dispose of the prior and conclusive rights of the French Panama Canal Co., which stood in the way of the construction of the canal by the United States pursuant to the Hay-Pauncefote treaty, was by purchasing those rights and becoming the successor of the Panama Canal Co. under the concessionary contracts. In those contracts there were stipulations and reservations running to Colombia, including rights of forfeiture of property and including an express stipulation for the right to pass her war vessels through the canal without the payment of dues. The third was the fact that Colombia had continuously refused to recognize the independence of Panama and stood ready to retake possession of the Isthmus and resume her control over it the moment that she was not prevented by the superior military and naval force of the United States, so that the only possession which was possible under the grant of Panama alone was the possession to be continuously maintained by force.

Under these circumstances the United States has deemed it to be its duty, in the performance of the obligations which it assumed in the Hay-Pauncefote treaty with Great Britain, to fortify its title and assure its peaceable possession of the canal for the purposes of the Hay-Pauncefote treaty by securing the assent of Colombia to the separation of Panama, the renunciation of Colombia’s claims, and the consent of Colombia to the necessary modification of the treaty engagements of 1846 between the United States and Colombia. In order to accomplish this the United States has found it necessary to renew the reservation of the specific right of Colombia to send its warships through the canal without the payment of dues, which has been insisted upon by that country in every concession and treaty she has made regarding it (for example, the Panama Canal concession of 1878, Article VI; the Hay-Concha accepted proposal for a treaty between the United States and Colombia of April 18, 1902, sent by Mr. Hay to the American Congress and printed as a public document; and the Hay-Herrán treaty of January 22, 1903, Articles XVI, XVII, and XVIII, and also to make the very substantial payment of a million and a quarter dollars, which the United States proposes to contribute toward the payment of Panama for the purpose of securing these rights.

The United States has considered not only that in prescribing the rule of equality in the Hay-Pauncefote treaty the parties must have contemplated the making of special arrangement by the United States with Colombia as the necessary source of title, but that the right to make such an exceptional arrangement still continues, in view of Colombia’s continued special relation to the title; and this view is supported by the provision of the fourth article of the Hay-Pauncefote treaty, which declares—

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.

Of course, in agreeing to accord to Colombia this reservation the United States is not dealing with the general subject of canal tolls. It is treating Colombia, for the reasons which I have described, as being in a wholly exceptional position, not subject to the rule of equality of the Hay-Pauncefote treaty and not to come within any
We are reassured, by a Great Purpose of equality in war any treaty, agree with the United States in accordance with such schedules as shall be established in accordance with the Hay-Pauncefote treaty.

Faithfully, yours,

ELIHU ROOT.

Mr. Root to Mr. Reid.

[Telegram.]

DEPARTMENT OF STATE.

Confidential and for your own information and guidance only.
The following letter sent to Ambassador Bryce to-day:

* * * * * * * * * * * * * * * *

I presume Bryce will mail it. Meantime you are at liberty to use it as you think best in your discretion to forestall premature action by British Government.

Your cable January 15, No. 352, saying that protest in Colombia matter is not likely to be of nature to be of much embarrassment, is reassuring, but it is important to avoid anything called a protest. We feel that the case does not warrant any protest, and that Great Britain instead of embarrassing ought to aid and encourage the consummation of an arrangement so useful for accomplishment of the purpose of Hay-Pauncefote treaty and so exceptional in character. Great Britain ought to consider that the good faith of the judgment of the United States as to the importance and necessity of this arrangement in aid of the enterprise is proved by our being willing not only to forego all dues from Colombia, but to pay a million and a quarter of dollars for the purpose of securing the arrangement. The position of the United States toward Great Britain in this matter is analogous to that of trustee securing advantage for the trust by means of personal sacrifices on his own part, and any objection by Great Britain would be like a beneficiary of a trust taking the benefit of the arrangement made by his trustee and at the same time making a very technical objection to his action. We are confident that the

1 Printed ante.
idea of protests by Great Britain arose before the full nature of the arrangement was made known to her and under a misconception as to its nature and extent.

Root.

Mr. Reid to Mr. Root.

No. 824.]

AMERICAN EMBASSY, LONDON.

January 25, 1909.

Sir: On receipt of your letter to Mr. Bryce * * * concerning the passage of Colombian war vessels through the Panama Canal, I sought an interview with the minister of foreign affairs.

But, as reported in my cipher telegram of the 19th instant, Sir Edward Grey was absent, and not expected to return much before the reassembling of Parliament. I then had an interview with Sir Charles Hardinge, the permanent undersecretary, and presented orally your representations as to the propriety and necessity of the arrangement with Colombia as forcibly as I could and at consider-able length. Sir Charles was obviously impressed by the facts, and did not insist so positively as at our first interview that Great Britain would be compelled to protest. He assured me that at any rate noth-ing in that direction would be done till there was ample time to con-sider your statement of the case. When I pointed out the inconveni-ence of long delay because of your approaching retirement he asked if I could not give him a memorandum of your views as I had just stated them. I promised to do so at once, and accordingly forwarded it the next day. He has since advised me that he sent it at once to Sir Edward Grey, in the north of England.

A copy of this memorandum is herewith inclosed. You will see that, in view of the danger of betraying our cipher, I felt bound to condense it materially, and also to put it in the form of a paraphrase instead of using your words. I hope you may find that the argument did not suffer too much in this process.

We have at least, by means of these interviews and the memo-randum, secured the promptest attention and at the same time pre-vented premature action.

I have, etc.,

Whitelaw Reid.

[Inclosure to No. 824.]

Mr. Reid to Sir Edward Grey.

MEMORANDUM.

Great Britain and the United States having no territory for an isthmian canal, nevertheless entered into a treaty looking to the con-struction of one by the United States.

They must have contemplated whatever arrangements were found necessary by the United States for securing the route and authority to build.
These arrangements could not have been thought to be involved in any subsequent toll sheet for the canals, and a payment in tolls due to itself promised by the United States in return for the right of way could not be considered a violation of the rule of equality as to tolls.

The Hay-Herran treaty promised such a payment, and it was duly ratified by the United States.

That treaty failing in Colombia, a revolution occurred on the Isthmus. The new State of Panama, after being recognized by Great Britain and the United States, gave consent to the purchase by the United States of the concession granted long before by Colombia to the French Panama Co. through territory now a part of Panama. There was no other way to dispose of the earlier and positive rights of the French company. But the concession thus taken over included, among various other obligations, this express agreement for freedom of tolls on the canal for Colombian war vessels.

Under the obligations assumed in the Hay-Pauncefote treaty, it was the duty of the United States to get a good title for the canal route and secure peaceful possession of the same.

But Colombia refused to recognize the independence of Panama and stood ready to seize and reannex it the moment the United States ceased to maintain it by force.

Under these circumstances the United States thought it was discharging its duty under the Hay-Pauncefote treaty in regularizing the title to the canal route, and in securing the peaceable acquiescence of Colombia by a large money payment and by foregoing the tolls on Colombian war vessels, as required in the French concession it had been forced to take over.

The United States is most desirous that Great Britain should realize the necessity under which it was placed, its full recognition of all its real obligations under the Hay-Pauncefote treaty, and its unreserved agreement that the concession demanded by Colombia in every treaty she has ever negotiated on this subject shall constitute no precedent for any other nation.

The good faith of the United States is certainly shown in its willingness to lose these tolls and to pay a large sum in administering the canal trust created between the two parties to the Hay-Pauncefote treaty. As trustee it is thus securing advantage for the trust by its own sacrifices. Great Britain, a beneficiary of the trust, while receiving the benefit of this action, will surely not, on full consideration, interpose a mere technical objection to it by anything in the shape of a protest.

January 20, 1909.

Memorandum received by the Secretary of State from British ambassador, February 3, 1909.

[Not of record in the Department of State.]

