COUNTER MEMORANDUM

OF THE

DEFENDANT PARTY TO THE HONORABLE ARBITRATOR, MR. T. M. C. ASSER, COUNSELOR OF STATE OF THE KINGDOM OF HOLLAND.

IN THE ARBITRATION FOR THE PURPOSE OF ADJUSTING THE DIFFERENCES BETWEEN THE GOVERNMENT OF THE UNITED STATES, CLAIMANT PARTY, AND THE IMPERIAL RUSSIAN GOVERNMENT, DEFENDANT PARTY, RELATING TO THE DETENTION AND SEIZURES OF AMERICAN VESSELS *CAPE HORN PIGEON*, *JAMES HAMILTON LEWIS*, *C. H. WHITE*, AND *KATE AND ANNA*.

COUNTER MEMORANDUM.

The Imperial Russian Government, having taken cognizance of the data contained in the memorandum presented by the United States Government to the honorable arbitrator, Mr. Asser, has the honor to formulate the following observations relative to the four cases in question:

First case, *Cape Horn Pigeon.*

Second case, *James Hamilton Lewis.*

Third case, *C. H. White.*

And finally, fourth case, *Kate and Anna.*

The defendant party recognizes the party claimant's demands for indemnity for material losses as justified to a certain extent in the Cases I and IV, but rejects from the very foundation the claims which relate to Cases II and III.

As to the question of interest upon the total amount of indemnity which may be due, the defendant party does not consider that it has the right to raise objections, and, in accordance with the customs obtaining in its country, is ready to consent to a tax of 6 per cent per annum.

Before proceeding to examine in detail the four cases under discussion, the defendant party believes it its duty to state the conditions under which these cases occurred.

The question of the protection of seals from destruction, with which they were threatened by marauding vessels, whether on the high seas or in territorial waters, has been for some time a matter of particular solicitude to the Governments of Russia and of the United States of America as the possessors, in the islands of Commander, Pribilof, and Tuleny, of the only landing places at present known of these precious animals.

To this end the Cabinet of Washington was obliged, long before the occurrence of the four cases in question, to treat with the Government of Great Britain because of the fact that seal fishing was specially carried on by Canadians.

The negotiations which took place upon this subject in 1887, in which the Russian Government also took part, did not bring about the desired result.

However, in 1890 the conferences were renewed between England and the United States of America, the latter power demanding that her jurisdiction be recognized far beyond territorial waters, which demand was not admitted by the London Cabinet. An agreement between the two Governments was concluded on the 15th of June, 1891. It was entitled "Agreement for a modus vivendi between the United States and Great Britain in relation to the fur-seal fisheries in Bering Sea."

By virtue of this agreement the two contracting parties engaged to interdict their subjects reciprocally, and as much as possible to pre-

vent them from killing seals during one year—that is to say, until the end of May, 1892—either in that part of the Bering Sea situated to the east of the line of demarcation established by the treaty of 1867 between Russia and the United States or on the Pribilof Islands, with the exception that 750 seals might be killed to supply the needs of the Aleutian population of these islands. Persons and vessels guilty of infringement of this interdiction were liable to seizure.

In concluding this agreement the object of the two powers was to pave the way for future negotiations as well as to be able to procure on the spot necessary data upon the subject of the conditions under which this industry was or might be carried on. This data would serve as material for the solution of differences arising between the two countries, which would have to be submitted to arbitration, as article 4 of the agreement also provided for.

The necessity for exceptional measures on this subject was so well recognized at this time by the interested Governments that the London Cabinet, through the medium of its representative at St. Petersburg, requested the Imperial Government to interdict Russian subjects during the existence of the Anglo-American agreement from sealing beyond the limits of the line of demarcation fixed by this agreement, and even to authorize the English naval authorities to seize vessels under the Russian flag which might infringe upon this interdiction.

This proposition was not accepted by the Imperial Government, which for its part did not fail to take measures for the protection of seals in the western part of Bering Sea, and accentuated this determination by sending a Russian man-of-war to those parts.

Meantime in the proximity of the Russian coasts there began an influx of foreign vessels engaged in poaching, and it was therefore that in 1892 a cruiser of the Imperial navy, furnished with instructions ad hoc, was sent to protect the Russian interests engaged in the preservation of the seal herds. From subsequent data it appears that, according to the estimates of the Russian concessionary company as to the sealing rights in these parts, there were killed in 1891 by poaching vessels 60,000 seals, of which 10,000 were within the limits of Russian territorial waters. American and English vessels had participated equally in this poaching.

As for the measures taken by the American Government on its part during the preceding years against vessels engaged in poaching in waters which it considered under its jurisdiction, it will suffice to refer, among others, to the Annex C of the award of the Paris tribunal of arbitration of the 29th of February, 1892, and in which are mentioned a certain number of seizures made by American cruisers, certain of which took place at considerable distance from the coast, even up to 115 miles.

In presenting the above explanations, to which may be added the facts developed further on in each particular case, the defendant party looks to the high equity of the arbitrator to decide these cases, which occurred, as a matter of fact, in a locality over which the claimant demands the right of jurisdiction far beyond the waters surrounding her own coasts. Under these conditions the defendant party, who had at that time taken such measures as it deemed necessary, was justified in all good faith in believing that the present claimant could not contest the legitimacy of actions having for their object the protection of interests then considered as common.

FIRST CASE.

Seizure of the American whaling bark Cape Horn Pigeon.

The American whaler *Cape Horn Pigeon* was seized in the Okhotsk Sea, and released at Vladivostok under the following circumstances:

On the 29th of August (10th September), 1892, at 3 a. m., in 46° 33′ latitude north, and 146° 30′ longitude east, from aboard the schooner *Maria*, seized by the Russian man-of-war *Vitiaz* for illegal seal fishing, and sailing under command of Lieutenant von Cube, was sighted the whaling bark *Cape Horn Pigeon* lying to, and which, at the approach of the schooner, hoisted red and white lights. Lieutenant von Cube knew that in the western waters of the Pacific Ocean there were vessels which remain at certain distance from the seal fisheries during the season, and fill the roll of store ships, receiving the cargoes of schooners which engage in that industry and which they furnish with provisions. From the appearance and the conduct of the *Cape Horn Pigeon*, the commander of the *Maria* took her for one of these vessels. On questioning Captain Scullun, Lieutenant von Cube learned that the lights hoisted were a signal agreed upon for the American schooner *Mary H. Thomas*, which was engaged in whaling and sealing, and that Captain Scullun himself had been emphatically refused permission by the Russian authorities to engage in whale fishing in the bays of the Sea of Okhotsk. He moreover ascertained other details concerning the relations of said bark with the sealing vessels off the Tuleny Island. He found upon the bark the remains of two whales killed, and he was satisfied by the points indicated upon the navigation chart that the *Cape Horn Pigeon* had entered the gulfs of Aniva and Patience, lingering during the hunt principally in the proximity of the Russian coast.

By reason of this data the Russian commander suspected the American vessel of being engaged in an illegal industry, but finding it impossible to search the vessel and thus confirm the fact upon the spot, he decided to conduct the bark to Vladivostok; to this end he transferred to said bark his own small crew of 12 men, and took with him Captain Scullun. The bark's crew, composed of about 30 men, he ordered to repair to Vladivostok also, aboard the schooner *Maria*. (See detailed account of the incident, Exhibits Nos. I and II.) When the two vessels arrived at the port of Vladivostok a special commission was immediately appointed by an order of the commander of the Pacific squadron, which, having inspected the bark *Cape Horn Pigeon*, examined the log book and other documents relating to the case, acknowledged the measures taken by Lieutenant von Cube to be entirely regular. It was shown among other things that the *Cape Horn Pigeon* had been in communication at sea with the schooner *Mary H. Thomas* and had begun the chase of the first whale at a point 5 miles off the island of Askold; but in the absence of duly established proofs of

incriminating facts, the commission did not find sufficient motives for the confiscation of the detained vessel (Exhibit III). In consequence of this finding by the above-mentioned commission, and in virtue of a decision by superior authority, the American bark was released and restored to Captain Scullun on the 15th of September, 1892 (Exhibit IV).

From the preceding it appears that Lieutenant von Cube, having in view the governmental instructions to protect the seals from the operations of poaching vessels in that region, and having strong presumptions against a vessel apparently suspicious, had no alternative but the fulfillment of the duty imposed upon him to subject the American bark to a preventive detention pending an exhaustive examination of the matter at the nearest port. Nevertheless, admitting that in the present case a regrettable error has been made, and that in connection with a friendly power the Russian Government recognized its responsibility to grant an equitable pecuniary indemnification for the material losses caused to these alien subjects by acts of agents of the Government, as has been declared on several occasions to the American Government. (See annexes to Memorandum of the United States, Exhibit I, etc.) The principle of international right regarding the liberty of the high seas advanced by the party claimant has no claim to consideration here, and the question is limited solely as to the extent of indemnity which remains to be assigned to the injured parties for the temporary arrest of the bark *Cape Horn Pigeon*.

AMOUNT OF INDEMNITY.

Passing to the question of the amount of indemnity, the defendant party finds it necessary to observe here that in the first place the chief grounds for examination as to the justice of the claims presented by the interested parties should be that furnishing the total of loss sustained, which was presented by Captain Scullun on the 15th of September, 1892, and which was sustained by the United States legation (American Memorandum, Exhibits P, Pa, etc.). The amount of indemnity claimed was then established under the still existing impression of facts just as they occurred, and thus merits more consideration than the claim advanced about eight years after the events had transpired.

Regarding the details of the claim, the defendant party deems it proper to submit the following:

1. The chief point is manifestly the one which relates to the claim for indemnity for the loss of profit which the whaler might have realized from the catch—that is to say, from the taking of five or six whales valued at $45,000. It does not appear to be reasonable to enter at this time into the quesion of these hypothetical estimates as to the possible number of whales killed at certain periods of the year, and of the possible profits which might have been realized by the bark's crew from certain accessory products of the catch of these animals eight years previous. Moreover, only the depositions of persons interested, or the testimony of persons known to them and obtained outside of judicial course, are admitted as proofs in the matter. The defendant party could not recognize that there is any just basis for the claims on this point. Although, according to the generally accepted views of civil rights, the indemnification for injury done to the property of others relates not only to the material damage (damnum emergens),

but also to the loss of profit (lucrum cessans); the latter must be understood in the sense of deprivation of a fixed revenue or of a certain profit to be derived from holdings in question (for example, such as the appropriation of another's goods, or of the damage occasioned to a vessel laden and on the point of departure). In the present case it is a question of the profit of an enterprise liable to risks, which may at any moment terminate in the loss to those who participate in said enterprise. It would be impossible to place an exact valuation several weeks previous upon that, whereon the result depends upon a fortuitous success; when starting upon a hunt exposed to dangers, one could not estimate in advance the product of said hunt; one could not affirm that another might not have the benefit of these very same whales which the *Cape Horn Pigeon* alone hoped to capture. As to the statistical deductions advanced, and which extend over a long period, they do not seem adapted to a civil proceeding relating to a precise fact as in the present case.

Nor do the arguments of the party claimant seem justified, either by the precedents cited and which relate to cases arising under other conditions. To the present case might better be likened the decision of the arbitration tribunal of 1872 in the Alabama claims, decision upon which was established the general principle that claims for indemnification for indirect damages can not be allowed. This incontestable principle of jurisprudence was practically applied in 1895 in a similar case, that is to say, in the case of a claim brought against the Russian Government by the British Government for the seizure of the Canadian schooners *Willie Mac Gowars* and *Ariel*. The Russian Government in declaring a willingness to indemnify the actual loss caused by the seizure of the American bark *Cape Horn Pigeon* rejected all responsibility for hypothetical losses occasioned by the vessel's temporary cessation from whale fishing (note of minister of foreign affairs of Russia, June 12, 1893, Exhibit I). For the above-mentioned reasons the demands of the party claimant looking to obtaining indemnification of $45,000 for loss of catch should not be granted.

