

Jay Treaty 1794: The Treasure Trove for Principles of International Law on Protection of Foreign Investments

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The paper entitled “Jay Treaty 1794: The Treasure Trove for Principles of International Law on Protection of Foreign Investments”, analyses Jay Treaty to discern the classical principles of international law on protection of foreign investments. It discerns at least 10 such principles which underlie various provisions of Jay Treaty. The paper argues that these principles are ubiquitous, enduring, and lofty and have the potential to address some of the contentious issues of contemporary international law on protection of foreign investments.

Keywords: amity, commerce, navigation, compensation, commission, reprisals, justice, equity

Introduction

November 2019 is the 225th year of the signing of the Treaty of Amity Commerce and Navigation (1794) between the representatives of the United States and the Great Britain, now popularly called the Jay Treaty. At about the most tumultuous period of history for the two nations of United States and Great Britain, the treaty defined the framework for amity, commerce, and navigation between the two nations. The treaty despite its intense criticisms from the Republicans proved particularly significant for the newly born nation of United States to pave for it thereon an unhindered path to “the command of its fortunes” as envisaged by its first President George Washington. However, somewhere in the political and nationalistic milieu of the then newly born United States, and subsequently in the emergence of the dominant United States in years to come, the significance of the Jay Treaty in strengthening the basic principles of International Law on Foreign Investment Protection was lost. The present paper seeks to study Jay Treaty from the perspective of discerning the principles of international law for protection of foreign investments on the premise that these principles are critically significant to enrich, strengthen, and enhance the justice quotient of the contemporary International Investment Law.

Background of the Jay Treaty

As is known the Treaty of Amity Commerce and Navigation was signed on November 19, 1794 between Great Britain and the United States of America. United States of America was liberated in 1776; however, its independence was recognized by Great Britain in 1783 by the treaty of Paris. On February 1, 1793, France declared war on Britain and Holland, forcing the latter two to join the first European coalition against France consisting of Austria, Prussia, Spain, Portugal, Holland, and Ottoman Empire (Maze & Grehan, 2013, p. 1).

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United States had sought to maintain neutrality in this continental war in Europe. However, in the winter of 1793-1794, the Royal Army of Britain seized about 250 American merchant vessels involved in neutral trade with the French West Indies and the British prize courts confiscated their cargoes (Trautsch, 2018, p. 80). As the news of seizures reached America in March 1794, the Republican claims of British hostility towards the newly born American Republic seemed to be proven correct giving rise to clamour for war among the Republican newspapers and local organizations (Trautsch, 2018, p. 80). The Federalists in America, however, were opposed to Republican's retaliatory or war outcry against Britain. They identified three issues that troubled Anglo-American relations, which needed to be addressed to contain Republican's accentuated war cry against United States: first, fulfilment of commitments of two countries enshrined in the Paris Treaty 1783; second, suspension of commercial privileges for the people of America by Britain after it had recognized the American independence in 1783, and third, British interference with American trade with France, after the outbreak of Anglo-French war in 1793 (Trautsch, 2018, p. 82). On the advice and insistence of Federalist Senators, the President George Washington officially announced on April 16, 1793 to send Federalist Chief Justice John Jay to London to settle the lingering Anglo-American tensions (Trautsch, 2018, p. 83). Hamilton, who was the treasury secretary then and other Federalists Senators met with Jay to finalize the broad framework for discussion and negotiation which John Jay should pursue with Great Britain. The following was agreed (Trautsch, 2018, p. 83):

(a) The Britain should be insisted upon to fulfil its remaining obligations of the Paris Treaty of 1783 and evacuate the posts in the Northwest of the United States; if Britain agreed America would pay the debts American citizens owed to British creditors.

(b) If the issues arising out of European war and the Peace Treaty of 1783 were settled amicably, Jay should seek to conclude a commercial treaty to seek access to British West Indies for American trade and most-favoured-nation status for American exports to Great Britain and Ireland.

(c) Indemnification for the seizures of around 250 American merchant vessels involved in neutral trade with the French West Indies in the winter of 1793 was made *sine qua non* condition for the conclusion of any treaty.

