of rules of arbitral procedure, which were finally adopted in 1875, the first result of the Institute's labors.²⁵ Its 27 articles were an effort to capture the necessary and useful organizational, structural, and process issues surrounding an arbitration, ranging from the scope of a *compromis* to timing issues, as a guide for states' men in drafting a *compromis* in a particular case. The preparatory report was careful to distinguish permanent groups, such as the Rhine River Commission or the proposals for a permanent tribunal.²⁶ It also emphasized the view that arbitration was appropriate only for disputes "whose nature does not admit of a judgement according to the rules of law."²⁷ It found that "political disputes of a complex nature, in which questions of nationality, of the equality of rights, of supremacy... will always be withheld from such mode of settlement."²⁸ The report encompassed the recent moves to enact compromissory clauses in treaties, but was skeptical of general arbitration agreements ever being adopted.²⁹ After this, the IDI turned its attention to other projects. Its procedural rules were extensively echoed in later proposal and in the Hague Conference a quarter-century later. Yet, it never returned to arbitration as a major substantive focus of its work after 1875. The ILA, too, deterred from the grand vision of an international code, found other, more prosaic outlets for its work. Thereafter, it provided a discussion forum for some in the peace movement but was not an effective channel of change.³⁰

Two perspectives on the role of the emerging international law of the later nineteenth century highlight the tensions embodied in the arbitration idea. The IDI engaged with arbitration in their role as legal technicians; building the machinery that would enable international

²⁵ Scott, *Resolutions*, 1-7.

²⁶ Goldschmidt, "Draft Regulations" in Scott, *Resolutions*, 205-43.

²⁷ *Ibid.*, 207.

²⁸ *Ibid.*, 208.

²⁹ *Ibid.*, 207.

³⁰ Abrams, "Emergence of International Law Societies," 378-9, indeed, over this period, both the IDI and ILA increasingly shifted their attention to commercial and private international law concerns.

(European) society/civilization to progress.³¹ This was useful, providing a measure of standardization and collective sanction for this underpinning of the increasingly well-known arbitration process. However, there were limits to what could be accomplished in this vein. Legal vocabulary and a “cult of codification” ensured that their work was entirely subject to the states’ system.³² The attitude reflected in the IDI’s attitude was fundamentally conservative and this reflected in the scope of work. Its members’ focus on demonstrating the professionalization of their discipline meant that their effective compliance with the needs of states, and any aspirations towards the peace movement were held firmly in check.³³ For example, James Lorimer, the British legal scholar and IDI member, thought it “very important that we jurists should try whether we cannot eliminate the impossible cases and moderate the expectations of its injudicious advocates.”³⁴ The IDI’s proclamation, in its statute, of its independence from governments was thus naive. Their work was “based on the assumption that if only the rules...were made clearer, they would also be obeyed.”³⁵ The newly professionalizing discipline sought a space between an “untrustworthy” diplomacy and states’ system founded on realpolitik on the one hand and burgeoning democratic pressures and “public opinion” on the other.³⁶ For Rolin-Jaequemyns this meant “a public opinion that was serious and calm, based on the application of certain principles of universal justice to the development of events; an opinion that reinforced itself and spread until it became the judgment of history.”³⁷ (With, as Koskenniemi ironically notes, “the jurist as the

³¹ Sylvest, “International Law,” 47.

³² Ibid.

³³ Mazower, *Governing the World*, 69.

³⁴ Lorimer to Thomas Balch, February 10, 1874, reprinted in Balch, *International Courts of Arbitration*, 35.

³⁵ Sylvest, “International Law,” 65-6. He also notes that this may have been a reaction to Austin’s challenge to international law, i.e. that they were driven by a need to show the ‘law-ness’ of international law.

³⁶ Koskenniemi, *Gentle Civilizer*, 15, 61

³⁷ Rolin-Jaequemyns, “De L’etude,” 225.

organ of liberal public opinion.”)³⁸ He sought to place the IDI between “the virtuous utopists that wanted the immediate abolition of war” and the “timid spirits” that saw no chance to change the world.³⁹ This belief in the efficacy of a self-fulfilling prophecy was shared with those international lawyers (some of whom were IDI members) who joined in the ILA’s more policy-oriented activities and later, as we shall see, were part of the pro-arbitration activities in parliaments and public affairs.

Thus, international lawyers dealing with arbitration faced precisely the tension between what Koskenniemi calls apology and utopia (and what I would characterize as submitting to the states' system versus the adoption of moral rules untethered to state action):

The problem of order becomes a procedural problem. If only advanced mechanisms for sovereign cooperation and settlement are developed, material disagreements can be prevented from threatening the system. The balance of power is one such mechanism. The creation of international "unions" is another. The culmination of this view takes place in the Hague Conferences of 1899 and 1907, in the establishment of the Permanent Court of Arbitration, and the proposal for an international prize court...Only when belief in procedure was shattered at the First World War, was the credibility of professional doctrines was lost.⁴⁰

As we have seen, arbitration was, for the early peace movement, a vague directional concept which fit in with the general principles of natural law. Indeed, it is not clear how natural law could even address the formal procedural modes which occupied the IDI. In terms of the later emerging international legal movement, this reveals the contradiction which revealed its ultimately statist stance inherent in the shift to positivism. The promotion of a state-based international law inherently prevented the establishment of an arbitration regime which could overawe states.⁴¹ This shift towards positivism in the international legal context marched in

³⁸ Koskenniemi, *Gentle Civilizer*, 17.

³⁹ Rolin-Jaequemyns, “De la Necessite,” 478-80.

⁴⁰ Koskenniemi, *From Apology to Utopia*, 149.

⁴¹ Orakhelashvili, “The Relevance of Theory,” 5-6. This is consistent with the prior point about Austinian-based debate about sovereignty as premise for international law, since Austin presupposed a state-based

parallel with the distillation of the peace movement's idea of arbitration into a specific set of mechanisms adapted from the practical business of government.⁴² Thus, arbitration as an expression of the peace movement over the course of the century moved from the vague 'not war' conception to the models of Ladd and William Jay and finally to the practical and detailed, yet denatured, steps of Field and the IDI.

At the same time, the rise of the international lawyers, coincident with the founding of the IDI, strengthened the path towards juridicalization initially marked out by Ladd (and different from the more achievable and ad hoc approach of William Jay) that finally culminated in the Hague Conferences' moves towards a mode of decision-making that was nominally objectivized, but politically sterile. The lawyers' preference for a court-based system over arbitration was based in no small part on their discomfort with the latter's ad hoc, compromise-prone, and ultimately political nature. In this regard, the arbitration advocates in the peace movement were more realistic in their acquiescence in a state-driven model and the lawyers were more muddled in their pursuit of an independent basis of decision-making even as they were building a positivist (i.e. state-based) set of rules.⁴³

Arbitration and its advocates can be framed within the context of nineteenth-century European liberalism; compulsory arbitration was a limit on state power, but, unlike those limits

universe which either produced a positivistic (and, so, controllable) international law or required a superstate with sovereignty over states. Such a superstate while solving the sovereignty problem, was, of course, completely infeasible at the time and, more fundamentally, would be the acme of positivism and still then inconsistent with any natural law based conception of society.

⁴² As Kennedy, "International Law," 398, has argued, "International law rid itself of faith only by enshrining the state, making the tasks of international public order both more realistic and more difficult." Thus, the "positivism" espoused by international lawyers was a combination of the order inherent in codification and the idealism of the jurists' embodiment of "public opinion." It was not so simple as merely shifting from traditional natural law concepts to a model based on expressed state action; although the latter is what, in the hands of states' men, resulted. See generally, Lebow, *Tragic Vision of Politics*, 253.

⁴³ Patterson, *Interpretation of American Peace*, 24.

enshrined in a domestic constitution, it had to be accepted by a pre-existing state and, in particular, by state's-men who were, by and large, considerably less constrained by domestic political controls than in the case of questions of, e.g., taxation.⁴⁴ Even if “democratic” controls and the influence of public opinion were effective in those domestic contexts, they made only marginal inroads on the foreign policy and procedural decisions of the state. Indeed, their greatest effect was to oppose peaceful dispute resolution, typically from nationalist/jingoist motivations. Some have argued that the IDI was not only an embodiment of nineteenth century liberalism, but of a particular brand of that liberalism which sought to go beyond “a system of rules that would govern the behavior of states, ... to reform states and combat authoritarian rule.”⁴⁵ However, the IDI and international leading international jurists as a group rarely challenged state discretion and, as we will see, up through the Hague Conferences, left states' men with the ability to avoid arbitration of differences through the “national honor” and “vital interests” provisions in virtually all treaties.⁴⁶ As Mazower has noted, “by the start of the twentieth, international law was the preeminent example of a once utopian internationalist creed harnessed and tamed by states themselves.”⁴⁷

Arbitration Studies and Proposals

Public discussions of arbitration over the period from the late 1870s up to World War I encompassed not only the particular projects and texts of the international legal community, but also several other strands that were interwoven with them, including pamphlets and speeches promoting arbitration, proposals for arbitral schemes of varying specificity, and historical

⁴⁴ Lev, “Transformation of International Law,” 122, and Spiermann, *International Legal Argument*, 92-8, argue that this effectively produced simultaneous international legal spheres of state coexistence and of cooperation.

⁴⁵ Fitzmaurice, *Liberalism and Empire*, 126.

⁴⁶ Hinsley, *Power*, 138, refers the international lawyers' “tenderness for the independence of the state,” and their “regard for practicability in the light of the problems created by that independence.”

⁴⁷ Mazower, *Governing the World*, 67.

discussions and compilations. These vehicles arose from both peace advocates and the legal community, and, in the new century, from political leaders from both legislative and executive parts of the major powers. These strands have to be considered together since each aspect informed the others and reflected the political, intellectual, and cultural sensibilities of the period. In the late nineteenth century, it seemed imperative for any liberal or reform endeavor to cast itself as part of the progress of civilization; and for this, it was necessary to have a history to lay down the foundation and describe the trajectory of progress.⁴⁸ This was particularly true for the arbitration movement, which operated in association with international law and, at least implicitly, situated itself en route to the teleology of world peace. The received history of public international arbitration grounded that history in the advocacy movement which fostered it. Furthermore, these writings show the evolution of the meaning of the concept of arbitration during this era; especially the increased influence of the international legal community. Arbitral proposals were increasingly juridical in tone and historical treatments of arbitration which first emerged in the 1870s began to base their characterizations of past agreements and decisions on this juridical standard. As a result, by the early twentieth century, the models for the resolution of international disputes were coalescing around “courts” and the more frequent state practice of mixed commissions were described as “not strictly” arbitration. This dichotomy thus set the stage for the major international conferences to create structures which were, as a practical (and often legal, as well) matter, disconnected from how states actually used arbitration to resolve their disputes.

⁴⁸ Bowler, *The Invention of Progress*. For example, one of the earliest detailed discussions of arbitration, Pierre Dubois’s *De Recuperatione Terre Sancte* of 1642. The Latin text was republished in 1891, ed. C.V. Langlois, Paris, which itself illustrates the desire of arbitration scholar-advocates to strengthen the historical foundations of their argument. It was cited repeatedly in the arbitration scholarship in the fin-de-siècle period; which, in the eagerness to promote arbitration tended to read Dubois’ proposal in a way that made it a clear precedent for the structures then under debate (particularly as to the permanence of the arbitral tribunal), despite the strained reading required to do so. See, e.g., Sherwood, “Pierre Dubois,” 142.

During the “*Alabama Claims*” dispute, the weakness of the peace movements in both the U.S. and Britain meant that there was relatively little engagement with that controversy. Nonetheless, two Americans advanced broader proposals for arbitration while the particulars of that case were being negotiated and several additional proposals followed during the 1870s.⁴⁹ These were but marginal advancements on the basic concept of an international court and congress, initially advanced by William Ladd in 1840.⁵⁰ Their generic nature failed to reflect the specifics of the Geneva Tribunal or any other of the many mixed commissions then employed around the world to handle a variety of individual disputes. The only outlier, as noted above, was the entirely procedural plan offered by the IDI, reflecting the legal community’s concern with “proper” procedure. Indeed, other than the project adopted by the First Inter-American Conference in 1890, the twenty years following the “*Alabama Claims*” was remarkably bereft of specific ideas on how to make arbitration work.⁵¹

However, the 1870s did see the publication of a series of pro-arbitration tracts which were notable for their novel engagement with the history of that idea.⁵² While many pamphlets and speeches had referred to past incidents of arbitrations stretching back to the Greeks, as well as more recent examples, this period saw the first focused, one might say ‘scholarly’ work in this regard. Still, these remained primarily compilations and summaries with little critique or interpretation. Their essential purpose remained, as with earlier references, to demonstrate the validity and practicality of the arbitration concept by illustrating its demonstrably illustrious past. Failure, apparently, was not an option. The selection of cases seems to have been anecdotal and

⁴⁹ Balch, *International Courts of Arbitration*, 9-11, in 1865. Field, *Outlines of an International Code*, 370-1, in 1872. Laveleye, *Des causes actuelles*, 149, in 1873 and Lacombe, “Memoire,” 139, in 1876.

⁵⁰ See Chapter 5, *supra*.

⁵¹ See Chapter 8, *infra*.

⁵² Bellaire, *Etude Historique* (1872), Van Blokland, *International Arbitrage* (1875). Rouard de Card, *L’Arbitrage International* (1877). French, Dutch and French lawyers, respectively.

often built on prior publications rather than coherent research. These continental publications probably filled a gap that in Britain and the U.S. were amply covered by the smaller and even more incomplete pamphlets from their respective peace movements.

Following a relative dearth of publications and proposals in the 1880s,⁶ the volume of publications grew in the 1890s, likely driven by the activity at the First Inter-American Conference, the trans-Atlantic agitation in favor of an Anglo-American arbitration agreement and the burgeoning Francophone peace movement.⁵³ While no treaty project directly materialized, two specific proposals for arbitration structures from this period highlight the changing tone of the debate by reaching for a significantly greater degree of specificity than had previously been seen. In 1896, the New York State Bar Association adopted a recommendation for a general international scheme to which individual nations could adhere.⁵⁴ Influenced by the Geneva Tribunal and the U.S. Supreme Court, this permanent “International Court of Arbitration” would be comprised of nine judges named by the highest court from nine countries that would hear cases brought by agreement of two disputing states.⁵⁵ In rejecting the model of mixed commissions which had been primarily comprised of nationals of the disputants, the Bar Association went so far as to require judges to recuse themselves from any case which arose from their own country. Typical for the period, the U.S. and Britain were jointly seen as the necessary leaders of such a global civilizing project.⁵⁶ The Bar Association proposal also reflected its legal origins, looking, with idealism, to structure and process, with little attention to the fundamental political issue of

⁵³ Kamarowsky’s *Le Tribunal international* (translated from Russian into French in 1887) was an exception, notable for its comprehensive scope and more scholarly detachment.

⁵⁴ New York State Bar Association, *Memorial*.

⁵⁵ The countries were to be the U.S., Britain, France, Germany, the Netherlands, Russia, Mexico, Brazil and the Argentine Republic; chosen on the basis of their likelihood of joining in this court project. Ibid. 18.

⁵⁶ Walter Logan, a member of the drafting committee, noted that it was “our Saxon race that must take the lead in this as it is taking the lead in everything that pertains to civilization.” Lake Mohonk Conference, *Second Annual Report*, 65. SCPC.

how states would determine to refer a dispute to this legal mechanism. It was part of the broader mix of proposals and general expressions of support for arbitration that circulated during this time; so many that in 1896, Hodgson Pratt, a leading British arbitration advocate, warned that there were too many specific plans being discussed, which risked dilution of the pro-arbitration effort.⁵⁷

A more influential concept had been put forward by the Inter-Parliamentary Union (“IPU”) in 1895.⁵⁸ This group grew out of discussions between Randall Cremer, the British MP, and Frederic Passy, the French legislator. Organized in 1888, it held its first conference in 1889 as a vehicle for Anglo-French amity. Cremer, whose leadership of the International Arbitration League, the foremost British working class peace group, had led to his election to Parliament in 1885, ensured that arbitration would be the central topic of the IPU’s discussions. While initially focused on promoting an Anglo-French arbitration agreement, over the course of the early 1890s, the IPU expanded its proposal to encompass a more comprehensive model. The resolution adopted in 1895 was its most comprehensive and the IPU’s endorsement of several aspects that had been part of the broader discussion of arbitration structures and procedures over the preceding decades established a foundation for the model that was ultimately adopted at the First Hague Conference four years later. It called for the creation of a “Permanent Court of International Justice” to address issues submitted to it by disputing states. Each signatory to the organic treaty was to nominate two members to the Court and Judges for each case were to be specified either by the Court’s President or by the Court as a whole. The key step was the concept of a standing organization with a list of potential judges; later, the premise of the Hague plan. This addressed the concern advanced by several states in individual cases during the century about the

⁵⁷ Ibid. 69. Pratt, while a competitor of Cremer in the British peace movement, endorsed Cremer’s IPU proposal as the preferred model.

⁵⁸ Lange, *Union interparlementaire*, 53-6.

neutrality/objectivity of the umpire/decision-makers in particular cases; but it failed, as did the New York Bar Association, or any other significant proposal of the time to engage with the political questions. However, IPU proposal, much less that of the Bar Association, approached the specificity of the First Inter-American Conference's proposal of 1890.

Meanwhile, the 1890s saw a florescence of studies of arbitration; some historical in orientation, others more forward looking, most actually a combination of the two.⁵⁹ Again, Francophone scholars took the lead; and, again, compilation/summaries of past practice provided the bulk of the material. Merignhac's *Traite Theorique et Pratique* was the most influential of this group. The trend continued well into the twentieth century, with Lapradelle & Politis' initial volume of 1905 providing a more critical overview of ancient and recent trends than others.⁶⁰ John Bassett Moore, an American lawyer and senior State Department official published a six-volume, comprehensive treatment of American practice.⁶¹ British works remained primarily descriptive, with Darby's re-iterated compilation for the London Peace Society being the most comprehensive.⁶² Finally, the burgeoning of international law treatises, which began in the 1870s, produced many words but few insights or innovations in terms of arbitration. The upshot was that throughout this period the idea of arbitration and the past practice of arbitration were both put before the public in a variety of publications. The connection between the two was not clearly drawn; nor was there much detailed analysis of what made arbitration a success. Proposals were generally much more generic than state practice, indicative of the distance that remained between advocates and states' men.

⁵⁹ See Dreyfus, *L'arbitrage international* (1892). Merignhac, *Traite Theorique et Pratique* (1895). Descamps, *Essai sur l'organisation* (1896).

⁶⁰ Lapradelle & Politis, *Recueil des arbitrages*.

⁶¹ Moore, *History and Digest*.

⁶² Darby, *International Tribunals*. Four Editions were published from 1897-1904.

Internationalism and International Organizations

In considering the nature of the term “internationalism,” especially in its nineteenth century context, we must take care to unpack from it the baggage which it and its related term “nationalism” acquired in the course of the twentieth. Nationalism then still partook of the flavor of the French Revolution: that of the ‘nation’ as opposed to the power of the elites of the embedded Ancien Regime. Cobden described his goal as “as little intercourse as possible betwixt the *Governments*, as much connection as possible between the *nations* of the world.”⁶³

Internationalism of the mid-to-late nineteenth century, as a description of a sentiment of the importance of the relations between such ‘nations’ (not-yet having fully imbibed the scent of the ‘nation-state’) could then sit comfortably atop such nationalisms. In this sense, internationalism was, as Mazower points out, a reaction to the reassertion of the power of elites, manifested in this case through the Vienna system of inter-state coordination and domination.⁶⁴

Organizationally, nineteenth century internationalism manifested in a wide variety of movements, sentiments, and organizations.⁶⁵ The bulk of these organizations represented the affiliation of national or local groups, components of their respective public spheres, that found common cause with like-minded folks from other countries or which were focused on issues

⁶³ Hammarlund, *Liberal Internationalism*, 116, citing Cobden’s 1836 pamphlet, “Russia.”

⁶⁴ Mazower, *Governing the World*, xv.

⁶⁵ Geyer and Paulmann, “Introduction,” 2-4. The historiography of international organizations before World War I is sparse. Reinsch, *Public International Unions* (1911) and Woolf, *International Government* (1915) were the leading contemporary accounts; but are more descriptive than analytic. Lyons, *Internationalism in Europe*, (1963) looks at 19th century internationalism more broadly but is often superficial. Narizny, “Political Economy,” tries to fit British and American policy decisions into a tidy (if flawed) model, and Reinalda’s, (2009) political-science oriented treatment is cursory on the 19th century. Geyer and Paulmann’s collection, *The Mechanics of Internationalism* (2001) include some useful perspectives. including Herren, “Governmental Internationalism,” 122 n.2. Sluga, *Internationalism*, (2013) has opened some new avenues.

which inherently or effectively transcended national boundaries.⁶⁶ But similar motivations drove those charged with the increasing scope of governmental activity as well and it was here, i.e., international inter-governmental organizations, that the most tangible progress was made in limiting state power. There are thus two reasons why the development of international organizations through the long nineteenth century needs to be addressed in the context of international arbitrations. First, these institutions reflected that same internationalization of governmentality seen in mechanisms for the resolution of specific disputes and commitments to future arbitration at the time.⁶⁷ Second, several of the founding documents of these organizations created arbitral mechanisms governing their specific subject matter.

The limitation on state power was accomplished by shifting the authority of individual states to institutions which shared their members' power, providing greater scope in return for a loss of individual discretion.⁶⁸ While many of these intergovernmental groups were effectively forums for sharing information and ideas, others were what we would now call "regulatory" in nature and were expressions of states' sharing of their police power. The subject matter of these groups—their "jurisdiction"—encompassed either a specific shared resource or issue (of which the riparian regimes were the best example) or involved an activity (typically some aspect of communication or transportation) which was inter-national in nature and common to multiple pairs of states. In either case, as states increasingly became aware of their need to direct private activity in these areas, they also started to see that they could not do so in a vacuum. Their steps were incremental and often repetitive. The concepts underlying the Rhine's "Octroi" structure

⁶⁶ Lyons, *Internationalism in Europe*, 12, counted almost 500 such nongovernmental groups created between 1815 and 1914. Speeckaert, *1,978 International Organizations*, lists over 30 inter-governmental groups.

⁶⁷ In this way, both intergovernmental organizations and arbitral regimes represent the same kind of challenge to the sovereignty model of the states-system, or what Howland has referred to as "alternative modes" of international order. Howland, "Alternative Mode," 3.

⁶⁸ Reinsch, *Public International Unions*, 135.

established in 1814-5 were applied again to the Danube at the 1856 Paris Peace Conference (which also nodded towards an endorsement of mediation). The creation of the International Telegraphic (now Telecommunications) Union in 1865 and the General (now Universal) Postal Union in 1874 similarly joined the powers of the participating states in setting and enforcing rules for an aspect of international commerce. Nineteenth century international organizations, to be sure, addressed but a fraction of what would become a major aspect of our current complex of regional and global structures; but the principles and processes of sharing and compromise were the same. It was assumed that states would have differences of opinion as to how to handle current and upcoming issues of shared management of the sectors being regulated. Each of these organizations thus established dispute resolution mechanisms to handle rule-setting, interpretation, and enforcement. Since there was little concern with any overweening power to be exercised by such entities, a rigid Montesquieuian separation of powers framework was unnecessary and what we would consider as distinct executive, legislative, and judicial functions were conflated. We have seen this in the riparian regimes for the Rhine and the Danube basins, to which the Congo was added in 1885.⁶⁹ These institutions—just as the arbitration process itself—reflected “the dilemma of diplomacy...the need to engage experts...without losing control of this aspect of foreign relations.”⁷⁰

Moreover, at the level of the entities themselves, states added arbitration provisions to resolve differences between them as to the interpretation of the foundational treaties. The first general non-riparian international organization, the International Telegraphic Union, was created in 1865. In its 1868 Convention it adopted a *de facto* arbitration mechanism, but it lapsed

⁶⁹ The Rhine Octroi is discussed in Chapter 4, *supra*, and the Danube structure in Chapter 5, *supra*. The General Act of the Berlin Congo Conference set up a multi-faceted structure for the Congo River Basin. SMH# 439.

⁷⁰ Herren, “Governmental Internationalism,” 123.

by the 1872 Convention and an arbitration provision comparable to that of the UPU was not adopted until 1927.⁷¹ The first permanent example was Article 16 of the 1874 UPU Constitution which provided for the arbitration of disputes between members due to different interpretations of the UPU treaty and was exercised six times by 1914.⁷² European states also joined in 1890 to govern the transportation of goods by rail; by 1905 they also included an arbitration provision.⁷³ On the other hand, the Latin and Scandinavian monetary unions of 1865 and 1872, respectively, did not appear to have such mechanisms. These were specific examples of the compromissory clause which gained broader traction in a variety of bilateral contexts in this period. The inclusion of such a clause in these organizational agreements thus reinforced the broader sense of cooperation which was their underlying premise.⁷⁴ Still, there was no general upswelling of support for broad arbitral schemes. A multi-national peace effort was “warmly received” at the Congress of Berlin in 1878, but made no substantive progress (echoing Paris in 1856).⁷⁵ If states saw a sufficient community of interest and a lack of risk to essential state concerns so as to justify entering into a shared power structure, there was little reason to allow specific disputes within this range of delegated shared power to blossom into a major diplomatic confrontation. In other words, no one was going to war over postal rates.

⁷¹ ITU Convention 1868 Art. LX provided that in case of a difference in interpretation of the Convention, the the last host of the ITU Conference would ask several other states to meet to resolve the matter. ITU Convention 1872. ITU Convention 1927 Art. XX.

⁷² The original language called for each disputant to name another member state and for those two to select an umpire. UPU Constitution (Berne: 2014) p. 74, Nn. 1-6. The provision, as amended, is now Art 32.

⁷³ Convention Internationale sur le transport des marchandises par chemins de fer. Woolf, *International Government*, 217-8; Lange, *L'arbitrage obligatoire en 1913*, 2-3. The Central Bureau established by the Convention was to act as the arbitral tribunal for issues of interpretation of the Convention. SMH #973.

⁷⁴ The multilateral 1890 Convention on the Suppression of the Slave Trade, while it did not create an institution, did provide, as an echo of the original slave trade tribunals from early in the century, for arbitral tribunals to review claims for improper seizure of alleged slave trading vessels. Lange, *L'arbitrage obligatoire en 1913*, 2-3.

⁷⁵ Beales, *History of Peace*, 161.

The Global Peace Movement

The Peace Congresses of the 1840s and 1850s had demonstrated that the early peace movement was not entirely an Anglo-American affair; the first half of the century saw incipient groupings in France, the Netherlands, Switzerland, and other western European countries.⁷⁶ The later nineteenth century peace movement (1873-1914) still looked significantly to British and American groups and individuals, but, consistent with the emergence of public sphere activities elsewhere, other Europeans as well as Latin Americans organized groups in their own countries. And, it is not too much to speak of a certain degree of French (or at least francophone) leadership of the increasingly international flavor of peace activities during this latter period; especially in the context of the close links with the international legal community. At the same time, it is difficult to find a distinctively continental flavor to the peace movement's approach to arbitration as a result of this new breadth.⁷⁷ Substantively, continental activities, whether in terms of propaganda, parliamentary engagement, or personal participation, seemed to echo the initiatives of the Anglo-American groups. Although the more sophisticated peace advocates were aware of the need to couch their program in the context of nationalist ideologies and the advancement of domestic concerns.⁷⁸ Nonetheless, overall, the peace movement looked and felt stronger for the larger number of countries in which peace activities were underway. Initiatives in one country were more likely to be echoed and reinforced by comparable events and arguments elsewhere, which increased the likelihood of governmental awareness and responsiveness. This was particularly true in more western, relatively liberal continental countries; since German, Austro-

⁷⁶ Van Der Linden, 59-269, *passim*

⁷⁷ Except to the extent that a more "realist" continental perspective downplayed Anglo-American talk of the 'Court-and-Congress' model in general and the American reiteration of its own experience as a model for European/global mechanisms. Cooper, *Patriotic Pacifism*, 93.

⁷⁸ Clinton, "The French Peace Movement," 1.

Hungarian, and Russian domestic political cultures effectively neutered any substantial peace movements.⁷⁹

The peace movement participated in the growth of international non-governmental organizations that flourished during the last twenty years of the century. The revival of the Peace Congresses, beginning in Paris in 1889 and continuing up to the start of the War, provided a forum for networking, shared propaganda, and mutual reinforcement. Arbitration remained the central item on the agenda. In addition, there were close ties with the international legal activities noted above and with the Inter-Parliamentary Union (“IPU”) which began in 1889. The latter, under Anglo-French leadership, most notably of workingman-turned-Arbitration-advocate-turned-Member-of-Parliament William Randall Cremer, also focused on arbitration and, due to its more practical focus and greater political prominence, increasingly became even more influential in this area than the Peace Congresses. The relative shift in leadership towards the IPU in the mid-1890s was due in part to the latter’s more pragmatic approach to peace issues in general and to arbitration in particular, as well as the inability of the broader peace movement to consolidate support for a single arbitration approach.⁸⁰

At one level, the shift in the peace movement in the 1840s from recitation to political engagement and exhortation was certainly a necessary, if not sufficient, step towards achieving its goal in the modern world. At another level, however, there might be less to this change than the

⁷⁹ See generally, Van Der Linden, *International Peace Movement*. Chickering, *Imperial Germany*, 42, notes that there was no real peace movement in Germany before the 1880s. Cooper, *Pacific Patriotism*, 67-70, sees peace movements in both Germany and Austria-Hungary as starting in the 1890s. No peace society developed in Russia until 1910. Ibid. 60.

⁸⁰ Cooper, *Pacific Patriotism*, 94, notes that by the time the Universal Peace Congress process found some coherence in its 1894 endorsement of a “Code of International Arbitration,” (which was not much of an advance on the IDI’s 1875 model), the parliamentarians were moving forward with a project whose result in 1896 did at least have some currency when the Hague Conference convened three years later. Still, as noted below, Chap. 9, *infra*, this more “realistic” position left arbitration as the “handmaiden to diplomacy” and was highly disappointing to many in the peace movement. Ibid. 95.

advocates of engagement might have hoped. Indeed, an examination of the rhetoric used by peace advocates retained the same air of optimistic millennial inevitability as it had heretofore; with a leavening of the Cobdenite argument that free trade plus peace would produce prosperity. The difference was that instead of merely spreading the word of the horrors, cost and un-christianity of war (as if that would have been sufficient to change state behaviors), the mantra became one of looking to “human nature, the power of public opinion and the facts of actual experience.”⁸¹ To be sure, this recognition of “public opinion” as a factor marked a change reflecting the evolving nature of European political culture at the turn of the century. But the appeal remained virtually as aspirational as the previous invocations of Christian morality. The effects of “public opinion” as a restraint on a state’s entry into a war had yet to be shown. Indeed, the most recent experiences (the Spanish-American War and the ill-fated British-launched Boer War) had seen little effective public resistance. Beyond these relatively “liberal” and “democratic” states (to which France might be added), the impact of public opinion on foreign affairs in general and decisions of war and peace in particular was minimal.⁸² Indeed, “self-appointed international peace missionaries were therefore the particular bane” of the foreign policy establishment, at least in Britain.⁸³ Regardless of whether peace advocates were “international busybodies” who actually were “merely the tools of those powers who find it useful to encourage the pacifists in those countries where their propaganda leads to the wholesale adoption of weakening sentimentality risks at the expense of efficiency of government,” they were seen as such and unlikely to have much impact on actual government decisions regarding arbitrations.⁸⁴ In this regard, parliamentary pressures, legalistic models, and peace advocates were all seen in the same light. This attitude also reflects

⁸¹ Darby, *The Peace Conference at the Hague*, London; Peace Society (n.d., 1899?) p. 62

⁸² See Chickering, *Imperial Germany*, 121; Bettez, “Peace Movement in Austria,” 25-9. Grossi, *Pacisfisme*.

⁸³ Otte, *The Foreign Office Mind*, 324.

⁸⁴ Ibid. quoting Eyre Crowe to Charles Dilke, 15 Oct 1907, Dilke Mss, BL 43919; Crowe Mss, FO 800/243.

the bureaucratic imperative to preserve the apparently indispensable infrastructure which supported the state, i. e., the foreign office staff. The use of arbitration was suspect, not only because of the “wetness” of its advocates, but also because it is sought to move the resolution of disputes away from the self-proclaimed experts in the foreign office and their use of diplomatic mechanisms to a nominally independent and unbiased forum in the arbitral panel. Furthermore, from a broader perspective, since there was a correlation between states where public opinion might have had an impact, those where there was an active peace movement and those less likely to go to war; it would have been difficult to extrapolate from the Anglo-Franco-U.S. context and the peace movement’s attempt to do so should have been suspect.⁸⁵ Thus, states’ men’s invocations of “public opinion,” whether in speeches or confidential negotiations, needs to be examined warily. It was typically more rationale than cause, especially since there was no clear means of ascertaining what “public opinion” might have been on a particular foreign policy matter due to the lack of public information, the limited role of foreign policy issues in elections and a certain difficulty in determining exactly who the “public” was.⁸⁶

As a result, prior to the First Hague Conference, the efforts in other European countries to affect governmental policy regarding arbitration appears to have been limited to an initial legislative endorsement of the concept following Henry Richard’s 1873 Motion in the House of Commons.⁸⁷ A small group of international jurists were certainly engaged with the issue, but their number east of the Stettin-Trieste line was minute. With the exception of Pasquale Mancini, the Italian legislator of the 1860s and 1870s who became Minister of Foreign Affairs in the 1880s and

⁸⁵ In addition, as Chickering, *Imperial Germany*, 144, notes, the German movement, for example, faced the additional challenge that late nineteenth century German legal thinkers were calling for a return to a natural law focus, in which law was “unpolitical,” and did not interfere with state discretion; making arbitration regimes even less conceivable.

⁸⁶ Robbins, *Public Opinion*, 70-3.

⁸⁷ These legislative actions are discussed in Chapter 9, *infra*.

sponsored arbitration clauses in several treaties, there were few champions of arbitration apparent in positions to do anything.⁸⁸

Conclusion

In the 1870s and 1880s, the peace movement built notable links to the newly professionalized and scientific community of international lawyers. It extended its reach into the Continent and produced an increasing number of studies and other publications which sought to establish the venerability and practicality of arbitration as a means of improving the nature of international relations. These efforts were linked to a broader manifestation of internationalism which also took root in this same era. As such the anti-statism of the peace movement should be seen as a counterpart to the internationalist view which rejected the nation-state as the sole means of organizing human societies. While the results of the Geneva Tribunal were widely acclaimed, in the decade or so afterwards, its practical implications were limited to sporadic projects for legislative endorsement of arbitration which had a modest impact on European treaty practice and a clear, if more attenuated, connection to the construction of arbitral procedures. State arbitration practice grew more widespread, as we shall see in the next chapter, but it remained generally unconnected to these peace and law activities.

⁸⁸ Mancini's principal effect was on the insertion of compromissory clauses in Italian treaties (13 between 1882 and 1893). There was no comparable impact on its use of compromis or general arbitration agreements. Such compromissory clauses were also a regular feature in a number of Latin American agreements of this period as well. This later phenomenon was connected to the continued widespread use of general arbitration agreements by Latin American states.

Chapter 8: Arbitration on a Global Stage

State arbitration practice in the late nineteenth century reflected the increasingly global perspectives of state's men which marked that era. Overall, there were over 250 *compromis* between Geneva and the Hague (1873 through 1899), which more than doubled the rate from the previous quarter century. There were two major sources of this increased activity. Of those, Latin American disputes accounted for more than 40, a continuation of a by-then well-established tradition. Western states, *qua* empires, entered into a majority of the rest, either with adjacent peripheral states, adjacent empires (each primarily concerning boundaries), or in pursuing commercial issues in an “informal” imperial context. The examples show that arbitration was chosen as the means of dispute resolution principally for political reasons, to resolve the pending dispute to gain political credit for a peaceful solution (and without the loss of ‘face’ that often accompanied what might be perceived as an unsuccessful negotiation).

In this chapter, seven examples illustrate how arbitration met states' men's needs for semi-amicable dispute resolution amidst complex global situations and domestic political pressures. Three examples show how the global reach of Britain, the U.S., and Germany led them to resolve disputes—in Samoa, Venezuela, and Alaska—that invoked a range of domestic and international political concerns. Three other examples demonstrate how Britain, the U.S., and other Western powers exercised their power to promote or reject arbitration with countries where their formal imperial hegemony was less clear—in Portuguese Mozambique, Latin America, and pre-unification South Africa. Finally, at the Pan American Conference of 1890, the U.S. unsuccessfully sought to use arbitration as a means of expanding its political, legal, and

commercial influence in Latin America; with results which set an important precedent for the European-dominated Hague conferences in 1899 and 1907.

The era of the “new imperialism” also reflected other factors in the growth of arbitration. As we have seen, the culmination of the intense and long-running negotiations over the “*Alabama* claims” in 1872-3 drew an unprecedented level of public attention to arbitration, just as European and American publics were gaining increased awareness of and influence in the domain of foreign relations. This energy was joined by the beginnings of the rise of the international lawyers as detailed in the previous chapter. The peace movement, spurred in part by the Prussian wars, gained new strength and a much more extensive footing outside the Anglo-American dialogue. This public activity, focused on legislative endorsements of arbitration treaties, eventually led to the Hague Conferences of 1899 and 1907 and will be discussed in the two chapters following this one.

The mythology of the “*Alabama* claims,” if nothing else, at least increased states’ men’s awareness of arbitration and the domestic political benefits from claiming its sanction in the resolution of international issues. Nonetheless, it was not as a war-preventative that arbitration featured in the actual diplomacy of the late nineteenth century. Rather, arbitration remained a useful tool for the resolution of difficult, if secondary, issues. Indeed, the period beginning in 1880 saw the apogee of arbitration negotiations and agreements which, in various forms, continued through the second Hague Conference in 1907. The subject matter of the disputes reflected the changing scope and scale of international relations generally, they were increasingly commercial in nature and increasingly global in areas covered. This meant that the legalization of international relations carried with it the cultural baggage of European perspectives and interests; sometimes within or between formal empires, but often in just a commercial or cultural context.

Of course, this was in no small part, a U.S. project as well, both imperially and intellectually. The international lawyers who were active in the proto-“establishment” of U.S. foreign policy beginning late in the nineteenth century saw international law as integral to its global vision. “By becoming a force for law in the world, they contended, America could reconcile its republican ideological tradition with a desire to rank with the great civilized powers.”¹ Thus, Americanizing international law, remaking it in our image, was a part of the imperial project. There was no better way to do so than by Americanizing the history of international law, not least by recasting arbitration as an American device, nurtured in the love/hate Anglo-American relationship, with the Jay Treaty as the touchstone. While he was no exceptionalist, Moore’s history of American arbitration became an American history of arbitration and the roles of others were suitably, if implicitly, diminished.

