HANDBOOKS PREPARED UNDER THE DIRECTION OF THE HISTORICAL SECTION OF THE FOREIGN OFFICE.—No. 150

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INTERNATIONAL CANALS

BY

EDWARD ARTHUR WHITTUCK, B.C.L.

LONDON:
PUBLISHED BY H. M. STATIONERY OFFICE.

1920

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EDITORIAL NOTE

In the spring of 1917 the Foreign Office, in connexion with the preparation which they were making for the work of the Peace Conference, established a special section whose duty it should be to provide the British Delegates to the Peace Conference with information in the most convenient form—geographical, economic, historical, social, religious, and political—respecting the different countries, districts, islands, &c., with which they might have to deal. In addition, volumes were prepared on certain general subjects, mostly of an historical nature, concerning which it appeared that a special study would be useful.

The historical information was compiled by trained writers on historical subjects, who (in most cases) gave their services without any remuneration. For the geographical sections valuable assistance was given by the Intelligence Division (Naval Staff) of the Admiralty ; and for the economic sections, by the War Trade Intelligence Department, which had been established by the Foreign Office. Of the maps accompanying the series, some were prepared by the above-mentioned department of the Admiralty, but the bulk of them were the work of the Geographical Section of the General Staff (Military Intelligence Division) of the War Office.

Now that the Conference has nearly completed its task, the Foreign Office, in response to numerous inquiries and requests, has decided to issue the books for public use, believing that they will be useful to students of history, politics, economics, and foreign affairs, to publicists generally and to business men and travellers. It is hardly necessary to say that some of the subjects dealt with in the series have not in fact come under discussion at the Peace Conference ; but, as the books treating of them contain valuable information, it has been thought advisable to include them.

It must be understood that, although the series of volumes was prepared under the authority, and is now issued with the sanction, of the Foreign Office, that Office is not to be regarded as guaranteeing the accuracy of every statement which they contain or as identifying itself with all the opinions expressed in the several volumes ; the books were not prepared in the Foreign Office itself, but are in the nature of information provided for the Foreign Office and the British Delegation.

The books are now published, with a few exceptions, substantially as they were issued for the use of the Delegates. No attempt has been made to bring them up to date, for, in the first place, such a process would have entailed a great loss of time and a prohibitive expense; and, in the second, the political and other conditions of a great part of Europe and of the Nearer and Middle East are still unsettled and in such a state of flux that any attempt to describe them would have been incorrect or misleading. The books are therefore to be taken as describing, in general, *ante-bellum* conditions, though in a few cases, where it seemed specially desirable, the account has been brought down to a later date.

G. W. PROTHERO,

General Editor and formerly
Director of the Historical Section.

January 1920.

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INTRODUCTORY

1. An interoceanic canal is an artificial waterway by which two oceans or seas are connected with one another to facilitate navigation.

2. Two canals of this kind—the Suez and Panama—on account of their special commercial and strategic importance to the world, have acquired an international status which it is the object of this paper to explain. Other interoceanic canals, made in the interests of the territorial State only, have not been internationalized in any way. Such are:

(*a*) The Corinth Canal, which is in Greek territory. It was opened in 1893, and is of some commercial value as connecting different parts of Greece and as a route between the Adriatic, the Black Sea, and Asia Minor.

(*b*) The Kiel Canal, between the Bay of Kiel and the mouth of the Elbe, which connects the North Sea and the Baltic and was constructed by the German Empire for strategic purposes. It brings the arsenals of Kiel and Wilhelmshaven into close communication and avoids for the German Navy the danger of the Danish Sounds and Belts. Its use in this respect has been conspicuous in the present war. The Baltic trade of Hamburg and Bremen derives some benefit from it.[1]

3. All interoceanic canals are subject to the sovereignty of the State within whose territory they are, i. e. the territorial State; but by treaty or international usage other States may acquire rights of navigation over them. It is a matter for consideration whether, independently of such a special title, other States have a right of innocent passage through an interoceanic canal, as they have through a narrow strait of the sea.

4. The existence of such a right has sometimes been

[1] See J. B. Moore, *Digest of International Law* (Washington, 1906), vol. iii, p. 269, who cites H. Bonfils, *Manuel de Droit International Public* (7th ed. Paris, 1914), p. 274.

claimed by publicists on the broad ground that a State, being a member of the Society of Nations, cannot shut itself off from intercourse with them and so must admit their vessels to such avenues of commerce as navigable rivers and interoceanic canals.

5. It has further been maintained that the sovereignty of a nation is limited by the right of other nations to have canals constructed and maintained in its territory which would be of benefit to the world.[1] But such limitations of sovereignty have not been admitted by the consent and practice of nations, so that these claims seem to be founded at present on international policy rather than on international law. The ground, however, on which a right of passage through interoceanic canals for all ships, apart from treaty, is generally made to rest, is that such canals, though issuing in the territorial waters of a State, are part of the sea, and should therefore enjoy rights and be subject to obligations similar to those attaching to straits of the sea, which are in territorial waters.[2] The objection to this view is that it disregards the important differences that distinguish these two kinds of channels of navigation. They differ not only in the fact that interoceanic canals, unlike narrow straits, have to be artificially constructed and maintained, but also in that the territorial sovereign exercises a much closer supervision and control over canals than he does over interoceanic straits, e.g. he imposes tolls on all vessels entering them, which he cannot require of vessels passing through straits. Moreover, it should be noticed that, if a right of innocent passage is claimed through a canal on the ground that it is part of the sea, the Kiel Canal, as well as the great interoceanic canals, should be subject to it, whereas

[1] See E. Root, *Addresses on International Subjects* (Harvard University Press and Oxford University Press, 1916), p. 181, and cf. President Roosevelt's Message (*infra*, § 133).

[2] For a discussion of the right of innocent passage through such straits, see Phillipson and Buxton, *The Question of the Bosphorus and Dardanelles* (London, 1917). It should be noted that such canals, e. g. the Panama Canal, are sometimes and in some parts above sea-level and are supplied not by sea-water but by fresh water from rivers or lakes, and are therefore in no sense parts of the sea.

the exclusive control of the German Empire over that Canal is fully established.

6. Taking these facts into consideration we are inclined to the view that, unless the Suez and Panama Canals had been internationalized by treaty, there would have been no strictly legal right of passage through them, though they were always intended to serve for the use of all nations on equal terms, and were to be in fact open to them. It cannot, however, be questioned that for safeguarding such canals international common law is insufficient, especially in time of war.[1] They may require, too, for their protection, the guarantee of extraneous States; in fact, until their safety is guaranteed by powerful States, such points of advantage are likely to be a constant source of international jealousy. Hence it has been an object of diplomacy to bring about agreements between States by which free passage through these Canals may be secured for the benefit of all nations.

7. To what extent the treaties actually concluded have effected this object, we shall see further on. In the opinion of some writers the conditions they prescribe are not of such a character as to neutralize the canals. Whether this be so or not seems to be a question of terminology, and this is not in a settled state. The Suez and Panama Canals have not, it is evident, been neutralized in the same way as countries like Belgium; otherwise, for instance, belligerent vessels of war and troopships could not pass through them as they are allowed to do. Nevertheless these canals, having been made immune as a rule from acts of war taking place in them and made subject to special regulations to keep them open for navigation, may perhaps be said to be neutralized or made neutral, though only imperfectly.[2]

[1] See T. E. Holland, *Studies in International Law*, Oxford, 1898, p. 278.

[2] Cf. T. E. Holland, *Letters on War and Neutrality* (2nd ed. London, 1914), pp. 44–7; C. Kennedy, *Neutralization and Equal Terms* (American Journal of International Law, vol. vii (1913), p. 27); C. F. Wicker, *Neutralization*, Oxford. 1911.

8. A special objection has been raised against the application of these terms to the Panama Canal; this is that the treaties regulating it were only contracted between two States, it being supposed that a treaty of neutralization ought to be a general one guaranteed by a number of Powers, like the Suez Canal Convention. But what chiefly determines the character of a treaty is its object, not the number of Powers who are parties to it. The expressly declared object of the treaty relating to the Panama Canal was the neutralization of the Canal, which is amply secured by the engagement of the United States to Great Britain on the subject. It would seem, therefore, that if the terms neutralization and neutral are applied to one of these canals they are applicable also to the other.[1] It is to be observed that treaties made with the object of securing benefits for all nations, such as the treaties for neutralizing the Suez and Panama Canals, do not on this account confer rights or impose liabilities on States who were not parties to them, since a treaty, like other agreements, only affects the legal condition of those who have agreed to it.[2] But by subsequent agreement third States may obtain the same position as original parties. Some treaties, e. g. the Suez Canal Convention, contain a clause inviting such States to accede to them; and in this way a treaty may become much more of a 'law-making' one than it was at first. An international right, such as a right to pass through an interoceanic canal, may be acquired by the custom of nations as well as by a written international agreement.

We will now consider the diplomatic history of the Suez and Panama Canals and the treaties relating to them.

[1] The treaty between Argentina and Chile for the neutralization of the Straits of Magellan, being entered into by minor Powers and about a different subject-matter, does not stand on the same footing as the Hay-Pauncefote Treaty and cannot be said to have neutralized these straits.

[2] For different views on this subject see R. F. Roxburgh, *International Conventions and Third States*, London, 1917.

PART I

THE SUEZ CANAL

9. The idea of connecting the Mediterranean and the Red Sea by means of a canal through the Isthmus of Suez occurred to men's minds in very early times, but it was not carried into effect till after the middle of the last century.

10. Changes of a constitutional kind, which had taken place previously in Egypt, in whose territory the canal routes lay, did much to prepare the way for the undertaking by encouraging the outlay of European capital on it; and, as the constitution of Egypt is bound up with our subject throughout its history, the nature of these changes must be described. Egypt before 1839 was entirely dependent on the Sultan of Turkey, who ruled it, like other great provinces of his Empire, through his Viceroy or Pasha, as the title ran till the higher title of Khedive was substituted for it. The Pasha's administration of the country had as a rule been left very much to itself by the Ottoman Porte—the Imperial Government—except for the requirement of tribute. It was the insurrection of Pasha Mehemet Ali against the Sultan's authority in 1839 that led to the semi-independence of the Pasha, and to the establishment of his Government on an international footing. For Mehemet's successes at this time threatened the very existence of the Ottoman Empire; and in order to preserve it, the Great Powers of Europe, with the exception of France—viz. Great Britain, Austria, Prussia, and Russia—intervened, bringing about in conjunction with the Porte a settlement which, while keeping Egypt within the Sultan's dominions, gave it a privileged position. The government was to be carried on by the Viceroy in the

Sultan's name as before. He was bound to pay the Sultan a fixed annual tribute, with the right of collecting taxes for this purpose and for the maintenance of civil and military administration; he might keep up a military force limited in number, but it was to be regarded as belonging to the Sultan.[1]

11. The limits of the Sultan's suzerainty were not defined. He was not prevented from interfering in the internal affairs of Egypt, and his sanction was required to confirm important acts of administration. Over foreign affairs he was to have control; treaties relating to Egypt were to be made by him, and war or peace, in which Egypt would be involved, to be declared by him. At the same time the Egyptian Government was regarded by the Powers as independent within its sphere of internal administration, under the limitations of firmans. This settlement was established by the Convention of London, concluded by the above Powers on July 15, 1840; but France, favouring Mehemet, was not a party to it, though she subsequently assented to its terms. The relations between the Sultan and the Pasha, being thus settled and fixed by the Firmans of February 13, 1841, could not be altered without the consent of the Powers. Henceforth the territorial Power in Egypt (and so over the canal when it came to be constructed) was divided, being under the immediate administration of the Egyptian Government but subject to the Sultan's suzerainty. The situation was further complicated by the intervention of the Powers and the want of union among them, more particularly by the rivalry of Great Britain and France on the subject of Egypt and the canal project.

12. Lord Palmerston, Secretary of State for Foreign Affairs at this period, opposed the construction of a canal and prevented its commencement for many years, fearing that it might put us at a disadvantage in defending India and be prejudicial to British interests in the Mediter-

[1] Cf. on the subject of the relations of the Sultan to the Khedive, the case of the *Charkieh* (L. R. 4 Admiralty & Eccles. Courts 59), decided in 1873.

ranean, especially as the undertaking was to be in French hands and mainly supported by French capital.

13. But M. Ferdinand de Lesseps, the famous Frenchman who projected it, was not diverted from his object by this opposition or by other difficulties which he had to meet,[1] and after his friend Said Pasha had become Viceroy of Egypt in 1854, he obtained a concession from him authorizing the formation of a company for the purpose of making a canal. Such a concession required the sanction of the Sultan to give it full legal validity; and it was not till 1866 that a firman to this effect was granted to the Company, and then only with some special conditions attached to it. The Sultan's refusal to sanction the scheme previously was due to the influence of Great Britain over him at the time. Meanwhile de Lesseps proceeded at once to form a Company under the name of the *Compagnie Universelle du Canal Maritime de Suez*, and obtained on January 5, 1856, a further concession by which the Company was established. This latter concession by which the Company's powers were determined and its statutes declared, is regarded as its fundamental charter.[2]

14. These concessions, it should be observed, great as were their political and international consequences, give the Suez Canal Company simply the status of a private company. By Article I of the second concession the Company is bound to construct a Maritime Canal between Suez in the Red Sea and Pelusium in the Mediterranean, and also a canal of irrigation to connect the Nile with the Maritime Canal. It was also, by Article VI, required, if necessary, (1) to construct a port at the entrance of the Maritime Canal in the Gulf of Pelusium, and (2) to improve the existing port of Suez. Further, by Article VII, it was to maintain these canals and ports in proper condition at its own charges.

[1] See on this subject J. Charles-Roux, *L'Isthme et le Canal de Suez*, 2 vols., Paris 1901.

[2] For Concessions, Conventions, Statutes, and Resolutions of the Suez Canal Company, with the Sultan's Firman, see Parliamentary Papers, Egypt No. 6, 1876 (C. 1416).

15. Articles XIV and XV show the uses which the Maritime Canal was intended by the Egyptian Government to serve. In Article XIV the Pasha solemnly declares for himself and his successors, subject to the ratification of the Sultan, that the great Maritime Canal from Suez to Pelusium and the ports attached to it shall be always open as neutral passages to every merchant ship passing through it from one sea to the other, without any distinction, exclusion, or preference either in respect of persons or nationalities, on payment of the dues and following the regulations laid down by the Company for the use of the canal and its dependencies. And Article XV further provides that the Company shall not under any circumstance grant to any ship, company, or private person any advantages or favours which are not granted to all other ships, companies, or private persons in the same conditions.

16. It should be observed in respect of these Articles—

(*a*) That they contain a distinct dedication of the Canal by the Egyptian Government to the use of the ships of all nations on equal terms, the Egyptian Government not reserving any right to give a preference to Egyptian vessels or those of the Ottoman Empire generally. Only merchant ships, it will be seen, are here mentioned; but in its administration of the Canal, the Company has also equally admitted all vessels of war.[1]

(*b*) The Company is bound to administer the Canal in accordance with these declarations, as it has in fact done; but the declarations themselves, being made only by an act of internal government and not in an agreement with foreign States, do not give rise to any international obligation on the part of the Egyptian Government.

(*c*) It seems to follow from Article XIV (cf. also Article VII) that the Company has no right to close the Canal at its pleasure, as de Lesseps at one time claimed in a dispute he had with the French on the tolls question. The Concession does not confer any political

[1] See memorandum of de Lesseps on the subject, Parliamentary Papers, Egypt No. 1, 1877 (C. 1766), p. 1.

rights on the Company, the defence of the Canal being left in the hands of the territorial Power.

17. The legal character of the Company is described by its statutes, which are appended to the Concession. Of these, Article I states that the *Compagnie Universelle du Canal Maritime de Suez*, as it is called, is a *société anonyme* of proprietary and other shareholders; and Article III that its local settlement (*siège*) shall be at Alexandria and its administrative domicile at Paris. As a *société anonyme* it is governed by the provisions of the French code respecting such companies. The Court of Appeal in Paris is the ultimate resort for the trial of cases coming under this law (see Articles LXXIII–LXXVIII); but jurisdiction over cases of a local character, including criminal cases, belongs to the Egyptian courts. Paris, being the administrative domicile of the Company, is its general place of business. By Article LXXVI the Egyptian Government has a special commissioner there to inspect its operations and to fulfil other duties with which he is charged. The government of the Company is carried on by a council of thirty-two members representing the principal nationalities interested in the undertaking and chosen by the general assembly of shareholders. For the conduct of business the council appoints a committee of management with executive powers.

18. The revenue of the Company is principally derived from the tolls and other dues it is authorized to impose. According to Article XVII, Section 3, of the Concession, no exception in respect of dues is to be made in favour of the vessels of any nation, and the maximum charge for vessels making use of the Canal is not to exceed ten francs a ton, estimated either by the capacity of the ship or per head for persons.

19. But the Concession left it to the Company to decide what system it should adopt for defining the ton of capacity. The question subsequently led to a dispute which was not settled without much difficulty.[1] An international commission to consider it sat in 1873 at Constantinople,

[1] See on the subject of the tonnage question Charles-Roux, *op. cit.*

on account of complaints made by shipowners of the working of recent changes in the system. The Commission recommended a new tariff, but this did not give satisfaction; and for some years the controversy between the Company and the shipowners continued, the latter at one time threatening to promote the construction of another canal. But eventually a settlement was arrived at by which the tolls were to be reduced in 1885 to $9\frac{1}{2}$ francs a ton, to be further reduced as the profits of the Company increased; on the dividends paying twenty-five per cent., the surplus profits were under this arrangement to be exclusively applied to their reduction till they were lowered to 5 francs a ton. Till the outbreak of war the profits continued to rise, so as to admit of a reduction of the tolls according to this scale.

20. In consideration of the concession to the Company of the Canal routes and other rights connected with them, the Egyptian Government reserved considerable interests in the undertaking itself. Thus by Article XVIII it was to be entitled to fifteen per cent. of the annual profits. The Khedive also took 85,506 shares on his own account. The lease of the Maritime Canal to the Company was limited to ninety-nine years, to run from the time of its opening, which was in 1869; hence, as the Company is the owner of a most prosperous concern, the reversionary interest of the Egyptian Government is of great and increasing value.

21. In 1875, some years after the Canal had been opened to navigation, the British Government obtained a powerful influence over the Company by the acquisition of the Khedive's original shares, with some others —in all 176,602 shares out of the 400,000 issued.

22. This step was taken to stop these shares coming into French hands, as it was feared that they might. Lord Derby, our Foreign Minister at the time, said on this subject that he would regard with much satisfaction

ii, p. 9, &c., &c.; Voisin Bey, *Le Canal de Suez*, Paris, 1902–7, ii, p. 41, &c., &c.; R. Dedreux, *Der Suez Kanal im internationalen Rechte*, Tübingen, 1913, p. 32, &c. &c.; *Encyclopaedia Britannica*, 11th ed., 1910–11, vol. xxvi, p. 22.

the carrying out of a scheme, if it were possible, by which the shareholders were made disinterested parties, or, if it were possible, replaced as a Company by a kind of administration or syndicate on which all the maritime Powers should be represented. But he objected to a monopoly in foreign hands of a concern in which we had the first interest, having made more use of the Canal than all other nations put together. The Company and the French shareholders, he said, possessed £110,000,000 of the £200,000,000 comprised in the capital of the Company's shares. It was on this account that the British Government purchased the shares in question, and not to obtain any monopoly for itself. At this time, it should be remembered, the future of the Canal was particularly uncertain ; the British occupation of Egypt had not begun and the Canal had not yet been internationalized by treaty. The intervention of Lord Beaconsfield in making the counsels of our Government in the affairs of the Company heard in this way has been abundantly justified. The effect was soon shown in the part our Commissioners took in the Tolls question and in getting the Canal deepened and extended, as well as in other ways.

The Protection of the Canal

23. We have seen that, while the concessions granted to de Lesseps and his Company declared the Canal to be neutral and open to the ships of all nations on equal terms, they were only unilateral acts and therefore could not internationalize it. To give an international status a treaty between the Powers was required, without which its condition would remain precarious.[1] Free access to it might be stopped, and it would be exposed to danger in case of war or insurrection, while the territorial Power might be in a too weak or divided condition to be able or willing to protect it. Moreover, this danger would be magnified if the territorial Power, i.e. the Ottoman Porte including Egypt, were itself a belligerent.

[1] Cf. *supra*, § 6, p. 3.

24. In 1870, a year after the Canal was opened, the Franco-German War broke out. During this war neither belligerent made any attack on the freedom of the Canal, the Company permitting the ships of war as well as the merchant ships of both belligerents to pass through it. But the outbreak of the Russo-Turkish War, in 1877, made the Canal question a critical one, since the Canal, being in Egyptian territory, became subject to belligerent action. Thus Russia would have been acting within her strictly legal rights if she had blockaded it or taken military occupation of it or closed it altogether; and the Porte was of course entitled to deal with it as best suited her military purposes. But the British Government, acting on its own account and in the interest of general commerce, determined to prevent any such interference with the Canal.

25. Accordingly Lord Derby, in a dispatch dated May 6, 1877,[1] declared to the Russian Government:

> 'An attempt to blockade or otherwise to interfere with the Canal or its approaches would be regarded by them (Her Majesty's Government) as a menace to India and as a grave injury to the commerce of the world. On both these grounds any such step—which they hope and fully believe there is no intention on the part of either belligerent to take—would be inconsistent with the maintenance by them of an attitude of passive neutrality.'

To this the Russian Minister, Prince Gortchakoff, replied:

> 'The Imperial Cabinet will neither blockade, nor interrupt, nor in any way menace the navigation of the Suez Canal. They consider the Canal as an international work, in which the commerce of the world is interested, and which should be kept free from any attack.'

26. Thus the Canal escaped interference. But five years later the insurrection in Egypt of Arabi Pasha put it in real jeopardy and made its internationalization a leading political question. The Egyptian Government was unable and the Porte unwilling to put down the insurgents. A Conference of the Powers was held at

[1] See Parliamentary Papers, Russia No. 2, 1877 (C. 1770).

Constantinople to consider how order could be restored, but it could come to no agreement on the subject. Bismarck objected to their commissioning some of their number to take the necessary steps.

27. The British Government, therefore, tried to obtain the co-operation of the French to interfere independently for the protection of the Canal. Italy, too, was invited to join; and Mancini, its representative, expressed himself as willing to do so, but only on the condition that the protection should take the form of an international police, in which it should be open to all interested Powers to join, and that operations on land should be reserved for a further understanding in case they should be necessary.[1] An international police, at least as a temporary measure, all the Powers, including Turkey, seemed then inclined to accept; but the immediate question was how to secure the safety of the Canal by means of a naval or military force. The failure of the Powers to co-operate for this purpose, and of France to do so with Great Britain, made it necessary for the latter to act by herself. Accordingly she sent an expeditionary force under Sir Garnet Wolseley through the Canal to Ismailia, which became the base of subsequent operations. For a very short time the Canal was closed, in spite of a protest by de Lesseps. The acquiescence of the Powers, as Mr. Westlake says, showed that no understanding would be allowed to interfere with the task of protecting the Canal when undertaken in case of necessity and in good faith, and carried out with no serious disturbance of commerce. Both the territorial Power and the Great Powers had clearly shown that they were not in a position to secure the great avenue of navigation against the danger threatening it. From this time Egypt, and with it the Canal, has been in the military occupation of Great Britain, which has made them safe from internal risings such as that led by Arabi, in addition to defending them against attack from outside.

[1] Parliamentary Papers, Egypt No. 17, 1882 (C. 3391), p. 44, &c.

Negotiations to Internationalize the Canal

28. The expediency of an understanding between the Powers and with the territorial Power as to the means to be adopted to render the Canal secure had been made evident by what had occurred during the insurrection.

29. Great Britain was in favour of a general agreement on the subject, in order that her own position might be regularized and that the Canal should cease to be a cause of international dissension. The other Powers, and especially France, wished to substitute international for British control. De Lesseps was anxious to see the Canal neutralized by treaty in accordance with the regulations which the Company had carried into practice respecting it. In 1873 a Commission at Constantinople had agreed that the Canal should be open to ships of war and to military transports. The difficulty was to find terms acceptable to the maritime Powers, which would properly secure the freedom of the Canal. Before the British occupation of Egypt, the problem had been discussed at meetings of the Institute of International Law,[1] a private society to which the leading international jurists of different countries belong; and a number of resolutions were adopted embodying the recommendations of this body as to the way in which the Canal should be regulated. In drawing them up some assistance was derived from the Clayton-Bulwer Treaty of 1850 between Great Britain and the United States respecting an American trans-isthmian canal.[2]

30. The principal recommendations made by the Institute were that, in order to keep the Canal open in time of war as well as in time of peace, the Powers should declare (1) that belligerent ships of war as well as private vessels must respect the complete freedom of the Canal; (2) that no troops or munitions of war should be landed

[1] See *Annuaire de l'Institut de droit international* (Paris), 1879–80, vol. i, pp. 127, 329, 349.

