



## SUPPLEMENT

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 Correspondence respecting the Award of the Halifax Fisheries Commission.
 

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No. 1.

*Mr. Evarts to Mr. Welsh.—(Communicated to the Marquis of Salisbury by Mr. Welsh, October 10, 1878.)*

Sir,

*Department of State, Washington, September 27, 1878.*

I AM directed by the President to present to the attention of Her Majesty's Government the sentiments of this Government respecting the result of the deliberations of the Commission, lately sitting at Halifax, for the determination of the question submitted to it under the Articles of the Treaty of Washington relating to the fisheries. It is the purpose of the present communication to put you fully in possession of these sentiments that you may impart them to Lord Salisbury with the same frankness that they are disclosed to yourself.

It is a matter of sincere regret to the President that the actual result of the deliberations of this Commission has been such as to require from this Government the course of observation upon the same, which it becomes my duty to submit to the consideration of Her Majesty's Government. For reasons of paramount importance to the interests of the two countries, in their future treatment of the subject of the fisheries, a candid statement of the views of this Government, as to the position in which the action of the Commission has placed those interests, is due alike to the British Government and ourselves. Nor are these views expressive only of the sentiments of the Executive Department of the Government. Upon the papers being laid before Congress for its necessary action, upon the question of making an appropriation from the Treasury to meet what should prove to be the proper obligations of the Government under the Treaty, Congress, with great unanimity, concurred with the Executive in the opinion that the attention of the British Government should be invited to the subject of the Award, as looked upon by this Government, in advance of the final action of the Executive in reference to its payment. Accordingly the sum appropriated by Congress to meet the Award.

is, by the "Appropriation Act" "placed under the direction of the President of the United States with which to pay the Government of Her Britannic Majesty the amount awarded by the Fisheries Commission, lately assembled at Halifax, in pursuance of the Treaty of Washington, if, after correspondence with the British Government on the subject of the conformity of the Award to the requirements of the Treaty, and to the terms of the question thereby submitted to the Commission, the President shall deem it his duty to make the payment without further communication with Congress."

The occasion for this correspondence with the British Government arises from the great importance of reaching a complete and explicit understanding between the two Governments, as to the conformity of the Award made by the Commission to the terms of the Treaty of Washington by which its authority and jurisdiction are communicated and defined. If the Award in respect to the fisheries had relation only to the sum of the payment involved, considerable as that is, the Government might prefer to waive any discussion which could affect no continuing and permanent interests of the two countries, and would, therefore, comprehend only such considerations as would touch the principles or elements of computation applied by the Commission in arriving at a pecuniary amount, the payment of which carried no consequences. It is true, even in such case, the indisputable right of the parties to an arbitration public or private, to examine an award in respect of its covering only the very matter submitted, should not be too readily relinquished from mere repugnance to question, a result which, at least, if undisturbed, serves the good purpose of closing the controversy. If the benevolent method of arbitration between nations is to commend itself as a discreet and practical disposition of international disputes, it must be by a due maintenance of the safety and integrity of the transaction in the essential point of the Award, observing the limits of the submission.

But this Government is not at liberty to treat the Fisheries Award as of this limited interest and operation in the relations of the two countries to the important, permanent, and difficult contention on the subject of the Fisheries, which for sixty years has at intervals pressed itself upon the attention of the two Governments, and disquieted their people. The temporary arrangement of the Fisheries by the Treaty of Washington is terminable, at the pleasure of either party, in less than seven years from now. The Fisheries Award, upon such termination of the Treaty arrangements, will have exhausted its force as compensation for a supposed equivalent and terminated privilege. If the Government by silent payment of the Award should seem to have recognized the principles upon which it proceeds, as they may then be assumed or asserted by Her Majesty's Government, it will at once have prejudiced its own rights, when it shall become necessary to insist upon them, and seem to have concealed or dissembled its objections to the Award when Great Britain was entitled to an immediate and open avowal of them.

Upon these considerations the President and Congress have required that the sentiments of this Government respecting the Fisheries Award should be set before Her Majesty's Government, to the end that a full interchange of views, in a friendly spirit, between the two Governments, should leave no uncertainty as to the degree of concurrence or of difference in their respective estimates of this transaction.

It is greatly to be regretted that the Protocols of the Commission make no record of the steps by which the majority reached the conclusion which they announced as the Award of the Commission, and the dissenting Commissioner, on the other hand, arrived at so widely different a result. Had the record disclosed the methods of reasoning on the processes of calculation respecting either of the privileges which, under the submission of the Treaty, were to be measured and compared, upon which these divergent results of their deliberations were reached, the task of exposing the manner and extent in which, in the opinion of the Government, the Award transcends, the submission of the Treaty would be much simpler. Indeed, in the view which this Government takes of the narrow and well-defined question submitted to the Commission by the Treaty, and of the indisputable result of the evidence pertinent thereto, there seems little reason to doubt that if the Protocols exhibited a trace even, of the elements of computation by which the two concurring Commissioners made up their judgment, they would inevitably disclose the infirmity of the actual Award, and make any careful demonstration of the same superfluous.

I desire that you will first call Lord Salisbury's attention to the nature of the

question submitted to the Halifax Commission as adjusted through the diplomatic Conferences of the Joint High Commission, and expressed in the Treaty.

In the first place, the United States, in the Fishery Articles of the Treaty of Washington, did not intend to, and did not, waive or curtail in the least, the construction of the fishery and appurtenant privileges accorded in the 1st Article of the Convention of 1818, as claimed by them and actually possessed and enjoyed by them under such claim, at and before the negotiation of the Treaty of Washington. Neither the Protocols of the Conferences of the Joint High Commissioners, nor the text of the Treaty negotiated by them, indicate any intention of submitting to the interpretation of the Halifax Commission the degree of privilege accorded to the United States by the Convention of 1818. On the other hand, it is manifest from the instructions to Her Majesty's High Commissioners, as well as from the Protocols of the Conferences, that a settlement of the disputed interpretation of the Convention of 1818 was contemplated as possible only by the diplomatic deliberations of the Joint High Commission, and such conclusions thereon as they might find it in their power to embody in the Treaty of Washington. This task, however, they did not undertake, but provided only for a temporary possessory privilege that should supersede, during its continuance, any determination of such disputed interpretation. In this disposition of the subject, it would seem quite beyond the scope of the jurisdiction of the Halifax Commission to include in any measure of the additional privilege accorded to the United States by Article XVIII of the Treaty of Washington, any contribution for the enjoyment of the privileges accorded to the United States by the Convention of 1818, as claimed and actually possessed by them, at the time of the negotiation of the Treaty of Washington. A reference to document No. 15, filed with the Halifax Commission, in support of the case of Her Britannic Majesty's Government, and found at page 238 of the Congressional publication of the proceedings of the Halifax Commission, will substantiate this proposition.

I do not regard this point of serious importance in the exposition of the subject, except that I desire to preclude, in behalf of the United States, any implication or argument hereafter to be drawn from my passing over, without criticism, this possible element in the admeasurement of the Award. The United States still maintains its interpretation of the privilege secured by the Convention of 1818, and protests against any implication from the magnitude of the Award of the Halifax Commission, or otherwise, from its proceedings under the Treaty of Washington, that the United States have sanctioned or acquiesced in, or by payment of that Award would sanction or acquiesce in any lesser measure of the privileges secured to the United States under the Convention of 1818, than, as is well known to Her Majesty's Government, they have always insisted upon.

In the next place the United States did not submit to the Halifax Commission under the Fishery Articles of the Treaty of Washington any valuation of any general economic or political advantages, which grow out of access to fishing grounds for the development of a mercantile or naval marine, and which, therefore, it might be argued, would be enhanced by adding the area of the inshore fisheries of the Gulf of St. Lawrence to the fields for that enterprise, from the earliest period, open to, and occupied by, the bold and hardy seamen of this country. Still less did the United States submit to that Commission a pecuniary measurement of the removal of occasions of strife between the fishermen, or misunderstanding between the Governments of the two countries, by the temporary obliteration of a restrictive line, dividing the inshore from the deep-sea fisheries on portions of the coast of British North America.

Both of these subjects are considerations, Governmental in their nature, suitable to be entertained, with many others, in the diplomatic negotiations which ended in the Treaty. They are neither of them computable in money. That which relates to the maintenance of good understanding and good neighbourhood between the United States and the British North American Provinces can, least of all things, be admitted as an estimable element in a pecuniary computation. The importance of such maintenance of good understanding and good neighbourhood the United States will never under-value. In this interest large fiscal concessions were made by the United States in the adjustments of the Treaty of Washington. After such concessions the superadded submission to the Halifax Commission of the question of equalizing, by a pecuniary measure, those concessions with supposed equivalent concessions by Her Majesty's Government, was entertained and agreed to by the United States, mainly, if not entirely, in the disposition to meet any just

interest of the British North American Provinces to be assured of the equality of these intended equivalents. But the maintenance of these good relations is of common interest to the two countries, and can never be made the occasion of pecuniary tribute, as if of more importance to one than to the other. No such calculation entered into the enlightened and conciliatory motives which animated and shaped the important series of negotiations which produced the Treaty of Washington. In the definition of whatever unadjusted computation was referred, for pecuniary settlement, to the Halifax Commission, care was taken to include nothing which, suitably to the honour of both countries, was not measurable by a scale of industrial and commercial profits.

