DECISION

OF THE

ARBITRATOR, MR. T. M. C. ASSER, MEMBER OF THE STATE COUNCIL OF THE NETHERLANDS, RENDERED AT THE HAGUE, NOVEMBER 29, 1902, IN THE INTERNATIONAL ARBITRATION BETWEEN THE UNITED STATES OF AMERICA, PARTY CLAIMANT, AND RUSSIA, PARTY DEFENDANT, RELATIVE TO THE VESSELS "CAPE HORN PIGEON," "JAMES HAMILTON LEWIS," "C. H. WHITE," AND "KATE AND ANNA."

DECISION OF THE ARBITRATOR.

THE CASE OF THE "CAPE HORN PIGEON."

The undersigned, Tobie Michel Charles Asser, member of the council of state of the Netherlands, exercising the functions of arbitrator, which he has had the honor to have conferred upon him by the Government of the United States of America, and the Imperial Government of Russia, to decide as to the differences relating to the affair of the bark *Cape Horn Pigeon:*

Whereas by virtue of the declarations exchanged at St. Petersburg the 26th August (September 8) 1900, between the aforesaid two Governments, the arbitrator shall take cognizance of the claims for indemnity for the seizure and detention of certain American vessels by Russian cruisers, brought against the Imperial Russian Government by the Government of the United States in the name of the parties in interest;

That according to these declarations the arbitrator, following in his award the general principles of international law and the spirit of international agreements applicable to the subject, shall determine with regard to each claim filed against the Imperial Russian Government, whether it is well founded, and if so, whether the facts upon which it is based are proved;

That, furthermore, it is recognized that this stipulation shall have no retroactive force, and that the arbitrator will apply to the cases in litigation the principles of international law and the international treaties which were in force and binding upon the parties engaged in this litigation at the time the seizure of the vessels took place;

Finally, that the arbitrator shall fix the amount of the indemnity which may be due from the Russian Government on account of the claims presented by the parties in interest;

Whereas, after a minute examination of the memoranda and counter memoranda exchanged between the high-contracting parties, as well as of all the exhibits of each side, the arbitrator, availing himself of the right accorded him by the said declarations of St. Petersburg, invited the two Governments to name commercial experts to aid him in fixing the amount of the indemnity which would eventually be due, and in addressing himself to that effect to the two high-contracting parties the arbitrator at the same time prayed them to furnish supplementary information regarding the points of law, indicated by him;

Whereas, in the sittings held by the arbitrator at The Hague in the hall of Permanent Court of Arbitration, from the 27th June to the 4th July, 1902, he heard the depositions of experts in the presence of the agents of the two high-contracting parties, who on that occasion furnished the supplementary information asked for by the arbitrator;

Whereas, in support of the claim relative to the seizure and detention of the American whaler *Cape Horn Pigeon* by an armed cruiser of the Imperial Russian Government, the party claimant alleged the following facts:

The bark *Cape Horn Pigeon*, constructed for whaling, having set sail from San Francisco on the 7th December, 1891, with a crew of thirty men besides the captain (named Scullun or Scullan) for a voyage in the seas of Japan and Okhotsk was, on the 10th September, 1892, in the Sea of Othotsk, on the high seas, engaged in whaling, when it was seized and detained by the commander of a vessel of the Russian navy (cruiser) and conducted to Vladivostok, where it was detained by the Russian authorities until the 1st October, 1892. After the seizure of the bark, her crew was placed aboard the Russian schooner *Maria* (which according to the declaration of the defendant party had been seized by the Russian cruiser for illegal sealing), and was forced to conduct her into the port of Vladivostok. In that town, after they had been told that they would be lodged in the guard house, this shelter from cold and hunger was refused them, and the captain found himself obliged to secure lodgings for them in a shed. They were detained from day to day without being told the reason, and finally, on the 1st October, 1892, they were sent back to their vessel.

Whereas the defendant party recognizes that in this case a regretable error occurred, since the naval officer (Lieutenant Von Cube) was mistaken in suspecting the *Cape Horn Pigeon* of being engaged in illegitimate hunting, and consequently the Imperial Government, recognizing its responsibility, offered to pay a pecuniary indemnity for the actual losses caused to the aliens by the acts of its governmental agents;

Whereas the task of the arbitrator in this affair consists in fixing the amount of indemnity to be paid by the defendant party;

Whereas the claim of the party claimant amounts to a total of $80,700, with interest at 6 per cent per annum from the 10th of September, 1892, and that the defendant party has offered to pay $2,500 also with interest at 6 per cent per annum;

