



PERMANENT COURT OF ARBITRATION

THE NORTH ATLANTIC COAST FISHERIES CASE

GREAT BRITAIN

v.

UNITED STATES OF AMERICA

AWARD OF THE TRIBUNAL

Arbitrators

H. Lammasch

A.F. de Savornin Lohman

G. Gray

Louis M. Drago

Charles Fitzpatrick

The Hague, 7 September 1910

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**AWARD OF THE TRIBUNAL OF ARBITRATION IN THE QUESTION RELATING
TO THE NORTH ATLANTIC COAST FISHERIES,
THE HAGUE, 7 SEPTEMBER, 1910^[2]**

PREAMBLE

Whereas a Special Agreement between the United States of America and Great Britain, signed at Washington the 27th January, 1909, and confirmed by interchange of Notes dated the 4th March, 1909, was concluded in conformity with the provisions of the General Arbitration Treaty between the United States of America and Great Britain, signed the 4th April, 1908, and ratified the 4th June, 1908;

And whereas the said Special Agreement for the submission of questions relating to fisheries on the North Atlantic Coast under the general treaty of arbitration concluded between the United States and Great Britain on the 4th day of April, 1908, is as follows:

Article I.

Whereas by Article I of the Convention signed at London on the 20th day of October, 1818, between Great Britain and the United States, it was agreed as follows:—

Whereas differences have arisen respecting the liberty claimed by the United States for the Inhabitants thereof, to take, dry and cure Fish on Certain Coasts, Bays, Harbours and Creeks of His Britannic Majesty's Dominions in America, it is agreed between the High Contracting Parties, that the Inhabitants of the said United States shall have forever, in common with the Subjects of His Britannic Majesty, the Liberty to take Fish of every kind on that part of the Southern Coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the Western and Northern Coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the Coasts, Bays, Harbours, and Creeks from Mount Joly on the Southern Coast of [174] Labrador, to and through the Straits of Belleisle and thence Northwardly indefinitely along the Coast, without prejudice, however, to any of the exclusive Rights of the Hudson Bay Company; and that the American Fishermen shall also have liberty forever, to dry and cure Fish in any of the unsettled Bays, Harbours and Creeks of the Southern part of the Coast of Newfoundland hereabove described, and of the Coast of Labrador; but so soon as the same, or any Portion thereof, shall be settled, it shall not be lawful for the said Fishermen to dry or cure Fish at such Portion so settled, without previous agreement for such purpose with the Inhabitants, Proprietors, or Possessors of the ground. – And the United States hereby renounce forever, any Liberty heretofore enjoyed or claimed by the Inhabitants thereof, to take, dry, or cure Fish on, or within three marine Miles of any of the Coasts,

¹ Page numbering in brackets refers to the text as it appears in REPORTS OF INTERNATIONAL ARBITRAL AWARDS (R.I.A.A.), Vol. XI.

² Permanent Court of Arbitration, *North Atlantic Coast Fisheries Tribunal of Arbitration constituted under a Special Agreement signed at Washington, January 27th, 1909, between the United States of America and Great Britain*, The Hague, 1910, p. 104.

Bays, Creeks, or Harbours of His Britannic Majesty's Dominions in America not included within the above-mentioned limits; provided, however, that the American Fishermen shall be admitted to enter such Bays or Harbours for the purpose of Shelter and of repairing Damages therein, of purchasing Wood, and of obtaining Water, and for no other purpose whatever. But they shall be under such Restrictions as may be necessary to prevent their taking, drying or curing Fish therein, or in any other manner whatever abusing the Privileges hereby reserved to them.

And, whereas, differences have arisen as to the scope and meaning of the said Article, and of the liberties therein referred to, and otherwise in respect of the rights and liberties which the inhabitants of the United States have or claim to have in the waters or on the shores therein referred to:

It is agreed that the following questions shall be submitted for decision to a tribunal of arbitration constituted as hereinafter provided:—

Question I. – To what extent are the following contentions or either of them justified?

It is contended on the part of Great Britain that the exercise of the liberty to take fish referred to in the said Article, which the inhabitants of the United States have forever in common with the subjects of His Britannic Majesty, is subject, without the consent of the United States, to reasonable regulation by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or rules, as, for example, to regulations in respect of (1) the hours, days, or seasons when fish may be taken on the treaty coasts; (2) the method, means, and implements to be used in the taking of fish or in the carrying on of fishing operations on such coasts; (3) any other matters of a similar character relating to fishing; such regulations being reasonable, as being, for instance –

- (a) Appropriate or necessary for the protection and preservation of such fisheries and the exercise of the rights of British subjects therein and of the liberty which by the said Article I the inhabitants of the United States have therein in common with British subjects;
- (b) Desirable on grounds of public order and morals;
- (c) Equitable and fair as between local fishermen and the inhabitants of the United States exercising the said treaty liberty and not so framed as to give unfairly an advantage to the former over the latter class.

It is contended on the part of the United States that the exercise of such liberty is not subject to limitations or restraints by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or regulations in respect of (1) the hours, days, or seasons when the inhabitants of the United States may take fish on the treaty coasts, or (2) the method, means and implements used by [175] them in taking fish or in carrying on fishing operations on such coasts, or (3) any other limitations or restraints of similar character –

- (a) Unless they are appropriate and necessary for the protection and preservation of the common rights in such fisheries and the exercise thereof; and
- (b) Unless they are reasonable in themselves and fair as between local fishermen and fishermen coming from the United States, and not so framed as to give an advantage to the former over the latter class; and
- (c) Unless their appropriateness, necessity, reasonableness, and fairness be determined by the United States and Great Britain by common accord and the United States concurs in their enforcement.

Question 2. Have the inhabitants of the United States, while exercising the liberties referred to in said Article, a right to employ as members of the fishing crews of their vessels persons not inhabitants of the United States?

Question 3. Can the exercise by the inhabitants of the United States of the liberties referred to in the said Article be subjected, without the consent of the United States, to the requirements of entry or report at custom-houses or the payment of light or harbour or other dues, or to any other similar requirement or condition or exaction?

Question 4. Under the provision of the said Article that the American fishermen shall be admitted to enter certain bays or harbours for shelter, repairs, wood, or water, and for no other purpose whatever, but that they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein or in any other manner whatever abusing the privileges thereby reserved to them, is it permissible to impose restrictions making the exercise of such privileges conditional upon the payment of light or harbour or other dues, or entering or reporting at custom-houses or any similar conditions?

Question 5. From where must be measured the “three marine miles of any of the coasts, bays, creeks, or harbours” referred to in the said Article?

Question 6. Have the inhabitants of the United States the liberty under the said Article or otherwise to take fish in the bays, harbours, and creeks on that part of the southern coast of Newfoundland which extends from Cape Ray to Rameau Islands, or on the western and northern coasts of Newfoundland from Cape Ray to Quirpon Islands, or on the Magdalen Islands?

Question 7. Are the inhabitants of the United States whose vessels resort to the treaty coasts for the purpose of exercising the liberties referred to in Article I of the treaty of 1818 entitled to have for those vessels, when duly authorized by the United States in that behalf, the commercial privileges on the treaty coasts accorded by agreement or otherwise to United States trading-vessels generally?

Article II.

Either Party may call the attention of the Tribunal to any legislative or executive act of the other Party, specified within three months of the exchange of notes enforcing this agreement, and which is claimed to be inconsistent with the true interpretation of the Treaty of 1818; and may call upon the Tribunal to express in its award its opinion upon such acts, and to point out in what respects, if any, they are inconsistent with the principles laid down in the award in reply to the preceding questions; and each Party agrees to conform to such opinion. [176]

Article III.

If any question arises in the arbitration regarding the reasonableness of any regulation or otherwise which requires an examination of the practical effect of any provisions in relation to the conditions surrounding the exercise of the liberty of fishery enjoyed by the inhabitants of the United States, or which requires expert information about the fisheries themselves, the Tribunal may, in that case, refer such question to a Commission of three expert specialists in such matters; one to be designated by each of the Parties hereto, and the third, who shall not be a national of either Party, to be designated by the Tribunal. This Commission shall examine into and report their conclusions on any question or questions so referred to it by the Tribunal and such report shall be considered by the Tribunal and shall, if incorporated by them in the award, be accepted as a part thereof.

Pending the report of the Commission upon the question or questions so referred and without awaiting such report, the Tribunal may make a separate award upon all or any other questions before it, and such separate award, if made, shall become immediately effective, provided that the report aforesaid shall not be incorporated in the award until it has been considered by the Tribunal. The expenses of such Commission shall be borne in equal moieties by the Parties hereto.

Article IV.

The Tribunal shall recommend for the consideration of the High Contracting Parties rules and a method of procedure under which all questions which may arise in the future regarding the exercise of the liberties above referred to may be determined in accordance with the principles laid down in the award. If the High Contracting Parties shall not adopt the rules and method of procedure so recommended, or if they shall not, subsequently to the delivery of the award, agree upon such rules and methods, then any differences which may arise in the future between the High Contracting Parties relating to the interpretation of the Treaty of 1818 or to the effect and application of the award of the Tribunal shall be referred informally to the Permanent Court at The Hague for decision by the summary procedure provided in Chapter IV of The Hague Convention of the 18th October, 1907.

Article V.

The Tribunal of Arbitration provided for herein shall be chosen from the general list of members of the Permanent Court at The Hague, in accordance with the provisions of Article XLV of the Convention for the Settlement of International Disputes, concluded at the Second Peace Conference at The Hague on the 18th of October, 1907. The provisions of said Convention, so far as applicable and not inconsistent herewith, and excepting Articles LIII and LIV, shall govern the proceedings under the submission herein provided for.

The time allowed for the direct agreement of His Britannic Majesty and the President of the United States on the composition of such Tribunal shall be three months.

Article VI.

The pleadings shall be communicated in the order and within the time following: –
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As soon as may be and within a period not exceeding seven months from the date of the exchange of notes making this agreement binding the printed case of each of the Parties hereto, accompanied by printed copies of the documents, the official correspondence, and all other evidence on which each Party relies, shall be delivered in duplicate (with such additional copies as may be agreed upon) to the agent of the other Party. It shall be sufficient for this purpose if such case is delivered at the British Embassy at Washington or at the American Embassy at London, as the case may be, for transmission to the agent for its Government.

Within fifteen days thereafter such printed case and accompanying evidence of each of the Parties shall be delivered in duplicate to each member of the Tribunal, and such delivery may be made by depositing within the stated period the necessary number of copies with the International Bureau at The Hague for transmission to the Arbitrators.

After the delivery on both sides of such printed case, either Party may, in like manner, and within four months after the expiration of the period above fixed for the delivery to the agents of the case, deliver to the agent of the other Party (with such additional copies as may

be agreed upon), a printed counter-case accompanied by printed copies of additional documents, correspondence, and other evidence in reply to the case, documents, correspondence, and other evidence so presented by the other Party, and within fifteen days thereafter such Party shall, in like manner as above provided, deliver in duplicate such counter-case and accompanying evidence to each of the Arbitrators.

The foregoing provisions shall not prevent the Tribunal from permitting either Party to rely at the hearing upon documentary or other evidence which is shown to have become open to its investigation or examination or available for use too late to be submitted within the period hereinabove fixed for the delivery of copies of evidence, but in case any such evidence is to be presented, printed copies of it, as soon as possible after it is secured, must be delivered, in like manner as provided for the delivery of copies of other evidence, to each of the Arbitrators and to the agent of the other Party. The admission of any such additional evidence, however, shall be subject to such conditions as the Tribunal may impose, and the other Party shall have a reasonable opportunity to offer additional evidence in rebuttal.

The Tribunal shall take into consideration all evidence which is offered by either Party.

Article VII.

If in the case or counter-case (exclusive of the accompanying evidence) either Party shall have specified or referred to any documents, correspondence, or other evidence in its own exclusive possession without annexing a copy, such Party shall be bound, if the other Party shall demand it within thirty days after the delivery of the case or countercase respectively, to furnish to the Party applying for it a copy thereof; and either Party may, within the like time, demand that the other shall furnish certified copies or produce for inspection the originals of any documentary evidence adduced by the Party upon whom the demand is made. It shall be the duty of the Party upon whom any such demand is made to comply with it as soon as may be, and within a period not exceeding fifteen days after the demand has been received. The production for inspection or the furnishing to the other Party of official governmental publications, publishing, as authentic, copies of the documentary evidence referred to, shall be a sufficient compliance with such demand, if such [178] governmental publications shall have been published prior to the 1st day of January, 1908. If the demand is not complied with, the reasons for the failure to comply must be stated to the Tribunal.

Article VIII.

