THE *ALABAMA* CLAIMS ARBITRATION

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A lecturer on the *Alabama* claims and the Geneva Tribunal of 1871–2, like a director of *Hamlet*, has to accept one inescapable fact: that everyone knows, broadly at least, how the story ends. There can be no reliance on suspense to sustain interest in the narrative. So I shall begin at the end.

Great Britain was ordered to pay the United States the sum of $15,500,000 in gold. To modern ears this sounds a modest sum, the sort of figure awarded against a middle-ranking firm of accountants in a medium-sized action. But the late Roy Jenkins, interpreting these figures with the insight of a former Chancellor—of the Exchequer, not the University—put the figure in its 1870s perspective. It was the equivalent of £160 million today. In relation to national income at the time it was the equivalent of about £4 billion. In relation to the size of the then budget (to which it contributed approximately five per cent) it was the equivalent of a modern £150 billion, or five pence on the income tax. Yet the award represented a small fraction of a claim earlier advanced, which was of a sum roughly six times the size of total British annual expenditure at the time.[1] Jenkins described the settlement as 'the greatest nineteenth-century triumph of rational internationalism over short-sighted jingoism', heralding an era of close and successful Anglo-American cooperation and ending a century when war between Britain and the United States had been twice a reality and several times a possibility.[2] The arbitration which led to this result has been described as one which, whether measured by the gravity of the questions at issue or by the enlightened statesmanship which conducted them to a peaceful determination, was justly regarded as the greatest the world had ever seen.[3]

If, as I think, this is a judicious assessment, I hope that the subject, despite the vast literature it has generated, deserves another visit.[4]

An American author, writing in 1898, suggested that '[a]t no time since the

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[1] R Jenkins *Gladstone* (Macmillan London 1995) 359.

[2] ibid 356–7.

[3] JB Moore *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington 1898) vol 1, ch XIV 'The Geneva Arbitration' at 652–3 (hereafter cited as 'Moore').

[4] There is another view. ED Bulloch *The Secret Service of the Confederate States in Europe* (Richard Bentley London 1883) vol 2 at 410, wrote: 'The "Geneva Arbitration" must therefore be recorded in history as a great international fiasco.' But Bulloch was a far from objective witness.

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year 1814 had the relations between the United States and Great Britain worn so menacing an aspect as that which they assumed after the close of the civil war in the United States.'[5] There had over the intervening half-century been differences, some of them serious, between the two countries, and more were to arise in the years immediately after the civil war,

> but they did not have their origin in a deep and pent-up feeling of national injury such as that which the conviction that the British government had failed to perform its neutral duties produced in the mass of the people of the United States.[6]

Not surprisingly, the American Civil War provoked mixed reactions in Britain. For some, notably Bright, Cobden, and WE Forster, the conflict involved one issue only—slavery—and that belief dictated support for the North. But for others dislike of slavery and respect for Britain's anti-slavery tradition were outweighed by a range of other sentiments. There was among some a vein of hostility, jealousy, apprehension, contempt, and sheer dislike directed towards the United States as a whole and the North in particular. Thus Sir John Ramsden, a Conservative member, was applauded in the House of Commons when he announced in May 1861 that the great Republican bubble had burst.[7] But there were more acceptable grounds for favouring the Confederacy: that the struggle was not really about slavery, as Lincoln himself repeatedly said, but about preservation of the Union; that the southern struggle was one for self-determination and independence; that as the Southern states had voluntarily chosen to join the Union they should be free voluntarily to secede; that Britain's commercial interests would be better served by a free-trade Confederacy than by a protectionist North; that denial of Southern cotton would devastate British manufacture and impoverish its workforce; that the Union could not be re-established by force of arms against the wishes of the Southern states; and that continuance of the conflict would lead to loss of life on a horrifying scale. It was thinking of this kind which prompted Gladstone to make a singularly ill-judged speech at Newcastle in October 1862, proclaiming that Jefferson Davis had done more than build an army and a navy, he had built a nation.[8] It was also thinking of this kind which prompted

[5] Moore (n 3) 495.

[6] ibid.

[7] A Cook *The Alabama Claims* (Cornell University Press Ithaca 1975) 18. John Laird, the former senior partner of the builders of the *Alabama*, who on retirement from the firm became the Conservative Member of Parliament for Birkenhead, was similarly cheered when, attacking Bright in the House on 27 March 1863, he said: 'I would rather be handed down to posterity as the builder of a dozen Alabamas than as the man who applies himself deliberately to set class against class and to cry up the institutions of another country . . .': US case, at 41. In March 1863 the destructive career of the *Alabama* was at its height.

[8] The United States in its Case (2nd edn at 41) placed special reliance on this speech by a leading member of the British Government. Gladstone nobly atoned for this unfortunate speech, both by his statesmanship in securing arbitration of the *Alabama* claims, and also by the unreserved regret for the speech which he expressed over 30 years later, an event rare in the history of politics: see P Parish 'Gladstone and America' in PJ Jagger (ed) *Gladstone* (Hambleden Press London 1998) 96–100.

Palmerston as prime minister and Russell as foreign secretary, in the summer and autumn of 1862, to ponder whether Britain, jointly with France, should mediate the American conflict so as to promote the peaceful separation of the warring states. This proposal, entertained when Confederate armies were enjoying their first flush of success, was discarded as the tide of war began to turn in favour of the North. But at the time and later, United States commentators had no difficulty pointing to numerous British statements, many of them official, expressing support for the Confederacy and antipathy to the North.[9]

This perception of strong British hostility formed the background to the most specific and deeply rooted of the Northern complaints: that Britain violated its duty as a neutral power to aid the Confederacy's maritime war against Federal merchant shipping. The course of events following the fall of Fort Sumter on 13 April 1861 was rapid. Two days later, on 15 April, Abraham Lincoln called up 75,000 militiamen, an act seen as a declaration of war. On 17 April Jefferson Davis announced that letters of marque and reprisal would be issued by the new Confederate government to masters seeking to prey, as privateers, on Federal shipping. Two days after that, on 19 April, Lincoln issued a proclamation declaring a blockade of all ports in the seceding states. Shortly thereafter, on the morning of 13 May 1861, the British government made a proclamation recognizing the Confederates as belligerents and declaring British neutrality. This was regarded in the North as a deeply unfriendly and precipitate manifestation of sympathy with the South, first because it was felt that the South had neither earned nor deserved the status of belligerents, and secondly because the proclamation was made a matter of hours before the arrival of Lincoln's new minister to London (Charles Francis Adams) and in breach, as it was asserted and believed, of an assurance given to his predecessor.[10]

The Northern blockade was a real threat to the Confederacy, which had no navy,[11] no merchant marine and no private shipbuilding capacity to speak of.[12] The problem was not, to begin with, to export its cotton, since the 1860 crop had been largely exported and it was believed that denial of cotton would force Britain and France to recognize the Confederacy. But there was an urgent need to obtain military armaments and supplies, which required ships to break the (admittedly not very effective) Northern blockade, and there was a strategic need, if possible, to cripple Northern commerce. To this end

[9] See, eg, the US Case ch II; FW Hackett *Reminiscences of the Geneva Tribunal of Arbitration 1872* (Houghton Miflin Boston 1911) ch III (hereafter cited as 'Hackett'); ED Adams *Great Britain and the American Civil War* (Longmans London 1925) vol 2, ch XVIII. See also Bulloch (n 4) vol 2 303; R Palmer *Memorials* (Macmillan London 1898) Part II, vol I 206–7.

[10] See the US Case (n 8) 23. As early as 1 May 1861 Lord John Russell, the Foreign Secretary, instructed the Admiralty to observe strict neutrality. On 4 May 1865 he told the Duke of Somerset that the government's instructions 'will be founded on the principle of neutrality between the two belligerents': see file PRO 30/22/31 at the National Archives.

[11] WF Spencer *The Confederate Navy in Europe* (University of Alabama Press 1983) 2.

[12] Bulloch (n 4) vol I 27.

Confederate agents were sent to Europe, particularly Britain and France, to buy or procure ships to prey on Northern merchant vessels. Notable among these agents were James Dunwoody Bulloch and Matthew Fontaine Maury. Bulloch was a former officer of the US Navy and an uncle of President Theodore Roosevelt.[13] He was recommended to the Confederate Secretary of the Navy by Judah P Benjamin, remembered in legal circles as *Benjamin on Sale*. Maury was also a former US naval officer, and a distinguished scientist. They and other agents procured and tried to procure a considerable number of ships. In the arbitration, claims were made against Britain in relation to 13 ships (four of them prizes which were used as tenders by their captors), and mention was made of many more. For simplicity's sake, I shall confine myself to four ships which featured largely in the arbitration, known to history as the CSS *Florida*, the CSS *Alabama*, the CSS *Georgia*, and the CSS *Shenandoah*. I shall also mention two vessels, not directly involved in the arbitration, which became known as 'the Laird rams'.

