MOORE

INTEROCEANIC CANAL AND THE HAY-PAUNCEFOTE TREATY

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BY

JOHN BASSETT MOORE

Professor of International Law and Diplomacy, Columbia University, formerly Assistant Secretary of State of the United States and Secretary and Counsel to the United States Peace Commission at Paris

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The Interoceanic Canal and the Hay-Pauncefote Treaty.

That the treaty signed at Washington February 5, 1900, by Mr. Hay and Lord Pauncefote, with a view "to facilitate the construction of a ship canal to connect the Atlantic and Pacific oceans," has attracted general attention not only in the United States and Great Britain, but in other countries as well, is a circumstance neither singular nor hard to explain. The treaty, in the first place, relates to a subject of world-wide interest, in which all nations may be said to have some concern, while that of maritime powers generally is direct and immediate. In the second place, it seems to mark a distinct advance toward the accomplishment of a work which, though long postponed, has been so persistently cherished that it has been called "the dream of the ages." Thirdly, it represents a notable achievement of American diplomacy, in that, while it removes all obstacles to the construction, ownership, and operation of the canal by the United States, it secures for the contemplated water way itself, by a comprehensive neutralization, and for "the plant, establishments, and buildings," and "all works" necessary to its "construction, maintenance, and operation," a "complete immunity" from injury or attack either in war or in peace.

It is not my purpose nor my desire to discuss the pending treaty in a spirit of partisanship. It has been severely criticised, and it has been ably defended, and in some instances the discussions have developed errors which it is proper to ascribe to a lack of information rather than to

an intention to misrepresent. Nor do I assume that all men can be brought to take one view of the questions at issue. I say "questions," although there is, in reality, but one question at issue, and that is whether the exclusive control of the canal for purposes of war is so essential to our national safety that we should discard the advantages that would accrue from its neutralization and devote ourselves to the accomplishment of the opposite policy. And when I speak of the "accomplishment" of the opposite policy, I refer to the removal of existing diplomatic obstacles by negotiation and mutual accommodation, as well as to the acquisition by the same means of the necessary jurisdictional rights in countries now independent. While I am one of those who believe that the physical power of the United States is practically unlimited, I do not assume that the United States will, in sheer wantonness of power, disregard solemn treaties and violate the rights of independent states. Besides, there seems to be a certain incongruity between that just confidence which we feel in our power and the extreme apprehensions sometimes expressed for our safety.

THE PRINCIPLE OF NEUTRALIZATION.

In order to comprehend the import of the stipulations of the pending treaty, it is necessary at the outset to understand the significance of the term "neutralization" or "neutrality" as therein employed. The term "neutrality," in its ordinary sense, refers to a state of hostilities and denotes the attitude and the duty of a noncombatant or neutral power toward the parties to the conflict. It signifies not only impartiality, so far at least as conduct is concerned, but also abstention from acts which may aid either belligerent in its contest with the other. Such is the subjective sense of the term. When used objectively with reference to an interoceanic canal, it embraces belligerent as well as neutral powers, and, while pointedly referring to the former, defines the attitude and the duty of both. It signifies that the thing is "neutral-

ized;" that it is to be treated as "neutral;" and therefore that it is not to be made the object of attack, nor distinctively employed as the means of hostilities.

Two plans of neutralization have been proposed: first, that of excluding the ships of war of all belligerents; and, second, that of permitting their passage without discrimination. The former plan has not prevailed, and for various reasons. The primary conception of an interoceanic canal is that of a highway always accessible, and nations are disinclined to approach the subject on any other basis. It is foreseen that, when once the canal was opened, the world would soon become so habituated to and dependent upon its use that to allow it to be closed at the behest of any one power might prove to involve inconveniences altogether insupportable. Moreover, as the construction of such a work would require the expenditure of a great amount of money, the general exclusion of belligerent men-of-war would diminish the possibility of securing reimbursement by means of tolls. Finally, there is no universal criterion by which the existence or nonexistence of a state of war can be determined. Not only may a state of war exist without a prior declaration, but the question whether war exists at a particular moment may depend upon the unexpressed intention of the parties as well as upon their acts. Under such conditions the attempt to exclude the men-of-war of belligerents would involve the exercise of a wide discretion and of a large measure of arbitrary power, and, being thus indefinite as to its grounds, it might prove to be uncertain in its operation, unjust and injurious in its effects, and provocative of jealousies, suspicions, and dangerous quarrels.

The second plan, of keeping the canal open at all times, without distinction as to vessels, has therefore been generally approved as the only one that can be relied on to assure complete "neutrality" and immunity. As such it was made the basis of the convention of October 29, 1888, for the free navigation of the Suez Canal, and is adopted as the basal principle of the pending treaty.

Equality of tolls has also been treated as a feature, or perhaps rather as a condition, of neutralization. Little need be said on this subject, since a discriminative policy, even if it did not lead to the immediate building of another canal, would merely provoke retaliation in some other form and prove in the end to be impracticable.

