ARBITRATION OF CLAIMS OF AMERICAN SEALING AND WHALING VESSELS AGAINST RUSSIA, AGREEMENT PROVIDING FOR. (SELECTION OF ARBITRATOR, SEE UNDER NETHERLANDS.)

Mr. Tower to Mr. Hay.

No. 84.] EMBASSY OF THE UNITED STATES,
St. Petersburg, August 29, 1899.

SIR: In compliance with the instructions contained in your dispatch No. 53[1] of the 22d of May, 1899, in relation to the proposed arbitration between the Government of the United States and the Government of Russia of the claims arising out of the seizure and detention by Russian cruisers of the American vessels *James Hamilton Lewis*, *C. H. White*, *Kate and Anna*, and *Cape Horn Pigeon*, I presented last June to the Count Mouravieff, Imperial minister of foreign affairs, a form of protocol upon which the proceedings of such arbitration should be established. This form, of which I have the honor to inclose to you a copy herewith, is made, in a general sense, to agree with those of former arbitrations of claims in America. It provides for the submission to the arbitrator of all the questions of law and fact brought into issue between the two Governments, together with copies of the correspondence, documents, and proofs which have already been submitted for the consideration of either Government in respect of these claims, and also for the appearance before the arbitrator of counsel for all the parties in interest, with authority to make oral arguments, at the discretion of the arbitrator, in addition to those written or printed, which were provided for.

The Russian Government, however, after having considered that method of procedure, has sent me a different form, which it prefers, a copy of which, and of Count Mouravieff's note of the 12th (24th) of August, which accompanied it, is respectfully submitted to you herewith.

This method provides only for written arguments before the arbitrator, in the form of memoranda and counter memoranda, by means of which each party shall set forth its case within limits as to time, which are specifically determined.

It is the same as that which is about to be employed for establishing the procedure in an arbitration of a similar case, soon to be held between Great Britain and Russia, and was originally proposed by the British Government to that of Russia for the purpose named.

The plan itself seems eminently a fair one for both parties. But I beg leave to suggest that, if it were accepted by the Government of the United States in the matter now under consideration, some modifi-

[1] Not printed.

cations might be made in respect of certain details, as, for example, the compensation to be paid to the arbitrator ought to be fixed and an agreement established between the two Governments as to the share of it which each should pay. There should also be a limit of time within which the arbitrator should engage to render his final decision (the term of one year proposed by me was merely intended as a suggestion open to argument), and a limit of time within which the Government of Russia should engage itself to pay any indemnity awarded by the arbitrator.

It may, perhaps, be considered advisable also to inquire what the precise meaning is of the phrase relating to the arbitrator's decision which provides that, besides following the general principles of international law, he shall also follow "the spirit of international agreements bearing upon the subject." I understand that this provision is one that was suggested by Russia as a modification of the original plan presented by Great Britain, but has not as yet been accepted by the British foreign office.

I have, etc.,

CHARLEMAGNE TOWER.

[Inclosure 1.]

MEMORANDUM FOR A PROTOCOL.

Protocol of an agreement between the Imperial Russian minister of foreign affairs and the ambassador extraordinary and plenipotentiary of the United States of America, for submission to an arbitrator of the claims arising out of the seizure and detention of the American vessels C. H. White, James Hamilton Lewis, Kate and Anna, and Cape Horn Pigeon.

The Government of His Majesty Nicholas II, Emperor of all the Russias, and the United States of America, through their representatives, the Count Mouravieff, Imperial Russian minister of foreign affairs, and Charlemagne Tower, ambassador extraordinary and plenipotentiary of the United States of America, have agreed upon and signed the following protocol:

Whereas the United States of America, having claimed indemnity from the Imperial Russian Government on behalf, respectively, of the owners, master, and crew of the schooner *C. H. White*, seized by the Imperial Russian cruiser *Zabiaca* in 1892; of the owners, master, and crew of the schooner *James Hamilton Lewis*, seized by the Imperial Russian cruiser *Aleute* in 1891; of the owners, master, and crew of the schooner *Kate and Anna*, seized by the Imperial Russian cruiser *Zabiaca* in 1892, and of the owners, master, and crew of the bark *Cape Horn Pigeon*, seized by an Imperial Russian armed vessel in 1892, it is agreed between the two Governments, with the consent of the said several parties in interest, given through their respective attorneys of record:

I. That the questions of law and of fact brought into issue between the two Governments in respect of each of these said several claims shall be referred to the decision of Monsieur T. M. C. Asser, doctor of laws, member of the Royal Council of State of the Netherlands, who is hereby fully authorized thereto as arbitrator.

II. That each Government shall submit to the arbitrator within three months from the day on which both Governments shall receive official notice from Monsieur T. M. C. Asser that he accepts the office of arbitrator by permission of his Government, copies of the correspondence, documents, and proofs which it has already submitted for the consideration of the other Government in respect of the said several claims.

III. That each Government may submit with the documents above described a separate argument, either written, typewritten, or printed, setting forth its own views in each of the said several cases respectively.

IV. The case of each of the said vessels shall be submitted separately to the consideration of the arbitrator, and each of the said cases shall be decided by him singly and separately upon its own merits as to the questions of law and of fact brought into

issue between the two Governments by the seizure and detention of the vessel to which it relates.

V. Each of the said several cases may be presented to the consideration of the arbitrator by separate counsel duly authorized thereto and empowered by either Government to act for it as counsel in such case, or the same counsel may be duly authorized and empowered by either Government to act for it in presenting two or more of the said several cases successively. And the arbitrator may, in his discretion, hear oral arguments of counsel in any or all of the said several cases in addition to the written or printed arguments above provided for. He may also call for evidence or arguments elucidating particular points not made clear to him if he shall deem it necessary to do so after having examined the documents submitted to him.

VI. The arbitrator shall render his decision as to all the said cases within one year from the date of the submission to him of the proofs, documents, and evidence by both parties. He shall decide whether, upon the proofs, documents, evidence, and arguments submitted to him, the owners, master, and crews, respectively, or any of them, of the said vessels, the *C. H. White*, *James Hamilton Lewis*, *Kate and Anna*, and the *Cape Horn Pigeon*, are or are not entitled to indemnification on the part of the Imperial Russian Government, and in the event that he shall decide this point affirmatively with respect to any or all of the said claimants, he will fix the amount of the indemnity to which each or either is entitled.

VII. Reasonable compensation to the arbitrator, and the other common expenses occasioned by the arbitration, shall be paid in equal moieties by the two Governments.

VIII. Any award made by the arbitrator shall be final and conclusive, and if in favor of the claimants or of either or any of them and of the contention of the United States of America, the amount or amounts so awarded shall be paid by the Imperial Russian Government not later than one year from the date of such award.

Done in duplicate at St. Petersburg this —— day of ———, 1899.

[Inclosure 2.]

Count Mouravieff to Mr. Tower.

[Translation.]

No. 4131.] MINISTRY OF FOREIGN AFFAIRS,
First Department, August 12, 1899.

In supplement to the communication No. 3227, of the 26th of June, 1899, the imperial ministry of foreign affairs has the honor to announce to the embassy of the United States that the form of protocol to establish rules of procedure in the arbitration of claims arising out of the seizure by Russian cruisers of the American schooners *James Hamilton Lewis*, *C. H. White*, *Kate and Anna*, and *Cape Horn Pigeon* has been carefully examined by the ministry of foreign affairs and the ministry of marine.

In view of the fact that in the form submitted by the embassy the limit of expenses does not appear to be sufficiently defined, and since in a similar case the ministry has recently proposed to the British Government another plan of arbitration which seems better to serve the interests of both parties to the litigation, the ministry of foreign affairs, with the concurrence of the ministry of marine, has the honor to submit herewith a copy in French, with the request that the embassy will communicate to it the opinion of the Government of the United States in regard to that plan.

[Subinclosure—Translation.]

The Imperial Government of Russia and the Government of the United States of America having agreed to invite M. Asser, member of the council of state of the Netherlands, to act as arbitrator in connection with the claims of the schooners *James Hamilton Lewis*, *C. H. White*, *Kate and Anna*, and *Cape Horn Pigeon*, arising out of their detention or seizure by Russian cruisers on the charge of having been illegally engaged in fur-seal fishing, the undersigned minister of foreign affairs of His Majesty the Emperor of Russia having been duly authorized thereto, has the honor to make

hereby the following declaration, in exchange with a similar declaration upon the part of the Government of the United States of America.

The arbitrator shall take cognizance of the claims for indemnity which have been presented to the Imperial Government of Russia by the Government of the United States on behalf of the parties in interest in the said schooners.

The party claimant shall present to the arbitrator, within three months from the date of the exchange of the present note with an identical one of the United States Government, a memorandum in support of its claim, and shall hand immediately a copy thereof to the party defendant.

Within three months from the date of the receipt of the said copy the party defendant shall present to the arbitrator a contramemorandum of which it shall hand immediately a copy to the party claimant.

Within three months after the receipt of such contramemorandum the party claimant may, if it sees fit to do so, present to the arbitrator a new memorandum, of which it shall hand immediately a copy to the party defendant; and the latter may also, within three months from the receipt thereof, present to the arbitrator a new contramemorandum, of which it shall hand immediately a copy to the party claimant.

The arbitrator shall be authorized at the request of either of the parties to extend for a period of not longer than thirty days any of the intervals of time hereinabove provided for.

After the exchange of memoranda as herein aforesaid no communication, either written or verbal, shall be addressed to the arbitrator, unless he shall request from the parties, or either of them, supplementary information to be given in writing.

The party so giving information to the arbitrator shall hand immediately a copy of its communication to the opponent, who may, if he thinks fit to do so, present in writing to the arbitrator, within one month from the date of his receipt thereof, comments relating to the subject-matter of the said communication, and a copy of such comments shall be sent immediately to the party opponent.

The arbitrator shall have authority to decide all questions that may arise in regard to procedure in the course of the arbitration.

In his decision, which shall be communicated by him to each of the two Governments interested, the arbitrator, following the general principles of international law and the spirit of international agreements bearing upon the subject, shall determine as to each claim brought against the Imperial Government of Russia, whether such claim is well founded; and, if he decides affirmatively, whether the facts upon which each of the said claims is based have been proven.

In that event the arbitrator shall fix the amount of the indemnity to be paid by the Russian Government in respect to the claims presented by the parties in interest in the said vessels.

If he wishes to do so without, however, lessening the obligation incumbent upon the party claimant to prove the damages suffered, the arbitrator may invite each Government to appoint a commercial expert to aid him in that capacity—in fixing the amount of the indemnity.

The Imperial Government of Russia declares itself ready, in exchange with a similar agreement upon the part of the Government of the United States, to assume all expenses which may or shall be incurred in the presentation of its side of the case in this matter; also to accept as a final judgment the decision pronounced by the arbitrator within the limits of the present agreement, and to submit thereto without any reservation whatsoever.

Mr. Hagerman to Mr. Hay.

No. 94.] EMBASSY OF THE UNITED STATES,
St. Petersburg, September 7, 1899.

SIR: I have the honor to call your attention to that part of Mr. Tower's dispatch No. 84, of August 29 last, in which he remarked that it might be considered advisable to inquire into the precise meaning of a certain phrase in the draft of protocol submitted by Russia for the arbitration of the claims arising out of the seizure of the *James Hamilton Lewis* and other American vessels by Russian cruisers. Mr. Tower stated that he understood that the phrase in question providing that the arbitrator in his decision, besides following the general prin-

ciples of international law, should also follow "the spirit of international agreements bearing upon the subject," had been suggested by Russia as a modification of the original plan presented by Great Britain.

I am able to state now that, according to reliable information given Mr. Tower immediately before his departure, this proposed modification is unacceptable to Great Britain, and that the Russian Government will be so advised.

I have, etc.,

HERBERT J. HAGERMAN.

Mr. Hill to Mr. Hagerman.

No. 89.] DEPARTMENT OF STATE,
Washington, September 28, 1899.