If these plain considerations shall be viewed in this light by Her Majesty's Government, it is hoped that a concurrence of opinion as to the nature of the question actually submitted to a pecuniary measure by the Halifax Commission, may be easily reached.

It cannot be very material to recall Lord Salisbury's attention to the historical attitude of the two Governments towards the subject in contention as to the fisheries, by any present exposition of the matter. The sources of knowledge on this subject are common to the public cognizance of the two Governments. Our diplomatic intercourse has unfolded the views of successive British and American Cabinets upon the conflicting claims of mere right, on the one side and the other, and at the same time evinced on both sides, an amicable preference for practical and peaceful enjoyment of the fisheries compatibly with a common interest, rather than a sacrifice of such common interest to a purpose of insisting upon extreme right, at a loss, on both sides, of what was to each the advantage sought by the contention. In this disposition the two countries have inclined, more and more, to retire from irreconcilable disputations as to the true intent covered by the somewhat careless, and certainly incomplete text of the Convention of 1818, and to look at the true elements of profits and prosperity in the fisheries themselves, which alone, to the one side or the other, made the shares of their respective participation therein worthy of dispute. This sensible and friendly view of the matter in dispute was greatly assisted by the experience of the provincial populations of a period of common enjoyment of the fisheries without attention to any sea-line of demarcation, but with a certain distribution of industrial and economical advantages in the prosecution and the product of this common enjoyment. The form of this experience was two-fold. First, for a period of twelve years under the Reciprocity arrangement of trade between the United States and those provinces; and, second, for a briefer period after the termination of the Reciprocity Treaty, under a system of licences, which obliterated the sea-line of circumscription to our fishery fleet upon the payment of fees deemed adequate by the provincial Governments.

In this disposition and with this experience, the negotiations of the Treaty of Washington were taken up and produced the Fishery Articles of that comprehensive Treaty. The results of this experience, and the influence of this disposition, are plainly marked in the pertinent Protocol, and in the text of the Articles.

At the outset it was apparent that neither a confirmation or rectification of the old sea-line of exclusion, or the adoption of a new one, had any place in the counsels or purposes of Her Majesty's Government, or in the interests or objects of Her Majesty's provincial subjects. It had become thoroughly understood, that the line of the Convention of 1818 had become inapplicable, and in some respects insufferable to the common interests.

The mackerel, which, always an inshore as well as a deep sea fish, off our coasts, at the date of the Convention of 1818, and for twenty years after, as an object of pursuit to our fishermen, was confined to the coast of the United States, and that fishery was substantially unknown, in any commercial sense, in the provincial waters. Either a change of habits in the fish, or an extension of the enterprize of our fishermen, had opened up the mackerel fishery of the Gulf of St. Lawrence to our pursuit. The gradual increase of the fishing coast population of the provinces had supplied the fishermen and excited the local interests, for the prosecution from the shore, as the base of its operations, of the new industry of inshore mackerel fishery.

Upon the concurrence of these circumstantial changes it was natural enough for the coast population and the public men of the provinces to conclude that the territorial authority which, under the Convention of 1818, gave the provinces the monopoly of the inshore mackerel fishery, only needed to be insisted upon, by a vigorous exclusion of our fishermen, to be fruitful of great local prosperity.

These calculations were disappointed. It was soon found that the provinces themselves were comparatively valueless as a market for mackerel, and that the quality of the fish, as respects the methods of its preparation for export, excluded it from the general foreign market which was open to the products of the cod fisheries. The near market of the United States was essential to the local prosperity of the inshore mackerel fishermen of the provinces. The political control of that market by the United States quite overreached the provincial control of the inshore fishing-grounds. Fish that cannot find a market will not long be pursued for gain; and the fishing-coast population and the statesmen of the provinces alike, saw that a participation in the mackerel market of the United States was the indispensable condition of prosperity to their inshore fishery. Experience confirmed the logic of this reasoning. While the Reciprocity Treaty endured, settlements thrived and wealth increased. When it was withdrawn, population shrunk and wealth declined; and, but for the hope of its renewal, a destruction of this industry seemed imminent.

Upon the other hand, the mackerel fishermen of the United States felt that a participation in the inshore fisheries of the Gulf of St. Lawrence was no equivalent for a surrender of our mackerel market to the participation of the inshore fishermen of the provinces. They justly reasoned that this arrangement, in respect of the mackerel catch within the line, instead of placing the provincial fishing industry upon an equal footing with ours, really put us at quite a disadvantage. Ordinarily, home products have a certain measure of advantage over duty-free competing imports in freight, ocean or inland—insurance, and interest, and factorage. But here, what passes for our home product is acquired upon the very shore of our foreign competitor. Its pursuit is at the expense of an extended voyage, with costly outfit and large investment, at great risk, with long delay, measured by heavy insurance and accruing interest. Bringing it to what is called the home market involves return voyage and the attendant burdens of expense. The farmer fishermen of the provincial coasts leave the plough in the furrow and the hay-cart in the field, and take to the simple implements and open boats, with which fishing from the shore is prosecuted, when the mackerel show themselves. They cure their catch as a part of their home labour, and ship it at low rates to our market by bottoms which make a returning commercial freight. At these odds, the share of the inshore mackerel fishery of the Gulf of St. Lawrence seemed to our fishermen but a poor addition to their former extensive rights to be purchased by so great a disadvantage in their general fishing industry, on our own coasts and in the deep sea, as well as inshore fisheries of the provincial waters.

These views, too, were confirmed by our experience during the Reciprocity arrangement, and after its close. Both periods unmistakably marked the policy of an open market for the products of the provincial fisheries as disastrous to our fishing industry.

With these opinions and these experiences, on the one side and on the other, the High Commissioners undertook an adjustment of the opposing interests upon the principle of obliterating the sea-line between the fishermen of the two countries, and finding such compensation for this concession as might seem equal and just.

In the Conferences of the Joint High Commission, it is very apparent that our High Commissioners regarded the obliteration of the sea-line as of no great pecuniary value to our fishing industry. Accordingly, they offered but 1,000,000 dollars for this concession in perpetuity. No doubt politically, and in the interest of good neighbourhood, this Government did regard, and at all times would regard, the restoration of the relations between the two countries in the common enjoyment of these fisheries, to the ancient footing of the Treaty of 1783, as most grateful in sentiment and as a most valuable guarantee against any renewal of strife. These considerations, for reasons already stated, could not be worthily entertained upon either side as an element of the pecuniary measure of the privileges to be accorded.

In these Conferences it is not less apparent that Her Majesty's High Commissioners recognized the possession of our market for the product of the provincial fisheries as the one thing essential to the prosperity of those fisheries, which could not be dispensed with or replaced by any money purchase. This commercial advantage was, of course, both practically and suitably to the dignity of the negotiation measurable in money. It seemed to our High Commissioners to exceed in value to the provinces, as it unquestionably did in loss to us, any reasonable estimate of the value of the privilege our fishermen were to acquire. This basis,

however, of freedom of the fishing grounds to our fishermen, and freedom of our market to the fishermen of the provinces, in simplicity and national equivalency, presented advantages which might well have dispensed with any nice calculation of comparative pecuniary values in the exchange.

Her Majesty's High Commissioners, however, thought that this exchange of privileges, even with the added concession on our part, of throwing open to the provincial fishermen unrestricted participation in the valuable inshore fisheries of our own coasts above the thirty-ninth parallel, left still a claim for a pecuniary make-weight in favour of the provinces in the nature of owelty of partition. This led to the constitution of the Halifax Commission to consider and decide the single question whether, and how much, the pecuniary measure of the new fishing privilege opened to the United States fishermen exceeded the pecuniary measure of the new fishing privilege opened to the provincial fishermen, and of the possession of our market, free of duty, for all the products of the provincial fisheries. This difference between the two pecuniary valuations was in the nature of the problem no less than by the terms of the Treaty to be expressed and paid in money.

Upon the conclusion of the labours of the Halifax Commission, and the communication of the concurring judgment of the two Commissioners, awarding the sum of 5,500,000 dollars as the amount to be paid by the United States under the Fishery Articles of the Treaty, and the judgment of the dissenting Commissioner that no sum whatever was payable by the United States under those Articles, it became the duty of this Government to compare this result with the authority imparted to the Commission by the Treaty, and to determine whether it comported with, or transcended, such authority.