OUR HISTORIC POLICY.

The principle of neutralization is a product of modern civilization and is one of the means by which nations have endeavored to secure the largest possible freedom of navigation. By those great masters of government and of jurisprudence, the Romans, the navigation of waters was held to be free to all. "By natural law," say the Institutes of Justinian, "the following things are common to all: The air, flowing water, and the sea. * * * All rivers and ports are public." ("Et quidem naturali jure communia sunt omnium haeo: aer, aqua fluens et mare. * * * Flumina autem omnia et portus publica sunt." Institutes, Lib. II, I, secs. 1–2.) In the centuries of warfare and confusion that followed the fall of the Roman Empire, this great principle gradually ceased to be observed. The practice of piracy and the Mussulman conquests in the west, together with other causes, contributed to introduce a system under which particular sovereign princes assumed to control and monopolize the navigation not only of waters within their own dominions, but also of the open seas. Under these conditions peaceful intercourse was almost unknown. Commerce and warfare were practically synonymous. The system of exclusion and monopoly became intolerable, and it was overthrown. The United States entered the family of nations in time to contribute powerfully to this result; and, as the advocate of the freedom of the seas, it conceived of an interoceanic canal between the Atlantic and the Pacific as a great common highway of nations, which should be open on equal terms to all. Perhaps there are no other American statesmen who are at once so prominently identified

with the two doctrines of the freedom of these continents from European domination and the freedom of the seas as John Quincy Adams and Henry Clay; and, under the Presidency of the former, Mr. Clay, as Secretary of State, referring to the subject of "a cut or canal for purposes of navigation somewhere through the isthmus that connects the two Americas, to unite the Pacific and Atlantic oceans," said:

> If the work should ever be executed so as to admit of the passage of sea vessels from ocean to ocean, the benefits of it ought not to be exclusively appropriated to any one nation, but should be extended to all parts of the globe upon the payment of a just compensation or reasonable tolls.

Nine years later, the subject was taken up by the United States Senate, and on March 3, 1835, that body unanimously adopted the following resolution:

> *Resolved*, That the President of the United States be respectfully requested to consider the expediency of opening negotiations with the governments of other nations, and particularly with the governments of Central America and New Granada, for the purpose of effectually protecting, by suitable treaty stipulations with them, such individuals or companies as may undertake to open a communication between the Atlantic and Pacific oceans by the construction of a ship canal across the isthmus which connects North and South America, and of securing forever, by such stipulations, the free and equal right of navigating such canal to all such nations, on the payment of such reasonable tolls as may be established to compensate the capitalists who may engage in such undertaking and complete the work.

In May, 1835, President Jackson, on the strength of this resolution, appointed Mr. Charles Biddle to make an investigation of transit routes. Mr. Biddle, who was directed to proceed first to Lake Nicaragua, went instead to New Granada, and obtained from that Government an exclusive grant to citizens of the United States, by which it was provided that two-thirds of the stock created under it should be "the property of Charles Biddle and such citizens of the United States as he might associate with him." Mr. Biddle's proceedings were wholly disavowed.

Four years later, in 1839, the canal question was brought

before the House of Representatives on a memorial of merchants of New York and Philadelphia, and was the subject of an exhaustive report. The House then adopted, by a unanimous vote, a resolution closely following that of the Senate, and requesting the President—

> To consider the expediency of opening or continuing negotiations with the governments of other nations, and particularly with those the territorial jurisdiction of which comprehends the Isthmus of Panama, and to which the United States have accredited ministers or agents, for the purpose of ascertaining the practicability of effecting a communication between the Atlantic and Pacific oceans by the construction of a ship canal across the Isthmus, and of securing forever, by suitable treaty stipulations, the free and equal right of navigating such canal by all nations.

On December 12, 1846, the United States concluded with New Granada (now the Republic of Colombia) a treaty which is still in force. By Article XXXV of this treaty, "the Government of New Granada guarantees to the Government of the United States that the right of way or transit across the Isthmus of Panama upon any modes of communication that now exist, or that may hereafter be constructed, shall be open and free to the Government and citizens of the United States." On the other hand, "the United States guarantee, positively and efficaciously, to New Granada, by the present stipulation, the perfect neutrality of the before-mentioned Isthmus, with the view that the free transit from the one to the other sea may not be interrupted or embarrassed in any future time while this treaty exists; and, in consequence, the United States also guarantee, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory."

