BEYOND THE TREATIES: LIMITATIONS ON NEUTRALITY IN THE PANAMA CANAL

Ralph H. Smith*

Treaties reformulating the principles controlling the defense and operation of the Panama Canal were signed on September 7, 1977, by General Torrijos of Panama and President Carter, and ratified by the United States Senate on March 16, 1978, and April 18, 1978. Treaty provisions are contained in three documents: The Panama Canal Treaty,[1] The Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal (Neutrality Treaty),[2] and Protocol to the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal (Protocol).[3] By the terms of these agreements (jointly, the Canal Treaties), the United States retains primary responsibility for the defense of the Panama Canal until the year 2000; although full sovereignty over the Canal and Canal Zone is returned to Panama immediately, the United States and Panama agree to provide for permanent "neutrality"[4] of the Canal. The Neutrality Treaty provides for accession by other interested states to the Proto-

* J.D. Candidate Yale Law School 1979; B.A. Washington & Lee University 1973; B.A. Corpus Christi College, Oxford University 1976.

1. *Reprinted in Panama Canal Treaties: Hearings Before the Comm. on Foreign Relations, United States Senate,* 95th Cong., 1st Sess. 497 (1977) [treaty hereinafter cited without cross reference as Panama Canal Treaty; hearings hereinafter cited as *Senate Hearings*].

2. *Reprinted in id.* at 509 [hereinafter cited without cross reference as Neutrality Treaty].

3. *Reprinted in id.* at 515 [hereinafter cited without cross reference as Protocol].

4. Under the Neutrality Treaty, the term "regime of neutrality" refers to the rights and responsibilities created by the Neutrality Treaty, including priority rights of passage through the Canal of ships of the United States.

col, by which signatories pledge adherence to the permanent regime of neutrality.

Debate in the United States surrounding the process of ratification of the Panama Canal Treaty and the Neutrality Treaty has focused on the rights of the United States under those Treaties to use, and to defend its use of, the Canal in peacetime and in war. Concern that the Treaties will not adequately protect the commercial and strategic interests of the United States led the leaders of the United States and Panama on October 14, 1977, to issue a "statement of understanding" (the October 14th Agreement)[5] clarifying the meaning of important provisions in the Neutrality Treaty. Subsequently, the United States Senate voted to incorporate the language of that statement and additional clarifying amendments into both Treaties.[6] This attention to the wording of the Treaties reflects the official position of both the United States and Panama that explicit agreements reached between the two countries will conclusively define the rights and obligations of both states to use and to defend the Canal.[7]

This article challenges that assumption and argues that the language of the Treaties fails to resolve three issues of great legal and political importance: whether Panama may, in the exercise of

---

5. Joint Statement of October 14, 1977, by President Carter and General Torrijos, 13 WEEKLY COMP. OF PRES. DOC. 1547 (Oct. 17, 1977) [hereinafter cited without cross reference as October 14th Agreement].

6. Texts of Senate Changes in Pact, *reprinted in* N.Y. Times, March 17, 1978, at 12, col. 1; Text of Reservation to Treaty on Canal, N.Y. Times, Apr. 19, 1978, at 16, col. 4. For text of the "De Concini Amendment", see pp. 24-25 *infra*.

7. *See, e.g., Senate Hearings, supra* note 1, at 23, 26 (commentary by United States negotiator Sol Linowitz). Even a minority view reported from the Senate Committee on Foreign Relations emphasizes the deficiency in Treaty language, but does not focus on legal issues beyond the terms of the Treaties. SENATE COMM. ON FOREIGN RELATIONS, PANAMA CANAL TREATIES, S. EXEC. DOC. NO. 95-12, 95th Cong., 2d Sess. 177 (1978).

self-defense, limit or prohibit passage through the Canal; whether the United States may use force to defend the regime of neutrality against its threatened or actual violation; and whether obligations created by the Canal Treaties are subordinate to obligations under collective security agreements. These issues remain unresolved because rights and responsibilities purportedly created by the Treaties conflict in important respects with general principles of international law.

This article will demonstrate that the obligations of "neutrality" in the context of interoceanic canals have historically yielded to the littoral state's right of self-defense. That right has generally entitled the nation exercising sovereignty over an interoceanic canal to enjoy certain rights of belligerency, including the right to close the canal to enemy shipping, when it is engaged in hostilities. Once Panama regains full and exclusive rights of sovereignty over the Canal, therefore, Panama will have a right firmly grounded in international law to exercise a similar right of self-defense, regardless of treaties signed with the United States purporting to limit that right. Legal obligations created by the Canal Treaties will be factors to be considered in determining the legitimacy of actions taken by Panama in controlling passage through the Canal, but Panama cannot entirely abdicate, by treaty or any other means, certain rights of self-defense that are fundamental to the concept of a nation-state under international law.

Regarding the second issue, this article will argue that the right of the United States under the Canal Treaties to use force to protect the regime of neutrality in the Canal, like the right of Panama to act in self-defense, will be subject to principles of customary international law and to provisions of the United Nations Charter that determine under what circumstances force may be used internationally. The official position of the United States is that action taken to uphold its rights and obligations under the Treaties would not conflict with these international limitations. This article argues, however, that enforcement rights of the United States will be circumscribed by Panama's right of self-

defense and by general principles of international law that limit the international use of force.

The neutrality of the Canal may also be compromised in a third respect. Both states that are to serve as guarantors of the neutrality of the Canal, the United States and Panama, are members of collective security organizations that could claim an interest in the rights of passage of ships through the Canal: the United Nations and the Organization of American States (O.A.S.). As such, both the United States and Panama may be called upon, in apparent violation of commitments under the Canal Treaties, to close the Canal to ships of certain nations in order to comply with punitive sanctions imposed on those nations by either of the two organizations. This article argues that such obligations under collective security agreements must prevail over bilateral treaty commitments entered into between the United States and Panama with the intent to create a strict regime of neutrality.

I. Principles of International Law Applicable to Interoceanic Canals: Neutrality Qualified by Consent and the Right of Self-Defense

Analysis of the legal effect of the Treaties must begin with an exploration of the principles of international law that control the operation of interoceanic canals.

The construction of an artificial waterway through the territory of a state leads inevitably to tension between rights of sovereignty and rights of free navigation. The customary law of interoceanic canals reflects this tension. Because these canals are of importance both as national and international resources, international law seeks to balance the interests of the sovereign with those of the user community. When these interests are in fundamental conflict, however, state practice and international law frequently favor the exercise by the littoral state of full rights of sovereignty over the canal.

A. *The Role of Consent of the Sovereign*

Analogies are often drawn between canals and international straits. In the case of straits, a universal right of innocent passage independent of the interests of the coastal state has been internationally recognized. This right of innocent passage, derived from the broader principle of freedom of the seas, was recognized by the International Court of Justice in the *Corfu Channel Case*,[8] and was codified in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.[9] The latest negotiating text of the Third United Nations Conference on the Law of the Sea also recognizes this right of passage of vessels through territorial seas and international straits so long as such passage is not prejudicial to the peace, good order, or security of the coastal state.[10]

An interoceanic canal is distinguishable from an international strait, however, because the former is artificially constructed, while the latter is a natural geographical link.[11] Most authorities agree that the legal status of an interoceanic canal is not determined by its geographical features, but may be the subject of express agreement.[12] Although a canal may connect two parts of the high seas, the rights of the international community to use that canal are governed by principles of territorial sovereignty, rather than by principles of the high seas, as in the case of international straits.[13] Because the route of transit of a canal passes through

8. [1949] I.C.J. 4, 22, 28-29.

9. Geneva Convention on the Territorial Sea and the Contiguous Zone, March 24, 1961, arts. 5, 14-17, 15 U.S.T. 1606, T.I.A.S. No. 5639.

