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978-1-107-41879-0 - The Panama Canal Conflict Between Great Britain and the United States of America: Second Edition

L. Oppenheim

Excerpt

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## I.

**The Panama Canal conflict is due to the fact that the Governments of Great Britain and the United States do not agree upon the interpretation of Article III, No. 1, of the Hay-Pauncefote Treaty of September 18, 1901, which stipulates as follows:—**

**“The Canal shall be free and open to the vessels of commerce and of war of all nations..., on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions and charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.”**

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By Section 5 of the Panama Canal Act of August 24, 1912, the President of the United States is authorised to prescribe, and from time to time to change, the tolls to be levied upon vessels using the Panama Canal, but the section orders that *no tolls whatever shall be levied upon vessels engaged in the coasting trade of the United States*, and also that, if the tolls to be charged should be based upon net registered tonnage for ships of commerce, the tolls shall not exceed one dollar and twenty-five cents per net registered ton nor be less, *for other vessels than those of the United States or her citizens*, than the estimated proportionate cost of the actual maintenance and operation of the Canal<sup>1</sup>.

Now Great Britain asserts that since these enactments set forth in Section 5 of the Panama Canal Act are in favour of vessels of the United States, they comprise

<sup>1</sup> As regards the enactment of Section 5 of the Panama Canal Act that the vessels of the Republic of Panama shall be entirely exempt from the payment of tolls, see below IX, p. 48.

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a violation of Article III, No. 1, of the Hay-Pauncefote Treaty which stipulates that the vessels of all nations shall be treated on terms of entire equality.

This assertion made by Great Britain is met by the Memorandum which, when signing the Panama Canal Act, President Taft left to accompany the Act. The President contends that, in view of the fact that the Panama Canal has been constructed by the United States wholly at her own cost, upon territory ceded to her by the Republic of Panama, the United States possesses the power to allow her own vessels to use the Canal upon *such terms as she sees fit*, and that she may, therefore, permit her vessels to pass through the Canal either without the payment of any tolls, or on payment of lower tolls than those levied upon foreign vessels, and that she may remit to her own vessels any tolls which may have been levied upon them for the use of the Canal. The President denies that Article III, No. 1, of the Hay-Pauncefote Treaty can be invoked against

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such power of the United States, and he contends that this Article III was adopted by the United States for a specific purpose, namely, as a basis of the neutralisation of the Canal, and for no other purpose. This article, the President says, is a declaration of policy by the United States that the Canal shall be neutral; that the attitude of the Government of the United States is that all nations will be treated alike and no discrimination is to be made against any one of them observing the five conditions enumerated in Article III, Nos. 2—6. The right to the use of the Canal and to equality of treatment in the use depends upon the observance of the conditions by the nations to whom the United States has extended that privilege. The privileges of all nations to which the use of the Canal has been granted subject to the observance of the conditions for its use, are to be equal to the privileges granted to any one of them which observes those conditions. In other words—so the President continues—the privilege to use the Canal is a conditional

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most-favoured-nation treatment, the measure of which, in the absence of an express stipulation to that effect, is not what the United States gives to her own subjects, but the treatment to which she submits other nations.

From these arguments of the President it becomes apparent that the United States interprets Article III, No. 1, of the Hay-Pauncefote Treaty as stipulating no discrimination against *foreign* nations, but as leaving it open to her to grant any privilege she likes to her own vessels. According to this interpretation, the rules for the use of the Canal are merely a basis of the neutrality which the United States was willing should be characteristic of the Canal, and are not intended to limit or hamper the United States in the exercise of her sovereign power in dealing with her own commerce or in using her own Canal in whatever manner she sees fit. The President specifically claims the right of the United States eventually to allow her own vessels to use the Canal

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without the payment of any tolls whatever, for the reason that foreign States could not be prevented from refunding to their vessels tolls levied upon them for the use of the Canal. If foreign States, but not the United States, had a right to do this—so the President argues—the irresistible conclusion would be that the United States, although she owns, controls, and has paid for the construction of the Canal, is restricted by the Hay-Pauncefote Treaty from aiding her own commerce in a way open to all other nations. Since the rules of the Hay-Pauncefote Treaty did not provide, as a condition for the privilege of the use of the Canal upon equal terms with other nations, that other nations desiring to build up a particular trade, involving the use of the Canal, should neither directly agree to pay the tolls nor refund to their vessels tolls levied, it is evident that the Hay-Pauncefote Treaty does not affect the right of the United States to refund tolls to her vessels, unless it is claimed that rules ensuring all nations against discrimination

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would authorise the United States to require that no foreign nation should grant to its shipping larger subsidies or more liberal inducements to use the Canal than were granted by any other nation.

II.

It cannot be denied that at the first glance the arguments of the United States appear to be somewhat convincing. On further consideration, however, one is struck by the fact that the whole argumentation starts from, and is based upon, an absolutely wrong presupposition, namely, that the United States is not in any way restricted by the Hay-Pauncefote Treaty with regard to the Panama Canal, but has granted to foreign nations the use of the Canal under a conditional most-favoured-nation clause.

This presupposition in no way agrees with the historical facts. When the conclusion of

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the Hay-Pauncefote Treaty was under consideration, in 1901, the United States had not made the Canal, indeed did not own the territory through which the Canal has now been made; nor was the United States at that time absolutely unfettered with regard to the projected Canal, for she was bound by the stipulations of the Clayton-Bulwer Treaty of 1850. Under this treaty she was bound by more onerous conditions with regard to a future Panama Canal than she is now under the Hay-Pauncefote Treaty. Since she did not own the Canal territory and had not made the Canal at the time when she agreed with Great Britain upon the Hay-Pauncefote Treaty, she ought not to maintain that she granted to foreign nations the privilege of using *her* Canal under a conditional most-favoured-nation clause, she herself remaining unfettered with regard to the conditions under which she could allow her own vessels the use of the Canal. The historical facts are five in number:—

Firstly, in 1850, Great Britain and the

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United States, by the Clayton-Bulwer Treaty, agreed that neither of them would ever obtain or maintain for herself any exclusive control over a future Panama Canal, or fortify it, or occupy or colonise any part of Central America; that the Canal should be neutralised, should be open to the vessels of all nations under conditions of equality; and so forth.

Secondly, in 1901, the two parties to the Clayton-Bulwer Treaty agreed to substitute for it the Hay-Pauncefote Treaty, Article II of which expressly stipulates *inter alia* that the Canal may be constructed under the auspices of the Government of the United States and that the said Government, *subject to the provisions of Articles III and IV*, shall have the exclusive right of providing for the regulation and management of the Canal.

Thirdly, the parties agreed—see the preamble of the Hay-Pauncefote Treaty—that the general principle of the neutralisation of the Canal as established by the Clayton-Bulwer Treaty should not be impaired, and

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that, therefore, the United States—see Article III of the Hay-Pauncefote Treaty—agrees to adopt as the basis of the neutralisation of the Canal certain rules, substantially the same as those embodied in the Suez Canal Convention of 1888, and amongst these a rule concerning the use of the Canal by vessels of all nations on terms of entire equality without discrimination against any such nation, or their citizens or subjects, in respect of the conditions or charges of traffic, or otherwise, such conditions and charges to be just and equitable.

Fourthly, the parties agreed—see Article IV of the Hay-Pauncefote Treaty—that no change of the territorial sovereignty or of the international relations of the country or countries traversed by the future Canal should affect the general principle of the neutralisation or the obligation of the parties under the Hay-Pauncefote Treaty.

Fifthly, when, in 1903, the United States by the Hay-Varilla Treaty, acquired from the Republic of Panama the strip of territory