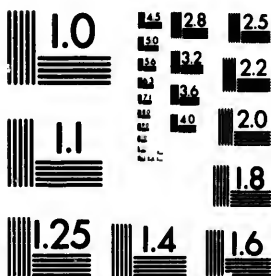


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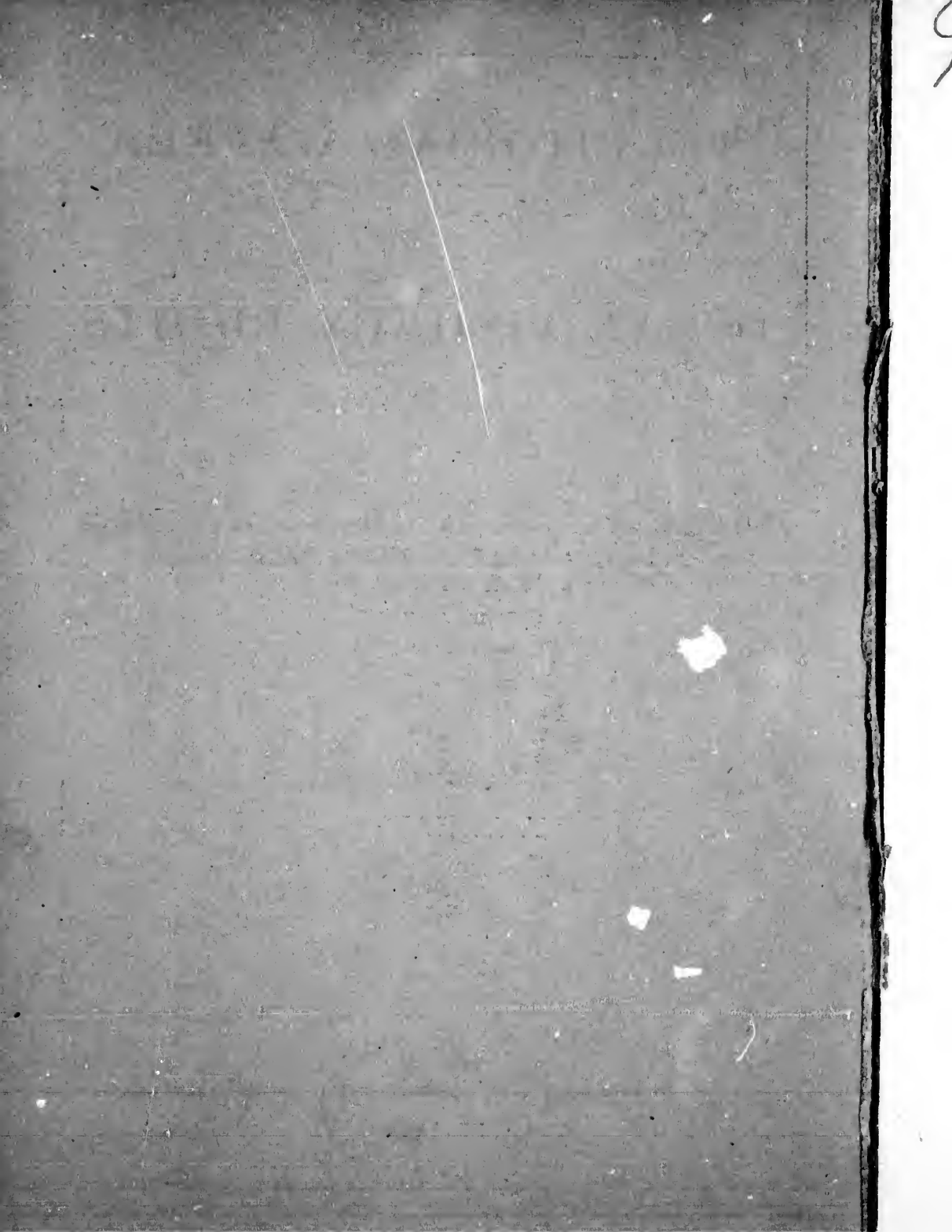
TERRITORIAL WATERS
AND
OCEAN FISHERY RIGHTS

A PAPER READ BEFORE THE
CONFERENCE OF THE ASSOCIATION FOR THE REFORM AND CODIFICATION
OF THE LAW OF NATIONS, AT THE GUILDHALL, LONDON
12TH OCTOBER, 1893

BY
T. H. HAYNES

Managing Director of the Pearl & Shaving Coy.