[2] Cf. § 87, &c., below, and for the full text of this treaty see Appendix, p. 108.

in it without the permission of the territorial Power; and (3) that its neutrality should be respected even when the territorial Power itself was at war. It is to be noticed that the Institute applied the terms neutral and neutrality to a canal made subject to these conditions.[1]

31. The most difficult of its proposals to carry into execution was the last. It could not mean that the territorial Power should be prevented from committing acts of war in the Canal in its own defence, or from closing the Canal as a measure of precaution against attack, if circumstances required it. The great Russian jurist, Professor de Martens, suggested that, in order to secure the freedom of the Canal in these circumstances, the rules in force for closing the Dardanelles should be applied as far as possible to the Suez Canal,[2] and that in time of war, at least, it should be entirely closed both to ships of war and troopships and to the passage of munitions of war. But this proposal, whatever its abstract merits, was not practicable in existing circumstances; for its effect would have been to deprive Great Britain of free access through the Canal to India for her ships of war and military transports, and similarly to cut off other European Powers from their oriental possessions.

32. The only means which could be resorted to for keeping the Canal open in time of war was to admit vessels of war into it freely, in so far as this could be done without depriving the territorial Power of its right of self-defence.

33. It was a settlement of this kind which Great Britain, after her military occupation of Egypt, brought to the notice of the Powers in Lord Granville's circular dispatch of January 3, 1883.[3] This became the basis of subsequent negotiations, which led to the conclusion of the Convention of Constantinople in 1888 on the subject. In it the British Foreign Minister made the following

[1] Cf. on this subject § 8 above.

[2] As to these, cf. L. Oppenheim, *International Law*, London, 1912, vol. i, § 197.

[3] Parliamentary Papers, Egypt No. 2, 1883 (C. 3462), p. 27.

preliminary remarks before laying down the conditions of the agreement suggested by him to the Powers:

'One result of recent occurrences has been to call special attention to the Suez Canal, firstly on account of the danger with which it was threatened during the first brief success of the insurrection; secondly in consequence of its occupation by the British forces in the name of the Khedive, and their use of it as a base of the operations carried on in his Highness' behalf and in support of his authority; thirdly because of the attitude assumed by the Direction and Officers of the Canal Company at a critical period of the campaign. As regards the first two points, Her Majesty's Government believe that the free and unimpeded navigation of the Canal at all times, and its freedom from obstruction or damage by acts of war, are matters of importance to all nations. It has been generally admitted that the measures taken by them for protecting the navigation of the Canal on behalf of the territorial ruler, and for the purpose of restoring his authority, were in no way infringements of this general principle. But to put upon a clearer footing the position of the Canal for the future, and to provide against possible dangers, they are of opinion that an agreement to the following effect might with advantage be come to between the Great Powers, to which other nations should subsequently be invited to accede:

(1) 'That the Canal should be free for the passage of all ships in any circumstances.

(2) 'That in time of war a limitation of time as to ships of war of a belligerent remaining in the Canal should be fixed, and no troops or munitions of war should be disembarked in the Canal.

(3) 'That no hostilities should take place in the Canal or its approaches, or elsewhere in the territorial waters of Egypt, even in the event of Turkey being one of the belligerents.

(4) 'That neither of the two immediately foregoing conditions should apply to measures which may be necessary for the defence of Egypt.

(5) 'That any Power whose vessels of war happen to do any damage to the Canal shall be bound to bear the cost of its immediate repair.

(6) 'That Egypt should take all measures within its power to enforce the conditions imposed on the transit of belligerent vessels through the Canal in time of war.

(7) 'That no fortifications should be erected on the Canal or in its vicinity.

(8) 'That nothing in the agreement should be deemed to

abridge or affect the territorial rights of the Government of Egypt further than is therein expressly provided.'

34. These conditions are evidently intended to encroach as little as possible on the rights of the territorial Power. It will be noticed that the circular only refers to the Government of Egypt in this connexion; but, though it was not the policy of the British Government to lay emphasis on the suzerainty of the Porte, there was no intention on its part to abridge or affect its rights any more than those of the Egyptian Government, its tributary.

35. In a war in which the Ottoman Empire was a belligerent, it would, according to the terms of No. 3 of the above proposals, be unable to make the Canal or its approaches, &c., a place of hostilities, unless in their defence; but, when this should be in question, it might according to No. 4 take such belligerent action in the Canal as might be necessary.

36. The circular would leave the general control of the Canal in the hands of the Egyptian Government as before. It does not suggest any supervision of the execution of the Treaty by the Great Powers. Lord Granville was anxious not to exclude Great Britain from coming forward by herself to protect the Canal should it be again necessary.

37. The circular, it has been seen, would prohibit any fortification of the Canal or its vicinity; this is a serious encroachment on the sovereign Power, since to fortify a canal may be the best means of defending it, especially if the other belligerent has a superiority in naval force over that of the territorial Power; but, as in the Clayton-Bulwer Treaty from which it is taken, the limitation is founded on the jealousy of rival Powers. The prohibition of fortifications is not, as some writers have supposed, essential to the idea of neutralization; otherwise a country in the condition of Belgium would not be neutralized.[1]

38. Lord Granville adopted from one of the resolutions

[1] Cf. § 68, below.

of the Institute of International Law[1] the rule that any Power whose vessels of war happen to do any damage to the Canal shall be liable to the cost of its instant repair. At the meeting of the Institute at which it was considered, and subsequently, the well-known Dutch jurist M. Asser objected to its adoption as introducing into the Convention a kind of civil liability of an anomalous character. But, having been adopted by the Institute, it was taken over by Lord Granville, though it did not ultimately find a place in the Suez Canal Convention.

39. Sir Erskine Holland's comments on the circular, made in a lecture soon after it was issued, and published in the *Fortnightly Review*, July 1883, and afterwards inserted in his *Studies in International Law* (pp. 286 and 287), are interesting, particularly if read in the light of the subsequent Convention.

> 'I incline to think', he says, 'that of these provisions only the first (supposing it to be limited to the vessels of friendly Powers) and the fifth are such as it is desirable to embody in an international Act. There should be no pretence for an allegation that Egypt, when neutral, is bound to stop the passage of belligerent ships of war; and it is reasonable that a State by whose ships damage is done to the Canal should be responsible for its repair. But it is hardly worth while solemnly to reaffirm the well-understood rights and duties of a neutral State; and the provisions as to the case when Egypt is belligerent seem to me dangerously complicated, even conceding that they are, as they now stand, intelligible. . . . The true safeguard of the Canal, in case of the territorial Power being at war, must be looked for in such a clear understanding between the belligerents and interested neutral Governments as resulted, during the late war between Russia and Turkey, from the announcement by Lord Derby already mentioned.'[2]

This criticism in fact throws doubt on the possibility of concluding any satisfactory international agreement for securing the freedom of the Canal in time of war.

40. Lord Granville's proposals, though attracting great attention, did not immediately lead to negotiations

[1] Cf. § 29, above.

[2] Cf. § 25, above.

on the subject of the Canal, these being hindered by the strained relations between the British and French Governments arising from the military occupation of Egypt.

41. In 1885, however, at a Conference of the Powers—viz. Great Britain, Germany, Austria-Hungary, France, Italy, Russia, and Turkey—held in London to consider the financial state of Egypt, a Declaration was made recognizing the urgent necessity for negotiation with the object of sanctioning by a Conventional Act the establishment of a definitive regulation guaranteeing at all times and for all Powers the freedom of the Suez Canal; and it was agreed that a Commission of Delegates of the seven Governments should meet at Paris on March 30, to prepare and draw up this Act, taking for its basis the circular of January 3, 1883. A delegate of the Khedive was to sit on the Commission with a consultative voice. The draft drawn up by the Commission was to be submitted to the said Governments, who engaged to take measures to obtain the accession of the other Powers.[1] The Commission met in Paris accordingly; but, besides the inclusion of delegates of the seven Powers and of the Khedive, the claims of Spain and Holland to be represented on the Commission, based on the use of the Canal by these Powers for communication with their colonies in the East, were admitted.[2] Portugal and Greece had also asked the Powers to include them, but they were not allowed to come in, as there were no stronger grounds for acceding to their request than could be urged by a number of other States. At the meeting of the Conference in Paris on March 30 Lord Granville's circular was proposed as the basis of discussion, as it had been understood it should be. But the representatives of the French Government brought forward a draft proposal of their own for consideration, and asked that it should be on an equal footing as a basis of discussion with the British

[1] Cf. Sir Travers Twiss, *Le Canal Maritime de Suez* (Revue de droit international, Brussels, vol. xvii, p. 617), and Parliamentary Papers, Egypt No. 19, 1885 (C. 4599).

[2] Cf. § 66 below.

one. After some protest from Sir Julian Pauncefote, one of the British representatives, this was allowed. These two draft proposals were then considered by the Commission and further submitted to a sub-Commission, which drew up a draft agreement, a kind of compromise between the French and English views; and this was referred back to the full Commission for approval. But the draft did not meet with the approval of the British delegates unless made subject to considerable amendments. These proposed amendments were embodied in a draft Treaty, which the British Government submitted to the Commission, adding to it, however, this important reservation, that the application of those provisions in the Treaty which might interfere with the free action of Great Britain during the occupation of Egypt, and which were incompatible with its position there, should be suspended.[1]

42. The Commission did not get beyond this point, and so, having failed to bring about an entire agreement between the Powers on the subject of the Canal, it brought its sittings to an end on June 13, 1885. But it had discussed a draft Treaty on the lines of Lord Granville's circular and, as Sir Julian Pauncefote remarked, had come to an agreement about its provisions except on some few points.

43. The subject which most divided Great Britain from France and from the majority of the other Powers, both at the Conference itself and in the subsequent negotiations about the Canal, was not so much the rules to be followed for keeping it open at all times, as the question of the means to be adopted for superintending them and securing their observance.

44. The refusal of the Powers to co-operate in the protection of the Canal during the insurrection had shown that their assistance could not be counted on, should it be in danger. And, even if this should be forthcoming, it was unlikely to be sufficiently prompt in case of

[1] Cf. § 74, below, and for a comparison of the texts of the draft proposals see Parliamentary Papers, Egypt No. 1, 1888 (C. 5255), p. 6.

a sudden emergency. Hence the British Government would agree to no form of international control which would be likely to stand in the way of its lending its independent support to Egypt, if the security of the Canal required it. Its policy was to leave to the territorial Power, and in the first place to the Egyptian Government, the supervision and enforcement of the regulations which were agreed to by the Powers, and not to allow the Powers to interfere with it in these respects unless the safety of the Canal absolutely required such interference. The aim of the French Government, on the contrary—an aim in which most of the other Powers concurred—was to bring the Canal so far as possible under their joint superintendence, and to restrict the rights of the territorial Power accordingly.

45. The differences which prevented an understanding being arrived at on this occasion related to Articles V, VI, IX, and XI of the draft Treaty prepared by the Commission. We shall again refer to them [1] in considering the terms of the Treaty which was ultimately concluded. Subsequently to the breaking up of the Conference, informal negotiations between Great Britain and France, in whose hands they were left by the other Powers, were entered into from time to time with the object of coming to a settlement.[2]

46. It was the French Government which pressed the British to treat on the subject. On March 25, 1886, M. de Freycinet submitted to Lord Rosebery a draft Paper proposing a compromise on the points at issue between the two Governments.[3] On October 21, 1887, Lord Salisbury submitted to the French Government a revised draft, which was accepted by the latter, and

[1] As to Article V of the draft Treaty, cf. § 54; as to Article VI, cf. § 57; as to Article IX, cf. § 62; as to Article XI, cf. § 67 below.

[2] See especially as to these, Parliamentary Papers, Egypt No 1, 1888 (C. 5255).

[3] For the text of this and for further correspondence about it see Parliamentary Papers, Egypt No. 1, above cited, p. 6, &c.

by the other Powers.[1] The Treaty was not signed till October 29, 1888; it was ratified on December 22 of the same year. Having been concluded at Constantinople, it is known as the Convention or Treaty of Constantinople of 1888.[2] The original parties to it were Great Britain, Germany, Austria, France, Russia, the Netherlands, Italy, Spain, and Turkey. It is to be noticed that no Powers seem to have acceded to the Treaty. It is, indeed, stated by Liszt (*Das Völkerrecht*, 10th ed., p. 220) that Greece, Sweden, Norway, Denmark, Portugal, Japan, and China did so; but this is not confirmed by the Foreign Office. That as many Powers as possible should be induced to accede is evidently an object to be aimed at in any revision of the Treaty that may take place.

47. *Article I.* 'The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.

'Consequently the High Contracting Parties agree not in any way to interfere with the free use of the Canal, in time of war as in time of peace.

'The Canal shall never be subjected to the exercise of the right of blockade.'

The basis of the Treaty, as is stated in this Article, is that the Maritime Canal shall always be free and open to vessels of all kinds of every flag. The Parties to it consequently agree that they themselves will do nothing to interfere with this freedom; and, as the exercise of the right of blockade, whether as a belligerent act or as what is known as pacific blockade, would evidently do so, it is declared that the Canal shall never be subjected to blockade.

48. But, unqualified as is this assertion of the principle that the Canal is free and open, the question has to be considered whether it is not subject to an exception, in case the closure of the Canal is necessary for its protection. Cannot the territorial Power, or any other Power acting as its agent, stop vessels of war entering

[1] For the text see Parliamentary Papers, above cited, p. 36, &c.
[2] For the full text see Appendix, p. 97.

the Canal if they are likely to attack it, or close it altogether in such circumstances as those existing in the time of the Arabi insurrection? As to this, it may be said that the Treaty does not expressly reserve any such right in favour of the territorial Power, the Parties all agreeing equally not to interfere with the free use of the Canal. Moreover, it is provided in Article XI that the exceptional measures which the Egyptian Government and the Ottoman Porte may take in defence of the Canal under Articles IX and X shall not interfere with such free use.

49. Notwithstanding this, however, it may be held that, since the maintenance of the Canal as a free and open passage is the paramount object of the Treaty, its temporary closure would be justifiable as a necessary means of defence, the safety of the Canal being the supreme law. This is the view which has been taken in the present war, the Canal having been closed, since it broke out, to enemy vessels of war. The obligation of the Parties to the Treaty not to interfere with the free use of the Canal, arising from Article I, is, it is to be observed, only a negative one. It does not bind them either individually or collectively to prevent the interference of others with it. The effect of one of the Parties to the Treaty violating it by making an attack on the Canal would, it seems, be to release the other Parties from their obligation not to interfere with the free use of the Canal, so that they would recover their natural freedom, as if the Treaty had not been made; the promise of each Party having been given in consideration of that of each of the others. This at least was Lord Salisbury's construction of the terms of the Treaty in the course of the preliminary negotiations.[1]

50. *Article II.* 'The High Contracting Parties, recognizing that the Fresh-Water Canal is indispensable to the Maritime Canal, take note of the engagements of His Highness the Khedive towards the Universal Suez Canal Company as regards the Fresh-Water Canal; which engagements are stipulated in a

[1] Cf. Parliamentary Papers, Egypt No. 1, 1888 (C. 5255), p. 42.

Convention bearing date the 18th March, 1863, containing an *exposé* and four Articles.

'They undertake not to interfere in any way with the security of that Canal and its branches, the working of which shall not be exposed to any attempt at obstruction.'

Article III. 'The High Contracting Parties likewise undertake to respect the plant, establishments, buildings, and works of the Maritime Canal and of the Fresh-Water Canal.'

Article I only includes the Maritime Canal. The Fresh-Water Canal (or *Canal d'eau douce*), which, as Article II states, is indispensable to the main canal, being the only means of supplying fresh water in the desert, is protected as a special entity by this Article. It was not included in the original Charter to the Company, but was the subject of the special Convention referred to in the text, and it has always remained entirely subject to the local law of Egypt.[1]

51. The French Government in the preliminary negotiations proposed that on both sides of the Maritime Canal there should be a neutral zone of land, such as we shall find has been established for the Panama Canal. The British, however, objected to any such territory being included, on the grounds that this would be too great an encroachment on the rights of the territorial sovereign and would complicate international relations. Hence only land actually covered by water is internationalized or neutralized, the Treaty however providing that the plant, establishments, buildings, and works of the Maritime Canal and also of the Fresh-Water Canal shall be respected.

52. *Article IV.* 'The Maritime Canal remaining open in time of war as a free passage, even to the ships of war of belligerents, according to the terms of Article I of the present Treaty, the High Contracting Parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the Canal, shall be committed in the Canal and its ports of access, as well as within a radius of three marine miles from those ports, even though the Ottoman Empire should be one of the belligerent Powers.

[1] For text of Convention see Parliamentary Papers, Egypt No. 6, 1876 (C. 1416), p. 19.

'Vessels of war of belligerents shall not revictual or take in stores in the Canal and its ports of access, except in so far as may be strictly necessary. The transit of the aforesaid vessels through the Canal shall be effected with the least possible delay, in accordance with the Regulations in force, and without any other intermission than that resulting from the necessities of the service.

'Their stay at Port Said and in the roadstead of Suez shall not exceed twenty-four hours, except in case of distress. In such case they shall be bound to leave as soon as possible. An interval of twenty-four hours shall always elapse between the sailing of a belligerent ship from one of the ports of access and the departure of a ship belonging to the hostile Power.'

Belligerent vessels of war on both sides having the right of passing through the Canal, it was necessary to declare by agreement that no right of war, &c. &c. shall be exercised in it, as this Article does. The prohibition, it will be seen, applies to the Ottoman Empire, should it be one of the belligerents, as well as to the other Parties; but we shall find this absolute prohibition cut down to some extent by later Articles. (See Articles IX, X, and XI.)

53. Not only the Canal itself but also its ports of entrance, as well as the sea within three marine miles from these ports, are made immune from hostilities and from the exercise of all rights of war in them.

54. In the preliminary discussions the Powers were divided in opinion as to the limits beyond the Canal within which such acts should not be allowed to take place.[1] In Article V of the Commissioners' draft it had been proposed to declare that no acts of hostility, and no *act to prepare directly an operation of war* shall be carried out either in the Canal or *in its approaches* or in its ports of access or *in the territorial waters of Egypt*. The British Government thought the words italicized much too extensive. 'Approaches' is an expression which would admit of an undue interference with territorial rights; and even the term 'territorial waters', though a technical one in international law, has been interpreted by States

[3] Cf. § 45, p. 21, above.

in different senses. To meet these objections the clause was finally drawn as it stands in the text. The words 'and its approaches' were omitted; and, instead of the term 'territorial waters of Egypt', a limit of three marine miles from the Canal ports was inserted at the instance of the British Government. Some objection was made to this definition on the ground that it originated at a time when the range of cannon was much less than now, but it was not maintained.

55. It is to be noticed that the Russian delegate made a protest at the preliminary Conference to the effect that the proposed Treaty would be useless, if it did not also neutralize the Red Sea, through which all ships making use of the Canal must pass. But this subject was not mentioned in Lord Granville's circular and was regarded as being beyond the scope of the Commission. Nevertheless it deserves attention, as it may be brought forward again. That some restrictions of belligerent rights in this sea are required in the interests of commerce, the conduct of Russian men-of-war there in the Russo-Japanese War of 1904 clearly showed.[1] But to put such a wide area as the Red Sea (and to effect the object of the provisions it would have to include also the Gulf of Aden, &c.) in the same international condition as the Canal itself would be impracticable. States having territory on its shores, or having Asiatic colonies, would probably raise objections on strategic and other grounds.

56. It will be seen that the second and third paragraphs of this Article make careful provision to prevent the Canal being used by belligerents as a base of hostilities. The rules on the subject are adopted to a great extent from previous usages in respect of the rights of vessels of war of belligerents in neutral harbours.

57. *Article V.* 'In time of war belligerent Powers shall not disembark nor embark within the Canal and its ports of access

[1] As to this see T. J. Lawrence, *War and Neutrality in the Far East* (2nd ed., London, 1904), Chap. VI, pp. 112–23; and for other sources of information, Dedreux, *op. cit.* p. 60, note 2.

either troops, munitions, or materials of war. But, in case of an accidental hindrance in the Canal, men may be embarked or disembarked at the ports of access by detachments not exceeding 1,000 men, with a corresponding amount of war material.'

On the subject of this Article the French and English Governments had found some difficulty in coming to an agreement. Both admitted that belligerents should not have the right of either disembarking or embarking troops or munitions or material of war when war was actually going on; but the British Government would not agree that these military measures should be prohibited in time of peace also, as the French draft and that of the Commission proposed. The matter was, as is seen, finally settled in accordance with the British view.[1] The British delegates at the preliminary Conference had further contended that the restriction should only apply to the Canal itself and not to the ports of access.[2] But to this it was replied that, if the landing of armies for hostile purposes was going on at the mouth of the Canal, efforts would certainly be made by the other belligerent to prevent the disembarkation, and the prohibition of hostilities in the Canal would become illusory. Lord Salisbury, however, pointed out that the difficulty felt by H.M. Government in assenting to the inclusion of the ports of access in this prohibition arose, not from any desire to see them used for belligerent purposes, but because it might in time of war be a serious impediment to the transit across the isthmus of reliefs for India, if the Canal happened to be temporarily blocked. This difficulty, it will be seen, is to some extent provided for in this Article.

58. *Article VI.* 'Prizes shall be subjected, in all respects, to the same rules as the vessels of war of belligerents.'

According to the practice of some States prizes brought into neutral harbours by the captor have been treated like belligerent vessels of war coming into neutral

[1] See Lord Salisbury's dispatch of October 21, 1887, to Mr. Egerton on the subject, in Egypt No. 1, 1888 (C. 5255), p. 41.

[2] See their amendment to Article VI of the Commissioners' draft.

harbours. It is prescribed in this Article that they are to be so treated in the Canal.[1]

59. *Article VII.* 'The Powers shall not keep any vessel of war in the Canal (including Lake Timsah and the Bitter Lakes).

'Nevertheless, they may station vessels of war in the ports of access of Port Said and Suez, the number of which shall not exceed two for each Power.

'This right shall not be exercised by belligerents.'

As has been seen, vessels of war as well as other ships have the right of passing through the Canal, but this Article provides for obvious reasons that they may make no stay in it or in its two accessory lakes, even in time of peace. It allows two vessels of war of any Power which is not a belligerent to be stationed at Suez and Port Said, the ports of entrance to the Canal. Ready assistance may thus be provided in case the territorial Power requires it for giving effect to the Treaty. The French draft project had proposed that only two light cruisers might be stationed in these parts in time of peace.

60. *Article VIII.* 'The Agents in Egypt of the Signatory Powers of the present Treaty shall be charged to watch over its execution. In case of any event threatening the security of the free passage of the Canal, they shall meet on the summons of three of their number under the presidency of their Doyen, in order to proceed to the necessary verifications. They shall inform the Khedivial Government of the danger which they may have perceived, in order that that Government may take proper steps to ensure the protection and the free use of the Canal. Under any circumstances, they shall meet once a year to take note of the due execution of the Treaty.

'The last-mentioned meetings shall take place under the presidency of a Special Commissioner nominated for that purpose by the Imperial Ottoman Government. A Commissioner of the

[1] As to the rules applicable to belligerent vessels of war in these circumstances, see Article IV. Articles XXI and XXII of Hague Convention XIII are less liberal in comparison, only allowing prizes to be brought into neutral ports on account of unseaworthiness, stress of weather, or want of fuel or provisions; they must leave as soon as the circumstances which justified their entry are at an end (cf. Oppenheim, *International Law*, vol. ii, § 328).

Khedive may also take part in the meeting, and may preside over it in case of the absence of the Ottoman Commissioner.

'They shall especially demand the suppression of any work or the dispersion of any assemblage on either bank of the Canal, the object or effect of which might be to interfere with the liberty and the entire security of the navigation.'

The subject on which Great Britain disagreed most with France and other Powers was the settlement of the machinery for securing the observance of the Convention. It was the failure of the Powers to come to a complete agreement about this which was the principal cause of the preliminary Conference becoming abortive.[1]

61. The British Government had throughout the negotiations opposed the idea of subjecting the Egyptian Government to any limitations in respect of the Canal beyond those arising from the Firmans. Such limitations would, it maintained, be inconsistent with the basis of negotiations as laid down in Lord Granville's circular and in the Declaration of London.