These stipulations have sometimes been cited as an example of the assumption by the United States of an exclusive guaranty with a view to the exclusive control of any future canal. Such a construction can only return to plague those who suggest it. Not only is it at variance with the guaranty of "perfect neutrality" and the ex-

press declaration with which that guaranty is accompanied, but it is contradicted by the record. The object of the stipulations was clearly set forth by President Polk, who, in submitting the treaty to the Senate, said:

> In entering into the mutual guaranties proposed by the thirty-fifth article of the treaty, neither the Government of New Granada nor that of the United States has any narrow or exclusive view. The ultimate object, as presented by the Senate of the United States in their resolution [of March 3, 1835] to which I have already referred, is to secure to all nations the free and equal right of passage over the Isthmus. If the United States, as the chief of the American nations, should first become a party to this guaranty, it can not be doubted—indeed, it is confidently expected by the Government of New Granada—that similar guaranties will be given to that Republic by Great Britain and France. Should the proposition thus tendered by rejected, we may deprive the United States of the just influence which its acceptance might secure to them, and confer the glory and benefits of being first among the nations in concluding such an arrangement upon the Government either of Great Britain or France. That either of these Governments would embrace the offer can not well be doubted; because there does not appear to be any other effectual means of securing to all nations the advantages of this important passage, but the guaranty of great commercial powers that the Isthmus shall be neutral territory. The interests of the world at stake are so important that the security of this passage between the two oceans can not be suffered to depend upon the wars and revolutions which may arise among different nations.

It was in conformity with these unvarying precedents that the treaty between the United States and Great Britain, commonly called the Clayton-Bulwer Treaty, signed at Washington April 19, 1850, was concluded and ratified. The treaty related, first, "to any means of communication by ship canal which may be constructed between the Atlantic and Pacific oceans by the way of the River San Juan de Nicaragua, and either or both of the lakes of Nicaragua or Managua," and, second, "to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America." As to the first—the Nicaragua Canal—it stipulated that neither Government would "ever obtain or maintain for itself any exclusive control over the said ship

canal," or "ever erect or maintain any fortifications commanding the same, or in the vicinity thereof." As to the second, it declared:

> The Governments of the United States and Great Britain, having not only desired, in entering into this convention, to accomplish a particular object, but also to establish a general principle, they hereby agree to extend their protection, by treaty stipulations, to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America, and especially to the interoceanic communications, should the same prove practicable, whether by canal or railway, which are now proposed to be established by way of Tehuantepec or Panama.

In 1856 the Isthmus of Panama was the scene of grave disturbances. The transit by the Panama Railway, which had then been completed, was seriously menaced, and on one occasion it was interrupted by mob violence. Acting in the spirit of the treaty of 1846 and of the Clayton-Bulwer Treaty, the Administration of President Pierce sent two commissioners to New Granada to propose the creation of an independent, neutral district on the Isthmus, with a view to the security of the transit route. "It is not designed," said Mr. Marcy, then Secretary of State, "to secure any exclusive advantages to the United States. To remove all objections of this sort an article is proposed securing the common use of the Panama route to all foreign nations." By this article it was stipulated that "the said road or route shall be open to the common use of all nations which shall, by treaty stipulations, agree to regard and treat the district of country aforesaid at all times as neutral," and that the contracting parties should "invite foreign nations to join in the mutual guaranty of the neutrality of the said country, of the municipal governments aforesaid, and of the unobstructed use of the said Panama Railroad, or any other road or route which may be established across the Isthmus within the limits of the territory before designated."

Mr. Cass, while Secretary of State in 1858, declared that "what the United States wants in Central America next to

the happiness of its people is the security and neutrality of the interoceanic routes which lead through it."

In June, 1862, the Colombian Minister in Washington invoked the interposition of the United States for the protection of the Isthmus of Panama against the revolutionary chief Mosquera. At that time the United States was occupied with its own civil war, and Mr. Seward, with a view to redeem the pledge of "perfect neutrality" under the thirty-fifth article of the treaty of 1846, directed the Ministers of the United States at London and Paris to confer with the Governments to which they were respectively accredited in regard to action by the United States, either alone or jointly, "in guaranteeing the safety of the transit and the authority of the Granadian Confederation, or either of these objects." "This Government," declared Mr. Seward, "has no interest in the matter different from that of other maritime powers. It is willing to interpose its aid in execution of its treaty, and for the benefit of all nations."

While Mr. Seward was still Secretary of State, the United States concluded with Nicaragua a treaty containing stipulations similar to those of the treaty of 1846 with New Granada. The treaty with Nicaragua, which is commonly known as the Dickinson-Ayon Treaty, was signed June 21, 1867, and, having been duly approved by both Governments, the ratifications were exchanged at Managua June 20, 1868. It is still in force. By Article XIV, Nicaragua grants "to the United States and to their citizens and property the right of transit between the Atlantic and Pacific oceans through the territory of the Republic on any route of communication, natural or artificial, whether by land or water," on the same terms as it should be enjoyed by Nicaragua and its citizens, "the Republic of Nicaragua, however, reserving its rights of sovereignty over the same." By the next article, the United States "agree to extend their protection to all such routes of communication as aforesaid, and to guarantee the neutrality and innocent use of the same. They

also agree to employ their influence with other nations to induce them to guarantee such neutrality and protection." It is evident that those who have charged Mr. Hay with proposing to give away a right of exclusive control of the Nicaragua Canal, granted us by Nicaragua itself, with the implied concurrence of Great Britain and other powers, under the Dickinson-Ayon Treaty, either have not read essential stipulations of that treaty or else have not seen fit to quote them.

