

THE PANAMA CANAL
IN PEACE AND WAR
NORMAN J. PADELFORD

BUREAU OF INTERNATIONAL RESEARCH
HARVARD UNIVERSITY AND RADCLIFFE COLLEGE

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THE PANAMA CANAL IN PEACE AND WAR

By

NORMAN J. PADELFOED

PROFESSOR OF INTERNATIONAL LAW
FLETCHER SCHOOL OF LAW AND DIPLOMACY

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PREFACE

WHEN THE United States undertook to build a ship canal across the Isthmus of Panama in the opening years of the twentieth century, the steamship seemed assured of a permanent place as the common trans-oceanic carrier, and as an instrument of naval defense. In such a world a Panama Canal appeared to be imperiously necessary, destined to function perpetually. Today as air transport links many parts of the globe, with giant planes shuttling regularly back and forth across the oceans, and as the warplane turns the issues of war upon both land and sea, a canal may seem less indispensable. However, the Panama Canal is more than a commercial artery uniting the waters of the Atlantic and Pacific for the benefit of foreign traders. It is a focal point of national defense, a base of operations for the protection of the Hemisphere, an instrument of national influence.

The United States acquired, built, and has continued to operate and protect the Panama Canal because consideration of the facts of the nation's development and its place in world affairs led to the conviction that the largest interests of the nation required possession of a Canal through Central America. It has remained firm in that conviction. The rendering of transit service to foreign vessels has always been a part of the program of the Panama Canal. But it would be erroneous to suppose that the United States built or now maintains the Canal for altruistic ends. First and last, the Panama Canal is a part of the national defense system of the United States, including the promotion of the national development. Secondly, the Canal is available to the transit of foreign vessels applying for passage, paying the requisite tolls, and prepared

to abide by all the laws relating to the Canal and not endangering its safety.

These facts make the Panama Canal a matter of concern not only to the United States and its citizens, but also to the mariners and governments of foreign nations. How far can the United States go in regulating use of the Canal by others? What obligations must be met by users of the Canal? To what extent is it advantageous to employ the Canal route, and what does it cost to transit the Canal? How is the enterprise administered? What part does the Canal play in the war effort of the United States when engaged in war? What attention attaches to the Canal and the Canal Zone in the strategies of peace and of war?

It is the purpose of this volume to describe the Canal as a going concern, to show how it functions in peace and in war, and to try to answer some of the questions sketched above which face the master of an approaching vessel, officers of government of the United States and of other states, the Canal employee trying to fit his daily task into the magnitude of the Canal undertaking as a whole, the lawyer, and the public.

No discussion of the Panama Canal can ignore the relations between the Republic of Panama and the United States as they revolve about the mutual interest of the two countries in the successful operation of the Canal. While the Canal treaties assigned to the United States complete control of the Canal and of activities within the Canal Zone, leaving no direct part to the Government of Panama, the livelihood of the people and the security of the Republic depend largely upon the Panama Canal. With the ratification of the General Treaty of Friendship and Cooperation in 1939, the relations between the two nations took a significant step forward. Instead of the protectorate relationship which subsisted formerly, the relations of the two parties were formally elevated to the plane of friendship and collaboration for the realization of their mutual interests. It is to be hoped that from the point of view of all concerned, the change signaled by the 1939 Treaty will prove

to be an auspicious one, for if the people of Panama must look, directly or indirectly, to the Canal enterprise for the sustenance of their present standard of living, so must the authorities of the United States look to the Republic of Panama for hearty cooperation in matters bearing upon the defense and protection of the Isthmus.

This book could not have been written without the assistance and counsel which it has been the privilege of the author to receive from many officials of the United States Government, in the Department of State, the War Department, the Navy Department, and The Panama Canal. Indeed, the associations which have been enjoyed during the task of preparing the manuscript for this book will long remain its happiest accompaniment. To all of these officials, each of whom he would like to mention personally, but which he forbears to do at this time, the author wishes to express his deepest gratitude. The kindly interest of these officials was most helpful in the gathering of information, in the elucidation of difficult problems, and in enabling the author to study Canal affairs intimately at a time when international complications called for restraint. Their helpfulness contributed in many ways to what must otherwise have been an incomplete treatment of a difficult subject. To each of these persons, and in particular to the ranking officers of The Panama Canal, the author would bespeak the hope that the results of his labor may prove of some usefulness by way of compensation for their time and counsel. For all errors of fact or of statement, as well as for views expressed, the author must of course, and does, assume responsibility.

The Bureau of International Research of Harvard University and Radcliffe College, under the chairmanship of Professor Sidney B. Fay, encouraged the study through its sponsorship, and by making available funds for assistance in research and for consultations at the Canal Zone. The Dean of the Fletcher School released me from numerous academic responsibilities in order that investigation might be completed at the Canal Zone, and my students bore with me many hours when fascina-

tion with Canal affairs absorbed many other matters. Miss Margaret Rush labored at length with me in the research, and in the progressive development of the manuscript. To her helpful cooperation much is owed. Miss Edith D. Haley of the Bureau of International Research saved the author from numerous pitfalls through editing the manuscript and reading proof. Mr. Edward Schmitz of the Geology Department of Harvard University did the cartographic work and assisted in the preparation of the charts. The Editor of the *American Journal of International Law* granted permission to reprint in Chapters II-IV portions of articles which appeared in that periodical.

Doubtless the further perfection of the airplane in the years to come will affect international communication and transport, as well as strategy and tactics in war, to an extent difficult to perceive now. With such developments new problems in peace and war will arise for the Panama Canal. Nevertheless, it seems safe to say that so long as any material part of the commodities of trade are carried in ships, and so long as sea power persists as a determining factor in the relationships of nations, so long certainly will use of the Panama Canal be sought by merchantmen and vessels of war. And so long will the Canal as a waterway remain essential to the United States. Over and beyond this, however, the Canal Zone would seem to be vouchsafed an even longer future as a way station for intercontinental air transports, and as a base for defending the territories of the American Hemisphere. No Panama Canal would exist today to pass great ships from ocean to ocean had it not been for vision which saw beyond the limitations of existent realities. The hope for a more ordered future, in which the Panama Canal and Canal Zone may play an important part in increasing the well-being of mankind, lies in similarly transforming present difficulties through enlightened leadership and continued vision.

NORMAN J. PADEFORD.

Medford, Massachusetts.
November 18, 1941.

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THE PANAMA CANAL
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CHAPTER I

WHY A PANAMA CANAL?

MANIFEST destiny impelled the United States to acquire and fortify an interoceanic canal across the Isthmus of Panama. Possessions and interests in the far reaches of two oceans, together with growing threats to the same, demanded a route by which vessels of commerce and of war might readily pass from ocean to ocean. A canal became essential to the advancement of foreign policy, to the perfection of national defense, and to the facilitation of commerce.

Useful, even indispensable as the Canal may be to foreign trade, the main concern of the United States Government is that the Canal shall at all times be free and unobstructed for the transit of vessels on government business. This is not to say that there is arbitrary disregard of the interests of commercial shipping. On the contrary, the testimony of shippers has repeatedly been that the needs of commercial vessels are met with unusual promptness and that there is less red tape at the Canal than in many large ports. This is due to the fact that "from the opening of the Canal it has been a primary policy to handle ships quickly, to avoid delay and confusion, and to require of them no more compliance with formalities than is essential to safety, quarantine protection, and accurate business conduct."¹ Everything at the Panama Canal relates in one way or another to, and the Canal itself is operated with consideration for, military reasons. Indeed, as maintained by Theodore Roosevelt, this is the only way that the United States can effectively guarantee the neutrality of the Canal, and be certain that it will not be abused by others.

¹ *Panama Canal Record*, Vol. X, p. 463.

THE PANAMA CANAL

EARLY CANAL PROJECTS

The history of the Panama Canal has been told many times, and fully. It needs no detailed rehearsal here in a study devoted to the Canal as a functioning institution. It may be useful, however, to review briefly certain parts of the record of the past by way of bringing out the motives which inspired the effort to thrust a canal between the Atlantic and Pacific Oceans.²

The explorers of the sixteenth century who discovered the Western Hemisphere were mainly searching for a route to Cathay. Land wherever encountered was viewed as an obstruction to the attainment of the ultimate goal, and ways were stubbornly sought through or around it. Vasco Nuñez de Balboa's perilous expedition across the Isthmus of Darien, and his discovery of "another great ocean" on September 25, 1513, revealed that here the land between the two oceans was narrow and penetrable. The idea of an interoceanic canal has not been attributed to Balboa. His discovery, nevertheless, was naturally father to the thought. In 1519 a road was cut across the Isthmus, running from Panama to Nombre de Dios. The Chagres River was opened to the navigation of small boats in 1535, thus making it possible for vessels to go as far as the continental midriff, approximately sixteen miles from the Pacific. The first study of the possibilities of an artificial waterway across the continent was completed in 1529 by Alvaro de Saavedra Ceron. His report dealt with the four routes which were to become the center of attention for centuries to come: the Tehuantepec, the Nicaragua, the Isthmus of Panama, and a nearby route via what he called the Isthmus of Darien. The interest of Spain, however, in a quicker route to the Orient via the Americas waned as continued exploitation revealed the

² A thorough study of Canal projects has been made by Commander Miles P. Du Val, Jr., in *Cadiz to Cathay: The Story of the Long Struggle for a Waterway Across the American Isthmus* (Stanford, 1940).

riches of the continent then being occupied. Henceforward, the philosophy of her colonial system excluded consideration of the interests of others in the advancement of trade by a shorter water route to the Pacific.

It was not until the nineteenth century that nations other than Spain commenced to have an interest in an interoceanic waterway. Baron Alexander von Humboldt's voyage to Central and South America during the years 1799-1804, drew widespread attention to the feasibility of such a scheme, as he suggested nine possible routes. Aware that its hold on the possessions in the Americas was becoming tenuous, the Spanish Cortes decided in 1814 to build a canal. The purpose of the venture was to facilitate the further extraction of wealth from the western coast of South America to Spain, and to make possible the more rapid transportation of troops to centers of unrest in those regions. The design was purely imperialistic. Spain still operated, so far as possible, on the principle of a closed economy. Despite the impulse, nothing came of the project. But a change began to occur. As Spanish America broke away from the mother country, England and the United States fastened increasing attention upon the Central American region. This may have been the logical consequence of the constriction of Spanish power. More probably, it was the resultant of one of those coincidences which dot the pages of history, with national development in one country or group of countries running parallel in point of time with disintegration elsewhere. Dynamic British and American mercantilism sought raw materials and markets everywhere for their own rapidly growing economies. Trade, competition, self-interest, tended to focus activity ever more toward the Isthmian belt.

AMERICA BECOMES INTERESTED IN A CANAL

American interest in a canal was largely commercial in nature until the last decade of the nineteenth century. Prior to the Civil War a canal was viewed primarily as a means of

speeding up the lucrative trade with the Orient or of transportation to the gold fields of California. Few were particularly concerned with the nationality of the canal. Secretary of State Clay urged consideration of a canal upon the Congress of Panama in 1826, saying: "What is to redound to the advantage of all America should be effected by common means and united exertions, and should not be left to the separate and unassisted efforts of any one power. . . . The benefits of it ought not to be exclusively appropriated to any one nation. . . ." A Senate resolution in 1835 urged the President to negotiate with various nations for the protection of such individuals or companies as might undertake the construction of a canal, as well as for securing free and equal right of navigation to all nations. A House resolution in 1839 also requested the President to negotiate with other nations "for the purpose of ascertaining the practicability of effecting" communication by a canal across the Isthmus.

THE TREATY OF 1846 WITH NEW GRANADA

The first fruit of these expressions was the Treaty of 1846 with New Granada by which that state guaranteed that "the right of way or transit across the Isthmus of Panama upon any modes of communication that now exist, or that may be hereafter constructed shall be open and free to the government and citizens of the United States." In return the United States guaranteed the neutrality of the Isthmus and the rights of sovereignty and property which New Granada "has and possesses over the said territory."³ This treaty did not refer to the purposes for which a canal should be used, if and when built, other than commerce; nor did it indicate by what means a canal should be constructed. President Polk, in transmitting

³ H. Miller, *Treaties and Other International Acts of the United States of America* (Washington, 1937), Vol. V, p. 115. For papers and correspondence bearing upon this treaty, see J. B. Moore, *Digest of International Law* (Washington, 1906), Vol. III, pp. 5-46.

the Treaty to the Senate, spoke of the "vast advantages to our commerce" which would result from a canal. It would, he said, "render our communication with our possessions on the northwest coast of America comparatively easy and speedy." Government construction was apparently thought of, for he remarked apropos of the guarantee to New Granada: "Neither sovereign states nor individuals would expend their capital in the construction of these expensive works [railroad or canal] without some such security for their investments."⁴ While there is little in Polk's message to show that the military importance of a canal had yet been fully sensed, one passage now seems prophetic:

New Grenada would not consent to yield up this province in order that it might become a neutral state, and if she should, it is not sufficiently populous or wealthy to establish and maintain an independent sovereignty. But a civil government must exist there in order to protect the works which shall be constructed. New Grenada is a power which will not excite the jealousy of any nation. If Great Britain, France, or the United States held the sovereignty over the Isthmus other nations might apprehend that in case of war the Government would close up the passage against the enemy; but no such fears can ever be entertained in regard to New Grenada.⁵

Equally prophetic was a note attributed to the French Minister at Bogotá at this time, and quoted by André Siegfried in his *Suez and Panama*:

Should New Grenada summon the aid of the United States to suppress any threat of secession on the part of Panama or Veraguas she will deliver to the Americans a position of military and commercial importance which will mean more to them than Gibraltar does to England. Should we not take the liberty of warning the New Grenada Government of the folly of compromising themselves without considering the effect that their action may have on the future? The road which the United States is trying to construct at its own expense across the isthmus will so modify the present state of things

⁴ Moore, *op. cit.*, pp. 8-9.

⁵ *Ibid.*, p. 10.

that, when the day comes that public opinion in the Union abandons its present indifference and takes an active interest in the matter, it will be irresistible.⁶

BRITISH-AMERICAN RIVALRY IN CENTRAL AMERICA

Various efforts by European engineers and capitalists to start an isthmian canal did not particularly arouse the United States. What did concern the country were British activities on the Mosquito Coast and in the Bay Islands at the very time that the nation was engaged in the war with Mexico. Neither the Government nor public opinion had forgotten the efforts of the British Government to circumscribe the United States in the Oregon dispute or to concert with France and Mexico in opposing, even by force of arms, the annexation of Texas. From the British point of view, the Treaty with New Granada cast a shadow before it. If the United States was able to acquire canal rights in that region in return for readiness on its part to guarantee the independence of New Granada, what was to deter it from seeking a similar treaty for exclusive rights with Nicaragua, as actually turned out to be the case in the unapproved Hise Treaty, and thus secure control over both routes? British occupation of San Juan del Norte on January 1, 1848, and the investiture during the next month of the entire course of the San Juan River up to Lake Nicaragua paved the way for check-mating any move of the United States through acquiring command of the Atlantic terminal of any Nicaragua canal. As Professor A. P. Newton admits in the *Cambridge History of British Foreign Policy*, "The attempts of American concession-hunters to gain control of the Nicaragua route were frustrated

⁶ Dated Aug. 10 and Dec. 7, 1848. Quoted by André Siegfried, *Suez and Panama* (New York, 1940), p. 225. The road referred to was the Panama Railroad, the concession for which had been secured by an American capitalist, Mr. Aspinwall, in 1848. Construction was commenced in 1850 and finished in 1855. An instrumental survey was made of a canal route in 1849 by American engineers. *Senate Executive Document* 9 [hereafter cited as S. Ex. Doc.], 36th Congress, 2d session.

by the support given by the British Colonial officials to the Mosquito kingdom.”⁷

The delicate situation prevailing between the two English-speaking nations was eased with the coming to office of President Taylor and Secretary of State Clayton. Notwithstanding the outcome of the Mexican War, Secretary Clayton comprehended the realities of power politics. The Chargé d’Affaires appointed to the Central American States, Mr. Squier, was instructed to negotiate a treaty with Nicaragua, if conditions were found to be suitable, in which there should be a clause securing to American citizens a free transit between the oceans on any canal or railway that might be built. He was told that he might use his personal good offices to help Americans procure a contract with the Nicaraguan Government for the construction of a canal. But, he was instructed

In the present posture of the conflicting claims respecting the Mosquito shore and the port of San Juan, it is not deemed expedient to give as a compensation for the grant of the right of way any guaranty of the independence of the country through which the canal or railroad might pass. Such a guaranty is entirely inadmissible in the proposed treaty.⁸

When the terms of the unauthorized Hise Treaty, negotiated by Squier’s predecessor and containing a clause giving Americans an exclusive right of construction together with a guaranty of independence, reached Washington in September, 1849, Secretary Clayton did not hesitate to get in touch with the British Minister at once and to disavow the project. In an important interview which took place in the presence of President Taylor on September 30, a policy was laid out which paved the way for the Clayton-Bulwer Treaty. It was proposed that exclusive canal and territorial ambitions would be disclaimed by the United States and the Hise Treaty not pressed upon the Senate,

⁷ *Cambridge History of British Foreign Policy* (New York, 1923), Vol. II, p. 266. See also Moore, *op. cit.*, Vol. III, p. 133 *et seq.*, notes.

⁸ Miller, *op. cit.*, pp. 710-711.

if the British Government would consent to negotiate on the whole matter and enter into a similar non-exclusive treaty with Nicaragua.⁹ The arrival of the Hise Treaty was a stroke of fortune. While the Secretary professed embarrassment, it actually played directly into the hands of the United States in bargaining with the British for their retreat in Central America. Incidentally, of course, the vanquishment of Mexico and the acquisition of Texas and California revealed American military power to be a far more potent force than Englishmen had hitherto given it credit for being.

The American suggestion soon evoked a declaration by Lord Palmerston that Her Majesty's Government had "no selfish or exclusive views in regard to a communication by canal or railway across the Isthmus from sea to sea."¹⁰ Thus, the ground was laid for negotiation.

Mr. Clayton's subsequent conversations with the British representative in Washington, as well as the instructions sent to Minister Lawrence at London show that the Government had in mind a commercial waterway, to be constructed—so it was hoped—by an American concessionaire, but protected and equally enjoyed by both Governments.¹¹ Several portions of the instructions to Minister Lawrence indicate a growing consciousness, however, of the strategic importance of a canal to the United States, and of circumstances which might require the possession of the canal area.

The ready reflection will occur to your own mind that if any nation should keep the key of this communication for the benefit of all, ours, as being most deeply interested in it, is entitled to that custody.

Without some such ship navigation, it may be difficult at some future period, to maintain our government over California and Oregon.

Say therefore with perfect frankness to Lord Palmerston, that while we are willing and anxious that the canal communication

⁹ *Ibid.*, pp. 717-719.

¹⁰ *40 British & Foreign State Papers* 962.

¹¹ Miller, *op. cit.*, pp. 716-719, 727, 731-732.

should be open between the two oceans, we desire no exclusive right to that navigation, and will not seek to obtain it, unless we are driven to do so in self-defense.¹²

Notwithstanding these thoughts, the Secretary invited Great Britain to enter into a treaty with the United States "binding both nations never to colonize, annex, settle or fortify any part of the ancient territory of Guatemala." But, it was added,

while we invite Great Britain to join with us in these guarantees, we hold the neutrality of Costa Rica and the whole country on both sides of the projected canal to be highly important; that while we are willing to forbear the exclusive occupation of the canal, and invite all other nations to participate with us on equal terms in the enjoyment of it, no other great maritime power should occupy the territory on either side of the canal. If we were to occupy it, Great Britain would complain that, in the event of a war, we, by virtue of our exclusive possession, might overawe or obstruct the commerce of a hostile power. For the same reason, no other authority except that of the small States bordering on the canal should be permitted to be exercised over the adjoining territory.

With what fidelity these sentiments forecast the fashioning of procedure in the years to come, and the principles upon which depend the security of the Panama Canal today!

THE CLAYTON-BULWER TREATY, 1850

Unable and indisposed at the time to take the initiative in itself constructing a canal, the Government of the United States did at least, by means of the conclusion of the Clayton-Bulwer Treaty,¹³ estop construction by the British Government. If it be true that the effect of this was to retard for many years a waterway that might otherwise have been built, it must be remarked, nevertheless, that it averted possible construction by another government, which, if accomplished, might have created a vastly greater danger to the United States than the absence of an interoceanic route. In this respect, the post-

¹² Miller, *op cit.*, p. 727 *et seq.*

¹³ Text in *ibid.*, p. 671.

ponement which the United States was willing to tolerate resembled the attitude taken for so many years by British statesmen regarding the digging of the Suez Canal.

The Clayton-Bulwer Treaty did not directly advance an American canal. For this reason criticism was heaped upon the Treaty in the years that followed. Buchanan charged that "the treaty altogether reverses the Monroe Doctrine and establishes it against ourselves rather than European Governments." Nevertheless, the fact cannot be obscured that the abnegatory clauses of Article I pledging the parties never to obtain or maintain exclusive control over a ship canal, or to fortify, or to assume or exercise dominion over any territory in Central America through which a canal might pass, did force England to relinquish a territorial control which she in fact possessed in 1850 over the Nicaragua route. If the United States was limited in freedom to develop the Panama route by this Treaty, it must be remembered that at this date, and until 1903, the Nicaragua route was considered preferable,¹⁴ and that a limitation of British power in Central America was no mean thing in measured progress toward the security of an all-American route. It would be unfair to one as astute in diplomacy as the record of Secretary Clayton's negotiations show him to be, to imagine that he conceived his Treaty to be anything but a step toward a goal which his instructions recognize but which his understanding of *Realpolitik* told him was then unobtainable.

The Civil War wrought a profound change in many realms of American thought and action. Military and naval power assumed a new significance to the nation. The policies of other countries during the war signalized the need for a larger navy and for widely scattered bases. The nationalism engendered by the trial at arms demanded assertion whenever the actions of others seemed to challenge the position of the nation in the Western Hemisphere.

¹⁴ The Lull and Collins Expedition of 1875 reported that the Nicaragua route possessed greater advantages and offered fewer difficulties than any other. S. Ex. Doc. 75, 45th Cong., 3d sess.

The procurement of a concession by M. Lucien Napoleon Bonaparte Wyse from the Government of Colombia on March 20, 1878, to build an interoceanic canal across the territory of Colombia aroused feelings in the United States, notwithstanding the fact that the grantees undertook that the Universal Interoceanic Canal Association should "always be kept free from political influence." Remembrance of French imperialism in Mexico during the early sixties bred no equanimity respecting a canal built under French auspices in Central America. Regardless of the idealistic, speculative, or mercantilistic motives which may have inspired Wyse and De Lesseps,¹⁵ sight was not lost of the fact that a canal completed by Frenchmen would redound to the glory of France. Who knew what imperialism, what violations of the Monroe Doctrine, might follow from the successful issue of such an enterprise? Had not the United States guaranteed the neutrality of a canal and the independence of Colombia by the Treaty of 1846? Would not a foreign canal "introduce new questions of relative rights and interest affecting both the sovereign and proprietary rights of the Government of Colombia and such as would seriously enlarge the responsibilities of our treaty guarantee?" "Our Pacific Coast is so situated," wrote Secretary Evarts,

that, with our railroad connections, time (in case of war) would always be allowed to prepare for its defense. But with a canal through the isthmus the same advantage would be given to a hostile fleet which would be given to friendly commerce; its line of operations and the time in which warlike demonstration could be made, would be enormously shortened. All the treaties of neutrality in the world might fail to be a safeguard in a time of great conflict.

Secretary of State Evarts further protested to the Government of Colombia:

This Government cannot consider itself excluded by any arrangement between other Powers or individuals to which it is not a party, from a direct interest, and, if necessary, a positive supervision and interposition in the execution of any project which, by completing

¹⁵ On the De Lesseps venture see Siegfried, *op. cit.*, Chaps. III-VI.

an interoceanic connection through the Isthmus, would materially affect its commercial interests, change the territorial relations of its own sovereignty, and impose upon it the necessity of a foreign policy, which, whether in its feature of warlike preparation or entangling alliance, has been hitherto sedulously avoided.¹⁶

PRESIDENT HAYES DECLARES FOR AN AMERICAN- CONTROLLED CANAL

President Hayes announced what was henceforth to be the policy of the United States when he stated in his message to Congress on March 8, 1880: "The policy of this country is a canal under American control." He continued, "if existing treaties between the United States and other nations, or if the rights of sovereignty or property of other nations stand in the way of this policy . . . suitable steps should be taken by just and liberal negotiations to promote and establish the American policy on this subject, consistently with the rights of the nations to be affected by it."¹⁷

The *raison d'être* of this policy was made abundantly clear in President Hayes' message to Congress the following December. "It is," he proclaimed, "the right and duty of the United States to assert and maintain such supervision and authority over any interoceanic canal . . . as will protect our national interests."¹⁸

¹⁶ Moore, *op. cit.*, Vol. III, pp. 14-15. Dated, April 19, 1880.

¹⁷ S. Ex. Doc. 112, 46th Cong., 2d sess.

¹⁸ Moore, *op. cit.*, p. 16. In a note to the British Government, Nov. 19, 1881, Secretary of State Blaine argued that United States' priority of interests in the Isthmian region indicated that the United States should have the same rights of protection and fortification there as the British had asserted in Egypt regarding the Suez Canal. A mere paper neutrality agreement, he added, was no sure defense against an aggressor. *Foreign Relations of the United States* [hereafter cited as *For. Rel.*], 1881, p. 554. In a circular of June 24, 1881, Secretary Blaine called attention to the United States guarantee in the Treaty of 1846, and the long-continued policy of this Government not to allow "any extension to our shores of the political system by which the great Powers have controlled and determined events in Europe." Moore, *op. cit.*, p. 17. This was called forth by intelligence that Colombia had proposed to the European Powers that they, without the United States, join in a guarantee of the neutrality of the proposed Panama Canal. *Ibid.*, pp. 18-19.