62. It refused to accept the French proposal which provided that a special standing Commission of representatives of the Powers should be established to supervise the execution of the Treaty. An international Commission for the purpose, like the Danubian Commission which had been suggested as a model, was in its opinion unsuitable to the circumstances of the Canal.[2] Thus, in the final negotiations on the subject, Lord Salisbury wrote:[3]

'It does not appear to them [Her Majesty's Government] that any exceptional machinery is required to secure the observance of this Treaty. It is the ordinary function of the Consular Representatives in Egypt to watch over the execution of any Treaty in which their Governments have a common interest; and they do this in concert, meeting under their Doyen, as occasion may demand, and making such representations to the Khedive's Government as may be required.'

[1] Cf. § 45 above.

[2] As to the Danubian Commission see *International Rivers*, No. 149 of this series.

[3] See Parliamentary Papers, Egypt No. 1, 1888 (C. 5255), p. 41.

Article IX of the draft of the Commission adopted the consular system of supervision; but the proposal of the British Government that the agents should only report to their own Governments, not to the Powers collectively, was not agreed to by the Commission. It will be seen that Article VIII of the Convention adopts this consular system for the supervision of the Treaty in accordance in the main with the view of the British Government. It was settled by this Article that they are to make representations to the Khedivial Government. The Consuls are to meet if the Canal is in danger, and to inform the Khedivial Government of the circumstances; but in any case they are to meet annually, and this meeting is to be under the presidency of a special Commissioner appointed by the Ottoman Government or, in his absence, of a Commissioner of the Khedive.[1]

64. This body, it will be observed, is given no right of control over the Khedivial Government. It is simply its duty to inform this Government if it considers the Canal to be in danger, in order that the latter may take proper steps to insure the protection and the free use of the Canal. It may demand the suppression of any work or the dispersal of any assemblage on either bank of the Canal, the object or effect of which might be to interfere with the liberty and the entire security of the navigation, but it has no executive powers of its own. Moreover it would seem that according to diplomatic usage its resolutions must be unanimous.

65. *Article IX.* 'The Egyptian Government shall, within the limits of its powers resulting from the Firmans, and under the conditions provided for in the present Treaty, take the necessary measures for insuring the execution of the said Treaty.

'In case the Egyptian Government should not have sufficient means at its disposal, it shall call upon the Imperial Ottoman Government, which shall take the necessary measures to respond to such appeal; shall give notice thereof to the Signatory Powers of the Declaration of London of March 17, 1885; and shall, if necessary, concert with them on the subject.

'The provisions of Articles IV, V, VII, and VIII shall not

[1] As to the meeting of the Consuls see § 74 below.

interfere with the measures which shall be taken in virtue of the present Article.'

Thus this Article is intended to provide a regular mode of sanctioning the Treaty. It declares (1) that the Egyptian Government shall within the limits of the Firmans, and under the conditions provided for in the Treaty, take the necessary steps for insuring its execution. It will be seen that this clause would prevent the Ottoman Porte, even were it the territorial Power, from interfering in the first instance to secure the execution of the Treaty. In the next place it declares (2) that, in case the Egyptian Government should not have sufficient means at its disposal, it shall call on the Ottoman Government, which shall take the necessary measures to respond to such appeal; shall give notice of this to the Signatory Powers of the Declaration of London of March 17, 1885; and shall, if necessary, concert with them on the subject.

66. The seven Signatory Powers of the Declaration of London,[1] viz. Great Britain, Germany, Austria-Hungary, Russia, France, Italy, and Turkey, were all Parties to this Treaty and by this Article became its Guarantors; Spain and Holland, who, as we have seen,[2] were admitted to the preliminary negotiations at Paris subsequently to the Declaration of London, were also original Parties to the Treaty, but they were not made Guarantors of it.[3] It is to be observed that the guarantee given by the Powers is only a collective one.[4]

67. *Article X.* 'Similarly, the provisions of Articles IV, V, VII, and VIII shall not interfere with the measures which His Majesty the Sultan and His Highness the Khedive, in the name of His Imperial Majesty, and within the limits of the Firmans granted, might find it necessary to take for securing by their own forces the defence of Egypt and the maintenance of public order.

'In case His Imperial Majesty the Sultan, or His Highness the Khedive, should find it necessary to avail themselves of the

[1] Cf. § 41 above.

[2] § 41 above.

[3] Cf. § 8 above.

[4] As to the effect on the Treaty of its violation by one of the Parties to it, see § 49 above.

exceptions for which this Article provides, the Signatory Powers of the Declaration of London shall be notified thereof by the Imperial Ottoman Government.

'It is likewise understood that the provisions of the four Articles aforesaid shall in no case occasion any obstacle to the measures which the Imperial Ottoman Government may think it necessary to take in order to insure by its own forces the defence of its other possessions situated on the eastern coast of the Red Sea.'

To make the territorial Power subject under all circumstances to Articles such as IV, which prohibits all operations of war in the Canal and the keeping of vessels of war in it, would evidently be to deprive it of the means of defending the Canal and Egyptian territory. Hence, for such purposes, it is allowed to carry on warlike operations in the Canal and to do other things which are forbidden generally in the Articles from which it is to this extent excepted. But these exceptions are restricted in the Treaty as much as possible, in order that its main object of keeping the Canal open may not be interfered with. The addition of the words 'by his own forces' in Article XI of the Commissioners' draft had been objected to by the British representatives at the Conference, and subsequently by Lord Salisbury, on the ground that they would prevent the Porte or the Khedive calling in any ally they chose to their assistance, which would be an undue limitation of sovereignty; but, on the Porte declaring that it had no objection to their inclusion, and understanding that if one of the Parties to the Treaty attacked the Canal, the others would be free to act against him in it (their obligations to one another having disappeared), Lord Salisbury withdrew his objection. The British Government had also objected to the words 'in the name of His Imperial Majesty' which were in Article XI of the Commissioners' draft.

68. *Article XI.* 'The measures which shall be taken in the cases provided for by Articles IX and X of the present Treaty shall not interfere with the free use of the Canal. In the same cases, the erection of permanent fortifications contrary to the provisions of Article VIII is prohibited.'[1]

[1] On the question of the right of closing the Canal see § 49 above.

The prohibition of permanent fortifications in the Canal was not, as has been previously remarked,[1] a subject of dispute between the French and British Governments, but it takes away from the territorial Power a chief means of defence and has been dropped in the case of the Panama Canal (cf. below, p. 58). It was limited, in the case of Suez, to the Canal itself.

69. *Article XII.* 'The High Contracting Parties, by application of the principle of equality as regards the free use of the Canal, a principle which forms one of the bases of the present Treaty, agree that none of them shall endeavour to obtain with respect to the Canal territorial or commercial advantages or privileges in any international arrangements which may be concluded. Moreover, the rights of Turkey as the territorial Power are reserved.'

Article XIII. 'With the exception of the obligations expressly provided by the clauses of the present Treaty, the sovereign rights of His Imperial Majesty the Sultan, and the rights and immunities of His Highness the Khedive, resulting from the Firmans, are in no way affected.'

Article XII is a declaration of disinterestedness. The reservation of the rights of the territorial Power in these two Articles was not necessary, but was formally inserted at its request. It was not thereby meant to reserve for Egypt or the Porte any right to differentiate in its own favour in respect of tolls. The exercise of any such right on its part would be contrary to Article I of the Convention and to established custom.

70. *Article XIV.* 'The High Contracting Parties agree that the engagements resulting from the present Treaty shall not be limited by the duration of the Acts of Concession of the Universal Suez Canal Company.'

This is the only Article in the Treaty which directly refers to the Charter of the Company. The Treaty would even without it have been regarded as unlimited in duration so long as the Canal is in existence.

71. *Article XV.* 'The stipulations of the present Treaty shall not interfere with the sanitary measures in force in Egypt.'

The British Government did not think this Article

[1] Cf. § 37, p. 17, above.

would be required, the banks of the Canal being left entirely subject to Egyptian law; but it was admitted since the necessity might arise for taking sanitary measures for the Canal conflicting with rules laid down by the Treaty.

72. *Article XVI.* 'The High Contracting Parties undertake to bring the present Treaty to the knowledge of the States which have not signed it, inviting them to accede to it.'[1]

73. The ratifications of the Treaty were exchanged soon after it was concluded, but it remained in suspense for some time on account of a reservation made to it on the part of Great Britain to the effect that those provisions in the Treaty which might interfere with the free action of Great Britain during the occupation of Egypt, and which were incompatible with its position there, should be suspended.[2] On this account the Treaty, though it was ratified by the Parties, seems to have been to a great extent inoperative, since the other Parties could not be expected to be bound by it unless it were also binding on Great Britain. But this suspended operation of the Treaty ceased in 1904, when Great Britain came to an Agreement with France in respect of Egypt, Morocco, and other subjects.

74. Article VI of the Agreement of 1904 provides that

'In order to insure the free passage of the Suez Canal, His Britannic Majesty's Government declare that they adhere to the stipulations of the Treaty of October the 29th, 1888, and that they agree to their being put in force. The free passage of the Canal being thus guaranteed, the execution of the last sentence of paragraph 1 as well as of paragraph 2 of Article VIII of the Treaty will remain in abeyance.'[3]

The provisions of the Treaty referred to as still to remain in abeyance concern the supervision of it by the consular agents of the Powers in Egypt. These are that 'under any circumstances, they [the agents] shall meet once a year to take note of the due execution of the Treaty', and that these 'meetings shall take place under the presi-

[1] As to Accessories see § 46 above. [2] Cf. § 41 above.
[3] Cf. Parliamentary Papers, France, No. 1, 1904 (Cd. 1952), Article VI, p. 10.

dency of a Special Commissioner nominated for that purpose by the Imperial Ottoman Government. A Commissioner of the Khedive may also take part in the meeting, and may preside over it in case of absence of the Ottoman Commissioner.'

75. As to the light in which the rules of the Convention are regarded by our Courts, some remarks of Lord Parker in the *Südmark* case[1] are instructive, in which, giving the decision of the Judicial Committee, he says:

> 'Assuming, however, that the rule [that is, the rule that belligerent vessels of war may not stay more than twenty-four hours in the Canal] was broken, the question remains whether a Court of Prize can properly constitute itself the guardian of the Convention and invent the exact penalties for its non-observance, though no such penalties are imposed by the Convention itself. This question can only be answered in the negative. The jurisdiction of a Court of Prize does not embrace the whole region covered by international law.'

In other words, Prize Law is not concerned with the rules which were agreed to for regulating the use of the Canal; it is to the means provided for the purpose by the Convention itself that one should look for their enforcement.

[1] L. R. (1917) A. C., p. 620.

PART II

THE PANAMA CANAL

76. The idea of making a ship canal through the narrow isthmus of Central America, in order to facilitate navigation between the Atlantic and Pacific, is a natural one. Since the first discovery of America it had been spoken of, and Philip II of Spain had a design of carrying it out; but it did not become really practicable till after the separation of the South American Colonies from the mother-country in the early part of the last century. The project was one in which the emancipated countries were primarily interested. Hence, not long after their independence was established, it was discussed at the Congress of American States at Panama, which met at the instance of Nicaragua in 1826 to consider American questions under the new conditions that had arisen. On this occasion the American Secretary of State, Mr. Clay, expressed himself as being favourably inclined to the proposal.

77. From this time onwards the subject was never lost sight of, though it was long before the undertaking could be accomplished.

78. The difficulties in the way of it were similar in their general character to those of the Suez Canal, but differed greatly in their special circumstances. Those of a material and economic character were perhaps greater than the obstacles which de Lesseps had to overcome in making the Suez Canal, while those arising from the jealousy of rival States, with which we are concerned in this Paper, proved a greater hindrance to the construction of the American Canal than to that of the Egyptian.

79. There was unanimous agreement from the first, as we found there was concerning the Suez Canal, that a trans-isthmian canal, by whatever route, must be appro-

priated to the use of all nations on terms of equality. Every charter to private companies granted by different States through whose territory canal routes lay had been based on this principle. But in this case the territorial States were too weak and unstable to be depended on for securing the free use of any canal which might be made. Unless one or both of the great American Powers—the United States and Great Britain—had a voice in the control of it, it was not likely to be secure. Of these the interest of the United States in the Canal was the greater, and became increasingly so as that Power extended towards the south and along the south-western coast of North America. More especially from the time of its acquisition of the Californian gold mines in 1848, the Canal question became one of vital importance to it, and this not only for commercial but also for strategic reasons. In the earlier period, the chief aim of American statesmen was to prevent the Canal falling into the hands of any European State and especially of Great Britain, whose position in the Caribbean Sea and territorial interests in Central America, as well as her world-wide commerce, made her anxious to obtain rights over any trans-isthmian canal that might be made.

80. The rival interests of these two States led to a long diplomatic conflict between them on the subject of the Canal, which was not terminated till the present century. In this conflict the Monroe doctrine was involved. The doctrine is not a legal one and has no recognition in international law. It is the assertion of a policy directed against the colonization of America by European Powers and against the extension of their State system. It has in course of time been given an even wider application, so as to include any European interference with American politics. It is a doctrine which changes from time to time in its extent, being adapted to political circumstances. Thus at one time we shall find it pushed to the front in the Canal negotiations and at others kept in the background.[1]

[1] See L. M. Keasbey, *The Nicaragua Canal and the Monroe Doctrine* (New York, 1896); E. J. Phelps, 'The Monroe Doctrine' in *America*

81. But the position of Great Britain as a great American Power made it necessary that the United States should consider with her the question of the control of any canal that might be made. Thus the two Powers were engaged from time to time during the last century in trying to come to a settlement on the subject. We shall find that in the course of these negotiations the United States was willing to join in a treaty not only with Great Britain but also with other European Powers for the protection of the proposed Canal. It was not indeed till after the American Civil War, which ended in 1865, that the United States began to adopt an exclusive policy in regard to the Canal. Till then its policy had been rather to see that no canal should be constructed in which its interests were not fully secured, than that it should have exclusive control of it. The idea of constructing one itself in its own territory did not occur to it till a recent period. It is to be remembered that in the country where the possible routes lay the United States possessed no territory, and that, till the final settlement of the Canal question, it did not seek to acquire any. The means which it took with the object of obtaining some control over these routes was to negotiate treaties on the subject with the States to which they belonged.

82. The most important of these treaties was that which was concluded with the Republic of New Granada in 1846, and ratified in 1848.[1] In this Treaty the Government of New Granada guaranteed to the Government of the United States that the right of way or transit across the isthmus of Panama upon any modes of communication that then existed or that hereafter might be constructed should be open and free to the Government and citizens of the United States, and that the commerce of the United

and Europe: A Study of International Relations (New York and London, 1896), pp. 73–100; W. F. Reddaway, *The Monroe Doctrine* (New York, 1905); W. F. Johnson, *America's Foreign Relations* (New York, 1916), vol. i, chap. xii.

[1] For the text of this Treaty see Appendix, p. 102.

States should be subject to no tolls not imposed also on native citizens. On the other hand, as a means of securing the tranquil and constant enjoyment of these advantages and as a special compensation for them and other favours, the United States guaranteed to New Granada the neutrality of the isthmus of Panama 'with the view that the free transit from the one to the other sea may not be interrupted or embarrassed at any future times while this treaty exists'.

The Treaty is not limited in time; it passed to Colombia as successor to New Granada in the sovereignty over the isthmus, and subsequently to Panama. As has been seen, it guarantees to the United States on the part of New Granada the free use on favoured terms of any route over the isthmus, but it does not deprive New Granada of the right of according to any other State the same privilege.

83. In respect of the guarantee to Colombia by the United States of the neutrality of the Isthmus of Panama, President Polk, in his message to the Senate (Feb. 10, 1847) on the subject of the Treaty, said:

> 'If the United States, as the chief of the American nations, should first become a party to this guarantee, it cannot be doubted—indeed, it is confidently expected by the Government of New Granada—that similar guarantees will be given to that Republic by Great Britain and France.'

Lord Palmerston was subsequently asked by the American Government to make a treaty with New Granada for this purpose, but he refused.[1] Diplomatic correspondence also took place between the British Government and New Granada on the same subject, but without result. There is nothing, it is to be observed, in the Treaty of 1846 as to the construction of a canal by the United States in the isthmus or the exclusion of other Powers from constructing one; nor does there seem to be anything in the Treaty from which these rights and obligations can be necessarily inferred. Mr. Root's view of the Treaty[2]—

[1] Cf. Moore, § 339.
[2] See his *Addresses on International Subjects*, pp. 184, 185.

that it conferred on the United States the functions of sovereignty in respect of the right of way over the isthmus, that it excluded foreign Powers from the opportunity to construct the Canal themselves, and that it imposed on Colombia, as successor to New Granada, the obligation to permit the United States to build the canal—seems to be based on political and not on legal grounds.[1] It may be mentioned in this connexion that in 1881 the United States proposed to Colombia to enter into a Protocol interpreting Article XXXV of the Treaty in such a sense as to give the United States the right of taking military occupation of the isthmus if it were in danger of attack; but Colombia refused to do this.

84. While the policy of the United States with regard to New Granada was as stated above, Great Britain was trying, in a somewhat indirect way, to establish herself in a controlling position at the head of the Nicaraguan Canal route, which, though longer than the Panama, was then regarded as the preferable one. She had for a considerable time exercised a sort of protectorate over the Indians of the Mosquito Coast, who lived in territory not clearly defined, which had nominally belonged to Spain. Over this territory agents of the British Government gradually established themselves in spite of the protests of the Governments of the United States and of Nicaragua.[2]

85. On January 1, 1848, the British superintendent, who was not disavowed by his Government, drove the Nicaraguans out of San Juan, the name of which was changed to Greytown. Thus Great Britain had acquired control of the eastern end of the Nicaraguan route. The United States naturally regarded the position of affairs, which had thus arisen, as a serious danger to it.

86. To counteract these proceedings on the part of the rival Power, the American Government sent to Central America an agent, Mr. Hise, who in 1849 contracted, on behalf of his Government though without its authority, what is known as the Hise-Selva

[1] Cf. § 130 *infra*.

[2] See *British Honduras*, No. 133 of this series.

Convention with Nicaragua. By this Treaty Nicaragua conceded the sole right of constructing a canal to the United States and its citizens, with leave to fortify the canal and its ports of entry at both ends. But General Taylor, who was then President of the United States, refused to confirm either this Treaty or that entered into by Mr. Squire, another American agent, on the ground that what these agents had done had been without authority. He objected to these Treaties because he thought they might bring about a conflict with Great Britain. He had come to the conclusion, as he explained in a message to Congress, that Great Britain and the United States should no longer pursue an antagonistic policy on the subject of the Canal, but come to a common understanding about it. He therefore approached the British Government in order to bring this about. As Mr. Root has pointed out, it was the United States that sought such a Treaty, not Great Britain, which occupied an advantageous position.[1]

87. Such was the origin of the Convention or Treaty between Great Britain and the United States, known as the *Clayton-Bulwer Treaty* from the names of those who negotiated it.

The Clayton-Bulwer Treaty of April 19, 1850

88. The Clayton-Bulwer Treaty and the Hay-Pauncefote Treaty which superseded it are not, like the Suez Canal Convention of Constantinople of 1888, general Treaties between a number of Powers among whom the territorial Power is included. They were made between two Powers only, both most interested in the construction of a canal, but neither of them being in possession of a canal route, which it was their object to regulate.

[1] See Root, *Addresses*, p. 210, &c., and on the general subject, I. D. Travis, *The History of the Clayton-Bulwer Treaty* (Michigan 1900), pp. 37–42; J. G. Whiteley, *Les Traités, Clayton-Bulwer et Hay-Pauncefote* (Rev. de Droit. int., iii, 2nd series, 1901, p. 5); Moore, iii, §.367; *Correspondence with the United States respecting Central America*, 1856 (Edinburgh Review, vol. civ, 1856, p. 267).

89. They differ also from the Suez Canal Convention in that they are not, like it, concerned with the regulation of a canal already made and open to traffic, but with one merely prospective, the construction of which they were to be the means of facilitating. But they resemble it in being likewise attempts to compose the differences between two great Powers, which stood in the way of the accomplishment of an undertaking of world-wide importance.

90. The Clayton-Bulwer Treaty tried to do this by establishing a system of co-operation between the United States and Great Britain on the subject of an isthmian canal.[1] Thus in Article I of this Convention both parties declare, (*a*) that neither the one nor the other will ever obtain or maintain for itself any exclusive control over the ship-canal, (*b*) that neither will ever erect or maintain any fortifications commanding the same or in its vicinity, (*c*) that neither will occupy, fortify, or colonize, or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America, nor make use of any protection or any alliance which either has or may have the purpose of doing so, and (*d*) that neither will try to obtain any rights or advantages in regard to commerce or navigation through the Canal for their own subjects, which shall not be offered on the same terms to the subjects or citizens of the other.

91. These Articles, it will be noticed, are of a restrictive character; their object is to prevent either Party pursuing any independent canal policy. They provide against this for the future; and by obliging Great Britain to abandon the favourable position she had obtained on the Mosquito Coast, put both Parties more on an equality in the immediate region of the Nicaraguan Canal route, the United States having no territorial rights there.

92. Further, it is provided that neither State shall use its alliances or influence for the purpose of obtaining exclusive control over the Canal,

[1] For the text of the Treaty, see Appendix II, p. 104.

'or for the purpose of acquiring &c. for the subjects or citizens of the one any rights or advantages in regard to commerce or navigation through the said Canal, which shall not be offered, on the same terms, to the subjects or citizens of the other.'

93. The Treaty is not only restrictive, it is also constructive. Thus the Parties agree to use their influence with the territorial States to induce them to facilitate the construction of the Canal (see Article IV), and to support and encourage undertakings for this purpose (see Article VII). But, what is of principal importance, they agree to protect it and to guarantee its neutrality and security so that it may for ever be open and free (see Article V).

94. Article II provides that vessels of the two countries in case of war between them shall be exempted in the Canal from blockade, detention, or capture by either belligerent.

95. In Article VI the Parties engage to invite other States to enter into stipulations with them similar to those they have entered into with each other, and to make treaties with the Central American States 'for the purpose of more effectually carrying out the great design of the Convention'. By this means, if it had been taken advantage of, the guarantee of the neutrality of the Canal might have become general.

96. The Treaty, as we have described it, was originally intended to apply only to the Nicaraguan route; but an additional Article (VIII) was inserted, by which the Parties, as it states,

'having not only desired, in entering into this Convention, to accomplish a particular object, but also to establish a general principle; they hereby agree to extend their protection by Treaty stipulations to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America; and especially to the interoceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by way of Tehuantepec or Panama,'

it being always understood by them

'that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the afore-

said Governments shall approve of as just and equitable; and that the same canals or railways, being open to the subjects and citizens of Great Britain and the United States on equal terms, shall also be open on like terms to the subjects and citizens of every other State which is willing to grant thereto such protection as Great Britain and the United States engage to afford.'

As this principle was taken over by the Hay-Pauncefote Treaty which succeeded it, we shall have to refer subsequently to this Article.[1]

97. There seems to be nothing in the Clayton-Bulwer Treaty, in spite of what has been alleged, to show that it was restricted in its application to a particular canal project, or to the Nicaraguan route only, though it had this immediately in view. On the contrary, its object was, as Article VIII declares, to establish a general principle of neutralization for keeping the Canal freely open on equal terms to the vessels of all nations whenever or by whatever route it was made.

98. The Treaty failed in so far as its constructive object was concerned. The system of co-operation between the two Governments which it proposed was never popular in America. It could not be carried out unless a common policy were adopted in negotiations with the territorial States and in the financing of a canal company. But instead of this, the United States after a time entered into agreements with these States in respect of canal routes as if it were entirely independent in the matter. It was the more inclined to pursue this separate policy, because, for a considerable time after the Treaty had been concluded, Great Britain continued to retain the Mosquito Coast, including Greytown, in the name of the Indians she protected. The Treaty was very loosely drawn in respect of the territorial restrictions it imposed on Great Britain. It was questionable whether and to what extent its provisions on this subject applied to vested rights; and their geographical limits were not clearly defined. The British Government maintained that British Honduras was not included in the Treaty, Lord Clarendon in a dispatch asserting that 'Great

[1] See §§ 112 and 113 below.