A telegram has been received from the foreign office informing Mr. Bryce that in view of the special circumstances of the case and in view of the explanation that Mr. Root has offered the Secretary of State may be informed that His Majesty's Government, on the
receipt of a formal assurance that a precedent for similar and other occasions shall not be constituted by the special treatment granted to Colombia with regard to free transit for her warships, are ready to forego the protest against the infringement of the Hay-Pauncefote treaty which they had intended to make.

This formal assurance and the acknowledgment thereof should be set forth in an exchange of notes.

The telegram further states that Mr. Bryce might further request the United States Government to use their good offices with the Government of Colombia to persuade them to devote an early installment of the sum received under the treaty of peace with Panama to settle the claims of British subjects against the Colombian Government.

It is believed that the amount of these claims is only about £6,000, but the claimants are for the most part persons of the laboring classes who can ill afford to lose these sums and the Colombian Government have more than once given an assurance to His Majesty’s Government that provision for their payment would be made by the treaty under contemplation.

Mr. Bacon to Mr. Bryce.

No. 540.]

DEPARTMENT OF STATE.
Washington, February 20, 1909.

EXCELLENCY: On the 8th of January, ultimo, Secretary Root communicated to you, confidentially, a memorandum regarding an arrangement then in progress of negotiation between Panama and Colombia and the United States which was deemed of considerable importance, especially to us, because enabling the United States to execute peaceably the purposes of the Hay-Pauncefote treaty concluded between the United States and Great Britain on November 18, 1901. That memorandum reads as follows:

In 1903, in settling with Colombia the terms upon which the United States might obtain the opportunity to construct the Panama Canal as contemplated in the Hay-Pauncefote treaty of November 18, 1901, Mr. Hay included in the Hay-Herrán treaty of January 22, 1903, a provision under which the war vessels of Colombia might pass through the canal free of duty. The United States has now, by the use of good offices and additional concessions on its own part, brought the Governments of the two sections which at that time constituted the Republic of Colombia, namely, Colombia and Panama, to the point of entering into an agreement under which Colombia will recognize the independence of Panama and confirm the title which Panama undertook to give to the United States to construct the canal by renouncing all Colombia’s claims. The proposed agreement will adjust the relations of the two to the public debt of Colombia, arrange for the settlement of the boundary, and provide for the exercise of election as to citizenship, and will constitute in general a treaty of separation.

As a part of this same arrangement of separation and to help bring it about, the United States is about to agree to the continuance of the right of passage on the part of Colombia which was formerly stipulated in the Hay-Herrán treaty. The United States has not been unmindful of the provision of the Hay-Pauncefote treaty under which the Suez rules were adopted as bases for the neutrality of the canal, including the rule against discriminations between different nations; but we have assumed that that rule had no relation to the terms by means of which the title to the site of the canal and the opportunity to build might be obtained.
The Government of the United States will communicate a copy of the different treaties immediately upon the final settlement of their terms and hopes that the accomplishment of this very important step toward executing the purposes which the United States and Great Britain have shared for so many years, and an expression of which is embodied in the Hay-Pauncefote treaty, will be received by Great Britain with special satisfaction.

**DEPARTMENT OF STATE,**

**Washington, January 8, 1909.**

The arrangement thus described took the shape of formal treaties, which were signed on the 9th ultimo, and are now before the Senate of the United States with a view to the advice and consent of that body being given to their ratification. They are still under the injunction of secrecy, but it seems necessary and proper to a full understanding of the foregoing memorandum and the subsequent comparison of views between the Governments of the United States and Great Britain that the provision thereof pertinent to the present communication should be cited herein:

Article II of the treaty between the United States and Colombia reads:

In consideration of the provisions and stipulations hereinafter contained it is agreed, as follows:

The Republic of Colombia shall have liberty at all times to convey through the ship canal now in course of construction by the United States across the Isthmus of Panama the troops, materials for war, and ships of war of the Republic of Colombia, without paying any duty to the United States, even in the case of an international war between Colombia and another country.

While the said interoceanic canal is in course of construction the troops and materials for war of the Republic of Colombia, even in the case of an international war between Colombia and any other country, shall be transported on the railway between Ancon and Cristobal, or on any other railway substituted therefor, upon the same conditions on which similar service is rendered to the United States.

The officers, agents, and employees of the Government of Colombia shall, during the same period, be entitled to free passage upon the said railway across the Isthmus of Panama upon due notification to the railway officials and the production of evidence of their official character.

The foregoing provisions of this article shall not, however, apply in case of war between Colombia and Panama.

After conference with you on the subject, Secretary Root amplified the ideas of the Government of the United States on the subject in a personal note to you, dated January 16, which so fully sets forth the policy and motives of the United States in the premises that I can not do better than cite it textually, as follows:

**DEPARTMENT OF STATE,**

**Washington, January 16, 1909.**

**DEAR MR. AMBASSADOR:** I think, on reflection, that I should follow your suggestion and put in writing the gist of the ideas which I conveyed to you orally in our interview last Thursday regarding the proposed concession to Colombia of the right to pass her war vessels through the Panama Canal, when completed, without the payment of any dues to the United States. The view of the United States upon this is, in substance, as follows:

The Hay-Pauncefote treaty of November 18, 1901, provided for the building of a canal in territory which was not under the jurisdiction of either of the contracting parties. The title to the land through which the canal was to be built, the authority to construct and operate, and jurisdiction and control over the canal when finished manifestly remained to be secured before the purposes of the treaty could be effected. The treaty said nothing about the way in which this should be accomplished. It follows by necessary implication that the agreements and arrangements to be made with the power or powers having right to grant or withhold the opportunity to construct and operate the canal must be
quite different from the mere application of a scale of tolls to the nations of the world in general which had nothing whatever to do with the creation of the canal. Such agreements are ex necessitate outside of the rule of equality to all the world which was embodied in the Suez rules.

This view was recognized in the Hay-Herrán treaty of January 22, 1903, in which the United States of Colombia, while undertaking to grant the right to the construction of the canal, reserved the right “to pass their vessels, troops, and munitions of war at all times without paying any dues whatever.” This treaty was confirmed by the Senate of the United States, but failed of confirmation by the Congress of Colombia. Then followed the revolution inaugurated on the 3d of November, 1903, and the recognition of the independence of Panama by both the United States and Great Britain, and thereafter the grant by the Republic of Panama to the United States of various rights connected with the canal, including as well as the direct grant a consent by Panama to the purchase by the United States of the property and concessions of the New Panama Canal Co., which had been for a long time engaged in canal construction across the Isthmus, and which had rights the acquisition or removal of which was necessary to vest in the United States the right to construct the canal in accordance with the terms of the Hay-Paucecfote treaty.

Notwithstanding the grant by Panama in her treaty with the United States, the remaining rights were subjects for serious consideration by the United States as affecting the peaceable and unquestioned title to the property and rights the acquisition of which was necessary to the execution of the canal project. One of these was that there still remained in force a treaty made in 1846 between the United States and Colombia, which was in existence at the time the Hay-Paucecfote treaty was made and under which the United States remained under special obligation to Colombia in respect of the very status of the canal. The second was that the only way to dispose of the prior and conclusive rights of the French Panama Canal Co., which stood in the way of the construction of the canal by the United States pursuant to the Hay-Paucecfote treaty, was by purchasing these rights and becoming the successor of the Panama Canal Co. under the concessionary contracts. In those contracts there were stipulations and reservations running to Colombia, including rights of forfeiture of property, and including an express stipulation for the right to pass her war vessels through the canal without the payment of dues. The third was the fact that Colombia had continuously refused to recognize the independence of Panama and stood ready to retake possession of the Isthmus and resume her control over it the moment that she was not prevented by the superior military and naval force of the United States; so that the only possession which was maintained under the grant of Panama alone was the possession to be continuously maintained by force.