SIR: I have to acknowledge the receipt of the ambassador's No. 84, of August 29 last, inclosing his draft and the Russian counterdraft of an agreement providing for the arbitration of the claims of American citizens growing out of the seizure of the vessels *James Hamilton Lewis*, *C. H. White*, *Kate and Anna*, and *Cape Horn Pigeon;* also of your No. 94, of the 7th instant, referring to a clause in the Russian counterdraft.

The draft proposed by the ambassador would be acceptable to this Government. The Russian counterdraft is also acceptable, with the modifications indicated in the accompanying memorandum.

I am, etc.

DAVID J. HILL,
Acting Secretary.

[Inclosure.]

MEMORANDUM.

The department suggests the insertion, after the words "*Cape Horn Pigeon,*" in the first paragraph, of the words "their owners, officers, and crews," and the omission at close of the second paragraph of the words "in the said schooners."

In case of at least one of the vessels there is involved a claim of members of the crew for illtreatment during detention, so the arbitration should not be limited to parties having interest in the vessels.

After the fourth paragraph, on the second page of the Russian draft, the department suggests the insertion of the following paragraph:

"The arbitrator shall render his decision in all the cases within six months from the date of the delivery to him of the last memorandum or contramemorandum provided for in this agreement."

It would seem wisest to omit in the fifth paragraph on the second page the words "and the spirit of international agreements bearing upon the subject."

This Government has entered into an agreement with Russia, dated May 4, 1894 (not retroactive, however), to prohibit our citizens from hunting for seal within a zone of 10 nautical miles along the Russian coasts and within a zone of 30 nautical miles of the Commander Islands. Very likely Russia may have similar agreements with other governments.

Omit the closing words of the last paragraph on the second page of the Russian draft—"in the said vessels."

In the last paragraph (last page) of the Russian draft, after the word "matter," insert: "to pay one-half of the compensation of the arbitrator for his services."

The Department also suggests the insertion of the following provision:

"Any amount awarded by the arbitrator in favor of the claimants or either of them shall be paid by the Government of Russia within one year from the date of the award."

Mr. Peirce to Mr. Hay.

[Telegram.—Paraphrase.]

EMBASSY OF THE UNITED STATES,
St. Petersburg, October 23, 1899.

[Mr. Peirce reports the adherence of the Russian Government to the protocol of the Russian minister of foreign affairs relative to the arbitration of the Bering Sea cases, and the suggestion that both sides might be limited to memorandum and contramemorandum unless further argument is requested by the arbitrator; to retain the phraseology of the fourth paragraph, second page, but the word "general" to be inserted before "spirit," and the following clause inserted: "But no special agreement between governments shall be considered applicable to the principles involved herein." All other modifications indicated in Department's No. 89 will be accepted.

Mr. Peirce asks if he is authorized to proceed on the basis outlined.]

Mr. Hay to Mr. Peirce.

[Telegram.—Paraphrase.]

DEPARTMENT OF STATE,
Washington, October 26, 1899.

[Mr. Hay directs Mr. Peirce to endeavor to secure the omission of the provision proposed by the Russian Government, fourth paragraph, second page of the protocol, which is not acceptable to this Government; to proceed as indicated in instruction No. 89, and report the result of his efforts.]

Mr. Peirce to Mr. Hay.

No. 133.] EMBASSY OF THE UNITED STATES,
St. Petersburg, October 27, 1899.

SIR: I have the honor to acknowledge the receipt of your telegram[1] of the 26th instant, a copy of which I append upon the overleaf.

Acting upon the instructions therein contained, I have requested a further interview with Professor de Martens for the purpose of urging upon him the wishes of our Government that the phrase "and the spirit of international agreements bearing upon the subject" be omitted from the protocol of the arbitration of the claims of American citizens arising out of seizures of American vessels.

I have, etc.,

HERBERT H. D. PEIRCE.

Mr. Peirce to Mr. Hill.

No. 134.] EMBASSY OF THE UNITED STATES,
St. Petersburg, October 27, 1899.

SIR: Referring to your dispatch No. 89 of September 28, 1899, I have the honor to confirm my telegram[1] of October 23 last, a copy of which I append on the overleaf.

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[1] Printed ante.

I had mentioned the matter of the protocol for the arbitration of the Bering Sea cases to Count Lamsdorff, urging upon him the importance of arriving at a decision on the subject at an early date and requesting a discussion of certain points relative thereto in order that the matter might be finally adjusted without unnecessary delay.

Count Lamsdorff was good enough to refer me to Professor de Martens, counsel for the ministry of foreign affairs, who was expected back to St. Petersburg shortly, the Venezuela board of arbitration, of which he was the president, having finished its sittings. The count stated that, as Mr. Martens would in fact determine the position of the Imperial Government in the affair, the most expeditious means of arriving at an agreement would be to come to an understanding with him as to the form and wording of the protocol.

Accordingly, on Saturday last, the 21st instant, I had, by appointment, an interview with Professor de Martens and went over with him the whole matter in detail.

I found him immovable regarding the question of the argument of the cases before the arbitrator by counsel. He stated frankly that, were such course to be adopted, the minister would request him to name suitable counsel and that he really did not know of anyone whom he could recommend to act in that capacity; that the whole system of Russian education is such that the men at the disposal of the ministry are unaccustomed and unfitted for the oral presentation or argument of such questions, and that he could not see his way clear to assent to the procedure indicated in the ambassador's draft of the protocol, but he suggested, as tending to materially shorten the duration of proceedings, that each side be limited to a memorandum and a contramemorandum unless further argument should be called for by the arbitrator for his further enlightenment.

As Mr. de Martens's views on this subject seemed to be fully fixed, and as in your dispatch above referred to you expressed no special preference for one mode of procedure proposed over the other, I deemed it in the interests of dispatch not to further press for the adoption of the ambassador's draft as a basis.

We then took up the Russian draft of the protocol, and I pointed out that in the first paragraph of that document the *Cape Horn Pigeon* should not be described as a schooner engaged in fur sealing, but as a bark engaged in whaling. This was at once assented to, as was the striking out of the words "in the said schooners" at the end of the second paragraph; the insertion of the following paragraph after the fourth paragraph on the second page:

> The arbitrator shall render his decision in all the cases within six months from the date of the delivery to him of the last memorandum provided for in this agreement.

The omission of the closing words of the last paragraph on the second page, "in the said vessels;" the insertion after the word "matter," in the last paragraph, of the words "to pay one-half of the compensation of the arbitrator for his services;" and the addition of a provision to read as follows:

> Any amount awarded by the arbitrator in favor of the claimants, or either of them, shall be paid by the Government of Russia within one year from the date of the award.

With regard to the omission of the words "and the spirit of international agreements bearing upon the subject," which you have taken exception to in your dispatch above quoted, Professor de Martens

expressed himself as decidedly favoring their retention, but suggested modifying them by the insertion of the word "general" before "spirit" and the addition of an explanatory phrase to the following effect:

but no special agreement between governments shall be considered as applicable to the principles herein involved.

This suggestion was made by him, upon my pointing out to him that such an agreement as that existing between Russia and the United States prohibiting the hunting of seals within a zone of 30 nautical miles of Commander Islands might exist between Russia and other countries, but that the Government of the United States could not recognize any such agreements as bearing upon the cases in question. He replied that such an agreement did exist with Great Britain, but that this was a special agreement, as were all agreements of that nature, and that the modifications he suggested would exclude all such. I am aware that this leaves an undesirable element of vagueness, but as Professor de Martens seems to attach importance to the retention of the wording, indicating that in the guidance of the arbitrator the books upon the subject of international law are not alone to be relied upon, I consented to submit the modified phraseology to you for your decision.

If the desire of the Russian Government in the retention of this expression is only to include it for the guidance of the arbitrator, it is not, perhaps, improbable that they would agree to the following wording of the entire paragraph:

In his decision, which shall be communicated by him to each of the two Governments interested, the arbitrator, following the general principles of international law and the spirit thereof as defined in international agreements bearing upon the subject, it being understood that special agreements between Governments are not applicable to the principles herein involved, shall determine as to each claim brought against the Imperial Government of Russia whether such claim is well founded, and if he decides affirmatively, whether the facts upon which said claim is based have been proven, and the decision of the arbitrator thereon shall be final, both as regards the claims and the principles determining his judgment.

Submitting the above for your approval, I have, etc.,

HERBERT H. D. PEIRCE.

Mr. Peirce to Mr. Hay.

[Telegram.—Paraphrase.]

EMBASSY OF THE UNITED STATES,
St. Petersburg, October 30, 1899.

[Mr. Peirce reports that the provision, fourth paragraph, second page of the protocol, which is objectionable to the Department, is to be omitted.]

Mr. Peirce to Mr. Hay.

No. 139.] EMBASSY OF THE UNITED STATES,
St. Petersburg, October 30, 1899.

SIR: In continuation of my dispatch No. 134 of the 27th instant, in relation to the protocol of arbitration on the seizure of American vessels by the Russian authorities in the Bering and Okhotsk seas, I have

the honor to confirm my telegram[1] of this date a copy of which please find appended on the overleaf.

Immediately upon the receipt of your telegram of the 26th of October, 1899, instructing me to endeavor to secure the omission of the phrase "and the spirit of international agreements bearing upon the subject" in the fifth paragraph of the second page of the Russian draft, I requested a further conference with Professor de Martens and received from him an appointment for this afternoon.

I found Professor de Martens, as I had anticipated, very loath to omit the provision to which you have taken exception, and he desired to know what I would propose to substitute for it. I replied that my Government desired its entire omission from the protocol without substitution of any provision of that nature, and I then asked him what purpose its retention could serve. He replied that it was intended for the guidance of the arbitrator in order that it might be understood that not the text-books on international law alone were to be considered as defining the principles of international law, but that the treaties between Governments should be recognized as one of its sources and one of the most important expressions of its principles.

I pointed out to Professor de Martens that in the choice of Mr. Asser as the arbitrator both Governments had been animated by the desire to refer the question to an unimpeachable authority upon international law, so that a decision might be arrived at in these cases in which absolute equity might, so far as possible, conform to the soundest theories of international rights, and that having, as we both believed, such an authority in Mr. Asser, it seemed to me unnecessary to instruct him as to the principles necessary for his guidance, but that we might with confidence leave the matter to his sound judgment, together with all the other and various points involved. This argument, touching as it did an "esprit du corps" which must of necessity exist between Professor de Martens and Mr. Asser, not only as high authorities upon their special subject, but as colleagues in their profession, seemed to produce the desired effect upon Professor de Martens's mind, for he at once admitted its force and agreed with me that the provision in question might safely be omitted from the protocol.

We then entered upon the subject of the language of the protocol, proceedings, and decision of the arbitrator. I had feared that the Russian Government, following their recent departure in regard to official communications, would insist upon the use of the Russian language for the protocol as official for them, to be accompanied by a translation into French, which should be of an unofficial character, and that it might be necessary for us also to accompany our memoranda with translations into French. Professor de Martens, however, assured me that Mr. Asser speaks and reads English fluently and correctly. I presume that he has not the same command of Russian, and that it was for these reasons that the professor proposed that throughout the arbitration, including the draft of the protocol, the official language for our side should be English and that of the Russian side French, and that the drafts of the two protocols should be carefully compared in order that it may be estsblished that the sense and force of each is identical with the other.

I asked Professor de Martens what, if any, steps had been taken on the Russian side to inform Mr. Asser of the proposal to invite him to

[1] Printed ante.

arbitrate the cases. He replied that nothing had been done, and stated that it was important that the two Governments act simultaneously and in complete unison, at the same time providing against an embarrassing refusal by, as a preliminary, informally, but semiofficially, posing the question as to whether or not Mr. Asser can and will act in the desired capacity. It was Professor de Martens's opinion that this should also be done simultaneously by both Governments, and to this end he requested me to ask of you to instruct our representative at The Hague to go to the minister for foreign affairs at that capital upon a certain fixed date, such date to be in the near future, but affording sufficient time for the Russian Government to instruct its representative there to do the same and upon the same day, and to further request of you to notify this embassy by telegraph what the date will be in order that we may inform the imperial foreign office, and for our representative to verbally ask of the minister of foreign affairs that he inquire of Mr. Asser whether he will consent to act as arbitrator in the premises. Accordingly I have the honor to submit the above request.