Printed by
SPOTTISWOODE & CO., NEW-STREET SQUARE, LONDON
1898



*Can. Haynes, T.H.
Pam.*

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TERRITORIAL WATERS BY CHART.

TERRITORIAL WATERS AND OCEAN FISHERY RIGHTS.

At the Conference of this Association last year, the proposals relating to Territorial Waters drafted for the consideration of the Institute of International Law were submitted to this Association for examination, and the friendly distinction that was drawn between the Institute and this Association was an apt allusion. The main object for defining territorial waters with accuracy is the avoidance of fishery disputes. The conflicting interests of what for brevity's sake I will term inshore and offshore fisheries are so complicated, and the welfare of both are so bound up together, that a full appreciation of the practical details of the world's fisheries is required before any proposal for the definition of territorial waters can be likely to meet with the approval of any substantial majority of the nations. Geography and natural history present hard facts which have to be met.

“All the water in the ocean
Can never turn the swan's black legs to white.”

The lesser rules the greater, and practice must point out the solution of the problem, and the golden principle, if there be one, which both the Institute and this Association are working to discover.

I.—SOVEREIGN RIGHTS IN TERRITORIAL WATERS.

Behring
Sea.

Three-mile Limit.—It is a matter for supreme congratulation that the Behring Sea Arbitration is now an accomplished fact. The freedom of the high seas has been vindicated as to the past and restricted as to the future. Departures have been taken which will go far to form precedents to justify new attempts for further restrictions and to lay down new principles for the development of international law.

Limita-
tion of
Sovereign
rights.

A 60-mile radius round the Pribyloff Islands has been substituted for one of three miles, but this zone *has been closed* to sealers of the adjacent Sovereign Power as well as to the British flag. This 60-mile zone is supposed to be based on the fact that the female seals suckling their pups ashore put out to sea in search of food; the evidence, however, available tends to show that 20 miles is more nearly the extent of such feeding grounds. A second zone comprising the remainder of the American side of Behring Sea from 180 miles in width upwards, which is frequented by seals for six months, from May to October inclusive, has been closed to sealers during May, June, and July; leaving August and September, the moulting months, when the skins are in bad condition, and October, open both to American and British sealers—fire-arms and nets being prohibited. A third zone outside Behring Sea, from 900 miles in width upwards, has also been closed to both nations from May 1 to July 31, a period when there are no seals there at all, and rifles and nets are prohibited at

other times. The only formal consideration taken from the United States is that hunting within the three-mile limit is forbidden, and obedience to the other restrictions upon the high seas is concurrently secured. It is, however, believed that the United States will continue to limit the slaughter ashore, not only in number, but also to males only.

The fact that the arbitrators have sacrificed abstract principles of international law to the exigencies of seal life goes far to show that we are pursuing a chimera in seeking for a golden rule applicable to all cases, although the regulations dictated may eventually require revision. The 60-mile zone appears an unnecessarily wide preserve, and within that excess and within the second zone sealers are restricted from killing the barren females and bachelors which are to be found there during May, June, and July, when their skins are in good condition, and are condemned after hunting in the third zone during February, March, and April to expensive idleness, or driven elsewhere until the moulting months render these skins comparatively valueless. Sir George Baden Powell can inform the Association probably whether these stringent regulations are necessary to save the pups which still have to run the gauntlet in October.