In November, 1881, notice was served upon the British Government of the desire of the United States to revise the Clayton-Bulwer Treaty. As stated by President Arthur in his annual message to Congress, December 6, 1881: "I have not hesitated to supplement the action of my predecessor by proposing to Her Majesty's Government the modification of that instrument and the abrogation of such clauses thereof as do not comport with the obligations of the United States toward Colombia, or with the vital needs of the two friendly parties to that compact."¹⁹

When the British Government declined to revise the 1850 Treaty, on the ground that insistence by the United States that a canal be regarded "as part of her coast line" would sooner or later result in the countries lying between the waterway and the United States proper finding it difficult to retain their independent position,²⁰ Secretary Frelinghuysen vehemently asserted that the Treaty was voidable at the option of the United States,²¹ and he signed a convention with Nicaragua by which the United States agreed to build a canal at its own cost and to guarantee by a "perpetual alliance" the integrity of the territory of Nicaragua.²² Such an extreme course was not favored by President Cleveland when he presently became Chief Executive. The Frelinghuysen convention was withdrawn from the Senate, and the policy announced of encouraging a project unattended "by paramount privileges of ownership or right outside of our own territory." "Whatever highway may be constructed," the President said, "must be for the world's benefit, a trust for mankind, to be removed from the chance of domination by any single power, nor become a point of invitation for hostilities or a prize for warlike ambition."²³

Here we see brought into relief the two principles which com-

¹⁹ *Ibid.*, p. 19.

²⁰ Lord Granville to Mr. West, Jan. 7, 1882. *Ibid.*, pp. 194-195.

²¹ Instruction to Minister Lowell at London, May 8, 1882. *Ibid.*, pp. 195-196.

²² *Ibid.*, p. 197.

²³ Message to Congress, Dec. 8, 1885. *Ibid.*, pp. 198-200.

peted so long for supremacy, and whose interplay in the relationships between the interested nations impeded the realization of a navigable waterway during the nineteenth century. It would be unjust to President Cleveland to charge that he was any less solicitous for the security of a canal than some of his predecessors or successors in office. Rather, it seems proper to say that the general conservatism which characterized his first term extended to what seemed to be the rash stand taken by Mr. Frelinghuysen. Proof that the Administration favored construction under what it considered to be the less dangerous, more commercial, policy may be found in its pleasure with the incorporation by the United States Senate of the Maritime Canal Company,²⁴ whose construction work started in Nicaragua in 1889.

EFFECT OF COLLAPSE OF FRENCH CANAL VENTURE

Nationalist sentiment came to the fore again in the Senate when in 1889, following the financial debacle of the French canal company, the Government of France proposed to guarantee the bonds of the company. A resolution was adopted by the Senate to the effect that "the Government of the United States will look with serious concern and disapproval upon any connection of any European Government with the construction or control of any ship-canal across the Isthmus of Darien or across Central America, and must regard any such connection or control as injurious to the just rights and interests of the United States and as a menace to their welfare."²⁵ Excavation by the French stopped at Panama at the end of 1888, the Compagnie Universelle dissolved on February 5, 1889, scandal broke forth in Paris, and the French Government declined to go further with the De Lesseps project. Thus tragically ended

²⁴ S. Doc. No. 400, 56th Cong., 1st sess.

²⁵ *Congressional Record*, 50th Cong., 2d sess., Vol. XX, Pt. 1, p. 338. The resolution did not pass the House of Representatives. Nevertheless, President Harrison expressed himself in favor of the principle which it stated. Dexter Perkins, *The Monroe Doctrine, 1867-1907* (Baltimore, 1937), p. 107.

the colorful and valiant effort of the De Lesseps canal scheme in the Isthmus of Panama. The collapse occurred when approximately two-fifths of the digging was done,²⁶ and after an heroic struggle against odds of heat, disease, jungle, mountains, and finance. Notwithstanding the suspicions and opposition of the United States, and the growing desire for an all-American waterway, no recital of Panama Canal history can afford to be niggardly in a mead of praise for what De Lesseps envisioned and sought. Nevertheless, the French disaster dramatically removed one more obstacle in the path of American destiny.

AMERICA BECOMES AWARE OF MILITARY VALUE OF A CANAL

A combination of foreign and domestic developments during the closing decade of the nineteenth century precipitated the ultimate action. They are worth noting, for they had much to do with giving the Panama Canal the military aspect which it has always borne. Disputes with Britain over the boundary in the Alaskan Panhandle, and with other Powers over sealing in the Bering Sea; the partitioning of China; the announcement of the Open Door Doctrine; the transition of commerce between the lands bordering on the Pacific and the eastern seaboard of the United States from a trade in luxuries to one predominantly in raw materials demanded by a rapidly expanding industrial system; the long voyage of Commodore Dewey to Hongkong, with the Battle of Manila Bay and the accompanying unpleasanties with foreign naval units; the annexation of the Hawaiian Islands; and finally, the Boxer troubles in China, focused public attention as never before upon the requirements of naval power in the Pacific. During the same years differences with Britain over the North Atlantic fisheries, the war with Spain, and the recurring revolutions in Latin America imperiling life and property, pointed to the imperative of having naval forces readily available for service in the Atlantic and Carib-

²⁶ Walker Commission Report, S. Doc. No. 357, 57th Cong., 1st sess., p. 57.

bean. The American people awoke to the influence of sea power, and its peculiar relations, so far as the United States went, to an isthmian canal. The ninety-day race of the cruiser *Oregon* around the Horn to participate in the Battle of Santiago de Cuba, and the vigorous writings of Captain Mahan were not lost on the public. It was realized that the United States was involved in a world situation in which the possession or otherwise of a naval force able to move quickly in two vast oceans was decisive. Policies succeeded, where supported by sea power; failed of accomplishment when that element was lacking.

Domestic occurrences meanwhile contributed likewise to the decision reached at the turn of the century to expedite government construction of a canal somewhere in Central America. The frontier disappeared within the United States. Energy and capital hitherto concentrated on pushing back the frontier were released for a broader sphere of action. An apparent surplus of manufactured goods and agricultural products began to seek foreign markets, while industry called for increasing amounts of raw materials found abroad. Accelerated communications and restive journalism turned public attention ever more overseas. Finally, politics thrust to the fore a coterie of statesmen whose interests extended far beyond the national shores and whose dynamic nature called for action by the exercise of power. National interests seemed to encompass the world. Manifest destiny required a short cut between the oceans for the naval protection of possessions, national interests, foreign trade, and the advancement of national policy.

The concurrence of these manifestations seemed to demand a canal under the sole control of the United States. The financial exhaustion of the Maritime Canal Company in 1893 posed a problem of first magnitude for the United States Government. Should it now do for this company what it had opposed on the part of France respecting De Lesseps' *Compagnie Universelle*? Should it proceed in the face of the Clayton-Bulwer Treaty and

build regardless of foreign nations? Or should it engage in another round of negotiation with the British, relying on the transitions then in process in world politics to bring them to another major concession? If the construction of a canal seemed to be required, where should it be run: in Nicaragua or in the Isthmus of Colombia?

The solution of this comprehensive problem brought into play a variety of persons and interests, and necessitated the working-out of time-consuming processes. In 1895 Congress ordered an investigation of the practicability of the Maritime Canal Company's plans, which resulted in basic endorsement but with a recommendation of a more elaborate study of the whole canal situation.²⁷ Accordingly the Walker-Hains-Haupt Nicaragua Canal Commission was appointed in 1897.²⁸ In both of these moves leadership had come from Senator John T. Morgan of Alabama, who, while possessed of a national outlook, was largely interested in the economic development of the Southern states. Because of the greater proximity of the Nicaragua route to the Gulf ports, Morgan had a greater leaning for this route.²⁹

Meanwhile, Secretary of State Olney had opened matters with the British. In a long Memorandum in 1896, the Secretary reviewed the history of the Clayton-Bulwer Treaty, and, rejecting former Secretary Frelinghuysen's ideas, advanced the statesmanly proposition:

If changed conditions now make stipulations, which were once deemed advantageous, either inapplicable or injurious, the true remedy is not in ingenious attempts to deny the existence of the treaty or to explain away its provisions, but in a direct and straightforward application to Great Britain for a reconsideration of the whole matter.³⁰

²⁷ House Document [hereafter cited as H. Doc.] No. 279, 54th Cong., 1st sess.

²⁸ *Cong. Rec.*, 55th Cong., 1st sess., p. 1398.

²⁹ Dwight C. Miner, *The Fight for the Panama Route* (New York, 1940), pp. 26-27.

³⁰ Moore, *op. cit.*, pp. 203-209.

Put forward on such a plane, not even the British could courteously decline conversations. These were soon commenced, and terminated in the Hay-Pauncefote Treaty of 1901.

PRESIDENT MCKINLEY ASSERTS CONSTRUCTION OF A CANAL
UNDER AMERICAN CONTROL "INDISPENSABLE"

President McKinley did not allow the subject to lie idle while the Walker Commission was busy in Central America. In his message on the state of the union, December 6, 1897, he told the Congress: "A subject of large importance to our country and increasing appreciation on the part of the people, is the completion of the great highway of trade between the Atlantic and Pacific known as the Nicaraguan Canal. Its utility and value to American commerce is universally admitted."³¹ A year later the course of world events sketched in preceding pages left its impress upon the President's message, and showed acute consciousness of the strategic character of a canal.

That the construction of such a maritime highway is now more than ever indispensable to that intimate and ready intercommunication between our eastern and western seaboard demanded by the annexation of the Hawaiian Islands and the prospective expansion of our influence and commerce in the Pacific, and that our national policy now more imperatively than ever calls for its control by this Government, are propositions which I doubt not the Congress will duly appreciate and wisely act upon.³²

Manifest destiny cast the die in 1898. Construction was held to be indispensable. National policy demanded Government control. Hayes' policy was at the threshold of consummation. A canal was identified with that fundamental ingredient of policy, national interest. The Expansionists of '98 did not retract before the logic of this conclusion. There remained only attendance upon a favorable issue of the negotiations under way with Great Britain, and with a local sovereign, together with final selection of the geographical pathway to be followed by

³¹ *For. Rel.*, 1897, p. xxiii.

³² *For. Rel.*, 1898, p. lxxi.

the constructors. These were requisites, but not ends in themselves. Primal was the resolution that a canal would be built for the advancement of commerce, for the protection of the nation and its possessions, and for the furtherance of national policy.

NICARAGUA OF PANAMA?

The Walker Commission reported to Congress in May, 1899, in favor of the Nicaragua route.³³ The lobbyists for the New Panama Canal Company had already entered the arena of politics, however, to salvage the interests of all tied up with the Panama route by inducing the United States to abandon Nicaragua and to purchase the rights and properties of the New Panama Canal Company. Thereupon the issue was joined. On March 3, 1899, a law was passed requiring the President to name a Commission to examine all practical routes in order "to determine the most feasible and practicable route."³⁴ The succeeding three years witnessed one of the most dramatic contests in legislative history as the partisans of each route endeavored by "hook or crook" to win the decision, and as the transcontinental railroads sought to negate the whole affair. This story has been told with such finesse by Dwight Miner in *The Fight for the Panama Route, the Story of the Spooner Act and the Hay-Herrán Treaty*,³⁵ that no gain would be made by repetition of details here. Suffice it merely to allude to the main steps which were taken.

On December 1, 1900, Secretary Hay signed protocols with

³³ S. Doc. No. 357, 57th Cong., 1st sess.

³⁴ 30 *U. S. Statutes at Large* [hereafter cited as Stat.], 1150. The President reappointed Admiral Walker, Colonel Hains, and Professor Haupt, but added Col. Ernst, Samuel Pasco, a lawyer, Professor Emory Johnson, and George Morison, Alfred Noble, and William Burr, civil engineers.

³⁵ Published by Columbia University Press, New York, 1940. See also *The Story of Panama: Hearings on the Rainey Resolution before the Committee on Foreign Affairs of the House of Representatives*, Washington, 1913; P. Bunau-Varilla, *Panama: the Creation, Destruction, and Resurrection* (New York, 1920); Siegfried, *Suez and Panama* (New York, 1940), Chap. VII.

the representatives of Costa Rica and Nicaragua by which the latter agreed to negotiate treaties for a canal with the United States when the President was authorized by Congress to acquire a canal route through their territories.³⁶ These protocols taken in conjunction with the right of transit assured by the Treaty of 1846 with New Granada,³⁷ placed the United States in a valuable bargaining position, and one from which it might proceed readily once Congress decided upon the alternatives before it.

The Walker Commission filed its final report on November 16, 1901. After examining at length the engineering problems involved in the Nicaragua and Panama routes, and estimating that the construction expense of the latter would amount to forty-five million dollars less, the Commission nevertheless unanimously recommended the Nicaragua route "as the most practicable and feasible" for a canal "under the control, management, and ownership of the United States." This conclusion was founded upon the persistent refusal of the New Panama Canal Company to submit a definite sale price. The Company valued its holdings at \$109,141,500. The Walker Commission refused to recommend payment of more than \$40,000,000.³⁸

THE CANAL TREATIES, 1901-03

One month to a day after the filing of the Walker Commission Report, the Senate gave its consent to the ratification of a new treaty, the Hay-Pauncefote Treaty, already negotiated with Great Britain.³⁹ This cleared the way at last, and in a friendly atmosphere, of British opposition to a purely American enterprise. As phrased by President Roosevelt: this Treaty

³⁶ W. H. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers* (Washington, 1910), Vol. I, p. 351; Vol. II, p. 1290.

³⁷ *Ibid.*, Vol. I, p. 302. Art. 35.

³⁸ S. Doc. No. 222, 58th Cong., 2d sess., pp. 149-160, 174, 175.

³⁹ 32 Stat. 1903. The details of this Treaty will be discussed in the next chapter.

“guarantees to this Nation every right that it has ever asked in connection with the Canal. . . . It specifically provides that the United States alone shall do the work of building and assume the responsibility of safeguarding the canal and shall regulate its neutral use by all nations on terms of equality without the guaranty or interference of any outside nation from any quarter.”⁴⁰

The ratification of the Hay-Pauncefote Treaty still left undecided which route should be followed in Central America. The battle of the lobbyists waxed hotter than ever. On June 28, 1902, Congress passed the Spooner Act “to provide for the construction of a canal connecting the waters of the Atlantic and Pacific oceans.”⁴¹ As passed, the Act was a triumph for the Panama forces, for it provided that if the President could obtain the holdings of the New Panama Canal Company and a suitable treaty arrangement with Colombia, the Canal should be constructed at Panama; if not, the President was to proceed with plans for a Nicaragua Canal.

While the contest ran on over the actual sale price and acquisition of the French company’s rights and properties, Secretary Hay strode on ahead to place the United States in an unimpeachable position come what might of the dealings with the New Panama Canal Company. A new treaty with Nicaragua, omitting all reference to neutralization of a canal, was submitted to the Senate, rejected, and then brought up for reconsideration. At the same time Secretary Hay negotiated a new treaty with Colombia authorizing the New Panama Canal Company to sell its rights and properties to the United States, and granting the United States an exclusive right to construct, maintain, operate, and protect a canal.⁴² The history of the

⁴⁰ *For. Rel.*, 1901, p. xxxv.

⁴¹ 32 Stat. 481. This Act also created the Isthmian Canal Commission of seven members, which, reorganized at various times, subsequently achieved construction of the Panama Canal.

⁴² Text in *Diplomatic History of the Panama Canal*, S. Doc. No. 474, 63d Cong., 2d sess., p. 277.

Hay-Herrán Treaty and the event to which it gave rise are notorious.⁴³ Consented to by the United States on March 17, 1903, the treaty was unanimously rejected on August 12 by the Colombian Senate.

On November 3, 1903, the district of Panama staged its epochal revolution, aided by the convenient interposition of United States naval forces which prevented Colombian troops from taking action on the Isthmus on the ground of the right of the United States under the 1846 treaty to "maintain free and uninterrupted transit" across the Isthmus. On November 6 the United States recognized the independence of Panama, and on November 18, 1903, the Convention for the Construction of a Ship Canal to Connect the Waters of the Atlantic and Pacific Oceans was signed by Messrs. Hay and Bunau-Varilla. It was ratified by Panama on December 2, 1903, consented to by the Senate on February 23, 1904, and formally proclaimed by the President of the United States on February 26, 1904.⁴⁴ By this Convention Panama granted to the United States in perpetuity the use, occupation, and control of the land and waters comprising the Canal Zone, and the right to exercise therein all of the rights of sovereignty. It also authorized the New Panama Canal Company to sell and transfer all of its rights, properties, interests, and concessions to the United States, which power of authorization it had acquired in place of Colombia by virtue of the transfer of sovereignty over the Isthmus. On March 8, 1904, the President appointed the seven Isthmian Canal Commissioners, under the Spooner Act of 1902, to undertake the organization and management of the Canal enterprise.⁴⁵ On April 28 Congress appropriated the funds required for the inaugural payment to Panama for the rights and properties in the Isthmus, and empowered the President to

⁴³ For best accounts with references, see Moore, *op. cit.*; Miner, *op. cit.*; E. T. Parks, *Colombia and the United States* (Durham, 1935).

⁴⁴ 33 Stat. 2234. The details will be discussed in the following chapter.

⁴⁵ *Executive Orders Relating to the Panama Canal* (Mt. Hope, 1922) [hereafter cited *Ex. O.*], p. 19.

proceed to the occupation of the lands and properties "necessary and convenient for the construction, maintenance, operation, sanitation, and protection" of the Canal and its auxiliary works.⁴⁶ Transfer of the properties and rights of the New Panama Canal Company took place on May 4. Active operations were under way in the Isthmus before the year was out.

THE UNITED STATES BUILDS ITS CANAL AT PANAMA

The construction period of the Panama Canal covered approximately ten years, but the actual excavation and construction was done in about seven years. The first three years were devoted to preliminary activities, involving the sanitation of the Canal Zone, the banishment of yellow fever and malaria, the assemblage of an operating plant, the modernization of the Panama Railroad, the gathering of a working force, the erection of living quarters, and the provision of a food and water supply. During this early period also the Isthmian Canal Commission underwent considerable evolution. In April of 1905 the Commission was first reorganized with a three-man leadership, composed of the Chairman, the Governor of the Zone, and the Chief Engineer, forming an Executive Committee, but responsible to the Commission as a whole.⁴⁷ This plan resulted in delays and disagreement, with the result that in 1906 another organization was attempted, abolishing the Executive Committee, placing the Chief Engineer and all other officers under the supervision of the Chairman, and more carefully defining the duties of each.⁴⁸ Even this move failed to eliminate political influence, and within a year Mr. John F. Stevens, the Chairman, resigned.

Inflamed by the situation, President Roosevelt is reported by Joseph Bucklin Bishop to have declared:

⁴⁶ 33 Stat. 429.

⁴⁷ Order of the President, April 1, 1905. *Ex. O.*, p. 35.

⁴⁸ Order of the President, Nov. 17, 1906. *Ibid.*, p. 55.

I propose now to put it in charge of men who will stay on the job till I get tired of having them there, or till I say they may abandon it. I shall turn it over to the army.⁴⁹

In April, 1907, Lieutenant Colonel George W. Goethals of the Army Engineer Corps was appointed Chairman of the Commission, and presently vested with the authority of the Governorship of the Canal Zone as well.⁵⁰ Furthermore, the Commission was ordered to remove itself to the Canal Zone where it belonged. Finally, in January, 1908, a further reorganization was ordered by the President making the Commission an advisory rather than a directive body.⁵¹ The combination of Colonel Goethals' ability and moral authority saved the day for the Canal undertaking. Political influence was resisted, an *esprit de corps* was generated among the employees in the Zone, and sound engineering knowledge was put to work in a manner productive of results.

The purchase of the properties of the New Panama Canal Company brought to the United States all of the plans and data assembled by the Company. These supplemented materials already available through the reports of the Walker Commission. But the question remained whether the United States should construct a sea-level or a lock canal. The Presidential order reorganizing the Isthmian Canal Commission in 1905 provided that that body should be "charged with the general duty of the adoption of plans for the construction and maintenance of the canal and with the execution of the work of the same." The order went further, however. It announced that the President would appoint a Board of Consulting Engineers, made up of "engineers of the highest standing, having experience in works of canal construction and hydraulics," to which were to be submitted for consideration and advice "the important engineering questions arising in the selection of the best plan for the construction of the canal." The recommendations

⁴⁹ Joseph B. Bishop, *The Panama Gateway* (New York, 1913), p. 176.

⁵⁰ *Ibid.*, pp. 64-65.

⁵¹ *Ibid.*, p. 72.

of this Board, which in addition to eight American members contained five experts from Europe, were to be considered by the Commission and forwarded with its recommendations "to the President for his decision."⁵²

The Consulting Board assembled in Washington on September 1, 1905, and continued its deliberations until the following January. After visiting the Isthmus and considering the evidence placed before it, the Board voted on November 18, 1905; eight to five in favor of a sea-level canal.⁵³ The vote was notable in that all of the European members voted for the resolution, and that the five of the eight Americans who voted against it, and who were in favor of the lock project, were all engineers.

In accordance with the order of the President, majority and minority reports were prepared for submission to the Commission. These were presented on January 10, 1906. The Canal Commission began its own study at once, and handed in its report to the Secretary of War on February 5, 1906. This report reversed the verdict of the majority of the Consulting Board, and, with only one dissenting vote, that of Admiral Endicott, recommended a lock canal. A fortnight later the President transmitted these documents to Congress, together

⁵² *Ex. O.*, pp. 37, 43. The members of the Board were: George W. Davis, Major-General, U. S. A. (retired), and member first Isthmian Canal Commission, Chairman; Alfred Noble, Chief Engineer, Pennsylvania Railroad Company; William Barclay Parsons, Chief Engineer, Rapid Transit Commission, New York City, and member first Isthmian Canal Commission; William H. Burr, Professor of Civil Engineering in Columbia University, New York City, and member first Isthmian Canal Commission; Henry L. Abbot, Brigadier-General, U. S. A. (retired); Frederic P. Stearns, Chief Engineer of Metropolitan Water and Sewerage Board of Massachusetts; Joseph Ripley, Chief Engineer of the Sault Sainte Marie Canal; Isham Randolph, Chief Engineer, Chicago Drainage Canal; William Henry Hunter, Chief Engineer, Manchester Ship Canal, nominated by the British Government; Adolph Guérard, Inspector of Bridges and Highways, France, nominated by the French Government; Eugen Tincauzer, Chief Engineer, Kiel Canal, nominated by the German Government; J. W. Welcker, Chief Engineer of Waterstaat, nominated by Netherlands Government; Edouard Quellenec, Consulting Engineer, Suez Canal, nominated by Netherlands Government.

⁵³ *Report of the Board of Consulting Engineers for the Panama Canal* (Washington, 1906).

with the added recommendations of the Secretary of War and of himself in favor of the lock plan.⁵⁴ The most vigorous contest over the two plans developed in the Senate. The lock plan eventually won out, on June 21, 1906, but only by the narrow margin of thirty-six to thirty-one votes.⁵⁵ The House concurred on June 27, and the plan became law on June 29.⁵⁶ From that date work in the Isthmus was prosecuted with vigor.

When the decision was reached in 1906 to build a lock canal, it was estimated that it would require nine years for completion. The original plans called for a total excavation of ninety-five million cubic yards of material. During the year 1908 the President ordered the width of the locks to be increased from one hundred to one hundred and ten feet, and the minimum width of the canal channel throughout its course to be three hundred feet. This involved a widening of the bottom of Culebra (now called Gaillard) Cut by one hundred feet. These changes increased the estimated excavation to one hundred and seventy-five million cubic yards. During the period of construction there were no less than twenty-two slides in the Cut area, adding a total of twenty-five million cubic yards of material which had not been figured on in the early estimates either of time or cost of construction. Nevertheless, due to the truly magnificent work of the construction crew, with excavation running up to the figure of 4,062,632 cubic yards during the month of March, 1909, the Canal was opened to navigation on August 15, 1914. On that day the S. S. *Ancon* of the Panama Line made the first historic trip from the Atlantic to the Pacific through the Canal.^{56a} Had it not been for another slide which occurred in October, 1914, the Canal would have been completed in its entirety within the estimated time notwithstanding

⁵⁴ *Message from the President of the United States transmitting the Report of the Board of Consulting Engineers and of the Isthmian Canal Commission on the Panama Canal* (Washington, 1906).

⁵⁵ *Cong. Rec.*, Vol. 40, Pt. 9, p. 8857.

⁵⁶ 34 Stat. 611.

^{56a} A vessel had been put through on Aug. 3, 1914, but not from deep water to deep water in continuous voyage.

all unforeseen difficulties. When the Canal was declared formally complete and open, July 12, 1920, a total of approximately two hundred and forty million cubic yards had been excavated, and the total cost, exclusive of outlays for defense, was only \$366,650,000.

Thus, three-quarters of a century of American interest in a Panama Canal came to a climactic realization. The ineffectiveness of private initiative, and the waywardness of over-ambitious politicians were swept away as before a tidal wave. How fatefully echoed the words of the French diplomat of '48: "When the day comes that public opinion in the Union abandons its present indifference and takes an active interest in the matter, it will be irresistible." The two great English-speaking democracies peacefully solved a half century of dispute and now stood, one in command of the maritime gateway to the East, and the other, master of the short cut to the West! This was an achievement which altered the geography of continents, and profoundly affected the trade routes and politics of the world.

Why did the United States determine so resolutely to go through with a Government canal at Panama? Let the words of its dynamic leader speak for themselves if any need exist to labor the motive:

The control, in the interest and traffic of the whole civilized world, of the means of undisturbed transit across the Isthmus of Panama has become of transcendent importance to the United States.

The course of events had shown that a canal to connect the Atlantic and Pacific oceans must be built by the United States or not at all. Experience had demonstrated that private enterprise was utterly inadequate for the purpose; and a fixed policy, declared by the United States on many memorable occasions, and supported by the practically unanimous voice of American opinion, had rendered it morally impossible that the work should be undertaken by European powers, either singly or in combination.