Whereas the defendant party thinks that the first item of the claim amounting to $3,040 for the expenses of the owner of the *Cape Horn Pigeon* on account of the seizure should be reduced to $1,040, and in fact, the amount claimed not being sufficiently justified, it might be reduced in conformity with the conclusions of the defendant party;

Whereas, for the services of the crew of the *Cape Horn Pigeon* for conducting the Russian schooner to Vladivotsok, the sum of $1,000, offered by the defendant party in lieu of the sum of $1,200 claimed by the party claimant, seems sufficient;

Whereas the defendant party admits as justified the claims for provisions consumed, $200; for lodgings for the crew, $210; for personal expenses of Captain Scullun, $50; total, $460;

Whereas the party claimant claims $45,000 for loss of the catch during the time which transpired between the seizure of the whaler and the day on which he was able to resume whaling; and the defendant party contests the underlying principle of that part of the claim, alleging that it is question of the profit of an enterprise liable to risks and which may readily terminate in loss, and applying in support of the assertion the award of the court of arbitration of 1872 in the case of the "Alabama claims," by which the claims for indemnity for indirect damages were set aside;

Considering that the general principle of civil law, according to which the damages should include an indemnity, not only for the loss suffered, but also for the profit of which one has been deprived, is equally applicable to international litigation, and that in order to apply it, it is not necessary that the amount of the profit of which one is deprived should be exactly determined, but that it suffices to show that in the natural order of things one would be able to realize a profit of which one is deprived by the act which gives rise to the claim;

Considering that in this case it is not a question of indirect damage, but of direct damage, the amount of which should be estimated;

Considering the amount of that part of the claim which the party claimant takes for starting point, the average number of whales taken in one season, which he estimates at 8, and from which he deducts 2, which Captain Scullun had already taken, leaving 6 as probable number of whales still to be caught by him, if the vessel had not been arrested and seized;

Considering, however, that according to Captain Scullun's own declaration he had taken 28 whales in four seasons, which make 7 per season, and whereas 7 indicate more justly the average catch for the whaler *Cape Horn Pigeon* during one season, which, after deducting the 2 whales already caught, gives 5 for the remaining probable catch;

Considering that with regard to the approximate value of a whale at the period when the product of the catch of the *Cape Horn Pigeon* in 1892 could have been sold, the result of the inquiry which took place in this arbitration, and the information furnished to the arbitrator, show that the average weight of the bone to be obtained from 1 whale may be estimated at 1,200 pounds and the average price at $4 per pound, the average quantity of oil at 100 barrels and the average price at $12 per barrel, which makes a total of $6,000 per whale and $30,000 for 5 whales, or after the deduction of $1,500, instead of $1,800 deducted by Captain Scullun, $28,500;

Considering, with regard to the indemnity claimed for the members of the crew at $1,000 per man to be $31,000, that it is not proved that the members of the crew were subjected to the bad treatment of which they complain, but that, on the other hand, the very fact that they were detained against their will at Vladivostok for about three weeks in consequence of the illegal seizure of their vessel, entitles them to indemnity independently of that which is due them for having been forced to conduct a Russian vessel to Vladivostok, and the amount of this indemnity should be fixed at $7,750, or an average of $250 per capita;

That, consequently, the total of damage due from the defendant party to the party claimant as a result of the detention and seizure of the *Cape Horn Pigeon* amounts to the sum of $38,750;

Considering that the defendant party recognized as perfectly regular the addition of interest at 6 per cent per annum;

Therefore, the arbitrator decides and pronounces the following:

The defendant party shall pay to the party claimant on account of the claims presented by the parties in interest in the case of the *Cape Horn Pigeon* the sum of $38,750 in United States money, with interest on that sum at 6 per cent per annum from the 9th of September, 1892, until the day of the payment in full.

Done at the Hague, November 29, 1902.

T. M. C. ASSER.

CASE OF THE "JAMES HAMILTON LEWIS."

The undersigned, Tobie Michel Charles Asser, member of the council of state of the Netherlands, exercising the functions of arbitrator, which he has had the honor to have conferred upon him by the Government of the United States and the Imperial Government of Russia, to decide as to the differences relating to the affair of the schooner *James Hamilton Lewis;*

Whereas, by virtue of the declarations exchanged at St. Petersburg the 26th August (September 8), 1900, between the aforesaid two Governments, the arbitrator shall take cognizance of the claims for indemnity for the seizure and detention of certain American vessels by Russian cruisers, brought against the Imperial Russian Government by the Government of the United States of America, in the name of the parties in interest;

That according to those declarations the arbitrator, being governed in his award by the general principles of international law and the spirit of international agreements applicable to the subject, shall determine with regard to each claim filed against the Imperial Russian Government whether it is well founded, and if so, whether the facts upon which it is based are proved;