10. Informal Composite Negotiating Text of the Third United Nations Conference on the Law of the Sea, arts. 17-25, 45, U.N. Doc. A/Conf.62/WP.10 (July 15, 1977).

11. *See* J. OBIETA, INTERNATIONAL STATUS OF THE SUEZ CANAL 24, 38 (1960), Khadduri, *Closure of the Suez Canal to Israeli Shipping*, 33 LAW AND CONTEMP. PROB. 147, 152-53 (1968).

12. *See, e.g.*, J. OBIETA, *supra* note 11, at 25-26.

13. *See generally* J. OBIETA, *supra* note 11, at 24-25.

territory over which full rights of sovereignty have been exercised, international law requires some manifestation of consent before a canal may be constructed and international rights of passage through that canal enjoyed. This necessity of securing the consent of the sovereign reflects the accepted principle of international law that no foreign state action may be taken within the boundaries of a state except by the consent of the host state.[14] Thus in the case of the *S.S. Wimbeldon*,[15] the Permanent Court of International Justice held that the consent of the sovereign is essential for the dedication of an artificial canal to the use of the world as an international waterway.

The consent of the sovereign may be given unilaterally or as a result of negotiation and agreement among several interested parties, including the sovereign.[16] If no stipulation has been made reserving rights in third party states, the sovereign is only bound to guarantee rights to those members of the international community that are parties to the agreement, and the canal cannot be said to be truly international.[17] If such stipulations are made, international rights of use can be created in a canal by "international settlement" or by custom, even in cases where third party states are not parties to the original agreement.[18] Consequently, international rights of use may be established in a

---

14. *See id.* at 26.

15. [1923] P.C.I.J., ser A., No. 1.

16. *See* J. OBIETA, *supra* note 11, at 27-29.

17. *Id.* at 30-33.

18. According to the holding in *Reparations For Injuries Suffered in Service to the United Nations*, [1949] I.C.J. 173, 185, a group of states through an international settlement may bring into being an "entity possessing objective international personality, and not merely personality recognized by them alone...." The case of the *S.S. Wimbeldon*, [1923] P.C.I.J., Ser.A No. 1, demonstrates this process of international settlement in the context of the Kiel Canal, in which international rights of passage were created in spite of the fact that only twenty-eight states had signed the treaty in question.

These international rights may also be created by customary practice, even where non-signatory states do not explicitly accept the stipulations that have been made in their favor. It

canal by the consent of the sovereign given in a multilateral treaty, even if that treaty is not explicitly joined by all beneficiaries.[19]

B. *The Tension Between Neutrality and the Sovereign's Right of Self-Defense*

The principle of sovereignty that underlies the necessity of consent, however, imposes limits on the extent to which national rights in the waterway can be given or taken away, and requires that fundamental rights of self-defense be retained.

The right of self-defense entitles a state that is the target of illegal force to respond with countervailing force necessary to assure its own protection. In contemporary international society, in which public bodies provide only limited protection to besieged states, the right of self-defense has been essential in order to maintain a minimum level of international

---

has been argued, for example, that states not parties to previous Panama Canal Treaties have acquired certain rights to use that Canal through years of reliance and use. J. OBIETA, *supra* note 11 at 34-35. In the future, these rights would be reinforced by the Protocol to the recent Canal Treaties, which invites accession by all world states.

19. These international rights of passage through a canal are established in a regime of "internationality." This status is often referred to as "internationalization", but the two concepts should be distinguished. A regime of internationality involves rights of passage in the international community, whereas internationalization refers to a method of international administration. *See generally* J. OBIETA, *supra* note 11, at 26-47. Proposals for the internationalization of the Panama Canal would involve identification of the Canal as a trust territory under Chapter XII of the U.N. Charter, G. CLARK & L. SOHN, WORLD PEACE THROUGH WORLD LAW 158 (1960), or creation of a specialized agency under Articles 57 and 63 of the Charter to administer the Canal, R. BAXTER, THE LAW OF INTERNATIONAL WATERWAYS 320-21 (1964). These proposals are not under serious consideration today because of Panama's desire to control fully its waterway resource. Thus, the Panama Canal Treaties create a regime of internationality, one characteristic of which is a declaration of permanent neutrality.

order and security.[20] Customary international law, however, imposes two limits on the use of force in self-defense: necessity and proportionality. The requirement of necessity indicates that the use of force as a means of self-defense may not be justified unless peaceful alternatives have been exhausted and major interests are at stake.[21] Proportionality, on the other hand, sets limits to the degree of permissible force, and has been described as a commitment to the principle of economy in coercion.[22] Within these limits, the right of self-defense may be seen not as an exception, but as a complement to the basic international policy prohibiting change by violence.

This right of self-defense is additionally recognized in the United Nations Charter as an inherent right of statehood.[23] Under the law of the

---

20. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L. L. 597, 598 (1962). *See also* M. McDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 213 (1961).

21. For example, Daniel Webster, commenting on the permissibility of a British raid into the United States in pursuit of Canadian revolutionists from *The Caroline* in 1842, said that force should be employed in self-defense only when "the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." Letter from Sec'y of State Webster to Lord Ashburton, Aug. 6, 1842, quoted in 2 J. MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906).

22. M. McDOUGAL & F. FELICIANO, *supra* note 20, at 243.

23. Article 51 of the U.N. Charter provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

The apparent requirement of Article 51 that rights of self-defense be exercised only in response to "armed attack" has been the subject of lively debate. Scholarly opinion is divided on whether Article 51 merely codifies the customary meaning of rights of self-defense or places new limitations on the exercise of that right. *See, e.g.*, Rostow, *Is The United Nations Charter Going the Way of the League of Nations Covenant?*, in THE IDEAL IN LAW 262, 281-82 (E. Rostow ed. 1978); 5

Charter, the United Nations may set standards of legality governing the use of force and establish

M. WHITEMAN, *infra* note 30, at 976-91. Those who argue that the Charter restates customary law point to the fact that Article 51 refers to an "inherent" right of self-defense and suggest that "armed attack" merely expresses the customary requirement of necessity. Under this interpretation, the phrase "if an armed attack occurs" does not mean that rights of self-defense are exercisable "if and only if" there is such an attack. *See generally* D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 182-99 (1958); P. JESSUP, A MODERN LAW OF NATIONS 166-69 (1949); H. KELSEN, THE LAW OF THE UNITED NATIONS 913-16, 797-801 (1964); M. McDOUGAL & F. FELICIANO, *supra* note 20, at 232-41.

The alternative view, that Article 51 sets new limitations on rights of self-defense, rests largely on a literal reading of the conditional phrase concerning armed attack and on the observation that only this literal reading is consistent with the general United Nations objective of bringing the unilateral use of force under greater international control. I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 273 (1963).

International experience since the signing of the Charter in 1949, however, has reduced the significance of this interpretive debate. The paralysis of certain United Nations institutions has necessitated a broader range of individual state action than was originally envisioned. Experience under the Charter, as under the League of Nations, demonstrates the limited effectiveness of a system of mutual restraint without proper mechanisms of enforcement. If the world community cannot act through the vehicle of the United Nations to bar illegitimate use of force, in part because of rivalry among the permanent members of the Security Council, then individual states must act on their own. Thus although the Security Council still retains the right to proclaim as legitimate the international use of force, and to impose sanctions on its improper exercise, many types of unilateral actions of self-defense remain legitimate, and provisions of customary international law retain importance. O'Brien, *International Law and the Outbreak of War in the Middle East, 1967*, in 2 THE ARAB-ISRAELI CONFLICT 75, 96-104 (J. Moore ed. 1974).

procedures for the enforcement of those standards, but the target state retains the initial right to determine the rightfulness of defensive action without authorization from international bodies.[24]

This inherent right of self-defense is of central importance to the operation of interoceanic canals because the means of exercising that right may lead to interference with international rights of passage.