John Jay sailed for Great Britain in May and reached Great Britain in June 1793. He was a known Britain lover, so it is not surprising that he was received well in Great Britain including having the privilege to kiss the hand of Queen of Great Britain in mutual honour, respect, and courtesy. The Right Honorable William Wyndham Baron Grenville of Wotton was soon nominated to represent His Britannic Majesty for negotiation with John Jay. After extensive deliberations, a treaty officially called the "Treaty of Amity Commerce and Navigation between His Britannic Majesty and the United States of America" was finalized and signed on November 19, 1794 in London, between the two representatives of the Great Britain and United States. The treaty was to become binding and obligatory on two countries after the ratification by the his Majesty, the King of Great Britain, and by the President of the United States by and with the advice and consent of the Senate of United States.

An Overview of the Relevant Treaty Provisions

This treaty had altogether had 28 articles dealing with various aspects of amity, commerce, and navigation between United States and Great Britain. Conceptually, these three concepts, i.e., amity, commerce, and navigation are inter related, interdependent, and thus integrated. All these concepts together evolve an

ecosystem for strong and healthy inter se trade and commerce between the nations. Movement and residence of the citizens of one country into the territory of other country, including the right to enter into commercial, contractual, and mercantile association with the natives of the other country, are necessary imperatives of the treaty of amity, commerce, and navigation. Thus, any such treaty of amity, commerce, and navigation would also invariably have provisions to protect the commercial-contractual rights, property, and person of the citizens of one Contracting party in the territory of other Contracting party. In the treaty of amity, commerce, and navigation, between Great Britain and United States, such provisions relating to protection of various rights of the merchants, traders, creditors, and other citizens of one country into the territory of other country are stated in various articles of the treaty. This treaty between United States and Great Britain, besides the futuristic objectives to promote amity, commerce, and navigation, also had the objectives to settle certain outstanding issues of the past. One such outstanding issue related to the claims of the creditors and other citizens of the Great Britain against the United States, for the debts unpaid by the citizens of United States and vice versa. All such Articles of the treaty which sought to grant or acknowledged the existence of one or other kind of business, commerce, or property related rights of the citizens of one country into the territory of others, including the provisions for settlement of any claims arising because of infringement of such rights have been culled out here. These provisions have been further analyzed to discern the principles of law then articulated and agreed between the two nations with respect to these issues which in the language of contemporary legal discourse may be broadly said to be the principles of international law for the protection of the foreign investments. These treaty provisions, severally or jointly, generally or specifically lay down various principles of law for protection of foreign investments by the host country for the nationals of other country. To bridge the semantic gap which may have arisen since the time when the Jay treaty was adopted and today, the two critical phrases, i.e., foreign investments and protection of foreign investments, need to be understood in broadest context. Thus, foreign investments would include any kind of property, assets, commercial interests, contractual rights, outstanding pecuniary credits, privileges, etc., of the citizens of one country into the territory of other country. Similarly protection of foreign investments should mean all such kinds of processes available in law to the citizens of one country into the territory of other country to protect and preserve any of its investments, interests, property, privileges, etc., including the right to get compensation for impairment of these investments, interests, property, and privileges.

A brief content description of the provisions stated under the relevant articles in the Jay Treaty 1794 is stated herein below.

1. The preambular paragraph of the treaty outlines the broad objectives of the treaty, i.e., firstly to terminate their differences in manner that may be best calculated to produce mutual satisfaction and good understanding and secondly to regulate their commerce and navigation in manner as to render them reciprocally beneficial and satisfactory.

2. Article I of the treaty binds the two nations into a commitment of inviolable and universal peace and in a relation of true and sincere friendship.

3. Articles III of the treaty stipulate freedom of movement over land, navigation in the rivers and lakes of the nationals of one country into the other. It further stipulates freedom of importation, export, and commerce in permitted goods and merchandise by the nationals of one country into the territory of other country in a manner that is at parity with the domestic nationals of the respective countries in terms of duties payable over such import, export, and commerce in goods and merchandise. This article sought to ensure local advantages of

each country to the nationals of other country primarily to promote a disposition favourable to friendship and good neighbourhood (Article III). Further the nationals of the two countries holding land in other country, in respect of their land holdings the legal incidences and remedies, were required to be treated at par with the natives and as such not be considered as aliens in such matters (Article IX).