From Alabama to the Hague

To the extent that arbitration was “in the air” following the “*Alabama* Claims,” it did not manifest in a burst of specific activity on the part of states. There was no noteworthy increase in of *compromis*, with the exception of the implementation of the Berlin Congress of 1878, until well into the 1880s, and most of these were either inter-imperial or informal imperial in nature.² Until the 1890s, compromissory clauses and general arbitration agreements, too, were to be found mostly in agreements to which Latin American states were a party. Arbitration made but incremental progress, slowly seeping into the core of European diplomatic practice. Looking back from the First Hague Conference in 1899, some opposed moving forward with standing structures

¹ Coates, “Transatlantic Advocates,” 2.

² The 24 *compromis* adopted at the Berlin Congress (SMH ##334-57) were more in the train of those adopted in Vienna and Paris in 1814/15 and the 7 adopted at the Congress in Paris in 1856 after the Crimean War (SMH ##177-81, 185-6) and the 10 adopted in the clean-up of the Austro-Prussian War in 1866 (SMH ##251-60).

based on the perceived novelty of arbitration. In terms of intra-European practice, this concern thus seem well-grounded, especially to state's men with a long view and conservative outlook.

It is not surprising, then, to find that many looked to an “Anglo-American” axis, in terms of both diplomatic practice and the advocacy efforts of their respective civil societies, as a central precedent. The line running from the Jay Treaty and the “*Alabama Claims*” case attaining iconic status amid a litany of other efforts and activities. It has been all too easy to overstate this centrality and we may look askance at one English lawyer's later characterization that the role and influence of arbitration “have been secured through the efforts of the Anglo-Saxon race, with its political far-sightedness, practical skill, and constant devotion to free institutions.”³ From 1794 through the 1871 Treaty of Washington, there were 22 *compromis*, of which 9 dealt with claims and 12 dealt with American-Canadian boundary and fisheries issues. Between then and the first Hague Conference 28 years later, there were 12 *compromis* in which both the U.S. and Britain were parties. Of those, six dealt with American-Canadian boundary and fisheries issues and six dealt with inter-imperial questions. Nor, as we shall see in the next chapter, did their joint efforts in the area of general arbitration agreements from 1890—bi-lateral or multi-lateral—end up accounting for much, not least due to the U.S. Senate's rigid preservation of its portion of American sovereignty. To the extent one can look to an “Anglo-Saxon-American” claim of arbitral primacy in specific issues away from the U.S.-Canada border, the list is unremarkable. Still, at least from the British perspective, the pattern of arbitrations with the U.S. certainly appears to have made it a touchstone for their diplomatic practice. Gladstone, for example, repeatedly referred to the Anglo-American practice in other contexts.⁴ To be sure, compared to

³ Phillipson, *Two Studies*, 22.

⁴ These include such examples as 1) the arbitration between Portugal and Sweden, which employed a British umpire, FO63/176 1881-5; 2) the border dispute between the Italian colony in Eritrea and (Turkish) Egypt in August, 1881, in which Britain endorsed arbitration, Gladstone to Granville, August 20,

other pairs of countries, the use of arbitration was *relatively* frequent, but it is difficult to find any underlying or continuing policy commitment to arbitrate specific disputes. The more likely cause was a shared legal and political culture in the context of a geo-political relationship that, in the second half of the century in particular, overcame occasional press-hyped “war scares” to remain focused on an underlying consanguinity and diplomatic rapprochement.

Arbitration as a Tool of Empire

Arbitration was a means by which states resolved secondary issues (i.e. issues that would not likely have led to war) and a manifestation of delegated governmental decision-making in an increasingly complex global environment. From the perspective of European metropolises, imperial holdings spread across the globe provided many opportunities for conflict between empires, between an empire and a neighboring state, or between an imperial power exercising informal (i.e., diplomatic, economic, and cultural) power over a peripheral state and the nominal government of that state. Within the context of a conducive diplomatic environment, arbitration was regularly part of the solution to many of these disputes.

As empires expanded and filled in the “blank spots” on the maps, the extent to which the inevitable disputes between empires or between an empire and a local polity (or an adjacent imperial holding) could be knowledgeably managed from the capital diminished. Thus, the arbitration of territorial and boundary issues, which had been centered in Europe in the first half of the century, shifted to Asia and Africa. Similarly, the expansion of trade and finance led to an increase in commercial disputes in which Western states 1) chose to take up the cause of their own national, 2) chose not to rely on local judicial systems, and 3) sought to ensure a “fair” and

1881, PRO30/29/124; and 3) the border dispute between Russia and Afghanistan regarding the Pendeh region, in which Gladstone urged the use of a mixed commission, Gladstone to Granville, February 25, 1885, BL 44769/33.

“reasonable” outcome for their national’s concerns. These goals led to the use of arbitration as a means of exporting Western notions of fairness or equity (as well as procedural norms) into disputes that arose locally. From a broader perspective, the shift in border arbitrations in the later nineteenth century shows the relative peace and stability of post-Vienna Europe, the relative shift of attention to imperial activities, and states’ increasing demand for territorial certainty.⁵ As a result, it is not surprising that of the over 140 claims which were the subject of arbitrations between Western commercial interests and local governments, almost 90% led to an award (of those for which we have records). In this way, arbitration was an important means by which international legal norms were part of the process of Western cultural (not to mention commercial) imperialism. Britain, in particular, “shepherded” pairs of peripheral states towards arbitration both as a means of removing secondary irritants in its handling of issues around the globe, but also to inculcate the practice of civilized and juridical dispute resolution.⁶ As Casper Sylvest has pointed out, modern international law was “conceived within a specific, and specifically progressive, temporality that cultivated a constant expansion of *civilized* international legal relations in quantitative, qualitative and geographical terms.”⁷ At the same time, the use of arbitration also provided a means for the local government to absolve itself from local political complications (such as nationalist pressures) by pointing to the need to utilize accepted standards of “civilized” justice.⁸ It is also possible that these local governments agreed to the principle of arbitration with the hope of securing better terms of reference and a better result than they might

⁵ Adelman, *Borderlands and Borders*, 816, argues that a “shift from inter-imperial struggle to international coexistence turned borderlands into bordered lands.”

⁶ For example, several cases noted in Chapter 4, notes 100-105, *supra*. However, in the Maria Luz case of 1873, it was the U.S. who claims to have fostered the arbitration process between Japan and Peru before the Czar. Dennett, “American ‘Good Offices’,” 7.

⁷ Sylvest, “Our passion,” 404.

⁸ It is also possible that these local governments agreed to the principle of arbitration with the hope of securing better terms of reference and a better result than they might otherwise have hoped to achieve through direct diplomatic negotiation.

otherwise have hoped to achieve through direct diplomatic negotiation. The appearance of a “neutral” and “objective” dispute resolution mechanism thus served both parties’ interests.

In disputes between imperial powers, the resolution of boundaries was the most common occasion for arbitration.⁹ However, there were other more complex cases in which it was invoked which shed light on the nature of the process. These include the long-running Samoan dispute between Germany, Britain and the United States which ran for most of the 1880s and 1890s, and the tumultuous (and more-or-less simultaneous) dispute between Venezuela and Britain over the former’s boundary with British Guiana in which the nominal issue was overshadowed by the inter-imperial tensions between Britain and the U.S. These events show that arbitration was a useful tool to settle far-flung disputes which, despite some alarms at their respective times, had no real chance of evolving into major confrontations between the Powers.¹⁰ In particular, they show that, in practice, lines between ‘executive’ and ‘judicial’ functions were often murky and that states’ men’s focus was more on resolution of the disputes, once those disputes had been sufficiently narrowed through diplomatic processes.

Even outside of the main focus of the “new imperialism” in Asia and Africa towards the end of the century, arbitration played a notable role at the Treaty of Berlin in 1878 as the assembled powers comprehensively addressed the erosion of Turkish power in south-eastern

⁹ Arbitration didn’t always work in these circumstances. The Anglo-French agreement of August 10, 1889 provided for the arbitration and delimitation of African colonial boundaries. But in at least two cases, supplemental diplomatic agreements were necessary when the commissioners could not agree on a line. See Arrangement between Great Britain and France fixing the Boundary between the British and French Possession on the Gold Coast, July 12, 1893. 1893-4 [C.7108] and Agreement between Great Britain and France, fixing the boundary between the British and French Possessions to the North and East of Sierra Leone, January 21, 1895. 1895 [C.7600]

¹⁰ For example, during their tense stand-off at Fashoda in 1897, British and French diplomats discussed the creation of an on-going arbitral process to handle “toutes nos petites difficultes mutuelle.” Kennedy, *Salisbury*, 281, relating a conversation between on March 26, 1897 between Salisbury and French Ambassador de Courcel; Kennedy cites unspecified French diplomatic records for this conversation and indicates that there are no British archives that cover the meeting.

Europe.¹¹ This revival of the Congress system from earlier in the century also continued the use of commissions to resolve boundaries and claims, and establish new governmental structures in the wake of the realignments sketched out in Berlin, much as the Powers had utilized them in the Paris and Vienna Peace Treaties in 1814 and 1815. The Treaty referred to other “commissaries (i.e. delegates) from individual countries in specific cases, also provides for decisions “by the Powers” as a group and by a the “Consular Delegates” (of the powers).¹² There were three boundary commissions, three property claims and allocation commissions, two governmental organization commissions, and a long-term body to manage the issues related to tolls, safety, and navigation of the Danube. Not surprisingly, there were differences among the Powers as to how these groups should function, with questions as to whether unanimous decisions would be required and whether conflicts should be brought to the group of the Powers’ Ambassadors in Constantinople or to the Powers’ respective cabinets. Several commissions created technical sub-commissions to handle boundary surveying and engineering issues.¹³ Together they show the Powers’ collective need to delegate responsibility to a larger number of representatives than those who gathered at the major conferences and to apply themselves to issues—legislative, executive, and judicial—over an extended period.

“Tridominium” in the Pacific

This same combination of functions can again be seen in the arrangements later established concerning the British, German, and American involvement in Samoa in the 1880s

¹¹ Although, at the Berlin Congo Conference in 1885, the U.S. proposed including a compromissory clause in the Final Act. According to John Kasson, the U.S. delegate to the Conference, it received widespread support (remarkably, in light of its later positions, including Germany). However, at French insistence, the arbitration requirement was watered down to an agreement for mediation. Lake Mohonk Conference, *Second Annual Report*, 89. SCPC.

¹² Salisbury to Lord Derby (Foreign Secretary), July 13, 1878, C. 2081.

¹³ See, e.g., Francis Adams (British Chargé (?) in Paris) to Salisbury (Foreign Secretary) August 20, 1878, C. 2227/2 (1878). Salisbury (Foreign Secretary) to Plunkett (British Commissioner on the Montenegrin Boundary Commission), September 9, 1879, September 23, 1879. C. 2471/261, 298 (1879).

and 1890s. The sparring between these three expanding powers ran through most of the second half of the century and, as with many inter-imperial contests, engendered diplomatic controversy far out of proportion to the subject's direct economic or strategic significance.¹⁴ Each of the three did have some economic interests and alignments with the complex local power structure. By the late 1880s, attempts to establish a stable and less troublesome local regime and a balance of the three imperial powers collapsed after a conference in Washington in 1887.¹⁵ A subsequent conference in Berlin in 1889 appeared to settle matters by providing a shared 'tridominium' that would manage the islands with a small local role.¹⁶ This didn't prove to be stable and civil war among local groups broke out in 1897, which also entailed the naval involvement of the three powers and resultant damage to the property interests of Samoans and imperial subjects.¹⁷ The British rejected a partition arrangement and another stab at shared governance was agreed to in the Spring of 1899, establishing a more intrusive three member commission that would govern the islands under principles of unanimity.¹⁸ This structure was an example of the conflation of adjudicatory, legislative, and executive powers. At various stages, for example, the Chief Justice was appointed by the three powers in a power-balancing scheme along with other supervisory positions. The 1899 Tripartite Commission effectively acted as a constitutive assembly, re-shuffling the nature and scope of governmental powers between the their own governments and the Samoans across different islands and local adversarial groupings. This included the expansion of judicial power over foreigners and the diminution of consular jurisdiction.¹⁹

¹⁴ The British diplomatic record is collected in 27 printed volumes.

¹⁵ Kennedy, *The Samoan Tangle*, 65.

¹⁶ *Ibid.*, 94-7.

¹⁷ *Ibid.*, 145.

¹⁸ *Ibid.*, 165-9.

¹⁹ FRUS 1899 638-63.

The Commission was also charged with devising a compromise long-term solution, but its 1899 recommendation to end the shared governance and unify control under one of the powers didn't resolve things and further diplomacy ensued amid heightened global tensions between Britain and Germany in particular. But finding a good plan to compensate the withdrawing power had stumped even Salisbury. In the course of discussions with German Ambassador Hatzfeldt on September 14, Salisbury suggested that in light of the significance of overall Anglo-German relations and the relative unimportance of the islands, that their ownership "might be decided by lot." Hatzfeldt said that German opinion wouldn't accept such a solution, but proposed arbitration instead. Salisbury couldn't see what equitable principles an arbitrator might use to make a decision which would lead to intractable problems in setting the terms of reference.²⁰ However, a week later, Salisbury had agreed to arbitrate before the King of Sweden and Norway; with alternative pre-established compensation schemes involving swaps for Tonga, Gilbert Islands, Volta and Zanzibar. Hatzfeldt was skeptical that this arrangement would work.²¹ The diplomatic tensions were matched by the difficulty in coming up with an arbitral solution that Germany could tolerate (this was just after Germany had successfully opposed the compulsory arbitration regimes proposed at the First Hague Conference).²² According to the British Ambassador in Berlin:

the German Government appear to shrink from any definite and formal decision as to the mode in which the portions of territory on which we are operating are to be assigned to their respective owners. They do not wish to agree that Samoa, or any part of it, shall be German or shall be British; but they wish it to be decided by an arbitrator. On the other hand, they are indisposed to leave matters to the chances of arbitration, without exactly defining the method by which such an end is to be attained.... They contemplate taking measure which will insure that the arbitrator shall conform his decision to arrangements made beforehand between the two Powers. I do not quite myself understand how this is to be done; but it does not seem to me to be a satisfactory mode of action, or one that would reflect credit

²⁰ Salisbury to Lascelles (British Ambassador in Berlin), September 15, 1899, FO881/7235/118-20.

²¹ Salisbury to Lascelles 22 Sept 1899, FO881/7235/123.

²² See Chapter 9, *infra*.

upon either Power, if, as is almost certain, it should ultimately come to be known.²³

Finally, a partition was agreed to through diplomatic discussions. The U.S. received clear jurisdiction over the islands of greatest interest to it; Britain and Germany agreed that Germany would take over the bulk of the islands (which allocation didn't survive the First World War) in return for British imperial gains elsewhere in the Pacific.²⁴ The only item that remained was the issue of liability for damages from naval forces during the civil war. Another arbitral structure was established, again following considerable delay over setting the terms of reference, with King Oscar of Sweden and Norway ultimately ruling against British and American naval actions in 1902 and a local commission handled individual claims by 1905.²⁵

The extended and complicated Samoan story illustrates that arbitration and related modes of joint dispute resolution played an important and varied role in resolving inter-imperial disputes. However, as shown by the position of the German Government and British Ambassador Lascelles, states and states' men took multiple and not-always-consistent perspectives. By the end of the century, arbitration per se had been clothed in juridical language so that the idea of states' managing the process and outcome, *or at least appearing to do so*, was problematic. Whereas any diplomatically-determined compromise solution was cognitively acceptable (if perhaps risky in terms of domestic politics), an arbitral determination of 'right and wrong' was also cognitively acceptable (and brought domestic political benefits by enabling a government to gain credit by both maintaining its position and appearing civilized to the degree of accepting the apparent international 'rule of law'). What wasn't acceptable was the apparent delegation of political compromise to those arbitrators/foreigners outside the direct control of the state. Indeed, the fear

²³ Lascelles to Salisbury, October 6, 1899, FO881/7314/16-17.

²⁴ FRUS 1899, 665-7.

²⁵ Kennedy, *The Samoan Tangle*, 280-1. Penfield 767-9.

of arbitrators' compromises continued to animate Salisbury and other states' men and affected the negotiations over the Olney-Pauncefote Treaty in 1896-7 and the Hague Conference debates in 1899. While they couched it in terms of concern over potential liability for their states, there was also a sense of needing to maintain control of the process. In Samoa, then, arbitration remained firmly under state control and juridicalization was limited both in terms of the international process and the management of the domestic Samoan administration.

The Venezuela Boundary

The jungles of northeastern South America were a typical site for an imperial frontier. Challenging terrain and sparse populations made precise boundaries difficult to survey and of little short-term value. Thus, despite the formal organization of the colony of British Guiana in 1831 and a survey 'line' drawn by a British agent in 1840, for over forty years, the demarcation between Venezuela and the colony, while not agreed upon, did not rise to the level of a major international dispute.²⁶ But the discovery of gold and other metals in the 1870s brought increased population and attention. By the 1880s, diplomats on both sides were engaged in intermittent and desultory discussions, including suggestions of arbitration on both sides at various stages.²⁷ The parties could not agree on the detailed terms of reference, and populations and tensions then rose to the point that Venezuela broke off diplomatic relations in 1887. Changes in both governments and an offer by the United States to facilitate a settlement kept arbitration on the table, but no

²⁶ Humphreys, *Anglo-American Rivalries*, 136-41.

²⁷ De Rojas (Venezuelan Minister in Paris) to Granville (Foreign Secretary), February 21, 1881, FO420/170/217-8. C.E. Mansfield (British Minister in Caracas) to Lord Granville, November 22, 1883, FO420/170/226-7. In their ongoing discussions, the Venezuelans also cited the early (1830s) suggestion of then prime Minister Lord Aberdeen to utilize arbitration, as well as the recent precedents of the Bowring arbitration treaties. Mansfield to Granville, April 10, 1884, FO420/170/232-3, enclosing Seijas to Mansfield, April 2, 1884.

settlement emerged in the on-going discussions through 1894.²⁸ At this point, Venezuela retained the services of William Scruggs, a former American diplomat, to rouse the U.S. public and government to its side.²⁹ Invoking the specter of the Monroe doctrine, lingering dislike of Great Britain, and engaging the increasingly aggressive/jingoistic American public opinion, Scruggs managed to gain the attention of President Cleveland and turn this imperial-peripheral dispute into a startling confrontation between the U.S. and Britain which illustrated the nature and uses of arbitration at the end of the century.

Scruggs's propaganda was leveraged by newly-installed U.S. Secretary of State Richard Olney into a broad assertion of an American sphere of influence across the Western hemisphere, rooted in the Monroe Doctrine.³⁰ Moreover, Olney now demanded that Britain agree to arbitration with Venezuela. There were two notable things about this intervention. The first was that the U.S. now assumed complete ownership of the issue; relegating Venezuela to merely a signer of the final accords. Second, the idea of arbitration had been agreed to by Britain and Venezuela for well over a decade, although they could not agree on the terms of reference. The British felt little urgency and the Venezuelans had no means of leverage short of starting a (likely expensive and unsuccessful) war. The American effort did not garner the full attention of the British Government until late in 1895, when Salisbury, in his measured (or brusque) tones, brushed off the idea that the Monroe Doctrine was a settled principle of international law and similarly rejected the American interpretation of the history of the case.³¹ The American riposte, in

²⁸ See, e.g. Salisbury to Pauncefote, November 11, 1891, FO420/170/329. Blaine (Secretary of State) to Peraza (Venezuelan Chargé in Washington), May 2, 1890, RG59 M99/99

²⁹ Humphreys, *Anglo-American Rivalries*, 142-6.

³⁰ Olney to Bayard (U.S. Minister in London), FRUS, 1895, i, 545-62.

³¹ Salisbury to Pauncefote, November 26, 1895, FRUS 1895, i. 563-76.

President Cleveland's Message to Congress of December 17, 1895 reignited the dispute.³²

Cleveland rejected Salisbury's principles and initiated an all U.S. Investigatory Commission on the boundary issue.³³ Cleveland had covered his political flank, but he also subtly created a negotiating space and, now recognizing the nature of the dispute, the British engaged more fully with the U.S.

Over the course of 1896, the two states (with Venezuela barely in evidence) negotiated the terms and procedures for the boundary arbitration.³⁴ The central issue was the scope of the territory which would be subject to arbitration. Beyond the nominal claims of both sides which were often founded on postures undertaken for domestic or international political consumption (e.g., the U.S. had to be seen as pressing for the full extent of the Venezuelan claims) and creative readings of history, the key sticking points were the existence of British settlements and its practical political control of certain areas. The upshot was a referral directing the arbitrators to take into account the holdings of landowners (i.e. British settlers) who had good title dating back at least fifty years as well as areas under effective political control. The key points in the agreement were signed by Secretary Olney and British Ambassador Julian Pauncefote on November 12, 1896 and the final full treaty was signed in February, 1897 by Britain and Venezuela.

As with the "Three Rules of Washington" which, through a political process, set the acceptable parameters of substantive risk for the "*Alabama* Claims" case, so too the substantive agreement between Olney and Pauncefote in expressly establishing the "Rules" of the Venezuelan boundary dispute arbitration similarly set not only the procedural rules, which were

³² James, *Richard Olney*, 121-3. British reaction to Cleveland's Message was distracted by the publication of the Kaiser's Kreuger Telegram a few weeks later.

³³ FRUS 1895, i, 542-5.

³⁴ Humphreys, *Anglo-American Rivalries*, 158-60. Venezuela had no role in the negotiations. For example, the arbitrators on the "Venezuelan" side were named by the U.S. Supreme Court.

unexceptionable, but also the substantive rules. If this did not render the formal procedure ministerial, it at least confined the discretion of the arbitrators to such a degree that their result could not be politically objectionable to the parties.³⁵ In particular, these negotiations concerning the recognition of the long-term presence of British subjects in certain areas ensured a result acceptable, if not satisfactory, to Britain. This was embodied in the so-called “50 year rule” (grandfathering British holdings) as well as in guidance to the arbitrators to recognize those areas under “exclusive political control” as de facto possession by the British settlers and colonial administration.³⁶

Thus, at one level, a situation which had seen talk of war in the press and some degree of ‘sabre-rattling’ by President Cleveland was resolved through a detailed, properly structured, and peaceful arbitration. It was hailed both in the U.S. and Britain as a triumph for peace and further evidence of the spread of arbitration in the forefront of which were the two Anglophone giants.³⁷ The public reaction was celebratory, particularly in the U.S., where the arbitration was portrayed as a rebuff of British imperial pretensions and an assertion of the U.S.’ power in the Western Hemisphere. In the event, the arbitrators found that almost all the disputed territory should go to Britain. Beyond this nominal result, the dispute was one in which two imperial powers jostled for influence and recognition. The U.S.’ interest in Venezuelan territorial claims was minor; Cleveland and Olney were much more focused on domestic political positioning and the global stature of the U.S. vis-a-vis Britain. They used the concept of arbitration (which Britain had

³⁵ Ibid. 161. However, allegations revealed in the 1940s led to Venezuela claiming that Dr. Martens, the Russian umpire in the arbitration had colluded with the British arbitrators. Child, “Venezuela-British Guiana Boundary.”

³⁶ Heads of Proposed Treaty, FRUS 1896, 254-5.

³⁷ Venezuela was pretty unhappy with the treaty, but having invoked American sponsorship, they were not in a position to complain much. They did secure the right to name one of the two “Venezuelan” members of the Commission, but, in the end, they named the Chief Justice of the United States. Humphreys, *Anglo-American Rivalries*, 161-2.

endorsed for decades in this case) as a means of ‘chest-thumping’ and, even rejected Salisbury’s suggestion of a joint fact-finding commission because it lacked public finality.³⁸ The Americans were keen to preserve the appearance of parity between themselves and the British and, while they vigorously negotiated rules of decision, the rules unsurprisingly produced a pro-British result.³⁹ Salisbury and Pauncefote were on guard for British interests on the ground in Guiana and for the appearance of an honorable settlement. As with the “*Alabama Claims*,” arbitration met their needs of a nominally fair and final resolution. Venezuela, too, had long pushed for arbitration. And although it was unhappy with the terms of reference and the final result, arbitration met an important need both politically and legally. Compliance with the arbitral award provided the Venezuelan government with an external scape-goat for the loss of its (claimed) territory. Further, as Olney noted to Pauncefote as they were beginning to work out the terms, “it was not possible for Venezuela to abandon her claims to the settled districts unless a Tribunal of Arbitration decided against her, as she was expressly precluded from doing so by the terms of her Constitution.”⁴⁰ So, from Venezuela’s perspective, short of submitting a negotiated territorial settlement to a domestic constitutional amendment process, there was no choice but arbitration.

The Alaskan Boundary

Canada’s western boundary was never fixed back in the days when it abutted Russian territory and there was no need to address its geographical, climactic, and treaty interpretation challenges until the Gold Rush of 1897 made it important for the area, literally, to be put “on the map.” The resulting arbitration between Canada (and its imperial representative, Britain) and the

³⁸ Pauncefote to Salisbury, February 28, 1896, FO420/168/66.

³⁹ Pauncefote got the impression from Olney that the latter “will strive to induce Venezuela to accept regulations for the guidance of the Arbitrators such as would diminish the danger of any injustice or hardship being inflicted by the decision of the Tribunal.” Pauncefote to Salisbury, March 1, 1896, FO420/168/70. In the event, Britain was awarded almost 90% of the territory in dispute. RIAA 38 (1899) 331-40.

⁴⁰ Pauncefote to Salisbury, March 1, 1896, FO420/168/70.

U.S. was another three-way diplomatic dispute where, as with Samoa and Venezuela, the process was more enlightening than the result.

The formal issue in this case was the interpretation of the 1825 Russo-British Treaty setting out the boundary between their imperial possessions in the northwestern portion of North America. At a more practical level, the origins of this dispute might be said to date from 1867 when ‘Seward’s Folly’ led to U.S. jurisdiction over Alaska and the consolidation of formal Canadian identity formalized in the British North America Act shifted the locus of control over what is now western Canada to the administration based in Ottawa. However, the immediate driver of this territorial dispute was economic, as increased mineral wealth spurred mining activity across the region without regard to where trappers, traders, and Tsars might have considered boundaries to exist. An expanded assertion of territory by Canada in the 1880s led to an agreement in 1892 to survey and demarcate the southern end of that boundary (i.e. the Alaskan ‘panhandle’), which was completed in 1896.⁴¹ A Report of the Canadian Privy Council in 1895 noted the uptick in mining activity and the need for a definitive boundary for purposes of civil administration and a further convention was signed in 1897 to demarcate the apparent boundary along the line of 141 degrees West (the boundary to the east of the main part of Alaska).

Meanwhile, however, tensions flared as both Canada and the U.S. sought to bring police and military forces to the southern/panhandle area to ensure local order. Given the topography, both sides needed the other’s cooperation to enable their men to get to their own jurisdictions. The southern end of the boundary, subject of the 1892 Convention and 1896 survey, remained disputed. In 1898, at the suggestion of Canada, Britain proposed a mixed commission arbitration since, in the words of the Colonial Office, “in the present circumstances it would be hopeless to

⁴¹ The survey under this agreement also finally resolved the demarcation of the boundary on the Atlantic Coast at Passamaquoddy Bay first proposed to be resolved under the Jay Treaty of a hundred years earlier.

expect that an agreement on the question could be reached by discussion, and...its reference to such a tribunal as that proposed is the most likely to insure an early decision which would be accepted by both Parties.”⁴² Salisbury concurred that afternoon and feared that the issues relating to local police forces “would lead to serious embarrassments.” He directed Pauncefote to determine whether the U.S. would be open to an arbitration, without which “there will be a dangerous conflict of jurisdiction. Procedure might be so arranged as to be tolerably rapid.”⁴³

The U.S. was equally desirous of preventing a local imbroglio, but fearing the complications of Senate approval of an arbitration agreement, suggested that a provisional line be demarcated by surveyors under the 1892 Treaty.⁴⁴ A provisional agreement was negotiated diplomatically, with the understanding that the final line would be set by the arbitration.⁴⁵ However, due to local complications, it took until late in 1899 for the provisional boundary to be settled.⁴⁶ Meanwhile, discussions of the arbitration process to finalize the permanent boundary struggled along. It is perhaps ironic that Ambassador Pauncefote did not participate directly in this process since he was seconded to the Hague to lead the British delegation to the Peace Conference there and negotiate its general arbitration agreement, from April through November.

From an overall perspective, it is clear that both Salisbury and Pauncefote were seeking a general resolution of outstanding issues with the U.S. However, Pauncefote was pessimistic, noting American rigidity on several issues, not least of which was the Alaskan boundary. In particular, he believed that the U.S. would be averse to arbitration on that topic, lest they lose territory based on the decision of a “foreign Umpire.” As a result, he suggested a limited

⁴² Colonial Office to Foreign Office, 18 February 1898, FO881/7161/9.

⁴³ Salisbury to Pauncefote, 18 February 1898, FO881/7161/10.

⁴⁴ Pauncefote to Salisbury 2 March 1898, FO881/7161/22.

⁴⁵ Salisbury to Pauncefote, 9 April 1898, FO881/7161/70; Pauncefote to Salisbury, 20 April 1898, FO881/7161/75.

⁴⁶ Tower (British Chargé in Washington) to Salisbury, 27 October 1899, FO881/7340.

arbitration that would provide for the preservation of limited specified rights or territory to the party losing the formal legal arbitration. He saw Article 6 of the still-born general arbitration Treaty of 1895 as a model.⁴⁷ There were similar repeated references to the Venezuelan Boundary situation, including a British proposal to apply its rules and procedures wholesale to the Alaskan situation.⁴⁸ This shows first, the seamlessness with which arbitration fit into the range of diplomatic solutions to pending problems. As with the Venezuela Boundary and Samoa, the use of constraints on the arbitrators' decisions, or the use of a pre-determined set of concessions on the implementation of those decisions as a means of alleviating the anxieties of loss on both sides makes clear that the formal sense of adjudication was secondary to the resolution of the overall bi-lateral relationship.⁴⁹ Second, the proliferation of arbitration proceedings during this period gave a common vocabulary to the overlapping group of diplomats who addressed these issues.

The U.S., too, was eager to avoid real trouble. Privately, according to Secretary of State Hay, President McKinley was "so anxious for a settlement, that [he] would be prepared to agree upon a form of arbitration for the whole frontier, even at the risk of possible objection from Congress."⁵⁰ But, such protestations notwithstanding, the process of agreeing on the terms of arbitration were almost as tortuous and complex as those regarding the Alabama claims, thirty years before. Indeed, if the agreement on the provisional boundary took the better part of a year to

⁴⁷ Pauncefote to Salisbury, 9 February 1899, FO881/7340/1

⁴⁸ Salisbury to Choate (US Ambassador to Britain) 1 July 1899, FO881/734/62.

⁴⁹ A significant part of the Olney-Pauncefote negotiations over the Venezuelan boundary agreement dealt with the extent to which the arbitrators would be required to recognize the longstanding nature of British settlement in the area and with the decisional significance of the preliminary British survey line (i.e. the Schombrugg Line) dating from the 1840s. In the event, Article IV of the agreement set out detailed rules of decision, including the crucial provision that grandfathered British holdings that had been in place for 50 years. Treaty of Arbitration between Great Britain and the United States of Venezuela, Washington D.C., 2 February 1897. BFSP 89:57. The negotiations over the Samoan settlement, *supra*, included arbitral structures under which the arbitrators would have to allocate certain designated territories to the "losing" party.

⁵⁰ Tower (British Chargé in Washington) to Salisbury, 4 May 1899, FO 881/7340/20-1.

secure, that establishing the arbitration for the permanent boundary took until 1903, long belying Lord Salisbury's early 1898 hope for an arrangement to be made "tolerably rapid," but amply demonstrating the infeasibility of negotiating an actual substantive settlement.⁵¹

Thus, it was not until May, 1901 that a fresh and focused set of proposed treaties—one relating to the Alaskan boundary, the other addressing all other pending Canadian-American issues—was presented by the U.S.⁵² This draft, which Pauncefote found encouraging, addressed both the specific issues to be covered as well as detailed procedures for the tribunal. The Canadians would have none of it, however, and remonstrated four months later in a memorandum twice the length of the proposed treaty. Not only did they object to the terms of reference, which they saw as self-serving on the part of the U.S.; but they vehemently opposed the proposed constitution of the tribunal. While all sides were agreeable to employing "eminent jurists," the American proposal suggested that each side appoint three such men and, unlike virtually all mixed commissions theretofore, that there be no umpire. The Canadians thought this a recipe for either a split or (from their perspective) an adverse decision.⁵³ In any event, the position of the Colonial Office was not definitively transmitted to the Foreign Office until January, 1902, almost

⁵¹ The list of the causes of delay included:

- intra-imperial tensions between Britain and Canada,
 - bureaucratic tensions between the Colonial Office and the Foreign Office,
 - differences in substantive historical and legal interpretation,
 - local military, police, and settler tensions and the difficulty in managing them from distant capitals,
 - some jingoism in the popular press and legislatures,
 - the pendency of and relationship to broader Anglo-American and Canadian-American issues (the latter embodied in the Joint High Commission process) ranging from the Bering and Atlantic fisheries to the proposed Nicaraguan Canal,
 - the insistence of both sides in arguing the substance of their cases in the course of negotiating whether and how an arbitration should proceed,
- as well as likely exhaustion over dealing with both the provisional and permanent aspects of the boundary for so many years.

⁵² Pauncefote to Lansdowne, 10 May 1901, FO 881/7904/11-21.

⁵³ Colonial Office to Foreign Office, 14 September 1901, FO 881/7904/40-6.

10 months after the U.S. floated its proposal.⁵⁴ The Foreign Office took another month to send its directions to Pauncefote in Washington, seeking changes in both the composition of the tribunal (either an odd number of members or the inclusion of two members from non-parties), and a more-neutral phrasing of the terms of reference.⁵⁵

In the event, the British delay proved highly problematic; for in the meantime, President McKinley had been assassinated and President Roosevelt took a decidedly different stance. Reconciling the beliefs and tactics of this nominal advocate of arbitration and later winner of the Nobel Peace Prize would be a complex task and would lead us far astray.⁵⁶ Suffice it to say here that when Pauncefote re-opened discussions with Secretary of State Hay, he learned that Roosevelt believed so strongly in the substance of the U.S. position on the boundary that he disapproved of Hay's proposal of the previous year. The best the Hay could offer was for a non-binding commission to opine and guide further negotiations.⁵⁷ With Pauncefote's death, very little happened formally during the next six months. But in informal discussions, Canadian Prime Minister Laurier indicated to the U.S. Ambassador Choate in London that Canada would recede on the 3+3 composition of the Tribunal and, indeed, that it recognized political benefit in an adverse arbitrator's decision as compared with a negotiated settlement, implicitly recognizing the weakness of the Canadian case.⁵⁸ In October, Hay indicated informally that since he feared the Senate would not approve any arbitration agreement that put any claimed American territory at risk and "all that he could do was to renew the proposal" for an advisory Tribunal.⁵⁹ When the British agreed to an advisory Tribunal, Secretary Hay again expressed hope for a binding

⁵⁴ Colonial Office to Foreign Office, 4 January 1902, FO 881/7932/1-4.

⁵⁵ Lansdowne to Pauncefote, 5 February 1902, FO 881/7932/7A-C.

⁵⁶ See Chapter 9, *infra*.

⁵⁷ Pauncefote to Lansdowne, 28 March 1902, FO 881/7932/12-3.

⁵⁸ Lansdowne to Raikes (British Chargé in Washington), 16 July 1902, FO 881/7932/22. AE Campbell.

⁵⁹ M. Herbert (British Ambassador in Washington) to Lansdowne, 17 October 1902, FO 881/7932/39.

Tribunal, subject to domestic political possibilities; and agreed with the bulk of the British proposals for changes in the terms of reference. Significantly, Hay indicated that he had reviewed the changes with the principle members of the Senate Foreign Affairs Committee and consulted more than thirty Senators in total, which made him optimistic about approval.⁶⁰

With the terms of reference agreed to, the Canadians made one more (unsuccessful) run at the issue of the composition of the tribunal. Both sides recognized that the 3+3 formulation, together with the underlying strength of the U.S. substantive case, made it highly unlikely that the result would be adverse to the Americans. Indeed, it seems clear that this belief underlay the willingness of Roosevelt and the U.S. Senate to proceed at all with this agreement.⁶¹ So, the Hague arbitration process was not a politically feasible avenue for this dispute, despite its recent inauguration and Roosevelt's endorsement of it in the Japanese House Tax Case. After all the '*sturm-und-drang*,' the Treaty was signed on January 24, 1903. It was approved by the Senate on February 12 without amendments, and ratifications were exchanged on March 3. The Tribunal heard arguments in September and October, 1903 and rendered its award, largely favorable to the United States, on October 20.

Throughout the pendency of this dispute there seems to have been, notwithstanding, a calm confidence in the reliability of surveying and demarcation and an appreciation at the diplomatic level that a few miles of wilderness, here or there, should not have been a material impediment in Anglo (/Canadian)-American relations.⁶² There are three important implications

⁶⁰ Herbert to Lansdowne, 8 December 1902, FO 881/7932/48 and Herbert to Lansdowne, 19 December 1902, FO 881/7932/56.

⁶¹ Campbell, A.E., *Great Britain*, 111.

⁶² See, e.g., Salisbury to Pauncefote, 9 April 1898, FO 881/7161/71, urging a "friendly representation" to the U.S. government about local police tensions and stressing "it is most desirable that both Governments should work harmoniously to relieve distress and preserve order." Of course, from other perspectives, this could be seen as the Olympian detachment which characterized Salisbury's later foreign policy generally, or imperial indifference to the pressing concerns of Canadians.

from this episode. First, largely due to public pressures and appearances (particularly from Canadians and Alaskans) the diplomatic process was unable to resolve this matter. Second, the particular arbitration process that was chosen to resolve the matter—while nominally balanced and objective—was deliberately structured to deliver an outcome politically acceptable to the United States. Finally, the process of establishing the arbitration specifics required at least as much diplomatic maneuvering after both sides had accepted the concept of arbitration. As with the “*Alabama Claims*” case, despite all the diplomatic difficulties, arbitration, while not simpler or faster, was an established method of getting to *a* solution; a solution that 1) could be portrayed by both governments as “fair” to their various constituencies, 2) avoided the risk of appearing weak in both domestic and international contexts, and 3) removed the relatively minor issue as an impediment to larger strategic alignments.

Informal Empire

Informal empire has traditionally been considered in the historiography as an alternative to the extension of Western state power through a formal declaration of sovereignty and metropolitan administration. However, in terms of international law in general and arbitration practice in particular, the phenomenon presents a distinctive opportunity to consider how that power was extended within the formal structures of the states system. In other words, within a formal empire, power was framed within the domestic legal system of the metropolitan power. However, since informal empire operated, by definition outside of that controlled environment, it had to rely to some degree on the forms and principles of international law. Arbitration was thus a tool of informal empire; sometimes as a means of political oversight and sometimes as a means of extending “civilizational” norms.

Lauren Benton has demonstrated that simple models of sovereignty within formal empires usually ran afoul of local conditions, particularly the complexities of geography and indigenous culture.⁶³ Those complexities, of course, did not stop at imperial borders (however precisely defined); nor were they contained solely within the territories and activities claimed by Western states. Arbitral regimes, whether in the context of particular *compromis* or broader agreements, inserted the same type of “layered sovereignty” into situations that were nominally in the “international” sphere of independent states. By the same token, as Benton has described the insertion of international legal concepts into imperial contexts, arbitration in “informal imperial” contexts represents the same type of complication, this time by the insertion of domestic legal concepts into nominally international relationships.⁶⁴ These include not only basic precepts of contract and property law, but, more fundamentally, the epistemic nature of law and its implications for the shape of the state.