Britain had not nor did she ever have any intention of renouncing the full and absolute right which she possesses over her own lawful territory'. In the course of time however, Great Britain abandoned, by Treaties with Honduras and Nicaragua in 1859 and 1860, everything which could be required of her in this respect;[1] nevertheless the Clayton-Bulwer Treaty remained a dead letter, except that its restrictive conditions stood in the way of the construction of a canal under the direction of the United States alone. A proposal was made by the British Government to the American that a joint guarantee of the Nicaraguan Canal should be entered into by the three Maritime Powers, Great Britain, the United States, and France; but this proposal was declined by the American Secretary of State in a letter to Lord Napier, the British ambassador at Washington, dated September 10, 1857, on the ground that the proposed Treaty of guarantee should be entered into directly between the above Powers and New Granada, not simply between the Powers themselves. At the same time the letter expressed sympathy with the idea of such a joint guarantee.

99. But an interoceanic canal under its own exclusive control became at length, as has been mentioned, the American Government's real aim. This was first made clear by Mr. Seward. He took steps to obtain control of a canal by the Honduras route and to get the clauses in the Clayton-Bulwer Treaty rescinded which prevented either party from acquiring territory in Central America. He also attempted, by Treaties with Colombia, to obtain control for the United States of the Panama route.

100. Thus in 1868 negotiations between the United States and Colombia were entered into, and a Treaty was concluded on January 14, 1869. This gave the United States control of the Panama Canal route; but eventually the Congress of Colombia refused to confirm the Treaty, as it did also in the case of another Treaty signed on January 26, 1870, partly because the Colombian

[1] See I. D. Travis, *The History of the Clayton-Bulwer Treaty*; British Blue Book, 1856 (vol. xxiii), on Central America (2052 and 2197); Moore, *op. cit.* § 358; also *British Honduras*, No. 133 of this series.

Government wished to have the Canal under the joint control of the Powers. In reference to the Treaty of 1869, Mr. Fish, Mr. Seward's successor as Secretary of State, had said:

> 'In the present state of international law such joint protectorate would be a source of future trouble . . . and might probably prove an obstacle to a ratification by the United States of a treaty on the subject.'

Mr. Fish seems subsequently to have altered his views on this subject, since, in a circular letter to the Agents of the United States on February 28, 1877, he invited the adhesion of the principal maritime Powers to the neutralization of the Canal. In respect of the Nicaraguan Canal, by the Dickinson-Ayon Treaty between the United States and Nicaragua, concluded on January 21, 1867, and ratified in the following year, the United States guaranteed the neutrality of all routes between the Atlantic and Pacific Oceans through Nicaraguan territory, and also agreed to employ its influence with other nations to induce them also to guarantee such neutrality and protection.

101. But no serious international controversy on the Canal question arose till 1878, when a French company, through the agency of M. Napoléon Bonaparte Wyse, obtained a concession from Colombia to construct a canal by the Panama route.[1] The Suez Canal, as we are aware, had been carried out mainly by means of French enterprise and capital, and had been opened to traffic in 1869. It was natural that de Lesseps, who after a time obtained control of the new Panama Company, should think that he might repeat his success by conducting a similar undertaking in America. He ultimately failed in his attempt, owing to a great extent to the immense difficulty of the undertaking, though a principal cause of his failure was American opposition to a canal supported by foreign capital and under foreign influence. De Lesseps' object from the first, as it had been in the case of the Suez Canal, was that the Canal should be brought under the

[1] See L. N. B. Wyse, *Le Canal de Panama*, Paris, 1886.

joint control of the Powers. He accordingly, in co-operation with Colombia, proceeded to enter into communication with the chief Foreign Offices of Europe to bring about a joint Canal Agreement. This at once aroused strong opposition on the part of the United States. On March 8, 1880, President Hayes in a special message to Congress had said:

> 'The policy of this country is a canal under American control. The United States cannot consent to the surrender of this control to any European Power, or to any combination of European Powers. . . . An interoceanic canal across the American Isthmus will essentially change the geographical relations between the Atlantic and Pacific coasts of the United States, and between the United States and the rest of the world. It will be the great ocean thoroughfare between our Atlantic and our Pacific shores, and virtually a part of the coast-line of the United States. Our merely commercial interest in it is greater than that of all other countries, while its relations to our power and prosperity as a nation, to our means of defence, our unity, peace, and safety, are matters of paramount concern to the people of the United States. No other Great Power would, under similar circumstances, fail to assert a rightful control over a work so closely and vitally affecting its interest and welfare.'

102. In the following year, 1881, the Secretary of State, Mr. Blaine, having heard that Colombia was about to propose a joint guarantee of the neutrality of the Canal by European Powers, expressed in a circular letter to the chief European Courts the strong disapproval of the American Government in regard to this proceeding. In the President's opinion, he said, the guarantee given by the United States to New Granada in the Treaty of 1846 was sufficient without 'reinforcement, or accession or any assent from any other Power'; and to attempt to supersede it by 'an agreement between European Powers' would 'partake of the nature of an alliance against the United States, and would be regarded . . . as an indication of unfriendly feeling'. In acknowledging this letter on November 10, 1881, Lord Granville simply pointed out that the position of Great Britain and the United States with reference to the Canal was determined by the engagements entered into by them

respectively in the Convention commonly known as the Clayton-Bulwer Treaty, and that H. M. Government relied with confidence upon the observance of all the engagements of that Treaty. Before this letter was received, Mr. Blaine had, on November 19, 1881, sent a further letter to England in which he made an attack on this Treaty, as having been 'misunderstandingly entered into, imperfectly comprehended, contradictorily interpreted, and mutually vexatious'. It was made, he alleged, more than thirty years before, in circumstances which had long ceased to exist. It bound the United States not to use its military force in any precautionary measures, while leaving the naval power of Great Britain perfectly free and unrestrained, ready at any moment to seize both ends of the Canal. It was an infringement of the prior right of the United States on the American continent. It gave the same right through the Canal to a war-ship bent upon an errand of destruction to the United States coasts as to a vessel of the American Navy sailing for their defence. Only by the supervision of the United States could the Isthmian Canal be definitely and at all times secured against the interference and destruction incident to war; and a mere agreement of neutrality on paper between the Great Powers of Europe might prove ineffectual to preserve the Canal in time of hostilities. The one conclusive mode of protecting the Canal was to place it under the United States, as being least likely to be engaged in war, and able in any and every event to enforce the guardianship which she should assume.[1]

103. Lord Granville, in two rejoinders to Mr. Blaine (January 7 and 14, 1882),[2] showed that his contentions were not well founded either in principle or in fact. He did not of course deny that the United States had a greater interest in the Canal than that of any other Power, but he pointed out at the same time that the Canal meant much to Great Britain also, and that the

[1] Cf. Moore, *op. cit.* § 360.

[2] Parliamentary Papers, United States No. 1, 1882 (C. 3110), pp. 13 and 15 respectively.

United States was estopped from any action in respect of it contrary to the obligations she had contracted by treaty. This (the Clayton-Bulwer) Treaty could not be regarded as having become void. It was as capable of fulfilling the objects for which it was intended as when it was originally concluded.[1]

104. Mr. Blaine's successor, Mr. Frelinghuysen, by way of answer to Lord Granville (May 8, 1882), tried to dissect the Clayton-Bulwer Treaty in detail.[2]

105. According to him, Articles I to VI of it were directed to particular objects, the making of a Nicaraguan Canal, which had lapsed, and the dispossession of Great Britain from territory which she had not abandoned. The extension of the general principle of neutrality in Article VIII to the Panama and other routes 'required', he said, 'the subsequent co-operation of both parties to carry out, and there had been no such co-operation for the purpose'.

106. As to the proposed international guarantee, he asserted that any such agreements among the Powers of Europe in regard to the Canal must lead to their political intervention in American affairs, which the traditional policy of the United States made it impossible that the President should either assent to or look on with indifference.

107. This attack upon the Clayton-Bulwer Treaty came to an end under President Cleveland's presidency. The President refused to authorize the Frelinghuysen-Zavala Treaty of December 1, 1884, between the United States and Nicaragua, by which a canal was to be constructed, to be owned by them in common. He said in his message to Congress:

> 'Whatever highway may be constructed across the barrier dividing the two greatest maritime areas of the world must be for the world's benefit, a trust for mankind, to be removed from the chance of domination by any single Power.'[3]

[1] As to the grounds of the voidance of treaties see Oppenheim, *op. cit.*, vol. i, p. 576, &c., &c.

[2] Moore, § 360.

[3] Moore, § 362.

108. In 1896 Secretary Olney issued his well-known memorandum, in which he examined the history of the Clayton-Bulwer Treaty and showed the weakness of Secretary Frelinghuysen's arguments against its existing validity. Mr. Olney said:

> 'Upon every principle which governs the relations to each other, either of nations or of individuals, the United States is completely estopped from denying that the Treaty is in full force and vigour. If changed conditions now make stipulations, which were once deemed advantageous, either inapplicable or injurious, the true remedy is not in ingenious attempts to deny the existence of the Treaty or to explain away its provisions, but in a direct and straightforward application to Great Britain for a reconsideration of the whole matter.'[1]

109. But, while American statesmen no longer contested the binding force of this Treaty, public opinion in the United States was fully resolved to have a canal constructed under its own control. The war with Spain had shown the want of such a canal for strategic purposes in connexion with the Philippine Islands; and its commercial advantages were increasingly recognized.

110. The disastrous failure of de Lesseps' Panama Company in 1888 had led to the conclusion that the construction of the Canal could not be left to a private company, but must be undertaken by the United States itself with its immense resources. The American Government recognized that, to enable this constructive policy to be carried out, the consent of Great Britain to the supersession of the Clayton-Bulwer Treaty must be obtained. This Great Britain was not unwilling to grant, if she could secure the free use of the Canal for her own navigation and for that of other nations on equal terms. Hence, under President McKinley's administration, negotiations were entered into with the British Ambassador, Lord Pauncefote, who, as Sir Julian Pauncefote, had taken a principal part in the negotiations which led to the Suez Canal Convention of Constantinople.

111. The negotiations between Mr. Hay, the American Secretary of State, and Lord Pauncefote in 1899 and the

[1] Moore, § 364.

following year led to the settlement of the Canal question between the United States and Great Britain which is known as the Hay-Pauncefote Treaty. The original Treaty which they signed (February 5, 1900) differed in some important respects from the subsequent one which was ratified. It failed on account of amendments which the Senate of the United States had inserted in it and which the British Government refused to accept. Some of the points of difference between the Treaty which came into force and the previous Treaty and the amendments which were proposed or inserted in it will be noticed in the course of examining the terms of the final Treaty.

The Hay-Pauncefote Treaty of November 18, 1901

112. The object of the Treaty is stated in its preamble to be to facilitate the construction of a Ship Canal by removing any objection which may arise out of the Clayton-Bulwer Treaty to this being done under the auspices of the United States, without impairing the 'general principle' of neutralization established in Article VIII of that Treaty.[1] Thus the Treaty was intended to give the United States a free hand to make the Canal by itself apart from Great Britain, while at the same time not interfering with the neutral character which the Canal would have had if it had been made under the Clayton-Bulwer Treaty itself.

113. What the general principle mentioned in Article VIII of the Clayton-Bulwer Treaty was meant to signify is not made altogether clear in that Treaty.[2] But it would seem to include nothing less than the keeping of the Canal open in time of war and peace, on the same terms not only to the subjects and citizens of Great Britain and the United States but also to the subjects and citizens of all other States. It is implied in the principle that the Canal must be kept immune from belligerent acts which might interfere with its free use. For effecting

[1] Cf. § 96 above.

[2] § 96 above

this purpose the same term 'neutralization' is also used in Article III of the Treaty, the Rules of the Suez Canal Convention of Constantinople being there declared to be adopted as the basis of it. The word is again used in Article IV of the Treaty. Thus the Treaty was intended to secure for the Canal this open and free character, thereby neutralizing it. Whether the Panama Canal can properly be said to have been made neutral is questioned.[1]

114. *Article I.* 'The High Contracting Parties agree that the present Treaty shall supersede the afore-mentioned Convention of the 19th April, 1850.'

Article II. 'It is agreed that the canal may be constructed under the auspices of the Government of the United States, either directly at its own cost, or by gift or loan of money to individuals or Corporations, or through subscription to or purchase of stock or shares, and that, subject to the provisions of the present Treaty, the said Government shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.'

Article 1 declares the agreement of the two Parties that this Treaty shall supersede the Clayton-Bulwer Treaty of 1850. In the original Hay-Pauncefote Treaty, which was dropped, the former Treaty was not declared to be superseded, and thus would have been left in force except in so far as its terms were incompatible with those of the new Treaty; but it is now, by Article I, entirely superseded (not declared void), this word being used because the new Treaty takes over the general principle of neutralization from the former one. It will be seen that Article II leaves it open to the United States either to carry out the undertaking as a State concern, which it subsequently did, or to carry it out through a company

[1] See on this subject § 8 above, and *The Neutralisation Features of the Hay-Pauncefote Treaty* (American Historical Association, Washington, Annual Report, 1902); P. C. Hains, *Neutralisation of the Panama Canal* (American Journal of International Law, New York, vol. iii (1909), p. 354); H. S. Knapp, *Real Status of the Panama Canal* (vol. iv (1910), p. 314 of the same); C. Kennedy, *Neutralisation and Equal Terms* (vol. vii (1913), p. 27 of the same).

as had been heretofore the custom. But in order to acquire the right either of constructing the Canal directly or of supervising its regulation and management, a further Treaty with the territorial Power would be necessary, this Power not being a Party to the Treaty. To acquire territorial sovereignty over the Canal route was not, it may be noticed, essential for the purpose of constructing the Canal directly.

115. '*Article III.* The United States adopts, as the basis of the neutralization of such ship-canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:

'1. The canal shall be free and open to the vessels of 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 respeet of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

'2. 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.

'3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the Regulations in force, and with only such intermission as may result from the necessities of the service.

'Prizes shall be in all respects subject to the same Rules as vessels of war of the belligerents.

'4. No belligerent shall embark or disembark troops, munitions of war, or warlike materials in the canal, except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible dispatch.

'5. The provisions of this Article shall apply to waters adjacent to the canal, within three marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time except in case of distress, and in such case shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

'6. The plant, establishments, buildings, and all works necessary to the construction, maintenance, and operation of the canal shall be deemed to be part thereof, for the purpose of this Treaty, and in time of war, as in time of peace, shall enjoy complete immunity from attack or injury by belligerents, and from acts calculated to impair their usefulness as part of the canal.'

It is to be noticed that the United States alone adopts the Rules, not Great Britain and the United States. Hence the United States alone is bound to see to their observance. The original Treaty had been in a dual form, making the adoption of the Rules obligatory on the part of Great Britain as well as the United States. Lord Lansdowne, in the course of the negotiations, laid stress on the importance of this alteration as materially diminishing the obligations of Great Britain. It will be found that the Rules adopted from the Suez Canal Convention are not adopted verbatim, the Rules of the two Treaties differing from one another in some important respects.[1] In interpreting Rule 1 it is necessary to determine what is included in the expression 'all nations', which is used in it. On the answer to this mainly depends the Tolls question about which Great Britain and the United States were subsequently divided.[2] The contention on the part of the American Government in the dispute was that the phrase meant all nations other than the United States itself.

116. The United States by adopting the Rules had thereby, it said, only asserted its willingness to put them into force and administer them. Holding this position, it did not mean to make itself subject to them, as it has been admitted it could not altogether be, if it acquired territorial power over the Canal. 'All nations observing the Rules', it maintained, was an expression not applicable to the nation administering and enforcing the Rules.

117. This interpretation of the expression cannot, however, be accepted. The words are not qualified in

[1] The texts of these two Treaties should be compared. See Appendix.

[2] See § 153, &c., &c., below.

any way by the context. It would be inconsistent with the principle of equality among nations in respect of the use of the Canal, which had been previously recognized and which regulated the Suez Canal, to imply that the United States was to be exempt from the Rules. It was not as if it were itself laying rules down respecting the use of its territory which other nations were to follow. The United States was not the territorial Power at the time the Treaty was made; and the Treaty might, as has been noticed, have been carried into full effect without its ever becoming so. To exempt one Power from the operation of the Rules was inconsistent with the principle of neutralization to which it was the declared object of the Treaty to give effect. Unless Great Britain was to be allowed to navigate the Canal as freely as the United States, it is impossible to suppose that she would have abandoned the rights she had under the Clayton-Bulwer Treaty. To allow her commerce to be put at a disadvantage by discriminating tolls was evidently very far from her intention in becoming a party to the new Treaty.

118. It is to be noticed that, whereas the Suez Canal Convention in Article I declares that the 'Canal shall always be free and open in time of war as in time of peace', the words 'in time of war as in time of peace' are not mentioned in Article III, Rule 1, of this Treaty. Such words were inserted in its original form and were subsequently omitted. It cannot, however, be inferred on account of this omission that the Canal is not to be open in time of war, since Article IV and other Articles of the Treaty show that it is to be thus open.

119. We may mention that the words 'observing these Rules' in this Article were inserted, at the instance of Lord Lansdowne, to make the vessels of other nations amenable to the Rules as well as those of the parties to the Treaty. They were added on account of an objection entertained by Lord Lansdowne to the Treaty in its original dual form, viz. that it made Great Britain subject to liabilities from which other nations were free. These words do not impose any obligations on States which

have not consented to them, as is not indeed possible,[1] but they qualify their free use of the Canal.

120. Rules 2, 3, and 4 make the Panama Canal, like that of Suez,[2] exempt from acts of war or hostility. But there are not in this Treaty any clauses, such as we found in the Suez Canal Convention of Constantinople, excepting the territorial Power from their operation in so far as this may be necessary for the defence of the Canal and its other territory.

121. The questions of interpretation to which these omissions give rise, particularly that respecting the right of fortifying the Canal, have led to much discussion and division of opinion, though they have not been subjects of diplomatic conflict. In considering them it must be remembered that, if the United States had adopted the course of constructing the Canal or of having it constructed under a concession from the territorial Power—which was open to it under the Treaty—the question of the right of taking military measures for its defence would not have arisen. For this case the terms of the Treaty make sufficient provision. A military police for keeping order in the Canal and the Canal zone would be the most that could be required by the United States for the protection of the Canal.

122. But in the event (which happened) of the United States itself becoming the territorial Power over the Canal and the Canal zone, the exercise of the elementary right of defending its own territory by all the military means in its power might be necessary and could only be taken away from it by the express terms of a Treaty. Those laid down in Article III do not seem to be sufficient to do this; while, as Professor Oppenheim notices,[3] the provision in Article II of the Treaty, that the United States shall have all the rights incident to the construction of the Canal, as well as the exclusive right of providing for its regulation and management,

[1] Cf. § 8 above.

[2] Cf. Articles IV, V, and VI of the Suez Canal Convention.

[3] L. Oppenheim, *The Panama Canal Controversy*, Cambridge, 1913, p. 22.

includes the right of defending it in any way that may be necessary. It will be seen that the Hay-Varilla Treaty, which is based on the Hay-Pauncefote, expressly gives the United States the right of protecting the Canal (Article XXIII).

123. That this is the right view to be taken of the omission in the Hay-Pauncefote Treaty of the exceptions made in the earlier draft Treaty, as in the Suez Canal Convention, in respect of the protection of the Canal, is confirmed by what Lord Lansdowne wrote in his memorandum of August 3, 1901, criticizing the amendments to the Treaty which were proposed.[1] 'As to this' (the defence of the Canal), he remarked:

> 'I understand that by the omission of all reference to the matter of defence the United States' Government desire to reserve the power of taking measures to protect the Canal, at any time when the United States may be at war, from destruction or damage at the hand of an enemy or enemies. On the other hand, I conclude that, with the above exception, there is no intention to derogate from the principles of neutrality laid down by the Rules. As to the first of these propositions, I am not prepared to deny that contingencies may arise when, not only from a national point of view but on behalf of the commercial interests of the whole world, it might be of supreme importance to the United States that they should be free to adopt measures for the defence of the Canal at the moment when they were themselves in hostilities.'

Thus Lord Lansdowne allows that—

> 'exception could not be taken to an arrangement under which supposing that the United States, as the Power owning the Canal and responsible for the maintenance of its neutrality, should find it necessary to interfere temporarily with its free use by the shipping of another Power, that Power would thereupon at once and *ipso facto* become liberated from the necessity of observing the Rules laid down in the Treaty.'[2]

124. On the question of the right of the United States to fortify the Canal the opinions of publicists have been

[1] Parliamentary Papers, United States No. 1, 1902 (Cd. 905), p. 2.

[2] The right of the United States to take measures in defence of the Canal was subsequently admitted by Sir Edward Grey. (Cf. § 158 below.)

much divided. The right is not excluded by the express terms of the Treaty, as it had been by the Clayton-Bulwer Treaty of 1850, by the Suez Canal Convention of Constantinople, and by the original draft of the Hay-Pauncefote Treaty. The absence of any such prohibition in the final form of the Treaty seems to be a strong argument in favour of the retention of the right, should the United States become the territorial Power. The express declaration of the right of the United States to maintain a military police in the Canal does not seem enough of itself to exclude the right of fortifying it. We have already expressed the opinion that the fortification of a territory is not inconsistent with the principle of neutralization.[1] The permanent fortification of the Suez Canal was forbidden, not because it would be contrary to the principle of neutralization, but on account of the fear of the Powers that the Canal might be thereby maintained under the exclusive control of one of them. For a similar reason the Clayton-Bulwer Treaty had prohibited such fortifications. But the Hay-Pauncefote Treaty contemplated the exclusive control of the trans-isthmian Canal by the United States; and therefore the previous ground for excluding the right of fortifying the Canal no longer existed. Interpreting the Hay-Pauncefote Treaty on this subject in favour of the United States, Sir Edward Grey and the British Government have never objected to its fortification of the Panama Canal; and at the present time the Canal is strongly fortified at both entrances.[2]

125. The actual right of fortifying the Canal could only be derived from territorial sovereignty. By Article XXIII of the Hay-Varilla Treaty it was declared that

> 'if it should become necessary at any time to employ armed forces for the safety and protection of the Canal, or of the ships

[1] Cf. § 37 above.

[2] On the question of the fortification of the Panama Canal see in American Journal of International Law (1909 and 1911), articles by Olney, Wambaugh, and Kennedy, and cf. Oppenheim, *International Law*, 2nd ed., vol. i, p. 252, note 1; E. Catellani, *Il Canale di Panama*, Rome, 1913, p. 58.

that make use of the same, or the railways and auxiliary works, the United States shall have the right, at all times and in its discretion, to use its police and its land and naval forces or to establish fortifications for these purposes.'

For the reasons that have been given, it may be inferred that the restrictions prescribed by the Hay-Pauncefote Treaty as to belligerent vessels revictualling, taking stores (e.g. coaling), embarking and disembarking troops, munitions of war, or warlike materials in the Canal, do not apply to the United States, at least in so far as the defence of the Canal zone is concerned. The American Government gave them a wide interpretation from the time when it became a belligerent in the late war. It enforced them on other nations, even on its own allies, but it made for itself the Canal a basis of hostilities. Accordingly it refused to allow British vessels of war to coal in the Canal, except to the limited extent allowed by the Rules.

126. It should be noticed that the obligation of the United States to carry out the Rules is only contracted with Great Britain. A third Party to the Treaty, such as Germany, would therefore have no ground of complaint if by agreement between these two States this obligation were in any way modified, as by exempting Great Britain from the Rules during the war.[1] Whether this would be a wise policy is another question, but it would not be a breach of good faith on their part.

127. *Article IV.* 'It is agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned Canal shall affect the general principle of neutralization or the obligation of the High Contracting parties under the present Treaty.'

This is a provision which we have not found in previous canal Treaties, and it would seem at first sight to be an unnecessary one. For a change of territorial sovereignty, such as was not unfrequently brought about by revolution

[1] Cf. § 8 above.

in Central American republics, would evidently not be a change of circumstances such as would be required to void this Treaty. The new sovereign would become a party to the Treaty by way of succession.[1] But what the Article seems particularly to provide for is the event of the United States becoming the sovereign Power over the Canal territory, in which case questions might arise as to the binding force of the Treaty under the new conditions thus created. The Article is not to be interpreted in such a way as would prevent the United States, on becoming the territorial Power, being exempted from the Rules so far as the defence of the Canal makes it necessary. Lord Lansdowne's memorandum above cited makes this clear. The meaning is that the fact of the United States acquiring ownership of the Canal territory is not to interfere with the general object of the Treaty in respect of the neutralization of the Canal.