In the closing year of President Grant's Administration another step was taken toward the final adjustment of the canal question on the lines of perfect neutralization. As appears by a circular of Mr. Fish, then Secretary of State, to United States ministers, of February 28, 1877, a draft treaty was prepared, "to which it was proposed to obtain the accession of the principal maritime powers." The negotiations failed owing to certain views of Nicaragua, which were neither satisfactory to the United States nor calculated to obtain the "cooperation" of those powers. By the draft treaty, every power becoming a party to its stipulations and guaranties" was "at all times, whether in peace or war," to have "the right of transit" through the canal when constructed, as well as "the benefit of the neutral waters at the end thereof for all classes of vessels entitled to fly their respective flags, with the cargoes on board, on equal terms in every respect as between each other;" and "the vessels of war and other national vessels" of such powers were to have "the right of transit through the canal."

December 1, 1884, Mr. Frelinghuysen, then Secretary of State, and Gen. Joaquin Zavala, ex-President of Nicaragua, signed at Washington a convention by which the United States engaged to build a canal at its own cost, and with that view entered into a "perpetual alliance" with Nicaragua and agreed "to protect the integrity of the territory of the latter." While the convention provided for "equal" tolls for the vessels of "all nations" (except vessels of the contracting parties engaged in the

coasting trade), and contained no stipulation for the fortification of the canal, yet it did not provide for its neutralization. It was submitted to the Senate December 10, 1884. It had not been approved by that body when, in the following March, President Cleveland withdrew it for reexamination. Referring to this act in his annual message of December, 1885, he said:

> Whatever highway may be constructed across the barrier dividing the two greatest maritime areas of the world 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. An engagement combining the construction, ownership, and operation of such a work by this Government, with an offensive and defensive alliance for its protection, with the foreign state whose responsibilities and rights we would share, is, in my judgment, inconsistent with such dedication to universal and neutral use, and would, moreover, entail measures for its realization beyond the scope of our national polity or present means.
>
> The lapse of years has abundantly confirmed the wisdom and foresight of those earlier Administrations which, long before the conditions of maritime intercourse were changed and enlarged by the progress of the age, proclaimed the vital need of interoceanic transit across the American isthmus and consecrated it in advance to the common use of mankind by their positive declarations and through the formal obligation of treaties.

The treaty signed by Mr. Hay and Lord Pauncefote on the 5th of February and transmitted by President McKinley to the Senate on the same day provides:

> 1. The canal shall be free and open, in time of war as in time of peace, to the vessels of commerce and of war of all nations on terms of entire equality, so that there shall be no discrimination against any nation or its citizens or subjects in respect of the conditions or charges of traffic or otherwise.
>
> 2. The canal shall never be blockaded, nor shall any right of war be exercised nor any acts of hostility be committed within it.

In view of what has been disclosed, it is superfluous to add that, no matter what our future policy may be, these stipulations embody our historic policy in respect of the interoceanic canal.

THE IDEA OF AMERICAN CONTROL.

The idea of control by the United States, not in the sense of ownership or management, but in that of opposition to neutralization, seems to have originated with Senator Douglas. It was at the time suggested, with a facetiousness more apparent than real, that he took this position because it was the only one by the assumption of which he could put himself in opposition to all other Presidential aspirants, including those of both political parties, and thus obtain an opportunity to kill them all off at one stroke.

The idea of American control was put forward thirty years later by President Hayes and by Mr. Evarts, as Secretary of State, but in terms that do not define what was meant by it, on the occasion of the granting of the concession for the Panama Canal by the Colombian Government to Mr. Lucien N. B. Wyse, as the representative of the International Interoceanic Canal Association, commonly called the French Company. This concession, however, contained clauses which were not only exclusive in their nature, but which also affected the rights and obligations of the United States under the treaty with New Granada in 1846.

It was under these circumstances that President Hayes said:

> It is the right and duty of the United States to assert and maintain such a supervision and authority over any interoceanic canal across the isthmus that connects North and South America as will protect our national interests. This, I am quite sure, will be found not only compatible with, but promotive of, the widest and most permanent advantage to commerce and civilization.

Mr. Evarts elaborated this idea with special reference to the treaty of 1846, which, as has been seen, stipulates for the "perfect neutrality" of the Isthmus of Panama.

Neither President Hayes nor Mr. Evarts proposed that the canal should be fortified. Such a proposal was, however, put forward by Mr. Blaine, in his instructions to Mr.

