

Note for students of Advanced International Law

Two treaties concerning the Panama Canal have been subject to somewhat different criticisms as regards their validity: the Convention for the Construction of a Ship Canal (Hay-Bunau-Varilla Treaty) (signed November 18, 1903); and a further treaty between the United States and Panama (1977).

This document deals with the 1903 treaty and the circumstances in which it was concluded. Read through this historical account and consider the provisions of the Vienna Convention on the Law of Treaties concerning validity. What arguments could be made for and against the validity of the 1903 treaty? What is at stake in interpretations of these provisions?

The 1977 instrument is discussed in the “Note on Invalidity of Treaties under Art. 46”, also included in the materials for this section of Unit 4 of Advanced International Law.

Panama Canal Treaty

By Andreas Lowenfeld

... The Panama Canal I naturally take special interest in, because I started it. If I had acted strictly according to precedent, I should have turned the whole matter over to Congress; in which case, Congress would be ably debating it at this moment, and the canal would be fifty years in the future. Fortunately, the crisis came at a period when I could act unhampered. Accordingly I took the Isthmus, started the canal, and then left Congress – not to debate the canal, but to debate me. And in portions of the public press the debate still goes on as to whether or not I acted properly in taking the canal. But while the debate goes on the canal does too; and they are welcome to debate me as long as they wish, provided that we can go on with the canal.

Theodore Roosevelt, March 23, 1911 (speech at the University of California)¹

The history of the 1903 Panama Canal Convention is rather more complicated than President Roosevelt suggests, and indeed some of the details are still in controversy. But the essential facts are reasonably clear.

The United States had cast a covetous eye on the Central American isthmus since early in the nineteenth century. In 1835, for example, the United States Senate urged the President to negotiate agreements with other nations for the protection of anyone building a transisthmian canal. In 1850, when both the United States and England thought that such waterway would soon be built, the two nations agreed in the Clayton-Bulwer Treaty that neither would exclusively control the canal and that both would safeguard its neutrality. Fifty-one years later, the United States and the United Kingdom replaced their earlier accord with the Hay-Pauncefote Treaty,

¹ Roosevelt, Charter Day Address 11; reprinted from 13 University of California Chronicle, No. 2, April 1911.

which provided that a transisthmian canal “shall be open to all vessels ... of all nations ... on terms of entire equality.”

Panama was a province (or department) of Colombia until November 1903. A French company, originally headed by Ferdinand de Lesseps – builder of the Suez Canal – obtained a concession in 1879 from Colombia to build a canal through the Isthmus of Panama. The company actually began digging the canal, but went bankrupt and stopped construction in 1888 after a financial scandal involving many prominent Frenchmen. The New Panama Canal Company, another French concern, succeeded to the concession agreement with Colombia at the same time that the United States began to take a serious interest in building an interoceanic canal. The principal United States representatives of the company were William Nelson Cromwell, a founder of the New York law firm of Sullivan & Cromwell, and Philippe Bunau-Varilla, a French engineer. Both lobbied actively for the United States to construct the canal in Panama. The alternate route under consideration would have followed the Nicaragua – Costa Rica border from the Atlantic coast to Lake Nicaragua and then on to the Pacific. In 1884 Secretary of State Blaine had negotiated a treaty with Nicaragua granting the United States the exclusive right to build a canal across Nicaragua and promising United States protection of Nicaragua’s territorial integrity. The United States Senate had rejected the treaty, but interest in the Nicaraguan route remained high.

In large part through the efforts of Cromwell and Bunau-Varilla, the United States decided on the Panama route. Congress adopted Senator Spooner’s proposal to purchase the New Panama Canal Company’s rights for \$40 million, to obtain the necessary rights for a canal from Colombia, and then to begin construction. An agreement was quickly concluded with the company, and discussions were begun with Colombia. After extended negotiations, the Hay-Herran Treaty was signed on January 27, 1903. Under that agreement the United States was to receive a 100-year lease of a 10-kilometer-wide zone through the Isthmus of Panama in exchange for a lump-sum payment of \$10 million and \$250,000 per year for the term of the lease. The United States Senate approved the treaty in March 1903. On August 12, however, the Colombian Congress rejected it. For the next three months Cromwell, Bunau-Varilla, and a group of Panamanian residents planned the secession of Panama from Colombia, with at least the tacit support of the United States government.