Still less justified seems the demand for indemnity of $31,000 for enforced service of 31 men of crew of *Cape Horn Pigeon* aboard the schooner *Maria*, and for the bad treatment to which they were subjected on shore by the authorities of Vladivostok. In the first place, it must be stated that therein is a repetition of claim for indemnity by the same crew for service rendered in conducting the schooner *Maria* to Vladivostok ($1,000 to $1,200), a claim which was originally filed by the interested parties in 1892. But the chief objection is that all of the allegations on the subject of acts of violence and cruelty committed against these aliens rest solely in complaints made by the parties concerned without the requisite proofs. The Russian Government protests energetically against these allegations, and refers in this particular to the view taken by the representative of the United States himself. (Memorandum, Exhibit K.) Suffice it to recall that when the two vessels met at sea the American crew was twice and one-half as numerous as that of the Russian vessel; that Captain Scullun refused the lodging offered him in the town, presenting a bill for the entertainment of his men on shore, and that advice of the incident of the *Cape Horn Pigeon* was at once sent to St. Petersburg. Moreover, as appears from the list joined to the memorandum (Exhibit C) among the crew of the *Cape Horn Pigeon*, there were, besides the American

citizens, Spaniards, Portuguese, English, Danes, Dutch, Swedes, and Germans, in defense of whose rights their respective Governments should intervene. However that may be, such claims would require positive proofs, which in the present case are absolutely lacking.

Relative to the two points above mentioned it may be remarked that they represent the greater part of the indemnity claimed, and that still more than $40,000 interest for the nine years must be added. It would also be well to examine that claim with particular care, without relieving the party claimant from the onus probandi required upon all the points.

3. As to the claim for indemnification of the bark *Cape Horn Pigeon* for conducting the schooner *Maria* to Vladivostok, it is admitted as just to the amount of $1,000 conformedly with a declaration made at the time by Captain Scullun, but not to the amount to-day unduly augmented to the sum of $1,200.

4. Neither does the defendant party contest the party claimant's demand of $200 for living expenses; $210 for lodgings, and $50 for the personal expenses of the captain.

Regarding the total amount for general expenses of the shipowners, estimated at $3,040, the defendant party maintains the opinion already expressed, viz, that the claimants should be content to receive, as general surplus, a sum of $1,040, since they have not presented vouchers covering this point (telegrams, correspondence, etc.), and that at present they refer still to expenses for the future conducting of the case; that is to say, they recognize themselves that their estimates were not entirely accurate.

5. Finally, the addition of legal interest, as has already been shown in the counter-memorandum, is recognized as perfectly regular from the moment when the party claimant may exact the payment of the principal that may be due.

There remains still one observation to be made. Although the party claimant has reserved liberty of future action, still in proposing lately to close the affair by a payment of $42,000, without interest (instead of $124,278 at present claimed), he manifestly expressed a doubt as to the convincing character and the accuracy of the estimates presented by him (note of 17th January (2d February) 1899, Memorandum, Exhibit T).

CONCLUSION.

Conformably with the preceding, the defendant party acknowledges its obligation to pay by way of indemnity the sum of $2,500 ($100, $200, $210, $50, $1,040) with interest at 6 per cent from the 15th (27) September, 1892, and requests that the other claims be rejected.

ANNEXES.

Protocol of the seizure of the bark *Cape Horn Pigeon*, dated the 29th August (10th September), 1892. II—Report of the Russian officer having command of the schooner *Maria*, dated 7th September, 1892. III—Proceedings of the commission appointed by order of the commander of the Pacific squadron, dated 11th September, No. 100; and IV—Report of the commander of the cruiser *Vitiaz*, dated 15th September, 1892, No. 389.

The defendant holds the originals of these documents at the disposition of the arbitrator.

EXHIBIT I.

PROTOCOL.

On the 29th of August (September 10), 1892, at 3 a. m., in 46° 33′ latitude north and 146° 30′ longitude east, on board the schooner *Maria*, under command of Lieutenant von Cube, a bark was sighted, lying to, which, upon the approach of the schooner, hoisted a white light and under this a red light. An officer was at once sent from the schooner in a ship's boat to request the captain of the bark to report aboard the schooner with his sailing papers. When the captain, Thomas Scullun, had been questioned and his papers examined, it was found that the American bark *Cape Horn Pigeon* was engaged in whaling in the Sea of Okhotsk, and moreover, from the points indicated on the chart, it was evident that she had entered the Gulf of Aniva and of Patience, and that her general course was in a direction to the southeast of the island of Tuleny. The captain of the bark declared that he had mistaken the Russian schooner for the American schooner *Mary H. Thomas*, which was engaged in whaling and sealing, that he was waiting to communicate with her, and to this end had hoisted the signal agreed upon. It was announced to the captain of the bark that he would be conducted with said bark to Vladivostok for investigation into the question of his right to engage in such industry and to sojourn in our waters.

The crew of the American bark was transferred to the schooner, and the crew of the Russian schooner to the bark; Captain Scullun, with his servant and steward, were left aboard the bark. At 10 o'clock in the morning the two vessels weighed anchor and repaired to Vladivostok.

ENSIGN SIMANSKY.
LIEUTENANT VON CUBE.

AUGUST 29, 1892.

I, the undersigned, Thomas Scullun, master of the *Cape Horn Pigeon*, declare that I agree with the statement of the facts in this act, with the exception of the lines marked with red ink, which I reject because—

First. I called in the bays of Aniva and Terpenia two years ago to get water, and not this season, and during my five years' cruise in these waters never sighted Robben Island; and,

Second. I was told by the officer who seized the bark that I was taken for whaling in the Okhotsk Sea, and that he would not have taken me if I had not had whales on board.

THOMAS SCULLUN,
Master Bark Cape Horn Pigeon.

EXHIBIT II.

REPORT OF THE COMMANDING OFFICER OF THE SCHOONER MARIA TO THE COMMANDER OF THE PACIFIC SQUADRON.

In conformity with the orders received from your excellency I took command of the schooner *Maria* on the 20th of August. This command was transmitted to me by the chief of district of the Commander Islands, and I began at once to put the schooner in order. I had all of the quarters scrubbed with the brush, as also the upper deck. I took on a supply of drinking water and dissipated the bad odor by frequently introducing water by means of the pumps. I took on provisions for the crew sufficient to last two months, and on the 24th of August I was ready to sail.

On the 24th of August at 8 p. m. I left by the outer road from Petropavlovsk. On the 25th of August at 9 a. m. the first-class cruiser *Vitiaz* weighed anchor, tendered me a cable, and at 10 o'clock, towed by the cruiser, I directed my course toward the outlet of the bay of Avatchinsk. Leaving the bay, I sailed in a direction parallel with the shore at a speed of from 6 to 8½ knots. From time to time when the wind permitted I augmented sail. During the night of August 26 the west wind became strong, the schooner was much shaken by the rolling and tossing of the sea, and was taking in water.

On August 26 toward 3 p. m. we entered the third strait. At about 6 p. m. the fog had somewhat lifted, I could take my bearings. At 10 p. m., leaving the fifth strait, still towed by the cruiser, I directed my course westward. I followed this direction until August 27 at 1.30 p. m., when the tow cable tendered by the cruiser broke.

Having received by signal the order to proceed to my destination, I spread sail and took the southwesterly direction. During the first three hours I maintained a speed of 9 knots, but at 6 o'clock in the evening the wind became so strong that it was necessary to reef sails, after which the speed diminished to no more than 6 knots. I continued in same direction until the 28th of August at 4 p. m., when I verified my position at 47° 10′ latitute north and 147° 24′ longitude east. The wind was still from ENE. After this verification I continued the same course. The wind abated gradually, and at midnight passed from S/2 to WSW.

At 3 a. m., I sighted at two points to starboard a vessel which I was not able to clearly distinguish on account of the fog. This vessel at my approach hoisted a white light above a red light, which was evidently a signal agreed upon. Approaching to a distance of less than a cable throw, and having ascertained that it was a whaling vessel, I dropped anchor, lowered a boat, in it placed armed oarsmen, and I sent Ensign Simansky to learn its mission, and to request the captain to report to me with his documents and charts. Capt. Thomas Scullun having boarded the cruiser declared that the said bark bears the name of *Cape Horn Pigeon*, and is engaged in the industry of whaling in the sea of Okhotsk; that he had killed two whales this year, of which the oil and bone could be found on the bark. To the question put by me as to the meaning of the two lights hoisted upon the bark, he answered they were a signal agreed upon, addressed to the schooner *Mary H. Thomas*, for which he had mistaken my vessel. The schooner *Mary H. Thomas* is engaged in whaling and sealing.

Having examined the navigation chart of the bark, I was convinced that she had followed a direction principally to the south of the island of Tuleny, but that she had been off the east coast and the northwest coast of that island at a distance of 10 miles. Taking into consideration the facts that the Tuleny Island is almost in a state of siege, the relation between the bark and a schooner engaged in sealing, and her continued presence at points not far from the said island, I concluded that this bark, besides it special calling, had some sort of bearing upon the seal fisheries in the vicinity of the island. It is possible that she furnishes the schooners with provisions or that she serves them as a storeship. For this reason I resolved to conduct her to Vladivostok. I learned, moreover, from the captain that his first mate, William Jong, had landed twelve years ago from a schooner upon the island of Tuleny, where he had killed 13,000 seals during one summer, from which it appears that among the bark's crew there were experts at this industry.

Finding it impossible to inspect the hold, and thus convince myself of the bark's participation in this sort of illegal industry, I took the above-mentioned determination, to the end, moreover, that a commission, specially appointed, might examine the hold and ascertain the truth.

I learned from the captain that he had asked through the medium of the governor of the maritime province permission to engage in whaling in the bays of the sea of Okhotsk, and had offered our Government $500 dollars to obtain that privilege, but permission was emphatically refused. I knew that the clipper *Abrek* had overhauled and detained this same bark off the Chantarsky Islands, but had not seized her because she had no whales on board, but had warned her that the industry was illegitimate. Having examined her chart I found that she had lingered several times near the Russian coast, even in the gulf of Peter the Great, between the island of Askold and the shore, in the gulfs of Patience and of Aniva, off the coast of Cape Aniva, and had engaged at that place in whaling, all of which I judge from the signs upon the chart I learned from the captain that in these waters the bark *Morgan*, belonging to the same party, and the schooner *Mary H. Thomas* were engaged in whaling. The bark *Morgan* not succeeding in her effort in these parts had gone to the north coast of the peninsula of Kamchatka, and had proposed to the captain of the *Cape Horn Pigeon* to accompany her, but the latter had refused. The captain declared that to the north of the sea of Okhotsk, in the bays, were two English steamers, the *Northless* and the *Norwall*, and the American brig *Hidalgo*, engaged in whaling. Taking into consideration all the preceding and having weighed all of the circumstances for and against, I concluded to conduct the said bark to Vladivostok, in order that the matter might be carefully investigated whether or not the industry in which she engaged and her sojourn in our waters was legitimate. For this purpose I required the bark's crew to board the schooner *Maria*, with the exception of the captain, the steward, and a small boy in the captain's service. The first mate, William Jong, was named in the capacity of captain of the schooner, to whom the order was given to conduct her to Vladivostok.

I, with Ensign Simansky and all of my crew, composed of twelve men, went aboard the bark. The whole affair was accomplished at half past 9 in the morning, and at 10 o'clock in the morning of August 29 the bark and the schooner filled away

toward the Strait of Laperouse. The schooner soon disappeared in the fog. Astern was another schooner, which also soon disappeared. At half past 7 in the evening a brisk wind, SSE., arose. As the bark had no balast I brailed up sails. The vessel leaned to greatly; it was evident she oscillated greatly. The first day the crew was occupied cleaning the quarters, which were in very bad condition. At night the wind changed from SSE. to NW. I continued in the same direction and sighted the summits of Cape Aniva; in the morning I augmented sail. At noon, August 30 (11th September), I stood in 46° 18.′5 latitude north and 144° 14′ longitude east. In the evening, the wind becoming brisk, I diminished sail. At 7.40 in the evening I sighted Cape Aniva, 2 miles distant. The night of August 31 I was in the Strait of Laperouse. Heavy fog; course WSW. ½ W.; now and again two lights were seen to starboard and port. Wishing to avoid danger, I sailed to SW.; having made 10 miles in that direction, I turned WNW. At 7 a. m. I sighted the light-house of Soiou.

