Dr Dawson

Behring Sea Arbitration

The next meeting in this matter will be held at the Attorney General's room at the House of Commons, on Monday, the 27th February, at 5 o'clock.

Counsel is sent herewith:-

(1) Preface to Argument
(2) Argument Part 1
(3) Argument Part 2
(4) Chapter on Regulations.
(5) Chapter on Damages.
(6) Chapter on present position of the Controversy.

The above papers form together the whole of the written argument

Part 1 of the Argument and a portion of Part 2 have been revised by the Attorney General and by Sir Thomas Sanderson. Time does not admit of a new proof being struck off embodying these alterations. The alterations have therefore been carried out in manuscript upon the documents now sent, the Attorney Generals alterations being shown in black ink and Sir Thomas Sandersons in red ink

Counsel is also sent herewith a copy of a paper by Dr Dawson upon Part 2 of the United States Counter Case. This is only a rough proof & therefore will be found to contain a considerable number of errors but it is sent to Counsel without correction so that they may decide at once in what form the material can best be used

Foreign Office
25/2/93

REGULATIONS.

It is now desired to formulate, on behalf of Great Britain, the outline of the argument which will be presented in connection with the question of Regulations. As stated at p. 9 of the original Case, Great Britain has throughout been favourable to the adoption of general measures for the control of the fur-seal fishery, provided that such measures be equitable, and framed ~~on just grounds of~~ common interest. It is, however, essential that any Regulations should operate to preserve the fur-seal industry for the benefit not of the United States alone, but of all those who may lawfully engage in pelagic sealing; in this connection the attention of the Arbitrators is respectfully directed to the general considerations summarized at p. 159 of the British Counter-Case.

Before considering the scope of the Regulations, the question as to the area of waters over which any Regulations should extend requires notice. It ~~is suggested in~~ certain passages in the United States' Case that it will be contended on behalf of the United States that the Regulations should amount to a practical prohibition of pelagic sealing in all waters to which seals from the Pribyloff Islands resort, and that they should effectually prohibit and prevent the capture, anywhere upon the high seas, of any seals from the Pribyloff Islands.

United States' Case, pp. 301–303.

It is submitted that any such contention is entirely beyond any claim ever alleged by the United States at any stage of the controversy prior to the delivery of their Case, and is contrary to the agreement of the parties as embodied in Article VII of the Treaty. In no part of the discussion was it suggested that the rights of the United States to limit the killing of seals extended beyond Behring Sea. On the contrary, when the British Government desired the assent of Russia to the *modus vivendi* proposed in the month of June

States in the correspondence prior to the Treaty of Arbitration is worthy of consideration.

Up to the month of December 1890 suggestions of a more or less general character appear from time to time in the correspondence to the effect that international Regulations should be established through the medium of a Convention, to which all nations interested should be parties. These suggestions led to no definite agreement, and were succeeded by a proposal contained in the following passage from a note of Mr. Blaine to Sir Julian Pauncefote, under date the 17th December, 1890 :—

"The President will ask the Government of Great Britain to agree to the distance of 20 marine leagues within which no ship shall hover round the Islands of St. Paul and St. George from the 15th May to the 15th October of each year. This will prove an effective mode of preserving the seal fisheries for the use of the civilized world." United States' Case, Appendix, vol. i, p. 284.

And in the same despatch there was formulated a question, in substance that which now forms the subject of the VIIth Article in the Treaty of Arbitration, in the following words :—

"Sixth. If the determination of the foregoing questions shall leave the subject in such position that the concurrence of Great Britain is necessary in prescribing Regulations for the killing of the fur-seal in any part of the waters of Behring Sea, then it shall be further determined: first, how far, if at all, outside the ordinary territorial limits it is necessary that the United States should exercise an exclusive jurisdiction in order to protect the seal for the time living upon the islands of the United States, and feeding therefrom; second, whether a closed season (during which the killing of seals in the waters of Behring Sea outside the ordinary territorial limits shall be prohibited) is necessary to save the seal-fishing industry, so valuable and important to mankind, from deterioration or destruction; and, if so, third, what months or parts of months should be included in such season, and over what waters it should extend." Ibid., p. 286.

To this proposal of Mr. Blaine's Lord Salisbury replied in his despatch of the 21st February, 1891, in which, dealing with the sixth question, he observed :—

"The sixth question, which deals with the issues that will arise in case the controversy should be decided in favour of Great Britain, would perhaps more fitly form the substance of a separate reference. Her Majesty's Government have no objection to refer the general question of a close time to arbitration, or to ascertain by that means Ibid., p. 294.

Passing from the question of the area of waters over which the proposed Regulations should extend, and assuming the Regulations to apply to the whole, or some part of, the non-territorial waters of Behring Sea, the contention of the United States, so far as it can be gathered from their Case, is that pelagic sealing must be entirely prohibited in Behring Sea.

It is submitted that any decision of the Tribunal prohibiting pelagic sealing in Behring Sea would be contrary to the terms of the Treaty.

Article VII contemplated the establishment of Regulations as applicable to the pursuit of seals outside the territorial waters of that sea.

To contend that pelagic sealing should be entirely prohibited in Behring Sea would be, under cover of so-called Regulations, to defeat the manifest intention of the parties in agreeing to the terms of the VIIth Article.

The following argument is, therefore, based upon the view that the Regulations should be such as should be fair, both to the United States as owners of the Pribyloff Islands, and to Great Britain as representing those who desire to engage in the lawful industry of pelagic sealing, but at the same time are willing to be bound by such Regulations as are necessary for proper protection and preservation of the fur-seal in, or habitually resorting to, Behring Sea.

Furthermore, it is essential that the Regulations should be such as would be likely to secure the adhesion of other Powers, and would not operate as an inducement to them to withhold their consent with the knowledge that by so doing they would secure to themselves greater advantages from the industry in question.