It will not, I think, be questioned by Her Majesty's Government that, upon the proofs and arguments, in whatever form submitted by the two Governments to the Commission, the practical measure of the concession to the United States under Article XVIII of the Treaty was simply of a free and equal right to take part in the fisheries of the Gulf of St. Lawrence within the three miles line, instead of being excluded therefrom, as we were under the Convention of 1818. Nor do I anticipate that you will find any dissent on the part of Lord Salisbury from the proposition, that the proofs fully show that the fishery thus opened to us was the mackerel fishery within that line. While both Governments must regret that the sure footing for a concurrence of views between them, which might have been furnished by a careful system of Protocols of the Conferences of the Commission, is wanting, yet the proofs on both sides leave this proposition in no doubt. Indeed, since the publication by Parliament of the "Correspondence respecting the Halifax Fisheries Commission" has disclosed the advices given from time to time to Her Majesty's Government by Mr. Ford, the very intelligent and circumspect British Agent in attendance upon the Commission, of the developments of the real subject for valuation, there seems to be no room for any difference of views between the two Governments on this point. Thus, in his despatch of September 10th, 1877, presenting the position upon the completion of the British evidence, and before the opening of the proofs on the part of the United States, Mr. Ford says, "the mackerel fishery being that most extensively pursued by the Americans in British waters, is the branch of the inquiry to which the greatest attention was devoted." In giving, too, in the same despatch, the general result of any pecuniary measure of benefit to the United States fishermen from the concession of Article XVIII of the Treaty, which the completed British proofs had presented as a basis for an Award, Mr. Ford makes it very apparent that the mackerel catch within the three-mile line was the only item of appreciable importance. He says, "according to the evidence adduced on the British side it seems beyond doubt that at least three-quarters of the mackerel taken on the British North American coast is caught within the three-mile limit, while, owing probably to the existence of sandy shoals at some distance from the shore, the catch of this fish in the United States waters, north of the 39th parallel of north latitude, is principally beyond that distance." Mr. Ford, also, upon the mere British proofs, no less distinctly excludes the cod fishery as an element of the computation of the value to us of the concession of Article XVIII. He says, "the cod fishery is pursued to a limited extent only by United States fishermen within British territorial waters, and this is probably the case with regard to hake, haddock, pollock, &c;" and, again, "the evidence is somewhat vague as to the proportion of cod fish taken by Americans in British inshores, and it does not probably amount to anything considerable, except on certain portions of the north shore of the Gulf of St. Lawrence."



Mr. Ford's despatch, upon a survey of the counterproofs of the United States, which had just been completed, under the date of 30th October, 1877, presents the contention between the parties, and as recognized by both sides, in the same light. He says, "78 witnesses, in all, have been examined, and 280 affidavits filed on the United States' side; and, as was the case on the British side, the main part of it has been directed to the mackerel fishery, with regard to which the United States' Counsel have sought to establish the following salient points:—

"1. That the fishing grounds principally resorted to by the United States' fishermen in the Gulf of St. Lawrence are on the banks situated outside the three-mile limit, and at the Magdalene Islands, to which they had access previous to the conclusion of the Treaty of Washington.

"2. That the fishing business is at the best an unprofitable one, as regards its net results to the owners or charterers of vessels. A mass of statistics has been put in evidence with a view to prove this assertion, and to show that the Canadian inshore fisheries can hardly be pursued by the United States' citizens except at a loss; while those on their own shore yield a greater prospect of remunerative results.

"3. That the remission of duties on Canadian fish is a great benefit to the producer, inasmuch as the chief market for mackerel is the United States."

In the same despatch Mr. Ford, in certain observations of his own upon the countervailing force of the proofs of the United States, as a whole, against the British proofs as a whole, shows that the valuation of the inshore mackerel fishery of the Gulf of St. Lawrence, opened to our fishermen, was the whole matter of contention before the Commission in respect of the concession of Article XVIII of the Treaty. He remarks, "I may, however, observe that, as it has never been denied, even by the British side, that a certain portion of the mackerel taken by the United States in the Gulf of St. Lawrence is caught outside the three-mile limit, there could be no difficulty in producing a considerable number of fishermen who would truthfully depose that the majority of their successful trips had been made outside the limit of British territorial jurisdiction. The main fact, however, remains practically intact, viz., that without access to the inshores it would be impossible for the general business of mackerel fishing by United States' vessels in the Gulf of St. Lawrence, to be pursued with profitable results."

It seems to this Government quite certain, then, that upon a correct exposition of the submission of the Treaty, and the concurring action of the two Governments in the production and application of what they deemed appropriate proofs, what the pecuniary value of our participation in the inshore mackerel fishery of the Gulf of St. Lawrence was fairly estimated at, constituted the extreme limit of any possible pecuniary award by the Halifax Commission against the United States. If, upon any rational view of the criteria of this value before the Commission, the Award of the two concurring Commissioners of 5,500,000 dollars as a twelve years' purchase of the privilege can be maintained, it may be fairly conceded that the imputation of invalidity to the award for transcending the submission of the Treaty will fail of adequate demonstration. If, on the other hand, the candid exploration of the evidence shall show that there exists no rational proportion between this award and the unquestionable limits of value which any view of the testimony must assign to the subject submitted for valuation by the Treaty, as correctly interpreted, then by the very statement of the proposition it is demonstrated that the concurring Commissioners have passed their judgment of valuation upon some other subject than that defined in Article XVIII of the Treaty, and have transcended the submission to their decision. In such case, the antecedent authority imparted to the Commission by the two Governments fails to justify the Award, and the subject of the Fisheries remains at the arbitrament of the two Governments, unconstrained though perhaps enlightened by the deliberations of the Halifax Commission.

In proceeding to apply the proposed test of conformity or nonconformity between the Award and the submission, I disclaim all right to trench upon the range of discretion, or to dispute the entire freedom in comparing, weighing, and extracting the true results from evidence which belongs to such special Tribunals as the Halifax Commission. I shall not seek in the least to impose any views of my Government upon the evidence in the place of any that may be assumed even to have been taken by the concurring Commissioners. I do, however, insist that upon any question of fact within the submission, the record of the evidence cannot be surpassed by spontaneous conjectures or imaginations of the Commissioners.

I have no difficulty in saying that the error of the concurring Commissioners, if error they have fallen into, does not seem to me of this nature. That error is not of mistaking the evidence adduced upon the subject submitted to them, but of mistaking the subject submitted to them, and thus liberating their judgments from obedience to the evidence as thus adduced.

Fortunately, there are trustworthy criteria for determining the value of the concession of Article XVIII, as I have defined that concession to be. They are resorted to upon one side and the other, and, confessedly, furnish the material upon which the appraisal, if confined to the subject as truly defined, must turn. If, then, upon the evidence, if found conflicting or divergent, the largest measure of valuation deducible therefrom be given in favour of the concession of Article XVIII, and that extreme value shall show no rational or approximate relation to the sum awarded, there would seem to be no escape from the conclusion that the concurring Commissioners accepted some other subject for their appraisal than that submitted to them.

It happened that, before the Halifax Commission had concluded its labours, five fishing seasons of the Treaty period had already elapsed, and the actual experience of the enjoyment by the United States' fishermen of the privilege conceded, replaced any conjectural estimate of its value by reliable statistics of its pecuniary results. These statistics disclosed that the whole mackerel catch of the United States for these five seasons in the Gulf of St. Lawrence, both within and without the three-mile line, was 167,945 barrels. The provincial estimates claimed that three-quarters of this catch was within the three-mile line, and so to be credited to the privilege conceded by Article XVIII. The United States' estimates placed the proportion at less than a quarter. Upon the provincial claim of three-quarters, the product to our fishermen of these five years of inshore fishing would be 125,961 barrels. It was established, upon provincial testimony, that the price which mackerel bore in the provinces, cured and packed ready for exportation, was 3 dol. 75 c. per barrel, and this would give as the value, cured and packed, of the United States' inshore catch for five years, the sum of 472,353 dollars. But in this value are included the barrel, the salt, the expense of catching, curing, and packing, which must be deducted before the profit, which measures the value of the fishery privilege, is reached. Upon the evidence 1 dollar a barrel would be an excessive estimate of net profit, and this would give a profit to our fishermen from the enjoyment for these five seasons of the fishery privilege, conceded under Article XVIII, of but 25,000 dollars a-year, or, for the whole Treaty period of twelve years, of 300,000 dollars.

Although there would seem to be no reason for distrusting this commercial and pecuniary measure of the privilege in question, yet, if it should be pretended that the provincial value should not be taken, but the value in the market of the United States; and, further, that an extravagant rate of 10 dollars per barrel should be assumed as that value; and, again, beyond all bounds of even capricious estimate, a conjectural profit of 50 per cent. should be assigned to the fishing adventures, we should have but 125,000 dollars a-year, or 1,500,000 dollars for the twelve years of the Treaty, for the gross valuation of the concession to the United States by Article XVIII, undiminished by a penny, for the counter-concessions of the United States of Articles XIX and XXI. Yet this sum, thus reached, is but little more than one-quarter of the Award of the concurring Commissioners, after taking into account the deductions required for the privileges of Articles XIX and XXI.

The proofs disclose another wholly independent criterion of the value of the privilege conceded to our fishermen by Article XVIII of the Treaty, drawn from the experience of some years intervening between the abrogation of the Reciprocity Treaty and the negotiation of the Treaty of Washington. The Provincial Government in these years adopted a licence system, by which vessels of the United States were admitted to the inshore fishery upon the payment of fees for the season, rated by the ton. The experience of this system showed that under an exaction of 50 cents per ton, our fishing fleet took out licences; that when the fee was raised to 1 dollar per ton, the number of licences fell off about one-half, and when a fee of 2 dollars per ton was exacted, but few licences were taken out. The fairness of this measure of the value of the privilege is obvious. It furnishes a compensatory rate between opposing interests, suggested and acted upon by them without coercion, and by concurring consent.

The tonnage taking out licences under the first and lowest rate was about 32,000 tons. Assuming, contrary to experience, that this tonnage would have borne



the highest rate of 2 dollars per ton, the sum of 64,000 dollars per annum would have measured the value of the privilege in question, and would have yielded for the Treaty period of twelve years 768,000 dollars. By this method of valuation of the privilege of Article XVIII (without deducting a penny for the counter-privileges of Articles XIX and XXI) would be but about 14 per cent. of the Award of the concurring Commissioners, after they had taken into account these privileges.

