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ARTICLE II

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

ARTICLE III

The United States adopts, as the basis of the neutralization of said ship canal, the following rules, substantially as embodied in the convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal; that is to say:

1. The canal shall be free and open to the vessels of commerce and of war of all nations, on terms of entire equality, so that there shall be no discrimination against any nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise.

2. The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

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

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

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

5. The provisions of this article shall apply to waters adjacent to the canal within 3 marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time except in case of distress, and in such case shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

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

**ARTICLE IV**

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

In faith whereof the respective plenipotentiaries have signed this convention, and thereunto affixed their seals.

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

**No. 2.**

*The Marquis of Lansdowne to Mr. Lowther.*

**FOREIGN OFFICE, August 3, 1901.**

**Sir:** The draft convention dealing with the question of the
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interoceanic canal, forwarded in Lord Pauncefote's dispatch of the 25th April, has been most carefully examined.

I inclose, for your information, the accompanying copy of a memorandum explaining the views of His Majesty's Government, which I have authorized Lord Pauncefote, should he think proper, to communicate to Mr. Hay.

His Majesty's Government have approached the consideration of this important question with a sincere desire to facilitate the progress of the great enterprise in which both Governments take such interest. They feel confident that the United States Government will give them credit for the friendly spirit in which Mr. Hay's proposals have been examined and that they will recognize that if it has been deemed necessary to suggest amendments at one or two points it has been because they are considered requisite for the purpose of bringing about the conclusion of a treaty which shall be accepted as equitable and satisfactory by the public of both countries.

I am, etc.,

Lansdowne.

[Inclosure 1 in No. 2.]

[Memorandum.]

In the dispatch which I addressed to Lord Pauncefote on the 22d February last, and which was communicated to Mr. Hay on the 11th March, I explained the reasons for which His Majesty's Government were unable to accept the amendments introduced by the Senate of the United States into the convention, signed at Washington in February, 1900, relative to the construction of an interoceanic canal.

The amendments were three in number, namely:

1. The insertion in Article II, after the reference to Article VIII of the Clayton-Bulwer convention, of the words "which convention is hereby superseded."

2. The addition of a new paragraph after section 5 of Article II in the following terms:

"It is agreed, however, that none of the immediately foregoing conditions and stipulations in sections numbered 1, 2, 3, 4, and 5 of this article shall apply to measures which the United States may find it necessary to take for securing by its own forces the
defense of the United States and the maintenance of public order."

2. The excision of Article III, which provides that "the high contracting parties will, immediately upon the exchange of the ratifications of this convention, bring it to the notice of the other powers and invite them to adhere to it."

3. The objections entertained by His Majesty's Government may be briefly stated as follows:

(1) The Clayton-Bulwer convention being an international compact of unquestionable validity could not be abrogated or modified save with the consent of both parties to the contract. No attempt had, however, been made to ascertain the views of Her Late Majesty's Government. The convention dealt with several matters for which no provision had been made in the convention of February, 1900, and if the former were wholly abrogated both powers would, except in the vicinity of the canal, recover entire freedom of action in Central America, a change which might be of substantial importance.

(2) The reservation to the United States of the right to take any measures which it might find necessary to secure by its own forces the defense of the United States appeared to His Majesty's Government to involve a distinct departure from the principle of neutralization which until then had found acceptance with both Governments, and which both were, under the convention of 1900, bound to uphold. Moreover, if the amendment were added, the obligation to respect the neutrality of the canal in all circumstances would, so far as Great Britain was concerned, remain in force; the obligation of the United States, on the other hand, would be essentially modified. The result would be a one-sided arrangement, under which Great Britain would be debarred from any warlike action in or around the canal, while the United States would be able to resort to such action even in time of peace to whatever extent they might deem necessary to secure their own safety.

(3) The omission of the article inviting the adherence of other powers placed this country in a position of marked disadvantage compared with other powers; while the United States would have a treaty right to interfere with the canal in
time of war, or apprehended war, and while other powers could with a clear conscience disregard any of the restrictions imposed by the convention of 1900, Great Britain alone would be absolutely precluded from resorting to any such action or from taking measures to secure her interests in and near the canal.

For these reasons His Majesty's Government preferred, as matters stood, to retain unmodified the provisions of the Clayton-Bulwer convention. They had, however, throughout the negotiations given evidence of their earnest desire to meet the views of the United States, and would sincerely regret a failure to come to an amicable understanding in regard to this important subject.

3. Mr. Hay, rightly apprehending that His Majesty's Government did not intend to preclude all further attempt at negotiation, has endeavored to find means by which to reconcile such divergences of view as exist between the two Governments, and has communicated a further draft of a treaty for the consideration of His Majesty's Government.