As appears from the British Counter-Case, and from the Report of the British Commissioners, the main provisions which might be properly embraced by Regulations are the maintenance of a zone of protected waters round the breeding-islands, the establishment of a close season, and restriction as to the date in each year when sealing-vessels should enter Behring Sea.

Having regard to the fact that each of these proposals, when taken separately, is treated in the United States' Case as being of no value, and that the proposals collectively appear to be considered as wholly insufficient, the way in which the question has been treated by the United

1891, it was pointed out by Mr. Wharton, in a despatch to Sir Julian Pauncefote, dated the 4th of that month, that the contention between the United States and Great Britain was limited to that part of Behring Sea eastward of the line of demarcation described in the Convention with Russia of the 30th March, 1867, and that Russia had never asserted any rights in the waters affecting the subject-matter of the contention, and could not, therefore, be a necessary party to the negotiations if they were not expanded; and further, that the authority of the President was derived from the Statute of the United States, and that no authority was conferred upon him to prohibit or make penal the taking of seals in the waters of Behring Sea westward of the line referred to.

It is scarcely necessary to point out that such language is wholly inconsistent with the contention that pelagic sealing in the parts of the Pacific Ocean outside Behring Sea, or in those parts of Behring Sea west of the line of demarcation, was the subject of controversy between the parties.

There is no known method whereby the seals from Behring Sea may be distinguished, at any rate before capture.

Upon no construction of the ~~Convention~~ could it be pretended that the Tribunal of Arbitration is empowered ~~even~~ to regulate the pursuit of fur-seals which may resort elsewhere than Behring Sea, nor of seals generally.

To prohibit the pursuit of special fur-seals outside of Behring Sea, or to make Regulations concerning them, ~~would~~ therefore ~~be impracticable~~.

Further, on the 11th June, 1891, Mr. Wharton, in his letter to Sir J. Pauncefote, stated that the Government of the United States, recognizing the fact that full and adequate measures for the protection of seal life should embrace the whole of Behring Sea and portions of the North Pacific Ocean, would have no hesitancy in agreeing, in connection with Her Majesty's Government, to the appointment of a Joint Commission to ascertain what permanent measures were necessary for the preservation of the seal species in the waters referred to, such an agreement to be signed simultaneously with the Convention for arbitration, and to be without prejudice to the questions to be submitted to the Arbitrators.

United States' Appendix, vol. i, p. 315.

how far the enactment of such a provision is necessary for the preservation of the seal species; but any such reference ought not to contain words appearing to attribute special and abnormal rights in the matter to the United States."

Finally, in deference to the above objection taken by Lord Salisbury to the actual language of the sixth question, above quoted, as proposed by Mr. Blaine, on the ground that the reference ought not to contain words appearing to attribute special and abnormal rights in the matter to the United States, Mr. Wharton, in a letter of the 25th June, 1892, to Sir Julian Pauncefote, proposed that the sixth question should be in the form subsequently adopted in Article VII of the Treaty.

United States' Case, Appendix, vol. i, p. 319.

It is therefore to be noted that the original proposition, emanating from the President of the United States, viz., that the establishment of a protective zone, within which the killing of seals should be prohibited between certain specified dates, was suggested as being an effective mode of preserving the seal fisheries for the use of the civilized world, and it is contended, on behalf of the British Government, that further investigation and examination of the facts fully justify the view that a Regulation containing such provisions is amply sufficient to protect the interests of the United States in the seals frequenting the breeding-islands.

Even assuming a point which is open to considerable doubt, viz., that the seals suckling their young do travel to parts of Behring Sea at considerable distances from the Pribyloff Islands, by far the greater majority, if not the whole, of such female seals will be found within a zone of moderate area.

It is established that the seals, whatever may be the cause of their leaving the islands, do not go in search of food. Food in abundance, ~~and ample for their wants~~, is to be found in the vicinity of the islands, but all the best information points to the fact that they do not feed during their sojourn on land. In addition, the prohibition of the killing of seals during July and August, within the protected zone, would insure that the vast majority, if not all the female seals actually suckling their young, would be free from capture by pelagic sealing during such time as the pups are dependent upon them.

habitually or regularly

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It is unnecessary to discuss in detail the minor Regulations which have been suggested as to the means of pelagic capture, and as to the due authentication of all licensed sealing-vessels. These are matters on which lengthened argument would be out of place.

It is, however, obvious that the adoption of such Regulations, and the enforcement of legislation in order to render them effective, does involve the curtailment of rights which, upon the hypothesis which forms the basis of this argument, now belong to other nationals, including British subjects.

The object of any Regulations is the proper protection and preservation of the fur-seal in, or habitually resorting to, the Behring Sea. It would be unjust that other nations should be asked to enforce by legislation this curtailment of the rights of their nationals, without some corresponding concession on the part of the United States, as owners of the islands and the territorial waters thereof.

That during a great portion of the year the seals are feeding upon fish which are valuable for the food of man upon the coasts of the territory of Great Britain, and other nations, cannot be denied.

That during other portions of the year they are consuming fish that are swimming in the high seas in which all nations have an interest is conceded.

It would not be equitable that the restrictions upon the rights of other nations should be demanded solely for the purpose of enhancing the benefit to be derived by the United States from their possession of the islands. The least that can be suggested is that, concurrently with the establishment of such Regulations as are applicable to pelagic sealing, and in order to induce other nations, who are not party to this Arbitration, to concur in, and give effect to, any Regulations, a reasonable limit to the slaughter of seals on the breeding-islands should be assented to by the United States.

The Treaty empowers the Arbitration to "determine what concurrent Regulations outside the jurisdictional limits of the respective Governments are necessary." Article VII.

Obviously, therefore, it is intended that the Regulations shall be operative only so long as suitable Regulations are enforced by the United

See U.S. Counter Case on regulations, p. 121.

States upon the breeding islands in their possession.

To apply restrictions to pelagic sealing without equally effective and concurrent Regulations being enforced on the breeding haunts would be as unreasonable and useless as the institution of restrictions over a coastal or estuary salmon fishery, while the salmon on the spawning-beds of the river were being taken without let or hindrance.

