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## Recent Development--Panama Canal Treaties

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# RECENT DEVELOPMENT

## PANAMA CANAL TREATIES—TREATIES RECOGNIZING PANAMANIAN SOVEREIGNTY OVER THE CANAL AND DECLARING THE CANAL PERMANENTLY NEUTRAL

### I. HISTORICAL BACKGROUND

The new draft Panama Canal Treaties signed by President Carter and General Omar Torrijos on September 7, 1977, are the culmination of a major effort by both parties to resolve long-standing disputes over the Canal. The trans-isthmian Canal has been a major concern of United States foreign policy since the Clayton-Bulwer Treaty of 1850,<sup>1</sup> which provided that neither the United States nor England would take sole control over any such canal. This bar was removed in 1901 by the Hay-Pauncefote Treaty,<sup>2</sup> and soon afterwards the United States began negotiations with Columbia for construction of a canal. After the breakdown of these negotiations in 1903, the United States indicated it would not oppose a Panamanian revolution against Columbia.<sup>3</sup> In November 1903 a representative of the new Panamanian government signed the Hay-Bunau Varilla Treaty.<sup>4</sup> Under this Treaty, Panama granted the United States "in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said Canal . . . ."<sup>5</sup> Panama also granted "all the rights, power and authority within the zone . . . which the United States would exercise if it were the sovereign . . . ."<sup>6</sup> Although these perpetuity and sovereignty clauses have been read as a cession of Panamanian sovereignty over the Canal Zone,<sup>7</sup> Panama has always contested this

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1. April 19, 1850, 9 Stat. 995, T.S. No. 122.

2. Nov. 18, 1901, 32 Stat. 1903, T.S. No. 401.

3. ABA SUBCOMM. ON INT'L WATERWAYS, INTERNATIONAL RIGHTS OF PASSAGE UNDER A NEW PANAMA CANAL TREATY, 20-22 (1975) [hereinafter cited as *ABA Report*].

4. Convention with Panama for the Construction of a Ship Canal to Connect the Waters of the Atlantic and Pacific Oceans, Nov. 18, 1903, 33 Stat. 2234, T.S. No. 431 [hereinafter cited as *Hay-Bunau Varilla Treaty*].

5. *Id.* art. 2.

6. *Id.* art. 3.

7. For the Panamanian view that sovereignty was not ceded, see Guevara, *Negotiating a Peaceful Solution to the Panama Canal*, 9 N.Y.U.J. INT'L L. & POL. 3 (1976). For an examination of the imprecise way in which Canal Zone jurisdiction under the Treaty has been handled in United States courts, see Shay, *The*

reading of the Treaty and has attempted, unsuccessfully, to modify those clauses.<sup>8</sup> The failure to accomplish such modification has been cited as a chief cause of the riots in the Zone in 1964.<sup>9</sup> These disturbances, however, did lead to renewed treaty negotiations between the United States and Panama. A proposed draft treaty was initialed on June 26, 1967,<sup>10</sup> but it soon met with heavy opposition in both countries.<sup>11</sup> Panama objected to the retention of the perpetuity clause and the failure to commit all disputes to an impartial tribunal.<sup>12</sup> The United States Congress objected to the creation of an unwieldy "joint administrative body" to run the Canal and to the provision that the Canal would be turned over to Panama by the year 2000.<sup>13</sup> The failure to reach an agreement led to a coup in Panama on October 11, 1968. General Omar Torrijos emerged as the new head of state,<sup>14</sup> and both parties to the Treaty began new efforts to reach an agreement. On February 7, 1974, a Joint Statement of negotiating principles was signed.<sup>15</sup> These prin-

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*Panama Canal Zone: In Search of a Juridical Identity*, 9 N.Y.U.J. INT'L L. & POL. 15 (1976).

8. *E.g.*, Treaty with Panama on Friendship and Cooperation, Mar. 2, 1936, 53 Stat. 1807, T.S. No. 945. Under this treaty, the parties agreed that any response to threats against the Canal's neutrality or security would be subject to consultation between them.