At 8 a. m., having doubled Soiou, I took the course 10 miles to the north of Rebouksiri. At 2 p. m. I sailed toward Cape Nizmenny. Throughout this time a steady wind was blowing from NE.; speed from 5 to 8 knots. At noon September 1 (13) there were no astronomical observations taken. The wind had changed to NW. and toward evening began to freshen. I diminished sail. The wind abated about morning; I augmented sail. At noon September 2 (14) I made 42° 25′ latitude north and 136° 48′ longitude east. I had been carried southward. I had steered west as much as a NNW. wind permitted. Wind feeble; speed 3 knots.

At noon September 3 (15) I made observation 42° 13′ north latitude, 135° 48′ east longitude. After midday I sailed to NW., nearer to shore, hoping to profit of the coast wind. On the morning of September 4 (16) I sighted the coast. At 9 a. m. I tacked. At noon I ascertained 42° 59′ latitude north and 135° 61′ longitude east. From Cape Krasny to the southeast for 23 miles. Wind W/5. I went about. The bark tacks well without losing headway. We lost much time while tacking, on account of the unskillfulness of the men at the helm. On September 5 (17) I tacked opposite the shore to WSW. At 8 o'clock I had favorable wind and sailed westward. At 6 o'clock I took my bearings; island of Petrow at No. 1, 40 to 13½ miles. At 9.50 p. m. I sighted a revolving light, which soon disappeared in the fog. During the night of September 6 (18) I continued my course westward. In the morning contrary wind from WNW. I sailed northward. At noon of 6th (18) 42° 17′ latitude north and 133° 0′ 6″ longitude east. At 2.45, nearing the shore, I tacked to westward. When it grew dark the Askold light could no longer be seen, in spite of the short distance. The night of the 7th (19th) off Askold, dead calm, the lights were not visible. At 7 o'clock a northwest wind prevailed. I sailed in a northwesterly direction, advancing on the light-house of Skryplew. At 10.30 the schooner *Vancouver Belle* came to meet me. I signaled (B. L. M.) asking that steam launches be sent to tow me.

At 3 o'clock I entered Vladivostok and cast starboard anchor.

During the entire passage both crews behaved well. The schooner's crew was divided into three watches, the bark's into two; 5 men in each. Knowing the fatigue of two watches, I endeavored to give the men as much free time as possible and to avoid superfluous work. They were often obliged to pump the water from the hold, for during the day it accumulated to a depth of from 10 to 20 inches. It is very evident that somewhere about the bark there is a leak.

The health of the crew was excellent throughout the passage. No one applied to me for medical assistance.

LIEUTENANT VON CUBE.

VLADIVOSTOK, *September 7, 1892.*

EXHIBIT III.

In conformity with order No. 160 of the commander of the Pacific Squadron dated the 11th September, 1892, the commission appointed by that order, and composed of the Ship's Captain Hessen, president; Ship's Captain Zarine, Captains of Frigate de Livron and Philissow, and of the auditor chief counselor of the college Yanevitch-Yanevsky, members, with Lieutenant Petrow, executive officer, proceeded to execute the work intrusted to them, took cognizance of the circumstances of the seizure of the American whaling bark *Cape Horn Pigeon.*

From the report of Lieutenant von Cube, who seized said bark, it appeared that he had been detailed from aboard the first-class cruiser *Vitiaz* aboard the schooner *Maria,* seized by the cruiser for illegal seal fishing, for the purpose of conducting her to Vladivostok during the voyage, when in 46° 33′ latitude north and 140° 30′ longtitude east he sighted the bark *Cape Horn Pigeon,* and, suspecting it of engaging in the same

illegal industry, he sent his Second Ship's Ensign Simansky with armed sailors to ascertain what vessel it was, and what its mission. Having learned from the bark's Captain Thomas Scullun, who returned with Lieutenant Simansky, that it was a whaling vessel having aboard at that moment the product of two whales killed by him, Lieutenant von Cube found it impossible to abandon his first intention. Moreover, on examining the log book and the navigation chart of the bark, he was convinced that the latter had on several occasions approached the Russian coast of the sea of Okhotsk, where whaling is absolutely interdicted to foreigners. Furthermore, Lieutenant von Cube was confirmed in this opinion by the circumstance that at the approach of the schooner the bark had hoisted a signal, which, according to Captain Scullun's explanation, had been intended for the schooner *Mary H. Thomas*, expected that same night, and which also engaged in whaling and sealing. In view of these facts, Lieutenant von Cube considered it incumbent upon him, in the interest of the Russian Government, to conduct said bark to Vladivostok in order that the question might be decided at once whether or not she should be confiscated. But not having at his disposal a crew sufficiently numerous to put a portion of it upon the bark, and not wishing to trust to the bark's crew, he decided to go aboard the bark with his entire crew, and to keep with him the bark's captain he transferred the captain's mate, with the entire crew of the bark, aboard the schooner *Maria* and ordered them to repair to Vladivostok. The *Cape Horn Pigeon* arrived at Vladivostok on the 7th September and the schooner several days earlier.

The commission at once took cognizance of the statements relating to this affair, as well as of the documents in evidence, such as the log book kept by Lieutenant von Cube on the schooner *Maria*, and afterwards on the bark *Cape Horn Pigeon*, the log book of the latter kept by Captain Scullun, the sailing papers of the bark taken from the captain by Lieutenant von Cube, the navigation chart of the bark and the instructions given to commanders of Russian cruisers on being sent north, to regulate their conduct when boarding and seizing schooners suspected of marauding.

From the above-mentioned documents and the examination of said bark made by the commission (of which the protocol is hereunto attached) results the following:

1. The bark *Cape Horn Pigeon* having left Vladivostok on June 22 (7th July) of this year without obtaining the permission sought for to take whales in the bays and coast waters of the Sea of Okhotsk, caught two whales in said sea; she sighted the first of these and began the chase at 5 miles from the island of Askold, but was not successful in catching it there.

During her cruise to the west of Cape Aniva, she communicated several times while at sea with the schooner *Mary H. Thomas*, which, according to Captain Scullun's statement, is engaged in whaling and sealing.

2. Whaling in the Sea of Okhotsk is not interdicted to foreigners except in the bays, the gulfs, and straits, and in coast waters or along shore. It is even permitted to foreign fishing vessels in cases of extreme necessity to enter the bays and gulfs, provided they do not enter into such negotiations with the inhabitants as are forbidden by law.

3. Upon the bark were found the oil and bone of two whales killed, as said the captain, in the Sea of Okhotsk, in that part wherein whale fishing is permitted; but although the statements of the captain were confirmed by the log book and the chart, the commission did not consider this fact sufficiently proven.

4. The conduct of Lieutenant von Cube at the time of the seizure of the bark is considered by the commission perfectly regular, inasmuch as overhauling a suspicious vessel, in a suspicious locality, he could not do otherwise than seize it and submit to an investigation as to the legitimacy of the seizure by a superior authority. The commission will not fail to notice here that the mere feat alone of detaining a bark with a crew numbering 30 men by the much less numerous crew of the schooner shows the initiative spirit and resolution of Lieutenant von Cube.

In consequence of the preceding and the impossibility of establishing the fact that the two whales had been taken by the bark in that portion of the Sea of Okhotsk where whaling is prohibited, the commission is of opinion that the position of the bark near the Russian coasts does not of itself constitute an illegal act, and it declares that for this reason the bark *Cape Horn Pigeon* can not be convicted of having engaged in illegitimate business, and it does not see sufficient motives for its confiscation.

(Signed) Members:

YANEVITCH-YANEVSKY, Presiding Counsellor of College.
Captain of Frigate PHILISSOW,
Captain of Frigate DE LIVRON,
Ship's Captain ZARINE,
President, Ship's Captain HESSEN,
Executive Officer, Lieutenant PETROW,

EXHIBIT IV.

REPORT OF THE COMMANDER OF THE SECOND-CLASS CRUISER VITIAZ TO THE COMMANDER OF THE PACIFIC SQUADRON, DATED AT VLADIVOSTOK, SEPTEMBER 15, 1892, No. 389.

I have the honor to report to your excellency that in conformity with order No. 4003 of the office of administrator of the port of Vladivostok, dated 12th of September of present year, the American whaler *Cape Horn Pigeon*, which had been detained, was restored to the captain of said bark by Lieutenant von Cube.

(Signed) Ship's Captain ZARINE.

Examiner:

N. N.

SECOND CASE.

Seizure and confiscation of the schooner James Hamilton Lewis.

The American schooner *James Hamilton Lewis* was detained and confiscated under the following circumstances:

On the 21st of July (August 2), at 4.40 a. m., from on board the screw ship *Aleout*, Russian man-of-war, coming from the western coast of the island of Medny, and being about 2 miles north of the southern extremity of that island, a sailing schooner was sighted ahead nearing the shore to northeast which was found to be the American schooner *James Hamilton Lewis*, from San Francisco, under command of Captain MacLean. Having orders from his superiors to effectually protect the Russian fisheries of Bering Sea against foreign marauders, Captain Brandt advanced immediately upon the suspected schooner, which was, judging from the clearness with which her sails were visible, at a distance of 6 miles at the most from the *Aleout*, and of 5 miles at most from the southern extremity of the island of Medny. (See the points A, B, and C on the appended chart.) Remarking the conduct of the man-of-war, the American schooner veered immediately to the southeast and fled under full sail. The *Aleout*, increasing her speed, went in pursuit of the *James Hamilton Lewis*, from the deck of which some objects were being thrown overboard. On approaching the latter at 6.15 the *Aleout* hoisted her colors and fired a blank shot, upon which the sailing schooner lay to. Lieutenant Lebedew and Ensign Engmann were sent in a ship's boat to board her, and received at first, by way of explanation from Captain MacLean, that the afore-named schooner was engaged in fishing and hunting of sea birds; that it carried a crew of 25 men, and that it had already delivered the fruits of their industry to another schooner off the coast of Alaska. On investigation it was found that the present crew numbered 22 men in all. In the main hold were evidences of a hasty removal of objects and a washing (a tub with reddened water, covered with a shirt, etc.); also a large quantity of salt in the scantling along the ship's side and in sacks, with seal skins scattered about. Moveover, upon the schooner were found a great many arms, powder, and paraphernalia for catching seals. In the schooner's log book delivered by the captain the last entry related to the 7th (19th) of June; the ship's journal bore no inscription. In consequence of the report of Lieutenant Lebedew as to what he had found, Captain Brandt sent this same officer again with six sailors to the schooner *James Hamilton Lewis* to notify the captain that the vessel was seized and to order him to report with a portion of his crew on board the *Aleout*. Not only did Captain MacLean refuse to comply with this order, but made an insolent reply, as did also his mate, MacDonald, and, weighing anchor, attempted to sail away from the boat, seeing which Lieutenant

Lebedew fired his revolver in air by way of signaling his commander. The *Aleout* in great haste fired a cannon shot ahead and gave verbal order to the American vessel to lay to. The latter, however, continued her course in the same direction. A second shot was fired into her rigging, and the order to lay to was repeated, but without result, after which the *Aleout*, sailing in front of the *James Hamilton Lewis*, barred her course. The American vessel, after a third shot fired at her starboard side, was overhauled at 11 or 12 miles off the island of Medny and taken in tow. After an inspection in detail of the arrested schooner a large number of seal skins were discovered and a new bag net for catching beaver, and two seal skins so small that from their age they could not have been killed elsewhere than on the shore. Deciding to confiscate the American vessel for illegal fishing in Russian waters, Captain Brandt dispatched her to Petropavlosk and Vladivostok, under the command of Lieutenant Lebedew. Captain MacLean, with the crew, was likewise dispatched by special steamer under surveillance on account of the resistance he had made to his arrest. A statement was drawn up relating all of the measures taken by the *Aleout*. Captain MacLean set forth his views in his protest of August 12, 1891. (See Exhibits I, II, III, IV, V, VI, and VII.)