This study has intentionally avoided engaging with the substantive doctrines of international law because, at least in principle they were—more-or-less—shared by Western powers and were often sufficiently vague as to not become part of the decision to participate in a specific arbitration proceeding.⁶⁵ However, in the context of informal imperial relations, several generally accepted doctrines tended not only to promote commercial and financial interests, but also provided a basis on which Western powers could hold peripheral states responsible for damage caused by domestic unrest or for maintaining a Western standard of domestic judicial process which, if contravened, provided a basis for diplomatic, if not military intervention. These principles—such as the duty to protect foreigners and their property from

⁶³ Benton, *A Search for Sovereignty*, 31.

⁶⁴ *Ibid.* 236–41.

⁶⁵ Indeed, as seen in Chapter 7, general arbitration proposals in the later nineteenth century led to the demand for more specific substantive and codified principles of international law.

domestic disturbance or judicial irregularity—which rarely, if ever, found application in an intra-European context. Arbitration became a forum for applying these substantive international legal principles and protecting Western interests outside of the peripheral state’s normal processes.⁶⁶

Nineteenth century international law was constructed in no small part out of what Anghie has called a “dynamic of difference” between European/”civilized”/universal states and non-European/uncivilized/particularized polities which necessarily undermined the global application of the essential concept of sovereignty as the premise of the international order.⁶⁷ This “dynamic of difference” can be seen in a range of contexts, including treaty practice, inclusion in conferences, the creation of protectorates, and rights of intervention. Some examples of arbitration certainly fit this model, such as the insertion of a Great Power as an arbitrator between two client states.⁶⁸ On the other hand, the invocation of arbitration by peripheral polities and even by secondary European states indicates that international law could be a tool—two-edged, to be sure—by which the weak could neutralize the military and political advantages of the Great Powers. Hawaii in the 1860s and Venezuela in its boundary and claims/blockade disputes are two examples. By invoking European legal norms they acquiesced in their own “suppressing and subordinating”,⁶⁹ but at the same time they sought and sometimes achieved a constraint on exercise of Great Power. While not fully congruent with Anghie’s model, even the flurry of general arbitration agreements entered into by secondary European states in the aftermath of the Hague Conference can be seen in this light as well.

One example arose in 1874-5 in a context which illustrates that the lines between “international arbitration” and extraterritorial jurisdiction for Western powers in peripheral states

⁶⁶ Arbitration was thus similar to the use of extraterritorial jurisdiction and Western-staffed mixed courts.

⁶⁷ Anghie, *Imperialism*, 4.

⁶⁸ E.g. Britain in Afghanistan and southern Africa, Russia in the Balkans in the early twentieth century, and the U.S. in Latin America.

⁶⁹ Anghie, *Imperialism*, 5.

could be blurred. In the course of increasing its penetration of Egypt in the 1870s, France, ensured that its judicial representatives would be inserted into the Egyptian judiciary for local cases which arose involving its nationals. In addition, it secured the right for French governmental claims to be resolved by a “Commission composed of three Magistrates of the Court of Appeal chosen by agreement between the two Governments.”⁷⁰ While such a structure was not framed in the same language used for a claims *compromis*, the effect was the same: a jointly-selected tribunal, with established rules of procedure, from which no appeal lay, would decide the Franco-Egyptian intergovernmental dispute.⁷¹

The Deleog Bay Railway

One of the perennial problems with the concept of informal empire has been the difficulty in clearly demarcating the separation between the government and private sector within the imperial power. In the context of arbitration, which at this time was almost entirely between two states, the question is how and when a government determined to engage in the process beyond the initial level of diplomatic investigation and support and declare its willingness to take on the claim as its own.⁷² Such a decision involved not only a consideration of the domestic political standing and economic effects associated with the imperial private claimant (a difficult issue to pin down from a documentary perspective), but also an assessment of the overall diplomatic

⁷⁰ The Franco-Egyptian Agreement of November 10, 1874. British Parliamentary Paper 1876 [C.1393]. Earlier versions of these arrangements were cited by Elihu Burritt as models for resolving other international disputes. *Advocate of Peace*, October, 1870, II (n.s.) No. 22 P. 291.

⁷¹ Germany and Britain shortly claimed the same rights. The Franco-Egyptian Agreement was substantially replicated by a German-Egyptian Agreement of May 5, 1875 and an Anglo-Egyptian Agreement of July 31, 1875. British Parliamentary Paper 1876 [C.1393]. The underlying agreement for the International Judicial Commission and its implementation by Mixed Courts was later expanded to include the U.S. and most other European powers, and extended through 1889. *Correspondence Respecting the Mixed Courts and Judicial Reforms in Egypt*. British Parliamentary Paper, 1884 [C. 4050].

⁷² There was only a few cases in which a private entity was formally the adversary of a state prior to World War I. See SMH## 239 (Suez Canal Co.), 606, 607 (U.S. companies in Ecuador). This changed in the twentieth century, as states became more willing to recognize companies (and individuals) as subjects of international law.

relationship between the two states involved. That such claims could result in military actions and war has been amply demonstrated by such episodes as the Franco-Mexican Pastry War (1838), the Opium Wars (1839, 1856), the Ashanti War (1873), the British Occupation of Egypt (1882), and the multi-state Venezuelan Blockade (1902).

One example of this type of arbitration was the Delagoa Bay Railway dispute of 1899 in which the British government sponsored an arbitration on behalf of its citizen-investors in the Railway company against an alleged breach of the company's concession issued by the Portuguese colonial administration in what is now Mozambique. Certainly, British sensitivities in this case were heightened by their prior involvement with Portugal over the boundary between Portuguese and British territorial claims in the Delagoa Bay arbitration of 1870.⁷³ In 1883, Portugal issued an exclusive concession for the construction and operation of a railway from Lourenco Marques to the Transvaal frontier to a group of American and British financial interests. The Company was to have full discretion in setting rates on this line in return for its high-risk nature. The line was completed in 1887 and in 1888, in the context of the gold-led boom in the Transvaal, the Portuguese government, apparently in conjunction with the Transvaal government and Dutch financial interests, contrived (according to the company) to threaten to cancel the concession. As the cancellation threatened, these financial interests engaged British diplomatic and military protection, but the company was unsuccessful in stopping the process. The cancellation became effective in 1889. Under the concession agreement, disputes about the agreement were to be referred to arbitration, which the Portuguese government never denied.⁷⁴ The Law Officers opined that the British investors had a valid claim for compensation, and the

⁷³ SMH# 301.

⁷⁴ Barros Gomes (Portuguese Minister of Foreign Affairs) to Petre (British Ambassador), 26 June 1889, FO 881/5988/112-3.

British Government advanced that claim to the Portuguese government.⁷⁵ The Portuguese agreed to arbitrate the Company's claim under the provisions of the concession agreement, but was considered unsatisfactory by British and American claimants feared that the domestic arbitration process under Portuguese domestic law would be biased. Salisbury proposed that the US and Britain jointly propose an international arbitration before a "jurisconsult of Sweden, Switzerland, or some other minor neutral State."⁷⁶ Throughout these extensive discussions, the Portuguese Government continually acknowledged its duty to pay just compensation.⁷⁷ However, both the British and U.S. governments were doubtful about the fairness of a domestic Portuguese compensation procedure.⁷⁸ The Portuguese finally agreed to international arbitration, however.⁷⁹ Following considerable negotiation over the selection of the nationality of the arbitrators, it was finally agreed that three Swiss jurists form the arbitration panel.⁸⁰

Most of 1891 was taken up with haggling over the specifics of the *compromis* and sparring between British and American investors as to their relative share of any award. In the course of working out the British position on these questions, Lord Salisbury framed an issue essential to the nature of international arbitration: what is the role of the government of its private claimant in a proceeding that appears to be between two governments? The Lord Chancellor (Halsbury) opined that, at least on the facts of this case, the British Government once it had made the political decision to intervene with the Portuguese Government, was only obligated to secure a fair procedure for the resolution of the investors' claims and was not obligated, either financially or substantively, to underwrite the specifics of those claims. The Chancellor emphasized that

⁷⁵ Law Officers to Salisbury, 15 August 1889, FO 881/5988/158-60. Petre to Salisbury, 18 September 1889, FO 881/5988/178-81.

⁷⁶ Salisbury to Pauncefote, 24 January 1890, FO 881/6058/3.

⁷⁷ Petre to Salisbury, 22 March 1890, FO 881/6058/16.

⁷⁸ Pauncefote to Salisbury, 25 April 1890, FO 881/6058/49.

⁷⁹ Ribeiro (Portuguese Minister of Foreign Affairs) to Petre 1 May 1890, FO881/6058/53.

⁸⁰ Pauncefote to Salisbury, 5 July 1890, FO 881/6058/75.

while this was an “international” arbitration in the sense that it was not “domestic” (as the Portuguese had proposed), it was not “international” in the sense that it was between the substantive claims of two national governments (as might be the case in a boundary dispute).⁸¹ This distinction, while it might appear obscure, goes to the heart of a significant class of arbitral proceedings dating back at least to the Jay Treaty where, as with the Delagoa Bay Railway claim, the arguably inadequate treatment of a private claim by nationals of country A against country B led country A to secure “international arbitration” as a remedy. From one perspective, this could be seen as country A ensuring that its nationals received a minimum standard of legal regularity with regards to their claims and property in country B. From another perspective, quasi-imperial powers forced peripheral states to allow foreigners to remove their claims from local jurisdiction and have them heard in more legal/Western/friendly fora. Implicit in the Chancellor’s opinion is the distinction between the present case and the more typical one where country A felt that the treatment by Country B towards country A’s nationals engaged national dignity and interests such that country A would assume the full role of plaintiff directly.⁸²

One of the illuminating aspects of the case is the apparent treatment of the Portuguese by the British and Americans as more of a ‘peripheral’ state (comparable to Chile or Siam) than a long-standing European imperial power. This is made clear by the strong demand, made particularly by the U.S., for an *international* arbitration and not allowing for the domestic Portuguese procedure provided for under the underlying concession agreement. Indeed, in the course of the procedural negotiations, the Portuguese diplomat managing the case told his British counterpart that he was repulsed by the harsh tone of the arbitration filings made by the American

⁸¹ Memorandum by the Lord Chancellor (Halsbury) to Salisbury, 17 April 1891, FO 881/6163/8-9.

⁸² In contrast, here, Salisbury made clear that the British Government would only present the company’s case to the arbitrators and that company had to reimburse the government for its expenses in presenting the case. Currie (PUS) to Delagoa Bay Railway Company, 30 October 1891, FO 881/6163/54-5.

investors and he “remarked with considerable bitterness that if his Government had not so keenly felt its comparative feebleness and isolation it would have unhesitatingly refused to proceed...”⁸³

In its weakened condition, Portugal could not protect the jurisdiction of its local court system and had to submit to a procedure shared with the U.S. and Britain.

Commercial Claims in Latin America

Outside of their respective empires, European and U.S. capitalists made their largest foreign direct investment in the later nineteenth century in Latin America. Typical issues of exploitation/expropriation were exacerbated by endemic political instability and led to no small number of disputes and claims. These, in turn, led to a spate of international arbitrations when capitalists’ home countries intervened in light of the Latin American states failure to either provide domestic judicial relief in accordance with Western models or failed to pay agreed upon compensation due to domestic political/economic instability. Gunboat diplomacy sometimes ensued.

The Cerruti Case illustrated the complications of this approach.⁸⁴ An Italian national sought pecuniary claims from Columbia beginning in 1885. The initial arbitration agreement called for a (1+1+1) mixed commission, but poor drafting apparently aborted the procedure in 1889 and diplomatic renegotiation took until 1894 when U.S. President Cleveland was selected as the sole arbitrator. Cleveland issued his decision in early 1897 (while the Venezuelan Boundary case was active and the negotiations with Britain over a general arbitration agreement were underway). The lack of an articulated rationale in favor of Italy and an overbearing attitude by the Italians led the Columbians to protest and the matter was not finally resolved until the Italian Navy showed up in Cartagena harbor in 1899.

⁸³ Scott (British Minister to Switzerland) to Salisbury, 11 April 1891, FO 881/6163/6-8.

⁸⁴ The case is discussed in detail in Bureau, *The Italo-Columbian Dispute*, from which this account is drawn.

There were two implications for the development of arbitration. While the Latin American tradition of endorsing arbitration was certainly a factor in this phenomenon, it represented as well a means by which Western powers could interject “civilization,” (i.e. their notions of legal regularity and their conceptions of property) into these peripheral socio-political contexts, with the threat of force looming (usually) in the background. As such, it was itself a means of informal (if shared) imperial activity and a limitation on Latin American sovereignty.⁸⁵ In addition, the use of Western diplomatic and military power to enforce commercial claims led to a Latin American initiative within the context of the international legal community to have all states agree not to use force in the pursuit of financial claims which was effectively a ‘back-door’ to the imposition of compulsory arbitration.

Of the approximately 250 *compromis* in which Latin American states were involved from 1828 to 1915 about 160 addressed claims issues and 150 of those were part of a ramp up of activity that began in the late 1850s. In 80 per cent of these situations (about half of all Latin American arbitral agreements or over ten per cent of all arbitration agreements globally from 1794-1918!), European or U.S. governments, on behalf of their nationals and their investments were the sole or predominant claimants. Of course, disputes and arbitrations arising from commercial claims go back to the Jay Treaty and have been a regular feature throughout the period, most commonly for the improper seizure of a ship. I have put these in a category of “informal empire” since a substantial percentage of this group were due to claims that alleged damage to property in the course of a war or civil disturbance in the Latin American country or

⁸⁵ See Benton, *Search for Sovereignty*. In addition, these arbitrations were a means by which Latin American regimes could resolve international disputes and gain the sanction of international law as a ‘scape-goat’ for the domestic political repercussions from the economic effects of compliance. This was a parallel to the situation involving boundary disputes (as in Venezuela) where the national constitution prohibited alienating any national territory, but de facto cessions could be complied with as the result of an arbitral award.

from a Latin American state's seizure or interference with a commercial concession or monopoly granted to an entity controlled by Western interests. A common denominator of many of these claims is the apparent lack of governmental stability and judicial regularity to adjudicate these claims (at least in the eyes of the claimants). The use of arbitration, with the sanction of the government of the affected Western power, was thus a means of hearing and resolving these claims outside the allegedly dubious domestic judicial system. In this way, arbitration before a mixed commission became a means by which Western-defined international legal standards and principles could be injected into Latin American commercial contexts.

Carlos Calvo, an Argentinian legal scholar, was the leading Latin American international lawyer of the nineteenth century.⁸⁶ Over the course of several editions of his oft-cited treatise on international law, beginning in the 1860s, he developed and promoted a doctrine under which the domestic judicial power of a (usually peripheral) debtor state would have the exclusive power to adjudicate claims arising in that jurisdiction and the capitalist investor/contractor/concessionaire would forego the right to invoke his home state's diplomatic intervention.⁸⁷ This model was debated within the international legal community and contested in commercial and governmental practice.⁸⁸ Following the military intervention in Venezuela over a financial dispute in 1902, the Argentinian Foreign Minister, Luis Drago, adapted Calvo's approach to enunciate a narrower doctrine under which (imperial) states would forego military intervention to force the collection

⁸⁶ Calvo was the sole founding member of the IDI (1873) not from the U.S. or Europe.

⁸⁷ Calvo's critique of European intervention had already begun by 1870 version of his *Droit International*, (2d Ed.) 251-50 and continued to expand over the course of subsequent editions of his treatise. Compare *Droit International* (5th Ed.) Vol. 1, 348-51 (1896). See Hershey, "Calvo and Drago," 26-32, for a summary of the argument.

⁸⁸ For example, Calvo's view was opposed by the British international lawyers Hall and Phillimore, but found considerable support from continental jurists. Hershey, "Calvo and Drago," 37. Its essence was adopted by the Second Pan American Conference in 1901-2. Noel, *History of the Second Pan American Conference*, 132-41.

of (peripheral) state's public debts.⁸⁹ The Drago Doctrine endorsed in part by the United States as part of the so-called Roosevelt Corollary to the Monroe Doctrine in 1904 and was debated by the Third Pan American Conference in 1906.⁹⁰ With U.S. sponsorship, a conditional version was adopted at the Second Hague Conference in 1907.⁹¹

The evolution of the Calvo and Drago Doctrines shows that, in the context of imperial/peripheral claims resolution, arbitration played fundamentally conflicting roles for the two types of parties. Both Calvo and Drago were mindful that Latin American states were often the sites of civil war and revolution, which usually reduced these states' ability to repay debts, resulted in Western claims for damage, and often produced new governments who desired to change prior policies on contracts and concessions. Calvo's approach would have excluded not only the capitalists' home state's courts from jurisdiction over such claims, but would also have similarly limited the role of international arbitration. In this way, Calvo's overall support for the international legal project was tempered by his desire to protect states whose nominal equality with others on the international plane was not matched by political and economic realities.⁹² While the Drago Doctrine applied to a narrower set of circumstances, it positioned arbitration as an important means of mitigating the risk of military and political weakness vis-a-vis Western Powers. However, supporters of both doctrines saw the increasing frequency of arbitration and,

⁸⁹ See Hershey, "Calvo and Drago". The Venezuelan Blockade Preference case is discussed in Chapter 9, *infra*.

⁹⁰ The Roosevelt Corollary was announced in the President's Annual Message to Congress on December 6, 1904. He leveraged the Monroe Doctrine to reject the potential for European intervention in Latin American states (for debt collection or other purposes) and asserted a U.S. right to intervene in a Latin American state to prevent "foreign aggression" which had been brought on by that state's "inability or unwillingness to do justice...." The Third Pan American Conference urged the member states to bring this issue to the upcoming Second Hague Conference. *Report of the Delegates of the United States to the Third International Conference of the American States*. Washington: USGPO (1907) 14, reprinted in FRUS, ii 1576.

⁹¹ Inman, *Inter American Conferences*, 56.

⁹² For a discussion of this phenomenon generally, see Lorca, "International Law in Latin America."

by the end of the century, its institutionalization, as a means by which their states would be protected. In contrast, Western states's desire to secure recovery for their nationals' claims pushed them, on the one hand, to seek international arbitration as a means of escaping what they considered to be local courts of dubious reliability and, on the other hand, to preserve their ability to utilize their superior military power if either domestic justice or international arbitral processes proved, from their perspective, inadequate.

Thus, rhetoric from U.S. leaders such as Roosevelt and Root was welcomed and their support for codifying the Drago Doctrine at the Second Hague Conference was avidly sought.⁹³ In the event, the proposal that the U.S. advanced at the Hague in 1907 was considerably tempered. It proposed to bar the use of military force as long as arbitration mechanisms were engaged and complied with.⁹⁴ While Europeans bridled at this constraint on their (sovereign) military power, Latin American states protested that such military power was not definitively eliminated.⁹⁵ The endorsement of this compromise meant that both "debtor" and "creditor" states' sovereignty was limited by the presence of arbitration processes. Moreover, while the contemporary and historiographical treatment of the Calvo/Drago doctrines has usually been separated from that of arbitration, the action at the Hague made clear that they were a *de facto* back door to compulsory arbitration. Drago said, in effect, creditor states must go to arbitration. The Roosevelt Corollary said, in effect, European states must go to arbitration before they go to war in the Americas (but the U.S. preserved its intervention rights). The U.S.' 1907 position said, in effect, creditor states must go to arbitration before they go to war. As we will see below, the Hague II Conference put itself through all sorts of machinations before deciding not to endorse a specific commitment to compulsory arbitration, but at the same time, it endorsed the U.S. approach. The compromise and

⁹³ Davis, *Second Hague*, 133-4.

⁹⁴ Scott, *Proceedings*, Vol II. 907. Hull, *Two Hague Conferences*, 352-70.

⁹⁵ Davis, *Second Hague*, 257-8.

conditions embodied in the U.S.' proposal meant that peace advocates were disappointed by the continued possibility of war and pleased with the agreement to at least defer it. As we look at these proposals and the debates they engendered, we need to go beyond the well-trod issues of imperial versus peripheral power. Underneath, what was at stake were two aspects of state sovereignty: the right to issue debt and the right to employ war or other coercive methods to support a state's own (creditor) nationals. By setting the international legal parameters under which arbitration would be accepted or required in these circumstances, states agreed to limit that "sovereignty."

A Semi-Formal Empire?: The Prelude to the Boer War

Arbitration also played a complicating, if ancillary, role in the process which led up to the Boer War of 1899-1902. Relations between the British Colonies in Southern Africa and the neighboring Boer Republics of Transvaal and the Orange Free State were never fully stabilized following the disputes and settlements of the early 1880s. The discovery of gold in 1886 had exacerbated the issues as British subjects moved to Boer areas to pursue their dreams of riches. The Boer states sought to preserve their cultural and political independence by limiting the political power of these immigrants. In 1898, Alfred Milner was sent from London to Cape Town as British High Commissioner, with an aggressive attitude, to resolve this issue.

At Bloemfontein conference in June 1899, Milner met with Transvaal President Paul Kruger. While the central issue in the negotiations was the scope of the franchise to be extended to British subjects within the Transvaal, Kruger made clear that the resolution of that issue had to be in the context of arbitration "for all points at issue between the two Governments."⁹⁶ In reviewing his negotiating stance with Joseph Chamberlain, the Colonial Secretary (and Milner's overseer), Milner stressed the distance between the two parties on the franchise issue, but added

⁹⁶ Milner to Chamberlain, telegram, June 1, 1899, Dispatch #S13998, CO 572/73.

“that while foreign arbitration or arbitration on questions of policy must be absolutely rejected, I should be prepared to submit a plan to your [Chamberlain’s] consideration, if such a plan can be devised for submitting to an impartial Tribunal cases of alleged breaches of Conventions, by which private rights were infringed.”⁹⁷ At this stage, Chamberlain expressed no great support for arbitration, at least in terms of the by-then ‘normal’ mixed commission. His approach to “impartiality” was to suggest that issues could be heard by “members of the Judicial Committee of the Privy Council with some Afrikaner [sic] like de Villiers added.”⁹⁸

The conference ended in failure, primarily over the franchise issue, but that did not end the negotiations either in general or with regard to arbitration. On June 11, Milner received a formal proposal for arbitration presented to the British Agent in Pretoria, suggesting arbitration for all future differences between the two parties before a tribunal comprised of an arbitrator named by each side with a third chosen by the two named and operating under the procedures set out in the 1875 design of the Institute of International Law.⁹⁹ Milner reiterated his opposition to arbitration in general (fearing it was a means to delay Boer concessions on the key British policy goals), to the vague terms of reference, and especially to having a third-party national have a deciding vote.¹⁰⁰

In summarizing the British Government position on arbitration with the Boers, Colonial Secretary Chamberlain reiterated British opposition to “the intervention of any foreign Power with regard to their interpretation of the Conventions [of 1881 and 1884],” and felt that the use of a mixed commission with a third party umpire was similarly problematic. Still, recognizing that there were interpretational differences, Chamberlain was willing, once the central political issue

⁹⁷ Milner to Chamberlain, telegram, June 3, 1899, Dispatch #S14169, CO572/83.

⁹⁸ Chamberlain to Milner, telegram, June 5, 1899, Dispatch #S14169, CO572/84.

⁹⁹ Milner to Chamberlain, telegram, June 11, 1899, Dispatch #S14985, CO572/95-6.

¹⁰⁰ Milner to Chamberlain, telegram, June 11, 1899, Dispatch #S14986, CO572/96.

was resolved, to refer these questions to “some judicial authority whose independence, impartiality, and capacity would be beyond and above all suspicion,” so long as any “foreign element” was excluded.¹⁰¹ During the rest of the summer, discussions on some limited form of arbitration continued in parallel with those concerning the central political issues. Even at the end, in what the British referred to as the South African “Ultimatum” of October 10, 1899, the Boers reiterated a plea for arbitration; but to no avail.¹⁰²

The source of British opposition to arbitration is not clear on the face of the documents. From a political perspective, Milner’s underlying design for war and incorporation of Transvaal into a British South Africa was likely central.¹⁰³ However, the nominal rationale was the long-standing British view that Transvaal was not a fully independent state (i.e. that Transvaal was under the “suzerainty” of the British Crown and thus not a proper party to engage Great Britain in an *international* arbitration).¹⁰⁴ This position seems dubious and was criticized at the time by John Westlake, the most influential British international legal scholar of the time.¹⁰⁵ While the Boer Republics’ status under the 1881 and 1884 independence agreements does appear ambiguous, Britain had, from the beginning, accommodated Boer demands for arbitral procedures to resolve claims and other issues; until, here, it became seriously inconvenient.¹⁰⁶

Kruger’s proposal had the benefit, common to weaker states when dealing with the British or other European imperial powers, of fully engaging with ‘established’ European precedents, as evidenced by his invocation of the 1875 arbitration procedures promulgated by the Institute de droit international. The controversy over the exclusion of the Orange Free State and Transvaal

¹⁰¹ Chamberlain to Milner, July 27, 1899, FO879/600/249.

¹⁰² Milner to Chamberlain, October 10, 1899, FO897/600/706.

¹⁰³ Pakenham, *Boer War*, 2-17, 57-67.

¹⁰⁴ Chamberlain to Milner, #279, 13 July 1899, CO879/600/167

¹⁰⁵ Westlake, “The Transvaal War,” 429-30.

¹⁰⁶ Hercules Robinson (High Commissioner) to the Earl of Kimberley (Colonial Secretary), June 29, 1881, #11439, CO 510/2, and Kimberley to Robinson, July 5, 1881.

from the Hague Conference was only a few months earlier.¹⁰⁷ Arbitration's high profile (and its British endorsement in principle) thus made it a convenient tool to at least embarrass the British, if not secure a better outcome for the Boers.¹⁰⁸ The essence of Kruger's point cannot be denied. Britain was, with the U.S., at the Hague, and elsewhere supporting the extension of arbitration and would, shortly enter into a series of general arbitration agreements. The summary dismissal of arbitration by neutral third parties seems at least incongruous. At the same time, this attempt to "hoist" the British Empire on its "own petard" of international legal regularity carried no small tinge of disingenuity. As previously noted, for example in the Hawaiian case, the use of international arbitration regimes necessarily has a temporizing and neutralizing effect which is disadvantageous to those in a dominant military/political position. Chamberlain's later indication of a willingness to have some sort of arbitration also seems disingenuous, since he refused to have third party participation. Both sides thus demonstrated that as a practical matter, arbitration was viewed as a diplomatic technique. Both sides sought the positive public and diplomatic reaction from claiming to be willing to arbitrate, but insisted on conditioning their acceptance on scoping parameters or procedural constraints that would remove the risk of an adverse decision. The echoes from the negotiations leading up to the "*Alabama* Claims" tribunal seem clear.

A Pan-American Project

After a long gestation, U.S. Secretary of State James Blaine's project of a political, legal, and cultural congress for the Western Hemisphere finally came to fruition in 1890. The first of a series, stretching well into the twentieth century, the Pan American Conference was central to the efforts of the United States to assert its leadership (domination?) of the states of the western

¹⁰⁷ Sir H. Howard (British Ambassador to the Netherlands) to Salisbury 13 April and 23 April 1899, in CO471/271/889-92.

¹⁰⁸ Reitz (Transvaal State Secretary) to Milner, 9 May 1899, enclosure in Milner to Chamberlain 17 May 1899, CO417/261/442-61 and "The Bond Speaks," in *The Cape Times*, 13 July 1899, enclosed in Dispatch 485, Milner to Chamberlain, 19 July 1899, CO417/263/754-7.

hemisphere in the late nineteenth century.¹⁰⁹ Blaine's agenda was robust, not to say utopian. It included a plan for a hemispheric customs union, a monetary union, projects for coordination of commerce and transportation, establishment of a permanent organization (which eventually evolved into the OAS), and, of course, multilateral compulsory arbitration. As such it represented the intersection of the long-standing Latin American arbitral tradition with the recently emerged international legal community in the an era of great expansion of U.S. commercial and political influence (and a concomitant wariness on the part of Latin American states).¹¹⁰ The arbitration agreement resulting from the Conference was never ratified, but the debates and the proposed treaty show that the tensions surrounding arbitration in this imperial context reflected differences in the conceptions of national sovereignty and specific concerns about the projection of imperial power. The debates also set some important precedents for arbitration proposals, including at the Hague Conferences nine and seventeen years later.

Blaine's vision encompassed not only a range of formal links to be discussed in the Conference, but was also embedded in more subtle ways, such as providing the delegates with a month-long tour of American economic power and culture in 1889 and trying to conduct the official business of the Conference in English. As the Conference got down to work in Washington in early 1890, it was divided into several working groups, each of which found not only American proposals, but a U.S. delegation whose size enabled it to participate simultaneously in the full range of topics. Many Latin American delegates were thus

¹⁰⁹ It was formally called the International American Conference. Its business sessions were held from January through April, 1890. There is no detailed study of the Conference, Inman, *Inter-American Conferences*, is the most recent treatment (1965) in English. The reports of the Conference are somewhat cursory and the verbatim proceedings of the working committees have never been transcribed. IAC, *Reports; Minutes*.

¹¹⁰ Indeed, Blaine's commitment to arbitration was certainly dubious. In 1881, he discouraged both the King of Belgium and the King of Spain from acting as arbitrators in a boundary dispute between Costa Rica and Columbia so that the U.S. could be the sole mediator between the parties and protect its interests in a potential isthmian canal. Tyler, *Foreign Policy of Blaine*, 65-70.

understandably wary, on top of their historical ambivalence about U.S. power and intentions.

Argentina, in particular, sought a leadership role in the region and used the Conference as a site to compete with the U.S.¹¹¹

The issue of an arbitration agreement was taken up in the “Committee on the General Welfare” in the form of proposals from both the U.S. and Argentina, which then reported a proposed treaty to the plenary session. There were three issues which shaped the debates. The first was the scope of topics for which arbitration should be compulsory and whether issues involving certain national rights should be excluded from the arbitration commitment. The second was whether a state not directly involved in a controversy could spur or require arbitration by those directly involved. The third, not directly taken up in the arbitration debate, was whether pecuniary claims could be a basis for military intervention or had to be settled peacefully.

Not very far in the background lurked two illustrations of the way in which arbitration was seen as a means to offset past or future conquests by war. First, there had been a perennial Latin American problem: the proclivity of states in that region to go to war, despite having made commitments to arbitrate. In this case, the recent war between Chile and Peru (and Bolivia) led Chile to take a rigid stance on arbitration lest it be required to submit to arbitration concerning the propriety of its territorial acquisitions.¹¹² However, this was merely the most current and visible example of the concern about the preservation of national territory and honor which has been common to almost all states, and of particular sensitivity to those of Latin America.¹¹³ In addition,

¹¹¹ McGann 22. Inman, *Inter-American Conferences*, 43.

¹¹² The “War of the Pacific” won by Chile had been settled in 1883. See Chilean comments at IAC, *Reports*, II: 976-8. Thus, Chile strongly opposed Article V of the proposal which expressly included issues which had arisen prior to the execution of the Treaty.

¹¹³ Under the international legal doctrine of *uti possidetis*, the Latin American states had reached a consensus to honor the Spanish provincial boundaries as the firm basis of their own borders.. Thus, there was strong support for Article V of the proposal which excluded issues which had arisen prior to

Venezuela raised the problem of its long-running boundary dispute with Britain; urging that the Conference's promotion of arbitration was particularly applicable to where a "weak American Republic is involved with a powerful European power...."¹¹⁴ The *denouement* of that episode has already been recounted, but this statement and the support it received are evidence of the awareness of Latin American states of the use of arbitration given their international capabilities relative to the Great Powers. For example, in February, as the Conference's work had just gotten underway, British Minister to Washington Julian Pauncefote accurately described the key problems which were likely to challenge the group:

No plan of arbitration is likely to be reported. The United States would not be willing to enter into any working arrangement that might necessitate the use of military power to give effect to the decisions of a Tribunal of Arbitration. Some of the Spanish American countries are equally adverse to bind themselves to an exercise of or submission to coercion. Besides, it would be practically impossible to coerce the United States, if they should prove the recalcitrant parties. The principle of arbitration will be approved in good rhetorical form, and an attempt may be made to vindicate the principle in terms as definite as the Chilean Delegates will permit to pass unchallenged.¹¹⁵

This same concern animated the Conference's treatment of the central issue of national sovereignty and compulsory arbitration. There were not radical differences between the U.S. and Argentinian proposals, but an atmosphere of resentment and jealousy ensured tension between them. The result was a compromise which endorsed arbitration in principle and compelled its use for a set of issues principally relating to boundaries, claims, diplomatic immunities, and treaty interpretation. It also required the use of arbitration for other issues, subject to an exclusion when

the execution of the Treaty and Article VI which excluded issues which had been already resolved by another agreement between the parties.

¹¹⁴ IAC, *Reports*, II: 1084-90, 1092-8.

¹¹⁵ Memorandum on Pan-American Conference by Pauncefote, February 15, 1890, FO881/5907. This candid assessment did not prevent Pauncefote from pursuing the same goals and colliding with the same problems when he led the British delegation to the Hague Conference nine years later.

a state asserted the need to protect its “national independence.”¹¹⁶ The debates on these issues reflect concerns that would be repeated at the Hague Conferences in 1899 and 1907: the scope of exclusion, whether and how to define a scope of compulsory arbitration, and the implications of the absence of a supranational enforcement power.

U.S. power set the framework within which the Pan American Conference proposed the first multilateral general arbitration agreement outside of Latin America itself. Its influence was not determinative, as evidenced by the support for the Argentinian view and the concerns expressed by Chile, Venezuela, and Mexico at the Conference and the failure of any state to adopt the proposed treaty thereafter. The tensions between the U.S.’s desire to promote arbitration in principle and its unwillingness/inability to force such a model that would conflict with each state’s jealously-guarded sense of sovereignty (including its own!) demonstrated that the distance from ideal to practicality remained immense.¹¹⁷ Blaine’s vision never reached fruition, nor did that of those general arbitration advocates. Latin American states had repeatedly—before and after the Conference—agreed to resort to arbitration. They were, at least in rhetoric, pioneers. However, the constraints on arbitral commitments they articulated, faced with a potential regime that might have the moral (if not military and economic) power of the U.S. behind it, showed that state power and amour-propre would protect themselves in the language of the proposed treaty and in its eventual non-ratification. In its issues, compromises, and outcome it remained, nonetheless, a model for arbitration projects for the following twenty-five years.

¹¹⁶ IAC, *Reports*, II: 954-8.

¹¹⁷ The proposed treaty, for example, would have run afoul of the refusal of the U.S. Senate, a few years later, to allow the delegation of arbitration commitments to the President, see Chapter 9, *infra*.

Conclusion

Arbitration was deployed as a diplomatic tool as European empires expanded and intersected with local neighbors or other imperial holdings. Whatever success it may have had on its own terms, its use demonstrated as much the limits of diplomacy, particularly in a world where public pressure—whether local or from the metropole—effectively constrained states' men's ability to compromise; leaving deferral to a carefully constrained arbitration as the best solution. In informal imperial contexts, similarly, arbitration provided a means of resolution where direct diplomatic intervention would likely be unavailing. By the same token, it was invoked by 'peripheral' states, such as Transvaal and Venezuela, where they thought that the appearance of an objective, legal process could deflect the political pressure from a metropole. In the case of the Pan American project, Latin American states could nominally endorse a general arbitration agreement with the U.S. but due to their wariness of 'El Norte,' maintain consistency with their lengthy tradition of ineffective arbitral arrangements by letting the treaty lapse without ratification. In each dispute, arbitraiton brought practical value, but one that belied the aspirations of its advocates.

Chapter 9: The Hague, Its Precedents, and Its Progeny

There are few documents in diplomatic history more curious than the Czar's Rescript, the circular letter distributed by the Russian Foreign Minister in August, 1898, inquiring of the other European Powers (and the U.S.) whether they would be willing to participate in a conference to discuss "the most effectual means of insuring to all peoples the benefits of a real and durable peace, and, above all, of putting an end to the progressive development of the present armaments."¹ It came a bit out of the blue, an unscripted initiative that was as surprising to the long-time advocates of the peace movement as it was to the hard-boiled diplomats of the era. The former, who had made no inroads in Russia, rejoiced. The latter, whether based in St. Petersburg or in the other capitals of Europe, scratched their heads. The powers' agreement to the proposal—sometimes bewildered, sometimes begrudging—led to a meeting at the Hague which began in May, 1899 and ran for two-and-a-half months. It produced several agreements, but that covering arbitration was the most extensive, most notable, and most successful of the entire project (although the standard of "success" was low). The arbitration structure established at the Hague led to a burgeoning of agreements to arbitrate in the following years. The follow-up session at the Hague in 1907 saw further, but relatively minor, refinements in the process and led to additional activity and the slowly increasing *apparent* solidification of an arbitration culture within the diplomatic community. Whether these agreements and the apparent strengthening of the arbitration movement actually led to an increase in the arbitration of individual cases is much more doubtful.

¹ Circular note to diplomatic representatives from Count Mouravieff, Russian Foreign Minister, August 24/12, 1898 reprinted in Scott, *Hague*, II:1-2.

While the Conference proposal was *sui generis*, its arrival was seized upon by arbitration advocates as a god-given opportunity to revive their flagging project. Beginning with Henry Richard's Motion in 1873, a concerted effort had been made to promote treaty commitments to arbitrate future international differences. This "compulsory arbitration" campaign combined public support with legislative actions in several countries. The resulting debates illustrated the tensions between state power and pacific aspirations, highlighting in particular the issue of democratic control over foreign policy and the locus of sovereignty within each state. The peculiar powers and political context of the U.S. Senate proved that arbitration could be both promoted and undermined almost simultaneously; frustrating advocates, but not deterring them. More broadly, their project had gained some intermediate success, but had accomplished little by way of actual treaty commitments (and less in terms of actual dispute resolution) when the Rescript emerged.

Both at the time and since, there has been a considerable gap in the assessment of the efficacy of the Hague process and results. Some have claimed it as a fundamental change in the nature of international relations and a landmark of progress and the rule of law. Others have characterized the Hague process as fundamentally flawed, whose evolution over prior practice as, at best, incremental or, at worst, illustrative of a model of international relations which led to the cataclysm of the First World War. It would be easy to assign the more optimistic view to the peace movement and the more pessimistic view to the "realist" diplomats; but there were idealists in morning coats and cool assessments among the advocates of arbitration. Particularly in the aftermath of the War, critiques of the Hague model were an important part of the campaign for a more effective and rigorous system of international adjudication that came to be embodied in the

Permanent Court of International Justice coming out of the Versailles package of agreements; but in this context the Hague was more of a whipping boy than an accomplice, much less a culprit.²

From one perspective, the Hague Convention was not a material advance on the general expression of sentiment in favor of the peaceful settlement of disputes acknowledged in Paris in 1856, combined with a detailed codification of procedures and rules which had a strong resemblance to those bruited about since the early meetings of the International Law Association in the 1870s. Stripped of the self-congratulatory speeches and pamphlets, the geographic coverage of the first Conference meant that China and Japan were now ‘in the club,’ but that the Latin American states (other than Mexico and Brazil), Siam, and a few other polities on the fringes of European empires were not. The increasing practical experience with both claims and boundary issues arbitrations since the “*Alabama*” decision had already naturally led to a regularization of the treatment of unremarkable matters. The most significant part of the Hague process was what we might now call the “branding” of the process, enshrined in be-ribboned diplomatic documentation. But the “brand” was still in the hands of states’ men who had one eye on the states’ system and the other on “public opinion”. Their begrudging accommodation of the process, launched by a semi-mystical Tsar, meant that “success” was ensured.

