

"It is further agreed that so long as this treaty shall remain in force this same right of navigation shall extend to the waters of Lake Michigan, and to all canals connecting boundary waters and now existing or which may hereafter be constructed on either side of the line. Either of the high contracting parties may adopt rules and regulations governing the use of such canals within its own territory, and may charge tolls for the use thereof; but all such rules and regulations and all tolls charged shall apply alike to the subjects or citizens of the high contracting parties . . . and they shall be placed on terms of equality in the use thereof."

A similar provision, though more restricted in its scope, appears in Article 27 of the Treaty of Washington, 1871, and Your Excellency will no doubt remember how strenuously the United States protested, as a violation of equal rights, against a system which Canada had introduced of a rebate of a large portion of the tolls on certain freight on the Welland Canal, provided that such freight was taken as far as Montreal, and how in the face of that protest the system was abandoned.

The principle of equality is repeated in Article 3 of the Hay-Pauncefote Treaty, which provides that the United States adopts, as the basis of the neutralization of the canal, certain rules, substantially as embodied in the Suez Canal Convention. The first of these rules is that the canal shall be free and open to the vessels of commerce and war of all nations observing the rules on terms of entire equality, so that there shall be no discrimination against any such nation.

The word "neutralization" is no doubt used in Article 3 in the same sense as in the preamble, and implies subjection to the system of equal rights. The effect of the first rule is therefore to establish the provision, foreshadowed by the preamble and consequent on the maintenance of the principle of Article 8 of the Clayton-Bulwer Treaty, that the canal is to be open to British and United States vessels on terms of entire equality. It also embodies a promise on the part of the United States that the ships of all nations which observe the rules will be admitted to similar privileges.

The President in his memorandum treats the words "all nations" as excluding the United States. He argues that, as the United States is constructing the canal at its own cost on territory ceded to it, it has, unless it has restricted itself, an absolute right of ownership and control, including the right to allow its own commerce the use of the canal upon such terms as it sees fit, and that the only question is whether it has by the Hay-Pauncefote Treaty deprived itself of the exercise of the right to pass its own commerce free or remit tolls collected for the use of the canal. He argues that Article 3 of the treaty is nothing more than a declaration of policy by the United States that the canal shall be neutral and all nations treated alike, and no discrimination made against any one of them observing the rules adopted by the United States. "In other words, it was a conditional favoured-nation treatment, the measure of which, in the absence of express stipulations to that effect, is not what the country gives to its own nationals, but the treatment it extends to other nations."

For the reasons they have given above His Majesty's Government believe this statement of the case to be wholly at variance with the real position. They consider that by the Clayton-Bulwer Treaty the United States had surrendered the right to construct the canal, and that by the Hay-Pauncefote Treaty they recovered that right upon the footing that the canal should be open to British and United States vessels upon terms of equal treatment.

The case cannot be put more clearly than it was put by 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 (see Senate Document No. 746, 61st Congress, 3rd session):—

"These rules are adopted in the treaty with Great Britain as a consideration for getting rid of the Clayton-Bulwer Treaty."

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. Nor is it easy to see in what way the principle of Article 8 of the Clayton-Bulwer Treaty, which provides for equal treatment of British and United States ships, has been maintained.

I notice that in the course of the debate in the Senate on the Panama Canal Bill the argument was used by one of the speakers that the third, fourth, and fifth rules embodied in Article 3 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.

The same point may strike others who read nothing but the text of the Hay-Pauncefote Treaty itself, and I think it is therefore worth while that I should briefly show that this argument is not well founded.

The Hay-Pauncefote Treaty of 1901 aimed at carrying out the principle of the neutralization of the Panama Canal by subjecting it to the same regime as the Suez Canal. Rules 3, 4, and 5 of Article 3 of the treaty are taken almost textually from Articles 4, 5, and 6 of 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 Articles 10 and 13 of the Suez Canal Convention, which preserve the sovereign rights of Turkey and of Egypt, and stipulate that Articles 4 and 5 shall not effect 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 on 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.