Existing treaties relating to the Panama Canal have referred frequently to the concept of neutrality but have never explicated the relationship between the status of neutrality and rights of self-defense. For example, the Hay-Bunau-Varilla Treaty of 1903[25] between the United States and Panama, which established "in perpetuity" the rights of the United States to administer the Canal, incorporated by reference important provisions on neutrality contained in the earlier Hay-Pauncefote Treaty[26] negotiated between the United States and Great Britain. The Hay-Bunau-Varilla Treaty provided that:

> The Canal, when constructed, and the entrances thereto *shall be neutral in perpetuity*, and shall be opened upon the terms provided for by Section I of Article III of, and in conformity with all the stipulations of, the treaty entered into by the Governments of the United States and Great Britain on November 18, 1901.[27]

---

24. That determination is, however, subject to appraisal by the United Nations. U.N. Charter article 51 provides that: "Measures taken by Members on the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

25. Isthmian Canal Convention, Feb. 26, 1904, United States- Panama, 33 Stat. 2234, T.S. No. 431 [hereinafter cited as Hay-Bunau-Varilla Treaty].

26. Hay-Pauncefote Treaty, Dec. 26, 1901, United States- Great Britain, 32 Stat. 1903, T.S. No. 401.

27. Hay-Bunau-Varilla Treaty, *supra* note 25, art. XVIII (emphasis added).

The "stipulations" referred to above include the following provisions of the Hay-Pauncefote Treaty:

> 1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation . . ..
>
> 2. The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it. 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.
>
> 3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the Regulations in force, and with only such intermission as may result from the necessities of the service . . ..
>
> 4. No belligerent shall embark or disembark troops, munitions of war, or warlike materials in the canal, except in case of accidental hindrance of the transit, and in such cases the transit shall be resumed with all possible dispatch.
>
> 5. The provisions of this Article shall apply to waters adjacent to the canal, within 3 marine miles of either end . . ..
>
> 6. The plant, establishments, buildings, and all works necessary to the construction, maintenance, and operation of the canal shall be deemed to be part thereof, for the purposes of this Treaty, and in time of war, as in time of peace, shall enjoy complete immunity from attack or injury by belligerents, and from acts calculated to impair their usefulness as part of the canal.[28]

28. Hay-Pauncefote Treaty, *supra* note 26, art III.

Although the terms of this Treaty purport to create a regime of absolute neutrality in the Panama Canal, in practice these terms were often violated by the United States, which acted as the *de facto* sovereign of the Canal.[29]

More general uses of the term "neutrality" in international law also show deference to the right of self-defense. Under customary law, a state has the right to remain neutral in hostilities,[30] and the status of neutrality has come to involve specific obligations of impartiality to belligerents such as abstention from hostilities and refusal of passage to troops or supplies across the neutral territory.[31] A self-proclaimed "neutral" state, however, always retains the right of self-defense.[32]

A significant body of international law exists also in relation to neutral ports and waters. The Hague Convention of 1907[33] codified many of these

---

29. See pp. 18-20 *infra*.

30. The right to remain neutral in hostilities, which is central to the concept of state neutrality, is theoretically inconsistent with the system of sanctions created in the Charter of the United Nations. Under that system, the international community may authorize binding enforcement measures to be taken against a state that offends the peace. It is the possibility of conflict between neutrality and these enforcement decisions that has caused Switzerland to remain outside of the United Nations. But the practical workings of the United Nations have not actually challenged state neutrality, and Austria, for example, maintains membership in the organization despite its declared permanent neutrality. *See generally* 11 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 144-160 (1965).

31. Recently, some neutral states have maintained a status of non-belligerency while providing active support for one set of parties during hostilities. One example is the posture of the United States in conducting its lend-lease program prior to its entry into World War II. *See* Memorandum from the Legal Advisor to the Under-Secretary of State, July 3, 1941, *reprinted in id.* at 465-67.

32. *Id.* at 451-61 (principle adopted by the American Republics in Declaration of Panama, 1939). *See also* AMERICAN BAR ASSOCIATION SUBCOMM. ON INTERNATIONAL WATERWAYS, INTERNATIONAL RIGHTS OF PASSAGE UNDER A NEW PANAMA CANAL TREATY 95 (1976) [hereinafter cited as A.B.A.].

33. Rights and Duties of Neutral Powers in Naval War, Jan. 26, 1910, 36 Stat. 2415, T.S. No. 545.

rules and established the respective rights and obligations of belligerent vessels, of neutral vessels, and of the neutral power that is sovereign over the ports and water in question. The Hague provisions, however, were drafted with reference to the territorial waters of a neutral state. No internationally recognized legal authority has ever established rules for preserving the neutrality of a body of water within the territorial boundaries of a state when the territorial sovereign is not itself neutral.[34] There is, therefore, no established concept of neutrality that applies to a canal if the littoral state becomes a belligerent or takes actions of self-defense.[35]

In the absence of a clear concept of neutrality of a particular territory independent of the international status of the state exercising sovereignty over that territory, a "regime of neutrality" in a canal cannot be inviolable, but must give way to properly exercised rights of self-defense. If even a neutral state has a right to protect itself from attack,[36] nothing less must be expected of a state that is not itself neutral and that is host to an interoceanic canal.

---

34. *See* A.B.A., *supra* note 32, at 56-57.

35. *Id.* at 57. The American Bar Association Subcommittee proposed the neutralization of the entire state of Panama, under guarantee of the United States, in order to resolve the conflict between neutrality and rights of self-defense. *Id.* at 92. It is inconceivable, however, that Panama, in light of its repeated demands for full sovereign control over the Canal, would submit to an arrangement such as state neutrality which would so substantially limit its international rights and responsibilities. The guarantee of such neutrality by the United States would also recall previous interventionist action taken by the United States in Panama and would unnecessarily involve the United States in Panama's domestic political affairs.

36. *See* U.N. CHARTER art. 51 (no exceptions made for neutral states that are members of the United Nations in allowing actions of self-defense). *See also* note 32 *supra*.

II. Customary Practice of States in Exercising Rights of Self-Defense Despite Regimes of Neutrality in Canals

The argument of this article that rights of self-defense may prevail over obligations of neutrality in the context of interoceanic canals is supported by case studies of the actual practice of states in exercising administrative or sovereign control over purportedly "neutral" canals. Analysis of the history of the Panama, Suez, and Kiel Canals indicates that the effective neutrality of a canal is consistently limited by the right of self-defense.

A. *The Panama Canal Under Treaties Previously in Force*

The United States, as the state responsible for completing construction of the Panama Canal and acting prior to ratification of the new Canal Treaties as its *de facto* sovereign, has propounded a concept of absolute neutrality for the Canal that in practice has given way to a variety of expedient practices of belligerent self-defense.

When the United States first demonstrated a serious interest in negotiating rights of passage across Central America, it sent representatives to the Panama Congress in 1826 with instructions that the benefits of any canal across the isthmus "should be extended to *all parts of the globe* upon the payment of a just compensation or reasonable tolls."[37] To further this goal, the United Sates Senate in 1835 passed a resolution requesting the President to open negotiations to secure "forever . . . the free and equal right of navigating such canal to all such nations...."[38] On December 12, 1846, the United

37. Letter from Sec'y of State Clay to Messrs. Anderson and Sargent, May 1, 1826, *reprinted in* 3 J. MOORE, A DIGEST OF INTERNATIONAL LAW 2 (1906) (emphasis added).

