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PRESENT-DAY RELEVANCE OF THE JAY TREATY ARBITRATIONS

Georg Schwarzenberger*

The Arbitrations under the Jay Treaty of November 19, 1794 are commonly treated as the starting point of present-day international adjudication.

Perhaps in response to written and oral pleadings before the International Court of Justice¹ in the *Interpretation of Peace Treaties* case (1950), Judge Read referred to international arbitration "as it has been developed since the Jay Treaty of 1794." More particularly, he traced from this date the origin of good faith as a factor in the evolution of international adjudication.²

Judge Read's *W. M. Martin Lectures on The Rule of Law on the International Plane*, given at Saskatchewan University in 1960, explain why Judge Read treated the Jay Treaty Arbitrations as the dawn of contemporary international arbitration: "It takes one bold act to transform the unthinkable into the thinkable, and a second or third to make it a normal course. . . . The Jay Treaty . . . was three bold steps in one, sufficient to transfer the unthinkable into the normal. . . . While Grotius was the father of international law, John Jay, who incorporated the arbitral provisions into the Treaty which bears his name, was the legitimate parent of international justice, and is entitled to a place of honour on the march towards the rule of law on the international plane."³

Similarly, in his Presidential Address at the special Commemoration Sitting of the International Court of Justice in 1972, Judge Sir Muhammad Zafrulla Khan praised the Jay Treaty as the "historical landmark from which the trend which was to lead to the establishment of a true international judicial system is usually dated."⁴

I. The Jay Treaty Tradition

Judge Read's and President Sir Muhammad Zafrulla Khan's evaluations of the Jay Treaty and the work of the three Commissions under the Treaty form part of a strong tradition in the Doctrine of International Law dating back to the end of the last century.⁵

A. Contents

This tradition is concerned with the contributions made by the Jay Treaty and the Arbitrations under the Treaty to International Judicial Law, rather than

* Of Gray's Inn, Barrister-at-Law; Director, London Institute of World Affairs; Emeritus Professor of International Law in the University of London.

1 Written Statement by the U.S.A. Government (*Pleadings* at 234) and Oral Statement by Mr. Fitzmaurice at the Court's public sitting of March 2, 1950 (*Pleadings* at 322-23).

2 [1950] I.C.J. REP. 242. See also *id.* at 61 (D.O., Judge Sir Arnold McNair).

3 THE RULE OF LAW 11 (1961).

4 [1970-1971] INTERNATIONAL COURT OF JUSTICE YEARBOOK 130 [hereinafter cited as I. C. J. Y. B.].

5 See Schlochauer, *Die Entwicklung der internationalen Schiedsgerichtsbarkeit*, in 10 ARCHIV DES VOLKERRECHTS 8 n.44, nn.4-7. See also *id.* at 9. This is also the starting point of A. STUYT, SURVEY OF INTERNATIONAL ARBITRATIONS (1972).

the substantive aspects of international law covered by the Awards.⁶

In this view, 1794 is the landmark which neatly divides "*les anciens errements des pratiques modernes*": it was then established that international judicial organs were entitled to vote by majority, determine their own jurisdiction, and settle international disputes on the basis of international law. The year 1794 was the first of the landmarks on mankind's march towards—in Judge Read's words—"the rule of law on the international plane."⁸

Each of these claims will have to be more closely examined: the institutional character of the Jay Treaty Commissions, the degree of integration attained by the Commissions, and their judicial character.

B. Origins

The origins of the tradition can be dated with relative accuracy.

Wheaton's *History of the Law of Nations in Europe and America from the Earliest Times to the Treaty of Washington, 1842* (1845) contained only brief references to provisions in the Jay Treaty on substantive international law.⁹ In Wheaton's *Elements of International Law* (ed. R. H. Dana—1866) and Woolsey's *Introduction to the Study of International Law* (1875) the Jay Treaty was altogether ignored. In Wharton's *Digest of International Law of the United States* (3 vols.—1886) the Jay Treaty and the Commissions were mentioned in only a perfunctory way.¹⁰

Similarly, in the major British works of the period—Phillimore's *Commentaries upon International Law* (4 vols.—1879-89)¹¹ and Lorimer's *Institutes of the Law of Nations* (2 vols.—1883/4),¹² the Jay Treaty but not the Arbitrations received passing notice, and neither was recognized in Travers Twiss, *The Law of Nations* (2 vols.—1875-1884).

The turning point came in 1898. A considerable part of the relevant material was made readily available in J. B. Moore's *History and Digest of the International Arbitrations to which the United States has been a Party*, published in six volumes by the United States Government Printing Office.¹³ Moreover,

6 On the various aspects of substantive international law considered in the Jay Treaty Arbitrations, see I G. SCHWARZENBERGER, *INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 641 *et seq.* (1957), and vol. II at 31, 564, 577-78, 596, 620, 646-47, (1968).

7 LaPradelle-Politis, *The bad old ways from modern practices* 1 RECUEIL DES ARBITRATIONS INTERNATIONALES xxix (rev. ed. 1932). See also C. E. HILL, *LEADING AMERICAN TREATIES* 365 (1922); P. CORBETT, *LAW IN DIPLOMACY* 139 *et seq.* (1959) Lillich, *The Jay Treaty Commissions*, 37 ST. JOHN'S L. R. 260 (1963).

8 See note 3 *supra*.

9 *Id.* at 379, 388.

10 Paras. 150a, 221, 316.

11 Vol. III (1885) at 345.

12 Vol. II at 556. The Jay Treaty and Arbitrations are not mentioned at all in H. MAINE, *INTERNATIONAL LAW* (2d ed. 1915); A. RIVIER, *LEHRBUCH DES VOELKERRECHTS* (1889); and F. VON MARTENS, *VOELKERRECHT* (German trans. from Russian, 1883-86).

13 Hereinafter cited as MOORE, *INTERNATIONAL ARBITRATIONS*. See also the subsequent edition of MOORE, *INTERNATIONAL ADJUDICATIONS, ANCIENT AND MODERN* (Modern Series), 6 vols. (1929-33) [hereinafter cited as MOORE, *INTERNATIONAL ADJUDICATIONS*].

soon after, in *Recueil des Arbitrages Internationales* (1905), de LaPradelle and Politis published lengthy extracts in French from Moore with elaborate comments of their own. They claimed considerably more for the Jay Treaty and Arbitrations than Moore had. What, to Moore, was an obvious starting point because the Jay Treaty Arbitrations were the first international arbitrations in which his country was involved, became to de LaPradelle and Politis the commencement of a new epoch.¹⁴ A reformist movement of growing impetus, and composed of many strands, had found a plausible pedigree for its evolutionary ideology. John Jay's use, with full British support, of the device of arbitration was upgraded to a deed of "world historic merit."¹⁵

II. The Institutional Character of the *Jay Treaty* Commissions

Two aspects of the Jay Treaty Commissions determine their institutional character: their constitution as organic units and the intended, and actual, freedom of their members from governmental instructions.