The Tribunal shall meet within six months after the expiration of the period above fixed for the delivery to the agents of the case, and upon the assembling of the Tribunal at its first session each Party, through its agent or counsel, shall deliver in duplicate to each of the Arbitrators and to the agent and counsel of the other Party (with such additional copies as may be agreed upon) a printed argument showing the points and referring to the evidence upon which it relies.

The time fixed by this Agreement for the delivery of the case, counter-case, or argument, and for the meeting of the Tribunal, may be extended by mutual consent of the Parties.

Article IX.

The decision of the Tribunal shall, if possible, be made within two months from the close of the arguments on both sides, unless on the request of the Tribunal the Parties shall agree to extend the period.

It shall be made in writing, and dated and signed by each member of the Tribunal, and shall be accompanied by a statement of reasons.

A member who may dissent from the decision may record his dissent when signing.

The language to be used throughout the proceedings shall be English.

Article X.

Each Party reserves to itself the right to demand a revision of the award. Such demand shall contain a statement of the grounds on which it is made and shall be made within five days of the promulgation of the award, and shall be heard by the Tribunal within ten days thereafter. The Party making the demand shall serve a copy of the same on the opposite Party, and both Parties shall be heard in argument by the Tribunal on said demand. The demand can only be made on the discovery of some new fact or circumstance calculated to exercise a decisive influence upon the award and which was unknown to the Tribunal and to the Party demanding the revision at the time the discussion was closed, or upon the ground that the said award does not fully and sufficiently, within the meaning of this Agreement, determine any question or questions submitted. If the Tribunal shall allow the demand for a revision, it shall afford such opportunity for further hearings and arguments as it shall deem necessary.

Article XI.

The present Agreement shall be deemed to be binding only when confirmed by the two Governments by an exchange of notes.

In witness whereof this Agreement has been signed and sealed by His Britannic Majesty's Ambassador at Washington, the Right Honourable JAMES BRYCE, O.M., on behalf of Great Britain, and by the Secretary of State of the United States, ELIHU ROOT, on behalf of the United States.

Done at Washington on the 27th day of January, one thousand nine hundred and nine.

James BRYCE [seal.]

Elihu ROOT [seal.]

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And whereas, the parties to the said Agreement have by common accord, in accordance with Article V, constituted as a Tribunal of Arbitration the following Members of the Permanent Court at The Hague: Mr. H. LAMMASCH, Doctor of Law, Professor of the University of Vienna, Aulic Councillor, Member of the Upper House of the Austrian Parliament; His Excellency Jonkheer A. F. DE SAVORNIN LOHMAN, Doctor of Law, Minister of State, Former Minister of the Interior, Member of the Second Chamber of the Netherlands; the Honourable GEORGE GRAY, Doctor of Laws, Judge of the United States Circuit Court of Appeals, former United States Senator; the Right Honourable Sir CHARLES FITZPATRICK, Member of the Privy Council, Doctor of Laws, Chief Justice of Canada; the Honourable LUIS

MARIA DRAGO, Doctor of Law, former Minister of Foreign Affairs of the Argentine Republic, Member of the Law Academy of Buenos-Aires;

And whereas, the Agents of the Parties to the said Agreement have duly and in accordance with the terms of the Agreement communicated to this Tribunal their cases, counter-cases, printed arguments and other documents;

And whereas, counsel for the Parties have fully presented to this Tribunal their oral arguments in the sittings held between the first assembling of the Tribunal on 1st June, 1910, to the close of the hearings on 12th August, 1910;

Now, therefore, this Tribunal having carefully considered the said Agreement, cases, counter-cases, printed and oral arguments, and the documents presented by either side, after due deliberation makes the following decisions and awards:

QUESTION I.

To what extent are the following contentions or either of them justified?

It is contended on the part of Great Britain that the exercise of the liberty to take fish referred to in the said Article, which the inhabitants of the United States have forever in common with the subjects of His Britannic Majesty, is subject, without the consent of the United States, to reasonable regulation by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or rules, as, for example, to regulations in respect of (1) the hours, days, or seasons when fish may be taken on the treaty coasts; (2) the method, means, and implements to be used in the taking of fish or in the carrying on of fishing operations on such coasts; (3) any other matters of a similar character relating to fishing; such regulations being reasonable, as being, for instance –

(a) Appropriate or necessary for the protection and preservation of such fisheries and the exercise of the rights of British subjects therein and of the liberty which by the said Article I the inhabitants of the United States have therein in common with British subjects;

(b) Desirable on grounds of public order and morals;

(c) Equitable and fair as between local fishermen and the inhabitants of the United States exercising the said treaty liberty, and not so framed as to give unfairly an advantage to the former over the latter class.

It is contended on the part of the United States that the exercise of such liberty is not subject to limitations or restraints by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or regulations in respect of (1) the hours, days, or seasons when the inhabitants of the United States may take fish on the treaty coasts, or (2) the method, means, and implements used by them in taking fish or in carrying on fishing operations on such coasts, or (3) any other limitations or restraints of similar character – [180]

(a) Unless they are appropriate and necessary for the protection and preservation of the common rights in such fisheries and the exercise thereof; and

(b) Unless they are reasonable in themselves and fair as between local fishermen and fishermen coming from the United States, and not so framed as to give an advantage to the former over the latter class; and

(c) Unless their appropriateness, necessity, reasonableness, and fairness be determined by the United States and Great Britain by common accord and the United States concurs in their enforcement.

Question I, thus submitted to the Tribunal, resolves itself into two main contentions:

1st. Whether the right of regulating reasonably the liberties conferred by the Treaty of 1818 resides in Great Britain;

2nd. And, if such right does so exist, whether such reasonable exercise of the right is permitted to Great Britain without the accord and concurrence of the United States.

The Treaty of 1818 contains no explicit disposition in regard to the right of regulation, reasonable or otherwise; it neither reserves that right in express terms, nor refers to it in any way. It is therefore incumbent on this Tribunal to answer the two questions above indicated by interpreting the general terms of Article I of the Treaty, and more especially the words “the inhabitants of the United States shall have, for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind”. This interpretation must be conformable to the general import of the instrument, the general intention of the parties to it, the subject matter of the contract, the expressions actually used and the evidence submitted.

Now in regard to the preliminary question as to whether the right of reasonable regulation resides in Great Britain:

Considering that the right to regulate the liberties conferred by the Treaty of 1818 is an attribute of sovereignty, and as such must be held to reside in the territorial sovereign, unless the contrary be provided; and considering that one of the essential elements of sovereignty is that it is to be exercised within territorial limits, and that, failing proof to the contrary, the territory is co-terminous with the Sovereignty, it follows that the burden of the assertion involved in the contention of the United States (viz. that the right to regulate does not reside independently in Great Britain, the territorial Sovereign) must fall on the United States. And for the purpose of sustaining this burden, the United States have put forward the following series of propositions, each one of which must be singly considered.

It is contended by the United States:

- (1) That the French right of fishery under the treaty of 1713 designated also as a liberty, was never subjected to regulation by Great Britain, and therefore the inference is warranted that the American liberties of fishery are similarly exempted.

The Tribunal is unable to agree with this contention:

(a) Because although the French right designated in 1713 merely “an allowance”, (a term of even less force than that used in regard to the American fishery) was nevertheless converted, in practice, into an exclusive right, this concession on the part of Great Britain was presumably made because France, before 1713, claimed to be the sovereign of [181] Newfoundland, and, in ceding the Island, had, as the American argument says, “reserved for the benefit of its subjects the right to fish and to use the strand”;

(b) Because the distinction between the French and American right is indicated by the different wording of the Statutes for the observance of Treaty obligations towards France and the United States, and by the British Declaration of 1783;

(c) And, also, because this distinction is maintained in the Treaty with France of 1904, concluded at a date when the American claim was approaching its present stage, and by which certain common rights of regulation are recognized to France.

For the further purpose of such proof it is contended by the United States:

- (2) That the liberties of fishery, being accorded to the inhabitants of the United States “for ever”, acquire, by being in perpetuity and unilateral, a character exempting them from local legislation.

The Tribunal is unable to agree with this contention:

(a) Because there is no necessary connection between the duration of a grant and its essential status in its relation to local regulation; a right granted in perpetuity may yet be subject to regulation, or, granted temporarily, may yet be exempted therefrom; or being reciprocal may yet be unregulated, or being unilateral may yet be regulated: as is evidenced by the claim of the United States that the liberties of fishery accorded by the Reciprocity Treaty of 1854 and the Treaty of 1871 were exempt from regulation, though they were neither permanent nor unilateral;

(b) Because no peculiar character need be claimed for these liberties in order to secure their enjoyment in perpetuity, as is evidenced by the American negotiators in 1818 asking for the insertion of the words “for ever”. International law in its modern development recognizes that a great number of Treaty obligations are not annulled by war, but at most suspended by it;

(c) Because the liberty to dry and cure is, pursuant to the terms of the Treaty, provisional and not permanent, and is nevertheless, in respect of the liability to regulation, identical in its nature with, and never distinguished from, the liberty to fish.

For the further purpose of such proof, the United States allege:

- (3) That the liberties of fishery granted to the United States constitute an International servitude in their favour over the territory of Great Britain, thereby involving a derogation from the sovereignty of Great Britain, the servient State, and that therefore Great Britain is deprived, by reason of the grant, of its independent right to regulate the fishery.

The Tribunal is unable to agree with this contention:

(a) Because there is no evidence that the doctrine of International servitudes was one with which either American or British Statesmen were conversant in 1818, no English publicists employing the term before 1818, and the mention of it in Mr. GALLATIN’S report being insufficient;

(b) Because a servitude in the French law, referred to by Mr. GALLATIN, can, since the Code, be only real and cannot be personal (Code Civil, art. 686);

(c) Because a servitude in International law predicates an express grant of a sovereign right and involves an analogy to the relation of a *praedium dominans* and a *praedium serviens*; whereas by the Treaty of 1818 one State grants a liberty to fish, which is not a sovereign right, but a purely economic right, to the inhabitants of another State; [182]

(d) Because the doctrine of international servitude in the sense which is now sought to be attributed to it originated in the peculiar and now obsolete conditions prevailing in the Holy Roman Empire of which the *domini terrae* were not fully sovereigns; they holding territory under the Roman Empire, subject at least theoretically, and in some respects also practically, to the Courts of that Empire; their right being, moreover, rather of a civil than of a public nature, partaking more of the character of *dominium* than of *imperium*, and therefore certainly not a complete sovereignty. And because in contradistinction to this quasi-sovereignty with its incoherent attributes acquired at various times, by various means, and not impaired in its character by being incomplete in any one respect or by being limited in favour of another territory and its possessor, the modern State, and particularly Great Britain, has never admitted partition of sovereignty, owing to the constitution of a modern State requiring essential sovereignty and independence;

(e) Because this doctrine being but little suited to the principle of sovereignty which prevails in States under a system of constitutional government such as Great Britain

and the United States, and to the present International relations of Sovereign States, has found little, if any, support from modern publicists. It could therefore in the general interest of the Community of Nations, and of the Parties to this Treaty, be affirmed by this Tribunal only on the express evidence of an International contract;

(f) Because even if these liberties of fishery constituted an International servitude, the servitude would derogate from the sovereignty of the servient State only in so far as the exercise of the rights of sovereignty by the servient State would be contrary to the exercise of the servitude right by the dominant State. Whereas it is evident that, though every regulation of the fishery is to some extent a limitation, as it puts limits to the exercise of the fishery at will, yet such regulations as are reasonable and made for the purpose of securing and preserving the fishery and its exercise for the common benefit, are clearly to be distinguished from those restrictions and “molestations”, the annulment of which was the purpose of the American demands formulated by Mr. ADAMS in 1782, and such regulations consequently cannot be held to be inconsistent with a servitude;

(g) Because the fishery to which the inhabitants of the United States were admitted in 1783, and again in 1818, was a regulated fishery, as is evidenced by the following regulations:

Act 15 Charles II, Cap. 16, s. 7 (1663) forbidding “to lay any seine or other net in or near any harbour in Newfoundland, whereby to take the spawn or young fry of the Poor-John, or for any other use or uses, except for the taking of bait only”, which had not been superseded either by the order in council of March 10th, 1670, or by the statute 10 and XI Wm. III, Cap. 25, 1699. The order in council provides expressly for the obligation “to submit unto and to observe all rules and orders as are now, or hereafter shall be established”, an obligation which cannot be read as referring only to the rules established by this very act, and having no reference to antecedent rules “as are now established”. In a similar way, the statute of 1699 preserves in force prior legislation, conferring the freedom of fishery only “as fully and freely as at any time heretofore”. The order in council, 1670, provides that the Admirals, who always were fishermen, arriving from an English or Welsh port, “see that His Majesty’s rules and orders concerning the regulation of the fisheries are duly put in execution” (sec. 13). Likewise the Act 10 and XI, Wm. III, Cap. 25 (1699) provides that the Admirals do settle differences between [183] the fishermen arising in respect of the places to be assigned to the different vessels. As to Nova Scotia, the proclamation of 1665 ordains that no one shall fish without license; that the licensed fishermen are obliged “to observe all laws and orders which now are made and published, or shall hereafter be made and published in this jurisdiction”, and that they shall not fish on the Lord’s day and shall not take fish at the time they come to spawn. The judgment of the Chief Justice of Newfoundland, October 26th 1820, is not held by the Tribunal sufficient to set aside the proclamations referred to. After 1783, the statute 26 Geo. III, Cap. 26, 1786, forbids “the use, on the shores of Newfoundland, of seines or nets for catching cod by hauling on shore or taking into boat, with meshes less than 4 inches”; a prohibition which cannot be considered as limited to the bank fishery. The act for regulating the fisheries of New Brunswick, 1793, which forbids “the placing of nets or seines across any cove or creek in the Province so as to obstruct the natural course of fish”, and which makes specific provision for fishing in the Harbour of St. John, as to the manner and time of fishing, cannot be read as being limited to fishing from the shore. The act for regulating the fishing on the coast of Northumberland (1799) contains very elaborate dispositions concerning the fisheries in the bay of Miramichi which were continued in 1823, 1829 and 1834. The statutes of Lower Canada, 1788 and 1807, forbid the throwing overboard of offal. The fact that these acts extend the prohibition over a greater distance than the first marine league from the shore may make them nonoperative against foreigners without the

territorial limits of Great Britain, but is certainly no reason to deny their obligatory character for foreigners within these limits;

(h) Because the fact that Great Britain rarely exercised the right of regulation in the period immediately succeeding 1818 is to be explained by various circumstances and is not evidence of the non-existence of the right;

(i) Because the words “in common with British subjects” tend to confirm the opinion that the inhabitants of the United States were admitted to a regulated fishery;

(j) Because the statute of Great Britain, 1819, which gives legislative sanction to the Treaty of 1818, provides for the making of “regulations with relation to the taking, drying and curing of fish by inhabitants of the United States in ‘common’”.

For the purpose of such proof, it is further contended by the United States, in this latter connection:

- (4) That the words “in common with British subjects” used in the Treaty should not be held as importing a common subjection to regulation, but as intending to negative a possible pretention on the part of the inhabitants of the United States to liberties of fishery exclusive of the right of British subjects to fish.

The Tribunal is unable to agree with this contention:

(a) Because such an interpretation is inconsistent with the historical basis of the American fishing liberty. The ground on which Mr. ADAMS founded the American right in 1782 was that the people then constituting the United States had always, when still under British rule, a part in these fisheries and that they must continue to enjoy their past right in the future. He proposed “that the subjects of His Britannic Majesty and the people of the United States shall continue to enjoy unmolested the right to take fish ... where the inhabitants of both countries used, at any time heretofore, to fish”. The theory of the partition of the fisheries, which by the American negotiators had been advanced with so much force, negatives the [184] assumption that the United States could ever pretend to an exclusive right to fish on the British shores; and to insert a special disposition to that end would have been wholly superfluous;

(b) Because the words “in common” occur in the same connexion in the Treaty of 1818 as in the Treaties of 1854 and 1871. It will certainly not be suggested that in these Treaties of 1854 and 1871 the American negotiators meant by inserting the words “in common” to imply that without these words American citizens would be precluded from the right to fish on their own coasts and that, on American shores, British subjects should have an exclusive privilege. It would have been the very opposite of the concept of territorial waters to suppose that, without a special treaty-provision, British subjects could be excluded from fishing in British waters. Therefore that cannot have been the scope and the sense of the words “in common”;

(c) Because the words “in common” exclude the supposition that American inhabitants were at liberty to act at will for the purpose of taking fish, without any regard to the co-existing rights of other persons entitled to do the same thing; and because these words admit them only as members of a social community, subject to the ordinary duties binding upon the citizens of that community, as to the regulations made for the common benefit; thus avoiding the “*bellum omnium contra omnes*” which would otherwise arise in the exercise of this industry;

(d) Because these words are such as would naturally suggest themselves to the negotiators of 1818 if their intention had been to express a common subjection to regulations as well as a common right.

In the course of the Argument it has also been alleged by the United States:

- (5) That the Treaty of 1818 should be held to have entailed a transfer or partition of sovereignty, in that it must in respect to the liberties of fishery be interpreted in its relation to the Treaty of 1783; and that this latter Treaty was an act of partition of sovereignty and of separation, and as such was not annulled by the war of 1812.

Although the Tribunal is not called upon to decide the issue whether the treaty of 1783 was a treaty of partition or not, the questions involved therein having been set at rest by the subsequent Treaty of 1818, nevertheless the Tribunal could not forbear to consider the contention on account of the important bearing the controversy has upon the true interpretation of the Treaty of 1818. In that respect the Tribunal is of opinion:

- (a) That the right to take fish was accorded as a condition of peace to a foreign people; wherefore the British negotiators refused to place the right of British subjects on the same footing with those of American inhabitants; and further, refused to insert the words also proposed by Mr. ADAMS – “continue to enjoy” – in the second branch of Art. III of the Treaty of 1783;

- (b) That the Treaty of 1818 was in different terms, and very different in extent, from that of 1783, and was made for different considerations. It was, in other words, a new grant.

For the purpose of such proof it is further contended by the United States:

- (6) That as contemporary Commercial Treaties contain express provisions for submitting foreigners to local legislation, and the Treaty of 1818 contains no such provision, it should be held, *a contrario*, that inhabitants of the United States exercising these liberties are exempt from regulation. [185]

The Tribunal is unable to agree with this contention:

- (a) Because the Commercial Treaties contemplated did not admit foreigners to all and equal rights, seeing that local legislation excluded them from many rights of importance, e.g. that of holding land; and the purport of the provisions in question consequently was to preserve these discriminations. But no such discriminations existing in the common enjoyment of the fishery by American and British fishermen, no such provision was required;

- (b) Because no proof is furnished of similar exemptions of foreigners from local legislation in default of Treaty stipulations subjecting them, thereto;

- (c) Because no such express provision for subjection of the nationals of either Party to local law was made either in this Treaty, in respect to their reciprocal admission to certain territories as agreed in Art. III, or in Art. III of the Treaty of 1794; although such subjection was clearly contemplated by the Parties.

For the purpose of such proof it is further contended by the United States:

- (7) That, as the liberty to dry and cure on the Treaty coasts and to enter bays and harbours on the non-treaty coasts are both subjected to conditions, and the latter to specific restrictions, it should therefore be held that the liberty to fish should be subjected to no restrictions, as none are provided for in the Treaty.

The Tribunal is unable to apply the principle of “*expressio unius exclusio alterius*” to this case:

(a) Because the conditions and restrictions as to the liberty to dry and cure on the shore and to enter the harbours are limitations of the rights themselves, and not restrictions of their exercise. Thus the right to dry and cure is limited in duration, and the right to enter bays and harbours is limited to particular purposes;

(b) Because these restrictions of the right to enter bays and harbours applying solely to American fishermen must have been expressed in the Treaty, whereas regulations of the fishery, applying equally to American and British, are made by right of territorial sovereignty.

For the purpose of such proof it has been contended by the United States:

- (8) That Lord BATHURST in 1815 mentioned the American right under the Treaty of 1783 as a right to be exercised “at the discretion of the United States”; and that this should be held as to be derogatory to the claim of exclusive regulation by Great Britain.

But the Tribunal is unable to agree with this contention:

(a) Because these words implied only the necessity of an express stipulation for any liberty to use foreign territory at the pleasure of the grantee, without touching any question as to regulation;

(b) Because in this same letter Lord BATHURST characterized this right as a policy “temporary and experimental, depending on the use that might be made of it, on the condition of the islands and places where it was to be exercised, and the more general conveniences or inconveniences from a military, naval and commercial point of view”; so that it cannot have been his intention to acknowledge the exclusion of British interference with this right;

(c) Because Lord BATHURST in his note to Governor Sir C. HAMILTON in 1819 orders the Governor to take care that the American fishery on the coast of Labrador be carried on *in* [186] *the same manner* as previous to the late war; showing that he did not interpret the Treaty just signed as a grant conveying absolute immunity from interference with the American fishery right.

For the purpose of such proof it is further contended by the United States:

- (9) That on various other occasions following the conclusion of the Treaty, as evidenced by official correspondence, Great Britain made use of expressions inconsistent with the claim to a right of regulation.

The Tribunal, unwilling to invest such expressions with an importance entitling them to affect the general question, considers that such conflicting or inconsistent expressions as have been exposed on either side are sufficiently explained by their relations to ephemeral phases of a controversy of almost secular duration, and should be held to be without direct effect on the principal and present issues.

Now with regard to the second contention involved in Question I, as to whether the right of regulation can be reasonably exercised by Great Britain without the consent of the United States:

Considering that the recognition of a concurrent right of consent in the United States would affect the independence of Great Britain, which would become dependent on the Government of the United States for the exercise of its sovereign right of regulation, and considering that such a co-dominium would be contrary to the constitution of both sovereign

States; the burden of proof is imposed on the United States to show that the independence of Great Britain was thus impaired by international contract in 1818 and that a co-dominium was created.

For the purpose of such proof it is contended by the United States:

- (10) That a concurrent right to co-operate in the making and enforcement of regulations is the only possible and proper security to their inhabitants for the enjoyment of their liberties of fishery, and that such a right must be held to be implied in the grant of those liberties by the Treaty under interpretation.

The Tribunal is unable to accede to this claim on the ground of a right so implied:

(a) Because every State has to execute the obligations incurred by Treaty *bona fide*, and is urged thereto by the ordinary sanctions of International Law in regard to observance of Treaty obligations. Such sanctions are, for instance, appeal to public opinion, publication of correspondence, censure by Parliamentary vote, demand for arbitration with the odium attendant on a refusal to arbitrate, rupture of relations, reprisal, etc. But no reason has been shown why this Treaty, in this respect, should be considered as different from every other Treaty under which the right of a State to regulate the action of foreigners admitted by it on its territory is recognized;

(b) Because the exercise of such a right of consent by the United States would predicate an abandonment of its independence in this respect by Great Britain, and the recognition by the latter of a concurrent right of regulation in the United States. But the Treaty conveys only a liberty to take fish in common, and neither directly nor indirectly conveys a joint right of regulation;

(c) Because the Treaty does not convey a common right of fishery, but a liberty to fish in common. This is evidenced by the attitude of the United States Government in 1823, with respect to the relations of Great Britain and France in regard to the fishery; [187]

(d) Because if the consent of the United States were requisite for the fishery a general veto would be accorded them, the full exercise of which would be socially subversive and would lead to the consequence of an unregulatable fishery;

(e) Because the United States cannot by assent give legal force and validity to British legislation;

(f) Because the liberties to take fish in British territorial waters and to dry and cure fish on land in British territory are in principle on the same footing; but in practice a right of co-operation in the elaboration and enforcement of regulations in regard to the latter liberty (drying and curing fish on land) is unrealisable.

In any event, Great Britain, as the local sovereign, has the duty of preserving and protecting the fisheries. In so far as it is necessary for that purpose, Great Britain is not only entitled, but obliged, to provide for the protection and preservation of the fisheries; always remembering that the exercise of this right of legislation is limited by the obligation to execute the Treaty in good faith. This has been admitted by counsel and recognized by Great Britain in limiting the right of regulation to that of reasonable regulation. The inherent defect of this limitation of reasonableness, without any sanction except in diplomatic remonstrance, has been supplied by the submission to arbitral award as to existing regulations in accordance with Arts. II and III of the Special Agreement and as to further regulation by the obligation to submit their reasonableness to an arbitral test in accordance with Art. IV of the Agreement.

It is finally contended by the United States:

That the United States did not expressly agree that the liberty granted to them could be subjected to any restriction that the grantor might choose to impose on the ground that in her judgment such restriction was reasonable. And that while admitting that all laws of a general character, controlling the conduct of men within the territory of Great Britain, are effective, binding and beyond objection by the United States, and competent to be made upon the sole determination of Great Britain or her colony, without accountability to anyone whomsoever; yet there is somewhere a line, beyond which it is not competent for Great Britain to go, or beyond which she cannot rightfully go, because to go beyond it would be an invasion of the right granted to the United States in 1818. That the legal effect of the grant of 1818 was not to leave the determination as to where that line is to be drawn to the uncontrolled judgment of the grantor, either upon the grantor's consideration as to what would be a reasonable exercise of its sovereignty over the British Empire, or upon the grantor's consideration of what would be a reasonable exercise thereof towards the grantee.