Upon receipt of an affirmative answer to this informal inquiry it is Professor de Martens's opinion that notes should be drawn up by both of our Governments formally inviting Mr. Asser to arbitrate the disputed claims, and, to the end that the terms of these notes should be identical, that they be carefully compared before transmission, and that thereafter dates of mailing be agreed upon in order that they may arrive as nearly simultaneously as possible.

I have now the honor to inclose a copy of the amended draft of the Russian protocol for your approval, it being understood between Professor de Martens and myself that this amended draft is not to be considered as final until it has received the sanction of our respective Governments.

In the telegrams which have passed between the Department and the embassy the fifth paragraph on the second page has been, by an oversight, erroneously described as the fourth on the same page.

Submitting the above for your approval, I have, etc.,

HERBERT H. D. PEIRCE.

[Inclosure.]

The Imperial Government of Russia and the Government of the United States of America having agreed to invite Mr. Asser, member of the Council of State of the Netherlands, to act as arbitrator in connection with the claims of the schooners *James Hamilton Lewis, C. H. White, Kate and Anna,* and the bark *Cape Horn Pigeon,* their owners, officers, and crews, arising out of their detention or seizure by Russian cruisers on the charge of having been illegally engaged in fur-seal fishing, the undersigned minister of foreign affairs of His Majesty the Emperor of Russia, having been duly authorized thereto, has the honor to make hereby the following declaration, in exchange with a similar declaration upon the part of the Government of the United States of America:

The arbitrator shall take cognizance of the claims for indemnity which have been presented to the Imperial Government of Russia by the Government of the United States on behalf of the parties in interest.

The party claimant shall present to the arbitrator, within three months from the date of the exchange of the present note with an identical one of the United States Government, a memorandum in support of its claim, and shall hand immediately a copy thereof to the party defendant.

Within three months from the date of the receipt of the said copy the party defendant shall present to the arbitrator a contramemorandum, of which it shall hand immediately a copy to the party claimant.

Within three months after the receipt of such contramemorandum the party

claimant may, if it sees fit to do so, present to the arbitrator a new memorandum, of which it shall hand immediately a copy to the party defendant; and the latter may also, within three months from the receipt thereof, present to the arbitrator a new contramemorandum, of which it shall hand immediately a copy to the party claimant.

The arbitrator shall be authorized, at the request of either of the parties, to extend for a period of not longer than thirty days any of the intervals of time hereinabove provided for.

After the exchange of memoranda as herein aforesaid no communication, either written or verbal, shall be addressed to the arbitrator, unless he shall request from the parties, or either of them, supplementary information to be given in writing.

The party so giving information to the arbitrator shall hand immediately a copy of its communication to the opponent, who may, if he thinks fit to do so, present in writing to the arbitrator, within one month from the date of his receipt thereof, comments relating to the subject-matter of the said communication, and a copy of such comments shall be sent immediately to the party opponent.

The arbitrator shall have authority to decide all questions that may arise in regard to procedure in the course of the arbitration.

The arbitrator shall render his decisions in all the cases within six months from the date of the delivery to him of the last memorandum or contramemorandum provided for in this agreement.

In his decision, which shall be communicated by him to each of the two Governments interested, the arbitrator, following the general principles of international law, shall determine as to each claim brought against the Imperial Government of Russia, whether such claim is well founded; and, if he decides affirmatively, whether the facts upon which each of the said claims is based has been proven.

In that event the arbitrator shall fix the amount of the indemnity to be paid by the Russian Government in respect to the claims presented by the parties in interest.

If he wishes to do so, without, however, lessening the obligation incumbent upon the party claimant to prove the damages suffered, the arbitrator may invite each Government to appoint a commercial expert to aid him in that capacity in fixing the amount of the indemnity.

The Imperial Government of Russia declares itself ready, in exchange with a similar agreement upon the part of the Government of the United States, to assume all expenses which may or shall be incurred in the presentation of its side of the case in this matter, to pay one-half of the compensation of the arbitrator for his services, also to accept as a final judgment the decision pronounced by the arbitrator within the limits of the present agreement, and to submit thereto without any reservation whatsoever.

Any amount awarded by the arbitrator in favor of the claimants, or either of them, shall be paid by the Government of Russia within one year from the date of the award.

The official language of the party defendant throughout the proceedings of the arbitration, including the protocol thereof, shall be the French language, and the official language of the party claimant throughout the proceedings of the arbitration, including the protocol thereof, shall be the English language, and the decision of the arbitrator shall be given to each of the parties in the French and English language respectively.

Mr. Hay to Mr. Peirce.

[Telegram.—Paraphrase.]

DEPARTMENT OF STATE,
Washington, November 14, 1899.

[Mr. Hay approves the protocol transmitted with Mr. Peirce's No. 139, except that the "*Cape Horn Pigeon*" should be described as having been engaged in whaling instead of sealing.]

Mr. Tower to Mr. Hay.

No. 152.] EMBASSY OF THE UNITED STATES,
St. Petersburg, November 18, 1899.

SIR: I have the honor to inform you that in compliance with the instructions contained in the dispatch No. 89 of Mr. Hill, Acting Sec-

retary, dated the 28th of September, 1899, in regard to certain modifications which the Government of the United States wished to have made in the wording of the protocol proposed by the Imperial Russian Government to be used in arbitrating the claims which have grown out of the seizure of the American vessels, *James Hamilton Lewis*, *C. H. White*, *Kate and Anna*, and *Cape Horn Pigeon*, the said modifications were duly presented to the Imperial Russian ministry of foreign affairs by Mr. Peirce, chargé d'affaires ad interim.

The modifications as contained in the memorandum which accompanied Mr. Hill's dispatch were apparently acceptable to the Russian Government, though, as Count Mouraview, the Imperial minister of foreign affairs, was then abroad upon leave, the gérant of the ministry, Count Lamsdorff, requested Mr. Peirce to confer upon this subject with Professor de Martens, who acts as counsel for the ministry in similar cases.

Mr. Peirce thereupon saw Professor de Martens, with whom he discussed the modifications proposed by the United States Government, and obtained from him the impression that they would be found quite acceptable to the Imperial Government and would be introduced into the protocol.

Professor de Martens was very unwilling, however, to omit from the protocol the phrase, "and the spirit of international agreements bearing upon the subject," in connection with the method in which the arbitrator should arrive at his decision. But upon the representation that this phrase was not entirely acceptable to the Government of the United States he consented to waive it, and Mr. Peirce understood that he would so advise the Imperial minister of foreign affairs.

I have received to-day, however, from the Count Lamsdorff a note (a translated copy of which I have the honor to inclose to you herewith), in which he declares that the Imperial Government insists upon retaining the phrase, "and the spirit of international agreements bearing upon the subject," upon the ground that it is essential to the arbitration, and that the decision as to what is relevant to the subject in this connection should be left to the arbitrator himself to decide.

The Imperial Government also proposes that the arguments of each of the contestants shall be made in the French language, in order to facilitate the interchange of memoranda and give greater celerity to the transactions than if the American side were presented in English and the Russian in Russian.

I inclose, also, herewith a copy of Mr. Peirce's letter of the 20th of October to Professor de Martens, which is referred to in the note of Count Lamsdorff.

I request the instructions of the Government for my further direction in this negotiation.

I have, etc., CHARLEMAGNE TOWER.

[Inclosure 1.]

Count Lamsdorff to Mr. Tower.

[Translation.]

No. 5719.] IMPERIAL MINISTRY OF FOREIGN AFFAIRS,
First Department, November 5 (17), 1899.

MR. AMBASSADOR: Mr. Privy Counsellor Martens has sent me the letter which Mr. Peirce had the goodness to address to him on October 20, transmitting to him a new draft for the protocol to be exchanged between the Imperial Government and that

of the United States on the subject of the arbitration procedure in the affair of the American vessels *James Hamilton Lewis, C. H. White, Kate and Anna,* and the *Cape Horn Pigeon.*

The Imperial Government has no objection to make for its part to the modifications contained in the new draft, except on the two following points: The draft in question does not contain the clause mentioned in the ministerial notice of August 16, stipulating that the arbitrator shall be guided by "the spirit of international agreements bearing upon the subject;" the imperial ministry of foreign affairs finds itself obliged to insist that the stipulation in question be introduced into the text of the protocol. In the opinion of the Imperial Government there can be no objection to the clause in question since it refers to agreements applicable to the subject. It is for the arbitrator to decide to what extent the agreements which might be cited could be made applicable to the present litigation.

The Imperial Government further considers that, with regard to the official languages to be employed in the course of the proceedings as regards the communications of the parties and the decision of the arbitrator, it is desirable, that uniformity be observed. To this end the use of the French language, as in general use in diplomatic correspondence, seems to it indicated in the present case, for otherwise, if each of the parties made use of his native language, this fact would impede the progress of the proceedings and render the task of the arbitrator more difficult.

Please to accept, etc.,

COUNT LAMSDORFF.

[Inclosure 2.]

Mr. Peirce to Professor de Martens.

EMBASSY OF THE UNITED STATES,
St. Petersburg, October 20 (November 1), 1899.

YOUR EXCELLENCY: Referring to our recent conversations regarding the protocol of the arbitration between the Imperial Government and the Government of the United States to adjudicate the claims arising out of the seizure of certain American vessels by officials of the Imperial Government, I have the honor to inclose herewith an amended copy of the Russian draft of the protocol conforming to certain changes desired by my Government, and certain other changes which, in the course of our conversations on the subject have appeared to be advisable, to all of which we have mutually agreed, subject on the part of each of us to the approval of our respective Governments.

For convenience in comparison I have marked with red ink those passages in which the text of the original Russian draft has been altered.

I avail, etc.,

HERBERT H. D. PEIRCE.

Mr. Tower to Mr. Hay.

No. 157.] EMBASSY OF THE UNITED STATES,
St. Petersburg, November 25, 1899.

SIR: Since writing my dispatch No. 152 to you on the 18th of November, I have had an opportunity, during a personal interview, to discuss further with the Count Mouravieff, imperial minister of foreign affairs, the protocol submitted to the Government of the United States by the Imperial Russian Government in relation to the mode of procedure to be adopted in the arbitration of the claims arising out of the seizure of the American vessels, *James Hamilton Lewis, C. H. White, Kate and Anna,* and *Cape Horn Pigeon.*

I recalled to the imperial minister the fact that the United States Government has intimated its willingness to accept the form of protocol submitted by Russia, with the introduction of a few minor changes which have been adopted by the Imperial Government without objec-

tion; but that, while the United States Government has expressed its preference to eliminate the clause which stipulates, as to the method in which the arbitrator shall arrive at his conclusions, by taking note of the rules on international laws, in addition thereto "il aura à se regler sur l'esprit des accords internationaux applicables à la matière," the imperial ministry of foreign affairs has declared—in the note of the Count Lamsdorff, under date of the 5th (17th) of November, a copy of which I have already forwarded to you—that it finds itself obliged to insist upon the retention of that clause in the protocol.

I asked M. de Mouravieff to explain to me, in order that I might report it to you, what particular treaties or agreements this stipulation has reference to, and why it is considered to be of especial importance in connection with the subject-matter to which the arbitration relates.

He replied that it is the intention of the Russian Government to give the arbitrator in this controversy all the latitude possible, which shall be as fair to one side as to the other, in the admission of evidence and in coming to his decision; and that, in order to afford him this assistance, it is intended to allow him to take notice of the spirit and general tendency of international agreements applicable to the cases. He assured me that the Imperial Government has no purpose of relying upon the language of any particular agreement; and he gave me authority to say to you that he is ready to stipulate that no treaty or international agreement shall be presented in evidence before the arbitrator in order to prove any particular point of the argument, but merely to prove the spirit or general drift of international agreements applicable to the questions in dispute. He declared it to be his intention that the arbitrator alone shall be the judge as to the pertinence or applicability to the present litigation of such "spirit of international agreement."