However, the nature of that which would be called “successful,” was not so clear. In the event, there were two large exemptions which reduced the Hague Convention to a side-show of international relations: the lack of compulsory jurisdiction and the exception of matters touching on “vital interests” and “national honor” (not to mention the underlying problem of the lack of enforceability of any arbitral decision). Indeed, while peace and arbitration advocates might be excused for again celebrating the most marginal steps forward in their quest; the graver

²Spiermann, “International Legal Argument,” 4.

responsibility lies with those states' men who manipulated the process and product and clothed these "advances" in lofty rhetoric despite their cynicism: creating the impression of progress. This can be seen not only from a close look at the conferences themselves, where the undermining of arbitration was a shared project of several states (not just Germany who is usually blamed). It is also visible in the governmental efforts in the aftermath of each of the Conferences: an Anglo-French model widely adopted in early 20th century Europe and four U.S. initiatives which were launched intermittently from 1902 through the start of World War I. Taken thus as a whole, the Hague process in fact demonstrates the solidification of state control over the arbitration process.

Legislatures, Sovereignty, and Compulsory Arbitration

Legislative engagement with the decision to arbitrate goes back to the Jay Treaty and evolved through several strands of development, although such involvement seems to have been minimal prior to the 1870s. The U.S. and several Latin American states required legislative ratification of *compromis* or other arbitration treaties. Both the U.S. Congress and the British Parliament were recipients of a string of public petitions promoting arbitration from peace advocates, which sometimes engendered a committee report.³ There would also be the occasional inquiry into a foreign claims situation, Most notable was Cobden's ground-breaking Motion of 1849 in Britain.⁴

Henry Richard's Parliamentary Motion of 1873 began a process of legislative endorsement of general arbitration concepts, agreements, and compromissory clauses that

³ In the U.S., the petitioning of legislatures and Congress began in 1834, but "the wording of early petitions was vague and amounted to little more than a plea for negotiation in cases of national disputes." Phelps, *Anglo-American Peace Movement*, 81. This was followed by a shift to standardized calls for a congress of nations and a code of laws. However, Curti, *American Peace Crusade*, 194, also finds attempts to gain congressional support for arbitration in particular cases in 1849-50. There were numerous petitions for support of arbitration in various state legislatures as well.

⁴ See Chapter 5 *supra*.

flourished in the 1880s and 1890s that have come to be referred to as “compulsory arbitration.” Inspired by the “*Alabama Claims*” and the Richard Motion, arbitration was endorsed by one or more legislative bodies in Italy, Belgium, Netherlands, Denmark, and Sweden beginning in the 1870s.⁵ In the U.S., the early petitions did not even gain endorsement from the relevant committee until the Senate Foreign Relations Committee did so (at least in principle) in 1853.⁶ But more serious legislative action appears to have awaited the “*Alabama Claims*” controversy in the early 1870s, when the Senate approved an endorsing resolution as a memorial to the recently deceased Charles Sumner.⁷

It is not clear to what degree these legislative actions specifically drove the inclusion of arbitration provisions in European treaties between 1873 and 1890. These were all compromissory clauses, generally of limited scope and duration. More importantly they don’t seem to have been the basis of any specific arbitrations between the respective parties during this period. A significant majority of these agreements were with Latin American states and there were only 11 such agreements between European states. Even the most prolific European participant, Italy with 10 compromissory clauses, may owe its role to the energy and vision of Pasquale Mancini, the spearhead of the Italian legislative endorsements in the 1870s, who became Foreign Minister in the 1880s and was able to directly implement his belief in arbitration clauses.

Indeed, in terms of state action, since most legislatures had a minimal role in their state’s conduct of foreign affairs, they should be considered as part of the “public,” whose influence on

⁵ Cory, *Compulsory Arbitration*, 22-24. See also, Lange, *L’arbitrage obligatoire*, ii-xix.

⁶ S. Rep. No. 423, 32d Congress, 2d sess., February 22, 1853. The Report reflects arguments very similar to those advanced by Cobden in Britain. However, no action was taken by the full Senate.

⁷ Massachusetts Senator Charles Sumner who, despite an association with the U.S. peace movement dating to the 1840s, had worked to upset the negotiations that led to the “*Alabama Claims*” tribunal in the 1860s and 1870s, twice introduced a resolution with a generic endorsement of arbitration in 1872-73. The Senate vote took place shortly after his untimely death in early 1874. Senate action on June 23, 1874, Cong Rec. 2: 5407, approving S. Rep. no. 426, 43d Cong., 1st sess., June 9, 1874. Myers, “Law and the Peace Society,” 236. Beales, *History of Peace*, 148.

Government actions was indirect. Their efforts to affect or drive Government policy should be seen as part of a “liberal” agenda to constrain the power of the state (i.e. the Crown/Government/Executive), in which the promotion of “objective” or “independent” international dispute resolution mechanisms would fit well.⁸ This was particularly true in “liberal” or “constitutional” states. The circumscribed role of the British Parliament in international relations during the nineteenth century seemed fairly well established from a constitutional perspective. It was up to the Crown (i.e. the Cabinet) to negotiate, execute, and ratify treaties. Parliament was typically advised afterwards and, where there were financial or domestic legal implications, some supplementary legislation would be sought. In terms of arbitration agreements, however, even those denominated “compulsory,” Parliament’s role was limited and with rare exceptions, even such debate as occurred was not seen as affecting the strength (i.e. the survivability) of the Government. Thus, despite its nominal “sovereignty,” Parliament It is unlikely that other continental states were fundamentally different, indeed, the locus of both formal and *de facto* political power was generally even more firmly placed in the Crown/Government/Executive. So we should similarly see the role of Randall Cremer and the Inter-Parliamentary Union (“IPU”) (which he co-founded in 1889).⁹ While comprised of public officials, its purpose and principal focus was more anti-governmental than intergovernmental. Its advocacy and extensive work in support of arbitration and dispute resolution on behalf of an international group of individual members of national legislatures, should be seen as an effort to limit state authority in international affairs, leveraging the principles and mechanisms of international law.

⁸ See also Wank, “Diplomacy.”

⁹ Ceadel, “Cremer,” 60. The IPU’s initial purpose was to become a major multi-national advocate of arbitration, a role it filled in the 1890s and beyond. Lange, *Union Interparlementaire*, 8-9.

The Senate: An American Conundrum

However, the U.S. Senate was a distinct exception to this characterization. Its constitutional power over any American treaties has proved to be an on-going challenge to the President's nominal leadership in foreign affairs. Indeed, much of the U.S.' mid-nineteenth to mid-twentieth century transition to world power was marked by the exertions of the Senate to assert its primacy. In the context of arbitration agreements, the impact of the Senate and its treaty veto has been repeatedly demonstrated since the "*Alabama Claims*" case, most notably in the rejection of the Olney-Pauncefote Agreement in 1897 and the Hay/Root/Taft projects of the early twentieth century.¹⁰ The Senate's rejection of these general arbitration efforts shows the limits to the general application of international sovereignty models to domestic constitutional structures.¹¹ By insisting on a constitutional interpretation that general arbitration agreements provide for case-by-case referral for further approval, the Senate effectively prohibited such agreements. This did not, of course, deter the Senate from urging that such international regimes be adopted. There are two implications of this inconsistency. First, it is difficult to cast the legislative endorsement of arbitration as a constraint on state power when, in the American case, that power is claimed by (a part of) the legislative body itself. The implicit claim of the Senate was that it was charged by the Constitution with limiting Executive power, so that any efforts to recruit internationally-based constraints on the state were superfluous and must be subsidiary to its own domestic parameters. In this way the Senate, in effect turned the European framework on its head, seeing general arbitration agreements as a constraint upon its "sovereign" legislative power. Second, and in light

¹⁰ These latter projects will be discussed *infra*.

¹¹ The U.S. did not sign any agreement with a compromissory clause prior to World War I. The only arguable exceptions were its adherence to the Universal Postal Union agreement in 1874 and to the Egyptian Mixed Courts in 1884. SMH## 317, 324. The unusual nature of these arrangements in the nineteenth century and their limited scope meant that the Senate probably did not think of them in terms of foregoing its claims to control arbitration processes.

of this, the Senate's endorsement of arbitration regimes in principle, but its repeated rejection of their specific implementation effectively aligned the Senate with those "executive-branch" states' men, such as Salisbury and Russell, for whom the arbitral regimes could only be applauded in the abstract and in deference to some vague "public" pressure, but for whom a general implementation presented a grave threat to their ability to act in the long-term interests of the state as they saw it. At the same time, neither Salisbury, nor the U.S. Senate had a problem with utilizing arbitration in specific and controlled circumstances, as a tool of, rather than as a threat to state power.¹² Thus, we can again see the essential difference between executory commissions and specific adjudicatory arbitrations on the one hand and open-ended arbitral regimes on the other.

This is most clearly demonstrated in the resolutions and debates of the British Parliament and the U.S. Congress which led their respective governments to negotiate a general arbitration agreement in 1895. The initial Congressional resolution contained the "constitutionally-necessary" provision preserving the rights of the Senate to approve each individual case to be submitted to arbitration. The British governmental proposed alternate language including a provision excluding issues which either state felt could adversely affect "its honor or the integrity of its territory." Implicitly, such a declaration would be made by the state's government. Since this would not meet the needs of the Senate, the U.S. opposed this exclusion, suggesting instead that the legislative body of either state could withdraw a matter from the arbitral process. Of course, by placing the British Parliament squarely within the treaty process, this suggestion ran afoul of British constitutional principles as to the location of international sovereignty in the Crown. At this point, the negotiations seem to have left the Senate's concerns to the side. The

¹² Indeed, the Senate's preservation of "sovereignty"/state discretion was fundamentally the same policy that appears to have animated several states at the Hague Conferences to oppose or limit the scope of compulsory arbitration. See *infra*.

treaty as signed by the two governments in 1897 provided for arbitration of all cases, but those 1) involving territorial integrity or 2) which either State felt it appropriate, would require the arbitral panel (consisting in such matters of 3 U.S. Supreme Court Justices and 3 members of the Judicial Committee of the British Privy Council) to make a decision by at least a 5-1 vote, i.e. a majority of a state's members would have had to vote against it. Even this small and somewhat convoluted step would have been a notable advance in the practice of arbitration, even if limited to the U.S. and Britain. However, the Senate added a block of further amendments (including a reservation for matters of national honor) to the extent that both President McKinley and the British government declined to pursue it.

On February 14, 1890, the U.S. Senate approved a resolution requesting the President to negotiate arbitration treaties.¹³ This was triumph for the peace and arbitration movement which had been pursuing this goal, particularly in the context of U.S.-British relations in a focused way since the late 1870s. However, just two months later, the arbitration treaty proposed by the U.S.-led Pan-American Conference was ignored. In due course, as we have seen, Secretary of State Olney reached such an agreement with British Ambassador Pauncefoot in 1897. Yet, a few months later, the Senate effectively rejected the proposed treaty. The next day, Senator Augustus Bacon proposed yet another resolution endorsing arbitration in general as American policy.¹⁴ A generation earlier, Charles Sumner, a leading voice for the peace movement, had led the opposition to the arbitration proposals to settle the "*Alabama Claims*." These strange juxtapositions illuminate several key points about the nature of the arbitration movement and its intertwining with the world of practical politics (at least late nineteenth century Washington, D.C.-style).

¹³ S. Misc Doc. no. 113, February 20, 1890, 51st Cong., 1st sess. This was also endorsed by the U.S. House on April 3, 1890. Cong. record 21: 2896. See also, Curti, *Peace or War*, 149.

¹⁴ Cong. Record, May 6, 1897, 55th Cong., 1st sess., 30: 907.

First, the Bacon resolution showed that the arbitration movement was indefatigable. The rejected treaty was the product of a campaign which ran in a focused way for twenty years, yet its fate did not deter renewed efforts. Indeed, the projects of Olney, Hay, Roosevelt, Taft, and Bryan, running through 1913 show the political engagement in the topic at the highest level of the U.S. government. Second, the American arbitration effort, as shown by the nature and fate of these agreements and proposals, was never able to make more than the most marginal progress in expanding the actual nature and scope of arbitration. Third, to the extent we can look on arbitration as a liberal and democratic internationalist project which limited the scope of state power and discretion, its effort seems to have foundered unexpectedly in the U.S. Senate. It foundered there because, beyond the partisanship and personal ambition which often led to the defeat of treaties in general and arbitration treaties in particular, the U.S. Senate viewed itself as a (liberal and democratic?) check on state power, and it would not brook any competition, especially from an alternative that, by its very internationalism, could not wrap itself in the American Constitutional legacy that the Senate claimed. The irony of the situation is particularly rich because the various arbitration projects were advanced not only by both Republicans (both Roosevelt and Taft) and Democrats (both Olney and Bryan), but by the very executive branch whose discretion (both internal and international) would have been constrained by the approval of these treaties.

In this way, whatever success the arbitration movement had in converting the American executive branch was trumped by the prior claim of the Senate. The Senate's repeated endorsement of the principle of arbitration also makes sense in terms of both institutional and popular politics so long as the arbitrations were structured in a way that preserved the Senate's sense of its own prerogatives. The arbitration movement could, in a bizarre sense, claim great

victories in terms of political endorsements, but could not translate that support into substance at least insofar as general arbitral regimes were concerned. In fact, the Senate's problem was not with arbitration, per se; at least in terms of its mode of judicial, objective, and rational mode of dispute resolution.¹⁵ Rather, it was with power, specifically the delegation of power and the Senate's perceived loss of the power to approve the final settlement of a particular dispute. The resolution of claims conventions which liquidated the amounts due to U.S. nationals or the fixing of boundaries diplomatically, neither of which involved mixed commissions or other umpires were regularly approved. Nor was the Senate's concern with the principle of delegating power. This period saw a considerable expansion of domestic administrative agencies, and even some tariff reduction authority, a central political issue of the day, was delegated to the President under certain conditions in principle,¹⁶ but the implementary treaties were never approved by the Senate; again showing the long distance from sentiment to practice.

The Olney-Pauncefote Agreement

On its own terms, the Olney-Pauncefote Agreement of 1897 presents a host of contradictions; in it we can trace many significant influences and many significant implications; but it was a failure on its own terms. When signed, it was hailed as the greatest step forward in the use of arbitration as a means of dispute resolution; but the lessons of its demise at the hands of the U.S. Senate were ignored at the Hague two years later and in subsequent efforts by the United States over the following 16 years. The negotiations were interrupted, but not derailed, by the

¹⁵ The U.S. entered into agreements to handle almost 60 different claims situations in the 40 years following the "*Alabama Claims*" case. However, of those, U.S. nationals were the claimants in 90% and of the six in which the U.S. was the de facto defendant, three were mutual claims settlements, two were part of part of larger agreement with the British and one was for a variety of claims arising out of the construction of the Panama Canal. SMH## 365, 605, 585, 592, 736.

¹⁶ Holt, *Treaties Defeated*, 196, notes the implementation of the Dingley Tariff Act of 1897 which enabled the President to reduce tariffs by up to 20% for up to five years, pursuant to reciprocal tariff agreements.

brouhaha over the Venezuelan Boundary. The product, while not the first general arbitration agreement by any means, was the first outside of the little-noticed Bowring treaties in the 1860s and the first between any pair of great powers; it also received world-wide notice as a symbol of Anglo-American rapprochement and shared leadership in international relations. Its history is uniquely revelatory of the implications of arbitration, both because of the details which were proposed, but also because the quality of the historical record is unusually rich.

As noted above, the concerted efforts of the Anglo-American peace community had gained some traction with both governments by the early 1890s, particularly through resolutions and petitions supported by majorities in both Congress and Parliament and the arbitration agreement endorsed by the Pan American Conference in 1890. This effort was led by Randall Cremer, the one-time laborer who became engaged in British working class organizations in the 1850s and took on leadership roles in the 1860s.¹⁷ His attention shifted to peace issues and arbitration in particular, leveraging the increased role of working men and the weakness in the British peace movement in the 1860s to found and lead the Workmen's Peace Association in 1870.¹⁸ A major supporter of Henry Richard's 1873 arbitration motion, Cremer followed in Richard's footsteps and was elected to Parliament in 1885 with peace and arbitration his principal concern. In the 1880s, with the cooperation and patronage of capitalist/philanthropist Andrew Carnegie, he began a campaign to secure a British-U.S. arbitration agreement, eventually securing 233 the signature of MPs on a petition to U.S. President Cleveland endorsing such a treaty in 1887.¹⁹ Cremer worked both sides of the Atlantic, as well as engaging with the ripening continental peace movement and activating legislative support through the IPU. This spurred the U.S. peace movement and action in Congress to increase calls for a general arbitration agreement.

¹⁷ Evans, *Sir Randall Cremer*, 31-88.

¹⁸ Ceadel, "Cremer," 53-55. Laity, *British Peace Movement*, 28-9.

¹⁹ Ceadel, "Cremer," 58.

Leading a domestic coalition of arbitration advocates, Cremer won formal Parliamentary endorsement when his motion, calling upon the Government to work with the U.S., was acquiesced in by Gladstone on June 16, 1893.²⁰ He followed this up with a further petition signed by 345 MPs responding to the U.S. steps in 1894.

Cremer was successful in marshaling considerable support for his cause, including millions of signatures on petitions to Parliament and bridging the diverse ideological and class components of the British peace movement. As was common in such political circumstances, however, his “success showed that though support for arbitration was becoming broader, it was also becoming shallower.”²¹ The initial focus on opposing war became sentimentalized in the increasingly political process, both domestically and internationally. Once the diplomatic process began, there is little evidence that Cremer or other peace advocates had much influence on the details worked out by states’ men on both sides.

In 1894, the Senate took a step beyond its prior resolutions and one resolution specifically called for the U.S. to negotiate a comprehensive twenty-five year commitment between the two states.²² However, the resolution made no mention of any exclusions or limits on scope and, apparently, it was the precise nature of these exceptions that led to considerable delay and debate within the Senate Foreign Relations Committee.²³ Julian Pauncefote, British Ambassador in Washington, however, did not wait on Congressional action and, initiated a series of informal discussions with U.S. Secretary of State Walter Gresham on the topic.²⁴ This led him to

²⁰ *Hansard*, 4th ser., vol. 13 (June 16, 1893), cols. 1240-73.

²¹ Ceadel, “Cremer,” 62.

²² S. Res. 93, 53d Cong. 2d Sess.,

²³ Pauncefote to Kimberley, February 15, 1895, FO414/131/2.

²⁴ Pauncefote was both a lawyer and an experienced senior Foreign Office official, including a term as Permanent Under-Secretary under Salisbury. His post as Minister to the U.S. was elevated to an Ambassadorship in 1893. In 1906, Pauncefote’s personal papers were destroyed by his wife after his

‘privately’ propose a draft treaty for discussion purposes. Under the initial Pauncefote plan, the other friendly powers to nominate three potential arbitrators who would then be a pool available to be selected by the Parties and form the basis of a future potential permanent “International Tribunal of Arbitration.” The commitment to arbitrate would cover all subjects, but issues of territorial integrity, national honor, or vital interests could be excluded by either party. The Cleveland Administration was clearly ready to move forward and responded with its version. Its approach as to the scope of the commitment was different, specifying five classes of subjects, including boundaries, claims and treaty interpretation, which would be covered, subject to an exclusion of issues relating to national independence.²⁵ There is no clear sense of how far discussions had proceeded when Gresham died in May, 1895. Gresham’s successor, Richard Olney, promptly launched a vigorous missive attacking the British position concerning the Venezuelan boundary and discussions on a general arbitration agreement were put aside for a time.

By late in the winter of 1896, the Venezuelan crisis had calmed down and Pauncefote and Olney were engaged in lengthy discussions of the structure of its arbitral resolution that wouldn’t be finalized until the end of the year. By March, however, the Marquess of Salisbury (who had again become Prime Minister in the Summer of 1895), was sufficiently confident of an eventual amicable result, that he was willing to re-open discussions on the general arbitration agreement. He asserted his direction of British foreign policy and advanced a proposal that was significantly more conservative and complicated than that initially suggested by Pauncefote’s broad and simple

death, so we have only the official correspondence and a relatively superficial biography upon which to rely in trying to ascertain his motivations. See Mowat, *Life of Lord Pauncefote*.

²⁵ Pauncefote to Kimberley, February 15, 1895, FO414/131/2.

model.²⁶ Salisbury would have seen arbitration as a mechanism to minimize international conflicts on lesser matters that should not take the time and attention of states' men in an increasingly complex world. At the same time, he sought only incremental steps in terms of what he viewed as a new approach to international relations. Since he was familiar with *compromis* treating of specific cases since the “*Alabama Claims*” and with the broader use of mixed commissions since the Treaty of Berlin in 1878, his concern was with the novel and potential exposure entailed in the commitment to arbitrate. These concerns manifested in two areas: the scope of issues subject to the commitment and the selection of those who would decide. He had a clear aversion to excessive reliance on “foreign” decision-makers. Further, he worked to balance the design of an arbitral structure that would not only suit the unique characteristics and relationship with the United States as well as be the foundation for a more extensive set of arbitration agreements with other states.²⁷ The U.S. not only shared a legal and cultural heritage with Britain, but also had a emerging geopolitical alignment.

Salisbury's proposal provided for arbitration in cases of claims, boundaries, commercial issues, treaty interpretation, and the application of international law (with exclusions for national honor and territorial integrity), but allowed for an appeal in cases of territorial issues, sovereignty, claims over £100,000 or international law interpretations to a panel of three judges from each state's highest court. Unless five of the six judges approved the initial arbitral award, it would be voided. This was a novel approach to arbitration procedure; not only in terms of its split into greater and lesser issues, but also by protecting each state from an adverse finding by either the

²⁶ Salisbury to Paunceforte, March 5, 1896, FO420/168/78. FRUS 1896 222. Salisbury, while he had come a considerable distance from his derisive dismissal of arbitration in the parliamentary debates on the Alabama Claims twenty-five years earlier (see Chapter 6, *supra*), remained a most pragmatic states' man and his endorsement of the project was measured and far from idealistic.

²⁷ Salisbury to Paunceforte, May 18, 1896, FRUS 1896 228. The implications of this were particularly important given the pendency of the Venezuelan case.

(third-party) umpire at the initial level or a single ‘defecting’ Supreme Court judge. Olney’s response criticized the British proposal for being too narrow and conservative in procedure.²⁸ He expanded the initial scope of coverage but gave each side’s legislature the ability to withdraw from the arbitration on grounds of national honor or integrity. Appeals would be allowed from the same limited class of cases, first to a mixed panel of three Supreme Court judges each and then to a new panel of three third party jurists for a final decision. The American stance reflected a stronger commitment to arbitration in principle, but its reservation of rights to Congress or Parliament is a curious notion given the considerable constitutional differences between the two, especially in terms of foreign affairs. It illustrates the important differences in constitutional structure which led the U.S. Senate to take a hostile stance on the treaty. Olney sought to treat both sides’ legislative bodies the same in order to both meet Senatorial concerns and obviate legitimate British objections that the Senate’s powers would give the U.S. a unique means to avoid any particular arbitration. By placing Parliament squarely within the formal treaty making process, however, his proposal ran afoul of British Constitutional principles and was rebuffed by the British negotiators.

The negotiations on this treaty (primarily directly between Olney and Pauncefoot) paralleled those relating to the Venezuelan boundary to the point that the two were finally signed within days of each other early in 1897. The Anglo-American accord was finally resolved by fleshing out details and limiting the scope to some agreed-upon categories. All small claims (under £100,000) were to be handled as originally proposed (i.e. by a mixed (1+1+1) commission) without appeal. Larger pecuniary claims and all other issues other than territorial claims were to be handled similarly, but with the right of appeal to a new five member mixed

²⁸ Olney to Pauncefoot, April 11, 1896, FRUS 1896 224.

commission. Territorial claims (including jurisdiction and fishery rights) were to be submitted to a six-member commission composed of three Supreme Court judges from each side whose decision, if supported by five votes, would be final but if supported by only four votes could be vacated by either party.²⁹ Significantly, even with this basic structure worked out, late in the negotiations, Salisbury sought to recur to his earlier concerns and re-insert an option for a state to decline arbitration for “a question of principle of grave general importance.”³⁰ Olney’s objection to this significant “escape hatch” prevailed and the British retracted their proposal, leaving only minor wording changes to be resolved over the following month.³¹

The announcement of a signed general arbitration agreement was widely hailed by the press and the peace movements on both sides of the Atlantic.³² Attention then turned to the question of Senate ratification where the new McKinley Administration and substantial expressions of public opinion also endorsed the project.³³ It is hard to assign responsibility for the Treaty’s failure to any individual Senator or issue. A negative atmosphere emerged in which a set of amendments fatal to the concept of the treaty were adopted in March. The Senate insisted on its right to approve any *compromis* by a 2/3 vote and to approve the naming of individual arbitrators. A variety of specific classes of cases (reflecting domestic and local political concerns) were excluded from the treaty. The final, emasculated, treaty received 43 votes, with 26 opposing Senators; thus failing the 2/3 constitutional requirement.³⁴

Olney, clearly unhappy over the fate of the Treaty, desired to preserve the relationship with Britain in order to have a foundation for another effort at arbitration. In a private letter

²⁹ FRUS 1896 237-40.

³⁰ Pauncefote to Salisbury, December 4, 1896, FO420/169/113, enclosing Olney to Pauncefote, December 3, 1896.

³¹ Pauncefote to Salisbury, December 13, 1896, FO420/169/114.

³² Campbell, *Rapprochement* 188.

³³ Blake, “Olney-Pauncefote Treaty,” 236.

³⁴ Blake, “Olney-Pauncefote Treaty,” 240.

intended for circulation among British foreign policy leaders, he ascribed the rejection to the domestic partisan politics and the Senate's desire to preserve its own foreign policy powers, rather than any anti-British or anti-arbitration sentiments.³⁵ Historians have generally agreed with this characterization, but in doing so, they (and Olney) have missed two critical points.³⁶ First, they have not acknowledged or explained the great distance between the Senate which in 1894 urged the President to negotiate such a treaty and the Senate which in 1897 rejected it. This distance was a reflection of an essential difference between abstract sentiments in favor of peace and the practical realities of a solution captured in specific negotiated language. It was a manifestation of the same distance between the peace movements and states' men; not just in attitude, but in function. In a way, the caution expressed by Salisbury about general arbitration commitments was of the same flavor. Both he and the U.S. Senate saw (though they couched it differently) that to aspire to peace and arbitration was one thing and to insert it into diplomatic practice was a major and difficult process. As we will see, the Second Hague Conference provided another clear example of the difficulty of wrestling a concept to the ground. Second, the rejection was part of the process of legislatures coming to terms with the need to recast the scope of their operations in an increasingly complex world through delegation to what has become to be called the "administrative state." In the case of arbitration, this delegation of a quasi-judicial function also occurred in the increasingly important international sphere. As a result, it collided with the Senate's central and traditional concern of its constitutional prerogatives. This manifested in both the plausible (approval of individual *compromis*) and contrived (use of the King of Sweden and Norway as the contingent selector of an umpire) rationales for rejection. However, the Senate added a block of further amendments (including a reservation for matters of national honor) to the

³⁵ Holt, *Treaties Defeated*, 159, quoting Olney to Henry White (U.S. Chargé in London), May 14, 1897, Olney MSS, LOC Shelf 17, 389, reel 51-2.

³⁶ Blake, "Olney-Pauncefote Treaty," 237-42. Campbell, *Rapprochement* 188. James, *Olney*, 149-52.

extent that both President McKinley and the British government declined to pursue further action on the treaty. The Senate did not reconcile the inherent contradiction between its support of general arbitration agreements and its refusal to allow the executive to sign and implement individual *compromis*; a problem, as noted below, that was to hamper Secretaries of State from Olney to Bryan.³⁷

The establishment of general arbitration agreements moved in the 1890s from being virtually a Latin American monopoly to one which stood astride the wider world.³⁸ Despite the facts that the Pan American Conference Treaty was never signed and the Olney-Pauncefote Treaty was not ratified, this was a common topic in diplomatic circles and led to the detailed discussions at the First Hague Conference in 1899. In the meantime, other agreements were discussed and negotiated; but the pairs of states pursuing this project did so only in the context of their understanding of their own fundamental relationship. While the British-American pact was still pending, the British and French explored a similar permanent arbitration arrangement in the context of the process of easing imperial tensions and clearing out the diplomatic underbrush that eventually led up to the Entente Cordiale of 1904.³⁹

The First Hague Conference (1899)

Outside of a small circle in St. Petersburg, the proposal for a European peace conference was a bewildering surprise when circulated by the Russian foreign minister on August 12/24, 1898. The Tsar's Rescript, as it came to be called, was the product of the intersection of domestic

³⁷ Senators Lodge and Hoar were particularly cynical about this. Blake, "Olney-Pauncefote Treaty," 235.

³⁸ Latin American states entered into eight such agreements during the 1870s, ten in the 1880s, and ten in the 1890s. The only other actual pre-Hague agreement was between Italy and Abyssinia in 1883 (see Chapter 8, *supra*).

³⁹ Salisbury proposed this arrangement "pour le règlement de toutes nos petites difficultés mutuelle." Kennedy, *Salisbury*, 281, citing unspecified French Foreign Ministry documents (and noting the absence of any record in the British archives).

political, religious, and economic traditions with the expected realities of the twentieth century. The rationale for the Russian proposal has long been debated; with some emphasizing semi-mystical and religious influences for peace which had long played a larger role in St. Petersburg than in other European capitals, while others have looked to the Russian government's increasing awareness of its economic backwardness as an inadequate foundation upon which to build a military machine necessary for the expected great power politics of the twentieth century.⁴⁰ Regardless of the precise balance of influences, the Rescript placed arms control at the center of the Russian initiative. Arbitration was not even included in the initial circular. Following the cautiously positive responses from the other European great powers, a second circular, issued on December 30, 1898/January 11, 1899, sought to focus on the specifics of the planned conference, including seven issues of disarmament and the laws of war, as well as "the employment of good offices, of mediation and facultative arbitration in cases lending themselves thereto, with the object of preventing armed conflicts between nations; to come to an understanding with respect to the mode of applying these good offices, and to establish a uniform practice in using them."⁴¹

The entire agenda was greeted with some skepticism by governments who were wary of the Tsar's character and Russian motives; although they all felt that they had no choice but to accept and endorse the proposal in light of public expectations.⁴² In response to British and other inquiries about the nature and scope of the proposed conference, Mouravieff, the Russian Foreign Minister, said that it would "be of an essentially non-political character," and would exclude

⁴⁰ Hull, *Two Hague Conferences*, 1-3, Davis, *Hague I*, 42-6, Morrill, "Nicholas II," 313, Kaplan, *Great Britain*, 25, 41; Tate, *Disarmament Illusions*, 167-81; Van Den Dungen, "Making of Peace."

⁴¹ Scott, *Hague*, II:2.

⁴² For example, the Kaiser quickly saw that Germany and the other powers faced public pressure to comply with the Rescript, lest they be seen as war mongers. Kaplan, *Great Britain*, 44, citing Wilhelm's minute on von Bulow's dispatch, August 28, 1898 in *Die Grosse Politik* XIV: 4219. Salisbury, too, was clearly unenthusiastic. Kaplan, *Great Britain*, 46.

discussion of currently pending specific disputes among the powers.⁴³ This was an important reassurance to the principal powers, who would have been wary of such an open-ended, wide-ranging, and likely unmanageable meeting. Most of the substantive attention in the preparatory period went to the military topics, although the inclusion of good offices, mediation, and arbitration, which had been increasingly used and discussed over the previous decades, strengthened the euphoria that swept through peace movements around the world. These groups, who had no notice and likely no influence in the Tsar's decision (there was no known Russian peace movement), immediately urged states to seize this opportunity.⁴⁴ States actively prepared during the first half of 1899 and the Conference opened at the Hague on May 18, 1899.

The Conference divided its work into three Commissions, one for the laws of war, one for disarmament and one for the peaceful settlement of disputes. The Third Commission (and its study group, the "Committee of Examination") based its work on a draft convention prepared by Russia and another model submitted by Sir Julian Pauncefote, Head of the British Delegation and veteran of many pre-arbitral negotiations as Minister to the U.S.⁴⁵ The principal issues discussed in the Third Commission were:

- 1) should there be a standing tribunal for international arbitration and how should it be constituted,
- 2) should arbitration be compulsory for certain types of issues and, if so, which ones, and
- 3) what should the procedures for arbitration be.

As previously noted, the procedural issues, which were actively debated by the legalistically-oriented group and which comprised the bulk of the resulting convention, made only modest and technical changes in the proposals of the IDI in 1875, the proposed convention from

⁴³ Kaplan, *Great Britain*, 45, citing Scott (British Ambassador in St. Petersburg) to Salisbury, September 1, 1898, FO65/1558.

⁴⁴ Kaplan, *Great Britain*, 89-112, outlines the activities of the British peace movement. Robinson, "Arbitration and the Hague," 106-109, provides a survey of the initial press reaction.

⁴⁵ An American proposal was formally introduced but was not pushed by the American delegation, which deferred to the Pauncefote proposal. Davis, *Hague I*, 147-8.

the Pan American Conference in 1890, the work of the Inter-Parliamentary Union in the mid-1890s, and a study project by the New York Bar Association in 1896.⁴⁶ The substance of these rules need not detain us here. Nonetheless, the fact that in many cases, the rules were not fixed or were subject to revision by the parties to a specific *compromis* supports an understanding that the rules were almost entirely a framework for further discussion and negotiation by the parties and cannot be characterized as any material limit on state discretion. Of considerably greater interest, both at the Conference and in terms of their implications for the nature and future of arbitration were the structure of the proposed tribunal and the compulsory nature of the arbitral process.

On June 3, following a discussion of other aspects of the baseline Russian plan, the Committee of Examination adopted, without any debate, a general endorsement of arbitration as a means of settling international disputes “concerning questions of law, and especially with regard to those concerning the interpretation or application of treaties.”⁴⁷ It similarly agreed summarily to the draft provision that excluded issues relating to a state’s “vital interests or national honor.” It then took up Article 10 which proposed to make arbitration compulsory for all signatories to the proposed convention for certain specified classes of issues, at least insofar as they did not engage with a state’s “vital interests or national honor.”⁴⁸ The German delegate, Dr. Phillip Zorn, made clear that the list was likely too much for his government to accept, but was not specific. The only material changes that the Committee proposed to adopt were 1) a slight expansion of the types of pecuniary claims that might be covered and 2) the removal of issues related to river and canal management and of money-related agreements. Both of these deletions were insisted upon by the American delegate, Frederick Holls, and both were accepted with only a slight push-back from

⁴⁶ See Chapter 7, *supra*.

⁴⁷ Scott, *Proceedings*, 700.

⁴⁸ Scott, *Proceedings*, 700-3. The list included: certain types of pecuniary damage claims and questions involving the interpretation of treaties relating to certain transportation and communications issues, intellectual property, money, sanitation extradition, inheritance, and technical marking of boundaries.

other delegations. Holls made no substantive argument, merely indicating that the U.S. would not accept such provisions. In his later book on the Conference, Holls said that his instructions were based on the domestic political concerns relating to sensitivities in the U.S. Senate in general and American protectiveness over its central American canal rights, its river borders with Canada and Mexico, and the major debate about bi-metalism which was current in the U.S. at that time.⁴⁹

Pauncefote's June 9 introduction of a plan for a permanent arbitration tribunal was, in one sense, no great surprise. The Americans had bruited a similar plan and peace and arbitration advocates had clamored for such a step for some years.⁵⁰ Still, it was a step beyond what the Russians had proposed and upset the delegates' expectations, causing one delegate to remark "Good heavens, but things are getting serious indeed."⁵¹ The Russians, not to be outdone, then amended their proposal by also calling for an international court.⁵² Neither proposal envisioned a sitting court, but rather each established a detailed process by which individual judges were named to resolve a particular dispute when it arose.⁵³ Pauncefote's proposal was designed to address several concerns: 1) the perceived weakness of the typical arbitration by mixed commission; i.e. the reliance on a single (potentially biased) umpire to cast a tie-breaking vote, 2) the use of governmental officials as judges who had often been seen as complying with their governmental preferences, 3) the aversion to and lack of experience with significant international institutions, balanced with the desire for states to be seen to endorse the arbitration process by

⁴⁹ Holls, *Peace Conference*, 228.

⁵⁰ A detailed American plan for a permanent tribunal was informally floated at the outset of the Conference, but the U.S. delegation determined that there was more support for the British proposal and did not formally submit it. Certain minor points were added into the overall drafting process. Scott, *Conference*, Vol. II, Holls, *Peace Conference*, 235ff. See also Parkman, *David Jayne Hill*, 72-6.

⁵¹ Davis, *Hague I*, 139, quoting the *Manchester Guardian*, May 17, 1899.

⁵² Scott, *Proceedings*, 585.

⁵³ Under the British proposal, each signatory would name two judges to a list from which the disputants would select a panel. The Russians would designate five states to specify a judge for a particular case. Scott, *Proceedings*, 816; Pauncefote to Salisbury, May 28, 1899, FO881/7473/108-14.

creating a permanent mechanism to resolve international disputes.⁵⁴ States were to nominate distinguished experts in international law to a list from which the disputants would select the panel of arbitrators; an administrative bureau would support the process.

The British plan become the basis of the working document, however, and seemed to gain momentum until Dr. Phillip Zorn, the German law professor on the Third Commission, objected to replacing the current ad hoc approach with a permanent structure until Germany had had more experience with “occasional arbitrations.”⁵⁵ The rationale for the German opposition was set out in an internal report from the German delegation back to Berlin a few days later. “At first sight the permanent Court of Arbitration, as suggested by the English...is harmless enough, for each state can utilize the Court or not, use it or not as it pleases. On the other hand a certain danger does lie in the existence of such an institution which is nothing but will always want to become something. Only men of the third or fourth rank will appear on the list [of judges] and these world arbitrators will do damage.”⁵⁶ This opposition led to an impasse and the Commission turned to preliminary discussions of other aspects of the Pauncefoot proposal.

In response to these Conference discussions and European press reports which indicated the increasing likelihood of an arbitration proposal emerging from the Commission, it seems that Kaiser Wilhelm issued one of his periodic policy fiats, making clear to the German delegation that they were to have no part of any arbitration plan.⁵⁷ This led to the decision to suspend the work of the Third Commission while Zorn went to Berlin to discuss the situation with the Foreign Ministry. Simultaneously, U.S. Ambassador Andrew White sent Holls to Berlin to lobby the German Government, and signaled to the Germans that the Conference would forego any sense of

⁵⁴ Kaplan, *Great Britain*, 163-5.

⁵⁵ June 9, 1899. Scott, *Proceedings*, 713.