The *Florida* began life in the yard of William C Miller & Sons of Liverpool as the *Oreto*, a name given by Bulloch to support his cover story that she was being built for the Italian Government through an agent.[14] Miller's were naval contractors to the Royal Navy, and were able to use standard plans for a Royal Naval gunboat which Bulloch adapted to give greater speed and more room for bunkers, to enable the ship to stay at sea longer. The order was placed very shortly after Bulloch's arrival and was financed through Fraser, Trenholm, Liverpool agents who acted as an outpost of the Confederate Treasury. Dudley, the US consul in Liverpool, employed spies to detect signs of Confederate shipbuilding activity in the port, where Confederate sympathy was rife, and a strong suspicion grew that the *Oreto* was destined for the Confederate service, a suspicion strengthened when enquiry of the Italian consul revealed that his Government had no knowledge of the purchase. Following the legal advice he had received from an astute Liverpool solicitor, confirmed by counsel,[15] Bulloch made sure that no arms or ammunition were delivered to the ship while she remained in Liverpool; another vessel, the *Bahama*, was loaded with these in Hartlepool with a view to delivery out of the jurisdiction. On 17 February 1862 the *Oreto* was launched and underwent trials. Two days later, on 19 February, Adams urged Russell, the Foreign

[13] In *The Secret Service of the Confederate States in Europe* (n 4), Bulloch gave a detailed but highly partisan account of his activities.

[14] A number of historians have told the story or parts of it, among them FL Owsley *King Cotton Diplomacy* (University of Chicago Press Chicago 1931); FL Owsley Jnr *The CSS Florida: Her Building and Operations* (University of Alabama Press 1965); WF Spencer *The Confederate Navy in Europe* (University of Alabama Press 1983); DB Mahin *One War at a Time* (Brasseys 1999). A lively modern account is given by JT de Kay in *The Rebel Raiders* (Ballantine New York 2002), on which I have drawn substantially.

[15] The solicitor was Mr FS Hull. His advice was confirmed by 'two eminent barristers, both of whom have since filled the highest judicial positions': Bulloch (n 4) vol I 66. Bulloch does not name the counsel involved, but it seems that they may have been Sir Hugh Cairns and George Mellish: ibid 96–7.

Secretary, to detain the vessel, passing on information received from Dudley. Having consulted the Customs authorities in Liverpool, Russell reported back that there was no evidence to warrant detention. The vessel was cleared for Jamaica, and sailed out of the Mersey on 22 or 25 March with a crew of 52 sailors, almost all of them British. She sailed for Nassau, where the *Bahama* joined her. In Nassau the *Oreto* was inspected by a Royal Navy captain who judged her to be designed and equipped as a warship and unsuitable for mercantile service. She was seized on 17 June on the direction of the colonial government for breach of the neutrality proclamation, and the validity of the seizure was tried in the Nassau vice-admiralty court before John Campbell Lees between 28 June and 2 August 1862. The judge, in a detailed judgment, found no sufficient proof of breach, and the vessel was released.[16] Her armament was delivered to her as she lay off Green Cay,[17] a deserted island 60 miles from Nassau, and her name was changed to *Florida*. Over the next two years the *Florida* preyed on Northern shipping, mostly in the West Indies and the Gulf but with a lengthy stay in Brest for repairs. She captured about 38 US merchant vessels, three of which she used as tenders, and was eventually taken by a US warship in Brazil in October 1864.

Very shortly after placing the order for the *Oreto*/*Florida*, Bulloch, in his own name and again on the strength of funds obtained through Fraser, Trenholm, placed a further order, this time with Laird Brothers of Birkenhead.[18] It was clear that the new building, known in the yard as '290', was to be a warship: she had (like the *Florida*) a lifting screw for greater speed; she had a telescopic funnel, to aid disguise; she had large bunkers to enable her to stay at sea for extended periods; she had heavy scantlings, to support guns; she had a large space for crew and a small space for cargo, undesirable in a merchant vessel; she had a lead-lined magazine. No 290 attracted the vigilant Dudley at an early stage and he reported his suspicions to Adams. The vessel, named *Enrica* to suggest a Spanish association, was launched on 15 May 1862.[19] On 23 June 1862, for the first time, Adams urged Russell to detain her. Russell ordered an inspection of the vessel by the Customs authorities in Liverpool, who accepted that she was a warship but found no evidence to justify detention. Dudley consulted RP Collier QC, soon to be solicitor-

[16] A copy of the judgment is in the National Archives, FO 881/2017B. The United States in its case suggested that this trial was little more than a charade, designed to ensure that the vessel was released: see 135–9. There must be room for more than a little doubt about correctness of the decision. But there appears to be no reason to question the bona fides of those involved, and a detailed minute of the proceedings is preserved by the Department of Archives in Nassau.

[17] Bulloch (n 4) vol I 167.

[18] It appears from the US Case (at 146), and was tentatively accepted in the British Counter Case (at 114–15), that the contract was probably made on 9 Oct 1861 when the drawings were signed. This may no doubt be correct. But de Kay, *The Rebel Raiders* (Ballantine New York 2002) 26, confidently dates the contract as signed on 1 Aug 1861 and Bulloch's account, (n 4) vol I 59, strongly suggests that the details of the order were settled well before October.

[19] Bulloch (n 4) vol I at 228, does not name the lady who christened the ship.

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general and then attorney-general, who advised that there were grounds for detention.[20] But recognizing the Customs' insistence on cast-iron evidence, Dudley set out to obtain it, and did, in the form of affidavits making plain the provenance and destination of the vessel. On seeing this Collier confirmed his opinion. All this material was forwarded to Adams, who sent it on to Russell and made urgent pleas for action on 23 and 24 July. Russell sought the advice of the Queen's Advocate who, although a permanent and not a political appointee, was then regarded as the senior of the three law officers, to whom, in matters of this kind, it was the practice to send instructions.[21] Unfortunately, the holder of this office, Sir John Harding, was at this crucial juncture mentally deranged.[22] This caused a delay before, on 28 July, the attorney-general and the solicitor-general, the latter of whom was Sir Roundell Palmer, advised that the vessel be detained.[23] This advice was relayed to Russell, and an order for detention was sent to Liverpool on, it appears, 29 or 30 July. It has been suggested that Bulloch was tipped off by a Confederate sympathizer with access to official information within government. This may doubtless be true, but if so it has never been proved by whom.[24] What is clear is that on 28 July the *Enrica* was moved from her berth into the river on the pretext that further sea trials were to be conducted the following day. On 29 July she sailed for the open sea carrying a number of wives and well-wishers, who in due course disembarked and were returned to Liverpool. After a short wait in Moelfra Bay in Anglesea, which she left very shortly before the arrival of a US warship dispatched from Southampton to intercept her, she sailed for the Azores. There she met two vessels: the *Agrippina*, which Bulloch had bought and loaded with guns, ammunition, uniforms, and coal at the Isle of Dogs; and the *Bahama* which brought the vessel's captain, Raphael Semmes, officers and crew. On 24 August 1862 the *Enrica* was commissioned as CSS *Alabama*, the name which she made famous. She then embarked on her voyage of destruction, during which she preyed on US merchantmen wherever she could find them: in the Atlantic, off Newfoundland and the New England

[20] This conflicted with the advice given to the shipbuilders by George Mellish (later Lord Justice), than whom (in the opinion of Roundell Palmer) 'there was no better lawyer at the English Bar'. His advice, like that given to Bulloch, was that the 1819 Act applied only to vessels capable of committing hositilities against an enemy when they left British waters: see R Palmer *Memorials* (Macmillan London 1896) part I, vol II at 417.

[21] On the appointment of Sir Robert Phillimore to succeed Harding, this 'anachronism' as Palmer called it (n 20 at 378) was ended.

[22] Hammond, permanent secretary to the Foreign Office in 1862, when asked about this mishap in 1869 by Russell, engagingly observed: 'The Foreign Office could not divine that poor Harding was mad, even if they had known that he was ill, which they hardly could do': R Palmer (n 20) 427.

[23] See DB Mahin *One War at a Time* (Brasseys 1999) 150–2.