4. Under the provisions of Article VI of the treaty, it was agreed that in all such cases where the British merchants and others his Majesty's subjects had failed to recover full debts from the citizens and inhabitants of United States or had suffered loss of value and impairment and by the ordinary course of judicial proceedings they cannot receive full and adequate compensation; it was provided that the United States will make full and complete compensation for the same to the creditors of the Great Britain. It was understood distinctly by the parties that this provision was to extend to only such losses as have been occasioned by the lawful impediments and was not to extend to losses occasioned by such acts as insolvency of debtors, or other losses caused by willful omission or delay or negligence of the claimants. For the purpose of ascertaining the amount of any such losses and damages, it was further agreed to appoint five commissioners; two of them to be appointed by Great Britain, the other two by the United States, and the fifth by the unanimous voice of other four (Article VI). Similar provision *mutatis mutandis* for payment of compensation to the subjects of United States by the British Government was stipulated under Article VII of the treaty for the cases where the vessels of the American citizens were illegally captured by British subjects (Article VII).

5. It was agreed that no debts due from individuals of one nation to individuals of the other, nor shares, nor monies which they may have in the public funds, or in the public or private banks shall ever in any event of war or national differences be sequestered or confiscated. It was particularly stated in the treaty that destruction or impairment of debts and engagements contracted and made by individuals, by the national authority on account of national differences and discontents was unjust and impolitic (Article X).

6. It was agreed that the people and inhabitants of the two countries respectively shall have liberty to freely and securely, and without hindrance and molestation, to come with their ships and cargoes to the lands, countries, cities, ports, places, and rivers within the dominions and territories to the two countries, to enter into the same, to resort there, and to remain and reside there, without any limitation of time. It was agreed that the merchants and traders on each side, shall enjoy the most complete protection and security for their commerce; but subject always as to the laws and statutes of the two countries respectively (Article XIV).

7. It was further agreed that no other or higher duties shall be paid by the ships or merchandise of the one party in the ports of the other, than such as are paid by the like vessels or merchandise of all other nations. Similarly with respect to imports, growth, produce, or manufacture of articles, it was agreed that no other or higher duties shall be paid than as paid for the like article by the producers or manufactures of any other foreign country (Article XV).

8. It was agreed that abundant care may be taken for the security of the respective subjects and citizens of the contracting parties, and to prevent their suffering injuries by the men of war, or privateers of either party; all commanders of ships of war and privateers, and all other subjects and citizens, shall forbear doing any damage to those of the other party, or committing any outrage against them; and if they act to the contrary, they shall be punished, and shall also be bound in their persons and estates to make satisfaction and reparation for all damages, and the interest thereof, of whatever nature the said damages may be (Article XIX).

9. It was expressly agreed under Article 22 that neither of the Contracting parties will order or authorize any Acts of Reprisal against the other on complaints of injuries and damages until it shall first have presented

to the other a statement thereof, verified by competent proof and evidence and demanded justice and satisfaction and the same shall have either been refused or unreasonably delayed (Article XXII).

10. Taking note of the futuristic uncertainties in the diplomatic relationship, the treaty expressly stated that, if at any time a rupture takes place between the Great Britain and United States, the merchants and others of each of the two nations, residing in the territory of other, shall have the privilege to remain and continue there so long as they behave peacefully and commit no offence against the laws. The treaty further provided that in case the conduct of such persons raises any suspicion and the respective government takes decision to remove such suspected from the territory, a term of 12 months from the date of notification of the order shall be allowed to such persons to move out of the said territory with families, effects, and property. However, this privilege was not to be granted to persons who act contrary to the established laws (Article XXVI).

11. Further Article 28 stated that after the exchange of the instruments of ratification, the treaty shall be binding on the two parties and it was incumbent upon the two parties to execute and observe the treaty with punctuality and the most sincere regard to good faith.

Analysis of the Relevant Treaty Provisions

An analysis of the relevant provisions of Jay Treaty reveals the following key principles which seem to form the basis for the agreement between the two countries for the protection of traders, merchants, creditors, and other citizens of one country in the territory of the other country.

First, the principle of reciprocity and mutuality: The principle of reciprocity and mutuality is central to any international treaty between two or more nations, wherein two or more countries agree to grant rights, privileges, or immunities to other party and further undertake obligations on reciprocal basis for the mutual benefit of each of the Contracting States. In Jay Treaty this principle of reciprocity and mutuality is evident in the preambular paragraph as well as other articles (Articles III, IX, X, XI, XII, XIV, XV, XVI, XVII, XIX, XX, XXI, XXII, XXIII, XXVI, XXVII, and XXVIII) where rights, privileges, and protection of the citizens of one country in the territory of other country have been accorded on reciprocal basis, to bring mutual benefits to all concerned.