Under these circumstances the United States has deemed it to be its duty in the performance of the obligations which it assumed in the Hay-Paucecfote treaty with Great Britain, to fortify its title and assure its peaceable possession of the canal for the purposes of the Hay-Paucecfote treaty by securing the assent of Colombia to the separation of Panama, the renunciation of Colombia's claims, and the consent of Colombia to the necessary modification of the treaty engagements of 1846 between the United States and Colombia. In order to accomplish this the United States has found it necessary to renew the reservation of the specific right of Colombia to send its warships through the canal without the payment of dues, which has been insisted upon by that country in every concession and treaty she has made regarding it (for example, the Panama Canal concession of 1878, Article VI; the Hay-Concha accepted proposal for a treaty between the United States and Colombia of April 18, 1902, sent by Mr. Hay to the American Congress and printed as a public document; and the Hay-Herrán treaty of January 22, 1903, Articles XVI, XVII, and XVIII), and also to make the very substantial payment of a million and a quarter dollars, which the United States proposes to contribute toward the payment of Panama for the purpose of securing these rights.

The United States has considered not only that in prescribing the rule of equality in the Hay-Paucecfote treaty the parties must have contemplated the making of special arrangement by the United States with Colombia as the necessary source of title, but that the right to make such an exceptional arrangement still continues in view of Colombia's continued special relation to the title; and this view is supported by the provision of the fourth article of the Hay-Paucecfote treaty, which declares 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.

Of course, in agreeing to accord to Colombia this reservation, the United States is not dealing with the general subject of canal tolls. It is treating Colombia for the reasons which I have described, as being in a wholly exceptional position, not subject to the rule of equality of the Hay-Pauncefote treaty, and not to come within any schedule of tolls which may hereafter be established, which must, of course, under the treaty, be equal for all nations to whom the rule of equality is properly applicable.

The United States is especially desirous that its course shall be understood by Great Britain, and that there shall be no thought on the part of that Government that the Government of the United States is unmindful of its obligations under the Hay-Pauncefote treaty, or is willing, in any degree whatever, to fail in strict compliance with those obligations, and for this reason I am making this explanation in the hope that the Government of Great Britain will agree with us regarding the situation of Colombia as to the title to the canal to be so exceptional as not to come within the rule of equality of the Hay-Pauncefote treaty, and will agree that the contemplated provision will constitute no precedent for the exception of any other nations from the payment of equal dues for the passage of war vessels in accordance with such schedules as shall be established in accordance with the Hay-Pauncefote treaty.

Faithfully, yours,

Elihu Root.

In the meantime the ambassador of the United States at London had held similar conference with the foreign office and communicated our views in a memorandum dated January 20, in which the considerations above set forth were substantially reproduced.

I have now had the pleasure to receive from you, on the 3d instant, an aide mémoire confirming your oral communication of that day, to the effect that you had been instructed by the foreign office, in view of the special circumstances of the case and in view of the explanation that Mr. Root had offered, to inform me that His Majesty’s Government, on the receipt of a formal assurance that a precedent for similar and other occasions shall not be constituted by the special treatment granted to Colombia with regard to free transit for her warships, are ready to forego the protest against the infringement of the Hay-Pauncefote treaty which they had intended to make. You added a proposal that this formal assurance and the acknowledgment thereof should be set forth in an exchange of notes.

Being thus in accord as to what is mutually understood to be an exceptional contingency growing out of the special circumstances of the case, and is, as explained by Mr. Root, a necessity toward the realization of the purpose for which the Hay-Pauncefote treaty was concluded, I have much pleasure in responding to your proposal by giving, on the part of the Government of the United States, through you, to His Majesty’s Government, formal confirmation of the assurance heretofore given to you by Secretary Root, that should the contemplated provision in favor of Colombia for the passage of Colombian warships through the Panama Canal become effective through the consummation of the treaty by ratification and exchange it will constitute no precedent for the exception of any other nations from the payment of equal dues for the passage of war vessels in accordance with such schedules as shall be established in conformity with the Hay-Pauncefote treaty.

Your acknowledgment and acceptance of this formal assurance will make it clear by exchange of notes that the Government of Great Britain agrees with the Government of the United States in regard-
ing the situation of Colombia as to the title to the canal to be so exceptional as not to come within the rule of equality of the Hay-Pauncefote treaty.

I have, etc.,

ROBERT BACON.

Mr. Bryce to Mr. Bacon.


Sir: I have the honor to acknowledge receipt of your note No. 540, of the 20th instant, on the subject of the treaty between the United States and the Republic of Colombia, and to say in reply that His Majesty's Government are glad to receive the full explanation given by you of the view which the Government of the United States take of the circumstances which appear to them to place the Republic of Colombia in a wholly different relation to the Panama Canal from that in which other countries stand, and which, as they conceive, distinguish the concession to that Republic of exceptional treatment from any case in which the question of making a similar concession to any other country could hereafter arise. Without entering on any discussion of the argument by which the view of your Government is supported and illustrated, His Majesty's Government are content to note that the United States Government hold that the right of the free passage for warships which the present treaty proposes to extend to Colombia is deemed by them to grow out of the entirely special and exceptional position of Colombia toward the canal and the title thereto, and accordingly does not constitute a precedent, and will not hereafter be drawn into a precedent, for the exception of any other nation from the payment of equal dues for the passage of war vessels in accordance with such schedules as shall be hereafter constituted in conformity with the Hay-Pauncefote treaty, or for any other concession of a special nature to Colombia or to any other power.

I have accordingly the honor of stating to you that His Majesty's Government consider that they can forego the making of such a protest as they had formerly contemplated, and that they accept the assurance contained in your note.

I have, etc.,

JAMES BRYCE.
PART III.

PAPERS SUBMITTED.

Chargé d'Affaires Innes to the Secretary of State.

British Embassy, Kineo, Me., July 8, 1912.

Sir: The attention of His Majesty's Government has been called to the various proposals that have from time to time been made for the purpose of relieving American shipping from the burden of the tolls to be levied on vessels passing through the Panama Canal, and these proposals, together with the arguments that have been used to support them have been carefully considered with a view to the bearing on them of the provisions of the treaty between the United States and Great Britain of November 18, 1901.

The proposals may be summed up as follows:

(1) To exempt all American shipping from the tolls; (2) to refund to all American ships the tolls which they may have paid; (3) to exempt American ships engaged in the coastwise trade; (4) to repay the tolls to American ships engaged in the coastwise trade.

The proposal to exempt all American shipping from the payment of the tolls would, in the opinion of His Majesty's Government, involve an infraction of the treaty, nor is there, in their opinion, any difference in principle between charging tolls only to refund them and remitting tolls altogether. The result is the same in either case, and the adoption of the alternative method of refunding the tolls in preference to that of remitting them, while perhaps complying with the letter of the treaty, would still contravene its spirit.

It has been argued that a refund of the tolls would merely be equivalent to a subsidy and that there is nothing in the Hay-Pauncefote treaty which limits the right of the United States to subsidize its shipping. It is true that there is nothing in that treaty to prevent the United States from subsidizing its shipping, and if it granted a subsidy His Majesty's Government could not be in a position to complain. But there is a great distinction between a general subsidy, either to shipping at large or to shipping engaged in any given trade, and a subsidy calculated particularly with reference to the amount of user of the canal by the subsidized lines or vessels. If such a subsidy were granted it would not, in the opinion of His Majesty's Government, be in accordance with the obligations of the treaty.

As to the proposal that exemption shall be given to vessels engaged in the coastwise trade, a more difficult question arises. If the trade should be so regulated as to make it certain that only bona fide coastwise traffic which is reserved for United States vessels would be benefited by this exemption, it may be that no objection could be taken. But it appears to my Government that it would be impossible
to frame regulations which would prevent the exemption from resulting, in fact, in a preference to United States shipping and consequently in an infraction of the treaty.