[24] See FO 881/2017A at the National Archives. Bulloch gave credence to suspicion of a tip-off by writing (n 4) vol I 238: 'On Saturday July 26th 1862, I received information from a private but most reliable source, that it would not be safe to leave the ship in Liverpool another forty-eight hours.' He was, however, at pains to exonerate any British official of treachery, breach of trust, or improper behaviour: ibid 262–4.

coast, the West Indies, Brazil, South Africa, Singapore, Capetown, and back to Europe. During this period she burned or sank 64 US vessels, one of which she used as a tender. She engaged only one US warship, a converted paddle steamer which she sank in January 1863.[25] But on returning to Europe, after nearly two years at sea, she badly needed repairs. Judging that the French authorities were more likely to be hospitable than the British, Semmes put in to Cherbourg instead of an English port. In Cherbourg she was blockaded by the USS *Kearsage* which had long hunted her. In an old-fashioned manner, Semmes challenged Captain Winslow of the *Kearsage* to battle and on 19 June 1864 sailed out of Cherbourg to meet him. The ensuing battle was witnessed by Manet, who went out to paint it, and by the owner of an English yacht who had offered his children a choice between watching the battle and going to church. The *Alabama* had more guns but the *Kearsage* had a heavier broadside and better powder. Had one particular shell from the *Alabama* exploded, it would have disabled the *Kearsage*, but it failed to do so and the greater firepower of the *Kearsage* told. The *Alabama* sank and her destructive career was ended. Semmes was rescued by the English yacht owner.

The ship which became the CSS *Georgia* was procured by the other Confederate agent I have mentioned, Matthew Fontaine Maury, from builders at Dumbarton. She was a new iron steamship, not built as a warship, named the *Japan*.[26] To avert suspicion, Maury did not visit the new building himself, conducted negotiations through a Dutch naval friend, and raised the necessary finance from a source other than Fraser, Trenholm. She was launched in January 1863, registered in the name of a Liverpool merchant, and sailed from the Clyde on 1 April 1863 with a crew of sailors recruited in Liverpool in ignorance of the vessel's true purpose. (Two of those responsible for recruiting the crew were prosecuted and convicted in 1864.) She received her armament from a transport, the *Alar*, off Brest. Not until a week after she sailed did Adams mention this vessel to Russell, who undertook to make enquiries, and a British warship was sent from Guernsey to try, unsuccessfully, to intercept her. Commissioned as the CSS *Georgia,* the vessel roamed the South Atlantic and destroyed or captured some six or seven US merchantmen. But she was an unsuitable predator, not being designed for that role, and required frequent visits to port to load coal. She lay in the port of Cherbourg from 28 October 1863 until 16 February 1864, and was sold in Liverpool on 1 June 1864 for £15,000. After leaving Liverpool she was captured by a US warship.

Encouraged by his success in avoiding seizure of the *Florida* and the *Alabama*, Bulloch embarked on an even more ambitious plan, the building of two ironclad warships, again at the Laird Yard in Birkenhead. Designed with sharp protruding prows to be used for ramming and holing other vessels, they

[25] The USS *Hatteras*.

[26] She may at one time have borne the rather incriminating name *Virginia*: see US Case at 156: British Counter Case at 128.

became known as 'the Laird rams'. There was again a cover story that they were ordered by a French buyer for the Pasha of Egypt for use on the Nile, and they were given French names in the yard. But enquiries of the Pasha revealed the falsity of that story and there was no real doubt that they were destined for use by the Confederacy against the United States. Despite intense pressure by Adams, the British Government insisted that there were no grounds to warrant seizure. On 5 September 1863, expressing profound regret at the conclusion to which Her Majesty's Government had arrived, Adams memorably added in his note to Russell: 'It would be superfluous in me to point out to your Lordship that this is war.' The message was meant and understood as a serious threat. Whether or not as a result of it, the British did seize the vessels. The lawfulness of the seizure was challenged, and Russell was very keen to avoid a trial in Liverpool, which he described as 'a port specially addicted to Southern proclivities, foreign slave trade and domestic bribery'.[27] The outcome of the trial was indeed regarded as so uncertain, and the destruction caused by the *Florida* and the *Alabama* was by this time so notorious, that in the end the British Government bought the rams for £220,000 for the Royal Navy, where they sailed as HMS *Wyvern* and HMS *Scorpion*.[28]

The *Sea King* was a merchant vessel built on the Clyde for the China trade. On her maiden voyage beginning at the end of 1863 she carried troops to New Zealand. On her return in September 1864 she was bought by Bulloch in the name of an agent. He never visited the vessel and raised the purchase price from a new source. She sailed from London on 8 October 1864 with no more armament than was normal for merchant vessels employed in the China trade, and was supplied with her armament at Madeira, becoming the CSS *Shenandoah* on 19 October. Not until a month later, on 18 November, did Adams notify Russell of these matters. The vessel claimed several US victims in the Atlantic in the course of a 90-day cruise which took her via Africa to Melbourne, which she reached on 25 January 1865. There she underwent repairs and recruited seamen, before leaving on 18 February. She then sank a number of vessels in the North Pacific, including a New England whaler, and continued her depredations after the Southern surrender at Appomattox of which she was unaware. Most of her victims were taken after the end of the war, but in due course, having learned the war was over, she spiked her guns and returned to Liverpool, still flying the Confederate colours, on 5 November 1865.

During the American Civil War, the domestic law governing our duty as

[27] Russell to Lyons (the British minister in Washington), 24 Oct 1863: see PRO 30/22/31 at the National Archives.

[28] They had been *El Tousson* and *El Monassir*. Palmer's judgment (n 20) 448 is probably right: 'If they had left our shores, they would probably have done a great deal more damage than the *Alabama* herself to the mercantile marine of the United States; and the almost certain result would have been war between that country and ourselves, either immediately, or on the termination (not then far distant) of the Civil War.'

neutrals was contained in the Foreign Enlistment Act 1819. This was a measure introduced by Canning and Castlereagh to restrain support in this country for Spain's South American colonies in their struggles for independence. Britain was not to be a base for hostile activities against Spain. Similar in effect to American Acts of 1794 and 1818, the Act restrained (section 2) British subjects from enlisting in the naval or military forces of a foreign State without leave. And, most relevantly to the *Alabama* claims, it provided in section 7:

> And be it further enacted, that if any person, within any part of the United Kingdom, or in any part of His Majesty's Dominions beyond the seas, shall, without the leave and licence of His Majesty for that purpose first had and obtained as aforesaid, equip, furnish, fit out or arm, or attempt or endeavour to equip, furnish, fit out or arm, or procure to be equipped, furnished, fitted out or armed, or shall knowingly aid, assist or be concerned in the equipping, furnishing, fitting out or arming of any ship or vessel with intent or in order that such ship or vessel shall be employed in the service of any foreign . . . state . . . or with intent to cruise or commit hostilities against any . . . state . . ., or against the subjects or citizens of any . . . state . . . with whom His Majesty shall not then be at war, . . . every such person so offending shall be deemed guilty of a misdemeanour . . . and every such ship or vessel . . . shall be forfeited; and it shall be lawful for any officer of His Majesty's Customs or Excise . . . to seize such ships and vessels . . . and every such ship and vessel . . . may be prosecuted and condemned in the like manner, and in such courts as ships or vessels may be prosecuted and condemned for any breach of the laws made for the protection of the revenues of Customs and Excise . . .

The legal lacuna in this tangled verbiage is obvious: the section did not, at any rate expressly, prohibit the construction in Britain of a ship capable of being adapted for the warlike purposes of a foreign power provided the ship was not equipped, furnished, fitted out, or armed within the jurisdiction. It was in reliance on this lacuna that care was taken to ensure that none of the ships built or procured in Britain were armed as warships until they had left the jurisdiction.

The first attempt to invoke section 7 against any of these ships was that against the *Florida* in Nassau. As already recorded, the seizure of the vessel was held to be unlawful and she was released.

It seems clear that the British authorities' hesitancy in detaining the *Florida* and the *Alabama* before they left the Mersey stemmed from apprehensions as to the efficacy of section 7. Given the obvious purpose of section 7, and indeed of the 1819 Act as a whole, these apprehensions might appear exaggerated. But on the only occasion when the issue was put to the test in an English court they were shown to be justified. Like the *Florida,* the *Alexandra* was ordered by Confederate interests through Fraser, Trenholm from Messrs Miller & Sons of Liverpool. Although unarmed, her design showed that she was not intended for mercantile purposes. Chastened by knowledge of the after-history of the

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Florida and the *Alabama,* and perhaps conscious of the Confederacy's waning power, the British authorities seized the *Alexandra* as she lay in dock on 6 April 1863. The lawfulness of the seizure was determined by Chief Baron Pollock and a jury at a three-day trial in June 1863. The Attorney-General, the Solicitor-General (Sir Roundell Palmer), and the new Queen's Advocate led for the crown,[29] Sir Hugh Cairns for the defendants, who faced a 98-count indictment.[30] The thrust of the defence argument was that the Act did not prohibit building ships.[31] To violate the Act, a ship had to be equipped and ready-armed for the purpose of hostilities when she left the country, and this could not be shown.[32] The Chief Baron's direction[33] gave the jury no effective choice:

> The question I shall put to you is, whether you think that vessel was merely in course of building to be delivered in pursuance of a contract, which, as I explain it to you, would be perfectly lawful, or whether there was any intention that, in the port of Liverpool, or any other English port, the vessel should be fitted out, equipped, furnished or armed for purposes of war? If a man may supply any quantity of munitions of war to a belligerent, why not ships? Why should ships alone be an exception?