OBJECTIONS TO THE GROUNDS OF THE CASE.

All of the facts above mentioned are exactly confirmed by the reports duly submitted by the officers of the Russian man-of-war, by the log book of the latter, by the chart showing the locality where the incident occurred, and by the formal statements drawn up on the subject of the seizure of the American schooner. These documents on account of their contents and of their import can not be invalidated by the allegations devoid of sufficient proofs furnished by persons interested in the case. It is therefore proper to consider as an established fact that the schooner *James Hamilton Lewis* having in the morning approached the coast of the Medny Island, concerning which restrictive measures had been taken, and being at the most 5 miles off the southern extremity of this island, veered about suddenly on perceiving the *Aleout*, which appeared unexpectedly in her course; that it endeavored in every way to elude the latter in open sea, and that thanks solely to the great speed of the *Aleout* it was obliged to lay to, on hearing the warning cannon shot; that Captain MacLean's first explanations were not truthful and were given the lie at once by the Russian officer, who discovered the true character of the American schooner, having satisfactory proof that the aforesaid captain, seeing himself convicted of falsehood, endeavored to extricate himself by flight, and after a useless resistance to the orders of Captain Brandt, yielded finally to Russian arms; that upon the detained schooner were found hidden evidences of recent seal fishing and two skins of seals so young that they could not have been killed elsewhere than upon the shore of the Commander Island.

All of these facts sufficiently prove that on the 21st July (August 2), 1891, the schooner *James Hamilton Lewis* was at sea with the secret intention of continuing, off the Medny Island, the occupation of illegal seal fishing, while the product of her former catch was already stored away in the hold of the vessel, and that fear alone of having to answer for his actions explains Captain MacLean's behavior.

Certainly the important allegations made by the latter that he had approached shore to verify his chronometer could not be substantiated by any of the ship's documents, calculations, etc. This statement appears as unlikely as his other explanations, which were totally untrue, particularly his statements that the two skins of small seals found aboard were skins of animals taken from the bodies of their mothers which had been killed in mid seas, which are contradicted by the testimony of an expert, the chief of the Commander Islands, rendered upon the basis of an examination of the actual objects under discussion; and for this reason the opinions presented by the claimant on the subject of the modus vivendi of seals of both sexes are not convincing in the matter. Finally, the refusal of the captain to comply with the order of the commander of the Russian man-of-war constitutes strong proof of his guilt of infraction of the order maintained in those parts.

The assertion of the party claimant that the schooner *James Hamilton Lewis* had not previously entered Russian territorial waters and had but that very day approached the Medny Island merits special attention. This essential circumstance of the affair should be, above all, proven by the vessel itself, more particularly as the Russian officer asked to see the documents which would indicate the previous course of the American schooner in open sea or in proximity to the coast. In any event Captain MacLean, intentionally it would seem, turned over only the official log book, which had no bearing upon the present question, but withheld the daily journal, in which the vessel's exact course could be determined by the daily entries.

Realizing, therefore, the extreme importance of having failed in this particular and of not having performed his duty, the party claimant then refers in its claim to extracts or copies from the log book, wherein were noted the geographical positions of the *James Hamilton Lewis* at different stages of her voyage, but the original documents remained always in its own hands, and were never shown except during verbal explanations with the representative of the United States in 1898. Finally, owing to repeated demands by the defendant party, on the 21st of May of this same year, that is to say, six years and nine months after the incident of the 21st of July (August 12), 1891, said log book was transmitted to the defendant party, after which, by Russian authority, the following note was made upon the original: "This log book has been examined by the minister of marine and returned to the minister of foreign affairs by an act of August 4, 1898, No. 527." This inscription is not found in the copy of the document now given to the defendant party, which fact he believes necessary to state here.

It would be difficult to find an explanation giving ground for a favorable interpretation of the fact that the log book of the schooner *James Hamilton Lewis*, as principal proof of his full right, was not presented at the critical moment of his seizure. The least likely explanation would assuredly be that of lack of confidence, which must have been offensive, on the part of the captain toward the commander of the Russian man-of-war. Still less comprehensible is the delay of the party claimant to present this justificatory document, to which both parties can not fail to attach the greatest importance, in the examination of the claim, and for this reason the defendant must be circumspect in regard to his admission of the authenticity of its contents.

Having examined the original in 1898, he was convinced of the utter inapplication of that element of proof to the defendant's interests. The log book represents a record of the fishing trip of the schooner *James Hamilton Lewis*. On the title page is written, "Illegally seized August 2 by the Russian man-of-war *Aleout*." That is to say, there is a note foretelling that which took place about five months after the departure of the vessel from San Francisco, the 7th of March, 1891. The impression is at once given that this title and the corresponding text were written after the events of which the log book should serve as decisive proofs. This opinion is corroborated by the outward suspicious appearance of the document in question; the inscriptions are made with the same ink, and appear to be copied from some other record; they have not the appearance of inscriptions made on different dates during the entire period between the 7th of March and the month of August, 1891, but all at one time. The added protest of Captain MacLean at the end of the diary, and the mention of the number of seals killed at sea in 1891, viz, 424 seals illegally caught, equally testify to the ulterior composition of the document, the value of which could only consist in having been preserved intact, such as it was on the 21st of July (August 2), 1891. All of the above data is convincing that aboard the *James Hamilton Lewis* at the time of her seizure there were no regular entries as to her daily navigation in the ship's journal, as has been previously shown in the act of confiscation on the 30th July (August 11), 1891. (Exhibit II.) Consequently the log book presented by the claimant does not furnish proof of an alibi of the vessel in question; on the contrary, it serves as better evidence for the party opposed to the claim. The *James Hamilton Lewis* had not noted her position at sea on the eve of her seizure, although she was undoubtedly at that time in the proximity of the Russian coast and was engaged in illegal sealing.

In view of these facts, the defendant party concludes that the marauding character of the schooner *James Hamilton Lewis* in Russian waters is sufficiently proven; therefore the Russian Government confirms the decision relating to the confiscation of the vessel, by its sovereign right, and in defense of its legitimate interests against all infringements thereon.

There can be no question as to the right of the constituted agents to pursue delinquent vessels beyond territorial waters, as was done in the present case, when the war ship sighted the schooner in the proximity of Russian coasts; that is to say, 5 miles from the shore, and overhauled her finally at a distance of from 11 to 12 miles from the Medny Island. Therein the principles of the liberty of the high seas are not violated, as they are understood by the representatives of contemporaneous science.

The question which suggests itself here is the one until now contested, viz, what is the extent of the "territorial sea," but in this respect it must be remembered that according to the accepted principle of international law, the limits of territorial waters are really determined by the possibility for the bordering State to establish its sovereignty over a certain extent of sea constituting a prolongation of its territory. (Terræ dominum finitur ubi finitur armorum vis.) With the resources of defense which nations have at the present time at their command, the perfection of firearms, the complexity of the conditions of existence, need of order, military, financial, and economical,

all limitations too narrow for the full manifestation of the sovereignty of a country, as, for instance, the fixation at 3 marine miles as the limit of territorial waters of which the party claimant makes mention, should be considered as arbitrary, devoid of all practical sense, and not serving their ends. In any case, the limits of territorial waters according to the doctrine of international law most recently accepted should be extended not only beyond 3 miles, but even beyond 5 miles, starting from low-water mark." (Session de Paris de 1894 de l'Institut de droit international.)

It would be well, moreover, to take into consideration the particulars of the present case arising from acts whose object it is to legally protect the seal fisheries in Bering Sea. From the facts set forth in detail in the case of *C. H. White* (third case) it appears that the United States had come to recognize the necessity for exceptional measures in this respect, yet in spite of these exigencies regarding prohibited zones, went beyond that which was deemed necessary by the Russian Government.

The defendant party does not intend to sustain here the point of view of the American Government according to which seals, not being feræ naturæ, are domestic animals having the animus rivertendi characteristic of the latter; but it believes it well to recall that at the time the claimant supported that opinion before the arbitration tribunal of Paris, in claiming a property right over all the seals that frequented the islands of Pribilof, American marauders were exterminating seals on the Russian coasts of Commander Islands. The United States Government then arrived at the conclusion that it was necessary to entirely interdict the killing of seals in open sea (pelagic sealing), with a view to preserving that race of animals in the Pacific Ocean. (Revue de droit international, 1893. Tome XXV, p. 434, etc.) After setting forth the above points, which in the opinion of the defendant party render inapplicable the principles invoked by the party claimant as the basis of the affair, it is useless to enter into an examination of the several points of the claim, limiting oneself to the following remarks:

With regard to the allegations not sustained by sufficient proofs concerning the bad treatment to which the men of the crew of the *James Hamilton Lewis* may have been subjected, it is well to note that, on the contrary, the men themselves made the most violent resistance to the orders of the officers of the cruiser *Aleout*, by which they made necessary decisive measures on the part of the Russian authorities. The defendant party energetically protests against these allegations which are not proven. To contest this portion of the claim, of which the total reaches the sum of $34,000, as well as the claims for indemnity for losses on the value of the confiscated vessel ($25,000) and her cargo ($5,936), also that in regard to the claim for indemnity for the loss of a probable profit ($36,400) and interest ($54,721.44), it suffices to refer to the explanations given concerning similar questions in the cases of *Cape Horn Pigeon*, *C. H. White*, and *Kate and Anna*. (Cases I, II, III.)

There still remains to be mentioned that the compromise recently proposed in regard to the payment of a sum of $82,000 instead of $156,057.44, now claimed, plainly shows that the first calculations of the claimant were not well founded.

CONCLUSION.

In view of all the preceding, the defendant requests that the demands of the claimant be rejected upon all points.

EXHIBITS.

I. Report of the commander of the schooner *Aleout*, dated August 3, 1891, No. 385.

II. Proceedings of the confiscation of the schooner *James Hamilton Lewis*, dated July 30 (August 11), 1891, No. 383.

III. Report of Lieutenant Lebedew, July 22, 1891, No. 41.

IV. Report of same officer dated July 23 of the same year, No. 42.

V. Certified copy of the report of the captain of frigate *Brandt*, October 20, 1891, No. 489.

VI. Legalized extract from the log book of the schooner *Aleout* on the subject of her navigation on July 21, 1891.

VII. Chart showing locality where the incident occurred, annexed to the report, No. 489.

The defendant party places the originals of these documents at the disposal of the arbitrator.

EXHIBIT I.

REPORT OF THE COMMANDER OF THE SCHOONER ALEOUT TO THE COMMANDER OF THE PORT OF VLADIVOSTOK, DATED AUGUST 3, 1891. No. 385.

I have the honor to report to your excellency that on the morning of July 4, off the southern extremity of the Medney Island, from on board the schooner commanded by me, was sighted a two-mast sailing vessel approaching the island, which, having sighted the *Aleout*, fled under full sail. For the purpose of inspecting, I overhauled her 12 miles from the island, and having made the inspection, suspecting her of engaging in illegal sealing, I detained and confiscated her on discovering aboard many seal skins salted down, arms, powder, and shot. This incident is set forth in the act hereunto annexed of the confiscation of the schooner. This act has been read and signed by the captain of the schooner and in this act his protest is set forth. All of the seal skins were turned over by me to the chief of district of the Commander Islands to be sent to London and sold on behalf of the Government, thinking thus to obtain better prices than at Vladivostok.

The schooner was at once conducted to Petropavlosk, and will thence be sent to Vladivostok under command of Lieutenant Lebedew. As it was impossible to spare enough men from the *Aleout*, I placed 6 of her sailors aboard the sailing vessel with 6 of the American crew already there. Captain MacLean and the 10 remaining men of his crew I put under surveillance, to be sent on the steamer *Vladivostok* to Vladivostok, in conformity with instructions which I received, on account of the resistance made when arrested, when it proved necessary to take decisive measures to compel her to stop her course. While the attitude of the crew was for the most part apparently passive, next to the captain the most noticeable was the first mate, MacDonald, who, according to accounts, not entirely confirmed, however, drew a knife at the moment of arrest; therefore I decided to send the entire crew to Vladivostok, that the local authorities might pass upon the matter. The chief of district of Petropavlosk, in view of the great need of boats by the inhabitants of that town and the neighboring villages, asked me if I could not sell some of the boats of the confiscated vessel. I consented, and of the six boats I authorized the sale of three at auction. The sum realized by this sale will be handed by me to the administrator of the port of Vladivostok. I also transmit herewith to your excellency the ship's papers of the confiscated schooner *James Hamilton Lewis*. I send the said documents by steamer *Vladivostok*, although the sailing vessel *Lewis* will probably reach Vladivostok before the steamer.