⁵⁶ Georg zu Münster to Friederich von Holstein (Head of the Political Department of the German Foreign Affairs Ministry), June 14, 1899, in Holstein, *Holstein Papers*, IV: 125-6.

⁵⁷ White Diary, June 16, 1899, reprinted in White, *First Hague*, 69

compulsory arbitration in return for German acquiescence in the establishment of a permanent tribunal. In a prior discussion, White had told Münster, the Head of the German delegation, that the voluntary part of the arbitration project was the key and that the commitment to obligatory arbitration was limited to “sundry petty matters” which, if too intrusive for Germany, could be dropped. Münster noted that the U.S. had already successfully gotten the list of obligatory arbitration topics narrowed; to which White offered to support any similar German moves.⁵⁸ Britain, too, was willing to drop the compulsory arbitration point to secure the permanent tribunal.⁵⁹ The upshot was a highly reluctant reversal of the German position.⁶⁰ The shape of the final agreement was resolved; even with the universally accepted exclusion of “vital interest and national honor” issues, there would be no obligatory arbitration emerging from the Hague in 1899.⁶¹

Compulsory arbitration’s impact on pre-war military preparations animated some portion of the German opposition, even beyond the generic intrusion into sovereign state discretion. They feared that states whose military was less prepared could use arbitration as a device to buy time for preparation and mobilization, thus negating the advantage that Germany had secured in the organization of its army. Münster told White that “Germany is prepared for war as no other country is or can be...Arbitration, he said, would simply give rival powers time to put themselves in readiness, and would therefore be a great disadvantage to Germany.” White downplayed this risk, urging the German’s to recognize that they need not be concerned about loss of mobilization time since “in any emergency, the Emperor and his government are always free to mobilize the

⁵⁸ White Diary, June 14, 1899, reprinted at White, *First Hague*, 62.

⁵⁹ Kaplan, *Great Britain*, 170.

⁶⁰ Bettez, “France, Germany,” 137, quoting the Kaiser’s characterization of the proposed acquiescence as “shit” and “nonsense.” Kaiser’s minute on von Bulow to the Kaiser, June 21, 1899 in *Die Grosse Politik*, XV: 4320.

⁶¹ White Diary, June 19, 1899, reprinted at White, *First Hague*, 78.

German Army at once.”⁶² British military analysts recognized that this might affect German response to arbitration and had a similar concern with regard to its own naval dominance.⁶³ Indeed, Salisbury expressed concern about weaker states using the arbitration process as a delaying tactic.⁶⁴

Despite the aspirations of the peace movement, lawyers, and those states’ men who endorsed at least the concept of arbitration, there were two factors which limited the ability of those at the Hague Conference to come to the most effective arbitration regime possible. The first was the Conference’s implicit principle of consensus, at least insofar as the Great Powers were concerned. An agreement without unanimity would have been, in U.S. Ambassador White’s view, a “catastrophe.”⁶⁵ In the context of compulsory arbitration, Germany was the main problem, but there were substantial fears that it would bring the other members of the Triple Alliance (Austria-Hungary and Italy) along with it.⁶⁶ However, the U.S. was itself certainly willing to play the consensus ‘card’ as shown by Holl’s attitude towards the need to accommodate American interests on the list of potentially compulsory arbitration topics. The second complicating factor was states’ men’s acute sensitivity to “public opinion.” White, for example, was deeply concerned that, given the lack of progress on the disarmament and laws of war commissions at the Hague, without an arbitration agreement, the Conference would have appeared to be “a failure and,

⁶² White to Von Bulow, June 16, 1899, reprinted in White, *First Hague*, 74. In addition, arbitration was seen by the Imperial Government as strengthening the hand of the Reichstag. Anderson, *Rise of Modern Diplomacy*, 257.

⁶³ Kaplan, *Great Britain*, 72-4. Bettez, “France, Germany,” 36.

⁶⁴ Salisbury to Pauncefote, May 19, 1899, FO85/1694.

⁶⁵ Andrew White Diary, June 13, 1899, reprinted in White, *First Hague*, 58.

⁶⁶ However, at one point von Bulow authorized the German delegation to indicate that German aversion to a permanent tribunal and to compulsory arbitration need not prevent the other states from establishing such a regime among themselves. Bettez, “France, Germany,” 132.

perhaps, a farce.”⁶⁷ In particular, White feared that a failure would strengthen the forces of socialism, especially in the domestic politics of France and Germany.⁶⁸ At the Hague, these forces worked in tension with each other, the consensus factor pushing for a ‘least common denominator’ solution and the need to be perceived as responsive to public opinion pushed states’ men toward taking *some* action; the result was a minimal advance.

German opposition to the concept of arbitration as well as to the permanent tribunal was the object of much criticism during and following the conference. Its position starkly illustrates the conflict between the nature of the modern state and efforts to tame sovereignty. There can be no doubt that Germany deserves its reputation as the chief opponent of arbitration at the Hague. During the preparation for the Conference, Georg zu Münster, the Head of the German delegation said “The great difficulty will be to formulate meaningless resolutions and find a cloak with which we can cover the inevitable fiasco.”⁶⁹ Friederich Holstein, the intellectual leader of the German Foreign Ministry described the concept of a permanent arbitration tribunal as “a world historical mistake, which will lead sooner or later to unfortunate consequences....”⁷⁰ However, just as with the War Guilt Clause at the end of World War I and the extensive *Sonderweg* historiographical debate on the nature of modern Germany, it has been easy to make Germany

⁶⁷ White Diary, June 13, 1899, reprinted in White, *First Hague*, 58. In addition to dropping the compulsory arbitration provisions, the Germans also secured a change in name from “tribunal” to “court,” an increase in the number of judges nominated by each signatory (presumably to increase each disputant’s flexibility in naming a particular panel), and a narrowing of the scope of the Court’s supporting Bureau so that there could be no independent pressure on any state to engage in arbitration in a particular case. Davis, *Hague I*, 158-9.

⁶⁸ White Diary, June 14, 1899, reprinted in White, *First Hague*, 60.

⁶⁹ Münster to Holstein, 12 April 1899, in Holstein, *Holstein Papers*, V: 107-8.

⁷⁰ Holstein to to Bernhard von Bülow (State Secretary for Foreign Affairs), Draft, Berlin 30 June 1899, in Holstein, *Holstein Papers*, IV: 134-5.

into a scapegoat and pay little attention to the extent to which its stance was different from other major states only in degree.⁷¹

The uncertainty with which the major powers greeted the Rescript was reflected in their lack of enthusiasm and underlying disregard for arbitration at the Conference itself, both at the level of the principle of national sovereignty and in the particulars. The exclusion of political issues from the Conference agenda, while certainly signaling normal diplomatic prudence, reflected for example the experience of the Pan American conference eight years earlier, where concerns about the application of arbitration requirements to pending disputes between the parties proved to be problematic. More fundamentally, it also implied the maintenance of the status quo, the stability of the states system, and the maximization of state discretion. As the official instructions to the American delegation said: “The duty of sovereign States to promote international justice by all wise and effective means is only secondary to the fundamental necessity of preserving their own existence.”⁷² Similarly, as the Conference work sessions showed, the immediate and undebated exclusion of “vital interests and national honor” -related issues made clear that arbitration was not seen as a tool to prevent war. Complete state discretion was protected. But even with that safeguard, the states’ men of the Hague shared a view of arbitration that was extremely narrow. For example, it was the United States that, on June 3, made the first preemptive move to narrow the scope of the compulsory arbitration clause. This effort was successful (apparently unopposed) and not for philosophical or principled reasons. U.S. Delegate Frederick Holls’ main rationale was that the Senate wouldn’t ratify such a broad

⁷¹ Boyle, *Foundations of World Order*, 28, is typical of those who blame Germany; although Robinson, “Arbitration and the Hague,” 131-5, makes some favorable nod in Germany’s direction.

⁷² Hay to White, April 18, 1899, reprinted in Scott, *Conference*, II.

commitment.⁷³ Further, according to U.S. Ambassador White, “Everybody knows that France has never wished arbitration, and that Russian statesmen are really, at heart, none too ardent for it.”⁷⁴ Even Leon Bourgeois, the former French Premier who chaired the Third Commission and a stalwart of the peace movement, said that establishing a general obligation to arbitrate was “evidently absurd.”⁷⁵ The French Foreign Ministry also raised concerns about the application of this mechanism to imperial powers with colonial entanglements and later implied that the removal of compulsory arbitration wouldn’t be such a bad thing, if Germany were seen as the disruptor of the Conference.⁷⁶ Finally, even Britain was not that far from the German position. Prime Minister Salisbury’s derogatory stance concerning arbitration, made during the “*Alabama Claims*” debates, had softened only incrementally, in light of his experiences during the Venezuelan Boundary dispute, Samoa, the 1897 Anglo-American Treaty debacle and other negotiations. He was willing to accommodate compulsory arbitration, but only on four narrowly defined classes of cases.⁷⁷ We must wonder whether, Sir Julian Pauncefote, upon hearing the German rebuttals of his arbitration initiative as too new and too broad, did not hear the echoes of his chief who, just three years earlier, had made exactly the same arguments in the negotiations with the U.S. on their bilateral agreement.⁷⁸ Indeed, we can recall Pauncefote’s comments about the 1890 Pan American

⁷³ Holls, *Peace Conference*, 228. Captain Alfred T. Mahan, part of the U.S. delegation, was also a clear opponent of compulsory arbitration concepts. Witt, *Lincoln’s Code*, 249. Davis, *First Hague*, 197.

⁷⁴ White Diary, June 15, 1899, reprinted in White, *First Hague*, 64,

⁷⁵ June 3, 1899, Documents Diplomatique Francais, XV:199, quoted in Bettez, “France, Germany,” 109. Bourgeois thought that arbitration between two great powers was impossible, as it would be between two “uncivilized” states; but remained feasible between secondary powers and between a great power and a secondary power. This implies a view of international law as applicable only within a relatively narrow band of international relationships, with (presumably) the law of nature applying to those whom did not understand or could not be subjected to the strictures of civilized international society.

⁷⁶ Bettez, “France, Germany,” 118, 129.

⁷⁷ Kaplan, *Great Britain*, 71.

⁷⁸ Salisbury to Pauncefote, March 5, 1896, FO420/168, “a system of arbitration is an entirely novel arrangement, and, therefore, the ... limits ultimately adopted must be determined by experiment. In the interests of the idea, and of the pacific results which are expected from it, it would be wise to

Conference which applied, *mutatis mutandis* here: “The principle of arbitration will be approved in good rhetorical form, and an attempt may be made to vindicate the principle in terms as definite as the Chilean [German] Delegates will permit to pass unchallenged.”⁷⁹ Thus, Germany was hardly alone in making it difficult to define compulsory arbitration and its opposition provided a convenient excuse for the Third Commission to avoid entanglements with the details, a messy and ultimately unsuccessful process as the Second Hague Conference was to demonstrate.⁸⁰

The Aftermath

Public reaction to the Conference was favorable, although far from unanimously so and, by April, 1900, the Hague Convention was ratified by 17 states, and the Permanent Court of Arbitration (“PCA”) commenced operations.⁸¹ The impact of the decisions in the Hague can be seen in two ways: 1) the initial cases brought to the PCA and 2) in the bi-lateral treaties that many states entered into to commit themselves to the PCA or arbitral process beyond what had been agreed to by the Conference. These developments show that the PCA was not a particularly attractive forum for international dispute resolution and that arbitration continued to be invoked by states only under tightly controlled parameters and only in the context of an international relationship which was highly unlikely to lead to significant conflict.

From its creation until the Second Hague Conference in 1907, four cases were brought to the PCA, the first two of which provide some insight into states’ decisions to arbitrate:

commence with a modest beginning, and not to hazard the success of the principle by adventuring upon doubtful ground.”

⁷⁹ Memorandum on Pan-American Conference by Pauncefoot, February 15, 1890, FO881/5907.

⁸⁰ Bettez’ comparative study of French and German positions at the Conference makes clear that while the French were marginally more supportive of arbitration, they were content to let other states take the lead since they could not be seen to undermine their Russian ally’s initiative. Bettez, “France, Germany,” 45-7.

⁸¹ Robinson, “Arbitration and the Hague,” 109-16, provides a survey of press and public reaction.

- The Pious Fund—United States vs. Mexico (1902)
- Venezuelan Preferences—Britain, Germany, Italy vs. Venezuela (1904)
- Japanese House Tax—Britain, France, Germany vs. Japan (1904)
- Muscat Dhows—Britain vs. France (1905)

In 1897, the U.S. revived a long-dormant dispute with Mexico over an annuity allegedly due to a religious fund in California. While the diplomatic process ground forward, by 1899, the U.S. suggested arbitration as a solution and by 1901, Mexico had agreed in principle, looking to the then-pending Second Pan American Conference to establish a forum. That Conference deferred to the newly established PCA, and in 1902, the U.S. urged Mexico in that direction, which was ultimately agreed to.⁸² This was the first use of the PCA mechanism and it was stimulated by a visit from the Baron d'Estournelles' to President Roosevelt on February 17, 1902. The French peace advocate quickly established some rapport with Roosevelt and urged him to initiate *some* action at the PCA, telling him that "European statesmen had boycotted the tribunal and meant to let it die for lack of any function."⁸³ The final U.S.-Mexican agreement was signed less than two months later. Beyond what this might say about American engagement with the arbitral process, d'Estournelles' characterization of European states' men's attitudes towards the PCA is consistent with their shared stance at the Hague.

The Venezuelan Blockade arose following differences between British, German, and Italian nationals in Venezuela whose claims were denied by the Venezuelan government. After considerable dispute, including Venezuela's rejection of the European powers' demands for payment of some claims and arbitration of others, in 1902 the European powers imposed a naval blockade and sank several local vessels, leading to Venezuela's proposal for arbitration of a

⁸² See Powell Clayton (U.S. Ambassador to Mexico) correspondence with John Hay (Secretary of State) from 1899 through 1902 in RG59 M77/121, M97/147 and Hay to Aspiroz (Mexican Minister in Washington), 1902 in RG59, M99/73, M54/36.

⁸³ Quoted in Curti, *Peace or War*, 190. See generally, Davis, *Hague II*, 51-61.

subset of the European claims.⁸⁴ While maintaining the blockade, the European powers insisted that some claims be paid directly because they “were of a kind which no Government could agree to refer to arbitration.”⁸⁵ In subsequent negotiations between Venezuela and the blockading powers, the issue arose as to whether the the claims of the blockading powers’ nationals should have priority in payment over those of other states’ nationals. It was this narrow issue—and not the underlying claim—which was ultimately referred to the PCA process, but only after U.S. President Roosevelt declined to act as arbitrator in the matter since he felt that the claims were of a type for which the PCA process had been created.⁸⁶ The balance of the ‘non-priority’ claims were submitted to a mixed commission outside of the Hague process. This case is often cited for its implications for substantive international law, but it is illustrative of the highly limited extent of the commitment of Britain, Germany, and Italy to the peaceful resolution of disputes in the immediate aftermath of the Hague Conference.⁸⁷ From their perspective, the Venezuelan refusal to arbitrate or pay the underlying claims left them little alternative to the use of ‘gunboat diplomacy,’ and their experiences in and attitudes towards Latin America made them wary of the credibility of Venezuela’s agreement to arbitrate.⁸⁸ However, since as a matter of military practicalities, their respective domestic political constraints, and some degree of deference to the U.S.’ Monroe Doctrine-based claims to a sphere of influence, there were constraints on the European powers’ military enforcement options. The narrow scope of the PCA issue overcame, in

⁸⁴ Maass, “Catalyst,” 387-8.

⁸⁵ FO881/7865/2-5, summarizing Lansdowne to Bowen (U.S. Chargé in Caracas), December 23, 1902. Germany and Italy each took a similar position. The European powers’ position was based on what they considered to be the indisputability of Venezuelan liability.

⁸⁶ FRUS 1902: 428.

⁸⁷ Davis, *Hague II*, 73-90.

⁸⁸ Anderson, “Venezuelan Claims Controversy,” 530-1 notes that the European reluctance to arbitrate was based in part on the perceived as procedural shortcomings in the as-yet barely-tried Hague process.

particular, Germany's general aversion to arbitration solutions.⁸⁹ On the other hand, it is difficult to reconcile the British aversion to arbitration here (in particular, its declaration that its claims were outside the scope of arbitration) with its push a few years earlier for compulsory arbitration of pecuniary claims at the Hague.

The failure of the Hague Conference to adopt a general multi-lateral compulsory arbitration agreement foundered, as we have seen, on the opposition of Germany and the (at least) reticence on the part of many of the other states; all hiding under the cover of a claimed urgency of multi-national unanimity. While we don't know if the German delegation there took up its Foreign Ministry's instructions and suggested that the other powers enter into a multi-lateral agreement for compulsory arbitration without Germany, it is clear that the other states did not do so. Some combination of diplomatic dynamics insisting on consensus and a lack of underlying drive to promote arbitration was at work. Instead, in the aftermath of the First Conference, 15 European states and 19 Latin American states entered into 72 bilateral agreements dedicated to the parties committing to arbitration for some range of issues, usually by referring the dispute to the Hague PCA mechanism.⁹⁰ This flurry of agreements was celebrated at the time and in subsequent historiography as yet another triumph of the pacific spirit of the age. It was complemented by an expansion of the use of compromissory clauses in bilateral treaties which committed to arbitration in case of dispute over the interpretation of that particular arrangement.⁹¹ However, a closer examination of these agreements and the circumstances surrounding their adoption shows that they were the smallest step towards arbitration possible, and in the case of the

⁸⁹ Mitchell, "The Height," 198-202.

⁹⁰ This total covers the period from 1901-07. By way of comparison, there were 25 such agreements from 1832-72 and 26 from 1873-1900.

⁹¹ Compromissory clauses had been a regular feature of treaty writing since the 1870s, particularly in Latin America. The quarter century before Hague I had seen about 2.5 per year; from 1904-1911, the rate tripled.

most visible dedicated “general arbitration” treaties, they were undertaken primarily to meet the perceived demands of public opinion. Notably, of the 143 post-Hague/pre-War cases of arbitration (1900-14), only 25 were between states who had previously committed to arbitration (and only a subset of those were formally within the scope of their particular bilateral commitment) and only 14 made use of the PCA mechanism.

Agreements between Latin American states (where this commitment was a standard diplomatic device), continued after the Hague Conference, often inspired by the on-going series of Pan American Conferences.⁹² However, there was a notable shift to intra-European agreements beginning in 1903. The first such agreement, and the model upon which most of the post-Hague flurry was based, was the Anglo-French Agreement of October 1903.⁹³ It is a brief treaty, committing the two parties to submit to the PCA in the Hague “differences which may arise of a legal nature, or relating to the interpretation of Treaties existing between the two Contracting Parties, and which it may not have been possible to settle by diplomacy... provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two Contracting States....” The agreement was, despite its acclaim by the peace advocates on both sides, was a meager advance for the cause of arbitration, as shown by its scope, its procedure and its negotiation history.

⁹² Argentina was most active here. In 1898, they had reached agreement with Italy on a general arbitration agreement which, remarkably, did not include the normal ‘vital interests/national honor’ exclusion, but the treaty was rejected by the Argentine Senate for this reason. It later did implement ‘normal’ agreements with seven other Latin American states over the following thirteen years, as well as Italy and France in 1907 and 1914, respectively. Cory, *Compulsory Arbitration*, 39. Brazil and Chile’s 1899 agreement did not include the exclusion, but was limited to issues that could be formulated juridically, presaging the Angle-French Agreement of 1903. Ibid. 40.

⁹³ Agreement between The United Kingdom And France Providing for the Settlement By Arbitration Of Certain Classes Of Questions Which May Arise Between The Two Governments. Signed at London, October 14, 1903. Cd. 1837.

The agreement covered only a subset of the list of topics that had been proposed at the Hague for compulsory arbitration. It excluded claims and boundary disputes, the two most common types of arbitration (both generally and in terms of Anglo-French practice). It preserved the “vital interests/national honor” exclusions. In terms of procedure, it made use of the Hague structure, but it still required that the parties reach a further agreement, a *compromis*, to cover each specific case.⁹⁴ So, it was, in effect, an agreement to commit to try to agree on submitting to arbitration in a narrow range of cases. This was precisely the kind of minimally-intrusive commitment which states’ men saw as preserving the discretion of the state while still being able to publicly proclaim adhesion to the ideal of arbitration and be responsive to domestic and international pressures along this line. In fact, this was the express goal of the two governments in these negotiations. Peace advocates had been agitating for a further arbitration commitment pretty much since the close of the Hague Conference. Thomas Barclay, the former head of the British Chamber of Commerce in Paris had pushed hard for the British and French to take the lead.⁹⁵ In March 1903, Baron d’Estournelles, one of the French delegates at the Hague, a leader of the peace movement, and member of the National Assembly, had organized a group of over 100 deputies to promote arbitration.⁹⁶ On May 11, probably prompted by Barclay, Prime Minister Balfour was pressed for a statement of policy on the floor of the House of Commons and made a general statement of support for arbitration.⁹⁷ This led to informal French diplomatic inquiries as to

⁹⁴ As we have seen in the “*Alabama* claims” and Alaska Boundary cases, and as occurred in the concurrent Muscat Dhows case, negotiating the compromise and its terms of reference for the arbitral tribunal was usually much more problematic than agreeing in principle to arbitrate.

⁹⁵ Edmund Monson (British Ambassador in Paris) to Lansdowne (Foreign Secretary) May 22, 1903, FO27/3620. See also Cory, *Compulsory Arbitration*, 51.

⁹⁶ Monson to Lansdowne, March 28, 1903, FO 27/2618.

⁹⁷ *Hansard*, 4th ser., vol. 122 (May 11, 1903) cols. 309-10.

whether a treaty covering legal questions regarding treaties would be agreeable to the British.⁹⁸ Later that month, further discussions in Paris led to the British Ambassador's view that an arbitration commitment treaty "would be difficult of realization unless the two countries were satisfied with one which bound the contracting parties very lightly indeed." He also noted that the French Foreign Minister thought that a treaty confining an arbitration commitment to "juridical interpretation of international conventions "would be considered by public opinion as 'satisfactory progress.'"⁹⁹ As public pressure continued into the summer, the French began the drafting process, although the British expected that all that would result would be "little more than a formal concession to a very praiseworthy but unpractical sentiment."¹⁰⁰ Over the late summer and fall, the language was tweaked and the agreement was signed in October. These negotiations occurred simultaneously with Anglo-French discussions concerning a dispute about slave trade enforcement in Muscat, which the two parties were unsuccessful in resolving diplomatically and, despite a British proposal to refer this matter to the PCA, the terms of reference proved complicated and it took another year for the agreement to be signed.¹⁰¹ Nor did the bilateral agreement seem to accelerate the resolution of two other matters which eventually ended up at the Hague.¹⁰² It may have however provided at least the nominal basis for at least two of the six later Anglo-French arbitrations.¹⁰³

⁹⁸ Lansdowne to Monson, May 19, 1903, FO 27/3616/99 (draft). The French Ambassador also noted similar inquiries to France from the Netherlands and Sweden and Norway.

⁹⁹ Monson to Lansdowne, May 29, 1903, FO27/3620.

¹⁰⁰ Monson to Lansdowne, July 24, 1903, FO 27/3622.

¹⁰¹ Lansdowne to Monson, May 19, 1903, FO146/3747. Agreement between Great Britain and France, referring to Arbitration the Right of certain Muscat Dhows to fly the French flag. Signed at London, October 13, 1904. BFSP 98:46.

¹⁰² The Venezuelan Blockade Preference case and the Japanese House Tax case were both subjects of diplomatic negotiation during this period.

¹⁰³ While the framework agreement is nowhere cited, it may have provided a basis for the agreements at SMH## 753, 760; but due to the subject matter, it did not apply to SMH## 752, 800, 802, 952.

More importantly, the text of the Anglo-French general arbitration agreement formed the basis of an extensive list of bilateral treaties entered into by both France and Britain; starting with Italy early in 1904, immediately followed by Spain.¹⁰⁴ This activity spurred German concern (whose anxiety over the strengthening rapprochement between Britain and France overcame its opposition to the principle of compulsory arbitration). As with France, Italy, and Spain, the Germans took the initiative with Britain and proposed not only to enter into a comparable agreement but to extend the principle of arbitration to the resolution of colonial boundary issues.¹⁰⁵ These proposals were floated in the context of the broader German strategic effort to improve relations with Britain on a wide range of issues. The by-now standard arbitration agreement was signed on July 12, 1904 (without the special coverage of colonial boundary issues), but the larger German diplomatic initiative came to naught.¹⁰⁶ The flurry continued with Britain entering into comparable agreements with Austria-Hungary, Denmark, Norway and Sweden, Portugal, and Switzerland by late 1905. In all, over 44 bilateral treaties were signed by Hague participants between 1903 and 1907, connecting Europe in a web of agreements; constituting a significant subset of the 136 general arbitration agreements that were signed between 1900 and 1914.¹⁰⁷ Virtually all of these post-Hague I treaties retained the crucial

¹⁰⁴ Carignani (Italian Chargé in London) to Lansdowne, November 25, 1903, FO45/883. Lansdowne to Carignani, January 5, 1904, FO45/899 (draft). Lansdowne to Egerton (British Ambassador to Madrid), February 10, 1904, FO72/2193 (draft). Egerton to Lansdowne, February 28, 1904 in FO72/2194.

¹⁰⁵ Lascelles (British Ambassador to Berlin) to Lansdowne, April 26, 1904, FO64/1593. May 13, 1904, FO64/1593. The arbitrator in this latter group would not have been under the PCA, but would have been either the Queen of the Netherlands or the President of the Swiss Confederation.

¹⁰⁶ Agreement Between The United Kingdom And Germany Providing For The Settlement By Arbitration Of Certain Classes Of Questions Which May Arise Between The Two Governments. Signed At London, July 12, 1904. Cd. 2245.

¹⁰⁷ However, of the 143 *compromis* signed between 1900 and 1914, only 24 were between parties that had signed a post-Hague bilateral general arbitration agreement. I suspect that only a few of those were encompassed by such general agreements and, given the widespread general practice of that era, it is difficult to attribute much if any effectiveness to these bilateral accords.

exclusion of issues relating to a party's vital interests, national honor, or independence. Only two Danish treaties—with the Netherlands and Italy—were fully comprehensive in scope.¹⁰⁸

Prior to 1907, the United States did not add to this total. Following the rejection of the Olney-Pauncefote Treaty, President McKinley signaled an effort to revive the effort while taking into account the concerns formally expressed by the Senate.¹⁰⁹ However, nothing apparently came of this gesture until after the Hague Conference. In the meantime, Theodore Roosevelt had succeeded to the Presidency and John Hay had become Secretary of State. Following its engagement in the Pious Fund Case and the Venezuelan Blockade Case, in 1904 the U.S. built upon the British-French bilateral agreement to propose a comparable arrangement with other states who had been parties to the Hague Conference.¹¹⁰ Within a year, ten such agreements had been signed. As with the British-French agreement, they provided for an implementing *compromis* in each specific case, but given Hay and Roosevelt's animosity towards the Senate, they were structured so as to avoid the need for Senate approval of each such *compromis*. In a repeat of the Olney-Pauncefote outcome from 1897, they were uniformly rejected by the Senate, which cited its need to approve each case.¹¹¹ Roosevelt decided that such a requirement was nonsensical and let the treaties lapse.¹¹²

In sum, the period between the two Hague Conferences was marked by a flurry of agreements entered into by states and states' men to meet a perceived public demand but which did not address or resolve real diplomatic issues. Nowhere was this more evident than in the United States as the peace movement became more embedded in middle-class environments where peace advocates, businessmen, lawyers, and government officials heard each other praise

¹⁰⁸ SMH## 775, 832.

¹⁰⁹ *New York Times*, June 20, 1897, 1.

¹¹⁰ FRUS 1904 8-10.

¹¹¹ Anderson, "Senate," 329-30.

¹¹² Holt, *Treaties Defeated*, 204-5.

peace and arbitration efforts. The exemplar of this phenomenon was the Lake Mohonk Conference on International Arbitration, an annual gathering of the great and good in a felicitous setting north of New York City which ran from 1895 to 1916. The Conference took the Cobdenite spirit to a new level in a new age. It sought an arbitral regime that was more pragmatic than idealistic.¹¹³ It engaged diplomats and political leaders. It looked to ground its arguments in modern economic and scientific sensibilities. It was a central part of the intersection of law and foreign policy that marked U.S. policy and thinking in this era.¹¹⁴

At the Second Conference, one speaker quoted U.S. Supreme Court Justice David Brewer at the previous year's American Bar Association meeting: "A parliament of man, he [Brewer] said, of which Tennyson had dreamed, is impracticable; but a supreme court of the world is not...."¹¹⁵ With its echoes of William Ladd's "court and congress" proposal of the 1830s, this crystallization of the juridical mentalite which dominated arbitration advocacy efforts brought several benefits. First, it appeared to provide a counterpoint to the political decision-making which risked war. Second, its familiarity engaged the legal community and its domestic analogies connected with businessmen who sought peace for commerce. Third, it provided a safe point of agreement for peace advocates who were often divided over the need for military or other enforcement of arbitration decisions. Finally, at the same time, as demonstrated by the 1890 Pan-American Conference proposal, the 1897 Olney-Pauncefote Agreement, and the output of the 1899 First Hague Conference, this model presented no real threat to states and states' men. As

¹¹³ For example, Benjamin Trueblood, longtime Secretary of the American Peace Society addressed the inaugural Conference in 1895, noting "“We have passed the sentimental stage in the history of the peace movement. That is necessarily the first stage in any reform movement. ... Very little comparatively is said in any of the peace congresses to-day about public sentiment; we have reached the time when practical means are being discussed for the settling of difficulties.” Lake Mohonk Conference, *[First] Annual Report*, 8 (1895).

¹¹⁴ See generally, Landauer, "Ambivalences of Power;" Reid, "American Internationalism;" and Zasloff, "Law."

¹¹⁵ Lyman Abbott, in Lake Mohonk Conference, *[Second] Annual Report* (1896).

one commentator has noted, “At times, tough-minded and realistic diplomats curried favor with the humanitarian sentiment of the age by supporting proposals emanating from the moderate upper-middle-class wing of the peace movement that committed them to do nothing of consequence, but in the main they condescendingly viewed the prescriptions of peace advocates as naïve and muddled.”¹¹⁶

The Second Hague Conference (1907)

The Second Peace Conference at the Hague (“Hague II”) was convened on June 15, 1907 at the instigation of U.S. President Theodore Roosevelt and the formal invitation of the Russian Tsar. Its agenda was similar in scope to the first session and its outcome was similarly disappointing to peace advocates. In contrast to the First Hague Conference, where arbitration was the surprising center of attention and the only apparent success, at Hague II, arbitration was a major focus of the preparations and the site of intense discussions, but the results were meager.¹¹⁷ More specifically, while a number of changes were made in the PCA procedures and an International Prize Court was established as an appellate body to centralize the treatment of maritime capture cases in times of war, the central issue was the implementation of a compulsory arbitration regime; a continuation of the debate which had occupied much of the 1899 Conference, at least at an abstract level.¹¹⁸ Indeed, the principal significance of Hague II was that

¹¹⁶ Wank, “Introduction,” 3.

¹¹⁷ In contrast to the first Hague Conference, the issue of arms levels and budgets, while actively discussed throughout Europe at the time, was not formally a topic at the Conference, likely due to the virtual impossibility of reaching any sort of agreement. The discussions of various aspects of the laws of war were a bit more productive. This led to considerable skepticism on the part of much of the press in advance of the Conference; a tone which only worsened as the Conference continued, particularly in Europe. See Robinson, “Arbitration and the Hague,” 117-130.

¹¹⁸ The International Prize Court Convention never went into effect. See generally, Davis, *Hague II*, 221-7, Hull, *Two Hague Conferences*, 410-448.

the concerns expressed by Germany and others at Hague I were confirmed: the wider range of states involved in Hague II attempted to bring specificity to the compulsory arbitration concept and failed.

Perhaps the most marked difference in the two Conferences was in the list of states attending. While the 1899 meeting included 26 countries, 20 of which were European, the 1907 version saw the participation of 44 countries, including 17 from Latin America and 3 from Asia. This changed the underlying organizational dynamics of the meeting in terms of voting and consensus, but also brought a strong ‘peripheral’ presence to what had been, in effect, a European club. In terms of arbitration, it brought into play the long-standing Latin American tradition in this area, as well as their acute sensitivity to the use of force and arbitration in informal imperial contexts; which manifested, in particular, in the debate about the use of force to collect national debts. The Conference was organized, as before into three Commissions, one of which was devoted to arbitration and related ‘peaceful settlement of disputes’ issues. This “First Commission,” in turn, broke out into several working groups to address particular issues, such as the Prize Court, the use of mediation, and changes to the arbitral structure adopted in 1899. There were three major issues at the First Commission which illuminate the evolving nature of arbitration: the establishing a permanent Court, regulating the relative use of force and arbitration in the collection of national debts, and making arbitration compulsory.

Advocates of a permanent court to resolve international disputes had been eager to enhance and refine the structure adopted in 1899. Several proposals to do so were submitted to the working group. There seemed to be general support for the American proposal for a standing body of judges to hear cases, which states could initiate at what became called the “International High Court of Justice,” as a standing alternative to the continuing PCA structure. However,

despite a surprising endorsement from Germany, an extensive debate ensued and foundered over widespread disagreement on the number of judges on the Court and allocating the power of the signatory states to appoint the judges; the result was merely a resolution generally endorsing the concept.¹¹⁹ The debate revealed that states remained fundamentally concerned about their formal sovereignty. Numerous delegations emphasized that the Court should not be dominated by the “Great Powers” and that sovereignty demanded equality among states; others were concerned about their role on the Court vis-a-vis other secondary states.¹²⁰

Greater progress was made with regard to debt collection and the U.S. proposal was essentially agreed to under which states agreed not to use force to collect national debts as long as the debtor state submitted to and complied with an arbitration process.¹²¹ Latin American states had long pushed for such a limitation, under the leadership of Calvo and Drago.¹²² They had gained some traction at the Second Pan American Conference in 1902 and, at the Second Hague Conference, urged generally wanted a full commitment to the Drago Doctrine (i.e., the use of force to collect such debts was to be flatly prohibited).¹²³ Western states’ desire to secure recovery for their nationals’ claims pushed them, on the one hand to seek international arbitration as a means of escaping what they considered to be local courts of dubious reliability and, on the other hand, to preserve their ability to utilize their superior military power if either domestic justice or international arbitral processes proved, from their perspective, inadequate. The resultant compromise agreement at the First Commission was remarkable because it, in effect, made

¹¹⁹ See generally, Davis, *Hague II*, 251-75. Hull, *Two Hague Conferences*, 410-448.

¹²⁰ The debate was thus part of a long-term issue about the structure of the international system which stretched back to small states’ disgruntlement at the Congress of Vienna and which would be reiterated in the construction of the League of Nations and United Nations and the shift to majority voting in the European Union in the late twentieth century.

¹²¹ Scott, *Proceedings I*: 616-7. See generally, Hull, *Two Hague Conferences*, 350-69. see also Chapter 7, *supra*.

¹²² See Chapter 8, *supra*.

¹²³ See Noel, *History of the Second Pan American Conference*, 132-41.

arbitration compulsory in the case of national debts (although the nominal opponents of compulsory arbitration refused to characterize it in this way).¹²⁴

The larger issue of formal compulsory arbitration was the centerpiece of the First Commission's debates and became the greatest disappointment of the Conference from the perspective of peace advocates. The debate in the working committee and then at the First Commission rehearsed, in more extensive form, that from the 1899 Conference. It revealed that the formal opposition of Germany and its supporters at both Conferences was merely more candid than the nominal endorsement of arbitration by most states. In 1907, the vigorous discussions revealed that states could not agree on what issues should be included in such a commitment. In part, this was a problem of the discourse of sovereignty and the inability of most states to tolerate any apparent derogation of their nominal status.¹²⁵ In part, it was a problem of multilateralizing a commitment that had been acceptable in limited circumstances on a bilateral basis to most of the parties. The former problem was illustrated by the split-sovereignty conundrum in which the United States found itself. From a rhetorical level, the U.S. sought to portray itself as a champion of arbitration; but notwithstanding the beliefs of Secretary of State Root, it could not make a definitive commitment due to the Senate's insistence on approving every proposed *compromis*. The American plan to take a leadership role in arbitration by introducing a compulsory arbitration proposal was almost aborted by concerns that the necessary preservation of Senate review would make the proposal appear disingenuous.¹²⁶ In the event, the delegation went forward with the

¹²⁴ Hull, *Two Hague Conferences*, 369.

¹²⁵ Thus, it was of a piece with the inability to come to terms over the allocation of judgeships on the International High Court of Justice.

¹²⁶ Davis, *Hague II*, 254.

proposal but was widely criticized for asking other states to make a commitment which it would/could not make itself.¹²⁷

The multilaterizing concern was aptly captured by Baron Marschall von Bieberstein, the head of the German delegation in 1907, who rejected the argument for extending the recent bilateral precedents to a general compulsory arbitration agreement:

Between two states which conclude a treaty of general obligatory arbitration, the field of possible differences is more or less under the eyes of the treaty makers; it is circumscribed by a series of concrete and familiar factors, such as the geographical situation of the two countries, their financial and economic relations, and the historical traditions which have grown up between them. In a treaty including all the countries of the world, these concrete factors are wanting, and hence, even in the restricted list of juristic questions, the possibility of differences of every kind is illimitable.¹²⁸

That, at least, is what they told the British. An internal memo shows that German concerns were closely linked with its geopolitical sensibility, including the value it placed on “the power factor in international relations.”¹²⁹ While the British eventually supported a general (if limited in scope) commitment, their internal debates show that they were supportive of the German position even before Marschall von Bieberstein enunciated it. One Foreign Officer minuted that an early draft of the agreement “would compel us, as it stands, to go to arbitration with any insignificant state who chose to demand it unless we could show that it affected our honour or vital interests.”¹³⁰

Foreign Secretary Grey agreed, directing the delegation to add language exclude cases which “for

¹²⁷ Davis, *Hague II*, 279.

¹²⁸ July 23, 1907. Hull, *Two Hague Conferences*, 313.

¹²⁹ A report to the Kaiser downplayed the significance of the U.S.-British precedents. “Geographic isolation from those countries facilitated inclusion of an obligatory arbitration clause. The situation remained different with immediately neighboring states.... Furthermore, a general arbitration treaty with small states was fully unacceptable, since it would reduce the worth of the power factor in international relations.” Bulow to the Kaiser, July 29, 1907, *Die Grosse Politik der Europäischen Kabinette* XXIII, Pt. 2, no. 7992. Quoted in Bettez, “France, Germany,” 262.