Since I asked you in my dispatch, No. 152, for your instructions as to my future conduct in this negotiation, I beg now to submit this statement of the Count Mouravieff in further explanation of the view taken by the Imperial Russian Government.

I have, etc.,

CHARLEMAGNE TOWER.

Mr. Hay to Mr. Tower.

[Telegram.—Paraphrase.]

DEPARTMENT OF STATE,
Washington, December 5, 1899.

[Mr. Hay states that the phrase proposed by the Russian Government, as reported in Mr. Tower's No. 152, is not acceptable, but that this Government would consent to strike out, in the paragraph referred to, the words "following the general principles of international law," so that it shall read: "The arbitrator shall determine as to each claim," etc. The change proposed in Department's cablegram of the 14th ultimo should be made, if the protocol is agreed to, and an express provision for the submission to the arbitrator of the evidence which has been presented in support of the claims should also be included.]

Mr. Hay to Mr. Tower.

No. 124.] DEPARTMENT OF STATE,
Washington, February 12, 1900.

SIR: I have to acknowledge the receipt of your No. 152, of November 18; No. 157, of November 25, and your No. 165, of December 9 last, relative to the modification of the protocol for the arbitration of the United States claims growing out of the Russian seizures of American sealing and whaling vessels.

The Department awaits the result of its telegraphic instruction of December 5 last relative thereto.

I am, etc.,

JOHN HAY.

Mr. Tower to Mr. Hay.

No. 192.] EMBASSY OF THE UNITED STATES,
St. Petersburg, February 28, 1900.

SIR: I have the honor to acknowledge the receipt of your dispatch No. 124, of the 12th of February, relative to the modification of the protocol for the arbitration of the claims of the United States growing out of Russian seizures of American sealing and whaling vessels, and I regret that I have not been able as yet to report fully upon that subject.

The delay had arisen from the unwillingness upon the part of the Russian Government to accept the phraseology proposed by us in connection with the method by which the arbitrator shall reach his decision. The Imperial minister for foreign affairs still insists upon the retention of the phrase to which I had the honor to refer in my dispatches to you, Nos. 152, of November 18, and 157, of November 25, 1899, "and the spirit of international agreements bearing upon the subject."

Upon receiving your telegram of the 5th of December, which instructed me that the United States Government will accept a modification which shall make the provision read: "The arbitrator shall determine as to each claim, etc.," I presented that suggestion to the minister for foreign affairs, and I have not fulfilled my promise to inform you of his reply because he has not as yet given me a definite reply.

I have discussed the subject with him upon several occasions personally and have presented it formally also in writing. He is not inclined to yield the point and I fear will not do so, though I can not say this finally at present.

The question of this modification has been referred, as I have already reported to you, to Professor Martens for decision, and I incline to believe that it is that gentleman who is stubbornly resisting our offer, although I have repeatedly urged that "instead of restricting the judgment of the arbitrator to any express mode of determination, our plan will leave the questions involved to be decided by his wisdom and learning, without qualification of any kind."

I shall not fail to attend diligently to this subject.

I have, etc.,

CHARLEMAGNE TOWER.

Mr. Hay to Mr. Tower.

No. 131.] DEPARTMENT OF STATE,
Washington, March 16, 1900.

SIR: I have to acknowledge the receipt of your No. 192, of the 28th ultimo, relative to the modification of the protocol for the arbitration of the whaling and sealing claims against Russia.

The action of the Russian Government in indicating its willingness to adopt the principle of arbitration for the settlement of the claim growing out of the seizure of American sealing and whaling vessels was peculiarly gratifying to the Government of the United States. It was regarded as one of the most auspicious steps recently taken in the interest of peace and justice among nations, both on account of its importance as a precedent and because it gave fresh evidence of the sentiment of mutual friendship which has ever happily characterized the relations of the two countries, and it inspires in the Government of the United States its entire confidence in reaching a satisfactory and reasonable basis of arbitration equally just and honorable to the contracting parties. It is of the essence of law, which is ordained to establish justice in governing the relation of individuals as well as of State, that it should consist of positive and certain rules by which they may regulate their conduct. It therefore follows that a law should be enacted to operate in futuro, so that those who are to be affected by it may have cognizance of it and govern their actions accordingly. To enact a rule and give it at the same time a retroactive operation is inconsistent with the most rudimentary ideas of justice, inasmuch as those who are most loyal and law abiding might thereby be subjected to penalties and losses for their very observance of the laws by which their conduct was scrupulously regulated and in the protection of which they confided. Such conception of law is impossible, because obedience to it was impossible; it is the abnegation of law and therefore of justice. At the time of the seizure complained of the vessels were subject to and governed by certain defined and well-known rules of law. It never entered into the minds of the parties that their conduct could be judged by any vague and indefinable "spirit of international agreement bearing upon the subject" which was nonexistent or was so vague and indefinable that it could afford no criterion of human conduct. The phrase is objectionable from a judicial standpoint for the reason that its meaning lacks definition. It seems difficult or entirely impracticable to understand its precise meaning as a criterion of human action and judgment. If it were adopted, the arbitrator in forming his decision would be compelled to give to the spirit substance by the formulation of a rule of conduct that would first come to the knowledge of the parties when announced by the arbitrator—a rule which, if differing from the positive law in force and governing the vessels when they were seized, could not be accepted as intrinsically just, and which, if accordant with any such positive law, it is unnecessary and superfluous to embody in the agreement.

The Government of the United States regrets its inability to assent to the incorporation in the agreement of the proposed phrase, unless it is defined and reduced to terms which will express a conception of some definite and tangible rule. If the phrase has any useful function this should be possible, inasmuch as the law of human conduct does not reside in mysteries and metaphors, but is capable of expression in

clear and precise terms. The spirit of law could not be said to exist independently of the law itself. A rule of law, where its meaning is in doubt, may be interpreted strictly or liberally, in accordance with the general intendment or spirit of the law. But this supposed intendment or spirit is resorted to never for the establishment of a positive rule of law, but sometimes as a supposed aid in interpreting such law already in force. The positive rules governing the action of the parties when the seizures were made should be the rules governing the decision of the controversy. They are found in the common law of nations, which itself affords complete canons for its own interpretation.

The Government of the United States confides in the just disposition of the Government of His Imperial Majesty; and as it would not expect the latter to enter into an agreement having the effect to bind its subjects to abide by any real or imaginary rules of conduct found in the treaties or in the spirit of treaties of the United States with foreign States, or even in its treaties with Russia, except so far as the latter were in force at the time when the controversy arose, it cherishes the belief that His Majesty's Government will not unwillingly accord to the citizens of the United States the same measure of justice which itself would reasonably expect for its own subjects.

If the Russian Government, after the matter has been presented in this light by you, is inflexible in its adherence to the phrase, you may suggest that the Government of the United States will assent to its inclusion on condition that the following language, in substance, be added, to wit:

> But in rendering his decision the arbitrator shall be governed by the law actually in force and binding upon the parties to the controversy at the time when the seizures were respectively made.

You will represent the matter in this sense to the Imperial minister for foreign affairs, and you are at liberty, in the exercise of your discretion, if requested to do so, to furnish him a copy of this instruction.

I am, etc.,

JOHN HAY.

Mr. Tower to Mr. Hay.

No. 206.] EMBASSY OF THE UNITED STATES,
St. Petersburg, March 31, 1900.

SIR: I have the honor to acknowledge the receipt of your dispatch No. 131, of the 16th of March, 1900, in relation to the modification of the protocol for the arbitration of the whaling and sealing claims against the Russian Government.

Immediately upon receiving these instructions I went to see the Count Mouravieff, Imperial minister for foreign affairs, to whom, in a personal interview, I repeated the contents of your dispatch.

I informed him that the Government of the United States is unwilling to accept the phrase which it has been proposed to introduce into the wording of the protocol, providing that the arbitrator should be governed by the "spirit of international agreements applicable to the subject," because the purpose of it is obscure, and, from a juridical standpoint, the phrase is objectionable for the reason that its meaning

lacks definiition. I repeated to him also your statement, that if this provison were adopted—

> the arbitrator, in forming his decision, would be compelled to give to the spirit the substance by the formulation of a rule of conduct that would first come to the knowledge of the parties when announced by the arbitrator, a rule which, if differing from the positive law in force and governing the vessels when they were seized, could not be accepted as intrinsically just, and which, if accordant with any such positive law, it is unnecessary and superficial to embody in the agreement.

I added further that the Government of the United States wished this language made to express, more precisely than it does in its present form, what specific class of international agreements the arbitrator shall be authorized to consult in order to determine the spirit which is applicable to the subject now in hand, and that it can not be supposed that rules of law which may be recognized to-day, but were unknown then, can be given a retroactive force so as to make them apply to the occurrences which took place at a time when these rules were not yet accepted as law.

No more could any international agreement now existing be made, ex post facto, to govern the cases which relate to conditions prior to its existence. And if the spirit of international agreements is to be regarded as applicable to this subject, it must relate only to the spirit of such international agreements as were actually in force and applicable to the subject at the time when these seizures took place.

M. de Mouravieff did not question the justice of this argument. But he was still unwilling to abandon entirely the provision which allowed the arbitrator to take note of the "spirit of international agreements."

I availed myself, therefore, of the authority given me by you in your dispatch of the 16th of March, and suggested to him that the Government of the United States will assent to the retention of that phrase, provided that the following language, in substance, be added:

> But, in rendering his decision, the arbitrator shall be governed by the law actually in force and binding upon the parties to the controversy at the time when the seizures were respectively made.

I have not yet the reply to this which the minister for foreign affairs promised soon to make; but I shall not fail to communicate it to you immediately upon its receipt.

I have, etc., CHARLEMAGNE TOWER.

Mr. Tower to Mr. Hay.

No. 214.] EMBASSY OF THE UNITED STATES,
St. Petersburg, April 14, 1900.

SIR: Subsequently to my conversation with the Imperial Russian minister for foreign affairs, the purport of which I had the honor to communicate to you in my dispatch No. 206, of the 31st of March, relating to the modification, in the proposed protocol for the arbitration of the whaling and sealing claims against the Russian Government, of the phrase "and of international agreements applicable to the subject," I addressed to the Count Mouravieff, on the 29th of March, a note of which I respectfully inclose a copy herewith.

I repeated in that note, as he had requested me to do, the objections to that phrase expressed by you on account of its lack of definiteness,

and I called his attention once more to the unwillingness of the United States Government to accept a provision of the agreement to arbitrate which was so obscure of purpose as this, or to bind itself by an expression which left it quite uncertain from our point of view what specific kinds of agreements are to be held to be applicable.

I argued also that it could not be supposed that either international agreements subsequently made, or principles of international law subsequently accepted as such, could be made retroactive and applicable to the cases in hand if they were not in existence and not recognized at the time when the seizures of these vessels actually took place.

But I offered, under the authority already given to me by you, of which I had availed myself previously in my personal interview with the minister for foreign affairs, to accept the phrase on behalf of the United States Government, provided the following language, in substance, should be added:

> But, in rendering his decision, the arbitrator shall be governed by the law actually in force and binding upon the parties to the controversy at the time when the seizures were respectively made.

On the 22d of March (4th of April) M. de Mouravieff replied to me by a note, of which I have the honor to inclose to you a copy herewith.

He declares, as you see, that, while the Imperial Government appreciates the readiness of the United States to admit the phrase now under discussion, since "it is undeniable that the arbitrator must be governed by such international agreements as he may consider applicable to the subject. The Imperial Government does not hold it to be necessary to make the addition proposed," because, in the opinion of the Government, "it is important to avoid going into any detailed specification as to what agreements the arbitrator shall base his decision upon, in order not to restrict in the least his freedom of judgment, which is to be considered in law and in fact as absolute."

The Russian Government is thus exceedingly tenacious of its point of view, and has again refused to accept any modification of this objectionable phrase, even upon the liberal basis upon which we have offered to treat; for you will recall the fact that before proposing the perfectly just qualification, that no international agreements shall be given a retroactive force in order to make them applicable in the sense here understood, we have offered heretofore to cut out the phrase entirely, and leave the decision to the learning and wisdom of the arbitrator without any qualification whatever.