It is contended on behalf of the United States that the management of the islands in the past had been properly controlled and conducted with due regard to the protection of seal life. Her Majesty's Government are unable to concur in that view. For reasons that have been stated at length in the Counter-Case, in reply to the contentions in the United States' Case, it is submitted that the excessive killing of seals on the islands during a long series of years has contributed largely, and has been in all probability the main cause of diminution in numbers. Be this as it may, in view of the experience of the past, the number of seals to be killed in each year upon the Pribyloff Islands ought to be limited, in accordance with the actual condition of seal life there, and to be subject to periodical review by independent Government Agents.

DAMAGES.

There remain for consideration the questions of fact which are involved in the claims made by the owners of British vessels for injuries sustained by the seizure of their vessels, and by such vessels being prevented by the action of the United States' cruizers from engaging in pelagic sealing in Behring Sea. The British Government are ready to agree with the Government of the United States that no questions of mere amount are to be discussed before the Tribunal of Arbitration, and that only questions of fact involved in the claim are proper for consideration. It is admitted in the Counter-Case on behalf of the United States that the seizures and acts of interference complained of took place outside the ordinary territorial waters of the United States, that is to say, outside the 3-mile limit; and, further, that the acts of seizure and interference were authorized and executed under and by the authority of the United States' Government, for the purpose of enforcing certain laws passed by the United States.

Under these circumstances, assuming, as is necessary for the purpose of the question now under discussion, that the claim on behalf of the Government of the United States to interfere with the ships of other nations fishing in the non-territorial waters of the Behring Sea is unfounded, the responsible Government of the United States have by force prevented the vessels in question, and their owners, masters, and crews, from engaging in a lawful occupation and industry. Moreover, by Article V of the Convention of the 18th April, 1892, referred to in the United States' Case and Counter-Case, it is expressly agreed that compensation shall be made by the United States to Great Britain for the use of her subjects for abstaining from the exercise of their right to take seals in Behring Sea claimed by the United States during the pendency of the Arbitration, upon the basis of

Government that the very stringent measures of the *modus vivendi* of 1891 need not, in the interests of the sealing industries, to be repeated in 1892. (See "United States No. 3, 1892," Marquis of Salisbury to Sir J. Pauncefote, 18th March, 1892; Sir J. Pauncefote to Mr. Blaine, 29th February, 1892.)

Consequently, when a new *modus vivendi* was pressed for by the United States, it was proposed by Her Majesty's Government that a zone of protection, not exceeding 30 miles, should be extended about the Pribyloff Islands, while the killing upon these islands should be restricted to a *maximum* number of 30,000. (Sir J. Pauncefote to Mr. Blaine, 29th February, 1892.)

The United States, however, promptly and decisively pronounced this proposal for the *modus vivendi* of 1892 to be, from their point of view, "so obviously inadequate, and so impossible of execution, that this Government cannot entertain it." (Acting Secretary Wharton to Sir J. Pauncefote, 8th March, 1892.)

The British Government eventually consented to the establishment of a new *modus vivendi*, generally similar to that of 1891.

It is therefore submitted that, in fixing the possible dimensions of the catch which might have been made upon the Pribyloff Islands, for the purposes of compensation, the United States cannot now justly revert to and rely on the data which they explicitly contradicted in the spring of 1892.

The above considerations, however, are again figures affecting the question of the claims, and are not material for the purposes of the Arbitration.

R. E. W.

such regulated or limited catch or catches as, in the opinion of the Arbitrators, might have been taken without an undue diminution of the seal herds.

There is no foundation for the contention put forward at p. 133 of the United States' Counter-Case, namely, that all the items of claim there referred to, that is, "Loss of estimated Catch," "Probable Catch," "Balance of probable Catch," "Reasonable Earnings for the months of October, November, and December," and "Loss of Profits," are in the nature of prospective profits or speculative damages, and are so uncertain as to form no legal or equitable basis for finding facts upon which damages can be predicated.

As regards the period during the pendency of the Arbitration, the compensation agreed to be paid must be based upon an estimation by the Arbitrators of the probable catch or catches of the vessels in question: and as regards the seizures or acts of interference which took place before the pendency of the Arbitration, exactly the same principles apply.

After due regard has been paid to all considerations such as the nature of the season, the size of the vessels, the amount of the catch in previous seasons, an estimate can be formed of the probable catch of each vessel during the season in which their operations were prevented or interfered with.

The loss of catch is due directly to the action of the United States' Government, and the fact that the earnings or profits were prospective in one way affects the right of the claimants to recover, or is only material, if at all, in estimating what is the reasonable amount to be awarded in respect of such prospective earnings or profit.

The indirect claims put forward on behalf of the United States before the Tribunal of Arbitration on the "Alabama" claims in the year 1872 were of a different character. Here the direct consequence of the action of the United States is that the owners of the vessels, masters, and crews are prevented in particular seasons from earning the natural return of their industry. The considerations which affect the question arising under Article V of the Convention of the 18th April, 1892, are identical with those which establish the right of owners, master, and crew of the ships seized in previous years to recover in

respect of the unlawful interference with their operations by the Government of the United States.

With regard to the particular arguments which are brought forward at pp. 130 and 133 of the United States' Counter-Case, that is to say, the allegations that certain citizens of the United States were interested, as mortgagees or otherwise, in some of the vessels in question, Her Majesty's Government do not admit either the truth of the allegations, or that they are proper for consideration; and they further say that they at most affect the quantum of damages only, and are not matters upon which it is proper to submit detailed argument to the Tribunal.

In the event of its being decided that British sealers have no right to take seals within the waters of Behring Sea, it will be contended by Her Majesty's Government that the basis upon which the amount of such claims is assessed in the Case of the United States is one wholly untenable by that Government.

The *modus vivendi* of 1891 was originally assented to by Great Britain because it was asserted on the part of the United States that the diminution of seals had become so great as to require some such immediate and drastic provision to prevent extermination.