Second, the principle of protection at par with local citizens: In terms of the scope of protection and standard of protection of the commercial interests, etc., of the citizens of one country into the territory of other, the treaty envisaged protection at par with the local citizens (Articles III and IX) in general. This principle of parity is besides certain specific rights stated in the treaty for the citizens of the one country into the territory of other like the right of treatment at par with any other foreign national which is akin to rights under the most favoured nation clause (Article XV) and the right against sequestering or confiscation (Article X) found in contemporary bilateral investment treaties.

Third, the principle of affirmation of the sanctimony of the local laws and statutes: The treaty granted protection to the security, liberty, and commercial interests of the citizens of one country in the territory of the other Contracting State; however, all such protection was subject to the conformity with the local laws and the statutes of the host state. Thus, the treaty did not create any better rights or privileges for the citizens of the other Contracting State than what was available under the domestic laws and statutes except some special rights that were only applicable to the foreigners like right against sequestering or confiscation. Article XIV of the treaty specifically mandated that whereas the merchants and traders on each side were entitled to enjoy most complete protection and security for their commerce, but subject was always to the laws and statutes of the two

countries respectively. Again under Article XVI of the treaty, it has been stipulated that in case of illegal or improper conduct towards the laws of government, the person responsible for such conduct, *inter alia*, may be punished according to law of the host state. Similarly Article XXVI of the treaty refers to the imperatives of refraining from acts contrary to the laws of the host state. All these provisions of the treaty clearly establish the principle of affirmation of the sanctimony of the local laws and statutes of the one Contracting State by the Other Contracting States. Each of the Contracting States permitted the local laws and statutes to be applied over their citizens residing in the territory of the other Contracting State. Article XIX of the treaty empowered each of the Contracting States to impose punishment and render judicial pronouncements against foreign nationals, if they acted in manner which was outrageous or damaging to the interests of the host state.

Fourth, the principle of full and absolute acknowledgment of the competence of domestic judicial proceedings of the host state: It is evident from Articles VI and VII of the Treaty that the aggrieved traders, creditors, merchants, and citizens of one country were entitled to get full and complete compensation from the other country under the provisions of the Jay Treaty only because it had so occasioned that in the ordinary course of judicial proceedings in the host state, it was not possible for them to obtain full and adequate compensation for the damages suffered by them in the territory of the other country. Thus as a corollary, it may be construed that they had the aggrieved traders, creditors, merchants, and citizens obtained compensation or they had the opportunity to obtain compensation in the ordinary course of judicial proceedings in the host state; they were not entitled to seek compensation by the commissions constituted under the Jay Treaty. Such disentitlement was there, even if the claims of the foreign investors were considered and compensation awarded at domestically prescribed lower standard from the standard prescribed for the commission constituted under the Jay Treaty. Article III of the treaty stated that causation of speedy and impartial justice by the Contracting States was imperative to build a disposition favourable to friendship, good neighbourhood, and amicable intercourse between the two Contracting States. These provisions of the treaty clearly evidence the principle of full and absolute acknowledgment by the two Contracting States for the competence of the domestic judicial proceedings to consider the claims of the aggrieved foreign nationals and award compensation as well as for other juridical purposes involving the foreign nationals.

Fifth, the principle of acknowledgment of differential standards of compensation for the domestic judicial proceedings and the proceedings of the commission constituted under the treaty: The provisions of the Jay Treaty refer to three differential standards of compensation. With reference to domestic judicial proceedings in the United States of America the treaty acknowledges the principle of full and adequate compensation; with respect to domestic judicial proceedings in Great Britain the treaty acknowledges the standard of adequate compensation; and with respect to the proceedings of the commission constituted jointly by the two Contracting States, treaty prescribes the standard of full and complete protection for the award of compensation. In the overall context of the treaty, the reasons for affirming three differential standards of compensation are not inexplicable. It emanates out of two considerations. The acknowledgement of the full and adequate standard and that of adequate standard of compensation with respect to the domestic judicial proceedings of United States and Great Britain respectively emanate out of the principle for full and complete acknowledgement of the domestic laws and the domestic judicial proceedings of the respective Contracting States. However, as regards, the commission constituted under the treaty, as a matter of mutually agreement on reciprocal basis, the standard of compensation seems to have been elevated to full and complete compensation without prejudice to award of compensation in the domestic judicial proceedings, if any. It is interesting to note that while agreeing

for a higher standard of compensation at the level of the international commission constituted under the treaty, the Contracting States recognized the sanctimony of the domestic standards of compensation of the respective states.

