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Legal History of the Panama Canal

LEGAL HISTORY OF THE PANAMA CANAL.

On May 18, 1914, the Panama Canal was opened for regular traffic.[1] The canal, standing as it does on the highway of nations, has been the occasion of some very lively international controversies, some of which are not even now permanently put to rest.

The Colombia Controversy.

By the so-called Spooner Act of June 28, 1902, Congress authorized the President to enter into a treaty with Colombia for the building of a canal across the Isthmus of Panama, it being provided that in the event of a failure to secure such a treaty after the lapse of a reasonable time, recourse should be had to building a canal through Nicaragua.[2] At this time, there was subsisting the treaty of 1846 between the United States and New Granada. The Republic of New Granada had subsequently become by constitutional changes the United States of Colombia, and later, the Republic of Colombia, so this treaty was then binding upon Colombia. In Article XXXV, the United States guaranteed the neutrality of the Isthmus and the rights of sovereignty and property over it of New Granada. The United States received the right of transit across the Isthmus on any modes of communication that might be constructed. The right to construct a canal was not expressly granted, but on the behalf of the United States it was claimed that the right of transit on any modes that might be constructed carries as a necessary implication the right to construct such modes if desirable. In carrying out the guaranty of the sovereignty of New Granada, the United States was forced to interfere to preserve order in Panama in 1856, 1860, 1873, 1885, 1901 and 1902.

In compliance with the Spooner Act, a treaty was drawn up which is known from the names of the representatives of the governments as the Hay-Herran Treaty. This granted to the United States the use and control of a strip of land for a period of years renewable perpetually at the option of the United States. In it,

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Table of abbreviations.
Moore—Moores Digest of International Law.
J. I. L.—American Journal of International Law.
Sup.—Supplement to the American Journal of International Law.

[1] 8 J. I. L., 623.
[2] 32 Stat. at L., 481.

the United States "freely acknowledges" the sovereignty of Colombia and "disavows any intention to impair it in any way whatever." Upon the exchange of ratifications, $10,000,000 in gold were to be paid to Colombia and in addition, beginning nine years after the same date, $250,000 in gold, annually. The treaty was expressly subject to ratification of the respective countries according to law.

The Senate of the United States after some debate, advised ratification, but in Columbia there was serious opposition. The government at Colombia seemed to make no serious effort to secure ratification. General Fernandez, in charge of the Ministry of Finance of Colombia, issued, more than a month before the Congress was convoked and more than two months before it met, a circular inviting discussion of the treaty, stating that the Government had no preconceived ideas for or against the measure, that it was for Congress to decide and that Congress would probably be guided largely by public opinion. The public discussion was to the effect that there was no power under the Colombian Constitution as it then stood to grant away any part of the sovereignty. It has been alleged that the private discussion was largely to the effect that the price was inadequate.[3] On October 14, 1903, the majority report of the Colombian Senate recommended that discussion of a law to authorize the government to enter into new negotiations should be indefinitely postponed and consideration deferred to October 14, 1904, when the time of the New Panama Company would have expired and Colombia might take up the question whether the property was not forfeited to it. At length, the Colombian Congress adjourned without having ratified the treaty.

The ratification of the treaty would have been a great benefit to the people of Panama and they were greatly dissatisfied by the action of the Congress. Almost immediately, they revolted with a surprising unanimity. No lives were lost in the accomplishment of the revolution. Columbian troops were sent to put down the revolt, but the United States, under the power granted by the treaty of 1846, to preserve the "free and uninterrupted passage across the Isthmus," prevented the landing of the troops. On November 13, 1903, the President of the United States recognized the Republic of Panama and formally received its minister plenipotentiary.[4] Recognition by other nations followed and by January 4, 1904, it had been accorded by the following: France, Ger-

[3] Pres. Roosevelt, Mess. to Cong., Jan. 4th, 1904, 3 Moore, 98.
[4] 3 Moore, 55.

many, Denmark, Sweden and Norway, Nicaragua, Peru, China, Cuba, Great Britain, Italy, Costa Rica, Japan and Austria-Hungary.