That furthermore it is recognized that this stipulation shall have no retroactive force, and that the arbitrator will apply to the cases in litigation the principles of international law and the international treaties which were in force and binding upon the parties engaged in this litigation at the time the seizure of the vessels took place;

Finally, that the arbitrator shall fix the amount of the indemnity which may be due from the Russian Government on account of the claims presented by the parties in interest;

Whereas, after a minute examination of the memoranda and countermemoranda exchanged between the high contracting parties, as well as of all the exhibits of each side, the arbitrator, availing himself of the right accorded him by the said declarations of St. Petersburg, invited the two Governments to name commercial experts to aid him in fixing the amount of indemnity which may eventually be due, and in addressing himself to that effect to the two high contracting parties, the arbitrator at the same time requested them to furnish supplementary information regarding the points of law indicated by him;

Whereas, in the sittings held by the arbitrator at The Hague, in the hall of the permanent court of arbitration, from the 27th June to the 4th July, 1902, he heard the depositions of experts in the presence of the agents of the two high contracting parties, who on that occasion furnished the supplementary information asked for by the arbitrator;

Whereas, in support of the claim relative to the seizure and confiscation of the schooner *James Hamilton Lewis*, the party claimant alleged the following facts:

The said schooner having set sail from San Francisco on the 7th

May, 1891, bound on a voyage in the North Pacific Ocean on a fishing and hunting expedition, with Alexander McLean as captain, was, on the 2d August, 1891, about 20 miles east of Copper Island (latitude 55° 35′ north, longitude 167° 21′ east), when she was seized early in the morning by the Russian cruiser *Aleoute*. The captain of the schooner thinking it necessary to make land for the purpose of verifying his chronometer, directed his course toward Copper Island. At that place his vessel was compelled to lay to by a cannon shot from said cruiser, and a longboat approaching the schooner, a Russian naval officer ascended from the boat to the deck of the schooner and demanded the official log book, which was given him by the captain, and which he took with him, returning to his vessel. Presently he returned with several armed men and ordered Captain McLean to leave his vessel and to come as a prisoner on board the *Aleout* with all of his crew, except seven men. Captain McLean refused to obey this order, and resumed his eastward course; then the commander of the cruiser began a pursuit, and, circling the *James Hamilton Lewis*, captured her by force of arms; the captain and members of the crew were conducted to Vladivostok; the vessel, with her cargo, her equipment, and the personal property of the captain, was confiscated; her captain, his officers, and crew were detained prisoners, and subjected to harsh and unjust treatment, and on being released, were left to find their way home as best they could;

Whereas the damage claimed by the party claimant on account of the parties in interest, for the seizure and confiscation of the vessel and the imprisonment of the captain and crew, reaches a total of $101,336 with interest at 6 per cent per annum;

Whereas the party defendant, replying to the allegations of the party claimant, maintains that when the *James Hamilton Lewis* was sighted by the cruiser she was only 5 miles at most from Medny Island (or Copper Island) and that the seizure took place at a distance of 12 (or 11) miles from the coast; that furthermore it is shown from a series of facts set forth by the defendant party that the *James Hamilton Lewis* must be presumed to have been guilty of illegal sealing in Russian territorial waters; that consequently the agents of the Imperial Government were justified in pursuing her even outside of such waters and in seizing and confiscating her with her cargo; that the imprisonment of the crew was caused by their resistance to arrest and the seizure of the vessel;

Whereas the defendant party, relying upon these allegations and subsidiarily contesting the amount of the demand, has requested that the claims of the party claimant be rejected;

Whereas the honorable delegate of the party claimant, Mr. Herbert H. D. Peirce, in the sitting of July 4, 1902, in the name of the Government of the United States of America made the following declaration:

DECLARATION MADE TO THE HONORABLE ARBITRATOR, MR. T. M. C. ASSER, JULY 4, 1902, BY THE PARTY CLAIMANT IN THE ARBITRATION BETWEEN THE UNITED STATES AND RUSSIA, IN REPLY TO THE QUESTION ASKED BY THE ARBITRATOR RELATIVE TO THE EXTENT OF JURISDICTION CLAIMED BY THE UNITED STATES OVER THE BORDERING WATERS OF THE BERING SEA.

The delegate of the United States makes this declaration under the specific authority received by him from the Secretary of State of the United States on July 3, 1902, to wit:

The Government of the United States claims neither in Bering Sea nor in its other

bordering waters an extent of jurisdiction greater than a maritime league from its shores, but bases its claims to such jurisdiction on the following principle:

The Government of the United States claims and admits the jurisdiction of any State over its jurisdictional waters only to the extent of a maritime league, unless a different rule is fixed by treaty between two States; even then the treaty States are alone affected by the agreement.