128. In the abortive Treaty of 1900 there was a clause inviting other States to accede to it, which might have led to the Treaty becoming a general one. This was struck out by the Senate of the United States in pursuance of the policy of excluding European States from interfering in American affairs. The Hay-Pauncefote Treaty, unlike the Convention of Constantinople, on which it was based, has only two Parties to it, though its object is the benefit of all nations. The only guarantee of the neutralization of the Panama Canal which it contains is the engagement to adopt the Rules which the United States has made with Great Britain in the Treaty.[2]

129. The Hay-Pauncefote Treaty having removed the barrier of the Clayton-Bulwer Treaty, the United States became free to construct a canal by itself. It had for some time previously been considering the steps which it should take for effecting this purpose. Thus it had caused to be made from time to time exhaustive reports by Commissions and other bodies and persons on all kinds of topics relating to the trans-isthmian Canal, and especially

[1] See § 82 above, and cf. Oppenheim, *International Law*, vol. i, § 80, &c.

[2] Cf. § 8 above.

as to the choice of a canal route.[1] It was the final report of the Isthmian Canal Commission in 1909, reversing its previous one in favour of the Nicaraguan and recommending the Panama route, that determined the American Government to prefer the latter. The Commission had changed its opinion principally because the New Panama Company had at length agreed to accept its valuation of $8,219,500 for the Company's interest, which had previously been refused. The Commissioners' Report of 1902 recommended the Government to purchase at this price. Before, however, the American Government could enter into the transaction, it was necessary that it should acquire from the territorial State the right of constructing the Canal, and also establish in agreement with it the neutralization of the Canal according to the terms of the Hay-Pauncefote Treaty. For this latter Treaty only created obligations between the two States that were Parties to it; it could not have the effect of neutralizing territory belonging to a third Party.

130. A Treaty with the Republic of Colombia was therefore necessary to enable the United States to construct the Panama Canal as it proposed. This the American Government now took steps to negotiate. On June 28, 1902, an Act of Congress, known as the Spooner Act, had been passed, authorizing the President to acquire, at a cost not to exceed $40,000,000, the rights, privileges, concessions, and other property of the New Panama Company. In the event of his failing to come to terms with Colombia he was authorized to acquire the Nicaraguan route. Colombia, the sovereign State in Panama, which was one of its departments, set a high value on its Canal monopoly, and was not prepared to cede it to the great North American Republic except on very advantageous terms. It has been mentioned that, as sovereign over Panama, Colombia was the successor of New Granada, and had thus succeeded to the Treaty

[1] See *List of United States Government Publications on the Panama Canal*, issued by the Superintendent of Documents, Washington, D. C., 1915.

of 1846, which this Republic had contracted with the United States in respect of Panama and transoceanic routes in it. We have already referred to the terms of this Treaty [1] and found that it did not give the United States any claim to the transfer of rights over Panama territory.

131. In consequence of negotiations entered into by the American Government under the authority of the Spooner Act, a Treaty was signed with Colombia on June 22, 1903, and confirmed at Washington on March 17, 1903. It is known as the Hay-Herran Treaty.[2] This conceded to the United States the exclusive right of constructing and controlling a Canal through Panama, transferring to that Power the Canal route and the zone of territory on both sides of it, which was declared to be neutral. The sovereignty of Colombia over the territory dealt with was not actually assigned to the United States by the Treaty, but the United States was to have the right of constructing, maintaining, and protecting the Canal for a term of 100 years, which it might extend at its pleasure for another 100 years; to exercise police powers over it, as contemplated by the Hay-Pauncefote Treaty; to guarantee its neutrality; and in case of urgent necessity to protect it by its military forces without the consent of Colombia, on condition that it should withdraw its forces when Colombia was able to supply sufficient troops for the purpose. Colombia was to receive from the United States a sum of $10,000,000, and a rent of $250,000 annually after sufficient time had elapsed to enable the Canal to be completed. But, whether it was that Colombia wished to hold out for better terms or that public opinion in that country had turned against such a surrender of the Canal to another State as the Treaty entailed, the Colombian Senate finally rejected the Treaty.

132. This was on August 12, 1903. The American Government at once expressed its strong disapproval of

[1] Cf. §§ 81–3 above.
[2] Cf. Catellani, *Il Canale di Panama*, pp. 30, 31.

the conduct of Colombia; and the department of Panama, which had always been in favour of the Treaty, was full of indignation at this summary rejection of the project of a canal to be made in its territory. Impolitic as the conduct of Colombia undoubtedly was, she had, as an independent Republic, a right to refuse to have the Canal made in her territory, if she chose. But President Roosevelt, in his annual message to Congress of December 7, 1903, and again in his special message of January 4, 1904, questioned this when, amongst other things, he said:

'Under the Hay-Pauncefote Treaty it was explicitly provided that the United States should control, police, and protect the canal which was to be built, keeping it open for the vessels of all nations on equal terms. The United States thus assumed the position of guarantor of the canal and of its peaceful use by all the world. The guarantee included, as a matter of course, the building of the canal. The enterprise was recognized as responding to an international need; and it would be the veriest travesty on right and justice to treat the governments in possession of the Isthmus as having the right, in the language of Mr. Cass, "to close the gates of intercourse on the great highways of the world, and justify the act by the pretension that these avenues of trade and travel belong to them and that they choose to shut them".'[1]

133. President Roosevelt further said (Jan. 4, 1904):

'It was the opinion of eminent international jurists that in view of the fact that the great design of our guaranty under the treaty of 1846 was to dedicate the Isthmus to the purposes of interoceanic transit, and above all to secure the construction of an interoceanic canal, Colombia could not under existing conditions refuse to enter into a proper arrangement with the United States to that end without violating the spirit and substantially repudiating the obligations of the treaty the full benefits of which she has enjoyed for over fifty years. My intention was to consult the Congress as to whether, under such circumstances, it would not be proper to announce that the canal was to be dug forthwith.'

A revolution in Panama had, however, made it un-

[1] Cf. § 4 above.

necessary to take this course. On November 3, 1903, the independence of that country was declared. It was almost immediately recognized by the United States, and not long afterwards by other Great Powers (including Great Britain). On November 18 the new Republic entered into the Panama Canal Treaty with the United States, which is called the Hay-Varilla Treaty.[1]

134. Such prompt recognition of a Government created by revolution was made a subject of complaint by Colombia. This, it may be said, had not any sufficient legal ground. A Government is justified in recognizing a new State, if the new State 'is safely and permanently established';[2] and this was secured in the case of Panama by the continuance of the guarantee given by the United States to New Granada in 1846, and confirmed by the new Treaty.

The Hay-Bunau-Varilla Treaty or Panama Convention of November 18, 1903

135. By this Convention, which in its first Article expressly declares that the United States guarantees and will maintain the independence of the Republic of Panama, the United States acquired the right, which it had long been seeking, of constructing a trans-isthmian canal under its own exclusive control. In entering into this Convention it was under an obligation to Great Britain not to agree to any terms which would be inconsistent with the Hay-Pauncefote Treaty; but as the Republic of Panama was not a Party to the latter Treaty, her agreement with the United States could not be affected by it. Thus, where the terms of the two Treaties clash, they are in neither case on this account invalidated, the rights and obligations established by the one being independent of the rights and

[1] For the text of Article XVIII of this Treaty see Appendix, p. 110.
[2] See Oppenheim, *International Law*, vol. i, § 74.

obligations established by the other, though concerning the same subject-matter.

136. The second Article effected the main object of the Convention by granting 'to the United States in perpetuity the use, occupation, and control of a zone of land and land under water' for the construction and maintenance of a canal,

> 'the said zone beginning in the Caribbean Sea three marine miles from mean water mark, and extending to and across the Isthmus of Panama into the Pacific Ocean to a distance of three marine miles from mean low water mark, with the proviso that the cities of Panama and Colon and the harbours adjacent to said cities, which are included within the boundaries of the zone above described, shall not be included within this grant.'

In Article III

> 'the Republic of Panama grants to the United States all the rights, power, and authority within the zone mentioned and described in Article II . . .' which the United States would have 'if it were the sovereign of the territory . . . to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power and authority.'

137. According to this Article Panama still retains a barren sovereignty over the territory. It may, perhaps, be questioned whether, in the unlikely event of the Canal being abandoned, Panama could reclaim the zone. But for all practical purposes its sovereignty is transferred to the United States. In Article VIII Panama grants to the United States all its rights in the New Panama Canal Company, and authorizes the New Panama Canal Company to sell to the United States its rights, privileges, properties, and concessions, as well as the Panama Railroad. In Article XIV the United States agrees to pay to Panama the sum of $10,000,000 and an annual payment of $250,000, beginning nine years from the date of ratification of the Convention.

138. In Article XVII Panama grants to the United States the use of all ports open to commerce as places of

refuge for vessels employed in the Canal enterprise, and for all vessels passing through the Canal which may be in distress, such vessels to be exempt from all dues on the part of the Republic of Panama.

139. Article XVIII declares that 'the canal, when constructed, and the entrances thereto shall be neutral in perpetuity' in conformity with Article III, Rule 1, of the Hay-Pauncefote Treaty and with its other stipulations. The unqualified terms of this Article certainly favour the view that by 'all nations', in Rule 1 here referred to, the United States is included.[1]

140. Article XIX declares that

> 'the government of the Republic of Panama shall have the right to transport over the canal its vessels and its troops and munitions of war in such vessels at all times without paying charges of any kind'.

This clause of the Treaty seems to be inconsistent with Article III, Rules 1, 3, and 4 of the Hay-Pauncefote Treaty. For it gives the Republic of Panama a privileged position in respect of the payment of tolls, munitions of war, &c., &c. If this is the case, the United States was disregarding its Treaty with Great Britain when it agreed to the clause; but nevertheless Panama has a valid claim to its enforcement.[2]

141. Article XXIII, as has been mentioned,[3] gives the United States an undoubted right to fortify the Canal and to take other measures for its protection. The question whether, by thus acting, it would be infringing the obligations it contracted in the Hay-Pauncefote Treaty with Great Britain has been already considered.[4]

142. It is to be noticed that in Article XXV Panama agrees

[1] See §§ 115–17 above.
[2] Cf. § 135 above, and see Oppenheim, *Panama Canal*, pp. 48–51.
[3] See § 122 above.
[4] Cf. §§ 120–3 above.

'for the better performance of the engagements of this convention and to the end of the efficient protection of the canal and the preservation of its neutrality,' to 'sell or lease to the United States lands adequate and necessary for naval and coaling stations on the Pacific coast and on the Western Caribbean coast of the Republic at certain points to be agreed upon with the President of the United States.'

It is well known that the stations referred to have been fully established, and that the naval position of the United States in the seas adjacent to the Canal has been much strengthened by these and other accessions of territory.

143. Other Articles of the Convention carry out its objects in detail, giving further rights and powers to the United States. The Convention was ratified on February 25, 1904. In 1909 Mr. Secretary Root effected a triple agreement between the United States, Panama, and Colombia,[1] by which the latter State was prevented from disputing any further the independence of Panama and her right to concede territory to the United States.

144. The construction of the Canal, which was set about soon after the Hay-Varilla Treaty was concluded, took some years to complete. Before it was carried out Congress passed an Act for the administration of the Canal, which was approved on August 24, 1912.

The Panama Canal Act[2]

145. The Act defines the Canal and the land attached to it in conformity with the Hay-Varilla Treaty.[3] It authorizes the President to acquire, by treaty with the Republic of Panama, any additional land that he may deem necessary for the operation, maintenance, sanita-

[1] Cf. Catellani, *op. cit.*, p. 37.

[2] For the text of the Act and for President Taft's Memorandum see Parliamentary Papers, Misc. No. 12, 1912 (Cd. 6451), Appendix 1, p. 7, &c.

[3] Cf. § 136 above.

tion, or protection of the Panama Canal . . . which additional land so acquired shall become part of the Canal zone. In respect of the administration of the zone the President is authorized to discontinue the services of the Isthmian Canal Commission and to complete, govern, and operate the Panama Canal, and to govern the Canal zone through a Governor. Special district courts in the zone are set up. Powers of regulating traffic, &c. are given to the Interstate Commerce Commission.

146. The President is authorized by it

> 'to prescribe and from time to time change the tolls that shall be levied by the Government of the United States for the use of the Panama Canal'; and it is added, 'No tolls shall be levied upon vessels engaged in the coastwise trade of the United States'.

147. The Act further declares that, when based upon net registered tonnage,

> 'the tolls shall not exceed 1 dol. 25 c. 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 XIX of the Convention between the United States and the Republic of Panama, entered into on November 18, 1903'.

148. The provisions referred to have been already mentioned.[1] Thereby Panama obtained entire exemption from tolls and other charges for her shipping. This stipulation she was entitled to make, and it is binding on the United States, though, by agreeing to it, the latter Power was contravening Article III, Rule 1, of the Hay-Pauncefote Treaty with Great Britain, which laid down that there shall be no discrimination against any nation or its citizens or subjects in respect of the charges of traffic or otherwise.[2]

149. This discrimination in favour of Panama was

[1] Cf. § 140 above.

[2] As to this exemption, see Oppenheim, *Panama Canal*, p. 48.

objected to by Sir Edward Grey on the part of the British Government; but what principally gave rise to the dispute between Great Britain and the United States on the Tolls question, as it is called, were the clauses in the Panama Act above cited which had, or might have, the effect of differentiating between the United States itself and other nations in respect of the payment of tolls.

150. The total exemption from tolls of vessels engaged in the coasting trade of the United States would not have offended against the principle of equal treatment of all nations if the term 'coasting trade' had been strictly circumscribed; but, considering the very extensive meaning which the United States has attached to it, such trade comes into competition with the trade of other nations, so that any exemption of it from tolls must produce inequality, as Professor Oppenheim has pointed out in detail.[1]

151. The Panama Canal Act does not, however, confine itself to exempting from the payment of tolls the vessels of the United States engaged in the coasting trade; for, as has been seen, it expressly gives the President of the United States the power, in fixing the rate of tolls, to exempt vessels of his own country.

152. Considering therefore how much such differentiation would affect the interests of Great Britain, it is not surprising that Sir E. Grey at once protested to the American Government against these clauses while the Act was going through the Houses of Congress, thus raising the question whether they were not in contravention of Article III, Rule 1, of the Hay-Pauncefote Treaty.

153. The subject was keenly discussed both in the House of Representatives and the Senate, and amendments to omit the toll clauses were proposed; but, although able speeches were made by Mr. Root and

[1] See *Panama Canal*, p. 31, &c. Cf. also L. Oppenheim, *The Meaning of Coasting-Trade in Commercial Treaties* (Law Quarterly Review, London, vol. xxiv (1908), p. 328.

others in support of the amendments, they were lost by a large majority in both Houses, the Act being passed on August 24, 1912. Subsequently the President by a proclamation prescribed tolls at $1.20 per net registered ton upon vessels loaded, without discriminating in favour of vessels of the United States as he was by the Act entitled to do, and no tolls on vessels engaged in the coasting trade of the United States. Thus he did not exercise the discretionary power, given him by the Act, of exempting vessels of citizens of the United States from the payment of tolls which he imposed on the vessels of citizens of other nations, though under the Act he is still entitled to do this at any time. What he actually did was to carry out the Act by levying no tolls on vessels engaged in the coasting trade of his own country.

154. President Taft, in signing the Panama Canal Act, appended a Memorandum to it in which he maintained that the exemption of the coasting trade of the United States from tolls was not, as the British protest alleged, contrary to the Hay-Pauncefote Treaty. According to him, by the third Article of the Treaty, which is the only one in question on the subject, the United States had not deprived itself of the exercise of the right to pass its own commerce free or 'to remit tolls collected for the use of the Canal'. The Canal was being constructed by the United States wholly at its own cost upon territory ceded to it by the Republic of Panama for that purpose. Unless it could be shown that it was restricted by this Article, the United States enjoyed absolute rights of ownership and control, including the right to allow its own commerce the use of the Canal upon such terms as it saw fit.

155. But, in the view of the President, no such restriction is contained in the Article. The rules specified in it, he declares,

> 'were adopted by the United States for a specific purpose, namely, as the basis of the neutralisation of the Canal, and for

no other purpose. The article is a declaration of policy by the United States that the Canal shall be neutral; that the attitude of this Government towards 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 right to the use of the Canal and to equality of treatment in the use depends upon the observance of the conditions of the use by the nations *to whom we extended that privilege. 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 the conditions. In other words, it was a conditional favoured-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.'[1]

156. Thus the President gave his authority to that interpretation of Article III of the Hay-Pauncefote Treaty which supported the American side of the Tolls question.[2] The defect of this interpretation seems to be that it leaves out of account the circumstances in which the Treaty was contracted. The assumption which the President makes in it, not only by implication but also in express words (which are italicized in the text), is that by the Treaty the United States extended or granted privileges to Great Britain, whereas it was in fact obtaining a release from the obligations which prevented it from becoming the territorial Power or from constructing the Canal independently of Great Britain.

157. Sir Edward Grey, the British Foreign Minister, in his dispatch of November 14, 1912, to the British Ambassador at Washington criticizing the tolls clauses of the Panama Canal Act and the President's Memorandum on the subject,[3] lays great stress on this point. He explains the relation of the Hay-Pauncefote and the Clayton-Bulwer Treaties to one another, observing that the case cannot be put more clearly than it was put by

[1] Cf. on the subject of these two kinds of equality of treatment, &c., Mr. Root's speech in *Addresses*, p. 252, &c.

[2] Cf. § 116 above.

[3] See Parliamentary Papers, Misc. No. 12, 1912 (Cd. 6451).

Mr. Hay himself, who, as Secretary of State, negotiated the Hay-Pauncefote Treaty, in the full account of the negotiations which he sent to the Senate Committee on Foreign Relations:—'These rules are adopted in the Treaty with Great Britain as a consideration for getting rid of the Clayton-Bulwer Treaty.'[1] As to the consideration to Great Britain for entering into the new Treaty Sir E. Grey remarks:

> 'If the rules set out in the Hay-Pauncefote Treaty secure to Great Britain no more than most-favoured-nation treatment, the value of the consideration given for superseding the Clayton-Bulwer Treaty is not apparent to His Majesty's Government.'

158. The Foreign Minister further notices in this dispatch an argument used in the Senate, on the American side of the question, which was not put forward in the President's Memorandum. This is that the third, fourth, and fifth Rules embodied in Article III of the Treaty show that the words 'all nations' cannot include the United States, because, if the United States were at war, it is impossible to believe that it could be intended to be debarred by the Treaty from using its own territory for revictualling its warships or landing troops.[2] This being so, it may be inferred (it is said) that none of the Rules were intended to be binding on the United States itself, which is not therefore within the prohibition against discrimination in Rule 1. Sir E. Grey's answer to this is that

> 'Rules 3, 4, and 5 of Article III of the Treaty are taken almost textually from . . . the Suez Canal Convention of 1888. At the date of the signature of the Hay-Pauncefote Treaty, the territory, on which the Isthmian Canal was to be constructed, did not belong to the United States; consequently there was no need to insert in the draft treaty provisions corresponding to those in

[1] In his speech to the Senate of May 21, 1914 (see *Addresses*, p. 256, &c.), Mr. Root pointed out that Mr. Choate and Mr. Henry White, who both took part in negotiating the Treaty, regarded it in the same light as Mr. Hay. Mr. Root at the same time also referred to President Roosevelt's message to Congress of January 4, 1904, laying before it the Panama Treaty, and supporting this view.

[2] Cf. § 121, &c., above.

Articles X and XIII of the Suez Canal Convention, which preserve the sovereign rights of Turkey and of Egypt, and stipulate that Articles IV and V shall not affect the right of Turkey, as the local sovereign, and of Egypt, within the measure of her autonomy, to take such measures as may be necessary for securing the defence of Egypt and the maintenance of public order, and in the case of Turkey, the defence of her possessions in the Red Sea. Now that the United States has become the practical sovereign of the Canal, His Majesty's Government do not question its title to exercise belligerent rights for its protection.'

159. Thus, according to this interpretation of the Article, the partial exemption of the United States from the operation of Rules 3, 4, and 5 is admitted on special grounds, which do not apply to Rule 1. There is no reason why the United States should not be included by the words 'all nations'; accordingly British vessels using the Canal are entitled to equal treatment with those of the United States and to the same tolls. The exemption of certain classes of ships from tolls, as the Act prescribed in respect of vessels engaged in the coasting trade of the United States and vessels belonging to the republic of Panama, would also, it is alleged in the dispatch, offend against another provision of Section 1 of Article III of the Treaty, viz. that declaring that 'conditions and charges of traffic shall be just and equitable', since the exemption from tolls of a particular trade using the Canal would throw an unfair proportion of the cost of maintaining it on vessels which had to pay tolls. The dispatch points out that, owing to the character of the coasting trade of the United States, its exemption from canal tolls would in fact differentiate in favour of American shipping.[1] In answer to the objection that the British claim would prevent the United States from remitting canal tolls which its own subjects had paid, as all other States might do, Sir Edward Grey disclaims any idea of trying to impose on it any restrictions, from which other nations are free, as to subsidizing its own commerce. Finally the dispatch invites the United States to agree to submit the whole case to arbitration,

[1] See § 150 above.

if it would prefer this course.[1] As to this it is to be remarked that, though the question is one of a kind well suited to this mode of settlement, it was doubtful whether either Government could insist on its being thus submitted under the existing Arbitration Treaty between the two States.[2] President Taft had suggested to Congress, in a message dated August 19, 1912, that it should pass an amendment by which British subjects who felt aggrieved by the Act might go to the Supreme Court of the United States for redress, but the suggestion was not adopted. Without such an enactment this was not open to them, the Supreme Court being bound in a question of conflict between a Treaty and a subsequent Act of Congress, such as was the Tolls question, to give effect to the Statute.[3]

160. The American and British Governments were still divided in this way on the Tolls question when Mr. Wilson became President of the United States. It was principally in consequence of his action in respect of it, that an end was put to the controversy between them. On March 5, 1914, he delivered in person a message to Congress in which he said:

> 'I have come to ask you for the repeal of that provision of the Panama Canal Act of August 24, 1912, which exempts vessels engaged in the coastwise trade of the United States from payment of tolls and to urge upon you the justice, the wisdom, and the large policy of such a repeal with the utmost earnestness of which I am capable. In my own judgment, very fully considered and maturely formed, that exemption constitutes a mistaken economic policy from every point of view, and is, moreover, in plain contravention of the treaty with Great Britain concerning the canal concluded on November 18, 1901. But I have

[1] Arbitration in the case was strongly recommended in a letter from the Carnegie Foundation, March 15, 1913, signed by Mr. Root, Mr. Brown Scott, and other well-known Americans. Cf. *Proceedings of the Third National Conference of the American Society for the Judicial Settlement of International Disputes*, edited by James Brown Scott (Baltimore, 1913), pp. 66–9 and 218–19.

[2] Cf. Oppenheim, *Panama Canal*, p. 44, &c.

[3] Cf. Oppenheim, op. cit., p. 42, &c.

not come to urge upon you my personal views. I have come to state to you a fact and a situation. Whatever may be our own differences of opinion concerning this much-debated measure, its meaning is not debated outside the United States. Everywhere else the language of the treaty is given but one interpretation, and that interpretation precludes the exemption I am asking you to repeal. We consented to the treaty; its language we accepted, if we did not originate; and we are too big, too powerful, too self-respecting a nation to interpret with too strained or refined a reading the words of our own promises just because we have power enough to give us leave to read them as we please. The large thing to do is the only thing that we can afford to do—a voluntary withdrawal from a position everywhere questioned and misunderstood. We ought to reverse our action without raising the question whether we were right or wrong, and so once more deserve our reputation for generosity and for the redemption of every obligation without quibble or hesitation. I ask this of you in support of the foreign policy of the Administration.'

A Repealing Bill of the provision in the Panama Canal Act enacting that 'no tolls shall be levied upon vessels engaged in the coastwise trade of the United States' had previously been introduced in both Houses of Congress, and after keen debates on the subject was carried, in the Senate fifty Senators voting for it and thirty-five against, ten abstaining. It was approved by the President on June 15, 1914.