We are met now, however, by the objection that we must not restrict the freedom of judgment of the arbitrator. And I regret to say that we are again temporarily held in check, and unable to take up the more important questions of the arbitration and the arguments of counsel for the parties in interest and the Government itself.

I do not despair, however, even yet, of reaching ultimately an agreement as to this small and troublesome difference which shall be satisfactory to both participants in the controversy; and I shall confer with the imperial minister of foreign affairs immediately to that end.

I beg leave in the meantime to report to you the exact position of the matter to-day.

And in this connection I venture to suggest that as this question has developed to such an extent that it has attained the proportions of an international litigation, and is so regarded by the Russian Government, the Government of the United States will of course so consider it and

so direct the proceedings of the arbitration. These cases are likely to be argued with very great skill upon the Russian side—the note, of which I inclose a copy herewith, may serve to forecast this—and, while I have no information as to whom the Government intends to select as counsel to watch the interest of the United States, I trust I may not be going too far if I refer to the necessity of intrusting that duty to an international lawyer whose skill and experience in matters of this kind may enable him to face any adversary he may encounter in the course of this contest.

Another point to which I ask permission to refer is the adoption of French as the language of intercourse during the proceedings before the arbitrator. I have reported to you heretofore the request of the Russian Government that this should be done, but as yet I have not received your reply in regard to it. There can be no doubt that by adopting the French language the progress of the arbitration will be greatly facilitated; for if we insist upon making our arguments in English—which of course we may do—the Russian arguments will all be sent to us in Russian, a not very agreeable anticipation for the counsel either of the Government or of the respective individual parties in interest.

I have, etc., CHARLEMAGNE TOWER.

[Inclosure 1.]

Mr. Tower to Count Mouravieff.

EMBASSY OF THE UNITED STATES,
St. Petersburg, March 16 (29), 1900.

EXCELLENCY: In compliance with your request made yesterday when I had the honor to discuss with you the question of the form of protocol intended to be used in the arbitration between the Imperial Russian Government and that of the United States in regard to the seizure of certain American vessels, I beg leave to confirm what I then announced to your excellency, that the Government of the United States, appreciating the willingness of the Imperial Government to adopt the principle of arbitration in this case, which it regards as one of the most auspicious steps recently taken in the interest of peace and justice among nations, earnestly hopes that the slight difference of opinion as to one phrase in the language of the protocol may be speedily adjusted to the complete agreement and satisfaction of both high contracting powers.

This phrase, as your excellency will remember, is that which provides that the arbitrator, in giving his judgement upon the questions submitted to him by the parties in interest, shall take note of the rules of international law, and also of the "spirit of international agreements applicable to the subject."

The Government of the United States, upon mature consideration of the protocol which I had the honor to transmit to Washington in accordance with your excellency's request, regards this phrase as not sufficiently definite in meaning. It would have this language made to express more precisely than it does in its present form what specific class of international agreements the arbitrator shall be authorized to consult in order to determine the spirit which is applicable to the subject now in hand.

I have already had the honor upon several occasions to call your excellency's attention to this wish of the United States Government.

I venture to believe that your excellency has been constantly in accord with me in the discussion of the principles here involved, in so far, at least, as to agree that, in considering the questions of law submitted to him in this arbitration, the arbitrator must take cognizance of the rules of international law as they existed at the time when the seizures of the vessels occurred.

It is not understood that rules of law which may be recognized to-day but were unknown then can be given a retroactive force so as to make them apply to the

occurrences which took place at a time when these rules were not yet accepted as law.

No more could any international agreement now existing be made ex post facto to govern the cases which relate to conditions prior to its existence. And if the spirit of international agreements is to be regarded as applicable to this subject, I have the honor to submit to your excellency that it must apply only to the spirit of such international agreements as were actually in force and applicable to the subject at the time when these seizures took place.

This is the view taken of the question by the Government of the United States, which I venture to believe does not differ in principle from that of your excellency.

I have already had the honor to propose in my note addressed to you on the 29th December, 1899 (12th January, 1900), that the phrase relating to the "spirit of international agreements" might be eliminated entirely from the language of the protocol. But as the Imperial Government has hitherto insisted upon the retention of that provision I beg to suggest that the Government of the United States will assent to its inclusion on condition that the following language, in substance, be added:

"But in rendering his decision the arbitrator shall be governed by the law actually in force and binding upon the parties to the controversy at the time when the seizures were respectively made."

I avail myself, etc., CHARLEMAGNE TOWER.

[Inclosure 2.]

Count Mouravieff to Mr. Tower.

(Translation.)

No. 1652.] IMPERIAL MINISTRY FOR FOREIGN AFFAIRS,
First Department, March 22 (April 4), 1900.

MONSIEUR L'AMBASSADEUR: I have had the honor to receive your excellency's note of the 16th (29th) of March announcing the acceptance by the Government of the United States of the clause suggested by the Russian Government, in the protocol for the arbitration relating to the seizure of the American schooners, which provides that the arbitrator shall be governed by the general principles of international law and by international agreements applicable to the subject, but asking, at the same time, that the following language shall be added:

"But in rendering his decision the arbitrator shall be governed by the law actually in force and binding upon the parties to the controversy at the time when the seizures were respectively made."

The Imperial Government appreciates highly the spirit of justice with which the Government of the United States has embraced the opportunity to admit into the text of the protocol the passage setting forth expressly, as one of the bases of the arbitrator's decision, the principle, which appears to be unquestionable, that the arbitrator shall be governed by such international agreements as he may consider applicable to the subject.

But the Imperial Government does not hold it to be necessary to add the language proposed in the note of the 16th (29th) March, because, in its opinion, it is important to avoid any detailed specification of the international agreements upon which the arbitrator shall base his decision, in order not to restrict in the least his liberty of action, which ought to be, in law and in fact, absolute.

This was the view of the character of an arbitrator called upon to decide international differences which was taken at the peace conference held last year at The Hague.

The Imperial Government is solicitous to such a degree in maintaining in practice this view that it must insist upon the complete independence of the arbitrator's judgment and upon the high station reserved for the arbitrator himself, charged as he is by the confidence of both parties to settle the differences which have arisen between them.

We hope, therefore, that these reasons will not escape the enlightened judgment of the United States Government, and that it will appreciate the circumstances which have made it impossible for the Imperial Government to enter in advance into an examination of the specific grounds upon which the arbitrator shall render his final decision after having heard the arguments presented to him by the parties on both sides.

I avail, etc., COUNT MOURAVIEFF.

Mr. Hay to Mr. Tower.

No. 150.] DEPARTMENT OF STATE,
Washington, May 24, 1900.

SIR: I have received your dispatch No. 214, of the 14th ultimo, relative to the protocol for the arbitration of the whaling and sealing claims, in which you transmit a copy of the reply of the Russian Government to your note, wherein you stated that this Government would assent to the inclusion in the protocol of the phrase "the spirit of international agreements" on condition that the following be added:

> But, in rendering his decision, the arbitrator shall be governed by the law actually in force and binding upon the parties to the controversy at the time when the seizures were respectively made.

Count Mouravieff states that his Government does not hold it to be necessary to add the language proposed in your note, because, in its opinion, "it is important to avoid any detailed specification of the international agreements upon which the arbitrator shall base his decision, in order not to restrict in the least his liberty of action, which ought to be in law and in fact absolute." "This," he continues, "was the view of the character of an arbitrator, called upon to decide international differences, which was taken at the peace conference held last year at The Hague." He adds that his Government is so solicitous of maintaining in practice this view that it "must insist upon the complete independence of the arbitrator's judgment," and that it is impossible for his Government "to enter in advance into an examination of the specific grounds upon which the arbitrator shall render his final decision."

Count Mouravieff's note conveys the impression that this Government is seeking to restrict the liberty of action of the arbitrator. As you are well aware, the reverse is true. The draft of the protocol originally proposed by this Government in June, 1899 (see your dispatch No. 84, of August 29, 1899), provided for the submission of the claims to the decision of the arbitrator without any restriction or qualification. The Russian Government, in its counterdraft of August 12, 1899, embodied the following language:

> In his decision the arbitrator, following the general principles of international law and the spirit of international agreements bearing upon the subject, shall determine as to each claim, etc.

After some discussion between the two Governments in relation to the phrase "the spirit of international agreements bearing upon the subject," this Government objecting to its inclusion without modification or explanation, and the Russian Government insisting that it be included in the form proposed by it, this Government proposed to strike out also the words "following the general principles of international law," so that it should read:

"The arbitrator shall determine as to each claim," thus submitting the matter unreservedly to the judgment of the arbitrator.

The Department is at a loss to understand the attitude taken by the Russian Government in this matter. It has declined to accept the proposition of this Government to refer the claims to the arbitrator leaving the matter absolutely to his decision, without qualification, and it refuses to eliminate or in any way modify or explain the qualifying phrase proposed by it, which clearly restricts the liberty of action of the arbitrator. And the reason assigned by the Russian

Government for its refusal to assent to the modification by this Government is its desire to maintain the complete independence of the arbitrator.

You will point out to the Russian Government the apparent inconsistency of the position assumed by it. You will inform Count Mouravieff that the Government of the United States does not find the reasons advanced by His Majesty's Government sufficient to justify its assent to the inclusion of the phrase "the spirit of international agreements" without the addition of some such language as that proposed in your last note. At the same time you may inform him that your Government will, as it has heretofore proposed, agree to the omission of all the language in the paragraph of the protocol under discussion which restricts the freedom of action of the arbitrator. This would leave the matter absolutely to the judgment of the arbitrator without limitation, and would thus meet the view advanced by Count Mouravieff. In view of the insistence of the Russian Government upon the complete independence of the arbitrator's action, it is not perceived how it can refuse to assent to this proposition.

In response to your suggestion concerning the language of intercourse during the proceedings before the arbitrator, I would refer you to Mr. Peirce's dispatch No. 139, of October 30, 1899.

The Department would suggest that you informally ascertain, so far as practicable, from the diplomatic representative of Great Britain at St. Petersburg, the status of the negotiations for settlement by arbitration similar claims of British subjects against the Russian Government, and whether a similar stipulation is embodied, or proposed to be so, in any agreement or arbitration.

I am, etc.,

JOHN HAY.

Mr. Tower to Mr. Hay.

No. 230.] EMBASSY OF THE UNITED STATES,
St. Petersburg, June 1, 1900.

SIR: In supplement to my dispatch No. 214, of the 14th of April, in regard to the wording of the protocol proposed for the arbitration of the whaling and sealing claims made by the Government of the United States against the Government of Russia, I have the honor to inform you that, as the result of considerable further negotiation by means of which the intention of both high contracting powers to seek merely the ends of justice and equity through such an arbitration has made itself perfectly clear, the gratifying decision has been reached by the Imperial Government that it will consent to modify the phrase, "The arbitrator shall be governed by the general principles of international law and by international agreements applicable to the subject," by adding to it the following passage:

> It is understood and agreed that this stipulation shall have no retroactive force, and that the arbitrator shall apply to the cases now in litigation the principles of international law and of international agreements which were in force and binding upon the parties to this litigation at the moment when the seizures aforementioned took place.

I inclose to you herewith a copy of the note which I addressed upon this subject to the Imperial minister of foreign affairs upon the 4th of April and a copy and translation of his reply to it, dated the 17th

(30th) of May, in which he announces the readiness of the Russian Government to modify the phrase to which objection has been made hitherto.

I have promised the Imperial minister to submit to you this announcement and to inform him immediately upon the receipt of instructions from you as to its acceptance by the Government of the United States.

I have the gratification to believe that with the modification thus proposed the language of the protocol will now be acceptable to both Governments, and that the more serious questions relating to the litigation may be taken up in due course.

I have, etc.,

CHARLEMAGNE TOWER.

[Inclosure 1.]

Mr. Tower to Count Mouravieff.

EMBASSY OF THE UNITED STATES,
St. Petersburg, April 3/16, 1900.