(Signed) Captain of Frigate BRANDT.

EXHIBIT II.

DECREE OF THE CONFISCATION OF THE AMERICAN SAILING SCHOONER JAMES HAMILTON LEWIS OFF THE COMMANDER ISLANDS BY THE SCREW SHIP ALEOUT, PETROPAVLOSK, JULY 30 (DECREE AUGUST 11), 1891. No. 383.

On the 21st of July (August 2), 1891, near the Isle of Medney, off the western coast of said isle and 3 miles north of its southern extremity, at 4.40 a. m., a schooner was sighted bearing, as it appeared, to northeast and approaching the island.

For the purpose of inspecting we advanced straight upon her, but, sighting us, she filled away, augmenting sails. While pursuing her we noticed that something was being hurriedly thrown overboard. At 6.15 we neared her and, hoisting our colors, fired a blank shot, on which the vessel hoisted the American flag and lay to. Two officers, sent to board her, returned reporting that she was a sailing vessel from San Francisco bearing the name *James Hamilton Lewis*, and that on board were guns, many cartridges, powder and shot, slender rods of bamboo with hooks and grappling irons for drawing seals from the water, 6 long boats and a crew of 16 men, a large quantity of salt, and evident signs of the operation of removing the skins from seals. In the official log book which was produced the last inscription was on the 7th (19th) of June. The journal of navigation bore no inscription.

Taking this data into consideration, an officer was sent, with 6 sailors, to inform the captain that his schooner was under detention, and to require him to report with a portion of his crew on board the schooner *Aleout*. The captain refused to comply with this order, and sailed away. Leaving the ship's boat to follow, the schooner *Aleout* pursued the vessel, and, in order to compel her to stop, fired a cannon ahead, in spite of which, and the verbal order to come to, the schooner did not lay to, but continued her course. The *Aleout* passed close under her stern and, repeating the verbal order to stop, fired a second shot into her forward rigging. The *James Hamilton Lewis* did not lay to, but continued her flight.

The *Aleout* increasing her speed barred the way, when the *James Hamilton Lewis*, fouling the starboard side of the *Aleout*, was seized and taken in tow. Captain MacLean with his entire crew was conducted on board the *Aleout* and was informed that his vessel was seized and would be taken to Nicolsk, on Bering Island. Being taken in tow, the *James Hamilton Lewis* was, upon inspection, found to contain a large quantity of seal skins, a bag net for catching sea otters, and two skins of small seals, which from their tender age, according to the opinion of an expert, the chief of the Commander Islands, could not have been killed elsewhere than upon the shore. The ship's papers were taken, and the captain was informed that the vessel *James Hamilton Lewis* was confiscated for having engaged in illegal and unauthorized hunting in Russian waters.

(Signed) Ensign ENGMANN.
Ensign KOLIOUBAVINE.
Ensign TRENTOVIUS.
Lieutenant SACHS.
Lieutenant LEBEDEW.
Captain of Frigate BRANDT,
Commanding Screw Ship Aleout.
ALEXANDER MACLEAN.

I, the undersigned, do hereby protest, in behalf of the schooner *James Hamilton Lewis* and her owners against the illegal seizure of said vessel, her cargo, and hunting outfit and tackle, made by the Russiam man-of-mar *Aleout*, the 2d of August, 1891, upon the high seas and neutral waters of the ocean.

All seal skins on board of said schooner were killed upon the water with shotguns, and the pup skins were taken from the inside of the seals after they were taken on board of the vessel, and there had been no seals taken on board of the vessel for forty hours previous to the time of seizure. I hereby hold the Russian man-of-war *Aleout* and her Government responsible for the detention and losses caused by the illegal seizure of said schooner, with her tackling and cargo and hunting outfit.

ALEXANDER MACLEAN,
Master of Schooner J. H. Lewis.

AUGUST 12, 1891.

EXHIBIT III.

REPORT OF LIEUTENANT LEBEDEW TO THE COMMANDER OF THE SCREW SCHOONER ALEOUT.

On the 21st of July, as we sailed in sight of the island of Medny, in obedience to your order, I left the ship commanded by you, and taking my place in a long boat at about 7 a. m., with Ensign Engmann, I advanced upon a schooner carrying the American flag, which lay to at a distance of about 3 cables' length to leeward. Having covered about half the distance I read upon the stern of the schooner the name *James Hamilton Lewis*, San Francisco.

Approaching her from windward, I boarded her on the starboard side and ascended to the deck and put the following question: "Who is captain here? I must speak with him." A man approached who said he was captain of the schooner. I next asked him if he was the ship's owner, to which he replied in the negative, and designated as owner a certain Lewis or some such name. To my question, What was the schooner's business, he replied; "Hunting and fishing" (hunting of sea birds). When I asked the number of men in the crew he at first replied 25, but when I required the captain to call all of his men on deck and asked him for his ship's papers and the log book to verify the crew, he delivered his papers and informed me that his crew numbered 22, but that two had deserted and four had been lost in the fog while fishing off Sandy Point.

Having told the captain that I was sent by the commander of the Russian man-of-war to inspect his vessel, I left Ensign Engmann on the deck to watch the crew, and I with the captain descended to the hold. There I ordered the removal of the planks beneath which were casks of fresh water. Then I ordered a hand pump to be brought, and while the captain busied himself lifting the planks I put the pump in place and began to examine this place, and found there salt piled in sacks along the sides and a quantity loose upon the floor. There was also a tub containing reddened water covered with a red flannel shirt. Over all were noticeable signs of a hasty putting to rights and of washing.

To my question where they keep the fish they had caught, the captain answered that the cargo had already been transported to another schooner off the coast of Alaska, and that they had but this very day arrived in our waters. Pretending to be satisfied with these replies, I next inspected the quarters of the crew. These quarters were very narrow and communicated with the kitchen or galley by means of a window or slide through which dishes could be passed. I next inspected the cabin astern, containing eight beds, and bunks in which four more persons could easily sleep. At the end of the common cabin there was a door opening into the captain's cabin; I did not enter there. Along the partitions near the bunks I saw eight guns of different models, and there also were wooden rods in greater number than the guns. Returning to the deck I examined the long boats; in one there was a box covered with a coarse red cloth containing ship's biscuit and other edibles; in another were two bamboo rods with pointed ends and iron hooks. Having informed the captain that I must show his log book to my commander, I received it and left in the boat to return to the *Aleout*, where I made my verbal report of all I had seen and heard, and expressed the opinion that the arrested schooner was a poacher and not merely engaged in fishing and hunting. Having then received orders to return to the vessel with a quartermaster and five armed sailors to bring the captain and a portion of his crew aboard the *Aleout*, and to assume command of the schooner to conduct her whither you should order, I left in the rowboat. During this time the distance between the *Aleout* and the schooner had noticeably increased. Approaching the *James Hamilton Lewis* I ascended to the deck, boarding her on starboard side, and delivered your order to the captain. I received by way of answer that he could not leave his vessel at sea, and if my commander desired to speak with him he could come to him. This reply was received with marked approval by a portion of the crew: "Certainly; let him come to us if he wishes; we are beyond Russian waters," etc.

During my interview with the captain one of his men seemed especially to sustain him; it proved to be the first mate; the latter passed back of me as if to seize me from behind; I turned suddenly upon him and informed him he would wait a long time for my commander to come aboard, and that the captain and crew would do well to comply at once with his orders. I had not finished speaking when the vessel filled away, leaning dangerously above our small boat, and sailed away. Then I returned in the ship's boat to the *Aleout* to report to you.

On nearing the *Aleout* I called to you "Fire upon them, they are rascals." Scarcely hoping that you had heard me, I pointed to the flying vessel and fired my revolver

in air. Approaching still nearer, I heard your order to follow in the ship's boat, which I did, endeavoring to avoid any interference with your movements or your guns. I submit this my report of the preceding.

Lieutenant LEBEDEW.

EXHIBIT IV.

REPORT OF LIEUTENANT LEBEDEW TO THE COMMANDER OF THE SCREW SHIP ALEOUT, DATED JULY 23, 1891, No. 42.

In addition to my report of July 22 (No. 41), I now report to you that while towing the *James Hamilton Lewis* from the island of Medny to Bering Island the schooner was by me searched in detail. There were found aboard of her guns underneath the mattresses. A pocket revolver was taken from the cook; in the galley were found two small seal skins hanging on nails in the partition to dry; in the forehold, under the trap, ten or more large tin boxes containing gunpowder; in the hold to starboard of traps were wooden boxes filled with large shot and cartridges, and similar cartridges and shots were found under the bunks and beds in the after cabin.

Under a platform and under the mess table were cases filled with cartridges of larger caliber, charged with shrapnel; other boxes contained cartridge shells which had not been filled. There was also a large bag net, quite new, worth $600, as said the American sailors who remained aboard the schooner; this bag net was used for catching sea otters.

During the inspection of the main hold by the quartermaster, Lestchew, it was found upon scattering the salt piled on the floor that seal skins had been packed therein. Being convinced that among the sacks containing salt one had been hastily filled with seal skins, I ordered that all be left intact until the examination by the commission; that is to say, until the arrival in the village of Nikolsky, on Bering Island.

(Signed) Lieutenant LEBEDEW.

EXHIBIT V.

REPORT OF THE COMMANDER OF THE SCREW SCHOONER ALEOUT TO THE COMMANDER OF THE PORT OF VLADIVOSTOK, DATED OCTOBER 20, 1891, No. 489.

[Resolutions sent to the military governor. Signed, K. A. Ermolaiew, October 23.]

In fulfillment of the order of October of the present year, I make report that, according to the log book of the schooner under my command, being on the morning of July 21 off the southern extremity of the island of Medny, I sighted the sailing vessel *James Hamilton Lewis*. At that moment the sails were distinctly visible, and the schooner was bearing toward the southern extremity of the island. To better elucidate the circumstances, I transmit herewith an extract from the ship's log and a chart, upon which is indicated the point at which the schooner commanded by me was situated when the sailing vessel was sighted (point "A"). Judging from the clearness with which her sails could be seen, the utmost limit of distance between the two vessels could not have exceeded 6 miles; that is to say, the *James Hamilton Lewis* was not more than 5 miles off the southern extremity of the Medny Island; that is, at point "C."

At this moment she neared the shore until she sighted the *Aleout*, when she veered quickly and, augmenting sails, hastily fled beyond the limit of territorial waters.

The schooner was seized at point "B," which was 13 miles from the point "A" and 11 miles from Medny Island.

(Signed) Captain of Frigate BRANDT.