9. STAFF OF HOUSE COMM. ON THE MERCHANT MARINE AND FISHERIES, REPORT ON PROBLEMS CONCERNING THE PANAMA CANAL, 91st Cong., 2d Sess. 4 (Comm. Print 1970) [hereinafter cited as *House Report*].

10. Treaty on the Defense of the Panama Canal and of Its Neutrality, initialed June 26, 1967, reprinted in HOUSE REPORT, *supra* note 9, app. 6.

11. HOUSE REPORT, *supra* note 9, at 4.

12. [T]he greatest cause, the constant cause [of friction with the United States over the treaties is] . . . the invariable conduct of the Government of the United States of America of interpreting the clauses of the existing treaties in the manner most convenient to their interests . . . .

. . . . This unilateral decision by the United States would subsist [sic] if the [1967 draft treaty] . . . were signed, since in the few instances in which possible arbitrations are foreseen, these deal with matters of a secondary order but not related to the defense of the sovereignty and dignity of the Republic.

*La Estrella de Panama*, Sept. 5, 1970, reprinted in *id.* at 90, 95. For a discussion of additional objections to the proposed draft treaty, see *id.* at 9-10.

13. HOUSE REPORT, *supra* note 9 at 19-20.

14. *Id.* at 4-5.

15. Joint Statement by the Honorable Henry A. Kissinger, Secretary of State of the United States of America, and His Excellency Juan Antonio Tack, Minister of Foreign Affairs of the Republic of Panama, on February 7, 1974 at Panama, 70 DEP'T STATE BULL. 184 (1974) [hereinafter cited as Joint Statement]. See also 7 VAND. J. TRANSNAT'L L. 744 (1974).

ciples called for the abrogation of the 1903 Hay-Bunau Varilla Treaty, the recognition of Panamanian sovereignty over the Zone, and the termination of the new treaty at a date to be fixed by its own terms. These principles were carried over into the new draft Panama Canal Treaties, which allow the United States to withdraw gradually from Panama without entirely giving up its strategic interest in the Canal.<sup>16</sup>

## II. DRAFT TREATY TERMS

Article I of the Canal Treaty explicitly declares the abrogation of the Hay-Bunau Varilla Treaty and all other United States-Panamanian agreements relating to the Panama Canal.<sup>17</sup> It further states that "Panama, as territorial sovereign, grants to the United States of America, for the duration of this treaty, the rights necessary to regulate the transit of ships through the Panama Canal, and to manage, operate, maintain, improve, protect and defend the Canal."<sup>18</sup> By these terms, the United States clearly abandons any claim to ultimate sovereignty over the Canal and instead accepts a grant of limited rights for limited purposes. The Treaty will come into force simultaneously with the Neutrality Treaty,<sup>19</sup> and will expire by its own terms on December 31, 1999.<sup>20</sup> While the Canal Treaty remains in force, the United States under article IV retains the "primary responsibility to protect and defend the canal." The operation and management of the Canal will be entrusted to a new United States government agency, the Panama Canal Commission, which will operate the Canal in accordance with rules laid down in article III. The Commission will be supervised by a joint board consisting of five American and four Panamanian nationals.<sup>21</sup> The Commission is required under article XIII of the Treaty to pay compensation to Panama for the use of the Canal at the rate of \$.30 U.S. per Panama Canal net ton, for

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16. Panama ratified the Treaties by a two to one margin in a plebiscite conducted on October 24, 1977, and the Treaties are currently being considered by the United States Senate Foreign Relations Committee. Panama Canal Treaty, Sept. 7, 1977, United States-Panama, reprinted in U.S. DEP'T OF STATE, SELECTED DOCUMENTS No. 6, at 1 (Sept. 1977); Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, Sept. 7, 1977, United States-Panama, reprinted in U.S. DEP'T OF STATE, SELECTED DOCUMENTS No. 6, at 13 (Sept. 1977).