The *modus vivendi* with Russia for pelagic sealing during 1893 on the Russian side of the Behring Sea gives a 10-mile closed zone all along the Russian coast, and a 30-mile radius round the Kormandorski and Robben Islands. Russia in return agrees not to withdraw from British sealers the usual commercial facilities of her ports,

Behring
Sea *modus
vivendi*
between
Russia
and Great
Britain.

and she permits no pelagic sealing at all on her coasts.

Spain.

Spain claims a six-mile limit round her coasts, and round those of Cuba.

Sweden
and
Norway.

With the assent of Russia in 1838 Sweden and Norway claim a four-mile limit, and they disregard any limitation between rocks and islands and the main land. The reason given by Professor Aubert to the Institute of International Law for this four-mile claim, is that the coast of Norway is so indented that foreign fishermen would find it difficult to tell whether they were inside a three-mile limit or not. It is, however, quite as easy to take cross bearings at three miles distance as at four miles, and landmarks are plainer and more easily recognised, and mist is less impenetrable, at the shorter distance. Norwegian fishermen can fish outside as well as inside any limit, and foreigners can safely be left to take care of themselves. To destroy a right simply because it might be infringed is strange logic. Monsieur Kleen advances the curious argument that, as the days are so long there, and fishermen can sail out long distances from shore and return the same evening, they ought accordingly to be protected from the competition of strangers coming from richer countries; he adds that, being poor, they need the exclusive enjoyment of the offshore fisheries in order to subsist in so rigorous a climate. The Government justifies the claim on the ground that three miles is less than the range of modern cannon, forgetting that such a reason was abandoned by the Powers subscribing to the North Sea Fisheries

Convention of 1882, from which Scandinavia held loof.

Ten-mile Headland Bays.—The arrangement whereby bays not exceeding 10 miles across are closed by a line drawn across three miles beyond the headlands, is formally accepted by France and Great Britain.

It is set aside by Sweden and Norway in a wholesale manner. Sweden and Norway.

The United States disregard it in two notable instances:— United States.

Cape Cod to Cape Ann, 32 miles across; and South Cape of Florida to the Mississippi, 500 miles across, enclosing a tract of deep sea as much as 180 miles broad.

Western Australia gravely advances an ambiguous claim to all bays the headlands of which are “in sight of one another”! The Colony also claims Exmouth Gulf, $12\frac{1}{2}$ miles across, and Sharks Bay, with passages thereto $13\frac{1}{2}$ and 20 miles in width. Western Australia.

In the British North American Dominions the Bay of Chaleur 16 miles across, and Conception Bay 20 miles across, are claimed. Numerous other claims of the same character were provided in the unratified Treaty of Washington of 1888. Canada and Newfoundland.

On the other hand, Mr. Gordon informs the Association that all Canadian bays over six miles in width are with one exception now opened to American fishermen. Dispensation.

Peaceful Transit.—The right of “*passage in-offensif*” through territorial waters is denied, according to a *Times* telegram of 27th April last, by United States.

the United States to British tourist steamers from Vancouver desiring to visit Alaskan waters.

Denmark.

The limitations described by M. Kleen as placed upon the choice of pilots by Denmark, appear to qualify to a considerable extent the right of way of foreign vessels through territorial waters. It may be noted that the Treaty of Copenhagen of 1857 is useful to show that the exercise of exceptional restrictions, even for two centuries, does not of necessity constitute a right to maintain the same. By the Treaty of 1857 Denmark expressly made *restitution* of the freedom of passage between the North Sea and the Baltic.

II.—JURISDICTIONAL RIGHTS: EXTRA-TERRITORIAL.

Piracy
and
slavers,
and right
of search.

Foremost amongst these come the universal right to capture or destroy pirates and slavers. In the latter case, which involves the exercise of the right of visit and search, France declines to acquiesce, but in practice the objection is not maintained if the suspicions causing the overhaul prove correct.

