



MegaReg Forum Paper 2017/1 **Alexander Hamilton's Defense of Foreign Capital**

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The Trump Administration promises to reshape, and perhaps even dismantle, significant parts of the international trade and investment regimes. The new President appears to favor trade wars (at least with China and Mexico) that may violate WTO agreements or the NAFTA, has promised to rip up the Trans-Pacific Partnership (TPP)(which some see as an alternative to post-Doha WTO paralysis), and seems even less likely to defend the independence of WTO Appellate Body members than the Obama Administration.¹ The possibility of populist ethno-nationalistic policies spilling over into trade wars with China or Mexico has alarmed many, but treaties to protect foreign investors, particularly through investor-state dispute settlement (ISDS), had few defenders in the recent Presidential campaign or among members of Congress from either party. For many, including prominent academics, it was easier to defend low tariffs and binding WTO arbitration to enforce them as well-established “American” ideas – as compared to special and enforceable privileges for foreign investment capital. The latter seemed a more recent (failed) experiment, an “un-American” attempt to emulate, in the wake of naïve post- Cold War enthusiasm, European bilateral investment treaties (BITs) like that concluded between Germany and Pakistan in 1959 and Indonesia and the Netherlands in 1968. This essay seeks to correct the historical record by reminding us that the defense of foreign capital has a longer association with U.S. foreign policy than does the goal of avoiding trade wars.

While a recent book argues persuasively that the investment aspects of U.S. Friendship, Commerce and Navigation treaties (FCNs) after WWII presaged today's International

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¹ See, e.g., Gregory Shaffer, Will the US Undermine the World Trade Organization?, Huffington Post, May 24, 2016, available at http://www.huffingtonpost.com/gregory-shaffer/will-the-us-undermine-the_b_10108970.html.

Investment Agreements (IIAs),² it is plausible to make the case that the 1794 Treaty of Amity, Commerce and Navigation between Great Britain and the United States, otherwise known as the “Jay Treaty,” has a prior claim. The Jay Treaty contains protections for foreign investors that anticipate those in 20th Century FCNs as well as their controversial off-spring, namely some 3400 contemporary IIAs. Its mixed claims commissions to settle both classic inter-state disputes and those arising from harms inflicted on private parties by the respective governments were precursors to investor-state dispute settlement (ISDS).³ Although the 1794 treaty is attributed to its lead U.S. negotiator, retired U.S. Chief Justice John Jay, it might be more appropriately designated “Hamilton’s treaty” since the preliminary negotiations on its behalf, Jay’s negotiating instructions, and most significantly, the substantial effort to elicit support for what became the most controversial foreign relations effort of Washington’s presidency were all undertaken by the current King of Broadway, Alexander Hamilton (initially as Secretary of the Treasury and thereafter, after his retirement from that position and while in private practice).⁴

At a time when the treaty was being passionately denounced and Jay was being burned in effigy in many U.S. cities, Hamilton became the treaty’s “undisputed champion.”⁵ Hamilton wrote 28 erudite essays, consisting of nearly 100,000 words defending sequentially the Treaty’s 28 articles, at the same rapid pace as “The Federalist Papers,” entitled “The Defence.”⁶ Hamilton’s impassioned defense, so intimidatingly comprehensive that Madison refused to write a response despite pleas by Jefferson, is credited for the razor-thin margin (51 to 48 votes) by which the House of Representatives approved appropriations for the treaty’s implementation.⁷ *The Defence* provides important insights into what one of the intellectual giants of the Founding generation thought of the connections between foreign relations and economics, the law of nations and national law (including the U.S. Constitution and the laws of the states of the union), and how both relate to natural law and the wealth of nations.

² Kenneth J. Vandeveld, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties* (forthcoming OUP 2017).

³ See, e.g., Georg Schwarzenberger, *Present-Day Relevance of the Jay Treaty Arbitrations*, 53 NOTRE DAME L. REV. 715 (1978).

⁴ Leading accounts of the Jay Treaty and Hamilton’s involvement include RON CHERNOW, *ALEXANDER HAMILTON* 482–500 (2004); SAMUEL FLAGG BEMIS, *JAY’S TREATY* (1923); JERALD A. COMBS, *THE JAY TREATY: POLITICAL BATTLEGROUND OF THE FOUNDING FATHERS* (1970). See also C. Van Vollenhoven, *International Arbitration, Past and Present*, 88 ADVOCATE OF PEACE THROUGH JUSTICE 542 (1926) (calling it “Hamilton’s treaty”).

