



1901

# RECENT ISTHMIAN CANAL NEGOTIATIONS

CHARLES CHENEY HYDE

Follow this and additional works at: <http://digitalcommons.law.yale.edu/ylj>

## Recommended Citation

CHARLES C. HYDE, *RECENT ISTHMIAN CANAL NEGOTIATIONS*, 10 *Yale L.J.* (1901).  
Available at: <http://digitalcommons.law.yale.edu/ylj/vol10/iss8/3>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in *Yale Law Journal* by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact [julian.aiken@yale.edu](mailto:julian.aiken@yale.edu).

## RECENT ISTHMIAN CANAL NEGOTIATIONS.

---

BY CHARLES CHENEY HYDE,

LECTURER ON DIPLOMACY IN THE NORTHWESTERN UNIVERSITY LAW SCHOOL.

Hitherto there has been a tendency in this country—at least with respect to isthmian affairs—to make questions of national restraint and obligation secondary to questions of national policy. The prosecution of a plan supposedly advantageous to the United States has been the first consideration; the justification of such a plan according to the law of nations has been a matter of minor importance. The politician who, for example, has advocated exclusive American control of an isthmian canal, who has urged legislation to that end, and has scornfully referred to the Clayton-Bulwer treaty as a lapsed and worn-out compact has been surer of the approval of his constituents than he who has ventured to question not only the wisdom of American control of the waterway, but also the very right of our government to disregard the terms of an agreement with a friendly power.

In contrast to such a tendency was the attitude of the Secretary of State in submitting to the British Ambassador the isthmian canal treaty which was signed February 5, 1900. Two vital conditions confronted Mr. Hay, and he appreciated the significance of both. On the one hand there was a widespread desire throughout this country for the immediate construction of an inter-oceanic waterway under the auspices of the United States. This desire was intensified by the reluctance of private capital to embark on the enterprise under existing circumstances. On the other hand, the terms of the Clayton-Bulwer treaty were a frank reminder of prohibitions expressly forbidding our government from building or obtaining any exclusive control over an isthmian canal, and from occupying, fortifying, colonizing or exercising any dominion over any part of Central America. The Secretary of State endeavored, there-

fore, to prepare a treaty which should enable the United States to construct the waterway under its own auspices, and at the same time remove the objections presented by the Clayton-Bulwer treaty. He foresaw that a convention embodying a plan of neutralization would satisfy Great Britain and at the same time not impair existing rights of the United States. He also firmly believed that the neutralization of the canal would be equally advantageous to our own country.

The Hay-Pauncefote treaty frankly expressed the purposes of the negotiator. In the preamble it was stated that the two nations were desirous to facilitate the construction of a ship canal to connect the Atlantic and Pacific oceans, and to that end to remove any objection which may arise out of the convention of April 18, 1850, commonly called the Clayton-Bulwer treaty, to the construction of such canal under the auspices of the government of the United States without impairing the general principle of neutralization established in Article VIII of that convention."

The same purpose was reiterated in Article II:

"The high contracting parties desiring to preserve and maintain the general principle of neutralization established in Article VIII of the Clayton-Bulwer convention, adopt as the basis of such neutralization the following rules:"

The Senate in modifying the Hay-Pauncefote treaty left unchanged these candid expressions. By ratifying the treaty though otherwise amended, that body apparently indicated its approval of the neutralized *status* of an isthmian canal, and at the same time admitted that the Clayton-Bulwer treaty opposed to American control of an inter-oceanic waterway a barrier which necessitated for its removal, the consent of Great Britain.

The treaty as it was originally submitted to the Senate contained exact provisions to express the purpose declared in the preamble and in Article II. By the terms of the first article, our government secured the right to construct the waterway as it might see fit. It was permitted to do so directly at its own cost, or indirectly through individual or corporate agencies, the United States in either event retaining all rights incident to the construction and management of the canal. A plan of neutralization was adopted following the convention of October 29, 1888, providing for the neutralization of the Suez canal.

The second and third articles provided that the canal should be free in time of war as in time of peace to the vessels of

commerce and of war of all nations without discrimination of any sort. The canal was never to be blockaded, nor was any right of war to be exercised, nor act of hostility to be committed within it. It was agreed that naval vessels of a belligerent should not re-victual in the canal, except so far as might be strictly necessary; and the transit of such vessels through the canal was to be effected with the least possible delay. Belligerents were not to be allowed to embark or disembark troops or munitions of war in the waterway, except in case of accidental hindrance in transit. The adjacent waters within three miles of either terminus were included in the provisions for neutralization; and the time was limited during which the war ships of a belligerent might linger within such waters. It was agreed that the plant and all works incidental to the construction of the canal should be considered a part of the canal and should enjoy complete immunity from attack or injury by belligerents. Fortifications commanding the canal or adjacent waters were prohibited. The United States was, however, to be at liberty to maintain a military police force along the canal, to protect it against lawlessness and disorder. It was further agreed that the two contracting parties, upon the exchange of ratifications should immediately bring the convention to the notice of the other powers, and invite them to adhere to it.

To render the waterway permanently safe from attack, and forever isolated from scenes of warlike activity, required the acquiescence of the other powers. Complete immunity from injury could only be guaranteed by international consent.

The probability of the adherence of the other powers was known. Thus the actual and technical neutralization of the projected canal was to be reasonably anticipated as the result of the ratification of the compact by the United States.