A verdict was entered for the defendants. The Crown challenged the Chief Baron's ruling in the Court of Exchequer,[34] but unsuccessfully.[35]

The difficulty of implementing section 7, and the grave damage thereby caused to Anglo-American relations prompted appointment of a Royal

[29] It was not originally proposed that the Solicitor-General should appear, but Russell urged that it was 'no common case and requires the whole force of our Law Officers': Russell to Sir G Grey, 13 June 1863, PRO 30/22/31 at the National Archives.

[30] The defendants included Bulloch, but he (like some of the other defendants) did not appear. The report of the trial (*The Attorney-General v Sillem and Others* (1863) 3 F&F 646, 176 ER 295) is of note, first, because the reporter's footnotes exceed by some margin the length of the report, and secondly, because the reporter, in a critical running commentary, made plain his own opinions on the argument and the direction to the jury.

[31] At 670 and 307 of the respective reports.

[32] At 672 and 308 of the respective reports.

[33] At 676 and 311 of the respective reports.

[34] The Lord Chief Baron tried to thwart such a challenge. When the Attorney-General reminded him of something he had said about the *Alabama*, the Chief Baron retorted that 'the *Alabama* had no more to do with the matter than Noah's Ark'. See R Palmer (n 20) 443–7.

[35] The later history of the case was more tortuous than this summary suggests. In the Court of Exchequer, Pollock CB and Bramwell B upheld the Chief Baron's trial direction, Channell B and Pigott B gave judgments against it. Since the court was equally divided, Pigott B as the junior judge withdrew his judgment: *The Attorney-General v Sillem and Others* (1863) 2 H & C 431, 159 ER 178. The Crown appealed to the Court of Exchequer Chamber which held, by a majority of 4:3, that the appeal was not competent: *The Attorney-General v Sillem and Others* (1864) 2 H&C 581 ER 242. This conclusion, by a majority of 4:2, the House of Lords endorsed: *The Attorney-General v Sillem and Others* (1864) 10 HLC 703, 11 ER 1200. Having left England in April 1864, the ship changed her name to *Mary* and was seized again in Nassau in December 1864. The government's charges against the ship again failed, but the trial was not held until 22–23 May 1865, by which date the war was over. Thus when released by order of 30 May 1865 she was of no use to the Confederacy. The record of the proceedings is preserved in the Department of Archives, Nassau.

Commission in January 1867, to review the 1819 Act. The result was the Foreign Enlistment Act 1870, most of which remains in force. For present purposes it is enough to refer to section 8, which made it a criminal offence without licence to build or cause to be built any ship with intent or knowledge, or having reasonable cause to believe, that the same would be employed in the military or naval service of any foreign State at war with any friendly State or, with that intent or knowledge, to equip or dispatch any ship. This was an overdue reform, welcomed in the United States as such, although also seen as an admission of past delinquency.

In October 1863 Adams, speaking of the *Alabama* claims, told Russell, on instructions, that there was no fair and equitable form of conventional arbitrament or reference to which the United States would not be willing to submit. Russell returned a haughty and negative answer.[36] In 1864 Thomas Balch, an American lawyer living in Paris, proposed both publicly, and privately (to President Lincoln), that the *Alabama* claims be referred to an international court of arbitration; he attracted sympathy but prompted no action.[37] In August 1865, after the end of the war, Russell reverted to the notion of a claims commission, but he imposed conditions unacceptable to Seward, the American Secretary of State, and the 1863 offer was withdrawn. Changes of personality[38] and government[39] in Britain in 1865–6 led to a more conciliatory attitude towards settlement on our side, but there were a number of stumbling blocks: the plethora of other differences between the two countries (the long-running problem of the San Juan boundary between Canada and the United States, Canadian inshore fisheries, the activity of Fenians in North America, and the naturalization of Irish-Americans); the ambition of Seward, who had recently bought Alaska, to acquire the British territories in Canada and the West Indies as part payment for the *Alabama* claims;[40] and British unwillingness to accept that the propriety of its neutrality proclamation could be an issue to be ruled upon by arbitrators.[41]

Adams's highly distinguished term of office in London ended in June 1868. President Johnson's first nominee to succeed him was rejected by the

[36] Moore (n 3) 496-7; TW Balch *The Alabama Arbitration* (Books for Libraries Press New York 1900) 20–4.

[37] Balch (n 36) 40–9. His was not a lone voice: in 1868 Charles Bowen published a monograph, *The 'Alabama' Claims and Arbitration*, in which he advocated arbitration and questioned the strength of the British case on the *Alabama* itself.

[38] Palmerston died in October 1865 and Russell was succeeded by Clarendon.

[39] A government led by Derby took office in June 1866, with Stanley as Foreign Secretary.

[40] This proposal surfaced, in one form or another, on several occasions over these years, but it never attracted universal American support. There were always those who regarded British withdrawal from the Western hemisphere as inevitable in the fullness of time, and were unwilling to discount the *Alabama* claims in consideration of a benefit which would accrue anyway. There were also those who thought, as the British did, that any cession of Canada would require the consent of the Canadians. See A Cook *The Alabama Claims* (Cornell University Press Ithaca 1975) 38–40, 47, 80, 82, 112, 125, 130, 132, 135, 147, 159 (hereafter 'Cook').

[41] This objection was raised in November 1866, January 1867, and October 1868: see Cook (n 40) 35–6, 40; Moore (n 3) 499.

Senate.[42] His second choice was Mr Reverdy Johnson, a Maryland Democrat, who was instructed to achieve agreement on the issues of naturalization, San Juan, and the mutual claims of United States and British citizens. This he did with remarkable but deceptive speed, in October and November 1868.[43] But only the naturalization agreement survived. The San Juan arbitration agreement was never ratified by the Senate. The claims convention, although formally signed by Johnson and Clarendon (Stanley's successor at the Foreign Office) on 14 January 1869, provoked a storm of American criticism, in particular because, instead of isolating the *Alabama* claims, it provided for resolution of all British and American claims arising from the war, with the possibility of setting off the one against the other; and because, if nationally appointed arbitrators disagreed, disputes were to be resolved by an umpire chosen by lot.[44] Any faint hope the claims convention might have had of earning Senate approval vanished on 13 April 1869 when Charles Sumner, the veteran abolitionist senator from Massachusetts, used his customary rhetoric and invective to savage the convention in a massive speech which, as has been said, 'served to set the standard of public expectation as to the terms that would be exacted by the United States as the final conditions of an amicable settlement'.[45] Sumner attacked the obvious deficiencies in the convention. But, more significantly in the longer term, he castigated the convention for its lack of any expression of regret by the British and its omission of any complaint about the neutrality proclamation. He also transformed the scale of the American claim. On the direct claim for loss of ships and property he put a value of $15 million, itself a very large figure by the standards of the day, as I have pointed out. To this he added what became known as 'the indirect claims'. These included a claim for the increased cost of marine insurance, for diminution in the American carrying trade, for a fall in American merchant tonnage, for loss of import and export business and for the loss of expected economic growth, together valued at $110 million.[46] They included also a claim for the cost of suppressing the rebellion during the period of two years by which, Sumner claimed, the war had been prolonged by the cruisers' depre-

[42] Johnson's first choice of minister was General George B McClellan, equally unsuccessful as commander of the Army of the Potomac in 1861–2 and as Democratic nominee for the presidency.

[43] See Cook (n 40) 502–3.

[44] ibid 57–65.

[45] Moore (n 3) 509–10. See also Cook (n 40) ch 4. Sumner was influential as Chairman of the Senate Foreign Relations Committee. His bile may have owed something to his failure to secure appointment as Secretary of State by the incoming President Grant. John Bancroft Davis, a strong admirer of Hamilton Fish, described Sumner as 'in public life, irascible, self-asserting, arrogant, and incapable of bearing contradictions', 'full of conceit, devoid of humor, and without tact': JB Davis *Mr Fish and the Alabama Claims* (Books for Libraries New York 1893) 14, 16.