But this contention is founded on assumptions, which this Tribunal cannot accept for the following reasons in addition to those already set forth:

(a) Because the line by which the respective rights of both Parties accruing out of the Treaty are to be circumscribed, can refer only to the right granted by the Treaty; that is to say to the liberty of taking, drying and curing fish by American inhabitants in certain British waters in common with British subjects, and not to the exercise of rights of legislation by Great Britain not referred to in the Treaty;

(b) Because a line which would limit the exercise of sovereignty of a State within the limits of its own territory can be drawn only on the ground of express stipulation, and not by implication from stipulations concerning a different subject-matter; [188]

(c) Because the line in question is drawn according to the principle of international law that treaty obligations are to be executed in perfect good faith, therefore excluding the right to legislate *at will* concerning the subject-matter of the Treaty, and limiting the exercise of sovereignty of the States bound by a treaty with respect to that subject-matter to such acts as are consistent with the treaty;

(d) Because on a true construction of the Treaty the question does not arise whether the United States agreed that Great Britain should retain the right to legislate with regard to the fisheries in her own territory; but whether the Treaty contains an abdication by Great Britain of the right which Great Britain, as the sovereign power, undoubtedly possessed when the Treaty was made, to regulate those fisheries;

(e) Because the right to make reasonable regulations, not inconsistent with the obligations of the Treaty, which is all that is claimed by Great Britain, for a fishery which both Parties admit requires regulation for its preservation, is not a restriction of or an invasion of the liberty granted to the inhabitants of the United States. This grant does not contain words to justify the assumption that the sovereignty of Great Britain upon its own territory was in any way affected; nor can words be found in the Treaty transferring any part of that sovereignty to the United States. Great Britain assumed only duties with regard to the exercise of its sovereignty. The sovereignty of Great Britain over the coastal waters and territory of Newfoundland remains after the Treaty as unimpaired as it was before. But from the Treaty results an obligatory relation whereby the right of Great Britain to exercise its right of sovereignty by making regulations is limited to such regulations as are made in good faith, and are not in violation of the Treaty;

(f) Finally to hold that the United States, the grantee of the fishing right, has a voice in the preparation of fishery legislation involves the recognition of a right in that country to participate in the internal legislation of Great Britain and her Colonies, and to that extent would reduce these countries to a state of dependence.

While therefore unable to concede the claim of the United States as based on the Treaty, this Tribunal considers that such claim has been and is to some extent, conceded in the relations now existing between the two Parties. Whatever may have been the situation under the Treaty of 1818 standing alone, the exercise of the right of regulation inherent in Great Britain has been, and is, limited by the repeated recognition of the obligations already referred to, by the limitations and liabilities accepted in the Special Agreement, by the unequivocal position assumed by Great Britain in the presentation of its case before this Tribunal, and by the consequent view of this Tribunal that it would be consistent with all the circumstances, as revealed by this record, as to the duty of Great Britain, that she should submit the reasonableness of any future regulation to such an impartial arbitral test, affording full opportunity therefor, as is hereafter recommended under the authority of Article IV of the Special Agreement, whenever the reasonableness of any regulation is objected to or challenged by the United States in the manner, and within the time hereinafter specified in the said recommendation.

Now therefore this Tribunal decides and awards as follows:

The right of Great Britain to make regulations without the consent of the United States, as to the exercise of the liberty to take fish referred to in Article I of the Treaty of October 20th, 1818, in the [189] form of municipal laws, ordinances or rules of Great Britain, Canada or Newfoundland is inherent to the sovereignty of Great Britain.

The exercise of that right by Great Britain is, however, limited by the said Treaty in respect of the said liberties therein granted to the inhabitants of the United States in that such regulations must be made bona fide and must not be in violation of the said Treaty.

Regulations which are (1) appropriate or necessary for the protection and preservation of such fisheries, or (2) desirable or necessary on grounds of public order and morals without unnecessarily interfering with the fishery itself, and in both cases equitable and fair as between local and American fishermen, and not so framed as to give unfairly an advantage to the former over the latter class, are not inconsistent with the obligation to execute the Treaty in good faith, and are therefore reasonable and not in violation of the Treaty.

For the decision of the question whether a regulation is or is not reasonable, as being or not in accordance with the dispositions of the Treaty and not in violation thereof, the Treaty of 1818 contains no special provision. The settlement of differences in this respect that might arise thereafter was left to the ordinary means of diplomatic intercourse. By reason, however, of the form in which Question I is put, and by further reason of the admission of Great Britain by her counsel before this Tribunal that it is not now for either of the Parties to the Treaty to determine the reasonableness of any regulation made by Great Britain, Canada or Newfoundland, the reasonableness of any such regulation, if contested, must be decided not by either of the Parties, but by an impartial authority in accordance with the principles hereinabove laid down, and in the manner proposed in the recommendations made by the Tribunal in virtue of Article IV of the Agreement.

The Tribunal further decides that Article IV of the Agreement is, as stated by counsel of the respective Parties at the argument, permanent in its effect, and not terminable, by the expiration of the General Arbitration Treaty of 1908, between Great Britain and the United States.

In execution, therefore, of the responsibilities imposed upon this Tribunal in regard to Articles II, III and IV of the Special Agreement, we hereby pronounce in their regard as follows:

AS TO ARTICLE II.

Pursuant to the provisions of this Article, hereinbefore cited, either Party has called the attention of this Tribunal to acts of the other claimed to be inconsistent with the true interpretation of the Treaty of 1818.

But in response to a request from the Tribunal, recorded in Protocol No. XXVI of 19th July, for an exposition of the grounds of such objections, the Parties replied as reported in Protocol No. XXX of 28th July to the following effect:

His Majesty's Government considered that it would be unnecessary to call upon the Tribunal for an opinion under the second clause of Article II, in regard to the executive act of the United States of America in sending warships to the territorial waters in question, in view of the recognized motives of the United States of America in taking this action and of the relations maintained by their representatives with the local authorities. And this being the sole act to which the attention of this Tribunal has been called by His Majesty's Government, no further action in their behalf is required from this Tribunal under Article II.

The United States of America presented a statement in which their claim that specific provisions of certain legislative and executive acts of the Governments of Canada and Newfoundland were inconsistent with the true interpretation of the Treaty of 1818 was based on the contention that these provisions were not "reasonable" within the meaning of Question I. [190]

After calling upon this Tribunal to express an opinion on these acts, pursuant to the second clause of Article II, the United States of America pointed out in that statement that under Article III any question regarding the reasonableness of any regulation might be referred by the Tribunal to a Commission of expert specialists, and expressed an intention of asking for such reference under certain circumstances.

The Tribunal having carefully considered the counter-statement presented on behalf of Great Britain at the session of August 2nd, is of opinion that the decision on the reasonableness of these regulations requires expert information about the fisheries themselves and an examination of the practical effect of a great number of these provisions in relation to the conditions surrounding the exercise of the liberty of fishery enjoyed by the inhabitants of the United States, as contemplated by Article III. No further action on behalf of the United States is therefore required from this Tribunal under Article II.

AS TO ARTICLE III.

As provided in Article III, hereinbefore cited and above referred to, "any question regarding the reasonableness of any regulation, or otherwise, which requires an examination of the practical effect of any provisions surrounding the exercise of the liberty of fishery enjoyed by the inhabitants of the United States, or which requires expert information about the fisheries themselves, may be referred by this Tribunal to a Commission of expert specialists: one to be designated by each of the Parties hereto and the third, who shall not be a national of either Party, to be designated by the Tribunal."

The Tribunal now therefore calls upon the Parties to designate within one month their national Commissioners for the expert examination of the questions submitted.

As the third non-national Commissioner this Tribunal designates Doctor P. P. C. HOEK, Scientific Adviser for the fisheries of the Netherlands and if any necessity arises therefor a substitute may be appointed by the President of this Tribunal.

After a reasonable time, to be agreed on by the Parties, for the expert Commission to arrive at a conclusion, by conference, or, if necessary, by local inspection, the Tribunal shall, if convoked by the President at the request of either Party, thereupon at the earliest convenient date, reconvene to consider the report of the Commission, and if it be on the whole unanimous shall incorporate it in the award. If not on the whole unanimous, i.e., on all points which in the opinion of the Tribunal are of essential importance, the Tribunal shall make its award as to the regulations concerned after consideration of the conclusions of the expert Commissioners and after hearing argument by counsel.

But while recognizing its responsibilities to meet the obligations imposed on it under Article III of the Special Agreement, the Tribunal hereby recommends as an alternative to having recourse to a reconvention of this Tribunal, that the Parties should accept the unanimous opinion of the Commission or the opinion of the non-national Commissioner on any points in dispute as an arbitral award rendered under the provisions of Chapter IV of the Hague Convention of 1907.

AS TO ARTICLE IV.

Pursuant to the provisions of this Article, hereinbefore cited, this Tribunal recommends for the consideration of the Parties the following rules and method of procedure under which all questions which may arise in the future regarding the exercise of the liberties above referred to may be determined in accordance with the principles laid down in this award. [191]

1.

All future municipal laws, ordinances or rules for the regulation of the fishery by Great Britain in respect of (1) the hours, days or seasons when fish may be taken on the Treaty coasts; (2) the method, means and implements used in the taking of fish or in carrying on fishing operations; (3) any other regulation of a similar character shall be published in the London Gazette two months before going into operation.

Similar regulations by Canada or Newfoundland shall be similarly published in the Canada Gazette and the Newfoundland Gazette respectively.

2.

If the Government of the United States considers any such laws or regulations inconsistent with the Treaty of 1818, it is entitled so to notify the Government of Great Britain within the two months referred to in Rule No. 1.

3.

Any law or regulation so notified shall not come into effect with respect to inhabitants of the United States until the Permanent Mixed Fishery Commission has decided that the regulation is reasonable within the meaning of this award.

4.

Permanent Mixed Fishery Commissions for Canada and Newfoundland respectively shall be established for the decision of such questions as to the reasonableness of future regulations, as contemplated by Article IV of the Special Agreement; these Commissions shall consist of an expert national appointed by either Party for five years. The third member shall not be a national of either Party; he shall be nominated for five years by agreement of the Parties, or failing such agreement within two months, he shall be nominated by Her Majesty the Queen of the Netherlands. The two national members shall be convoked by the Government of Great Britain within one month from the date of notification by the Government of the United States.

5.

The two national members having failed to agree within one month, within another month the full Commission, under the presidency of the umpire, is to be convoked by Great Britain. It must deliver its decision, if the two Governments do not agree otherwise, at the latest in three months. The Umpire shall conduct the procedure in accordance with that provided in Chapter IV of the Convention for the Pacific Settlement of International Disputes, except in so far as herein otherwise provided.

6.

The form of convocation of the Commission including the terms of reference of the question at issue shall be as follows: "The provision hereinafter fully set forth of an Act dated _____, published in the _____ has been notified to the Government of Great Britain by the Government of the United States, under date of _____, as provided by the award of the Hague Tribunal of September 7th, 1910.

"Pursuant to the provisions of that award the Government of Great Britain hereby convokes the Permanent Mixed Fishery Commission for (Canada) (Newfoundland) _____ composed of _____ Commissioner for the United States of America, and of _____ Commissioner for (Canada) (Newfoundland) _____, which shall meet at [192] _____ and render a decision within one month as to whether the provision so notified is reasonable and consistent with the Treaty of 1818, as interpreted by the award of the Hague Tribunal of September 7th, 1910, and if not, in what respect it is unreasonable and inconsistent therewith.

" Failing an agreement on this question within one month the Commission shall so notify the Government of Great Britain in order that the further action required by that award may be taken for the decision of the above question.

"The provision is as follows: _____".

7.

The unanimous decision of the two national Commissioners, or the majority decision of the Umpire and one Commissioner, shall be final and binding.

QUESTION II.

Have the inhabitants of the United States, while exercising the liberties referred to in said Article, a right to employ as members of the fishing crews of their vessels persons not inhabitants of the United States?

In regard to this question the United States claim in substance:

1. That the liberty assured to their inhabitants by the Treaty plainly includes the right to use all the means customary or appropriate for fishing upon the sea, not only ships and nets and boats, but crews to handle the ships and the nets and the boats;
2. That no right to control or limit the means which these inhabitants shall use in fishing can be admitted unless it is provided in the terms of the Treaty and no right to question the nationality or inhabitancy of the crews employed is contained in the terms of the Treaty.