161. The Act, it is to be observed, only repeals the words in the principal Act which exempt the coasting trade of the United States from tolls. It therefore leaves the exemption of vessels of the Republic of Panama unrepealed, and, what is more important, it does not repeal the provision of the Act which gives the President of the United States the power of excepting all vessels of the United States from the payment of tolls imposed on the vessels of other nations. This discretionary power the President has not made use of, but there is nothing to prevent any future President from doing so. Nor has the American Government admitted in any diplomatic way that it is restricted by the Hay-Pauncefote Treaty from differentiating in its own favour in respect of

Panama Canal tolls, as it pleases. Regarding the subject from a formal standpoint, it cannot therefore be said that the Panama Canal Tolls question is settled. Nevertheless there are good grounds for regarding it as one which is not likely to be re-opened.[1]

162. In the same year as the Repealing Act was passed, 1914, the Panama Canal was opened, and the great war began.

[1] The American literature on the Panama Canal Tolls question is extensive; see *Panama and the Canal Zone*, in the list of United States Government Publications; for Mr. Root's speeches see his *Addresses*; a full discussion of the subject will be found in Oppenheim's *Panama Canal*; Sir Erle Richards, *The Panama Canal Controversy*, Oxford, 1913; G. Butte, *Great Britain and the Panama Canal*, Heidelberg, 1913; M. Williams, *Anglo-American Isthmian Diplomacy*, Washington, 1916; W. F. Johnson, *America's ForeignRelations*, New York, 1916.

PART III

THE CANALS DURING THE RECENT WAR

(a) *The Suez Canal since the beginning of the War*

163. The international position of Egypt arising from the war which broke out in 1914 has been difficult to determine, on account of the different parts which Great Britain and the Ottoman Empire have taken in connexion with it. According to the Egyptian Constitution, as we have seen, Egypt was dependent in its external relations on the Sultan, and so could have no belligerent or neutral character of its own apart from him.[1] As a matter of fact, Egypt had not taken part in any war in which the Sultan was engaged since its Constitution was established, and though, during the Turco-Italian War of 1911, Italy treated her as a neutral State,[2] it is clear that her Government could not declare or be engaged in war on its own account, nor has Germany or any other Power declared war against Egypt. Hence, as the Ottoman Empire did not take part in the war at first, the constitutional status of the Egyptian Government was at this time also one of neutrality. But, while this was from a constitutional point of view its position, it is clear that since August 4, 1914, when Great Britain, being in military occupation of Egypt, declared war against Germany, Egyptian territory must be regarded as having been in a state of belligerency in respect of the latter Power, subject, however, to the international rights over the Canal which the Convention of Constantinople gave to the Contracting Parties.

[1] Cf. § 11 above.

[2] Hall, W. E., *A Treatise on International Law*, 7th ed., Oxford. 1917, p. 546, note 1.

For the state of belligerency or neutrality of a country, as Mr. Hall remarks,[1] is to be gathered from its actual condition.

> 'When', he says, 'a place is militarily occupied by an enemy, the fact that it is under his control, and that he consequently can use it for the purposes of his war, outweighs all considerations founded on the bare legal ownership of the soil.'

This passage was cited and approved in the *Gutenfels* case by the Judicial Committee of the Privy Council.[2] It was there decided—and the decision was followed in other cases[3]—that, 'having regard to the relations between Great Britain and Egypt, to the anomalous position of Turkey, and to the military occupation of Egypt by Great Britain', Port Said was an 'enemy port' within the meaning of the Hague Convention—that is, a port enemy to Germany. The constitutional relations of the Sultan to the Khedivial Government were made altogether impossible when, on November 5, 1914, Great Britain declared war against the Sultan, since thereby the Khedive had either to be engaged in a sort of civil war with his suzerain, or to be at war with the Power which had long been in military occupation of Egypt as its protector.

164. To avoid this dilemma, the British Government brought about a drastic change in the constitution of Egypt, putting an end to the Sultan's suzerainty and establishing itself in the country on a constitutional footing. Thus, by a Proclamation published in the Official Journal of Egypt and otherwise publicly announced, it declared through the Foreign Secretary that

> 'in view of the state of war arising out of the action of Turkey, Egypt is placed under the protection of His Majesty and will henceforth constitute a British Protectorate', and that 'the suzerainty of Turkey over Egypt is thus terminated, and His Majesty's Government will adopt all measures necessary for the defence of Egypt, and protect its inhabitants and interests'.[4]

[1] *International Law*, § 174.
[2] L.R. (1916), 2 A.C., p. 112, &c.
[3] See § 166 below.
[4] *London Gazette*, Dec. 18, 1914.

This was immediately followed by another Proclamation declaring the deposition of the late Khedive of Egypt, 'who had adhered to the king's enemies', and conferring the Khediviate, with the title of Sultan, on another member of the royal Egyptian house.[1]

165. Obviously the consent of all the Signatory Powers of the Treaty of London of 1840, which is necessary to give international effect to this change, could not be obtained during the war; but France, the Power which with Great Britain is most interested in the Canal, has agreed to it.

166. Some of the consequences of the Proclamations were pointed out by the British Foreign Secretary in a covering dispatch to the new Sultan, one of these being that the foreign relations of Egypt are henceforth to be conducted through His Majesty's representative at Cairo.[2] In this Paper we are concerned with the new Constitution of Egypt only in so far as it affects the Suez Canal. It will, it is clear, make a revision of the Convention of Constantinople of 1888 necessary. But in the meantime this Treaty may be regarded as being still in operation, the changes which have taken place in the character of the territorial Power not affecting the administration of the Canal as previously conducted by the Egyptian Government and the Suez Canal Company under the protection of Great Britain. The object of these Rules is that the Canal shall be kept open in time of war as well as in time of peace for the vessels of all nations, even when the territorial Power is a belligerent. As to this it is correct to say that no vessel has been actually prevented from passing through which fulfilled the conditions required of her. An order was indeed issued by the British General Officer Commanding the Forces protecting the Canal, that no enemy

[1] *London Gazette*, Dec. 22, 1914.

[2] See, as to the effects of the Proclamation, Sir M. McIlwraith, *The Declaration of a Protectorate in Egypt* (Journal of the Society of Comparative Legislation, No. XXXIX, p. 238); and *Egypt a British Protectorate* (American Journal of International Law, New York, vol. ix, No. 1, Jan. 1915, p. 202, Editorial Comment).

vessel was to enter the Canal.[1] But this was only a precautionary measure, occasioned by a reasonable fear that the Germans intended to sink ships for the purpose of blocking the Canal.[2] The British command of the high seas on both sides of the Canal effectually prevented German ships making any proper use of it. But there were some German ships at the ports of entrance or in the Canal when the war broke out, or which, like the *Concadoro*, took refuge there at this time. As to these the British Government sent a notification to foreign maritime States in the following terms:

'Since the outbreak of war certain ships of enemy countries have remained in the Suez Canal. Some of these vessels were detained by the Egyptian Government on account of hostile acts committed in the Canal; some because there was reason to apprehend that they contemplated hostile acts; others, though perfectly free, have refused to leave the Canal in spite of the offer of a free pass, thus disclosing their intention to use the ports of the Canal merely as ports of refuge, a measure which is not contemplated by the Suez Canal Convention. His Majesty's Government do not admit that the conventional right of free access to and use of the Canal enjoyed by merchant vessels implies any right to make use of the Canal and its ports of access for an indefinite time to escape capture, since the obvious result of permitting any such course must be greatly to incommode and even to block the use of the ports and Canal by other ships; and they are consequently of opinion that the Egyptian Government are fully justified in the steps which they are taking to remove from the Canal all enemy ships which have been long enough in the Canal ports to show clearly that they have no intention of departing in the ordinary way, and that they are putting the Canal and its ports to a use which is inconsistent with the use of the Canal in the ordinary way by other shipping.'

Cases on this subject have arisen in the British Prize

[1] See Lord Parmoor's judgement in the case of the *Concadoro* (L.R. (1916), 2 A.C., p. 199).

[2] In the *Concadoro* case, although the general order was in force at the time, permission to go through the Canal was granted, taking into account Hague Convention No. VI, 1907, Articles I and II, as to the condition of merchant ships found in an enemy port; but the master of the vessel refused to take advantage of it.

Courts, bringing Rules of the Convention into question. In the *Gutenfels* case, which the *Barenfels* and *Derflinger* followed,[1] it was decided, as has been already noticed, that the Suez Canal might be belligerent for certain purposes. This apparently means, that if the Suez Canal Convention did not give immunity to these vessels in the Canal, they were in the same position as in any other belligerent ports, and so had no right to stay in the Canal ports. As these vessels were not thus protected, they were on various grounds condemned. But, in order to observe strictly Article IV of the Convention relating to the exercise of rights of war in the Canal, and notwithstanding the fact that this Article was modified by Article IX, which gave the Egyptian Government a free hand to do what might be necessary for the execution of the Treaty, that Government thought it advisable to give these German vessels permission to leave the ports but not to enter the Canal, and without giving them a safe-conduct. As they refused to take advantage of these terms, they were conducted outside territorial waters, where they were captured by a British vessel of war. By their action in these cases the British and Egyptian Governments did not infringe the Rules for securing the freedom of transit through the Canal and its ports; and the Prize Court was free to condemn the vessels, since Port Said and Suez could not be used as ports of refuge by enemy merchant ships, though the duration of their stay in them was not expressly limited by the terms of the Treaty, as it was by Article IV for belligerent vessels of war.

167. The exercise of the right of visit or search of neutral vessels for contraband and the capture of them are acts of war, the commission of which either in the Canal itself or in its ports or within a distance of three miles from their furthest limit[2] is forbidden by the

[1] Cf. A. Wallace Grant, *British and Colonial Prize Cases* (London, 1916), vol. ii, Part VI, pp. 43 and 44.

[2] The exact points in the sea where the three-mile limit ends do not appear to be indicated in Admiralty charts, or to have been clearly defined.

Suez Canal Convention. Nor would it appear that the sovereign Power over Egypt, as Great Britain became when she succeeded the Sultan as suzerain, is exempted from Article IV of the Convention, as this Rule is cancelled by Article X, since the exercise of the right of visit and search in the Canal cannot be said to be necessary for its defence or for that of Egypt. Hence British naval officers, when the war broke out in 1914, were instructed not to examine vessels within the Canal area, but beyond it; that is, either in the open sea, or—after the British Protectorate of Egypt had been declared—in other Egyptian territorial waters or elsewhere. They soon, however, found by experience that the boarding and examination of ships in outside waters adjacent to the Canal was very inconvenient, and in some winds impracticable. Having no facilities for overhauling cargo there, they had frequently to leave vessels, after examining their papers, to be dealt with farther on by the French or English Navy as opportunity for doing so should arise. The disadvantage of this state of things became more serious after the issue of the Reprisals Order in Council of March 11, 1915, especially as this was made to apply to Austria and other belligerent States as well as to Germany. In order, therefore, to have greater freedom in controlling commerce at the eastern end of the Mediterranean, British admirals on the Canal Station raised the question whether the objection arising from the Convention to examining vessels inside the three-mile limit could not in some way be got over, so that vessels, after being examined within it, might be intercepted if necessary by British cruisers at the entrance of the Canal and conducted to Alexandria to be tried by the Prize Court which had been set up there (called, after the British Protectorate was proclaimed, H.M. Prize Court for Egypt).

168. Such being the object in view, a way for effecting it without apparently disregarding the Suez Canal Convention was proposed. This was that the examination of vessels should be conducted within the three-mile limit of the Canal, but that it should be done with the

primary and ostensible object of seeing that they were not engaged in any undertaking likely to affect the free navigation and safety of the Canal. If the result of it showed that the vessel contained nothing likely to injure the Canal, but that there was on board contraband or enemy's cargo, it should be allowed to pass through, the information thus gained being, however, passed on to places or ships outside with a view to formal capture there. This course of proceeding was submitted to Sir Edward Grey for his approval, and he appears, at the end of March 1915, to have assented to it. While the Foreign Secretary laid down that any right of war exercised within the three-mile limit at Suez is technically a violation of the Suez Canal Convention (1888), he was of opinion that the object of the Convention was primarily the protection of the Canal itself, and that it would therefore be in conformity with the spirit of the Convention if Great Britain, on whom the duty of protecting the Canal has devolved, were to search vessels within the three-mile limit in order to ascertain that they were not engaged in any enterprise likely to affect the free navigation of the Canal. He had some doubt whether this principle could be extended so as to justify the examination of cargo also, since this would only have an indirect connexion with the protection of the Canal. But he thought that, if this were done with reasonable discretion, no objection to it in practice was likely to be raised. At the same time he stated that no capture or detention of guilty or suspected vessels should take place within the three-mile limit. With the main principle thus expressed by this high authority there is likely to be general agreement. It is in fact evident that the examination of vessels within the Canal area, in so far as this is really necessary for securing the safety of the Canal, is in accordance both with the letter and the spirit of the Convention (see especially Article X). In respect of the doubt which Sir Edward Grey raised about the examination of the cargo of vessels in the Canal area, it is to be noticed that the cargo of a ship may contain articles, such as bombs, calculated to injure

the Canal, and so the cargo may require examination as much as the ship itself. That the information acquired by the territorial Power as to the character of vessels passing through the Canal may be used by it for other purposes besides that of securing the safety of the Canal seems to be in no way contrary to the Convention. The above seems to have been the practice established in 1915 as to the search of neutral vessels passing through the Canal.

169. It may be added that, since Italy became a belligerent, Holland and Spain were the only neutral Powers being parties to the Convention that were in a position to complain of any infringement of neutral rights under it. The Convention is not one of those treaties which were intended to be suspended or determined by the fact of war breaking out between parties to it, but the existence of war may deprive them of the opportunity of asserting their rights under it. It is to be noticed that the general war in which the signatory Powers of the Declaration of London have been engaged, and especially the state of war between Great Britain and the Sultan, made it impossible to carry out in their entirety Articles IX and X of the Suez Canal Convention. But the British and Egyptian Governments did not on this account treat the Convention as otherwise inoperative, as Lord Salisbury seems to have thought it would be if a war broke out between the signatory Powers, and if the Canal came within the area of hostilities.[1] No attack was made on the Canal by sea during the war, though on land the British and Egyptian forces had to defend it against the Turks. In its defence of Egypt and of the Canal, as has been noticed, the British Government was not restricted by the Convention, except that it was bound, so far as possible, to keep the passage of the Canal free and open.

[1] Cf. § 49 above.

(b) *The Panama Canal since the beginning of the War*

170. From the beginning of the war which broke out in 1914 between the Great Powers of Europe, the United States remained neutral until April 1917. It was therefore during this period in a favourable position for maintaining the neutrality of the Panama Canal according to the conditions of the Hay-Pauncefote and Hay-Bunau-Varilla Treaties. The Canal was not indeed at any time in the war in danger of attack. The strength of the United States Navy in the adjacent seas, the Canal fortifications, and the military forces in the Canal Zone, made it very powerful from a defensive point of view. Nor was any belligerent likely to attack it. The German Navy, apart from submarine vessels, was unable to keep the seas; and Great Britain, who had maritime supremacy, showed herself as anxious as the United States itself that the neutrality of the Canal should not be violated, and that the Hay-Pauncefote Treaty should continue in force. But, though the safety and freedom of the Canal were not in jeopardy, there was a good deal of uncertainty as to the way in which the United States might interpret its duties as guardian of it. The views of the American and British Governments had been sometimes at variance on this subject in the past, and there was still room for controversy between them. The strategic importance of the Canal to Great Britain, more particularly as affording a shorter route between Australia and Great Britain than that by the Cape, made the regulations of the American Government concerning the use of the Canal by vessels of war and transport ships of considerable importance to her.

171. It was not till some time after the war began that the American Government published special regulations as to the administration of the Canal in the war. It is true that these 'Rules and Regulations for the Operation and Navigation of the Panama Canal and Approaches thereto, including all waters under its jurisdiction,' which were put into force by the Executive Order of July 9, 1914,

were in existence, but they did not provide sufficiently for a state of belligerency. The Governor of the Canal had apparently no system of rules to guide him, though, instructed from time to time by the Government at Washington, he exercised stringent control over belligerent vessels of war coming into the Canal. The British Government therefore found it difficult to instruct captains of British vessels as to their conduct in the Canal at this time.

172. This state of things only lasted for a short time, for on November 13, 1914, the President of the United States issued a Proclamation 'prescribing Rules and Regulations for the Use of the Panama Canal by Belligerent Vessels'.[1] Of its character the Editor of the American Journal of International Law has remarked:[2]

> 'These rules are of much interest from two points of view, as indicating the attitude of the United States towards the use of the Canal by belligerents and as a practical construction of what the United States Government conceives to be its rights and duties with respect to the Canal in a war, to which it is not a party, under the Hay-Pauncefote Treaty and the Treaty of 1904 with Panama. The rules are intended to maintain both the neutrality of the Canal and that of the United States, holding and operating it as a Government enterprise. It is understood they are the result of the joint efforts of representatives of the Departments of State, Justice, War, and Navy. The framers for the most part have based the provisions of the rules upon the Hay-Pauncefote Treaty, under which the Canal was to be constructed and operated, the Convention respecting the free navigation of the Suez Maritime Canal of October 29, 1888, the rules issued on February 10, 1904, covering the use of that Canal by belligerent war-ships in the Russo-Japanese War,[3] and the Treaty between the United States and Panama of February 26, 1904, by which the United States obtained the right to construct the Canal. Where it was necessary to make rules which could not be obtained from any of the foregoing sources, the framers have followed the rules agreed upon by the nations in conference at The Hague. The Hague Convention of 1907 respecting the

[1] For text of this document see Appendix V, p. 111.

[2] American Journal of International Law, vol. ix, No. 1, Jan. 1915, p. 167, Editorial Comment.

[3] Cf. British and Foreign State Papers, vol. cii, p. 591.

rights and duties of neutral Powers in Naval War (No. 13) is liberally drawn upon for guidance.'

It is to be remembered that this Hague Convention was not of itself binding on the belligerents, as not all of them were parties to it.

173. These Rules and Regulations are said in the Proclamation to be issued by the President in virtue of the sovereignty which the United States exercises in the land and waters of the Canal Zone. Such sovereignty is of course unlimited. Nevertheless, in drawing up these regulations, the President had to take care that they should not in any way be contrary to the obligations to Great Britian entered into by the United States in the Hay-Pauncefote Treaty. It will generally be found that they are in conformity with it. In some cases the Rules of the Proclamation are in the same terms as the Treaty. There is nothing in the Proclamation to interfere with the principle of equality among nations[1] in the use of the Canal, which it was the principal object of the Treaty to secure; nor does the Proclamation seem unduly to restrict the freedom of nations in their use of the Canal. The limitations in Rule 10 as to the number of vessels of war of any one nation, including those of its allies, which may be in the Canal or its ports at the same time is explained thus: 'the Canal shall be kept free and open on terms of entire equality to vessels of commerce and of war,' which apparently means that war-ships should not unduly exclude merchant vessels.[2]

174. Many of the Rules and Regulations to which vessels of war in the Canal are made subject aim at preventing one belligerent from obtaining any advantage over another; they are merely matters of procedure, and, though of a restrictive character, are such as the object of maintaining the neutrality of the Canal requires.

[1] For an explanation of these Rules see Editorial Comment, *The Regulations governing the use of the Panama Canal by Belligerents* (American Journal of International Law, vol. ix, No. 1, Jan. 1915, p. 167).

[2] Cf. Hague Convention XIII, Article XV.

There are others which interpret or supplement Rules of the Hay-Pauncefote Treaty. Thus Rule 1 defines the meaning of a vessel of war so as to enable the Canal authorities to distinguish such vessels from others:

> 'A vessel of war, for the purposes of these rules, is defined as a public armed vessel, under the command of an officer duly commissioned by the government, whose name appears on the list of officers of the military fleet, and the crew of which are under regular naval discipline, which vessel is qualified by its armament and the character of its personnel to take offensive action against the public or private ships of the enemy.'

By Rule 2

> 'An auxiliary vessel, for the purposes of these rules, is defined as any vessel, belligerent or neutral, armed or unarmed, which does not fall under the definition of Rule 1, which is employed as a transport or fleet auxiliary or in any other way for the direct purpose of prosecuting or aiding hostilities, whether by land or sea; but a vessel fitted up and used exclusively as a hospital ship is excepted.'

It should be observed that armed merchant ships do not fall under either of these two heads, and thus are not subject to the Rules specially applicable to vessels of war and auxiliary vessels, such as those relating to re-victualling and taking in stores in the Canal, transit through the Canal, receiving fuel or lubricants within the territorial waters of the Canal Zone, the use of the repair facilities and docks belonging to the United States and administered by the Canal authorities, and other regulations.[1]

175. In examining the Rules laid down by the Proclamation, it is to be borne in mind that their purpose is not only to conform to the specific obligations which the United States had contracted in respect of the Canal, but also to carry out its general duties as a neutral Power.[2] Thus Rule 7[3] declares that 'supplies will not be furnished

[1] For these Rules see Appendix.

[2] As to the nature of these see Oppenheim, *International Law*, vol. ii, part III, chap. II (cf. Hague Convention XIII, but as to this see § 172 above).

[3] Cf. Rules 5 and 6.

by the Government of the United States, either directly or indirectly, through the intervention of a corporation, or otherwise, to vessels of war of a belligerent' or to auxiliary vessels. Private contractors, however, being (under the general law of neutrality) in a different position from a neutral Government in this respect, are allowed to supply such vessels with fuel, lubricants, and provisions, though to a limited extent and only by permission of the Canal authorities. In the case of fuel and lubricants they are limited to 'such amounts as will enable them, with the fuel and lubricants already on board, to reach the nearest accessible port, not an enemy port, at which they can obtain supplies necessary for the continuation of the voyage'. The amounts of fuel and lubricants so received are to be deducted from the amounts subsequently to be allowed in ports of the United States during the next three months. In the case of provisions, only such an amount is to be supplied as will bring their supplies to the peace standard.

176. The provision limiting the amount of fuel and lubricants to such amounts as will enable vessels to reach the nearest accessible port at which they can obtain supplies is similar to that in the Suez Canal Rules of 1904.[1] In the Hague Convention of 1907, No. 13, Article XIX, the limit prescribed is the nearest port in the vessel's own country.[2] It is evident that, owing to the distance of the Panama Canal from Europe, a belligerent vessel might frequently under this Rule be able to claim a full supply of fuel and lubricants, since at the nearest accessible ports there might not be a sufficient stock of coal or lubricants to supply its needs. There is no provision in the Suez Canal Rules or in the Hague Convention similar to the requirement in this Article that the amount of fuel &c. shipped by a vessel of war in the Canal is to be taken into account at any other port of the United States which the vessel might be in during the next three months. On October 10, 1914, the

[1] British and Foreign State Papers, vol. cii, p. 591, Rule 3.
[2] Editorial Comment, p. 171, cited above, § 172.

United States entered into an agreement with Panama in a Protocol in the following terms:

> 'That hospitality extended in the waters of the Republic of Panama to a belligerent vessel of war or a vessel belligerent or neutral, whether armed or not, which is employed by a belligerent Power as a transport or fleet auxiliary or in any other way for the direct purpose of prosecuting or aiding hostilities, whether by land or sea, shall serve to deprive such vessel of like hospitality in the Panama Canal Zone for a period of three months, and *vice versa*.'

About the same time the principle seems to have been further extended in accordance with the Pan-American idea of driving hostilities away from American waters; for at the instance of Brazil, supported it is said by Peru and Ecuador, the doctrine was declared that, if a war-ship accepts the hospitality of one American State, it is debarred from similar treatment by any other American State for the prescribed period of three months. This ceased to be in force after Panama entered into the war, on April 10, 1917.

177. Rule 8 declares that

> 'No belligerent . . . shall embark or disembark troops, munitions of war or warlike materials in the Canal, except in case of necessity due to accidental hindrance of the transit. In such cases the Canal Authorities shall be the judge of the necessity, and the transit shall be resumed with all possible dispatch.'

This follows, except that there is no limitation as to numbers of troops, Article V of the Suez Canal Convention as well as Article III, Rule 4, of the Hay-Pauncefote Treaty. The exception contained in it is not in accordance with the general rules of the law of neutrality respecting the condition of belligerent troops on neutral territory.[1] But the rule of the Proclamation seems to have been carried out by the Canal Authorities during the war with great strictness. They did not allow belligerent officers and men to go on shore from the Canal without their leave, nor did they admit such men when sick to hospitals in the Zone.

[1] Cf. Oppenheim, *International Law*, vol. ii, p. 391.

178. Rule 9 prescribes the twenty-four hours' limit for the duration of the stay of belligerent vessels of war and auxiliary vessels in the Canal Zone, except in cases of distress. 'The twenty-four hours is construed to be twenty-four hours in addition to the time necessarily occupied in going through the Canal.' In Hague Convention XIII, 1907, Article XII, which, as has been previously remarked, did not become obligatory in the war, it is declared:

> 'In the absence of special provisions to the contrary in the legislation of a neutral Power, belligerent war-ships are not permitted to remain in the ports, roadsteads, or territorial waters of the said Power for more than twenty-four hours, except in the cases covered by the present Convention.' [1]

179. Rule 13 follows closely the general law of neutrality in its limitations as to the use by belligerent vessels of war and auxiliary vessels of the 'repair facilities and docks belonging to the United States and administered by the Canal authorities'.[2] We understand that there are no private establishments for repairing vessels in the Canal Zone. The rule is intended to prevent a port such as Balboa being used as a general repairs station for belligerent vessels.

