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EDITORIAL COMMENT

THE NORTH ATLANTIC COAST FISHERIES¹

The Tribunal of the Permanent Court of Arbitration at The Hague handed down its award on September 7th in this long-standing and vexatious dispute between Great Britain and the United States and both countries are to be congratulated that the controversy and principles involved in it have been decided after a prolonged and careful examination for the purpose of determining the rights and duties of each litigant. But the great importance of the arbitration can hardly be said to lie in the award: the example of two great and powerful nations submitting to judicial determination an acute controversy involving a question of sovereignty and its exercise is likely to influence

¹ A critical and detailed examination of the arbitration and the award will appear later in the JOURNAL.

other nations to resort to this peaceable method of settling intricate disputes dangerous to their peace, and the award is calculated to create confidence in the method. Within three weeks of the present award the United States and Venezuela submit their difference in the Orinoco Steamship Company case to arbitration at The Hague and two other arbitrations are in the course of preparation. Every war, it is said, carries with it the seeds of future wars; it may be said with greater confidence that each arbitration leads inevitably to arbitration and accustoms the world to the peaceful settlement of international disputes.

In the present instance the award determines the rights of the United States under the convention of 1818 and enables the Government to inform American fishermen of their rights and duties, thus settling old controversies and preventing new ones, and in determining the rights of Great Britain under the same convention enables the British Government to hold the colonies to the strict observance of their duties as defined by the award without the suggestion of undue Imperial interference or dictation. The award is therefore mutually beneficial to the two countries so recently contending at The Hague, even although it may not have given to either the full extent of its claims. The example to the world is greater than the benefit to either litigant and the advantage to each transcends the terms of the award.

It is not the purpose of the present comment to state the origin or nature of the controversy, with which the reader is already sufficiently familiar,² but to express in brief and summary form the questions submitted to the Tribunal and its decisions upon them as they appear in the award which is printed in full in the judicial decisions of the present number of the Journal.³

In the final position assumed in submitting the case to arbitration, the Government of Great Britain contended for the right directly or indirectly through Canada or Newfoundland, to make regulations applicable to American fishermen in treaty waters without the consent of the United States, 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, provided such regulations were "reasonable, as being for instance, appropriate or necessary for the protec-

² See JOURNAL, 1:963.

³ Page 948.

tion and preservation of such fisheries; desirable on grounds of public order and morals; equitable and fair as between local fishermen and the inhabitants of the United States."

The United States, on the other hand, denied the right of Great Britain to make such regulations "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."

The fishing regulations were thus by the submission of both parties to be reasonable; who was to pass upon the question of reasonableness? The Tribunal has affirmed the right of Great Britain "to make regulations without the consent of the United States" but lays down that "such regulations must be made *bona fide* and must not be in violation of the said treaty;" and that "regulations which are appropriate or necessary for the preservation of such fisheries, or 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 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 not in violation of the treaty."

So far the award is squarely in favor of Great Britain, but the award goes further and holds that, if the reasonableness of a regulation is contested, Great Britain is not to be the judge of what is or what is not reasonable. The language of the award on this *crucial* point is as follows:

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 hereinbefore laid down, and in the manner proposed in the recommendations made by the Tribunal in virtue of Article IV of the agreement.

But the present purpose is not necessarily to examine the recommendations drawn up by the Tribunal and inserted in the award; it is sufficient to state that Great Britain is no longer the judge of the reasonableness of a contested regulation and that the reasonableness or unreasonableness of future regulations is henceforth to be determined by impartial authority instead of by partial authority as in the past.

This provision of the award thus seems substantially the result for which the United States has contended.

The necessity of submission to "impartial authority" in case of a contested regulation may well result in practice in the amicable discussion by the interested parties of proposed regulations so as to prevent the delay and expense likely to result from a reference to the "impartial authority" provided for by the award.

The award on the first question is thus in substance a victory for the United States.

Question II involving the right of the United States to employ as members of the fishing crews non-inhabitants of the United States is decided in favor of the right of the United States. The reservation in the second paragraph of the award negatives any treaty rights in aliens, who derive their rights solely from their employer.

In the exercise of the fishing-rights under the convention of 1818, the United States claimed that its inhabitants were not, without its consent, to be subjected "to the requirements of entry or report at custom-houses or the payment of light or harbor dues, or to any other similar requirement or condition or exaction."