Considering that the arbitrator must decide:

I. Whether the seizure and confiscation of the schooner *James Hamilton Lewis* and her cargo, as well as the imprisonment of the crew, should be considered as illegal acts.

II. If in the affirmative, what amount of indemnity is due from the defendant party.

I. (*a*) Considering this question must be decided according to the general principles of international law and the spirit of international agreements in force and binding upon the two high parties at the time of the seizure of the vessel;

That at the time no agreement existed between the two parties containing in the special matter of sealing any derogation of the general principles of international law with regard to the extent of territorial waters;

That the defendant party sets forth that in the litigation between the United States of America and Great Britain before the Tribunal of Arbitration established by virtue of the treaty concluded at Washington the 29th February, 1892, the United States Government set up with regard to the right of jurisdiction in Bering Sea, against Great Britain, claims to an extent of far greater limits than those which are admitted by the general principles of international law, that these claims were prompted by the interest in the preservation of the seals and the suppression of illegal sealing, and that while the Government of the United States of America loyally submitted to the decision of the arbitrary court of 1893, which did not adopt its view, that view may nevertheless be employed to combat the claim filed by this Government in the present litigation;

Considering that whatever may be the desirability of the policy in in question as basis of an agreement between the States interested, it could not be obligatory without such an understanding even in the case of a government which at another time had pleaded it, but unsuccessfully, before a tribunal of arbitration;

Considering that the agreement which was entered into between the parties after the seizure and confiscation of the *James Hamilton Lewis* could not modify the effect of the principles of law generally accepted at the time of these acts;

Considering that the seizure of the schooner took place according to the party claimant at a distance of about 20, and according to the defendant party at a distance of 11 or 12, miles from Russian territory, and that even if the latter version be the true one, the act was accomplished outside Russian territorial waters, which is, moreover, admitted by both parties;

Considering that the policy of the defendant party according to which it was permitted to a war ship of a State to pursue beyond territorial waters a vessel whose crew had rendered themselves guilty of an illegal act in territorial waters or on the territory of that State could not be regarded as conforming to international law, since the jurisdiction of a State does not extend beyond the limits of the territorial sea, unless this rule has been derogated by a special convention;

Considering that it is not necessary to examine whether the presumptions alleged by the defendant party are serious enough to cause the admission that the crew of the *James Hamilton Lewis* had been guilty of sealing in territorial waters or on Russian territory;

Considering that the seizure and confiscation of the *James Hamilton Lewis* and her cargo, as well as the imprisonment of her crew, should in consequence be regarded as illegal acts, there remains but to fix the amount of indemnity due from the defendant party in this respect.

II. (*b*) Considering that the party claimant claims, in the first place, $25,000 for the confiscation of the vessel, but that that claim is exaggerated; that basing its claim on the figures to be found in the American publications sent to the arbitrator by the party claimant (Report of fur-seal investigations, 1899, Part III, p. 228), and more particularly on the value specified of the vessels having about the same or greater tonnage than the *James Hamilton Lewis*, and noting on the one hand that the schooner was in excellent condition, and on the other hand the fact that having gone to sea on the 7th March, 1891, nearly five months of her provisions had been consumed at the time of the seizure (August 2, 1892), there could not be attributed to this vessel, with her boats and equipment and her provisions, a value exceeding the sum of $9,000;

Considering that the party claimant claims for the 424 seal skins confiscated with the vessel $14 per skin, being a total of $5,936, but that upon minute examination of the several documents produced, as well as the depositions of experts, it appears that the price per skin would not exceed $12, which makes a total of $5,088 for the 424 skins;

Considering that the party claimant claims $36,400 for the loss of the probable catch of 2,600 skins, at $14 per skin, but that, while admitting that the principal loss of catch during the portion of the season still remaining after the seizure of the vessel may be claimed as an item of the damage, the number 2,600 skins is in no way justified, and seems exaggerated; that from statistics produced in litigation, while noting the number of seals already taken, and of the time which must elapse before the close of the season, it may be admitted that the product of sealing would not have exceeded 500 seals, which, at the rate of $12 per skin, gives a total of $6,000;

Finally, considering that the party claimant claims for the benefit of the crew of the *James Hamilton Lewis* for their imprisonment, their sufferings, mental and physical, etc., $2,000 for each of the 17 men, being $34,000; that the defendant party energetically denies that the complaints made by the crew on the subject of acts of violence and bad treatment to which they were subjected are founded, and that evidence in support of these allegations has not been submitted; that, however, the very fact of the illegal imprisonment give to the parties in interest a right to claim an indemnity, the amount of which, according to an equitable estimate, may be fixed at $8,500, or an average of $500 per person;

That consequently the total of indemnity due from the defendant party to the party claimant on account of the seizure and confiscation of the *James Hamilton Lewis* amounts to the sum of $28,588.