In all the range of our international relations, I do not hesitate

to affirm that there is nothing of greater or more pressing importance than the construction of an interoceanic canal. *Long acknowledged to be essential to our commercial development, it has become, as the result of the recent extension of our territorial dominion, more than ever essential to our national self-defense.* In the light of our present situation, the establishment of easy and speedy communication by sea . . . presents itself not simply as something to be desired, but as an object to be positively and promptly attained. *Reasons of convenience have been superseded by reasons of vital necessity,* which do not admit of indefinite delays.⁵⁷

What was determined in principle by such reasons was translated into realized fact only by the dauntless, aggressive will of a handful of leaders—Hay, Roosevelt, Taft, Stevens, Goethals, Gaillard, Gorgas—and by the hard, relentless toil of a host of assistants and laborers. In the majestic ease with which the luxurious liners of this day pass from sea to sea through the Canal it is easy for the seafarer to forget the human element that made this possible. Yet but for the thoughts, the will-power, and the brawn of these men there would be in the Isthmus of Panama today but the steamy wastes of the Chagres, unfit for navigation, inhospitable to the habitation of civilized man.

NICARAGUA CANAL PROJECT STILL ALIVE

Although the route so long favored by American statesmen lost out in 1903, the United States has never allowed a Nicaragua canal to slip entirely from sight. In 1914 a new treaty with Nicaragua, the Bryan-Chamorro Treaty, conferred upon the United States an exclusive right to construct, operate, maintain, and protect a canal through that territory whenever it saw fit to do so.⁵⁸ In 1929-31, and again in 1938-39, serious thought was given to the construction of such a canal as the rapid

⁵⁷ Roosevelt's Special Message to Congress, Jan. 4, 1904. *For. Rel.*, 1903, pp. 260-278. Italics added.

⁵⁸ 39 Stat. 1661.

development of military aviation threw doubt upon the safety of the Panama Canal.⁵⁹ Again side-tracked, this time in deference to the Panama Canal "by-pass,"⁶⁰ the Nicaragua canal project must be considered as in storage rather than abandoned. World affairs and national policy may yet require its creation.

FOREIGN AFFAIRS DEMONSTRATE STRATEGIC IMPORTANCE OF PANAMA CANAL

No sooner had construction commenced at the Canal Zone in 1904 than threatening circumstances arose in both the Pacific and the Atlantic. Japan, victorious in the war with Russia, embarked upon a program of aggrandizement running in opposition to the policy of the United States. Japanese laborers inundated American possessions, while traders took away markets from American manufacturers. But more important yet, a major naval force began to grow on the other side of the Pacific, increasing apprehension for the safety of American rights and interests. The seizure of Shantung Province in 1914, the presentation of the Twenty-One Demands to China in 1915, the occupation of German islands in the Pacific, and the intervention in Siberia in 1917 added further to the clash of policies. These events vindicated the warnings of Mahan. They pointed undeniably to the need not only of a large naval establishment in the Pacific at all times, but to the existence of a canal which would make it possible to rush additional ships or troops to that region when needed.

European affairs also cast a shadow which touched the United States. The Agadir and Algeciras crises, the naval race between Germany and England, the blockade of Venezuela, and German

⁵⁹ *Report of the Army Interoceanic Canal Board*, H. Doc. No. 139, 72d Cong., 1st sess.; Hearings before the Committee on Merchant Marine and Fisheries, *Additional Interoceanic Canal Facilities*, House Report, 76th Cong., 1st sess.; Hearings before the Committee on Interoceanic Canals, *Additional Interoceanic Canal Facilities*, S. Doc., 76th Cong., 1st sess.

⁶⁰ See Chap. IV, pp. 157-158; Chap. V, pp. 213-215.

activities in Latin America showed that in the Atlantic America must look to her defenses.

The coincidence of the simultaneous outbreak of the World War and the opening of the Panama Canal emphasized the significance of the Canal to national defense. The Canal doubled the efficiency of the Navy and greatly facilitated the transportation of certain key raw materials, notably nitrates, oil, rubber, tungsten, copper, tin, lumber, to points of manufacture.

American influence could never have been what it was in the Far East in 1915, 1918, and 1921 had it not been for the Panama Canal. The war effort in Europe would have suffered materially without the reductions in time and distance to shipping. Hostile raiders would have carried on their depredations longer than they did had it not been for the mobility afforded the Allied fleets by the Canal.

THE CANAL AND AMERICA'S POSITION IN WORLD AFFAIRS

The logic of these circumstances seems irresistible. Given the indispensability of the Canal, adequate insurance of its continued operation followed as of necessity. A lock canal is a vulnerable affair. The geo-meteorological factors present in the Isthmus of Panama make the Panama Canal peculiarly delicate. Allow the lock gates to be destroyed, or the dam structures to be breached, and the entire canal may be jeopardized. Permit an unfriendly vessel to block the channel or put out of commission any pair of locks, and the whole Canal is rendered temporarily useless. The meaning of this is clear if a portion of the fleet required for operations in one ocean happens to be in the other.

The Panama Canal has come to hold such an accepted place in world economy that one is apt to view it principally from its contribution to commerce and shipping. This has come to be of significance to all nations. Because of this fact the United States as proprietor of the Canal cannot afford to abuse its

trusteeship. Should it ever do so it may well court challenge by those whose national interests are heavily bound up with the economic profits obtainable by continuous use of the Canal route. Notwithstanding the boon to the wealth of nations represented in the maintenance of the Canal, the Panama Canal that became a reality on August 15, 1914, was a far cry from the idealistic dreams of Saint Simon and De Lesseps. Born out of the stern struggle of power politics, the Canal which is seen in operation today is more a military and political instrument than an idyllic channel between the oceans through which may pass any who will. The Canal can never be separated from world trade. Neither can it be viewed at any time as distinct from the national defense and national policy of the United States of America. Good neighbor policies, war-time associations, and programs of international organization may incline the nation to many concessions in favor of others. But permanent national interests demand that the United States never relax its vigilance for the maintenance and protection of the Panama Canal. Should it do so, it must be prepared to lose influence and position in world affairs.

CHAPTER II

AMERICAN RIGHTS AND POWERS

THE construction, maintenance, and protection of a ship canal by the Government of the United States of America in the Isthmus of Panama was made possible by a series of legal measures whose import cannot be overlooked by anyone concerned with Canal affairs. Upon these instruments depend the rights and powers of the United States over the Panama Canal and Canal Zone, and over all persons and vessels coming within the jurisdictional limits of the Canal and Canal Zone. From the authority conferred by them have stemmed the manifold activities of the United States in the Canal Zone, the regulations for the navigation of the Canal, and the administration established at the Canal. The most outstanding of these general power-conferring measures are the Hay-Pauncefote Treaty with Great Britain, the Spooner Act of 1902, the 1903 Convention for the Construction of an Inter-oceanic Canal and the General Treaty of Friendship and Cooperation of 1936 with Panama, and the Constitutions of the Republic of Panama adopted in 1903 and in 1941.

THE HAY-PAUNCEFOTE TREATY, 1901

The Treaty to Facilitate the Construction of a Ship Canal, signed by Messrs. Hay and Pauncefote on November 18, 1901, is the cornerstone of American rights in the Panama Canal.¹ Superseding the Clayton-Bulwer Treaty of 1850,² which had pledged Great Britain and the United States never to "obtain

¹ 32 Stat. 1903.

² 9 Stat. 995.

or maintain for itself any exclusive control" over "any means of communication by ship-canal" which might be constructed between the Atlantic and Pacific Oceans, the Hay-Pauncefote Treaty provided that as between the two contracting parties a ship canal, "by whatever route may be considered expedient," may "be constructed under the auspices of the Government of the United States, directly or indirectly," and that the United States "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." This Treaty did not confer territorial rights on the United States for a Canal or canal zone; such could be obtained only from the local sovereign. It did, however, free the United States to negotiate the necessary arrangements for an exclusive jurisdiction over a canal and adjacent zone.

Articles III and IV, setting forth rules to be adopted as a basis for "the neutralization of such ship canal," and providing 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," must be read as limitations, and as the only limitations imposed by this treaty upon "the exclusive right" of regulation and management accorded to the United States. Nevertheless, it is to be observed that these limitations were contractual only with Great Britain. Although the United States "adopts" the rule that the "canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules" it has never entered into a treaty with any Power, excepting Great Britain and Panama, requiring it to keep the Canal free and open to the vessels of a particular state.³

³ The Senate of the United States refused to consent to the treaty with Great Britain signed in 1900 containing the clause: "The High Contracting Parties will, immediately upon the exchange of ratifications of this Convention, bring it to the notice of the other Powers and invite them to adhere to it." Moore, *Digest*, Vol. III, p. 211.

that this is the case with the notable exception that the Hay-Pauncefote Rules did not specify that the American canal must be kept free and open "in time of war as in time of peace" to the vessels of all nations.⁶

During the Tolls controversy in 1912, it was contended by the British that "neutralization must refer to the system of equal rights."⁷ Neutralization, however, is a concept additional to equality of treatment. The latter may be embodied in neutralization, but it is not all that is involved. The United States agreed that the Canal should be free and open to the vessels of all nations "on terms of entire equality, so that there shall be no discrimination . . . in respect to the conditions or charges of traffic, or otherwise. Separately and additionally, it adopted five sections of Rules relating exclusively to belligerent activities vis-à-vis the Canal. Observance of these Rules "is the condition for the privilege of using the Canal."—To that extent the system is one of "equality." As President Taft observed:

The Article is a declaration of the policy of the United States that the Canal shall be neutral, that the attitude of this Government towards the commerce of the world is that all nations will be treated alike and no discrimination made by the United States against any one of them observing the rules adopted by the United States.⁸

While much has been said about the neutralization of the Suez Canal, the Convention of 1888 did not use the term

⁶ The first part of Sec. 1 is based upon Art. I of the Constantinople Convention, omitting the important clause "in time of war as in time of peace." The latter half of the section is related to Art. XII, although it is made rather more specific than in the 1888 instrument. Had this portion of Sec. 1 reproduced Art. XII, the United States might have had a stronger case on the Tolls question. Sec. 2 draws upon the wording or principles of parts of Arts. I, IV, and X. The first half of Sec. 3 follows almost literally par. 2 of Art. IV, while the second part reproduces Art. VI. Sec. 4 adopts Art. V, slightly rephrased. Sec. 5 takes over parts of pars. 1 and 3 of Art. IV. Sec. 6 adopts and strengthens propositions contained in Arts. II and III. The text of the 1888 convention may be found in 79 *British & Foreign State Papers* 18.

⁷ Sir Edward Grey to the British Ambassador in Washington, Nov. 14, 1912. *For. Rel.*, 1912, pp. 481-489.

⁸ Memorandum accompanying signature of the Panama Canal Act, 1912. *Ibid.*, pp. 475-480.

“neutralization.” It provided that the Suez Canal should “always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.” It allowed defensive measures to be taken for the security of the Canal and to insure the execution of the Convention, with the exception of the erection of permanent fortifications.⁹

If the Suez Canal was not “neutralized,” certainly the Panama Canal was not in the broadest sense of the word. The United States did not guarantee that it should be “free and open, in time of war as in time of peace.” The United States and Great Britain (together with the Republic of Panama, by virtue of the terms of the 1903 convention), are the only parties agreeing to the so-called “neutralization” of the Panama Canal. Other states are under no treaty obligation to respect the neutrality of the Canal, or to observe the Rules set forth in the Hay-Pauncefote Treaty. The United States is not restricted in what it may do to enforce the Rules laid down in the Treaty. It may add other rules and regulations. It may restrict or prohibit the transit of the Canal by vessels which it may have reason to believe will not abide by the Rules. Violation of the Rules by a vessel of a state having strained relations with the United States would constitute an infraction of the law of the United States. Under some circumstances it might be regarded as an act of war, and as a *casus belli*. It would not, however, except in the case of Great Britain, amount to a violation of a treaty. Judging from numerous situations elsewhere, it may be said that little would be gained by others or by the United States through the negotiation of a convention pledging other countries to observe the neutrality of the Canal.

⁹ It may be recalled that the British landed troops in Egypt in 1882 to protect the Canal against the Arabi rebels; that they expressly refused to withdraw them at the time of, or after, the signature of the Constantinople Convention; and that Bismarck was advised: “We can never agree to the canal being neutralized.” See Halford L. Hoskins, “The Suez Canal in Time of War,” *Foreign Affairs*, Vol. XIV (1935), pp. 93-101.

RIGHT OF DEFENSE NOT INCOMPATIBLE WITH
NEUTRALIZATION RULES

May the United States defend the Panama Canal against an enemy or other danger? May it erect fortifications, commanding the Canal and its approaches, for its protection? May it engage in military operations within the Canal as a part of its defense? These questions may well be the crux of the larger question of "neutralization."¹⁰ The Hay-Pauncefote Treaty is largely silent on these matters, save for the last part of Section 2 of Article III. "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." If the maintenance of military police is conceded, which may be represented by units of the United States Army, that must involve the right to provide the police with such equipment and supportive devices as may be necessary to insure the proper execution of their function. Lacking restrictive treaty definition of "protect it against lawlessness and disorder," the United States has exclusive right to determine what is "necessary to protect," and what constitutes "lawlessness and disorder." Obviously, this would include protection against acts violative of the Rules laid down in Article III, as well as against any acts threatening the "exclusive right of providing for the regulation and management of the canal."

There is no express authorization of the right of erecting fortifications or of taking measures of military defense. But, more importantly, there is no prohibition of such action, as there is in the Constantinople Convention regarding the Suez Canal. The abortive 1900 treaty had contained a limitation,¹¹ but

¹⁰ These questions were vigorously debated in articles appearing in the *American Journal of International Law* in 1909, 1910, and 1911. See references in Padelford, "American Rights in the Panama Canal," *A. J. I. L.*, Vol. XXXIV, p. 420 n.

¹¹ Sec. 7 of Art. II. Moore, *op. cit.*, Vol. III, p. 211. This had led the Senate to insert a reservation, which the British refused to accept, asserting that none of the Rules should "apply to measures which the United States may find it necessary

Secretary Hay eventually persuaded the British of the American desire to omit all mention of fortifications and defense. Lord Lansdowne's Memorandum of August 3, 1901, recognized American wishes:

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.

In my despatch 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 defence the United States' Government desire to reserve the power of taking measures to protect the canal, at any time when the United States may be at war, from destruction or damage at the 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.¹²

to take for securing by its own forces the defense of the United States and the maintenance of public order." *Ibid.* See *Reports of the Committee on Foreign Relations, 1789-1901* (Washington, 1901), Vol. VIII, p. 650. It is notable that this reservation was based upon the British position regarding the defense of Egypt and the Suez Canal. *Ibid.*, p. 648. The British negotiators maintained that such a reservation "would strike at the very root of that 'general principle' of neutralization on which the Clayton-Bulwer treaty was based, and which was reaffirmed in the Convention as drafted." The Marquess of Lansdowne to Lord Pauncefote, Feb. 22, 1901. 94 *British & Foreign State Papers* 483. Secretary Hay's energies were subsequently directed toward persuading the British to forego all reference to the Clayton-Bulwer "general principle of neutralization" in the text of the new treaty.

¹² Moore, *op. cit.*, Vol. III, pp. 214, 215.

On December 12, 1901, Secretary Hay wrote to Senator Cullom:

The obvious effect of these changes [which had been introduced into the Treaty during its negotiation] is to reserve to the United States, when engaged in war, the right and power to protect the Canal from all damage and injury at the hands of the enemy, to exclude the ships of such enemy from the use of the Canal while the war lasts and to defend itself in the waters adjacent to the Canal the same as in any other waters, without derogation in other respects of the principles of neutrality established by the treaty.¹³

It may be concluded that under the Hay-Pauncefote Treaty the United States has: (1) a plenary and exclusive right to regulate and control the Canal and all shipping using it; (2) ample authority to police the Canal, and to take such measures as it alone may consider necessary to protect it against whatever it may determine to be lawlessness and disorder; (3) a conceded right as a belligerent to take any and all "measures to protect the canal from destruction or damage at the hands of an enemy or enemies"; (4) no undertaking expressly prohibiting its fortification and militarization of the Canal in time of peace or war. If it may take "measures to protect the canal from destruction or damage at the hands of an enemy" when it is a belligerent, it certainly must be free to prepare and establish such permanent "measures" before war breaks out, in other words, in time of peace. And if it has "the whole responsibility for upholding" the Rules of "neutralization" laid down in Article III, it must have the right and authority to take any and all measures necessary therefor.

Although pronounced free and open to the vessels of commerce and of war of all nations on terms of equality, the

¹³ MS. Department of State. On Nov. 14, 1912, Sir Edward Grey wrote to the British Ambassador in Washington a note handed to the Department of State, in which he said: "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. Rel.*, 1912, p. 486. See Chap. IV for discussion of exercise of belligerent rights.

Panama Canal cannot be said to have been "internationalized." It is under the jurisdiction of the United States, subject to the exercise by it of sovereign rights and authority by virtue of the Convention with Panama. Except as limited by treaty arrangements with Great Britain and Panama, the United States has complete and "exclusive" right to control the Canal and to regulate vessels passing through it as it may see fit.

THE TOLLS CONTROVERSY

Of all Rules in the Hay-Pauncefote Treaty relating to the operation and use of the Canal, the Rule concerning the "charges of traffic" has been the cause of the most controversy. As phrased in the Treaty this Rule provided that

The Canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

When Congress passed the Panama Canal Act in 1912, empowering the President to prescribe the tolls to be charged vessels using the Canal, it ordained that American vessels engaging in coastwise or intercoastal trade should not be subjected to charge.¹⁴ The British Government at once protested that the

¹⁴ 37 Stat. 560. Sec. 4132 of the Revised Statutes was at the same time changed to exclude foreign-owned and registered vessels from the intercoastal trade. An Executive Order of Nov. 13, 1912, established the tolls to be charged various classes of vessels. *Ex. O.*, pp. 131-132. Rules of admeasurement were set forth in an Executive Order of Nov. 21, 1913. *Ibid.*, p. 154. Regulations concerning the payment of tolls were established by Executive Order of April 16, 1914. *Ibid.*, p. 172.

A preliminary protest was lodged with the Government in Washington by the British Chargé while the Act was still pending. *For. Rel.*, 1912, pp. 469-471.

Professor Jessup in his biography of Elihu Root reveals that in a Cabinet meeting July 17, 1912, while the Panama Canal Act was still before Congress, Secretary Root opposed the exemption clause, while President Taft, Secretary of State Knox, Secretary of War Stimson, and Attorney General Wickersham supported it. Philip C. Jessup, *Elihu Root* (New York, 1938), Vol. II, p. 264.

The literature on the tolls controversy is extensive. The more important documents and treatments bearing upon it are referred to in *A. J. I. L.*, Vol. XXXIV, p. 603, n. 11.

United States was bound to open the Canal "to British and American vessels upon terms of equal treatment," on the ground 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."¹⁵

In replying to the British protest Secretary of State Knox sought refuge in the pretext that at the time the protest was lodged no tolls had been collected from British vessels from which American vessels had been exempted. He argued that "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 or 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 the 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."¹⁶

Unwilling to permit such a weighty matter to remain in this state until after the opening of the Canal to navigation, Ambassador Bryce asserted that the mere conferring by Congress of power to fix tolls at a lower rate for American vessels, even though they were engaged in coastwise or intercoastal trade, amounted, nevertheless, to a denial of the right of equality of treatment to British shipping, and was therefore inconsistent with the Treaty. Going a step further he urged that the interests of both countries required that the issue be settled amicably, "by means which will leave no ground for regrets or complaints," and before the Canal was actually opened to navigation.¹⁷

Influential persons in the United States, including officials of the Panama Canal, advocated suspension or repeal of the

¹⁵ *For. Rel.*, 1912, pp. 481, 486.

¹⁶ *Ibid.*, 1913, pp. 540-547.

¹⁷ *For. Rel.*, 1913, pp. 547-549.

tolls exemption clause.¹⁸ President Wilson, at length, came out in favor of the latter course in a message to Congress on March 5, 1914. Repeal was advocated on grounds of justice, wisdom, and policy. The exemption, he maintained,

. . . constitutes a mistaken economic policy from every point of view, and is, moreover, in plain contravention of the treaty with Great Britain. . . . The large thing to do is the only thing we can afford to do, a voluntary withdrawal from a position everywhere questioned and misunderstood. We ought to reverse our action without raising the question whether we were right or wrong. . . .¹⁹

The bill as finally passed and approved by the President on June 15, 1914, repealed the exemption clause of the 1912 Act, but carried a reservation added by the Senate which provided:

¹⁸ See Report of the Superintendent of the Marine Division of the Canal, *Annual Report*, 1915, pp. 218-221; C. L. Jones, *Caribbean Interests of the United States* (New York, 1916), p. 214. Elihu Root was one of the foremost protagonists of repeal. He believed in the trusteeship of the United States regarding the Canal and responsibility for the observance of the treaty. Jessup, *op. cit.*, Vol. II, p. 262. See also forceful arguments of Admiral Stockton, *U. S. Naval Institute Proceedings*, Vol. XXXVIII (1912), pp. 493-499.

¹⁹ H. Doc. No. 813, 63d Cong., 2d sess.; *For. Rel.*, 1914, p. 317. President Wilson was aided by the strong stand which Senator Root had taken on the issue as early as Jan. 21, 1913. R. S. Baker, *Woodrow Wilson, Life and Letters*, Vol. IV (New York, 1931), pp. 398-400. After an informal meeting in New York at which Root and Choate were present, Mr. Wilson decided Jan. 24, 1913, to advocate repeal. *Ibid.*, p. 400; Jessup, *op. cit.*, Vol. II, pp. 264-265; C. Seymour, *The Intimate Papers of Colonel House*, Vol. I (Cambridge, 1926), p. 193. However, he allowed the question to remain in a semi-active condition for a year after taking office, partly because of the platform adopted by the Democratic Convention which had nominated him, which had favored exemption for American vessels, and partly because of the opposition known to exist to repeal in the Senate. Baker, *op. cit.*, pp. 396-400. Writing to Mr. E. F. Baldwin of the *Outlook*, June 8, 1914, Senator Root said: "The main thing I have been contending for in the Tolls Repeal controversy is that we should not acquire rights upon the Isthmus upon one theory, stated by Mr. Roosevelt, and having got them, hold them on the contrary theory, stated by Mr. Taft. I have no doubt that we were both morally and legally right in what we did, but on Mr. Taft's theory of our own title to our rights, we were not morally right." Jessup, *op. cit.*, Vol. II, p. 266. The British Government accepted suggestions made by Colonel House and Ambassador Page that they refrain from pressing the issue. *Ibid.*, p. 403; Seymour, *op. cit.*, pp. 202-203. Mr. Wilson finally decided to push matters after a talk with Colonel House on Jan. 21, 1914. Seymour, *op. cit.*, p. 204. For further review of the fight for passage of the Repeal Act, see Baker, *op. cit.*, pp. 406-418.

That the passage of this Act shall not be construed or held as a waiver or relinquishment of any right the United States may have under the treaty with Great Britain, . . . or the treaty with the Republic of Panama . . . to discriminate in favor of its vessels by exempting the vessels of the United States or its citizens from the payment of tolls for passage through said Canal, or as in any way waiving, impairing, or affecting any right of the United States under said treaties, or otherwise, with respect to the sovereignty over or the ownership, control, and management of said Canal and the regulations of the conditions or charges of traffic through the same.²⁰

Notwithstanding the proviso added by the Senate, from the opening of the Canal to commerce on August 15, 1914, vessels of American ownership and registry were charged tolls and dues upon the same basis as the vessels of all other nations.

SPoonER ACT ENABLES PRESIDENT TO ACQUIRE CANAL RIGHTS AND COMMENCE CONSTRUCTION

The second element of the fundamental law applying to the Panama Canal is the Spooner Act of June 28, 1902.²¹ By the terms of this Act the President was authorized to: (1) acquire for and on behalf of the United States, the rights, privileges, grants, property, plants, etc., of the New Panama Canal Company of France; (2) acquire from the Republic of Colombia (or from Costa Rica and Nicaragua if unsuccessful with Columbia), "perpetual control of a strip of land," and "the right to use and dispose of the waters thereon, and to excavate, construct, and to perpetually maintain, operate, and protect thereon a canal," together with such police, sanitary, and judicial jurisdiction "as may be necessary to preserve order and preserve the public health thereon"; (3) cause a ship canal "of sufficient

²⁰ 38 Stat. 385. See *Cong. Rec.*, Vol. LI, pp. 10076, 10077, 10211-10247, 10274, for arguments advanced during passage of the bill. Members of the British Government expressed pleasure at the manner in which President Wilson had carried through the repeal. Baker, *op. cit.*, pp. 419-420; Seymour, *op. cit.*, p. 206.

Vessels passing through the Canal to Balboa and return for the sole purpose of having repairs made at the docks and shops there are exempt from payment of tolls by an Executive Order of Nov. 17, 1921. *Ex. O.*, p. 292.

²¹ 32 Stat. 481.

capacity and depth" to be excavated and constructed "as shall afford convenient passage for vessels of the largest tonnage and greatest draft now in use, and such as may be reasonably anticipated," together with the necessary locks, appliances, and harbors; (4) "make such provisions for defense as may be necessary for the safety and protection of said canal and harbors"; (5) include in the treaty "a guarantee" to the said state, or states, of "the use of said canal and harbors, upon such terms as may be agreed upon, for all vessels owned by such states or by citizens thereof"; (6) establish an Isthmian Canal Commission "to construct the canal and works appurtenant thereto."