⁵ CHERNOW, at 496.

⁶ For a text of *The Defence*, see THE WORKS OF ALEXANDER HAMILTON VOL. V (Henry Cabot Lodge, ed., 1904). Hamilton (writing as “Camillus,” a wise Roman general who, according to Plutarch’s Lives, was sorely misunderstood by his people) wrote nos. I–XXII, XXXI–XXXIII, and XXXVI–XXXVIII; Rufus King, a federalist ally of Hamilton’s wrote, under Hamilton’s supervision, nos. XXIII–XXX and XXXIV–XXXV.

⁷ CHERNOW, 493–99. Hamilton wrote *The Defence* after the Senate had narrowly approved the Jay Treaty, its text was published, and the battle shifted to the House of Representatives to appropriate funds.

In 1795, the principal arguments arrayed against the Jay Treaty by Jefferson and other leading Republicans of the day, including Robert R. Livingston whose writings under the name of “Cato” are specifically addressed in *The Defence*, were that Jay had concluded a wildly unequal and possibly unconstitutional agreement that undercut U.S. sovereignty and fundamental U.S. national interests – all while undemocratically allocating important adjudicative decisions to arbitrations in lieu of Article III judges. The critics charged, more specifically, that the one-sided treaty failed to press the British to pay compensation for U.S. slaves taken from their U.S. owners at the end of the Revolution or for U.S. sailors abducted by the British Navy; granted British concessions, such as most-favored-nation status or other benefits, which given the wildly unequal terms of trade between the British hegemon and a fledging republic, would benefit the more powerful treaty partner; elevated the property rights of British traitors during a time of national emergency while overriding state court decisions and state laws to the contrary; and violated the law of nations.

Hamilton responded that the terms of the Jay Treaty were not only defensible reciprocal compromises that were in the national interests of the U.S., but the best alternative to renewed conflict or war. Hamilton’s defense was equal parts law and policy. He argued that many of the treaty’s provisions sought only to enforce prior promises made in the Treaty of Peace between the U.S. and Great Britain in 1783 and affirmed in the U.S. Constitution, while others echoed comparable provisions in prior treaties with other states concluded under the Articles of Confederation, in treaties concluded between European powers, or were otherwise supported by U.S. national law and practice or the law of nations. Hamilton denied that anything in the treaty went against the U.S. Constitution. He argued that its provisions acknowledging that pre-1783 private British debts owed by U.S. nationals remained valid and that henceforth such debts should not be confiscated even in the event of “war, or national differences”⁸ fulfilled pledges made in the Treaty of Peace that had, in any case, the backing of the law of nations.

In defending these parts of the Jay Treaty, and the need to protect private property even when owned by foreigners, Hamilton appealed to morality as well as pragmatism. “No powers of language at my command,” he wrote, “can express the abhorrence I feel at the idea of violating the property of individuals, which, in an authorized intercourse, in time of peace, has been confided to the faith of our Government and laws, on account of controversies between nation and nation. In my view, every moral and every political sentiment unite to consign it to

⁸Jay Treaty, Art. 10. *See also* Arts. 6 and 7.

execration.”⁹ For Hamilton it was a pity that the merchants’ chapter of the Magna Carta, which respected the rights of merchants from countries at war with England, was not explicitly adopted in the U.S. Constitution but was only implied from its clause barring U.S. states from passing laws impairing the obligation of contracts, but he took comfort in the fact that the law of nations provided that while a nation was free to determine for itself whether to permit foreigners to bring property into or acquire property in its territory, once it did so, it had a “duty . . . to protect that property, and to secure to the owner the full enjoyment of it” as “it tacitly promises protection and security.”¹⁰ Anything else is “inconsistent with the very notion of property” as it would violate the contract between the society and the individual ensuring that the latter retains his property and its use so long as he observes and performs “the conditions which the laws have annexed to the tenure.”¹¹ This right cannot be dependent on causes foreign to the proprietor, much less the “volition or pleasure . . . of the very government to whose protection it has been confided. . . .The property of a foreigner placed in another country, by permission of its laws, may justly be regarded as a deposit, of which the society is the trustee.”¹² A violation of that trust would be an act of “perfidious rapacity,” offensive to “moral feeling” and its perpetrator would deserve “all the opprobrium and infamy of violated faith.”¹³

Accordingly, the Jay Treaty’s article permitting compensation to British creditors for their losses and damages notwithstanding state laws (as in Virginia and South Carolina) that made it impossible for them to collect on these debts wiped away a stain on the “honor and character of the country” and was required by morality, natural justice, and the “spirit and principles of good government.”¹⁴ But respecting the public pledge made to these investors at a time of peace required renouncing recourse to such sequestrations in the future as well, even in a time of war, as a “valuable pledge for the more strict future observance of our public engagements.”¹⁵ Doing anything else would sanction “the power of committing fraud, of violating the public faith, of sacrificing the principles of commerce, of prostrating credit.”¹⁶

⁹ *The Defence*, No. XVIII.