180. Rule 14 carries out more fully Article V of Hague Convention XIII, 1907, which states:

> 'Belligerents are forbidden to use neutral ports and waters as a base of operations against their adversaries, and in particular to *erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea.*'

181. Rule 15 is directed against the use of aircraft in the Canal Zone. It declares that

> 'aircraft of a belligerent Power, public or private, are forbidden to descend or arise within the jurisdiction of the United States at the Canal Zone, or to pass through the air spaces above the lands and waters within the said jurisdiction.'

[1] See also Articles XIII and XIV.
[2] Cf. Oppenheim, *International Law*, vol. ii, p. 420.

The principle of the law of property, *cujus est solum ibi est dominium usque ad coelum*, is here applied to territorial sovereignty in respect of the control of aircraft. What qualifications should be made to this principle from an international standpoint is an important question awaiting determination.

182. Rule 16 includes in the Canal Zone, for the purpose of these Rules, the cities of Panama and Colon, and the harbours adjacent to them. In the preamble to the Proclamation it is affirmed that the United States is authorized by its Treaty with Panama of February 26, 1904, i. e. by the Hay-Varilla Treaty, to maintain neutrality in the cities of Panama and Colon and the harbours adjacent. It will be seen that these cities are not included in the Canal Zone by the Treaty; and there do not seem to be any express terms in the Treaty which authorize such inclusion. Whether this is the case or not is a matter for the parties to the Treaty to determine; and it is of course open to them to make any arrangement about the limits of the Canal Zone which they please. Such an agreement cannot of course affect the rights of third parties until they have in some way recognized it. It is to be noticed that not all the territorial waters of the Republic of Panama are comprehended in this extension of the Zone to the cities of Panama and Colon and the adjacent harbours. Thus the words 'harbours adjacent' to Panama city evidently refer to Panama Bay, not to the waters of the Republic outside this bay, such as those of Taboguilla Island. To these waters, therefore, the rules of neutrality laid down in the Proclamation, which particularly relate to the Canal Zone, do not apply.

183. While the United States remained neutral, representations were from time to time made to the Government at Washington by the German ambassador, Count Bernstorff, and by other Germans, alleging cases of breaches of neutrality in the Canal Zone on the part of Great Britain.[1] These, as it appears, had little or no

[1] See e. g. the letters of the British Ambassador at Washington to the Secretary of State, dealing with the charges brought against the

foundation in fact. There is ample evidence to show that the British Government took all the means in its power to inform British vessels of the terms of the Proclamation, and to exercise the strictest control over them for the purpose of maintaining the neutrality of the Canal; while on their side the Governor of the Canal and the American Government kept the Canal Zone under the closest supervision, and, on any suspicion of breach of the Rules by British ships, made representations to the British Government on the subject. How little reason Germans had to complain of the Proclamation on the ground that it favoured Great Britain, may be gathered from the fact that the only German grievance under this head alleged in the list of complaints presented to the Secretary of State in a letter of the Hon. W. J. Stone, of the Foreign Relations Committee of the Senate, dated Jan. 8, 1915, was that the Proclamation allowed belligerent war vessels to coal to a limited extent in the Canal. The unfairness of this to Germany arose, it was said, from the fact that Great Britain had coaling stations near the Canal, whereas Germany had none.[1]

184. Till April 6, 1917, when the United States declared war gainst Germany, the neutrality of the Panama Canal was successfully maintained and its passage kept open for the vessels of all nations. Whether or to what extent it was to be preserved in that state after the United States became a belligerent, was the question which then arose. On this subject President Wilson soon made his position clear. Not only was the administration of the Canal continued on lines very much the same as before, but on May 23, 1917, he reissued his Proclamation of November 13, 1914, in much the

Admiralty colliers—the *Mallina* and *Protesilaus*—of having used wireless installation in the Canal, which are published in the Supplement to the American Journal of International Law, July 1915, vol. ix, p. 207.

[1] For Mr. Brian's reply to Mr. Stone's letter see American Journal of International Law, vol. ix, No. 2, April 1915, Editorial Comment, p. 442.

same terms, making, however, some not unimportant alterations in it.

185. It will be remembered that opinion has been much divided on the question whether the United States itself is subject to the Rules of the Hay-Pauncefote Treaty as well as other nations, especially as regards Article III, Rule 1, and the discrimination of tolls. Thus it is to be noticed that in this Proclamation the President is careful to except his own State from the Rules made applicable to other belligerents, the expression 'all nations other than the United States' being one that he repeatedly makes use of. Whether these exceptions are in all cases in complete accordance with the equality which is a main principle of the Hay-Pauncefote Treaty may perhaps be questioned; but both Lord Lansdowne and Sir Edward Grey had recognized that the United States, as the territorial Power, was not restricted by the Rules of the Treaty from taking defensive measures. Thus the President claimed for belligerent vessels of war of the United States the right of coaling in the Canal without restriction, of embarking or disembarking troops, munitions of war, and warlike materials in the Canal, and of keeping its vessels of war and auxiliary vessels in the Canal for any length of time. But so strictly during the war did the American Government interpret its duties as guardian of the neutrality of the Canal, that it refused to allow Great Britain and its other allies the privileges it claimed for itself. These Powers were in the same position, as regards the use of the Canal, as they were in when the United States was not belligerent.

186. It will be noticed that Rule 7 of the earlier Proclamation is modified in the later one, especially by the omission of the provision that 'supplies will not be furnished by the Government of the United States, either directly, or indirectly through the intervention of a corporation, or otherwise'. The provision in this Article that 'the amounts of fuel and lubricants so received in the Canal Zone will be deducted' from the amounts otherwise allowed in ports of the United States is also omitted as not being applicable between co-belligerents.

187. Rule 15 of the Proclamation is a new and important one. It is in the following terms:

> 'In the interest of the protection of the Canal while the United States is a belligerent no vessel of war, auxiliary vessel, or private vessel of an enemy of the United States or an ally of such enemy shall be allowed to use the Panama Canal nor the territorial waters of the Canal Zone for any purpose, save with the consent of the Canal authorities and subject to such rules and regulations as they may prescribe.'

The Rule assumes the right of the United States to exclude vessels of belligerents, both public and private, from the use of the Canal at the discretion of the Canal Authorities, either entirely or on such conditions as they may impose. The Rule is to be justified on the ground that it is necessary for the protection of the Canal against injury or destruction. Except on this ground it seems to be contrary to Article III, Rule 1, of the Hay-Pauncefote, and to Article XVIII of the Hay-Varilla, Treaties; but, as neither Germany nor her allies were parties to these Treaties, she and they had no rights under it. Both Great Britain and Panama, with whom these Treaties were made by the United States, became co-belligerents with her.

188. It is to be added that throughout the war the American Government consistently upheld the neutral character of the Canal. While itself neutral, it prohibited belligerent vessels of war from making use of the Canal except for the purpose of transit; nor, when the United States had become a belligerent, were Great Britain or the other allies allowed to treat it as a base of hostilities. Acting on the same principle, the Canal authorities seized German vessels found taking refuge there. The overwhelming superiority of Great Britain and the United States at sea rendered the Canal immune from hostile attack. But in the approaches to it navigation was exposed to the attack of hostile submarines.

189. To provide a means of protection against this danger, the American Government issued an Executive Order on August 27, 1917, which is described as 'establishing defensive sea areas for terminal ports of the Panama Canal and providing regulations for the govern-

ment of the said areas'.[1] The order first defines the geographical limits of the areas, and then the entrances to each. A number of regulations for vessels crossing them follow. No vessel was permitted to enter the limits of a defensive sea area otherwise than at a designated entrance and after authorization by the Harbour Entrance Patrol. She must then comply with the instructions given her as to pilotage and other matters.

190. As these areas are for the most part in the open sea, they do not so far come within the Canal Rules, and thus do not, strictly speaking, belong to our subject; but, being required for the safety of vessels going through the Canal, they are closely connected with it. The establishment of defensive sea areas is a consequence of the indiscriminate laying of mines in the late war, and is only to be justified on this account.

[1] The text will be found in full in the Supplement to the American Journal of International Law for October 1917.

APPENDIX

(A) SUEZ CANAL

CONVENTION BETWEEN GREAT BRITAIN, GERMANY, AUSTRIA-HUNGARY, SPAIN, FRANCE, ITALY, THE NETHERLANDS, RUSSIA, AND TURKEY, RESPECTING THE FREE NAVIGATION OF THE SUEZ MARITIME CANAL.

Signed at Constantinople, October 29, 1888.

[*Ratifications deposited at Constantinople, December* 22, 1888.]

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Empress of India; His Majesty the Emperor of Germany, King of Prussia; His Majesty the Emperor of Austria, King of Bohemia, &c., and Apostolic King of Hungary; His Majesty the King of Spain, and in his name the Queen Regent of the Kingdom; the President of the French Republic; His Majesty the King of Italy; His Majesty the King of the Netherlands, Grand Duke of Luxembourg, &c.; His Majesty the Emperor of All the Russias; and His Majesty the Emperor of the Ottomans; wishing to establish, by a Conventional Act, a definite system destined to guarantee at all times, and for all the Powers, the free use of the Suez Maritime Canal, and thus to complete the system under which the navigation of this Canal has been placed by the Firman of His Imperial Majesty the Sultan, dated the 22nd February, 1866 (2 Zilkadé, 1282), and sanctioning the Concessions of His Highness the Khedive, have named as their Plenipotentiaries, that is to say:—

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Empress of India, the Right Honourable Sir William Arthur White, her Ambassador Extraordinary and Plenipotentiary;

His Majesty the Emperor of Germany, King of Prussia, M. Joseph de Radowitz, his Ambassador Extraordinary and Plenipotentiary;

His Majesty the Emperor of Austria, King of Bohemia, &c., and Apostolic King of Hungary, M. Henri, Baron de Calice, his Ambassador Extraordinary and Plenipotentiary;

His Majesty the King of Spain, and in his name the Queen Regent of the Kingdom, Don Miguel Florez y Garcia, his Chargé d'Affaires;

The President of the French Republic, M. Gustave Louis Lannes, Count de Montebello, Ambassador Extraordinary and Plenipotentiary of France;

His Majesty the King of Italy, M. Albert, Baron Blanc, his Ambassador Extraordinary and Plenipotentiary;

His Majesty the King of the Netherlands, Grand Duke of Luxembourg, &c., M. Gustave Keun, his Chargé d'Affaires;

His Majesty the Emperor of All the Russias, M. Alexandre de Nélidow, his Ambassador Extraordinary and Plenipotentiary;

His Majesty the Emperor of the Ottomans, Mehemmed Said Pasha, his Minister for Foreign Affairs;

Who, having communicated to each other their respective full powers, found in good and due form, agreed upon the following Articles:—

ARTICLE I.

The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.

Consequently, the High Contracting Parties agree not in any way to interfere with the free use of the Canal, in time of war as in time of peace.

The Canal shall never be subjected to the exercise of the right of blockade.

ARTICLE II.

The High Contracting Parties, recognizing that the Fresh-Water Canal is indispensable to the Maritime Canal, take note of the engagements of His Highness the Khedive towards the Universal Suez Canal Company as regards the Fresh-Water Canal; which engagements are stipulated in a Convention bearing date the 18th March, 1863, containing an *exposé* and four Articles.

They undertake not to interfere in any way with the security of that Canal and its branches, the working of which shall not be exposed to any attempt at obstruction.

ARTICLE III.

The High Contracting Parties likewise undertake to respect the plant, establishments, buildings, and works of the Maritime Canal and of the Fresh-Water Canal.

ARTICLE IV.

The Maritime Canal remaining open in time of war as a free passage, even to the ships of war of belligerents, according to the terms of Article I of the present Treaty, the High Contracting

Parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the Canal, shall be committed in the Canal and its ports of access, as well as within a radius of 3 marine miles from those ports, even though the Ottoman Empire should be one of the belligerent Powers.

Vessels of war of belligerents shall not revictual or take in stores in the Canal and its ports of access, except in so far as may be strictly necessary. The transit of the aforesaid vessels through the Canal shall be effected with the least possible delay, in accordance with the Regulations in force, and without any other intermission than that resulting from the necessities of the service.

Their stay at Port Said and in the roadstead of Suez shall not exceed twenty-four hours, except in case of distress. In such case they shall be bound to leave as soon as possible. An interval of twenty-four hours shall always elapse between the sailing of a belligerent ship from one of the ports of access and the departure of a ship belonging to the hostile Power.

Article V.

In time of war belligerent Powers shall not disembark nor embark within the Canal and its ports of access either troops, munitions, or materials of war. But in case of an accidental hindrance in the Canal, men may be embarked or disembarked at the ports of access by detachments not exceeding 1,000 men, with a corresponding amount of war material.

Article VI.

Prizes shall be subjected, in all respects, to the same rules as the vessels of war of belligerents.

Article VII.

The Powers shall not keep any vessel of war in the waters of the Canal (including Lake Timsah and the Bitter Lakes).

Nevertheless, they may station vessels of war in the ports of access of Port Said and Suez, the number of which shall not exceed two for each Power.

This right shall not be exercised by belligerents.

Article VIII.

The Agents in Egypt of the Signatory Powers of the present Treaty shall be charged to watch over its execution. In case of any event threatening the security or the free passage of the Canal, they shall meet on the summons of three of their number under the presidency of their Doyen, in order to proceed to the necessary verifications. They shall inform the Khedivial Government of the

danger which they may have perceived, in order that that Government may take proper steps to insure the protection and the free use of the Canal. Under any circumstances, they shall meet once a year to take note of the due execution of the Treaty.

The last-mentioned meetings shall take place under the presidency of a Special Commissioner nominated for that purpose by the Imperial Ottoman Government. A Commissioner of the Khedive may also take part in the meeting, and may preside over it in case of the absence of the Ottoman Commissioner.

They shall especially demand the suppression of any work or the dispersion of any assemblage on either bank of the Canal, the object or effect of which might be to interfere with the liberty and the entire security of the navigation.

Article IX.

The Egyptian Government shall, within the limits of its powers resulting from the Firmans, and under the conditions provided for in the present Treaty, take the necessary measures for insuring the execution of the said Treaty.

In case the Egyptian Government should not have sufficient means at its disposal, it shall call upon the Imperial Ottoman Government, which shall take the necessary measures to respond to such appeal; shall give notice thereof to the Signatory Powers of the Declaration of London of the 17th March, 1885; and shall, if necessary, concert with them on the subject.

The provisions of Articles IV, V, VII, and VIII shall not interfere with the measures which shall be taken in virtue of the present Article.

Article X.

Similarly, the provisions of Articles IV, V, VII, and VIII shall not interfere with the measures which His Majesty the Sultan and His Highness the Khedive, in the name of His Imperial Majesty, and within the limits of the Firmans granted, might find it necessary to take for securing by their own forces the defence of Egypt and the maintenance of public order.

In case His Imperial Majesty the Sultan, or His Highness the Khedive, should find it necessary to avail themselves of the exceptions for which this Article provides, the Signatory Powers of the Declaration of London shall be notified thereof by the Imperial Ottoman Government.

It is likewise understood that the provisions of the four Articles aforesaid shall in no case occasion any obstacle to the measures which the Imperial Ottoman Government may think it necessary to take in order to insure by its own forces the defence of its other possessions situated on the eastern coast of the Red Sea.

Article XI.

The measures which shall be taken in the cases provided for by Articles IX and X of the present Treaty shall not interfere with the free use of the Canal. In the same cases, the erection of permanent fortifications contrary to the provisions of Article VIII is prohibited.

Article XII.

The High Contracting Parties, by application of the principle of equality as regards the free use of the Canal, a principle which forms one of the bases of the present Treaty, agree that none of them shall endeavour to obtain with respect to the Canal territorial or commercial advantages or privileges in any international arrangements which may be concluded. Moreover, the rights of Turkey as the territorial Power are reserved.

Article XIII.

With the exception of the obligations expressly provided by the clauses of the present Treaty, the sovereign rights of His Imperial Majesty the Sultan, and the rights and immunities of His Highness the Khedive, resulting from the Firmans, are in no way affected.

Article XIV.

The High Contracting Parties agree that the engagements resulting from the present Treaty shall not be limited by the duration of the Acts of Concession of the Universal Suez Canal Company.

Article XV.

The stipulations of the present Treaty shall not interfere with the sanitary measures in force in Egypt.

Article XVI.

The High Contracting Parties undertake to bring the present Treaty to the knowledge of the States which have not signed it, inviting them to accede to it.

Article XVII.

The present Treaty shall be ratified, and the ratifications shall be exchanged at Constantinople, within the space of one month, or sooner if possible.

In faith of which the respective Plenipotentiaries have signed the present Treaty, and have affixed to it the seal of their arms.

Done at Constantinople, the 29th day of the month of October, in the year 1888.

[Here follow the Signatures.]

(B) PANAMA CANAL

I. TREATY OF PEACE, AMITY, NAVIGATION, AND COMMERCE BETWEEN THE UNITED STATES AND NEW GRANADA.

Concluded December 12, 1846, *at Bogotá and ratified on June* 10, 1848.

ARTICLE 35TH.

The United States of America and the Republic of New Granada, desiring to make as durable as possible the relations which are to be established between the two parties by virtue of this treaty, have declared solemnly and do agree to the following points.

1st. For the better understanding of the preceding articles, it is and has been stipulated between the high contracting parties that the citizens, vessels, and merchandise of the United States shall enjoy in the ports of New Granada, including those of the part of the Granadian territory generally denominated *Isthmus of Panamá*, from its southernmost extremity until the boundary of Costa Rica, all the exemptions, privileges and immunities concerning commerce and navigation which are now or may hereafter be enjoyed by Granadian citizens, their vessels and merchandise; and that this equality of favours shall be made to extend to the passengers, correspondence, and merchandise of the United States in their transit across the said territory, from one sea to the other. The Government of New Granada guarantees to the Government of the United States that the right of way or transit across the Isthmus of Panamá, upon any modes of communication that now exist or that may be hereafter constructed shall be open and free to the Government and citizens of the United States, and for the transportation of any articles of produce, manufactures or merchandise, of lawful commerce, belonging to the citizens of the United States; that no other tolls or charges shall be levied or collected upon the citizens of the United States, or their said merchandise thus passing over any road or canal that may be made by the Government of New Granada, or by the authority of the same, than is, under like circumstances, levied upon and collected from the Granadian citizens; that any lawful produce, manufactures or merchandise belonging to the citizens of the United States thus passing from one sea to the other, in either direction, for the purpose of exportation to any other foreign country, shall not be liable to any import duties whatever, or, having paid such duties, they shall be entitled to drawback upon their exportation; nor shall the citizens of the United States be liable to any duties, tolls, or charges of any kind to which native citizens are not subjected for

thus passing the said Isthmus. And, in order to secure to themselves the tranquil and constant enjoyment of these advantages, and as an especial compensation for the said advantages, and for the favours they have acquired by the 4th, 5th and 6th articles of this treaty, the United States guarantee, positively and efficaciously, to New Granada, by the present stipulation, the perfect neutrality of the before-mentioned Isthmus, with the view that the free transit from the one to the other sea may not be interrupted or embarrassed in any future time while this treaty exists; and in consequence, the United States also guarantee, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory.

2nd. The present treaty shall remain in full force and vigor for the term of twenty years from the day of the exchange of the ratifications; and, from the same day, the treaty that was concluded between the United States and Colombia on the 13th of October 1824, shall cease to have effect, notwithstanding what was disposed in the first point of its 31st article.

3rd. Notwithstanding the foregoing, if neither party notifies to the other its intention of reforming any of, or all, the articles of this treaty twelve months before the expiration of the twenty years stipulated above, the said treaty shall continue binding on both parties beyond the said twenty years, until twelve months from the time that one of the parties notifies its intention of proceeding to a reform.

4th. If any one or more of the citizens of either party shall infringe any of the articles of this treaty, such citizens shall be held personally responsible for the same, and the harmony and good correspondence between the nations shall not be interrupted thereby; each party engaging in no way to protect the offender, or sanction such violation.

5th. If unfortunately any of the articles contained in this treaty should be violated or infringed in any way whatever, it is expressly stipulated that neither of the two contracting parties shall ordain or authorize any acts of reprisal, nor shall declare war against the other on complaints of injuries or damages, until the said party considering itself offended shall have laid before the other a statement of such injuries or damages, verified by competent proofs, demanding justice and satisfaction, and the same shall have been deemed in violation of the laws and of international right.

6th. Any special or remarkable advantage that one or the other power may enjoy from the foregoing stipulations, are and ought to be always understood in virtue, and as in compensation, of the obligations they have just contracted, and which have been specified in the first number of this article.

II. CLAYTON-BULWER TREATY, 1850.

Convention between Her Majesty and the United States of America, relative to the Establishment of a Communication by Ship-Canal between the Atlantic and Pacific Oceans.

Signed at Washington, April 19, 1850.

[*Ratifications Exchanged at Washington, July* 4, 1850.]

Her Britannic Majesty and the United States of America being desirous of consolidating the relations of amity which so happily subsist between them, by setting forth and fixing in a Convention their views and intentions with reference to any means of communication by Ship-Canal which may be constructed between the Atlantic and Pacific Oceans, by the way of the River San Juan de Nicaragua, and either or both of the Lakes of Nicaragua or Managua, to any port or place on the Pacific Ocean:

Her Britannic Majesty has conferred Full-powers on the Right Honourable Sir Henry Lytton Bulwer, a Member of Her Majesty's Most Honourable Privy Council, Knight Commander of the Most Honourable Order of the Bath, and Envoy Extraordinary and Minister Plenipotentiary of Her Britannic Majesty to the United States; and the President of the United States on John M. Clayton, Secretary of State of the United States, for the aforesaid purpose; and the said Plenipotentiaries, having exchanged their Full-powers, which were found to be in proper form, have agreed to the following Articles:—

Article I.

The Governments of Great Britain and the United States hereby declare, that neither the one nor the other will ever obtain or maintain for itself any exclusive control over the said ship-canal; agreeing that neither will ever erect or maintain any fortifications commanding the same, or in the vicinity thereof, or occupy, or fortify, or colonize, or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America; nor will either make use of any protection which either affords, or may afford, or any alliance which either has, or may have, to or with any State or people, for the purpose of erecting or maintaining any such fortifications, or of occupying, fortifying, or colonizing Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America, or of assuming or exercising dominion over the same. Nor will Great Britain or the United States take advantage of any intimacy, or use any alliance, connection, or influence that either may possess with any State or Government through whose territory

the said canal may pass, for the purpose of acquiring or holding, directly or indirectly, for the subjects or citizens of the one, any rights or advantages in regard to commerce or navigation through the said canal, which shall not be offered, on the same terms, to the subjects or citizens of the other.

ARTICLE II.

Vessels of Great Britain or the United States traversing the said canal shall, in case of war between the Contracting Parties, be exempted from blockade, detention, or capture by either of the belligerents; and this provision shall extend to such a distance from the two ends of the said canal as may hereafter be found expedient to establish.

ARTICLE III.

In order to secure the construction of the said canal, the Contracting Parties engage that, if any such canal shall be undertaken upon fair and equitable terms by any parties having the authority of the Local Government or Governments through whose territory the same may pass, then the persons employed in making the said canal, and their property used or to be used for that object, shall be protected, from the commencement of the said canal to its completion, by the Governments of Great Britain and the United States, from unjust detention, confiscation, seizure, or any violence whatsoever.

ARTICLE IV.

The Contracting Parties will use whatever influence they respectively exercise with any State, States, or Governments possessing, or claiming to possess, any jurisdiction or right over the territory which the said canal shall traverse, or which shall be near the waters applicable thereto, in order to induce such States or Governments to facilitate the construction of the said canal by every means in their power; and, furthermore, Great Britain and the United States agree to use their good offices, wherever or however it may be most expedient, in order to procure the establishment of two free ports, one at each end of the said canal.

ARTICLE V.