¹³⁰ Quoted in Sir Edward Fry (Head of the British Delegation) to Grey, July 4, 1907, FO376/68; Gooch and Temperley, *British Documents*, VIII: 253-6. Minute of W. Maycock.

special reasons of which each State must itself be the judge the State considers that the method of arbitration is inexpedient.”¹³¹ Grey saw this complete preservation of state discretion as not materially weakening the agreement and, indeed, only giving each state the same flexibility which the U.S. had sought. The British delegation pushed back against Grey’s direction and the patently eviscerating language was not introduced.¹³²

Even more generally, in the debates, Danish and Dominican proposals for universal obligatory arbitration “without restriction” was unanimously dismissed by the working committee as wholly unrealistic and a Brazilian proposal for comprehensive commitment, while preserving exclusions for vital interests, national honor, independence and territorial integrity met a similar fate.¹³³ The Committee then turned to the proposal of Portugal which limited the scope of the arbitration commitment to the interpretation of treaties covering a specified list of categories, with the usual exclusions. While reminiscent of the Russian proposal of 1899, the list of included categories was considerably longer and the committee considered 30 such classes of treaties. Some categories were narrow and innocuous (pest control or estates of deceased sailors), others were broad and had extensive implications (friendship, commerce, and navigation, or monetary systems). Each raised issues of definition, variations, and exceptions. As the Committee voted, only eight got majority support, none got an overwhelming endorsement, and only five of eighteen states voted for all the groups.¹³⁴ An American proposal for requiring arbitration of “differences of a judicial kind” and treaty interpretation generally was endorsed, along with an endorsement of specifying a some list of categories of disputes without reservation.¹³⁵ In the full

¹³¹ Grey to Fry, , July 19, 1907, FO372/69; Gooch and Temperley, *British Documents*, VIII: 259.

¹³² Fry to Grey, July 21, 1907, FO372/75; Gooch and Temperley, *British Documents*, VIII: 259-60.

¹³³ Robinson, “Arbitration and the Hague,” 53.

¹³⁴ Hull, *Two Hague Conferences* 334.

¹³⁵ Hull, *Two Hague Conferences* 338. This proposal was built on the set of bilateral agreements implemented by the U.S. earlier in the decade.

First Commission, the debates raged again, but, in the end, it couldn't propose any treaty at all; it decided that all it could put forward to the Conference Plenary was a resolution endorsing compulsory arbitration without any specifics; the project collapsed.¹³⁶

Thus, nominally, insofar as arbitration was concerned, the Second Hague Conference produced only minimal "progress." Procedures for the PCA were adjusted, and arbitration was required before using force to collect national debts, but more broadly, national concerns again trumped internationalism and the "rule of law." Still, at a more atmospheric level, debates at the Conference shifted attitudes towards more juridical approaches as the baseline for international dispute resolution, even if not implemented. One aspect of this tension was manifest at the Plenary Session where, exasperated at the Conference's inaction (and conveniently ignoring the problematic implications of its own insistence on preserving Senate powers), the U.S. petulantly abstained from joining even the generic endorsement of arbitration.¹³⁷ The German opposition to a global solution was clear and central, but it was hardly alone, either in sentiment or in the voting, with frequent support from 4-6 other European powers. At the same time, the U.S. reconciliation of the Calvo and Drago doctrines and European assertions of power with regard to the relationship between use of force and arbitration in the context of claims collections was a more significant result. Arbitration mechanisms thus served states simultaneously as a sword, a shield, and a temporizing device.

¹³⁶ Hull, *Two Hague Conferences*, 348. Robinson, "Arbitration and the Hague," 53-66, outlines the debates and argues that there was a majority favoring arbitration in principle. However, this apparent majority was unable to coalesce on any specifics, illustrating the ephemerality of these states' position.

¹³⁷ The U.S. also reiterated the reservation made at the First Hague Conference that nothing agreed to should be construed as chaining the traditional American aversion to foreign entanglements or to preserving its own judgment as to its own sovereignty. Davis, *Hague II*, 285.

Root, Taft, and Bryan

Following the minor changes in the PCA structure made in the 1907 Convention, the PCA's workload did not materially increase. Between 1908 and World War I, only another 10 cases were resolved. Meanwhile, a total of 30 arbitrations were resolved by means outside of the PCA process. While this represented an increase in the number of *compromis*, it was not dramatic. Indeed, by this time, the use of arbitration to resolve claims and boundary issues had become more or less routine. One effort to implement a compulsory version of the PCA model on a regional basis produced little. Instead, the most notable development of the period was another flurry of bilateral general arbitration agreements. Sixty-three such agreements were signed, of which an initiative by U.S. Secretary of State Root was responsible for about one-third, another one-third were due to a similar Brazilian project, and the rest were scattered across the Hague signatory states in both Europe and Latin America. However, as with the period between the two Hague Conferences, it is difficult to find much link between these bilateral commitments to arbitrate and *compromis* implementing them in specific cases.¹³⁸ Overall, it is difficult to agree with the characterization of this era as "the golden age of modern international arbitration."¹³⁹

Under the auspices of the U.S., five states in Central America, continued their region's traditions by agreeing to establish a Central American Court of Justice ("CACJ") in 1907.¹⁴⁰

Modeled on the permanent court proposal debated at the Second Hague Conference, the CACJ

¹³⁸ Only 4 of the 40 *compromis* were between states who had bilateral general arbitration agreements in place.

¹³⁹ In support of his characterization, Boyle, *Foundations of World Order*, 34-6, attributes to the PCA the termination of one set of hostilities (the "Venezuelan Blockade" case, see *supra*.) and the prevention of another (the "Casablanca" case involving the 1908 French seizure of German deserters from the French Foreign Legion in Morocco, see Scott, *Hague Court Reports*, 110-20). However, while the Casablanca case did cover some new ground in terms of the legal issues, it was, as Ralston, *International Arbitration*, 271, notes, "highly diplomatic in its nature and in scarcely any sense to be called judicial." In any event, claiming that arbitration prevented war (as peace advocates had been doing since the Jay Treaty) is more of a rhetorical device than an analysis.

¹⁴⁰ The Treaty and implementing regulations are reprinted at "Convention" and "Regulations." Hudson, "Central American Court," provides the best overview.

was seen as an means of demonstrating the possibilities of the Hague concept.¹⁴¹ It operated for ten years, but dissolved after its underlying treaty was not renewed due to disagreements between its constituent states.¹⁴² During that time, it heard ten cases, of which five were dismissed on jurisdictional grounds and only two of the cases resulted in definitive judgments.¹⁴³ While much was made at the time of the distinctive *judicial* (as opposed to arbitral) nature of the CACJ, in an era when the issue of compulsory jurisdiction of international dispute resolution was vigorously debated, the example provided by the CACJ could not have been but highly discouraging to advocates of greater role for arbitration or courts. The Court's two substantive decisions were enmeshed in Nicaraguan political disruptions of the period (both domestic and regional) and its demise demonstrated the difficulty of casting political issues as juridical, as the peace movement had sought.¹⁴⁴

There were three consecutive efforts by U.S. states' men during this period and while none of the three had much practical effect, they provided a rich demonstration of the nature and purposes of arbitration and related means of dispute resolution. Elihu Root, Secretary of State under President Theodore Roosevelt, secured twenty-two bilateral agreements between 1907 and 1909. President William Howard Taft was unsuccessful in expanding the scope of these commitments during 1910-11. Finally, Secretary of State William Jennings Bryan, during the first Wilson Administration, gained twenty-two "Peace Commission Treaties during 1913-4.

Root was certainly no naive peace advocate. The leading lawyer of his era, his enthusiasm for arbitration was tempered by his close familiarity with international realities, which led him to take a long-term and incremental view of its progress. He was not surprised by the impasse at the

¹⁴¹ Davis, *Hague II*, 298.

¹⁴² Scott, "Closing," 380.

¹⁴³ Hudson, "Central American Court,": 768-77.

¹⁴⁴ Ibid. 785.

Second Hague Conference. He fostered the Central American Court project and sponsored a series of bilateral U.S. arbitration agreements, recognizing their incremental nature. His legal mindset framed the direction in which he thought the handling of international dispute resolution needed to go: “What we need for the further development of arbitration is the substitution of judicial action for diplomatic action, the substitution of judicial sense of responsibility for diplomatic sense of responsibility.”¹⁴⁵ It was in this spirit that, in the aftermath of the Second Hague Conference, in 1908 Root prevailed upon Roosevelt to propose, once again, a series of bilateral general arbitration agreements.¹⁴⁶ As with the unsuccessful project which John Hay had essayed only four years before, these agreements were limited to legal and justiciable issues and excluded those relating to a party’s vital interests and national honor. Moreover, they expressly complied with the Senate’s requirement of individual approval of each *compromis*. Given Roosevelt’s refusal to pursue Hay’s initiative in light of the Senate’s intervention, this was a testament either to Root’s persuasiveness or Roosevelt’s underlying indifference. From Root’s perspective, building up momentum for the concept of arbitration was crucial, regardless of whether the specific agreements resulted in any immediate *compromis* or the resolution of any particular cases. This was certainly understood by the British and, likely, by the other states as well.

The main object of the treaty of 1908 was to give some formal recognition to the oft-frustrated public demand for an arbitration treaty. What the Root treaty should be was not at the time of the negotiation so important a matter as when it should be. It was, indeed, in the interests both of practical and of pacifist arbitrationists a less satisfactory compact than the Hay treaty of 1905, just as that was less satisfactory than the Olney treaty of 1899. But these earlier failures

¹⁴⁵ Root, “American Sentiment,” 45. Zasloff, “Law and the Shaping,” provides an extensive assessment of Root and the intersection of law and U.S. foreign policy; esp. 300-15.

¹⁴⁶ Davis, *Hague II*, 298-9.

made success in 1908 indispensable at any cost. The Root treaty of 1908 had served its real purpose at the moment of its passage through the Senate.¹⁴⁷ The apparent failure of the Second Hague Conference had to be repaired, and promptly. The first agreement, with France, was signed in February, 1908, and a total of 22 agreements resulted through 1909.¹⁴⁸

Treaties with the limits that Root was willing to accept were wholly inadequate from the perspective of President Taft who announced his intent in 1910 to negotiate new and effective general arbitration agreements rather than renew the Root treaties. Taft came to this initiative in a manner reminiscent of Bowring. His prior experience as a lawyer (particularly as a judge) and senior governmental official provided him with the intellectual context, his affinity for stable international relations and commerce (a la Cobden) led him to promote the peaceful settlement of disputes, and he had been active in supporting the Olney-Pauncefote Agreement fifteen years earlier.¹⁴⁹ As President, he was now in a position to actively pursue his vision. He had his Secretary of State, Philander Knox, negotiate and sign treaties with Britain and France in 1911 and submitted them to the Senate.¹⁵⁰ They were remarkable because they expanded the scope of issues subject to arbitration by removing the hitherto almost universal exclusion of issues relating to a party's 'vital interests or national honor.' In its place, Taft substituted a standard of "justiciability" (i.e., an issue had to be "susceptible of decision but the application of the principles of law or equity") and provided for a Joint Commission (3+3) to determine if an issue were "justiciable." If five of the six Commissioners (i.e. two of the three Commissioners from the party which might think an issue not "justiciable,") were to find a matter "justiciable," it would be

¹⁴⁷ James Bryce (British Ambassador to Washington) to Sir Edward Grey (Foreign Secretary), January 5, 1911, FO414/225/5.

¹⁴⁸ See Noyes, "Taft," 543 n. 50 for the list.

¹⁴⁹ Noyes, "Taft," 536-9. On the other hand, Taft said privately that his proposal was primarily political in nature, a gesture to the peace community to offset his support for an aggressive naval building program. Butt, *Taft and Roosevelt*, II:635-6

¹⁵⁰ The two treaties were substantially similar. The British version is reprinted in Noyes, "Taft," 555-8.

submitted to arbitration. This was Taft's effort to turn discretionary, political, and soft standards that had been part of the arbitration debate for over half a century into something more legal and rational, determined by (presumably legal) experts. It failed.

It failed despite a vigorous public relations campaign on the part of the President that seemed to have garnered considerable public support.¹⁵¹ This was due in part to Presidential arrogance vis-a-vis the Senate, a common affliction that seems to have run from at least McKinley through Wilson (the opposition to the Taft Treaties was led by Senator Henry Cabot Lodge who was later to stymie Wilson). It was also due to the vehement opposition of Roosevelt who, while he seemed to have endorsed arbitration when he proposed it (at the Hague and in the Hay and Root Treaties), found that any initiative by Taft was both naive and disingenuous.¹⁵² Even some prior advocates of the peace and arbitration movement, veterans of the Hay/Root/Roosevelt administrations, denigrated the Taft proposals since they pursued a merely quasi-judicial arbitration mode and not the more juridical court models that had advanced particularly at the Second Hague Conference.¹⁵³ Finally, it was due to the opposition in the Senate who interpreted the justiciability Joint Commission process as usurping their power to determine

¹⁵¹ Noyes, "Taft," 545; Campbell, "Taft, Roosevelt," 283.

¹⁵² According to Holt, *Treaties Defeated*, "Roosevelt was no ardent advocate of arbitration. Several years before this time he had written of the 'futile sentimentalists of the international arbitration type.' And several years later he was to amaze Taft by attacking the latter's arbitration treaties with similar contemptuous language. Apparently the treaties Roosevelt had negotiated in 1904 were a gesture for the benefit of the large group in the country who had continued and intensified the active campaign for arbitration and the peaceful settlement of international disputes, notwithstanding the setback of 1897." Citing Lodge, *Selections from the Correspondence of Theodore Roosevelt and Henry Cabot Lodge*, 1884-1918, 2 vols, NY: 1925, I: 218, II: 404-14; Pringle, Henry, Theodore Roosevelt, NY: 1931 pp. 1687, 551. Roosevelt's expedient approach to arbitration was also demonstrated during the Alaskan Boundary negotiations, as discussed in Chapter 8. See Campbell, *Great Britain*, 106, 111.

¹⁵³ Campbell, "Taft, Roosevelt," 292-3. In other words, the Second Hague Conference effectively changed the status of traditional arbitration modes. The drive for "progress" inevitably cast "traditional" arbitration into a more derogatory light. "The criticism of arbitration reached such a point that members of the older peace societies began to worry that the lawyers, in aspiring to perfection, might discredit the semi-judicial institution already formed." Marchand, *American Peace Movement*, 54.

whether the U.S. should enter into a particular arbitration.¹⁵⁴ This stance was particularly curious since Taft had clearly retained the Senate's right to approve each individual *compromis*. However, the Senate apparently felt that if the Joint Commission (including two out of three of the U.S. commissioners) had already upheld the justiciability of the issue, that it would have little political choice but to acquiesce. As a result, in March 1912, it required a series of amendments as a condition to its consent.¹⁵⁵

Beyond these political factors, there were several substantive issues raised by Taft's proposal. First, the justiciability standard was problematic. Taft's arguments for the new standard willingly accepted the risk that resulting arbitrations could produce decisions adverse to U.S. interests, even significantly so. He was willing to accept this risk in order to advance the cause of international law and peace. Yet this risk, which could easily have included such U.S. policy hot buttons such as the Monroe Doctrine, Confederate bonds, the Mexican boundary, and the rules governing access to the (then under construction) Panama Canal, was more than some Senators (and others) were willing to take.¹⁵⁶ From their perspective, the 'vital interests/national honor' exclusion remained important, as did other specific issues which the U.S. had kept out of the First Hague Conference debates. It is likely that much of the argument over preserving Senate prerogatives was a convenient cover for retaining this aspect of state discretion in agreeing to arbitrations. Indeed, Taft himself suspected that the Senate was fundamentally opposed to any real general arbitration commitment.¹⁵⁷

¹⁵⁴ Dennis, "Pending Arbitration Treaty," provides a detailed review of the Senate issues and positions.

¹⁵⁵ Campbell, "Taft, Roosevelt," provides the best review of the public and senatorial politics involved.

¹⁵⁶ This included Root, by then a Senator from New York. Although, when informally consulted but he British Ambassador early in the negotiations, he seemed to favor a treaty that would merely remove the 'vital interests/national honor' exclusion and thought that such an approach would be acceptable to the Senate. It is not clear why he changed his view. See Bryce to Grey, March 28, 1911, FO414/225/41.

¹⁵⁷ Taft, *United States and Peace*, 112.

Second, the issue of justiciability and its reliance on common law principles of law and equity were difficult of precise translation to those trained in continental legal systems (not to mention those beyond Europe) and concepts of ‘international law and equity’ were even more ambiguous.¹⁵⁸ This problem was raised at the time in general terms: Were these treaties with Britain and France to become standardized (as had the initial post-Hague I flurry or the Root Treaties)? Just as Salisbury had indicated at the time of the Olney-Pauncefote negotiations, the prospect of an open-ended commitment with a state with whom there was cultural and legal affinity and underlying geopolitical alignment was one thing, but a generic and global commitment was something else again.¹⁵⁹ The Senate Foreign Relations Committee was concerned about this potential, too.¹⁶⁰ Taft indicated that he was looking to set a broader precedent as well:

I do not regard them as important in keeping us out of a war with England, or with France; we are never going to war with England, or with France. They are useful by way of example to the whole world that we are willing to put ourselves in that situation with respect to those countries...The moment the treaties are ratified there will be other nations only too glad to make the same treaties with us....¹⁶¹

Taft’s perspective highlights the tension inherent in arbitration (and other multi-lateral initiatives and international organizations) between universal inclusion of all states and limitation to those states with whom some degree of alignment and reciprocal understanding had been reached. The premise for inclusion was the equal treatment of all equally sovereign states, but in an era with radically differing political and social structures and an implicit understanding on the

¹⁵⁸ Even the British government was concerned about its ambiguity. Grey to Bryce, July 21, 1911, FO414/225/137.

¹⁵⁹ See *supra*.

¹⁶⁰ S. Doc. 98, 62d Cong. 1st sess., 8.

¹⁶¹ Taft, “Address,” 16. Curiously (not to say bizarrely), even before the Senate ended the process, Germany was apparently interested in entering into an agreement comparable to those which the U.S. had signed with Britain and France. Bryce to Grey, November 21, 1911, FO414/225/182. It is not clear how this might be reconciled with the traditional German stance on arbitration at both Hague Conferences.

part of Western powers that there was a standard of “civilization” which acted as a threshold for inclusion in proper international society, it was not always clear how to set precedents that might be surprisingly extended.¹⁶² In addition, Taft’s comment makes clear how Hague era general arbitration treaties had become vehicles for public and international awareness, with little regard for either the short-term war-prevention rationale central to much of the peace movement or for the actual resolution of international disputes. In this way, Taft was actually quite aligned with Root (despite Root’s significant reservations about the structure of Taft’s approach); they both promoted general arbitration agreements to build or maintain momentum in support of a long-term goal of changing state practice. This purpose seems consistent with both British and French views at the time. While French Ambassador Jusserand viewed the treaty as “a feeble instrument at best,” while British Ambassador Bryce saw its greater value as having a “moral effect as a rallying point for sound public sentiment.”¹⁶³ Nonetheless, once the Senate had insisted on amendments that Taft considered eviscerating, he was left in the same situation as his predecessor and adversary, Roosevelt, had been in 1905. Taft declined to ratify the treaties and they died.¹⁶⁴

Into the arena now stepped the new Secretary of State, William Jennings Bryan. Bryan had been engaged in the area of international dispute resolution at least since 1905 Dogger Bank incident.¹⁶⁵ Since that time, he had worked with both the peace movement and the Inter-Parliamentary Union.¹⁶⁶ As part of his agreement to become Secretary, he had secured President-

¹⁶² See Gong, *The Standard of ‘Civilization’*.

¹⁶³ Bryce to Grey, December 4, 1911. FO414/225/183.

¹⁶⁴ Noyes, “Taft,” 549.

¹⁶⁵ In 1904, a Russian fleet en route to the war with Japan, mistakenly attacked some British fishing boats and causing a spike in European diplomatic tensions. While the Russians were quick to accept responsibility, a formal Commission of Inquiry was established to investigate and report to the two governments.

¹⁶⁶ Curti, “Bryan and World Peace,” 143-8.

elect Wilson's authorization to pursue his own approach.¹⁶⁷ In 1913, he launched his own initiative and by late 1914, negotiations with 34 countries had been opened, 24 treaties had been agreed and 22 ratified by the U.S.¹⁶⁸ However, Bryan's Peace Commissions were expressly not arbitral bodies; they had no power of decision, they were merely a vehicle for an organized international investigation. The parties agreed not to pursue hostilities during the pendency of the proceeding. A long-standing diplomatic device, such commissions were also seen as a means by which heated international tempers could be cooled off while the investigation went forward and the parties could discuss the dispute under the auspices of third party facilitators. Bryan's proposal built on this tradition, the recent Dogger Bank example, and a subsidiary aspect of Taft's Joint Commission process (which Bryan had promoted to the President) to determine the justiciability of a particular dispute.¹⁶⁹ Since the Bryan Peace Commissions had no decision-making power, they could not impose any international legal obligation on either party and raised none of the political problems in the U.S. Senate as had the arbitration agreements over the previous twenty years. We might infer that Bryan recognized the limited utility of these arbitration agreements that had effectively excluded that the issues that were more likely to lead to war. However, if their scope was broader, then the ability of the Peace Commissions to take formal action was correspondingly reduced. By freezing the relations of the parties for a period, the Bryan approach was a step away from the juridical nature of dispute *resolution* which had been the centerpiece of peace movement activities for several decades. At the same time, as a

¹⁶⁷ Patterson, *Warless World*, 206-7.

¹⁶⁸ See Noyes, "Taft," 550 n. 96 for the list of finalized treaties; which included 11 Latin American states, 10 European states and China. "Secretary Bryan's Peace Plan," lists the negotiations. Finch, "The Bryan Peace Treaties," contains a detailed comparison of the texts and the unsigned (but likely written by J.B. Scott) 1913 article, "The Bryan Peace Treaties," provides a comparison of the Bryan model with those of Taft and the Hague.

¹⁶⁹ Curti, "Bryan and World Peace," 149.

means of actually preventing war (the peace movement's underlying goal), the standstill provision might well have been more effective.

From one perspective, Bryan's initiative can be seen as the culmination of a continual retreat on the part of peace advocates from the concepts that were promoted in the 1880s and 1890s and at the First Pan American Conference and the Olney-Pauncefote Agreement to less stringent voluntary arbitration with numerous exceptions at the First Hague Conference to Root's treaties which were subject to case-by-case senate approval to non-binding commissions of inquiry. On the other hand, this same process can be seen as a gradual accommodation by advocates of arbitration and peace to the realities of international relations and the willingness of states to bind themselves. This increasing realism might, in due course, have secured the very foundation of both public and state confidence that over time might have proved sufficiently strong to support a subsequent process of building a more robust arbitral structure. Still, some of the critique of the Taft treaties was based on their retention of arbitration rather than shifting towards a purer juridical court model which was eventually adopted a few years later under the League of Nations. So, we can see several conflicting currents in the pre-World War I period. Looking back to the differences between Ladd's Congress-and-Court concept and William Jay's treaty approach in the 1840s, we can see the long-term tension between the more utopian and more pragmatic wings of the peace movement. The more incremental approach seems to have dominated until the influence of the international legal community and the structuralism of international organizations late in the century turned the focus prematurely to the more idealistic projects. Bryan's approach might thus be seen as a 'reeling-back' of plans to what was feasible. The onset of the war immediately upon the achievement of the Bryan treaties prevents us from seeing how these trends might have played out in other circumstances.

Conclusion

The contortions through which Hay, Roosevelt, Root, Taft, and Bryan went to try to sustain the momentum of the Hague process cannot be ascribed entirely to the ordinary cynicism to which states' men are prone. They were animated by ideals of liberal progress, too. Their ambivalences—promoting arbitration while preserving state discretion, seeking the rule of law amidst *realpolitik*—were real and widespread; at global, national, and individual levels. Thus, to hasten to blame German state-fixated intransigence as the rock on which the Hague Conferences and their progeny foundered is to wander down our own version of the *Sonderweg*. The German position on compulsory jurisdiction and vital national interests certainly provided cover for those from other states who were less than enamored with the dreams of peace advocates who lobbied at the Hague and at home. In the event, no state proposed, much less implemented an optional compulsory clause. No state proposed a treaty from which Germany (and Austria-Hungary) would be excused but the other 40+ states would proceed. The commitment to consensus outweighed the hopes for arbitration. That commitment was a product of the same states' system mentality which crystallized at Vienna 84 years earlier and was international aspect of state power against which liberal internationalists, peace advocates and international lawyers fought.¹⁷⁰ Despite various proposals from the peace movement, the creation of a vehicle for an "inner" group of states committed to arbitration had to await the creation of the Permanent Court of International Justice under the Versailles agreements in 1920 and its "optional clause" for jurisdiction. The flurry of general arbitration agreements in the years following Hague I (65 agreements involving 32 countries) and Hague II (70 agreements involving 35 countries)

¹⁷⁰ However, the Second Pan American Conference (1901-2) provided a contrary example. There, Brazil and Chile resisted a broad push towards a general arbitration agreement due to pending disputes with their neighbors. This did not stop a ten-state group from proceeding. Inman, *Inter American Conferences*, 56.

effectively built a network of commitments that covered less than 10% of the relationships that a multi-lateral treaty of the 44 Hague II states would have and utilized a bewildering set of variations in the place of the sought-after uniformity of coverage and commitment.

The essential debate regarding arbitration in the last third of the century, was centered on states' refusals to submit their self-defined national "honor" or "vital" interests to a third party judgment. This was framed most vigorously by Lord John Russell in the early stages of the “*Alabama Claims*” negotiations, and continued through to the debate at the Hague in 1899. In the context of a proposed *compromis*, the raising of such concerns was a political argument to both domestic and international audiences, that the state didn't want to take the risk of an adverse arbitral decision. That it ultimately might do so, as Great Britain did in the “*Alabama Claims*” case, was a political decision reflecting the state's calculus of the entire range of its interests. If it declined to do so, the matter would be resolved, eventually, through ongoing diplomatic, military, cultural and economic dynamics. In the context of anticipatory arbitration commitments, particularly general arbitration agreements, which became the focus of popular and diplomatic activity late in the century, a state's decision was framed in the same way, but on a broader and more open-ended scale. No longer was the risk confined to a particular known matter, but would now encompass a whole class of issues and perhaps the entire range of the relationship between two states. Such a decision would be made based on one or more of the following factors:

- A low chance of going to war, due to distance, military capabilities, and relative military strength
- A high valuation of commercial and cultural relationships
- A domestic political culture which characterized state action, typically through threatening or entering into a war as "unreasonable" or "inappropriate"

The agreement to enter into a general arbitration agreement thus depended on a state's ability to assess prospectively its situation relative to another in terms of these factors, which, in turn, required a degree of self-awareness within the context of a (often implicit) recognition of the nature of that state's "sovereignty" in the real world. In other words, when a state understood that its "sovereignty" did not extend to the ability to go to war over a certain class of issues with a certain class of other states, it would be willing to, in effect, waive its right to do so. Thus, it cannot be surprising that arbitration found a home in those states with stability and who recognized that, unlike the great powers, they were unlikely to go to war (except defensively). This accounts for much of the activity by second and third tier European states. The approach of Latin American states has reflected their struggle to reconcile their history of internecine warfare and domestic instabilities with a fraternal political culture and shared concerns about Spanish/British/American imperialism.

But underneath these specifics ran the major currents of European and global politics at the turn of the twentieth century. Germany's fear that arbitration would erode its relative advantage in military preparedness was one aspect of this. Britain and Germany shared a concern about being nagged at by small states. The U.S. Senate kept an eye on its prerogatives vis-a-vis the executive branch and both kept an eye on the Monroe Doctrine and the Panama Canal as bulwarks of the U.S.' geopolitical position. Austria-Hungary was resolute in preserving a nineteenth (eighteenth?) century *weltanschauung*. Alois Aehrenthal, before he, as Foreign Minister, oversaw Austria-Hungary's reluctant participation in the Second Hague Conference, recognized the Inter-Parliamentary Union and the arbitration movement as part of an existential threat with the goal of undermining the existing state-to-state nature of the international system with:

the creation of new relations between peoples. This is to happen over the heads of monarchs and governments [who must] fix their attention on the vital interests of their dynasties and ... the great principle of the unity of rulers for the purpose of preserving their position in the war against socialism and anarchism.¹⁷¹

Although extreme, he was perceptive; but least with regard to arbitration agreements, he needn't have worried.

¹⁷¹ Wank, "Diplomacy," 60, quoting Aerenthal (Austrian Ambassador to St. Petersburg) to Goluchowski (Foreign Minister), July 20, 1906, published in Verosta, Stephan, *Theorie und Realitat von Bundnissen: Heinrich Lammasch, Karl Renner und der Zweibund (1897-1914)*, (Vienna 1971) 298-303. One can almost hear Metternich—the states' men's states' man—speaking, not to mention later echoes in the European Union debates about the relative role and power of states and electorates.

Chapter 10: Conclusion

The stories of international dispute resolution extracted here weave together many strands from the diplomatic, political, legal, and cultural history of states, states' men, and those who sought to affect them in the long nineteenth century. These stories have often been obscured because they did not neatly fit into the styles and silos—such as diplomatic history, peace history, or legal history—which historians have used to sometimes explain and sometimes justify their subjects, particularly those of peace advocates whose juridically-focused definition gained widespread rhetorical currency, even as it remained aspirational in practice. In this study, I have sought to recover these stories because they show how international relations actually worked in the context of hopes and pressures from domestic political environments of increasingly importance to the conduct of states' foreign policy, how ideas of law and hopes for peace intersected with international realpolitik, and how a practical tool emerged from the incremental practice of states over time.

The premise for these stories has been that the concept of arbitration has come to be overdetermined and that the methods used by states to resolve disputes needs to be reframed. When we dispense with a somewhat anachronistic standard of juridicality, we see that there were over 1000 examples to be considered. When we look at this list we can see that states made increasing use of these mechanisms in a variety of circumstances, particularly commercial and financial, and did so across a widening geographic scope; often in track with expanding European empires, whether formal or informal. As a set of tools for resolving secondary issues, those which required more time or detailed knowledge than normal diplomatic channels could devote, and those which states' men had 'neutralized' as to their impact on "vital" state interests, arbitral

regimes were quite effective. When invoked, they only rarely failed, but they never stopped or prevented a war, as peace advocates had conceived them.

States' men proved extremely effective at creating the appearance of limiting their own state's discretion and donning the robes of peace, but they consistently viewed its vocal advocates as at least premature, if not naive. As public energy grew in the late nineteenth century to have states commit in advance to arbitrating disputes, states' men rose to the challenge of enacting such agreements which were highly constricted in scope or applicable only where the underlying facts of international relationships were such that war was already out of the realm of possibility; so that the arbitration agreements were a 'trailing indicator' of peace, not a means to promote it. Nowhere was that more evident than in the relationship between the United States and Great Britain. Building on a common language and legal culture, since the Napoleonic Wars there was a particular sense of folly about the potential for military solutions to their disagreements. Both countries had relatively active peace movements and, more importantly, both had slowly increasing democratic governance which tempered any desire for launching a long-distance war, despite domestic pressures and jingoism (especially in the U.S.) and created a receptivity for peaceful solutions to diplomatic disputes. The result was a lengthy string of arbitral arrangements for many of the issues that arose (particularly related to the Canadian-U.S. boundary), leading to pioneering, if unsuccessful, efforts to establish general arbitral regimes late in the century.

At the Pan American Conference of 1890 and the Hague Conferences of 1899 and 1907, diplomatic failure was papered over. We cannot know if the U.S. Senate's evisceration of the Olney-Paunceforte Treaty in 1897 would have set back the peace movement in both countries for decades, as did the Crimean and U.S. Civil Wars. The Czar's Rescript brought renaissance, but states' men were able to put the genie of "compulsory arbitration" back in the bottle. Meanwhile,

problematic situations in Samoa, Alaska, Venezuela, and elsewhere were handled; as and when those states' men were ready to permit it.

Failure, or a Premature Assessment?

[I]nternational arbitration will not seriously develop except by definitively leaving the world of politics and diplomacy where it has been historically been confined and placing itself fully in the juridical domain.... This is the only step which will inspire the confidence of governments and peoples....— Louis Renault, a leading French international jurist and Nobel Peace Laureate (1905)¹

A few years later, Lenin said that “If Socialism can only be realized when the intellectual development of all the people permits it, then we shall not see Socialism for at least five hundred years.”² He meant it as a rationale for immediate revolution under the leadership of the Party; but we may now take it as a plausible prediction with four hundred years to run. We may read Renault’s assertion similarly. The cumulative effort of the peace movement and international lawyers to limit the scope of the state discretion and confine it by means of legal parameters and procedures failed in the century leading up to World War I. It failed (so far) for three reasons.

First, it failed because it was premature. Many in those groups understood, as Renault (and Lenin) did, that long-term changes in human nature and socio-political structures were prerequisites to making arbitration effective. The early peace advocates’ emphasis on popular education and changing the attitudes of individuals was not wrong, but its time frame was millennial, not modern. William Ladd’s “court and congress” proposal of 1840 was correctly seen as a long-term solution in that vein. The shift to political engagement, embodied in William Jay’s arbitration treaty proposal two years later and carried forward by Cobden, Henry Richard, and Cremer created the tempting prospect of ‘short-circuiting’ that long-term process. Optimism was

¹ Renault, “Preface,” in Lapradelle & Politis, *Recueil des arbitrages*, x.

² Vladimir Lenin, quoted in Reed, John, *Ten Days that Shook the World*.
<http://www.gutenberg.org/ebooks/3076>, accessed, November 11, 2014.

bolstered by idealistic speeches, potted histories, and mythical readings of the Jay Treaty and the “*Alabama* claims.” Endorsement and engagement by the emerging international legal community in the latter part of the nineteenth century built momentum and a procedural framework. Popular support drove states’ men to create a simulacrum of arbitration for the Great Powers while excluding existential issues. Meanwhile a few secondary states, for whom war was never an option, committed to a model process and Latin American states, for whom war was too frequently invoked, didn’t live up to their ideals and so their example was not taken seriously.

Second, it failed because states (the Great Powers in particular) were unwilling to take a useful mechanism for resolving secondary disputes—commercial, administrative, or diplomatically-neutered—and apply it to the breadth of their international relations. Instead, they placated the public yearning for peace by adopting the language and procedure of international arbitration, but carefully limiting it in a way that made it seem that they were submitting state power to public/democratic/irenic ideals. In the meantime, commencing with the post-Napoleonic settlements at Vienna and Paris, joint commissions became an increasingly frequent tool of international relations. It was a tool separated from the anxieties and posturing of states’ men; but only by half a step. Arbitrators and other commissioners were chosen by political processes and even, in an era increasingly dominated by expertise and professionalism and legalistic thinking, if they claimed independence and objectivity, they were still vehicles of state (and imperial) power and discretion. This tool was useful as far as it went. Still, for the increasingly complex and involved nature of international relations of the nineteenth century, marked by dramatic increases in commerce and finance, in communications, in imperial expansion, and in comprehending a global scope of activities, it went pretty far. By the end of the century, *compromis* were an ordinary occurrence in a wide variety of circumstances. And, we may suspect, may well have

been a foundation for a degree of comfort that would have, over time, enabled states' men to apply these mechanisms to increasingly complex and delicate matters.

Finally, it failed because the line that Renault sought to draw between the juridical and the political could not and cannot be definitively fixed. The nature of the state is such that it must reserve solely to itself the power to exercise or forego power. This was implicitly understood by states' men from Lord John Russell in the 1860s to German Chancellor von Bulow during the First Hague Conference. It was apparent as the Second Hague Conference struggled to draft a detailed list of arbitratable issues. It was convincingly argued by Hans Morgenthau in his dissertation in the 1920s and his response to Carl Schmitt in the 1930s.³ The essence of Morgenthau's argument was that the subject matter of the dispute was not the key determinant of its resolution. Rather, the characterization of a dispute as 'political' was a function of the level of national interest (not interests in the economic sense, but interest in the sense of engagement by the populace or other political class). From this perspective, the choice of arbitration represents a domestic political decision (Morgenthau refers to it as a "whim") to either downplay the level of national interest, either retrospectively or anticipatorily, and thus remove it from the 'political' to the legal.⁴ In other words, agreeing that a dispute will be submitted to arbitration cannot be objective or rule-determined, as juridicalists seemed to have sought, but was a discretionary state choice of whether to invoke either a legal or political discourse. This tension produced cultural discomfort at the levels of both international elites (states' men vs. experts) and of states (liberal democracies (especially Anglo-American) vs. the rest of the world). Indeed, it may have been the very juridicalization of the arbitration process that has made for "wryness and circumspection" by

³ Morgenthau, *Die international Rechtspflege and The Concept of the Political*.

⁴ Morgenthau, *The Concept of the Political*, 91.

states, especially those who were not part of the process by which arbitration was “transformed into a system of high legal refinement.”⁵

Thus, when Leonard Woolf argued in 1915 that converting political disputes into justiciable cases could be simply accomplished, he forgot that the conversion itself was a political process.⁶ The problem is that such a formulation necessarily begs the question of how those issues which contained so much economic, political, or psychological value (e.g., “national honor” or “vital interests”) could be submitted to a process which was to some material degree independent of the state and to which the utmost degree of that state’s manifold resources could not be brought to bear. The other side of the coin is equally illustrative. How could the resolution of ordinary, incidental, or minor disputes as were commonly submitted to arbitral panels late in the nineteenth century by virtually all notable states engender the confidence and acquiescence implicit in a model in which such lesser cases were seen as the foundation for the more serious (war-risking) disputes. This conversion of disputes, whether in the context of anticipatory treaties (as Woolf addressed) or post-hoc specification to an arbitration process, to a legal from a political framework illustrates the desire of those in the peace and international legal communities to telescope—at an international level—the process of state-building which, even in a Whiggish, Lockean reading, took centuries and wars to accomplish. Thus, the central problem for arbitration advocates—a problem which came into gradually increasing focus throughout their long labors of the nineteenth century—was that they had reversed the necessary order of progress. Arbitration (which was seen as increasingly legalized and judicialized by later in the century) could not

⁵ Pinto, “Comment,” 211

⁶ “Political and administrative differences are often of a nature which would make it extremely difficult, if not impossible, even to state a case to a court for a decision upon questions either of facts or of law. But once the political and administrative relations have been defined, however vaguely, and rendered legal by the words of a treaty, any “incident” that may occur afterwards can easily be adjudicated upon by a court, for the questions will usually reduce itself to the ordinary judicial question....” Woolf, *International Government*, 21.

engage with the important international issues (the potential *causi belli*) until those issues were susceptible of resolution by clear rules of decision. But such rules depended on political processes for their definition and enactment, and those processes could have only come about, in turn, out of a political culture which spanned multiple nations to a depth and scope that remains elusive to this day. The early arbitration advocates were correct in seeing that changing popular awareness through education was the essential first step. It is a step that remains uncompleted. The shift towards intermediate solutions, crystallized by Jay *films* in 1841, promoted by Cobden and Richard in mid-century, continually weakened by exemptions for “vital national interests” at the Pan American Conference and the two Hague sessions, ultimately demonstrated the limitations of this route. In contrast, it was the incremental expansion of specific commercial and technocratic areas, details of borders, and management of on-going issues that has eventually built up a body of rules and—more importantly—of culture in which states agree to dispose of their differences jointly and peacefully.

