

The 'New' Panama Canal: Present and Future (ARI)

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Theme: A Spanish company at the head of an international consortium has won the major part of the contract for the expansion of the Panama Canal. This analysis sums up the history, the present and the future plan of an oceanic corridor of prime importance in world politics and the world economy.

Summary: The connection between the Atlantic and the Pacific through the Central American Isthmus has played a major role in history. The pioneer efforts of the Spanish, the failure of the 'French Canal' promoted by Lesseps and the success of the US in the midst of a race towards world leadership are the milestones of an engineering masterpiece in a complex and not always praiseworthy social and political scenario. The great work was inaugurated in 1914 and since then it has upheld a position of international neutrality, surviving the creation of a new Republic, two world wars and a drastic change in its model of use and control. Its full sovereignty and territorial control by Panama since the Carter-Torrijos Treaties has set in motion an ambitious expansion process that will enable the inter-oceanic canal to maintain and even enhance its prominent role in the geopolitical and economic world of the 21st century.

Analysis: On 15 August 1914, the SS Ancón steamship completed the almost 84 km long crossing from Balboa on the Pacific coast from the Atlantic coast city of Colón. This was the official opening of the Panama Canal, an extraordinary feat of engineering with a controversial legal and political background. After so many efforts, with an extremely high price in terms of time, money and human lives, the international context made it impossible to celebrate the occasion as would have been appropriate. The reason was obvious: on 28 June the double murder in Sarajevo marked the start of the Great War, and it was just not the right time to adequately celebrate such a triumph of civilisation, marked by both grandeur and misery. If the deadlines are met, the expansion of the Canal will be completed in 2014, in time for its centenary celebration. It will not be easy, judging by the precedents. The enthralling story of success and failure is recounted brilliantly by the American historian David McCullough in an essential book, *The Path Between the Seas. The Creation of the Panama Canal (1870-1914)* (Simon & Schuster, New York, 1978).

The first inkling of the great project dates back to the early years of the discovery of the Americas. In 1508, King Ferdinand the Catholic agreed to send Juan Díaz de Solís and Vicente Yáñez Pinzón on an expedition to find a passage between the Atlantic and the Pacific oceans. In 1514, the military governor Pedrarias Dávila ordered the exploration of

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the area with the aim of identifying a natural site that would allow the two oceans to be connected, and once it was established that no such connexion existed, he began the construction of the *Camino Real* –the Royal Highway– by land. By virtue of a Royal Charter of 1534, the Emperor Charles V ordered that the cost of the project be studied in terms of money, men and time. The Spanish opened a path through the jungle with machetes along the *Camino de Cruces* ('Road of Crosses') or *Canal Seco* ('Dry Canal') for the transport by mule of goods and precious metals. The adventures of English privateers, Spanish settlers and natives in the region, always in violent conflict, are well known. The (scant) archaeological remains of Ancient Panama can still be seen, along with Portobelo and its beautiful bay and Fort San Lorenzo, that dominates the mouth of the Chagres River.

Polytechnic mindsets, positivism, the idea of progress and, of course, the Gold Rush in California are just some of the factors that gave rise to the ultimate impetus that would set the project in motion in the 19th century. While US lobbies were busy fighting over the conflicting options of Nicaragua and Panama in Washington, the French gained the concession from the Colombian government. Ferdinand de Lesseps took the helm of an ambitious project that aimed to emulate the great feat of the Suez Canal, which was opened in 1869. However, the project was a complete failure, due to mistaken technical calculations, which once combined with effective solutions would ultimately prove to be extremely useful in the future. Deplorable financial management led to the bankruptcy of the *Compagnie Universelle du Canal Interocéanique*, unleashing a national scandal that jeopardised the institutions of the French Third Republic and damaged the reputations of god-like personages including Gustave Eiffel, George Clemenceau and Lesseps himself, along with his son. Worst of all was the lost battle against the tropical rainforest, malaria and yellow fever, which took thousands of lives. Ultimately, a death toll ranging from 6,000 to 20,000 would bear witness to the organisational disaster.

Seven years of fruitless efforts provided the opportunity for the final drive by the US. Thus, Theodore Roosevelt would proclaim, 'I am going to make the dirt fly', at the height of the Manifest Destiny campaign, which was fuelled by the theories of US Navy Captain Alfred Thayer Mahan, in *The Influence of Sea Power Upon History* (Little, Brown & Co., Boston, 1890). The leadership and efficiency of military engineers such as George W. Goethals and doctors including William C. Gorgas were decisively supported by a booming era of financial capitalism. The technical and medical feats were matched in the international legal aspect by the emergence of a new state: in 1903 the Republic of Panama proclaimed its independence from Colombia. The Treaty of 18 November 1903, signed by John Hay (US Secretary of State) and the French engineer Philippe Bunau-Varilla (acting as plenipotentiary of the newly-formed State), laid the foundation for the Canal Zone, which was created for the construction and operation of the canal. The US was to purchase 1432 km² (712 km² of which were water), some 7 km inland on each shore of the Canal and some strategic islands in the Gulf of Panama. This time, neither jungle, heat nor mosquitoes could hold back the political and economic might of a great power in search of its place under the sun. In 1855, the Americans had already built the world's first transcontinental railway, through the *Panama Railroad Company*, which today is no more than a simple and pleasant trip for tourists. They were frenzied years on the isthmus, with a vast array of different people: heroic patriots, bandits, cheap labour and financial 'sharks', among others. The result was spectacular: in a matter of eight hours (or almost 24, if requisite formalities are included), vessels of all kinds and in all conditions could cross the three current locks of Miraflores, Pedro Miguel and Gatún, sail along the