On October 19, 1903, United States warships were ordered to prevent Colombian troops from landing in the event of a revolt. And on November 3, Secretary of State Hay cabled the United States consul in Panama: “Uprising on Isthmus reported. Keep the Department fully informed.” The consul replied: “No uprising yet. Reported it will be in the night.”² The revolution did begin that night, and it was successful within a few hours. The Republic of Panama declared its independence on November 4 and the United States recognized the new nation two days later. By prearrangement, the Panamanian regime immediately appointed Bunau-Varilla, a Frenchman, as its representative in the United States to negotiate a canal treaty.

Secretary Hay offered to sign substantially the same treaty that had been signed with Colombia. But Bunau-Varilla rewrote the agreement extensively – in favor of the United States: (1) The Hay-Herran Treaty would have created a canal zone 10 kilometers wide; Bunau-Varilla’s draft provided for a zone 10 miles wide. (2) The Hay-Herran Treaty provided for 100-year concession,

² Morison, *The Oxford History of the American People* 825 (1935).

with options for renewal; the Bunau-Varilla draft contained a grant in perpetuity. (3) The Hay-Herran Treaty provided for three kinds of courts, Colombian, United States, and mixed; the Bunau-Varilla draft contained no such provision, on the theory that exclusive jurisdiction would rest in the United States. (4) The Hay-Herran Treaty contained an express statement that the rights and privileges granted to the United States did not affect the sovereignty of Colombia over the territory on which they were to be exercised; the Bunau-Varilla draft contained no comparable provision. Finally, the Bunau-Varilla draft provided that "The United States guarantees and will maintain the independence of the Republic of Panama." There was, of course, no comparable provision in the Hay-Herran Treaty.

Hay accepted Bunau-Varilla's amendments and the treaty was signed on November 18, two weeks after Panama's independence, five days after Bunau-Varilla's arrival in Washington, and just before a commission of Panamanians, sent by the Panamanian provisional government, was to arrive in Washington. That government, which owed its life both to the work of Bunau-Varilla and his associates and to the United States government, was in no position to reject the draft treaty. Accordingly, Panama ratified the convention on December 2, 1903, several months before it adopted its own constitution.

To head off possible revisions by the United States Senate, Secretary Hay wrote Senator Spooner that:

... As it stands now as soon as the Senate votes we shall have a treaty in the main very satisfactory, vastly advantageous to the United States, and we must confess, with what face we can muster, not so advantageous to Panama. If we amend the treaty and send it back there some time next month, the period of enthusiastic unanimity, which ... comes only once in the life of a revolution, will have passed away, and they will have entered on the new field of politics and dispute. You and I know too well how many points there are in this treaty to which a Panamanian patriot could object.

The Senate approved the convention without change. The French company then closed the sale of its rights to the United States government for \$40,000,000. Work then began on the canal and it was opened in 1914.

Expressions of Panamanian dissatisfaction with the 1903 convention arose soon after it was signed. In 1905, for example, Panama protested the extension of United States customs laws to the zone. It was not until 1936, however, that the convention was modified. Under the 1936 treaty, the United States guarantee of Panamanian independence was eliminated, the annual compensation paid to Panama was raised to \$430,000, to compensate for devaluation of the dollar, and several other changes in the relationship were made. In 1955, several further revisions were agreed on, including an increase to \$1,930,000 in the annual payments to Panama. And a number of secondary concessions, such as joint flag displays, were arranged in more recent years. But in its essential provisions, the 1903 convention remained intact until 1977.