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THE PANAMA CANAL TREATIES: PAST, PRESENT, FUTURE

E. L. ROY HUNT*

Two years have elapsed now since the January riots of 1964. Immediately after the riots, as upon previous occasions, a clamor sounded throughout Panama for seizure and nationalization of the Canal, though significantly the clamor, despite a three-month hiatus in diplomatic relations, was not an official one. At the same time there sounded again in other quarters of the world what may more aptly be described as a murmur in favor of internationalization of the Canal. Neither, of course, has occurred. Instead the United States and Panama have for the past several months been engaged in discussions both in Washington and Panama, discussions which President Johnson has recently announced will result in a new treaty. And this despite the United States' insistence that it is doing so under no legal compulsion!

Three broad but interrelated questions are posed:

(1) Why is the United States discussing a new treaty if it is under no legal compulsion to do so?

(2) Why has Panama taken no action to terminate unilaterally the Hay-Bunau-Varilla Treaty¹ of 1903?

(3) Why has the world community made no move toward internationalizing the Canal, thus assuring the most inclusive possible use of such a vital waterway?

It is at once apparent that the greatest problem confronted is that of accommodating inclusive and exclusive interests.² On the lowest level of abstraction this accommodation must be achieved in the particular context of a bilateral treaty and its related agreements. Immediate attention is directed to the danger of assuming, without appropriate verification, that the words of treaties mirror community expectations. In the context presently to be considered there is serious

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1. Convention With the Republic of 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. Although this treaty is the keystone of our relations with Panama, it must be considered in conjunction with the revisions of 1936 and 1955.

2. The author is indebted to Professors McDougal and Lasswell for the analytical approach suggested in their article: McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959). A slightly different version appears in McDougal & Associates, *STUDIES IN WORLD PUBLIC ORDER* 3-41 (1960).

doubt whether community expectations were shared even at the time of commitment; certainly they have been modified as new conditions have arisen.

Inclusive interests refer to the demands and expectations that affect collective processes to a degree significant enough to bring more than a single nation-state into control of the process. For clarity one must distinguish inclusive interests in regard to impact or "use," and authorized control or "competence." Inclusive use refers to a process in which all phases of an activity are or may be shared; while inclusive competence, either organized or unorganized, means shared effective authority to participate in decisions. Similarly, exclusive interests may be broken down into exclusive uses and exclusive competences. Exclusive interests in use pertain uniquely to one participant in the world community. Exclusive interests in competence exist when the general community's constitutive process allocates authority to a state to act unilaterally, with a minimum of review by others.

Additional complications are inherent in the particular questions posed because of the exclusivity of competence jointly claimed by the United States and Panama as against the world community. While maintaining a united front against inclusive interests (such as proposals for internationalization of the Canal), each of the two nation-states has made conflicting claims involving both exclusive uses and exclusive competences.

By now it should be evident that the problem in the past has been more than one of simply interpreting particular clauses of the Hay-Bunau-Varilla Treaty, though this task is by no means to be taken lightly. But our attention is also required to the intermediate and long-range aspects of the problem as well as to the short-range aspects. Practically speaking, this observation is buttressed by agreement on all sides that a new canal must be in operation by 1980;³ such an undertaking implies new and perhaps radically different arrangements from those now existing.

Certainly no intelligent analysis of the problem of accommodating inclusive and exclusive interests can be made without placing the problem in its proper context. In an attempt to answer the questions posed, then, our goal should be one of interpreting the Hay-Bunau-Varilla Treaty and related treaties, past, present, and future, in terms of an accommodation of interests, continually referring to the whole of the social context.

3. In addition to the needs expressed in President Johnson's statements of September 24, 1965 (see APPENDIX), and December 19, 1964 (N.Y. Times, Dec. 19, 1964, p. 1, col. 8) see Stratton, *Sea-Level Canal: How and Where*, 43 FOREIGN AFFAIRS 512, 513 (1965); The Atlantic Monthly, May 1965, p. 28.

THE CONTEXT AND PROCESS OF INTERACTION

The status of the various Panama Canal treaties and the position of the United States in the Panama Canal Zone can be understood only in the larger context of the entire world social process since the enunciation of the Monroe Doctrine⁴ in 1823. This context must include all the participants of the world social process, their perspectives, the sustaining patterns of institutional practice in communication and collaboration, and the features of the resource environment.