¹⁰ *Id.*; *The Defence*, No. XIX. Hamilton was not alone among his contemporaries in invoking the Merchants’ Chapter. See Daniel J. Hulsebosch, *Magna Carta for the World? The Merchants’ Chapter and Foreign Capital in the Early American Republic*, 94 N.C. L. REV. 1599 (2016).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *The Defence*, No. XIII.

¹⁵ *The Defence*, No. XIV.

¹⁶ *The Defence*, No. XVIII.

To Hamilton, protecting a nation's reputation for respecting private rights of property under the rule of law was vital to ensuring incoming flows of capital. It is "advantageous to nations to have commerce with each other," and commerce, "like any other object of enterprise or industry, will prosper in proportion as it is secure."¹⁷ "The pretension of a right to confiscate or sequester the effects of foreign merchants," he writes, is ". . . fatal to that necessary security. Its free exercise would destroy external commerce; or, which is nearly the same thing, reduce it within the contracted limits of a game of hazard, where the chance of large profits, accompanied with the great risks, would tempt alone the adventurous and the desperate."¹⁸ Such protections were necessary because foreign investments demand "considerable time for their completion" and merchants of one country would not trust putting their property in another for any duration if the frequent "storms of war" put them at risk.¹⁹ Even temporary suspensions of the exercise of foreigners' property rights could not be justified for "extraordinary and great emergencies" because foreigners who would enter a country with such laws in place would presumably only do so after assurances that the host government would not deploy such laws and any departure from such assurances would "involve an act of treachery and cruelty."²⁰ Moreover, "the possibility of the occasional exercise of such a right, if conceived to exist, would be, at least, a slow poison, conducing to a sickly habit of commerce; and, in a series of time, would be productive of much more evil than could be counterbalanced by any good which it might be possible to obtain the contemplated emergency, the use of the expedient."²¹

In response to the complaint that given existing trade and capital flows between the U.S. and Great Britain, many of the treaty's provisions – such as clauses barring the confiscation of private debts or private property and permitting each country's merchants to continue to ply their trades even in case of war – would inure to the benefit of Britain as the greater treaty-trader/capital exporter, Hamilton argued that "there is no room for an argument about reciprocity further than to require that the promise should be mutual" since "the true rule of reciprocity in stipulations of treaties, is equal right, not equal advantage from each several stipulation."²² Granting such rights, he argued, would preclude retaliations in which U.S. interests could be "made to suffer beyond any possible degrees of advantage to be derived from the

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *The Defence*, No. XXII.

occasion of the retaliation.”²³ These assurances would inspire “confidence” on the British side, obviate “obstructions to trade,” and avoid encumbrances on credit. Besides, a promise to respect the property of British subjects only renounces a claim “to the negative merit of not committing injustice” and it is “always honorable to give proof of upright intention.”²⁴

Hamilton had a personal stake in the Jay Treaty. Accepting obligations to pay for private debts in the wake of war was not only a matter of established principle and practice; it was the only alternative to an economic “calamity” that “would not only arrest our present rapid progress to strength and property, but would probably throw us back into a state of debility and impoverishment, from which it would require years to emerge. Our trade, navigation, and mercantile capital would be essentially destroyed . . . our exports obstructed . . . branches of industry would proportionately suffer; our public debt, instead of a gradual diminution, would sustain a great augmentation, and draw with it a large increase of taxes and burthens on the people.”²⁵ A failure to ratify the Jay Treaty and resulting conflict with Great Britain would, in other words, threaten Hamilton’s principal legacy. A man known for establishing a sound financial infrastructure for the fledging republic, complete with a monetized national debt, secure federal revenues, and a national bank to promote economic development and mobilize wealth, had much to lose if his defense failed.²⁶

Hamilton also defended the Jay Treaty’s resort to three mixed arbitral commissions.²⁷ Critics charged that Jay ought to have demanded an apology for British seizure of U.S. vessels, not mere compensation; that all or some of the disputes should have been submitted to Art. III courts; and that the ‘unconstitutional’ arbitrators, untested and prone to be biased, were being given too much authority and could abuse their discretion to render awards from which there was no review or remedy.²⁸ Hamilton responded to all of these in terms both broad and specific. These treaty provisions were as “fair and equitable” as the rest of the treaty. Under both national

²³ *Id.*

²⁴ *Id.* Along the way, Hamilton also denounced the idea that treaty promises are dissolved during wartime, observing that provisions that contemplate the state of war are designed to operate in case of war. *Id.*

²⁵ *The Defence*, No. II.