38. Message to Congress, quoted in *id.*, at 3.

States signed a treaty[39] with the predecessor to the modern state of Colombia which guaranteed a right of way across the isthmus in return for a United States guarantee of the "perfect neutrality" of this isthmus "with the view that the free transit from one to the other sea may not be interrupted or embarrassed...."[40] President Polk defended this provision of the treaty on the ground that "[t]he interests of the world at stake are so important that the security of this passage between the two oceans cannot be suffered to depend upon the wars and revolutions which may arise among different nations."[41] The goal of the United States, to insulate the vital isthmian territory from such "wars and revolutions" through guarantees of neutrality, was thus affirmed by treaty.

The concept of total neutrality of a future canal was further expressed in 1850 in the Clayton-Bulwer Treaty,[42] signed by the United States and Britain. Both parties to this Treaty agreed not to obtain exclusive control over any shipping canal in any part of Central America and to "guarantee the neutrality [of a subsequent canal], so that [it] may forever be open and free, and the capital invested therein secure."[43] In 1885, still fearing domination in Central America by nations stronger than the United States, President Cleveland restated the interests of the United States in a canal withdrawn from international contention: "'Whatever highway may be constructed, must be for the world's benefit, a trust for mankind, to be removed from the

---

39. A General Treaty of Peace, Amity, Navigation, and Commerce, Dec. 12, 1846, United States -- New Granada, art. XXXV, 9 Stat. 881, T.S. No. 54.

40. *Id.* art. XXXV.

41. Message of President Polk to Congress, quoted in 3 J. MOORE, *supra* note 37, at 9.

42. Convention As To Ship Canal Connecting Atlantic and Pacific Oceans, May 23, 1850, United States -- Great Britain, 9 Stat. 995, T.S. No. 122 [hereinafter cited as Clayton-Bulwer Treaty].

43. *Id.* art. V.

chance of domination by any single power, nor become a point of invitation for hostilities or a prize for warlike ambition.'"[44]

By the turn of the 19th Century, however, the United States, for both strategic and commercial reasons, had become increasingly interested in securing close administrative control over a future canal. In 1901 the United States again signed with Great Britain, the principal foreign competitor of the United States in Central America, a treaty (Hay-Pauncefote Treaty)[45] which set terms by which such a canal should be operated. As noted earlier,[46] this treaty provided for the "neutrality" of the canal, yet no restrictions were placed on the right of the United States to place fortifications and defenses in the Canal region or to take all necessary measures to protect the Canal. In December, 1901, Secretary of State Hay advanced this interpretation of the Hay-Pauncefote Treaty in a letter to Senator Cullom:

> The obvious effect of these changes . . . is to reserve to the United States, when engaged in war, the right and power to protect the Canal from all damage and injury at the hands of the enemy, to exclude the ships of such enemy from the use of the Canal while the war lasts and to defend itself in the waters adjacent to the Canal the same as in any other waters, without derogation in other respects of the principles of neutrality established by the treaty.[47]

A note dated November 14, 1912, from the British Embassy in Washington confirmed: "Now that the United States has become the practical sovereign of the Canal, His Majesty's Government do not question its title to exercise belligerent rights for

---

44. Message of President Cleveland to Congress, Dec. 8, 1885, quoted in N. PADELFORD, THE PANAMA CANAL IN PEACE AND WAR 13 (1942).

45. Hay-Pauncefote Treaty, *supra* note 26.

46. *See* pp. 10-11 *supra*.

47. Quoted in N. PADELFORD, *supra* note 44, at 39.

its protection."[48] Thus in spite of the neutrality rules referred to in Hay's letter to Cullom, it was understood, at least by the United States and Britain, that the United States would possess full rights of belligerency in the Canal in the event of engagement by the United States in hostilities.

The Hay-Pauncefote Treaty cleared the way for negotiations with Colombia in order to construct a transisthmian canal. The first treaty negotiated by the parties[49] was ultimately rejected by Colombia, but a successful revolution in the isthmus brought independence to Panama and gave the United States an opportunity to negotiate a canal treaty on more favorable terms.

The Hay-Bunau-Varilla Treaty,[50] hastily signed in 1903 between the United States and a minister of dubious authority[51] of the breakaway state of 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,

---

48. Quoted in 2 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 797 (1941).

49. Hay-Herran Treaty (ratified by United States Senate, Mar. 17, 1903; Treaty rejected by Colombian Congress, Aug. 12, 1903). *See* 3 UNPERFECTED TREATIES OF THE UNITED STATES OF AMERICA 1776-1976 (C. Wiktor ed. 1977).

50. Hay-Bunau-Varilla Treaty, *supra* note 25.

51. Bunau-Varilla was an engineer on the original French Canal project and had been an important but informally designated emissary from the United States to the rebel movement in Panama. After the revolution, to which the United States provided substantial aid by making a show of force in the isthmus in the guise of honoring commitments under the treaty with New Granada, the United Sates recognized Bunau-Varilla as the minister plenipotentiary from the Republic of Panama. The United States then signed with him the Hay-Bunau-Varilla Treaty while the official treaty delegation from Panama was *en route* to Washington. *See generally* P. BUNAU VARILLA, LA CREATION, LA DESTRUCTION, LA RESURRECTION (1913) (recounting Bunau-Varilla's personal activities in the struggle to complete the Panama Canal).

> operation, sanitation and protection of said Canal of the width of ten miles . . . [and] any other lands and waters outside of the zone above described which may be necessary and convenient for the construction, maintenance, operation, sanitation and protection of the said Canal... .[52]

Panama further granted the United States:

> ...all the rights, power and authority within the zone mentioned and described in Article II of this agreement and within the limits of all auxiliary lands and waters mentioned and described in said Article II which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.[53]

As a result of these provisions, and others contained in the treaty and subsequent enabling legislation, the United States established the Canal Zone, built the Canal, and continued to exercise "as-if-it-were" sovereign power in the Zone.

Although the Hay-Bunau-Varilla Treaty declares the Canal to be neutral in perpetuity, and thereby implies that the United States must keep the Canal neutral even when the United States is a belligerent, the practice of the United States since 1904 has been to exercise belligerent rights in the Canal when engaged in hostilities.

At the outbreak of the First World War, the United States, while still a neutral party, issued a general proclamation of neutrality[54] that was subsequently extended to the Panama Canal.[55] Warships of

---

52. Hay-Bunau-Varilla Treaty, *supra* note 25, art. II.

53. *Id.* art. III.

54. Proclamation by the President of the United States of America, Aug. 4, 1914, 38 Stat. 1999.

55. Proclamation by the President of the United States of America, Nov. 13, 1914, 38 Stat. 2039.

all belligerent nations were permitted to pass through the Canal and no restrictions were placed on the carrying of arms or other contraband through the Canal. When the United States in 1917 entered the War, however, the proclamation of war issued by the United States extended regulations of belligerency to "all land and water, continental or insular, in any way within the jurisdiction of the United States."[56]

Clearly, the "permanently neutral" Canal was included within the terms of the declaration, since six German ships lying in the Canal Zone waters were seized following the issuance of the proclamation and further steps were taken to protect the Canal against possible attack. Normal operational authority was suspended, and the military commander in charge of the Canal Zone was placed in charge of defense and operation of the Canal. On May 23, 1917, President Wilson issued a new proclamation concerning the neutrality and protection of the Canal:

> In the interest of the protection of the Canal while the United States is a belligerent no vessel of war, auxiliary vessel, or private vessel of an enemy of the United States or an ally of such enemy shall be allowed to use the Panama Canal nor the territorial waters of the Canal Zone for any purpose, save with the consent of the Canal authorities and subject to such rules and regulations as they may prescribe.[57]

Thus the exercise of belligerent rights in the Canal was authorized under a renewed "neutrality" proclamation justified on the basis of the need to protect the Canal.