The Colombian government complained of the action of the United States on the following grounds: (1) That the sovereignty of New Granada, to which Colombia succeeded, was guaranteed by the United States in the treaty of 1846. (2) That the recognition of a revolted state should be withheld until it has shown its ability to maintain itself as a de facto government. (3) That the interference of the United States with the landing of Colombian troops was the only thing that prevented Colombia from suppressing the revolt. (4) That the garrisons at Panama and Colon were bought with gold brought from the United States.

The answers of President Roosevelt in his message to Congress of January 4, 1904 and in the answers by the United States government to the notes of Colombia are as follows:

(1) The guaranty of sovereignty in the treaty of 1846 applied only as against other and foreign governments and did not apply to internal changes of government. This was announced as early as 1865 by Attorney General Speed in his opinion rendered to Secretary of State Seward dated November 7.

(2) As excusing the early recognition of the de facto government, it was pointed out that from 1850 to 1902 the government at the Isthmus had been constantly disturbed, there having been 53 revolutions and attempts of sufficient importance to have been reported by the United States consuls. This showed the inability of Colombia to preserve order.

(3) The next ground of justification for the United States is that of treaty rights. The United States maintained that the treaty of 1846 gave it the right to build a canal and that the refusal of Colombia to grant such a degree of control as was asked was necessarily a refusal to make any practicable treaty at all.[5]

(4) Another justification was the application of a principle analogous to eminent domain. The doctrine had been announced by Secretary of State Cass in1858 in a letter to Mr. Lamar, Minister to Central America, in these words: "While the just rights of sovereignty of the states occupying this region should always be respected, we shall expect that these rights will be exercised in a spirit befitting the occasion and the wants and circumstances that have arisen. Sovereignty has its duties as well as its rights, and none of these local governments, even if administered with more

[5]Pres. Roosevelt, Mess. to Cong., Jan. 4th, 1904.; 3 Moore, 59.

regard to the just demands of other nations than they have been, would be permitted, in a spirit of Eastern isolation, to close these gates of intercourse on the great highways of the world.[6]

(5) The third ground of complaint by Colombia, as before enumerated, that is, that the United States prevented landing of troops to put down the revolt, can only be met, if at all, by the treaty of 1846 as before stated and the charge that it is doubtful whether the revolt could have been put down if the troops had landed.

(6) The charge that the United States was in some way connected with the causing of the revolt was flatly denied by President Roosevelt[7] and has not been proved.

The United States refused to submit the controversy to the Hague Tribunal on the ground that recognition of states and foreign policy are of a political nature which nations of even the most advanced ideas of arbitration do not consider suitable to be arbitrated.[8]

The matter was attempted to be adjusted in three interdependent treaties between Panama and the United States, Colombia and the United States, and between Panama and Colombia. Ratification of these were advised by the United States Senate, February 24, 1909, but they failed to come into force because they were not ratified by Colombia.[9]

On October 5, 1913, the Senate of Colombia, by unanimous vote, passed a resolution that Colombia's Isthmian rights are imprescriptible. At the same time, the Senate protested against the causes preventing Colombia's defence of her rights and stated that she would view with satisfaction "anything modifying those causes and replacing them with acts of equity and justice."[10]

On April 6, 1914, a treaty was signed between the United States and Colombia, restoring friendly relations between the two countries. An indemnity of $25,000,000 is provided to be given by the United States to Colombia within six months after ratifications have been exchanged. This was ratified by the Colombian government but failed of ratification in that form in the United States and the matter is still pending.

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[6] Cor. in relation to the Prop. Int. Canal, (wash. 1885), 281, 3 Moore, 5.
[7] Mess. to Cong., Jan. 4th, 1904, 3 Moore, 71.
[8] Sec. of State, Hay to Gen. Reyes, Jan. 5th, 1904, 3 Moore, 105.
[9] 3 J. I. L. 447; for test see Charles, Treaties, Conventions, etc. of the U. S., Vol. 3, p. 235.
[10] 8 J. I. L., 147; N. Y. Times, Nov. 6th, 1913.