During the sealing season of 1890 on the islands, Mr. Goff, the Government Agent, stopped the killing of seals when only 21,857 had been killed, alleging that this was absolutely necessary because of the paucity of killable seals. The agent of the North American Commercial Company thereupon lodged a protest against the curtailment of the Company's privilege of killing.

In reporting on the sealing season of 1890, Mr. Goff, the Government Agent on the islands, and Mr. Lavender, Assistant Agent, both advised the cessation of all killing for skins upon the islands for several years. Mr. Elliott, in his letter to Secretary Windom, summarizing and transmitting a detailed Report made in pursuance of a Special Act of Congress, makes a recommendation to the same effect, placing the period of abstention from killing at seven years at least. (See "United States No. 2, 1891," pp. 17, 21, 60.)

The result of the investigation of seal life made by the British Commissioners in 1891 was, however, such as to convince Her Majesty's

PRESENT STATE OF THE CONTROVERSY.

Before closing this argument, it is necessary to point out the practical abandonment by the United States of their original Case, and the attempt to substitute a new one, which was not the subject of reference. This new Case, they call on the Tribunal to deal with on principles not sanctioned by international law or by the Treaty of Arbitration.

In their Counter-Case they say :—

United States' Counter-Case, pp. 33, 34.

"On the 17th December, 1890, Mr. Blaine addressed to the British Minister an exhaustive note in relation to the construction of the Ukase of 1821 and the treaties of 1824 and 1825. Notwithstanding the earnestness and vigour with which he had defended his position based upon those documents, he insisted at the close of his note that he had not been dealing with the true issues in the case, and he forthwith proceeded to state those issues by quoting the following from a despatch written by Mr. Phelps when United States' Minister at London to Mr. Bayard, Secretary of State, on the 28th September, 1888."

It is not necessary to set out at length the passage ~~then~~ quoted: in which the right of fishing, hitherto exercised by Great Britain in supposed accordance with all authorities on international law, is likened to piracy, the Slave Trade, and the poisoning of fish, while the right of self-defence by the United States is asserted. The last paragraph of the quotation is the important one here :—

Ibid., p. 35.

"If precedents are wanting for a defence so necessary and so proper, it is because precedents for such a course of conduct are likewise unknown. The best international law has arisen from precedents that have been established when the just occasion for them arose, undeterred by the discussion of abstract and inadequate rules."

On another page of the Counter-Case will be found the following :—

made previously to the Treaty of Arbitration, or is referred to the Tribunal thereby constituted. Indeed, the words of Article VII, as finally proposed by Mr. Wharton, and embodied in the latter Treaty, show that, on neither of these points, would the two Governments have differed. For that Article says:—

United States' Case, Appendix, vol. i, p. 319.

"If the determination of the foregoing questions as to the *exclusive jurisdiction* of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Behring Sea, the Arbitrators shall then determine what concurrent regulations . . . . are necessary."

The supposition that Question 5 was not a question as to "exclusive jurisdiction," exercisable within defined limits only, involves the transparent absurdity that the answer to it was not to be taken into account in deciding whether or not the concurrence of Great Britain was necessary in making regulations. The United States could not have meant to claim exclusive jurisdiction over all the high seas. Mr. Wharton's understanding of the clause thus proposed by himself is shown by his letters of the 8th and 22nd March, 1892, written after the date of the Treaty of which Article VII forms part. In the first of these he says:—

Ibid., p. 356 *et seq.*

"The United States claims an exclusive right to take seals in a portion of the Behring Sea, while Her Majesty's Government claims a common right to pursue and take the seals in those waters outside a 3-mile limit. This serious and protracted controversy, it has now been happily agreed, shall be submitted to the determination of a Tribunal of Arbitration, and the Treaty only awaits the action of the American Senate. . . . If the contention of this Government is sustained by the Arbitrators, then any killing of seals by the Canadian sealers during this season in these waters is an injury to this Government in its *jurisdiction* and property. . . . The United States cannot be expected to suspend the defence, by such means as are within its power, of the property and *jurisdictional rights* claimed by it, pending the Arbitration."

In his letter of the 22nd March, 1892, Mr. Wharton says:—

Ibid., p. 361.

"For it must not be forgotten, that if Her Majesty's Government proceeds during this sealing season upon the basis of its contention as to the rights of the Canadian sealers, no choice is left to this Government but to

"The distinction between the right of exclusive territorial jurisdiction over Behring Sea, on the one hand, and the right of a nation, on the other hand, to preserve for the use of its citizens its interests on land by the adoption of all necessary, even though they be somewhat unusual, measures, *whether on land or at sea*, is so broad as to require no further exposition. It is the latter right, not the former, that the United States contend to have been exercised, first by Russia, and later by themselves." United States' Counter-Case, p. 19.

Finally, the United States expressly ask for "the Award of this Tribunal against all pelagic sealing." Ibid., p. 121.

Mr. Blaine's letter does not bear out the above statement as to its contents, or accord with the contention embodied in the last extract from the Counter-Case. Of the following two passages, the first is taken from the beginning of the letter; the second is taken from the concluding part:—

"Legal and diplomatic questions, apparently complicated, are often found, after prolonged discussion, to depend on the settlement of a single point. Such, in the judgment of the President, is the position in which the United States and Great Britain find themselves in the pending controversy touching the true construction of the Russo-American and Anglo-Russian treaties of 1824 and 1825. Great Britain contends that the phrase 'Pacific Ocean,' as used in the treaties, was intended to include, and does include, the body of water which is now known as the Behring Sea. The United States contends that the Behring Sea was not mentioned, or even referred to, in either treaty, and was in no sense included in the phrase 'Pacific Ocean.' If Great Britain can maintain her position, that the Behring Sea at the time of the treaties with Russia of 1824 and 1825 was included in the Pacific Ocean, the Government of the United States has no well-grounded complaint against her. United States' Case, Appendix, vol. i, p. 263.

