

cate original sets of which are to be filed with each Government; the commissioners are further required to file with each Government joint reports describing in detail the location of the line and the monuments or other boundary marks established along its course; and it is agreed that the line so marked and defined by them shall be taken and deemed to be the international boundary.

The boundary is appropriately divided by the treaty into eight different sections, each one of which is dealt with in a separate article containing a recital of the several treaty provisions and the proceedings thereunder which define and fix its location, the extent of each section being determined by its relation to such treaty provisions and by the character of the future proceedings which are to be taken for the more complete definition and demarcation of such section of the boundary.

Thus, it will be seen that in addition to its primary value, as a preventative of boundary disputes in the future, this treaty has a secondary value of considerable importance, in that, by the method of arrangement and treatment above referred to, it furnishes an authoritative outline or synopsis of the history of the establishment of our entire northern boundary, showing with respect to each section the various different proceedings which have been taken from its inception to its final completion.

#### THE BOUNDARY-FISHERIES TREATY

A most interesting illustration of the extent of the jurisdiction of the treaty-making power of the United States is presented by the treaty recently entered into with Great Britain for the uniform regulation of the fisheries in the contiguous boundary waters between the United States and Canada, a copy of which treaty will be found in the Supplement to this number of the JOURNAL at p. 322.

This treaty provides that the times, seasons, and methods of fishing in certain specified waters contiguous to the boundary between the United States and Canada and the nets, engines, gear, apparatus, and appliances which may be used therein shall be fixed and determined by uniform and common international regulations, restrictions, and provisions, which are to be prepared by an international fisheries commission to be appointed for that purpose, and the two Governments engage to put into operation and to enforce by legislation and executive action, with as little delay as possible, such regulations, restrictions, and provisions, with appropriate penalties for all breaches thereof.

On the American side of the boundary, the waters containing the fisheries referred to are wholly within the borders of the several boundary

States, and it has been held in an opinion rendered by Attorney-General Griggs in 1898 (*Opinions of Attorney-General*, Vol. XXII, p. 214), and this view presumably prevails to-day, that on account of the division of powers between the Federal and State governments under the Constitution the regulation of the fisheries in these boundary waters within the territorial limits of the several States is a subject of State rather than of Federal jurisdiction, and that Congress has no authority, in the absence of a treaty giving such authority, to pass laws to regulate or protect the fisheries in such waters.

Notwithstanding this exclusive jurisdiction of the several boundary States over these fisheries in the absence of a treaty, the right of the treaty-making power to take jurisdiction over these fisheries is recognized and supported in this opinion of the Attorney-General, and such power has been exercised in full measure in entering into the present treaty. Under the provisions of this treaty, the fishery regulations adopted and enforced by the individual boundary States are superseded and displaced, in so far as they conflict, by regulations to be adopted by an international commission and to be enforced by the Federal Government, if necessary, thus substituting for the authority of the individual boundary States the authority of an international commission backed by the Federal Government and extending the jurisdiction of Congress to the regulation of these fisheries, which in the absence of this treaty provision would be entirely beyond the control of Congress.

This treaty, therefore, recalls, and it is to be hoped will finally settle, the question of whether or not the treaty-making power has jurisdiction to deal with matters which are not among the enumerated powers delegated by the Constitution to Congress, and to extend the jurisdiction of Congress over such matters when congressional legislation is necessary to carry out treaty stipulations, which has been the subject of much discussion in the past. Those commentators on the treaty-making power who are inclined to maintain States' rights at the expense of the effectiveness and the national character of the Federal Government in its foreign relations have always questioned the right to exercise so extensive a power by treaty under any circumstances. By entering into this treaty, however, the executive branch of the Government and the Senate, which together constitute the treaty-making power, have asserted in the most emphatic manner the possession of this power, and unquestionably the weight of authority found in judicial decisions and in the opinions of those entitled to speak with authority on the subject, and in the precedents already established, sustain beyond the possibility of any

reasonable doubt the right of the treaty-making power to exercise such jurisdiction to the fullest extent, provided, always, that the treaty is designed to promote the general welfare and relates to matters clearly of an international character which either can not be dealt with so effectively by the individual States or not at all except by treaty.