Lowell of November 19, 1881, as one of the "modifications" of the Clayton-Bulwer Treaty which he desired the British Government to concede. He not only proposed that the canal should be fortified by the United States, but he also frankly declared his object to be that the United States should use the canal for itself in time of war, while closing it "impartially" to the war vessels of other belligerents. This he described as a proposal for the preservation of the "neutrality" of the canal by the United States. But it seems obvious that to apply the term "neutrality" to such a plan is to be guilty of a manifest contradiction of terms. The idea of neutrality or neutralization has usually been deemed incompatible even with the mere maintenance of armed forces and fortifications, to say nothing of the offensive or warlike use of them. When, by Article IX of the treaty of Vienna, provision was made for the "neutrality of the Free Town of Cracow and its territory," it was declared in the same breath: "No armed forces shall be introduced upon any pretense whatever." When, by Article XI of the treaty of Paris, the Black Sea was "neutralized," the maintenance of armaments upon it was forbidden. In the neutralization of Luxemburg it was stipulated that the city of Luxemburg should no longer be treated as a federal fortress. By a treaty between Austria, France, Great Britain, Prussia, and Russia, signed at London November 14, 1863, the Ionian Isles were united to Greece and were neutralized. Article III of the treaty declares that "as a necessary consequence of the neutrality which the Ionian Isles are thus to enjoy, the fortifications constructed in the Isle of Corfu and in its immediate dependencies, having no longer any object, shall be demolished." The treaties of March 30, 1856, November 2, 1865, and March 13, 1871, having effected the neutralization of the Lower Danube and of the works constructed in aid of its navigation, the treaty of Berlin of July 13, 1878, provided (Article LII) that "all the fortresses and fortifications existing on the course of the river from the Iron Gates to

its mouth" should be "razed and no new ones erected." The Argentine Republic and Chile, by their treaty of July 23, 1881, declare:

ARTICLE V. The Straits of Magellan are neutralized forever, and their free navigation is guaranteed to the flags of all nations. To insure this neutrality and freedom, it is agreed that no fortifications or military defenses which might interfere therewith shall be erected.

The convention of 1888 for the neutralization of the Suez Canal contains substantially the same stipulations against fortifications as the Hay treaty. Indeed, the idea of erecting fortifications, even if no offensive or hostile use of them be intended, for the purpose of preserving "neutrality," is novel in public law. But, whatever may be said of fortifying a place in order to preserve its "neutrality," to apply the term "neutral" to a canal not only fortified by some one power, but fortified by that power with the avowed design, while using it for purposes of war, to exclude other belligerent powers from it, is to lay ourselves open to the charge of a confusion of ideas and a misuse of language.

Mr. Frelinghuysen, in continuing in 1882 the correspondence begun by Mr. Blaine, did not renew the latter's specific proposals, but stated that a canal under "the protectorate of the United States and the republic whose territory it may cross" could be "freely used by all nations;" and, after adverting to the fact that commerce had moved through the Suez Canal "quietly and safely under no international protectorate," he added:

The President, therefore, considers it unnecessary and unwise, through an invitation to the nations of the earth, to guarantee the neutrality of the Isthmus, or to give their navies a pretext for assembling in waters contiguous to our shores, and to possibly involve this Republic in conflicts from which its natural position entitles it to be relieved.

These statements seem to contemplate a provision for neutrality in a form different from that contained in the pending treaty, under which the powers are simply to pledge themselves neither to blockade the canal nor to exercise any right of war or commit any act of hostility

within it. Such a pledge could hardly afford their navies "a pretext for assembling in waters contiguous to our shores."

In the years that have elapsed since this correspondence took place our situation has undergone a vast change. We were then engagingly presented by our Department of State to foreign nations as a people altogether singular and bent upon a singular policy. We had neither navy nor distant possessions, nor wanted any; and it might have been added that we had no coast defenses. "Even as simple coaling stations" said Mr. Frelinghuysen, "territorial acquisitions would involve responsibilities beyond their utility;" and he laid great stress upon our policy of naval weakness, which he assumed to be permanent. To-day we are improving our coast defenses, we hold distant possessions capable of great development, and we have a navy which we are increasing and shall continue to increase.

THE POLICY OF NEUTRALIZATION AND THE MONROE DOCTRINE.

While neutralization appears to have been our historic policy, the assertion is made that it is incompatible with another historic policy—the Monroe doctrine; and this assertion has been repeated, with especial emphasis, with reference to the particular guaranty of neutrality found in the Clayton-Bulwer Treaty. That many of our statesmen have entertained a different view it would not be difficult to prove by their utterances as well as by their acts; for, among those who have sustained the principle of the Clayton-Bulwer Treaty, there are numbered some of the foremost champions of the Monroe doctrine. Without going too far back, it is believed that we may place in this category Mr. Olney, who, as Secretary of State, in his instructions to Mr. Bayard of July 20, 1895, on the Venezuelan boundary, said:

> It [the Monroe doctrine] was the controlling factor in the emancipation of South America, and to it the independent states which now divide that region between them are largely indebted for their very

existence. Since then the most striking single achievement to be credited to the rule is the evacuation of Mexico by the French upon the termination of the civil war. But we are also indebted to it for the provisions of the Clayton-Bulwer Treaty, which both neutralized any interoceanic canal across Central America and expressly excluded Great Britain from occupying or exercising any dominion over any part of Central America.