* * * *

"It will mean something tangible, in the President's opinion, if Great Britain will consent to arbitrate the real questions that have been under discussion between the two Governments for the last four years. I shall endeavour to state what, in the judgment of the President, those issues are." Ibid., pp. 285, 286.

Then follow five questions, of which the first four are as follows:—

"First. What exclusive jurisdiction in the sea now known as the Behring Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

"Second. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?

"Third. Was the body of water now kuown as the Behring Sea included in the phrase 'Pacific Ocean' as used in the treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Behring Sea were given or conceded to Great Britain by the said treaty?

"Fourth. Did not all the rights of Russia as to jurisdiction, and as to the seal fisheries in Behring Sea east of the water boundary in the treaty between the United States and Russia of 30th March, 1867, pass unimpaired to the United States under that treaty?"

Of these four questions, those numbered 1, 2, and 4 are each identical in terms with the question bearing the same number in Article VI of the Treaty of Arbitration. So, also, is the first branch of Question 3; which question, in the Treaty, stands thus:—

"3. Was the body of water now known as the Behring's Sea included in the phrase 'Pacific Ocean' as used in the Treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Behring's Sea, were held and exclusively exercised by Russia after said Treaty?"

Pausing here, and delaying for the moment to deal with Question 5, it is clear:—

1. That Mr. Blaine admitted the United States to be out of court if, on the coustruction of the Treaties of 1824 and 1825, the term "Pacific Ocean" should be found to include Behring Sea; and

2. That four of the five "real questions" which, according to Mr. Blaine, had been under discussion for four years, were questions relating to the exclusive jurisdiction in Behring Sea, claimed by the Ukase of 1821, and disclaimed by the Treaties of 1824 and 1825.

The fifth question proposed by Mr. Blaine in the above-mentioned letter formed the basis of what is now Question 5 in Article VI: that, namely, as to right of protection and property in the fur-seal. It has been shown in the British Counter-Case, and will be shown in its proper place in the present Argument, that the claim to a right of protection over the fur-seal at sea is a claim of jurisdiction there; and that no claim to such right of protection extending beyond the waters over which jurisdiction had been claimed by the United States under the Treaty of Cession, was

British Counter-Case, pp. 76 *et seq.*

proceed upon the basis of its confident contention, that *pelagic sealing in the Behring Sea is an infraction of its jurisdiction* and property rights."

It is, therefore, evident that the right claimed by the United States down to the date of the Treaty, and afterwards, was a right of *exclusive* jurisdiction in Behring Sea, or, more strictly, in the eastward part thereof; and not a jurisdiction to protect fur-seals, exercisable on the high seas generally, such as is now claimed, though without sanction from the Treaty.

The disclaimer of exclusive jurisdiction in part of Behring Sea contained in a passage from the United States' Counter Case, quoted on p. 2, is emphasized by the following passage, which occurs later:—

United States' Counter-Case, pp 30, 31

"The United States' Government has only to say that in its view the whole subject of the character and extent of the Russian occupation and assertion of right in and over Behring Sea, and all the diplomatic discussion which has taken place in reference thereto, is of secondary and very limited importance in the consideration of the Case submitted to the Tribunal, *and it relies upon the evidence submitted in respect to that subject as showing only:*

"First, that soon after the discovery by Russia of the Alaskan regions, and at a very early period in her occupancy thereof, she established a fur-seal industry on the Pribilof Islands, and annually killed a portion of the herd frequenting those islands for her own profit and for the purposes of commerce with the world; that she carried on, cherished, and protected this industry by all necessary means, whether on land or at sea, throughout the whole period of her occupancy, and down to the cession to the United States in 1867; and that the acquisition of it was one of the principal motives which animated the United States in making the purchase of Alaska.

"Second, that by no act, consent, or acquiescence of Russia was the right renounced to carry on this industry without interference from other nations, much less was a right in other nations to destroy it in any manner admitted or recognized; and that no open or known persistent attempt had ever been made to interfere with it down to the time of the cession of Alaska to the United States.

"Third, that the claim now made by the United States' Government of a right to protect and defend the property and interest thus acquired, and which it has ever since sedulously maintained, while in no sense dependent upon any right previously asserted by Russia in the premises, is,

nevertheless, in strict accordance with, and in continuation of, the industry thus established and the rights asserted and maintained by Russia in connection therewith."

After this repudiation of the claim to exclusive jurisdiction which formed the subject of the reference, an Argument, printed or otherwise, on behalf of Great Britain, appears unnecessary. The present Argument is furnished under protest, that the Case of Great Britain on the five questions set forth in Article VI is admitted, and that she is therefore already entitled to an Award in her favour. But the event of an admission of her Case by the United States not being expressly provided for by the Treaty of Arbitration, it has been thought well to comply with the requirement of Article V that there shall be a printed Argument. In the peculiar circumstances in which it is delivered, brevity has been studied in its preparation.

The statement that "if precedents are wanting for a defence so necessary and so proper, it is because precedents for such a course of conduct are likewise unknown," is scarcely reconcilable with what is known as to the antiquity of fishing. And when it is suggested that, to restrain such a practice, international law may advantageously be made for the occasion, "undeterred" by the discus-

sion of abstract rules, inadequate to the requirements of the United States' Case, it may be observed that law so made would not be international law at all. International law is evolved by a more tedious process. Its sources are thus stated by Wheaton :—

Wheaton's "International Law," 8th edition, by Dana, sec. 15.

"§ 15. The various sources of international law . . . . are the following :—

"1. Text-writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent.

* * * *

"2. Treaties of peace, alliance, and commerce declaring, modifying, or defining the pre-existing international law.

". . . . Though one or two treaties, varying from the general usage and custom of nations, cannot alter the international law, yet an almost perpetual succession of treaties, establishing a particular rule, will go very far towards proving what that law is on a disputed point.

* * * *

"3. Ordinances of particular States, prescribing rules for the conduct of their commissioned cruizers and prize tribunals.

