WAS THE AWARD IN THE NORTH ATLANTIC FISHERIES CASE A COMPROMISE?

In the July, 1911, number of the JOURNAL (Vol. 5, p. 725), an editorial was printed under the heading "Statement by the President of the Tribunal that the North Atlantic Fisheries Award was a Compromise," the subject of which was a statement, made by the president of the tribunal, Dr. Lammasch, in an article published in *Das Recht,* that the award in the fisheries arbitration "contained elements of a compromise for which, however, the tribunal had received special and exceptional authorization." The editorial briefly reviewed the treaties relating to and providing for the arbitration and concluded that compromise seemed to have been excluded and that we were unable to discover the special and exceptional authorization mentioned by the president as justifying a compromise.

We are now in receipt of a communication from Dr. Lammasch in which he explains what was meant by his statement referred to and gives the reasons upon which it was based. At the request of Dr. Lammasch, and in order that our readers may have the benefit of the distinguished arbitrator's views, his communication is printed in full:

The AMERICAN JOURNAL OF INTERNATIONAL LAW did me the honour to quote some part of a little article I had published in a German law review concerning the award of the arbitral tribunal instituted at The Hague to decide the controversies between the United States of America and Great Britain concerning the North Atlantic fisheries, of which tribunal I had been the president. I had said in that article that the sentence of this tribunal "contained elements of a compromise, for which, however, the tribunal had received special and exceptional authorization." In saying so, I alluded of course to the *recommendations* which the tribunal had proposed to both governments in virtue of Article IV of the special agreement concluded between the litigating Powers.

One of the questions to be decided by the arbitral tribunal was: 5th. From where must be measured the "three marine miles of any of the coasts, *bays,* creeks or harbours" referred to in the said article of the treaty of 1818? In regard to this question the difference was that Great Britain claimed that the renunciation of the United States applied to all bays generally, whereas the United States contended that it applied only to bays of a certain class or condition. The majority of the tribunal, including the two national arbitrators, Mr. Justice Gray and Sir Charles Fitzpatrick, were of opinion that the treaty used the general term *bays* "without qualification" and that therefore

> These words of the treaty must be interpreted in a general sense as applying to every bay on the coast in question that might be reasonably supposed to have been considered as a bay by the negotiators of the treaty under the general conditions then prevailing.
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> The negotiators of the treaty of 1818 did probably not trouble themselves with subtle theories concerning the notion of "bays," they most probably thought that everybody would know what was a bay. In this popular sense the term must be interpreted in the treaty. The interpretation must take into account all the individual circumstances which for any one of the different bays are to be appreciated, the relation of its width to the length of penetration inland, the possibility and the necessity of its being defended by the state in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in general.

For these reasons the tribunal decided that in case of bays the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. The majority of the tribunal developed the reasons for this award in a very detailed statement containing not less than 21 items. Only one of the arbitrators, Mr. Drago, dissented from this part of the sentence, without nevertheless exactly stating in his opinion filed at the International Bureau of the Permanent Court of Arbitration what sense he attributed to the word "bay" in the treaty of 1818. The tribunal could not overlook that the answer given to Question V "*although correct in principle and the only one possible in view of the want of sufficient basis for a more concrete answer,*" was "not entirely satisfactory as to its practical applicability and that it *leaves room for doubts and differences in practice.*" The tribunal foresaw that there would arise *in future* questions regarding the *exercise of* the *liberty of* American citizens to fish outside the limits indicated by the treaty and the award. For the purpose of determining these questions in accordance with the *principles* laid down in the award, the tribunal made use of the special and exceptional authorization which had been given to it by Article IV of the agreement of April 4, 1908.

Article IV reads as follows:

> The Tribunal shall recommend for the consideration of the high contracting parties *rules* and a *method of procedure* under which all questions which may arise *in the future* regarding the *exercise* of the *liberties* above referred to may be determined in accordance with the *principles* laid down in the award.

Pursuant to this article, the tribunal recommended for the consideration and acceptance of the high contracting parties some *rules* and a *method of procedure* for determining the limits of the bays enumerated.

The starting point of these recommendations were the considerations that in subsequent treaties with France, with the North German Confederation and the German Empire, and likewise in the North Sea Convention, Great Britain had adopted for similar cases the rule that only bays of ten miles width should be considered as those wherein the fishing is reserved to nationals, and that in the course of the negotiations between Great Britain and the United States a similar rule had been on various occasions proposed and adopted by Great Britain in instructions to the naval officers stationed on these coasts.

Though these considerations, in the opinion of the majority of the tribunal, were not sufficient, as they seemed to Dr. Drago, to constitute this a principle of international law, it nevertheless seemed reasonable to them to recommend this rule with certain exceptions, especially since this rule with such exceptions had already formed the basis of an agreement between the two Powers. *These recommendations were the result of a compromise* and *to that compromise I recall to have alluded* with the words which the editor of this JOURNAL did me the honour to quote from my article in the *Recht*.

I think it necessary to make this statement with reference to what I meant by the words in question, because not only the distinguished editor of the JOURNAL but also two other prominent American lawyers, with whom I had the pleasure to collaborate at The Hague, Mr. Robert Lansing, in the *University of Pennsylvania Law Review* (1910, p. 143), and Mr. Wm. Cullen Dennis in the *Columbia Law Review* (1911, p. 499), seem to have interpreted my article in the *Recht* in a sense which I must most respectfully decline. I did not state that the sentence in the fisheries cases *was* a compromise, but that it did *contain elements of a compromise*.

DR. LAMMASCH.

NAVAL PRIZE BILL AND THE DECLARATION OF LONDON.

The rejection by the House of Lords on December 15th of the Naval Prize Bill [1] carries with it the repudiation of the International Prize Court, created by the Second Hague Conference. The bill amends the English law relating to naval prizes of war in such a way as to enable the Hague Convention to be carried into effect, while Article 28 of the bill provides that British courts shall enforce the decrees of the International Prize Court. It is evident from the attacks upon the bill, both in the press and in the House of Commons, that the real reason for the opposition to the International Prize Court was the fact that the Declaration

[1] 1 and 2, George V.