And Great Britain claims:

1. That the Treaty confers the liberty to inhabitants of the United States exclusively;
2. That the Governments of Great Britain, Canada or Newfoundland may, without infraction of the Treaty, prohibit persons from engaging as fishermen in American vessels.

Now considering (1) that the liberty to take fish is an economic right attributed by the Treaty; (2) that it is attributed to inhabitants of the United States, without any mention of their nationality; (3) that the exercise of an economic right includes the right to employ servants; (4) that the right of employing servants has not been limited by the Treaty to the employment of persons of a distinct nationality or inhabitancy; (5) that the liberty to take fish as an economic liberty refers not only to the individuals doing the manual act of fishing, but also to those for whose profit the fish are taken.

But considering, (1)^[3] that the Treaty does not intend to grant to individual persons or to a class of persons the liberty to take fish in certain waters “in common”, that is to say in company, with individual British subjects, in the sense that no law could forbid British subjects to take service on American fishing ships; (2) that the Treaty intends to secure to the United States a share of the fisheries designated therein, not only in the interest of a certain class of individuals, but also in the interest of both the United States and Great Britain, as appears from the evidence and notably from the correspondence between Mr. ADAMS and Lord BATHURST in 1815; (3) that the inhabitants of the United States do not derive the liberty to take fish directly from the Treaty, but from the United [193] States Government as party to the Treaty with Great Britain and moreover exercising the right to regulate the conditions under which its inhabitants may enjoy the granted liberty; (4) that it is in the interest of the inhabitants of the United States that the fishing liberty granted to them be restricted to exercise by them and removed from the enjoyment of other aliens not entitled by this Treaty to participate in the fisheries; (5) that such restrictions have been throughout enacted in the British Statute of June 15, 1819, and that of June 3, 1824, to this effect, that no alien or stranger whatsoever shall fish in the waters designated therein, except in so far as by treaty

³ Numbering (1) added as omitted in original and R.I.A.A.

thereto entitled, and that this exception will, in virtue of the Treaty of 1818, as hereinabove interpreted by this award, exempt from these statutes American fishermen fishing by the agency of non-inhabitant aliens employed in their service; (6) that the Treaty does not affect the sovereign right of Great Britain as to aliens, non-inhabitants of the United States, nor the right of Great Britain to regulate the engagement of British subjects, while these aliens or British subjects are on British territory.

Now therefore, in view of the preceding considerations this Tribunal is of opinion that the inhabitants of the United States while exercising the liberties referred to in the said article have a right to employ, as members of the fishing crews of their vessels, persons not inhabitants of the United States.

But in view of the preceding considerations the Tribunal, to prevent any misunderstanding as to the effect of its award, expresses the opinion that non-inhabitants employed as members of the fishing crews of United States vessels derive no benefit or immunity from the Treaty and it is so decided and awarded.

QUESTION III.

Can the exercise by the inhabitants of the United States of the liberties referred to in the said Article be subjected, without the consent of the United States, to the requirements of entry or report at custom-houses or the payment of light or harbour or other dues, or to any other similar requirement or condition or exaction?

The Tribunal is of opinion as follows:

It is obvious that the liberties referred to in this question are those that relate to taking fish and to drying and curing fish on certain coasts as prescribed in the Treaty of October 20, 1818. The exercise of these liberties by the inhabitants of the United States in the prescribed waters to which they relate, has no reference to any commercial privileges which may or may not attach to such vessels by reason of any supposed authority outside the Treaty, which itself confers no commercial privileges whatever upon the inhabitants of the United States or the vessels in which they may exercise the fishing liberty. It follows, therefore, that when the inhabitants of the United States are not seeking to exercise the commercial privileges accorded to trading vessels for the vessels in which they are exercising the granted liberty of fishing, they ought not to be subjected to requirements as to report and entry at custom houses that are only appropriate to the exercise of commercial privileges. The exercise of the fishing liberty is distinct from the exercise of commercial or trading privileges and it is not competent for Great Britain or her colonies to impose upon the former exactions only appropriate to the latter. The reasons for the requirements enumerated in the case of commercial vessels have no relation to the case of fishing vessels.

We think, however, that the requirement that American fishing vessels should report, if proper conveniences and an opportunity for doing so are provided, is not unreasonable or inappropriate. [194] Such a report, while serving the purpose of a notification of the presence of a fishing vessel in the treaty waters for the purpose of exercising the treaty liberty, while it gives an opportunity for a proper surveillance of such vessel by revenue officers, may also serve to afford to such fishing vessel protection from interference in the exercise of the fishing liberty. There should be no such requirement, however, unless reasonably convenient opportunity therefor be afforded in person or by telegraph, at a custom-house or to a customs official.

The Tribunal is also of opinion that light and harbor^[4] dues, if not imposed on Newfoundland fishermen, should not be imposed on American fishermen while exercising the liberty granted by the Treaty. To impose such dues on American fishermen only would constitute an unfair discrimination between them and Newfoundland fishermen and one inconsistent with the liberty granted to American fishermen to take fish, etc., “in common with the subjects of His Britannic Majesty”.

Further, the Tribunal considers that the fulfilment of the requirement as to report by fishing vessels on arrival at the fishery would be greatly facilitated in the interests of both parties by the adoption of a system of registration, and distinctive marking of the fishing boats of both parties, analogous to that established by Articles V to XIII, inclusive, of the International Convention signed at The Hague, 8 May, 1882, for the regulation of the North Sea Fisheries.

The Tribunal therefore decides and awards as follows:

The requirement that an American fishing vessel should report, if proper conveniences for doing so are at hand, is not unreasonable, for the reasons stated in the foregoing opinion. There should be no such requirement, however, unless there be reasonably convenient opportunity afforded to report in person or by telegraph, either at a custom-house or to a customs official.

But the exercise of the fishing liberty by the inhabitants of the United States should not be subjected to the purely commercial formalities of report, entry and clearance at a custom-house, nor to light, harbor or other dues not imposed upon Newfoundland fishermen.

QUESTION IV.

Under the provision of the said Article that the American fishermen shall be admitted to enter certain bays or harbours for shelter, repairs, wood, or water, and for no other purpose whatever, but that they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein or in any other manner whatever abusing the privileges thereby reserved to them, is it permissible to impose restrictions making the exercise of such privileges conditional upon the payment of light or harbour or other dues, or entering or reporting at custom-houses or any similar conditions?

The Tribunal is of opinion that the provision in the first Article of the Treaty of October 20th, 1818, admitting American fishermen to enter certain bays or harbors for shelter, repairs, wood and water, and for no other purpose whatever, is an exercise in large measure of those duties of hospitality and humanity which all civilized nations impose upon themselves and expect the performance of from others. The enumerated purposes for which entry is permitted all relate to the exigencies in which those who pursue their perilous calling on the sea may be involved. The proviso which appears in the first article of the said Treaty immediately after the so-called renunciation clause, was doubtless due to a recognition by Great Britain of what was expected from the humanity and civilization of the then leading commercial nation of the world. To impose restrictions making the exercise of [195] such privileges conditional upon the payment of light, harbor or other dues, or entering and reporting at custom-houses, or any similar conditions would be inconsistent with the grounds upon which such privileges rest and therefore is not permissible.

⁴ Original spelling retained.

And it is decided and awarded that such restrictions are not permissible.

It seems reasonable, however, in order that these privileges accorded by Great Britain on these grounds of hospitality and humanity should not be abused, that the American fishermen entering such bays for any of the four purposes aforesaid and remaining more than 48 hours therein, should be required, if thought necessary by Great Britain or the Colonial Government, to report, either in person or by telegraph, at a custom-house or to a customs official, if reasonably convenient opportunity therefor is afforded.

And it is so decided and awarded.

QUESTION V.

From where must be measured the “three marine miles of any of the coasts, bays, creeks, or harbours” referred to in the said Article?

In regard to this question, Great Britain claims that the renunciation applies to all bays generally and

The United States contend that it applies to bays of a certain class or condition.

Now, considering that the Treaty used the general term “bays” without qualification, the Tribunal is of opinion that these words of the Treaty must be interpreted in a general sense as applying to every bay on the coast in question that might be reasonably supposed to have been considered as a bay by the negotiators of the Treaty under the general conditions then prevailing, unless the United States can adduce satisfactory proof that any restrictions or qualifications of the general use of the term were or should have been present to their minds.

And for the purpose of such proof the United States contend:

1. That while a State may renounce the treaty right to fish in foreign territorial waters, it cannot renounce the natural right to fish on the High Seas.

But the Tribunal is unable to agree with this contention. Because though a State cannot grant rights on the High Seas it certainly can abandon the exercise of its right to fish on the High Seas within certain definite limits. Such an abandonment was made with respect to their fishing rights in the waters in question by France and Spain in 1763. By a convention between the United Kingdom and the United States in 1846, the two countries assumed ownership over waters in Fuca Straits at distances from the shore as great as 17 miles.

The United States contend moreover:

2. That by the use of the term “liberty to fish” the United States manifested the intention to renounce the liberty in the waters referred to only in so far as that liberty was dependent upon or derived from a concession on the part of Great Britain, and not to renounce the right to fish in those waters where it was enjoyed by virtue of their natural right as an independent State.

But the Tribunal is unable to agree with this contention:

(a) Because the term “liberty to fish” was used in the renunciatory clause of the Treaty of 1818 [196] because the same term had been previously used in the Treaty of 1783 which gave the liberty; and it was proper to use in the renunciation clause the same term that was used in the grant with respect to the object of the grant; and, in view of the terms of the grant, it would have been improper to use the term “right” in the renunciation. Therefore the conclusion drawn from the use of the term “liberty” instead of the term “right” is not justified;

(b) Because the term “liberty” was a term properly applicable to the renunciation which referred not only to fishing in the territorial waters but also to drying and curing on the shore. This latter right was undoubtedly held under the provisions of the Treaty and was not a right accruing to the United States by virtue of any principle of International law.

3. The United States also contend that the term “bays of His Britannic Majesty’s Dominions” in the renunciatory clause must be read as including only those bays which were under the territorial sovereignty of Great Britain.

But the Tribunal is unable to accept this contention:

(a) Because the description of the coast on which the fishery is to be exercised by the inhabitants of the United States is expressed throughout the Treaty of 1818 in geographical terms and not by reference to political control; the Treaty describes the coast as contained between capes;

(b) Because to express the political concept of dominion as equivalent to sovereignty, the word “dominion” in the singular would have been an adequate term and not “dominions” in the plural; this latter term having a recognized and well settled meaning as descriptive of those portions of the Earth which owe political allegiance to His Majesty; e.g. “His Britannic Majesty’s Dominions beyond the Seas”.

4. It has been further contended by the United States that the renunciation applies only to bays six miles or less in width “*inter fauces terrae*”, those bays only being territorial bays, because the three mile rule is, as shown by this Treaty, a principle of international law applicable to coasts and should be strictly and systematically applied to bays.

But the Tribunal is unable to agree with this contention:

(a) Because admittedly the geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity, of defence, of commerce and of industry are all vitally concerned with the control of the bays penetrating the national coast line. This interest varies, speaking generally in proportion to the penetration inland of the bay; but as no principle of international law recognizes any specified relation between the concavity of the bay and the requirements for control by the territorial sovereignty, this Tribunal is unable to qualify by the application of any new principle its interpretation of the Treaty of 1818 as excluding bays in general from the strict and systematic application of the three mile rule; nor can this Tribunal take cognizance in this connection of other principles concerning the territorial sovereignty over bays such as ten mile or twelve mile limits of exclusion based on international acts subsequent to the treaty of 1818 and relating to coasts of a different configuration and conditions of a different character;

(b) Because the opinion of jurists and publicists quoted in the proceedings conduce to the opinion that speaking generally the three mile rule should not be strictly and systematically applied to bays; [197]

(c) Because the treaties referring to these coasts, antedating the treaty of 1818, made special provisions as to bays, such as the Treaties of 1686 and 1713 between Great Britain and France, and especially the Treaty of 1778 between the United States and France. Likewise JAY'S Treaty of 1794, Art. 25, distinguished bays from the space "within cannon-shot of the coast" in regard to the right of seizure in times of war. If the proposed treaty of 1806 and the treaty of 1818 contained no disposition to that effect, the explanation may be found in the fact that the first extended the marginal belt to five miles, and also in the circumstance that the American proposition of 1818 in that respect was not limited to "bays", but extended to "chambers formed by headlands" and to "five marine miles from a right line from one headland to another", a proposition which in the times of the Napoleonic wars would have affected to a very large extent the operations of the British navy;

(d) Because it has not been shown by the documents and correspondence in evidence here that the application of the three mile rule to bays was present to the minds of the negotiators in 1818 and they could not reasonably have been expected either to presume it or to provide against its presumption;

(e) Because it is difficult to explain the words in art. III of the Treaty under interpretation "country ... together with its bays, harbours and creeks" otherwise than that all bays without distinction as to their width were, in the opinion of the negotiators, part of the territory;

(f) Because from the information before this Tribunal it is evident that the three mile rule is not applied to bays strictly or systematically either by the United States or by any other Power;

(g) It has been recognized by the United States that bays stand apart, and that in respect of them territorial jurisdiction may be exercised farther than the marginal belt in the case of Delaware bay by the report of the United States Attorney General of May 19th 1793; and the letter of Mr. JEFFERSON to Mr. GENET of Nov. 8th 1793 declares the bays of the United States generally to be, "as being landlocked, within the body of the United States".