* * * *

"4. The adjudications of international tribunals, such as boards of arbitration and courts of prize.

* * * *

"5. . . . The written opinions of official jurists, given confidentially to their own Governments. . . . .

"6. The history of the wars, negotiations, treaties of peace, and other transactions relating to the public intercourse of nations."

Kent says :—

Kent's "Commentaries on International Law," 2nd edition, by Abdy, p. 4.

"The sole source of this law, the fountain from which it flows, whether in its customary, conventional, or judicial-customary shape, is the consent of nations."

And again :—

Ibid., p. 37.

"In cases where the principal jurists agree, the presumption will be very greatly in favour of the solidity of their maxims; and no civilized nation that does not arrogantly set ordinary law and justice at defiance will venture to disregard the uniform sense of the established writers on international law."

In a case of Triquet *v.* Bath, Lord Mansfield said :—

3 Burr. 1478 (at p. 1481).

"I remember, in a case before Lord Talbot, of Buvot *v.* Barbut, upon a motion to discharge the defendant (who was in execution for not performing a decree) 'because he was agent of commerce, commissioned by the King of Prussia, and received here as such;' the matter was very

elaborately argued at the bar, and a solemn deliberate opinion given by the Court. . . . Lord Talbot declared a clear opinion, 'That the *law of nations*, in its *full* extent, was *part of the law of England*.' . . . 'That the *law of nations* was to be *collected* from the *practice* of different nations and the authority of *writers*.' Accordingly, he argued and determined from such instances, and the authority of Grotius, Barbeyrac, Binkershoek, Wiquefort, &c., there being no English writer of eminence upon the subject.

"I was counsel in this case; and have a full note of it.

"I remember, too, Lord Hardwicke's declaring his opinion to the same effect; and denying that Lord Chief Justice Holt ever had any doubt as to the law of nations being part of the law of England, upon the occasion of the arrest of the Russian Ambassador."*

This extract shows it to have been the opinion of Lord Talbot, Lord Hardwicke, and Lord Mansfield, that international law is to be collected from the practice of nations and the authority of writers; and shows that they and Chief Justice Holt were agreed in regarding it as part of the law of England. How a case depending on the law of England should be investigated is well explained by Mr. Justice Parke (afterwards Lord Wensleydale), in delivering his opinion to the House of Lords in a case of Rennell *v.* Mirehouse :—

"The precise facts stated by your Lordships have never, as far as we can learn, been adjudicated upon in any Court; nor is there to be found any opinion upon them of any of our Judges, or of those ancient text-writers to whom we look up as authorities. The case, therefore, is in some sense new, as many others are which continually occur; but we have no right to consider it, because it is new, as one for which the law has not provided at all; and because it has not yet been decided, to decide it for ourselves according to our own judgment of what is just and expedient. Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science." 1 C. & F. 527 (at p. 546).

* The *italics* in this passage are taken from the Report itself.

Should all or any of the quotations on this page be omitted?—
M. H. B.

[In a letter from Sir J. Pauncefote to the Marquis of Salisbury, dated the 31st October, 1891, the writer reports a conversation with Mr. Blaine, whom he represents as saying that—

British Case, Appendix, vol. iii, "United States No. 3 (1892)," p. 107.

"In his opinion, the appointment of English and American jurists as Arbitrators was advisable on account of the community, not only of language, but of the principles of law, of Great Britain and the United States."

This observation is illustrated by words of Sir W. Grant, quoted by Wheaton:—

Wheaton's "International Law," 8th edition, by Dana, sec. 15.

"Although the law of nations ought to be the same in every country, yet as the tribunals which administer the law are wholly independent of each other, it is impossible that some differences should not take place in the manner of interpreting and administering it in the different countries which acknowledge its authority."

? why brackets?

In a note to the section from which these words are taken, Mr. Dana says:—

Ibid., note 11.

"Commentators seem agreed as to what are the sources of international law. They differ as to the relative importance and authority of these sources. Hautefeuille, especially, gives little weight to the decisions of prize courts, and places far before them the speculations of writers. It is noticeable that continental writers incline the same way, although they may not go as far; while Wheaton, Kent, Story, Halleck, and Woolsey in America, and Phillimore, Manning, Wildman, Twiss, and others in England, give a higher place to judicial decisions. This is attributable to the different systems of municipal law under which they are educated."

And again:—

"The consideration most favourable to the text-writer is his probable impartiality. Not that, personally, he is more impartial than the magistrate, or has less of nationality, but that he is engaged on a scientific treatise, where his reputation must rest on the consistency and reasonableness of the whole, tested by time," &c.]

Her Majesty's Government respectfully claim that, as far as the present case may be found to raise questions of law at all, the same may be dealt with in the method indicated by the jurists and judges above mentioned. No other method is sanctioned by the Treaty of Arbitration, which clearly distinguishes between the questions as to existing or past rights, embodied in Article VI, and the power of legislating for the future conferred by Article VII. Article V of the

modus vivendi is, if possible, even more distinct. For that provides that "if the result of the arbitration be to *affirm the right* of British sealers," compensation shall be made to them "for *abstaining* from the exercise of that right" during the arbitration; and that "if the result of the arbitration shall be to *deny the right*," compensation shall be made by Great Britain for the agreement to limit the island catch. It can only be to existing rights that reference is here made; not to rights created by the Award of the Arbitrators.

Notes on Hooper's Report

U.S. Case. Opp. I. p. 498 et seq.

Hooper says Seals on islands in 1891, and about 1/4 that they were in 1869 & 1870. He had visited the islands between these dates at intervals, but fails to support in his statement U.S. Claim that reduction began in 1884-85. His statement in fact, so far as it goes, corresponds with that of Br. Commrs.

Feb. 26. 93.