Following the order of the Senate amendments, the convention now proposed—

(1) Provides by a separate article that the Clayton-Bulwer Convention shall be superseded.
(2) The paragraph inserted by the Senate after section 5 of Article II is omitted.
(3) The article inviting other powers to adhere is omitted.

There are three other points to which attention must be directed:

(a) The words "in time of war as in time of peace" are omitted in rule 1.
(b) The draft contains no stipulation against the acquisition of sovereignty over the Isthmus or over the strip of territory through which the canal is intended to pass. There was no stipulation of this kind in the Hay-Pauncefote convention; but, by the surviving portion of Article I of the Clayton-Bulwer convention, the two Governments agreed that
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neither would ever “occupy, or fortify, or colonize, or assume, or exercise any dominion over Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America,” nor attain any of the foregoing objects by protection offered to, or allegiance with, any State or people of Central America.

(c) While the amendment reserving to the United States the right of providing for the defense of the canal is no longer pressed for, the first portion of rule 7, providing that “no fortifications shall be erected commanding the canal or the waters adjacent,” has been omitted. The latter portion of the rule has been incorporated in rule 2 of the new draft, and makes provision for military police to protect the canal against lawlessness and disorder.

4. I fully recognize the friendly spirit which has prompted Mr. Hay in making further proposals for the settlement of the question, and while in no way abandoning the position which His Majesty's Government assumed in rejecting the Senate amendments, or admitting that the dispatch of the 22d February was other than a well-founded, moderate, and reasonable statement of the British case, I have examined the draft treaty with every wish to arrive at a conclusion which shall facilitate the construction of an interoceanic canal by the United States without involving on the part of His Majesty's Government any departure from the principles for which they have throughout contended.

5. In form the new draft differs from the convention of 1900, under which the high contracting parties, after agreeing that the canal might be constructed by the United States, undertook to adopt certain rules as the basis upon which the canal was to be neutralized. In the new draft the United States intimate their readiness “to adopt” somewhat similar rules as the basis of the neutralization of the canal. It would appear to follow that the whole responsibility for upholding these rules, and thereby maintaining the neutrality of the canal, would henceforward be assumed by the Government of the United States. The change of form is an important
one; but in view of the fact that the whole cost of the construction of the canal is to be borne by that Government, which is also to be charged with such measures as may be necessary to protect it against lawlessness and disorder, His Majesty's Government are not likely to object to it.

6. The proposal to abrogate the Clayton-Bulwer convention is not, I think, inadmissible if it can be shown that sufficient provision is made in the new treaty for such portions of the convention as ought, in the interests of this country, to remain in force. This aspect of the case must be considered in connection with the provisions of Article I of the Clayton-Bulwer convention which have already been quoted, and Article VIII referred to in the preamble of the new treaty.

Thus, in view of the permanent character of the treaty to be concluded and of the "general principle" reaffirmed thereby as a perpetual obligation, the high contracting parties should agree that no change of sovereignty or other change of circumstances in the territory through which the canal is intended to pass shall affect such "general principle" or release the high contracting parties, or either of them, from their obligations under the treaty, and that the rules adopted as the basis of neutralization shall govern, so far as possible, all interoceanic communications across the isthmus.

I would therefore propose an additional article in the following terms, on the acceptance of which His Majesty's Government would probably be prepared to withdraw their objections to the formal abrogation of the Clayton-Bulwer convention:

In view of the permanent character of this treaty, whereby the general principle established by Article VIII of the Clayton-Bulwer convention is reaffirmed, the high contracting parties hereby declare and agree that the rules laid down in the last preceding article shall, so far as they may be applicable, govern all interoceanic communications across the isthmus which connects North and South America, and that no change of territorial sovereignty, or other change of circumstances, shall affect such general principle or the obligations of the high contracting parties under the present treaty.
7. The various points connected with the defense of the canal may conveniently be considered together. In the present draft the Senate amendment has been dropped, which left the United States at liberty to apply such measures as might be found "necessary to take for securing by its own forces the defense of the United States." On the other hand, the words "in time of war as in time of peace" are omitted from rule 1, and there is no stipulation, as originally in rule 7, prohibiting the erection of fortifications commanding the canal or the waters adjacent.

I do not fail to observe the important difference between the question as now presented to us and the position which was created by the amendment adopted in the Senate.