[46] Factually, these complaints were not without foundation. The losses inflicted on Northern merchant ships did lead to greatly increased insurance premiums, many Northern ship-owners registered their vessels under foreign flags, and knowledgeable commentators have asserted that the American merchant marine never fully recovered from the Civil War: see FL Owsley Jr *The CSS Florida: Her Building and Operations* (University of Alabama Press 1965) 9: Cook (n 40) 15.

dations.[47] This claim was valued at $2 billion. The Senate rejected the convention by 44 votes to one. Sumner's speech was 'wildly popular'.[48] An orgy of anglophobia followed.[49] In Britain, there were renewed fears of war.[50]

The incoming administration of President Grant, in which Hamilton Fish reluctantly and, as he thought, very temporarily, served as Secretary of State,[51] sent John Lothrop Motley, the historian, to London as its minister. His instructions were to adopt a conciliatory line, to suspend negotiations on the *Alabama* claims, and to make no complaint about the neutrality proclamation.[52] Almost at once he departed from this last instruction. Grant wanted him dismissed on the spot. Fish preferred to leave him in post for the time being but without responsibility, perhaps for fear of antagonizing Sumner, whose nominee Motley was.[53] As a result, the focus of negotiation shifted to Washington, initially through the deft diplomacy of Sir John Rose, a half-American, half-English businessman then serving as the Canadian Minister of Finance.[54]

Although the path of negotiation proved very far from smooth, several factors worked towards the finding of some means of resolving the *Alabama* claims. Gladstone's administration favoured settlement, and he himself was willing to make a noncommittal expression of regret.[55] A rupture of relations between Grant and Sumner on the annexation of Santo Domingo freed Fish, by instinct conciliatory, from the domination of Sumner's uncompromising obduracy.[56] As time passed, the increasingly tarnished Grant administration became ever more anxious for a popular foreign policy success to secure the president's re-election in 1872.[57] A process of quiet diplomacy, in which Fish and John Bancroft Davis distinguished themselves on the American side and Rose, Thornton (the British minister in Washington), and Granville (now Foreign Secretary) on the British, led to agreement in January–February 1871 that a joint commission should be established to resolve all disputes between the United States, Britain, and Canada.[58]

The seriousness of the issues at stake was reflected in the membership of the two commissions. The American team was led by Fish and included Samuel Nelson (senior associate justice of the US Supreme Court), a Democrat representing the political opposition;[59] General Robert C Shenk

[47] Cook (n 40) 76. [48] ibid 76. [49] ibid 79-80.
[50] ibid 84.
[51] ibid 104. Grant's first appointee as Secretary of State, Elihu B Washburne, served for only a week. Fish declined to be nominated, but found his name had already been passed to the Senate, and then agreed to serve for a period. In the event, he was Grant's longest-serving cabinet member. See also *American National Biography* (OUP Oxford 1999) vol 7 at 948.
[52] Moore (n 3) 513–15; Cook (n 40) 109. [53] Moore (n 3) 518; Cook (n 40) 116.
[54] Moore (n 3) 519–22; Cook (n 40) 117, 150–8. [55] Cook (n 40) 123, 164.
[56] ibid 131–2, 162. [57] ibid 145.
[58] Moore (n 3) 532; Cook (n 40) 166.
[59] Nelson (1792–1873) was appointed to the state bench in New York in 1823, rose to be Chief Justice of New York, and was appointed to the Supreme Court in 1845 when the preferred candidates declined to be nominated or were turned down. He resigned from the Supreme Court after nearly 50 years' judicial service in 1872.

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(Motley's designated successor in London); Ebenezer Rockwood Hoar (a former judge and US Attorney-General);[60] and George Williams (formerly senator for Oregon and shortly to be US Attorney-General).[61] The British team comprised Earl de Grey and Ripon (Lord President of the Council);[62] Sir Stafford Northcote MP, representing the Conservative opposition; Sir Edward Thornton; Professor Mountague Bernard, first holder of the newly created Chichele chair in International Law and Diplomacy at All Souls, who had in 1870 published *An Historical Account of the Neutrality of Great Britain during the American Civil War*; and Sir John Macdonald, Prime Minister of Canada. Rose, to the regret of both sides, declined to serve. The secretaries were undersecretaries in the two foreign ministries: John Bancroft Davis on the American side,[63] Lord Tenterden on the British.[64] The commissioners met in Washington and held 37 meetings over nine weeks in the spring of 1871. The earlier sessions were devoted to Canadian problems, on which Macdonald was opposed by the Americans and (in private) the British also,[65] and a scheme of arbitration was imposed upon him.[66] On the *Alabama* claims a major issue dividing the parties concerned the principles of public international law applicable in 1861–5, on which the parties held conflicting views.[67] An ingenious compromise, favourable to the United States, was found. There was 'ferocious' argument about the wording of the preamble to the proposed treaty.[68] But eventually, as it was supposed, all differences were resolved and on 5 May 1871 the Treaty of Washington was signed 'amidst the greatest good humor and jollity'.[69] Davis and Tenterden tossed up to decide which team should sign first. Tenterden won.[70]

[60] Hoar (1816–95) had held judicial office in Massachusetts and was 'astonished' when Grant made him Attorney-General in March 1869. Grant also nominated him for appointment to the US Supreme Court, but the Senate rejected him in February 1870 and he lost office as Attorney-General four months later.

[61] Williams (1823–1910) was a former Democrat who had become a Republican senator. He advocated the impeachment of President Johnson and served as Attorney-General of the United States 1872–5. In December 1874 Grant nominated him as Chief Justice of the United States (after Roscoe Conkling of New York had declined), but he was strongly and widely criticized as lacking appropriate qualifications, and also on personal grounds. He asked that the nomination be withdrawn.

[62] He became a Marquess in recognition of his service in negotiating the Treaty of Washington: R Palmer *Memorials* Part II, vol 1 (Macmillan London 1898) 212.

[63] Davis (1822–1907) was a lawyer who had served in the US legation in London and acted as US correspondent of *The Times*. He had been elected, as a Republican, to the New York State Assembly, and became first assistant secretary of state under Fish, an office to which he returned after serving as agent for the United States in Geneva. He later served as minister to Germany, as a judge of the US Court of Claims, and as reporter of the US Supreme Court.

[64] Tenterden (1834–82), a grandson of the Chief Justice, served as an assistant under-secretary at the Foreign Office 1871–3. He then became permanent secretary.

[65] Cook (n 40) 171.

[66] ibid 172.

[67] Moore (n 3) 540–4; Cook (n 40) 177–82.

[68] Cook (n 40) 185.

[69] ibid 185. They celebrated with strawberries and ice cream: FW Hackett *Reminiscences of The Geneva Tribunal* (Houghton Miflin Boston 1911) 66 (hereafter 'Hackett').

[70] Moore (n 3) 546. Tenterden compounded his triumph by dropping burning sealing wax on the fingers of the Irish-American sealing clerk, who 'was so much excited that he burst into tears at the conclusion of the affair'.

The core of the Treaty, which was ratified by the Senate and approved by Parliament, lay in Article 1, part of which I should quote:

> Whereas differences have arisen between the Government of the United States and the Government of Her Britannic Majesty, and still exist, growing out of the Acts committed by the several vessels which have given rise to the claims generically known as the Alabama Claims: And whereas Her Britannic Majesty has authorized her High Commissioners and Plenipotentiaries to express in a friendly spirit, the regret felt by Her Majesty's Government for the escape, under whatever circumstances, of the Alabama and other vessels from British ports, and for the depredations committed by those vessels; Now, in order to remove and adjust all complaints and claims on the part of the United States and to provide for the speedy settlement of such claims, which are not admitted by Her Britannic Majesty's Government, the High Contracting Parties agree that all the said claims, growing out of Acts committed by the aforesaid vessels, and generically known as the Alabama Claims, shall be referred to a tribunal of arbitration to be composed of five arbitrators to be appointed in the following manner, that is to say: one shall be named by Her Britannic Majesty; one shall be named by the President of the United States; His Majesty the King of Italy shall be requested to name one; the President of the Swiss Confederation shall be requested to name one; and His Majesty the Emperor of Brazil shall be requested to name one.

The arbitrators were to meet in Geneva.[71] Decisions were to be made by a majority.[72] The parties were to appoint agents,[73] and were to exchange written or printed Cases;[74] they might exchange Counter Cases;[75] they were to submit written or printed arguments.[76] The arbitrators might call for further elucidation by way of written statement or oral argument.[77] Article VI of the Treaty laid down the rules of public international law by which British liability was to be judged:

> *Article VI*
> In deciding the matters submitted to the Arbitrators they shall be governed by the following three rules, which are agreed upon by the High Contracting Parties as rules to be taken as applicable to the case, and by such principles of International Law, not inconsistent therewith, as the Arbitrators shall determine to have been applicable to the case:
>
> *Rules*
>
> A neutral Government is bound—
>
> First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to war-like use.

[71] Art II. [72] ibid. [73] ibid.
[74] Art III. [75] Art IV. [76] Art V.
[77] ibid.

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> Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.
>
> Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.
>
> Her Britannic Majesty has commanded her High Commissioners and Plenipotentiaries to declare that Her Majesty's Government cannot assent to the foregoing rules as a statement of principles of International Law which were in force at the time when the claims mentioned in Article I arose, but that Her Majesty's Government in order to evince its desire of strengthening the friendly relations between the two countries, and of making satisfactory provision for the future, agrees that in deciding the questions between the two countries arising out of those claims, the Arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules.

And the High Contracting Parties agreed to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime Powers, and to invite them to accede to them.