Sixth, the principle of determination of the admissibility of claims and compensation by co-jointly constituted autonomous and independent commission (Article VI): The Jay Treaty envisaged an international commission (Hershey, 1912, p. 55)¹ jointly constituted by the two Contracting States to determine the admissibility of claims and the amount of compensation payable by the Contracting States as against the admissible claims. To ensure impartiality in the decision making of the commission, the composition was envisaged to be constituted of two nominated appointees from each of the Contracting States and the fifth odd commissioner appointed by unanimous decision of all other four already nominated commissioners. Further to ensure avowed integrity in the decision making each of the commissioners so appointed under the treaty was required to take prescribed oath (Article VI)² or affirmation in the presence of all other commissioners and the oath so taken were required to be attested and entered on the record of their proceedings. The Commission so constituted under Articles VI and VII of the treaty was independent and autonomous as it was not under the operational command or supervision of any other body for the conduct of its proceedings and for the substantive decision making processes. Further the Commission was empowered to examine all persons who appear before it on oath or affirmation and take independent decision thereto. The commission was further empowered under the treaty to receive in evidence duly authenticated written depositions, or books, or papers or copies, or extracts thereof, in the manner as they may think most consistent with equity or justice.

Seventh, the principle of positive obligations of the citizens of the one Contracting State residing in the territory of other Contracting State: The treaty specifically provided that the citizens of one country residing and/or doing business or any other commercial activity in the territory of the other country shall forbear doing any damage or commit any outrage against the said country. In case of any act to the contrary by the nationals of the other Contracting State, they were liable to be punished and liable in their person and estates to make satisfaction and reparation for all the damages and the interest thereof, of whatever nature the said damages may be (Article XIX). Similarly Article XIV of the treaty specifically mandated that whereas the merchants and traders on each side were entitled to enjoy most complete protection and security for their commerce, but subject was always to the laws and statutes of the concerned state.

Eighth, the principle of refrain from reprisals: Article 22 of the treaty specifically provided that the Contracting States should refrain from any acts of reprisal against each other on complaints of injuries or damages except in one extreme situation when one party had refused or caused undue delay to furnish duly verified complete statements thereof with appropriate proof and evidence and further denied the demanded justice and satisfaction. Thus, as a matter of principle, the treaty stipulated refrain from reprisals except in the exceptional situations specified in the treaty.

¹ Amos S. Harshey claims that the Jay Treaty revived the practice of international arbitration, which had greatly declined at the close of the Middle Ages and which had almost disappeared from international usage during the 17th and 18th centuries, primarily because of the fact that the absolute monarchs of this period, who were ruled by divine right, were unwilling to submit their cause to any other than the God of hosts.

² The prescribed oath read as follows: "I, A. B. one of the commissioners appointed in pursuance of the sixth article of the treaty of amity, commerce, and navigation, between his Britannic Majesty and the United States of America, do solemnly swear (or affirm) that I will honestly, diligently, impartially, and carefully examine, and to the best of my judgment, according to justice and equity, decide all such complaints, as under the said article shall be preferred to the said commissioners; and that I will forbear to act as a commissioner, in any case in which I may be personally interested".

Ninth, the principle of justice and equity: It is noticeable that Article VI of the treaty³ which dealt with the issue of compensation payable by the government of United States to the British citizens used the phrases justice and equity (or equity and justice) on three occasions with reference to three distinct issues. Firstly, it is used with reference to duty of the commissioners to decide all complaints, *inter alia*, in manner, which is consistent with justice and equity, thus the imperatives of procedural justice is underscored and stated. Secondly, it is used with reference to determination of claims on the merit of each cases, but with due consideration, *inter alia*, to justice and equity, thus on matters of substantive claims, the imperatives of substantive justice is underscored and stated. Thirdly, it is used with reference to receiving in evidence of written depositions of various kinds, in manner which is consistent with equity and justice, thus justice in determination of facts is underscored and stated. Similarly Article VII of the treaty which dealt with the issue of compensation payable by the British government to American citizens also used the phrase equity and justice in similar connotations as it has been used with reference to the issue of compensation payable by the United States to the British citizens under Article VI of the treaty. Multiple references of justice and equity particularly with reference to almost all aspects of the proceedings of the commission constituted under the treaty for the determination of the claims of the aggrieved aliens and for determination of the compensation payable by the concerned host state, clearly establish the principle of justice and equity in the context of determination of admissible claims of foreign investors and award of compensation thereto.