Stated differently, the evolution of dispute resolution in the nineteenth century illustrates the tensions in the emergence of liberalism—in the Foucaudian sense, as “an ethos and rationality of government, rather than as a historical period or a philosophical doctrine”—and its application to the international sphere.⁷ The rationality of arbitration was manifested both as a Cobdenite economical analysis of the relative futility and inefficiency of war, as a dispute resolution mechanism, and as an increasingly legalistic mode of handling ordinary governmental issues (whether categorized as “legislative,” “executive,” or “judicial”) between states. It faced resistance from states’ men as defenders both of sovereignty as a traditional mode of state power and of their ‘turf’ as handlers of international relations. Their success in thus utilizing and

⁷ Neumann, “‘The International’ as Governmentality,” 693.

containing arbitration was, then, symptomatic of the persistence of the old regime in international relations, as exemplified by the comments of Russell, Cambon, and Aerenthal.⁸

Nonetheless, from the perspective of the early twentieth-first century, whose international relations are populated by myriad institutions which seek to resolve disputes among nations, with a thickening sheaf of regulations which testify to the domestication of “international” life, we must be careful not to dismiss the setbacks out of hand. For the long nineteenth century as considered in this study, arbitration has sometimes seemed as an evolutionary stage, if not dead end. However, the evolution of the structure of international relations, no less than in biological models, is convoluted and it is difficult to definitively assign success or failure to those to seek change. “Experience teaches that serious and lasting works in state policy are always gradually and slowly accomplished. Passing rapidly, without transition, from one established system to another ... is to run the risk of soon coming back to the starting-point.”⁹ As a result, arbitration advocates’ fundamental disconnect from the processes and essence of state discretion and from the nature of democratic control, left them ineffective.

The Uses of Arbitration

Yet, notwithstanding the flood of moot or eviscerated arbitration agreements that issued forth in the wake of the two Hague Conferences, the essential usefulness of arbitration was not entirely lost. As it turned out, *there was* a situation where there was a real risk of war, where vital national interests were at stake, and where the business-like resolution of differences was remained more important than either, with the result that state interest made it valuable to commit to arbitration. *There was* an agreement which, had it been public, would have caused the peace movement to cringe over what they would have decried as the two parties’ cynicism; but it was

⁸ Pace, Arno Meyer.

⁹ From the critique of arbitration proposals by E.C. Varas, Delegate of Chile to the International American Conference, April 14, 1890. IAC Minutes 715.

secret: In 1912, following the Italian attack on Turkish Libya, the “sick man of Europe” appeared more ashen than usual and the situation in the Balkans was precarious. Both Bulgaria and Serbia were eager not only to push the Turks out of Europe and fulfill their irredentist visions, but they also vied for the role as the principal Russian client and thus as the leading Slavic entity in the region. Thus, under Russian auspices, the two states agreed first on a defensive alliance and then, secretly, on an offensive alliance against Turkey.¹⁰ As part of these arrangements, they agreed on a preliminary but highly detailed boundary the two would share as they, along with Greece, pushed the Turks out of the Balkans. However, since this agreement was made in advance of the war, they were aware that the post-war situation might be different and, with considerable prescience, provided for the Russian Tsar to act as arbitrator and make the final boundary determination in the event that the two client states were unable to agree. In the event, the First Balkan War was successful in pushing Turkey back to the slightest toe-hold in Europe, but Serbia in particular was unwilling to stick by the previously agreed line which led Bulgaria to launch the Second Balkan War a month later.¹¹

So, while the commitment to arbitrate did not stick, the agreement highlighted a key aspect of the nature of arbitration which continued throughout the long nineteenth century and into the immediate pre-War period. There were none of the quasi-legal trappings which had filled the treaty books. This was a frankly political agreement, with the Russian Tsar exercising unconstrained discretion; a concluding illustration that the lawyers were unsuccessful in establishing a monopoly over the states’ men. Indeed, the Serbian-Bulgarian Treaty was more candid than the bulk of the more-acclaimed agreements in recognizing the realities of power; i.e.,

¹⁰ Treaty Of Friendship And Alliance Between Bulgaria And Serbia (1912) , translated and reprinted at American Journal of International Law, VIII Supplement, (1914), 1-5.

¹¹ Clark, *Sleepwalkers*, 256-8.

that Russian patronage was more important than the precise boundary or any legal rationalization of the result. It was almost as if the Hague had never happened.

Because, in an important sense, from the perspective of states' men whose mentalities were focused on the preservation of their states, their territories, and their vital national interests, the concept of arbitration had become almost irrelevant. In their world (to which Einstein had just caught up), there was no Newtonian objective stance from which to make "judgments" about the propriety of state's actions. This was true not only in Sofia and Belgrade in 1913, but for Theophile Delcasse negotiating the Anglo-French Arbitration Treaty in 1904, for Theodore Roosevelt who leveraged the Drago Doctrine into a proclamation of a U.S. right of intervention in the Western Hemisphere in 1903, for Salisbury, Chamberlain, and Milner who rejected the Boer demand for arbitration while simultaneously promoting their commitment to peace at the Hague in 1899, and for Charles Francis Adams and British Chief Justice Alexander Cockburn who overcame a diplomatic impasse to salvage the "*Alabama* Claims" case through "extrajudicial" means. All these states' men were experts in that diplomatic art of "saving the appearances" and, whether due to "public opinion" or diplomatic niceties, they knew also the value of appearing to be legal and proper and admirable. Some states' men (and the peace movement), believed that eventually the incremental steps would have real world effects; others just made use of the appearances.

And so, on July 23, 1914, the famous Austrian ultimatum following the assassination of Archduke Ferdinand demanded a detailed response from the Serbian government. Many at the time thought it impossible of response in a way that maintained the dignity and sovereignty of Serbia. Among the less well-known provisions of that remarkable reply was the suggestion that "In the event the Austrian government is not satisfied with this response, the Serbian

government... is prepared, as always, to accept a peaceful agreement, by submitting the question...to the decision of the International Tribunal at the Hague." ¹² The Serbian government of Nikola Pasic was deft; after all, they had promised and reneged on their arbitration commitment with Bulgaria the previous year. Yet they knew their audiences; international “public opinion” would applaud—and states’ men would ignore—this offer. Whether this response to the Austrians was a sincere invocation of the process of arbitration that had been developing for the previous 120 years or a disingenuous diversion, it proved ineffective at derailing the war desired in Vienna and, by then, widely expected. The Hague framework, urged by the peace movement and designed by the international lawyers, stood ready to complete its assigned task. What these worthies had not and probably could not have done in the space of one century was to change the culture of states and the psychology of states’ men as fast as hoped. In managing large-scale change, ‘the hard stuff is easy and the soft stuff is hard;’ and culture and psychology are the hardest of all to change. Despite the hopes of Ladd and Rolin-Jaequemyns and Cremer, despite the concrete steps taken or attempted by Castlereagh and Pauncefote and Hay, the states’ system maintained control of the processes of diplomacy and dispute resolution; these processes were never allowed to escape their control and discretion. In most cases they were useful; in some cases problematic. Change came, slowly and incrementally, and not before the states’ system collapsed on its own; not before, as Sir Edward Grey said that August: “the lamps [went] out all over Europe.”¹³ It would be nice to imagine that, a few weeks later, his telegram to Sir Cecil Spring-Rice approving the Peace Commission Treaty with the United States was an attempt to keep at least one lamp at least dimly lit.

¹² July 25, 1914, Paragraph X, in Gooch and Temperley, *British Documents*, XI:367-71 (App. B).

¹³ Grey, *Twenty-Five Years*, 20.

Instead, romantic fancies aside, we have to recognize that Grey's urgency (shared by France) was actually due to a desire to "save the appearances," to convince the public in the U.S. and at home that Britain was more open to a quick end to the War than was Germany; rather than an affinity for Bryan's watered-down plan for peace.¹⁴

¹⁴ Curti, "Bryan and World Peace," 160-1.

Appendix -- Compilation of Arbitration Agreements 1794-1918

SMH Index #	Agree- ment Date	Parties	Treaty Type	Subject Type	Source
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Appendix¹

1	1794	US UK ("Jay Treaty")	Comp	C	D18-2, S2
2	1794	US UK ("Jay Treaty")	Comp	B	D18-1, S1
3	1794	US UK ("Jay Treaty")	Comp	C	D18-3, S3
4	1795	US Spain	Comp	C	D18-4, S4
5	1795	US Spain	Comp	B	D18-4, S4
6	1796	Austria Prussia	Comp	B	S4a
7	1797	Prussia Russia Austria	Comp	C	S6
8	1797	Prussia Russia Austria	Comp	C	S5
9	1802	US Spain	Comp	C	D1, S7
10	1803	Rhenish States	Comp	M	D223
11	1808	France HRE/Confederation of the Rhine	Comp	M	D224
12	1809	Austria Bavaria	Comp	B	D320
13	1809	Austria France	Comp	B	D321
14	1810	Bavaria Italy	Comp	B	D322
15	1811	Austria Saxony	Comp	M	D225
16	1812	Lippe-Detmold Schaumburg-Lippe	Comp	S	S8
17	1813	Persia Russia	Comp	B	D323
18	1813	Austria Hesse-Cassel	Comp	M	D226
19	1814	UK Netherlands	Comp	C	D231
20	1814	France Spain	Comp	B	D324
21	1814	Allied Powers France	Comp	C	D6, S9
22	1814	France Russia	Comp	C	D2, S10
23	1814	Allied Powers France	Comp	M	D227
24	1814	Austria Bavaria	Comp	M	D229
25	1814	France Spain	Comp	M	D230
26	1814	UK France	Comp	C	D228b
27	1814	UK France	Comp	C	D228a
28	1814	Denmark Prussia	Comp	C	D232
29	1814	US UK	Comp	B	D4, S12
30	1814	US UK	Comp	B	D3, S11
31	1814	US UK	Comp	B	D5, S14
32	1814	US UK	Comp	B	D5, S13
33	1814	Allied Powers France	Comp	B	FO93/33/8 (8)
34	1814	Allied Powers France	Comp	M	See Note ²
35	1815	Allied Powers France	Comp	C	D241

¹ Descriptive notes and abbreviations for the Appendix follow on page 388.

² Convention on the Suspension of Hostilities, April 23, 1814, reprinted at *Hansard*, vol. 27 (May 2, 1814), cols. 627-31.

Appendix -- Compilation of Arbitration Agreements 1794-1918

SMH Index #	Agree- ment Date	Parties	Treaty Type	Subject Type	Source
36	1815	Canton of Tessin Canton of Uri	Comp	C	D233
37	1815	Prussia German Princes	Comp	S	S15
38	1815	Austria Russia	Comp	B	D326
39	1815	Austria Russia	Comp	M	D234
40	1815	Austria Russia	Comp	M	D235
41	1815	Austria Russia	Comp	C	D236
42	1815	Austria Russia Prussia	Comp	M	D238
43	1815	Prussia Russia	Comp	B	D325
44	1815	Prussia Russia	Comp	M	D237a
45	1815	Prussia Russia	Comp	C	D237b
46	1815	Prussia Russia	Comp	M	D237c
47	1815	Prussia Saxony	Comp	B	D7, S16
48	1815	Poland Saxony	Comp	C	D242
49	1815	Prussia Saxony	Comp	B	D327
50	1815	Prussia Saxony	Comp	M	D240
51	1815	Hanover Prussia	Comp	M	D243
52	1815	Austria Prussia Russia	Comp	B	D328
53	1815	Netherlands Prussia	Comp	M	D245
54	1815	Netherlands Prussia	Comp	B	D328
55	1815	Prussia Nassau	Comp	B	D9, S17
56	1815	Prussia Sweden	Comp	M	D246
57	1815	Allied Powers France	Comp	M	D239
58	1815	Austria Hesse-Darmstadt	Comp	C	D247
59	1815	Tessin Uri	Comp	S	S19
60	1815	Prussia Saxe-Weimar	Comp	M	D248
61	1815	Hanover Prussia	Comp	C	D249
62	1815	France Netherlands	Comp	C	D12, S20
63	1815	France UK	Comp	C	D10, S22
64	1815	France Allied Powers	Comp	C	D11, S21
65	1815	Allied Powers France	Comp	M	D250
66	1815	Allied Powers France	Comp	B	D330
67	1815	Prussia Netherlands	Comp	B	H Eur 1-208 (25)
68	1815	Prussia Hanover	Comp	B	H Eur 1-208 (27)
69	1815	Prussia Hanover	Comp	M	H Eur 1-208 (31)
70	1815	Auvergne Rohan	Comp	S	H Eur 1-208 (69)
71	1815	Bavaria Prussia Hesse	Comp	C	H Eur 1-208 (45)
72	1815	Berne Basel	Comp	M	H Eur 1-208 (77)
73	1815	Savoy Geneva	Comp	B	H Eur 1-208 (80)
74	1815	(States Bordering Po River)	Comp	M	H Eur 1-208 (96)
75	1815	Components of ex-King. Of Italy	Comp	C	H Eur 1-208 (97)
76	1815	Allied Powers France	Comp	M	FO93/33/15 (9)

Appendix -- Compilation of Arbitration Agreements 1794-1918

SMH Index #	Agree- ment Date	Parties	Treaty Type	Subject Type	Source
77	1815	Allied Powers France	Comp	C	FO93/33/15
78	1816	Sardinia Switzerland	Comp	M	D251
79	1816	Sardinia Switzerland	Comp	B	D332
80	1816	Austria Bavaria	Comp	C	D253
81	1816	Austria Bavaria	Comp	B	D333
82	1816	Austria Bavaria	Comp	M	D252
83	1816	Auvergne Rohan	Comp	S	D8, S18
84	1816	Austria Hesse-Darmstadt	Comp	C	D254a
85	1816	Austria Hesse-Darmstadt	Comp	M	D254b
86	1816	Netherlands Prussia	Comp	M	D255
87	1817	UK Portugal	Comp	C	S23
88	1817	UK Portugal	Comp	C	D256
89	1817	France Portugal	Comp	C	D257
90	1817	France Portugal	Comp	B	D334
91	1817	UK Spain	Comp	C	D258
92	1818	US UK	Comp	C	D13, S 24
93	1818	UK Netherlands	Comp	C	FO93/46/12
94	1819	US Spain	Comp	B	Malloy 2-1651
95	1820	France Netherlands	Comp	B	D331
96	1820	Germanic Confederation	Gen'l	G	D259
97	1822	US UK	Comp	C	D14, S25
98	1823	UK Spain	Comp	C	D15, S26
99	1823	Hanover Prussia	Comp	M	D260
100	1823	Chile Peru	CC	T	Manning 4
101	1825	France Bavaria	Comp	B	D335
102	1826	Russia Sweden	Comp	B	D336
103	1826	Russia Turkey	Comp	C	D261
104	1826	UK Brazil	Comp	C	BFSP 14-609
105	1827	US UK	Comp	B	S27
106	1828	US Mexico	Comp	B	D337
107	1828	Greece Turkey	Comp	C	D263
108	1829	Columbia Peru	Comp	B	D338
109	1829	UK Brazil	Comp	C	D16, S28
110	1829	Columbia Peru	Gen'l	G	Manning 9
111	1830	UK Argentine Rep	Comp	C	D17, S29
112	1830	Belgium Netherlands	Comp	S	D18
113	1831	Bolivia Peru	CC	T	Manning 10
114	1832	Greece Turkey	Comp	C	D264
115	1832	Greece Turkey	Comp	B	D339
116	1832	UK Turkey France, Russia	Comp	S	D262
117	1832	Ecuador Peru	Gen'l	G	Manning 11

Appendix -- Compilation of Arbitration Agreements 1794-1918

SMH Index #	Agree- ment Date	Parties	Treaty Type	Subject Type	Source
118	1833	Basel Landschaft Basel-Stadttheil	Comp	S	S30
119	1833	Servia Turkey	Comp	B	D340
120	1834	Russia Turkey	Comp	B	D341
121	1835	Persia	Comp	S	D19
122	1835	Prussia Russia	Comp	B	D342
123	1838	Afghanistan Lahore	Comp	B	D20, S31
124	1838	Columbia Ecuador Venezuela	CC	T	Manning 12
125	1839	France Mexico	Comp	C	D21, S32
126	1839	US Mexico	Comp	C	D22, S33
127	1839	Belgium Netherlands	Comp	C	D265
128	1839	Belgium Netherlands	Comp	B	D343
129	1839	Guatemala Salvador	Gen'l	G	Manning 18
130	1839	Guatemala Nicaragua	Gen'l	G	Manning 19
131	1840	Argentine Rep France	Comp	C	D23, S34
132	1840	UK Portugal	Comp	C	D24, S35
133	1840	UK Two Sicilies	Comp	C	D25, S36
134	1840	Bolivia Peru	Comp	C	Manning 24
135	1841	Austria Italy	Comp	B	D344
136	1842	Baden Hesse-Darmstadt Wurtemberg	Comp	M	D266
137	1842	US UK (Canada)	Comp	B	D345
138	1842	US Brazil	Comp	C	D26, S37
139	1842	UK France	Comp	C	D27, S38
140	1842	UK Portugal	Comp	C	FO93/77/21
141	1842	Columbia Venezuela	Gen'l	G	Manning 25
142	1843	UK Hanover	Comp	C	D28, S39
143	1843	Persia Turkey	Comp	B	D346
144	1843	US Mexico	Comp	C	S40
145	1843	Natal Zululand	Comp	B	D347
146	1844	Austria Bavaria	Comp	B	D348
147	1844	Austria Sardinia	Comp	B	D349
148	1844	Modena Tuscany	Comp	B	D350
149	1845	Austria Sardinia	Comp	S	D29, S41
150	1845	Costa Rica Salvador	Gen'l	G	Manning 27
151	1846	US UK	Comp	B	Malloy 1-657
152	1847	Persia Turkey	Comp	B	D30, S41
153	1848	US Mexico	Comp	B	D351
154	1848	Bolivia Peru	Comp	C	Manning 29
155	1849	Russia Turkey	Comp	M	D267
156	1849	Austria Modena Parma	Comp	M	D244
157	1849	Austria Modena	Comp	B	D268

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158	1849	Netherlands Bally	Comp	C	See Note ¹
159	1850	Denmark Prussia	Comp	B	D352
160	1850	UK Greece	Comp	C	D31, S48
161	1850	UK (Gambia) Combo/	Comp	B	D353
162	1850	Costa Rica Honduras	Gen'l	G	Manning 30
163	1851	Canada New Brunswick	Comp	B	D34, S46
164	1851	France Spain	Comp	C	D32, S44
165	1851	US Portugal	Comp	C	D33, S45
166	1852	Chile France	CC	T	Lange
167	1853	US UK	Comp	C	D35, S47
168	1853	Ecuador Peru	Comp	C	D26, S48
169	1853	Prussia Oldenburg	Comp	B	D354
170	1853	US Mexico	Comp	B	D355
171	1854	US UK	Comp	B	D37, S 49
172	1854	Costa Rica Nicaragua	Comp	B	Manning 31
173	1854	Chile UK	CC	T	Lange
174	1855	UK Portugal	Comp	C	D38, S50
175	1855	UK France	Comp	C	D269
176	1855	Argentina Chile	Comp	B	Manning 33
177	1856	Montenegro Turkey	Comp	B	D273
178	1856	Russia Turkey France, UK	Comp	M	D272
179	1856	Russia Turkey France, UK	Comp	M	D270
180	1856	Russia Turkey France, UK	Comp	M	D271
181	1856	Russia Turkey	Comp	B	D356
182	1856	France Spain	Comp	B	D357
183	1856	Ecuador Columbia	Gen'l	G	Manning 34
184	1856	Chile Italy	CC	T	Lange
185	1857	Russia Greece France, UK	Comp	M	D274
186	1857	Russia Austria France, UK	Comp	B	D358
187	1857	Afghanistan Persia	Comp	B	S51
188	1857	Netherlands Venezuela	Comp	B	D40, S54
189	1857	US New Granada	Comp	C	D41, S55
190	1857	Chile Costa Rica	Gen'l	G	Manning 35
191	1857	Costa Rica Nicaragua	Comp	B	Manning 40
192	1858	UK Brazil	Comp	C	D42, S56
193	1858	Moldavia Wallachia	Comp	M	D43, S57
194	1858	Argentine Republic UK France, Sardinia	Comp	C	D44, S58
195	1858	Montenegro Turkey	Comp	B	D359
196	1858	Chile US	Comp	C	D45, S59

¹ *Economist*, December 22, 1849.

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SMH Index #	Agree- ment Date	Parties	Treaty Type	Subject Type	Source
197	1858	Columbia Peru	Gen'l	G	Manning 41
198	1858	Costa Rica Nicaragua	Gen'l	G	Manning 42
199	1859	Parguay US	Comp	C	D46, S60
200	1859	Guatemala UK	Comp	B	D47, S61
201	1859	Brazil Venezuela	Comp	B	D362
202	1859	Morocco Spain	Comp	B	D360
203	1859	Muscat Zanzibar	Comp	S	D51, S62
204	1859	Austria France Sardinia	Comp	C	D275
205	1859	Austria Sardinia	Comp	B	D361
206	1859	UK Honduras	Comp	C	D48, S63
207	1859	Peru Venezuela	Gen'l	G	Manning 48
208	1860	UK Nicaragua	Comp	C	D49, S64
209	1860	France Sardinia	Comp	C	D276
210	1860	France Sardinia	Comp	B	D363
211	1860	US Costa Rica	Comp	C	D50, S65
212	1860	Argentine Rep France	Comp	C	S66
213	1860	Ecuador Peru	Gen'l	G	Manning 49
214	1861	US UK	Comp	C	BFSP 55-800
215	1861	France Monaco	Comp	S	D277
216	1861	France Monaco	Comp	B	D364
217	1861	UK Portugal	Comp	C	D52, S67
218	1861	Italy Switzerland	Comp	B	D365
219	1861	Costa Rica Nicaragua	Gen'l	G	Manning 55
220	1862	US UK	Comp	C	V9-293
221	1862	Uruguay UK France	Comp	C	D39, S53
222	1862	Servia Turkey	Comp	C	D278
223	1862	Servia Turkey	Comp	B	D366
224	1862	US Ecuador	Comp	C	D53, S68
225	1862	France Switzerland	Comp	B	D367
226	1862	US Peru	Comp	C	D54, S69
227	1862	UK US	Comp	C	Malloy 1:674
228	1862	Guatemala Nicaragua	Gen'l	G	Manning 56
229	1862	Hawaii Belgium	Gen'l	G	BFSP 52:521
230	1863	UK Brazil	Comp	C	D55, S70
231	1863	US Peru	Comp	C	D56, S71
232	1863	UK Peru	Comp	C	D58, S72
233	1863	US UK	Comp	C	D57, S73
234	1863	Peru Bolivia	Gen'l	G	Manning 65
235	1863	Hawaii Spain	Gen'l	G	BFSP 62: 1004
236	1863	Hawaii Italy	Gen'l	G	BFSP 60:397
237	1864	France Venezuela	Comp	C	D63

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SMH Index #	Agree- ment Date	Parties	Treaty Type	Subject Type	Source
238	1864	US Columbia	Comp	C	D59, S74
239	1864	Egypt Suez Canal Co	Comp	C	D62, S75
240	1864	Montenegro Turkey	Comp	C	D279
241	1864	US Salvador	Comp	C	D60, S76
242	1864	UK Argentine Rep	Comp	C	D61, S77
243	1864	Austria Denmark Prussia	Comp	C	D280
244	1864	Prussia Denmark	Comp	B	D368
245	1865	Honduras Nicaragua	Gen'l	G	Manning 68
246	1866	Brazil Peru	Comp	B	D372
247	1866	US Venezuela	Comp	C	D64, S78
248	1866	France Spain	Comp	B	D369
249	1866	UK Mexico	Comp	C	D65, S79
250	1866	UK (Gold Coast) Germany	Comp	B	D373
251	1866	Prussia Wurtenburg	Comp	M	D281
252	1866	Prussia Baden	Comp	M	D282
253	1866	Prussia Bavaria	Comp	C	D66, S80
254	1866	Prussia Bavaria	Comp	B	D379
255	1866	Prussia Bavaria	Comp	M	D283
256	1866	Prussia Austria	Comp	C	D284
257	1866	Prussia Hesse-Darmstadt	Comp	M	D285
258	1866	Austria Italy	Comp	B	D371
259	1866	Prussia Saxony	Comp	M	D286
260	1866	Austria Russia Moldavia, Wallachia	Comp	M	D287
261	1867	UK (Gold Coast) Netherlands	Comp	B	D374
262	1868	UK Spain	Comp	C	D67, S81
263	1868	US Mexico	Comp	C	D68, S82
264	1868	UK Venezuela	Comp	C	D69, S83
265	1868	US Peru	Comp	C	D79, S84
266	1868	Nicaragua Salvador	Gen'l	G	Manning 71
267	1868	Argentina Bolivia	Gen'l	G	Manning 77
268	1868	Costa Rica Nicaragua	Gen'l	G	Manning 77
269	1868	Chile Peru	Comp	C	Manning 78
270	1868	Siam Sweden/Norway	Gen'l	G	BFSP 69:1135
271	1868	Belgium Siam	CC	T	Lange
272	1868	Italy Siam	CC	T	Lange
273	1868	Italy Switzerland	CC	T	BFSP 58:718
274	1868	Siam Belgium	Gen'l	G	BFSP 59: 405
275	1869	UK Portugal	Comp	B	D71, S85
276	1869	UK Orange Free State	Comp	C	D72, S86
277	1869	France Tunis	Comp	M	D288
278	1869	Transvaal Orange Free State	Comp	B	D73, S87

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SMH Index #	Agree- ment Date	Parties	Treaty Type	Subject Type	Source
279	1869	Italy Turkey	Comp	C	S88
280	1869	Argentina Bolivia	Comp	B	Manning 83
281	1869	Austria-Hungary Siam	CC	T	Lange
282	1870	Kelat Persia	Comp	B	D77
283	1870	Afghanistan Persia	Comp	B	D76
284	1870	UK (Canada) US	Comp	B	D375
285	1870	US Brazil	Comp	C	D74, S89
286	1870	US Spain	Comp	C	D75, S90
287	1870	Columbia Peru	Gen'l	G	Manning 84
288	1871	US Spain	Comp	C	D78, S91
289	1871	France Germany	Comp	B	D376
290	1871	Transvaal Griqualand	Comp	B	D83, S92
291	1871	UK US	Comp	B	D82, S95
292	1871	UK US	Comp	S	D81, S96
293	1871	UK US (<i>"Alabama Claims"</i>)	Comp	C	D79, S94
294	1871	UK US	Comp	C	D80, S93
295	1871	Brazil Sweden/Norway	Comp	C	D84, S97
296	1871	Chile Peru	Comp	C	D85, S98
297	1871	France Germany	Comp	M	D289
298	1871	Mexico US	Comp	C	Manning 87
299	1872	Brazil Paraguay	Comp	C	D86, S99
300	1872	UK (Canada) US	Comp	B	D377
301	1872	UK Portugal	Comp	S	D87, S100
302	1872	Bolivia Chile	Comp	B	D88, S101
303	1872	UK Columbia	Comp	C	D89, S102
304	1872	Guatemala Salvador	CC	T	Manning 93
305	1872	Costa Rica Guatemala Hond., Salv.	Gen'l	G	Manning 93
306	1872	Mexico US	Comp	C	Manning 95
307	1873	UK Brazil	Comp	C	D90, S103
308	1873	Japan Peru	Comp	C	D91, S104
309	1873	UK France	Comp	C	D92, S105
310	1873	US Chile	Comp	C	D93, S106
311	1873	Italy Switzerland	Comp	B	D94, S107
312	1873	UK Peru	Comp	C	FO93/76/7
313	1873	Bolivia Peru	Gen'l	G	Manning 97
314	1873	Guatemala Nicaragua Salvador	Comp	B	Manning 97
315	1874	China Japan	Comp	C	D96, S109
316	1874	US Columbia	Comp	C	D95, S108
317	1874	Universal Postal Union Members	CC	T	D290
318	1874	Guatemala Nicaragua	CC	T	Manning 98
319	1874	Argentina Peru	CC	T	Manning 99

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SMH Index #	Agree- ment Date	Parties	Treaty Type	Subject Type	Source
320	1874	Bolivia Chile	CC	T	Manning 100
321	1874	Mexico US	Comp	C	Manning 103
322	1875	UK Chile	Comp	C	D97, S110
323	1875	Bolivia Chile	Comp	B	Manning 105
324	1876	Egypt The Powers	CC	T	D291
325	1876	Argentine Rpublic Paraguay	Comp	B	D98, S111
326	1876	Egypt The Powers	Comp	M	D292
327	1876	Costa Rica Guatemala Hond, Nic, Salv.	Gen'l	G	Manning 109
328	1876	Mexico US	Comp	C	Manning 110
329	1876	Guatemala Salvador	CC	T	Manning 112
330	1876	Chile Peru	Gen'l	G	Manning 113
331	1878	UK Liberia	Comp	B	D100
332	1878	Canada UK (Ontario)	Comp	B	D99, S113
333	1878	Transvaal Zululand	Comp	B	D378
334	1878	Russia Turkey	Comp	C	D294
335	1878	Egypt The Powers	Comp	M	D293
336	1878	Austria-Hungary Servia	Comp	M	D295
337	1878	The Powers Turkey	Comp	M	D296
338	1878	The Powers Turkey	Comp	M	D297
339	1878	Greece Turkey	Comp	B	D104, S112
340	1878	Bulgaria The Powers	Comp	B	D379a
341	1878	Bulgaria The Powers	Comp	B	D379b
342	1878	Bulgaria The Powers	Comp	B	D379c
343	1878	Bulgaria Turkey	Comp	C	D299a
344	1878	Bulgaria Turkey	Comp	B	D380
345	1878	Eastern Rumelia Turkey	Comp	B	D381
346	1878	Montenegro Turkey	Comp	C	D299b
347	1878	Montenegro Turkey	Comp	B	D382
348	1878	Persia Turkey	Comp	B	D387
349	1878	Rumania Turkey	Comp	B	D301
350	1878	Rumania Turkey	Comp	B	D385
351	1878	Russia Rumania	Comp	B	D384
352	1878	Russia Turkey	Comp	B	D386
353	1878	Servia Turkey	Comp	C	D299c
354	1878	Servia Turkey	Comp	B	D383
355	1878	The Powers Turkey	Comp	M	D298
356	1878	The Powers Turkey	Comp	M	D300
357	1878	The Powers Turkey	Comp	M	D304
358	1878	Honduras Nicaragua	Gen'l	G	Manning 113
359	1878	Honduras Salvador	Gen'l	G	Manning 114
360	1879	UK Nicaragua	Comp	S	D101, S114

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SMH Index #	Agree- ment Date	Parties	Treaty Type	Subject Type	Source
361	1879	Russia Turkey	Comp	C	D302
362	1879	France Nicaragua	Comp	C	D102, S115
363	1879	Nicaragua Peru	Gen'l	G	Manning 114
364	1879	Italy Uruguay	CC	T	Lange
365	1880	France US	Comp	C	D103, S116
366	1880	Egypt The Powers	Comp	M	D303
367	1880	Honduras Salvador	Comp	B	D105, S117
368	1880	Columbia Costa Rica	Comp	B	D106, S118
369	1880	Honduras Salvador	Comp	B	Manning 115
370	1880	Columbia Salvador	Gen'l	G	Lange
371	1880	Italy Rumania	CC	T	Lange
372	1880	Greece Italy	CC	T	Lange
373	1881	Basutoland Cape Colony	Comp	S	D109
374	1881	Netherlands San Domingo	Comp	C	D107, S119
375	1881	Greece Turkey	Comp	C	D305
376	1881	Greece Turkey	Comp	M	D306
377	1881	Greece Turkey	Comp	M	D307
378	1881	Greece Turkey	Comp	B	D388
379	1881	Argentine Republic Chile	Comp	B	D389
380	1881	UK Transvaal (South African Republic)	Comp	C	D108, S120
381	1881	UK Transvaal	Comp	B	D390
382	1881	UK Transvaal	Comp	B	D391
383	1881	Columbia Venezuela	Comp	B	D110, S121
384	1881	Honduras Salvador	Comp	B	Manning 125
385	1882	France Chile	Comp	C	S122
386	1882	UK France	Comp	B	D392
387	1882	US Mexico	Comp	B	D393
388	1882	Mexico Guatemala	Comp	B	D394
389	1882	France Chile	Comp	C	D111, S123
390	1882	Italy Chile	Comp	C	D112, S124
391	1882	UK France	Comp	B	D395
392	1882	Dominican Rep. Salvador	Gen'l	G	Manning 128
393	1882	Spain Venezuela	CC	T	Lange
394	1882	Belgium Italy	CC	T	Lange
395	1883	UK Chile	Comp	C	D113, S125
396	1883	Egypt Foreign Powers	Comp	C	D115, S126
397	1883	The Powers Turkey	Comp	M	D308
398	1883	Chile Peru	Comp	C	D114, S127
399	1883	Italy Abyssinia	Gen'l	G	See Note ¹

¹ *H Afr* 1-7, citing *Italian Green Book* 1890, 128.

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400	1883	Costa Rica Nicaragua	Gen'l	G	Manning 130
401	1883	Salvador Uruguay	Gen'l	G	Manning 131
402	1883	Paraguay Uruguay	CC	T	Manning 132
403	1883	Salvador Venezuela	CC	T	Manning 133
404	1883	Nicaragua Salvador	CC	T	Manning 134
405	1883	Guatemala Nicaragua	Gen'l	G	Manning 134
406	1883	Italy Montenegro	CC	T	Lange
407	1883	UK Italy	CC	T	Lange
408	1883	Salvador Switzerland	CC	T	Lange
409	1884	China US	Comp	C	D116, S128
410	1884	UK Portugal	Comp	M	D309
411	1884	UK Transvaal (South African Republic)	Comp	B	D117, S129
412	1884	Chile Bolivia	Comp	C	D118, S130
413	1884	Haiti US	Comp	C	D119, S131
414	1884	UK Germany	Comp	C	D120, S132
415	1884	Columbia Ecuador	Comp	C	D121, S133
416	1884	Chile Germany	Comp	C	D122, S134
417	1884	Chile Belgium	Comp	C	D123, S135
418	1884	UK Germany	Comp	C	D124, S136
419	1884	UK Mexico	Comp	C	See Note ¹
420	1884	Costa Rica Nicaragua	Gen'l	G	Manning 134
421	1884	Bolivia Chile	Comp	C	Manning 137
422	1884	Italy Netherlands	CC	T	Lange
423	1884	Belgium Venezuela	CC	T	Lange
424	1885	Afghanistan Persia	Comp	B	D125
425	1885	US, Haiti, Fr, It, Ger, Sp, UK	Comp	C	D126, S137
426	1885	France Congo	Comp	C	D310
427	1885	France Congo	Comp	B	D396
428	1885	Portugal Congo	Comp	B	D397
429	1885	The Powers Congo	Comp	M	D311
430	1885	US Spain	Comp	C	D127, S138
431	1885	The Powers Egypt	Comp	M	D312
432	1885	Austria-Hungary Chile	Comp	C	D128, S139
433	1885	UK Russia	Comp	B	D130, S140
434	1885	Germany Spain	Comp	S	D129, S141
435	1885	Argentine Republic Brazil	Comp	B	D398
436	1885	UK Germany	Comp	B	D399
437	1885	US Venezuela	Comp	C	S1421
438	1885	US Venezuela	Comp	M	R349

¹ Tischendorf, "Anglo-Mexican Claims."