Considering that the defendant party consents to the adjunction of interest at 6 per cent per annum to the sum to be paid; that as an

indemnity is granted for the loss of catch during the remainder of the season of 1891, it is just that the interest should only begin to accrue from the 1st January, 1892;

Therefore the arbitrator decides and pronounces the following:

The defendant party will pay to the party claimant on account of the claims presented by the parties in interest in the case of the *James Hamilton Lewis* the sum of $28,588 in United States money, with interest on that sum at 6 per cent per annum from the 1st January, 1892, until the day of full payment.

Done at The Hague November 29, 1902.

T. M. C. ASSER.

AFFAIR OF THE "C. H. WHITE."

The undersigned, Tobie Michel Charles Asser, member of the council of state of the Netherlands, exercising the functions of arbitrator, which he has had the honor to have conferred upon him by the Government of the United States of America and the Imperial Government of Russia, to decide as to the differences relating to the affair of the schooner *C. H. White;*

Whereas, by virtue of the declarations exchanged at St. Petersburg, August 26 (September 8), 1900, between the aforesaid two Governments, the arbitrator must take cognizance of the claims for indemnity for the seizure and detention of certain American vessels by Russian cruisers, brought against the Imperial Russian Government by the Government of the United States of America, in the name of the parties in interest;

That according to these declarations the arbitrator, following in his award the general principles of international law and the spirit of international agreements applicable to the subject, shall decide with regard to each claim filed against the Imperial Russian Government whether it is well founded; and if in the affirmative, whether the facts upon which it is based are proved;

That furthermore it is recognized that this stipulation shall have no retroactive force, and that the arbitrator shall apply to the cases in litigation the principles of international law and of international treaties which were in force and binding upon the parties engaged in this litigation at the time the seizure of the vessels took place;

That finally the arbitrator shall fix the sum of the indemnity which may eventually be due from the Russian Government on account of the claims presented by the parties in interest;

Whereas, after a minute examination of the memoranda and counter memoranda exchanged between the high contracting parties, as well as of all the exhibits of each side, the arbitrator, availing himself of the right accorded him by said declarations of St. Petersburg, invited the two Governments to name commercial experts to aid him in fixing the amount of indemnity which would eventually be due, and in addressing himself to that effect to the high contracting parties the arbitrator at the same time requested them to furnish supplementary information regarding the points of law indicated by him;

Whereas, in the sittings held by the arbitrator at The Hague, in the hall of Permanent Court of Arbitration, from the 27th June to the 4th July, 1902, he heard the depositions of experts in the presence of the agents of the two high contracting parties, who on that occasion furnished the supplementary information asked for by the arbitrator;

Whereas, in support of the claim relative to the seizure and confiscation of the schooner *C. H. White*, the party claimant alleged the following facts:

The said schooner having set sail from San Francisco on May 7, 1892, on a hunting and fishing expedition in the North Pacific Ocean or elsewhere, with Lawrence M. Furman as captain, was, on the 12th July, 1892, about 40 miles south of the Agatha Island, one of the Aleutian Islands, and about the same day the captain set sail for the Kuriles Islands with the intention of fishing some distance off the coast. The captain deviated from his course toward the Kuriles Islands in the direction of Copper Island or Bering Island, to regulate his chronometer. The 15th July, 1892, the vessel having reached latitude 54° 18′ north and longitude 167° 19′ east (it is evidently by mistake that in certain places in the memorandum of the party claimant longitude 167° 19′ west is given) was overhauled by the Russian man-of-war *Zabiaka*, and the captain of the *C. H. White* was ordered to come aboard the Russian cruiser with all of his ship's papers; the commander of the cruiser having examined his papers, arrested the captain of the schooner and transferred him with all of his crew, except the first mate, aboard the cruiser as prisoners; the captain was put under surveillance. The schooner (with her cargo consisting of 20 seal skins, 8 casks of mackerel, and 1 ton of codfish) was seized and towed as far as the bay of Nicolsky (Bering Island), whence it was taken to Petropavlovsk; later it was confiscated and appropriated to the use of the Imperial Russian Government. The captain and crew of the schooner were transported as prisoners to Petropavlovsk, where they arrived on July 20, 1892. On the 8th August, of the same year, the crew was conducted aboard the American ship *Majestic* to be returned to their country. The captain and members of the crew claimed to have suffered greatly from ill treatment inflicted upon them during their imprisonment; besides the captain, the first mate, Andrew Ronning, and the fisherman, Neils Wolfgang, claimed to have lost personal belongings which were not restored to them.