This Act was essentially an enabling act, carrying with it appropriations sufficient for the acquisition of the specified rights, and for the commencement of construction. It had to be followed by the conclusion of a treaty of cession with the local sovereign in the Isthmus. The story of the negotiations with Colombia, and then with Panama, has been told fully elsewhere and needs no repetition here.²² The Convention for the Construction of a Ship Canal to Connect the Waters of the Atlantic and Pacific Oceans, signed by Messrs. Hay and Bunau-Varilla on November 18, 1903, is the definitive legal instrument.²³ The Republic of Panama was the successor in law, as well as in fact, to the Isthmus and to the rights formerly exercised in that territory by New Granada and Colombia. As such it was the only

²² For most complete accounts see Bunau-Varilla, *Panama*; Du Val, *Cadiz to Cathay*; Miner, *The Fight for the Panama Route*; Parks, *Colombia and the United States*. All are based on studies of original sources. Inasmuch as each has been written with access to materials not consulted equally or at all by the others they complement one another and form an important collection as a whole.

²³ President Theodore Roosevelt remarked in his Annual Message to Congress, Dec. 7, 1903: "When the Congress directed that we should take the Panama route under treaty with Colombia, the essence of the condition, of course, referred not to the Government which controlled that route, but to the route itself; to the territory across which the route lay, not to the name which for the moment that territory bore on the map. The purpose of the law was to authorize the President to make a treaty with the power in actual control of the Isthmus of Panama." *For. Rel.*, 1903, p. xxxii. The Republic of Panama existed neither in fact nor in law when the Spooner Act was passed in 1902. Had it existed at that time, the contention of the President would have had less weight.

party with which the President of the United States, acting under the Spooner Act, could make the necessary treaty arrangements for the acquisition of *the* isthmian canal route which the Panama Canal Company of France had started, and which had been surveyed by United States officers.²⁴

THE CANAL CONVENTION WITH THE REPUBLIC OF PANAMA, 1903

The Hay-Varilla Convention may be said to be the third fundamental law regarding the Panama Canal.²⁵ Without this the United States could not have carried out the authorizations contained in the Hay-Pauncefote Treaty and in the Spooner Act. Without it the United States would not today possess its control over the Panama Canal.

UNITED STATES GRANTED JURISDICTION OVER CANAL ZONE

The Republic of Panama by Article II of the Convention, "grants" to the United States, "in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said Canal," ten miles wide "beginning in the Caribbean Sea three marine miles from mean low water mark and extending to and across the Isthmus of Panama into the Pacific Ocean to a distance of three marine miles from mean low water mark," together with any other lands or waters outside of the zone "which may be necessary and convenient" for the purposes set forth above, or for ancillary canals or other "works necessary and convenient" to the enterprise.²⁶

It is notable that Panama did not cede, sell, or lease the ter-

²⁴ See President Roosevelt's Special Message to Congress, Jan. 4, 1904, *For. Rel.*, 1904, pp. 260-278. See also S. Doc. 230, 56th Cong., 1st sess.; *ibid.*, 389, 56th Cong., 1st sess.; H. Ex. Doc. 63, 46th Cong., 2d sess.; S. Doc. 54, 57th Cong., 1st sess., Pts. 1 and 2; *ibid.*, 123, 57th Cong., 1st sess. See further, *Treaties and Acts Relating to the Panama Canal*, p. 31, n. 34.

²⁵ Text in 33 Stat. 2234.

²⁶ Cf. Art. XXV. See Art. II of 1936 Treaty, *infra*.

ritory for the Canal Zone,²⁷ although it granted "the use, occupation and control" of the zone for a period of endless time.²⁸ No limitation was placed upon the duration of the grant, as it had been in the Hay-Herrán Treaty (one hundred years). Neither was provision made for the revocation, recapture, or transfer of the grant by the Republic of Panama. Articles XXII and XXIV substantiate this, and ensure that Panama has contracted away all legal right to challenge the "exclusive" jurisdiction of the United States over the Canal and Canal Zone. By Article XXII Panama renounces all right, claim, and title to participation in the earnings of the Canal and railroad. It also "renounces, confirms and grants to the United States, now and hereafter," all of the rights and property formerly conceded to or made over to the New Panama Canal Company, together with "all right, title and interest which it now has or may hereafter have, in and to the lands, canal, works, property and rights held by the said companies under said concessions or otherwise, and acquired or to be acquired by the United States from or through the New Panama Canal Company." This is more than a mere usufructuary grant. Furthermore, the last paragraph of the article declares:

The aforesaid rights and property shall be and are free and released from any present or reversionary interest or claims of Panama and the title of the United States thereto upon consummation of the contemplated purchase by the United States from the New Panama Canal Company, shall be absolute, so far as concerns the Republic of Panama, excepting always the rights of the Republic specifically assured under this treaty.

In short, while at the end of legal perpetuity Panama might

²⁷ The Secretary of Foreign Affairs of Panama, Mr. Arias, writing to American Minister Barrett, July 27, 1904, did speak of the transfer of the Canal Zone as a cession: ". . . and the zone thus surrendered was ceded to the Government of the United States, in perpetuity." *For. Rel.*, 1904, pp. 591-592. In Art. XXV Panama did agree to sell or lease land for naval or coaling stations.

²⁸ The jurisdiction of Panama "ceased" upon the exchange of ratifications of the treaty. See Note from Panamanian Government to General Davis, May 24, 1904, *ibid.*, 1904, p. 584.

conceivably reacquire the exercise of sovereignty over the territory called the Canal Zone, it would not thereby reacquire right or title to the lands, property, and works of, and, particularly, to the Panama Canal itself.

Article XXIV adds further force to the finite character of the transfer:

No change either in the Government or in the laws and treaties of the Republic of Panama shall, without the consent of the United States, affect any right of the United States under the present convention, or under any treaty stipulation between the two countries that now exists or may hereafter exist touching the subject matter of this convention.

If the Republic of Panama shall hereafter enter as a constituent into any other Government or into any union or confederation of states, so as to merge her sovereignty or independence in such Government, union or confederation, the rights of the United States under this convention shall not be in any respect lessened or impaired.

If this grant was thus unlimited in point of time, its purpose was nevertheless carefully defined. The Panamanian Government did not grant the *territory* in perpetuity. It granted "the use, occupation and control" of the territory. And it did so for certain specific ends: "for the construction, maintenance, operation, sanitation and protection of said canal. . . ." Controversy existed between the Governments of Panama and the United States from 1904 to 1936 over the question of whether the United States might engage in activities in the Canal Zone which were only indirectly connected with the "construction, maintenance, operation, sanitation and protection" of the Canal.²⁰ Secretary of State Hay enunciated the stand of the

²⁰ This involved questions of the application of the United States tariff; the establishment of customs houses; the construction and operation of hotels, stores, motion picture houses; the sale of provisions and supplies to vessels, etc. See various notes of the Secretary for Foreign Affairs, Mr. Arias, to American Minister Barrett, and of Panamanian Minister de Obaldia to Secretary Hay: *For. Rel.*, 1904, pp. 587-613. The same points were argued extensively in 1923 between Minister Alfaro and Secretary Hughes. See *ibid.*, 1923, Vol. II, pp. 638-687. For résumé of these problems, see W. D. McCain, *The United States and the Republic of Panama* (Durham, 1937), pp. 23-47, 225-241.

United States, which has been adhered to since: "The position of the United States is that the words 'for the construction, maintenance, operation, sanitation and protection of the said canal' were not intended as a limitation on the grant but are a declaration of the inducement prompting the Republic of Panama to make the grant." Asserting that the great object of the United States was to construct and operate the Canal, he added that the right to exercise sovereignty, conferred by Article III, left the United States exclusive right to determine what things should be done in the zone ancillary to the main objective.³⁰ The successful operation, sanitation, and protection of an enterprise of the magnitude of the Panama Canal, located as it is far from the United States, must entail the provision of many subsidiary services in the Canal Zone. Of the necessity of providing any such services or activities within the Canal Zone the authorities of the United States must be the judges.

Article III has been regarded by the United States as a keystone in the structure of its rights in the Panama Canal and Canal Zone. By this article,

The Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned and described in Article II of this agreement and within the limits of all auxiliary lands and waters mentioned and described in Article II which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.

As early as August 11, 1904, representatives of the Government of Panama contested the scope of American authority under this article.³¹ It was maintained that the United States was merely in the position of a private lessee; that Panama had not relinquished dominion and sovereignty over the zone; that the sovereignty was exercisable conjointly; and that any

³⁰ *For. Rel.*, 1904, pp. 613-630. This position was strongly sustained by Secretary Hughes in 1923. *Ibid.*, 1923, Vol. II, pp. 652-653.

³¹ Señor de Obaldía to Secretary Hay, *For. Rel.*, 1904, p. 598 *et seq.*

rights not specifically contracted away remained in the full power of Panama.³² All contentions of this nature have been forthrightly refuted by the United States, to the extent that they deny, or appear to do so, the right freely to exercise sovereign powers within the zone. Secretary Hay, in the note to Señor de Obaldia already quoted above, insisted that the United States "cannot concede the question to be open for discussion or the Republic of Panama to possess the right to challenge such exercise of authority," and he laid much weight upon the words of Article III: "to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights."³³ At length,

³² Minister Alfaro renewed the arguments in his letter to Secretary Hughes, dated January 3, 1923. The Minister asserted:

"It is proper to remark that the zone has not been sold, transferred, or alienated by the Republic of Panama to the United States in full ownership. That which was ceded is the use, occupation, and control of the zone for the specific needs of the construction, conservation, operation, sanitation, and protection of the Canal. If the Canal were abandoned by the United States, the United States would have no legal ground for occupying the zone, title to which it has not acquired either by purchase, transfer, or conquest. Further, the Canal Zone has not been even leased to the United States because the annual payment of two hundred and fifty thousand dollars which it undertook to make under the Canal treaty was not stipulated as a fee for the use of the zone." *Ibid.*, 1923, Vol. II, pp. 645-646. See also Memorandum of a Conversation, Dec. 15, 1923, *ibid.*, pp. 682-683. For a general account of the controversy at this time, see McCain, *op. cit.*, pp. 225-241.

³³ Secretary Hughes reiterated this in 1923: "The grant to the United States of all the rights, power and authority which it would possess if it were sovereign of the territory described, and to the entire exclusion of the exercise by Panama of any such sovereign authority, is conclusive upon the question you raise. The position of this Government upon this point was clearly and definitely set forth in the note of Mr. Hay to Mr. de Obaldia of October 24, 1904." *For. Rel.*, 1923, Vol. II, pp. 638, 653 *et seq.* In conversation Secretary Hughes said: "This Government would never recede from the position which it had taken in the note of Secretary Hay in 1904. This Government could not and would not enter into any discussion affecting its full right to deal with the Canal Zone under Article III of the Treaty of 1903 as if it were the sovereign of the Canal Zone and to the exclusion of any sovereign rights or authority on the part of Panama . . . This must be regarded as ending the discussion of that matter." *Ibid.*, p. 684.

Cf. the citation of *J. N. Gris v. The New Panama Canal Co.*, Supreme Court of Panama, in Secretary Hughes' note of Oct. 15, 1923, quoted above, in which that Court said: "The Republic of Panama agreed that the United States should possess and exercise, to the entire exclusion of the Republic, those rights, powers and authority, that is to say, the rights, power and authority that a sovereign alone can have . . ." *Ibid.*, p. 656.

In a note dated Oct. 13, 1923, the Secretary refused to agree to arbitrate "any

in 1923, the Panamanian Minister, in a conversation with Secretary Hughes, "said that the position taken by the Secretary might be sound from a technical, legal standpoint."³⁴

The United States, while insisting that it possesses all of the rights to exercise sovereignty, has not contested that titular sovereignty continues to reside in the Republic of Panama.³⁵ Nevertheless, the Supreme Court of the United States has concluded that "any contention of imperfection of title of the United States to the Canal Zone was hypercritical."³⁶ With this the matter may be left. The United States has

question attacking the exercise of sovereign rights of the United States explicitly granted under Article III of the Treaty of 1903 with Panama." *Ibid.*, p. 710.

³⁴ *Ibid.*, p. 685.

³⁵ Secretary Taft remarked before the Committee on Inter-oceanic Canals, April 18, 1906:

"It (Article III) is peculiar in not conferring sovereignty directly upon the United States, but giving to the United States the powers which it would have if it were sovereign. This gives rise to the obvious implication that a mere titular sovereignty is reserved in the Panamanian Government. Now, I agree that to the Anglo-Saxon mind a titular sovereignty is like what Governor Allen, of Ohio, once characterized as a 'barren reality,' but to the Spanish or Latin mind poetic and sentimental, enjoying the intellectual refinements, and dwelling much on names and forms it is by no means unimportant.

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"The truth is that while we have all the attributes of sovereignty necessary in the construction, maintenance, and protection of the canal, the very form in which these attributes are conferred in the treaty seems to preserve the titular sovereignty over the Canal Zone in the Republic of Panama, and as we have conceded to us complete judicial and police power and control over the zone and the two ports at the end of the canal, I can see no reason for creating a resentment on the part of the people of the Isthmus by quarreling over that which is dear to them but which to us is of no real moment whatever." Hearings, pp. 2527, 2399.

Mr. Lester H. Woolsey, formerly Solicitor of the Department of State, observes in an editorial comment in the *American Journal of International Law* that: "There remains a scintilla of sovereignty—a reversionary sovereignty still in the Republic of Panama." *A.J.I.L.*, Vol. XX (1926), p. 117.

³⁶ *Wilson v. Shaw*, 204 U. S. 24. In *Canal Zone v. Christian*, the Supreme Court of the Canal Zone said: "It was clearly the intention of the High Contracting Parties, expressed in unequivocal language, that the United States should have absolute, unqualified and unquestioned control over the zone mentioned, free from any debts, liabilities, concessions or privileges whatsoever." *Canal Zone Supreme Court Reports*, Vol. I, pp. 3-4. See also *Government v. Diaz*, *ibid.*, Vol. III, p. 465; *Dixon v. Goethals*, *ibid.*, p. 23.

adequate title and *majestas* to support to the enactment and enforcement of all laws, orders, regulations, and rules necessary for the maintenance, operation, sanitation, and protection of the Canal and of the Zone, and to govern the conduct of all persons and property located therein or passing therethrough.

TREATY OBLIGATIONS OF UNITED STATES TO PANAMA

Articles IX, XI, XIII, XIV, XVI, and XIX of the Convention contain undertakings on the part of the United States toward Panama. These cover agreements by the United States that customs dues shall not be levied on vessels passing through the Canal, that Panama may establish customs houses in the ports of the Canal Zone to collect dues on goods destined for her territory, that Panama Government dispatches shall be sent over the telegraph and telephone lines in the Canal Zone, that any goods disposed of for use outside the Zone shall be subject to the same customs duties as in Panama, that provision shall be made for the capture and rendition of fugitives from justice,³⁷ and that Panama may send its vessels of war, troops, and munitions through the Canal without payment of charges.

Article XIV stipulates that "as the price or compensation for the rights, powers and privileges granted in this convention," the United States "agrees to pay to the Republic of Panama" the sum of ten million dollars on ratification, "and also an annual payment during the life of this Convention" of two hundred and fifty thousand dollars in gold coin of the United States beginning nine years after the exchange of ratifications. Is the continued "use, occupation and control" of the Canal and the Canal Zone contingent upon payment of the annual fund? ³⁸ The answer would properly seem to be no.

³⁷ Regarding extradition from the Canal Zone, see *Annual Report, Isthmian Canal Commission*, 1906, pp. 75-79, and *Canal Zone Code*, Title 6, Secs. 881-892. See also Extradition Treaty, United States-Panama, May 25, 1904. 34 Stat. 2851.

³⁸ Following the abandonment of the gold standard by the United States in 1933, a disagreement arose between the United States and Panamanian Gov-

The grant of the use, occupation, and control of the Zone was "in perpetuity." Payments, according to Article XIV, are compulsory "during the life of this Convention," not in perpetuity, not for so long as the United States shall continue to use, occupy, or control the said Zone. The third paragraph of Article XIV is far-reaching in its significance. "No delay or difference of opinion under this Article or any other provision of this Treaty shall affect or interrupt the full operation and effect of this Convention in all other respects." Payments may fall into arrears, claims may be put forward of failure on the part of the United States to accord to Panama rights and privileges set forth in the Articles mentioned above, but the possession and control of the Canal Zone by the United States shall continue unaffected according to the letter of the Convention.

Question may also be raised what would happen to American use, occupation, and control of the Canal Zone if a Government of the Republic of Panama should abrogate the Canal Convention. In such an instance the United States would be free, under generally accepted principles of international law, to consider its own course of action. It might regard the Convention as continuing to be in force between the two states regardless of the action of the Panamanian Government and attempt to hold Panama to its contractual agreements. Or it

ernments concerning the obligation of the United States to continue paying the annuities in "standard gold coin of the United States of America." Department of State, *Press Releases*, March 2, 1936. Agreement was finally reached in the General Treaty of Friendship and Cooperation, signed March 2, 1936, in Art. VII, that beginning with the 1934 payment, the annuity was to be calculated in balboas, and the United States was to pay in any coin or currency having a sum value equal to 430,000 balboas in Panamanian currency. *U. S. Treaty Series* No. 945. By an Exchange of Notes dated March 2, 1936, it was agreed that one balboa should equal one dollar. *Ibid.*, p. 59. Consequently, the agreement to pay 430,000 balboas annually involved an additional payment of \$180,000 per year to Panama. The larger payment was first made in 1939, at which time arrears payments for the years 1934 to 1939 inclusive were also made at the rate of \$430,000 per annum. Payments in dollars rather than in gold coin were tendered by the United States each year from 1934 until after the ratification of the new Treaty, but returned each year by Panama. Simultaneously, Panama defaulted on the interest payment of some of her bonds.

might regard the Convention as being no longer binding and proceed as its own interests dictated. Under these circumstances the United States would doubtless rely upon the perpetual character of the grant of the use, occupation, and control of the Canal Zone and upon the finite nature of its acquisition of the Panama Canal by the terms of the Convention.

MONOPOLY OF INTEROCEANIC COMMUNICATIONS

The rights and powers conferred upon the United States by other articles of the Convention with Panama follow in secondary importance after Articles II, III, XXII, and XXIV. Articles IV and VII give the United States the right to use and acquire other bodies of water and land in Panamanian territory for purposes connected with the Canal.³⁹ Article V gives the United States "in perpetuity a monopoly . . . of any system of communication by means of canal or railroad" across the territory of Panama between the two oceans.⁴⁰ No other nation or company may be allowed by Panama to establish a canal or railroad competing with the Panama Canal and the Panama Railroad. Even the Government of Panama is precluded from constructing and operating such in its own domain, connecting the two oceans. It may of course build and operate railroads and canals which do not provide an interoceanic route. May it establish an automobile highway extending from the Atlantic to Pacific shores? Until 1936 efforts to construct such a highway were discouraged.⁴¹ May Panama establish, operate, or sanction the operation by others of an aeronautical service across the Isthmus or across its territory? This has been a delicate question. While the United States has rigorously controlled all air navigation above the Canal and the Canal Zone,⁴²

³⁹ Disputes have persisted between the two countries over the implications and application of these articles by the Canal Zone officials. McCain, *op. cit.*, pp. 144-161. See Art. II of the 1936 Treaty *infra*.

⁴⁰ Art. XX further supplements the monopoly assured to the United States.

⁴¹ McCain, *op. cit.*, pp. 180-183 and references.

⁴² Chapter III, pp. 119-122.

it has not actually had a governmental monopoly upon flight or transportation outside of the Canal Zone.⁴³ In 1929, however, it reached an agreement with the Government of Panama, whereby both countries adopted identical flight regulations and Panama passed a law creating an Aviation Commission, composed of three Panamanian officers and three United States officers, to supervise all aviation in and over Panamanian territory.⁴⁴

ECONOMIC CLAUSES IN CANAL CONVENTION

Article IX provides that neither party shall impose customs charges, dues, or other levies at the "ports" and waters of the Canal and of Panama and Colón upon transiting vessels, or vessels belonging to the United States and on Canal duty. This does not prejudice, however, the imposition by the United States of tolls and service charges "for the use of the Canal and other works." Nor does it preclude the levying of dues by Panama upon goods destined for introduction into the Republic (including the cities of Panama and Colón). Entry of the ports, for purposes other than direct passage of the Canal, warrants the assessment and collection of port charges, except, as provided in Article XVIII, where vessels put in for refuge in case of distress. Nothing is said in Article IX about the right of the United States to collect customs duties upon goods imported into the Canal Zone. The United States has maintained a right to do so from the beginning, and justified it under Article III.⁴⁵ Article X supports Article III, in freeing the Canal Zone, the Canal, and all property, equipment, vessels, and persons in any way connected with the Canal, from taxation and charges by the Government of Panama, while Article XXI averts all pre-treaty claims on the Canal Zone and Canal. Article XII adds to

⁴³ Commercial flights across Panama territory began early in 1929. McCain, *op. cit.*, pp. 183-185.

⁴⁴ Pan American Union, *Bulletin*, Vol. LXIII (1929), pp. 723, 833-834, 1267.

⁴⁵ See *For. Rel.*, 1904, pp. 585-655; *ibid.*, 1923, Vol. 11, pp. 638-687. Art. IX is superseded by Art. V of the 1936 Treaty.

the exemption by providing that Panama shall not hinder persons employed by the Canal or by the United States Government from proceeding to and from their work, and shall not exact military service from them. Article XIII provides that Panama will not subject to customs duties articles introduced into the Canal Zone for purposes connected with the Canal operations, or for the needs or use of persons residing there. The United States agrees that if such articles are disposed of for use outside of the Zone, they shall be subject to Panamanian duties. An agreement with Panama in 1904, known as the Taft Agreement, and an Executive Order of January 7, 1905, interpreted this article, and governed the matter until 1923. Since 1939 it has been covered by Articles IV and V of the 1936 Treaty and Notes exchanged by the two Governments which will be touched upon presently.⁴⁶

“NEUTRALIZATION” AND FORTIFICATION

Article XVIII of the Canal Convention is related to Article III of the Hay-Pauncefote Treaty, although markedly different in language. This states:

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

The Hay-Pauncefote Treaty did not provide that the Canal “shall be neutral in perpetuity.” The United States only agreed to adopt certain Rules “as the basis of the neutralization of such ship canal.” Furthermore, the Treaty did not provide that its Rules should be perpetual. They are binding upon the United States and Great Britain only for the duration of the Hay-

⁴⁶ Articles VI and XV provided for a Joint Commission for the determination of claims based upon appraisals and condemnations of property required for Canal purposes. This Commission was dissolved March 10, 1920. *Treaties and Acts Relating to the Panama Canal*, p. 19 n.

Pauncefote Treaty. Did the United States then accept in 1903 a status for the Canal which it had objected to in 1900? Is the United States bound to keep the Canal "neutral in perpetuity . . . in conformity with all the stipulations" of the British treaty after the termination of that compact? Is it estopped from arranging new Rules, either with Britain or with any third state?⁴⁷ Article XVIII is pregnant with implications.

The precise wording and punctuation of Article XVIII may indicate its meaning. The "Canal . . . shall be neutral in perpetuity," is one thing; "and shall be opened upon the terms . . . , and in conformity with . . . ," is another thing. The implication is that while the United States must *open* the Canal on the basis of the Hay-Pauncefote Rules,⁴⁸ it may at a later time change them, but not in such a way as to render the Canal anything other than "neutral in perpetuity."⁴⁹ Incorporated in the Convention with Panama, that is to say, with the *de jure* sovereign of the Isthmus, this limitation has greater significance than it would have had were it embodied in the treaty with Britain, but not in the one with Panama. The language of the Convention conveys the impression that the United States must keep the Panama Canal "neutral," even when it may itself be a belligerent, and notwithstanding the fact that it has jurisdiction over the Canal and Canal Zone as "if it were the sovereign of the territory." Panama granted to the United States valuable concessions and rights. This restriction would appear to have been a part of the price paid, and to be more limiting upon the United States than the provisions

⁴⁷ See Chapter IV, p. 176 for discussion of modification of Rules in favor of the United States and Great Britain.

⁴⁸ M. Bunau-Varilla in *Panama, The Creation, Destruction, and Resurrection* (New York, 1920), says that it was his and Secretary Hay's desire that the principles of the Convention of Constantinople of 1888 "should become, in a permanent way, *the directing principle* of the operation of the Panama Canal." p. 373. Italics inserted.

⁴⁹ Art. XXV emphasizes the neutral character of the enterprise: "For the better performance of the engagements of this convention and to the end of the efficient protection of the Canal and the preservation of its neutrality . . ."

of Article III of the Hay-Pauncefote Treaty.⁵⁰ However, it would not be logical to construe Article XVIII to mean that the United States cannot prevent enemy or other vessels from entering and using the Canal for the destruction of the same or of American property located in the Canal Zone.

Article XXIII confers upon the United States a right which was sought in the negotiations with the British, but which was finally settled with them upon the basis of an agreed treaty-silence.

If it should become necessary at any time to employ the armed forces for the safety or protection of the Canal, or of the ships that make use of the same, or the railways and auxiliary works, the United States shall have the right, at all times and in its discretion, to use its police and its land and naval forces or to establish fortifications for these purposes.

Conceded by the local sovereign granting the use, occupation, and control of the Zone, this article leaves no doubt as to the right of the United States to police the Canal, to use force to compel obedience to the Rules and regulations governing the use of the Canal, to defend and protect the Canal by its armed forces and by the erection of fortifications in time of peace as well as in time of war. There is no prohibition against the United States using the Canal for purposes of its own national defense whenever it may be neutral or belligerent, provided the Canal remains technically "neutral" in the sense envisaged by the Rules adopted in 1901.