The Contracting Parties further engage that, when the said canal shall have been completed, they will protect it from interruption, seizure, or unjust confiscation, and that they will guarantee the neutrality thereof, so that the said canal may for ever be open and free, and the capital invested therein secure. Nevertheless, the Governments of Great Britain and the United States, in according their protection to the construction of the said canal, and guaranteeing its neutrality and security when completed, always understand

that this protection and guarantee are granted conditionally, and may be withdrawn by both Governments, or either Government, if both Governments, or either Government, should deem that the persons or company undertaking or managing the same adopt or establish such regulations concerning the traffic thereupon as are contrary to the spirit and intention of this Convention; either by making unfair discriminations in favour of the commerce of one of the Contracting Parties over the commerce of the other, or by imposing oppressive exactions, or unreasonable tolls upon passengers, vessels, goods, wares, merchandise, or other articles. Neither party, however, shall withdraw the aforesaid protection and guarantee without first giving six months' notice to the other.

Article VI.

The Contracting Parties in this Convention engage to invite every State with which both or either have friendly intercourse, to enter into stipulations with them similar to those which they have entered into with each other, to the end that all other States may share in the honour and advantage of having contributed to a work of such general interest and importance as the canal herein contemplated; and the Contracting Parties likewise agree that each shall enter into Treaty stipulations with such of the Central American States as they may deem advisable, for the purpose of more effectually carrying out the great design of this Convention; namely, that of constructing and maintaining the said canal as a ship-communication between the two Oceans for the benefit of mankind, on equal terms to all, and of protecting the same; and they also agree that the good offices of either shall be employed, when requested by the other, in aiding and assisting the negotiation of such Treaty stipulations; and should any differences arise as to right or property over the territory through which the said canal shall pass, between the States or Governments of Central America, and such differences should in any way impede or obstruct the execution of the said canal, the Governments of Great Britain and the United States will use their good offices to settle such differences in the manner best suited to promote the interests of the said canal, and to strengthen the bonds of friendship and alliance existing between the Contracting Parties.

Article VII.

It being desirable that no time should be unnecessarily lost in commencing and constructing the said canal, the Governments of Great Britain and the United States determine to give their support and encouragement to such persons or company as may first offer to commence the same, with the necessary capital, the consent of the local authorities, and on such principles as accord with the spirit and

intention of this Convention; and if any persons or company should already have, with any State through which the proposed ship-canal may pass, a contract for the construction of such a canal as that specified in this Convention, to the stipulations of which contract neither of the Contracting Parties in this Convention have any just cause to object, and the said persons or company shall, moreover, have made preparations and expended time, money, and trouble on the faith of such contract, it is hereby agreed, that such persons or company shall have a priority of claim over every other person, persons, or company, to the protection of the Governments of Great Britain and the United States, and be allowed a year, from the date of the exchange of the ratifications of this Convention, for concluding their arrangements, and presenting evidence of sufficient capital subscribed to accomplish the contemplated undertaking; it being understood that if, at the expiration of the aforesaid period, such persons or company be not able to commence and carry out the proposed enterprise, then the Governments of Great Britain and the United States shall be free to afford their protection to any other persons or company, that shall be prepared to commence and proceed with the construction of the canal in question.

Article VIII.

The Governments of Great Britain and the United States having not only desired, in entering into this Convention, to accomplish a particular object, but also to establish a general principle; they hereby agree to extend their protection by Treaty stipulations to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America; and especially to the interoceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama. In granting, however, their joint protection to any such canals or railways as are by this Article specified, it is always understood by Great Britain and the United States, that the parties constructing or owning the same 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 subjects and citizens of Great Britain and the United States on equal terms, shall also be open on like terms to the subjects and citizens of every other State which is willing to grant thereto such protection as Great Britain and the United States engage to afford.

Article IX.

The ratifications of this Convention shall be exchanged at Washington within six months from this day, or sooner if possible.

In faith whereof we, the respective Plenipotentiaries, have signed this Convention, and have hereunto affixed our seals.

Done at Washington, the nineteenth day of April, Anno Domini one thousand eight hundred and fifty.

(*Signed*) HENRY LYTTON BULWER. (L.S.)

(*Signed*) JOHN M. CLAYTON. (L.S.)

III. HAY-PAUNCEFOTE TREATY, 1901

TREATY BETWEEN THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA RELATIVE TO THE ESTABLISHMENT OF A COMMUNICATION BY SHIP-CANAL BETWEEN THE ATLANTIC AND PACIFIC OCEANS.

Signed at Washington, November 18, 1901.

[*Ratifications exchanged at Washington, February* 21, 1902.]

His Majesty Edward the Seventh, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, and Emperor of India, and the United States of America, being desirous to facilitate the construction of a ship-canal to connect the Atlantic and Pacific Oceans, by whatever route may be considered expedient, and to that end to remove any objection which may arise out of the Convention of the 19th April, 1850, commonly called the Clayton-Bulwer Treaty, to the construction of such canal under the auspices of the Government of the United States, without impairing the 'general principle' of neutralization established in Article VIII of that Convention, have for that purpose appointed as their Plenipotentiaries:—

His Majesty Edward the Seventh, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, and Emperor of India, the Right Honourable Lord Pauncefote, G.C.B., G.C.M.G., His Majesty's Ambassador Extraordinary and Plenipotentiary to the United States; and

The President of the United States, John Hay, Secretary of State of the United States of America;

Who, having communicated to each other their full powers, which were found to be in due and proper form, have agreed upon the following Articles:—

ARTICLE I.

The High Contracting Parties agree that the present Treaty shall supersede the afore-mentioned Convention of the 19th April, 1850.

ARTICLE II.

It is agreed that the canal may be constructed under the auspices of the Government of the United States, either directly at its own cost, or by gift or loan of money to individuals or Corporations, or through subscription to or purchase of stock or shares, and that, subject to the provisions of the present Treaty, the said Government shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

ARTICLE III.

The United States adopts, as the basis of the neutralization of such ship-canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say :—

1. The canal shall be free and open to the vessels of 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.

2. 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.

3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary ; and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the Regulations in force, and with only such intermission as may result from the necessities of the service.

Prizes shall be in all respects subject to the same Rules as vessels of war of the belligerents.

4. No belligerent shall embark or disembark troops, munitions of war, or warlike materials in the canal, except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible dispatch.

5. The provisions of this Article shall apply to waters adjacent to the canal, within three marine miles of either end. Vessels of war

of a belligerent shall not remain in such waters longer than twenty-four hours at any one time except in case of distress, and in such case shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

6. The plant, establishments, buildings, and all works necessary to the construction, maintenance, and operation of the canal shall be deemed to be part thereof, for the purpose of this Treaty, and in time of war, as in time of peace, shall enjoy complete immunity from attack or injury by belligerents, and from acts calculated to impair their usefulness as part of the canal.

Article IV.

It is agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralization or the obligation of the High Contracting Parties under the present Treaty.

Article V.

The present Treaty shall be ratified by His Britannic Majesty, and by the President of the United States, by and with the advice and consent of the Senate thereof; and the ratifications shall be exchanged at Washington or at London at the earliest possible time within six months from the date hereof.

In faith whereof the respective Plenipotentiaries have signed this Treaty and thereunto affixed their seals.

Done in duplicate at Washington, the 18th day of November, in the year of our Lord one thousand nine hundred and one.

(Seal.) (*Signed*) Pauncefote.

(Seal.) (*Signed*) John Hay.

IV. HAY-BUNAU-VARILLA TREATY, 1903.

Article XVIII.

The Canal, when constructed, and the entrances thereto shall be neutral in perpetuity, and shall be opened upon the terms provided for by section 1 of Article III of, and in conformity with all the stipulations of, the Treaty entered into by the Governments of the United States and Great Britain on November 18th, 1901.

V. NEUTRALITY OF THE PANAMA CANAL ZONE

(1) Protocol of an Agreement concluded between Honorable Robert Lansing, Acting Secretary of State of the United States, and Don Eusebio A. Morales, Envoy Extraordinary and Minister Plenipotentiary of the Republic of Panama, signed the Tenth day of October, 1914.

The undersigned, the Acting Secretary of State of the United States of America and the Envoy Extraordinary and Minister Plenipotentiary of the Republic of Panama, in view of the close association of the interests of their respective governments on the Isthmus of Panama, and to the end that these interests may be conserved and that, when a state of war exists, the neutral obligations of both governments as neutrals may be maintained, after having conferred on the subject, and being duly empowered by their respective governments, have agreed:

That hospitality extended in the waters of the Republic of Panama to a belligerent vessel of war or a vessel belligerent or neutral, whether armed or not, which is employed by a belligerent Power as a transport or fleet auxiliary or in any other way for the direct purpose of prosecuting or aiding hostilities, whether by land or sea, shall serve to deprive such vessel of like hospitality in the Panama Canal Zone for a period of three months, and *vice versa*.

In testimony whereof, the undersigned have signed and sealed the present protocol in the city of Washington, this tenth day of October, 1914.

Robert Lansing [L. S.]
Eusebio A. Morales [L. S.]

(2) Proclamations of the President of the United States relating to the Panama Canal.

On November 13, 1914, the President of the United States issued a Proclamation prescribing Rules and Regulations for the Use of the Panama Canal by Belligerent Vessels.

On May 23, 1917, after the United States had become belligerent a further Proclamation was issued, containing Rules and Regulations for the Regulation, Management and Protection of the Panama Canal and the Maintenance of its Neutrality, which is printed in full below. The two Proclamations are in the main in the same terms, but in that of 1917 certain additions and alterations were made which are shown below: passages peculiar to either document are printed in italics, while those showing

considerable variation in substance are given side by side. The numbering in the two Proclamations does not in every case correspond.

PROCLAMATION BY THE PRESIDENT OF THE UNITED STATES OF AMERICA PRESCRIBING RULES AND REGULATIONS FOR THE USE OF THE PANAMA CANAL BY BELLIGERENT VESSELS.

Nov. 13, 1914.

RULES AND REGULATIONS FOR THE REGULATION, MANAGEMENT AND PROTECTION OF THE PANAMA CANAL AND THE MAINTENANCE OF ITS NEUTRALITY.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A Proclamation.

May 23, 1917.

WHEREAS the United States exercises sovereignty in the land and waters of the Canal Zone and is responsible for the construction, operation, maintenance, and protection of the Panama Canal:

NOW, THEREFORE, I, WOODROW WILSON, President of the United States of America, do hereby declare and proclaim the following Rules and Regulations for the regulation, management and protection of the Panama Canal and the Maintenance of its Neutrality which are in addition to the general 'Rules and Regulations for the Operation and Navigation of the Panama Canal and Approaches Thereto, including all Waters under its jurisdiction' put into force by Executive Order of July 9, 1914.

RULE 1.

RULE 1. A vessel of war, for the purposes of these rules, is defined as a public armed vessel, under the command of an officer duly commissioned by the government, whose name appears on the list of officers of the military

Proclamation, Nov. 13, 1914.

Proclamation, May 23, 1917.

fleet, and the crew of which are under regular naval discipline, which vessel is qualified by its armament and the character of its personnel to take offensive action against the public or private ships of the enemy.

RULE 2.

RULE 2. An auxiliary vessel, for the purposes of these rules, is defined as any vessel, belligerent or neutral, armed or unarmed, which does not fall under the definition of Rule 1, which is employed as a transport or fleet auxiliary or in any other way for the direct purpose of prosecuting or aiding hostilities, whether by land or sea; but a vessel fitted up and used exclusively as a hospital ship is excepted.

RULE 3.

RULE 3. A vessel of war or an auxiliary vessel of a belligerent, *other than the United States*, shall only be permitted to pass through the Canal after her commanding officer has given written assurance to the Authorities of the Panama Canal that the Rules and Regulations will be faithfully observed.

The authorities of the Panama Canal shall take such steps as may be requisite to insure the observance of the Rules and Regulations by auxiliary vessels which are not commanded by an officer of the military fleet.

RULE 4.

RULE 4. Vessels of war or auxiliary vessels of a belligerent, *other than the United States*, shall not revictual nor take any stores in the Canal except so far as may be strictly necessary; and the transit of such vessels through

Proclamation, Nov. 13, 1914.

RULE 5.

RULE 6.

RULE 7. Supplies will not be furnished by the Government of the United States, either directly or indirectly through the intervention of a corporation, or otherwise, to vessels of war of a belligerent or vessels falling under Rule 2. If furnished by private contractors, or if taken from vessels under the control of a belligerent, fuel and lubricants may be taken on board vessels of war of a belligerent or vessels falling under Rule 2 only upon

Proclamation, May 23, 1917.

the Canal shall be effected with the least possible delay in accordance with the Canal Regulations in force, and with only such intermission as may result from the necessities of the service.

Prizes shall be in all respects subject to the same Rules as vessels of war of a belligerent.

RULE 5. No vessel of war or auxiliary vessel of a belligerent, *other than the United States*, shall receive fuel or lubricants while within the territorial waters of the Canal Zone, except on the written authorization of the Canal Authorities, specifying the amount of fuel and lubricants which may be received.

RULE 6. Before issuing any authorization for the receipt of fuel and lubricants by any vessel of war or auxiliary vessel of a belligerent, *other than the United States*, the Canal Authorities shall obtain a written declaration, duly signed by the officer commanding such vessel, stating the amount of fuel and lubricants already on board.

RULE 7. Fuel and lubricants may be taken on board vessels of war or auxiliary vessels of a belligerent, *other than the United States*, only upon permission of the Canal Authorities, and then only in such amounts as will enable them, with the fuel and lubricants already on board, to reach the nearest accessible port, not an enemy port, at which they can obtain supplies necessary for the continuation of the voyage. Provisions furnished by con-

Proclamation, Nov. 13, 1914.

permission of the Canal authorities, and then only in such amounts as will enable them, with the fuel and lubricants already on board, to reach the nearest accessible port, not an enemy port, at which they can obtain supplies necessary for the continuation of the voyage. The amounts of fuel and lubricants so received will be deducted from the amounts otherwise allowed in the ports under the jurisdiction of the United States during any time within a period of three months thereafter. Provisions furnished by contractors may be supplied only upon permission of the Canal authorities, and then only in amount sufficient to bring up their supplies to the peace standard.

RULE 8.

RULE 9.

but a vessel of war of one belligerent shall not depart within twenty-

Proclamation, May 23, 1917.

tractors may be supplied only upon permission of the Canal Authorities, and then only in amount sufficient to bring up their supplies to the peace standard.

RULE 8. No belligerent, *other than the United States*, shall embark or disembark troops, munitions of war, or warlike materials in the Canal, except in case of necessity due to accidental hindrance of the transit. In such cases the Canal Authorities shall be the judge of the necessity, and the transit shall be resumed with all possible dispatch.

RULE 9. Vessels of war or auxiliary vessels of a belligerent, *other than the United States*, shall not remain in the territorial waters of the Canal Zone under the jurisdiction of the United States longer than twenty-four hours at any one time, except in case of distress ; and in such case, shall depart as soon as possible.

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four hours from the departure of a vessel of an opposing belligerent.

The twenty-four hours of this rule shall be construed to be twenty-four hours in addition to the time necessarily occupied in passing through the Canal.

RULE 10.

RULE 13.

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RULE 10. In the exercise of the exclusive right of the United States to provide for the regulation and management of the Canal, and in order to ensure that the Canal shall be kept free and open on terms of entire equality to vessels of commerce and of war, there shall not be, except by special arrangement, at any one time a greater number of vessels of war of any one nation *other than the United States* including those of the allies of such nation, than three in either terminal port and its adjacent terminal waters, or than three in transit through the Canal; nor shall the total number of such vessels, at any one time, exceed six in all the territorial waters of the Canal Zone under the jurisdiction of the United States.

RULE 11. The repair facilities and docks belonging to the United States and administered by the Canal Authorities shall not be used by a vessel of war or an auxiliary vessel of a belligerent, *other than the United States*, except when necessary in case of actual distress, and then only upon the order of the Canal Authorities, and only to the degree necessary to render the vessel seaworthy. Any work

Proclamation, Nov. 13, 1914.

RULE 14.

RULE 15.

RULE 16.

RULE 11. *When vessels of war or vessels falling under Rule 2 belonging to or employed by opposing belligerents, are present simulta-*

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authorized shall be done with the least possible delay.

RULE 12. The radio installation of any public or private vessel or of any auxiliary vessel of a belligerent, *other than the United States*, shall be used only in connection with Canal business to the exclusion of all other business while within the waters of the Canal Zone, including the waters of Colon and Panama Harbors.

RULE 13. Air craft, public or private, of a belligerent, *other than the United States*, are forbidden to descend or arise within the jurisdiction of the United States at the Canal Zone, or to pass through the air spaces above the lands and waters within said jurisdiction.

RULE 14. For the purpose of these rules the Canal Zone includes the cities of Panama and Colon and the harbors adjacent to the said cities.

RULE 15. *In the interest of the protection of the Canal while the United States is a belligerent no vessel of war, auxiliary vessel, or private vessel of an enemy of the United States or an ally of such enemy shall be allowed to use the Panama Canal nor the territorial waters of the Canal Zone for any purpose, save with the consent of the Canal authorities and subject to such rules and regulations as they may prescribe.*

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neously in the waters of the Canal Zone, a period of not less than twenty-four hours must elapse between the departure of the vessel belonging to or employed by one belligerent and the departure of the vessel belonging to or employed by his adversary.

The order of departure is determined by order of arrival, unless the vessel which arrived first is so circumstanced that an extension of her stay is permissible.

A vessel of war of a belligerent or vessel falling under Rule 2 may not leave the waters of the Canal Zone until twenty-four hours after the departure of a private vessel flying the flag of the adversary.

RULE 12. *A vessel of war of a belligerent or vessel falling under Rule 2 which has left the waters of the Canal Zone, whether she has passed through the Canal or not, shall, if she returns within a period of one week after her departure, lose all privileges of precedence in departure from the Canal Zone, or in passage through the Canal, over vessels flying the flag of her adversaries which may enter those waters after her return and before the expiration of one week subsequent to her previous departure. In any such case the time of departure of a vessel which has so returned shall be fixed by the Canal authorities, who may in so doing consider the wishes of the commander of a public vessel or of the master of a private vessel of the adversary of the returned vessel, which adversary's vessel is then present within the waters of the Canal Zone.*

Proclamation, May 23, 1917.

Proclamation, May 23, 1917.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the city of Washington this twenty-third day of May in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States of America the one hundred and forty-first.

[SEAL].

WOODROW WILSON.

By the President:

ROBERT LANSING,

Secretary of State.

(C) REPORT OF THE INTER-PARLIAMENTARY UNION, Jan. 9, 1913.

AVANT-PROJET DE CONVENTION[1]

ARTICLE PREMIER.

La présente convention s'applique :

(1) aux détroits qui constituent la seule ou la principale communication entre deux mers libres et dont la largeur minimum n'excède pas . . . . (par exemple 8) kilomètres ;

(2) aux canaux de Suez et de Panama.

ARTICLE 2.

Le régime spécial des détroits visés dans l'article premier s'étend à toute la longueur du détroit pour autant que la largeur n'excède pas . . . (par exemple 80) kilomètres.

[1] Extract from R. Laun, *Die Internationalisierung der Meerengen und Kanäle*, &c., The Hague, 1918, pp. 163–166. The notes (in parentheses) to Articles 5, 17, 20, 25 are in German in the original.

ARTICLE 3.

Le régime spécial des canaux s'étend aux eaux avoisinant le canal dans la limite de . . . (par exemple 20) kilomètres de chaque extrémité du canal.

ARTICLE 4.

Le Golfe de Suez et la partie septentrionale du Golfe de Panama sont considérés comme détroits pour autant que la largeur de ces golfes n'excède pas . . . (par exemple 80) kilomètres.

ARTICLE 5.

Le droit de libre passage et l'égalité de traitement dans tous les détroits visés dans l'article 1er sont reconnus à tous les navires sans distinction de pavillon, excepté les navires (armés) de l'ennemi, si l'État riverain est belligérant.

(*Note.*—The word 'armés' is to be retained only if the righ of capture of private property at sea is abolished.)

ARTICLE 6.

Dans ces détroits l'emploi des mines automatiques de contact amarrées et d'autres engins de destruction amarrés est interdit excepté comme moyen de défense.

ARTICLE 7.

Les États riverains ne pourront se servir de ces mines et engins que pour la protection de leurs propres côtes et seulement jusqu'à la distance de la portée extrême des canons.

ARTICLE 8.

Pour autant que la largeur d'un détroit n'excède pas la double portée extrême des canons, l'État riverain qui fait usage des facultés prévues aux articles précédents doit laisser un passage non barré par des mines automatiques de contact ou par d'autres engins éclatant au simple choc.

ARTICLE 9.

Dans ce passage il ne peut employer que des mines à commande électrique ou d'autres engins dont l'explosion suppose un acte volontaire, commis en connaissance de cause, pour la défense de l'État par les agents de celui-ci.

ARTICLE 10.

Le passage pourra être fermé pendant la nuit.

ARTICLE 11.

Lorsque des mines automatiques de contact ou d'autres engins de destruction amarrés éclatant au simple choc sont employés, l'État riverain doit faire connaître à la navigation par un avis préalable le rayon infesté de ces mines et engins et le passage.

ARTICLE 12.

Dans le passage visé dans l'article 8, l'État riverain peut laisser les navires se servir de ses pilotes brévétes ; s'il fait usage de cette faculté, il n'est pas tenu de faire connaître à la navigation les régions où seront mouillés les engins de destruction.

ARTICLE 13.

Dans les détroits visés dans l'article 1er il est interdit de placer des mines automatiques de contact non amarrées ou d'autres engins de destruction non amarrés.

ARTICLE 14.

Il est également interdit d'y placer des mines amarrées ou d'autres engins amarrés qui ne deviennent pas inoffensifs dès qu'ils auront rompu leurs amarrés.

ARTICLE 15.

Dans les détroits visés dans l'article 1er, le blocus par pierres et d'autres moyens de clôture sont interdits à moins qu'ils ne soient construits de manière à laisser un passage non barré ouvert à la navigation pacifique.

ARTICLE 16.

Si les rives d'un détroit appartiennent à des États différents et ceux-ci n'ont pas conventionnellement fixé la route du passage visé dans les articles 8 et 15, le passage peut être demandé de chacun d'eux.

ARTICLE 17.

Les actes d'hostilité pratiqués dans les détroits visés dans l'article 1er ne devront pas constituer un empêchement de plus de vingt-quatre heures en libre passage des bateaux neutres à travers les détroits.

(*Note.*—In case the right of capture of private property at sea is abolished, the words 'de tous les navires excepté les navires armés de l'ennemi' should be substituted for the words 'des bateaux neutres.')

ARTICLE 18.

Les canaux maritimes de Suez et de Panama seront toujours libres et ouverts, en temps de guerre comme en temps de paix, à tout navire de commerce ou de guerre, sans distinction de pavillon, même aux navires de guerre des belligérants.

ARTICLE 19.

Dans ces canaux et dans les zones internationalisées devant les embouchures de ces canaux, aucun acte d'hostilité et aucun acte ayant pour but d'entraver la libre navigation du canal ne pourra être exercé.

ARTICLE 20.

Dans ces eaux, l'emploi des mines et d'autres engins de destruction est absolument interdit, de même les blocus par pierres ou d'autres moyens de clôture.

(*Note.*—To this might perhaps be added further stipulations as to the period of stay allowed to ships of war, the disembarkation of troops, &c., corresponding to Article IV *seq.* of the Suez Canal Treaty, and Article III, Rule 3 *seq.*, of the Hay-Pauncefote Treaty of Nov. 18, 1901, as well as the remaining regulations of these treaties.)

ARTICLE 21.

Le blocus des eaux visées dans les articles 1er—4 est interdit, de même la déclaration d'une zone prohibée dans ces eaux excepté le placement d'engins de destruction amarrés, le blocus par pierres et d'autres moyens de clôture établis dans un détroit conformément aux prescriptions de cette convention.

ARTICLE 22.

Les phares qui marquent les abords des détroits et canaux visés dans l'article 1er ne doivent pas être étients, même en temps de guerre.

ARTICLE 23.

Si des divergences se rapportant à interprétation ou à l'application des stipulations de cette convention ne peuvent pas être aplainies par des négociations diplomatiques, les litiges y relatifs seront portés devant la Cour permanente d'arbitrage de La Haye.

ARTICLE 24.

Le compromis sera éventuellement établi conformément aux articles 53 et 54 de la Convention du 18 octobre, 1907, sur le règlement pacifique des conflits internationaux en tant qu'il n'y serait pas dérogé par un accord exprès au moment du litige.

ARTICLE 25.

Toutes clauses des traités, conventions et accords antérieurs, qui seraient contraires aux stipulations qui précèdent sont abrogées.

(*Note.*—Here would have eventually to be recited those older treaty stipulations which are in conflict with the foregoing project, but are nevertheless to remain in force.)

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