17. Canal Treaty, *supra* note 16, art. 1.

18. *Id.* art. 1, para. 2.

19. *Id.* art. 2, para. 1.

20. *Id.* art. 2, para. 2.

21. *Id.* art. 3, para. 3.

each ship which passes through the Canal.<sup>22</sup> Although the Commission will replace the present Panama Canal Company and Canal Zone Government, it will have less power and authority than its predecessors. For example, municipal services such as fire and police protection in the Zone will be provided by Panama.<sup>23</sup> Furthermore, Panama will exercise territorial jurisdiction over the former Zone by providing courts, postal services, and customs controls.<sup>24</sup> The United States will no longer exercise sovereign jurisdiction.<sup>25</sup> Qualifications on Panamanian jurisdiction are set out in articles VIII and IX. Article VIII grants immunity to United States government agencies acting pursuant to the Treaty and allows the United States to designate up to twenty members of the Canal Commission who shall be accorded diplomatic immunity.<sup>26</sup> Article IX provides that Panama shall recognize the property rights of natural or juridical persons in real property in the Zone "as recognized by the United States."<sup>27</sup> Under the same article Panama undertakes not to issue, adopt, or enforce any law or international agreement which would interfere with the United States exercise of rights granted under the Treaty.<sup>28</sup> Article XI provides for a thirty-month transition period during which the United States would continue to maintain police protection and exercise criminal jurisdiction.<sup>29</sup> Article XII commits the parties to study the feasibility of constructing a new sea-level canal or a third lane of locks.<sup>30</sup> Finally, article XIV addresses the settlement of disputes arising under the Treaty. It refers back to the various consultative bodies established under previous articles and stipulates that the parties may resolve disputes through diplomatic channels or through arbitration.<sup>31</sup> In the Neutrality Treaty,<sup>32</sup> the United States and Panama declare the Canal to be permanently neutral in order that "both in time of peace and in time of war it shall remain secure

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22. *Id.* art. 13, para. 4.

23. *Id.* art. 3, para. 5.

24. *Id.* art. 3, para. 6.

25. A symbolic indication of the change in Canal Zone status under the new Treaty is the provision that the Panamanian flag will occupy the place of honor at all times and in all places within Panama, whereas the United States flag will only be flown at specified times and places. Canal Treaty, *supra* note 16, art. 7.

26. *Id.* art. 8, para. 2.

27. *Id.* art. 9, para. 3.

28. *Id.* art. 9, para. 2.

29. *Id.* art. 11, paras. 2, 3, 4.

30. *Id.* art. 12.

31. *Id.* art. 14.

32. Neutrality Treaty, *supra* note 16.

and open to peaceful transit by the vessels of all nations on terms of entire equality."<sup>33</sup> The technical rules governing passage under the neutral regime are set out in article III. The United States role in Canal defense is restricted by article V which states that upon termination of the Canal Treaty in 1999 only Panama will maintain a military presence in the Canal.<sup>34</sup> Continuing United States interest in the Canal is defined by article IV in which both parties "agree to maintain the regime of neutrality."<sup>35</sup> This clause purportedly gives the United States a permanent right to defend the Canal when its neutrality is threatened. The Protocol to the Neutrality Treaty provides that the signatories recognize the Canal's permanent neutrality and agree to observe the rules governing Canal use.<sup>36</sup> The Protocol will be opened to accession by all nations by means of a joint United States-Panama resolution in the Organization of American States, pursuant to article VII of the Neutrality Treaty.<sup>37</sup>

### III. COMMENT

The most controversial aspect of the Panama Canal Treaties is the issue of Canal neutrality and the United States right to intervene. The claim that the United States has the right to defend the Canal under the Neutrality Treaty is based upon article IV: "The United States of America and the Republic of Panama agree to maintain the regime of neutrality established in this Treaty, which shall be maintained in order that the Canal shall remain permanently neutral, notwithstanding the termination of any other treaties entered into by the two Contracting Parties."<sup>38</sup> Since the maintenance of Canal neutrality in the face of a military threat might well require a military presence in the Canal area, and since the Canal is Panamanian territory, the right of the United States to maintain neutrality is in this context indistinguishable from a right to intervene. The claim that the United States has such a right under the Treaty is equivalent to a claim that the Republic of Panama has consented to a restriction on her territorial sover-

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33. *Id.* art. 2.