Articles XI and XIX assure to Panama that its war ves-

⁵⁰ Attention may be called to an odd aspect of the drafting of Art. XVIII. It is provided that the Canal shall be opened upon the terms provided for by Sec. 1 of Art. III of the 1901 treaty. No mention is made of Secs. 2-6 of Art. III. However, Art. XVIII continues: "and in conformity with *all* the stipulations" of the treaty. If the Canal is to be opened in conformity with *all the stipulations* of the treaty, does that not include Secs. 2-6 of Art. III? It has never been admitted by the United States that Secs. 2-6 are servitudes upon itself. From this point of view, the omission of reference to these sections of the Rules may be important.

sels, troops, and materials of war may be moved from one part of the country to another via the Canal when need arises.⁵¹

Finally, reference may be made to Article XXV, whereby Panama agreed to "sell or lease" naval and coaling-station sites to the United States "for the better performance of the engagements of this convention and to the end of the efficient protection of the Canal and the preservation of its neutrality."

In summary it may be said that by virtue of the Convention with Panama the United States secured: (1) complete and irrevocable title to the Panama Canal and to all property, land, and works relating to the Canal and its operation, maintenance, and sanitation; (2) a grant for the perpetual use, occupation, and control of the Canal Zone, and a right to exercise sovereignty therein; (3) permission to acquire additional territory needed for purposes connected with the Canal; (4) exclusive and absolute authority in and over the Canal and over all vessels using the Canal, subject to the limitation of equality of treatment, to the Rules forming the "basis of neutralization," and to a right of passage of Panamanian troops and war materials; (5) a mandate for the erection of such fortifications and for the execution of such measures of armed defense, in peace as well as in war, as it may decide to be needful.

The Panama Convention complements the Hay-Pauncefote Treaty, and affords a wide foundation for the legislative and executive action of the United States Government. If it be said that the Hay-Pauncefote and Hay-Varilla Treaties are grants of limited power and that the United States must find in them authority for every right which it claims to exercise and for every function performed, it must be admitted that the draftsmen drew on broad lines.

Surveying the course of international relations since 1900, one is bound to conclude that little of practical value would

⁵¹ Sec. 6 of the Spooner Act authorized the President to give such a guarantee to Panama.

have been accomplished by a general international agreement along the lines of Article III of the Hay-Pauncefote Treaty. Considering the fluctuation which there can be in the policies of nations, it will never be wise to place too much reliance on the effectiveness of a multilateral agreement to preserve the neutrality and safety of the Panama Canal. Its strategic and economic importance warrants the exercise of the greatest care for its security by a far-sighted coordination of international agreement, municipal law, and national defense. For any limitation upon its present scope of action at the Panama Canal, the United States must at the same time insist on compensatory restrictions upon the potential striking power of all nations which might covet the injuring or seizing of the Canal. National policy may lead to special agreements for the use of the Canal. Support of an international organization, a continental political unity, or eventually a world state may induce participation in a multilateral agreement pledging others to abide by certain rules. But at all times and in all ways, so long as goods pass by sea and the destinies of nations depend even only in part upon sea power, the fundamental interests of the United States will demand that control, protection, and defense of the Panama Canal remain in United States hands to an extent that will leave no room for possibility of seizure by others.

AMERICAN TREATY RIGHTS GUARANTEED BY CONSTITUTION OF PANAMA

After the Canal Convention had been ratified by the Government of Panama, but while it was yet under advisement in the Senate of the United States, the people of Panama turned to the drawing up of a Constitution. On leaving for his mission to Panama in December, 1903, Minister Buchanan was provided with a memorandum by Elihu Root, in which it was suggested that the proposed Constitution "should expressly impose on the Government to be elected under it a strict observance of

the treaty with the United States.”⁵² Such a limitation found its way into the Constitution as Article 3 in these words:

The territory of the Republic remains subject to the jurisdictional limitations stipulated or which may be stipulated in public treaties concluded with the United States of North America for the construction, maintenance, or sanitation of any means of interoceanic transit.⁵³

When the Constitution was reformed by Act of the National Assembly in 1940, an article was inserted in the new law preserving something of the general principles of Article 3 of the 1904 Constitution but couched in different language. Article 4 of the Constitution as now in force provides:

All jurisdictional limitations stipulated in public treaties entered into prior to the present legislative act which reforms the Constitution are recognized.

Although the more recent phraseology does not disturb the constitutional foundation of rights granted to the United States by the Government of Panama prior to 1940, the omission of reference to treaties which may be concluded in the future may create some doubt as to the constitutional validity of any territorial limitations which might be there stipulated. The United States need not be apprehensive on this score, however, so long as it can arrange its relations with Panama on the basis of the 1903 Convention and the 1936 Treaty, the latter of which pledges Panama to take in conjunction with the United States such measures as may be necessary to assure the maintenance, sanitation, efficient operation, and effective protection of the Canal, as well as the protection of their common interests.

From an early date in his mission, Minister Buchanan became imbued with the idea of seeing an article inserted in the original Constitution of Panama granting the Government of

⁵² *Jessup*, op. cit., Vol. I, pp. 406-407.

⁵³ Text of Constitution, *For. Rel.*, 1904, p. 562.

the United States the right to intervene in the territory of Panama.⁵⁴ While the necessity of such an article was not formally admitted by the Secretary of State in Washington,⁵⁵

⁵⁴ Writing to Secretary of State Hay, Jan. 4, 1904, Mr. Buchanan said: "I find them ready to do anything we suggest which they can harmonize with their own plans and purposes.

"Indeed, what many here would like to see embodied in their Constitution, and what some of those in the Government have not hesitated to talk over very fully and openly with me, would be a clause recognizing the right and the obligation of the United States to intervene at all times to stop internal revolutions or 'breaking-outs' within the Republic, without reference to the limits of the Canal Zone.

"I personally believe that some such arrangement by Treaty or some other form, would be gladly taken up here and that it would be the wisest thing both countries could do since trouble of all kinds here would be discounted." Department of State, MS. Despatches, Panama, Vol. I.

The next day Buchanan wrote again on the same subject, saying:

"I feel each day more strongly convinced that our own interests here will be so wrapped up with the internal order or disorder that will exist here that we should certainly put ourselves in a position wherein we can make order and constitutional government here a certainty." *Ibid.*

It is difficult to satisfy oneself as to the origin of the intervention clause idea. It may have been Buchanan's own thought; it may have grown out of his interview with Secretary of War Root; or it may have come from some of the political leaders in Panama who saw in such a clause a guarantee of their own security in office both against other local politicians and against Colombian machinations. This much is clear: Buchanan was provided by Root with a copy of the Cuban Constitution, which of course contained the Platt Amendment. Moreover, the frequency of revolution in the Isthmian region in the past had been the object of plain speaking by President Roosevelt in his Message to Congress on December 7, 1903. Moore, *op. cit.*, Vol. III, pp. 46, 50-51.

⁵⁵ Secretary Hay, in an instruction dated Jan. 19, 1904, informed Buchanan:

"Your dispatch has been read with interest, but the Department thinks it preferable that the Panama Constitution should contain nothing in conflict with the widest liberty of action on our part. The adoption of the suggested article, at our instigation, would morally bind us to do for Panama what Colombia claims we are bound to do by the Treaty of 1846, namely, to intervene to put down revolts against the titular authority. Article XXIII of the treaty with Panama insures to us the right to protect and safeguard the transit and goes as far as is thought necessary for our own security." Department of State, MS. Instructions, Panama, Vol. I.

It may be said that Acting Secretary of State Loomis had previously instructed Mr. Buchanan on Jan. 6, to use his discretion regarding such an article. MS. Despatches, *op. cit.* Furthermore, it may be observed that Secretary Hay did not oppose the adoption of an intervention clause, provided it was not inserted "at our instigation," and did not interfere with liberty of action on the part of the United States.

it was, nevertheless, incorporated into the constitutional law of Panama, as Article 136.

The Government of the United States of America may intervene in any part of the Republic of Panama to re-establish public peace and constitutional order in the event of their being disturbed, provided that nation shall, by public treaty, assume or have assumed the obligation of guaranteeing the independence and sovereignty of this Republic.

This was rendered operative by the coming into force of Article I of the Convention of November 18, 1903. The United States shortly made it clear, however, to the Government of Panama that it would use the power thus authorized circumspectly.⁵⁶

⁵⁶ Secretary of War Taft, in his conference with Panama officials on Nov. 28, 1904, said:

"Now, that I may make myself plain: With the present Government, with President Amador and these gentlemen as his advisers, it might very well be that we should allow to lie dormant the exercise of powers that in case of the election of a Government whose personnel would not be so friendly to the United States we might have to use, and thus to protect our construction and maintenance and control of the Canal by the exercise of greater powers than those we desire not to exercise." *For. Rel.*, 1923, Vol. II, p. 681.

The position was stated in greater detail in a letter addressed to the Secretary of War by Mr. Root, Secretary of State, on Feb. 21, 1906, in response to the receipt by the Department of State of a memorial from the Liberal Party in Panama soliciting the intervention of the United States in the approaching national elections. Mr. Root stated that while the United States does not propose to interfere with the independence of the Republic, and while it is its desire to maintain an attitude of impartiality between contesting parties, it is interested in seeing "a fair, free, and honest election in Panama, because it considers such an election necessary to the peace and prosperity of the country and the stability of its Government." No doubt was left that in Panama City, Colón, and the Canal Zone, the United States "will not permit any interference with the peace and order."

He added: "If circumstances require that a military force of the United States be sent into foreign territory and there enforce the rights of this nation by force of arms, such proceeding would be an act of war, unless assented to by the nation exercising sovereignty over said territory. In the instance of Panama the constitutional provision above quoted supplies the necessary assent provided the injury anticipated results from disturbance of the public peace and constitutional order. . . . The construction of the Isthmian Canal is . . . a national endeavor of the United States, and measures which interfere with that work and are calculated to obstruct, hinder, or delay its accomplishment are interferences with the rights and privileges of the United States and must be dealt with accordingly . . ." *Ibid.*, 1906, Pt. II, pp. 1203-1206.

This it appears to have done in the years that have followed.⁵⁷

The General Treaty of Friendship and Cooperation, for which ratifications were exchanged on July 27, 1939, introduced a change in the relationship between Panama and the United States.⁵⁸ Article I of this Treaty "superseded" the article of the same number in the Convention of 1903 by which the United States had guaranteed the independence and sovereignty of Panama. With the guarantee removed, the premise on which United States intervention was authorized by the Constitution of 1904 was correspondingly eliminated, and the Act of the National Assembly reforming the Constitution in 1940 omitted all reference to intervention by the United States.⁵⁹

An Instruction drawn up by the Secretary of War and sent to the American Minister at Panama on April 26, 1906, expressed the policy of the Government even more clearly. Referring to Mr. Root's note, copy of which had been sent as an Instruction to the Minister, Secretary Taft said that this "did not mean at all to circumscribe the powers of action of the United States in case an insurrection in the Republic of Panama anywhere threatened danger to the interests of the United States in building the canal, or to its property in the Canal Zone. The question whether such interference ought to take place he characterizes as a military question, and one to be determined by the knowledge of conditions on the Isthmus and the practical effect that the insurrection would have on the building of the canal. I have no hesitation whatever in saying that in my judgment an insurrection in any part of the Republic would disturb the order in Panama and Colón and adjacent territory, and would greatly increase the difficulties that the United States would have in constructing the canal; and while, of course, the forces of our Government ought not to intervene until it is established that the Republic of Panama cannot maintain order in its own territory, I think the United States may properly, under the clauses of the treaty construed in the light of the provision of the constitution of Panama, quoted by the Secretary of State, and to prevent its inevitable interference with the work of canal construction, suppress any insurrection in any part of the Republic." *Ibid.*, pp. 1206-1207.

Secretary of State Frank B. Kellogg advised the Panama authorities in 1927 that these notes continued to express the policy of the United States. Department of State, *Press Releases*, Dec. 23, 1927.

⁵⁷ The instances of intervention are discussed in McCain, *op. cit.*, pp. 62-96.

⁵⁸ *Treaty Series* No. 945.

⁵⁹ Prior to the conclusion of the 1936 treaty both nations had ratified the multilateral Convention on the Rights and Duties of States, Article 8 of which provides that "no State has the right to intervene in the internal or external

THE GENERAL TREATY OF FRIENDSHIP AND COOPERATION
WITH PANAMA, 1936

In proceeding to the negotiation of the General Treaty of Friendship and Cooperation the United States acted upon the principles of its Good Neighbor Policy, by seeking "to eliminate, in so far as possible, all causes of friction and all grounds of legitimate complaint on the part of Panama, without sacrificing any rights deemed essential by this Government for the efficient operation, maintenance, sanitation and protection of the Canal."⁶⁰ As stated in the Preamble of the Treaty, the parties were "animated by the desire to strengthen further the bonds of friendship and cooperation between the two countries and to regulate on a stable and mutually satisfactory basis certain questions which have arisen as a result of the construction of the interoceanic canal across the Isthmus of Panama."

It is essential to note two aspects of the General Treaty. In the first place, it does not terminate or supplant entirely the Convention of 1903. Certain Articles of that Convention are expressly "superseded" or "abrogated," but Article XI of the 1936 Treaty declares:

The provisions of this Treaty shall not affect the rights and obligations of either of the two High Contracting Parties under the treaties now in force between the two countries, nor be considered as a limitation, definition, restriction or restrictive interpretation of such rights and obligations, but without prejudice to the full force and effect of any provisions of this Treaty which constitute addition to, modification or abrogation of, or substitution for the provisions of previous treaties.

affairs of another," and the Additional Protocol of Non-Intervention in which the parties "declare inadmissible the intervention of any of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the Parties." *Ibid.*, Nos. 881, 923. On reconciliation of these undertakings with the rights and powers set forth in the Canal Convention, the Constitution of Panama, and the General Treaty of 1936, see N. J. Padelford, "American Rights in the Panama Canal," *A. J. I. L.*, Vol. XXXIV, pp. 436-442.

⁶⁰ Department of State, *Press Releases*, March 2, 1936.

Secondly, the signature of the Treaty was accompanied by Exchanges of Notes designed to interpret and explain contents of the Treaty. While these Exchanges of Notes do not form a part of the Treaty proper, they were taken into account in the ratifications and are officially published together with the Treaty.⁶¹

AGREEMENT TO COOPERATE FOR MUTUAL BENEFIT

By Article I the parties agree, after superseding the former guarantee of Panamanian independence, that there shall be an "inviolable peace" between them. They declare that in view of the formal opening of the Panama Canal on July 12, 1920, the provisions of the Convention of 1903 contemplate the use, occupation, and control by the United States of the Canal Zone,⁶² "and of additional lands and waters under the jurisdiction of the United States of America for the purpose of efficient maintenance, operation, sanitation and protection of the Canal and of its auxiliary works." No doubt is left as to the perpetuation of United States control over the Canal, as the Article states, "the United States will continue the maintenance of the Panama Canal for the encouragement and use of interoceanic commerce." At the same time, the two countries avow "their willingness to cooperate, so far as it is feasible for them to do so, for the purpose of insuring the full and perpetual enjoyment of the benefits of all kinds which the Canal should afford the two nations that made possible its construction as well as all nations interested in world trade."⁶³

⁶¹ *Treaty Series*, No. 945, pp. 23-69, esp. pp. 68-69. See remarks of Senator Pittman, *Cong. Rec.*, July 25, 1939, p. 13841 (daily ed.).

⁶² In the first Exchange of Notes, dated March 2, 1936, the parties "confirm the understanding we have reached during the negotiations that wherever the provisions of the said treaty and the statements contained in the accessory notes refer to the Canal Zone, such provisions and statements are applicable to all such lands and waters as may be used, occupied, or controlled by the United States of America." *Treaty Series* No. 945, p. 23.

⁶³ Compare with Art. III of 1903 Convention.

In an Exchange of Notes on Feb. 1, 1939, the following is agreed with regard

Article II deals with the acquisition of additional land from Panama. The Article makes no change in the perpetuity of the grants of the use, occupation, and control of lands and waters previously placed under United States jurisdiction. Neither does it rule out perpetual grants for the future. But the United States declares that Panama has "loyally and satisfactorily complied with the obligations which it entered into under Article II of the Convention of November 18, 1903," whereby it provided the United States with the lands and waters necessary for Canal purposes, and it "renounces the grant made to it in perpetuity by the Republic of Panama of the use, occupation and control of lands and waters, in addition to those now under the jurisdiction of the United States of America outside of the zone" as envisaged in Article II of the 1903 Convention. On the other hand, while the treaty makers went further by committing the Governments to the proposition that "while . . . the requirement of further lands and waters . . . appears to be improbable," they nevertheless "recognize . . . their joint obligation" under Articles I and X to insure the "effective and continuous operation of the Canal, and the preservation of its neutrality,"⁶⁴ and they "agree" that if there should arise "some new unforeseen contingency" necessitating the utilization⁶⁵ of additional lands or waters for "the maintenance, sanitation, efficient operation of the Canal, or for its effective protection," they will "agree upon such measures as it may be necessary to take" in order to assure these purposes.

to the term "maintenance." "1. In connection with the declared willingness of both the Government of the United States and the Government of the Republic of Panama to cooperate for the purpose of insuring the full and perpetual enjoyment of the benefits of all kinds which the Canal should afford them (Article I of the General Treaty of March 2, 1936), the word 'maintenance' as applied to the Canal shall be construed as permitting expansion and new construction when these are undertaken by the Government of the United States of America in accordance with the said Treaty." *Ibid.*, pp. 63-65.

⁶⁴ It is to be noted that there is no mention of the protection of the Canal in this clause.

⁶⁵ The words "occupation and control," employed in this connection in the 1903 Convention, are here omitted.

Under Article II of the 1903 Convention Panama agreed in advance to grant to the United States in perpetuity the use, occupation, and control of any lands and waters outside the Canal Zone which the United States might signify at any time to be "necessary and convenient for the construction, maintenance, operation, sanitation and protection" of the Canal enterprise. This valuable concession was sacrificed in 1936 in favor of the indefinite agreement to agree "upon such measures as it may be necessary to take" to insure the operation, maintenance, and protection of the Canal if some "unforeseen contingency" should arise.

Such a contingency arose in 1940 when the rapid developments in aerial warfare made it apparent that the Canal could not be adequately defended against enemy aircraft able to travel faster than three hundred miles an hour with the facilities concentrated within the Canal Zone alone. Experience in the European War indicated that defending forces must have timely notice of the approach of hostile craft in order to get into the air to intercept them, and in order to coordinate ground and air fire. This meant that the Canal Zone must be surrounded by outlying listening posts and anti-aircraft units. It also pointed to the necessity of establishing Army air fields at considerable distances from the Canal Zone from which American forces might intercept any attacking craft before it could reach the Canal Zone. The situation also called for such military sites in Panamanian territory in order that watch might be kept against the establishment anywhere in the Central American region of hostile bases from which an attack might be launched upon the Canal or the security of the American Republics threatened.

With these requirements in mind negotiations were conducted between the Governments of the United States and Panama during 1940 and 1941 for the acquisition by the former of numerous base sites. These were accorded after it became apparent that an "international conflagration" existed

threatening the security of both the Canal and the Republic of Panama.⁶⁶ Possession was taken of the sites indicated by the military authorities of the United States and preparation of defense installations commenced.⁶⁷

TREATY REVISES ECONOMIC RELATIONSHIPS CONCERNING CANAL ZONE

Article III is concerned with clarifying some of the controversies and resolving some of the complex situations which have arisen in commercial relations between the two states as a consequence of the development of the Canal and Canal Zone. In order to enable Panama to take advantage of "the commercial opportunities inherent in its geographical situation," the United States agrees to restrict the sales of goods imported by it or produced by it in the Canal Zone, as well as residence in the Canal Zone. For this purpose it agrees to confine sales in the commissaries to employees, workmen, or laborers in the service of the United States, the Panama Canal, the Panama Railroad Company, and the armed forces, together with members of their families residing with them.⁶⁸ It is not material whether these individuals live within or outside the Canal Zone. However, in certain instances sales may be made to persons, and the domestic servants actually residing with them, only if they reside within the Zone. These include contractors and their employees fulfilling contractual work in the Canal Zone; offi-

⁶⁶ See Manifesto to the Nation, issued by Pres. Arnulfo Arias, March 5, 1941. *Panama Star and Herald*, March 6, 1941. See statement of Secretary of State Hull, Department of State, *Bulletin*, Vol. IV, p. 265.

⁶⁷ Notwithstanding that possession was obtained under Art. X rather than Art. II of the Treaty, according to the Arias Manifesto, it is understood that ultimate settlement will be arranged on the basis of Art. II.

⁶⁸ By an Exchange of Notes it is agreed that these privileges shall extend to representatives of any branch of the United States Government "exercising official duties within the Republic of Panama," including consular and diplomatic officers and members of their staffs. *Treaty Series* No. 945, pp. 24-25. It is also agreed by similar means that purchases may be made for the use or consumption of servants living with families entitled themselves to purchase goods at the commissaries. *Ibid.*, pp. 32-34.

cers, employees, or workmen of companies permitted to engage in business operations within the Zone; and persons engaged in religious, welfare, charitable, educational, recreational, and scientific work exclusively in the Canal Zone.⁶⁹

Residence in the Canal Zone, and assignments of quarters there are limited to the groups mentioned above. In addition, hucksters, settlers, shopkeepers, and gardeners are permitted to reside in the Canal Zone at the discretion of Canal authorities.⁷⁰ No restrictions were placed upon transients stopping at the hotels belonging to the United States, although it was agreed that unless they had a right to reside in the Canal Zone they might not establish a permanent abode there. The statement was also made by the United States in an Exchange of Notes that it was not its intention to compete with the hotel business in Panama and that as soon as the "situation is satisfactorily altered" with respect to the ability of Panamanian hotels to entirely meet the necessities of the "passenger traffic," the "hotel business proper" will be left to Panamanians.⁷¹

By Section 4 of Article III the United States agrees to cooperate "in all proper ways" with the Government of Panama to prevent violations of the immigration and customs laws of the Republic, including the smuggling of goods imported into or produced in the Canal Zone by the United States Govern-

⁶⁹ The United States advised Panama in an Exchange of Notes that administrative measures would be taken to limit also the use and services of hospitals, dispensaries, restaurants, clubhouses, and motion picture houses, laundries, and cleaning establishments in the Canal Zone to persons entitled to reside in the Canal Zone, and to officers and employes of the United States Government, The Panama Canal, the Panama Railroad Company, and members of the armed forces. Use of the hospitals might be afforded in "emergencies occurring within the Canal Zone" and to the officers and crews of ships arriving at Canal Zone ports. The United States also reserved the right to allow persons entitled to take advantage of the Canal Zone facilities to take guests with them into the restaurants, clubhouses, and motion picture houses. *Ibid.*, pp. 36-39.

⁷⁰ *Ibid.*, pp. 26-29. The United States stated that it was the policy of The Panama Canal to issue only an "inconsequential number" of new licenses regarded as necessary to the Canal Zone.

⁷¹ *Ibid.*, pp. 28-32. By virtue of the fact that hotel guests are not enumerated in Art. III among the classes of persons who may reside in the Canal Zone, they are not allowed to make purchases at the commissaries.

ment from the Canal Zone into Panama in violation of the laws of the Republic.⁷² In Section 5 it submits itself to an undertaking not to permit in the future the establishment in the Canal Zone of any new private business enterprises, with the exception of those "having a direct relation to the operation, maintenance, sanitation or protection of the Canal, such as those engaged in the operation of cables, shipping, or dealing in oil or fuel."⁷³ Furthermore, in Section 7 the United States agrees to "extend to private merchants residing in the Republic of Panama full opportunity for making sales to vessels arriving at terminal ports of the Canal or transiting the Canal, subject always to appropriate administrative regulations of the Canal Zone." In an Exchange of Notes accompanying the Treaty, the United States divided goods sold to vessels into three classes: ship's stores, which were to be sold as formerly; tourist or luxury goods, consisting of such items as Panama hats, alcoholic beverages, linens, perfumes, and so forth, which would not be sold to ships by agencies of the United States; and sea stores, meaning most standard quality goods, food, and medicinal supplies, which were to be sold "at prices which, in the judgment of the Government of the United States of America and in so far as may appear feasible, will afford merchants of Panama fair opportunity to sell on equal terms." It was agreed that the Canal Zone prices should be taken as a base, with no discounts allowed for purchases in large quantities. The United States went further, expressing the "hope . . . that in benefit to Panamanian commerce merchants of Panama may be able to furnish in satisfactory quantities and qualities and at reasonable prices" many of the articles classed as sea stores, and it

⁷² In a note to the Panamanian Treaty Commission, March 2, 1936, Secretary Hull said the United States would be prepared to appoint a representative to meet with a Panamanian representative for regular and continuing conference on this question. *Ibid.*, p. 39.

⁷³ An Exchange of Notes expressed an understanding that this Section would not prevent the establishment in the Canal Zone of private enterprises temporarily engaged in construction work related to the Canal undertaking. *Ibid.*, pp. 41-42.

stated that it would be its policy whenever and for so long as Panamanian merchants "are in fact able" to furnish such articles under such conditions to refrain from offering like articles for sale to ships through the commissaries.⁷⁴ In Section 6 of Article III the United States agrees to continue to permit vessels entering or clearing Canal Zone ports to use the docks and facilities to load and unload goods and passengers destined for Panamanian jurisdiction under suitable regulations and payment of proper charges. Panama, on the other hand, agrees to permit vessels entering or clearing from the ports of Panama or Colón, "in case of emergency and also under suitable regulations and upon payment of proper charges" to use the docks and facilities for receiving and disembarking Canal Zone passengers, and for loading and unloading goods in transit or destined to the service of the Canal and its auxiliary works.

The provisions of Article III and the diplomatic Notes

⁷⁴ The United States launch service was offered to Panamanian merchants for this business, subject to the necessary regulations. The United States also offered to appoint a representative to meet with a representative of the Government of Panama for regular conference and exchange of views on these matters. *Ibid.*, pp. 43-45.