If it is through the protocols, as seems possible that the U.S. may succeed in the contention that the arbitrators are empowered & empowered to establish regulations for the Pacific ocean beyond Behring sea, in what ever the questions under article VI, being decided in our favour, measures should be considered to meet this contingency. —

It may be shown by argument that neither the wording of the treaty (properly considered) nor the terms of the Correspondence leading up to it, (in the light by which any doubtful points in the treaty itself must be interpreted) bear out the view that that regulations competent to the arbitrators should extend beyond the area in dispute.

The U.S. have gradually shifted their ground during the progress of the discussions, & when the questions were finally agreed to, have set so far as to insist on a new claim of right by "property or protection" in seals. This claim had never before appeared in substantive form. It was set urged as an excuse for the seizure of vessels or their condemnation. It is possible that its purport as embodied in question 3, (though it was strongly contended & was thereupon admitted as a question for decision by Great Britain without objection) was merely that by leading or attempting to lead the considerations of the arbitrators beyond the region in actual dispute. Viz the seal as one of the questions which on any interpretation can be considered as extending beyond Behring sea, & then only because regularly put. But this question like the

text, must be governed by the scope of the dispute as shown by the correspondence & the Preamble to the treaty. Moreover we have Wharton's explanation, dealing upon the treaty, as to understanding of its purposes by the President & ~~[illegible]~~ the U.S.

We have maintained in the Counter-Case that regulations can only apply to Behring Sea. It is absurd to suppose that if the Court should decide all the points in dispute in our favour — should find that the U.S. have been in the wrong & have acted illegally — that as a consequence of this we should become subject to onerous regulations the arbitrators may see fit to provide over every part of the North Pacific to which the seals may at any time resort.

Such a view would be to justify & encourage illegal acts, committed for the purpose of achieving an ulterior benefit in some other direction. It would be to stultify the whole submission of the questions to arbitration.

Even if the U.S. can be compelled to pay damages for seizures of vessels, the whole amount of such damages sink into insignificance beside the possible destruction by "regulations" of the Canadian sealing industry.

It is clear that no such regulations extending beyond the limits of Behring Sea could have been in contemplation (though such had before been mentioned as possible under Conventional arrangements) from the very nature of the Treaty of Arbitration. —

There are obviously two courses provided by the treaty for the revision or termination of regulations which the arbitrators may decide upon.

Such regulations are to last for all time, or to be terminable only by war.

They are not in terms made to depend upon the adhesion of them of other nations.

These considerations clearly show that the regulations intended cannot have had any such wide scope as appears now to be held by the United States.

It is very to understand that the U.S. should decline to admit regulations are then territory to be placed within the absolute power of the arbitrators; but it equally follows, that there can have been any intention on the part of Great Britain to place her vessels & subjects under permanent disabilities over a great extent of the high seas, for ever.

When the Paris Maxim regulations were adopted by a number of powers, the U.S. were asked to assent to them, but did not do so. They had at the time no intent & declined to bind themselves for the future.

Other nations may be expected to take the same ground with respect to any regulations which the arbitration Court may decide upon in the present case — especially if such regulations should be extended beyond Belligerent Seas. Judging from known occurrences, France, in particular, would never assent to such regulations on the high seas.

The result is obvious. — We might find ourselves in the intolerable position of being permanently prohibited to send even off our own coasts, when the seas are

actually consuming the salmon & other food-fishes resorting to our coasts & rivers & upon which our fishermen depend, while France & other countries might be freely engaging in these seal fisheries, & very possibly engaging in pelts & bodies disputes with the U.S. as to protection & property in seals, in which we could no longer have any voice.

The sealing vessels now sailing from British Columbia & ports in the U.S. could forcibly obtain registration under some foreign flag — under that of France, Germany or Italy, which would not admit any of the claims of the U.S. or under that of some smaller state too attached or under that of some smaller state too attached to be able to keep out the reach of the U.S. It ~~is necessary~~ that is already credibly reported that negociations were last autumn actually on foot to place the sealing fleet under the Italian flag.

It is not necessary that vessels should seal from ports in the country whose flag they carry. Foreign registration is easily obtained through Consular avenues in China & Japan. Neither is it necessary that vessels engaged in sealing should be registered in the Pacific. A sealing vessel could be registered in the Atlantic, commanded under any one of the two engaged in sealing some from ports in Nova Scotia, Boundy the Horn. There is no occasion for them to return to either home ports with their catches. It would be as easy for French vessels sailing from France itself to engage in sealing in the Pacific as it now is for them to prosecute the cod fishery on the Newfoundland Banks.

The Claims of the U.S., which widen in their documental number of items, appear now to be so far as to seek for the creation of new principles of international law, of a retroactive character, such as to justify their acts of violence in the past, & to endow them with special & peculiar rights, greater than any before contemplated, in the future.

The Tribunal is not competent to decide upon its own Treaty powers.

If this were the case, that we should appear before the Court of Arbitration with an absolute protest. viz That we do not admit the power of the Tribunal to lay down regulations beyond the area in dispute — the Eastern part of Behring sea.

Refer to Counter-Case and Argument

The second question set out in Article I of the Treaty of Arbitration is that concerning the "preservation of the fur-seal in or habitually resorting to the said sea [Behring sea] & the rights of the citizens & subjects of either Country as regards the taking of fur-seal in or habitually resorting to the said waters"

It has already been shown that the regulations provided for in Article VII, refer to the area thought in dispute, viz to ~~the~~ that part of Behring ~~Sea~~ Straits to the eastward of the line of demarcation of the Treaty of Cession of 1867.

The protection & preservation of the fur-seal spoken of in both these articles ~~was~~ has for its object the maintenance of a sufficient abundance of fur-seals for the purposes of those industries of that commerce which is dependent on the animal; & for the reason it follows that the interests directly dependent on the capture of the fur-seal must be considered in connection with any proposed regulations. Had such interest not been reciprocally involved the question for decision ~~would not have arisen between~~ between Great Britain & the United States would not have arisen.