²⁶ See, e.g., JOHN LAMBERTON HARPER, *AMERICAN MACHIAVELLI: ALEXANDER HAMILTON AND THE ORIGINS OF U.S. FOREIGN POLICY* 272 (2004) (describing Hamilton’s accomplishments).

²⁷ See Jay Treaty, Art. V (establishing a three-person commission to reach a binding and unanimous resolution of a boundary dispute regarding the United States’ north-east boundary with Canada); Art. VII (establishing a five-person commission to resolve claims by U.S. citizens that their vessels and cargos had been illegally seized by the British), and Art. VI (five-person commission charged with resolving debts owed by U.S. nationals to British creditors). In all cases, the commissions anticipated a mix of state party-appointed persons with others appointed by their agreement or by lot.

²⁸ Indeed, even the leading historian of the Jay Treaty, Bemis, argued the U.S. Supreme Court should have determined the British debt claims. BEMIS, *supra* note 4, at 259–60.

law and the law of nations, individuals who suffer injury are owed “reparation . . . an apology in fact, whatever it may be in form.”²⁹ The expeditious adjustment of these types of disputes requires a “bona fide” and relatively expeditious process of investigation, but not mere summary disposition, culminating in binding awards based on law. The envisioned commissions would likely “be more certainly impartial than the established courts of either party. Without impeaching the integrity of those courts, it was morally impossible that they should not fell a bias towards the nation to which they belonged, and for that very reason they were unfit arbitrators. In the case of the spoliations of our property, we should undoubtedly have been unwilling to leave the adjustment in the last resort to the British courts; and by parity of reason, they could not be expected to refer the liquidation of compensation in the case of the debts to our courts.”³⁰ As for the demand for Article III judges instead, this was not a case of transferring jurisdiction from any American courts and juries, the treaty commissions were to consider disputes between governments that acknowledge “no common judge on earth” and therefore require the establishment of a “special tribunal for the purpose.”³¹ Nor were there federalism concerns: that the commissions would render awards that would unfairly penalize U.S. states that had not imposed impediments to the recovery of British debts had been anticipated in the Treaty of Peace, which enjoyed constitutional supremacy over state laws.

As for the composition and powers of the arbitrators: it was impossible to “imagine a plan for organizing a tribunal more completely equitable and impartial” as the respective states were given equal voice in its constitution, the arbitrators were sworn to be impartial and had “character at stake,” and were only authorized to adhere to the law.³² In response to the risk of arbitral abuse of power, Hamilton acknowledged that the commissioners had “much latitude of discretion” but warned that should they transgress its intended limits, “the United States, though bound to perform what they have stipulated with good faith, would not be bound to submit to a manifest abuse of authority by the commissioners. Should they palpably exceed their commission, or abuse their trust, the United States may justifiably, though at their peril, refuse compliance.”³³

²⁹ *The Defence*, No. XV.

³⁰ *The Defence*, No. XIV.

³¹ *Id.*

³² *The Defence*, No. XV.

³³ *The Defence*, No. XIV (providing examples which would “exonerate the United States from performance” such as an award upon a debt outside their accorded jurisdiction or other “plain cases of misconduct”). “It is only incumbent upon them to act, bona fide, and as they act at their peril, to examine well the soundness of the ground on which they proceed.” *Id.*

The Defence highlights the remarkable continuity of U.S. foreign policy when it comes to the need to protect foreign capital both here and abroad.³⁴ Hamilton's essays highlight themes that endure through the 65 claims commissions established over the two centuries since the Jay Treaty,³⁵ U.S. diplomacy against the Calvo Doctrine and in defense of foreign investor rights in the 19th century, U.S. efforts to transform FCNs as agents of FDR's New Deal,³⁶ its multiple (failed) attempts to establish multilateral regimes in favor of free capital flows after WWII, its opposition to the UN General Assembly's New International Economic Order in the 1970s, and its modern-day resort to IIAs and (at least through the Obama Administration) its insistence on ISDS. These themes include reverence for private property and its protection even in cases of war and national emergency; a preference for formal reciprocity over tit-for-tat assurances of actual reciprocal benefit; presumed connections between the social contract struck between the government and the governed, comparable contracts between nations grounded in the need to maintain rule of law reputations, and implicit contracts made with foreigners when they are permitted to bring in their capital; and confidence that protecting foreign capital helps to ensure more of it.