Tenth, the principle of inviolable universal peace, true, and sincere friendship: The objectives of the Jay Treaty may be varied and multiple, but the ultimate inspiration and the basis of Jay Treaty seem to be the principle of inviolable universal peace, true, and sincere friendship between the two Contracting States and the same is stated in Article I of the treaty. To this end, the Contracting States bound themselves into reciprocal and mutually beneficial and satisfactory relationship and good understanding through the instrumentality of the treaty. Thus, the treaty seems to be in consequence to the principle of inviolable universal peace and sincere friendship between the two Contracting States, rather than merely an instrumentality to address the grievances of the aggrieved investors from one country residing in the territory of other country. Just and equitable redressal of grievances of the foreign investors stated in the treaty thus seems to be a necessary imperative and consequence of the broader treaty framework for the amity, commerce, and navigation inspired by the imperatives for inviolable universal peace and friendship.

Significance of the Principles

Jay Treaty seems to be the first international treaty signed, ratified, and adopted by two nation states, *inter alia*, to address in an institutionalized, impartial, independent, bilateral, and judicially diligent manner, the claims for compensation of the nationals of one state against the other state, for the commercial damages suffered by them by the operation of lawful impediments in the territory of the other state. On careful and discerning analysis of the provisions of the Jay Treaty, this paper finds as many 10 key principles underlying the relevant provisions of the Jay Treaty in relation to protection of interests of the foreign traders, creditors, and other citizens in the territory of the other Contracting State. This framework for protection of the commercial interests of the nationals of one country in the territory of the other country is conceptually akin to the contemporary frameworks for protection of foreign investments. Thus, it is argued that almost each of these

³ Article VI of the treaty is titled as "U.S. to make compensation to British creditors, for losses occasioned by legal impediments to the collection of debts contracted before the peace".

principles has their relevance and reckoning till date in various shades and substance in the contemporary international law and jurisprudence for the protection of foreign investments. The principles of Jay Treaty have the potential to address the multitude of challenges of the contemporary international law on foreign investment protection.

Jay Treaty seems to revive the process of legal/judicial adjudications through international commissions which was a kind of precursor to the modern day international tribunals. Appreciating the significance of Jay Treaty in rejuvenating the idea of international arbitration, Harshey (1912) claimed that the Jay Treaty revived the practice of international arbitration, which had greatly declined at the close of the Middle Ages and which had almost disappeared from international usage during the 17th and 18th centuries, primarily because of the fact that the absolute monarchs of this period, who were ruled by divine right, were unwilling to submit their cause to any other than the God of hosts (p. 55).

In the history of the modern international law, the Jay Treaty may be the first treaty framework affirming specific rights of the foreign nationals' vis-à-vis their businesses, commercial, and investment related interests against the host states and further instituting an international commission to redress the reported infringements of such rights, based on sound and cohesive legal, juridical, and diplomatic principles. The redressal of the grievances of the foreign claimants was one of the key objectives of Jay Treaty, but this was inspired by much broader objectives of building an enduring relationship between two Contracting States based on ubiquitous ideals of universal peace, sincere, and true friendship, mutually beneficial and satisfactory association, good understanding. The genius of the Jay Treaty in encapsulating these lofty ideals may be appreciated from the fact that the two persons authorized to negotiate and sign the treaty, i.e., John Jay⁴ representing the United States of America and William Wyndham Grenville⁵ representing Great Britain were men of commendable public accomplishments and standing in their respective countries at one of the most tumultuous times of their respective national history.

It is surprising that enriching and enduring principles of Jay Treaty do not find much reference in the literatures on International Investment Laws which developed later. One possible reason may be that the commission constituted under the treaty was a kind of one time commission with specific terms of reference to consider the claims of the traders, creditors, and other nationals of the two countries who had already suffered the alleged wrongs before the signing of the treaty in 1794. The commission constituted under the Jay Treaty was neither permanent nor futuristic, and this may be one possible reason for its conspicuous absence from the

⁴ John Jay was the first Chief Justice of the United States Supreme Court. He served the Supreme Court from 1789 to 1795. In 1795, he resigned from the Supreme Court to become the Governor of New York. In 1783, he signed the Treaty of Paris, by which the Independence of United States was recognized by Great Britain and other European powers. He with Madison and Hamilton wrote the Federalist Papers. He was author of five of the total 85 Federalist Papers that were published by the trio. In 1800, John Jay ran for the office of the President of United states, but lost.