The outbreak of the Second World War in 1939 prompted the United States to issue neutrality proclamations relating to the Canal that were substantially similar to those issued during the period of United States neutrality during the First World War. Armed merchant vessels and belligerent or neutral vessels carrying contraband of war to belligerents, as well as warships, were allowed passage.[58] After

---

56. Proclamation by the President of the United States of America, Apr. 6, 1917, 40 Stat. 1650, 1652. *See also* N. PADELFORD, *supra* note 44, at 136.

57. Rules and Regulations for the Regulation, Management, and Protection of the Panama Canal and the Maintenance of its Neutrality, May 23, 1917, 40 Stat. 1667, 1668-69.

58. Exec. Order No. 8234, 4 Fed. Reg. 3823 (1939).

the United States entered the war, however, the Canal was effectively closed to enemy ships.[59] It has been observed that: "The provisions of the [Hay-Pauncefote] Treaty . . . which gave the Canal a neutralized status must accordingly be considered, in legal as well as in practical effect, to have yielded to the realities of the strategic importance of interoceanic canals and of the manner in which modern wars are fought."[60]

B. *The Suez and Kiel Canals*

The conflict between neutrality and self-defense is not unique to the experience of the Panama Canal. State practice in the Suez and Kiel Canals also indicates that relatively well-defined rules for administering the neutrality of international canals during peacetime give way to interests of self-defense and to the exercise of belligerent rights when the sovereign becomes involved in hostilities.[61]

The 1888 Convention of Constantinople,[62] which governs international rights in the Suez Canal, effected a compromise between international interests in free passage and the needs of self-defense of the littoral state.[63] The Convention provided that the

---

59. Canal records indicate that no enemy ship of any sort sought passage through the Canal. *See Senate Hearings, supra* note 1, at 40.

60. Baxter, *Passage of Ships Through International Waterways in Time of War,* 31 BRIT. Y.B. INT'L L. 187, 205 (1954).

61. *See* A.B.A., *supra* note 32, at 71-74.

62. Convention Between Great Britain, Austria-Hungary, France, Germany, Italy, the Netherlands, Russia, Spain, and Turkey, Respecting the Free Navigation of the Suez Maritime Canal, Oct. 29, 1888, [1889] Parl. Pap., Commercial No. 2 (Cmd. 5623) [hereinafter cited as Convention of Constantinople].

63. Egypt was a part of the Ottoman Empire when concessions were granted in 1854 and 1856 by the Turkish Viceroy of Egypt for the construction of the Suez Canal. These concessions, confirmed by convention in 1866 and signed by the Sultan of Turkey, vested control of the Canal in the Suez Canal Company until 1968. By 1882 Great Britain owned substantial stock in this company and exercised effective control by maintaining troops in the Canal area. The Convention of

Canal was to be "free and open, in time of war as in time of peace to every vessel of commerce or of war, without distinction of flag,"[64] but that Egypt could take all necessary measures to defend its own internal security.[65]

For several decades, the sovereign's right of self-defense did not seriously limit the free passage of ships through the Canal. During the Russo-Japanese war of 1904-05, for example, armed Russian ships passed freely through the Canal even though those ships were operating against Japan, an ally of Great Britain, which controlled the Canal.[66] Britain's right of inspection of vessels passing through the Canal was ostensibly used to determine whether the examined vessels posed a threat to free navigation. During the First and Second World Wars, however, Britain used its right of inspection to exercise effective belligerency rights over the use of the Canal. Typically, if contraband or enemy cargo was found on board, the ship was allowed to pass through the Canal and then captured outside the three-mile zone on the other side.[67] Egypt has also continued to exercise belligerent rights, despite Egypt's declaration of support for the 1888 Convention, by periodically denying rights of passage since 1948 to ships bound for Israel.[68]

Administration of the Kiel Canal by Germany also reflects the rights of the territorial sovereign to interfere with international rights of passage through a neutral canal for reasons of self-

---

Constantinople in 1888 confirmed the principles enunciated in 1866 ar also guaranteed that the Canal would be open during wartime. In 1914 Great Britain declared Egypt a protectorate and in 1922 Egypt gained independence. Control over the Canal, however, was reserved by Great Britain. *See generally* R. BOWIE, SUEZ 1956 2-7 (1974); J. OBIETA, *supra* note 11, at 4-18; Khadduri, *supra* note 11, at 148-51.

64. Convention of Constantinople, *supra* note 62, art. I.

65. *Id.* art X.

66. Hoskins, *The Suez Canal as an International Waterway*, 37 AM. J. INT'L L. 373, 377-78 (1943).

67. *See* Baxter, *supra* note 60, at 206-207.

68. *See* notes 91 & 94 *infra*.

defense. The Kiel Canal acquired a status of "internationality"[69] under Article 380 of the Treaty of Versailles, which established a right of passage to ships of all nations "at peace with Germany."[70] In 1921, before the termination of hostilities between Russia and Poland, Germany refused passage to the *Wimbeldon*, a British ship carrying arms to Poland, on the ground that such passage violated Germany's neutrality obligations. Citing the experience of the United States in the Panama Canal, the Permanent Court of International Justice held that such passage did not compromise the neutrality of the state exercising jurisdiction over the waterway.[71] The Court implicitly recognized, however, that if Germany had been a belligerent in the war, the terms of the Treaty of Versailles would have entitled Germany to close the Canal to enemy ships.[72]

State practice concerning international canals, therefore, suggests that internationally recognized rules of neutrality are applicable to those canals only when the state exercising sovereignty over the canal is not participating in hostilities. When the territorial sovereign becomes so engaged, the neutral status of the Canal is compromised.[73] This historical practice weakens the contention of the United States today that under the new Canal Treaties Panama would not be entitled to exercise rights of belligerency affecting the Canal if necessary in order to protect the security of Panama.[74]

---

69. For discussion of meaning of term "internationality", see note 19 *supra*.

70. Treaty of Peace Between the Allied and Associated Powers and Germany, Je. 28, 1919, art. 380, *reprinted in* S. DOC. No. 348, 67th Cong., 4th Sess., app. 1, at 3329, 3502 (1923).

71. The *S.S. Wimbeldon*, [1923] P.C.I.J., ser. A., No.1, 26-28.

72. *See* R. BAXTER, *supra* note 19, at 217-18.

73. *See* A.B.A., *supra* note 32, at 71.

74. Note the following colloquy between Senator Baker and Ambassador Linowitz, *reprinted in Senate Hearings*, *supra* note 1, at 58:

> SEN. BAKER: Imagine...that Panama and another Latin American country are suddenly in dispute, maybe at war, and it is alleged by one that there is not neutrality and by the other, by Panama,

III. Limitations on the Right of the United States to Enforce Provisions of the Panama Canal Treaties

The newly ratified Panama Canal Treaties purport to alter the tradition of qualified neutrality of interoceanic canals by guaranteeing, if not perfect neutrality in the sense of total equality of rights of passage under all circumstances,[75] at least availability of use of the Canal by all nations regardless of the relationship of those nations to the United States or Panama. The Neutrality Treaty expresses this commitment in the following language:

> The Republic of Panama declares that the Canal, as an international transit waterway, shall be permanently neutral in accordance with the regime established in this Treaty....The Republic of Panama declares the neutrality of the Canal in order that both in time of peace and in time of war it shall remain secure and open to peaceful transit by the vessels of all nations.[76]

The Neutrality Treaty also creates an obligation in both the United States and Panama to enforce the regime of neutrality:

---

that there is. Is it a treaty obligation by reason of that document or protocol of the United States to maintain the neutrality of that canal in favor of the Latin American country that does not have access?