I have, etc.,

A. Mitchell Innes.

Mr. Innes to Mr. Knox.

British Embassy,
Washington, August 27, 1912.

Sir: On the 8th July I had the honor to present to the Government of the United States the views of His Majesty's Government on certain proposals which had been formulated with the object of relieving United States ships using the Panama Canal from the payment of tolls, while levying such tolls on foreign ships.

In view of the bill which has now been passed and of the memorandum issued by the President on signing it, I am instructed to inform you that His Majesty's Government adhere to the views expressed in that note, and that when His Majesty's Government have had time to consider fully the act and the memorandum a further communication will be made to you on the subject.

I am instructed to add at the same time that should there eventually be a difference between the two countries as to the correct interpretation of the Hay-Pauncefote treaty which cannot be settled by other means, His Majesty's Government would then ask that it should be referred to arbitration in accordance with the provisions of the existing arbitration treaty concluded in 1908.

I have, etc.,

A. Mitchell Innes.

Hon. Philander C. Knox,
Secretary of State.

Mr. Wilson to Mr. Innes.

Department of State,
Washington, August 30, 1912.

Sir: I have the honor to acknowledge the receipt of your note of the 27th instant in further expression of the views of His Britannic Majesty's Government concerning the relieving of American vessels using the Panama Canal from the payment of tolls.

Due note has been taken of the information which you communicate by instruction of your Government that His Majesty's Government adhere to the views expressed in your note of the 8th ultimo and that when His Majesty's Government has had time to consider fully the act and the memorandum issued by the President upon signing the act a further communication will be made to this Government on the subject.

I have, etc.,

Huntington Wilson,
Acting Secretary of State.
Mr. Phillips to Mr. Knox.

No. 2121.]  

AMERICAN EMBASSY,  
London, October 11, 1912.

Sir: I have the honor to report that, in reply to a question asked yesterday in the House of Commons respecting the Panama Canal dues, Sir Edward Grey announced the action which the Government had taken during the passage of the bill through Congress and explained that in his communication to the Government of the United States he had said that should there eventually be a difference between the two countries respecting the interpretation of the Hay-Pauncefote treaty that could not be settled by other means His Majesty's Government would ask that it be referred to arbitration in accordance with the provisions of the existing arbitration treaty concluded with the United States in 1908.

Sir E. Grey added that the whole subject was one of great importance and, together with the opinions of the legal advisers of the Crown, is now under the consideration of His Majesty's Government.

I beg to inclose herewith the questions and answers referred to as they appear in this morning's Times.

I have, etc.,

WILLIAM PHILLIPS.

[Inclosure.]

[From London Times, October 11, 1912. The Panama Canal dues.]

THE PANAMA CANAL DUES.

Mr. Hewins (Hereford, opp.) asked the secretary of state for foreign affairs whether he had received any definite reply to the representations made to the Government of the United States in regard to the bill which was then passing through Congress for regulating the Panama Canal dues; and whether His Majesty's Government were making any further representations, now that the bill had become law, so as to secure equitable treatment for British and Canadian ships.

Sir E. Grey. The Panama Canal bill underwent some alterations in the course of its passage through Congress, and after it was passed toward the end of August we informed the Government of the United States that we would address a communication to them after we had received and had time to consider the full text of the bill as signed by the President and his memorandum respecting it; it was added that should there eventually be a difference between the two countries respecting the interpretation of the Hay-Pauncefote treaty that could not be settled by any other means, we should ask that it be referred to arbitration in accordance with the provisions of the existing arbitration treaty concluded with the United States in 1908. The whole subject is one of great importance and, together with the views of the legal advisers of the Crown upon it, is now under consideration of His Majesty's Government. As soon as we are in a position to do so we shall be glad to make a further statement to the House.
Sir C. Hunter (Bath, opp.). Has the right honorable gentleman noticed the remark of President Taft that British representation was made rather tardily?

Sir. E. Grey. I have not seen that remark. I shall be very glad to know the date when that remark was made, for the bill would not pass in its final form, which is the important matter, until toward the end of August, and immediately after the receipt of the news that the bill had passed we stated that we would consider it in its final form and made a further communication.

Mr. Hewins. Did not the British Government make representations before the bill was passed?

Sir. E. Grey. It is quite true that we did express our views while the bill was in progress through Congress, but it was impossible to make a final communication with regard to a bill which was then being shaped, and we expressly stated that we would address a further communication after the bill had reached its final form and had been considered.

Mr. Lee (Hants, Fareham opp.). Will the right honorable gentleman consider the advisability of postponing those further representations until after the United States elections?

Sir. E. Grey. The subject is one of great importance, and when we do make our communication it ought to be the result of the very fullest consideration of all legal points of view. That we hope to complete this month, and we shall address our communication then to the United States. Of course, I can not say that it will be dependent upon internal affairs in the United States, but it must take a little time.

The Secretary of State for Foreign Affairs of Great Britain to Ambassador Bryce.

[Handed to the Secretary of State by the British ambassador December 9, 1912.]

Foreign Office, November 14, 1912.

Sir: Your excellency will remember that on the 8th July, 1912, Mr. Mitchell Innes communicated to the Secretary of State the objections which His Majesty’s Government entertained to the legislation relating to the Panama Canal, which was then under discussion in Congress, and that on the 27th August, after the passing of the Panama Canal act and the issue of the President’s memorandum on signing it, he informed Mr. Knox that when His Majesty’s Government had had time to consider fully the act and the memorandum a further communication would be made to him.

Since that date the text of the act and the memorandum of the President have received attentive consideration at the hands of His Majesty’s Government. A careful study of the President’s memorandum has convinced me that he has not fully appreciated the British point of view, and has misunderstood Mr. Mitchell Innes’s note of the 8th July. The President argues upon the assumption that it is the intention of His Majesty’s Government to place upon the Hay-Pauncefote treaty an interpretation which would prevent
the United States from granting subsidies to their own shipping passing through the canal, and which would place them at a disadvantage as compared with other nations. This is not the case; His Majesty's Government regard equality of all nations as the fundamental principle underlying the treaty of 1901 in the same way that it was the basis of the Suez Canal convention of 1888, and they do not seek to deprive the United States of any liberty which is open either to themselves or to any other nation; nor do they find either in the letter or in the spirit of the Hay-Pauncefote treaty any surrender by either of the contracting powers of the right to encourage its shipping or its commerce by such subsidies as it may deem expedient.

The terms of the President's memorandum render it essential that I should explain in some detail the view which His Majesty's Government take as to what is the proper interpretation of the treaty, so as to indicate the limitations which they consider it imposes upon the freedom of action of the United States, and the points in which the Panama Canal act, as enacted, infringes what His Majesty's Government hold to be their treaty rights.

The Hay-Pauncefote treaty does not stand alone; it was the corollary of the Clayton-Bulwer treaty of 1850. The earlier treaty was, no doubt, superseded by it, but its general principle, as embodied in article 8, was not to be impaired. The object of the later treaty is clearly shown by its preamble; it was "to facilitate the construction of a ship canal to connect the Atlantic and Pacific Oceans by whatever route may be deemed expedient, and to that end to remove any objection which may arise out of 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 8 of that convention." It was upon that footing, and upon that footing alone, that the Clayton-Bulwer treaty was superseded.

Under that treaty both parties had agreed not to obtain any exclusive control over the contemplated ship canal, but the importance of the great project was fully recognized, and therefore the construction of the canal by others was to be encouraged, and the canal when completed was to enjoy a special measure of protection on the part of both the contracting parties.