5. In this latter regard it is further contended by the United States, that such exceptions only should be made from the application of the three mile rule to bays as are sanctioned by conventions and established usage: that all exceptions for which the United States of America were responsible are so sanctioned; and that His Majesty's Government are unable to provide evidence to show that the bays concerned by the Treaty of 1818 could be claimed as exceptions on these grounds either generally, or except possibly in one or two cases, specifically.

But the Tribunal while recognizing that conventions and established usage might be considered as the basis for claiming as territorial those bays which on this ground might be called historic bays, and that such claim should be held valid in the absence of any principle of international law on the subject; nevertheless is unable to apply this, *a contrario*, so as to subject the bays in question to the three mile rule, as desired by the United States:

(a) Because Great Britain has during this controversy asserted a claim to these bays generally, and has enforced such claim specifically in statutes or otherwise, in regard to the more important bays such as Chaleurs, Conception and Miramichi;

(b) Because neither should such relaxations of this claim, as are in evidence, be construed as renunciations of it; nor should omissions to enforce the claim in regard to bays

as to which [198] no controversy arose, be so construed. Such a construction by this Tribunal would not only be intrinsically inequitable but internationally injurious; in that it would discourage conciliatory diplomatic transactions and encourage the assertion of extreme claims in their fullest extent;

(c) Because any such relaxations in the extreme claim of Great Britain in its international relations are compensated by recognitions of it in the same sphere by the United States; notably in relations with France for instance in 1823 when they applied to Great Britain for the protection of their fishery in the bays on the western coast of Newfoundland, whence they had been driven by French war vessels on the ground of the pretended exclusive right of the French. Though they never asserted that their fishermen had been disturbed within the three mile zone, only alleging that the disturbance had taken place in the bays, they claimed to be protected by Great Britain for having been molested in waters which were, as Mr. RUSH stated “clearly within the jurisdiction and sovereignty of Great Britain”.

6. It has been contended by the United States that the words “coasts, bays, creeks or harbours” are here used only to express different parts of the coast and are intended to express and be equivalent to the word “coast” whereby the three marine miles would be measured from the sinuosities of the coast and the renunciation would apply only to the waters of bays within three miles.

But the Tribunal is unable to agree with this contention:

(a) Because it is a principle of interpretation that words in a document ought not to be considered as being without any meaning if there is not specific evidence to that purpose and the interpretation referred to would lead to the consequence, practically, of reading the words “bays, creeks and harbours” out of the Treaty; so that it would read “within three miles of any of the coasts” including therein the coasts of the bays and harbours;

(b) Because the word “therein” in the proviso – “restrictions necessary to prevent their taking, drying or curing fish therein” can refer only to “bays”, and not to the belt of three miles along the coast; and can be explained only on the supposition that the words “bays, creeks and harbours” are to be understood in their usual ordinary sense and not in an artificially restricted sense of bays within the three mile belt;

(c) Because the practical distinction for the purpose of this fishery between coasts and bays and the exceptional conditions pertaining to the latter has been shown from the correspondence and the documents in evidence, especially the Treaty of 1783, to have been in all probability present to the minds of the negotiators of the Treaty of 1818;

(d) Because the existence of this distinction is confirmed in the same article of the Treaty by the proviso permitting the United States fishermen to enter bays for certain purposes;

(e) Because the word “coasts” is used in the plural form whereas the contention would require its use in the singular;

(f) Because the Tribunal is unable to understand the term “bays” in the renunciatory clause in other than its geographical sense, by which a bay is to be considered as an indentation of the coast, bearing a configuration of a particular character easy to determine specifically, but difficult to describe generally.

The negotiators of the Treaty of 1818 did probably not trouble themselves with subtle theories concerning the notion of “bays”; they most probably thought that everybody would know what was [199] a bay. In this popular sense the term must be interpreted in the Treaty. The interpretation must take into account all the individual circumstances which for any one of the different bays are to be appreciated, the relation of its width to the length of penetration inland, the possibility and the necessity of its being defended by the State in whose territory it

is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in general.

For these reasons the Tribunal decides and awards:

In case of bays the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast.

But considering the Tribunal cannot overlook that this answer to Question V, although correct in principle and the only one possible in view of the want of a sufficient basis for a more concrete answer, is not entirely satisfactory as to its practical applicability, and that it leaves room for doubts and differences in practice. Therefore the Tribunal considers it its duty to render the decision more practicable and to remove the danger of future differences by adjoining to it, a recommendation in virtue of the responsibilities imposed by Art. IV of the Special Agreement.

Considering, moreover, that in treaties with France, with the North German Confederation and the German Empire and likewise in the North Sea Convention, Great Britain has adopted for similar cases the rule that only bays of ten miles width should be considered as those wherein the fishing is reserved to nationals. And that in the course of the negotiations between Great Britain and the United States a similar rule has been on various occasions proposed and adopted by Great Britain in instructions to the naval officers stationed on these coasts. And that though these circumstances are not sufficient to constitute this a principle of international law, it seems reasonable to propose this rule with certain exceptions, all the more that this rule with such exceptions has already formed the basis of an agreement between the two Powers.

Now therefore this Tribunal in pursuance of the provisions of art. IV hereby recommends for the consideration and acceptance of the High Contracting Parties the following rules and method of procedure for determining the limits of the bays hereinbefore enumerated.

1.

In every bay not hereinafter specifically provided for the limits of exclusion shall be drawn three miles seaward from a straight line across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles.

2.

In the following bays where the configuration of the coast and the local climatic conditions are such that foreign fishermen when within the geographic headlands might reasonably and bona fide believe themselves on the high seas, the limits of exclusion shall be drawn in each case between the headlands hereinafter specified as being those at and within which such fishermen might be reasonably expected to recognize the bay under average conditions.

For the Baie des Chaleurs the line from the Light at Birch Point on Miscou Island to Macquereau [200] Point Light; for the Bay of Miramichi, the line from the Light at Point Escuminac to the Light on the Eastern Point of Tabisintac Gully; for

Egmont Bay, in Prince Edward Island, the line from the light at Cape Egmont to the Light at West Point; and off St. Ann's Bay, in the Province of Nova Scotia, the line from the Light at Point Anconi to the nearest point on the opposite shore of the mainland.

For Fortune Bay, in Newfoundland, the line from Connaigre Head to the Light on the Southeasterly end of Brunet Island, thence to Fortune Head.

For or near the following bays the limits of exclusion shall be three marine miles seawards from the following lines, namely:

For or near Barrington Bay, in Nova Scotia, the line from the Light on Stoddart Island to the Light on the south point of Cape Sable, thence to the light at Baccaro Point; at Chedabucto and St. Peter's Bays, the line from Cranberry Island Light to Green Island Light, thence to Point Rouge; for Mira Bay, the line from the Light on the East Point of Scatari Island to the Northeasterly Point of Cape Morien; and at Placentia Bay, in Newfoundland, the line from Latine Point, on the Eastern mainland shore, to the most Southerly Point of Red Island, thence by the most Southerly Point of Merasheen Island to the mainland.

Long Island and Buyer Island, on St. Mary's Bay, in Nova Scotia, shall, for the purpose of delimitation, be taken as the coasts of such bays.

It is understood that nothing in these rules refers either to the Bay of Fundy considered as a whole apart from its bays and creeks or as to the innocent passage through the Gut of Canso, which were excluded by the agreement made by exchange of notes between Mr. Bacon and Mr. Bryce dated February 21st 1909 and March 4th 1909; or to Conception Bay, which was provided for by the decision of the Privy Council in the case of the Direct United States Cable Company v. The Anglo American Telegraph Company, in which decision the United States have acquiesced.

QUESTION VI.

Have the inhabitants of the United States the liberty under the said Article or otherwise, to take fish in the bays, harbours, and creeks on that part of the southern coast of Newfoundland which extends from Cape Ray to Rameau Islands, or on the western and northern coasts of Newfoundland from Cape Ray to Quirpon Islands, or on the Magdalen Islands?

In regard to this question, it is contended by the United States that the inhabitants of the United States have the liberty under Art. I of the Treaty of taking fish in the bays, harbours and creeks on that part of the Southern Coast of Newfoundland which extends from Cape Ray to Rameau Islands or on the western and northern coasts of Newfoundland from Cape Ray to Quirpon Islands and on the Magdalen Islands. It is contended by Great Britain that they have no such liberty.

Now considering that the evidence seems to show that the intention of the Parties to the Treaty of 1818, as indicated by the records of the negotiations. and by the subsequent attitude of the Governments was to admit the United States to such fishery, this Tribunal is of opinion that it is incumbent on Great Britain to produce satisfactory proof that the United States are not so entitled under the Treaty.

For this purpose Great Britain points to the fact that whereas the Treaty grants to American fishermen liberty to take fish "on the coasts, bays, harbours, and creeks from Mount Joly on the Southern coast of Labrador" the liberty is granted to the "coast" only of Newfoundland and to the "shore" only of the Magdalen Islands; and argues that evidence can be found in the correspondence [201] submitted indicating an intention to exclude Americans

from Newfoundland bays on the Treaty Coast, and that no value would have been attached at that time by the United States Government to the liberty of fishing in such bays because there was no cod fishery there as there was in the bays of Labrador.

But the Tribunal is unable to agree with this contention:

(a) Because the words “part of the southern coast ... from ... to” and the words “Western and Northern Coast ... from ... to”, clearly indicate one uninterrupted coast-line; and there is no reason to read into the words “coasts” a contradistinction to bays, in order to exclude bays. On the contrary, as already held in the answer to Question V, the words “liberty, forever, to dry and cure fish in any of the unsettled bays, harbours and creeks of the Southern part of the Coast of Newfoundland hereabove described”, indicate that in the meaning of the Treaty, as in all the preceding treaties relating to the same territories, the words coast, coasts, harbours, bays, etc., are used, without attaching to the word “coast” the specific meaning of excluding bays. Thus in the provision of the Treaty of 1783 giving liberty “to take fish on such part of the coast of Newfoundland as British fishermen shall use”; the word “coast” necessarily includes bays, because if the intention had been to prohibit the entering of the bays for fishing the following words “but not to dry or cure the same on that island”, would have no meaning. The contention that in the Treaty of 1783 the word “bays” is inserted lest otherwise Great Britain would have had the right to exclude the Americans to the three mile line, is inadmissible, because in that Treaty that line is not mentioned;

(b) Because the correspondence between Mr. ADAMS and Lord BATHURST also shows that during the negotiations for the Treaty the United States demanded the former rights enjoyed under the Treaty of 1783, and that Lord BATHURST in the letter of 30th October 1815 made no objection to granting those “former rights” “placed under some modifications”, which latter did not relate to the right of fishing in bays, but only to the “preoccupation of British harbours and creeks by the fishing vessels of the United States and the forcible exclusion of British subjects where the fishery might be most advantageously conducted”, and “to the clandestine introduction of prohibited goods into the British colonies”. It may be therefore assumed that the word “coast” is used in both Treaties in the same sense, including bays;

(c) Because the Treaty expressly allows the liberty to dry and cure in the unsettled bays, etc. of the southern part of the coast of Newfoundland, and this shows that, a fortiori, the taking of fish in those bays is also allowed; because the fishing liberty was a lesser burden than the grant to cure and dry, and the restrictive clauses never refer to fishing in contradistinction to drying, but always to drying in contradistinction to fishing. Fishing is granted without drying, never drying without fishing;

(d) Because there is not sufficient evidence to show that the enumeration of the component parts of the coast of Labrador was made in order to discriminate between the coast of Labrador and the coast of Newfoundland;

(e) Because the statement that there is no codfish in the bays of Newfoundland and that the Americans only took interest in the codfishery is not proved; and evidence to the contrary is to be found in Mr. JOHN ADAMS Journal of Peace Negotiations of November 25, 1782;

(f) Because the Treaty grants the right to take fish of every kind, and not only codfish;

(g) Because the evidence shows that, in 1823, the Americans were fishing in Newfoundland [202] bays and that Great Britain when summoned to protect them against expulsion therefrom by the French did not deny their right to enter such bays.