A. *Organic Character*

In relation to the Commissions under Articles VI (pre-peace claims of British subjects against United States citizens and inhabitants) and VII (illegal seizures of United States ships and property during the then pending war of France against Great Britain and her Continental Allies) of the Jay Treaty, it is expressly stated that three of the Commissioners shall constitute a "board, and shall have power to do any act appertaining to the said Commission." The only proviso is that one of the Commissioners named by each Contracting Party (original Commissioners) and the fifth Commissioner (chosen by the original Commissioners or by lot) should be present.¹⁶

Article V (identity of the River St. Croix) does not contain any corresponding provision. The reason is that the Commission under this Article consisted of only three Commissioners, and they together were charged with drawing up and signing a joint declaration which was to embody their findings.¹⁷ Thus, the Contracting Parties had expressed in different form their common intent that, once the two original Commissioners had chosen the third Commissioner, the Commission should function with its full complement of all three Commissioners.

B. *Freedom from Instructions*

Articles V-VII of the Jay Treaty do not contain any express reference to

¹⁴ See text accompanying note 7 *supra*.

¹⁵ H. LAMMASCH, *DIE LEHRE VON DER SCHIEDSGERICHTSBARKEIT IN IHREM GANZEN UMFANG* 30 (1914).

¹⁶ MARTENS, *RECUEIL I* 350, 354 (Supp. 1800) and H. MILLER *TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA* 245 (1931). For the reasons why there is no signed original of the Treaty in the United States Department of State, see MILLER at 267.

¹⁷ See 6 MARTENS, *supra* note 16, at 346.

freedom of the Commissioners from instructions. Yet, in at least three spheres, it would have been contrary to the common intent of the Parties to issue instructions to their original commissioners, not to speak of those selected—without this being stated in so many words—as umpires:

1. Instructions in Bad Faith

The Treaty was to be executed and observed with “punctuality and the most sincere regard to good faith.”¹⁸ To instruct any of the Commissioners to withdraw from the Commission so as to make it inoperative (or not to replace Commissioners who, on their own initiative, acted in bad faith) would have been incompatible with the *jus æquum* nexus of the Treaty.¹⁹

To allow the original United States Commissioners to withdraw from Commission VI without instructing them to resume their duties, and if they refused, to replace them, could be considered—as Great Britain so characterized it—as a breach of the Treaty by the United States. This, in turn, entitled the British Government, at least in its own view of the matter, to withdraw by way of reprisal its own original Commissioners from Commission VII.²⁰ In the end, the matter was cleared up by inter-governmental negotiation and the conclusion of a further Convention on January 8, 1802. Accordingly, the United States made an agreed lump sum payment regarding the British claims under Article VI, and the Commission under Article VI was wound up. After two and a half years’ interruption of the work of the Commission under Article VII, the British Government asked the British members to resume their duties²¹ and, in 1804, the Commission completed its work.

2. Instructions Conflicting with the Oaths and Declarations Prescribed in the Treaty for the Commissioners

The Commissioners under Article V had to swear to examine and decide “impartially” the matters entrusted to them on the basis of the evidence laid before the Commission.²² More elaborately, the Commissioners under Article VI were to swear or affirm that they would “honestly, diligently, impartially and carefully” examine all claims before them.²³ Similarly, the Commissioners under Article VII were to decide the cases submitted to them according to their merits.²⁴

3. Instructions Incompatible with the Rules Prescribed in the Treaty for the Settlement of Disputes

The character of these rules will be examined in a subsequent Section.²⁵

18 6 MARTENS, *supra* note 16, at 384.

19 See also I-III SCHWARZENBERGER, *supra* note 6, at index under *Jus æquum*.

20 MOORE, INTERNATIONAL ARBITRATIONS 337-38.

21 *Id.* at 339.

22 6 MARTENS, *supra* note 16, at 346.

23 *Id.* at 350.

24 *Id.* at 354.

25 See Section 5 *infra*.

Yet, irrespective of this, to interfere with the Commissioners' right and duty to apply the rules prescribed by the Treaty would have constituted a breach of treaty no less than instructions incompatible with the oaths or declarations of the Commissioners.

With the exception of the retaliatory instructions issued by the British Government to the British members of the Commission under Article VII, the instructions known to have been issued to members of the Commissions all served the purpose of implementing the common intent of the Parties to "terminate their differences"²⁶ and to facilitate the Commissions' work.

III. The Degree of Integration Attained by the *Jay Treaty* Commissions

To measure the degree of integration or institutional cohesion attained by the Jay Treaty Commissions, two tests appear to be helpful: the voting rules provided²⁷ and the Commissions' attitudes to self-determination of their own jurisdiction.

A. *Voting Rules*

It is advisable to distinguish between the measures to be taken by the original members, nominated by each Party for purposes of completing each of the three Commissions by selecting the third Commissioner (under Article V) and the fifth Commissioner (under Articles VI and VII), and subsequent decisions to be made by any of the completed Commissions.

Under Article V of the Jay Treaty, each Party was to name a Commissioner, and the two Commissioners named were to agree on the choice of a third. If they failed to do so, each was to propose one name, and one of these was to be drawn by lot in their presence.²⁸

Under Articles VI and VII of the Treaty, two Commissioners were to be appointed by each side, and the fifth by the "unanimous voice" of the other four. In case of disagreement, the fifth Commissioner was to be drawn by lot in a procedure adapted from Article V.²⁹

Voting rules for the completed Commissions under Articles VI and VII were expressly prescribed by the Treaty. A board of three members, consisting of one of the original Commissioners on each side and the fifth member, was entitled to make any decision by majority vote.³⁰

In contrast, Article V remained silent on voting rules. From this it could be inferred that, because the final Declaration on the identity of the River St. Croix was to be under the hands and seals of all three Commissioners, they were intended to reach a unanimous conclusion. This was the view taken by the United States Attorney General. He was, however, overruled by the Secretary

26 Preamble to the Jay Treaty, *reprinted in* 6 MARTENS, *supra* note 16 at 338.

27 *See also* 3 SCHWARZENBERGER, *supra* note 6, at 475.