The idea thus expressed by Mr. Olney is that in which the treaty was conceived, namely, that an agreement of neutralization should, as a measure excluding intervention, be considered, not as an infringement, but as a fulfillment of the Monroe doctrine; and it is probable that this idea would have continued to be accepted with practical unanimity had it not been for certain stipulations which the Hay treaty nullifies and supersedes.

Not only was the Clayton-Bulwer Treaty construed, by reason of its provision against "exclusive control," as inhibiting either Government from constructing or owning the canal, but it bound them, while the canal was in process of construction, jointly to "protect" all persons and property connected with it "from unjust detention, confiscation, seizure, or any violence whatsoever," and, after its completion, jointly "to protect it from interruption, seizure, or unjust confiscation," as well as to "guarantee" its neutrality. These stipulations have been criticised as creating a virtual alliance for joint protection and security, even to the extent of joint intervention in the affairs of American governments within whose jurisdiction the canal might lie, and as constituting in this sense a violation of the spirit of the Monroe doctrine. This objection, whether well-founded or ill-founded, is, as a simple comparison will demonstrate, removed by the Hay treaty, which contains no stipulation for a joint guaranty, but permits the United States alone, subject only to the engagement of neutralization, to construct, manage, and protect the canal:

CLAYTON-BULWER TREATY.

ARTICLE I. The Governments of the United States and Great Britain hereby declare that neither the one nor the other will ever obtain or maintain for itself any exclusive control over the said ship canal; * * * neither will ever erect or maintain any fortifications commanding the same, etc.

ART. III. The persons employed in making the said canal, and their property * * * shall be protected * * * by the Governments of the United States and Great Britain from unjust detention, confiscation, seizure, or any violence whatsoever.

ART. V. The contracting parties further engage that when the said canal shall have been completed they will protect it from interruption, seizure or unjust confiscation; * * *

HAY TREATY.

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

ART. II. No fortifications shall be erected commanding the canal or the waters adjacent. 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.

THE CLAYTON-BULWER TREATY.

But it is suggested that no treaty of any kind should have been made, and particularly that no recognition should have been given to the Clayton-Bulwer Treaty, which, it is said, had not merely ceased to exist, but, in fact, never legally existed. Concerning the question thus raised, it is our duty candidly to examine our own record. The facts in regard to the treaty are neither difficult to ascertain nor hard to understand; nor, singularly enough, did the controversies to which it gave rise, soon after it was ratified, relate to that feature of it—the principle of neutralization—which the Hay treaty has been criticised for sanctioning.

As has been shown, the Governments of the United States and Great Britain, in Article I of the Clayton-Bulwer Treaty, declared that neither the one nor the

other would "ever obtain or maintain for itself any exclusive control" over the canal by way of the River San Juan de Nicaragua, and either or both of the lakes of Nicaragua or Managua. To this end they further agreed that neither would—

> Ever erect or maintain any fortification commanding the same, or in the vicinity thereof, or occupy, or fortify, or colonize, or assume, or exercise any dominion over Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America; nor * * * make use of any protection which either affords or may afford, or any alliance which either has or may have to do with any State or people for the purpose of erecting or maintaining any such fortifications, or of occupying, fortifying, or colonizing Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America, or of assuming or exercising dominion over the same; nor * * * take advantage of any intimacy, or use any alliance, connection, or influence that either may possess, with any State or Government through whose territory the said canal may pass, for the purpose of acquiring or holding, directly or indirectly, for the citizens or subjects of the one any rights or advantages in regard to commerce or navigation through the said canal which shall not be offered on the same terms to the citizens or subjects of the other.

When this agreement was made, Great Britain held what was then called the settlement at Belize, or British Honduras, which had been in her actual possession for half a century, and of which she claimed certain islands to be a dependency; and she also exercised a protectorate over the Mosquito Coast. The ratifications of the treaty were exchanged at Washington July 4, 1850. On the 29th of the preceding month Sir Henry Bulwer communicated to Mr. Clayton the following memorandum:

> In proceeding to the exchange of ratifications of the convention * * * the undersigned, Her Britannic Majesty's Plenipotentiary, has received Her Majesty's instructions to declare that Her Majesty does not understand the engagements of that convention to apply to Her Majesty's settlement at Honduras, or to its dependencies. Her Majesty's ratification of the said convention is exchanged under the explicit declaration above mentioned.