You will say then, to Lord Salisbury, that with every anxiety to find some rational explanation of the enormous disparity between the pecuniary computations of the evidence and the pecuniary measure announced by the concurring Commissioners, this Government has been unable to do so upon any other hypothesis than that the very matter defined in Article XVIII, and to which the proofs on both sides were applied, and the very matter measured by the Award of the concurring Commissioners, were not identical nor even similar, and that such Award, upon this reason, transcends the submission.

The demonstration at which I have aimed appears so conclusive upon the mere consideration of the concession of Article XVIII, as to supersede, so far as the immediate argument goes, an exhibition of the reduction even of the moderate sum above assigned, as the true appraisal of the concession of that Article, by the pecuniary value, as laid before the Commission, of the counter-concessions of Articles XIX and XXI. But a brief statement of the views of this Government on the treatment of these counter-concessions in the deliberations of the Halifax Commission, is requisite both to the completeness and the frankness of this exposition.

In brief, it may be said that Her Majesty's Government formally insisted in their "Case" and in their "Reply" laid before the Commission, that the concession of Article XIX, whereby British subjects are admitted to the freedom of our coast fisheries north of the thirty-ninth parallel, is, to quote the language of the "Case," "absolutely valueless;" and that the concession of Article XXI, admitting fish and fish-oil, the product of the provincial fisheries, to our markets duty-free, to quote the language of the "Reply," "has not resulted in pecuniary profit to the British fishermen, but, on the contrary, to the American dealer or consumer."

If I have been at all successful in showing the enormous disproportion between the sum of 5,500,000 dollars announced as their award by the concurring Commissioners, and the pecuniary value which the evidence assigns to the concessions of Article XVIII by itself considered, I need spend little time in showing that these Commissioners must have accepted the views of Her Majesty's Government that nothing was to be allowed for countervailing value to the concessions of Articles XIX and XXI, or, that these Commissioners had in their minds a measure for the concession of Article XVIII still more inconsistent with the true Treaty definition of the subject described in that Article and submitted to the appraisal of the Commission.

If the concession of Article XIX was held by the Commissioners to be "absolutely worthless," as asserted in the "Case" of Her Majesty's Government, it must have been because the pecuniary profit to the provincial fishermen of the privilege as actually enjoyed by them was the true measure of estimation of the value of the concession. In this view the immense value of these fisheries, as shown in the evidence, all went for nothing, because the population, capital or enterprise in the provinces, could not carry on, what to them were remote fisheries in competition with our own coast population. Without insisting upon the unreasonableness of measuring the value of our fishing grounds by the incompetency of provincial resources to engage in the fishery opened to them, this disposition of the value of the concession of Article XIX recognizes the whole force and result of the reasoning by which I have assigned the true criteria of value for the privilege of Article XVIII, under the experience of the actual five years' enjoyment thereof by our fishermen, who were able to take advantage of the privilege and did so, to the furthest extent compatible with profit. The view of the reasoning by which a right of fishery, valuable in its own capacity, is measured by the tenants' incapacity to fish, is obvious. It furnishes no true criterion of the rent value of a fishery, which is what needed to be got at both under Article XVIII and Article XIX. Under Article XVIII we are furnished a true criterion by the experience of a tenant, confessedly willing and able to improve the fishery to the utmost, and actually doing so.

I now desire you to present to Lord Salisbury's attention the subject of the concession of a free market in the United States for the products of the provincial

fisheries, as made by Article XXI. The value of this privilege to the provinces was required by the Treaty to be measured by the Halifax Commission, and deducted from their appraisement of the concession of Article XVIII in favour of the United States.

The statistics of the importation under this privilege showed that at the rate of duty prevalent before that concession, a revenue of about 200,000 dollars per annum on mackerel alone, and of more than 300,000 dollars on all kinds of fish (mackerel included) and fish-oil would have accrued to the United States. For the purpose of argument, conceding that but one-half of this annual sum of 300,000 dollars should be set down as pecuniary profit to the Provincial interests, the sum of 1,800,000 dollars would need to be deducted, on the score of Article XXI, from the true valuation of the privilege conceded by Article XVIII. If I have assigned correctly the highest possible measure of the privilege of Article XVIII, upon the evidence, as not being more than 1,500,000 dollars, this low valuation of the privilege of Article XXI more than extinguishes it.

Whatever disposition the concurring Commissioners made of this countervailing concession of Article XXI—whether they gave it a value commensurate with the statistical evidence of the revenue loss to the United States, and market gain to the Provincial interest, or considered it absolutely valueless—the matter is one of much moment.

If these concurring Commissioners gave the sum of 5,500,000 dollars as the appraisement of the concession of Article XVIII, after deducting some 2,000,000 dollars for the countervailing concession of Article XXI, the argument, as it seems to this Government, adequate before, becomes still more conclusive that the measurement, thus enhanced to some 7,500,000 dollars, was not applied and confined to the very subject submitted to the appraisement of the Commission by Article XVIII.

But, it may be said, these concurring Commissioners may have treated the concession of Article XXI as absolutely valueless to the Provincial interests, and it was competent for them to do so. But this alternative is little consistent with the whole tenour of the views of Her Majesty's Government, as maintained by successive Cabinets, and insisted upon in responsible negotiations, by their most eminent Representatives through a long course of years. Certainly, ever since 1851, when Lord Elgin, as Governor-General of Canada, communicated, through the British Minister at Washington, Sir Henry Bulwer, to Mr. Webster, Secretary of State, the opinion of the British Government that the admission of the product of the Provincial fisheries duty free to our market was the one indispensable condition to our participation in the inshore fisheries of the Provinces, down to the negotiation of the Treaty of Washington, the attitude of the British Government on this point has been explicit and unequivocal.

Lord Elgin declared, "Her Majesty's Government are prepared, on certain conditions and with certain reservations, to make the concession to which so much importance seems to have been attached by Mr. Clayton, viz., to throw open to the fishermen of the United States the fisheries in the waters of the British North-American Colonies, with permission to those fishermen to land on the coasts of those Colonies for the purpose of drying their nets and curing their fish, provided that in so doing they do not interfere with the owners of private property, or with the operations of British fishermen.

"Her Majesty's Government would require, as an indispensable condition in return for this concession, that all fish, either fresh or cured, imported into the United States from the British North-American possessions, in vessels of any nation or description, should be admitted into the United States duty free, and upon terms in all respects of equality with fish imported by citizens of the United States."

The deliberations of the Joint High Commission, as preserved in the Protocols of their Conferences on the fisheries, exhibit, with perfect distinctness, the British opinion as to a free market for the product of the Provincial fisheries being a value to the Provincial interests which could not be missed, or replaced by a pecuniary substitute, in any settlement of the question. Thus our High Commissioners stated "that if the value of the inshore fisheries could be ascertained, the United States might prefer to purchase for a sum of money the right to enjoy, in perpetuity, the use of these inshore fisheries in common with British fishermen, and mentioned 1,000,000 dollars as the sum they were prepared to offer." The British High Commissioners replied "that this offer was, they thought, wholly inadequate, and that no arrangement would be acceptable of which the admission into the United States, free of

duty, of fish, the produce of British fisheries, did not form a part." After a consideration of commercial equivalents, in which the offers of our High Commissioners were not accepted by the British High Commissioners, all such propositions on our part were withdrawn, and our Commissioners renewed their proposal to pay a money equivalent for the use of the inshore fisheries, and further proposed that, "in case the two Governments should not be able to agree upon the sum to be paid as such equivalent, the matter should be referred to an impartial Commission for determination." To this the British High Commissioners replied, "that it would not be possible for them to come to any arrangement except one for a term of years, and involving the concession of free fish and fish-oil by our High Commissioners; but that, if free fish and fish-oil were conceded, they would inquire of their Government whether they were prepared to assent to a reference to arbitration as to money payment." Our High Commissioners replied "that they were of opinion that free fish and fish-oil would be more than an equivalent for those fisheries, but that they were also willing to agree to a reference to determine that question, and the amount of any money payment that might be found necessary to complete an equivalent." Hereupon, as stated in the Protocol, "the British Commissioners having referred the last proposal to their Government, and received instructions to accept it," the fishery Articles of the Treaty were agreed to.

These opinions of Her Majesty's Government were entirely in accord with the views of the leading Provincial statesmen. Mr. Stewart Campbell, of Nova Scotia, declared that "under the Reciprocity Treaty the total exemption from duty of all fish exported from the maritime Provinces to the markets of the United States was also a boon of inestimable value to the very large class of British subjects directly and indirectly connected with our fisheries and its resulting trade." Sir John Macdonald said, in the Parliament of the Dominion, "the only market for the Canadian No. 1 mackerel in the world is the United States. That is our only market, and we are practically excluded from it by the present duty. The consequence of that duty is that our fishermen are at the mercy of the American fishermen; they are made the hewers of wood and drawers of water for the Americans. They are obliged to sell their fish at the Americans' own price. The American fishermen purchase their fish at a nominal value, and control the American market. The great profits of the trade are handed over to the American fishermen or the American merchants engaged in the trade, and they profit to the loss of our own industry and our own people."