34. *Id.* art. 5.

35. *Id.* art. 4.

36. Protocol to Treaty Concerning the Permanent Neutrality and Operation of The Panama Canal, arts. I, II, September 7, 1977, N.Y. Times, Sept. 7, 1977, at A17, col. 5 [hereinafter cited as Protocol to Neutrality Treaty].

37. *Id.* art. 3 at A17, col. 6; Neutrality Treaty, *supra* note 16, art. 7.

38. Neutrality Treaty, *supra* note 16, art. 4.

eignty. Since "[r]estrictions upon the independence of states cannot . . . be presumed,"<sup>39</sup> and since this particular restriction permits unilateral intervention by another state, the proponents of the interpretation that Panama has consented to such a restriction must bear a heavy burden of persuasion.<sup>40</sup> Article IV on its face is incapable of supporting such a burden, especially when it is compared with the intervention provisions of other treaties. For example, the Russia-Persia Treaty of Friendship of 1921 provides:

If a third party should attempt to carry out . . . armed intervention in Persia, . . . and if the Persian government should not be able to put a stop to such menace after having been once called upon to do so by Russia, Russia shall have the right to advance her troops in the Persian interior for the purpose of carrying out operations necessary for its defense.<sup>41</sup>

The Cyprus Treaty of Guarantee provides:

In so far as common and concerted action may not be possible [in maintaining the security and neutrality of Cyprus], each of the three guaranteeing powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty.<sup>42</sup>

The Anglo-Egyptian Agreement Regarding the Suez Canal Base provides: "In the event of an armed attack by an outside power [on Egypt] Egypt shall afford to the United Kingdom such facilities as may be necessary in order to place the base on a war footing and operate it effectively."<sup>43</sup> The Neutrality Treaty is much less

39. S.S. Lotus, [1927] P.C.I.J., Ser. A, No. 9, at 18. See also 1 L. OPPENHEIM INTERNATIONAL LAW 257 (H. LAUTERPACHT ed. 1948) (1948).

40. ". . . the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State." *Id.* at 18.

41. Treaty of Friendship, Feb. 26, 1921, Russia-Persia, art. 6, 9 L.N.T.S. 383, 403. The Treaty was renewed in 1927. In 1958 and 1959 the Soviet Union made public statements re-affirming its validity, but Iran objected on the basis of changed circumstances. F. DE LIMA, INTERVENTION IN INTERNATIONAL LAW, 110-11 (1971).

42. Treaty of Guarantee, Aug. 16, 1960, Greece, Turkey, Great Britain-Cyprus, 382 U.N.T.S. 3, [1961] Gr. Brit. T.S. No. 5 (Cmd. 1253). During the 1963 civil war between Greek and Turkish ethnic groups, two of the signatories, Greece and Turkey, threatened to intervene. Before any such intervention occurred, the third signatory, the United Kingdom, put the issue before the United Nations. F. DE LIMA, *supra* note 41, at 113.

43. Agreement Regarding the Suez Canal Base, Oct. 19, 1954, Great Britain-Egypt, 225 U.N.T.S. 292, [1955] Gr. Brit. T.S. No. 67 (Cmd. 9586). In conse-

specific. Under the Neutrality Treaty the United States neither "reserves the right"<sup>44</sup> nor "shall have the right"<sup>45</sup> of intervention. It merely agrees "to maintain the regime of neutrality."<sup>46</sup> Such language is at best ambiguous. In determining the meaning of ambiguous treaty terms, international tribunals generally look to the preamble, other terms of the same document, and the terms of related documents.<sup>47</sup> The Neutrality Treaty has no preamble but reference can be made to the Canal Treaty preamble, which states that the parties came to their agreement "[a]cting in the spirit" of the 1974 Joint Statement and "[a]cknowledging the Republic of Panama's sovereignty over its territory . . . ."<sup>48</sup> Since the Joint Statement stipulates, and the preamble acknowledges, Panamanian sovereignty over the Canal, it is hard to find any support in the preamble for the proposition that the parties intended to limit that sovereignty by granting a right of intervention. Furthermore, the article V provision that only Panama will maintain a military presence in the Canal after the year 1999<sup>49</sup> suggests otherwise.