It is submitted, that information obtained ~~during the~~ by means of the investigations carried on under the provisions of the Treaty of Arbitration, which are summarized in the foregoing Chapters & given in greater detail in the Second Report of the British & American Fur Seals Commissioners, Establishing such Regulations (if any) as may be necessary or desirable) should, in order to be effective, include dealing with the killing of seals at sea, but also with the killing of seals ashore on the breeding islands to which they resort for a portion of each year.

It is further submitted, that the industry of sealing at sea, commonly known as "pelagic sealing" is in itself a perfectly legitimate method of obtaining the benefit of the fur-seal, a product of the sea. That while pelagic sealing must evidently be held responsible for some part of any decrease observed in the seals on the Pribyloff Islands, it has been shown that the practices heretofore employed in taking seals upon those islands have alone been sufficient at different times to seriously ~~influence~~ impair the ~~abundance~~ continued abundance of fur-seals upon which the several industries depend ~~and should be~~ upon the killing upon the islands must be attributed ~~held as~~ not to ~~them~~ a large part of the ~~present~~ observed decrease ~~must~~ decrease at

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to attributed.

It also appears, from the facts contained in the foregoing chapters, that regulations, if any, should embrace a wider area than that originally contemplated in the Treaty of arbitration; that they should, on the one hand, be such as to set effective limits to the killing of seals upon the Pribyloff Islands, and on the other hand such as to include concurrent regulation of all that part of the North Pacific Ocean to which considerable numbers of seals at any season resort. Any such general scheme of regulations involves concurrent & reciprocal restrictions, affecting the several methods of taking the fur-seal by which the legal interests of the right, & all returns, of taking the fur-seal at sea, as well as the equally legal method of taking there animals upon the islands to which they resort at certain seasons.

It is thus further evident that such General regulations must obtain the concurrence & consent not only of Great Britain & the United States, but also of other Powers the subjects of which are interested in sealing, or likely to become interested in sealing; & that a specified & reciprocal method of protection be not thus decided upon

& agreed to, either or any
Power shall be free to withdraw
from any provisional arrangement
if it is dissatisfied with the methods or
amount of the control exercised by
any other Power or Powers.

The regulations referred to in
article VII of the Treaty of arbitration
are described in that article as for

— — — — —

It has been shown, (p — .) that
such regulations are by the letter &
intent of the Treaty, confined to the
area in dispute, which includes in
fact only that portion of Behring Sea to
the eastward of the line of demarcation
shown specified by the Treaty of Russia of 1867
The protection & preservation of the fur-seal
referred to, however desirable
that such protection & preservation should
be exercised & here for its object the
preservation of the fur-seal for the use of
men & for purposes of commerce, but
of the animal as such, involving the abstention from all killing
of fur-seals everywhere. This being the case,
it follows that the interests directly
dependent on the capture of fur-seals must be
considered in any proposed regulations.
Had such interests not been involved,
the question here at issue would never
have arisen between Great Britain &
the United States.
It is submitted, that the facts outlined
in the foregoing chapters establish, that
regulations, if found to
be desirable or necessary, must
in order to be effective

Rights of
Citizens & Subjects
of each Country

the killing of seals at sea, but also the killing upon the breeding islands, to which the greater number of the seals resort at certain seasons.

It has been shown that the continued abundance of fur-seals, upon which the several industries rest, might easily in the course of a few years, be seriously imperilled by injudicious acts upon the breeding islands, & that the self interest of those interested in killing seals upon these islands has not in the past (some before the rapid increase of pelagic sealing attained any considerable proportions) acted as a sufficient check upon practices highly injurious to seal-life, upon these islands.

~~It is~~
It is further submitted, that the industry of sealing at sea, commonly known as "pelagic sealing" is in itself a perfectly legitimate method of obtaining the benefit of ~~a marine product~~ the fur-seal, as a marine product, being in its nature analogous to the taking of the hair-seal or the whale fishery, practised outside jurisdictional limits.

~~During the Russian regime~~
While the Pribyloff Islands remained under the control of Russia, no consideration was given to any other method of taking the fur-seal than that practised upon the breeding islands. The United States, under the changed territorial conditions resulting from the cession of Alaska in 1867, inherited this tradition, but since the development of pelagic sealing, other conditions have to be regarded, & the investigations carried out by the respective Commissioners of G.B. & the U.S. under the provisions of the Treaty of Arbitration(?) clearly show that the development of pelagic sealing, ~~and~~ has rende[illegible]

any longer to maintain the old rookeries. These, in other words, have become obsolete, & though their ~~[illegible]~~ conception & execution were from the first imperfect, they are no longer in any way suited to insure the continued ~~[illegible]~~ existence of the fur-seal as a basis of industry & commerce.

The information respecting the conditions obtained & set forth in the ~~[illegible]~~ Case of the United States, the joint & several reports of ~~[illegible]~~ Great Britain & the United States & in the foregoing chapters of this Counter-Case show that in order to effectually regulate the killing of fur-seals, regulations, if any, must include a wider area than that contemplated by the reference in the Treaty of Arbitration. They must, on the one hand & in the first place, be such as to set effective limits to the killing of seals upon the Pribilof ~~[illegible]~~ islands, & on the other, such as to embrace all that part of the Pacific Ocean ~~[illegible]~~ to which considerable numbers of seals at any season resort.

Any such scheme of regulations involves concurrent & reciprocal restrictions affecting the several methods of taking the fur-seals, by which the ~~[illegible]~~ legal, exercise of all nations of taking the fur-seal at sea ~~[illegible]~~ as well as the equally ~~[illegible]~~ legal method of taking them upon the islands to which they must at certain seasons, shall be governed.

It is thus further evident, that such regulations ~~shall [illegible]~~ must obtain the concurrence not only of Great Britain but also of all other nations interested in taking or likely to be interested [illegible]

as well as that of the United States, the owners of the Philippine Islands, & that by a specified & reasonable method of protection to not thus decided upon, either or any Power shall be free to withdraw from any provisional arrangement entered into if not satisfied with the methods or amount of the protection & control actually exercised by the other Power or powers.