Under article 8 the two powers declared their desire, in entering into the convention, not only to accomplish a particular object, but also to establish a general principle, and therefore agreed to extend their protection to any practicable transisthmián communication, either by canal or railway, and either at Tehuantepec or Panama, provided that those who constructed it should impose no other charges or conditions of traffic than the two Governments should consider just and equitable, and that the canal or railway, "being open to the subjects and citizens of Great Britain and the United States on equal terms, should also be open to the subjects of any other State which was willing to join in the guaranty of joint protection."

So long as the Clayton-Bulwer treaty was in force, therefore, the position was that both parties to it had given up their power of independent action, because neither was at liberty itself to construct
the canal and thereby obtain the exclusive control which such con-
struction would confer. It is also clear that if the canal had been
constructed while the Clayton-Bulver treaty was in force, it would
have been open, in accordance with article 8, to British and United
States ships on equal terms, and equally clear, therefore, that the
tolls leviable on such ships would have been identical.

The purpose of the United States in negotiating the Hay-Paunce-
fote treaty was to recover their freedom of action, and obtain the
right, which they had surrendered, to construct the canal them-
selves; this is expressed in the preamble to the treaty, but the com-
plete liberty of action consequential upon such construction was to
be limited by the maintenance of the general principle embodied in
article 8 of the earlier treaty. That principle, as shown above, was
one of equal treatment for both British and United States ships,
and a study of the language of article 8 shows that the word "neu-
tralization," in the preamble of the later treaty, is not there confined
to belligerent operations, but refers to the system of equal rights for
which article 8 provides.

If the wording of the article is examined it will be seen that there
is no mention of belligerent action in it at all. Joint protection and
equal treatment are the only matters alluded to, and it is to one, or
both, of these that neutralization must refer. Such joint protection
has always been understood by His Majesty's Government to be
one of the results of the Clayton-Bulver treaty of which the United
States was most anxious to get rid, and they can scarcely therefore
believe that it was such joint protection that the United States were
willing to keep alive, and to which they referred in the preamble
of the Hay-Pauncefote treaty. It certainly was not the intention of
His Majesty's Government that any responsibility for the protection
of the canal should attach to them in the future. Neutralization
must therefore refer to the system of equal rights.

It thus appears from the preamble that the intention of the Hay-
Pauncefote treaty was that the United States was to recover the
right to construct the transisthmian canal upon the terms that, when
constructed, the canal was to be open to British and United States
ships on equal terms.

The situation created was in fact identical with that resulting
from the boundary waters treaty of 1909 between Great Britain
and the United States, which provided as follows:

The high contracting parties agree that the navigation of all navigable
boundary waters shall for ever continue free and open for the purposes
of commerce to the inhabitants and to the ships, vessels, and boats of both
countries equally, subject, however, to any laws and regulations of either
country, within its own territory, not inconsistent with such privilege of free
navigation, and applying equally and without discrimination to the inhabitants,
ships, vessels, and boats of both countries.

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 here-
after 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 sub-
jects 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 favored-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 can not 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 S. Doc. No. 746, 61st Cong., 3d sess.):

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-favored-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" can not 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 victualing its war ships 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 régime 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 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 defense of Egypt and the maintenance of public order, and, in the case of Turkey, the defense 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.

For these reasons, His Majesty's Government maintain that the words "all nations," in rule 1 of article 3 of the Hay-Pauncefote treaty include the United States, and that, in consequence, British vessels using the canal are entitled to equal treatment with those of the United States, and that the same tolls are chargeable on each.

This rule also provides that the tolls should be "just and equitable." The purpose of these words was to limit the tolls to the amount representing the fair value of the services rendered, i.e., to the interest on the capital expended and the cost of the operation and maintenance of the canal. Unless the whole volume of shipping which passes through the canal, and which all benefits equally by its
services, is taken into account, there are no means of determining whether the tolls chargeable upon a vessel represent that vessel's fair proportion of the current expenditure properly chargeable against the canal—that is to say, interest on the capital expended in construction and the cost of operation and maintenance. If any classes of vessels are exempted from tolls in such a way that no receipts from such ships are taken into account in the income of the canal, there is no guarantee that the vessels upon which tolls are being levied are not being made to bear more than their fair share of the upkeep. Apart altogether, therefore, from the provision in rule 1 about equality of treatment for all nations, the stipulation that the tolls shall be just and equitable, when rightly understood, entitles His Majesty's Government to demand, on behalf of British shipping, that all vessels passing through the canal, whatever their flag or their character, shall be taken into account in fixing the amount of the tolls.

The result is that any system by which particular vessels or classes of vessels were exempted from the payment of tolls would not comply with the stipulations of the treaty that the canal should be open on terms of entire equality, and that the charges should be just and equitable.

The President, in his memorandum, argues that if there is no difference, as stated in Mr. Mitchell Innes's note of the 8th July, between charging tolls only to refund them and remitting tolls altogether, the effect is to prevent the United States from aiding its own commerce in the way that all other nations may freely do. This is not so. His Majesty's Government have no desire to place upon the Hay-Pauncefote treaty an interpretation which would impose upon the United States any restriction from which other nations are free, or reserve to such other nation any privilege which is denied to the United States. Equal treatment, as specified in the treaty, is all they claim.

His Majesty's Government do not question the right of the United States to grant subsidies to United States shipping generally or to any particular branches of that shipping, but it does not follow therefore that the United States may not be debarred by the Hay-Pauncefote treaty from granting a subsidy to certain shipping in a particular way, if the effect of the method chosen for granting such subsidy would be to impose upon British or other foreign shipping an unfair share of the burden of the upkeep of the canal, or to create a discrimination in respect of the conditions or charges of traffic, or otherwise to prejudice rights secured to British shipping by this treaty.

If the United States exempt certain classes of ships from the payment of tolls, the result would be a form of subsidy to those vessels which His Majesty's Government consider the United States are debarred by the Hay-Pauncefote treaty from making.

It remains to consider whether the Panama Canal act, in its present form, conflicts with the treaty rights to which His Majesty's Government maintain they are entitled.

Under section 5 of the act the President is given, within certain defined limits, the right to fix the tolls, but no tolls are to be levied upon ships engaged in the coastwise trade of the United States, and
the tolls, when based upon net registered tonnage for ships of commerce, are not to exceed $1.25 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. There is also an exception for the exemptions granted by article 19 of the convention with Panama of 1903.

The effect of these provisions is that vessels engaged in the coastwise trade will contribute nothing to the upkeep of the canal. Similarly vessels belonging to the Government of the Republic of Panama will, in pursuance of the treaty of 1903, contribute nothing to the upkeep of the canal. Again, in the cases where tolls are levied, the tolls in the case of ships belonging to the United States and its citizens may be fixed at a lower rate than in the case of foreign ships and may be less than the estimated proportionate cost of the actual maintenance and operation of the canal.

These provisions (1) clearly conflict with the rule embodied in the principle established in article 8 of the Clayton-Bulwer treaty of equal treatment for British and United States ships, and (2) would enable tolls to be fixed which would not be just and equitable, and would therefore not comply with rule 1 of article 3 of the Hay-Pauncefote treaty.

It has been argued that as the coastwise trade of the United States is confined by law to United States vessels, the exemption of vessels engaged in it from the payment of tolls can not injure the interests of foreign nations. It is clear, however, that the interests of foreign nations will be seriously injured in two material respects.

In the first place, the exemption will result in the cost of the working of the canal being borne wholly by foreign-going vessels, and on such vessels, therefore, will fall the whole burden of raising the revenue necessary to cover the cost of working and maintaining the canal. The possibility, therefore, of fixing the toll on such vessels at a lower figure than $1.25 per ton, or of reducing the rate below that figure at some future time, will be considerably lessened by the exemption.