Whereas the damage claimed by the party claimant in the name of the parties in interest, on the counts mentioned, amount to the sum of $150,720 with interest at 6 per cent per annum;

Whereas the defendant party, replying to the allegations of the party claimant, maintains that the seizure of the *C. H. White* took place not in 54° 18′ but in 54° 10′ latitude north, or at a distance of only about 23 miles from the nearest Russian coast; that moreover from a series of circumstances set forth by the defendant party there resulted the presumption that the *C. H. White* might have been guilty of illegal sealing in Russian territorial waters;

That therefore the agents of the Imperial Government were justified in pursuing the schooner even beyond those waters, and in seizing and confiscating her with her cargo;

That the defendant party sets up against the complaint of the crew regarding the ill treatment they were subjected to an energetic denial, by setting forth that the harsh treatment of which they complain was but the unavoidable consequence of local conditions of the place to which the crew were transported, and that finally the fact that property belonging to the captain and two other persons was not returned to them is not sufficiently proved:

Whereas the defendant party, basing its case upon these allegations and incidentally contesting the amount of the claim, requested that the claims of the party claimant be rejected;

Whereas the honorable agent of the party claimant, Mr. Herbert H. D. Peirce, made at the sitting of July 4, 1902, in the name of the Government of the United States of America, the following declarations:

DECLARATION MADE TO THE HONORABLE ARBITRATOR, MR. T. M. C. ASSER, JULY 4, 1902, BY THE PARTY CLAIMANT IN THE ARBITRATION BETWEEN THE UNITED STATES AND RUSSIA IN REPLY TO THE QUESTION ASKED BY THE ARBITRATOR RELATIVE TO THE EXTENT OF JURISDICTION CLAIMED BY THE UNITED STATES OVER THE BORDERING WATERS OF THE BERING SEA.

The delegate of the United States makes this declaration under the specific authority received by him from the Secretary of State of the United States on July 3, 1902, to wit:

The Government of the United States claims neither in Bering Sea nor in the other bordering waters an extent of jurisdiction greater than a marine league from its shores, but bases its claims to such jurisdiction upon the following principle:

The Government of the United States claims and admits the jurisdiction of any State over its territorial waters only to the extent of a marine league unless a different rule is fixed by treaty between two States; even then the treaty States are alone affected by the agreement.

Considering that the arbitrator must decide:

I. Whether the seizure and confiscation of the schooner *C. H. White*, and of her cargo, as well as the imprisonment of the crew, shall be considered as illegal acts;

II. If in the affirmative, what amount of indemnity is due from the defendant party?

I. (*a*) Considering that this question must be decided according to the general principles of international law and of the spirit of international agreements in force and binding upon the high contracting parties at the time of the seizure of the vessel;

That at that time there did not exist any agreement between the two parties, containing in the special matter of sealing any derogation of the general principles of international law with regard to the extent of territorial seas;

That the defendant party sets up that in the litigation between the United States of America and Great Britain before the tribunal of arbitration, established by virtue of the treaty concluded at Washington, February 29, 1892, the Government of the United States recognized with regard to the right of jurisdiction in Bering Sea in connection with the British Government, claims which extended to limits far exceeding those which are admitted by the general principles of international law; that these claims were prompted by the interest in the preservation of the seals, and the suppression of illegal sealing, and that while the Government of the United States of America submitted loyally to the decision of the Arbitration Tribunal of 1893, which did not adopt its system, that system nevertheless may be used to oppose the claim of that Government in the present litigation.

Considering that whatever be the value of the system in question as basis of an agreement between the interested States, it could not be compulsory without such an agreement, even for a Government which had on another occasion pleaded it, though unsuccessfully, before a tribunal of arbitration;

Considering that the agreement which was entered into between the parties after the date of the seizure and confiscation of the *C. H. White* could not modify the consequences resulting from the general principles of law recognized at the time of these acts;

Considering that the seizure of the schooner took place, according to the party claimant at about 20, and according to the defendant party about 11 or 12, miles from Russian territory, and that even if the latter version be the true one, it results that the act was perpetrated outside the Russian territorial waters, which is moreover admitted by both parties;

Considering that the system of the defendant party, according to which a war ship of a State would be permitted to pursue even beyond the territorial sea any vessel whose crew was guilty of an illegal act in territorial waters or on territory of that State, could not be recognized as conforming to the principles of international law, since the jurisdiction of a State does not extend beyond the limits of the territorial sea, unless that rule has been derogated by a special convention;

Considering that it is not necessary to examine if the presumptions alleged by the defendant party be sufficiently grave to cause the admission that the crew of the *C. H. White* were guilty of illegal sealing in Russian territorial waters;

Considering that the seizure and confiscation of the *C. H. White* and her cargo, as well as the imprisonment of her crew, should therefore be considered as illegal acts, it remains but to fix the amount of indemnity due by the defendant party on account of these acts.