Secondly, there is the right of pursuit and capture. Russia claims to capture sealers and condemn them by implication only; Great Britain, however, in the *modus vivendi* for 1893 acquiesces in simple capture with proper trial. The distinction is particularly important, as the closed zone extends far out of sight of land, in a sea noted for its fogs and where soundings are no guide, so that a vessel's position is often a matter of pure conjecture. If the right of pursuit and capture is to

be freely granted to countries adjacent to ocean fisheries, stipulation should be made that whereas a vessel may easily trespass by accident within territorial waters, she should be given the benefit of any doubt, and leniency should be shown her unless a flagrant case or a succession of suspicious cases of trespass shall have betrayed the deliberate nature of such offences.

Trial of prizes.

Then there is the right to resent acts of belligerency within reach of cannon-shot of the land, and to treat such acts as violations of neutrality.

Lastly, there is the claim in many countries to visits of inspection for quarantine and revenue protection. In England this does not obtain now, but in the past it has extended as much as 12 miles off shore, and has included compulsory signalling of notification of infection to passing vessels.

III. MARITIME COMMERCIAL INTERCOURSE.

I now pass to the more immediate and important details which so vitally affect the prosecution of ocean fisheries, and I will preface my remarks with the reminder that the fishermen of the "adjacent country" participate largely in the use of the off-shore fishery whilst exclusively enjoying the inshore fishery, and that any efforts made artificially to preserve, improve, and restock the inshore fisheries must naturally greatly benefit the offshore fishery. By international courtesy the country adjacent to an international fishery admits strangers to its ports for commercial intercourse with resultant profit to

Privileges conceded to foreigners.

both sides in trade. This intercourse covers liberty for the following purposes :—

- (a) To obtain wood and water.
- (b) To lie at anchor in shelter.
- (c) To effect repairs.
- (d) To buy bait, ice, and stores.
- (e) To tranship the catch and stores.
- (f) To give liberty to the crew.
- (g) To use the postal and telegraphic services.
- (h) To obtain assistance for repairs ashore or afloat.
- (j) To obtain medical assistance or bury dead bodies.
- (k) To pay off or engage men.

Infractions.— With the exception of *a* and *b*, which are in most countries extended to the coast generally as well as to ports, the whole of these facilities are withheld by Great Britain at the instance of Canada from American fishermen on British North American coasts, under the treaty of 1818, whereby the United States renounced the right thereto. Under Mr. Chamberlain's *modus vivendi* these facilities are temporarily conceded on payment of a nominal licence fee, and certain inshore fishery rights which the United States gained by their renunciation have neither been suspended nor cancelled.

The British Government of 1871 condemned the enforcement of this renunciation clause of the Treaty of 1818 as impolitic; but the Government of 1890 expressed readiness to enforce a similar policy in Western Australia against foreign pearlers.

Great
Britain,
Canada,
and
United
States.

Western
Australia

The Newfoundland Bait Act, now in abeyance, New-
foundland. was another notable infraction of the rules of international courtesy. It was the outcome, principally, of the interference on the part of France with the free enjoyment of the neutral markets of the Mediterranean by the bounty system—a system the resultant of the “French shore” dispute as to the interpretation of the Treaty of Utrecht of 1713, a fit subject for arbitration.

The Netherlands Indian officials have recently Holland. warned the master of a pearling schooner from Australia that he might not visit the port where the mail steamer calls.

Extension of Privileges to Foreigners.—In order to give effect to the recognition that ocean fisheries are international property and not so in name only, the facilities I have enumerated require, if possible, to be extended to meet the practical needs of the strangers using the fishery. *a*, *b*, and *c* are already extended in British North America along the entire coast line as well as in ports. Ports were made for ships, not ships for ports, and foreign fishermen chafe at losing valuable time in going to ports to do what they could do just as well at many other points under shelter of the coast. They desire the extension of *d*, *e*, *f*, *g*, *h*, and *j* to the coast line generally, and by such extension the inhabitants would profit considerably, inasmuch as the prices paid would not suffer from competition so much and they would not be grudged. As *a*, *b*, and *c* are already conceded, the facilities for smuggling, slaving, or fishing inshore would

not be increased, whilst the means of detection can be, and would have to be, increased by the safeguards 1, 2, 3 and 4 mentioned hereafter. Disorderly conduct ashore would not only be more easily detected and brought home to offenders at isolated spots, but better feeling would prevail.