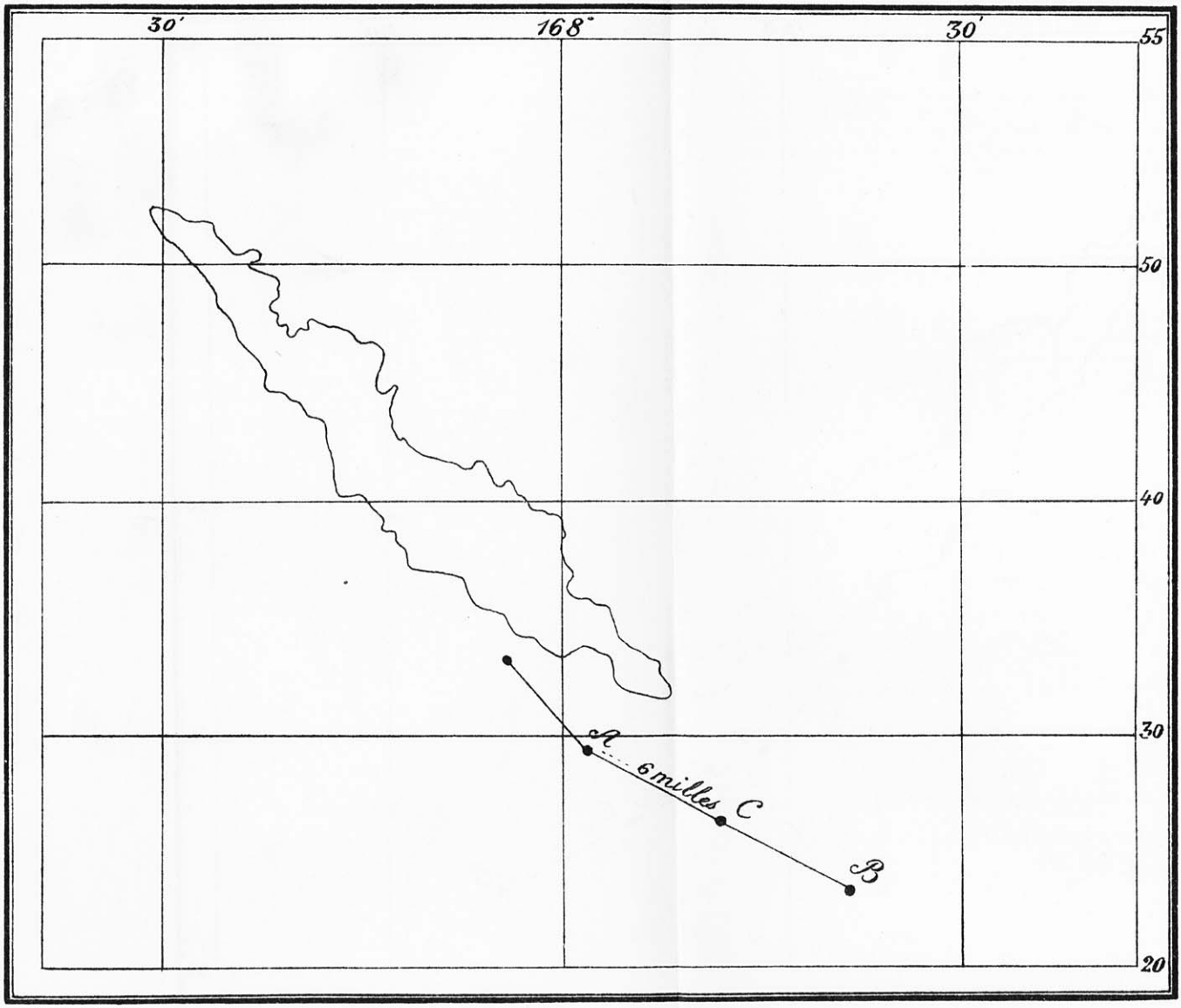
EXHIBIT VI.

EXTRACT FROM THE LOG BOOK OF THE SCHOONER ALEOUT CONCERNING THE NAVIGATION OF JULY 21, 1891.

At 4.40 a. m. a sailing vessel was sighted, bearing to northeast, which at once veered about and passed to southeast before the wind; we accelerated the engine to 80 turns. At 5 o'clock the crew were aroused. Prayer and breakfast. At 5.47 carry-

PIECE PRODUITE VII.

Annexe au vapport № 489.



ing of coal from the hold to the coal bins. At 6.15, nearing the schooner, we fired a blank shot, upon which the sailing vessel hoisted the American flag and fled. At 6.20 we lowered a long boat and sent two officers to inspect her. It was found that aboard the schooner, named *James Hamilton Lewis*, was a quantity of salt, piled in the hold and in sacks, also powder and bamboo rods, with hooks and grappling irons for lifting seals from the water. On the return of the boat the crew was armed with revolvers.

At 7 o'clock the rowboat, with an officer and a number of the crew, were again sent to detain the vessel. The captain refused to quit his vessel, and sailed on. Leaving the rowboat to follow, we quickened our speed and pursued the schooner. At 7.43 we fired a gun ahead, but the schooner continued her flight in the same direction. Fog began to gather.

At 8 o'clock, according to report, all goes well; there are no sick men, no men under arrest, no water in the hold.

The captain of the sailing vessel obstinately continued his course, and struck our schooner with his bowsprit a little ahead of the bridge. Her jib boom became tangled with the starboard beam; the jib boom was broken, but the shock was deadened, and the vessel hove alongside, shattering the hammocks in two places, and with one of her sideboards tore the port edge of the starboard side, bent the beam of the stern boat, damaged the awning stay, and scratched the side with her port anchor, which then became detached and fell into the sea. In the meantime Ensign Trentovius, with a portion of the crew, boarded the sailing vessel, which lay alongside, and ordered the captain to report to the commander of the *Aleout*. As the vessel was still under sail and striking our side, in brailing up sails she cut a part of our rigging. At 8.25 we tendered her a tow cable; and the boat which had approached in the meantime went to get the remainder of the crew. There were 16 men of the crew, of whom 4 were at once placed aboard the *James Hamilton Lewis*, and 12, with Captain MacLean, were left on board the *Aleout*. Lieutenant Lebedew with 6 men were left aboard the sailing vessel; at 8.50 we started.

(Signed) Lieutenant TCHERNIKOW,
Officer of the Pilot Corps.

EXHIBIT VII.

ANNEX TO THE REPORT No. 489.

A. Point from which was sighted the schooner *James Hamilton Lewis*.

B. Point at which the schooner *James Hamilton Lewis* lay to and was overhauled by the *Aleout*.

C. Supposed situation of the *James Hamilton Lewis* when it was sighted by the schooner *Aleout*.

(Signed) Captain of Frigate BRANDT.

Certified conformedly.
J. STEBLINE-KAMENSKY,
Deputy of Jurisconsulate of Minister of Marine.

THIRD CASE.

Detention and confiscation of the American schooner C. H. White.

The American schooner *C. H. White* was detained and confiscated under the following circumstances:

On the 3d (15th) of July, 1892, at 10.30 p. m., the Russian cruiser *Zabiaka*, under command of Captain de Livron, being in 54° 30′ latitude north, and 167° 15′ longitude east from the port cathead in the direction southeast 68, observed at a distance of 2 miles a schooner without distinctive lights sailing toward the southern extremity of the island of Medny, in a westerly direction.

Having for special mission the protection of the coasts of the Commander Islands in Bering Sea, and suspecting this vessel of being engaged in illegal seal fishing, the commander of the cruiser fired a blank shot, and on approaching the schooner commanded her to lay to. When this order was complied with an officer was sent in a ship's boat to the vessel, which was found to be the American schooner *C. H. White*, under command of Captain Furman. The officer, after a short inspection of the schooner, discovered in the hold a quantity of seal skins and several seals but recently killed. It was evident from documents presented by the captain that the log book had not been kept during the last two days; and from the entries in the journal, in spite of the explanations made by the captain concerning his previous navigation, it was plain that the schooner had during the two weeks preceding this encounter remained in the proximity of the Commander Islands. For instance, the 12th of June, when according to his statements they were engaged in hunting and fishing 40 miles south of the Agatha Island, they were in reality 8 miles off the Medny Island; the course followed by the schooner on her return voyage brought her 3 miles off the southern extremity of that island. In view of this data the schooner *C. H. White* was conducted to the village of Nicolsk, on Bering Island, where a formal inspection by a special commission was made, which established the presence on board of about 12 tons of salt, 15 seal skins, 5 seals newly killed, different accessories for catching these animals, powder, and other articles. A protocol relating the details of the episode was immediately drawn up; Captain Furman in it set forth his observations, and his first mate, Andren Ronning, signed the document unreservedly.

On the part of the crew of the schooner not the slightest resistance was made to the measures taken by the commander of cruiser. Upon the basis of this protocol, and regulated by the instructions received from governmental authorities, Captain de Livron, by a resolution of 4th (16th) of July, 1892, decided to confiscate the *C. H. White* and to send her to Vladivostok; moreover to send the captain and crew to Petropavlovsk, allowing them to return freely to their country. This decision was strictly carried out; Captain Furman and the members of the crew were authorized to remove such effects as belonged to them,

and which in no way constituted the accessories of equipment of the schooner. Furthermore, in conformity with the decision of the commander of the cruiser *Zabiaka*, the aliens, who had thus been taken upon Russian territory, whether those of the schooner *C. H. White* or of the other confiscated vessels, were conveyed to America on the brig *Majestic*. (See Exhibits I, II, and III; Exhibit S annexed to American memorandum, third case.)

OBJECTIONS CONCERNING THE BASIS OF THE AFFAIR.

From the preceding it appears, in the first place, that the American schooner *C. H. White* was detained in her course and seized in 54° 10′ latitude north and in 167° 10′ longitude east, and not in 54° 18′ latitude north and 167° 10′ longitude east—that is to say, in all, a distance of 23 miles, as Captain Furman pretends. The unsubstantiated statements of the latter are contradicted by the official protocol drawn up at that time on the cruiser *Zabiaka* (Exhibit I) and by the official log book of the cruiser for the year 1892 (Exhibit III) while the log book of the schooner was not kept in order precisely during the last days preceding her seizure. Even the observations of the captain of the *C. H. White* in the protocol of July 3 (15), 1892, show that he well understood the meaning of the document which he signed, since he endeavored to justify his situation at the time of his encounter with the Russian man-of-war. At all events, the suspicious character of the schooner *C. H. White* was established by the fact alone that in flagrant violation of international maritime laws it was sailing far enough into the night without distinctive lights. Moreover, the log book of the vessel served to show the inaccuracy of the captain's statements relating to his previous course, and proved the schooner's recent presence in the proximity of the Russian coasts; the course followed on her return voyage indicated a passage at 3 miles off the southern extremity of the Medny Isle. Finally, a casual examination of the hold revealed to the Russian officers the presence of products of illegal seal fishing and confirmed Captain de Livron in his opinion that he had effectually caught up with the marauders almost upon the spot where the offense had been committed, or shortly after the accomplishment of same. Under these circumstances the Russian cruiser, whose special mission it was to strictly guard the fisheries off Commander Islands, could not fail to pursue and seize a foreign vessel which after all doubts as to her pretended nonculpability have been dispelled should have been confiscated in conformity with the prescribed regulations (Exhibit II).

In sanctioning the measures taken by her agents in this respect, the Imperial Government does not intend to dispute the principle of international law which recognizes the liberty of the high seas, but thinks there is reason to attribute particular importance to the essential circumstances of this affair without, however, losing sight of the fact that the limits of territorial waters are not at present clearly determined (see second case). It must be chiefly considered that this vessel, which was found to be a poacher (since it is impossible to lend even a semblance of likelihood to the supposition that the schooner, having been detained with the products of a recent catch of these costly animals, could have been engaged in legitimate business during the two weeks which were spent in the proximity of the Russian coasts, where poaching is interdicted), was sighted by the Russian cruiser at a

moment when, after being engaged in illegitimate seal fishing near Russian territory, it was stealing away in the darkness from the pursuit to which it had rendered itself liable. The schooner *C. H. White* was definitely seized at a relatively inconsiderable distance from land, but after spending entire days on the point of a seizure, in coast waters, had not time to escape beyond the reach of the armed force of the country upon whose rights it had infringed. The cruiser *Zabiaka*, whose special duty it was to watch all suspected vessels about the Commander Islands, had the right to pursue the fleeing schooner and seize her even beyond the limits of territorial waters, according to the Russian law. This point of view must not be regarded as a denial of the principle of the freedom of the high seas, whose object is to attain an advantage of universal interest; that is to say, to protect aliens of all countries in peaceful occupations, but not individuals guilty of harmful attacks upon the rights of others. It is not to be expected that vessels engaged in marauding will not be seized in every case beyond the immediate proximity of the coasts; the protection of the immense extent of Russian coasts in the Pacific Ocean would thus be almost impossible. If the offense had been committed within the limits of the jurisdiction of the local authority, the right to pursue the delinquent still farther could not be ignored. In the case of the Costa Rica packet which is cited quite a different case is in question, that of the pillage of a canoe abandoned at sea, but having been the object of a pursuit proceeding from the Russian coasts, which excludes all question of violation of the principles of international law.