EXCELLENCY: I beg leave to acknowledge the receipt of your excellency's note, No. 1652, of the 22d of March (4th of April) in reply to one which I had the honor to address to your excellency on the 16/29th March, relating to the wording of the protocol proposed for the arbitration of the cases which have arisen out of the seizure of certain American vessels.

I hasten to express to your excellency the gratification which I feel in being able, both from the statements contained in this esteemed note and from the tenor of the personal interviews which I have recently been privileged to have with your excellency, to confirm my belief that the Imperial Government and the Government of the United States are substantially in accord in regard to submitting the cases in question to the judgment of an arbitrator who shall be satisfactory to both high contracting powers.

As I have already had the honor to inform your excellency, the United States Government is prepared to accept the conditions in the protocol suggested by the Imperial Russian Government, except that it wishes for a more definite statement as to the exact meaning of the phrase, "and the spirit of international agreements applicable to the subject."

The United States Government is not averse to the retention in the protocol of this phrase, provided, as I have heretofore had the advantage of explaining to your excellency, the intention of this language can be clearly defined, and that it may be understood to mean such international agreements and such rules of international law as may, by a just and fair interpretation, be found to be applicable to the subject.

As I have the personal assurance of your excellency that the purpose of the Imperial Government is no other than this, it is quite evident that the only difference still remaining between the two high contracting powers in this connection is one of expression and not of meaning, and that neither of the powers has the intention of applying either the principles of international law or the spirit of international agreements in a retroactive sense so as to make them relate to the questions now to be considered by the arbitrator, unless they were actually in existence and binding upon the parties in interest at the time when the seizures of the American vessels respectively took place.

This being the fact, it seems that there ought to be no difficulty in reaching an accord upon the subject. For that purpose, therefore, and with the earnest desire of forwarding the interests of all parties concerned in this litigation, I have the honor to request your excellency that you will authorize me to report officially to the Government of the United States in regard to the provision suggested in the protocol—"the general principles of international law and the spirit of international agreements applicable to the subject"—the following statement: "It is understood and agreed that this stipulation shall have no retroactive force and that the arbitrator shall apply to the cases now in litigation the principles of international law and the spirit of such international agreements only as were in force and binding upon the parties hereto at the moment when the seizures in question took place."

If your excellency will favor me with this statement I shall not fail to communicate it forwith to the Government of the United States for its approval and acceptance.

I avail, etc.,

CHARLEMAGNE TOWER.

[Inclosure 2.—Translation.]

Count Mouravieff to Mr. Tower.

No. 2614.] MINISTRY FOR FOREIGN AFFAIRS,
First Department, May 17 (30), 1900.

MONSIEUR L'AMBASSADEUR: Having had the honor to receive your excellency's note of the 3d (16th) of April, I hasten to inform you that the Imperial Government, as a proof of its desire to arrive at an understanding in regard to the wording of the protocol in the arbitration of the cases relating to American vessels, is disposed to admit in the text of the protocol, in conformity with the wish expressed in the abovementioned note, the following phrase: "It is understood and agreed that this stipulation shall have no retroactive force, and that the arbitrator shall apply to the cases now in litigation the principles of international law and of international agreements which were in force and binding upon the parties to this litigation at the moment when the seizures aforementioned took place."

This phrase is to follow the passage which reads: "The general principles of international law and the spirit of international agreements applicable to the subject."

I beg you to accept, etc., COUNT MOURAVIEFF.

Mr. Hay to Mr. Tower.

[Telegram.—Paraphrase]

DEPARTMENT OF STATE,
Washington, June 15, 1900.

[Mr. Hay directs Mr. Tower to conclude the protocol, the proposition conveyed in dispatch No. 230 having been approved.

Mr. Tower to Mr. Hay.

No. 234.] EMBASSY OF THE UNITED STATES,
St. Petersburg, June 6, 1900.

SIR: I beg leave to inclose to you herewith a draft of the protocol suggested by the Russian Government in the arbitration of the claims arising out of the seizure by Russian armed ships of the American vessels *James Hamilton Lewis*, *C. H. White*, *Kate and Anna*, and *Cape Horn Pigeon*.

This draft includes, as you will observe, the minor corrections of the original language which have been accepted by the Imperial minister for foreign affairs, as well as the qualifying clause added to the phrase: "And the spirit of international agreements applicable to the subject."

As soon as I shall have been instructed by you of your assent to this form of the protocol, I shall notify the Russian Government accordingly and request that the negotiations may further proceed.

I understand that, after the signing of the protocol in due form, it is the desire of the Russian minister for foreign affairs that a note shall be addressed by each Government through its representative at The Hague, upon the same day, to Mr. Asser requesting him to act as arbitrator in these cases.

I await your further instructions in regard to that.

I have, etc.,

CHARLEMAGNE TOWER.

[Inclosure.]

The Imperial Government of Russia and the Government of the United States of America, having agreed to invite Mr. Asser, member of the council of state of the Netherlands, to act as arbitrator in connection with the claim of the schooners *James Hamilton Lewis, C. H. White, Kate and Anna*, their owners, officers, and crews, arising out of their detention or seizure by Russian cruisers on the charge of having been illegally engaged in fur-seal fishing, and the claim of the whaling bark *Cape Horn Pigeon*, her owners, officers, and crew, arising out of her detention or seizure by a Russian cruiser, the undersigned minister for foreign affairs of His Majesty the Emperor of Russia, having been duly authorized thereto, has the honor to make hereby the following declaration in exchange with a similar declaration upon the part of the Government of the United States of America.

The arbitrator shall take cognizance of the claims for indemnity which have been presented to the Imperial Government of Russia by the Government of the United States on behalf of the parties in interest.

The party claimant shall present to the arbitrator, within three months from the date of the exchange of the present note with an identical one of the United States Government, a memorandum in support of its claim, and shall hand immediately a copy thereof to the party defendant.

Within three months from the date of the receipt of the said copy, the party defendant shall present to the arbitrator a contramemorandum, of which it shall hand immediately a copy to the party claimant.

Within three months after the receipt of such contramemorandum the party claimant may, if it sees fit to do so, present to the arbitrator a new memorandum, of which it shall hand immediately a copy to the party defendant; and the latter may also, within three months from the receipt thereof, present to the arbitrator a new contramemorandum, of which it shall hand immediately a copy to the party claimant.

The arbitrator shall be authorized, at the request of either of the parties, to extend for a period of not longer than thirty days, any of the intervals of time hereinabove provided for.

After the exchange of memoranda as herein aforesaid, no communication, either written or verbal, shall be addressed to the arbitrator, unless he shall request from the parties, or either of them, supplementary information to be given in writing.

The party so giving information to the arbitrator shall hand immediately a copy of its communication to the opponent, who may, if he thinks fit to do so, present in writing to the arbitrator within one month from the date of his receipt thereof comments relating to the subject-matter of the said communication, and a copy of such comments shall be sent immediately to the party opponent.

The arbitrator shall have authority to decide all questions that may arise in regard to procedure in the course of the arbitration.

The arbitrator shall render his decisions in all the cases within six months from the date of the delivery to him of the last memorandum or contra memorandum provided for in this agreement.

In his decision, which shall be communicated by him to each of the two Governments interested, the arbitrator following the general principles of international law and the spirit of international agreements applicable to the subject, shall determine as to each claim brought against the Imperial Government of Russia whether such claim is well founded; and, if he decides affirmatively, whether the facts upon which each of the said claims is based have been proven. It is understood and agreed that this stipulation shall have no retroactive force, and that the arbitrator shall apply to the cases now in litigation the principles of international law and of international agreements which were in force and binding upon the parties to this litigation at the moment when the seizures aforementioned took place.

The arbitrator shall fix the amount of any indemnity to be paid by the Russian Government in respect to the claims presented by the parties in interest.

If he wishes to do so, without, however, lessening the obligation incumbent upon the party claimant to prove the damage suffered, the arbitrator may invite each Government to appoint a commercial expert to aid him in this capacity in fixing the amount of the indemnity.

The Imperial Government of Russia declares itself ready, in exchange with a similar agreement upon the part of the Government of the United States, to assume all expenses which may or shall be incurred in the presentation of its side of the case in this matter, and to pay one-half of the compensation of the arbitrator for his services; also to accept as a final judgment the decision pronounced by the arbitrator within the limits of the present agreement, and to submit thereto without any reservation whatsoever.

Any amount awarded by the arbitrator in favor of the claimants, or either of them, shall be paid by the Government of Russia within one year from the date of the award.

Mr. Hay to Mr. Tower.

No. 154.] DEPARTMENT OF STATE,
Washington, June 18, 1900.

SIR: I have to acknowledge the receipt of your No. 230 of the 1st instant, reporting the assent of the Imperial Government to add to the phrase which reads, "the general principles of international law and the spirit of international agreements applicable to the subject," the following phrase:

It is understood and agreed that this stipulation shall have no retroactive force, and that the arbitrator shall apply to the cases now in litigation the principles of international law and of international agreements which were in force and binding upon the parties of this litigation at the moment when the seizures aforementioned took place.

The Department understands that the substantial terms of the protocol have now been fixed by agreement of the two Governments, and I take this opportunity to express my cordial appreciation of the high sense of justice and equity manifested by the Imperial Government in fixing the terms of the arbitration. You will accordingly proceed to the conclusion of the negotiations and to the embodiment of the protocol in definite form.

I am, etc., JOHN HAY.

Mr. Hay to Mr. Tower.

[Telegram.—Paraphrase.]

DEPARTMENT OF STATE,
Washington, June 19, 1900.

[Mr. Hay, referring to his telegram of December 5, 1899, states that the protocol, as forwarded with Mr. Tower's dispatch No. 234, should contain provision for the submission to the arbitrator of evidence which has been presented in support of the claims.]

Mr. Tower to Mr. Hay.

[Telegram.—Paraphrase.]

EMBASSY OF THE UNITED STATES,
St. Petersburg, June 20, 1900.

[Mr. Tower reports the readiness of the Russian Government to sign protocol, and its insistence upon the use of French as the language of arbitration; otherwise communications will be made by Russia in Russian and by us in English.

Refers to dispatch No. 214, of April 14, 1900, and requests instructions in the matter.]

Mr. Hay to Mr. Tower.

[Telegram.—Paraphrase.]

DEPARTMENT OF STATE,
Washington, June 22, 1900.

[Mr. Hay directs that Mr. Tower exercise his discretion in the selection of language for arbitration.]

Mr. Tower to Mr. Hay.

No. 256.] EMBASSY OF THE UNITED STATES,
St. Petersburg, June 26, 1900.

SIR: Upon the receipt on the 20th of June of your telegram, I called upon the Count Mouravieff, imperial minister for foreign affairs, with whom I had already reached the understanding that all evidence heretofore submitted by the Government of the United States to the Russian Government in connection with the seizure by Russian armed ships of American vessels should be presented in full at the arbitration. I informed M. de Mouravieff of the instructions I had just received, which obliged me to ask for a specific provision in the protocol as to the admission of this testimony. He expressed some surprise and reminded me that he had discussed that question with me in detail, and that he had repeatedly declared that the admission of all the testimony on both sides was provided for by the clause in the protocol, which reads as follows:

> The arbitrator shall take cognizance of the claims for indemnity which have been presented to the Imperial Government of Russia by the Government of the United States on behalf of the parties in interest.

But as I answered that my later instructions were direct and that I must therefore request of him an express statement as to the intention and understanding of the Imperial Government in this matter, he agreed to an interchange of notes with me which should completely remove any doubt as to the point raised by the United States, declaring at the same time that Russia is quite as anxious to submit her whole case to the arbitrator as we are, and he appointed the hour of 12 o'clock upon the following day, Thursday, the 21st of June, for the signing by himself and me of the protocol.

His sudden death, however, on the morning of the 21st instant has temporarily checked further proceedings, though the subject is one with which the Count Lamsdorff, the present gerant of the ministry for foreign affairs, is entirely familiar, and I have no doubt the few remaining details will be readily carried out by him.

I received your telegram of the 23d of June authorizing me to use my discretion in regard to making French the language of the arbitration. But as I expect to have the honor of seeing you in Washington within a short time, I will leave that question open, with your permission, until I may be able to discuss it with you personally.