Although the United States has no basis for a right of intervention assertion under the textual, or objective, analysis, the prevailing international practice is to take a more subjective or "intent of the parties" approach.<sup>50</sup> Using this approach it is appropriate to look to the *travaux préparatoires* when textual analysis fails to resolve an ambiguity.<sup>51</sup> Part of the *travaux préparatoires* of the Neutrality Treaty is the previously rejected 1967 draft, which provided that the United States "shall have the right to act to ensure

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quence of the Anglo-French intervention in 1956, Egypt denounced the Agreement in 1957. F. DE LIMA, *supra* note 41, at 112.

44. Treaty of Friendship, *supra* note 41.

45. Treaty of Guarantee, *supra* note 42.

46. Neutrality Treaty, *supra* note 16, art. 4.

47. See South West Africa Cases, [1966] I.C.J. 6, 15, 23; Advisory Opinion on Convention Concerning Employment of Women During the Night, [1932] P.C.I.J., ser. A/B, No. 50, at 373; Advisory Opinion on Competence of the International Labour Organisation, [1926] P.C.I.J., ser. B, No. 13, at 14-17.

48. Joint Statement, *supra* note 15 (emphasis added).

49. Neutrality Treaty, *supra* note 16, art. 5.

50. This approach is codified in the Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, U.N. Doc. A/CONF. 39/27 (1969). The United States signed on April 24, 1970, but the Senate has not given its advice and consent.

51. I. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 71 (1973). See also Advisory Opinion on Convention Concerning Employment of Women During the Night, [1932] P.C.I.J., ser. A/B, No. 50, at 383-88 (Anzilotti, J. dissenting); South West Africa Cases, [1966] I.C.J. 6, 20, 45.

Canal Defense.”<sup>52</sup> Only actions affecting areas “outside the Defense Areas” were to be subject to consultation.<sup>53</sup> The rejection of the draft treaty by Panama on the grounds that it gave the United States a right to intervene<sup>54</sup> argues against any inference that the parties intended to establish such a right in the present Treaty. Nor does the Joint Statement of 1974 support any such inference. The Joint Statement provision that “Panama shall grant to the United States the rights necessary to . . . protect and defend the Canal” has reference to a treaty which is to have a “fixed termination date.”<sup>55</sup> The Panama Canal Treaty has a “protect and defend” provision and a fixed termination date;<sup>56</sup> the Neutrality Treaty has neither. Thus the intent to grant defense rights applies only to the Canal Treaty and not the Neutrality Treaty. A statement which does apply to the Neutrality Treaty was made by President Carter and General Torrijos on October 15, 1977, in Washington, D.C.<sup>57</sup> The probative weight of the statement is subject to some question since it was not signed, an official joint text was not released, and it was made after the Treaty had been signed.<sup>58</sup> Furthermore, it does not provide an answer because the statement itself is ambiguous. It states that the United States has “the right to act against any aggression or threat directed against the Canal . . .,” but it also asserts that such right “does not mean, nor shall it be interpreted as a right of intervention of the United States in the internal affairs of Panama. Any United States action will be directed at insuring that the Canal will remain open . . . , and it shall never be directed against the territorial integrity or political independence of Panama.”<sup>59</sup> The statement seems to limit the United States to actions necessary to the defense of the Canal short of intervention in Panama’s internal affairs. The problem with this distinction is that the class of actions “directed at insuring that the Canal remain open” overlaps the class of actions which infringe upon the

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52. Treaty on the Defense of the Panama Canal and of its Neutrality, art. 2, § 1, reprinted in HOUSE REPORT, *supra* note 9, app. 6.