In the second place, the exemption will, in the opinion of His Majesty's Government, be a violation of the equal treatment secured by the treaty, as it will put the "coastwise trade" in a preferential position as regards other shipping. Coastwise trade can not be circumscribed so completely that benefits conferred upon it will not affect vessels engaged in the foreign trade. To take an example, if cargo intended for a United States port beyond the canal, either from east or west, and shipped on board a foreign ship could be sent to its destination more cheaply, through the operation of the proposed exemption, by being landed at a United States port before reaching the canal, and then sent on as coastwise trade, shippers would benefit by adopting this course in preference to sending the goods direct to their destination through the canal on board the foreign ship.

Again, although certain privileges are granted to vessels engaged in an exclusively coastwise trade, His Majesty's Government are given to understand that there is nothing in the laws of the United States which prevents any United States ship from combining foreign commerce with coastwise trade, and consequently from entering into
direct competition with foreign vessels while remaining "prima facie" entitled to the privilege of free passage through the canal. Moreover, any restriction which may be deemed to be now applicable might at any time be removed by legislation, or even, perhaps, by mere changes in the regulations.

In these and in other ways foreign shipping would be seriously handicapped, and any adverse result would fall more severely on British shipping than on that of any other nationality.

The volume of British shipping which will use the canal will in all probability be very large. Its opening will shorten by many thousands of miles the waterways between England and other portions of the British Empire, and if, on the one hand, it is important to the United States to encourage its mercantile marine and establish competition between coastwise traffic and transcontinental railways, it is equally important to Great Britain to secure to its shipping that just and impartial treatment to which it is entitled by treaty, and in return for a promise of which it surrendered the rights which it held under the earlier convention.

There are other provisions of the Panama Canal act to which the attention of His Majesty's Government has been directed. These are contained in section 11, part of which enacts that a railway company subject to the interstate-commerce act of 1887 is prohibited from having any interest in vessels operated through the canal with which such railways may compete, and another part provides that a vessel permitted to engage in the coastwise or foreign trade of the United States is not allowed to use the canal if its owner is guilty of violating the Sherman Antitrust Act.

His Majesty's Government do not read this section of the act as applying to or affecting British ships, and they therefore do not feel justified in making any observations upon it. They assume that it applies only to vessels flying the flag of the United States, and that it is aimed at practices which concern only the internal trade of the United States. If this view is mistaken and the provisions are intended to apply under any circumstances to British ships, they must reserve their right to examine the matter further and to raise such contentions as may seem justified.

His Majesty's Government feel no doubt as to the correctness of their interpretation of the treaties of 1850 and 1901 and as to the validity of the rights they claim under them for British shipping; nor does there seem to them to be any room for doubt that the provisions of the Panama Canal act as to tolls conflict with the rights secured to their shipping by the treaty. But they recognize that many persons of note in the United States, whose opinions are entitled to great weight, hold that the provisions of the act do not infringe the conventional obligations by which the United States is bound, and under these circumstances they desire to state their perfect readiness to submit the question to arbitration if the Government of the United States would prefer to take this course. A reference to arbitration would be rendered unnecessary if the Government of the United States should be prepared to take such steps as would remove the objections to the act which His Majesty's Government have stated.

Knowing, as I do, full well the interest which this great undertaking has aroused in the New World, and the emotion with which
its opening is looked forward to by United States citizens, I wish to add before closing this dispatch that it is only with great reluctance that His Majesty's Government have felt bound to raise objection on the ground of treaty rights to the provisions of the act. Animated by an earnest desire to avoid points which might in any way prove embarrassing to the United States, His Majesty's Government have confined their objections within the narrowest possible limits and have recognized in the fullest manner the right of the United States to control the canal. They feel convinced that they may look with confidence to the Government of the United States to insure that in promoting the interests of United States shipping nothing will be done to impair the safeguards guaranteed to British shipping by treaty.

Your excellency will read this dispatch to the Secretary of State and will leave with him a copy.

I am, &c.,

E. Grey.

The Secretary of State to Chargé d'Affaires Laughlin.

No. 1833.] Department of State, Washington, January 17, 1913.


Sir: I inclose a copy of an instruction from Sir Edward Grey to His Britannic Majesty's ambassador at Washington, dated November 14, 1912, a copy of which was handed to me by the ambassador on the 9th ultimo, in which certain provisions in the Panama Canal act of August 24 last are discussed in their relation to the Hay-Pauncefote treaty of November 18, 1901; and I also inclose a copy of the note addressed to me on July 8, 1912, by Mr. A. Mitchell Innes, His Britannic Majesty's chargé d'affaires, stating the objections which his Government entertained to the legislation relating to the Panama Canal, which was then under discussion in Congress. A copy of the President's proclamation of November 13, 1912, fixing the canal tolls, is also inclosed.

Sir Edward Grey's communication, after setting forth the several grounds upon which the British Government believe the provisions of the act are inconsistent with the stipulations of the Hay-Pauncefote treaty, states the readiness of his Government "to submit the question to arbitration if the Government of the United States would prefer to take this course" rather than "to take such steps as would remove the objections to the act which His Majesty's Government have stated." It therefore becomes necessary for this Government to examine these objections in order to ascertain exactly in what respects this act is regarded by the British Government as inconsistent with the provisions of that treaty, and also to explain the views of this Government upon the questions thus presented, and to consider the advisability at this time of submitting any of these questions to arbitration.

It may be stated at the outset that this Government does not agree with the interpretation placed by Sir Edward Grey upon the Hay-

1 Printed ante.
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Pauncefote treaty, or upon the Clayton-Bulwer treaty, but for reasons which will appear hereinbelow it is not deemed necessary at present to amplify or reiterate the views of this Government upon the meaning of those treaties.

In Sir Edward Grey's communication, after explaining in detail the views taken by his Government as to the proper interpretation of the Hay-Pauncefote treaty, "so as to indicate the limitations which" His Majesty's Government "consider it imposes upon the freedom of action of the United States," he proceeds to indicate the points in which the canal act infringes what he holds to be Great Britain's treaty rights.

It is obvious from the whole tenor of Sir Edward Grey's communication that in writing it he could not have taken cognizance of the President's proclamation fixing the canal tolls. Indeed, a comparison of the dates of the proclamation and the note, which are dated, respectively, November 13 and November 14 last, shows that the proclamation could hardly have been received in London in time for consideration in the note. Throughout his discussion of the subject, Sir Edward Grey deals chiefly with the possibilities of what the President might do under the act, which in itself does not prescribe the tolls, but merely authorizes the President to do so; and nowhere does the note indicate that Sir Edward Grey was aware of what the President actually had done in issuing this proclamation. The proclamation, therefore, has entirely changed the situation which is discussed by Sir Edward Grey, and the diplomatic discussion, which his note now makes inevitable, must rest upon the bases as they exist at present, and not upon the hypothesis formed by the British Government at the time this note was written.

Sir Edward Grey presents the question of conflict between the act and the treaty in the following language:

It remains to consider whether the Panama Canal act, in its present form, conflicts with the treaty rights to which His Majesty's Government maintain they are entitled.

Under section 5 of the act the President is given, within certain defined limits, the right to fix the tolls, but no tolls are to be levied upon ships engaged in the coastwise trade of the United States, and the tolls, when based upon net registered tonnage for ships of commerce, are not to exceed 1 dollar 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. There is also an exception for the exemptions granted by article 19 of the convention with Panama of 1903.

The effect of these provisions is that vessels engaged in the coastwise trade will contribute nothing to the upkeep of the canal. Similarly vessels belonging to the Government of the Republic of Panama will, in pursuance of the treaty of 1903, contribute nothing to the upkeep of the canal. Again, in the cases where tolls are levied, the tolls in the case of ships belonging to the United States and its citizens may be fixed at a lower rate than in the case of foreign ships, and may be less than the estimated proportionate cost of the actual maintenance and operation of the canal.