Therefore this Tribunal is of opinion that American inhabitants are entitled to fish in the bays, creeks and harbours of the Treaty coasts of Newfoundland and the Magdalen Islands and it is so decided and awarded.

QUESTION VII.

Are the inhabitants of the United States whose vessels resort to the Treaty coasts for the purpose of exercising the liberties referred to in Article I of the Treaty of 1818 entitled to have for those vessels, when duly authorized by the United States in that behalf, the commercial privileges on the Treaty coasts accorded by agreement or otherwise to United States trading vessels generally?

Now assuming that commercial privileges on the Treaty coasts are accorded by agreement or otherwise to United States trading vessels generally, without any exception, the inhabitants of the United States, whose vessels resort to the same coasts for the purpose of exercising the liberties referred to in Article I of the Treaty of 1818, are entitled to have for those vessels when duly authorized by the United States in that behalf, the above mentioned commercial privileges, the Treaty containing nothing to the contrary. But they cannot at the same time and during the same voyage exercise their Treaty rights and commercial privileges, because Treaty rights and commercial privileges are submitted to different rules, regulations and restraints.

For these reasons this Tribunal is of opinion that the inhabitants of the United States are so entitled in so far as concerns this Treaty, there being nothing in its provisions to disentitle them provided the Treaty liberty of fishing and the commercial privileges are not exercised concurrently and it is so decided and awarded.

Done at The Hague, in the Permanent Court of Arbitration, in triplicate original, September 7th, 1910.

H. LAMMASCH.
A. F. DE SAVORNIN LOHMAN.
B. GEORGE GRAY.
C. C. FITZPATRICK.
D. LUIS M. DRAGO.

Signing the Award, I state pursuant to Article IX clause 2 of the Special Agreement my dissent from the majority of the Tribunal in respect to the considerations and enacting part of the Award as to Question V.

Grounds for this dissent have been filed at the International Bureau of the Permanent Court of Arbitration.

LUIS M. DRAGO.

Grounds for the Dissent to the Award on Question V, by Luis M. Drago

Counsel for Great Britain have very clearly stated that according to their contention the territoriality of the bays referred to in the Treaty of 1818 is immaterial because whether they are or are not territorial, the United States should be excluded from fishing in them by the terms of the renunciatory clause, which simply refers to “bays, creeks or harbours of His Britannic Majesty’s Dominions” without any other qualification or description. If that were so, the necessity might arise of discussing whether or not a nation has the right to exclude another by contract or otherwise from any portion or portions of the high seas. But in my opinion the Tribunal need not concern itself with such general question, the wording of the treaty being clear enough to decide the point at issue.

Article I begins with the statement that differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof to take, dry and cure fish on “certain coasts, bays, harbours and creeks of His Britannic Majesty’s Dominions in America”, and then proceeds to locate the specific portions of the coast with its corresponding indentations, in which the liberty of taking, drying and curing fish should be exercised. The renunciatory clause, which the Tribunal is called upon to construe, runs thus: “And the United States hereby renounce, forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry or cure fish on, or within three marine miles of any of the Coasts, Bays, Creeks or Harbours of His Britannic Majesty’s Dominions in America not included within the above mentioned limits.” This language does not lend itself to different constructions. If the bays in which the liberty has been renounced are those “of His Britannic Majesty’s Dominions in America”, they must necessarily be territorial bays, because in so far as they are not so considered they should belong to the high seas and consequently form no part of His Britannic Majesty’s Dominions, which, by definition, do not extend to the high seas. It cannot be said, as has been suggested, that the use of the word “dominions”, in the plural, implies a different meaning than would be conveyed by the same term as used in the singular, so that in the present case, “the British dominions in America” ought to be considered as a mere geographical expression, without reference to any right of sovereignty or “dominion”. It seems to me, on the contrary, that “dominions”, or “possessions”, or “estates”, or such other equivalent terms, simply designate the places over which the “dominion” or property rights are exercised. Where there is no possibility of appropriation or dominion, as on the high seas, we cannot speak of dominions. The “dominions” extend exactly to the point which the “dominion” reaches; they are simply the actual or physical thing over which the abstract power or authority, the right, as given to the proprietor or the ruler, applies. The interpretation as to the territoriality of the bays as mentioned in the renunciatory clause of the treaty appears stronger when considering that the United States specifically renounced the “liberty”, not the “right” to fish or to cure and dry fish. “The

United States renounce, forever, any liberty heretofore enjoyed or claimed, to take, cure or dry fish on, or within three marine miles of any of the coasts, bays, creeks or harbours of His Britannic Majesty's Dominions in America". It is well known that the negotiators of the Treaty of 1783 gave a very [204] different meaning to the terms liberty and right, as distinguished from each other. In this connection Mr. ADAMS' Journal may be recited. To this journal the British Counter Case refers in the following terms: "From an entry in Mr. ADAMS' Journal it appears that he drafted an article by which he distinguished the right to take fish (both on the high seas and on the shores) and the liberty to take and cure fish on the land. But on the following day he presented to the British negotiators a draft in which he distinguishes between the 'right' to take fish on the high seas, and the 'liberty' to take fish on the 'coasts', and to dry and cure fish on the land ****. The British Commissioner called attention to the distinction thus suggested by Mr. ADAMS and proposed that the word liberty should be applied to the privileges both on the water and on the land. Mr. ADAMS thereupon rose up and made a vehement protest, as is recorded in his Diary, against the suggestion that the United States enjoyed the fishing on the banks of Newfoundland by any other title than that of right. **** The application of the word liberty to the coast fishery was left as Mr. Adams proposed." "The incident, proceeds the British Case, is of importance, since it shows that the difference between the two phrases was intentional." (British Counter Case, page 17). And the British Argument emphasizes again the difference.

"More cogent still is the distinction between the words right and liberty. The word right is applied to the sea fisheries, and the word liberty to the shore fisheries. The history of the negotiations shows that this distinction was advisedly adopted." If then a liberty is a grant and not the recognition of a right; if, as the British Case, Counter Case and Argument recognize, the United States had the right to fish in the open sea in contradistinction with the liberty to fish near the shores or portions of the shores, and if what has been renounced in the words of the treaty is the "liberty" to fish on, or within three miles of the bays, creeks and harbours of His Britannic Majesty's Dominions, it clearly follows that such liberty and the corresponding renunciation refers only to such portions of the bays which were under the sovereignty of Great Britain and not to such other portions, if any, as form part of the high seas.

And thus it appears that far from being immaterial the territoriality of bays is of the utmost importance. The treaty not containing any rule or indication upon the subject, the Tribunal cannot help a decision as to this point, which involves the second branch of the British contention that all so-called bays are not only geographical but wholly territorial as well, and subject to the jurisdiction of Great Britain. The situation was very accurately described on almost the same lines as above stated by the British Memorandum sent in 1870 by the Earl of Kimberley to Governor Sir JOHN YOUNG: "The right of Great Britain to exclude American fishermen from waters within three miles of the coasts is unambiguous, and, it is believed, uncontested. But there appears to be some doubt what are the waters described as within three miles of bays, creeks or harbors. When a bay is less than six miles broad its waters are within the three mile limit, and therefore clearly within the meaning of the treaty; but when it is more than that breadth, the question arises

whether it is a bay of Her Britannic Majesty's Dominions. This is a question which has to be considered in each particular case with regard to international law and usage. When such a bay is not a bay of Her Majesty's dominions, the American fishermen shall be entitled to fish in it, except within three marine miles of the 'coast'; when it is a bay of Her Majesty's dominions they will not be entitled to fish within three miles of it, that is to say (it is presumed) within three miles of a line drawn from headland to headland". (American Case Appendix, page 629.)

Now, it must be stated in the first place that there does not seem to exist any general rule of [205] international law which may be considered final, even in what refers to the marginal belt of territorial waters. The old rule of the cannon-shot, crystallized into the present three marine miles measured from low water mark, may be modified at a later period inasmuch as certain nations claim wider jurisdiction and an extension has already been recommended by the Institute of International Law. There is an obvious reason for that. The marginal strip of territorial waters based originally on the cannon-shot, was founded on the necessity of the riparian State to protect itself from outward attack, by providing something in the nature of an insulating zone, which very reasonably should be extended with the accrued possibility of offense due to the wider range of modern ordnance. In what refers to bays, it has been proposed as a general rule (subject to certain important exceptions) that the marginal belt of territorial waters should follow the sinuosities of the coast more or less in the manner held by the United States in the present contention, so that the marginal belt being of three miles, as in the Treaty under consideration, only such bays should be held as territorial as have an entrance not wider than six miles. (See Sir THOMAS BARCLAY'S Report to Institute of International Law, 1894, page 129, in which he also strongly recommends these limits). This is the doctrine which WESTLAKE, the eminent English writer on International Law, has summed up in very few words : "As to bays," he says, "if the entrance to one of them is not more than twice the width of the littoral sea enjoyed by the country in question – that is, not more than six sea miles in the ordinary case, eight in that of Norway, and so forth – there is no access from the open sea to the bay except through the territorial water of that country, and the inner part of the bay will belong to that country no matter how widely it may expand. The line drawn from shore to shore at the part where, in approaching from the open sea, the width first contracts to that mentioned, will take the place of the line of low water, and the littoral sea belonging to the State will be measured outwards from that line to the distance of three miles or more, proper to the State" (WESTLAKE, Vol. 1, page 187). But the learned author takes care to add: "But although this is the general rule it often meets with an exception in the case of bays which penetrate deep into the land and are called gulfs. Many of these are recognized by immemorial usage as territorial sea of the States into which they penetrate, notwithstanding that their entrance is wider than the general rule for bays would give as a limit for such appropriation. And he proceeds to quote as examples of this kind the Bay of Conception in Newfoundland, which he considers as wholly British, Chesapeake and Delaware Bays, which belong to the United States, and others. (Ibid, page 188.) The Institute of International Law, in its Annual Meeting of 1894, recommended a marginal

belt of six miles for the general line of the coast and as a consequence established that for bays the line should be drawn up across at the nearest portion of the entrance toward the sea where the distance between the two sides do not exceed twelve miles. But the learned association very wisely added a proviso to the effect, "that bays should be so considered and measured unless a continuous and established usage has sanctioned a greater breadth". Many great authorities are agreed as to that. Counsel for the United States proclaimed the right to the exclusive jurisdiction of certain bays, no matter what the width of their entrance should be, when the littoral nation has asserted its right to take it into their jurisdiction upon reasons which go always back to the doctrine of protection. Lord BLACKBURN, one of the most eminent of English judges, delivering the opinion of the Privy Council about Conception Bay in Newfoundland, adhered to the same doctrine when he asserted the territoriality of that branch of the sea, giving as a reason for such finding "that the [206] British Government for a long period had exercised dominion over this bay and its claim had been acquiesced in by other nations, so as to show that the bay had been for a long time occupied exclusively by Great Britain, a circumstance which, in the tribunals of any country, would be very important." "And moreover," he added, "the British Legislature has, by Acts of Parliament, declared it to be part of the British territory, and part of the country made subject to the legislation of Newfoundland." (*Direct U. S. Cable Co. v. The Anglo-American Telegraph Co.*, Law Reports, 2 Appeal Cases, 374.)

So it may be safely asserted that a certain class of bays, which might be properly called the historical bays such as Chesapeake Bay and Delaware Bay in North America and the great estuary of the River Plate in South America, form a class distinct and apart and undoubtedly belong to the littoral country, whatever be their depth of penetration and the width of their mouths, when such country has asserted its sovereignty over them, and particular circumstances such as geographical configuration, immemorial usage and above all, the requirements of self-defense, justify such a pretension. The right of Great Britain over the bays of Conception, Chaleur and Miramichi are of this description. In what refers to the other bays, as might be termed the common, ordinary bays, indenting the coasts, over which no special claim or assertion of sovereignty has been made, there does not seem to be any other general principle to be applied than the one resulting from the custom and usage of each individual nation as shown by their Treaties and their general and time honored practice.

The well known words of BYNKERSHOEK might be very appropriately recalled in this connection when so many and divergent opinions and authorities have been recited: "The common law of nations," he says, "can only be learnt from reason and custom. I do not deny that authority may add weight to reason, but I prefer to seek it in a constant custom of concluding treaties in one sense or another and in examples that have occurred in one country or another." (*Questiones Jure Publici*, Vol. 1, Cap. 3.)