Most of the substantive guarantees contained in modern IIAs and their alleged connections to the rule of law, 'good governance,' and the customary law of nations – rights to non-discrimination, the international minimum standard and protections from denials of justice and uncompensated takings – find distinct rationales in *The Defence* – as does the more general (and contentious) idea that governments need to respect the legitimate expectations that they generate when they accept foreign capital into their territories. Hamilton's defense of the five mixed claims commissions in the Jay Treaty fits well within current debates over the relative benefits of settling investor claims through more summary processes, in national courts, or in one or more permanent international investment courts. Hamilton provides a nuanced rationale for why international arbitration, including party-appointed arbitrators specially selected to handle distinct disputes, may be preferable to any of those alternatives and particularly to the presumptively biased courts of the host states of foreign capital – but also why it would be an exaggeration to contend that resorting to arbitration wholly depoliticizes such disputes

³⁴ See José E. Alvarez, *The U.S. Contribution to International Investment Law*, in AMERICAN CLASSICS IN INTERNATIONAL LAW: INTERNATIONAL INVESTMENT LAW (José E. Alvarez, ed., forthcoming Brill 2017).

³⁵ For an overview of Jay Treaty's contribution to arbitration, see Charles H. Brower II, *Arbitration*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Feb. 2007).

³⁶ See Vandevelde, *supra* note 2.

(particularly when it comes time to secure a state's voluntary compliance with any resulting awards).

Like those who designed post WWII FCNs, Hamilton presumed that the Jay Treaty was part and parcel of the rule of law as defended in the U.S. Constitution itself, that is, its contract, takings, due process, and equal protection clauses.³⁷ He presciently defended the elements of what, much later, came to be known as liberal internationalism. Interestingly, at least in Hamilton's time, there was no comparable consensus with respect to the need to avoid protectionism through low tariffs. Indeed, as has been recently pointed out, the "framers believed that a tax on imports would be the country's main source of income," and such tariffs dwarfed other federal revenues for much of the nation's history.³⁸ Contrary to what some assume, defending the interests of foreign capital, including through supra-national tribunals empowered to give foreigners greater rights than are available under U.S. law or U.S. courts was more of an "American" idea, with deeper historical roots, than was the national consensus that emerged in favor of avoiding tariff wars reached only after enactment of the 1930 Smoot-Hawley Act.

It is, of course, impossible to know where Hamilton would stand on today's trade and investment debates. While *The Defence* suggests one answer, Hamilton himself defended the Trumpian idea in those essays that very powerful states can hazard what weak states cannot,³⁹ and some of his other writings affirm the need for strong sovereign regulatory powers, including in defense of what we would call today industrial policy.⁴⁰ Today, while the U.S. has become the great empire that Hamilton foresaw, the implications of defending, within the context of a modern welfare state, foreign property rights that have now expanded to include, for example, some forms of intellectual property that have no Jay Treaty equivalent, are different. It is also possible that Hamilton, like many critics of ISDS, would see extending the right to arbitrate to private parties and their chosen arbitrators as a step too far.

It is nonetheless striking how much U.S. Presidents – from FDR through Obama, continue to justify treaties to protect foreign capital interests largely on Hamilton's terms. We are still waiting

³⁷ See also Vandevelde, *supra* note 2 (describing assumptions of U.S. post WWII FCNs).

³⁸ Rebecca M. Kysar, "Is Trump's Tariff Plan Constitutional?," NY Times, Jan. 3, 2017, at A23.

³⁹ *The Defence*, No. II ("A very powerful state may frequently hazard a high and haughty tone with good policy: but a weak state can scarcely ever do it without imprudence. The last is yet our character; though we are the embryo of a great empire.")

⁴⁰ See, e.g., ALEXANDER HAMILTON, REPORT ON MANUFACTURES (1791), *available at* http://www.constitution.org/ah/rpt_manufactures.pdf.

for someone with Hamilton's eloquence – perhaps in Trump's circle – to tell us why treaties like this are contrary to making America great.

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