The Republic of Panama made a special reservation "in conformity with its opinion that the exemptions covered by Art. XIII of the Convention of Nov. 18, 1903, were stipulated exclusively for the benefit of the Canal enterprise, of the persons in the service of the United States of America in connection therewith, and of their families; but until an understanding is reached regarding this matter, the Panamanian Government desires to express its deep satisfaction at the decision of the Government of the United States of America to put into effect measures such as those set forth in the note to which this is a reply, for the purpose of restricting sales to ships, which in former times had been made without any limitation." *Ibid.*, pp. 45-47. The early Panamanian contentions on this score were answered by Secretary Hay in his letter of Oct. 24, 1904, to Señor de Obaldia, *cit. supra*, p. 10.

In another Exchange of Notes, and as a further concession to enabling Panama to improve its commercial opportunities, the United States expressed the view that it had no desire to continue in the "hold-for-orders" and bonded warehouse business in the terminal ports beyond the time when "satisfactory bonded warehouse facilities may become available at reasonable rates in Panamanian jurisdiction." It promised to withdraw at such a time and to abstain therefrom so long as such changed conditions existed. *Treaty Series*, No. 945, pp. 34-36.

referring to it constitute a concession for the benefit of certain classes of merchants doing business in Panama. Sales within a carefully defined field are permitted to vessels transiting the Canal. While the United States asserts that it will voluntarily refrain from offering sea stores to vessels through its commissaries whenever and for so long as Panamanian merchants can furnish "satisfactory quantities and qualities and at reasonable prices," the price scale is to be based on that prevailing in the Canal Zone, plus a small surcharge, which means for many articles a price below what even wholesalers in Panamanian territory could afford to offer. Moreover, the United States retains freedom of decision at all times whether the conditions which it has prescribed are being met.

Nowhere in Article III or elsewhere is there any provision, direct or indirect, for affording merchants of Panama an opportunity for making sales in the Canal Zone, either through permanent establishments there or through house-to-house solicitation. Consideration of the position of the Canal as an instrument of national defense quite as much as an artery of commerce makes impossible any view other than that the requirements of the Government, its agencies and employees on the Isthmus be supplied without any dependence whatever on local sources in Panama. That view, of necessity, precludes admission of the merchants of Panama as competitors for the business of supplying those needs, since it is imperative that the United States Government maintain an uninterrupted and unrestricted line of supply.

Articles IV and V have to do with charges on goods and persons going from one jurisdiction to the other. No import duty or tax of any kind is to be charged goods passing from the Canal Zone into Panama for the use of the Canal or Railroad employees, or for members of the armed forces of the United States. Likewise, no duties or taxes are to be levied on goods passing from Panama into the Canal Zone. Article V recognizes

the right of Panama, however, to impose duties and charges upon merchandise destined for places in its jurisdiction imported via Canal Zone ports. It also takes cognizance of its complete right to exercise jurisdiction over the ports of Panama and Colón⁷⁵ and to charge such port dues therein as it may see fit, providing that there is no discrimination against vessels stopping as an incident to transit of the Canal. Finally, the United States agrees to furnish Panama free of charge sites for customs houses in ports of the Canal Zone for the examination of goods and passengers bound for the Republic and for the collection of duties.

The Treaty establishes in a similar manner that no charges are to be levied by either party upon persons passing from one jurisdiction to the other. Excepting for persons in the service of the United States or residing in the Canal Zone, all other persons proceeding from the Canal Zone into the Republic are subject to the immigration laws of the latter. Panama has the right, according to Article V, to determine what persons or classes of persons arriving at Canal Zone ports shall be admitted to or excluded from the Republic, and the United States agrees both to allow the Panamanian immigration officials access to vessels arriving at Canal Zone ports for the purpose of obtaining information whether persons arriving there and destined for points within Panama should be admitted or excluded, and to grant those officials facilities for the exercise of their functions. By an Exchange of Notes, however, Panama expressed its "understanding" "that this provision does not prejudice persons in the service of the United States or residing in the Canal Zone from passing freely into the jurisdiction of Panama."⁷⁶ Persons arriving at Canal Zone ports are subject to the rules of entry issued by the President and administered

⁷⁵ An Exchange of Notes confirms the treaty rights of the Panama Railroad Company to own and operate facilities in these ports. *Treaty Series*, No. 945, pp. 47-48.

⁷⁶ *Ibid.*, pp. 49-50.

by the Quarantine officers of the Health Department of The Panama Canal.⁷⁷ They may be admitted to the Canal Zone by the United States authorities, either as transients or as workers in the Canal Zone, without regard for the immigration laws of the Republic. Once admitted to the Canal Zone as residents or in the service of the United States,⁷⁸ persons may pass without restraint to and from the jurisdiction of Panama. Notwithstanding its right to admit and employ whomsoever it will in the Canal Zone, the United States has, nevertheless, pursuant to the principles of friendship and cooperation underlying the 1936 Treaty, sought to recruit and introduce into the Canal Zone as laborers classes and races not objected to by the Government of Panama.

A final part of Article IV assures Panamanian citizens who may be deported from the Canal Zone transit through the Zone in order to pass from one part to another of the territory of the Republic.⁷⁹

Among the basic changes in United States-Panama relations introduced by the 1936 Treaty are two alterations of the 1903 Convention contained in Article VI. In the first place, the United States relinquishes a treaty right to acquire land deemed necessary and convenient for purposes related to the Canal enterprise in Panama and Colón or in adjacent Panama territory by exercising the right of eminent domain. It retains, however, the right to acquire lands, buildings, water rights, or other property outside of the Canal Zone by purchase, the difference being that whereas formerly it might be sure of obtaining property which was felt to be necessary to the proper conduct of the Canal undertaking at reasonable rates, it is now stripped of power to make certain of obtaining what is desired, and

⁷⁷ *Canal Zone Code*, Title II, Sec. 141; 35 C. F. R., Sec. 10. See Chapters III and V, pp. 94, 246-248.

⁷⁸ Cf. provisions of Art. III discussed above.

⁷⁹ See *Canal Zone Code*, Supp. No. 1, Title II, Sec. 142.

forced to pay whatever price can be agreed upon with the land owner.⁸⁰

The second concession to Panama made through Article VI is the abrogation of the treaty right for maintaining "public order" in the cities of Panama and Colón and the adjacent areas in case Panama should not be able in the judgment of the United States to do so. Giving up this right of intervention was fitting in view of the termination of the protectorate status brought about by the abrogation of the guarantee on the part of the United States to maintain the independence of the Republic. It was also in order as a result of the ratification by both states of the Montevideo Convention on the Rights and Duties of States and the Buenos Aires Protocol on Non-Intervention, by which the signatories declared intervention in the internal affairs of any American Republic to be inadmissible. Although an important right was given up by the United States for the sake of bringing about the new era of friendship and collaboration which Secretary Hull referred to, not all basis for action in Panamanian territory was lost, for in Article X the parties agree that in certain contingencies "measures of prevention and defense" may be taken in Panama. On the basis of a less formal but amicable arrangement United States military and naval police circulate in various parts of Panamanian territory where members of the American armed forces may be present or on leave.

CHANGE IN ANNUITY PAYMENTS

As noted previously, it was agreed by Article XIV of the 1903 Convention that the United States should pay to Panama annually a sum of two hundred and fifty thousand dollars "in gold coin of the United States" as compensation for the rights,

⁸⁰ An Exchange of Notes paved the way for cooperation on the part of Panama in the continuance and expansion of the sewage and sanitation program, and the settlement of water rates. *Ibid.*, pp. 51-56.

privileges, and powers granted by other parts of that Convention. Article VII of the General Treaty revised this commitment, however, so that beginning with the 1934 payment, the amount shall be four hundred and thirty thousand balboas a year payable "in any coin or currency" equivalent thereto. By an Exchange of Notes on March 2, 1936, it was agreed that the balboa should be equal in value to the dollar.⁸¹ Consequently, the Republic of Panama now receives one hundred and eighty thousand dollars a year more than envisaged when the United States acquired its Canal rights in 1903.⁸²

Articles VIII and IX make provision for a corridor from the city of Colón to the Canal Zone boundary under the jurisdiction of Panama on the one side, and a highway strip under the jurisdiction of the United States running from the Zone out to Madden Dam on the other side. Identical provisions restrict the uses to be made of the corridors and the activities permitted within them, while at the same time each party is guaranteed the right of unimpeded transit on the road of the other.

DEFENSE AND CONSULTATION

So far as concerns the fundamental security of the Canal, Article X is the most important part of the Treaty. According to this,

In case of an international conflagration or the existence of any threat of aggression which would endanger the security of the Republic of Panama or the neutrality or security of the Panama Canal, the Governments of the United States of America and the Republic of Panama will take such measures of prevention and defense as they may consider necessary for the protection of their common interests. Any measures, in safeguarding such interests, which it shall appear essential to one Government to take, and which may affect the territory under the jurisdiction of the other Government, will be the subject of consultation between the two Governments.

Uncertainty as to the adequacy of the treaty provisions for the operation and protection of the Canal and Canal Zone was

⁸¹ *Ibid.*, pp. 58-63.

⁸² See note 38 *supra* for further details.

largely responsible for the long delay in Senatorial consent to ratification in the United States. Although understandings as to the interpretation of various parts of the Treaty including Article X had been reached by the negotiators prior to its initialing, these had not been made public or attached to the instrument submitted for ratification. In order to anticipate requests by Senators for clarification of the meaning of certain provisions, and to prevent further delay in the consummation of the Treaty, an Exchange of Notes took place on February 1, 1939, between Secretary Hull and the Panamanian Minister in Washington, relating to Article X which must be read together with the text of the Treaty itself, as these Notes were made "accessory" to it. Because of the significance of the contents of the Exchange of Notes, the reply of the Panamanian Minister deserves to be given *in extenso*.

The holding of maneuvers or exercises by the armed forces of the United States of America in territory adjacent to the Canal Zone is an essential measure of preparedness for the protection of the neutrality of the Panama Canal, and when said maneuvers or exercises should take place, the parties shall follow the procedure set forth in the records of the proceedings of the negotiations of the General Treaty of March 2, 1936, which proceedings were held on March 2, 1936.

As set forth in the records of the proceedings of the negotiations of the General Treaty of March 2, 1936, which proceedings were held on March 16, 1935, in the event of an emergency so sudden as to make action of a preventive character imperative to safeguard the neutrality or security of the Panama Canal, and if by reason of such emergency it would be impossible to consult with the Government of Panama as provided in Article X of said Treaty, the Government of the United States of America need not delay action to meet this emergency pending consultation, although it will make every effort in the event that such consultation has not been effected prior to taking action to consult as soon as it may be possible with the Panamanian Government.⁸³

⁸³ *Ibid.*, pp. 63-67. A Note from the Minister of Panama at Washington to Secretary of State Hull affirms that these propositions were "considered and understood" by the National Assembly when it ratified the Treaty. *Ibid.*, pp. 68-69.

This Note gives the United States formal written permission to take military measures for the defense of the Canal within the jurisdiction of Panama. This may not have all the characteristics which would go with a clause in the treaty explicitly stating the same thing.⁸⁴ However, being annexed to the Treaty, and having been taken into account in its ratification, it does give a firm foundation for action if such must be taken instantly. The developments in military science have made it necessary that defense measures and installations be extended beyond the confines of the Canal Zone, and that the armed forces be possessed of the right to act quickly and forcefully in times of emergency. The written agreement contained in this Exchange of Notes may come to be viewed as one of the most salient achievements of the negotiations connected with the General Treaty.

Practice will illuminate the possibilities latent in Article X and in this Exchange of Notes. Obviously a situation is covered which would arise with the approach of hostile forces toward the Isthmus, or with the development of ominous preparations in foreign lands. But would forthright action be sustainable when there may be an international disturbance not immediately jeopardizing the Canal but seeming nevertheless to the United States to indicate the need for immediate military action of some kind by American forces in Panama, and diplomatic negotiations become protracted? If an "emergency" exists and steps are believed to be urgently required, it is submitted that the United States may so inform the Government of Panama, and, while negotiations go on through diplomatic channels, it may proceed with the military measures. The parties have agreed by treaty that the Canal affords benefits

⁸⁴ The Panamanian Treaty Commissioners reportedly expressed the opinion in their negotiations that the question of holding maneuvers in Panamanian territory could not be made the subject of a contractual obligation, and could only be determined as a matter of policy based on the common interests, the joint obligations and responsibilities of the two countries, the special ties existing between them, and the principles of cooperation, consultation, and accord which govern relations under the 1936 Treaty.

to both of them. Damage to or an attack upon the Canal would affect both countries adversely. As the one charged with the protection of the Canal the United States is in the best position to judge of what must be done at any given time for safeguarding the neutrality or security of the Canal, and when an emergency requiring swift action has arisen. By the terms of the Treaty and the Exchange of Notes Panama has attested its own concern for mutual security and adequate defense. With a spirit of good neighborliness on both sides, no insuperable difficulties or unhappy differences should arise in connection with defense to mar the relations between the two countries.

CONCLUSION

Viewing the terms of the 1936 Treaty in retrospect, one is inclined to remark that the numerous provisions operative in favor of Panama should eliminate many of the causes of friction between the two countries and remove the grounds of complaint advanced in the past by Panama. Time alone will demonstrate whether the concessions made to Panama by the Treaty have sacrificed any rights essential to the United States for the efficient operation, maintenance, sanitation, and effective protection of the Canal. Some of the articles of most importance to the United States—Articles I, II, X, and XI—may, as a result of the Exchanges of Notes accompanying the Treaty, prove in practice to be susceptible of sufficiently flexible interpretation so that while the United States may have improved the friendship of Panama by the new phraseology it will not have lost any of the rights and powers deemed indispensable to the functioning of the Canal undertaking. Much will hinge upon the trend of international relationships generally. In any event, it is to be hoped that henceforth "Friendship and Cooperation" will be an object of genuine and constant reciprocation between Panama and the United States.

If there are any two political entities between which friendship and cooperation ought to prevail, they are the Republic of

Panama and the United States. To the Republic of Panama the United States owes its jurisdiction over the Panama Canal and the Canal Zone, which, while it has cost the people of the United States well on toward a billion dollars, has been an important element in national welfare and defense. But for a reversal of decision on the part of the United States to build at Panama rather than in Nicaragua (historically favored by Americans as a Canal route), Panama would be today the backward, malarial province which it was in 1900. For that decision Panama can claim little credit: it was determined in New York and Washington before the revolt in 1903. To Americans Panama must be grateful for its independence. To the unsolicited generosity of the United States it owes paved streets in its cities, sanitation that has wiped out numerous diseases rampant in its territory, as well as sewage and a clean water supply. To the existence of the Canal it is in debt for a steady stream of tourists and ships' crews who have purchased many thousands of dollars of native and foreign articles every year within its port cities. To the Canal it is in debt for transportation services from all parts of the world that have poured into its stores staples and luxuries that would never otherwise have found their way thither, and which have taken from the Isthmus such commodities as have been available for export. To the limitations which the United States has itself imposed upon the conduct of business in the Canal Zone, Panama can account for the development of prosperous business houses, stores, cantinas, and the erection of expensive buildings and dwellings in its own jurisdiction. Furthermore, to these tangible returns must be added as well the employment, directly or indirectly, which the Canal enterprise has given to large numbers of nationals. It has been estimated unofficially that as much as thirty-five percent of the Canal Zone payroll, including Canal, Army, Navy, contractors, goes into Panama, thereby exercising an influence on local economy. Panama has been the beneficiary of an undertaking costing the American taxpayer far more than

he has ever received in revenues. Seen in this perspective, there is every reason to say that the Canal has afforded benefits to both nations, and that friendship and cooperation ought always to characterize their relationships with each other. The Republic of Panama has given the United States extraordinary rights and privileges in its territory. The Canal enterprise has brought in return profits, prestige, and increased strength to both Panama and the United States. To date the rights given to the United States and exercisable with respect to the Panama Canal have proven adequate for the operation and defense of the Canal in the face of all exigencies.

CHAPTER III

THE PANAMA CANAL IN TIME OF PEACE

THE Panama Canal was opened to navigation on August 15, 1914. Although this event coincided with the outbreak of the Great War in Europe, the Canal was intended as much for operation in normal times of peace as in the face of the extraordinary conditions of modern warfare. In drafting the Rules and Regulations for the Operation and Navigation of the Canal, which were drawn up before it was opened, an effort was made to interpose the minimum of regulation upon transiting vessels compatible with safeguarding the waterway and protecting vessels themselves against harm. These Rules and the technique inaugurated for passing vessels through the Canal became the basis of procedure for all normal times. Upon this basis additional controls have been superimposed as occasion demanded. As international peace has prevailed for the greater part of the time since the Canal was opened to navigation, this chapter will be given to a discussion of the functioning of the Canal under normal or peace-time circumstances.

TRANSITING THE CANAL

Passing a vessel through the Panama Canal is one of the most interesting of maritime experiences. At the same time it is a delicate procedure requiring the closest cooperation of ship and shore authorities. Keeping the Canal free and open at all times for the instant use of the vessels of the United States Government, as well as avoiding costly delays to shipping and dangers to the property of the Canal or to vessels in transit, calls for precision of operation and attention to precautionary measures that may seem superfluous to the casual tourist. The larger

the ship the greater the precaution needed at the locks and in the narrow parts of the Canal channel. Yet no vessel is put through hastily or without incessant observation of all the details and regulations of transit procedure.

The Canal is fifty miles long from deep water to deep water, and transit ordinarily occupies about seven hours. Of interest is the fact that in transiting the Canal from the Atlantic to the Pacific a vessel, according to the compass, is twenty-seven miles farther East at the Pacific than at the Atlantic end, so geographically placed is the Isthmus and the Canal route.

Vessels approaching the Canal are required to notify the Captain of the Port of Cristóbal or Balboa approximately twenty-four hours before their arrival of their desire to transit the Canal and of the probable hour of their arrival off the terminal. This is done in order to enable the Canal authorities to make the necessary arrangements for inspections and transit. On arrival off the terminal a vessel is advised where to anchor to await the boarding party of inspectors. Because of the heavy swells that prevail outside of the breakwaters at the Atlantic terminal when the trade winds are blowing, vessels are usually guided by a Port Captain's vessel through the breakwaters to an anchorage in Limon Bay.

A vessel may proceed through the Canal only after it has been boarded and given permission to enter. The boarding party is ordinarily composed of a customs inspector, a quarantine and immigration officer, and an admeasurer. In time of emergency boarding parties have been supplemented by a naval officer who has charge of the party and whose duties relate to the enforcement of the neutrality, defense, and protective regulations. The ship's papers must be presented to and certified by the proper boarding officers. The health officer must assure himself that there are no dangerous communicable diseases on board necessitating quarantining the vessel. If the vessel has been measured previously under the Panama Canal measurement rules, the admeasurer has merely to satisfy himself that

there have been no alterations in the structure of the vessel since its last trip through the Canal which would alter the tonnage in such a way as to require remeasurement. If the vessel has not been through the Canal before or if there have been numerous changes since the last voyage which might result in an alteration of toll charges, the admeasurer will proceed to the remeasurement of the vessel while the remainder of the boarding party may leave to board another vessel. When all of the formalities are observed, and the boarding officers have satisfied themselves that there is nothing about the vessel, its hull, machinery, or cargo, which might "endanger the structures pertaining to the Canal or which might render the vessel liable to obstruct the Canal," and that there are no unsettled claims or disputes involving violation of the laws of the United States or the Rules and Regulations for the Navigation and Operation of the Panama Canal the master is told to run up the signal for a pilot, and authorized to proceed as soon as the pilot arrives. In time of emergency or war the vessel may be required to receive an armed guard which stands watch to see that no act of sabotage or violation of the Rules and Regulations is attempted while the vessel is passing through the Canal.

Vessels begin moving through the Canal from each terminal at six in the morning, and dispatches are made thereafter from each terminus at half hour intervals until mid-afternoon. The locks are operated as late at night as necessary to clear vessels admitted to the Canal during the daily schedule. No vessel is allowed to remain within the Canal overnight except on account of accident and only with the permission of the Marine Superintendent.¹

¹ Passenger vessels on regular schedules and American naval vessels may be given priority in dispatch from a terminal notwithstanding the order of their arrival. Tankers with gasoline are usually restricted to early morning schedules to assure their not meeting other vessels in Gaillard Cut. No tanker with inflammable cargo is allowed to proceed unless it can clear the Cut before dark. Passenger and cargo vessels capable of fifteen knots may be dispatched as late as three in the afternoon from Balboa and four o'clock from Cristóbal.

Moving from Cristóbal, on the Atlantic end of the Canal, the Canal pilot supervises the navigation of the vessel through a dredged channel between mangrove swamps to Gatun. There at the Gatun Locks it is raised in three consecutive steps to the level of Gatun lake, a process requiring about an hour. As the ships near the locks, a rowboat takes out leaders to which are attached the lines that are made fast to the vessel and to the towing locomotives that pull the ship through the locks and keep it in position so that no damage may be done to either the vessel or the lock mechanism. From the time the ship comes to a stop near the approach wall of the locks until the last towing line is disengaged at the opposite end of the flight of three locks, its movements are directed jointly by the pilot aboard ship and the lock master on the walls, who is in constant telephonic communication with the lock operator in the control tower. The actions of the locomotive engineers are directed by the pilot and lock master jointly. The mechanical operation of the locks is normally electrically controlled by an operator in the control tower which is located on the center wall between the two sets of locks. He has a control board which shows at all times the positions of the gates, the water level in the lock chambers, the positions of the guard chains and emergency dams.

Of the six originally constructed sets of locks in the Canal, three pairs are located at Gatun, which raise or lower a vessel eighty-five feet. There is one pair at Pedro Miguel with a lift of thirty-one and a quarter feet. Thirdly, there are two pairs at Miraflores with a lift of fifty-three and three-quarters feet at mean tide. The differential on the Pacific side is explainable by the higher mean tide level prevailing there. When the "third set of locks" and by-pass project are completed there will be an additional lock system, perhaps eventually an additional pair of locks, and separate approach channels, at Gatun, Pedro Miguel and Miraflores. Each of the original lock chambers is one thousand feet long, one hundred and ten feet wide,

and forty-two feet deep. For economy in the use of water, intermediate gates have been installed in all save one of the sets of lock chambers dividing the chambers into smaller units of six hundred and four hundred feet in length. Some idea of the durability of the construction can be gained from figures, although only observation can satisfy the mind as to the scale on which the builders did their work. The side walls of the locks are more than forty-five feet thick at the bottom and up to a point twenty-four feet above the floor. From there they taper to ten feet in width at the top. The center wall between the two sets of chambers is of a uniform width of sixty feet. Neither the side nor center wall is solid concrete, for they must contain the "culverts" through which the water is forced to raise or lower vessels, in addition to galleries in which are located the machinery for operating the gates, chains, and other mechanisms, together with a passageway for operators. "One culvert two hundred and fifty-four square feet in area of cross section, about the area of the Hudson River tunnels of the Pennsylvania Railroad, extends the entire length of each of the middle and side walls."²

A vessel is raised by forcing water into the lock chamber through a series of apertures in the floor of the lock. Water may be forced in from only the culvert in the side wall, or from the culvert in the center wall as well. When both sides are used for flooding, a lock may be filled in seven or eight minutes. When water is utilized from one side only, the time required is naturally longer. In either event, the culvert and tunnel valves are adjusted in such a way that the entire horizontal area of the locks is filled or emptied evenly. When the chamber is emptied for the descent of a vessel the valves at the upper end are closed, those at the lower end are opened, and the water flows out from the floor of the lock through the same

² *Manual of Information Covering the Organization and Operations of the Panama Canal and Panama Railroad* (mimeographed for official use of The Panama Canal), p. 53.

apertures through which it may be forced into the lock and down into the lower chamber or pool.

The lock gates are in two leaves, operated by motors and gears recessed in the walls. "Each leaf of the gates, which appear to swing as easily and smoothly as an ordinary door, is a steel structure, 7 feet thick, 65 feet long, from 47 to 82 feet high, and weighs from 390 to 730 tons. Each leaf is divided horizontally into two separate compartments, the lower compartment being watertight so that it practically floats in the water and relieves the stress on the bearings by which it is hinged to the lock wall."³ Opening or closing the gates requires only two minutes.

Caution is exercised to preserve both the locks and vessels from harm. The valves and gates are so arranged that the valves cannot be opened until the gates are in the proper position; nor can one set of gates be opened until the ones above or below are closed. Among the safety devices is a system of fender chains placed beyond the ends of the gates. Each weighs more than twelve tons, and is so arranged that the chain is paid out gradually by hydraulic pressure if struck by a vessel. Vessels have hit and been stopped by the chains which would probably have crashed into the lock gates. This chain is left in position until the vessel is made fast to the towing locomotives.

Vessels are not allowed to move through the locks under their own power, and the towing locomotives can move no faster than two miles an hour when on the rack and pinion when pulling a vessel. When the approaching vessel is made fast fore and aft to towing locomotives on each side, it is centered by means of adjustment of the cables on the locomotives. The apparatus is so fixed in the locomotives that the cable will then slip or pay out only if the pull exceeds twenty-five thousand pounds. With a sufficient number of locomotives on each side this possibility is minimized. However, it occa-

³ *Panama Canal, 25th Anniversary* (Mt. Hope, 1939), p. 84.

sionally happens when strong gusts of wind strike the superstructures of large vessels locked up high.

Double gates are provided at lock entrances and at the lower end of the upper lock in each flight. Furthermore, emergency dams have been provided at the upper end of each flight of locks which can be swung into place quickly in case the lock gates should be so damaged as to allow water to flow out unimpeded. The dams constructed originally operated from steel structures superimposed above the lock walls. As part of the new defense work these are being replaced by installations much less likely to suffer from bombing, and always in place ready for instantaneous damming.

Speed is carefully regulated in all parts of the Canal. In the locks the engines must be shut off, and the vessel towed, except as directed by the lock controller and pilot. In the dredged channels from the sea to the locks at either end of the Canal, in Gaillard Cut and Miraflores Lake, six knots is stipulated. In Gatun Lake, a vessel may travel much faster, although the speed limit, generally speaking, is fifteen knots.