If Britain were found liable, the arbitrators could either award a gross sum or refer the assessment of damages to a board of assessors.[78] The award was to be a 'full, perfect, and final settlement of all the claims referred, and was to bar any future claim'.[79]

As their arbitrator the Americans chose Charles Francis Adams. It has been suggested that the British resisted his appointment, because of his intimate involvement in the matters on which the tribunal was to rule.[80] If there was such an objection it would be very unsurprising, but the standard lives of Adams do not mention it,[81] and I have been unable to verify the fact. If there was any objection it was not pursued, and the appointment proved a very wise one.[82]

Much less wise was the British appointment of Sir Alexander Cockburn, the Lord Chief Justice.[83] He had the advantage of being fluent in French, with

[78] Art X. [79] Art XI.

[80] JT de Kay *The Rebel Raiders* (Ballantine New York 2002) 237–8.

[81] *Charles Francis Adams* by his son CF Adams, at 382; M Duberman *Charles Francis Adams, 1807–1886* (Houghton Miflin Boston 1960) 342–3. Roundell Palmer did however record his opinion that the appointment of Adams was 'undoubtedly contrary to the traditional rules of judicial etiquette': *Memorials* Part II, vol 1 at 232.

[82] Adams (1807–86) was the son and grandson of presidents, both of whom served as minister in London. During his father's term, Adams was educated in England. He read law in the office of Daniel Webster, but was drawn into politics, first as a Whig, then as a leader of the Free Soil party, whose (very unsuccessful) vice-presidential candidate he was in the election of 1848. He migrated to the Republican party and was elected to the House of Representatives in 1858. In 1860 he supported Seward, on whose recommendation he was sent to London in 1861, serving until June 1868. In 1872 he offered himself as the Liberal Republican candidate for the presidency, narrowly losing to Horace Greeley. His service in London and as the American arbitrator at Geneva has been rightly seen as the high point of his public career.

[83] Cockburn (1802–80) had a lively youth, having on one occasion to escape from bailiffs by

some knowledge of Spanish, German, and Italian, but he brought to his (admittedly very difficult) assignment the qualities of an ill-tempered partisan advocate and not the even-tempered objectivity of a judicial arbitrator. Writing to Russell in October 1872, after the arbitration was over, he said:

> I have always considered the Treaty of Washington—with the arbitration and the three rules—as a *grievous* mistake; and when applied to by the Government to undertake the office of British arbitrator did not hesitate to express my dislike of the Treaty.[84]

He went on to suggest that two at least of the neutral arbitrators 'were from the beginning disposed to find against us, so far as they possibly could'.

The King of Italy appointed Count Sclopis, a lawyer and statesman, who was later chosen to be chairman of the tribunal; the President of Switzerland appointed Mr Staempfli, an advocate, himself a former President of the Swiss Confederation; the Emperor of Brazil appointed the Baron (later Viscount) d'Itajuba, a former professor with long diplomatic experience. Cockburn was not impressed by his neutral colleagues. In a letter to the Foreign Secretary, he described Staempfli as 'a furious Republican, hating monarchical government, and ministries in which men of rank take part, ignorant as a horse and obstinate as a mule'. Sclopis was little better: 'vapid, and all anxiety to give a decision which shall produce an effect in the world . . . *un vrai phrasier*.' The Baron was the best of the three, but was

> not sufficiently informed and very indolent; and apt by reason of the latter defect to catch hold of some salient point without going to the bottom of things, with the further defect of clinging to an opinion once formed with extreme tenacity'.[85]

The Americans by no means shared these disparaging judgments.[86] Nor, it seems, did the British Government, which made generous acknowledgement of the arbitrators' services after the award.[87] The neutral arbitrators' reasons, published in supplements of the *London Gazette* in September 1872, although relatively brief, read as thoughtful and coherent judgments.[88] It is however

climbing out of the window of the robing room at Exeter Castle, and also of fathering two illegitimate children. He enjoyed great success in practice and also in politics, where his defence of Palmerston in the Don Pacifico debate earned him appointment as solicitor-general, from which office he was promoted to be attorney-general. After three years as Chief Justice of Common Pleas he became Chief Justice of the Queen's Bench, declining the peerage offered on the ground that he did not wish to be a peer as Chief Justice. When, five years later, he sought the peerage it was refused by the Queen on the ground of his notoriously bad character. He opposed the Judicature Acts, but became the first Lord Chief Justice of England. He was not highly regarded as a judge, and excited considerable controversy.

[84] Cockburn to Russell, 6 Oct 1872, PRO 30/22/17A at the National Archives.

[85] Hackett (n 69) 281.

[86] ibid 215; C Cushing *The Treaty of Washington* (Harper Bros New York 1873) 78–83.

[87] An antique silver bowl weighing 120 lbs presented by HMG to Staempfli was the centre piece of an exhibition held at the Hotel de Ville in Geneva in 1972 to mark the centenary of the award.

[88] Supplement to the *London Gazette*, 30 Sept 1972: see FO 881/2086 at the National Archives.

recorded that, before the first substantial hearing of the tribunal, but following months of work at a mountain retreat in the Alps, Staempfli announced 'that he had arrived at conclusions on all points, though he would not say that on consideration with his colleagues they might not be changed'. So Cockburn had some grounds for complaint.[89]

To conduct its case the United States appointed a team of three counsel, with Davis to act as agent, and a new office (Solicitor for the United States) was created.[90] The three counsel made a formidable team. The senior was Caleb Cushing, a Democrat lawyer who had become a Brigadier-General in the Mexican war, served as US Attorney-General under Pierce and was to be (unsuccessfully) nominated as Chief Justice of the United States in 1874.[91] He was the only Anglophobe in the American team.[92] Next in seniority was William Maxwell Evarts, who had visited Britain on behalf of the United States in 1863 to observe the *Alexandra* trial. He had defended President Johnson on his impeachment and served as US Attorney-General and was to serve as Secretary of State under President Hayes before being elected to the Senate.[93] The third member of the team was Morrison Remick Waite, who became Chief Justice of the United States shortly after, in 1874, and served in that office for 14 years.[94]

The British team was smaller. It was led by the Attorney General, Sir Roundell Palmer,[95] who appeared with Professor Mountague Bernard.[96] A

[89] Moore (n 3) 648–9. Davis reported to Fish: 'It is impossible to convey to you the interest of the scene, especially when Mr Staempfli made the declaration that his own mind was nearly made up on the question at issue.' See also Cushing (n 86) 83.

[90] Hackett (n 69) 84.

[91] 1800–79. He had been (also unsuccessfully) nominated as Secretary to the Treasury in 1843. He had considerable experience as a lawyer, a politician, and a diplomat.

[92] See Hackett (n 69) 126. The *American National Biography* (OUP Oxford 1999) vol 5 at 909 speaks of his 'aggressive Anglophobia'. His account of these proceedings in *The Treaty of Washington* (Harper Bros New York 1873) is highly chauvinistic.

[93] 1818–1901. He was counsel for Hayes in the disputed presidential election of 1876. When President Hayes forbade the consumption of wine at state banquets, Evarts observed: 'Water flows like champagne at the White House': Hackett (n 69) 233. As a senator he pioneered the 'Evarts Act', which introduced circuit courts of appeals. He became a close friend of Palmer.

[94] 1816–88. Waite's appointment followed the refusal of Roscoe Corkling to be nominated and the rejection of Williams and Cushing. Rockwood Hoar said that Waite was 'the luckiest of all individuals known to the law, an innocent third party without notice'.

[95] 1812–95. As befitted an alumnus of two public schools (Rugby and Winchester) and three Oxford colleges (Christ Church, Trinity, and Magdalen), Palmer won the highest academic honours. He also wrote the Newdigate Prize Poem and was the first Eldon law scholar; acted as counsel to the University of Oxford; served as deputy steward; and became High Steward on the death of Lord Carnarvon in 1891. He became Solicitor-General in 1861 and Attorney-General during the *Alexandra* litigation in 1863. He was said to have refused a fee of £30,000 for conducting the *Alabama* arbitration, but (per the *DNB*) 'is known to have accepted remuneration on a satisfactory scale'. (The American counsel received $10,000 each and expenses: Moore (n 3) 666.) He succeeded Lord Hatherley as Lord Chancellor in October 1872 and became the Earl of Selborne, returning to the woolsack in 1880, but declined to do so in 1886 because of his opposition to Home Rule.

[96] 1820–82. He had been Palmer's pupil at the Bar. On his return from Washington Bernard became a Privy Councillor and was awarded a DCL. He resigned his chair in 1874, but served on the University of Oxford Commission in 1877 and was one of the original members of the Institut de Droit International, presiding at its Oxford conference in 1880.

young admiralty barrister, Mr Arthur Cohen,[97] was engaged to work on the figures. The British agent, as in Washington, was Lord Tenterden.