Safeguards.—To meet the wishes of the strangers the following safeguards would be required by the “adjacent country” :—

1. Registration, and perhaps bonds and nominal license fees.
2. Conspicuous marking of hulls and sails.
3. Pursuit and capture off shore; flight being taken as *prima facie* evidence of wrong-doing.
4. Inspection of log-books.
5. Proper lights.
6. Prohibition of destructive methods of fishing.
7. Suppression of floating grog-shops and brothels.
8. Compulsory report of infectious diseases and deaths, and inquest if necessary.
9. Close season off shore in accordance with close season in shore.
10. The exclusion of all vessels receiving bounties, directly or indirectly, from the benefits of *d, e, f, g* and *k*.
11. The exclusion of any vessel assisting such bounty-fed vessel to obtain the aforesaid benefits.
12. The establishment of Fishery Boards with the following objects :—
 - To regulate trawling.
 - To fix the minimum limits of size of fish, crustaceans, molluscs, or sponges, &c., to be taken.

To limit the size or sex of seals, turtles, or other animals to be taken.

To regulate priority or precedence between trawlers and drift-net boats, and between diving boats drifting and at anchor.

To determine the mesh of nets.

In return for such concessions on the part of the strangers, the adjacent country will benefit offshore fisheries by any artificial cultivation of or aids to marine life ; it should also undertake not to damage offshore fisheries by the discharge of mud, rubbish, or other deleterious matter upon or near to them ; it should also prevent malicious damage on the part of its inhabitants such as that described in the Behring Sea Blue Book, page 363, where the Alaska Commercial Company is charged with killing 9,000 to 10,000 seals after having secured their own full number, and mutilating their skins to spite pelagic sealers. International fisheries are not likely to be created except through the efforts to establish or improve inshore fisheries. With proper preservation the fur seal may yet again abound in southern seas, and sea otters may yet be acclimatised there ; mother-of-pearl shell and the true pearl oyster will probably be introduced into the Atlantic and cheat Cape Horn and the Cape of Good Hope by means of the Panama railroad ; the hawksbill turtle, beche-de-mer, the green snailshell of Penang, and the Australian dugong may yet flourish in the West Indies. Orchella and aga-aga weed may yet be acclimatised in new grounds, cultivated and improved. The sea-bottom produces crops of weeds at regular intervals, each

Benefits
in return.

Hatch-
eries.

Discharge
of mud,
&c.

Wanton
destruc-
tion.

Develop-
ment of
fisheries.

variety having its own season; paper-mills may yet be supplied from such sources. Nurseries for squid—so valuable as tough and toothsome bait—may yet benefit all fishermen alike.

IV.—DANGER-DEPTH LIMIT.

There is one point regarding territorial waters which requires attention, having been absolutely ignored, and that is the element of depth.

Every maritime country with shallow water round its coasts has an onerous duty thrust upon it—

Responsi-
bilities.

1. To remove wrecks dangerous to navigation.
2. To place lightships and buoys at dangerous spots, in addition to the task of dredging, in order to obtain access and egress to and from its coasts.

Proposal.

Wherever the sea-bottom can be reached by divers it acquires a value of some sort, and may be regarded as submerged territory. The responsibility of protecting vessels from the dangers of this submerged territory I suggest should be met by the addition to territorial waters of all seven-fathom depths at low water. Divers can descend and work in three times that depth, and wrecks even in 20 fathoms may be in such a position as to be a source of danger to passing vessels, although below 12 fathoms it is generally sufficient to remove the masts only. However, it is necessary to keep any addition to territoriality within moderate limits, and I select seven fathoms as a suitable depth, inasmuch as that is the depth in which naked divers can do a fair day's work, and within which they ought not

to be subjected to the competition of strangers in diving-dresses.