At the end of the Gatun flight, a vessel is pulled clear of the locks, towing lines are disengaged, and the vessel moves across Gatun Lake for twenty-four miles through a marked channel. Gatun Lake is artificial, formed by water contributed by four tributary rivers, principally the Chagres, and held back by Gatun dam. It has an area of 163.38 square miles and a shore line of 1,100 miles. At the far end of the lake, a ship passes through Gamboa Reach to enter Gaillard Cut at the confluence of the Chagres River at Gamboa. In the succeeding nine mile stretch through the mountains of the Continental Divide approximately half of the total excavation made for the Canal channel was dug out. It is the scene of the slides which obstructed traffic in the early period of Canal operation. Passage through the Cut is governed by ball and flag signals from stations situated high above the Canal at Gambia and Empire because the high land obstructs the view around the bends.

Since the channel is too narrow at some points for ships to pass easily, it is necessary to control the movements of approaching vessels. Because of the nature of the Cut, traffic is closely guarded at this point. When, for example, deep draft vessels and vessels loaded with explosives or regarded with suspicion are in transit, all other vessels are kept out and required to wait until passage of the Cut is completed.

The descent to sea level again requires three lockages. At the Pacific end, however, the steps are not contiguous as they are at Gatun. A vessel coming from Gaillard Cut passes through one lock chamber at Pedro Miguel, then travels one mile across Miraflores Lake to the Miraflores Locks which are in two flights. Back at sea level, the ship moves to Balboa Harbor through a channel similar to the approach to Gatun, and from thence five miles out through a dredged channel past Naos, Perico, and Flamenco Islands to the sea.

Thus the Canal may be considered as made up of six principal features: the sea approaches, the terminals, the channels leading to the locks, the locks, the navigable lakes, and Gaillard Cut.

AUTHORITY TO REGULATE VESSELS USING CANAL

The Canal rights secured by the United States through the conclusion of the Hay-Pauncefote Treaty and the Convention with Panama were accompanied by a series of conditions upon which the United States agreed to open and maintain a canal. The Rules adopted by the United States in the Hay-Pauncefote Treaty, and referred to in the Canal Convention with Panama, did not purport to set forth all the regulations under which vessels might pass through the Canal. Indeed, Article II of the Treaty with Great Britain states that the United States Government shall have "the exclusive right of providing for the regulation and management of the Canal," and Article III of the Convention with Panama grants the United States all "rights, power and authority" within the Canal Zone.

In pursuance of the rights acquired by the United States through the Convention with Panama, Congress passed an Act on August 24, 1912, known as the Panama Canal Act which provided for "the opening, maintenance, protection, and operation of the Panama Canal, and the sanitation and government of the Canal Zone."⁴ Power was conferred upon the President by this Act to issue and to amend

regulations governing the operation of the Panama Canal, and the passage and control of vessels through the same or any part thereof, including the locks and approaches thereto, and all rules and regulations affecting pilots and pilotage in the Canal or the approaches thereto through the adjacent waters.

Other sections of the Act gave the executive and the judiciary complementary powers to control the movements and activities of persons in the vicinity of the Canal. Section 8 gave the District Court established in the Canal Zone jurisdiction "of all felony cases, of offences arising under Section 10 of this Act, all causes in equity; admiralty and all cases at law involving principal sums exceeding three hundred dollars." Section 10 entitled the Governor, after the completion and opening of the Canal, to make "such rules and regulations . . . touching the right of any person to remain upon or pass over any part of the Canal Zone as may be necessary." Furthermore, the Act made it "unlawful for any person, by any means or in any way, to injure or obstruct, any part of the Panama Canal or the locks thereof or the approaches thereto."⁵ That this law

⁴ 37 Stat. 560. This Act supplemented an Act of April 28, 1904 (33 Stat. 429), which had empowered the President to direct the construction and operation of the Canal. The Canal was designated the Panama Canal for the first time in legislation in the 1912 Act.

⁵ The section merits quotation in full:

"Sec. 10. That after the Panama Canal shall have been completed and opened for operation the Governor of the Panama Canal shall have the right to make such rules and regulations, subject to the approval of the President, touching the right of any person to remain upon or pass over any part of the Canal Zone as may be necessary. Any person violating any of such rules or regulations shall be guilty of a misdemeanor, and on conviction in the District Court of the Canal Zone shall be punished by a fine not exceeding five hundred

extended to persons on board vessels in the Panama Canal is certain in view of the territorial character of the waters of the Canal and of the jurisdiction of the United States over the Canal Zone. Furthermore, the admiralty powers of the District Court extend, under American law, to persons on board vessels in territorial waters.⁶

Finally, reference may be made in passing to Section 11 of the 1912 Act which closed the Canal to vessels operated by railway companies or in violation of the anti-trust laws of the United States, and gave the Interstate Commerce Commission power to determine questions as to competition, routes, and rates. Although applicable to American vessels, save those of the Panama Railroad Company, no endeavor seems to have been made to apply these conditions to foreign vessels passing through the Canal.⁷

The power to make and enforce regulations for the operation and navigation of the Canal, and with regard to the activities of individuals near the Canal, is essential to the maintenance, operation, and protection of the Canal. It is necessary in time of peace and indispensable in time of emergency and war. Fortunately for the efficient management of the Canal, Con-

dollars or by imprisonment not exceeding a year, or both, in the discretion of the court. It shall be unlawful for any person, by any means, or in any way, to injure or obstruct, or attempt to injure or obstruct, any part of the Panama Canal or the locks thereof or the approaches thereto. Any person violating this provision shall be guilty of a felony, and on conviction in the District Court of the Canal Zone shall be punished by a fine not exceeding ten thousand dollars or by imprisonment not exceeding twenty years, or both in the discretion of the court. If the act shall cause the death of any person within a year and a day thereafter, the person so convicted shall be guilty of murder and shall be punished accordingly."

⁶ Sec. 2 of the Act of Sept. 21, 1922, amended Sec. 8 by expressly providing that the jurisdiction in admiralty shall be the same as is exercised by the United States District Judges and the United States District Courts, and that practice and procedure shall be the same as in those courts. 42 Stat. 1004. For American law on subject see G. H. Robinson, *Handbook of Admiralty Law in the United States* (St. Paul, 1939), pp. 20-22, 234-238.

⁷ No objection is on record against the assumption advanced by the British Government that this section is not applicable to British vessels. *For. Rel.*, 1912, p. 488.

gress has given plenary powers to the executive.⁸ It has consequently been possible at all times to act expeditiously and as local circumstances seemed to require. The power is limited only by the British-American treaty agreement, which gives other nations no contractual rights, that the Canal shall be "open" to the vessels of all nations, that there shall be no discrimination in the terms or the administration of the regulations, and that the regulations shall be "just and equitable."

RULES AND REGULATIONS GOVERNING NAVIGATION

Rules and Regulations for the Operation and Navigation of the Panama Canal and the Approaches Thereto were first issued on July 9, 1914, one month before vessels began navigating the Canal.⁹ Revisions and additions have been made from time to time, and navigation today is governed by Rules issued September 25, 1925, as amended. These Rules provide the municipal law basis upon which vessels may enter, pass through, and are granted final clearance from the Canal.¹⁰

⁸ In *McConaughey v. Morrow* the District Court in the Canal Zone held: "An examination of this Act (1912) discloses the fact that while Congress reserves the right to modify existing rules and regulations, or to create new ones, there is nevertheless conferred upon the President, in reality, the entire management and control of the operation and government of the Canal and the Canal Zone, and all subsidiary agencies. . . . A careful examination of the whole case has convinced the Court that Congress not only conferred, but intended to confer, upon the President an unrestricted power of supervision, involving judgment, decision and discrimination, with respect to the entire Canal project and that the Courts can exercise no discretion thereover." 3 *Canal Zone Reports*, pp. 377, 381, 382, 394. Affirmed, 263 U. S. 39.

⁹ Exec. Order No. 1990. *Ex. O.*, pp. 178-193.

¹⁰ 2 *Canal Zone Code*, Sec. 9. Revisions of and additions to the original Rules and Regulations were introduced by Proclamation of Nov. 13, 1914, 38 Stat. 2039; Proclamation of May 23, 1917, 40 *ibid.*, 1667; Exec. Order of Dec. 20, 1923, *Ex. O.*, Supp. No. 3, p. 339; Exec. Order No. 4314, Sept. 25, 1925, *ibid.*, Supp. No. 10, p. 382; Exec. Order No. 7813, Feb. 14, 1938, *Fed. Reg.*, Vol. III, p. 383; Governor's Regulations regarding ship's papers and other matters, June 13, 1939, *ibid.*, Vol. IV, p. 2914; Governor's Order of Oct. 3, 1939, regarding health and quarantine, *ibid.*, p. 4171; Exec. Order No. 8417, May 22, 1940, regarding excluded persons, *ibid.*, Vol. V, p. 1943. While the 1925 Rules are to be found in *Ex. O.*, Supp. No. 10, p. 382 and in the *Code of Federal Regulations* [hereafter cited C. F. R.], Title 35, Sec. 4, they are also

After entering the limits of the Panama Canal, that is to say, a point three marine miles from the terminals of the Canal proper,¹¹ a vessel becomes subject to the Port Captain and other Canal officials, and may proceed into the Canal or onto the high seas only after obtaining express permission, or clearance.¹²

INSPECTION AND CLEARANCE

Permission to proceed into and through the Canal is treated as a "privilege," and accorded only after the Canal authorities have examined all of the papers of the ship; ¹³ satisfied themselves that there is nothing about the ship, its hull, machinery, or cargo which might "endanger the structures pertaining to the

published separately by the Panama Canal as *Rules and Regulations Governing Navigation of the Panama Canal and Adjacent Waters* (Mt. Hope, Reprint, 1939). [Hereafter they will be cited as 1925 *Rules*].

¹¹ Art. II of the Convention with Panama.

¹² Rules 3, 4, 13 of 1925 *Rules*. Distinction is to be made between entering and clearing from the Panama Canal, and entering and clearing from the ports of the Canal Zone, i.e., Cristóbal and Balboa. Vessels do not enter and clear from these ports unless they discharge or take on cargo there. Coming alongside for fuel and supplies, or landing passengers temporarily while the vessel is awaiting transit, does not involve stopping at the ports in a sense requiring entry and clearance therefrom. *Panama Canal Record*, Vol. VIII (1914-1915), pp. 41, 296.

¹³ Per Governor's Regulations of Sept. 9, 1939, these include: (1) Ship Information Sheet; (2) Clearance from last port; (3) Bill of health; (4) Quarantine declaration (3 copies); (5) All other certificates of a sanitary nature; (6) Passenger List (4 copies), except in case of troop and contract labor ships; (7) Descriptive list of Chinese on board (2 copies); (8) Crew List (3 copies), except for warships; (9) Store List; (10) Cargo declaration (Panama Canal form), or complete manifest; (11) Manifest of local cargo (4 copies); (12) Declaration of explosive cargo carried; (13) Declaration of inflammable or combustible liquids in bulk carried as cargo; (14) Statement of fuel account; (15) Panama Canal tonnage certificate; (16) National Register; (17) General arrangement, plan of vessel; (18) Report of structural changes since last transit. Rule 12 of the 1925 *Rules* allows the Governor to prescribe the delivery of other papers or information. Failure to have cargo completely manifested, or to carry non-listed ship's stores exposes the goods to seizure and forfeiture, and the master to penalty under the Customs Laws. Rules 145-150 of the 1925 *Rules*. Vessels arriving without bills of health shall be subject to such quarantine measures and delay as may be deemed necessary to determine satisfactorily the sanitary status of the vessel. Regulation 106.2 (f), Governor's Regulations of Sept. 9, 1939.

Canal, or which might render the vessel liable to obstruct the Canal";¹⁴ determined that there are no unsettled claims or disputes involving violation of the laws of the United States, or the Canal Zone, or the Rules and Regulations of the Panama Canal;¹⁵ and discovered that the ship does not require quarantining.

QUARANTINE

Under the quarantine regulations,¹⁶ vessels clearing from any foreign or American port for the Canal Zone ports, for the ports of Panama and Colón, or "for passage through the Panama Canal," are required to obtain from the proper authorities at such ports of clearance, bills of health as stipulated by the laws of the United States to be presented to the quarantine officers of the Panama Canal. Inspection of vessels and persons follows immediately upon arrival at quarantine at the Canal terminals, unless pratique without inspection has been given by the chief quarantine officer.¹⁷ Vessels are permitted to enter the Canal, or to clear from the jurisdiction only after obtaining a certificate from this officer.

CUSTOMS REGULATIONS

A customs service was first established for the Canal Zone in 1904, at which time Ancón and Cristóbal were made ports of

¹⁴ Rule 3 of 1925 *Rules*.

¹⁵ Rule 4 of 1925 *Rules*. The 1923 Regulations contained a section (No. 16) forbidding unauthorized possession or transportation of intoxicating liquors in the Canal Zone in violation of the National Prohibition Act. This was not applicable, however, to the "transportation of intoxicating liquors in transit by vessels." *Ex. O.*, Supp. No. 3, p. 341. See below, pp. 98-99, for discussion of application of liquor laws to vessels in the Canal.

¹⁶ Chap. VIII of 1925 *Rules*, as amended by the Governor's Order of Oct. 3, 1939.

¹⁷ Provisional pratique may be accorded to certain vessels after advising in advance by radio the names of ports visited in the last ten days, assurance that there is no sickness on board, and stating that the vessel intends "to transit the Canal without taking on or landing either cargo or persons." *Ibid.*

entry, and the application of United States tariff laws authorized.¹⁸ No direct authorization for the application of the United States Customs Service and laws to vessels entering the Panama Canal was contained in the Panama Canal Act of 1912, or in any other law prior to the opening of the Canal. Such power, however, might have been inferred from the general authority conferred upon the President to "govern and operate the Panama Canal." Without specifying the source of his authority, President Wilson, in an Executive Order of August 8, 1914, laid down orders and penalties relating to the Customs Service applicable to vessels of all nations arriving at the Canal Zone.¹⁹ The order made no mention of vessels arriving for the sole purpose of transit of the Canal, as distinct from vessels arriving for the purpose of discharging and taking on cargo at one of the ports. It was applied, however, to vessels belonging to both categories. Penalties were ordained for: (1) failure or refusal to produce manifests, or a true account of the vessel's destination; (2) having on board merchandise not included in the manifest; (3) having on board sea stores not mentioned on the sea stores list of the ship; (4) violation of any of the customs laws applicable to, or customs regulations established for, the Canal Zone by the Governor of the Panama Canal.²⁰ The 1904 and 1914 Orders were superseded by Chapter XI of the Rules and Regulations Governing the Navigation of the Panama

¹⁸ Exec. Orders, June 24, Dec. 3, 6, 16, 28, 1904, Jan. 7, 1905. *Ex. O.*, pp. 26-27, 29-34. By an agreement with Panama, known as the Taft Agreement, the United States agreed to lift its tariff laws from goods entering the Zone from Panama or destined for Panama, in consideration of Panama agreeing to lower certain of its duties generally, and not applying its tariffs to goods entering or passing through Panama for ultimate sale or use in the Canal Zone. *For. Rel.*, 1904, pp. 640-642, 643.

¹⁹ *Ex. O.*, p. 195.

²⁰ Penalties were a fine not exceeding \$500 for Nos. 1 and 4; fine equal to value of merchandise not manifested, and forfeiture of same, for No. 2; fine for treble the value of goods omitted from sea store list, together with forfeiture of the same. (These orders and penalties reproduced, so far as they went, the law then in force respecting such matters in continental United States.) Additional regulations were issued by the Governor in Series 679 of the Governor's Circulars.

Canal, of September 25, 1925,²¹ which incorporated the substance of the previous orders, with the addition of sections conferring powers of search, seizure, and arrest upon customs officers, prohibiting smuggling, and regulating the shipment of articles from the Canal Zone to the United States.²² Balboa and Cristóbal were made the ports of entry of the Canal Zone. Statutory foundation was finally placed beneath the Canal Zone Customs Service and the rules relating to customs, by Act of Congress of February 16, 1933.²³ Disagreements with the Republic of Panama concerning the imposition of duties on goods entering Canal Zone ports destined for Panama were removed by the 1936 General Treaty by which Panama and the United States agreed not to impose duties on goods destined for the Republic or the Canal Zone arriving at each other's ports. They also agreed to recognize the right of Panama to impose duties and taxes on goods and persons entering Panama, and to permit the establishment of Panamanian customs houses, with Panamanian officials, in ports of the Canal Zone for the examination of goods and persons destined for Panama.²⁴

CARRIAGE OF EXPLOSIVES, FIREARMS, AND PROHIBITED GOODS

Extra care has always been exercised over vessels carrying explosives and volatile oil products.²⁵ Exact information must

²¹ *Ex. O.*, Supp. No. 10, pp. 397-398; 35 C. F. R. Sec. 9.

²² Rules 145, 146, 153. Rules 142-144 established the customs district, ports of entry, and a Bureau of Customs to enforce the rules and regulations; Rule 147 made it unlawful to pass a fraudulent invoice; Rule 148 authorized seizure of goods smuggled or brought in under false invoice; Rules 159, 160 carried on the 1914 provisions regarding articles not manifested, and non-listed sea stores; Rule 151 provided for fee service; Rule 152 empowered a shipping commissioner to carry out the laws relating to merchant seamen; finally, the penalty clause (Rule 154) added to the monetary fine of the 1914 Order the possibility of 90 days in prison. Act of July 10, 1937, 50 Stat. 509, amended the penalty for entering articles without approval, or for passing false invoices or bills, to \$100 fine, or 30 days' imprisonment, or both. 50 Stat. 509; 2 *Canal Zone Code*, Sec. 62.

²³ 47 Stat. 813; 2 *Canal Zone Code*, Sec. 61.

²⁴ Arts. 4-5, *U. S. Treaty Series*, No. 945.

²⁵ Regulations 47.5-47.12 of 1925 *Rules* as amended.

be furnished the Canal authorities regarding the amounts and character of explosives carried, excepting ships of war, and where and how the explosives are stowed and packed, which must be in accordance with definite rules.²⁶ Vessels carrying inflammable and combustible liquids are required to have special fire-fighting equipment, vent and valve systems, and other precautions to give the maximum margin of safety. So far as practicable, such vessels are dispatched so that they do not meet any traffic while passing through Gaillard Cut.²⁷ In case of fire aboard any vessel it is stipulated that the Port Captain shall be in "complete charge for the purpose of coordinating the various Panama Canal or Panama Railroad functions engaged or concerned."²⁸

The Rules and Regulations governing navigation of the Canal have always prohibited the discharge of "firearms of any kind . . . from vessels while in Canal Zone Waters," excepting salutes by war vessels in terminal ports.²⁹ Although no case appears on record, it may be presumed that any use or discharge of arms or weapons on board a vessel in the Canal would be considered as affecting the peace of the Canal Zone, and come within the jurisdiction of the District Court by virtue of Section 8 of the Panama Canal Act. Should the use of such arms or weapons injure or obstruct, or be used in an attempt to injure or obstruct the Canal, such action would come within the terms of Section 10 of that Act, and as such would be punishable by a fine not exceeding ten thousand dollars or by imprisonment not exceeding twenty years, or both.³⁰

The United States laws regarding traffic in opium, cocaine, and their derivatives are applicable to the Canal Zone. Smoking opium or opium prepared for that purpose is not only for-

²⁶ Regulations 88 A-1-88 A-10. Navigation Regulations, Supp. No. 12, July 15, 1938.

²⁷ Regulations 88 B-1-88 C-5. *Ibid.* Also Governor's Regulations, June 13, 1939. *Fed. Reg.*, Vol. IV, p. 2914.

²⁸ Regulation 97.1 of 1925 *Rules*, as amended by Supp. No. 8, July 26, 1935.

²⁹ Rule 6 of 1925 *Rules*.

³⁰ 39 Stat. 527.

bidden entry into the Canal Zone, but by law may not even be carried as a part of the cargo of a vessel transiting the Panama Canal.³¹

The National Prohibition Act made it illegal to introduce into, sell, give away, dispose of, transport, or "have in one's possession or under one's control within the Canal Zone, any . . . liquors," except for religious, scientific, and medical purposes, but the Act expressly provided that the prohibition "shall not apply to liquor in transit through the Panama Canal."³² To clarify the rights and privileges of the United States and of foreign vessels, the United States entered into the Liquor Conventions with various countries, one article of each of which referred specifically to the Canal.³³ After the conclusion of

³¹ 38 Stat. 275; 38 Stat. 785; 40 Stat. 1057, 1126, 1130-1132; 42 Stat. 595; 44 Stat. 97. U. S. Code, Title 26, Secs. 1040-1055, 1383-1391; *Canal Zone Code*, pp. 969-981. The Narcotic Drugs Import and Export Act of May 26, 1922 (42 Stat. 595), allows certain kinds of narcotic drugs to be carried by vessels in the jurisdiction of the United States, if properly manifested, but gives the narcotic authorities extensive powers of search and certification.

³² 41 Stat. 305, 322. Cf. supplemental Act of Nov. 23, 1921, 42 Stat. 222. This was construed to involve prohibition of possession or transportation of liquor in the territorial waters of the Canal Zone. In *Government v. Flannery and Lorenz*, the District Court upheld the boarding of a naval cutter in Canal Zone waters for the seizure of liquor and the arrest of persons on board having liquor in their possession. 3 *Canal Zone Reports*, pp. 595-601.

Notwithstanding the exemption regarding liquor in transit through the Canal, uncertainty prevailed for some time concerning the right to sell and possess liquor on board ships while within Canal waters. An opinion rendered by the Attorney General of the United States concluded that the prohibition was absolute with respect to vessels under the flag of the United States wherever located, and that it applied to all transport and sale of liquor on board foreign vessels within the territorial waters of the United States, save the Panama Canal. 33 *Ops. Att'y Gen.*, pp. 335-352. On Oct. 6, 1922, the President ordered the U. S. Shipping Board to enforce the ruling on all ships under the American flag. *For. Rel.*, 1922, Vol. I, p. 577. Oct. 14, 1922, the Secretary of the Treasury issued instructions to the effect that the Prohibition law was applicable to all foreign vessels coming within the territorial waters of the United States, excepting vessels passing through the Panama Canal and not touching any other port under the jurisdiction of the United States. *Ibid.*, p. 580. See *Cunard S. S. Co. v. Mellon*, 262 U. S. 100, 127-129.

³³ Article 3 of the Convention of January 23, 1924, with Great Britain recited for example that:

"No penalty or forfeiture under the laws of the United States shall be applicable or attach to alcoholic liquors or to vessels or persons by reason of the

these conventions and until the termination of the Prohibition Act and the repeal of the Eighteenth Amendment, foreign vessels had to close their bars and place all liquor under lock from the time the vessel came within three marine miles of the terminal of entrance until it passed an equal distance beyond the terminal of exit of the Canal. Since March, 1935, it has been lawful for transient vessels both to carry alcoholic beverages and to sell them to their passengers.³⁴

DISPATCHING AND PILOTAGE

The dispatch of vessels through the Canal is determined exclusively by the Canal authorities, at such time and in such order as they may see fit. Priority of arrival at a terminal does not give any vessel the right to pass through the Canal ahead of another that may arrive later. Passenger steamers when carrying mail on regular fixed schedules are given preference in transit. Any vessel, however, may be held for the purpose of investigating claims, disputes, or charges of violations of the Rules and Regulations, and until it has been put into condition in the opinion of the Canal authorities to make it safe for passage through the Canal. Moreover, it is ordained that "no claim for damages shall be admitted because of such

carriage of such liquors, when such liquors are listed as sea stores or cargo destined for a port foreign to the United States, or its territories or possessions or passing through the territorial waters thereto, and such carriage shall be as now provided by law with respect to the transit of such liquors through the Panama Canal, provided that such liquors shall be kept under seal continuously while the vessel on which they are carried remains within said territorial waters and that no part of such liquors shall at any time or place be unladen within the United States, its territories, or possessions." 43 Stat. 1875.

The special relationship between the Republic of Panama and the Canal Zone, and the characteristics of their respective territorial waters, made the insertion of somewhat different terms a necessity in the Convention with Panama. While generally following the other conventions, this provided that the rights of boarding and search specified in Article 2 of the other conventions "shall not be exercised in waters adjacent to territorial waters of the Canal Zone." See *For. Rel.*, 1924, Vol. I, pp. 192, 196.

³⁴ Exec. Order No. 6997, March 25, 1935. *Ex. O. Supp. No. 28*, p. 477; 35 C. F. R. Sec. 6. The possession and transportation of intoxicating liquors in the Canal Zone became lawful in 1934. *Ex. O. Supp. No. 28*, p. 470.

temporary holding of vessels.”³⁵ The forthright recitation of these powers of the Canal authorities in the Rules and Regulations Governing Navigation of the Panama Canal can leave no room for doubt in the minds of ship owners and operators as to the necessity of conformity on their part to the details of the Rules and Regulations if they wish their vessels to avoid delays which are likely to prove expensive to them prior to obtaining permission to transit the Canal.

From the moment a vessel receives permission to proceed into and through the Canal, until it clears the Canal waters beyond the opposite terminal, it must navigate according to the Rules and Regulations of Navigation,³⁶ and under the direction of a Canal pilot, who, while not in full charge of the vessel excepting in the locks, may require the master to navigate according to his directions.³⁷ Failure to follow the pilot’s directions resulting in any accident damaging any vessel or property or blocking the Canal may cause the holding of both master and vessel until full settlement shall have been made.³⁸

LIABILITY OF CANAL FOR DAMAGES INCURRED IN TRANSIT

The liability of The Panama Canal for damages occurring to vessels while passing through the Canal was laid down by Section 5 of the Panama Canal Act.³⁹ This liability was speci-

³⁵ Regulations 4, 5 of 1925 *Rules*.

³⁶ Rules and Regulations 31-88, 177-180 of 1925 *Rules* as amended.

³⁷ Rules 26-30 of 1925 *Rules*.