II. Considering that the party claimant claims in the first place $35,000 for the confiscation of the vessel, but that that claim is exaggerated; that based upon the figures which are found in the American publications, such as the reports of the fur-seal investigation, sent to the arbitrator by the party claimant (Part III, p. 228), and more particularly on the value specified for vessels having the same or greater tonnage than the *C. H. White*, there could not be attributed to this schooner, with her boats, her equipment, and her provisions, a value exceeding $10,000;

Considering that the party claimant claims for the cargo confiscated with the vessel the following: (*a*) for the 20 seal skins, a sum of $14 each, being a total of $280; but that from a minute examination of the several documents produced, as well as the depositions of experts, it appears that the price per skin is not more than $12, which gives a total of $240 for the 20 skins; (*b*) for 8 casks of mackerel, $160, and for a hogshead of codfish, $260; but that the defendant party, having maintained that the value of the 8 casks of mackerel could not exceed the sum of $80, and that of the hogshead of codfish the sum of $124, the party claimant reduced the claim for that part of the cargo to a sum of $204, which, with the $240 for the 20 seal skins, makes a total of $444;

Considering that the party claimant claims (*a*) $34,720 for loss of probable catch of 2,480 seals at $14, and (*b*) $10,300 for loss of probable catch of fish;

Considering that while admitting the principle that the loss of catch for the portion of the season still remaining after the seizure of the vessel can be claimed as an element of damages, the amounts claimed are not justified and appear very much exaggerated;

Considering (*a*) that from the statistics produced in the litigation it may be admitted that the product of the sealing after the day of seizure of the vessel would certainly not have exceeded the number of 1,000 seals, which, at the rate of $12 per skin, gives a total of $12,000;

(*b*) That for the loss of probable catch of fish, a sum of $1,000 seems a sufficient indemnity;

Considering with regard to the personal claims of Captain Furman ($25,000), of Andrew Ronning ($15,000), and of Neils Wolfgang ($10,000), for the loss of their property, for their imprisonment, outrages, and privations, that the loss of personal property is not proved—the declarations of the interested parties alone can not be admitted as sufficient evidence; that the defendant party energetically denies that it had any intention of inflicting inhuman treatment upon the captain or crew of the schooner, adding that if their lodgings and their food were insufficient this may be explained by the insufficiency of local resources;

Considering that this explanation does not suffice to excuse the defendant party from the responsibility, since, being responsible for the imprisonment, it is also responsible for the consequences of that illegal act;

That although the amount of indemnity claimed on that head is exaggerated and should be reduced, for Captain Furman to $3,000, for Andrew Ronning to $2,000, for Neils Wolfgang to $1,000;

Considering that the claim of the crew for their imprisonment may be admitted as amounting to $300 per person, being $3,000 for the ten members of the crew;

That, consequently, the total of indemnity due from the defendant party to the party claimant on account of the seizure and confiscation of the *C. H. White*, reaches $32,444;

Considering that the defendant party agrees to add interest at 6 per cent per annum to the sums which it must pay; since indemnity is granted for the loss of the catch during the remainder of the season of 1892, it is just that the interest should not begin to accrue until the 1st January, 1893;

Therefore, the arbitrator decides and pronounces the following:

The defendant party will pay to the party claimant on account of the claims presented by the parties in interest in the affair of the *C. H. White* the sum of $32,444 in United States money, with interest on that sum at 6 per cent per annum, from the 1st of January, 1893, to the time of full payment.

Done at The Hague, November 29, 1902.

T. M. C. ASSER.

AFFAIR OF THE "KATE AND ANNA."

The undersigned, Tobie Michel Charles Asser, member of the council of state of the Netherlands, exercising the functions of arbitrator, which he has had the honor to have conferred upon him by the Government of the United States of America and the Imperial Government of Russia, to decide as to the differences relating to the affair of the vessel *Kate and Anna;*

Whereas by virtue of the declarations exchanged at St. Petersburg, August 26 (September 8), 1900, between the aforesaid two Governments, the arbitrator must take cognizance of the claims for indemnity for the seizure and detention of certain American vessels by Russian cruisers, brought against the Imperial Russian Government by the United States of America in the name of the parties in interest;