In my dispatch I pointed out the dangerous ambiguity of an instrument of which one clause permitted the adoption of defensive measures, while another prohibited the erection of fortifications. It is most important that no doubt should exist as to the intention of the contracting parties. As to this, I understand that by the omission of all reference to the matter of defense the United States Government desire to reserve the power of taking measures to protect the canal, at any time when the United States may be at war, from destruction or damage at the hands of an enemy or enemies. On the other hand, I conclude that, with the above exception, there is no intention to derogate from the principles of neutrality laid down by the rules. As to the first of these propositions I am not prepared to deny that contingencies may arise when, not only from a national point of view, but on behalf of the commercial interests of the whole world, it might be of supreme importance to the United States that they should be free to adopt measures for the defense of the canal at a moment when they were themselves engaged in hostilities.

It is also to be borne in mind that, owing to the omission of the words under which this country became jointly bound to defend the neutrality of the canal, and the abrogation of
the Clayton-Bulwer treaty, the obligations of Great Britain would be materially diminished.

This is a most important consideration. In my dispatch of the 22d February I dwelt upon the strong objection entertained by His Majesty's Government to any agreement under which, while the United States would have a treaty right to interfere with the canal in time of war, or apprehended war, Great Britain alone, in spite of her vast possessions on the American continent and the extent of her interests in the East, would be absolutely precluded from resorting to any such action, or from taking measures to secure her interests in and near the canal. The same exception could not be taken to an arrangement under which, supposing that the United States, as the power owning the canal and responsible for the maintenance of its neutrality, should find it necessary to interfere temporarily with its free use by the shipping of another power, that power would thereupon at once and ipso facto become liberated from the necessity of observing the rules laid down in the new treaty.

8. The difficulty raised by the absence of any provision for the adherence of other powers still remains. While indifferent as to the form in which the point is met, I must emphatically renew the objections of His Majesty's Government to being bound by stringent rules of neutral conduct not equally binding upon other powers. I would therefore suggest the insertion in rule 1, after "all nations;" of the words "which shall agree to observe these rules." This addition will impose upon other powers the same self-denying ordinance as Great Britain is desired to accept, and will furnish an additional security for the neutrality of the canal, which it will be the duty of the United States to maintain.

As matters of minor importance, I suggest the renewal of one of the stipulations of Article VIII of the Clayton-Bulwer convention by adding to rule 1 the words "such conditions and charges shall be just and equitable," and the adoption of
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"treaty" in lieu of "convention" to designate the international agreement which the high contracting parties may conclude.

Mr. Hay's draft, with the proposed amendments shown in italics, is annexed.

LANSDOWNE.

AUGUST 3, 1901.

[Inclosure 2 in No. 2.]

Draft of treaty relative to the construction of an interoceanic canal.

The United States of America and His Majesty, the King of the United Kingdom of Great Britain and Ireland, etc., being desirous to facilitate the construction of a ship canal to connect the Atlantic and Pacific Oceans, and to that end to remove any objection which may arise out of the convention of the 19th April, 1850, commonly called the Clayton-Bulwer treaty, to the construction of such canal under the auspices of the Government of the United States, without impairing the "general principle" of neutralization established in Article VIII of that convention, have for that purpose appointed as their plenipotentiaries:

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

And His Majesty the King of Great Britain and Ireland, etc., the Right Honorable Lord Pauncefote, G. C. B., G. C. M. G., His Majesty's ambassador extraordinary and plenipotentiary to the United States;

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

ARTICLE I

The high contracting parties agree that the present treaty shall supersede the aforementioned convention of the 19th April, 1850.
ARTICLE II

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

ARTICLE III

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

1. The canal shall be free and open to the vessels of commerce and of war of all nations which shall agree to observe these rules, on terms of entire equality, so that there shall be no discrimination against any nation so agreeing, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

2. The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

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

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

5. The provisions of this article shall apply to waters adjacent to the canal within 3 marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time except in case of distress, and in such case shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

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

ARTICLE III-A

In view of the permanent character of this treaty whereby the general principle established by Article VIII of the Clayton-Bulwer convention is reaffirmed, the high contracting parties hereby declare and agree that the rules laid down in the last preceding article shall, so far as they may be applicable, govern all interoceanic communications across the isthmus which connects North and South America, and that no change of territorial sovereignty, or other change of circumstances, shall affect such general principle or the obligations of the high contracting parties under the present treaty.

ARTICLE IV

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

In faith whereof the respective plenipotentiaries have signed this treaty, and thereunto affixed their seals.

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

No. 3.

The Marquis of Lansdowne to Mr. Lowther.

FOREIGN OFFICE, September 12, 1901.

SIR: I have to inform you that I have learned from Lord Pauncefote that Mr. Hay has laid before the President the memorandum, a copy of which was forwarded to you in my dispatch of the 3d August.