These provisions (1) clearly conflict with the rule embodied in the principle established in article 8 of the Clayton-Bulwer treaty of equal treatment for British and United States ships and (2) would enable tolls to be fixed which would not be just and equitable and would therefore not comply with rule 1 of article 3 of the Hay-Pauncefote treaty.

From this it appears that three objections are made to the provisions of the act: first, that no tolls are to be levied upon ships engaged in the coastwise trade of the United States; second, that a discretion appears to be given to the President to discriminate in fixing tolls
in favor of ships belonging to the United States and its citizens as against foreign ships; and, third, that an exemption has been given to the vessels of the Republic of Panama under article 19 of the convention with Panama of 1903.

Considered in the reverse order of their statement, the third objection, coming at this time, is a great and complete surprise to this Government. The exemption under that article applies only to the government vessels of Panama and was part of the agreement with Panama under which the canal was built. The convention containing the exemption was ratified in 1904, and since then to the present time no claim has been made by Great Britain that it conflicted with British rights. The United States has always asserted the principle that the status of the countries immediately concerned by reason of their political relation to the territory in which the canal was to be constructed was different from that of all other countries. The Hay-Herran treaty with Colombia of 1903 also provided that the war vessels of that country were to be given free passage. It has always been supposed by this Government that Great Britain recognized the propriety of the exemptions made in both of those treaties. It is not believed, therefore, that the British Government intend to be understood as proposing arbitration upon the question of whether or not this provision of the act, which in accordance with our treaty with Panama exempts from tolls the government vessels of Panama, is in conflict with the provisions of the Hay-Pauncefote treaty.

Considering the second objection based upon the discretion thought to be conferred upon the President to discriminate in favor of ships belonging to the United States and its citizens, it is sufficient, in view of the fact that the President’s proclamation fixing the tolls was silent on the subject, to quote the language used by the President in the memorandum attached to the act at the time of signature, in which he says:

It is not, therefore, necessary to discuss the policy of such discrimination until the question may arise in the exercise of the President’s discretion.

On this point no question has as yet arisen which, in the words of the existing arbitration treaty between the United States and Great Britain, “it may not have been possible to settle by diplomacy,” and until then any suggestion of arbitration may well be regarded as premature.

It is not believed, however, that in the objection now under consideration Great Britain intends to question the right of the United States to exempt from the payment of tolls its vessels of war and other vessels engaged in the service of this Government. Great Britain does not challenge the right of the United States to protect the canal. United States vessels of war and those employed in Government service are a part of our protective system. By the Hay-Pauncefote treaty we assume the sole responsibility for its neutralization. It is inconceivable that this Government should be required to pay canal tolls for the vessels used for protecting the canal, which we alone must protect. The movement of United States vessels in executing governmental policies of protection are not susceptible of explanation or differentiation. The United States could not be called upon to explain what relation the movement of a particular vessel through the canal has to its protection. The
British objection, therefore, is understood as having no relation to the use of the canal by vessels in the service of the United States Government.

Regarding the first objection, the question presented by Sir Edward Grey arises solely upon the exemption in the canal act of vessels engaged in our coastwise trade.

On this point Sir Edward Grey says that “His Majesty's Government do not question the right of the United States to grant subsidies to United States shipping generally, or to any particular branches of that shipping,” and it is admitted in his note that the exemption of certain classes of ships would be “a form of subsidy” to those vessels; but it appears from the note that His Majesty's Government would regard that form of subsidy as objectionable under the treaty if the effect of such subsidy would be “to impose upon British or other foreign shipping an unfair share of the burden of the upkeep of the canal, or to create a discrimination in respect of the conditions or charges of traffic, or otherwise to prejudice rights secured to British shipping by this treaty.”

It is not contended by Great Britain that equality of treatment has any reference to British participation in the coastwise trade of the United States, which, in accordance with general usage, is reserved to American ships. The objection is only to such exemption of that trade from toll payments as may adversely affect British rights to equal treatment in the payment of tolls, or to just and equitable tolls. It will be helpful here to recall that we are now only engaged in considering (quoting from Sir Edward Grey's note) “whether the Panama Canal act in its present form conflicts with the treaty rights to which His Majesty's Government maintain they are entitled,” concerning which he concludes:

*These provisions (1) clearly conflict with the rule embodied in the principle established in article 8 of the Clayton-Bulwer treaty of equal treatment for British and United States ships, and (2) would enable tolls to be fixed which would not be just and equitable, and would therefore not comply with rule 1 of article 3 of the Hay-Pauncefote treaty.*

On the first of these points the objection of the British Government to the exemption of vessels engaged in the coastwise trade of the United States is stated as follows:

* * * the exemption will, in the opinion of His Majesty’s Government, be a violation of the equal treatment secured by the treaty, as it will put the “coastwise trade” in a preferential position as regards other shipping. Coastwise trade can not be circumscribed so completely that benefits conferred upon it will not affect vessels engaged in the foreign trade. To take an example, if cargo intended for a United States port beyond the canal, either from east or west, and shipped on board a foreign ship could be sent to its destination more cheaply through the operation of proposed exemption by being landed at a United States port before reaching the canal and then sent on as coastwise trade, shippers would benefit by adopting this course in preference to sending the goods direct to their destination through the canal on board the foreign ship.

This objection must be read in connection with the views expressed by the British Government while this act was pending in Congress, which were stated in the note of July 8, 1912, on the subject from Mr. Innes, as follows:

As to the proposal that exemption shall be given to vessels engaged in the coastwise trade, a more difficult question arises. If the trade should be so
regulated as to make it certain that only bona fide coastwise traffic which is reserved for United States vessels would be benefited by this exemption, it may be that no objection could be taken.

This statement may fairly be taken as an admission that this Government may exempt its vessels engaged in the coastwise trade from the payment of tolls, provided such exemption be restricted to bona fide coastwise traffic. As to this it is sufficient to say that obviously the United States is not to be denied the power to remit tolls to its own coastwise trade because of a suspicion or possibility that the regulations yet to be framed may not restrict this exemption to bona fide coastwise traffic.

The answer to this objection, therefore, apart from any question of treaty interpretation, is that it rests on conjecture as to what may happen rather than upon proved facts, and does not present a question requiring submission to arbitration, as it has not as yet passed beyond the stage where it can be profitably dealt with by diplomatic discussion. It will be remembered that only questions which it may not be possible to settle by diplomacy are required by our arbitration treaty to be referred to arbitration.

On this same point Sir Edward Grey urges another objection to the exemption of coastwise vessels, as follows:

Again, although certain privileges are granted to vessels engaged in an exclusively coastwise trade, His Majesty's Government are given to understand that there is nothing in the laws of the United States which prevents any United States ship from combining foreign commerce with coastwise trade, and consequently from entering into direct competition with foreign vessels while remaining "prima facie" entitled to the privilege of free passage through the canal. Moreover any restriction which may be deemed to be now applicable might at any time be removed by legislation or even perhaps by mere changes in the regulations.

This objection also raises a question which, apart from treaty interpretation, depends upon future conditions and facts not yet ascertained, and for the same reasons as are above stated its submission to arbitration at this time would be premature.

The second point of Sir Edward Grey's objection to the exemption of vessels engaged in coastwise trade remains to be considered. On this point he says that the provisions of the act "would enable tolls to be fixed which would not be just and equitable, and would therefore not comply with rule 1 of article 3 of the Hay-Pauncefote treaty."

It will be observed that this statement evidently was framed without knowledge of the fact that the President's proclamation fixing the tolls had issued. It is not claimed in the note that the tolls actually fixed are not "just and equitable" or even that all vessels passing through the canal were not taken into account in fixing the amount of the tolls, but only that either or both contingencies are possible.