The tribunal met for the first time at the Hotel de Ville in Geneva on 15 December 1861, when the parties presented their written Cases. The British Case was mainly the work of Bernard, who had discussed the relevant history very fully in his book, but with considerable assistance from Palmer.[98]

It was a substantial document running to 168 closely printed foolscap pages, with four volumes of supporting correspondence.[99] It reviewed the rights and duties of neutrals in international law, emphasized the need for proof before the Government could act, and reviewed the facts with particular reference to the *Florida*, the *Alabama*, the *Georgia*, and the *Shenandoah*. The tone of the document was dignified and professional. It disclaimed all liability. The US Case was the work of Davis alone, although he consulted others including the President of Yale, Rockwood Hoar, Caleb Cushing, and Hamilton Fish.[100] It was a document of a very different stamp: a hard-hitting adversarial document which attacked not only the competence but the good faith of the British Government. It devoted one substantial section to describing 'The Unfriendly Course Pursued by Great Britain toward the United States from the Outbreak to the Close of the Insurrection', making strong complaint of (but basing no claim on) the British neutrality proclamation. It reviewed the activities of nine vessels in addition to those on which the British had concentrated. The style and hostility of this document did not please the British but, as Davis tartly observed, 'it was not written with a view of pleasing them'.[101] It also was a substantial document, running in its original edition to 480 pages, with seven volumes of supporting documents.

The exchange of Cases passed off quietly enough but the peace was shattered early in the New Year of 1872 when, studying the US Case, the British found that it advanced, in Chapter VI, all the heads of indirect claim which Sumner had advanced in his Senate speech three years earlier. There was uproar in the press and in Parliament. Government and opposition were at one in holding that these claims could not be the subject of arbitration.[102] The British contended strongly that they were outside the arbitrators' terms of reference, a suggestion made in the Queen's Speech of 6 February 1872.[103] There was also talk of a secret understanding that the claims would not be put forward.[104] But it is very hard to read the terms of reference as excluding these claims (as Lord Cairns pointed out in the House of Lords),[105] the Americans

[97] Cohen became a QC and MP for Southwark. Palmer (as Lord Chancellor) offered him a *puisne* judgeship, but he declined: R Palmer *Memorials* Part II, vol 1 at 249.
[98] Hackett (n 69) 149; R Palmer (n 97) 227–9.
[99] See FO/2017A at the National Archives.
[100] Hackett (n 69) 88; Moore (n 3) 591; Davis *Mr Fish and the Alabama Claims* (Books for Libraries New York 1893) 86.
[101] Davis (n 86) 88.
[102] Moore (n 3) 626.
[103] ibid 625.
[104] ibid 627.
[105] ibid 639.

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relied on a protocol of Joint High Commissioners' meetings as showing that the indirect claims had been reserved[106] and it became clear that there had been no secret understanding. Although the British and American positions on this question were diametrically opposed,[107] there was a surprising lack of recrimination and the two States did not accuse each other of deceit or bad faith. The difference has been put down to a simple misunderstanding.[108] But there remains a baffling puzzle. Against the background of Sumner's speech and rejection of the Johnson–Clarendon agreement, with Grant facing a difficult election in 1872, it was politically impossible for the Americans to abandon these claims, as must have been obvious to all. Sumner had voted for the Treaty of Washington, but only because he thought the indirect claims were included.[109] On the other hand, the British High Commissioners, who complained of unwarrantable intrusion by their home government in their conduct of the Washington negotiations,[110] cannot conceivably have intended to expose the country to the risk of an award which could bankrupt it. Even with the indirect claims excluded, the Treaty had powerful opponents, notably Earl Russell.[111] The British High Commissioners may well have gained the impression that their American counterparts had no confidence in these claims, which was true,[112] and may—wrongly—have thought they would be abandoned. But the future of the arbitration was thrown into doubt, because the Americans insisted that the arbitrators should rule on the claims and the British insisted they should not. There was an impasse.

Despite this impasse, the parties exchanged their Counter-Cases on 15 April 1872 as the arbitrators had directed. The British Counter-Case, delivered under an express reservation,[113] disdained to reply to the accusation of consistent hostility and reserved the Government's position on the indirect claims.[114]

[106] ibid 629. But the reliability of this protocol has been questioned: see Cook (n 40) 208–10.

[107] The accounts given by, for instance, C Cushing *The Treaty of Washington* (Harper Bros New York 1873) 39 *passim* and R Palmer (n 97) Part II, vol 1 227 *passim*, could scarcely be more different.

[108] Moore (n 3) 629.

[109] Cook (n 40) 194, 204.

[110] Moore (n 3) 538; Palmer (n 97) 221; Hackett (n 69) 64–5. At one stage the home government insisted on un-splitting infinitives in the draft text of the Treaty.

[111] Russell regarded the arbitration process as an attack on his personal honour and integrity. Writing to Gladstone on 17 Sept 1865 he reviewed the questions that arbitrators might be asked to determine: '1. Was Lord Russell diligent or negligent in the execution of the duties of his office? 2. Was Sir Roundell Palmer versed in the laws of England, or was he ignorant or partial in giving his opinion to the Government? . . . ' And so on. Russell concluded: 'I feel that England would be disgraced for ever if such questions were left to the arbitration of a foreign Government'. See PRO 30/22/21 at the National Archives. When the dispute about the terms of reference arose he tried to raise a vote of censure on the Government. After the Geneva Tribunal had made its award, Russell complained that he had been 'thrown over' by Gladstone and Granville, an accusation which the Duke of Argyll considered 'not at all just'. The Duke observed: 'I must remind you that *our* conduct when you were Foreign Minister, was not unanimously considered by ourselves so certainly right as you now hold it to be.' See PRO/30/22/17A at the National Archives.

[112] Both Fish and Adams thought them untenable.

[113] Moore (n 3) 641.

[114] 2nd edn Washington 1872 at 9.

Even so, it was a substantial document, running with annexes and supporting documents to over 1,100 pages. It convincingly demolished certain of the more irrelevant complaints in the American Case.[115] The American Counter-Case was shorter and advanced little that was new. Davis and Tenterden, meeting in Geneva in April 1872, discussed how the impasse could be resolved, but without immediate success.[116]

When the Tribunal formally convened in Geneva on Saturday, 15 June 1872, Davis presented the written Argument of the United States. Tenterden declined to present the British Argument, but instead asked for an adjournment of eight months to enable the two governments to conclude and ratify a supplementary convention.[117] Everyone took this to signal the effective end of the arbitration, an outcome very unwelcome to the arbitrators (other than Cockburn) and to the Americans. The hearing was adjourned until Monday, 17 June and then to Wednesday, 19 June. During this period there was intense negotiation, particularly involving the two agents and Adams but also Palmer, Evarts, Waite, Cockburn, and Sclopis, to try to find a solution. The upshot was a statement publicly read by Sclopis with the agreement of both sides on 19 June.[118] The statement referred to the parties' disagreement over whether the tribunal was competent to rule on the indirect claims, but neither expressed nor implied any opinion on the point. It did however acknowledge that the requested adjournment might render the arbitration 'wholly abortive', and continued:

> That being so, the Arbitrators think it right to state that, after the most careful perusal of all that has been urged on the part of the Government of the United States in respect of these claims, they have arrived, individually and collectively, at the conclusion that these claims do not constitute, upon the principles of international law applicable to such cases, good foundation for an award of compensation or computation of damages between nations, and should, upon such principles, be wholly excluded from the consideration of the Tribunal in making its award, even if there were no disagreement between the two Governments as to the competency of the Tribunal to decide thereon.

On 25 June Davis informed the tribunal that in view of its declaration the indirect claims would not be further pursued[119] and two days later Tenterden, in reliance on the declaration and the American response, withdrew his request for an adjournment and presented the written British Argument.[120] On the

[115] Eg that the Confederates had been preferentially treated in the supply of munitions and that British ports had shown Confederate vessels excessive hospitality: see Parts IV and IX of the British Counter-Case.

[116] Moore (n 3) 641.

[117] ibid 642; Hackett (n 69) 236–7.

[118] The course of negotiation is fully described by Moore (n 3) 643–6, Hackett (n 69) 237–54, and Cook (n 40) 233–7. Hackett sets out the full text of the statement in his Appendix III, at 393–5. See also Moore (n 3) 646.

[119] ibid; Hackett (n 69) 255.