53. *Id.* art. 2, § 2.

54. HOUSE REPORT, *supra* note 9, app. 9.

55. Joint Statement, *supra* note 15, arts. 2, 6.

56. Canal Treaty, *supra* note 16, art. 4, § 2, art. 2, § 2.

57. Statement by President Carter of the United States and General Omar Torrijos of the Republic of Panama, N.Y. Times, October 15, 1977, at 8 [hereinafter cited as Carter-Torrijos Statement].

58. *Cf.* Joint Statement, *supra* note 15, which was signed by Henry Kissinger and Juan Antonio Tack.

59. Carter-Torrijos Statement, *supra* note 57.

“territorial integrity or political independence” of Panama. Effective military defense of the Canal may well require action within Panamanian territory; however, such action would be a *prima facie* violation of Panama’s territorial integrity. Various arguments can be made that a short term intervention for limited purposes would not violate territorial integrity. First, without an intent on the part of the United States to permanently annex the territory, the distinction could be drawn between territorial integrity, which is not violated by intervention, and territorial inviolability, which is.<sup>60</sup> Since, *arguendo*, states have no right to territorial inviolability to begin with,<sup>61</sup> there is no contradiction in saying the United States can intervene but may not violate Panama’s territorial integrity. The reply to this argument is that under the United Nations Charter, to which both Panama and the United States are parties, territorial integrity is synonymous with territorial inviolability, except in cases of self-defense and enforcement of Charter provisions. The terms must be synonyms, or there would have been no purpose to coupling “political independence” to “territorial integrity” under the article 2 prohibition against the use of force.<sup>62</sup> Since United States intervention to defend the Canal would not be an exercise of self-defense or enforcement of Charter provisions, such action would be a violation of Panama’s territorial integrity. Second, even if the distinction between inviolability and integrity could be maintained, it would still be subject to the objection that insofar as it requires an analysis of intent, it is judicially unworkable. Finally, the argument that the Neutrality Treaty gives the United States a right of intervention is based on the premise that treaties must be interpreted so as to give effect to their underlying purposes. Since the underlying purpose of the Neutrality Treaty is the preservation of Canal neutrality, and since arguably that purpose can only be achieved if the United States has a right of intervention, the Treaty must have granted that right. Even if the premises are admitted, however, the conclusion cannot be supported. International tribunals are cautious in implying legal rights from general treaty purposes. In the *South West Africa Cases*,<sup>63</sup> Ethiopia and Liberia brought suit against the Union of South Africa for alleged violation of the League of Nations Mandate for South West Africa. The plaintiffs argued that the provi-

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60. D. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW*, 31, 33-34 (1958).

61. *Id.* at 31.

62. U.N. CHARTER, art. 2, para. 4; 2 L. OPPENHEIM, *supra* note 39, at 154 (1948).

63. *South West Africa Cases*, [1966] I.C.J. 6.

sions of the Mandate should not become ineffective by reason of the League's dissolution but should be given continuing effect through members of the United Nations. The argument that plaintiffs, as members of the United Nations, should have a legal right of action against South Africa was rejected by the International Court of Justice. The Court stated that to imply a right of action would "exceed the bounds of normal judicial action."<sup>64</sup> If a right of action cannot be implied, certainly the right of intervention cannot be implied.<sup>65</sup> The same flaw can be found in the argument that the United States, as a user of an inter-oceanic waterway dedicated to international use, shares with all other user states an interest in the waterway and therefore may act on behalf of all in protecting that shared interest through intervention.<sup>66</sup> This argument attempts to convert an interest into a right without an adequate legal premise. At present, no such right exists in international law.<sup>67</sup> The right which does exist for users of inter-oceanic waterways dedicated to international use is the right of free passage,<sup>68</sup> which is not the same as a right of intervention. Thus, while an attempt to force passage through the Canal contrary to Panama's wishes would be legal, an attempt to seize the Canal in order to defend it would not.