Mr. McKinley regarded, as did Mr. Hay, the consideration shown to the last proposals of the United States Government relative to the interoceanic canal treaty as in the highest degree friendly and reasonable.

With regard to the changes suggested by His Majesty's Government, Mr. Hay was apprehensive that the first amendment proposed to clause 1 of Article III would meet with opposition because of the strong objection entertained to inviting other powers to become contract parties to a treaty affecting the canal. If His Majesty's Government found it not convenient to accept the draft as it stood, they might perhaps consider favorably the substitution for the words "the canal shall be free and open to the vessels of commerce and of war of all nations which shall agree to observe these rules" the words "the canal shall be free and open to the vessels of commerce and of war of all nations observing these rules," and instead of "any nation so agreeing" the words "any such nation." This, it seemed to Mr. Hay, would accomplish the purpose aimed at by His Majesty's Government.
The second amendment in the same clause, providing that conditions and charges of traffic shall be just and equitable, was accepted by the President.

Coming to article numbered III-A, which might be called Article IV, Mr. Hay pointed out that the preamble of the draft treaty retained the declaration that the general principle of neutralization established in Article VIII of the Clayton-Bulwer convention was not impaired. To reiterate this in still stronger language in a separate article, and to give to Article VIII of the Clayton-Bulwer convention what seemed a wider application than it originally had, would, Mr. Hay feared, not meet with acceptance.

If, however, it seemed indispensable to His Majesty’s Government that an article providing for the contingency of a change in sovereignty should be inserted, he thought it might state that:

It is agreed that no change of territorial sovereignty or of the international relations of the country traversed by the aforementioned canal shall affect the general principle of neutralization or the obligation of the high contracting parties under the present treaty.

This would cover the point in a brief and simple way.

In conclusion, Mr. Hay expressed his appreciation of the friendly and magnanimous spirit shown by His Majesty’s Government in the treatment of this matter, and his hope that a solution would be attained which would enable the United States’ Government to start at once upon the great enterprise which so vitally concerned the whole world, and especially Great Britain, as the first of commercial nations.

I am, etc., Lansdowne.

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No. 4.

*The Marquis of Lansdowne to Lord Pauncefote.*

*Foreign Office, October 23, 1901.*

*My Lord: I informed the United States chargé d’affaires to-day that His Majesty’s Government had given their careful
Negotiations of Treaty

attention to the various amendments which had been suggested in the draft interoceanic canal treaty, communicated by Mr. Hay to your lordship on the 25th April last, and that I was now in a position to inform him officially of our views.

Mr. Hay had suggested that in Article III, rule 1, we should substitute for the words "the canal shall be free and open to the vessels of commerce and of war of all nations which shall agree to observe these rules," etc., the words "the canal shall be free and open to the vessels of commerce and of war of all nations observing these rules," and in the same clause, as a consequential amendment, to substitute for the words "any nation so agreeing" the words "any such nation." His Majesty's Government were prepared to accept this amendment, which seemed to us equally efficacious for the purpose which we had in view, namely, that of insuring that Great Britain should not be placed in a less advantageous position than other powers, which they stopped short of conferring upon other nations a contractual right to the use of the canal.

We were also prepared to accept, in lieu of Article III-A, the new Article IV proposed by Mr. Hay, which, with the addition of the words "or countries" proposed in the course of the discussions here, runs as follows:

It is agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralization or the obligation of the high contracting parties under the present treaty.

I admitted that there was some force in the contention of Mr. Hay, which had been strongly supported in conversation with me by Mr. Choate, that Article III-A, as drafted by His Majesty's Government, gave to Article VIII of the Clayton-Bulwer treaty a wider application than it originally possessed.

In addition to those amendments, we proposed to add in the preamble, after the words "being desirous to facilitate
the construction of a ship canal to connect the Atlantic and Pacific Oceans," the words "by whatever route may be considered expedient," and "such ship canal" for "said ship canal" in the first paragraph of Article III, words which, in our opinion, seemed to us desirable for the purpose of removing any doubt which might possibly exist as to the application of the treaty to any other interoceanic canals as well as that through Nicaragua.

I handed to Mr. White a statement showing the draft as it originally stood and the amendments proposed on each side.

I am, etc.,

Lansdowne.

No. 5.

Lord Pauncefote to the Marquis of Lansdowne.

Washington, November 18, 1901.

My Lord: I have the honor to transmit to your lordship herewith a copy of a communication from Mr. Hay, dated the 8th November, formally placing on record the President's approval of the various amendments made in the draft of the new interoceanic canal treaty in the course of the negotiations, and particularly set forth in your lordship's dispatch to me of the 23d October.