It may be that Her Majesty's Government has surrendered these opinions, and that the statesmen of the Dominion and the people of the provinces now think that the possession of our market for the products of the provincial fisheries is of no pecuniary advantage to these provincial interests. In such case, in any future negotiation respecting the fisheries, this Government would expect no stress to be laid upon the question of the possession of our own markets. If Her Majesty's Government accepts the award of these concurring Commissioners as carrying the necessary consequence that the concession of Article XXI is of no value to British or provincial interests, that element of calculation will disappear from any possible exchange of equivalents that the exigencies of any future friendly negotiations may need to find at their service. A privilege that is valueless when granted to and enjoyed by a beneficiary may well be reserved and withheld, without the charge of its being ungracious to do so.

If, on the other hand, Her Majesty's Government adheres to the views of the value of our market for the product of the Provincial fisheries, so often and so earnestly pressed upon the attention of this Government, and asserts that the Award of the concurring Commissioners must be held, upon necessary reasoning, to have measured and deducted this great value of free market from the appraisal of the concession of free fishing to us, made by them under Article XVIII, this Government will expect the more ready acceptance by Her Majesty's Government of the proposition, that these concurring Commissioners, in their Award, mistook the subject submitted by Article XVIII to their pecuniary measurement, and exceeded the authority under which the Commission acted.

You will, however, very earnestly press upon Lord Salisbury's attention, in advance of any declaration from Her Majesty's Government of their present views of the value of our markets for the products of the Provincial fisheries, that this Government has not changed or at all modified its opinions on this subject. To dissemble or conceal from Her Majesty's Government this fact would be uncandid, and, by silence on our part now, breed mischief for future contentions or negotia-

tions. This Government holds now, as it did by the mouth of its High Commissioners in the Conferences on the subject of the fisheries which produced the pertinent Articles of the Treaty, "That free fish and fish-oil would be more than an equivalent for those fisheries." The measure of pecuniary value which I have drawn from the revenue loss to the United States, calculated with extreme moderation, is an inadequate expression of the benefit to the Provincial interests and injury to our own from their free importations. It is still the opinion of this Government that the possession of our market is of vital importance to the maritime provinces, and such possession a formidable menace, if not a fatal wound, to our own fishing interests. I do not think that I misunderstand or misrepresent those interests when I say that, standing as we now do, midway in the Treaty-period, it would be better for those interests to surrender the enjoyment of the fishing privilege of Article XVIII for the remaining six years of the twelve, upon a resumption by the Government of the control of our own market for this unexpired period.

If Her Majesty's Government and the Provincial statesmen are firm in the opinion that the concession of Article XVIII parts with so much to us, and the concession of Article XXI is valueless to British and Provincial interests, it may be well worth while for the two Governments to consider whether a mutual resumption of these exchanged interests may not be desirable. In the future, as in the past, this Government will go very far in concessions to remove occasions of strife between the fishermen of the two nations. But these contributions to goodwill, as I have before insisted, are not to be confounded with pecuniary tribute on one side or the other.

It was in this spirit that the free importation of coal, salt, and lumber, which was in debate as a measure of wholly domestic interest to ourselves, but with divided opinions, was proposed to the British Government for reciprocal arrangements in respect of these Articles to be incorporated in the Treaty of Washington. The proposal was rejected by the British Government and the Provincial interests, doubtless, upon a measuring cast as to whether this reciprocity carried more benefit or injury to Provincial interests, and what we thought an appreciably greater advantage to the Provinces than to ourselves, was rejected as unimportant to them. The contrast between this indifference to a free market for coal, salt, and lumber, and the inexorable demand for a free market for fish and fish-oil, speaks volumes for the pecuniary value of this latter to Provincial interests.

Her Majesty's Government, it may reasonably be assumed, has given to this Award of the concurring Commissioners its careful attention, and subjected it, in the light of the diplomatic negotiations which established the Halifax Commission, and the evidence before that Commission, to a comparison with the authority imparted by the Treaty, to determine whether it conforms to that authority and is valid, or transcends that authority and, for that reason, is void. Whatever opinion Her Majesty's Government may have formed on this point has not, so far as this Government is aware, been made public at home, and has not been communicated to this Government. In inviting a full exposition of the views of Her Majesty's Government upon the matter, as now brought into consideration between the two Governments, you will say to Lord Salisbury that, wholly unsupportable as the pecuniary measure of the single and fragmentary matter, not embraced in the diplomatic concurrence of the High Commissioners, and thus left by them to impartial appraisal, seems to this Government, it will receive and examine with entire candour any opposing views in maintenance of the validity of the Award which Her Majesty's Government may present. If, as I shall not cease to anticipate, Her Majesty's Government shall agree that the subject submitted to the Halifax Commission has not been adequately disposed of by the concurring Commissioners, the way will seem to this Government to be thereby opened for a more permanent and comprehensive settlement of the fishery interests of the two countries than was reached by the Treaty of Washington. If the present correspondence shall not result in this desired agreement, and even if the opposing views which may be communicated by Her Majesty's Government should affect our present judgment in the very matter of the validity of the Award, I cannot, in all candour, hold out any expectation that this Government can ever recognize the valuation of the countervailing concessions of Articles XVIII, XIX, and XXI, involved in this Award, as a guide even, much less a standard, for any future treatment of the fishery contentions, which the exigencies of the situation as now left may require.

Passing from the grave question which touches the essential elements of the Award, upon considerations vital to the whole system of arbitration, I desire you, further, to call Lord Salisbury's attention to a particular point in the actual Award; that is to say, the failure of the three Commissioners to agree in any result, and the consequent announcement of that inability, and the promulgation of the widely different conclusions which the two concurring Commissioners and the dissenting Commissioner had reached.

The question presented on the face of the Award of the Halifax Commission, viz., whether the concurrence of the three Commissioners in their Award was required by the Treaty, was made a matter of public discussion, both in Great Britain and in the Provinces, before and during the sitting of the Commission. In this discussion, so far as it has fallen under my notice, the legal, political, and popular organs of opinion seemed quite positive that this unanimity was required by the Treaty. In this country the matter was little considered, either because the British view of the subject was accepted, or because complete confidence in our Case, on its merits, supervaded any interest in the question. The point comes up now, for the first time, for consideration between the two Governments, and will need attention from either, only, in case Her Majesty's Government should fail to concur in the views of this Government which condemn the Award on the grave grounds already presented.

The question involves nothing more than the interpretation of the Treaty, and is quite clear of any intermixture with the substance of the Award as satisfactory or unsatisfactory to either party. It turns, first, upon the mere text of the Treaty; and, second, upon the surrounding circumstances and the different subjects to be treated by the various Boards of Arbitration framed by the Treaty of Washington, so far as they may be rightly resorted to in aid of a just construction of the text.

By the Treaty of Washington four Boards are constituted for the determination of certain matters to be submitted to their respective decisions.

1. The Geneva Arbitration was composed of five members, in regard to whose deliberations and conclusions Article II of the Treaty expressly provides that "all questions considered by the Tribunal, including the final Award, shall be decided by a majority of all the Arbitrators."

2. A Board of Assessors under the Geneva Arbitration, in case the Tribunal should not award a gross sum, was to be composed of three members. In the action of this Board, Article X of the Treaty declares that "a majority of the Assessors in each case shall be sufficient to a decision."

3. A Commission of three members to determine reciprocal claims between the two countries arising during the Civil War. Article XIII provides that "a majority of the Commissioners shall be sufficient for an award in each case."

4. The Halifax Commission, composed of three members, undistinguished, among themselves, by any description of umpirage to either, and with no provision in any form for an award by less than the whole number. The Treaty expressly accepts awards, signed by the assenting Arbitrators, or Assessors, or Commissioners under the other Articles, while, in the case of the Halifax Commission, this provision takes the place of such acceptance: "The Case on either side shall be closed within a period of six months from the date of the organization of the Commission, and the Commissioners shall be requested to give their award as soon as possible thereafter."

The argument from this comparison is obvious. The High Contracting Parties possessed a common system of jurisprudence, according to which a reference to Arbitrators *ex vi termini* required the Award to be the act of the Arbitrators, that is, of all of them. The parties to an arbitration, public or private, might accord to any lesser number the power of award, but express stipulations in the submission alone could carry that authority. Acting in full view of this rule, to which a desired exception needed to be expressed, in three cases, in the same deliberate and solemn instrument, the High Contracting Parties imparted the authority to a majority by careful and solicitous provisions to that end. In the case of the Halifax Commission, last in the order of the Treaty, and with the previous arrangements, in this regard, in their minds and under their eyes, this power is withheld. It is impossible, because it is plainly irrational, to say that a Treaty provision containing power to a majority to bind, and a Treaty provision expressing no such authority, mean one and the same thing. The High Contracting Parties have excluded any such conclusion, by the sedulous discrimination which the text of the Treaty discloses.

To the countervailing suggestion that this variation from the system of the Treaty in the case of the Halifax Commission is most reasonably accounted for by inadvertence on the part of the High Joint Commissioners, the answer is obvious. If either of the High Contracting Parties should so allege, which it certainly would not do without much deliberation, the suggestion would not affect the argument as to the meaning of the Treaty as it stood, but would be in the nature of an appeal to the other High Contracting Party to waive the objection and reform the Treaty. No doubt cases may exist where such appeals should be frankly responded to, though against interest.

But, you will say to Lord Salisbury that the suggestion of inadvertence in the negotiations, never to be lightly indulged in, overlooks an adequate and presumptively the real reason for the requirement of unanimity in the case of the Fisheries Commission, while it was expressly waived in the other submissions of the Treaty.