28 6 MARTENS, *supra* note 16, at 346.

29 *Id.* at 348, 354.

30 *Id.* at 350, 354.

of State, after consultations with the Secretaries of the Treasury and War.³¹

The British Foreign Secretary took a view similar to that of the United States Secretary of State. Provided that the decision was reached in the presence of all three Commissioners—an analogy from the voting rules under Articles VI and VII of the Treaty—the Commission was empowered to decide, if necessary, by majority vote.³²

In view of formal discrepancies in the wording of the commissions issued to the original commissioners by their governments—only that of the British Commissioner contained an express authorization to accept majority decisions—the matter was clarified on the diplomatic level. Yet, no occasion arose when the Commission of any majority of it asserted its rights to majority voting against one or both Contracting Parties.³³ The most that could be said would be that the subsequent diplomatic exchanges between the Parties amounted to an authoritative interpretation of Article V of the Jay Treaty by both Parties.

B. *Self-Determination of Jurisdiction*

The Commission under Article V of the Jay Treaty was charged with the task of establishing which river was intended to be the River mentioned in the Peace Treaty of September 3, 1783 under the name of St. Croix and forming part of the British-United States boundary in North America. The issue was to be decided according to the evidence to be laid before the Commission by the Contracting Parties. Thus, everything was so straightforward as to raise little doubt on the scope of the Commission's jurisdiction.

In Article VI of the Treaty, the claims by British subjects against United States citizens and inhabitants within the Commission's jurisdiction—or, as it was put in the Article, "appertaining to" the Commission—had been carefully defined. Nevertheless, disagreement on the scope of the Commission's jurisdiction arose between the three British Commissioners—the two original members and the third, also British and drawn by lot—and the two United States Commissioners. While the British members desired to settle the issues of jurisdiction by majority vote, the United States members claimed the right in cases which they considered to be outside the Commission's jurisdiction to withdraw from the Commission. They did so and, thus, brought the Commission's work to a standstill.³⁴

Although Article VII on illegal seizures and captures of United States ships by Great Britain had also been drafted with great care, the same issue arose but with roles reversed. The three United States Commissioners—the two original Commissioners and the fifth chosen by lot—asserted the Commission's right to

31 1 OP. ATT'Y GEN. 66 (1976); I MOORE, INTERNATIONAL ARBITRATIONS at 752. See also D. R. DEENER, THE UNITED STATES ATTORNEY GENERAL AND INTERNATIONAL LAW 337-38 (1957).

32 I MOORE, INTERNATIONAL ARBITRATIONS at 10-11. Lord Grenville's (undated) *Project of Heads of Proposals and Jay's Draft of the Treaty* (September 30, 1974) does not throw any further light on the question. See S. BEMIS, JAY'S TREATY 279, 292-93 (1924).

33 I MOORE, INTERNATIONAL ARBITRATIONS, at 10, 751-52 n.1.

34 *Id.* at 290; 3 MOORE, INTERNATIONAL ARBITRATIONS at 2277. See also text accompanying note 20 *supra*; Sir Gerald Fitzmaurice, *International Court of Justice* 1951-54, 34 BRIT. Y. B. INT'L 26-28 (1958).

determine its own jurisdiction, and the two British Commissioners disagreed.³⁵

The way in which the Contracting Parties resolved the deadlock has already been described. It only needs adding that on the British side, Lord Grenville, the Foreign Secretary, and Lord Loughborough, the Lord Chancellor, showed little patience with the scruples of the British Commissioners over the Commission's right to determine its own jurisdiction. Lord Grenville instructed the British Commissioners to decide "every question that should be brought before them according to the conviction of their consciences."³⁶ With this guidance, the consciences of the British Commissioners operated wonderfully, and with predictable results.³⁷

IV. The Judicial Character of the *Jay Treaty* Commissions

Six tests will help in determining the judicial character of the Jay Treaty Commissions: the professional qualifications of their members; the degree of autonomy granted to, and exercised by, the Commissions; the rules applied by the Commissions; the technical standards of their awards; their legal effects and; finally, the overall structure of the Commissions.

A. *Professional Qualifications*

The three Commissions consisted chiefly of lawyers with a wide cultural background. Some of them could even claim professional distinction and notable public records in their own countries.

Thus, Thomas Barclay of Annapolis, Nova Scotia, the British member of the Commission under Article V of the Jay Treaty, had been a volunteer and colonel in the British forces during the American Revolution, a former student of John Jay and practitioner of law. David Howell, the United States member, was a graduate of Princeton, a former Attorney General of Rhode Island and member of the State Supreme Court of Rhode Island, and had held Chairs of Mathematics and Natural Philosophy, and of Law at Brown University at Providence. The elected member, Egbert Benson, also a United States citizen and the choice of both the original Commissioners, was a relation of Barclay and had been brought up in Barclay's family. Barclay attested to him that he was a "gentleman of undoubted ability and integrity" and hoped that he would make a "cool, sensible and dispassionate third Commissioner."³⁸

The Commission was assisted by qualified agents on both sides and provided with technical assistance from surveyors and astronomers.³⁹

35 I MOORE, *INTERNATIONAL ARBITRATIONS*, *supra* note 13, at 324; 3 MOORE, *INTERNATIONAL ARBITRATIONS*, *supra* note 13, at 2277.

36 I MOORE, *INTERNATIONAL ARBITRATIONS*, *supra* note 13, at 327-28.

37 While the United States lump sum payment to Great Britain for British claims before the dissolved Commission under Article VI of the Jay Treaty, agreed on in the Convention of January 8, 1802, amounted to U.S. Dollars 2,664,000 (I MOORE, *INTERNATIONAL ARBITRATIONS*, *supra* note 13, at 298), that paid for United States claims settled by the Commission under Article VII amount to U.S. Dollars 11,650,000. *Id.* at 343-44. *See also* S. BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES* 110 (1936).

38 I MOORE, *INTERNATIONAL ARBITRATIONS*, *supra* note 13, at 6-14.

39 *Id.* at 8.