I have, etc.

Pauncefote.

[Inclosure in No. 5.]

Mr. Hay to Lord Pauncefote.

Washington, November 8, 1901.

Excellency: Upon your return to Washington, I had the honor to receive from you a copy of the instruction addressed to you on the 23d October last by the Marquis of Lansdowne, accepting and reducing to final shape the various amendments in the draft of an interoceanic canal treaty, as developed in the course of the negotiations lately conducted in London, through Mr. Choate, with yourself and Lord Lansdowne.
First British Protest

The treaty, being thus brought into a form representing a complete agreement on the part of the negotiators, has been submitted to the President, who approves of the conclusions reached, and directs me to proceed to the formal signature thereof.

I have, accordingly, the pleasure to send you a clear copy of the text of the treaty, embodying the several modifications agreed upon. Upon being advised by you that this text correctly represents your understanding of the agreement thus happily brought about, the treaty will be engrossed for signature at such time as may be most convenient to you.

I have, etc.

John Hay.

No. 6.

Lord Pauncefote to the Marquis of Lansdowne.

Washington, November 19, 1901.

My Lord: I have the honor to report that, by appointment with Mr. Hay, I yesterday went to the State Department, accompanied by Mr. Wyndham, and signed the new treaty for the construction of an interoceanic canal.

I have, etc.

Pauncefote.

No. 7.

[Telegraphic.]

Lord Pauncefote to the Marquis of Lansdowne.

Washington, December 16, 1901.

Canal treaty ratified by 72 votes to 6 in Senate to-day.

FIRST BRITISH PROTEST

Chargé d'Affaires Innes to the Secretary of State.

British Embassy

Kineo, Maine.

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 18th 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
Second British Protest

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 the honor to be,

With the highest consideration,

Sir,

Your most obedient, humble Servant,

A. MITCHELL INNES.

SECOND BRITISH PROTEST

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' 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 trans-isthmian 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 guarantee 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 construction would confer. It is also clear that if the Canal had been constructed while the Clayton-Bulwer 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-
Pauncefote Treaty was to recover their freedom of action,
and obtain the right, which they had surrendered, to con-
struct the Canal themselves; this is expressed in the preamble
to the treaty, but the complete 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 al-
luded to, and it is to one, or both, of these that neutraliza-
tion must refer. Such joint protection has always been under-
stood by His Majesty’s Government to be one of the results
of the Clayton-Bulwer Treaty of which the United States was
most anxious to get rid, and they can see clearly therefore be-
lieve 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 re-
sponsibility for the protection of the Canal should attach
to them in the future. Neutralization must therefore re-
fer 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 re-
cover the right to construct the trans-isthmian 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 re-
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suiting 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, 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 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 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 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-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" 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 revictualing 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 cor-
responding 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 those 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 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
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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' 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 of 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 25c. 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 cannot 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 dol. 25c. 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 cannot 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 an 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 an 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.
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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 Inter-State Commerce Act 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 Anti-Trust 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 correct-
ness 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 ensure 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.
REPLY OF SECRETARY OF STATE KNOX TO THE BRITISH PROTEST

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 dis-
erection 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 cannot 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 an 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 an 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 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 Professor 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 Professor Johnson's report, it will be seen that the estimated net tonnage of shipping using the canal in 1915 is as follows:

Coast to coast American shipping............ 1,000,000 tons
American shipping carrying foreign commerce of the United States...................... 720,000 tons
Foreign shipping carrying commerce of the United States and foreign countries........ 8,780,000 tons

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 coastwise 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 examination and report, in the manner provided for in the unratified arbitration 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 institution, as occasion arises, of a Joint
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High Commission of Inquiry, to which, upon the request of either Party, might be referred for impartial 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 elucidating 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 adopting it, either under a special agreement, or under the unratified arbitration 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, Sir,
Your obedient servant,

P. C. Knox.

PRESIDENT TAFT'S MEMORANDUM TO ACCOMPANY THE PANAMA CANAL ACT

In signing the Panama Canal bill, I wish to leave this memorandum. The bill is admirably drawn for the purpose of securing the proper maintenance, operation, and control of the canal, and the government of the Canal Zone, and for the furnishing to all the patrons of the canal, through the Government, of the requisite docking facilities and the supply of coal and other shipping necessities. It is absolutely necessary to have the bill passed at this session in order that the capital of the world engaged in the preparation of ships to use the canal may know in advance the conditions under which the traffic is to be carried on through this waterway.

I wish to consider the objections to the bill in the order of their importance.