Gaillard Cut and silently navigate through the largest artificial lake in the world, with the jungle by their side.

To all intents and purposes, the Canal Zone was considered US territory, subject to the laws of the Commonwealth of Virginia. An interesting case arose relatively recently. The Constitution of 1787 (Article II, Section I, Paragraph V) sets forth the condition for being a natural born citizen as a requirement to run for President of the US. According to the established interpretation, original nationality is attained by virtue of *ius soli* (right of soil). The possible reform of this rule has been debated with varying degrees of emphasis in relation to Henry Kissinger and the current Governor of California, Arnold Schwarzenegger. The last presidential election could potentially have led to a quandary, although Barack Obama's resounding victory over John McCain set the matter to rest. The Republican candidate had been born on 29 August 1936 at the Coco Solo Air Base, in the Canal Zone, where his father was based as a US naval officer. Though there were no precedents, the jurists consulted were all of the same opinion, making things very clear: McCain is a natural born citizen by virtue of the laws in force in that territory at the time of his birth. The legal system of the Canal Zone has served hundreds of classic internationalists by helping them justify a distinction that is not always precise between sovereignty and territorial supremacy, through the analogy of the institutions of ownership and possession in Civil Law, respectively. Thus, Panama exercised sovereignty, and the US, supremacy, as Alfred Verdross writes in *Völkerrecht* (Springer Verlag, Vienna, 1964; *Derecho Internacional Público*, Spanish translation by Antonio Truyol, Aguilar, Madrid, 1976, p. 247). This doctrine was supported by both Panamanian legislation on the air space of the Canal Zone and by a singular principle of the Hay-Bunau Varilla Treaty, Article 24, which sets forth that the territorial rights of the US over the Zone would not be affected by a possible union of the Republic of Panama with other states.

In any case, the foundational treaty granted the US, in perpetuity, the monopoly for the construction, the assignment of use and the jurisdictional and military control of the Zone, as well as the option of establishing military bases –an important difference in relation to the Suez Canal–. In exchange, Washington would undertake to safeguard the independence of Panama (the finer points of which were revised in subsequent reforms) and to pay an annual fee. Successive revisions of the text, in 1936 and 1955, partially toned down certain clauses by extending the presence of the Panamanian authorities and reducing the privileges of US citizens. Tensions heightened in the 1960s, with serious incidents that caused deaths and injuries in 1964 and led to the severing of diplomatic relations. The situation was taken in hand under the auspices of the Organisation of American States (OAS), through the Moreno-Bunker agreement, the main precedent of a long series of negotiations that concluded with the Carter-Torrijos Treaties of 7 December 1977. In sum, the Canal's technical and economic success was unable to conceal the social and political reality of the time: the State of Panama –and thus the continent itself– was physically divided by the Zone. The physical separation was rectified in 1962, however, by the opening of the spectacular Bridge of the Americas, a structure of more than 100 metres in height and almost 2 km in length built by the US.

The first of the Treaties of 1977 repealed the previous system and acknowledged the Republic of Panama's sovereignty and jurisdiction over the Zone, provisionally assigning the Canal's management to a US public agency. The concession finally expired on 31 December 1999. From that date, the Panama Canal Authority (a government agency of the sovereign state of Panama, regulated in Title XVI of the National Constitution) has been responsible for the Canal's management and administration, and has been

efficiently fulfilling its tasks in all respects. The second Treaty re-confirms the Canal's international status, which had been established in its day in keeping with the Suez Canal model. According to Article 3 of the former Hay-Pauncefote Treaty of 18 November 1901, the Canal must remain open on equal terms to the warships and merchants vessels of all nations. This is a typical example of a clause for third parties in a bilateral treaty that does not contemplate their possibility of joining, and clauses of this type can be found in many manuals of International Law. Here, it is important to recall the context: the US took advantage of the period of British weakness in the midst of the 2nd Boer War, leading the supreme maritime power to legally acknowledge Washington's monopoly over the Canal's use and operation. Going back to 1977, the treaty signed by the US and Panama reaffirms the permanent neutrality of this 'international waterway' and reiterates the equality of use for the vessels of every nation in times of peace and war, and now includes a protocol that allows third parties to join, which Spain did on 13 April 1981 (*Boletín Oficial del Estado*, 26 May). It is true that precedents are confusing. During both World Wars passage remained open, but with certain fine distinctions: in WWI, by an express declaration of President Wilson on 13 November 1914, yet in practice under strict military control, as occurred in WWII by a declaration of President Roosevelt of 5 September 1939. This, however, was no obstacle to various restrictions, including mined accesses, passage only during the daytime and strict control over the movement of ships. Nevertheless, times have indeed changed: on 5 December 2008 the anti-submarine ship *Admiral Chabanenko* made the first passage of a Russian warship in the Canal's history, as part of a six-day visit to the country.