I have, etc.,

CHARLEMAGNE TOWER.

Mr. Peirce to Mr. Hay.

No. 259.] EMBASSY OF THE UNITED STATES,
St. Petersburg, June 29, 1900.

SIR: Referring to Mr. Tower's dispatch, No. 256, of June 26, 1900, regarding the protocol of arbitration upon the Bering Sea seizures, and especially to the last paragraph thereof, a few words of explanation seem to me desirable.

On April 14 last, Mr. Tower, in his dispatch, No. 214, referred to the desirability of the employment of French as the language of the

arbitration. In your reply thereto, No. 150, of May 24, 1900, you referred the ambassador to my dispatch, No. 139, of October 30, 1899.

In that dispatch I reported an interview which I had had with Professor de Martens, permanent counselor of the Imperial Russian minister of foreign affairs, in which he expressed the belief that English would be accepted as the language on our side, the Russian side employing French.

As was pointed out in my dispatch, however, both Professor de Martens and myself made the reservation that our negotiations were subject to the approval of our respective Governments.

On November 19, 1899, a note was received from the Russian foreign office, dated November 5 (17), 1899, insisting upon the importance of employing French as the language of the arbitration and intimating that otherwise it would result in the inconvenience of each of the parties communicating in his own language. Thus Professor de Martens's agreement as to the language fell to the ground. A copy of this note was inclosed in the dispatch of the ambassador, No. 152, dated November 18, 1899.

Speaking in my unofficial capacity as associate counsel for the claimants, I may be permitted to say that the employment by Russia of the Russian language in the arbitration might, in my opinion, be dangerous to the interests of the claimants as well as complicating the proceedings and increasing their expense. For, as it is improbable that the arbitrator is familiar with the Russian language, as certainly the claimants are not, each would have to be provided with a translation, and while the Russian Government might and probably would, by courtesy, furnish Mr. Asser with a translation into French, they would hardly do so as regards us, unless we reciprocated. Thus, either there would be two versions of the Russian case, or we should have to supply a translation into French, which would in effect, so far as the cost of the proceedings is concerned, at any rate, amount to the same thing as if we wrote in French at the outset.

I have, etc., HERBERT H. D. PEIRCE.

Mr. Peirce to Mr. Hay.

No. 260.] EMBASSY OF THE UNITED STATES,
St. Petersburg, June 30, 1900.

SIR: Referring to the ambassador's dispatch, No. 256, of June 26, 1900, and in continuation of my dispatch, No. 259, of June 29, I have the honor to say that I see no reason to anticipate any difficulty in finally settling the few remaining details of the protocol of arbitration regarding the seizures of American vessels in the North Pacific Ocean.

The protocol makes no provision for the manner of presentation to the arbitrator of the various memoranda and counter memoranda, which will no doubt be subject to further understanding.

From conversations which I had with the late Count Mouravieff and Professor de Martens, some time ago, I am inclined to believe that it is not impossible that the Russian Government may hold with some tenacity to the view that all communications should be officially delivered to the arbitrator, and that they will consider the respective legations at The Hague as appropriate channels through which such communications should be made.

In case this question should arise, I would like to be provided with your instructions upon this point, in order that there may be no delay in the proceedings on this account.

I have, etc., HERBERT H. D. PEIRCE.

Mr. Hay to Mr. Tower.

No. 159.] DEPARTMENT OF STATE,
Washington, July 3, 1900.

SIR: Referring to your No. 214, of April 14 last, I inclose herewith for your information copy of a letter[1] from Mr. E. W. S. Tingle, relating to the appointment of counsel to represent the Government of the United States in the arbitration proceedings with Russia. I have received similar communications from the other claimants in the cases to be submitted for arbitration, and I have given my consent to the appearance of Mr. Peirce as counsel for the Government of the United States in the affair. This has been done with the understanding that for the services thus rendered by counsel no compensation shall be paid by the Government. You are therefore authorized, if it should become necessary to do so, to inform the Imperial Government that this Government's interests in said arbitration will be represented by Mr. H. H. D. Peirce as its counsel.

I am, etc., JOHN HAY.

Mr. Hay to Mr. Peirce.

No. 167.] DEPARTMENT OF STATE,
Washington, July 17, 1900.

SIR: I have to acknowledge the receipt of your No. 260, of the 30th ultimo, inquiring as to the method of presentation to the arbitrator in the sealing and whaling cases of the necessary communications.

In reply I have to say that the Department perceives no objections, unless you do, to the view that all communications in the Bering Sea cases should be officially delivered to the arbitrator, and that the respective legations of the United States and Russia at The Hague be considered the appropriate channels through which such communications should be made. In the event that view prevails, which you may adopt unless you see objections to it, it would be convenient to stipulate that a duplicate of all such official communications should be delivered at the same time for the opposing counsel, and it would serve your convenience, and perhaps the convenience of the counsel for the Russian Government, if the United States Embassy at St. Petersburg and the Russian foreign office acted respectively as the medium for the delivery of such duplicates.

I am, etc., JOHN HAY.

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[1] Not printed.

Mr. Peirce to Mr. Hay.

[Telegram.—Paraphrase.]

EMBASSY OF THE UNITED STATES,
St. Petersburg, August 2, 1900.

[Mr. Peirce reports the receipt, on the 1st instant, from the Russian minister for foreign affairs, of the final draft of the protocol of arbitration of Bering Sea claims of citizens of the United States, with a clause inserted admitting the introduction of all evidence which has already been presented, or which has appeared in the correspondence between the official representatives of the two high contracting powers; and that a clause has been added providing that the decision of the arbitrator shall be rendered in French, that language being recognized as the official language of the arbitration. With the exceptions noted the draft of the protocol is identical with that inclosed with dispatch No. 234, of June 6. As the Russian Government is ready to sign the protocol at once, Mr. Peirce asks if he is authorized by the Department to sign.]

Mr. Peirce to Mr. Hay.

No. 276.] EMBASSY OF THE UNITED STATES,
St. Petersburg, August 3, 1900

SIR: I have the honor to acknowledge the receipt of your dispatch, No. 159, of July 3, informing the ambassador of my selection as counsel for the Government of the United States in the arbitration upon the seizures of certain American vessels in the Bering and Okhotsk seas by the Russian authorities.

Deeply appreciating the trust reposed in me by this selection, and with profound gratification that my efforts on behalf of these claimants during the past six years has been so satisfactorily recognized, I have delayed replying to this dispatch in the daily expectation of being able in my reply to report material progress regarding the protocol of arbitration.

I now have much satisfaction in confirming my telegram[1] of yesterday's date, a copy of which I append upon the overleaf, announcing the fact that on Wednesday last, the regular reception day of Count Lamsdorff for the diplomatic corps, his excellency handed me the final draft of the protocol of arbitration, into which a clause had been inserted providing for the admission in the testimony presented to the arbitrator of all evidence previously submitted or contained in the correspondence between the representatives of the two Governments.

The translation of the text of the Russian draft,[2] which is in French, which I inclose, gives this clause in its entirety, as well as the final paragraph, which I referred to in my telegram, which states that—

> French being recognized as the official language of the arbitration, the decision of the arbitrator should be rendered in that language.

In regard to this, I had presented to Count Lamsdorff as strong a plea as I was able to obtain an agreement, specified in the protocol,

[1] Printed ante.

[2] Final draft printed, page 883.

that the language employed by the United States, in presenting its cases, should be English, the Russian replies being in French.

In handing me the draft of the protocol Count Lamsdorff remarked that the clause in question referred to the decision of the arbitrator, but that it was his interpretation of it that each side could use its discretion regarding language. I then asked him if the United States should present its memoranda in English, whether the Russian Government would reply in French. To this he replied that he supposed it would, as the arbitrator does not speak or read Russian, but I was unable to get him to absolutely and explicitly commit himself on this point. He was, however, explicit in categorically replying in the affirmative to my question whether if the American side is presented in French the Russian reply would be in the same language.

In view of the specific stipulation in the protocol that copies of the communications made by the respective parties to the arbitrator shall be furnished to the other side, I can not see how a translation of a Russian memorandum could be given to the arbitrator without furnishing a copy of the translation to the American side. It, however, seems to me to be on the whole better that the memoranda should all be in French, as we shall thereby avoid any danger of complication on this account, and as I have been able to make an arrangement with a competent translator to translate the memoranda into French at the rate of 3 roubles (about $1.50) a page, the expense to the various claimants will not be excessive. According to my estimate, it will be about $60 a case, on an average.

I have now finished the English draft of the memorandum presenting each of the cases, and these have, in two of them, viz, the *Cape Horn Pigeon* and the *James Hamilton Lewis*, been submitted to the claimants and returned with their approval. They are now being recopied and will be forwarded to you for examination and amendment very shortly. The case of the *C. H. White* has been forwarded to the claimants, who have not yet replied, and that of the *Kate and Anna* is now being copied from my first draft.

Replying to your dispatch, No. 167, of July 17, 1900, the receipt of which I have the honor to acknowledge, I beg to say that the suggestions therein contained regarding the presentation to the arbitrator seem to me to completely meet the case, and will, I have no doubt, be acceptable to the Russian Government. The stipulation calling for the delivery of a duplicate of all communications made by either party to the arbitrator, suggested by you, should certainly be agreed upon, and this will still further strengthen the position that translations presented to the arbitrator must be furnished to the counsel for the United States.

The suggestion that this embassy and the Russian foreign office be the agreed medium for the delivery of the duplicates is both in the line of convenience and dispatch and will be duly acted upon in arranging for the procedure, regarding which, doubtless, a separate protocol will be found advisable.

Referring to the remarks contained in your dispatch, No. 154, of June 18, it is an interesting fact, worthy of remark, that the present is, I believe, the first arbitration to which Russia has ever been a party.

I have, etc.,

HERBERT H. D. PEIRCE.

Mr. Adee to Mr. Peirce.

No. 170.] DEPARTMENT OF STATE,
Washington, August 4, 1900.

SIR: I confirm your telegram[1] of the 2d instant.

Judge Embry, attorney in the case of the *C. H. White*, thinks that some of his evidence is wanting to the proof of his case. He will write to you the particulars.

Whenever the evidence is completed in all the cases, and has been presented in such form as to make it admissible and competent for the consideration of the arbitrator, you may sign the protocol.

I am, etc.,

ALVEY A. ADEE,
Acting Secretary.

Mr. Peirce to Mr. Hay.

[Telegram.—Paraphrase.]

EMBASSY OF THE UNITED STATES,
St. Petersburg, August 24, 1900.

[Mr. Peirce acknowledges the receipt of instruction No. 170, and the letter of Judge Embry, and states that questions as to insufficient evidence are covered by the addition to the third paragraph of the draft of the protocol which accompanied his dispatch No. 276, of the following: "As well as all evidence relating to the questions in litigation," which has been agreed to by the ministry. Claimants can, therefore, complete evidence after the signing of the protocol. Mr. Peirce fears that embarrassment may be caused by great delay.]

Mr. Adee to Mr. Peirce.

[Telegram.—Paraphrase.]

DEPARTMENT OF STATE,
Washington, August 25, 1900.

[Mr. Adee authorizes Mr. Peirce to sign the protocol with the addition indicated in his cablegram of the 24th instant.]

Mr. Peirce to Mr. Hay.

[Telegram.—Paraphrase.]

EMBASSY OF THE UNITED STATES,
St. Petersburg, September 8, 1900.

[Mr. Peirce reports the signature at noon this day of the protocol of the arbitration of the claims of United States citizens for the seizure by Russia of vessels in the North Pacific.]

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[1] Printed ante.

Mr. Peirce to Mr. Adee.

No. 310.] EMBASSY OF THE UNITED STATES,
St. Petersburg, September 8, 1900.

SIR: I have the honor to confirm my telegram[1] of this day, a copy of which I append upon the overleaf, informing you that the protocol of the arbitration of the claims of American citizens for the seizure of their vessels in the North Pacific Ocean by Russia was signed at noon to-day.