In the matters of computation submitted in the several other references of the Treaty, two circumstances distinguished them from that subjected to the Award of the Halifax Commission. First, they were wholly matters of determinate proof, an appraisal of the ships and cargoes destroyed by the "Alabama" and her consorts, an estimation of damages to persons or property suffered by individual British subjects or American citizens for which reparation should be made—these were matters of definite affirmative proof in pounds or dollars before any award could be asked, and were subject to correction by equally definite opposing proofs before any award could be granted. Second, the assessments carried no measurement of any still subsisting interests between the High Contracting Parties which would survive the payment of the several awards. It was then quite suitable to these references to accept the judgment of a majority and dispense with the concurrence of both parties, as represented in the Commissions, in the results of the contentions before them.

The matter submitted to the Halifax Commission was different in nature, and in the relations of the High Contracting Parties to the subject of contention. Both these traits of this dispute conspired to urge upon the High Contracting Parties the need of every possible guaranty against unreasonable or illusory estimates on the part of the Commission to the prejudice of one party or the other. Besides, this computation touched a matter in which large classes and interests of either community felt a concern, and it was essential that dissatisfaction with results should be alleviated by confidence in the judgment. So vague a subject of valuation as the twelve years' prospective catch of mackerel within three miles of the shore on the coasts of the United States and of the Provinces, so diffuse a problem as the distribution of the burdens of duties between producer and consumer, gave too large a range for floating speculations, unless anchored to sober sense by the requirement of unanimity. The permanent importance of these valuations in future negotiations of the two countries, forbade their submission to any Commission uncontrolled by the necessary concurrence of the Representatives of both countries, in any award. The interests and feeling of the large populations, on the one side and the other, dependent for prosperity, if not for livelihood, on these fisheries, made the two Governments careful to secure them, in any result, against a sense of injustice as well as of disappointment, by the conservative requirement of unanimity.

In submitting to Her Majesty's Government the failure of the Commissioners to come to the agreement which, in this interpretation of the Treaty, is requisite to the validity of the Award, the Government wishes to lay no undue stress upon this objection. If Her Majesty's Government concurs in this construction of the authority conferred upon the Halifax Commission, this agreement between the Governments will enable them, presently, to make more complete, as well as more satisfactory, arrangements for the reciprocal interests of the industry and commerce of the Provinces and of the United States than at present exist. If, on the other hand, Her Majesty's Government shall announce to this Government their construction of the Treaty to be that the concurrence of a majority of the Commissioners warrants a valid award, notwithstanding the declared dissent of the third Commissioner, this Government will not refuse to accord to that opinion, thus expressed, all the weight which it desires for its own views. You will therefore say to Lord Salisbury that, upon such a declared disagreement upon the true interpretation of the Treaty in respect of unanimity of the Commissioners, this Government will regard the maintenance of entire good faith and mutual respect in all dealings under the beneficent Treaty of Washington as of paramount concern, and will not assume to press its



own interpretation of the Treaty, on this point, against the deliberate interpretation of Her Majesty's Government to the contrary.

You will promptly communicate these views to Her Majesty's Government by delivering a copy of this despatch to Lord Salisbury, and requesting an early attention to its contents.

I am, &c.  
(Signed) WM. M. EVARTS.

No. 2.

*The Marquis of Salisbury to Mr. Welsh.*

Sir,

*Foreign Office, November 7, 1878.*

HER Majesty's Government have given their attentive consideration to the despatch relating to the proceedings of the Halifax Fisheries Commission, addressed to you by Mr. Evarts, the Secretary of State of the United States, a copy of which you were good enough to place in my hands on the 10th ultimo; and I have now the honour to make the following observations in reply, which I shall feel greatly obliged by you communicating to Mr. Evarts with the least possible delay:—

Her Majesty's Government fully appreciate the frankness with which Mr. Evart has requested you to communicate to them the views of the Government of the United States on this question, and it is their desire to reciprocate in the fullest degree the wish expressed by Mr. Evarts to come to a complete and explicit understanding between the two Governments as to the conformity of the Award made by the Commission to the terms of the Treaty of Washington.

I must, in the first instance, recall to your recollection the circumstances which led to the organization of the Halifax Commission.

The Reciprocity Treaty of the 5th June, 1854, between Great Britain and the United States, terminated in 1866, not from any desire on the part of Her Majesty's Government to put a period to its stipulations, but in consequence of the notice provided for in Article V of that Treaty having been given by the United States' Government. The mutual privileges in respect to free fishing and free trade in certain productions, which had under its operation been enjoyed by the inhabitants of the United States and of Her Majesty's North American Possessions, thus came to an end. The effect of this determination of the Reciprocity Treaty was to revive the difficulties incidental to the Fisheries question; difficulties so well known to both Governments that it is needless for me to enlarge upon them on the present occasion.

The danger, however, of collision between the fishermen of the two nations began to manifest itself soon after the termination of the Reciprocity Treaty; and Her Majesty's Government were anxious to come to a speedy and satisfactory solution of the question. With this view Her Majesty's Minister at Washington addressed, on the 26th January, 1871, a note to Mr. Fish, in which he stated that Her Majesty's Government deemed it of importance to the good relations which they were ever anxious should subsist and be strengthened between the United States and Great Britain that a friendly and complete understanding should be come to between the two Governments as to the extent of the rights belonging to the citizens of the United States and Her Majesty's subjects respectively with reference to the Fisheries on the coasts of Her Majesty's Possessions in North America, and as to any other questions between them affecting the relations of the United States towards those Possessions.

As the consideration of these matters would, however, involve investigations of a somewhat complicated nature, and as it was very desirable that they should be thoroughly examined, he was directed by Lord Granville to propose to the Government of the United States the appointment of a Joint High Commission which should be composed of members to be named by each Government, should hold its sessions at Washington, and should treat of and discuss the mode of settling the different questions arising out of the Fisheries, as well as all those affecting the relations of the United States towards Her Majesty's Possessions in North America.

To this note Mr. Fish replied on the 30th January of the same year, and whilst stating that the President shared with Her Majesty's Government the appreciation of the importance of a friendly and complete understanding between the two Governments with reference to the subjects specially suggested for the consideration of the proposed Joint High Commission, he added that it would be desirable to include in the

deliberations of that Commission a consideration of the other questions then at issue between the two Governments, particularly those known as the "Alabama" claims.

It was, thus, owing to the importance attached by Her Majesty's Government to the Fisheries question, and to their anxiety to come to a satisfactory settlement of the difficulties connected with it, that the negotiations were commenced which led to the organization of the Joint High Commission and ultimately to the Treaty of Washington. A large portion of the deliberations of that Commission was devoted to the difficult and long-standing question now under consideration, and after many proposals and counter-proposals, including offers on the part of the United States' Commissioners to grant commercial privileges far in excess of the mere remission of duty on fish and fish oil, in order that they might acquire for United States fishermen unrestricted access to the inshore waters of British North America, Articles XVIII to XXV and XXXII and XXXIII were at length agreed to, and constitute the authority under which the Halifax Commission acted.

Article XXII provided that—

"Inasmuch as it is asserted by the Government of Her Britannic Majesty that the privileges accorded to the citizens of the United States under Article XVIII of this Treaty are of greater value than those accorded by Articles XIX and XXI of this Treaty to the subjects of Her Britannic Majesty, and this assertion is not admitted by the Government of the United States, it is further agreed that Commissioners shall be appointed to determine, having regard to the privileges accorded by the United States to the subjects of Her Britannic Majesty, as stated in Articles XIX and XXI of this Treaty, the amount of any compensation which, in their opinion, ought to be paid by the Government of the United States to the Government of Her Britannic Majesty in return for the privileges accorded to the citizens of the United States under Article XVIII of this Treaty; and that any sum of money which the said Commissioners may so award shall be paid by the United States' Government, in a gross sum, within twelve months after such Award shall have been given."

The Acts necessary to enable the several Articles of the Treaty relating to the fisheries to be carried into effect were passed by the Imperial Parliament of Great Britain on the 6th August, 1872; by the Parliament of Canada on the 14th June, 1872; by the Legislature of Prince Edward Island (which did not at that time form part of the Dominion) on the 29th June, 1872, by the Colony of Newfoundland on the 28th March, 1874; and by the United States' Congress on the 25th February, 1873. So scrupulous, moreover, were Her Majesty's Government that United States' citizens should enjoy in the fullest degree the benefits secured to them under the Treaty, that United States' fishermen were admitted to the practical use of the inshore fishing grounds in advance of the formal Legislative Acts necessary for that purpose, and this concession was acknowledged by the Government of the United States as a "liberal and friendly act." Her Majesty's Government consider that it is important, in examining this subject, to bear in mind the distinction between that part of the Treaty relating to Fishery rights in British waters and the part relating to claims then pending on other heads. As regards the Fishery rights, the citizens of the United States were, by the Treaty, put into actual possession and enjoyment of them. That enjoyment has been had and cannot be recalled. Whether any and what sum was to be paid by the Government of the United States for the rights thus conceded was to be determined, and determined without appeal, by the Tribunal constituted under the Treaty.

United States fishermen having entered into the enjoyment of the privileges thus secured to them, it became necessary to take immediate steps for the constitution of the Commission appointed to meet at Halifax in the manner prescribed by the Treaty.