Mr. Clayton on the 4th of July replied:

> The language of Article I of the convention concluded on the 19th of April last between the United States and Great Britain * * * was neither understood by them nor by either of us (the negotiators)

to include the British settlement in Honduras (commonly called British Honduras, as distinct from the State of Honduras), nor the small islands in the neighborhood of that settlement which may be known as its dependencies. * * * The title to them it is now and has been my intention throughout the whole negotiation to leave as the treaty leaves it, without denying, affirming, or in any way meddling with the same, just as it stood previously. The chairman of the Committee on Foreign Relations of the Senate, the Hon. William R. King, informs me that "the Senate perfectly understood that the treaty did not include British Honduras." It was understood to apply to, and does include, all the Central American States of Guatemala, Honduras, San Salvador, Nicaragua, and Costa Rica, with their just limits and proper dependencies.

When this correspondence was communicated to the Senate, it gave rise to a discussion, in which Mr. Cass bore the leading part. Mr. Cass denied the authority of Mr. King to speak for him, and offered a resolution instructing the Committee on Foreign Relations to inquire and report what measures, if any, should be taken by the Senate in regard to the correspondence. The committee reported that no measures were, in its opinion, necessary, and none were taken. The treaty had, in fact, been ratified by a vote of 42 to 11.* The case was allowed to stand as the two Governments had made it; and it appears that their representatives, in negotiating the treaty and in exchanging its ratifications, considered and treated British Honduras, with its proper limits and dependencies, as having once formed a part of Yucatan or Mexico, and not as a part of Central America; and, having no power to determine those limits and dependencies, they left that subject to be adjusted between Great Britain, on the one hand, and Mexico and the adjacent Central American

* This number includes the vote of Senator Douglas, who, though he was not recorded at the time, afterward stated that he voted against the treaty. With this inclusion, the vote stood:

"Yeas—Messrs. Badger, Baldwin, Bell, Berrien, Butler, Cass, Chase, Clarke, Clay, Cooper, Corwin, Davis of Massachusetts, Dawson, Dayton, Dodge of Wisconsin, Dodge of Iowa, Downs, Felch, Foote, Green, Hale, Houston, Hunter, Jones, King, Mangum, Mason, Miller, Morton, Norris, Pearce, Pratt, Sebastian, Seward, Shields, Smith, Soulé, Spruance, Sturgeon, Underwood, Wales, and Webster—42.

"Nays—Messrs. Atchison, Borland, Bright, Clemens, Davis of Mississippi, Dickinson, Douglas, Turney, Walker, Whitcomb, and Yulee—11."

States, on the other. In July, 1852, however, Great Britain, by a proclamation, erected the Bay Islands, which she claimed as a dependency of British Honduras, into a Crown colony. The islands were also claimed by the State of Honduras, and against this act of the British Government the United States protested as a violation of the treaty. The British Government also claimed that it might, under the terms of the treaty, continue its protectorate over the Mosquito Coast. The position consistently maintained by the United States in the controversies which ensued was well expressed by Mr. Marcy, Secretary of State, who, in an instruction to Mr. Borland, United States Minister to Central America, of December 30, 1853, said:

> This Government considers it (the Clayton-Bulwer Treaty) a subsisting contract, and feels bound to observe its stipulations so far as by fair construction they impose obligations upon it. If Great Britain has failed, or shall fail, on her part to fulfill the obligations she has therein assumed, or if she attempts to evade them by a misconstruction of that instrument, the discussions that may arise on these subjects must necessarily take place between the parties to it. * * * It is believed that Great Britain has a qualified right over a tract of country called the Belize, from which she is not ousted by this treaty, because no part of that tract, when restricted to its proper limits, is within the boundaries of Central America.

Mr. Cass, who succeeded Mr. Marcy as Secretary of State, maintained the same position, declaring on various occasions that the great object of the United States was to effect the execution of the treaty and thus to secure the neutralization of interoceanic communication. The result of the long-continued negotiations was stated by President Buchanan in his fourth annual message, Mr. Cass still being Secretary of State, as follows:

> The discordant constructions of the Clayton and Bulwer Treaty between the two Governments, which at different periods of the discussion bore a threatening aspect, have resulted in a final settlement entirely satisfactory to this Government. In my last annual message I informed Congress that the British Government had not then "completed treaty arrangements with the Republics of Honduras and

Nicaragua in pursuance of the understanding between the two Governments. It is, nevertheless, confidently expected that this good work will ere long be accomplished." This confident expectation has since been fulfilled. Her Britannic Majesty concluded a treaty with Honduras on the 28th November, 1859, and with Nicaragua on the 28th August, 1860, relinquishing the Mosquito protectorate. Besides, by the former, the Bay Islands are recognized as a part of the Republic of Honduras.

Since 1860 the Government of the United States has on various occasions referred to the Clayton-Bulwer Treaty as a subsisting convention. Mr. Fish, as Secretary of State, in a memorandum communicated to the Nicaraguan Minister, February 16, 1877, said:

> The obligation of the Clayton-Bulwer Treaty, including that which provides for an invitation to other powers to join in guaranteeing the neutrality (of the canal), are still subsisting. This Government has hitherto abstained from making a proposition on the subject to other powers, because there has been no prospect of a completion, or even of a commencement, of the canal. Having already entered into the stipulation with Great Britain, and that still being in force, its repetition in a treaty with Nicaragua might imply a doubt of the good faith of the United States on the subject.