The most distinguished member of the Commission under Article VI of the Treaty was one of the United States Commissioners: Colonel James, a personal friend of President Washington and former Attorney General of Virginia. On his death in 1798, he was replaced by Samuel Sitgreaves, another well-known lawyer and public figure.⁴⁰ In the opinion of the then United States Secretary of State, Thomas Macdonald, one of the original British Commissioners so much dominated the other two British Commissioners—Henry Pye Rich and John Guillemand, the fifth member chosen by lot—that he virtually had three votes at his disposal. The United States Secretary of State also noted with disapproval that, as he had been informed, the fifth Commissioner behaved in the Commission with less aloofness from the government-appointed Commissioners than might have been expected from an “umpire”: “He had entered into the private deliberations of the two British Commissioners and come to the board with all the decisive prepossessions which such private, partial consultations were calculated to produce.”⁴¹

The Commission under Article VII of the Treaty had as one of its two original members on the British side John Nicholl, a specialist in Admiralty Law (when he accepted the post of King’s Advocate before the High Court of Admiralty, he was replaced by another civilian) and two eminent United States lawyers, Christopher Gore and William Pinkney. The most colorful member of the Commission was Colonel Trumbull, a United States citizen who had been drawn by lot as the fifth Commissioner. He had been Jay’s Secretary in the negotiations on the 1794 Treaty and, subsequently, was primarily remembered as a painter of historical pictures.⁴²

Compared with the professional qualifications of members of subsequent mixed commissions and other tribunals, those of the remaining members of the Jay Treaty Commissions were perhaps less orthodox but hardly inferior.

B. *Autonomy*

The standards laid down for the Commissioners in their oaths or declarations offered some indirect protection to the Commissioners against unwarranted interference with their autonomy by either of the Parties.

As implied in Articles V-VII of the Jay Treaty, each of the Parties replaced unilaterally one of its Commissioners, the United States because of the death of one of its original Commissioners, and Great Britain because of a Commissioner’s appointment to governmental office. The United States did not take any objection to the withdrawal and replacement of this British Commissioner from the Commission under Article VII. It probably considered it as understood that each Party was free to replace, for any reason, any of its original Commissioners.

It is questionable whether, without concurrence of the other Party, with-

40 *Id.* at 398.

41 *Id.* at 295.

42 Including a portrait of John Jay in City Hall, New York. On the attempts made by the original commissioners to reduce the disadvantages arising from choosing the fifth commissioner by way of lottery, see I MOORE, *INTERNATIONAL ARBITRATIONS*, *supra* note 13, at 320. See also J. TRUMBULL, *REMINISCENCES OF HIS TIME* (1841).

drawals due to acts of one of the Parties—as, for instance, the offer of another post—are compatible with the *jus aequum* character of clauses such as Articles V-VII of the Jay Treaty.

It is arguable that, in the case of commissions such as those under Articles VI and VII of the Jay Treaty in which one of the original members from each side and the fifth member remain available,⁴³ fewer objections arise than in the case of a commission such as that under Article V when, in accordance with the governing treaty, each member is indispensable for the proper functioning of a commission.

In all cases, difficulties arising in a *jus aequum* nexus can be decided, in the last resort, only in the light of all the circumstances of the individual case. Thus, the substitution of one nominated commissioner by another may, or may not, be compatible with the obligations of a contracting party. If acts of sharp practice were thought to be compatible with the obligations of contracting parties, the door would be opened wide for acts which, without involving bad faith, might fall just short of clearly illegal behavior. Yet, such action might lead to, for instance, unnecessary delays if an experienced commissioner were appointed to a post which would dictate his resignation from the commission.

The workload of the Commission under Article VII of the Jay Treaty illustrates the problems that might have been caused by unnecessary substitutions. When, after three years of the Commission's work, its proceedings were suspended, over four hundred claims were pending before it.⁴⁴ In commissions of this type, the swift disposal of the bulk of cases depends on the preliminary classification of all cases under prototypes, considered in detail by the commissioners. Continuity is preserved either by identity of membership or acceptance by successors of the judicial policies laid down by their predecessors.

In the political environment of the Jay Treaty Arbitrations, nothing was further from the minds of the two Governments than to interfere with the autonomy of any of the Commissions. With the exception of the retaliatory withdrawal of the British Commissioners from the Commission under Article VII, both Governments issued instructions only on rare occasions. Even so, this only happened when some of their own Commissioners took up positions which their governments considered to be too extreme representations of supposed or actual national interests of their countries, and the governments were concerned that their own Commissioners might jeopardize overriding common or parallel interests.

C. Rules Applied

The Jay Treaty was reasonably explicit in the formulation of the rules which each of the three Commissions was to apply.

In the case of the Commission under Article V of the Treaty, establishment of the "truly intended" identity of the River St. Croix necessarily involved in-

⁴³ For a short period, the Commission under Article VII had to operate in such conditions. I MOORE, *INTERNATIONAL ARBITRATIONS*, *supra* note 13, at 320.

⁴⁴ *Id.* at 342.

terpretation of the Peace Treaty of September 3, 1783 between the Parties. The Commissioners were charged to base their identification of the River on the evidence laid by the Parties before the Commission. Thus, the extent to which the Commission had to apply international law was negligible. Its major task was to apply common sense and find an accommodation between the Parties which did justice to the double *jus aequum* nexus created by the 1783 and 1794 Treaties.⁴⁵

Similarly, the claims before the Commission under Article VI of the Treaty had only an indirect connection with international law. They related to private debts to British nationals, incurred by United States citizens and inhabitants prior to the 1783 Peace Treaty, and, in principle, were subject to municipal law. International law was relevant only in setting limits under Article VI of the Treaty to the application of this municipal law and providing overriding criteria of "justice and equity."⁴⁶

It was only the Commission under Article VII of the Treaty which was concerned with issues arising directly from international law: allegedly illegal seizures and captures, prior to the ratification of the Jay Treaty, of United States ships and property by Great Britain in the war then being waged by Great Britain and her Continental allies against revolutionary France. These cases were to be decided in accordance with "justice, equity, and the law of nations."⁴⁷

In all cases, the primary emphasis was on the express provisions of the Treaty, and the equity elements introduced by the Treaty served to ease the task of making final settlements of the disputes submitted to the Commissions. By and large, the rules of decision provided strengthen the case in favor of the Commissions' judicial character.

D. *Quality of the Awards*

The quality of the awards rendered by the Commissions under Articles V and VII of the Jay Treaty is impressive. As the Commission under Article VI was dissolved before it could deal with the bulk of the cases before it, its professional standards can be assessed best by the quality of the terms in which majority and minority members expressed their disagreements.⁴⁸ These maneuvers can vie with the most sophisticated of lawyers' stalling techniques.