Independently of the preceding considerations, it would be well to note the following particulars of the present case:

The question of preservation of fur seals against the destruction to which they are exposed from marauding vessels, either on the high seas or in territorial waters, has been for a long time a matter of solicitude to the Russian Government and the Government of the United States, who are the possessors of the only territory whereon these animals land—on Commander, Pribilof, and Tuleny islands. Great Britain was implicated in this question on the occasion of disputes which arose in consequence of fishery carried on by Canadian vessels. On June 3 (15), 1891, the Cabinets of London and Washington agreed to establish a provisory modus vivendi, by virtue of which aliens of both countries were interdicted during the period of one year from engaging in fur-seal fishing in that portion of Bering Sea east of the line of demarcation fixed by the treaty concluded in 1867 between Russia and the United States; that is to say, at a time when the American Government claimed exclusive sovereignty over these parts, founded upon the ancient rights of Russia, acquired at the same time as Alaska and the neighboring islands. This provisory state of things was continued until the decision of the Paris tribunal of arbitration, which passed upon the American claims. (See Review of International Law, Vol. XXV, 1893, p. 417.)

As a consequence of the practical application of this measure for the interdiction of seal fishing, there was an extraordinary influx of poaching vessels in the proximity of Russian coasts in the western part of Bering Sea.[a]

[a] In the documents of the confiscated vessels there were shown inscriptions made by English or American officers ordering these vessels to go beyond the line of demarcation of the forbidden zone, and not to enter again under penalty of confiscation.

This circumstance obliged the Russian Government to send a cruiser, furnished with suitable instructions, to the Pacific ocean to protect the fur-seal fisheries. The attitude of the aliens of the party claimant was such as to require Russia to take a stand of legitimate defense. At this time, among other very numerous vessels, both English and American, the schooner *C. H. White* was seized for engaging in illegitimate fur-seal fishing off the Commander Islands. Then in the month of May, 1893, a special agreement was concluded between England and Russia, by which the English Government engaged to temporarily interdict her subjects from seal fishing in a zone of 10 miles along the Russian coasts, along the whole extent of Bering Sea and the western part of the Pacific Ocean, as well as in a zone of 30 miles around the Commander and Tuleny islands. An arrangement of the same nature was concluded on April 22 (May 4), 1894, between Russia and the United States of America. On a parallel with the above facts the Paris tribunal of arbitration of the 15th of April, 1893, settled the difference between England and America, concerning the general question pending between the two Governments, by fixing obligatory rules regarding the protection of seals, by which it was agreed, among other things, that the two countries should completely prohibit their subjects the catching of these animals within the limits of a zone of 60 miles around the Pribilof Islands. This last decision gave partial satisfaction to the claims of the Washington Cabinet. The application of the decisions of the Paris tribunal of arbitration by the two countries was assured, so far as regards England, by means of a bill adopted by Parliament and in America by an act of Congress dated April 5 and 6, 894. In fact, the United States Government showed itself disposed to sign a convention with Russia, England, and Japan on the subject of the extension of the decision of the Paris tribunal of arbitration to all of the waters of the Pacific north of 35° of latitude.

Thus it is evident that the points of view of the Russian and American Governments, in a question of such importance for both countries as the preservation of the seals, were, upon the whole, concordant. According to the principle of reciprocity, the United States Government, which claimed the right of control over a great extent of sea, alleging rights in which, according to its own statement, it had taken the place of Russia, and which (Government) availed itself thereof for the protection of its own industry in the territories and waters which belonged to it, was obliged to recognize, on its part, the control of Russia, at least to the limited extent to which the latter proposed to exercise it, without disputing the legality of the measures which the Russian Government thought it necessary to take in order to preserve its own coast against pirates, and without giving its support to the claims of American citizens who infringed upon the regulations adopted by Russia in an interest that was common to both countries. It is incontestable that the Russo-American agreement, concluded after the confiscation of the schooner *C. H. White*, not having retroactive force, could not, strictly speaking, be applied in the present case; but it is beyond doubt that the agreement only sanctioned in a formal manner the previous point of view in the question of common interest to both countries. Therefore the seizure of an American vessel at a distance of 23 miles from the Russian coast, which vessel may have been guilty of infringement upon interests which the Russian Government meant to protect, could not in justice give grounds to claim of the party claimant.

By contesting in its entirety, upon the basis of the preceding considerations, the sound basis of the claim of party claimant, the defendant party thinks it necessary to pause at certain points of detail of the said claim.

1. Particular weight should be attached to the personal claims of Captain Furman ($25,000), of his first mate, Ronning ($15,000), and of the fisherman Wolfgang ($10,000); also to the claim presented in the name of the entire crew of the confiscated vessel, which reaches a sum of $20,000. All of these claims, stripped of sufficient proofs to a total of $70,000, with interest for nine years, are based upon the pretended facts which follow: The captain of the American vessel had been compelled by force, under penalty of transportation to Siberia, to sign a document in a foreign language which he did not understand, and to submit to a severe imprisonment on the Russian cruiser. Cruelties were committed against the crew in general, either at sea or on shore, on account of which they must have suffered greatly both physically and mentally. In fact, certain trifling objects belonging to Furman, Ronning, and Wolfgang were lost and were not restored to them when they were given their liberty. Then the inquiry which was made and the decision of the superior authority as to these facts established not only the complete inaneness of these allegations, offensive to the honor of the Russian navy, but still more the fact that many of these aliens at Petropavlovsk expressed their thanks to the Russian officers for the good treatment they received and the assistance that was given them for their return to their own country. (See Exhibit H.) As for the particular point of the argument drawn from the fact that uncomfortable lodgings in the town had been assigned to these parties, it is explained by the insufficiency of the local resources and not from any intention to treat the aforementioned persons as criminals. On the contrary, the Russian authorities renounced all personal judicial action against the parties who aboard the *C. H. White* engaged in illegal fishing, confining itself to confiscating the seized vessel. (Exhibits II and III.) In view of the preceding, the mention made by the party claimant of the precedent of the decision of the Commission of Washington in 1871, where, according to the memorandum, it is a question of the illegal confinement of persons in a prison or in a fortress at the time of the war of secession is not applicable in the present case, and the defendant party believes it right to reject in a manner most emphatic all claims bearing upon personal bad treatment to which the interested parties may have been subjected.

2. As to the claims relating to the loss of probable profit which might have been derived from the seal fishing and from the catch of fish ($34,700—$10,300), the defendant party considers it sufficient to refer to his explanations concerning the case of the *Cape Horn Pigeon* (first case).

3. The sum for loss representing the value of the confiscated vessel and of her cargo ($35,000—$280—$160—$260) is not justified except by the testimony of interested persons and can not be considered as regularly established. (See fourth case.)

4. It naturally follows that the claim for interest since the year 1892 ($81,388.80), added to the principal of the claim, could not be admitted by the defendant party once the latter is rejected by him.

Finally there remains to be mentioned that the proposition recently made by the party claimant to settle the affair by compromise for the

sum of $112,500, instead of $232,108.80 at present claimed, shows plainly the absence of accuracy in the estimates of the party claimant.

CONCLUSION.

By virtue of the preceding the defendant party requests that the entire claim of the party claimant be rejected.

EXHIBITS.

I. Verbal proceedings of the seizure of the schooner *C. H. White*, dated July 3 (July 15), 1892, No. 376;

II. Act of the confiscation of the said vessel dated July 4 (16), 1892, No. 377; and

III. Certified copy of the log book of the cruiser *Zabiaka* for the year 1892.

The defendant party holds the original of these documents at the disposal of the arbitrator.

EXHIBIT I.

OFFICIAL REPORT OF THE CONFISCATION OF THE AMERICAN SCHOONER C. H. WHITE ON THE 3D (15TH) JULY, 1892, IN BERING SEA, ON BOARD THE CRUISER ZABIAKA.

On the 3d (15th) July, at 10.30 p. m., being in 54° 30′ latitude north and 167° 15′ longitude east, bearing toward southeast 68, from the port cathead, at a distance of 2 miles, was sighted a sailing vessel without distinctive lights, which bore in the direction west of the southern extremity of the island of Medny. A blank shot fired from a 9-pounder, and approaching the schooner she was ordered to lay to, which injunction was at once obeyed. An armed rowboat was sent from the cruiser under command of Lieutenant Panferow, who having superficially examined the hold discovered a number of seal skins, and of five seals but recently killed. Lieutenant Panferow, remaining aboard the schooner, sent her captain with the log book and the ship's papers aboard the cruiser, from which was learned the following:

1. During the last two days the log was not kept.

2. The schooner *C. H. White*, under the United States flag, belonging to John Prien, left San Francisco the 7th (19th) May, under command of Capt. L. M. Furman, with an European crew of ten men, among whom the said Captain Furman, his first mate, Andrew Roning, and the cook, Julius Furman, were remunerated according to the number of skins of seals killed. Besides the persons above mentioned, forming part of the crew and not on the ship's roll, were four Aleouts speaking Russian. The captain with seven men were left aboard the cruiser. Lieutenant Panferow, being sent aboard the schooner, took the towline tendered by the cruiser and conducted the schooner into the roadstead of the village of Nikolsk on the Bering Island, where, after inspection by a commission composed of the ship's executive officer, Second Lieutenant Arnaoutow, of the examiner, Lieutenant Bezkrovny, of first pilot officer, Lieutenant Lakhtine, and of Lieutenant Nasonow, it was shown that the schooner contained about 12 tons of salt, 15 seal skins, 5 seals newly killed, 23 guns of different systems, with cartridges, 10 tin boxes containing powder, a variety of groceries, manufactured articles, and various small objects made of iron. There was no opposition or resistance by the captain or crew.

The contents of the official report were communicated to the captain, who made no objections.

(Signed) Lieutenant NASONOW.
Lieutenant LAKHTINE.
Lieutenant BEZKROVNY.
[L. S.] Lieutenant ARNAOUTOW.
Captain of Frigate DE LIVRON.
ANDREN RONNING.
L. M. FURMAN,
Master Schooner C. H. White.

EXHIBIT II.

DECISION MADE ON BOARD THE SECOND-CLASS CRUISER ZABIAKA ON THE WAY TO THE VILLAGE OF NICOLSK ON BERING ISLAND, No. 337.

On July 4, 1892, upon the basis of the official report of the examination of the schooner *C. H. White*, drawn up on July 3 by the commission appointed by my order dated June 28, No. 60, and founded upon the publication by the Russian Imperial Government, published in 1881, as well as by virtue of the decision of the governor-general of eastern Siberia of the 1st November, 1883, No. 1171, and of the instructions given to the cruiser by the commander of the port of Vladivostok, dated April 22, 1892, No. 1425, I, commander of the above-mentioned cruiser, captain of frigate *Boris Karlovitch de Livron III*, have decided:

First. To confiscate the schooner *C. H. White* and to dispatch her to Vladivostok under command of Lieutenant Koltchak.

Second. To convey the captain and crew to Petropavlovsk, allowing them freely to return to their country.

Third. To draw up a complete inventory of the schooner's cargo upon her arrival at Petropavlovsk.

Fourth. To sell at auction at Petropavlovsk, for the benefit of the State, all of the cargo susceptible of deterioration and the unnecessary long boats, as well as arms.

Fifth. To deliver without receipt the seal skins to the chief of district of Commander Islands.

Sixth. To deliver without receipt one of the seven long boats to the chief of district of the Commander Islands, in compliance with the request of said chief.

Seventh. To submit the present decision to competent superior authority.

Eighth. To deliver to the captain copies of this official report and of the present decision.

(Signed) BORIS DE LIVRON, [L. S.]
Commander of the Second-Class Cruiser Zabiaka.

EXHIBIT III.

EXTRACT FROM THE JOURNAL KEPT ABOARD THE SECOND-CLASS CRUISER ZABIAKA DURING HER CRUISE FOR THE PROTECTION OF THE COMMANDER ISLANDS IN 1892.

Name and nationality of vessel: United States of America, *C. H. White.*

Cargo: Twenty seal skins, salt, powder, shot, arms, various implements for the taking of seals. Provisions and a variety of merchandise for commerce by means of barter.