If the British contention is correct that the true construction of the treaty requires all traffic to be reckoned in fixing just and equitable tolls, it requires at least an allegation that the tolls as fixed are not just and equitable and that all traffic has not been reckoned in fixing them before the United States can be called upon to prove that this course was not followed, even assuming that the burden of proof would rest with the United States in any event, which is open to

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question. This Government welcomes the opportunity, however, of informing the British Government that the tolls fixed in the President's proclamation are based upon the computations set forth in the report of Prof. Emory R. Johnson, a copy of which is forwarded herewith for delivery to Sir Edward Grey, and that the tolls which would be paid by American coastwise vessels, but for the exemption contained in the act, were computed in determining the rate fixed by the President.

By reference to page 208 of Prof. Johnson's report, it will be seen that the estimated net tonnage of shipping using the canal in 1915 is as follows:

<table>
<thead>
<tr>
<th>Tons.</th>
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</thead>
<tbody>
<tr>
<td>American shipping</td>
</tr>
<tr>
<td>American shipping carrying foreign commerce of the United States</td>
</tr>
<tr>
<td>Foreign shipping</td>
</tr>
<tr>
<td>Foreign shipping carrying commerce of the United States and foreign countries</td>
</tr>
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It was on this estimate that tolls fixed in the President's proclamation were based.

Sir Edward Grey says, "This rule [1 of article 3 of the Hay-Pauncefote treaty] also provides that the tolls should be 'just and equitable.'" The purpose of these words, he adds, "was to limit the tolls to the amount representing the fair value of the services rendered, i.e., to the interest on the capital expended and the cost of the operation and maintenance of the canal." If, as a matter of fact, the tolls now fixed (of which he seems unaware) do not exceed this requirement, and as heretofore pointed out there is no claim that they do, it is not apparent under Sir Edward Grey's contention how Great Britain could be receiving unjust and inequitable treatment if the United States favors its coastwise vessels by not collecting their share of the tolls necessary to meet the requirement. There is a very clear distinction between an omission to "take into account" the coastwise tolls in order to determine a just and equitable rate, which is as far as this objection goes, and the remission of such tolls, or their collection coupled with their repayment in the form of a subsidy.

The exemption of the coastwise trade from tolls, or the refunding of tolls collected from the coastwise trade, is merely a subsidy granted by the United States to that trade, and the loss resulting from not collecting, or from refunding those tolls, will fall solely upon the United States. In the same way the loss will fall on the United States if the tolls fixed by the President's proclamation on all vessels represent less than the fair value of the service rendered, which must necessarily be the case for many years; and the United States will, therefore, be in the position of subsidizing or aiding not merely its own coastwise vessels, but foreign vessels as well.

Apart from the particular objections above considered, it is not understood that Sir Edward Grey questions the right of the United States to subsidize either its coastwise or its foreign shipping, inasmuch as he says that His Majesty's Government do not find "either in the letter or in the spirit of the Hay-Pauncefote treaty any surrender by either of the contracting powers of the right to encourage its shipping or its commerce by such subsidies as it may deem expedient."
To summarize the whole matter: The British objections are, in the first place, about the canal act only; but the canal act does not fix the tolls. They ignore the President's proclamation fixing the tolls which puts at rest practically all of the supposititious injustice and inequality which Sir Edward Grey thinks might follow the administration of the act, and concerning which he expresses so many and grave fears. Moreover, the gravamen of the complaint is not that the canal act will actually injure in its operation British shipping or destroy rights claimed for such shipping under the Hay-Pauncefote treaty, but that such injury or destruction may possibly be the effect thereof; and further, and more particularly, Sir Edward Grey complains that the action of Congress in enacting the legislation under discussion foreshadows that Congress or the President may hereafter take some action which might be injurious to British shipping and destructive of its rights under the treaty. Concerning this possible future injury, it is only necessary to say that in the absence of an allegation of actual or certainly impending injury there appears nothing upon which to base a sound complaint. Concerning the infringement of rights claimed by Great Britain, it may be remarked that it would, of course, be idle to contend that Congress has not the power or that the President, properly authorized by Congress, may not have the power to violate the terms of the Hay-Pauncefote treaty in its aspect as a rule of municipal law. Obviously, however, the fact that Congress has the power to do something contrary to the welfare of British shipping or that Congress has put or may put into the hands of the President the power to do something which may be contrary to the interests possessed by British shipping affords no just ground for complaint. It is the improper exercise of a power and not its possession which alone can give rise to an international cause of action; or, to put it in terms of municipal law, it is not the possession of the power to trespass upon another's property which gives a right of action in trespass, but only the actual exercise of that power in committing the act of trespass itself.

When and if complaint is made by Great Britain that the effect of the act and the proclamation together will be to subject British vessels, as a matter of fact, to inequality of treatment or to unjust and inequitable tolls in conflict with the terms of the Hay-Pauncefote treaty, the question will then be raised as to whether the United States is bound by that treaty both to take into account and to collect tolls from American vessels, and also whether under the obligations of that treaty British vessels are entitled to equality of treatment in all respects with the vessels of the United States. Until these objections rest upon something more substantial than mere possibility it is not believed that they should be submitted to arbitration. The existence of an arbitration treaty does not create a right of action; it merely provides a means of settlement to be resorted to only when other resources of diplomacy have failed. It is not now deemed necessary, therefore, to enter upon a discussion of the views entertained by Congress and by the President as to the meaning of the Hay-Pauncefote treaty in relation to questions of fact which have not yet arisen but may possibly arise in the future in connection with the administration of the act under consideration.

It is recognized by this Government that the situation developed by the present discussion may require an examination by Great
Britain into the facts above set forth as to the basis upon which the
tolls fixed by the President's proclamation have been computed,
and also into the regulations and restrictions circumscribing the
eastwise trade of the United States, as well as into other facts
bearing upon the situation, with the view of determining whether or
not, as a matter of fact, under present conditions there is any ground
for claiming that the act and proclamation actually subject British
vessels to inequality of treatment or to unjust and inequitable tolls.

If it should be found as a result of such an examination on the
part of Great Britain that a difference of opinion exists between the
two Governments on any of the important questions of fact involved
in this discussion, then a situation will have arisen which, in the
opinion of this Government, could with advantage be dealt with by
referring the controversy to a commission of inquiry for examina-
tion and report in the manner provided for in the unratified arbi-
tration treaty of August 3, 1911, between the United States and
Great Britain.

The necessity for inquiring into questions of fact in their relation
to controversies under diplomatic discussion was contemplated by
both parties in negotiating that treaty, which provides for the insti-
tution, as occasion arises, of a joint high commission of inquiry, to
which, upon the request of either party, might be referred for impar-
tial and conscientious investigation any controversy between them,
the commission being authorized upon such reference "to examine
into and report upon the particular questions or matters referred to
it, for the purpose of facilitating the solution of disputes by elucidat-
ing the facts, and to define the issues presented by such questions, and
also to include in its report such recommendations and conclusions
as may be appropriate."

This proposal might be carried out, should occasion arise for adopt-
ing it, either under a special agreement or under the unratified arbi-
tration treaty above mentioned, if Great Britain is prepared to join
in ratifying that treaty, which the United States is prepared to do.

You will take an early opportunity to read this dispatch to Sir
Edward Grey; and if he should so desire, you will leave a copy of it
with him.

I am, etc.,

P. C. Knox.

[Inclosure.]

[Panama Canal toll rates.]

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

I. William Howard Taft, President of the United States of
America, by virtue of the power and authority vested in me by the
Act of Congress, approved August twenty-fourth, nineteen hundred
and twelve, to provide for the opening, maintenance, protection and
operation of the Panama Canal and the sanitation and government
of the Canal Zone, do hereby prescribe and proclaim the following
rates of toll to be paid by vessels using the Panama Canal:

1. On merchant vessels carrying passengers or cargo one dollar and twenty
cents ($1.20) per net vessel ton—each one hundred (100) cubic feet—of actual
earning capacity.