To do justice to the joint Declaration made by the three Commissioners under Article V, it is necessary to supplement study of the text of the Declaration by that of the Report,⁴⁹ submitted to the President of the United States by Egbert Benson, the United States member selected by agreement between the original Commissioners. It then emerges that the Declaration was as sensible an

45 For the 1783 Peace Treaty, see II MARTENS, *supra* note 16, at 497; HILL, *supra* note 7, at 22. On the unavoidable element of compromise in the judicial settlement of border disputes, see II MOORE, INTERNATIONAL ADJUDICATIONS, *supra* note 13, at 367-68.

46 II MARTENS, *supra* note 15, at 350. On Jay's explanatory letter to his Government on these equity clauses, see I MOORE, INTERNATIONAL ARBITRATIONS, *supra* note 13, at 275. See also BEMIS, *supra* note 32, at 315 *et seq.*

47 II MARTENS, *supra* note 16, at 354.

48 I MOORE, INTERNATIONAL ARBITRATIONS, *supra* note 13, at 280. See also Lillich, *supra* note 7, at 272-74.

49 I MOORE, INTERNATIONAL ARBITRATIONS, *supra* note 13, at 33.

accommodation as, with scanty evidence and in trying physical conditions imposed by the largely unexplored character of part of the area in dispute, could be expected from any frontiers commission.

It was the work of the Commission under Article VII of the Jay Treaty which produced the Commissions' most remarkable contributions to substantive international law on major issues such as necessity⁵⁰ and maritime neutrality.⁵¹ Similarly, the Opinions filed in the cases of *The Betsey* and *Sally* (1798) by the United States Commissioners Gore and Pinkney on the Commission's right to determine its own jurisdiction and deal with cases pending in British prize courts⁵² have provided leading cases on these central issues of International Judicial Law.

Moreover, the unchallenged reliance of both Commissioners on natural-law arguments and the authority of Grotius, Sir Leoline Jenkins, Pufendorf and Vattel illustrate how, on a basis of tacit consent, ethical postulates can be transformed legitimately into experimentally applied rules of international *ius aequum*.

These Opinions have stood the test of time. They are what Wheaton praised when speaking of the work of one of the United States Commissioners as "finished models of judicial eloquence, uniting powerful and comprehensive argument with a copious, pure and energetic diction,"⁵³ a judgment with which John Bassett Moore associated himself.⁵⁴

E. Legal Effects of the Awards

In relation to each of the three Commissions, the Parties to the Jay Treaty made it clear that they intended the awards of these Commissions to be final and binding decisions on the underlying disputes.

In the words of Article V of the Treaty, "both Parties agree to consider such decision as final and conclusive, so that the same shall never thereafter be called into question, or made the subject of dispute or difference between them."⁵⁵

Like the professional standards attained in the awards, the legal effects contemplated by the Parties are characteristic of those normally associated with arbitration. They further strengthen the case for the classification of the Commissions under the Jay Treaty as judicial international institutions.

50 See I SCHWARZENBERGER, *supra* note 6, at 641.

51 See II SCHWARZENBERGER, *supra* note 6, at XXXI-XXXII, for a Table of Cases under Jay Treaty Arbitrations.

52 III MOORE, INTERNATIONAL ARBITRATIONS, *supra* note 13, at 2278, 2305.

53 C. PINKNEY, LIFE OF PINKNEY 26 (1895). See also S. BEMIS, PINKNEY'S TREATY: A STUDY OF AMERICA'S ADVANTAGE FROM EUROPE'S DISTRESS, 1783-1800 (1960).

It would be mistaken to underestimate the quality of Commissioner Trumbull's Opinions. See, e.g., IV MOORE INTERNATIONAL ARBITRATIONS, *supra* note 13, at 3993, 4001.

For the reasons why Jay has chosen Trumbull as Secretary of the United States Mission for the negotiation of the 1794 Treaty, see F. MONAGHAN, JOHN JAY 369 (1935).

54 I MOORE, INTERNATIONAL ARBITRATIONS, *supra* note 13, at 319-20.

55 MARTENS, *supra* note 16, at 346. See also Arts. V and VII reprinted in MARTENS at 352, 354.

F. Structure

Given contracting parties who, as happened in the case of the Jay Treaty Arbitrations, put observance of their commitments above everything else, the structure of international judicial organs appears to affect less than may be expected the attainment of the parties' overriding object: final disposal of the disputes entrusted to the international organs concerned. Yet, even in such optimal conditions, their structure can enhance or detract from the judicial character of such organs.

If a bipartite organ consists of an equal number of representatives, without express provision for the election or co-option of one or more additional members but with guidance on the rules to be applied similar to that given in the Jay Treaty, it may have every intention of complying with the directions of the contracting parties. Yet, they may find that, on other than clear-cut issues (and, on the facts or the applicable rules of law and equity, not many issues are in this category), the members of such a bipartite organ will find it difficult to reach agreement. If, as with members comparable to those of the Jay Treaty Commissions, they have a common background of civilization, moral values, and approaches to law, their disagreements may be of a purely personal character. Yet, this may be an illusion, or the members may hide from others, if not themselves, divisive considerations of a metalegal character. Undisclosed major premises, especially views on actual or imagined national interests or other ideological commitments may guide the choice of undisclosed major premises and, consequently, of applicable legal rules or equitable preferences.

On the hypothesis made of an equal number of members, every majority decision would depend on at least one member chosen by one side being persuaded of the better case of the other side. It may be that the member who tilts the balance makes his decision on grounds he professes and, in the history of international judicial institutions, this has happened.⁵⁶ Yet, the disagreement on major issues in the Jay Treaty Arbitrations—voting rules and self-determination of jurisdiction—hardly recommends such an assumption as a general hypothesis.

The explanation which appears most consistent with the attitudes actually adopted by the members of the Commissions under Articles VI and VII of the Jay Treaty is that their legal preferences on each of two major issues of International Judicial Law were determined by their conscious or subconscious views on the national interests of their own countries.

In the cases of the Commissions under Articles VI and VII of the Jay Treaty, the attitudes of the original Commissioners were hardened by the knowledge that, with fifth Commissioners of their own nationality, they were defending majority positions. Neither the majority in the Commission under Article VI (the British Commissioners) nor that in the Commission under Article VII (the United States Commissioners) was prepared to jeopardize these advantages without governmental instruction.