An examination of the fisheries question and the conditions surrounding it will show that the exercise of this power in the present case arises from and is based upon the international character of such fisheries and the interest of the nation at large in having them protected and preserved on account of their great value as a food supply, and from the impossibility, as shown by practical experience, of adequately providing for their protection and preservation except by regulations established by means of an international agreement, as here proposed, under Federal authority.

The importance of adopting uniform restrictive regulations for the protection and preservation of these fisheries and of establishing fish hatcheries to increase the supply of food fish has long been recognized on both sides of the boundary. The whole subject was examined and reported on by a joint commission of two experts appointed in 1892 by the United States and Great Britain, and their report establishes conclusively the necessity not only of revising and adding to the protective regulations then in force and of providing methods for increasing the supply of food fish, but also of securing uniformity and harmony in the application and enforcement of such regulations and methods in the waters of Canada and of the several boundary States on the American side of the line. It appears that under existing conditions the differences in the method of dealing with the fisheries and of enforcing the regulations adopted in the several different States and in Canada have led to mutual recriminations and complaints, attended by considerable friction and some violence.

Efforts have been made to secure uniform action among the several States on the one side and the Dominion of Canada on the other along the lines recommended in this report, but without success. Concurrent legislation by the several States and Canada has been found inexpedient. Experience has shown that it would be a practical impossibility to secure such legislation, and even if it could be secured there would be no guaranty of any degree of permanency. It would of course be permissible, if the consent of Congress could be secured, for the several States to avail themselves of the privilege reserved to them under the Constitution of entering into an agreement on this subject with the Dominion of

Canada, but our history furnishes no precedent for an agreement between a State and a foreign government, and although such a course might be appropriate in this case, yet undoubtedly it would be even more difficult for the several States and the Dominion of Canada to reach an agreement on these questions and to secure congressional approval of it, than it would be to secure uniform regulations among the several States and in Canada by concurrent legislation independently of any such agreement. Moreover, even if such an agreement became effective, the situation would hardly be more satisfactory in the end than under concurrent legislation, for so long as the regulations on the American side were under State control, the difficulties attendant upon their enforcement would be largely the same, whether the Canadian regulations were concurrent or divergent. The inherent difficulty with any arrangement leaving the control of these fisheries to the several border States is that the enforcement of fishery regulations in the contiguous waters is likely to involve the authorities on either side in conflict with the citizens of the other country, or otherwise raise international questions which the several States have no power to deal with. The several boundary States seem to be entirely willing to turn to the Federal Government for relief in this matter, and their fisheries commissioners and in more than one instance their legislatures have expressed the view that if these fisheries are to be preserved they must be subjected to Federal regulation, and in this view the commercial interests in the Great Lakes fisheries have fully concurred.

It is evident, therefore, that nothing short of the adoption of regulations for the protection and preservation of these fisheries through the operation of the treaty-making power would furnish a complete and permanent solution of the difficulties presented, and if the present treaty accomplishes this result it will serve as a conspicuous example of the wisdom and foresight of the framers of the Constitution in conferring upon the treaty-making power the extensive jurisdiction which has been exercised in this case.

#### RUSSIAN-JAPANESE FISHERIES CONVENTION OF JULY 15 (28), 1907

In pursuance of Article XI of the Treaty of Portsmouth, Russia in July, 1907, reached an understanding with Japan, granting to subjects of the latter State fishing rights along the coast of Russian possessions in the seas of Japan, Okhotsk, and Bering.<sup>1</sup> This convention, with the

<sup>1</sup> For the text of this article see U. S. For. Rel., 1905, 826.

The text of the fisheries convention of 1907 is contained in the current number of the Supplement of this JOURNAL.