Mr. Blaine, in his correspondence with the British Government in 1881, expressed the earnest hope that Great Britain would "concede" certain "modifications" of the treaty, the rest of it to "remain in full force." Indeed, by those who hold that the United States should as a matter of policy rid itself of the obligations of the Clayton-Bulwer Treaty, Mr. Blaine has been severely criticised for making this broad acknowledgment of its continuing validity. Mr. Frelinghuysen, who took up the correspondence where Mr. Blaine left it, is sometimes supposed to have held the treaty to be null and void. This supposition is altogether erroneous. Instead of declaring the treaty to be void, he merely expressed the opinion that it was "voidable," and this opinion he based upon a hypothesis and not upon any positive assumption of fact. He based it solely upon the question as to British Honduras. Nevertheless, he did not discuss the question whether British Honduras was ever a part of Central America, nor did

he assert that it was. On the contrary, he contented himself with saying, "If Great Britain has violated and continues to violate" the treaty by holding British Honduras, then "the treaty is, of course, voidable at the pleasure of the United States." Mr. Olney, as has been seen in his instructions to Mr. Bayard of July 20, 1895, a copy of which was communicated to the British Government, referred to the treaty as a subsisting engagement.

THE GENERAL TREATY SITUATION.

But the Clayton-Bulwer Treaty is not the only act by which the neutralization of the canal is pledged. In respect to the Panama Canal, there is also our treaty with New Granada of 1846, to which we have heretofore adverted, and if this treaty, which is terminable on notice, were out of the way, it remains to be seen whether Colombia would negotiate on any other basis. The situation in respect of the Nicaragua Canal appears to be more complicated. The treaty of peace and friendship between Spain and Nicaragua of July 25, 1850, provides (Article XIII) that the former power shall "enjoy on the transit the same advantages and exemptions as are granted to the most favored nation," and shall, on the other hand, guarantee its "neutrality," in order "to keep the transit thereby free" and "protect it against all embargo or confiscation," and the treaty between Spain and Costa Rica of May 10, 1850, grants (Article XIII) to the Spanish flag and merchandise "free transit" upon any canal through the territory of Costa Rica on the same terms as "the vessels, merchandise, and citizens" of the latter country. By Articles XXVII–XXXIII of the treaty of amity, commerce, and navigation, between France and Nicaragua, of April 11, 1859, the neutrality and free use of the canal are amply guaranteed. The treaty of commerce between Great Britain and Nicaragua of February 11, 1860, contained similar stipulations; but it expired June 11, 1888, on notice given in conformity with its terms. The treaty between Italy and Nicaragua of March 6, 1868, provides

for most-favored-nation treatment in respect of "navigation," as well as of commerce. Last, but not least, there is our own treaty with Nicaragua of 1867, the precise stipulations of which have already been quoted.

SUMMARY OF RESULTS.

Our investigations seem to have shown:

1. That the engagement of neutralization, embodied in the Hay treaty, is amply supported by precedent and by principle.

2. That the policy of a neutralized canal is the historic policy of the United States.

3. That the Clayton-Bulwer Treaty, in stipulating for neutralization, excluded either Government from constructing and owning the canal, but permitted and required both Governments to protect it against all attacks.

4. That this treaty has been repeatedly and continually referred to and acted upon by the United States as a subsisting engagement, and has never in fact been declared to be at an end.

5. That, if the Clayton-Bulwer Treaty were abrogated, the situation would not be radically altered, since the neutralization of the canal is guaranteed by various other treaties.

6. That the Hay treaty, while adhering to the policy of neutralization, permits the United States to construct, own, and manage the canal, does away with all stipulations for joint intervention, and concedes to the United States alone the liberty to afford protection against lawlessness and disorder.

Into the military question, with which the argument against neutralization is for all practical purposes exclusively concerned, I have not attempted to enter. One view of it is well expressed in the reported statement of Admiral Dewey:

> Fortifications? Why, of course not. As I understand it, the canal is to be, and should be, a neutralized commercial pathway between the two great oceans. To fortify it would simply result in making it a

battle ground in case of war. Fortifications would be enormously expensive, and ought not to be erected. Our fleets will be a sufficient guaranty of the neutrality and safety of the canal in time of war, as well as in peace.

In opposition to this weighty opinion of the hero of Manila, it may be urged that circumstances may be conceived in which exclusive military control would, if attainable, constitute a great advantage. This view, however, may suggest the retort that circumstances may readily be conceived in which the assurance of an unobstructed passage would constitute as great an advantage; that, to argue from conceivable circumstances, is in effect to admit that the question is one of chance, and that, in such a predicament, considerations of another order, such as the security and preservation of the canal, the freedom of commerce and navigation, and that "decent respect to the opinions of mankind," of which the Declaration of Independence speaks, should prove decisive.

J. B. Moore.