I have examined the charts of the world sufficiently to see that the only countries which would gain any important addition to their waters would be North-Western Australia, the Bahamas, and to a less extent Ceylon. It may be noticed that North-Western Australia and Ceylon both possess pearl-fisheries, and can justly advance the naked-diver argument; the Bahamas may, by the introduction of pearl-shells and beche-de-mer, soon be able to do the same, if she cannot do so already on account of sponge-fishing. The limit is easily ascertained by the lead-line, and this is not affected by fog.

Countries
benefited.

In whatever way territorial waters may be agreed to, it is impossible to ignore the element of depth, as it is open to a country to build up from shallow bottom above the surface, and by so extending its territory call for a readjustment of its territorial limit seawards.

I only know of one place where doubt would occur as to who should remove a wreck, and that is between France and Jersey, a space of $16\frac{1}{2}$ miles, all less than seven fathoms deep. Territorialise that water equally between England and France, and buoy the dividing line, and neither side could dispute who should accept a thankless and onerous task.

Advantages.—The advantage to be gained by such additions to territorial waters may at first sight appear to many extremely problematical and obscure, but they may be enumerated as follows:—

1. Extension of inshore fishery rights.

2. Nurseries for fisheries, especially for such objects as are gathered by divers.

3. Submarine shafts for mining: for instance, on the magnetic shoal off North-West Australia, the seat probably of a mass of iron-ore.

4. The erection of artificial shelter for vessels.

In conclusion, it appears to me that the attempt to fix upon some hard-and-fast rule, applicable and likely to be acceptable to all countries, is a thankless endeavour to adapt practice to principle rather than to derive principle from practice. The jealousy with which every nation would regard its gulfs and inlets and its port approaches would alone require many exceptions to any general rule; harbour limits are required, varying with the geographical characteristics of each place. Again, the United States have made good their claim to fish down the centre of the Bay of Fundy, the coasts of which are British. The Gulf of California is geographically very similar; but can we doubt that if this gulf were to become the scene of a prosperous fishery, especially if that arose through artificial assistance, the United States would object strongly to any British fishermen fishing down the centre and claiming the hospitality of the coast and its ports?

The exceptions to a general rule would prove to be so numerous that there would be no rule at all. But I see no reason why the nations should not find it possible and convenient to lay down by chart the territorial waters of each country, and meet each case on its merits. Even if a universal three-mile limit pure and simple were accepted, it

would be necessary to delineate territorial waters by chart. The soundings are always low-water soundings, but the coast-line shown does not clearly show low-water mark, from which the three-mile limit is taken ; neither do charts always show which reefs or rocks are always submerged. Ocean fishermen would always require special charts for their guidance, and it would be unfair to leave them in the future as they have been left with the responsibility of deciding for themselves what waters are open to them and what are closed. Nations need not be so jealous of one country obtaining some little concession ; every addition to inshore fisheries is likely to bring benefit to the adjoining offshore fisheries. The hatching establishment in Newfoundland has not been at work long, yet the deep-sea fishermen report the presence of enormous numbers of codfish a year or two old on the Banks.

I do not wish to legislate the ocean-fishermen off the face of the globe ; their work is a veritable nursery and school for seamen ; it is unjust too to term them pests and poachers ; they are more sinned against than sinners. But their interests are bound up closely with those of their brethren in shore, and with the existence of cordial relations with the " adjacent country."

If Russia agrees to Norway having a four-mile limit, is it impossible for England and France to acquiesce ? If Norway can plead poverty with success, may not the inhabitants of Newfoundland and Labrador be treated with generosity ? If the United States and Russia are allowed exceptional privileges in Behring Sea, may not the islands in

the Southern Seas be allowed a chance of fostering the few remaining seals of the enormous herds in the destruction of which American vessels had so large a hand?

And lastly I will ask, If the claims of the fair sex secure such protection to seals, may not the pearl banks of Ceylon, Australia, and the Netherlands Indies be taken favourably into consideration?

But to secure these objects I fear that the blanks left in the draft proposals of the Institute of International Law can never be filled in.