⁵⁶ See, e.g., BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 281 (1953).

If an even number of members had been left to their own devices, they would have had to confess failure or, whatever rules might have been prescribed in the governing treaty, the actual settlement would have involved an element of compromise sufficient to carry all or a majority of the commissioners. It is reasonably clear that this was what happened before all three Commissioners under Article V of the Jay Treaty signed and sealed their joint Declaration as bidden by the Treaty.

If, as under Articles VI and VII of the Jay Treaty, the original Commissioners are to elect the fifth member, and they limit their choice to candidates of their own nationalities—as they did, without being obliged to do so by the Treaty—they have taken a decisive step towards pre-empting decision of the adjective and substantive issues yet to be considered by their fully established commissions. Making every allowance for the honorable intentions of all concerned, such scepticism is confirmed by the evidence of how, subsequently, with reversed roles, the majorities of both Commissions under Articles VI and VII of the Jay Treaty dealt with the issue of self-determination of their jurisdiction.

Even if the Commissioners under the Jay Treaty had been unaware of the implications of their actions—and the more they acted in a spirit of complete oblivion to these metalegal factors, the more convincingly they would have fulfilled their appointed functions—their governments had anticipated the contingency of ties between an even number of commissioners. This is why they had provided that if the Commissioners should fail to agree on the fifth members in the Commissions under Articles VI and VII of the Treaty, these should be chosen by lot.

The Parties could hardly have indicated more clearly that choice by lottery was the lesser evil compared with the overriding object of settling these disputes and maintaining peace between the two States in the midst of a major war. As it happened, at least as far as the honors and appearances, if not the balance of actual payments, were concerned, “Goddess Fortuna” distributed the odds equally in presenting one umpire to each of the Parties.

As previously explained, contracting parties have considerable discretion in replacing nominated members of mixed commissions. If to such situations others are added in which the parties are entitled to withdraw commissioners by way of reprisal or issue instructions to their commissioners, or commissioners consider themselves entitled to advise their governments—as did the United States Commissioners in the Commission under Article VII of the Jay Treaty on the most effective way in which claims should be submitted⁵⁷—such action, proper as it may be, cannot help but detract from the independence or self-isolation from extraneous quarters which, on principle, is desirable even for part-time and *ad hoc* judicial officers.

In individual cases, it may be true that members of mixed commissions may consider themselves international judges as Commissioner Gore stated in his individual Opinion in the *Betsey* case, filed during the suspension of the Commission under Article VII of the Jay Treaty. He declared his sense of “equal obligations of duty to both nations: Although I am a citizen of but one,

57 I MOORE, INTERNATIONAL ARBITRATIONS, *supra* note 13, at 329.

I am constituted a Judge for both. Each nation has the same, and no greater, right to demand of me fidelity and diligence in the examination, exactness and justice of the Decision."⁵⁸

The structural shortcomings of commissions of the Jay Treaty type counsel caution regarding the classification without qualifications of these commissions as international judicial institutions. Yet, in the case of the Jay Treaty Arbitrations, the willingness of the Contracting Parties to assist in overcoming any difficulties that arose and the standards maintained by the Commissioners themselves appear to carry greater weight.

It may well be that then, or subsequently, the constructive attitude shown by the Parties in the Jay Treaty Arbitrations was atypical. Yet, whenever good faith is in short supply, even more sophisticated institutional guarantees of judicial immunity and self-isolation of the judicial element can offer but limited protection against pressures from outside and self-coordination inside international judicial institutions.

V. The Post-1898 Tradition Re-examined

In the post-1898 tradition in the Doctrine of international law, outlined in the previous Section,⁵⁹ the Jay Treaty Arbitrations established the right—and duty—of international judicial institutions to make decisions by majority vote, determine their own jurisdiction, and settle disputes submitted to them on the basis of international law. To avoid being misleading, however, each of these apparently simple propositions requires qualification.

A. Voting

It remains a moot point whether the Contracting Parties ever intended the Commission under Article V of the Jay Treaty to make decisions by majority vote. As the Commission was able, if with difficulties, to reach a unanimous decision, it appears impossible to reach any firm conclusion either way.

Insofar as the Commissions under Articles VI and VII of the Treaty are concerned, the limited forms of majority voting applied rested on express treaty authorization. Thus, it would require considerable subsequent evidence to establish, in the absence of express treaty provisions to the contrary, a presumption in favor of majority voting in international judicial institutions.⁶⁰

B. Self-Determination of Jurisdiction

All the Jay Treaty Arbitrations settled on this point was that—in the one case British and, in the other, American—majorities in each of the Commissions

⁵⁸ *Id.* at 2288, vol. III.

⁵⁹ *Id.* at Section I.

⁶⁰ For some time, it has probably been possible to presume that the relevant provisions of Hague Conventions I of 1899 and 1907 (Articles 51 and 78, *reprinted in* J. SCOTT, *THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907*, at 73 (1915)) and Articles 55 (1) of the Statutes of the Permanent Court of International Justice and the International Court of Justice which represented the typical intentions of parties to international adjudications.

under Articles VI and VII asserted, and the minorities disputed, the right of their Commission to determine its own jurisdiction.

As Sir Gerald Fitzmaurice pointed out,⁶¹ the rule of self-determination of jurisdiction can be challenged on two grounds: its incompatibility with the *Nemo iudex in sua causa* maxim and with the principle of consent as the basis of the jurisdiction of international judicial institutions.

In view of the limited and purely consensual reception of the *Nemo iudex* maxim into international law,⁶² the first doubt reduces itself to a matter of interpreting the overriding intention of contracting parties. Similarly, in the absence of express provision to the contrary, it would require a generally accepted practice of assertion by judicial international institutions of the power to determine their own jurisdiction before the grant of such authority could be considered as having been implied by contracting parties.⁶³

All that can be stated on this matter in relation to the Jay Treaty Arbitrations themselves is that, in very special circumstances, two particular contracting parties preferred the one surviving Commission (under Article VII) not to refer the issues before them back to their constituent governments, but to settle the disputes submitted to the Commission. In the case of the Commission under Article VI, as a result of the discord between the Commissioners on the issue of self-determination of jurisdiction, the two Governments found it simpler than reconvening the Commission to settle the issues before the suspended Commission by diplomatic negotiation and treaty.