AMB. LINOWITZ: Yes, sir, to assure the neutrality.

SEN. BAKER: Even against the will of the Panamanians?

AMB. LINOWITZ: Yes, sir.

75. Article VI of the Neutrality Treaty gives warships of the United States the right to pass through the Canal expeditiously. In the October 14th Agreement, this right is interpreted to entitle ships of the United States to go to the "head of the line" in an emergency. Article VI(1) of the Neutrality Treaty also gives ships of the United States a broader right of passage than is afforded ships of other nations under Article III(1)(e).

76. Neutrality Treaty arts. I & II.

> 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.[77]

The text of the October 14th Agreement and an amendment to the Neutrality Treaty added by the United States Senate further articulated the nature of this obligation:

> Under the [Neutrality Treaty], Panama and the United States have the responsibility to assure that the Panama Canal will remain open and secure to ships of all nations. The correct interpretation of this principle is that each of the two countries shall, in accordance with their respective constitutional processes, defend the Canal against any threat to the regime of neutrality, and consequently shall have the right to act against any aggression or threat directed against the Canal or against the peaceful transit of vessels through the Canal.
>
> This 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, secure and accessible, and it shall never be directed against the territorial integrity or political independence of Panama.[78]
>
> [I]f the Canal is closed, or its operations are interfered with, the United States of America and the Republic of

77. *Id.* art. IV.

78. *See* October 14th Agreement, *supra* note 5, at 1547.

> Panama shall each independently have the right to take such steps as it deems necessary, in accordance with its constitutional processes, including the use of military force in Panama, to reopen the Canal or restore the operations of the Canal . . ..[79]

United States State Department officials interpret these agreements to mean that neither the United States nor Panama has the right to deny anyone--even enemies of either state--full use of the Canal, and that the United States will have the unilateral right to redress any violations of the regime of neutrality caused by either third party nations or Panama.[80]

The right of the United States to enforce the neutrality of the Canal, however, is conditioned by two factors: limitations placed by the United Nations

---

79. *See* Texts of Senate Changes in Pact, *supra* note 6, at A12. This provision, known as the "DeConcini Amendment", created political controversy in Panama, and led to passage of the following reservation in the Panama Canal Treaty, ratified on April 18, 1978, by the United States Senate:

> [A]ny action taken by the United States of America in the exercise of its rights to assure that the Panama Canal shall remain open, neutral, secure, and accessible,., shall not have as its purpose..., a right of intervention in the internal affairs of the Republic of Panama or interference with its political independence or sovereign integrity.

Text of Reservation to Treaty on Canal, *supra* note 6, at 16.

80. *See id.* It has been suggested further that although the United States does not have a right under the Treaties to close the Canal, it does have the power to prevent its enemies from reaching the Canal in time of war. *See Senate Hearings*, *supra* note 1, at 34-35, 137 (testimony of C. Vance and S. Linowitz; statement of Sen. C. Percy).

Charter on the international use of force, and the irrevocable authority of Panama as the sovereign state under the Treaties to exercise rights of self-defense affecting operation of the Canal. Under United Nations Charter provisions, the United States retains considerable latitude to defend its national interests in the Canal. Rights of self-defense in Panama, however, may seriously impinge on the rights of the United States to enforce rights ostensibly guaranteed by Treaty.

1. *Use of Force by the United States in Defending Canal Neutrality Against Third Party States*

The United Nations Charter prohibits the use of war as an instrument of national policy and sets limits on the unilateral use of force. In language that was followed closely by the October 14th Agreement and by Treaty amendments, Article 2(4) of the Charter provides that: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

The framers of the Charter originally intended that the international community would act through the Security Council to identify threats to the peace and to counter such threats with collective force, if necessary.[81] But it was not contemplated that the world order to be created through the United Nations would displace the system of state sovereignty, and in fact since the creation of the United Nations, states have continued to be a principal source of world authority.

The prohibition under international law against certain uses of force, however, requires the United States to justify its right to employ force to enforce provisions of the Panama Canal Treaties, even when the United States is given that apparent right by bilateral treaty. If a conflict exists between obligations under the United Nations Charter and the Canal Treaties, Article 103 of the Charter provides that responsibilities under the Charter prevail. However, justifications not in conflict with Charter

81. *See generally, e.g.*, H. KELSEN, *supra* note 23, at 13-14, 724-37; Rostow, *supra* note 23, at 277.

provisions exist for the use of force in defense of the regime of neutrality against third party states in most circumstances.

Upon the invitation of Panama, the United States has a right firmly established in international law to use force in defending the Canal regime against attack by third party nations. Such action would be justifiable as assistance afforded to a state defending itself against attack--a right generally recognized by the language of "collective self-defense" in Article 51.[82] No legal obstacles are posed by Article 2(4) to such assistance, because no state as a result of such action would suffer violation of its territorial integrity or political independence.

Even if Panama did not explicitly invite the United States to provide assistance in repulsing such an attack, the United States would have the right under the Treaties unilaterally to "maintain the regime of neutrality" against an attack by other states or persons. Such action by the United States also need not violate the territorial integrity or political independence of any state. In addition, the United States would itself be exercising a legitimate right of self-defense in protecting a regime that it is bound by treaty to maintain and in which it has a vital security interest.[83]

Sound precedent exists in international law for a grant of power to a state to act as guarantor of a particular regime in another state.[84] Thus the United States would have the right to use reasonable force to defend the regime of neutrality against a threat posed by a state other than Panama, even after the military presence of the United States in the Canal Zone terminates in the year 2000.

---

82. *See* Rostow, *supra* note 23, at 279-80.

83. For discussion of rights of self-defense in the United States, see pp. 28-30 *infra*.

84. For example, the United Kingdom was granted a right of intervention to guarantee the peace in Cyprus under the Treaty of Guarantee, 382 U.N.T.S. 3 (1960).

2. *Limitations Imposed on Enforcement Actions of the United States Against Panama*

A more serious challenge to the enforcement rights of the United States under the Treaties arises when the threat to the proposed regime is posed by the Republic of Panama itself. It has been argued that action taken even directly by the United States against Panama to defend the regime of neutrality would be permissible under the Treaties and general provisions of international law, despite the apparent violation of Panama's territorial integrity and political independence that such action would involve.[85]

If "territorial integrity" and "political independence" of a state are violated by an intervention that aims to overthrow or modify that nation's government but not by a use of force with more limited objectives, such as enforcing rights of passage through an interoceanic canal, then action by the United States to enforce the terms of the Treaties would not violate Article 2(4). Furthermore, the new Canal Treaties attempt to depart from past precedent concerning the Panama Canal by declaring the Canal to be open in time of both peace and war,[86] and arguably Panama must be "estopped" from objecting to enforcement action taken by the United States against Panama, even on the territory of Panama, in accordance with an agreement to which Panama was a willing party. The United States also could invoke rights of self-defense in its own behalf in countering closure of the Canal to its ships. In view of the strategic importance of the Panama Canal to the security of the United States, the historical relationship of the United States to Panama, and the delicate balance struck in the Treaties between the interests of the United States and the sovereignty of Panama, any threat to interests of the United States in the Canal could reasonably be seen as posing a direct threat to the national security of the United States.

---

85. *See Senate Hearings*, *supra* note 1, at 332.
86. Neutrality Treaty art. II.