⁵ The Right Honorable William Wyndham Baron Grenville of Wotton, as he is referred in the Jay Treaty, was one of his Majesty's Privy Council and his Majesty's Principal Secretary for Foreign Affairs. In 1806, after the death of the then Prime Minister William Pitt, William Wyndham Grenville became the Prime Minister of Great Britain. It was during his tenure as Prime Minister that slave trade was abolished in Britain. In its third reading, the Bill abolishing the slave trade was passed in the House of Lords, however, the day it received Royal Assent, i.e., March 30, 1807, his coalition government collapsed and he resigned from the office of Prime Minister. He is reported to have made a powerful speech in House of Lords to ensure that the Bill abolishing slave trade was passed. The extract of speech is commemorative and hence the same is reproduced here: "... What right do we derive from any human institution, or any divine ordinance, to tear the natives of Africa, to deprive them by force of the means of labouring for their own advantages, and to compel them to labor for our profit? ... Can there be a question that the character of the country ought to be cleared from the stain impressed by the guilt of such traffic, by the effect of which we keep Africa in a state of barbarity and desolation? ... Twice has this measure failed in this House, and if this iniquitous traffic is not now abolished, the guilt will rest with your lordships".

textbooks of contemporary International Investment Laws. Even this reason seems superficial as the principles underlying the rights of the foreign nationals with respect to their commercial, business, and investment related interests and the constitution of commissions to consider such claims as discernible from Jay Treaty are based on the principles and traditions of international law as understood then. Other possible reason for grounding the enduring principles of Jay Treaty may be political in nature. It is common knowledge that John Jay was considered a lover of Great Britain, and this was the reason why the then President George Washington nominated him to negotiate with Great Britain in manner that threatening war with it may be averted. John Jay succeeded in negotiating a treaty with Great Britain which succeeded in averting the then almost impending war with Great Britain. Nonetheless the treaty itself did not receive warm and kind reception in United States. It was considered as betraying American interests and drew intense criticism of John Jay (McMaster, 1907, p. 213).⁶ Referring to this treaty an author has noted,

Bad as treaty was, both in its omissions and its admissions, as a matter of foreign relations, these defects were almost trifles when compared with its mischievous results at home. It thrust a sword into the body politic. ... Nothing could have so effectively arrayed the two great domestic parties in sharply defined opposition to each other, and nothing could have aroused more bitterness of personal feeling. (Adams, 1943/1879, p. 159)

When the treaty was being considered in the Senate in United States, two motions were made, one by Aaron Burr, who proposed that all consideration of the treaty should be postponed and the President should be urged to negotiate further. The other motion was made by Henry Tazewell, who proposed that the President should be advised not to sign the treaty and gave seven reasons why (Adams, 1943/1879, p. 159). Both the motions failed, and the Senate approved Jay Treaty, with 20 votes in support and 10 votes against. President Washington was fairly aware of the outcry against the treaty, yet he signed the treaty after long deliberation (Adams, 1943/1879, p. 158). It is understandable that sum and substance of Jay treaty would not have been agreed by John Jay, without the administrative brief and mandate of the President, which also seems to be evident from the farewell speech of President Washington. Referring to his foreign policy decisions, President George Washington notes,

... With me, a predominant motive has been to endeavor to gain time to our country to settle and mature its yet recent institutions and to progress without interruption to that degree of strength and consistency which is necessary to give it, humanly speaking, the command of its fortune. ("Farewell Address of President George Washington", 1796)

As late as in 1879, Henry Adams (1943/1879) wrote his critique of Jay Treaty by observing "that Mr. Jay's treaty was a bad one, few persons even then ventured to dispute; no one would venture on its merits to defend it now" (p. 158). Henry Adams states the part truth; the other part of the truth is that Jay Treaty averted the impending war with Great Britain in 1794, which gave the United States thereon the unhindered path to