Treaty with Panama.

On November 18, 1903, about a week after the formal recognition of the Republic of Panama, a treaty popularly known as the Hay-Bunau Varilla Treaty was signed by the United States and Panama. By this treaty, the United States guarantees the independence of the Republic of Panama.[11] The United States receives in perpetuity the use, occupation and control of a Canal zone ten miles wide and certain other lands.[12] Article III grants the United States all the rights, power and authority within the zone which the United States would possess and exercise if it were the sovereign of the territory.

In Article V, the United States receives in perpetuity a monopoly for the construction, maintenance and operation of any system of communication across its territory between the Caribbean Sea and the Pacific Ocean. Under Articles VI and XV of the treaty, which reserve the claims of private land owners, a joint commission is provided to determine the rights of such owners to damages.[13]

Article XII provides for free immigration of persons to work on the canal, and their families. As compensation to Panama, Article XIV provides for $10,000,000 to be paid on exchange of ratifications and $250,000 annually to begin nine years after ratification. The government of Panama gets the right to transport over the canal its vessels and its troops and munitions of war in such vessels free of charge.[14] The United States has the right at all times and in its discretion to use its police or its land and naval forces or to establish fortifications to protect the canal.[15]

Fortification.

As the canal neared completion, the question arose whether the canal should be fortified or should be neutralized by international agreement in such a way as to obviate the necessity for fortification. With the policy of fortification as a matter of expediency, this memorandum is not concerned, but in determining this question the right of the United States to fortify the canal under the existing treaties was seriously questioned.

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[11]Art. I.
[12]Art. II.
[13]See "Work of Joint International Commission on Panama Claims" by Leo S. Rowe, 8 J. I. L., 738.
[14]Article XIX.
[15]Article XXIII.

For a proper understanding of this question, it is necessary to go back to 1850 when the Clayton-Bulwer Treaty was made with Great Britain. At that time, and indeed until 1902 when Senator Hanna won Congress over to the Panama route, the Nicaragua route was considered the most feasible. But Great Britain held San Juan del Norte (Greytown) which is at the eastern terminus of the Nicaragua route. Moreover, it had a protectorate over the Mosquito Coast, which gave it a foothold at the Panama route.

At the request of the United States, the Clayton-Bulwer treaty was entered into. It was made with particular reference in the preamble to the Nicaragua route, but in Article VIII it is extended to "any other practicable communications whether by canal or railway" across the Isthmus "and especially the communications proposed by way of Tehuantepec or Panama. This Treaty provides that neither of the contracting parties "will ever erect any fortifications commanding the same or in the vicinity."[16]

When it became evident that private capital was not adequate to construct a canal and also that if the canal was to be constructed, the United States would have to do it, the Clayton-Bulwer treaty seemed to be a serious objection.

To enable the United States to construct the canal, a treaty was drawn up and signed known as the first Hay-Pauncefoote treaty. This was not ratified by the Senate, but was amended and Great Britain refused to agree to the amendments, so it never came into effect. A second draft was drawn up and signed November 18, 1901, known as the second Hay-Pauncefoote treaty. This did not contain a clause forbidding fortifications as both the Clayton-Bulwer treaty and the first draft had. That fact would have made a rather plain implication but for the wording of the second section of Article III: "The canal shall never be blockaded, nor shall any right of war be exercised, nor any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder." This is some ground for argument that there is no right to fortify the canal.

The question, however, has been put to rest by the action of the United States in building fortifications and the acquiescence of Great Britain in that course.

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[16]Article I.

Tolls Exemption.