These arguments are persuasive in authorizing the use of force against Panama when Panama cannot justify its own actions in closing the Canal under other principles of international law. If, however, Panama violates the regime of neutrality in the Canal in order to protect a vital security interest of its own, as in defense against an armed or other direct attack on Panama, the arguments for unilateral intervention by the United States are not compelling; for a state cannot abandon, either expressly or impliedly, such a substantial prerogative of sovereignty as the right to defend itself from attack without risking the abandonment of sovereignty itself.[87]

Nor could the United States plausibly argue that breach of the treaties by Panama constitutes an act of aggression against the United States, giving rise to a permissible response of self-defense by the United States. In the case of the Anglo-French invasion of Suez in 1956, a similar argument was advanced that the violation by Egypt of the 1866 Convention in nationalizing the Canal entitled France and England forcibly to reinstate the treaty regime in an act of self-defense.[88] This argument, however, has been discredited on the ground that Egypt has a legal right to nationalize the Canal so long as it compensated the owners;[89] therefore, Egypt's action did not give rise to any rights by England and France in self-defense. Similarly, should Panama exercise its sovereign right to defend itself from the threat of attack, the United States would not have a superior right under the doctrine of self-defense to oppose

87. "[The right of self-defense] is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion." Address by Sec'y of State Kellog, Apr. 28, 1928, quoted in 5 M. WHITEMAN, *supra* note 30, at 971-972.

88. *See* R. BOWIE, *supra* note 63, at 24.

89. *See, e.g., id.* at 48, 100.

that action with the use of force.[90] Because the United States under the Treaties no longer enjoys "as-if-it-were sovereign" power over the Canal Zone, it is not entitled to exercise rights of belligerency in the Canal;[91] but the United States cannot

90. The expansive application of the concept of self-defense to the Cuban missile crisis of 1962, during which the United States imposed a naval quarantine on Cuba in order to force the Soviet Union to dismantle nuclear missile bases under construction, is distinguishable from the case of the Panama Canal. First, the nature of the threat posed to the United States by the missiles placed in Cuba was much more direct than any threat posed to a foreign state through closure of an interoceanic canal. Second, the secret stationing of missiles in Cuba by the Soviet Union, in disregard of warnings from the United States and assurances of compliance from the Soviets, must be seen in the context of international confrontations between the United States and the Soviet Union and not as an act of self-defense on the part of Cuba. And finally, the United States officially justified its quarantine as a collective security measure taken by the Organization of American States, and not as an exercise of national self-defense. For a general discussion of the legal issues raised by the Cuban missile crisis, see A. CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISIS AND THE RULE OF LAW (1974); Akehurst, *Enforcement Action By Regional Agencies With Special Reference To The O.A.S.*, 42 BRIT. Y.B. INT'L L. 175, 197-203 (1967); Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT'L L. 515 (1963); McDougal, *supra* note 20, at 597; Rostow, *supra* note 23, at 279.

91. When the Suez Canal was under the protection of the United Kingdom, Britain could use the Canal for strategic advantage only by commandeering ships outside the Canal area. *See* p.21 *supra*. On the other hand, when the Canal passed under the full control of the territorial sovereign, Egypt, that state was entitled to defend itself by closing the Canal to its enemies. *See id.* Legal objections that have been raised to Egypt's closure of the Canal to ships of Israel have focused on whether or not Egypt has actually been in a state of hostilities with Israel, thus giving rise to belligerency rights in the Canal, and not on whether in the event of Egypt's engagement in war it would be obliged to open the Canal to hostile powers. *See* Khadduri, *supra* note 11, at 154, 156-57.

deny Panama a right that the United States and every other sovereign of an interoceanic canal have exercised.

This conclusion does not suggest that Panama is free to violate the Treaties and to close the Canal at will. The right of self-defense is subject to limitations in spite of the initial discretion given to a state to determine when actions of self-defense are required.[92] Thus the right of self-defense would not justify closure of the Canal as a general sanction against states with which Panama is in political dispute or as an act of retaliation for hostilities arising elsewhere.[93] Closure of the Canal by Panama would be a legitimate act of self-defense only on a selective basis against those ships which by passing through the Canal would pose a direct threat to the territorial integrity or political independence of Panama, and only after peaceful alternatives to such closure are exhausted.[94]

Indiscriminate or unreasonable invocation by Panama of belligerency rights in the Canal could be countered by the United States. Denunciation by the Security Council of closure of the Canal by Panama

---

92. The legitimate exercise of self-defense must satisfy the requirements of "necessity" and "proportionality". For discussion of the use of force in self-defense, see pp. 7-10 *supra*.

93. *See generally* Higgins, *The June War: The United Nations and Legal Background*, in 2 THE ARAB-ISRAELI CONFLICT, *supra* note 23, at 445, 449 (retaliation not permissible action of self-defense under various resolutions of United Nations).

94. Recent practice in the Suez Canal indicates that the state that is sovereign over an interoceanic canal must be directly and unambiguously threatened by military action before that state is entitled to restrict passage in its own defense. Following Egypt's closure of the Suez Canal to Israeli shipping in 1949, the United Nations Security Council resolved that the armistice signed by the two countries in 1949 denied Egypt the right to exercise belligerency rights in the Canal, in spite of continued fighting in the Middle East and Egypt's claim that there existed a state of hostilities. In effect, the Security Council resolved that Egypt's claim of self-defense was not justified under the circumstances. 6 U.N. SCOR (558th meeting) 2-3, U.N. Doc. S/2322 (1951), *reprinted in* 2 THE ARAB-ISRAELI CONFLICT, *supra* note 23, at 580.

would reinforce the rights of enforcement by the United States, but unilateral enforcement could proceed without prior authorization from the United Nations. International legal standards and the norms expressed by the Charter operate even if the institutions of the United Nations are paralyzed.[95]

In summary, although the legal requirements of "necessity" and "proportionality" impose limits on the permissible exercise of self-defense by Panama, nothing can abridge entirely that fundamental right. No bilateral treaty can deny to Panama the right to defend itself if under otherwise applicable legal standards Panama is entitled to act in self-defense. This right is the essence of sovereignty, which Panama has long demanded and which has been granted by the Treaties to Panama in the Canal Zone. Nevertheless, these rights can be properly invoked only under narrow circumstances and should not seriously jeopardize the interests of the United States and the world user community in the secure and neutral administration of this vital waterway.

IV. Further Exceptions to the Regime of Neutrality in the Panama Canal: Obligations Under Collective Security Agreements

Analysis of the conflict between rights of treaty enforcement in the United States and inherent rights of self-defense in Panama has indicated that the concept of neutrality of interoceanic canals is not absolute. A further exception to neutrality of the Panama Canal does not concern relations between the United States and Panama, but the obligations of those two states jointly under the Panama Canal Treaties. This exception could arise from the obligation

---

95. *See* Rostow, *supra* note 23, at 269-70. For example, international disapproval of the 1956 Anglo-French invasion of Egypt was apparent even in the absence of action by the Security Council, which was barred by vetoes of Britain and France. *Id.* at 279.

of the United States and Panama, as members of the United Nations and the Organization of American States (O.A.S.), to impose sanctions on members of the world community found to constitute a threat to peace. Compliance with these sanctions by the United States and Panama could compel closure of the Canal to the states on which the sanctions have been imposed, in violation of the regime of permanent neutrality.[96]

A. *Sanctions Under the United Nations*

The system of sanctions under the United Nations is designed to secure world peace by providing for united, forceful opposition to acts of aggression by states. Chapter VII of the United Nations Charter provides for determination by the Security Council of the "existence of any threat to the peace, breach of the peace, or act of aggression,"[97] and article 2(5) provides for the imposition of binding obligations on members to implement "decisions" made by the Security Council to counter such threat.[98] This system of mandatory collective sanctions against aggressor states, together with limitations on the unilateral use of force articulated elsewhere in the Charter,[99] constitutes a major potential limitation on the freedom of member states to engage, and even to remain fully neutral in hostilities.