I inclose herewith a copy of the protocol as signed by me, except that in the original the text was given in French only. I have caused the English and French to be typewritten in parallel columns in the copy for convenience in reference.

The final paragraph states that the protocol has been signed in four copies. This is to be interpreted as meaning two copies on each side.

After signing the protocol it was agreed to between Count Lamsdorff, who signed for the Russian Government, and myself verbally—

1. That the various memoranda and contramemoranda shall be handed to the arbitrator by the respective ministers plenipotentiary of the two signatory powers at The Hague.

2. That the respective ministers plenipotentiary aforesaid shall simultaneously, as a preliminary measure, make inquiries through the medium of the minister for foreign affairs of the Netherlands whether, if Mr. Asser is invited to act as arbitrator in the premises, he will consent to do so, and what amount of compensation he would consider adequate.

3. That if Mr. Asser intimates that he will consent to act as arbitrator, if invited, that then the aforesaid respective ministers plenipotentiary shall simultaneously invite Mr. Asser to act as arbitrator upon the claims and shall convey the invitation simultaneously, in identical notes to be drawn up after conference between them and compared.

I have the honor, therefore, to respectfully request that his excellency the minister plenipotentiary of the United States at The Hague be requested to confer with the Russian minister plenipotentiary at the same court, with a view to agreeing upon a time for simultaneously making these preliminary inquiries, and upon receipt of an affirmative answer and after approval by the respective Governments, for the draft and simultaneous presentation of the note inviting Mr. Asser to act as arbitrator.

I have, etc., HERBERT H. D. PEIRCE.

[Inclosure.]

Le Gouvernement des Etats-Unis d'Amérique et le Gouvernement Imperial de Russie, s'étant mis d'accord pour inviter Mr. Asser, Membre du Conseil d'Etat des Pays-Bas, à prononcer comme arbitre dans le différend relatif aux affaires des schooners *James Hamilton Lewis, C. H. White, Kate and Anna*, leurs armateurs, propriétaires, officiers et équipages, arrêtés ou saisis par des croiseurs Russes sous prévention de s'être livrés à la chasse illicite des phoques à fourrure, et à l'affaire du navire baleinier *Cape Horn Pigeon*, ses armateurs, propriétaires, officiers et équipage arrêté ou saisi par un vaisseau Russe, le soussigné, Chargé d'Affaires des Etats-Unis d'Amérique, dûment autorisé à cet effet, a l'honneur par la présente note de déclarer ce qui suit, en échange d'une déclaration identique du Gouvernement Impérial de Russie.

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[1] Printed ante.

L'arbitre aura à prendre connaissance des réclamations d'indemnité qui ont été présentées au Gouvernement Impérial de Russie par le Gouvernement des Etats-Unis au nom des ayants-droits.

Il est bien entendu que cette clause doit être interprétée comme admettant la présentation, de part et d'autre, dans le témoignage soumis à l'arbitre, de toute preuve qui a déjà été présentée ou qui a paru dans la correspondance entre les représentants officiels des deux Hautes Puissances contractantes, aussi bien que toute évidence se rapportant aux questions en litige.

La Partie demanderesse remettra à l'arbitre dans un délai de trois mois à partir de l'échange de la présente note contre une note identique du Gouvernement Impérial de Russie, un memorandum à l'appui de sa demande, et en fera parvenir immédiatement une copie à la Partie défenderesse.

Dans un délai de trois mois après la réception de la dite copie, la Partie défenderesse remettra à l'arbitre un contre-memorandum dont elle fera parvenir immédiatement une copie à la Partie demanderesse.

Endéans trois mois après la réception du contre-memorandum susmentionné, la Partie demanderesse pourra, si elle le juge utile, remettre à l'arbitre un nouveau memorandum, dont elle fera parvenir immédiatement une copie à la Partie défenderesse, laquelle pourra également, endéans trois mois après la réception de cette copie, remettre à l'arbitre un nouveau contre-memorandum, dont elle fera parvenir immédiatement une copie à la Partie demanderesse.

L'arbitre est autorisé à accorder à chacune des parties qui le demanderait, une prorogation de trente jours au maximum par rapport à tous les délais mentionnés plus haut.

Après l'échange des memorandums susindiqués, aucune communication ni écrite ni verbale ne pourra être adressée à l'arbitre, à moins que celui-ci ne s'adresse lui-même aux Parties ou à l'une d'entre elles pour obtenir des renseignements supplémentaires par écrit.

La Partie qui donnera un renseignement à l'arbitre fera parvenir immédiatement copie de sa communication à l'autre Partie, et celle-ci pourra, si bon lui semble, endéans un mois après la réception de cette copie, transmettre par écrit à l'arbitre des observations au sujet du contenu de cette communication; ces observations seront immédiatement communiquées en copie à la Partie adverse.

Il appartiendra à l'arbitre de statuer sur toutes les questions qui pourraient surgir relativement à la procédure dans le cours de l'arbitrage.

L'arbitre rendra sa sentence dans toutes les causes de l'arbitrage dans un délai de six mois à partir de la réception du dernier memorandum ou contre-memorandum mentionné dans ce protocole.

Dans sa sentence qui sera communiqué par lui aux deux Gouvernements intéressés, l'arbitre en se réglant sur les principes généraux du droit des gens et sur l'esprit des accords internationaux applicables à la matière, devra décider à l'égard de chaque réclamation formulée à la charge du Gouvernement Impérial de Russie, si elle est bien fondée, et, dans l'affirmative, si les faits sur lesquels chacune de ces réclamations est basée, sont prouvés.

Il est bien entendu que cette stipulation n'aura aucune force rétroactive, et que l'arbitre appliquera aux cas en litige les principes du droit des gens et les traités internationaux qui étaient en vigueur et obligatoires pour les Parties impliquées dans ce litige, au moment oú la saisie des navires susmentionnés a eu lieu.

Dans ce cas l'arbitre fixera la somme de l'indemnité qui serait due par le Gouvernement Russe pour le compte des réclamations présentées par les ayants-droits.

Sans préjudice de l'obligation incombant à la Partie demanderesse de justifier les dommages soufferts, l'arbitre pourra, s'il le juge opportun, inviter chaque Gouvernement à désigner un expert commercial pour l'aider, en sa dite qualité, à fixer le montant de l'indemnité.

Le Gouvernement des Etats-Unis se déclare prêt, en échange d'un engagement semblable du Gouvernement Impérial de Russie, à prendre à son compte toutes les dépenses qui seraient faites ou auraient été faites pour soutenir son point de vue dans cette affaire, à payer la moitié de la compensation à l'arbitre pour ses offices, de même qu'à accepter comme jugement en dernier ressort la décision prononcée par l'arbitre dans les limites du présent accord et à s'y soumettre sans aucune réserve.

Toute somme décrétée par l'arbitre aux réclamants, ou à l'un d'entre eux, sera payée par le Gouvernement Impérial Russe au Gouvernement des Etats-Unis dans un délai d'un an à partir de la date du décrêt.

La langue française étant reconnue comme la langue officielle de l'arbitrage, la sentence arbitrale devra être rendue dans cette langue.

Fait en quatre exemplaires à St. Petersbourg, le 26 Aout (8 Septembre), mil neuf cent.

HERBERT H. D. PEIRCE.
LAMSDORFF.

[Translation.]

The Government of the United States of America and the imperial Government of Russia, having agreed to invite Mr. Asser, member of the council of state of the Netherlands, to act as arbitrator in connection with the claim of the schooners *James Hamilton Lewis, C. H. White, Kate and Anna,* their charterers, owners, officers, and crews, arising out of their detention or seizure by Russian cruisers on the charge of having been illegally engaged in fur-seal fishing, and the claim of the whaling bark *Cape Horn Pigeon,* her charterers, owners, officers, and crew, arising out of her detention or seizure by a Russian vessel, the undersigned chargé d'affaires of the United States of America, having been duly authorized thereto, has the honor to make hereby the following declaration in exchange with a similar declaration upon the part of the imperial Government of Russia.

The arbitrator shall take cognizance of the claims for indemnity which have been presented to the imperial Government of Russia by the Government of the United States on behalf of the parties in interest.

It is understood and agreed that this provision is to be construed as permitting the introduction on both sides into the testimony submitted to the arbitrator of any and all evidence which may have already been presented or appeared in the correspondence between the official representatives of the two high contracting powers, as well as all evidence relating to the questions in litigation.

The party claimant shall present to the arbitrator, within three months from the date of the exchange of the present note with an identical one of the imperial Government of Russia, a memorandum in support of its claim, and shall hand immediately a copy thereof to the party defendant.

Within three months from the date of the receipt of the said copy the party defendant shall present to the arbitrator a contramemorandum, of which it shall hand immediately a copy of the party claimant.

Within three months after the receipt of such contramemorandum the party claimant may, if it sees fit to do so, present to the arbitrator a new memorandum, of which it shall hand immediately a copy to the party defendant, and the latter may also, within three months from the receipt thereof, present to the arbitrator a new contramemorandum, of which it shall hand immediately a copy to the party claimant.

The arbitrator shall be authorized, at the request of either of the parties, to extend for a period of not longer than thirty days any of the intervals of time hereinabove provided for.

After the exchange of memoranda as herein aforesaid no communication, either written or verbal, shall be addressed to the arbitrator, unless he shall request from the parties, or either of them, supplementary information to be given in writing.

The party so giving information to the arbitrator shall hand immediately a copy of its communication to the opponent, who may, if he thinks fit to do so, present in writing to the arbitrator, within one month from the date of his receipt thereof, comments relating to the subject-matter of the said communication, and a copy of such comments shall be sent immediately to the party opponent.

The arbitrator shall have authority to decide all questions that may arise in regard to procedure in the course of the arbitration.

The arbitrator shall render his decisions in all the cases within six months from the date of the delivery to him of the last memorandum or contramemorandum provided for in this agreement.

In his decision, which shall be communicated by him to each of the two governments interested, the arbitrator, following the general principles of international law and the spirit of international agreements applicable to the subject, shall determine as to each claim brought against the imperial Government of Russia whether such claim is well founded; and, if he decides affirmatively, whether the facts upon which each of the said claims is based have been proven.

It is understood and agreed that this stipulation shall have no retroactive force, and that the arbitrator shall apply to the cases now in litigation the principles of international law and of international agreements which were in force and binding upon the parties to this litigation at the moment when the seizures aforementioned took place.

The arbitrator shall fix the amount of any indemnity to be paid by the Russian Government in respect to the claims presented by the parties in interest.

If he wishes to do so without, however, lessening the obligation incumbent upon the party claimant to prove the damage suffered, the arbitrator may invite each Government to appoint a commercial expert to aid him in this capacity in fixing the amount of the indemnity.

The Government of the United States declares itself ready, in exchange with a similar agreement upon the part of the imperial Government of Russia, to assume all expenses which may or shall be incurred in the presentation of its side of the case in

this matter and to pay one-half of the compensation of the arbitrator for his services; also to accept as a final judgment the decision pronounced by the arbitrator within the limits of the present agreement and to submit thereto without any reservation whatsoever.

Any amount awarded by the arbitrator in favor of the claimants, or either of them, shall be paid by the imperial Government of Russia to the Government of the United States within one year from the date of the award.

French being recognized as the official language of the arbitration, the decision of the arbitrator should be rendered in that language.

Done at St. Petersburg, August 26 (September 8), 1900, in four copies.

HERBERT H. D. PEIRCE.
LAMSDORFF.

Mr. Hill to Mr. Peirce.

No. 185.] DEPARTMENT OF STATE,
Washington, September 25, 1900.

SIR: I have received your No. 310 of the 8th instant, inclosing a copy of the convention providing for the arbitration of the claims of the American vessels therein named against Russia.

A copy of the dispatch and of the English text of the convention has been sent to the minister of the United States to the Netherlands, with instructions to act concurrently with the Russian minister to that Government in endeavoring to secure the acceptance by Mr. Asser, member of the Netherlands council of state, of the office of arbitrator, and to inform the Department by cable as soon as Mr. Asser's answer may have been given.

I am, etc.,

DAVID J. HILL,
Acting Secretary.