Various circumstances, however, with which your Government are familiar, contributed to occasion delay in the complete organization of the Commission, and it was not, therefore, until the 1st March, 1877, that an identic note was addressed to the Austro-Hungarian Ambassador in London by the Earl of Derby and by the United States' Minister in London, requesting that his Excellency would be pleased to name the third Commissioner in the manner provided for by Article XXIII of the Treaty. His Excellency thereupon named M. Maurice Delfosse, the Belgian Minister at Washington, and apprized the Governments of Great Britain, the United States, and Belgium of the selection thus made.

Her Britannic Majesty's Government having previously appointed Sir Alexander T. Galt to be their Commissioner, and Francis Clare Ford, Esq., to be their Agent, and the Government of the United States having similarly appointed the Honourable Ensign H. Kellogg to be their Commissioner, and the Honourable Dwight Foster to be their Agent, the constitution of the Commission was complete in accordance with the

terms of the Treaty; and after previous communication between the three Commissioners, the 15th June, 1877, was fixed for the first day of meeting.

The Commission was accordingly organized by holding the first conference at the City of Halifax on that day, when all the Commissioners were present and produced their respective powers. The Honourable Dwight Foster and Mr. Ford were also present as Agents of their respective Governments.

M. Delfosse was then, upon the proposal of the United States' Commissioner, elected President of the Commission, and a Secretary having been appointed by him, the three Commissioners proceeded, in accordance with the XXIIIrd Article of the Treaty, to make and sign a solemn declaration that they would impartially and carefully examine and decide the matters referred to them to the best of their judgment and according to justice and equity.

The Commission then, after a meeting on the next day for the purpose of approving and signing the Protocol of the previous day's proceedings, adjourned until the 28th day of July, 1877.

The Commission having met pursuant to adjournment on the 28th day of July, the United States Agent named the Counsel retained on behalf of the United States, and at the next Conference, held on the 30th day of July, the Case of Her Majesty's Government was opened, and was concluded on the 18th day of September; that of the United States of America was opened on the 19th of the same month, and closed on the 24th day of October.

It is unnecessary that I should here recite each step in these lengthened proceedings: it will be sufficient to note that eighty-four witnesses in all were examined on behalf of Her Britannic Majesty's Government and seventy-eight on the part of the United States of America. These witnesses were subjected to the most searching cross-examination by Counsel of the greatest ability; and amongst those examined were to be found the names of many persons who, from their special knowledge of the subject, both practically and generally, were well qualified to express an opinion, and whose evidence was entitled to the greatest weight in the investigation of the matter.

Three hundred and nineteen affidavits were produced in support of the Case of Her Britannic Majesty's Government, and 280 in support of that of the United States; the deponents comprising those who were also in a position to give valuable and convincing testimony with regard to the Fisheries, but who from various causes were unable to give oral evidence before the Commission.

A voluminous mass of documentary and statistical matter was produced and submitted to the Commission on either side, and about fourteen entire days were devoted to the arguments of Counsel upon the whole case.

The Commission held in all seventy-eight sittings, of about four hours' duration each, and the proceedings terminated on the 23rd day of November, 1877, by the announcement of the following Award:—

“The undersigned Commissioners appointed under Articles XXII and XXIII of the Treaty of Washington of the 8th May, 1871, to determine, having regard to the privileges accorded by the United States to the subjects of Her Britannic Majesty, as stated in Articles XIX and XXI of said Treaty, the amount of any compensation which in their opinion ought to be paid by the Government of the United States to the Government of Her Britannic Majesty, in return for the privileges accorded to the citizens of the United States, under Article XVIII of the said Treaty;

“Having carefully and impartially examined the matters referred to them according to justice and equity, in conformity with the solemn declaration made and subscribed by them on the fifteenth day of June, one thousand eight hundred and seventy-seven;

“Award the sum of five millions five hundred thousand dollars, in gold, to be paid by the Government of the United States to the Government of Her Britannic Majesty, in accordance with the provisions of the said Treaty.

“Signed at Halifax, this twenty-third day of November, one thousand eight hundred and seventy-seven.

(Signed)

“MAURICE DELFOSSE.

“A. T. GALT.”

“The United States' Commissioner is of opinion that the advantages accruing to Great Britain under the Treaty of Washington are greater than the advantages conferred on the United States by the said Treaty, and he cannot, therefore, concur in the conclusions announced by his colleagues.

“And the American Commissioner deems it his duty to state further that it is questionable whether it is competent for the Board to make an Award under the Treaty, except with the unanimous consent of its members.

(Signed) “E. H. KELLOGG,  
“Commissioner.”

It was thus assuredly not without the most thorough and laborious investigation of the question submitted to their appreciation that a majority of the Commissioners arrived at the decision above quoted; and it must be observed that the whole of the proceedings were held in strict conformity with the terms of the Treaty of Washington, whilst the Award was given by a majority of the Commissioners in the very terms contained in Article XXII of the Treaty.

In the despatch which has been communicated to Her Majesty's Government, Mr. Evarts seeks to invalidate the Award, which is the result of this exhaustive investigation, upon the ground that, in estimating the claims of Great Britain, the Commissioners must be assumed to have taken into consideration circumstances which the Treaty of Washington had not referred to them. There is nothing upon the face of the Award which gives any countenance to the supposition that the Commissioners travelled beyond the limits assigned to them by the Treaty. Mr. Evarts' argument in favour of this contention is entirely deduced from what he considers to be the magnitude of the sum awarded. It is, he contends, so far in excess of what the United States' Government believe to be the true solution of the problem submitted by the Treaty, that some factor which the Treaty has not recognized must necessarily, in his opinion, have been imported into the calculation.

Mr. Evarts proceeds to give in detail the considerations by which, in his judgment, the result arrived at should be tested. He gives his reasons for believing that mackerel is the only fish to whose capture in the waters opened by Great Britain any value should be assigned, and that no account is to be taken of herring, halibut, cod, hake, pollack, or bait fishes. He computes the number of mackerel which the United States' fishermen have caught within a three-mile line from the shore during the years of the Treaty period which have expired; and infers from it the number which they are likely to catch within the same area during the interval that remains; and he concludes this branch of his argument by estimating, on various hypotheses, the profit which the United States' fisherman is likely to have made from the mackerel which he has probably caught. On the other side, he estimates at a high value the profit which the British fishermen have derived from the opening of the markets of the United States; and concludes that the sum fixed by the Award is so much larger than these considerations would have justified, that the United States' Government can only explain its magnitude on the assumption that the Commission has mistaken the question that was referred to it.

That Mr. Evarts' reasoning is powerful it is not necessary for me to say; nor, on the other hand, will he be surprised to hear that Her Majesty's Government still retain the belief that it is capable of refutation. But, in their opinion, they would not be justified in following him into the details of his argument. These very matters were examined at great length and with conscientious minuteness by the Commission whose Award is under discussion. The decision of the majority was given after full hearing of all the considerations that either side was able to advance; and that decision, within the limits of the matter submitted to them, is, under the Treaty, without appeal. The argument of Mr. Evarts amounts to a review of their Award upon the questions of fact and of pecuniary computation referred to them. He contends that the sum awarded is excessive; and that therefore the Award must have been arrived at by some illegitimate process. But to argue against the validity of an Award, solely on the ground that the conclusion arrived at by the Arbitrators on the very point referred to them is erroneous, is in effect the same thing as to dispute the judgment which they have formed upon the evidence.

Her Majesty's Government do not feel that it is their duty to put forward any opinion, adverse or favourable, to the decision which the majority of the Commissioners have passed upon the affidavits and depositions which they had to consider. Her Majesty's Government could not do so without undertaking the same laborious investigation as that which was performed by the Commission, a task for which the interval which has been left between October 10, the day on which Mr. Evarts' despatch was delivered to me, and November 23, the day on which the payment awarded is to be made, would certainly not suffice.

But they are precluded from passing in review the judgment of the Commission by a far more serious disqualification. They cannot be judges of appeal in this cause,

because they have been litigants. As litigants they have expressed the view upon the facts which they felt bound in that capacity to maintain. Their computations have been totally different in method and result from those which the American Counsel sustained, and which, in part, Mr. Evarts reiterates in his despatch. The interpretation which they have given to the data laid before the Tribunal has been in complete antagonism to his. They have been of opinion, and have insisted with all the force of argument that their Agents could command, that 15,000,000 dollars was the legitimate compensation which, under the Treaty, was their due. The majority of the Commissioners has decided to reduce that claim nearly by two-thirds. Having formally engaged to submit the matter to this arbitration, they do not think that it is open to them to inquire how it was that the Commission came to form an opinion upon their claims so widely different from their own. Still less can they admit that either side is entitled to treat this difference as ground for assuming that the Arbitrators have imported into their judgment considerations which the Treaty did not authorize them to entertain. Her Majesty's Government can only accept now, as on similar occasions they have accepted before, the decision of the Tribunal to which they have solemnly and voluntarily submitted.

At the close of his despatch Mr. Evarts refers to a consideration, which I ought not to pass over without observation, though he does not place it in the first rank among the objections which he raises against the Award. He calls attention to the fact that the Award of the Commission was not unanimous, and that in the Treaty of Washington no stipulation is, in this case, made that the decision of the majority is to be binding.

The opinion that, according to the Treaty of Washington, the Fishery Commission was incapable of pronouncing any decision unless its members were unanimous, is one in which Her Majesty's Government are unable to concur.