[120] Moore (n 3) 646; Hackett (n 69) 260–1.

same day Davis sent to Fish one of the shorter diplomatic dispatches on record: 'British argument filed. Arbitration goes on.'[121] The only problem was that Cockburn, confident that the arbitration would not take place, had not applied himself to the papers and was grossly under-prepared for the hearing. By prodigious hard work and the avoidance of almost all social intercourse with others involved in the arbitration, he tried to make up lost ground, but the strain and the lack of earlier preparation may well have contributed to his irascibility and unseemly behaviour.[122]

Before the substantive hearing began on 15 July 1872, Palmer sought to submit a further written argument, but the arbitrators refused leave. Cockburn proposed that the arbitrators should invite such argument on the legal principles involved in the case, but the other four arbitrators ruled otherwise[123] and maintained their position when Cockburn elaborated his proposal on 15–16 July.[124] Against his dissent, the tribunal resolved to consider the vessels one by one, which they did, although the tribunal did accommodate Cockburn's wishes to some extent by requesting written argument on some specified questions of law, including the meaning of 'due diligence'.[125]

In the result,[126] the tribunal found against Britain unanimously on the *Alabama*; by a majority of 4:1, Cockburn dissenting, on the *Florida*;[127] and by a majority of 3:2, Cockburn and d'Itajuba dissenting, on the *Shenandoah*, but only for her acts after recruiting seamen in Melbourne in February 1865. The decision on the tenders followed that on the principal vessels to which they were accessories. The claim for the *Georgia* was unanimously rejected, to the disappointment of Davis.[128] Claims relating to the remaining five vessels were unanimously rejected, save in one case[129] where the rejection was by a majority. At a formal discussion of damages on 2 September, Davis asked for an award of $24 million. No arbitrator favoured an award of that amount. Their estimates ranged from $18 million (Adams and Staempfli) down to $4 million (Cockburn). Eventually a majority accepted the final figure of $15.5 million, including interest.[130]

The award was formally read, in English, at the Hotel de Ville, on Saturday, 14 September 1872. Cockburn, who (with Tenterden) had arrived an hour late

[121] Moore (n 3) 647; Hackett (n 69) 262.
[122] ibid 222–3, 272, 322, 339–42; Cook (n 40) 238; Moore (n 3) 649; C Cushing (n 107) 83.
[123] Moore (n 3) 647.
[124] ibid 648; Hackett (n 69) 284–9.
[125] Moore (n 3) 649; Hackett (n 69) 290–3. The American and British arguments on these points were published in the *London Gazette* on 1 Oct 1872: see FO 881/2087 at the National Archives.
[126] Moore (n 3) gives the Award in full at 653–9.
[127] Palmer later wrote: 'With respect to the *Florida*, I have been as little able to understand since the Award at Geneva as I was before, how the British Government could be held worthy of blame.' See *Memorials* part 1, vol II at 418.
[128] Hackett (n 69) 305.
[129] The *Retribution*: the majority for dismissal were Cockburn, Sclopis, and d'Itajuba.
[130] Cook (n 40) 239.

for the event,[131] and appeared to be 'very angry',[132] declined to sign the award, but instead produced a massive dissent, which he wished to be annexed to the protocol, as it was.[133] This dissent,[134] couched in immoderate and unjudicial language, caused understandable offence, and provoked Cushing into writing and publishing a lengthy and very insulting riposte.[135] Promulgation of the award was greeted by an artillery salute, and Swiss gunners held aloft the flags of Geneva, Switzerland, the United States, and Britain. The only sour note amid the general rejoicing was struck by the British arbitrator, who snatched up his hat and unceremoniously left.[136] In Britain the award had a mixed reception. But within the time allowed the British Government honoured it, by surrender of US bonds which it held to the value of the award.[137]

It seems fairly clear in retrospect that the British were always likely to lose in the arbitration, particularly on the *Alabama*, and the *Alabama* lay at the heart of the dispute. The reasons were both factual and legal. Factually, the British Government was generally perceived to have been remiss, if nothing worse. Britain's expression of regret for the escape of the cruisers was widely seen as a confession,[138] and this impression was fortified by Russell's observation, in a message to the British minister in Washington on 28 March 1863, which was—remarkably—published, that the *Alabama* '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'.[139]

The legal reason is that by agreeing to arbitration based on the three rules in Article VI of the Treaty the British Government deprived itself of perhaps its best defence: that it had been bound to act in accordance with domestic law and had had to require strict proof, as evidenced by its failure on the three occasions when it had attempted to seize vessels in reliance on section 7 of the 1819 Act. There was force in the complaint made by Russell that the dice were loaded.[140] But this was not a very powerful defence, since if the Act was

[131] Hackett (n 69) 341; Cushing (n 107) 126–8.
[132] Hackett (n 69) 342.
[133] Moore (n 3) 652, Hackett (n 69) 341–2. The (uncut) copy of Cockburn's dissent in the National Archives (FO 881/2085) runs to 254 closely printed foolscap pages.
[134] Moore (n 3) 660–1; Hackett (n 69) 356–62. The dissent was published in the *London Gazette* in full on 24 Sept 1872.
[135] Cushing *The Treaty of Washington* (n 107). Cushing was very extreme in his criticisms of Cockburn, whom he accused (among other things) of a 'singular want of discretion and good sense' (27–8), of being 'prejudiced' (52) and 'neglectfully ignorant' (83), and of 'extraordinary confusion of mind', 'forgetfulness of his own official opinions', 'ignorance of the most commonplace events of English history' (90), 'vindictive ill-will' and 'ecstasies of spiteful rage' (145).
[136] Hackett (n 69) 345–6; Cushing (n 107) 128. According to Cushing, at 128, Cockburn 'disappeared, in the manner of a criminal escaping from the dock, rather than of a judge separating, and that forever, from his colleagues of the Bench'.
[137] See FCO 26/1211 at the National Archives.
[138] Hackett (n 69) 131–2.
[139] PRO 30/22/97 at the National Archives.
[140] Russell to Roundell Palmer, in a letter of 7 Aug 1871: see Palmer *Memorials* part II vol 1 at 225.

defective it could have been amended, as Adams had urged at the time and as the Americans had done in response to British pressure in 1793–4 when French privateers had used American ports as a base to attack British shipping.[141] As it was, and although Russell was at one point willing to discuss amending the Act, no amendment was made until the war had been over for five years.

The *Alabama* arbitration is, however, significant as one of the very few instances in history when the world's leading nation, in the plenitude of its power, has agreed to submit an issue of great national moment to the decision of a body in which it could be, as it was, heavily outvoted. Gladstone did not see the arbitration as righting a wrong. Rather, '[h]e saw the process as exemplifying the means by which two civilised nations could settle differences, without either having to admit being in the wrong.'[142]

Gladstone considered the award 'harsh in its extent and punitive in its basis' yet 'as dust in the balance compared with the moral example set' of two proud nations going 'in peace and concord before a judicial tribunal' rather than 'resorting to the arbitrament of the sword'.[143] One may question whether even the most ethical of foreign policies could accommodate such grandeur of vision today.

The *Alabama* arbitration did not, regrettably, herald a century in which judicial arbitration of international differences became the norm. But when in 1872 Gustave Moynier made the first proposal to establish a permanent international criminal court to rule on breaches of the 1864 Convention on the treatment of wounded combatants, he based his model on the Geneva tribunal.[144] It was experience of this tribunal which inspired the Tsar and President Theodore Roosevelt to seek, in the Hague Conferences of 1899 and 1907, to explore means of making international arbitration more effective.[145] On these foundations the Permanent Court of Arbitration, the Permanent Court of International Justice, and the International Court of Justice were in due course to be built.[146] And two more tangible reminders of the *Alabama* arbitration remain. In what is now called La Salle de l'Alabama in the Hotel de Ville in Geneva, a plaque records the decision 'rendit dans cette salle' on 14 September 1872. In 1984 a French minesweeper detected, on the sea bed off Cherbourg, the submerged wreck of the *Alabama* herself. The United States,

[141] This history was relied on in the US Case at 55–8, 102–4.
[142] HCG Matthew *Gladstone, 1809–1874* (Clarendon Press Oxford 1986) 186.
[143] R Shannon *Gladstone: Heroic Minister, 1865–1898* (Allen Lane London 1999) 114.
[144] CK Hall 'The first proposal for a permanent international criminal court' (ICRC 1998) 322 International Review of the Red Cross.
[145] S Roseanne *The World Court: What it is and how it works* (5th edn Martinus Nijhoff Dordrecht 1995) 5–6. An invitation to attend the first conference was gladly accepted by Lord Salisbury, although he considered that the British Government's commitment to the cause of arbitration and mediation for the avoidance of war was such as to require no fresh declaration on its part: FO 881/7473, Salisbury to Scott, 14 Feb 1899.
[146] ibid, chs 1 and 2.

as legal successor to the Confederacy, claimed ownership of the wreck. But it is within French territorial waters. By a pact signed in 1989 the two countries have agreed that the United States own the ship, but the French retain custody.[147] Her epitaph may perhaps be taken from the President of the Permanent Court of International Justice, speaking on 4 December 1939: 'In the last resort, recourse to international justice depends on the will of governments and on their readiness to submit for legal decision all which can and should be preserved from the arbitrament of violence.'[148]

[147] JT Le Kay *The Rebel Raiders* (Ballantine New York 2002) 250–1.
[148] Judge J Gustavo Guerrerro.

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