⁶ The Treaty was opposed by the Gallican party, the Republicans, and the French party. Referring to criticism of the Treaty in America, an author writes as follows: "From the day whereon Jay sailed out of the harbour of New York, the Gallican party had openly declared the Minister could accomplish nothing. When they heard that he had been well received, he was accused on selling himself for British Gold. When it was known that he had kissed the Queen's hand, a shout went up that he had 'prostrated at the feet of majesty the sovereignty of the people', and that 'he richly deserved to have his lips blistered to the bone'. When it was reported that something was really being done, every Republican determined to oppose it. The thing must of necessity be bad". The author refers to another ridicule published in the New Jersey Advertiser, under the title "Oracle of the Day" on November 25, 1795, where the writer exclaimed in ridicule, "Hear the voice of truth, hear and believe! John Jay, ah! The arch traitor seize him, drown him, hang him, burn him, flay him alive! Men of America, he betrayed you with a kiss! As soon as he set foot on the soil of England he kissed the Queen's hand. He kissed the Queen's hand, and with that kiss betrayed away the rights of man and the liberty of America".

“the command of its fortune” envisioned by its first President George Washington. However, for years to come, it seems, idea of finding any appreciation for the treaty for any purpose whatsoever, got grounded from the public as well as academic discourse in United States because of its staunch criticism particularly from the Republican Party.

The second reasons for grounding of the principles of Jay Treaty seem to emanate from the success of United States of America in emerging as a major economic power. After the adoption of the Jay Treaty, it not only succeeded in averting an almost impending war with the then militarily powerful United Kingdom, but further, for very long period it succeeded in keeping itself away from any major war against any major power then. It gave United States, what has been called by its first President, “... time to our country to settle and mature its yet recent institutions and to progress without interruption” and since then it indeed progressed to become one of the formidable nations in years to come. Because of its formidable position, it never found any serious challenge from any foreign investor of any country nor did the investors of the United States find any serious threat to their commercial, economic, and trading interests in any foreign land. Further as a dominant power, the perspectives of the United States also got significantly altered than what it may have been during the days of negotiations of Jay Treaty. This changed perspective was brazenly evident in 1936, when, on the request of investors from United States having commercial stakes in Mexico, the United States threatened and forced Mexico to accept a unilaterally declared standard of treatment for its investors under the principle which later came to be called the Hull Doctrine.

The threat of use of force to settle the grievances of the aggrieved citizens in a foreign state under the framework often called the gun boat diplomacy and the international law on protection of foreign investors are mutually exclusive and non-overlapping concepts in strict sense. Jay Treaty though triggered by the fear of an impending war against the then military power of Great Britain, sought to enunciate principles to denounce gun boat policy and reprisals of any kind against the other nation. In 1936, the United States of America resorted to use of threat against Mexico because by this time the valuable principles of Jay Treaty had got completely whittled down in the political and nationalistic milieu of United States of America. It is not surprising that the nation which had the genius and had further acquired in the years to come, the political and diplomatic capability to establish just and equitable principles of international law on contentious subject like protection of foreign investment had to fall back on gun boat diplomacy, as late as in 1936.

Did the United States have the obligation to take forward the principles of Jay Treaty to strengthen the International Law on the Protection of Foreign Investments? Answer to this question may be inferred from the farewell address of its first President who while underscoring the need for neutral conduct noted,

The duty ... may be inferred, without anything more, from the obligation which justice and humanity impose on every nation, in cases in which it is free to act, to maintain inviolate the relations of peace and amity towards other nations. (“Farewell Address of President George Washington”, 1796)

The obligation to justice, the obligation to humanity, the obligation to maintain inviolate the relations of peace and amity towards other nations, remain the fundamental basis, and the defining threshold for every principle of international law and every branch of international law including the international law relating to foreign investment protection. Jay Treaty is among the first international legal document to encapsulate principles of international law relating to protection of business interests of foreign nationals based on *inter alia* justice, equity, humanity amity, and peace with nation states.

Conclusion

November 2019 is the 225th year of the signing of Jay Treaty between two great nations of United States and Great Britain. Since then tremendous developments have occurred in the area of protection of foreign investments, nonetheless, the principles underlying the Jay Treaty is relevant even today. On careful and discerning analysis of the provisions of the Jay Treaty, this paper finds as many as 10 key principles underlying the Jay Treaty in relation to protection of foreign investments. Almost each of these principles carries their relevance and reckoning till date in various shades and substance in the contemporary international law and jurisprudence of foreign investment protection. The principles of Jay Treaty have the potential to address the multitude of challenges of the contemporary international law on foreign investment protection.

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