Another serious question, which is not even now finally settled, arose from the exemption in the Panama Canal Act of August 24, 1912 of all "vessels engaged in the coastwise trade of the United States" from the payment of tolls.[17] Section V provides further: "When based on 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, other than for vessels of the United States and its citizens, than the estimated proportionate cost of the actual maintenance and operation of the canal, subject, however, to the provisions of article nineteen of the convention between the United States and the Republic of Panama entered into November 18th, nineteen hundred and three."

Pursuant to this act, President Taft on November 13, 1912 proclaimed the tolls for the canal. It will be noticed that the act requires that tolls for other than American vessels shall not be less than the estimated proportionate cost of the actual maintenance and operation of the canal. In fixing upon the rate, President Taft took into account the estimated amount of American coastwise shipping.[18] Great Britain in several notes[19] protested against the exemption, saying that it was in conflict with the Hay-Pauncefoote treaty. The argument is partly based on that part of the preamble of the Hay-Pauncefoote treaty which recites that a convention was made to remove any objection which may arise out of the Clayton-Bulwer treaty "without impairing the 'general principle' of neutralization established in Article VIII of that convention" etc.

The "general principle" of Article VIII referred to was that the parties constructing or owning the canals or railways shall "impose no other charges or conditions of traffic thereupon than the aforesaid governments shall approve of as just and equitable; and that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other state which is willing to grant thereto such protection as the United States and Great Britain engage to afford."

Article III of the Hay-Pauncefoote treaty is also relied upon. Rule I states: "The canal shall be free and open to the vessels of

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[17]Section 5.
[18]Sec. of State, Knox, to Laughlin, Jan. 17, 1913, 7 Sup. 200.
[19]July 8, 1912, 7 Sup., 46; Nov. 14, 1912, 7 Sup., 48; Feb. 27, 1913, 7 Sup., 100.

commerce and of war of all nations observing these rules 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 or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable."

Great Britain maintains that the "general principle" of Article VIII was that the canal be open to citizens of the United States and of Great Britain on equal terms and that an exemption to the United States coasting vessels violates this, especially since the coastwise trade cannot be so circumscribed that the exemption with not result in a practical discrimination against the ships of Great Britain. Great Britain further maintains that "all nations" in Article III, supra, includes the United States and that the exemption destroys the "entire equality" provided for.

The view of the United States was that so long as the charges to British shipping are based on their proportionate share of the upkeep of the canal, they have no cause to complain if the United States exempts their vessels, for in that case, the deficit in the operating revenue will be borne out of the United States treasury, and that therefore the charges are "just and equitable." It is stated that the United States could grant a subsidy on any terms that it sees fit and that this is the effect of the exemption.

Article III is construed by President Taft in his memorandum accompanying the Panama Canal Act as follows: "Article III is a declaration of policy that the canal shall be neutral; that the attitude of this government toward the commerce of the world is that all nations will be treated alike and no discrimination made by the United States against any one of them observing the rules adopted by the United States. The privileges of all nations to whom we extended the use upon the observance of these conditions were to be equal to that extended to any one of them which observed these conditions. In other words, it was a conditional favored-nation treatment, the measure of which in the absence of express stipulation to that effect, is not what the country gives to its own nationals, but the treatment it extends to other nations."

The matter had lagged for a little over a year when President Wilson on March 5, 1914, asked Congress to repeal the exemption. This was done by the act of June 15, 1914, known as the Repeal Bill, but with an amendment by the Senate that the passage of the act shall not be construed as a waiver or relinquishment of any right which the United States may have under the treaties with Great Britain and with Panama. This amendment shows that

the Senate intends to raise the question again in case another Congress seeks to adopt a different course.

Recent Events.

On November 21, 1913, President Wilson proclaimed "Rules for the Measurement of Vessels for the Panama Canal"[20] by virtue of authority of the Act of Congress of August 24, 1912.

On November 13, 1914, the United States proclaimed the neutrality of the canal zone[21] and also the rules for the use of the canal by belligerents.[22]

R. R. N.

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[20]8 Sup., 56.
[21]9 J. I. L. 228.
[22]9 Sup., 126.