The decision of the Tribunal on this point raised by Question III is very reasonable and satisfactory to both parties. The duty to report is not unreasonable, if the report may be made conveniently either in person or by telegraph. If no reasonably convenient opportunity be provided, then the American vessel need not report.

The second and final clause of the award on this point is admirably clear and concise: "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."

The United States has always admitted and stated in the presentation of its case that American fishing vessels exercising their treaty rights might properly be called upon to make known their presence and exhibit their credentials by a report at customs, but on the other hand, the United States always denied that such vessels could be subjected to the customs regulations imposed upon other vessels, or required to pay light, harbor or other dues not imposed upon local fishing vessels. The award, therefore, sustains the American contention to its fullest extent.

The convention of 1818 permitted American fishermen to enter the

bays or harbors of the non-treaty coast covered by the renunciatory clause "for the purpose of shelter and of repairing damages therein, of purchasing wood and of obtaining water, and for no other purpose whatever." The treaty specifically subjected American fishermen to such restrictions as might be necessary to prevent them from abusing the privileges thus reserved.

Great Britain contended as to this question (Question IV), that vessels seeking these non-treaty ports were to be treated as ordinary vessels, subject to local ordinances and regulations, whereas the United States maintained that the ports were to be treated as ports of refuge and that subjection of fishing vessels to the prerequisite of entering and reporting at custom-houses, or of paying light, harbor or other dues would unjustly impair and limit the privileges which the clause meant to concede. The Tribunal adopted the American contention as in accord and with the "duties of hospitality and humanity which all civilized nations impose upon themselves."

To prevent the abuse of the privileges, the Tribunal holds that if the American vessel remains in such ports for more than forty-eight hours, Great Britain may require such vessel to report either in person or by telegraph, at a customs-house or to a customs official, if reasonably convenient opportunity therefor is afforded. Question IV is thus decided in favor of the American contention.

By the convention of 1818 the United States renounced the right "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 limits specified by the treaty. Great Britain contended that the United States renounced by this clause the right to fish within all bays and within three miles thereof, whereas the United States maintained that it renounced merely the right to fish within such bays as formed part of His Majesty's dominions, that is to say, territorial bays; that only such bays whose entrance was less than double the marine league were renounced, and that in such cases the three marine miles were to be measured from a line drawn across the bays where they were six miles or less in width. In other words, Great Britain argued that "bays" were used in both a geographical and territorial sense, thereby excluding American fishermen from all bodies of water on the non-treaty coast known as bays on the maps of the period, whereas the United States insisted that "bays" were used in the territorial sense, and therefore limited to small bays.

Question V asked "from where must be measured the 'three marine miles of any of the coasts, bays, creeks or harbors' referred to in the said Article?" The Tribunal adopted the British contention only to the extent of holding that the word "bays" must be interpreted as applying to geographical bays. "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."

A body of water, geographically called a bay, may cease to have "the configuration and characteristics of a bay" and at this point the line is to be drawn. This would leave each bay to be considered by itself, and the Tribunal recognized that the terms of its award would be too general. Therefore to avoid this difficulty it conceded in part the contention of the United States and recommended the ten-mile provision found in recent fishery treaties and drew the lines in the most important bays of the non-treaty coast in general accordance with the unratified treaty of 1888 between Great Britain and the United States, with, however, very considerable modifications in favor of the United States. Without indulging in criticism of the award, attention is called to the very able dissenting opinion of Dr. Drago.⁴

The attempt of Great Britain under Question VI to exclude American fishermen from "the bays, harbours and creeks" of the treaty coast, which would have worked irreparable injury to American fishing interests, signally failed, and the final question (Question VII) was likewise resolved in favor of the United States, for it is held that its inhabitants are entitled to have for their vessels "the commercial privileges on the treaty coasts accorded by agreement or otherwise to United States trading vessels generally," provided "the commercial privileges are not exercised concurrently" with the exercise of treaty rights.

With the exception of Question V, the award of the Tribunal was unanimous.

Both the United States and Great Britain are to be congratulated upon the award. As previously stated, the real importance lies in its international bearings; for it furnishes an example of the peaceful and harmonious settlement of international disputes which will not, it is to be hoped, be without influence upon the world at large.

⁴ Printed in this JOURNAL, p. 988.