C. *The Rules Applied by the Commissions*

On the rules applied by the three Commissions, it will suffice to summarize here the results of the examination made in the preceding Section:

(1) In a formal sense, all three Commissions under the Jay Treaty applied international law; for they had to interpret the Articles of the Treaty under which they were operating.

(2) In the cases of the Commissions under Articles V and VI, the application of international law was merely nominal.

(3) In that of the Commission under Article VII, the work involved the formulation and application of important rules of the law of maritime neutrality.

(4) Equitable considerations influenced in different ways the findings of each of the three Commissions:

(a) The Commission under Article V applied equity in the sense that it had to determine the disputed frontier under investigation in a spirit of accommodation and common sense.

(b) The Commission under Article VI was expressly authorized to apply considerations of justice and equity so as to override incompatible rules of otherwise applicable municipal law.

⁶¹ Fitzmaurice, *supra* note 34, at 26-28.

⁶² See also III SCHWARZENBERGER, *supra* note 6, at 64.

⁶³ See text accompanying note 60 *supra*, for a similar position. See also Article 43 of Hague Convention I of 1899 and Article 73 of Hague Convention I of 1907, reprinted in SCOTT, *supra* note 60, at 72, and Article 36 (6), Statutes P.C.I.J. and I.C.J.

- (c) The Commission under Article VII employed the ambiguous juxtaposition of equity and law of nations in Article VII so as to infuse reasonable doses of *jus aequum* into the rules of international law it chose to apply.

VI. Present-Day Relevance of the *Jay Treaty* Arbitrations

The present-day significance of the *Jay Treaty* Arbitrations will be discussed under five heads: a new beginning, limitations of the arbitration clauses, the overriding common interest, loopholes, and unstated major premises.

A. *A New Beginning?*

The initiative in proposing commissions for the settlement of the issues covered in the end by Articles V-VII of the *Jay Treaty* came from John Jay, but Lord Grenville also took an active part in this work, especially in drafting Article VII.⁶⁴ The reasons for Jay's initiative were mixed but he received a sympathetic response in London. The primary reason for Jay's proposal was the formidable list of unsolved controversies between the two countries.⁶⁵ There was a common desire on the part of both nations to reach a settlement of, at least, the most inflammable issues without undue delay.⁶⁶ The second was to disembarass the two Governments of the thorny questions involved and to leave their settlement to the "law," because of the hostility of public opinion to the *Treaty* in the United States.⁶⁷

It is not necessary to search far for how Jay rediscovered the "egg" of Columbus. From the authorities quoted by the United States Commissioners in the *Jay Treaty* Arbitrations,⁶⁸ it is evident that United States lawyers concerned with international law, like their British counterparts—from the same sources

64 Compare Jay's draft of September 30, 1794, with the final version in the convenient presentation by BEMIS, *supra* note 32, at 292. See also I MOORE, *INTERNATIONAL ARBITRATIONS*, *supra* note 13, at 5, 309.

On the relevance of Jay's earlier studies of international law, his experience as Chief Clerk to the Royal Commission for determining the disputed boundaries between New York and New Jersey (1769-1776), and the proposals of 1782 and those contained in his Report of April 21, 1785, to Congress for a mixed commission to settle the eastern frontier with Great Britain, see THE AMERICAN SECRETARIES OF STATE AND THEIR DIPLOMACY 194-95, 203-05, 283 (S. Bemis ed. 1927) and MONAGHAN, *supra* note 53, at 41, 205, 271.

While Articles V-VII of the 1794 *Treaty* are Jay's original contribution, the preliminary negotiations had been conducted largely by Alexander Hamilton and George Hammond, the British minister to the United States. See BEMIS, *supra* note 53, at 283.

J. Newcomb, *New Light on Jay's Treaty*, 28 A.J.I.L. 685 (1934), is chiefly concerned with relevant British Orders in Council on the seizure of contraband, but not with the issues covered in this paper.

65 See the list in II F. WHARTON, *A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES* 161-62 (1886); and V. MOORE, *A DIGEST OF INTERNATIONAL LAW* 704-05 (1906) [hereinafter cited as MOORE, *DIGEST OF INTERNATIONAL LAW*].

66 Thus, it was agreed in Article XXVIII of the *Jay Treaty* that "other Articles be proposed and added to this *Treaty*, which Articles, from want of time and other circumstances, cannot now be perfected." See MILLER, *supra* note 16, at 384.

67 See, e.g., J. Clapham in I Sir A. Ward & G. Gooch, *THE CAMBRIDGE HISTORY OF BRITISH FOREIGN POLICY* 156 (1922); BEMIS, *supra* note 53, at ch. XIX; V. MOORE, *DIGEST OF INTERNATIONAL LAW*, *supra* note 65, at 701-02.

68 See text accompanying Section 4 *supra* and, for instance, GROTIUS, *II DE JURE BELLI AC PACIS* Ch. XXIII, VIII (1625); PUFENDORF, *DE JURE NATURAE ET GENTIUM* Ch. XIII (1688); and II VATTTEL, *LE DROIT DES GENS* Ch. XVIII, Para. 329 (1758).

and, possibly, earlier English and British treaty practice⁶⁹—were fully conversant with the device of arbitration and its functions, as one of the four types of measures taken *via amicitiam*, the others being negotiation, conference and congress.⁷⁰

For purposes of a typology of the forms of international judicial institutions,⁷¹ some novelty may be thought to attach to the variants of judicial institution incorporated in the Jay Treaty. In a subsequent phase of the development of the doctrine of international law, some of its representatives would also desire to emphasize the novelty of reviving this type of machinery after a considerable break in its use, and the frequency with which, for over a century, such commissions were to be employed. Yet, from an inter-disciplinary angle, these breaks in continuity and revivals appear less significant than the continuity in function: resort to arbitration in comparable constellations of international power politics and, in the case of the Jay Treaty Arbitrations, for even more typical and immediate purposes of power tactics.

The problem for Great Britain was how to detach the United States from revolutionary France, and the Jay Treaty more than fulfilled British expectations. It led to a partial break in diplomatic relations between France and the United States.⁷²

Similarly, the problem for the United States was to avoid becoming a junior partner of either of the greater Powers involved in the war then being waged between France and Great Britain and supported by most Continental Powers. The Jay Treaty greatly assisted President Washington's policy of strict neutrality between the belligerents as the best way of achieving this national objective.⁷³

69 In Lord Grenville's *Project of Heads of Proposals*, provision was made for a Commission to deal with complaints regarding the execution of what subsequently became Article VI of the Jay Treaty (*see* Section 4 *infra*): "Two Commissaries" to be appointed by each side, with power to call to their assistance, as "Joint Commissaries," one or three more persons, of any "Indifferent Nation or Nations." BEMIS, *supra* note 32, at 280.