The first amendment of the Hay-Pauncefote convention was the insertion of the words "which is superseded," following the reference to the Clayton-Bulwer treaty in Article II. The insertion did not signify that the Senate undertook to abrogate the Clayton-Bulwer treaty without the consent of England. The use of such language in a treaty submitted to Great Britain for acceptance would imply an opposite intention. As a declaration of the scope and effect of either the Hay-Pauncefote convention or of the treaty finally amended with reference to the compact of 1850, the words used are not out of place. By the provisions of both instruments, the Clayton-

Bulwer treaty is in point of fact superseded. The provisions which England might seek to enforce by virtue of the compact of 1850 are either set aside or re-asserted.

The second amendment was inserted after certain sections of Article II, providing for the neutralization of the canal, and immediately preceding the section prohibiting fortifications commanding the canal or adjacent waters. It was in the following words :

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

By this means, provision was made for a contingency when the canal might become the center of hostilities. It was to be left to the United States to determine the circumstances in which it should exercise rights of war in the vicinity of the canal, as well as the character of naval and military operations necessary for the national defence. By this amendment, our country was to enjoy the right, when necessity so required, to do the very things which Mr. Hay and Lord Pauncefote agreed that neither nation should do, and to act in direct violation of the general principles which the Senate expressed its desire to preserve and maintain. In the recent note of His Majesty's government to Lord Pauncefote formally rejecting the amended treaty, Lord Lansdowne criticises in detail the changes made by the Senate. Referring to the insertion above noted, he says :

“The first of them which reserves to the United States the right of taking any measures which they may find necessary to secure by their own forces the defence of the United States, appears to His Majesty's government to involve a distinct departure from the principle which until now found acceptance with both governments,—the principle, namely, that in time of war as well as in time of peace the passage of the canal is to remain free and unimpeded and is to be so maintained by the power or powers responsible for its control. Were this amendment to be added to the convention, the United States would, it is presumed, be within their rights, if at any moment when it seemed to them that their safety required it, in view of warlike preparations not yet commenced, but contemplated or supposed to be contemplated by another power, they resorted to warlike acts in or near the canal—acts clearly inconsistent

with the neutral character which it has always been sought to give it, and which would deny the free use of it to the commerce and navies of the world.”<sup>1</sup>

The fact that the amendment by its terms had reference solely to the preceding sections, and that it was followed by a section prohibiting the fortification of the canal was unsatisfactory to the British government. Lord Lansdowne in this connection says :

“Even if it were more precisely worded it would be impossible to determine what might be the effect if one clause permitting defensive measures and another forbidding fortifications were allowed to stand side by side in the convention.”

The third and last amendment consisted in striking out the provision inviting the adherence of other powers. The situation would not have been altogether devoid of humor had the Senate in view of its previous amendment seen fit to invite the other maritime nations to accede to an agreement by the terms of which they should at all times refrain from exercising acts of war within the waters of the canal, and at the same time permit the United States under a certain contingency to be free from such restraint and make use of the waterway as a strategic base. More surprising is the invitation seriously proffered to England to agree to impose upon itself an obligation not imposed upon any other power, nor even upon the United States. Lord Lansdowne's criticism of this amendment expresses well the discrimination against his government :

“The amendment not only removes all prospect of the wider guaranty of the neutrality of the canal, but places this country in a position of marked disadvantage compared with other powers which would not be subject to the self-denying ordinance which Great Britain is desired to accept. It would follow, were His Majesty's government to agree to such an arrangement, that while the United States would have a treaty right to interfere with the canal in time of war or apprehended war, and while other powers could with a clear conscience disregard any of the restrictions imposed by the convention, Great Britain alone in spite of her enormous possessions on the American continent, in spite of the extent of her Australasian colonies and her interests in the East, would be absolutely precluded from resorting to any such action or from taking measures to secure her interests in and near the canal.”

---

<sup>1</sup> The several extracts from Lord Lansdowne's note are taken from press despatches of March 25, 1901.

It is difficult to answer the British objections. That His Majesty's government would decline to accept the amended treaty was to be anticipated. Willingness on the part of Great Britain to become a party to a convention providing for the neutralization of the waterway, and contemplating the adherence of the other powers, did not signify a willingness also to acquiesce in a plan arranging for exclusive American control of the canal in the event of a certain contingency. If the Senate believed that American control was essential to the best interests of the United States, and that a treaty to that end should be submitted to the British government, it is unfortunate that such a plan was not frankly presented in its true colors rather than under cover of declarations alleging a desire on the part of the United States to preserve and maintain the general principle of neutralization. But the isthmian canal negotiations have not been barren of good results. The attitude of Great Britain has been ascertained. That government has expressed its approval of a plan permitting the United States to construct the canal under its own auspices as well as to manage and regulate it, provided the waterway be given a neutralized *status*. The United States, on the contrary, has indicated a desire to secure for itself the right, at certain times to regard the waterway as a part of its own coast line.

This country has at the same time declared to England through the Department of State, and by the action of the Senate that it still recognizes the binding character of the Clayton-Bulwer treaty. This has been a direct result of the isthmian canal negotiations. A clearer understanding of our duty to England according to the agreement of 1850 has aroused a greater reluctance to disregard the restraints and obligations then imposed. With the growth of the desire for American control there has developed a sense of the impropriety of any effort on the part of the United States to secure such control without the consent of England. A national consciousness that Great Britain has a right to withhold its consent has been stimulated. This fact minimizes the isthmian canal problem. It removes all objection to the giving of a consideration for the acquisition of greater rights in the isthmus. What Great Britain would require as compensation for the relinquishment of its hold upon the United States with respect to an inter-oceanic canal is still a matter of conjecture. Nevertheless the appreciation of the fact that the difficulties between

the two nations are reduced to a question of the adjustment of consideration promises such. The solution of the problem has been hastened by the negotiations of the Hay-Pauncefote treaty, by its amendment by the Senate and by its final rejection by His Majesty's government.