The future starts now. Some 17,000 ships cross the Canal each year, carrying approximately 4.1 million containers, with free passage 24 hours a day, every day of the year. According to data from the *Anuario Iberoamericano 2009* (Real Instituto Elcano & Agencia Efe, Ed. Pirámide, Madrid, 2009, p. 413), on 24 October 2008 the Canal hit a highly significant record, for the first time exceeding US\$2 billion in toll revenues for the fiscal year ended 30 September, showing a 14% increase over the previous year. It must be borne in mind that at the moment only *Panamax vessels* (with a length of 267 metres and a beam of 28 metres) can use the waterway. The enlargement envisages doubling the capacity of the passageway, which today accounts for 5% of world trade, with the aim of reaching a capacity of 330 million tonnes through the new giants, which are known today as *post-Panamax vessels*. Here are some important facts relating to what today is considered to be the world's most important engineering work: with an envisaged use of 230,000 tonnes of steel, 800,000 tonnes of cement and 42,000 tonnes of structural steel, the work will generate 7,500 direct jobs and some 40,000 indirect jobs. The key resides in the construction of two three-story lock facilities, each with three immense water re-utilisation basins per level. The project includes the widening and deepening of the navigation canals of Gatún Lake and of the entrances to both oceans, as well as the deepening of the Gaillard Cut. To connect this section with the Pacific locks, a new channel envisaged to measure over 6 km long will be dry excavated. All of the information on the technical data and the contract process is updated –with some delay– on the official website of the Panama Canal Authority (<http://www.pancanal.com>).

The expansion project was approved by the referendum promoted by President Martín Torrijos Espino, on 22 October 2006, with a 78% vote in favour. Now the responsibility for the project is in the hands of President Ricardo Martinelli, leader of the centre-right Democratic Change Party (CD), who took office on 1 July after clearly out-voting his rival (60.11% vs 37.54%) the social-democrat Balbina Herrera, of the Revolutionary Democratic Party (PRD). Moreover, the President's term in office ends in 2014, coinciding

with the existing Canal's centenary. This is also the year that marks the theoretical end of the envisaged expansion works, that are financially backed by large institutions, including the European Investment Bank, the Japanese Bank of Cooperation and a number of US-based institutions.

Five centuries later, Spain is once again a major player in the Central American Isthmus, this time through the construction companies that are successfully competing for the contract. After a technically and legally impeccable procedure, Sacyr was awarded the contract for the main work pertaining to the construction of the new locks, as officially announced in July. At the head of the 'United for the Canal' consortium –made up of Italy's Impregilo, Belgium's Jan de Nul and Panama's Constructora Urbana, among others–, the company directed by Luis del Rivero has beaten another Spanish consortium (ACS, Acciona and FCC, in addition to foreign partners) and the US company Bechtel, whilst France's Bouygues withdrew before confirming its participation. Sacyr's economic offer was unbeatable: its tender amounted to US\$3.12 billion (approximately €2.24 billion), whilst the authorities had set the target price at US\$3.48 billion and its competitors proposed far higher estimates. Thus, a new and exciting era for Spanish and Panamanian financial cooperation is beginning. A symbol is already there: on the shores of Gatún Lake, the old School of the Americas was a place of learning for more than one Latin American dictator during the Canal Zone period. Today it is a luxury hotel managed by the Meliá chain, located in an outstanding backdrop with excellent access to Fort San Lorenzo, Portobelo and many other places that preserve the memory of a tradition that is now half a millennium old.

Conclusions: Among other factors, the global era carries with it an evidently major role for the Pacific in the international society of our time. In this context, the Panama Canal expansion project is opening up essential opportunities in the political and economic arena. Now underway, the project's completion is envisaged for 2014 to coincide with its centenary. Spanish companies are at the forefront of this colossal project. From this position, it is vital to fully develop the instruments for cooperation between the two countries in a particularly important realm for the community of Hispanic nations. To optimise this unique opportunity as much as possible, it will be necessary to:

- (1) Uphold current levels of transparency and objectivity in the legal, economic and technological processes involved in this major project, in strict compliance with conditions and due dates.
- (2) Work more intensively on the development of the principles of constitutional democracy and the Rule of Law for the rigorous application of the Canal's current favourable legal system, both in the realm of International Law and in domestic Panamanian legislation.

The expectations awakened by the 'new' Panama Canal require a unique effort from the main political and entrepreneurial actors to forge ahead in a process that is so far being conducted in an exemplary fashion.

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