Tonnage: Eighty-four.

Name of captain: L. M. Furman.

Circumstances of the case: On the 3d (15th) July, 1892, at 10.30 p. m., in 54° 30′ latitude north and 167° 15′ longitude east, while sailing in the direction southeast 68, we sighted at a distance of 2 miles a sailing vessel without distinctive lights following a course to the west of the southern extremity of the island of Medny. A blank shot was fired from the cruiser, and on approaching the schooner was enjoined by verbal order to lay to; this she did. Two officers and 11 sailors were sent aboard. On inspection it was discovered that the schooner contained 15 seal skins and 5 seals newly killed, after which a towline was tendered and she was towed to the village of Nicolsk. There was no resistance on the part of the captain from the moment of his arrest.

Number of crew: Fifteen.

Decision: The schooner and the cargo are confiscated and the crew will be sent to America on the brig *Majestic.*

(Signed) Captain of Frigate DE LIVRON.

The present extract is in conformity with the original of the log book among the papers of the acting major-general of marine, 1895, No. 30.

St. Petersburg, March 24, 1901.

P. MIKHAILOW,
Governor of Chancery of the Ministry of Marine.

S. STEBLINE KAMENSKY,
Deputy of the Jurisconsulate.

[L. S.]

FOURTH CASE.

Confiscation of sealskins from the American schooner Kate and Anna, detained in her course by the Russian cruiser Zabiaka.

STATEMENT OF CASE.

The American schooner *Kate and Anna* was detained and afterwards permitted to continue her course under the following circumstances:

On the 31st of July (August 12), 1892, at 7 a. m., the Russian naval cruiser *Zabiaka*, under command of Captain de Livron, detained off the Medny Island, in Bering Sea, three small boats engaged in poaching, and belonging to the English schooner *Sayward*, and afterwards another marauding schooner, the *Vancouver Belle*, seeking the *Sayward*, which had disappeared, when it sighted through the fog at a short distance still another sailing vessel, which was found to be the American schooner *Kate and Anna*.

The *Zabiaka* detained the latter in her course in 54° $\frac{9}{10}$′ latitude north and 168° $\frac{21}{22}$′ longitude east, 30 miles south of the Commander Islands. From the ship's papers, which were presented by Captain Lutjens, the commander of the *Zabiaka* discovered that the log of the schooner had not been kept for ten days past, and that it was generally not in order. According to the lines of route indicated on the chart of navigation, as also from the points noted at noon, the commander of the *Zabiaka* was convinced that the *Kate and Anna*, during the last ten days, had twice entered the strait between the Bering and Medny Islands. Consequently, not trusting to the explanations made by the captain that he had entered the strait on account of bad weather, and believing that he had engaged in illegitimate seal fishing in the proximity of the Russian coasts, Captain de Livron seized the 124 sealskins which were aboard the schooner. As he had no more convincing proofs he permitted the schooner to continue her course, after compelling the captain to sign an agreement not to kill seals in Russian waters. This warning was inscribed in the log book of the *Kate and Anna*, and Captain Lutjens made at that time no further claim. (See Exhibts I and II; compare Memorandum, Exhibit E.)

GROUNDS FOR LEGAL RESPONSIBILITY.

There is no doubt, in consideration of the conditions of the encounter with the *Kate and Anna* and from the evidence of her ship's papers, that the commander of the cruiser *Zabiaka* had serious reasons to suspect this vessel and even to conclude that at least a portion of her catch had been obtained by poaching in Russian territorial waters. However, the setting at liberty of the vessel, after having seized the cargo which rendered it suspicious, shows a lack of purpose in the decision of the naval cruiser's commander, which might be partly explained by

want of positive proofs of the culpability of Captain Lutjens regarding the wrong attributed to him. Therefore the Russian Government, in conformity with its desire to maintain on all occasions amicable relations with the American Government, is ready to acknowledge its obligation to indemnify the actual losses caused the individual by the lamentable fact concerning the schooner *Kate and Anna*. In view of the preceding there is no reason to enter into an examination of the principle of international law regarding the freedom of the high seas, and the question now is the settlement of the amount of indemnity to be paid to the injured parties for the decision taken at the moment the said vessel was stopped.

AMOUNT OF INDEMNITY.

All the claims in this affair are filed in the name of the captain, owner of the vessel *Kate and Anna*, Charles Lutjens, who thinks he has the right to claim not only reimbursement of the value of 124 confiscated sealskins, but also an indemnity for the interruption of her voyage during the fishing season. The total amount of Lutjens's claims was limited in 1893 to $10,000; at present, with interest added, it reaches the sum of $16,148.44. (See Memorandum, Exhibits C, H, and statement of case.)

I. Regarding the most important portion of the alleged losses, which is estimated at $8,750 and which relates to the interruption of the schooner's course, the defendant party considers that this feature of the claim is devoid of all juridical grounds. It is plain that in warning the suspected vessel of the legal responsibility it incurred by navigating in Russian waters, the cruiser *Zabiaka* did not forbid her to continue fishing outside the aforesaid zone, and did not touch upon the freedom of the further navigation of the schooner upon the high seas, open alike to all. This warning consisted only of a necessary reminder of the obligation not to infringe upon the rights of others, and not a forbidding of the American vessel to exercise her legitimate rights. At all events, the commander of the Russian cruiser had not ordered the captain of the schooner to "stop seal fishing and go home" (as the claimant pretends); confining himself to the confiscation of the sealskins, he inscribed in the schooner's log, that "the vessel was not taken and got free," so it appears from the explanations of the claimant himself. Therefore De Livron's warning to the captain alone did not oblige the schooner to quit at once the western waters of the Pacific and to return to San Francisco. In a word, there could be no question of enforced interruption of the voyage of the *Kate and Anna* until the close of the fishing season, or of the loss which the vessel may have sustained of a probable profit derived from legitimate fishing in open sea. Judging superfluous a return to the questions developed in case of *Cape Horn Pigeon* (first case) concerning the inapplicability in a civil action of hypothetical calculations as to the number of animals that might have been killed, a quantity estimated in the present case at 625, the defendant party rejects on his part said claim as unfounded.

II. Captain Lutjens's claim for indemnity for 124 sealskins which were confiscated from him is recognized as essentially legitimate, but the amount of the claim upon this point seems exaggerated. To justify the sum of $1,736 claimed to-day, while in 1893 the sum of $1,737 was claimed, reveals the fact that according to the word of the ship's owner

of the *Kate and Anna* (Memorandum, Exhibit G), the 1,252 skins previously delivered to Hakodate that same season were sold on the London market at $14 each. But, independent of this, the fact alleged is not proven in a documentary manner (compare Memorandum, Exhibit Q). It will be seen that the claimant party in his statement cites the case of the valuation of sealskins at $8 each. There also appear data contained in the books of the imperial ministry of marine that, at the time of the sale through an intermediary of the firm of Lindholm at London of sealskins confiscated from different vessels in 1892, sums amounting to 15 rubles 61 copeck and 18 rubles 44 copeck each were realized; that is to say, from about $8 to $9.50, valuing the dollar at 1 ruble 95 copeck.

From the preceding, and considering that the party claimant does not present exact data on the subject of the then price of the raw products on the San Francisco market, that is to say, from the starting point to the destination of the schooner *Kate and Anna*, the defendant party thinks it quite sufficient to take as mean value of one sealskin $10 as a maximum, and declares a willingness to pay for said 124 skins a sum total of $1,240.

III. The addition of legal interest, as has been stated above in the counter memorandum, is recognized as just by the defendant party, to date from the day of confiscation of the seal skins in question. In fine, it suffices to say that the compromise recently proposed to fix the indemnity at $7,500 instead of $16,148.44, now claimed, shows a lack of accuracy in the calculations of the party claimant. (Memorandum Exhibits T and U of the first case.)

CONCLUSION.

On the basis of all that precedes, the defendant party recognizes the obligation to pay an indemnity amounting to $1,240, with added interest at 6 per cent per annum from the 31st July (August 12), 1892, and requests that the claims of the party claimant upon the other points be rejected.

ANNEXES.

I. Extract from the report of the commander of the cruiser *Zabiaka* dated August 11, 1892, No. 354.

II. Extract from the log of the cruiser *Zabiaka* during her protective cruise off the Commander Islands in 1892.

The defendant party holds the originals of these documents at the disposal of the arbitrator.

EXHIBIT I.

EXTRACT FROM THE REPORT OF THE COMMANDER OF THE SECOND-CLASS CRUISER ZABIAKA DATED AUGUST 11, 1892, No. 354.

On the 31st of July, being sheltered by the southern extremity of the Medny Island, and off the western coast, I was notified between 12 and 1 o'clock by a signal from shore that from the western coast of the island a schooner had been sighted. I at once circled the extremity of the island, and saw at a distance of 3 miles from shore three sails, which disappeared in the distance. On approaching we discovered that they were three poaching vessels, which fled at the approach of the cruiser.

On reaching these boats, which were found to belong to the schooner *Sayward*, I gave orders to seize them. The boats, with nine men, guns, and eight seals just killed, were taken aboard the cruiser and confiscated. The boats and guns were sold at auction in the village of Nicolsk for 200 rubles. At the court of inquiry these aliens declared to me the point at which the schooner lay, at southwest 45°, and I made way thither. Shortly thereafter we sighted the schooner, and at 4.30 we hove to in close proximity to the latter. The captain being requested to report aboard the cruiser with his ship's papers, presented himself; but I discovered that I had made a mistake. The poachers had misdirected me. This vessel proved to be the English schooner *Vancouver Belle*, commanded by Capt. W. H. Copp, 23 men in crew. There were aboard the schooner nearly 600 seal skins, salt, powder, and arms. I ordered her confiscation, since it developed from her log book that a portion of the seals had been caught in the strait between the islands. I took the captain and crew aboard, and I charged Lieutenant Koltchak to conduct her to Petropavlovsk. Immediately after the seizure a dense fog gathered, which robbed me of all possibility of discovering the cruiser *Sayward*. At 6.15 the fog lifted somewhat, and at a short distance I again sighted a schooner in 54° 10′ latitude north and 168° 22′ longitude east. The captain being requested to come aboard, presented his papers and his log book.

I learned from the log book that the American schooner *Kate and Anna*, detained by me at considerable distance off the islands, had twice been in the strait between the islands of Bering and Medny; that according to the captain's word he had passed into the strait on account of the bad weather, and had not caught any seals in Russian waters.

There were absolutely no convincing proofs against the schooner; therefore, on account of the irregularities of the log book, I took all the seal skins to the number of 124 and allowed the latter to depart, after giving him warning.

(Signed) Captain of Frigate DE LIVRON.

The above extract is in conformity with the original report, which was upon the books of the acting major-general of marine, 1892, No. 194.

(Signed) P. MIKHAILOW, [L. S.]
Governor in Chancery of the Ministry of Marine.
J. STEBLINE-KAMENSKY,
Deputy of the Jurisconsulate.

EXHIBIT II.

EXTRACT FROM THE JOURNAL KEPT ON BOARD THE SECOND-CLASS CRUISER ZABIAKA, DURING THE PROTECTIVE CRUISE OFF COMMANDER ISLANDS IN 1892.

Name and nationality of vessel: American sailing schooner *Kate and Anna*.
Cargo: One hundred and twenty-four seal skins, salt, shot, etc.
Tonnage: ———.
Name of captain: Charles Lutgens.
Number of crew: ———.

Circumstances of the case: On the 31st of July at 6.15, being in 64° 10′ latitude north and in 168° 22′ longitude east, we met the sailing schooner *Kate and Anna*. Having detained the schooner, we required the captain to report, with his papers. It was found that the schooner log had not been kept during the past ten days and the ship's journal in general could afford not the least justification. Moreover, the points indicated on the navigation chart caused me to suspect that the seals had been killed in our waters. For this reason they were confiscated. The captain made no resistance.

Decision: On account of the irregularity of the log book I confiscated the seal skins and required the captain to sign agreement not to kill seals in Russian waters and to enter on log book the warning he received.

(Signed) Captain of Frigate DE LIVRON.