It is not difficult to produce from text-books, even of very recent date, authority for the doctrine that in International Arbitrations the majority of the Arbitrators binds the minority unless the contrary is expressed.

"Halleck's International Law," edited by Sir Sherstone Baker, 1878, says (Chap. xiv, Sect. 6):—

"The following Rules, mostly derived from the Civil Law, have been applied to International Arbitrations where not otherwise provided in the Articles of Reference. If there be an uneven number the decision of a majority is conclusive."

Bluntschli (Sect. 493) says:—

"La décision est prise à la majorité des voix."

Calvo (i, p. 791), lays down:—

"A défaut d'obligations nettement tracées dans l'acte de compromis, les arbitres, pour s'acquitter de leur mandat, se guident d'après les règles tracées par le droit civil: ainsi ils doivent procéder conjointement, discuter et délibérer en commun, décider à la majorité."

I am not aware of any authorities who, in respect to International Arbitrations, could be quoted in the contrary sense; and it would not be difficult to show, by a reference to cases in the American as well as in the English Courts, that the same rule has always been judicially applied in the case of Arbitrations of a public nature.

The language and stipulations of the Treaty itself, so far as they are explicit upon the subject, point to a similar conclusion. Mr. Evarts, indeed, argues that the requirement of unanimity was intended, because, while it is not disclaimed in the case of the Fishery rights, it is disclaimed in the case of three other Arbitrating Tribunals set up by the Treaty. It is evident that, at most, this omission would have left the matter in uncertainty. The suggestion that the framers of the Treaty meant by their silence to prescribe a mode of proceeding which, before a Tribunal thus constituted, is unexampled, can only be accepted on the hypothesis that they were deliberately preparing an insoluble controversy for those by whom the Treaty was to be executed.

It appears to me that if the language employed in the case of the other Tribunals set up by the Treaty be examined carefully a more probable solution of the difficulty may be found. The words used in each case are somewhat peculiar, and lend themselves to the supposition that what the draftsman was thinking of when he employed them was not the question whether unanimity should or should not be required, but under what circumstances the Tribunal should be held to be fully constituted for the purpose of giving a decision. It was obvious that in the course of a protracted and manifold inquiry, in which questions would constantly come up for decision, it was a matter of great practical importance to lay down whether for each decision the presence of the whole Tribunal was required, or whether any condition might be pre-

scribed under which, in spite of the absence of any one member from illness or other cause, a valid decision might yet be given.

The difficulty of conducting, on the more rigid rule, a lengthened inquiry, involving frequent decisions, is a matter of ordinary experience. A common mode of escape from it is to fix some number, short of the entire complement, as the quorum or minimum number which must be present to give validity to a decision. The framers of the Washington Treaty adopted an arrangement somewhat different in form, but similar in effect. They laid down that the decisions should be valid so long as they were adopted by a number not less than the majority of the whole body. That this is the meaning of the three passages in which the word majority appears may be gathered both from the expressions themselves and from the connection in which they are found. The following is a portion of the first paragraph of Article XIII on the Commission of Civil War Claims:—

“They shall be bound to receive and consider all written documents or statements which may be presented to them by or on behalf of the respective Governments in support of, or in answer to, any claims; and to hear, if required, one person on each side, on behalf of each Government, as Counsel, or Agent for such Government, *on each and every separate claim*. A majority of the Commissioners shall be sufficient for an Award in each case.”

Here it is evident that the multiplicity of the claims was the matter specially under consideration; and that “the sufficiency of a majority of the Commission for an Award” was stipulated with a view to the possible delay which the requirement of a full Tribunal in each case might cause. That the majority should be sufficient for an Award in the case of one member being absent was a rule which it was necessary to lay down; for where frequent decisions are not required, provisions of the kind are not customary. On the other hand, it is a universal practice that upon public Arbitrations thus constituted, in case of difference of opinion, the majority shall prevail. It is, therefore, consistent with sound principles of interpretation, to assume that the phrase was meant to apply to the point on which a provision was necessary, and not to the point on which a provision was superfluous.

The same reasoning is applicable to the case of the Geneva Tribunal, which had to decide on the alleged failure of neutral duty in Great Britain as to seventeen different ships, besides questions arising in respect to damages. The Board of Assessors which was provided in case the Geneva Tribunal had not awarded a gross sum was a Commission of Claims which would have had to adjudicate upon a very large number of individual losses. In these cases, therefore, as in that which has been just adverted to, the Joint High Commission took a natural and a judicious course in providing that a decision should not be invalid by reason of the absence of a member of the Tribunal, so long as a majority concurred in the Award.

On the other hand, no such provision was necessary in the case of the Halifax Commission, which, beyond questions of procedure, had but one issue before it, and but one decision to pronounce. In this case it was not necessary to lay down, as in the other cases, that “a majority of the Commissioners should be sufficient for an Award,” or that “all questions should be decided by a majority of *all* the Arbitrators.”

This construction of the Treaty appears to Her Majesty’s Government more natural and more respectful to the Joint High Commission than the assumption that, having resolved to leave one particular case to a mode of Arbitration which was entirely novel, and wholly unlikely to issue in a decision, they carefully abstained from the use of any words to indicate the unusual resolution they had formed.

It further appears to Her Majesty’s Government that a distinct intimation of the true meaning of the Joint High Commission in respect to the Fishery Award is to be found in the composition of the Tribunal which they adopted. This constitution is consistent with the intention that the majority should decide; it is not consistent with the supposed intention that the dissent of one Commissioner should prevent any decision from being pronounced. The XXIIIrd Article of the Treaty makes the following provision for the constitution of the Tribunal:—

“The Commissioners referred to in the preceding Article shall be appointed in the following manner, that is to say:—

“One Commissioner shall be named by Her Britannic Majesty, one by the President of the United States, and a third by Her Britannic Majesty and the President of the United States conjointly; and in case the third Commissioner shall not have been so named within a period of three months from the date when this Article shall take effect, then the third Commissioner shall be named by the Representative at London of His Majesty the Emperor of Austria and King of Hungary. In case of the death,



absence, or incapacity of any Commissioner, or in the event of any Commissioner omitting or ceasing to act, the vacancy shall be filled in the manner hereinbefore provided for making the original appointment, the period of three months in case of such substitution being calculated from the date of the happening of the vacancy.

“The Commissioners so named shall meet in the City of Halifax, in the Province of Nova Scotia, at the earliest convenient period after they have been respectively named, and shall, before proceeding to any business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide the matters referred to them to the best of their judgment and according to justice and equity; and such declaration shall be entered on the record of their proceedings.

“Each of the High Contracting Parties shall also name one person to attend the Commission as its Agent, to represent it generally in all matters connected with the Commission.”

This is the ordinary form of Arbitration in which each side chooses an Arbitrator, and an umpire is chosen by an indifferent party to decide between the two. The appointment of the umpire is of no utility, the precautions for securing his impartiality are unmeaning, if the adverse vote of one of the Arbitrators may deprive his decision of all force and effect.

In ordinary phraseology the decision of a body of members means a decision come to by a majority of voices. In the common use and understanding of language, this is the interpretation which suggests itself to every reader, when it is stated that a number of men have expressed an opinion or have arrived at a determination. The requirement of unanimity is the exception, and therefore can only be conveyed by an explicit statement. There are, of course, well-known exceptions, as in the case of trial by jury. But in such cases the constitution of the deciding body is diametrically opposed to that adopted in the case of the Fishery Commission. Instead of a provision that two-thirds shall be named by the parties to the suit, the most elaborate precautions are taken that the whole body shall be unbiassed. It is obvious that when unanimity is to be required, when any one member of the deciding body is to have the power of nullifying all the proceedings and preventing a decision, such an arrangement will only be endurable on the condition that each member shall be so chosen as to be as far as possible free from any inclination to exercise that power on one side rather than on the other. If a jury were constituted on the principle that the Plaintiff should choose one-third of it and the Defendant another third, very few persons would be found to expose themselves to the cost of an action at law. Had it been known five years ago that an Award would be prevented by the dissent of one of the members of an arbitration constituted on the same principle, though I do not venture to conjecture what the course of the United States' Government would have been, I feel confident that England would have declined to enter upon so unfruitful a litigation.

Her Majesty's Government may appeal to a cogent proof that in accepting this Arbitration they did not contemplate that the Award was liable to be prevented by the requirement of unanimity. Believing, in agreement with the majority of the Commission, that they were heavy losers by the exchange of concessions contained in Articles XVIII, XIX, and XXI of the Treaty, they nevertheless have for five years allowed those concessions to come into force, trusting to the compensation which the Commission would give to them. That they have done so is a sufficient proof that they did not anticipate a construction of the Treaty which would make the delivery of an Award almost impossible. A valuable property has actually passed into the enjoyment of others, and cannot be recalled. The price to be paid for it was to be determined later by a Tribunal agreed upon between the parties. Is it conceivable that they should have deliberately constituted a Tribunal for this purpose, in which a decision could be wholly prevented by the dissent of a member nominated by the party to whom the property had passed?

Reciprocating cordially the courteous and friendly sentiments by which Mr. Evarts' language is inspired, Her Majesty's Government feel confident that the United States' Government will not, upon reflection, see in the considerations which have been advanced any sufficient reason for treating as a nullity the decision to which the majority of the Commission have arrived.

I have, &c.  
(Signed) SALISBURY.

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