The assumption underlying both sides of the intervention argument is that the meaning of neutrality as applied to the Canal is clear. Historically, canal neutrality has meant that when the canal sovereign<sup>69</sup> is neutral, the sovereign does not interfere with free passage.<sup>70</sup> When the canal sovereign is belligerent, however, neutral canals have, without exception, been closed to enemy ships,

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64. "[T]he Court cannot remedy a deficiency if, in order to do so, it has to exceed the bounds of normal judicial action." *Id.* at 48.

65. "In the international field, the existence of obligations that cannot in the last resort be enforced by any legal process, has always been the rule rather than the exception . . ." *Id.* at 45. Pre-Treaty proposals for neutrality enforcement mechanisms are found in ABA REPORT, *supra* note 3, at 88-94, and in R. BAXTER, *THE LAW OF INTERNATIONAL WATERWAYS* 314 (1964).

66. Hints at an analogous argument were made by the United Kingdom during the 1956 Suez crisis, F. DE LIMA, *supra* note 41, at 91.

67. The argument "amounts to a plea that the Court should allow the equivalent of an 'actio popularis,' or right resident in any member of a community to take legal action in vindication of a public interest . . . a right of this kind . . . is not known to international law as it stands at present." [1966] I.C.J. at 47.

68. R. BAXTER, *supra* note 65, at 182-84 (1964).

69. Or the power acting as "if it were the sovereign," as is the case with the Panama Canal under the Hay-Bunau Varilla Treaty, *supra* note 4.

70. ABA REPORT, *supra* note 3, at 70.

notwithstanding treaty clauses to the contrary.<sup>71</sup> If historical practice is the basis for the legal definition as well as the practical meaning of canal neutrality provisions, Panama has the right under the Treaty to close the Canal to her enemies in wartime. If the legal definition of neutrality is taken to be consistent with the literal terms of the Treaty, Panama has no right to close the Canal to ships of any state at any time. Regardless of the definition used, however, it is clear that the United States alone will have no right to close the Canal under the Treaty. This conclusion must stand even if a right of intervention under the Treaty is admitted, since such a right can only be exercised to preserve neutrality as defined by the Treaty.

Given its strategic interest in the Canal, it might well be asked why the United States would sign a Treaty which does not give an unambiguous right of intervention. Under the Treaty, the United States has at best only a weak legal justification for intervention, which will be useful in domestic politics should the popular opposition to "giving the Canal away" become critical, but which will be much less convincing elsewhere. World opinion is suspicious of the reliance of any great power on intervention, regardless of the legal rationale. The justification will be least persuasive in Latin America where there is deep resentment against the United States for past intervention in the area.<sup>72</sup> On the other hand, this resentment is another reason the United States did not secure an unambiguous right to intervene—after the 1964 riots and the 1967 coup, no Panamanian leader could have agreed to such a provision. A political realist would suggest that the United States will probably take whatever action it deems necessary for national security regardless of legal ramifications, hence the failure to secure the right to intervene should not prevent ratification if the Treaty serves other national interests. Indeed, there are good foreign policy reasons for ratifying it. In view of the mounting popular resentment in Panama over the United States presence in the isthmus, it may be wise for the United States to withdraw gradually. The Treaties allow the United States to do so without losing face. Therefore, good diplomacy may be reason enough for the United States to agree to terms which severely restrict its legal rights. If the United States can avoid possible military entanglement in Panama and begin to

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71. *Id.* at 60-65, 72, 73.

72. *E.g.*, the Bay of Pigs and Dominican Republic interventions, R. VINCENT, *NONINTERVENTION AND INTERNATIONAL ORDER* 199-203 (1974).

clear the way, after years of ill will, for a genuine "new relationship,"<sup>73</sup> the new Treaties should be ratified.

*David M. Himmelreich*

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73. Canal Treaty, *supra* note 16, at Preamble.