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439	1885	France Germany	Comp	B	D400
440	1885	Costa Rica Nicaragua	Gen'l	G	Manning 146
441	1885	Italy Uruguay	CC	T	Lange
442	1885	UK Uruguay	CC	T	Lange
443	1885	Mexico Norway	CC	T	Lange
444	1885	Mexico Sweden	CC	T	Lange
445	1886	Bakwena Bamngwato	Comp	S	D133, S145
446	1886	Chile Switzerland	Comp	C	D131, S 143
447	1886	Bulgaria Eastern Rumelia	Comp	B	D401
448	1886	Bulgaria Eastern Rumelia	Comp	M	D313
449	1886	Bolivia Peru	Comp	B	D402
450	1886	France Portugal	Comp	B	D403
451	1886	Columbia Italy	Comp	C	D132, S144
452	1886	Montenegro Turkey	Comp	C	D314
453	1886	Bulgaria Serbia	Comp	B	D134, S146
454	1886	Costa Rica Nicaragua	Comp	B	D135, S147
455	1886	Nicaragua Salvador	Gen'l	G	Manning 154
456	1886	Columbia Costa Rica	Comp	B	Manning 155
457	1886	Columbia Venezuela	Comp	B	Manning 157
458	1886	Bolivia Peru	Comp	B	Manning 159
459	1886	Honduras Salvador	Comp	B	Manning 164
460	1886	Dominican Rep Italy	CC	T	Lange
461	1886	UK Greece	CC	T	Lange
462	1887	Bolivia Paraguay	Comp	B	D404
463	1887	UK Spain	Comp	C	D137, S148
464	1887	UK Russia	Comp	B	D405
465	1887	Ecuador Peru	Comp	B	D138, S149
466	1887	Costa Rica Guatemala Hond., Nic., Salv.	Gen'l	G	Manning 169
467	1887	UK Honduras	CC	T	Lange
468	1887	Belgium Ecuador	CC	T	Lange
469	1888	UK Siam	Comp	B	D406
470	1888	Mexico Guatemala	Comp	C	D139, S150
471	1888	Morocco US	Comp	C	D141, S151
472	1888	US Haiti	Comp	C	D140, S152
473	1888	Russia Sweden	Comp	B	D407
474	1888	Honduras Salvador	Comp	B	D136
475	1888	France Netherlands	Comp	B	D142, S153
476	1888	Denmark US	Comp	C	D143, S154
477	1888	Ecuador Mexico	Gen'l	G	Manning 179
478	1888	Argentina Chile	Comp	B	Manning 179
479	1888	Spain Italy	CC	T	Lange

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480	1888	Spain Ecuador	CC	T	Lange
481	1888	Ecuador Switzerland	CC	T	Lange
482	1888	UK Mexico	CC	T	Lange
483	1889	US Siam	Comp	C	R349
484	1889	Costa Rica Nicaragua	Comp	B	D144, S155
485	1889	US Mexico	Comp	M	D315
486	1889	UK Germany	Comp	S	D145, S156
487	1889	Italy Abyssinia	Comp	B	D408
488	1889	Argentine Republic Bolivia	Comp	B	D409
489	1889	Argentine Republic Brazil	Comp	B	D146, S157
490	1889	Honduras Nicaragua	Comp	B	Manning 183
491	1889	Greece Italy	CC	T	Lange
492	1890	UK Haiti	Comp	C	D154
493	1890	UK Haiti	Comp	C	S158
494	1890	Congo Portugal	Comp	B	D147, S159
495	1890	UK China	Comp	S	D148, S160
496	1890	US UK Germany ("Samoa")	Comp	M	D316a
497	1890	US UK Germany ("Samoa")	Comp	C	D316b
498	1890	Italy Persia	Comp	C	D149, S161
499	1890	UK Germany	Comp	B	D150, S162
500	1890	UK Germany	Comp	B	D410
501	1890	UK Germany	Comp	B	D411
502	1890	UK France	Comp	B	D152, S163
503	1890	UK France	Comp	B	D151
504	1890	UK Portugal US (Delegoa Bay Rwy.)	Comp	C	D153, S164
505	1890	Ecuador Salvador	CC	T	Manning 190
506	1890	Costa Rica Ecuador	Gen'l	G	Manning 191
507	1890	Guatemala Salvador	Gen'l	G	Manning 192
508	1890	Italy Mexico	CC	T	Lange
509	1890	Multi	CC	T	Lange
510	1890	Multi	CC	T	Lange
511	1890	Bolivia Italy	CC	T	Lange
512	1891	France Haiti	Comp	C	D155
513	1891	France Venezuela	Comp	C	D156, S165
514	1891	UK France	Comp	C	D157, S166
515	1891	Congo Portugal	Comp	B	D412
516	1891	UK Portugal	Comp	B	D158, S167
517	1891	UK Portugal	Comp	C	D317
518	1891	UK Portugal	Comp	B	D413
519	1891	UK (Canada) US	Comp	B	D414
520	1891	Italy Portugal	Comp	C	D159, S168

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SMH Index #	Agree- ment Date	Parties	Treaty Type	Subject Type	Source
521	1891	UK Germany	Comp	C	FO93/36/32
522	1891	Guatemala Mexico	Comp	C	Manning 194
523	1892	US Venezuela	Comp	C	D160, S169
524	1892	US UK	Comp	B	D161, S170
525	1892	UK France	Comp	C	D162, S171
526	1892	France Chile Peru	Comp	C	D163, S172
527	1892	US Chile	Comp	C	D164, S173
528	1892	Barolong Bangwaketse	Comp	B	D415
529	1892	Chile US	Comp	C	Manning 202
530	1892	Guatemala Honduras Nic., Salv.	Gen'l	G	Manning 198
531	1892	Spain Norway	CC	T	Lange
532	1892	Spain Sweden	CC	T	Lange
533	1892	Italy Montenegro	CC	T	Lange
534	1892	Columbia Italy	CC	T	Lange
535	1892	Belgium netherlands	CC	T	Lange
536	1893	US Ecuador	Comp	C	D165, S174
537	1893	UK Russia Afghanistan	Comp	B	D166, S175
538	1893	Persia Russia	Comp	B	D416
539	1893	UK Chile	Comp	C	D167, S176
540	1893	UK Afghanistan	Comp	B	D417
541	1893	Ecuador US	Comp	C	Manning 207
542	1893	Mexico Salvador	CC	T	Manning 210
543	1893	Rumania Switzerland	CC	T	Lange
544	1893	Netherlands Portugal	CC	T	Lange
545	1893	Italy Paraguay	CC	T	Lange
546	1894	Germany Haiti	Comp	C	D179
547	1894	UK Transvaal (South African Republic)	Comp	S	D168, S177
548	1894	France Chile UK, Peru	Comp	C	D163, S178
549	1894	Italy Columbia	Comp	C	S179
550	1894	Honduras Nicaragua	Comp	B	D169, S180
551	1894	Chile France	Comp	C	D170, S181
552	1894	Bakhatla Bakwena Bamangwato	Comp	B	D418
553	1894	France Chile UK, Peru	Comp	C	D163, S182
554	1894	Honduras Nicaragua	Comp	B	Manning 211
555	1894	Columbia Spain	CC	T	Lange
556	1894	Netherlands Portugal	CC	T	Lange
557	1894	Spain Honduras	CC	T	Lange
558	1895	Brazil UK	Comp	S	D181
559	1895	UK Portugal	Comp	B	D171, S183
560	1895	Honduras Salvador	Comp	B	S184
561	1895	Honduras Guatemala	Comp	B	D172, S185

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SMH Index #	Agree- ment Date	Parties	Treaty Type	Subject Type	Source
562	1895	Afghanistan Russia	Comp	B	D419
563	1895	Mexico Guatemala	Comp	C	D173, S186
564	1895	France San Domingo	Comp	C	S187
565	1895	UK Netherlands	Comp	C	D174, S188
566	1895	Haiti San Domingo	Comp	B	D175, S189
567	1895	Chile Sweden/Norway	Comp	C	D176, S190
568	1895	Bolivia Peru	Comp	C	D177, S191
569	1895	UK Nicaragua	Comp	C	D178, S192
570	1895	UK Persia	Comp	B	D420
571	1895	UK France	Comp	B	D421
572	1895	Guatemala Honduras	CC	T	Manning 222
573	1895	Costa Rica Guatemala	Gen'l	G	Manning 231
574	1895	Bolivia Chile	Comp	B	Manning 232
575	1895	Costa Rica Salvador	CC	T	Manning 233
576	1895	Honduras Nicaragua Salvador	Gen'l	G	Manning 234
577	1895	Bolivia Peru	Comp	S	Manning 238
578	1895	Costa Rica Honduras	CC	T	Manning 241
579	1895	Honduras Salvador	Gen'l	G	Manning 221
580	1895	Belgium Greece	CC	T	Lange
581	1895	Belgium Sweden	CC	T	Lange
582	1895	Belgium denmark	CC	T	Lange
583	1895	Norway Portugal	CC	T	Lange
584	1896	UK France	Comp	B	D182, S194
585	1896	US UK	Comp	C	D183, S195
586	1896	Brazil Italy	Comp	C	D180, S193
587	1896	Brazil Italy	Comp	C	D184, S196
588	1896	Costa Rica Nicaragua	Comp	B	D185, S197
589	1896	Argentine Rpublic Chile	Comp	B	D186, S198
590	1896	UK Siam	Comp	C	D187, S200
591	1896	Lippe/Detmold Schaumburg-Lippe	Comp	S	D197, S199
592	1896	US UK	Comp	C	R351
593	1896	UK Columbia	Comp	C	D188, S201
594	1896	Columbia Costa Rica	Comp	B	Manning 248
595	1897	France Chile	Comp	C	S202
596	1897	UK Germany	Comp	C	D194, S203
597	1897	France Germany	Comp	B	D195, S204
598	1897	US Siam	Comp	C	D199, S205
599	1897	Austria Hungary	Comp	B	S206
600	1897	UK Venezuela	Comp	B	D189, S207
601	1897	UK (Burma) China	Comp	B	D422
602	1897	UK Portugal	Comp	B	D425

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SMH Index #	Agree- ment Date	Parties	Treaty Type	Subject Type	Source
603	1897	US Mexico	Comp	C	D190, S208
604	1897	France Brazil	Comp	B	D191, S209
605	1897	US Chile	Comp	C	S210
606	1897	US Ecuador	Comp	C	S211
607	1897	US Ecuador	Comp	C	S212
608	1897	France Chile	Comp	C	D192, S213
609	1897	France Chile	Comp	C	D193
610	1897	Japan Hawaii	Comp	S	D196
611	1897	France Germany	Comp	B	D423
612	1897	US Siam	Comp	C	D200, S214
613	1897	Greece Turkey	Comp	M	D318
614	1897	Greece Turkey	Comp	B	D424
615	1897	Greece Turkey	Comp	S	D198, S215
616	1897	Spain Peru	CC	T	Lange
617	1897	Mexico Netherlands	CC	T	Lange
618	1898	UK Costa Rica	Comp	C	AA1-375
619	1898	US San Domingo	Comp	C	R351
620	1898	Italy Guatemala	Comp	C	D201, S216
621	1898	UK Belgium	Comp	C	D202, S217
622	1898	France Westphalia	Comp	B	D319
623	1898	Italy Ecuador	Comp	C	D203, S218
624	1898	Chile Peru	Comp	S	D208, S219
625	1898	Costa Rica Republic of Central America	Comp	C	D204, S220
626	1898	US Peru	Comp	C	D205, S221
627	1898	UK (Canada) Russia	Comp	C	D206, S223
628	1898	UK France	Comp	B	D428
629	1898	UK France	Comp	B	D429
630	1898	UK France	Comp	B	D430
631	1898	Argentine Republic Brazil	Comp	B	D426
632	1898	Argentine Republic Chile Bolivia	Comp	B	D209, S224
633	1898	US Spain	Comp	C	S225
634	1898	Columbia Venezuela	Comp	B	D427
635	1898	UK France	Comp	B	D431
636	1898	Columbia Peru	Gen'l	G	Manning 255
637	1898	Japan Siam	CC	T	Lange
638	1899	Belgium France	Comp	B	D433
639	1899	UK Honduras	Comp	C	D210, S226
640	1899	UK France	Comp	B	D432
641	1899	UK US Germany ("Samoa")	Comp	M	D211, S227
642	1899	UK Russia	Comp	C	D214
643	1899	US Haiti	Comp	C	D212, S228

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SMH Index #	Agree- ment Date	Parties	Treaty Type	Subject Type	Source
644	1899	US UK (Canada)	Comp	B	D207, S222
645	1899	UK Germany US	Comp	C	D213, S229
646	1899	Italy Peru	Comp	C	D215, S230
647	1899	UK China	Comp	C	D216, S231
648	1899	Hague I	Gen'l	G	Malloy 2: 2016
649	1899	Brazil Chile	Gen'l	G	Manning 259
650	1899	Argentina Uruguay	Gen'l	G	Manning 262
651	1899	Argentina Paraguay	Gen'l	G	Manning 284
652	1899	Netherlands Rumania	CC	T	Lange
653	1899	Italy Mexico	CC	T	Lange
654	1899	Denmark Sweden	CC	T	Lange
655	1900	Denmark Germany	Comp	B	D436
656	1900	UK Germany	Comp	B	D434
657	1900	US Guatemala	Comp	C	D218, S232
658	1900	US Nicaragua	Comp	C	D219, S233
659	1900	Bolivia Chile	Comp	C	D234, S220
660	1900	France Spain	Comp	B	D435
661	1900	US Russia	Comp	C	D221, S236
662	1900	UK Venezuela	Comp	B	D437
663	1900	Italy Peru	Comp	S	D222, S238
664	1900	Columbia Italy	Comp	C	S235
665	1900	UK Germany	Comp	C	D217, S237
666	1900	Mexico Nicaragua	CC	T	Mannign 295
667	1900	Mexico US	Comp	B	Manning 295
668	1901	UK France	Comp	C	D20-1, S239
669	1901	UK Italy	Comp	B	D20-22
670	1901	France Morocco	Comp	B	D20-46
671	1901	UK China	Comp	M	D20-23
672	1901	US China	Comp	C	R 388
673	1901	France UK	Comp	B	D20-43
674	1901	UK Turkey	Comp	B	D20-45
675	1901	UK Brazil	Comp	B	D20-2, S240
676	1901	US Salvador	Comp	C	D20-4, S241
677	1901	UK Nicaragua	Comp	C	See Note ¹
678	1901	Congo Germany	Comp	B	D20-42
679	1901	Congo Portugal	Comp	B	D20-41
680	1901	UK Germany	Comp	B	D20-44
681	1901	Bolivia Peru	Gen'l	G	Manning 297
682	1901	Germany Netherlands	CC	T	Martens 3-VII-272

¹ *Herald of Peace*, January 1902, 176; *Advocate of Peace*, December 1901, 239.

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683	1902	France Venezuela	Comp	C	S242
684	1902	Guatemala Italy	Comp	C	D20-10, S243
685	1902	Columbia Italy	Comp	C	S244
686	1902	France Turkey	Comp	B	D20-53
687	1902	Italy Abyssinia	Comp	B	D20-49
688	1902	UK Abyssinia	Comp	C	D20-48
689	1902	US Mexico ("Pious Fund")	Comp	C	D20-5, S245
690	1902	Argentine Republic Chili	Comp	B	D20-52
691	1902	Austria Hungary	Comp	B	D20-7
692	1902	UK Russia	Comp	C	D20-6, S 246
693	1902	UK Japan France Germany ("House Tax")	Comp	S	D20-8, S247
694	1902	US Brazil	Comp	C	S248
695	1902	France Guatemala	Comp	C	D20-9
696	1902	Bolivia Peru	Comp	B	D20-13, S249
697	1902	Afghanistan Persia	Comp	B	D20-25
698	1902	Russia Turkey	Comp	C	D20-24
699	1902	UK Germany	Comp	B	D20-51
700	1902	UK France	Comp	B	D20-47
701	1902	UK Liberia	Comp	B	D20-50
702	1902	Costa Rica Honduras Nic., Salv.	Gen'l	G	Manning 303
703	1902	Argentina Bolivia Dom Rep, Guat,	Gen'l	G	Manning 307
704	1902	Argentina Bolivia Chile, Colum, Costa, Dom	Gen'l	G	Manning 313
705	1902	Argentina Bolivia	Gen'l	G	Manning 316
706	1902	Dominican Rep. US	Comp	C	Manning 320
707	1902	Bolivia Peru	CC	B	Manning 334
708	1902	Mexico Spain	Gen'l	G	Lange
709	1902	Dominican Rep Spain	Gen'l	G	Lange
710	1902	Spain Uruguay	Gen'l	G	Lange
711	1902	Spain Salvador	Gen'l	G	Lange
712	1902	Dominican Rep Guatemala	Gen'l	G	Lange
713	1902	Columbia Spain	Gen'l	G	Lange
714	1902	Spain Guatemala	Gen'l	G	Lange
715	1902	Argentina Chile	Gen'l	G	Lange
716	1902	Mexico Persia	CC	T	Lange
717	1903	Austria-Hungary Turkey	Comp	C	D20-15, S250
718	1903	UK (Canada) US	Comp	B	D20-27, S251
719	1903	US Dominican Rep.	Comp	C	D20-16, S252
720	1903	Turkey The Powers	Comp	C	D20-17, S253
721	1903	Germany Venezuela	Comp	C	D20-29, S256
722	1903	Italy Venezuela	Comp	C	D20-30, S257
723	1903	UK Venezuela Germany, Italy	Comp	C	D20-18, S255

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SMH Index #	Agree- ment Date	Parties	Treaty Type	Subject Type	Source
724	1903	Mexico Venezuela	Comp	C	D20-37, S259
725	1903	France Venezuela	Comp	C	D20-32, S260
726	1903	Netherlands Venezuela	Comp	C	D20-35, S261
727	1903	Beluchistan Persia	Comp	B	D20-55
728	1903	Belgium Venezuela	Comp	C	D20-34, S262
729	1903	Sweden/Norway Venezuela	Comp	C	D20-36, S263
730	1903	Spain Venezuela	Comp	C	D20-33, S264
731	1903	UK Venezuela	Comp	C	D20-28, S254
732	1903	UK China	Comp	B	D20-56
733	1903	US Venezuela	Comp	C	D20-31, S258
734	1903	UK Portugal	Comp	B	D20-12, S265
735	1903	Bolivia Brazil	Comp	C	S266
736	1903	US Panama	Comp	C	S267
737	1903	Afghanistan UK	Comp	B	D20-26
738	1903	UK Germany	Comp	B	D20-54
739	1903	US Dominican Rep.	Comp	C	D20-14
740	1903	Guatemala Honduras Nic., Salv.	Gen'l	G	Manning 346
741	1903	Brazil Venezuela	Comp	B	Martens 3-IX-763
742	1903	UK France	CC	T	Martens 3-V-760
743	1903	Italy Cuba	CC	T	Martens 2-XXXIII-493
744	1903	France UK	Gen'l	G	Lange
745	1903	France Italy	Gen'l	G	Lange
746	1904	Ecuador Peru	Comp	C	D20-19, S268
747	1904	UK Afghanistan	Comp	B	D20-57
748	1904	France Siam	Comp	B	D20-58
749	1904	UK Haiti	Comp	C	S269
750	1904	UK Germany	Comp	B	D20-60
751	1904	Bulgaria Turkey	Comp	C	D20-38
752	1904	France UK	Comp	C	D20-40
753	1904	France UK (Canada)	Comp	C	D20-39
754	1904	France Guatemala	Comp	C	S270
755	1904	Columbia Peru	Comp	B	D20-21, S271
756	1904	France Haiti	Comp	C	S272
757	1904	Brazil Peru	Comp	C	S273
758	1904	Spain Holy See	Comp	S	S274
759	1904	Netherlands Portugal	Comp	B	S275
760	1904	UK France	Comp	S	D20-20, S276
761	1904	Ecuador Peru	Comp	C	S277
762	1904	Columbia Ecuador	Comp	B	S278
763	1904	Lippe-Biesterfeld Lippe-Weissenfeld	Comp	S	S279
764	1904	Nicaragua Honduras	Comp	B	R353

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765	1904	UK Portugal	Comp	B	D20-59
766	1904	Bolivia Chile	CC	T	Manning 354
767	1904	France Netherlands	CC	T	Martens 2-XXXIII-516
768	1904	Belgium Germany	CC	T	Martens 2-XXXIV-538
769	1904	Italy Switzerland	CC	T	Martens 2-XXXIV-525
770	1904	Bolivia Chile	CC	T	Martens 3-II-79
771	1904	Germany Switzerland	CC	T	Martens 2-XXXIV 585
772	1904	Germany Serbia	CC	T	Martens 2-XXXIV-595
773	1904	Germany Italy	CC	T	Martens 2-XXXIV-605
774	1904	UK Italy	Gen'l	G	Lange
775	1904	Denmark Netherlands	Gen'l	G	Lange
776	1904	Spain France	Gen'l	G	Lange
777	1904	Spain UK	Gen'l	G	Lange
778	1904	France Netherlands	Gen'l	G	Lange
779	1904	Spain Portugal	Gen'l	G	Lange
780	1904	France Norway	Gen'l	G	Lange
781	1904	France Sweden	Gen'l	G	Lange
782	1904	Germany UK	Gen'l	G	Lange
783	1904	UK Norway	Gen'l	G	Lange
784	1904	UK Sweden	Gen'l	G	Lange
785	1904	Netherlands Portugal	Gen'l	G	Lange
786	1904	Spain Nicaragua	Gen'l	G	Lange
787	1904	Belgium Russia	Gen'l	G	Lange
788	1904	Belgium Switzerland	Gen'l	G	Lange
789	1904	UK Portugal	Gen'l	G	Lange
790	1904	UK Switzerland	Gen'l	G	Lange
791	1904	Italy Switzerland	Gen'l	G	Lange
792	1904	Belgium Norway	Gen'l	G	Lange
793	1904	Belgium Sweden	Gen'l	G	Lange
794	1904	Norway Russia	Gen'l	G	Lange
795	1904	Sweden Russia	Gen'l	G	Lange
796	1904	France Switzerland	Gen'l	G	Lange
797	1904	Norway Switzerland	Gen'l	G	Lange
798	1904	Sweden Switzerland	Gen'l	G	Lange
799	1904	Germany Rumania	CC	T	Lange
800	1905	UK France	Comp	C	S280
801	1905	Columbia Peru	Comp	B	S281
802	1905	Norway Sweden	Comp	S	S282
803	1905	UK Russia ("Dogger Bank Inquiry")	Comp	C	BFSP 99-921
804	1905	France Mexico	Comp	C	AA 10-12
805	1905	Costa Rica Panama	Comp	B	Manning 355

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806	1905	Argentina Brazil	Gen'l	G	Manning 357
807	1905	Bolivia Peru	CC	T	Manning 361
808	1905	Greece Serbia Bulgaria Roumania	CC	B	[lost]
809	1905	Germany Austria	CC	T	Martens 2-XXV-516
810	1905	Germany Bulgaria	CC	T	Martens 2-XXXIV-664
811	1905	Denmark Chile	CC	T	Martens 3-II-291
812	1905	UK Bulgaria	CC	T	Martens 2-XXXIV-738
813	1905	Italy Bulgaria	CC	T	Martens 2-XXXIV-755
814	1905	France Bulgaria	CC	T	Martens 2-XXXV-3
815	1905	Belgium Spain	Gen'l	G	Lange
816	1905	Spain Norway	Gen'l	G	Lange
817	1905	Spain Sweden	Gen'l	G	Lange
818	1905	UK Netherlands	Gen'l	G	Lange
819	1905	Denmark Russia	Gen'l	G	Lange
820	1905	Italy Peru	Gen'l	G	Lange
821	1905	Belgium Denmark	Gen'l	G	Lange
822	1905	Belgium Greece	Gen'l	G	Lange
823	1905	Portugal Sweden	Gen'l	G	Lange
824	1905	Italy Portugal	Gen'l	G	Lange
825	1905	Spain Honduras	Gen'l	G	Lange
826	1905	Belgium Rumania	Gen'l	G	Lange
827	1905	Portugal Switzerland	Gen'l	G	Lange
828	1905	Columbia Peru	Gen'l	G	Lange
829	1905	Denmark UK	Gen'l	G	Lange
830	1905	Norway Sweden	Gen'l	G	Lange
831	1905	Denmark Spain	Gen'l	G	Lange
832	1905	Denmark Italy	Gen'l	G	Lange
833	1905	Columbia Ecuador	CC	T	Lange
834	1905	Norway Sweden	CC	T	Lange
835	1905	Norway Sweden	CC	T	Lange
836	1905	Norway Sweden	CC	T	Lange
837	1906	France Switzerland	Comp	S	S283
838	1906	Brazil Netherlands	Comp	B	R353
839	1906	Guatemala Honduras Salvador	Gen'l	G	Manning 361
840	1906	Argentina Bolivia Braz, Chile, Colum, Costa, Dom Rep Ec, Guat, Haiti, Hond, Mex, Nic, Pana, Par, Peru, Salv, US, Urug,	Comp	C	Manning 362
841	1906	Costa Rica Guatemala Hond., Salv.	Gen'l	G	Manning 364
842	1906	Austria-Hungary Italy	CC	T	Martens 2-XXXV-30
843	1906	Austria-Hungary Belgium	CC	T	Martens 2-XXXV-130

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844	1906	Italy Switzerland	CC	T	See Note ¹
845	1906	Germany Norway	CC	T	Martens 3-VII-275
846	1906	Multi (Red Cross)	CC	T	Herts Comml 25-515
847	1906	France Switzerland	CC	T	Martens 3-I-509
848	1906	Multi (Red Cross)	CC	T	Martens 3-III-147
849	1906	Italy Rumania	CC	T	Martens 2-XXXV-547
850	1906	Austria-Hungary Portugal	Gen'l	G	Lange
851	1906	Belgium Nicaragua	Gen'l	G	Lange
852	1906	Italy Nicaragua	CC	T	Lange
853	1906	Austria Switzerland	CC	T	Lange
854	1906	Belgium Peru	CC	T	Lange
855	1907	Bolivia Paraguay	Comp	B	S284
856	1907	Columbia Ecuador	Comp	B	S285
857	1907	Peru Peruvian Corp (UK)	Comp	C	S286
858	1907	Hague II	Gen'l	G	Malloy 2:2220
859	1907	Bolivia Chile	Comp	B	Manning 365
860	1907	Brazil Columbia	Comp	B	Manning 366
861	1907	Costa Rica Guatemala Hond, Nic, Salv	Gen'l	G	Manning 366
862	1907	Costa Rica Guatemala Hond, Nic, Salv	Gen'l	G	Manning 394
863	1907	Costa Rica Guatemala Hond, Nic, Salv	Gen'l	G	Manning 394
864	1907	Costa Rica Guatemala Hond, Nic, Salv	Gen'l	G	Manning 401
865	1907	Costa Rica Guatemala Hond, Nic, Salv	Gen'l	G	Manning 402
866	1907	Italy Serbia	CC	T	Martens 2-XXXV-596
867	1907	Serbia Switzerland	CC	T	Martens 2-XXXV-619
868	1907	UK Serbia	CC	T	Martens 2-XXXV-608
869	1907	Belgium Serbia	CC	T	Martens 3-I-778
870	1907	Denmark Portugal	Gen'l	G	Lange
871	1907	Argentina Italy	Gen'l	G	Lange
872	1907	Italy Mexico	Gen'l	G	Lange
873	1907	France Serbia	CC	T	Lange
874	1908	UK Peru	Comp	C	S287
875	1908	Norway Sweden	Comp	B	S288
876	1908	US Peru	Comp	C	R354
877	1908	France Germany	Comp	C	S289
878	1908	Honduras Mexico	Gen'l	G	Manning 403
879	1908	Mexico US	Gen'l	G	Manning 404
880	1908	Brazil Columbia	CC	T	Manning 406
881	1908	Peru US	Gen'l	G	Manning 406
882	1908	Salvador US	Gen'l	G	Manning 408

¹ Cory, 87-9.

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883	1908	Honduras Guatemala Salvador	Comp	S	See Note ¹
884	1908	Netherlands Sweden	CC	T	Martens 3-IV-217
885	1908	Belgium Bulgaria	CC	T	Martens 3-IV-896
886	1908	Montenegro Netherlands	CC	T	Martens 3-IV-883
887	1908	Germany Portugal	CC	T	Martens 3-IV-896
888	1908	Netherlands Sweden	CC	T	Martens 3-V-300
889	1908	US France	Gen'l	G	Lange
890	1908	US Switzerland	Gen'l	G	Lange
891	1908	US Italy	Gen'l	G	Lange
892	1908	US UK	Gen'l	G	Lange
893	1908	US Norway	Gen'l	G	Lange
894	1908	US Portugal	Gen'l	G	Lange
895	1908	US Spain	Gen'l	G	Lange
896	1908	US Netherlands	Gen'l	G	Lange
897	1908	US Sweden	Gen'l	G	Lange
898	1908	US Japan	Gen'l	G	Lange
899	1908	US Denmark	Gen'l	G	Lange
900	1908	Denmark Sweden	Gen'l	G	Lange
901	1908	US China	Gen'l	G	Lange
902	1908	Denmark Norway	Gen'l	G	Lange
903	1908	Norway Portugal	Gen'l	G	Lange
904	1908	France Columbia	Gen'l	G	Lange
905	1908	Columbia UK	Gen'l	G	Lange
906	1909	US Canada (UK)	Comp	C	S290
907	1909	UK (Canada) US	Comp	S	S291
908	1909	US Venezuela	Comp	C	S292
909	1909	France Mexico	Comp	S	S293
910	1909	Columbia Peru	Comp	C	S294
911	1909	Italy Switzerland	Comp	S	S295
912	1909	Columbia Italy	Comp	C	S296
913	1909	US Chile	Comp	C	S297
914	1909	France Germany	Comp	C	AA11-26
915	1909	Ecuador US	Gen'l	G	Manning 409
916	1909	Haiti US	Gen'l	G	Manning 411
917	1909	Uruguay US	Gen'l	G	Manning 412
918	1909	Costa Rica US	Gen'l	G	Manning 413
919	1909	Brazil US	Gen'l	G	Manning 414
920	1909	Paraguay US	Gen'l	G	Manning 426

¹ In the Central American Court of Justice, see *American Journal of International Law*, 3:2 434-6, 3:3 729-36.

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SMH Index #	Agree- ment Date	Parties	Treaty Type	Subject Type	Source
921	1909	Brazil Mexico	Gen'l	G	Manning 428
922	1909	Brazil Honduras	Gen'l	G	Manning 431
923	1909	Brazil Venezuela	Gen'l	G	Manning 433
924	1909	Brazil Ecuador	Gen'l	G	Manning 436
925	1909	Brazil Costa Rica	Gen'l	G	Manning 438
926	1909	Brazil Cuba	Gen'l	G	Manning 439
927	1909	Brazil Bolivia	Gen'l	G	Manning 441
928	1909	Brazil Peru	CC	B	Manning 448
929	1909	Brazil Salvador	Gen'l	G	Manning 446
930	1909	Brazil Peru	Gen'l	G	Manning 450
931	1909	Belgium Honduras	CC	T	Martens 3-V-500
932	1909	Austria Rumania	CC	T	Martens 3-IV-229
933	1909	Germany Italy/Switz	CC	T	Martens 3-VIII-195
934	1909	US Austria-Hungary	Gen'l	G	Lange
935	1909	Brazil Portugal	Gen'l	G	Lange
936	1909	Brazil France	Gen'l	G	Lange
937	1909	Brazil Spain	Gen'l	G	Lange
938	1909	Brazil Norway	Gen'l	G	Lange
939	1909	Nicaragua Portugal	Gen'l	G	Lange
940	1909	Brazil China	Gen'l	G	Lange
941	1909	Brazil Salvador	Gen'l	G	Lange
942	1909	Italy Netherlands	Gen'l	G	Lange
943	1909	Spain Greece	Gen'l	G	Lange
944	1909	Hungary Italy	CC	T	Lange
945	1910	Costa Rica Panama	Comp	B	S298
946	1910	Italy Peru	Comp	C	S299
947	1910	France Peru	Comp	C	S317
948	1910	US Mexico	Comp	B	S300
949	1910	Russia Turkey	Comp	C	S301
950	1910	UK Honduras	Comp	C	S302
951	1910	UK US	Comp	C	S303
952	1910	UK France	Comp	S	S304
953	1910	Belgium Italy	Gen'l	G	Lange
954	1910	Italy Norway	Gen'l	G	Lange
955	1910	Mexico US	Comp	B	Manning 472
956	1910	Columbia Peru	Comp	B	Manning 457
957	1910	Brazil Haiti	Gen'l	G	Manning 462
958	1910	Brazil Dom Rep	Gen'l	G	Manning 463
959	1910	Argentina Brazil Chile, Colum, Costa, Dom	Gen'l	G	Manning 469
960	1910	Bulgaria Italy	CC	T	Martens 3-VI-892
961	1910	Denmark Mexico	CC	T	Martens 3-VII-504

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SMH Index #	Agree- ment Date	Parties	Treaty Type	Subject Type	Source
962	1910	UK Honduras	CC	T	See note ¹
963	1910	Belgium Norway	CC	T	Martens 3-VI-534
964	1910	Costa Rica Italy	Gen'l	G	Lange
965	1910	Austria-Hungary UK	Gen'l	G	Lange
966	1910	Spain Russia	Gen'l	G	Lange
967	1910	Brazil Russia	Gen'l	G	Lange
968	1910	Spain Italy	Gen'l	G	Lange
969	1910	AH Brazil	Gen'l	G	Lange
970	1910	Italy Russia	Gen'l	G	Lange
971	1910	Austria-Hungary Serbia	CC	T	Lange
972	1911	US Nicaragua	Comp	C	S305
973	1911	Italy Sweden	Gen'l	G	Lange
974	1911	Bolivia Italy	Gen'l	G	Lange
975	1911	Bolivia Peru	CC	B	See Note ²
976	1911	Austria Serbia	CC	T	Martens 3-VII-564
977	1911	Germany Sweden	CC	T	Martens 3-VIII-435
978	1911	Austria Bulgaria	CC	T	Martens 3-VIII-523
979	1911	Denmark France	Gen'l	G	Lange
980	1911	Brazil Italy	Gen'l	G	Lange
981	1911	Germany France	CC	T	Lange
982	1911	Germany France	CC	T	Lange
983	1911	Bulgaria Russia	CC	T	Lange
984	1911	Bulgaria Russia	CC	T	Lange
985	1912	Bulgaria Serbia	Comp	B	S305a
986	1912	France Italy	Comp	C	S306
987	1912	France Italy	Comp	C	S307
988	1912	France Italy	Comp	C	S308
989	1912	France Spain	Comp	B	S308a
990	1912	Mexico Salvador	CC	T	Martens 3-VI-456
991	1912	France Spain	CC	T	Martens 3-VII-323
992	1912	Spain Panama	Gen'l	G	Lange
993	1913	France Venezuela	Comp	C	S309
994	1913	Greece Netherlands	Comp	C	S310
995	1913	Columbia Ecuador	Comp	C	S311
996	1913	UK Portugal France, Spain	Comp	C	S312
997	1913	France Haiti	Comp	C	S313
998	1913	Italy Uruguay	Comp	C	S314

¹ Cory, 87-9.

² *Report of the Peru-Bolivia Boundary Commission, 1911-13*. London: Royal Geographic Society, 1918.

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SMH Index #	Agree- ment Date	Parties	Treaty Type	Subject Type	Source
999	1913	France Turkey	Comp	C	S315
1000	1913	Bulgaria Turkey	CC	T	Martens 3-VIII-78
1001	1913	Greece Turkey	CC	T	Martens 3-VIII-93
1002	1913	Bulgaria Greece Rumania, Serbia	CC	T	Lange
1003	1913	Bulgaria Serbia ("Second Balkan War")	Comp	B	See Note ¹
1004	1914	Morocco Netherlands	Comp	C	S316
1005	1914	US UK	Comp	C	AA 6-21
1006	1914	UK Honduras	Comp	C	FO93/47/16
1007	1915	US Haiti	Comp	C	S318
1008	1915	US Panama	Comp	C	S319
1009	1916	Columbia Venezuela	Comp	B	S320
1010	1916	Nicaragua Salvador	Comp	S	See Note ²
1011	1916	Nicaragua Costa Rica	Comp	S	See Note ³
1012	1916	UK Portugal	CC	T	See Note ⁴
1013	1916	Denmark US	CC	T	Malloy 3:2563
1014	1917	Germany Netherlands	Comp	S	S3212
1015	1918	UK France	Comp	T	AA11:563
1016	1918	Netherlands Greece	Comp	C	V 8:118

¹ Reprinted at *American Journal of International Law* 8:Supp. 1 (1914).

² See Hudson, "Central American Court of Justice," 774-7.

³ Ibid.

⁴ Cory, 87-9.

General Notes to the Compilation

1. This list of decisions and agreements to arbitrate was compiled from a variety of sources, principally including arbitration compilations and treatises, and treaty compilations, during the course of my research in 2012-4.
2. Since the focus of my research was on the *decision* to arbitrate, the list includes many agreements to arbitrate which did not result in an actual arbitration proceeding or decision; of these, the many general arbitration agreements are notable.
3. The list covers the period from 1794 through the end of World War I. The Jay Treaty between the U.S. and Britain has been traditionally considered the starting point of modern public international arbitration. While I argue that the post-Napoleonic settlements were far more significant as a starting point, it is true that there appears to be a hiatus in such agreements for most of the 18th Century and that the Jay Treaty ended the drought.
4. The vast majority of entries are taken from published compilations and treatises; a few were discovered in the course of research. In most cases, no attempt was made to verify the citations in the various published sources and given the huge number of instances, most agreements and arbitral records were not consulted or verified.
5. Wherever possible, an agreement that established multiple arbitrations or commissions is listed separately for each such specific issue covered. Thus, for example, there are three entries for the Jay Treaty, corresponding to Articles 5 (St. Croix river boundary), 6 (British commercial and financial claims), and 7 (American commercial and maritime claims). While it is arguable that, from a diplomatic perspective, these issues were settled as a group, in each case a separate decision-making apparatus was established in light of the materially different nature of the claims and allegations at issue and distinctive rationales typically underlay the political decisions to commit each set of issues to an arbitration.
6. Nonetheless, it is important to emphasize that I make no claims either as to the precise count of arbitration instances or the exact definition of such a proceeding. Indeed, a central part of my argument is that arbitrations, mixed commissions and other decision-making methods cannot and should not be precisely demarcated. My goal to provide some shape to the overall phenomenon; not provide definitional precision.
7. At the same time, I have excluded other modes of dispute resolution which I have considered to be essentially diplomatic in nature, whether through “normal” channels, conferences, and advisory and facilitative processes, which usually go under the rubrics of “good offices” or “mediation.” This is because the focus of my project is the political decision to shift an issue to what is or appears to be a decision-making process not fully under the control of the states involved, due to the persons, procedures, or “legal” rules of decision.
8. Abbreviations in the “Treaty Type” column indicate my classification of the arbitration agreement as follows:

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Comp	Compromis, an agreement to handle a specific past disagreement
CC	Compromissory Clause, a provision in a broader treaty which typically mandated arbitration for disputes arising under that treaty
Gen'l	General, a general arbitration agreement which typically mandated arbitration for all issues or a wide range of issues that might arise between the signatories

9. Abbreviations in the "Subject Type" column indicate my classification of the subject matter of the arbitration agreement as follows:

B	Boundary
C	Claims, usually pecuniary and arising out of the commercial or property matters of the national of the claimant
G	General, covering a wide range of issues that might arise between the signatories
M	Management, an agreement which principally set up a mechanism to manage or administer some ongoing matter between the signatories
S	Sovereignty, a dispute as to the allocation of power over a particular polity or area
T	Treaty, issues that might arise as to the interpretation of a treaty

10. The "Sources" column indicates, where applicable, one of the four largest compilations of arbitration agreements (Darby (D), Lange, Manning, or Stuyt (S)) or, where necessary (about ten percent of the cases), one of the less accessible sources. In most cases the principal compilations refer to national or other published treaty collections (more detailed citations are available from the author):

AA	United Nations Office of Legal Affairs. <i>Reports of International Arbitral Awards</i> , 1948-. http://www.un.org/law/riaa/ , accessed 6/19/14.
Aitchison	Aitchison, C.N. <i>A Collection of Treaties, Engagements, and Sanads</i> , Vol. X. Calcutta, 1892.
BFSP	<i>British Foreign and State Papers</i> . London: HMSO, 1841-.
Cory	Cory, Helen M. <i>Compulsory Arbitration of International Disputes</i> . NY: Columbia University Press, 1932.
D	Darby, W. Evans. <i>International Tribunals</i> , 4 th Ed. London: Peace Society, 1904. Agreements are cited by entry number; those from the eighteenth or twentieth century are preceded by an 18- or 20-, respectively.

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- DG Garden, Guillaume Laurent, Comte de. *Histoire generale des traites de paiz et autres transactions principales entre toutes les poissances de L'Europe d'uis la paix de Westphalie*, 15 vols. Paris: Amyot, 1848-87.
- F La Fontaine, Henri. *Pasicrisie Internationale: Histoire documentaire des arbitrages intenationaux*. Paris: 1902.
- FRUS U.S. Department of State. *Foreign Relations of the United States*. Washington: USGPO, 1861-.
- H Comp Hertslet, Lewis, et al., *Complete Collection of the Treaties and Conventions*. London: HMSO, 1841.
- H Afr Hertslet, Edward. *The Map of Africa by Treaty*, London: HMSO, 1894.
- H Eur Hertslet, Edward. *The Map of Europe by Treaty*, 3 vols. London: HMSO, 1875.
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R - *Recueil* (1re édition), 7 vols, Suppléments, 4 vols.
R2 - *Recueil* (2e édition), 8 vols.
NR - *Nouveau recueil*, 16 vols, Nouveaux suppléments, 3 vols.
NRG - *Nouveau recueil general*. 20 vols.
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- Sch Schoell, Friedrich. *Recueil de pieces officielles destinees a detromper les Francios sur les evenemens qui se sont passes depuis quelque annees*, 9 vols. Paris: Libirie grecque-latine-allemande, 1814-6.
- S Stuyt, A.M. *Survey of International Arbitrations*, 3d ed. Hague: Nijhoff, 1939. Cited by entry number.
- V Verzijl, J.H.W. *International Law in Historical Perspective*. Leyden: Sitjhoff, 1968-98. Vol. X.

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Abbreviations used in Notes

BFSP — British Foreign and State Papers

BL — British Library, Additional Manuscripts

CO — Colonial Office (U.K.)

FO — Foreign Office (U.K.)

FRUS — Foreign Relations of the United States

IAC – Inter-American [Pan American] Conference

IDI—Institute de Droit International

ILA- International Law Association

LC — Library of Congress

NARA — U.S. National Archives, College Park, MD

PCA – Permanent Court of Arbitration

PRO – General Records held in The (U.K.) National Archives, Kew

RIAA – Reports of International Arbitration Awards, United Nations

RG 59 — Record Group 59, General Records of the Department of State, NARA

SCPC – Swarthmore College Peace Collection

SMH# -- Appendix, Index number, *supra*

TNA — The (U.K.) National Archives, Kew

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