³⁸ Rule No. 30 of the 1925 *Rules* states:

“The pilot is to be considered on board solely in an advisory capacity, but the master of a vessel must obey all the rules and regulations of the Canal as interpreted by the pilot. The pilot shall be consulted freely at all times, to insure safety in navigation, and no master, officer nor other person connected with the vessel shall give or cause to be given any order concerning the movement of the vessel without the knowledge of the pilot, or against his advice. In case the master, officer, or other person connected with the vessel disregards or fails to obtain the advice of the pilot and an accident occurs which damages his own or another vessel or Canal property of any kind, or endangers or blocks the Canal, he will be held strictly responsible; and the vessel may be held by legal process until settlement in full shall have been made to cover any loss or damage that may have resulted in consequence thereof.”

³⁹ 37 Stat. 562; 2 *Canal Zone Code*, Sec. 10.

fied as covering only "claims for damages which may arise from injury to vessels, cargo or passengers from the passing of vessels *through the locks* under the control of those operating them under such rules and regulations [i.e. of Navigation]. . . ." ⁴⁰ This law was tested in 1937 in a case involving a marine accident in the Canal outside of the locks.⁴¹ In the *Wisconsin* case the Circuit Court of Appeals for the Fifth Circuit held that suit could not be maintained against The Panama Canal or the Governor for an accident occurring outside of the locks without the consent of the Government. An appeal on error case was framed and directed at Tawes, the Canal pilot on board the vessel. But the same Court refused to find the pilot negligent.

On June 13, 1940, Congress passed an Act amending the

⁴⁰ Italics inserted.

⁴¹ In *Cie Générale Transatlantique v. Governor of the Panama Canal et al.*, which went on appeal to the Circuit Court of Appeals (90 Fed. (2d) 225), suit was attempted to be maintained against "the Panama Canal as a public utility operated as a waterway," against "the Governor of the Canal as charged with the operation and management, and designated as the opposite party in a claim for damages to vessels by navigating in the Panama Canal and through the locks," and against Tawes, a Canal pilot, on account of the stranding of the S. S. *Wisconsin* in the Canal during a fog. The vessel ran aground at a turn in the Canal due to its failure to turn fast enough at its reduced speed to keep the channel. Just before the grounding the Captain had suggested reversing the engines, but the pilot judged otherwise, directing that the helm be put to port instead. The District Court held that The Panama Canal was not suable at all, and that consent to sue the Governor was limited to claims for damages "caused from the passing of vessels through the locks." On appeal, the Fifth Circuit Court of Appeals held that this suit "though in name and by fiction against the Panama Canal, a mere designation of a governmental activity, and the Governor of the Canal Zone, is in fact a suit for tort brought against the United States in its governmental capacity for an affirmative judgment which it must pay and not against persons, incorporate or unincorporate, in their personal capacity." It was maintained that suit might be made only with consent. The Court took note of the fact that the legal limitation of liability was carefully designated as including only the passing of ships "through the locks." This liability, it said, extends from the first moment the tow line is made fast on board before entrance until the tow lines are cast off following lockage.

An appeal was made on error, and the case framed as *Cie Générale Transatlantique v. Tawes* (111 Fed. (2d) 92), with the appellants seeking recovery on account of the alleged failure of the pilot to observe the Rules and Regulations, particularly Chap. VI, Rule 58. The Court dismissed the appeal, stating that it was of the opinion that a jury could reasonably approve the pilot's conduct as being not negligent in the circumstances.

liability section of the *Canal Zone Code*.⁴² This broadened the liability somewhat, while at the same time making more explicit the grounds on which suit might be instituted. Adjustment and payment were made permissible where damages for injuries arose "by reason of the passage of such vessels through the locks of the canal under the control of officers or employees of the Panama Canal: Provided, however, That no such damages shall be paid in any case wherein the Governor shall find that the injury was proximately caused by the negligence or fault of the vessel, master, crew, or passengers. . . ." It will be noted that classification was made respecting those in charge of the vessel in the locks, and that room is allowed for contributory negligence on the part of others.

Another section of the same Act introduced a basis on which liability might be found respecting the handling of vessels elsewhere in the Panama Canal. This provided that damages for injuries might arise

By reason of the presence of such vessels in the waters of the Canal Zone, other than the locks, when the Governor shall find that the injury was proximately caused by negligence or fault on the part of any officer or employee of the Panama Canal acting within the scope of his employment and in the line of his duties in connection with the operation of the canal: Provided, however, That when the Governor shall further find that the negligence or fault of the vessel, master, crew, or passengers proximately contributed to the injury, he shall diminish the award of damages in proportion to the negligence or fault, as determined by him, attributable to the said vessel, master, crew, or passengers: And provided further, That, in the case of any vessel which is required by or pursuant to regulations heretofore or hereafter prescribed under Section 9 of this title to have a Panama Canal pilot on duty aboard, no damages shall be adjusted and paid for injuries to any such vessel, or to the cargo or passengers of any such vessel, incurred while the vessel is under way and in motion, unless at the time such injuries are incurred the navigation or movement of the vessel is under the control of a Panama Canal pilot.

⁴² H.R. 5584, Public No. 626, 76th Cong., 3d sess.

The law directed that adjustment of claims might be made directly with the Governor by mutual agreement, compromise, or otherwise where the amount claimed falls below sixty thousand dollars. Where a claim may exceed this, the law provides that the Governor must submit a report to the Congress with his recommendations thereon for such action as that body may determine. Should the claimant fail to obtain satisfaction by the action of the Governor regarding claims for damages for injuries due to passage *through the locks*, he is authorized to bring an action on such claim "against the Panama Canal" in the District Court of the Canal Zone, from which, of course, appeal may be taken according to Title 7, Sections 61-62 of the *Canal Zone Code*. Actions relating to damages for injuries "arising in connection with the operation of the Canal and by reason of the presence of a vessel in the waters of the Canal Zone" are expressly disbarred "in any court against the United States or the Panama Canal, or against any officer or employee of the Panama Canal," with the exception of actions against officers or employees for damages resulting from "acts of such officers or employees outside the scope of their employment and not in line with their duties, or from acts of such officers or employees committed or performed with intent to injure the person or property of another."

These amendments to the *Canal Zone Code* should make the situation clearer to all parties concerned. No doubt is left as to the obligation of a vessel to be under "the control" of Canal authorities if recourse against the Canal is to be had. The owners and operators of vessels benefit from the concession that damage claims shall be entertained where the injury occurs outside of the locks but due to the negligence or fault of a Canal officer or employee. To be sure, the fault or negligence must come "within the scope of his employment and in the line of his duties in connection with the operation of the Canal," which is a carefully delimited field by virtue of the Rules and Regulations Governing Navigation of the Panama Canal and Ad-

jacent Waters, and the Governor's Regulations regarding administration. The Canal is the beneficiary of this law in two respects. Contributory negligence of "the vessel, master, crew, or passengers" is admitted as a basis for the ascertainment and adjustment of claims for damages due to injuries. In the second place, the Canal is now undoubtedly relieved of the possibility of a court judgment against it in such cases as those brought by the *Cie Générale Transatlantique*. Shipping interests having considerable numbers of vessels constantly passing through the Canal have felt that the Canal authorities have adopted a very fair attitude in their procedure of dealing with accidents and claims. Where the amount of damage done may have been small cases may be settled satisfactorily by informal decisions of the authorities at Balboa Heights. Where damages have occurred outside of the locks as a result of an acknowledged fault of a Canal pilot, repairs and settlement have on occasion been made by the Canal at its own expense.

USE OF RADIO APPARATUS

Within Canal Zone waters radio stations on board all vessels, save those of the United States Army and Navy, are under the entire control of the Governor.⁴³ Except as authorized by the Governor, all radio communication by vessels in the Canal, whether with other vessels or with other places, must be carried on via the United States Naval Radio Shore Stations in the Canal Zone. No transmission is permitted within fifteen miles of the Canal Zone save on low power, and, within the Canal Zone waters except through the shore stations. The Canal pilot has free use of a transiting vessel's radio at all times for the transaction of Canal business. The penalty for violation of these rules regarding radio is the same as that for infraction of other rules.⁴⁴

⁴³ Chap. XIII of the 1925 *Rules*, as amended by Exec. Order No. 8715, March 18, 1941. *Fed. Reg.*, Vol. VI, p. 1531.

⁴⁴ Rules 2 and 4, 1925 *Rules*.

VIOLATION OF NAVIGATION RULES

Violation of the Rules and Regulations Governing Navigation of the Panama Canal and Adjacent Waters, and damages caused by vessels in Canal waters may lead to a variety of penalties and actions. Violation of any part of the Rules may result in a fine or imprisonment, or both, of any person or persons charged with responsibility of observing the Rules.⁴⁵ Damage caused to any other vessel or to Canal property of any kind may lead to holding the person in charge responsible, and to the issuance of legal process against the damaging vessel for the satisfaction of such loss or damage.⁴⁶ Persons injuring, obstructing, or attempting to injure or obstruct, any part of the Canal or its locks or approaches may be charged with the commission of a felony and, on conviction, punished severely.⁴⁷ If the action involves the violation of any regulations issued by the President or Governor of the Panama Canal acting in time of a proclaimed national emergency, the vessel may be seized and forfeited to the United States, and the person guilty of the action punished by a severe fine, or imprisonment, or both.⁴⁸

CONTROL OF UNDESIRABLE PERSONS

It was recognized from an early date that the presence of undesirable persons near the Canal had an important bearing

⁴⁵ Rule 2 of the 1925 *Rules* ordains a fine not exceeding \$100, or imprisonment in jail not exceeding thirty days, or both.

⁴⁶ Rules 99, 101 of 1925 *Rules*. See also Governor's Circular No. 720. Settlement may be between parties out of court, or in admiralty in the District Court of the Canal Zone. Rule 101 provides that "In case of damage to any of the Canal structures or equipment by a vessel under the conditions specified in Rules 99 and 100, the matter shall be adjusted by mutual agreement, when practicable, between the Panama Canal and the owner, agent, or underwriters of the vessel; and in case of disagreement the vessel will be proceeded against in the District Court of the Canal Zone." Minor accidents involving little or no damage are customarily settled by informal decisions of the Canal authorities.

⁴⁷ Sec. 10 of Act of Aug. 21, 1916, authorizes punishment by fine not exceeding \$10,000, or by imprisonment not exceeding twenty years, or both. 39 Stat. 527. Reproduced in Rule 98 of 1925 *Rules*.

⁴⁸ Secs. 1-2 of Title II of Act of June 15, 1917. 40 Stat. 217. Exec. Order of July 9, 1918. *Ex. O.*, p. 240. Proclamation No. 2352, Sept. 8, 1939. *Fed. Reg.*, Vol. IV, p. 3841.

upon the security of the Canal and upon the activities of the United States in the Canal Zone.⁴⁹ It has already been noted that Section 10 of the Panama Canal Act allowed the Governor to make "such rules and regulations . . . touching the right of any person to remain upon or pass over any part of the Canal Zone as may be necessary." This power was strengthened by an Act of August 21, 1916, which gave the President discretionary power to make and enforce rules concerning the right of any person to enter, as well as to remain upon or pass over, any part of the Canal Zone. This Act also authorized the President to detain violators, to return them to the countries from which they proceeded to the Canal Zone, and to punish persons committing unlawful breaches of the peace, those engaging in disorderly conduct, or who injure or obstruct the Canal or its locks or approaches,⁵⁰ or attempt to do the same.

⁴⁹ Letter of the President placing the Isthmian Canal Commission under the Secretary of War, May 9, 1904, *Ex. O.*, pp. 20, 23:

"The commission shall have power to exclude from time to time from the Canal Zone and other places on the isthmus, over which the United States has jurisdiction, persons of the following classes who were not actually domiciled within the zone on the 26th day of February, 1904, *viz.*: Idiots, the insane, epileptics, paupers, criminals, professional beggars, persons afflicted with loathsome or dangerous contagious diseases, those who have been convicted of felony, anarchists, those whose purpose it is to incite insurrection and others whose presence it is believed by the commission would tend to create public disorder, endanger the public health, or in any manner impede the prosecution of the work of opening the canal, and may cause any and all such newly-arrived persons or those alien to the zone to be expelled and deported from the territory controlled by the United States. . . ."

This general formula was followed in subsequent laws and orders. An Executive Order of Jan. 9, 1908, provided fines for allowing Chinese to escape in the Canal Zone. *Ibid.*, p. 75.

⁵⁰ 39 Stat. 527; 5 *Canal Zone Code*, Sec. 591. Sec. 4 of the Statute provided:

"That it shall be unlawful to commit any breach of the peace or engage in or permit any disorderly, indecent, or immoral conduct in the Canal Zone. The President is authorized to enforce this provision by making rules and regulations to assert and exercise the police power in the Canal Zone, or for any portion or division thereof, and he may amend or change any such regulation now existing or hereafter made."

An Executive Order of Jan. 9, 1908, had made breaches of the peace and disorderly conduct misdemeanors. *Ex. O.*, p. 74.

Sec. 10 of the 1916 Act provided that undesirable persons should be returned

Orders were issued pursuant to these laws excluding various classes of undesirable persons, and Chinese.⁵¹ Such classes of persons included criminals, insane, persons with dangerous diseases, anarchists, those whose purpose is to incite insurrection, together with "any other persons whose presence, in the judgment of the Governor, would be a menace to the public health or welfare of the Canal Zone, or whose presence would tend to create public disorder or obstruct the operation or maintenance of the Canal, or who are liable to become a public charge." The classification of excluded and undesirable persons

to the country from which they came on the vessel bringing them, or on any vessel belonging to the same owner or interest, at the expense of the owner or interest. Any person violating any of the rules or regulations issued under this section was declared to be guilty of a misdemeanor, and subject to a fine of not more than \$500 or imprisonment not exceeding a year, or both, in the discretion of the District Court. Any person injuring or obstructing the Canal or locks was declared to be guilty of a felony, and on conviction, punishable by a fine not exceeding \$10,000 or imprisonment not exceeding twenty years, or both.

The Act of Congress requiring Registration of Persons Employed to Disseminate Propaganda in the United States was applied to the Canal Zone. 52 Stat. 631. Amended by Pub. No. 319, 76th Cong., 1st sess., approved Aug. 7, 1939.

⁵¹ Exec. Orders Nos. 2526 and 2527, Feb. 6, 1917. *Ex. O.*, pp. 220, 222. Governor's Circulars, Series 714 and 714-1, amplify details of these Orders. The exclusion and deportation sections of these Orders are incorporated in the 1925 Rules and Regulations Governing Navigation of the Panama Canal and Adjacent Waters as Chapters IX and X.

The exclusion of undesirables is administered by the Division of Quarantine. Transiting vessels are required to adopt precautions to prevent undesirable persons on board from landing in the Canal Zone. They are also obligated to declare to the Quarantine Officer all persons on board who are being deported from or repatriated to any country.

The rules and regulations regarding exclusion of Chinese are administered by the Canal Zone Customs authorities. Vessels approaching the Canal are required to have a formal descriptive list of Chinese persons on board filled out, sworn to, and handed to the Customs officer upon arrival at a Canal terminal. Vessels are duty bound to take all necessary precautions to prevent the landing or escape of Chinese in the Canal Zone without permission.

Both undesirables and Chinese may be permitted to cross the Canal Zone under regulations prescribed by the Governor.

Certain groups of Chinese are allowed to enter the Canal Zone, *viz.*: diplomatic and consular personnel, lawful residents of the Canal Zone, persons in United States service, domestic servants of United States officials, and persons admitted by authority of the Governor.

is both comprehensive and flexible. This is necessary in a locality so vitally connected with the national defense. The authorities must be able to cope instantly with situations affecting the Canal and vessels passing through it. Although the application in practice of all such far-reaching laws may be subject to abuse, the courts are open to anyone who feels that he has been the object of an unjust or illegal treatment by the administrative authorities.

Deportation of excluded and undesirable persons is determinable by the Governor after giving an opportunity to the persons to be heard. Should the occasion arise where the deportee is not given an adequate hearing, the District Court, or, on appeal, the Circuit Court of Appeals of the Fifth United States Circuit, may by *habeas corpus* inquire into the authority for the deprivation of liberty without due process of law.⁵²

THE COMPUTATION OF CANAL TOLLS

All vessels passing through the Panama Canal are required to pay tolls.⁵³ The purpose of this charge is to defray the costs involved in passing each vessel through the Canal, to pay for the operation and maintenance of the waterway, and to bring some return to the United States Government upon its investment in the Canal as a commercial enterprise. Different classes of vessels pay different amounts in tolls, but within each classification the vessels of all nations pay upon the same basis in accordance with the prescription of the Hay-Pauncefote Treaty.

In order to determine the amount of tolls due the Canal for transit, every vessel applying for transit is subject to measurement upon arrival at the Canal terminal by the authorities of the Panama Canal before it is permitted to proceed into the

⁵² Opinion of the Judge Advocate General of the Army, March 4, 1920. *Digest of Opinions*, Sec. 2143.

⁵³ The only exception allowed is in the case of vessels going through the Canal to and from Balboa for the sole purpose of effecting repairs at the shops and docks there. *Ex. O.*, p. 292.

Canal. Once a vessel has been measured under the Panama Canal measurement rules a record is kept on file at the Panama Canal. On returning for subsequent transits, the admeasurer has only to satisfy himself that no alterations have been made in the structure of the vessel since its last transit which would effect the computation of the tonnage of the vessel. If in the interim changes have been made which would result in revising the tolls chargeable to the vessel, the vessel is remeasured before transit is authorized. Presentation of the tolls bill is made while the vessel is in Canal waters, and this must be paid or secured before a vessel is allowed to enter a lock.

It has been customary in many parts of the world to tax vessels, to charge them port dues, and to exact tolls from them where such are demanded, on the basis of vessel tonnage. There are, however, various ways in which this may be computed, and there are various kinds of tonnage measurement systems which may be adopted as the yardstick for the levy. Tolls for vessels transiting the Panama Canal were originally assessed upon the "net registered tonnage" of a ship. This is distinguishable from gross tonnage, which is the entire internal cubical capacity of a ship measured on the basis of one hundred cubic feet per ton. Net registered tonnage is the amount of burden which may be carried. This too is measured by the standard of 100 cubic feet per ton. It differs from gross tonnage in estimating only the "pay-capacity space" of vessels: that is, it makes allowance for the area occupied by the propelling power, and subtracts such areas from the gross tonnage. Question arises over what should be included under the term "propelling power." It is customary for the net tonnage of a vessel as computed under the registry rules of the flag it flies to be accepted as the basis of charges in ports of other states. Yet there is no uniformity among the registry rules of various nations. They differ in particulars both as regards the space included in the gross tonnage and as regards the space deducted therefrom in determining the net tonnage upon which shipping charges are im-

posed. The United States deducts for fuel space. It also deducts crew accommodation space from measurement.

Should tolls for vessels transiting the Canal be based upon the net tonnage of ships as recorded on their certificates of registry? Nothing in the Panama Canal Act of 1912 forbade such a procedure. It merely stated that "tolls may be based upon gross or net registered tonnage, displacement tonnage, or otherwise, and may be based on one form of tonnage for warships and another for ships of commerce. The rate of tolls may be lower upon vessels in ballast than upon vessels carrying passengers or cargo."⁵⁴ But the United States was bound, under treaty agreements with Great Britain and Panama, not to discriminate against any nation "in respect of the conditions or charges of traffic. . . ." Had the Panama Canal used net tonnage under national registry as the basis for levying tolls, privileges would have accrued to vessels sailing under one flag as against vessels of another nationality because of differences in methods of computing net registered tonnage in different states.

It was obvious that some standard system of measurement was required. Should that standard be United States Measurement Rules for determining net registered tonnage? The Suez Canal Measurement Rules offered precedent for special standards of measurement for the Panama Canal. National registry rules do not always measure the cargo space of vessels accurately. In the case of United States rules, there are methods by which, through small structural changes that do not affect the actual carrying capacity of the vessel, the owner can materially increase the space occupied by "propelling power" and exempted from measurement, thus reducing the registered tonnage of his ship. Furthermore, the national registry rules are subject to change from time to time by the Director of Navigation and Steamboat Inspection.

Before the opening of the Canal, Professor Emory R. Johnson was employed by the Canal Commission to determine the

⁵⁴ Sec. 5. 37 Stat. 560.

basis for making charges. His task had two angles: (1) to recommend the amount of the charge to be made; and (2) to suggest a standard of measurement for the computation of the charge. He recommended that tolls bear some relationship to the savings vessels effected by employing the Canal route.⁵⁵ In proposing a new system of measurement he attempted to provide a fair and equitable means of levying tolls according to the actual carrying capacity of vessels. By his system, as in the registry rules of nations, tonnage was estimated on "its pay-capacity space at the rate of 100 cubic feet per ton."⁵⁶ The difference was in the care with which the rules were drawn to measure accurately the space usable for the carriage of cargo. Both the measurement rules and the rate he recommended were adopted in 1913.⁵⁷

The wording employed in the Panama Canal Act of 1912, which authorized the President to prescribe the canal tolls, unfortunately created a long and troublesome problem. This provided that ". . . if the tolls shall not be based upon net registered tonnage, they shall not exceed the equivalent of \$1.25 per net registered ton as nearly as the same may be determined, nor be less than the equivalent of \$.75 per net registered ton." Did the term "net registered tonnage" mean tonnage as determined by United States registry rules, or could it be interpreted as referring to the special Panama Canal Measurement Rules recommended by Professor Johnson?⁵⁸ The President ordered that tolls should be levied on the basis of the Panama Canal Measurement Rules at one dollar and twenty cents per ton for laden ships and seventy-two cents for ships in ballast.⁵⁹

⁵⁵ Johnson, *op. cit.*, p. 5.

⁵⁶ H. Rep. No. 91, 74th Cong., 1st sess., p. 2.

⁵⁷ 38 Stat. 1968.

⁵⁸ The Panama Canal Measurement Rules were not adopted until 1913, and the Panama Canal Act was passed in 1912, but Dr. Johnson had been engaged in his studies since 1911, and *Panama Canal Traffic and Tolls* had been published and submitted to Congress on August 7, 1912, before the passage of the Act on August 24. *Annual Report*, 1936, p. 90.

⁵⁹ *Ex. O.*, p. 131. Rules for Measurement prescribed by Proclamation of Nov. 21, 1913. *Ibid.*, p. 154.

If the restrictions of the Panama Canal Act related to United States rules, it would be necessary to measure vessels transiting the Canal under both rules in order to determine whether the discrepancy between tonnage under the two systems was great enough to make a charge of one dollar and twenty cents per net *Panama Canal* ton exceed the limit of one dollar and twenty-five cents per net *registered* ton as measured under United States rules. In other words, if such were the case, "if the toll rate established at \$1.20 per net registered ton, when multiplied by the tonnage as ascertained by the Panama Canal rules, exceeds the amount produced by multiplying the net registered tonnage as measured by the rules prescribed in the United States Statutes, by \$1.25, . . . the excess thus produced is uncollectible."⁶⁰

In 1914 the Attorney General was asked for an advisory opinion on the controverted point. He declared that Congress had intended registered tonnage as determined by United States Measurement Rules.⁶¹ "The result created thereby was that, whereas toll charges at the Panama Canal were based on one tonnage—the Panama Canal net tonnage—the limiting factor was that provided by a different and lower tonnage—the United States net tonnage."⁶² The resulting dual measurement system was extremely disadvantageous to the Government. The necessity of measuring vessels twice added to the work connected with the assessment of tolls, and to the time required in the business of dispatching craft for transit. Furthermore, the United States was deprived of a considerable amount of revenue which it would have received but for the Attorney General's opinion.⁶³

As mentioned above, United States rules for measurement

⁶⁰ Letter of President Wilson to the Secretary of War, Feb. 15, 1915. MS. Panama Canal.

⁶¹ Unpublished opinion of the Attorney General. MS. Panama Canal.

⁶² *Annual Report*, 1936, p. 92.

⁶³ According to Canal officials, receipts to 1936 were \$92,000,000 less under the dual measurement system than they would have been under Panama Canal measurement rules alone. *Ibid.*, pp. 94-96.

exempt spaces which have actual earning capacity, and which would be included in the space measured and charged for by the Panama Canal rules. Thus in 1920 a United States net ton averaged 82.9 per cent of a Panama Canal net ton. In 1936 the average registered tonnage of vessels transiting the Canal was 69.5 per cent of the average under Panama Canal measurement.⁶⁴ Instead of one dollar and twenty cents per Panama Canal net ton for vessels laden, as fixed by the President, the rate continuously decreased year by year, ranging from 93.1 cents in 1930 to 87.04 cents in 1936. Perhaps the clearest way to illustrate what the dual measurement system meant in terms of loss of deserved revenue is to take the example of a 5,000-ton ship, Panama Canal measurement. At a rate of one dollar and twenty cents per ton, such a craft would pay a toll of \$6,000 under Panama Canal rules. But in 1920 its United States net was 4,145 tons; and under Congressional limitation, as interpreted by the Attorney General, the ship could not be charged over one dollar and twenty-five cents per United States net ton. Its United States net times one dollar and twenty-five cents gave a toll of \$5,181.25, a difference of \$818.75. In 1936 the same vessel, by the same system, would have paid a toll of \$4,343.75, or \$1,656.25 less than under Panama Canal net. Neither toll rates nor the pay-capacity space of the ship had been changed. Alterations and adjustments in registry rules or in the vessel to take advantage of the maximum reduction of United States net produced the difference. A flagrant example of the consequences of this situation was the case of the *Empress of Britain*.

Her net tonnage as measured under the Suez rules is 26,541 tons and for transit through the Suez Canal she pays \$30,741, plus any charge for individual passengers. The net tonnage of this vessel under Panama Canal rules is 27,503 tons. Her net tonnage under British registry rules is 22,545 tons. Under United States registry rules in effect at the time of the latest transit of the *Empress of Britain* through the Panama Canal her net tonnage measured 15,153 tons,

⁶⁴ *Ibid.*