The implementation of the United Nations collective security system since the Second World War has not been effective, however, in large part because of the veto power of the permanent members of the Security Council. Practical limitations on the ability of the United Nations to require belligerent action of member states thus reduces the likelihood that Panama and the United States, as the guarantors of neutrality in the Canal, would ever be subject to enforcement obligations that conflict with duties under the new Canal Treaties. Also, although obligations under the Char-

96. For a general discussion of neutrality and collective security, see A.B.A., *supra*, note 32, at 75-86.

97. U.N. CHARTER art. 39.

98. *Id.* art. 2(5).

99. *Id.* art 2(4).

ter of the United Nations prevail over other treaty commitments,[100] Article 48 of the Charter empowers the United Nations to exempt certain nations from enforcement responsibilities[101] and thus could allow exemption of the United States and Panama from any obligation to close the Canal to ships of a violating state. Since the United States, as a permanent member of the Security Council, could veto any sanction proposal that does not include such an exemption, such a conflict would not arise unless it was understood to serve a policy interest of the United States. Should the Security Council impose such an obligation, however, the United States and Panama would be legally bound to honor it. Thus there would be created a further exception to the regime of strict neutrality purportedly created by the Panama Canal Treaties.

B. *Sanctions under Regional Security Organizations*

Panama and the United States also are members of the Organization of American States and participate in the regional security system established by the Inter-American Treaty of Reciprocal Assistance ("Rio Treaty").[102] Regional security agreements of this type are authorized in Chapter VIII of the United Nations Charter,[103] and may compel the taking of belligerent actions so long as those actions are consistent with the "purposes and principles of the United Nations."[104] Because of the obligatory nature

---

100. *Id.* art. 103.

101. U.N. CHARTER art. 48 provides: "The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine."

102. Dec. 3, 1948, 62 Stat. 1681, T.I.A.S. No. 1838 [hereinafter cited as Rio Treaty].

103. U.N. CHARTER art. 52.

104. For discussion of the role of regional organizations in enforcement activities, see Meeker, *supra* note 90, at 516-24; 12 M. WHITEMAN, *supra* note 30, at 490-491. *But see generally* Akehurst, *supra* note 90, at 175 (arguing that regional organizations do not have the authority to take enforcement action without the express authorization of the Security Council).

of compliance with the sanctions imposed under Article 20 of the Rio Treaty, the relative frequency of invocation of such sanctions in the past, and the failure of the O.A.S. Charter and the Rio Treaty to provide exceptions for special circumstances, these agreements present a more serious threat to the neutrality of the Panama Canal than actions taken through the United Nations.

The O.A.S. Charter provides in Article 24 that "Every act of aggression by a State against the territorial integrity or...sovereignty or political independence of an American State shall be considered an act of aggression against the other American States."[105] Article 25 further provides that where a threat of such action exists, the American states "shall apply the measures and procedures established in the special treaties on the subject." The Rio Treaty, which is the only such "special" treaty, authorizes the contracting parties by two-thirds vote to take collective action to deal with any threat to regional peace and the security of O.A.S. member states.[106] The sanctions available include the "...recall of chiefs of diplomatic missions; breaking of diplomatic relations; breaking of consular relations; partial or complete interruption of economic relations or of rail, *sea*, air, postal, telegraphic, telephonic, and radiotelephonic or radiotelegraphic communications; and use of armed force."[107] The consent of a member state is required only for actions involving use of military force. For all other sanctions, including the interruption of sea communications, all members are obliged to comply with sanctions promulgated through the O.A.S.[108]

The Rio Treaty has been invoked many times since its signing in 1947,[109] and although it has never been

---

105. Charter of the Organization of American States, June 15, 1951, 2 U.S.T. 2416, T.I.A.S. No. 2361.

106. Rio Treaty, *supra* note 102, arts. 3 & 17.

107. *Id.* art. 8 (emphasis added).

108. *Id.* art. 20.

109. Most notably, the Treaty was invoked against the Dominican Republic in 1960 and 1965 and against Cuba twice in 1962. *See* Akehurst, *supra* note 90, at 188, 190, 197, 203.

used to compel Panama or the United States to restrict international passage through the Canal, such an obligation could be imposed in the future.[110] The influence of the United States in the O.A.S. makes it unlikely that Panama and the United States would be required, over the objection of the United States, to take acts in violation of neutrality provisions of the Panama Canal Treaties. If such an obligation were imposed despite objections, however,[111] the parties would be bound by duties created by the O.A.S. Charter and the Rio Treaty.[112]

---

110. A subcommittee of the American Bar Association has recommended that a reservation be added to the Rio Treaty exempting Panama from the obligation to comply with sanctions that could lead to conflict with Panama's neutrality obligations in the Canal. *See* A.B.A., *supra* note 32, at 92. This suggestion is unwise, however, because the effective defense of the Western Hemisphere could under certain circumstances require denial of rights of passage through the Canal to ships of an aggressor state.

111. The United States has no veto power under the Rio Treaty comparable to that in the United Nations Security Council.

112. It could be argued that the Panama Canal Treaties, signed after the Rio Treaty, impliedly modify or suspend the commitments of Panama and the United States under the Rio Treaty, and hence would prevail in case of conflict. However, although the modification by implication of an existing treaty may be effected by a subsequent treaty, such modification may generally occur only with the consent of all the parties to the initial treaty. In the case of multilateral treaties, such as the Rio Treaty, the possibility of such a modification depends on the nature of the original treaty, and any provisions it contains concerning subsequent alteration. The 1969 Vienna Convention on the Law of Treaties, art. 58, permits modification by implication of a multilateral treaty only where such modification is compatible with the objectives of the initial treaty and does not substantially affect the rights and responsibilities of the other parties. 14 M. WHITEMAN, *supra* note 30, at 411, 419-422.

None of these conditions is satisfied by an implied bilateral modification of a multilateral collective security treaty which does not provide for such alteration. Furthermore, the United States has never expressed any intention of altering its own or Panama's obligations under the Rio Treaty by adopting the Panama Canal Treaties. *See Senate Report*, *supra* note 7, at 171. Consequently, the obligation of the parties to the prior collective security treaty must prevail.

Thus the possibility of conflict between neutrality obligations arising under the Panama Canal Treaties and the membership of Panama and the United States in collective security organizations poses a challenge to the neutrality of the Panama Canal. Although the likelihood that such a conflict would arise is small because of the infrequency of mandatory sanctions imposed by the United Nations and the influential role of the United States in the United Nations and the O.A.S., any actual conflict would necessarily be resolved in favor of the collective agreements and in violation of the regime of neutrality in the Canal.

Conclusion

Analysis of the conflict between rights of self-defense in Panama and rights of treaty enforcement in the United States, and of obligations placed on the United States and Panama under collective security agreements to which both states are parties, indicates that the concept of neutrality in the Panama Canal cannot be absolute. The literal language of the Treaties is insufficient to resolve important issues concerning the Canal's neutrality. General principles of international law and overriding legal obligations of the parties, rather than Treaty language, must finally be determinative.

The agreements nevertheless constitute an important legal accomplishment. The interest of Panama in the successful operation of the Canal is strengthened by its acquisition of full sovereignty over its major national resource. The rights of the United States to priority passage through the Canal[113] and the ability of the United States through its naval power to control wartime access to the Canal also suggest that the United States has sacrificed no vital interest in the Treaties. By securing the mutual interest of both Panama and the United States in the safety and efficient administration of the Canal, the Treaties may thus create a different, but no less stable, balance of interest in the Canal than their literal language suggests.

113. *See* note 75 *supra*.