On the use of mixed commissions in earlier English and British practice, *see, e.g.*, Article XXX of the Peace Treaty of April 5, 1654 between the Commonwealth and the United Provinces of the Netherlands (III COLLECTION OF TREATIES 78 (1732)), and Articles X and XI of the Peace Treaty of Utrecht of March 31/April 11, 1713, on, among other matters, the delimitation of the Franco-British frontier in the areas of the Hudson Bay and Straits by Commissioners to be named by each of the Parties. *Id.* at 431-32.

70 *See, e.g.*, VATTEL, *supra* note 68; I PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 11 (1879).

71 The model of the Commissions under Articles VI and VII of the Jay Treaty bears some similarity to that of the Commission under Article XXX of the Anglo-Dutch Treaty of 1654. *See* note 69 *supra*.

If the Commissioners, on each side, were unable to agree, the issues before the Commission were to be decided by Commissioners to be appointed by the Protestant Swiss Cantons, and the decisions of these Commissioners, or a majority of them, was to be binding on both Parties. *Id.* at 78-79.

Actually, the Anglo-Dutch Commission under Article XXX was able to reach agreement without recourse to the Protestant Swiss Cantons. For the text of the Award (termed *Regulation*) of August 30, 1654, *see* V. MOORE, INTERNATIONAL ARBITRATIONS, *supra* note 13, at 4838.

72 *See, e.g.*, W. PHILLIPS & A. REEDE, NEUTRALITY: THE NAPOLEONIC PERIOD 73 (1936); R. VAN ALSTYNE, AMERICAN DIPLOMACY IN ACTION 488-89, 687-89 (1947).

73 *See, e.g.*, R. VAN ALSTYNE, *supra* note 72, at 687.

See also letter of September 5, 1793, from Mr. Jefferson to Mr. Hammond, annexed to the Treaty, *reprinted in* MARTENS, *supra* note 16, at 386; CH. THOMAS, AMERICAN NEUTRALITY IN 1793 (1931).

In the equilibrium established by the Jay Treaty, Great Britain fared better than the United States. The latter had to content itself with fewer issues being settled than it might have wished. This was due to the greater interest shown by the United States in reaching an agreement and well-informed British Intelligence on the terms which, if necessary, the United States negotiators were prepared to accept.⁷⁴

B. *Limitations of the Arbitration Clauses*

In any assessment of the Jay Treaty, it is necessary to recall that this was not a treaty for the promotion of peace in general but for an accommodation between two particular States, one a belligerent greater Power involved in a major war, and the other an untried and small would-be neutral State. Moreover, the arbitration provisions were limited to three specific types of past disputes and did not cover any future disputes on maritime neutrality beyond the date of the ratification of the Treaty.⁷⁵

C. *The Overriding Common Interest*

Both Contracting Parties considered the maintenance of peace between them on the basis of the equilibrium established by the 1783 and 1794 Treaties as more important than any of the issues entrusted to the three Commissions. This overriding objective was symbolized by their willingness, if necessary, to leave to chance the choice of the uneven commissioner in each Commission. Their joint resolve found further expression in the effective settlement by diplomatic means of the difficulties in which any of the Commissions landed itself.

D. *Loopholes*

In the historical circumstances surrounding the Jay Treaty and its application, both Parties had every reason to practice the maximum of good faith. Yet, in cases in which parties were less anxious to apply the arbitration model provided by the Jay Treaty, the Treaty would have offered four major loopholes:

- (1) Contracting parties would have been able to withdraw commissioners they had appointed on grounds such as those advanced by the minorities on self-determination of a commission's jurisdiction and voting procedures or because of, for instance, political appointments offered to commissioners.
- (2) Contracting parties would have been free to leave it to the commis-

⁷⁴ For the list of nineteen *desiderata*, see Jay's official instructions. BEMIS, *supra* note 32, at 213.

Id. at 251, 269; BEMIS, *supra* note 37, at 101.

See also V. MOORE, DIGEST OF INTERNATIONAL LAW, *supra* note 65, at 701-06.

⁷⁵ This point is rightly emphasized by J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 76 n.11 (1949).

On the then relatively minor character of the River St. Croix issue, see BEMIS, *supra* note 64, at 332, n.17.

sioners to spin out controversies over jurisdiction, procedure and voting rights and, until the solution of such disagreements, refuse to deal with the substantive issues submitted to their commission.

- (3) Contracting parties would have been free, as happened even in the exceptionally favourable circumstances of the Jay Treaty Commissions, to withdraw—temporarily or finally—their appointed commissioners by way of reprisal.
- (4) Contracting parties would have been free to treat any obvious excess of jurisdiction by a commission as a ground for treating awards so vitiated as null and void.⁷⁶

E. Unstated Major Premises

Finally, and this gives to the Jay Treaty Arbitrations truly a claim to be regarded as a historical landmark, the study of these Arbitrations poses with classic simplicity and in a readily verifiable form central issues of International Judicial Law. They arise from the striking coincidences between majority and minority reasonings in the Commissions under Articles VI and VII of the Jay Treaty and narrowly conceived national interests on the issues before the two Commissions.

Growing awareness of the choices open regarding applicable rules in any rudimentary system of international law would soon lead to a powerful, if but moderately successful, movement for the codification of international law. Yet, that it was possible to argue questions of adjective international law such as jurisdiction, voting, or procedure from undisclosed major premises and, thus, avoid or, possibly, pre-empt the substantive decisions to be made was perhaps never before demonstrated so vividly.

What was even more disturbing was that this should have happened in optimal conditions of international adjudication: between governments of countries linked by common legal, cultural and ethnic traditions, in a liberal age, with arbitrators well-qualified for their task and accepted by both sides as men of the highest moral integrity, and in an atmosphere of few, if any, pressures on the members of the commissions.

If any or all of these optimal conditions were not fulfilled, how international adjudication would fare was the crucial question posed, and left unanswered, by the Jay Treaty Arbitrations.

⁷⁶ See the Order of April 18, 1798, issued by the Commission under Article VI of the *Jay Treaty*. I MOORE, *INTERNATIONAL ARBITRATIONS*, *supra* note 13, at 281.

See also VATEL, *supra* note 68, at ¶ 329.