It is to be borne in mind in this respect that the Tribunal has been called upon to decide as the subject matter of this controversy, the construction to be given to the fishery

Treaty of 1818 between Great Britain and the United States. And so it is that from the usage and the practice of Great Britain in this and other like fisheries and from Treaties entered into by them with other nations as to fisheries, may be evolved the right interpretation to be given to the particular convention which has been submitted. In this connection the following Treaties may be recited:

Treaty between Great Britain and France. 2nd August, 1839. It reads as follows:

Article IX. The subjects of Her Britannic Majesty shall enjoy the exclusive right of fishery within the distance of 3 miles from low water mark along the whole extent of the coasts of the British Islands.

It is agreed that the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries, shall, with respect to bays, the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland.

Article X. It is agreed and understood, that the miles mentioned in the present Convention are geographical miles, whereof 60 make a degree of latitude.

(HERTSLETT'S Treaties and Conventions, Vol. V, p. 89.) [207]

Regulations between Great Britain and France. 24th May, 1843.

Art. II. The limits, within which the general right of fishery is exclusively reserved to the subjects of the two kingdoms respectively, are fixed (with the exception of those in Granville Bay) at 3 miles distance from low water mark.

With respect to bays, the mouths of which do not exceed ten miles in width, the 3 mile distance is measured from a straight line drawn from headland to headland.

Art. III. The miles mentioned in the present regulations are geographical miles, of which 60 make a degree of latitude.

(HERTSLETT, Vol. VI, p. 416.)

Treaty between Great Britain and France. November 11, 1867.

Art. I. British fishermen shall enjoy the exclusive right of fishery within the distance of 3 miles from low water mark, along the whole extent of the coasts of the British Islands.

The distance of 3 miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays, the mouths of which do not exceed ten miles in width be measured from a straight line drawn from headland to headland.

The miles mentioned in the present convention are geographical miles whereof 60 make a degree of latitude.

(HERTSLETT'S Treaties, Vol. XII, p. 1126, British Case App., p. 38.)

Great Britain and North German Confederation. British notice to fishermen by the Board of Trade. Board of Trade, November 1868.

Her Majesty's Government and the North German Confederation having come to an agreement respecting the regulations to be observed by British fishermen fishing off the coasts of the North German Confederation, the following notice is issued for the guidance and warning of British fishermen:

1. The exclusive fishery limits of the German Empire are designated by the Imperial Government as follows: that tract of the sea which extends to a distance of 3 sea miles from the extremest limits which the ebb leaves dry of the German North Sea Coast of the German Islands or flats lying before it, as well as those bays and incurvations of the coast which are ten sea miles or less in breadth reckoned from the extremest points of the land and the flats, must be considered as under the territorial sovereignty of North Germany. (HERTSLETT'S Treaties, Vol. XIV, p. 1055.)

Great Britain and German Empire. British Board of Trade, December 1874.

(Same recital referring to an arrangement entered into between Her Britannic Majesty and the German Government.)

Then the same articles follow with the alteration of the words "German Empire" for "North Germany".

(HERTSLETT'S, Vol. XIV, p. 1058.) [208]

Treaty between Great Britain, Belgium, Denmark, France, Germany and the Netherlands for regulating the police of the North Sea Fisheries, May 6, 1882.

II. Les pêcheurs nationaux jouiront du droit exclusif de pêche dans le rayon de 3 milles, a partir de la laisse de basse mer, le long de toute l'étendue des côtes de leurs pays respectifs, ainsi que des îles et des bancs qui en dépendent.

Pour les baies le rayon de 3 milles sera mesuré à partir d'une ligne droite, tirée, en travers de la baie, dans la partie la plus rapprochée de l'entrée, au premier point où l'ouverture n'excédera pas 10 milles.

(HERTSLETT, Vol. XV, p. 794.)

British Order in Council, October 23rd, 1877.

Prescribes the obligation of not concealing or effacing numbers or marks on boats, employed in fishing or dredging for purposes of sale on the coasts of England, Wales, Scotland and the Islands of Guernsey, Jersey, Alderney, Sark and Man, and not going outside;

(a) The distance of 3 miles from low water mark along the whole extent of the said coasts;

(b) In cases of bays less than 10 miles wide the line joining the headlands of said bays.

(HERTSLETT'S, Vol. XIV, p. 1032.)

To this list may be added the unratified Treaty of 1888 between Great Britain and the United States which is so familiar to the Tribunal. Such unratified Treaty contains an authoritative interpretation of the Convention of October 20th, 1818, sub-judice: "The three marine miles mentioned in Article I of the Convention of October 20th, 1818, shall be measured seaward from low-water mark; but at every bay, creek or harbor, not otherwise specifically provided for in this Treaty, such three marine miles shall be measured seaward from a straight line drawn across the bay, creek or harbor, in the part nearest the entrance at the first point where the width does not exceed ten marine miles", which is recognizing the exceptional bays as aforesaid and laying the rule for the general and common bays.

It has been suggested that the Treaty of 1818 ought not to be studied as hereabove in the light of any Treaties of a later date, but rather be referred to such British international Conventions as preceded it and clearly illustrate, according to this view, what were, at the time, the principles maintained by Great Britain as to their sovereignty over the sea and over the coast and the adjacent territorial waters. In this connection the Treaties of 1686 and 1713 with France and of 1763 with France and Spain have been recited and offered as examples also of exclusion of nations by agreement from fishery rights on the high seas. I cannot partake of such a view. The treaties of 1686, 1713 and 1763 can hardly be understood with respect to this, otherwise than as examples of the wild, obsolete claims over the common ocean which all nations have of old abandoned with the progress of an enlightened civilization. And if certain nations accepted long ago to be excluded by convention from fishing on what is to-day considered a common sea, it is precisely because it was then understood that such tracts of water, now free and open to all, were the exclusive property of a particular power, who, being the owners, admitted or excluded others from their use. The treaty of 1818 is in the meantime one of the few which mark an era in the diplomacy of the world. As a matter of fact it is the very first which commuted the rule of the cannon-shot into the three marine miles of coastal jurisdiction. And it really would appear unjustified to explain such historic [209] document, by referring it to international Agreements of a hundred and two hundred years before when the doctrine of SELDEN'S Mare Clausum was at its height and when the coastal waters were fixed at such distances as sixty miles, or a hundred miles, or two days' journey from the shore and the like. It seems very appropriate, on the contrary, to explain the meaning of the Treaty of 1818 by comparing it with those which immediately followed and established the same limit of coastal jurisdiction. As a general rule a Treaty of a former date may be very safely construed by referring it to the provisions of like Treaties made by the same nation on the same matter at a later time. Much more so when, as occurs in the present case, the later Conventions, with no exception, starting from the same premise of the three miles coastal jurisdiction arrive always to a uniform policy and line of action in what refers to bays. As a matter of fact all authorities approach and connect the modern fishery Treaties of Great Britain and refer them to the Treaty of 1818. The second edition of KLUBER, for instance, quotes in the same sentence the Treaties of October 20th, 1818, and August 2, 1839, as fixing a distance of three miles from low water mark for coastal jurisdiction. And FIORI, the well-known Italian jurist, referring to

the same marine miles of coastal jurisdiction, says: "This rule recognized as early as the Treaty of 1818 between the United States and Great Britain, and that between Great Britain and France in 1839, has again been admitted in the treaty of 1867." (Nouveau Droit International Public, Paris, 1885, Section 803.)

This is only a recognition of the permanency and the continuity of States. The Treaty of 1818 is not a separate fact unconnected with the later policy of Great Britain. Its negotiators were not parties to such international Convention and their powers disappeared as soon as they signed the document on behalf of their countries. The parties to the Treaty of 1818 were the United States and Great Britain, and what Great Britain meant in 1818 about bays and fisheries, when they for the first time fixed a marginal jurisdiction of three miles, can be very well explained by what Great Britain, the same permanent political entity, understood in 1839, 1843, 1867, 1874, 1878 and 1882, when fixing the very same zone of territorial waters. That a bay in Europe should be considered as different from a bay in America and subject to other principles of international law cannot be admitted in the face of it. What the practice of Great Britain has been outside the Treaties is very well known to the Tribunal, and the examples might be multiplied of the cases in which that nation has ordered its subordinates to apply to the bays on these fisheries the ten mile entrance rule or the six miles according to the occasion. It has been repeatedly said that such have been only relaxations of the strict right, assented to by Great Britain in order to avoid friction on certain special occasions. That may be. But it may also be asserted that such relaxations have been very many and that the constant, uniform, never contradicted practice of concluding fishery Treaties from 1839 down to the present day, in all of which the ten miles entrance bays are recognized, is the clear sign of a policy. This policy has but very lately found a most public, solemn and unequivocal expression. "On a question asked in Parliament on the 21st of February 1907, says PITT COBBETT, a distinguished English writer, with respect to the Moray Firth Case, it was stated that, according to the view of the Foreign Office, the Admiralty, the Colonial Office, the Board of Trade and the Board of Agriculture and Fisheries, the term "territorial waters" was deemed to include waters extending from the coast line of any part of the territory of a State to three miles from the low-water mark of such coast line and the waters of all bays, the entrance to which is not more than six miles, [210] and of which the entire land boundary forms part of the territory of the same state. (PITT COBBETT Cases and Opinions on International Law, Vol. 1, p. 143.)

Is there a contradiction between these six miles and the ten miles of the treaties just referred to? Not at all. The six miles are the consequence of the three miles marginal belt of territorial waters in their coincidence from both sides at the inlets of the coast and the ten miles far from being an arbitrary measure are simply an extension, a margin given for convenience to the strict six miles with fishery purposes. Where the miles represent sixty to a degree in latitude the ten miles are besides the sixth part of the same degree. The American Government in reply to the observations made to Secretary BAYARD'S Memorandum of 1888, said very precisely: "The width of ten miles was proposed not only because it had been followed in Conventions between many other powers, but also

because it was deemed reasonable and just in the present case; this Government recognizing the fact that while it might have claimed a width of six miles as a basis of settlement, fishing within bays and harbors only slightly wider would be confined to areas so narrow as to render it practically valueless and almost necessarily expose the fishermen to constant danger of carrying their operations into forbidden waters.” (British Case Appendix, page 416.) And Professor JOHN BASSET MOORE, a recognized authority on International law, in a communication addressed to the Institute of International law, said very forcibly: “Since you observe that there does not appear to be any convincing reason to prefer the ten mile line in such a case to that of double three miles, I may say that there have been supposed to exist reasons both of convenience and of safety. The ten mile line has been adopted in the cases referred to as a practical rule. The transgression of an encroachment upon territorial waters by fishing vessels is generally a grave offense, involving in many instances the forfeiture of the offending vessel, and it is obvious that the narrower the space in which it is permissible to fish the more likely the offense is to be committed. In order, therefore, that fishing may be practicable and safe and not constantly attended with the risk of violating territorial waters, it has been thought to be expedient not to allow it where the extent of free waters between the three miles drawn on each side of the bay is less than four miles. This is the reason of the ten mile line. Its intention is not to hamper or restrict the right to fish, but to render its exercise practicable and safe. When fishermen fall in with a shoal of fish, the impulse to follow it is so strong as to make the possibilities of transgression very serious within narrow limits of free waters. Hence it has been deemed wiser to exclude them from space less than four miles each way from the forbidden lines. In spaces less than this operations are not only hazardous, but so circumscribed as to render them of little practical value”. (Annuaire de l’Institut de Droit International, 1894, p. 146.)

So the use of the ten mile bays so constantly put into practice by Great Britain in its fishery Treaties has its root and connection with the marginal belt of three miles for the territorial waters. So much so that the Tribunal having decided not to adjudicate in this case the ten miles entrance to the bays of the treaty of 1818, this will be the only one exception in which the ten miles of the bays do not follow as a consequence the strip of three miles of territorial waters, the historical bays and estuaries always excepted.

And it is for that reason that an usage so firmly and for so long a time established ought, in my opinion, be applied to the construction of the Treaty under consideration, much more so, when custom, one of the recognized sources of law, international as well as municipal, is supported in this case by reason and by the acquiescence and the practice of many nations. [211]

The Tribunal has decided that: “In case of bays the 3 miles (of the Treaty) are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration characteristic of a bay. At all other places the three miles are to be measured following the sinuosities of the coast”. But no rule is laid out or general principle evolved for the parties to know what the nature of such configuration is

or by what methods the points should be ascertained from which the bay should lose the characteristics of such. There lies the whole contention and the whole difficulty, not satisfactorily solved, to my mind, by simply recommending, without the scope of the award and as a system of procedure for resolving future contestations under Article IV of the Treaty of Arbitration, a series of lines, which practical as they may be supposed to be, cannot be adopted by the Parties without concluding a new Treaty.

These are the reasons for my dissent, which I much regret, on Question Five.

Done at The Hague, September 7th, 1910.