That according to those declarations the arbitrator, following in his award the general principles of international law and the spirit of international agreements applicable to the subject, shall determine with regard to each claim filed against the Imperial Russian Government whether it is well founded, and if in the affirmative, whether the fact upon which it is based are proved;

That, furthermore, it is recognized that this stipulation shall have no retroactive force, and that the arbitrator will apply to the cases in litigation the principles of international law and international treaties which were in force and binding upon the parties engaged in this litigation at the time the seizure of the vessels took place;

Finally, that the arbitrator shall fix the amount of the indemnity which may eventually be due from the Russian Government on account of the claims presented by the parties in interest;

Whereas after a minute examination of the memoranda and counter memoranda exchanged between the high contracting parties, as well as of all of the exhibits of each side, the arbitrator, availing himself of the right accorded him by the said declarations of St. Petersburg, invited the two Governments to name commercial experts to aid him in fixing the amount of indemnity which would eventually be due, and that when addressing himself to that effect to the two high contracting parties the arbitrator at the same time requested them to furnish supplementary information with regard to the points of law indicated by him;

Whereas in the sittings held by the arbitrator at The Hague, in the hall of permanent court of arbitration, from the 27th June to the 4th July, 1902, he heard the depositions of experts in the presence of agents of the high contracting parties, who on that occasion furnished the supplementary information asked by the arbitrator;

Whereas in support of the claim relative to the schooner *Kate and Anna* and the confiscation of the seal skins found aboard that vessel, the party claimant alleged the following facts:

On August 12, 1902, while the said schooner, whose captain was Claus Lutjens, was on the high sea beyond the jurisdiction of territorial waters of all nations, and at a distance of more than 30 miles from the nearest Russian land, and while no member of the crew was either hunting or fishing, the said schooner having been compelled to lay to, was overhauled by the Russian naval cruiser *Zabiaka*, whose commander ordered Captain Lutjens to come aboard the cruiser and to bring with him all of his ship's papers, which was done, and the captain delivered all of his documents to the commander of the Russian cruiser. The latter then ordered that the 124 seal skins which were aboard the schooner be delivered to him, and he declared them confiscated, the captain of the schooner having presumably engaged in sealing in Russian territorial waters. Captain Lutjens, being sent back to his vessel and permitted to continue his course, resolved to quit sealing and return immediately to San Francisco. The commander of the Russian cruiser, before permitting the captain to depart, gave him warning, by which, according to Captain Lutjens, he was ordered to quit sealing and go home, while, according to the defendant party, the warning consisted only in the prohibition to seal in Russian territorial waters.

Whereas the defendant party recognized that under the conditions of the encounter with the *Kate and Anna*, and from the verification of her log book, that the commander of the Russian cruiser had serious reason to consider the American vessel with suspicion, and even to conclude that a portion, at least, of the product of her sealing had been obtained in an illigitimate manner in Russian territorial waters; however, the setting at liberty of the vessel itself, after seizing the cargo which rendered her suspicious, shows a great lack of decision on the part of the cruiser, partly explained by the absence of positive proofs of Captain Lutjens's guilt; and, therefore, the defendant party, conformedly with the desire to maintain at all times the friendly relations with the American Government, declared its readiness to acknowledge the obligation to pay an indemnity for the actual losses which were caused by the lamentable fact concerning the schooner *Kate and Anna*.

Whereas, however, the defendant party insists that the amount of damage justly claimed from it reaches only the sum of $1,240 for the 124 seal skins at $10 each, with interest at 6 per cent per annum from the 12 August 1892;

Considering that the claimant party claims it is right to demand not only the amount of the price of the 124 seal skins illegally confiscated, but also the loss of the probable catch of 625 seals, basing on this fact that after the schooner *Kate and Anna* was stopped the captain resolved not to continue sealing, but to return immediately to San Francisco, and that this resolution was taken in consequence of the warning given him by the commander of the Russian cruiser;

Considering that whatever may have been the tenor of this warning, it could not have the effect of preventing the captain of the *Kate and Anna* from continuing sealing, and that consequently if the said captain nevertheless resolved to return at once to San Francisco, the defendant party is not responsible for the loss or profit which might have accrued to the schooner;

Considering with regard to the indemnity due for the confiscation of the 124 seal skins, for which the claimant party demands $14 per skin, that the defendant party offers $10 per skin, being a total of $1,488 for the 124 skins;

Therefore, the arbitrator decides and pronounces the following:

The defendant party will pay to the claimant party on account of the claims presented by the parties in interest in the affair of the *Kate and Anna* the sum of $1,488 in United States money, with interest on that sum at 6 per cent per annum from the 12th August, 1892, until the day of full payment.

Done at The Hague, November 29, 1902.

T. M. C. ASSER.