The relevance of such an inquiry may easily be seen. The comprehensive world social process has shaped the predispositions of particular agreement-makers. It has contributed the environment which has expanded the effective capabilities of both the United States and Panama in strategies of persuasion. It has affected not only demands for commitment (including freedom or compulsion in choice) and capabilities for fulfillment, but also the modalities by which the parties have mediated their subjectivities and the degree of their common perception and understanding.⁵

United States policy in the Mexican Gulf and the Caribbean has been characterized by pursuit of one over-riding value: *Power*. A typical expression of this goal may be found in President Hayes' advice to the Senate more than three decades before the Canal was completed: "[I]ts relation to our power and prosperity as a nation, to our means of defense, our unity, peace and safety, are matters of paramount concern to the people of the United States."⁶ This objective has been justified in the name of "national interests" and "national security." At various times less important goals have influenced our policy, but the exclusion of other first-rate powers in the Caribbean has been the keynote of the course pursued by the United States during the past one hundred and forty years.

This basic proposition, as first articulated by President Monroe, was that no European nation would be suffered to impose its sovereignty or system of government on any former colony in this hemisphere that had won its independence. The Monroe Doctrine ex-

4. The "Monroe Doctrine," so-called because of its enunciation in President Monroe's message at the commencement of the First Session of the 18th Congress, December 2, 1823, finds its classic exposition in: TAFT, *THE UNITED STATES AND PEACE* 1-39 (1914). For a recent and lucid discussion of the doctrine and its status see: Rovere, *Letter From Washington*, *The New Yorker*, Oct. 6, 1962, pp. 148-57. See also the discussion by Reston and Sulzberger of the "Johnson Doctrine" as a corollary to the "Monroe Doctrine," *N.Y. Times*, May 5, 1965, p. 46, col. 5.

5. McDougal, Lasswell & Miller, *The Interpretation of International Agreements: Principles of Content and Procedure in Process* at 18 (unpublished article in Yale Law School Library, to be published in 1966 under the title *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER*).

6. 10 CONG. REC. 1399 (1880).

cluded existing European colonies from its scope, but was positive in its declaration that henceforth the continents of the Western Hemisphere were not to be considered as subjects for future colonization by European powers. In the course of the nineteenth century the Doctrine was enlarged to include in its restriction all nations outside this hemisphere as well as any efforts by these nations to transfer to another its existing sovereignty or dominion in a territory of the Americas.

Despite such strong talk, the United States remained a relatively weak power, and the remainder of the nineteenth century brought concessions and treaties which gave the United States valuable time for securing its power position in the Caribbean.

Annexation of the Far Southwest and the Pacific Coast led the United States, more than a decade before the outbreak of the Civil War, to pursue a policy of safeguarding the Isthmian routes, a policy made more urgent with the discovery of gold in California. The Government at Washington interested itself in Panama, Nicaragua, and Tehuantepec. Under these circumstances the United States and New Granada (presently Colombia), on December 12, 1846, signed a treaty that was to have a far-reaching influence in the Isthmus and which finally provided the legal excuse for the action of the Washington Government in securing Panamanian independence in 1903. Article 35 of that convention stated:⁷

[T]he United States guaranty, positively and efficaciously, to New Granada, by the present stipulation, the perfect neutrality of the beforementioned isthmus, with the view that the free transit from the one to the other sea may not be interrupted or embarrassed in any future time while this treaty exists; and, in consequence, the United States also guaranty, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory.

At this point, however, the United States confronted England and, to a lesser extent, France, both of whom objected to her domination of the Gulf and Caribbean. English opposition was so effective that Secretary of State John M. Clayton and the British minister, Sir Henry Lytton Bulwer, signed, on April 19, 1850, a treaty by which their governments obligated themselves not to obtain exclusive control over any ship canal in any part of Central America. They further promised never to fortify, to occupy, to colonize, or to assume dominion over any part of Central America in connection with a canal

7. A General Treaty of Peace, Amity, Navigation, and Commerce With the Republic of New Granada, Dec. 12, 1846, art. XXXV, para. 1, 9 Stat. 881, 898-99, T.S. No. 54.

enterprise.⁸ The practical result was an understanding that any canal joining the Caribbean Sea and the Pacific Ocean should be controlled jointly by the United States and Great Britain. This British opposition was not resolved in favor of the United States until the signing of the Hay-Pauncefote Treaty in 1901.

After decades of discussion an attempt to cut a canal across the Isthmus was finally begun in 1879 under the auspices of Ferdinand de Lesseps. Work was carried on for several years, and French savings were wasted by the hundreds of millions until operations were suspended in 1888. The canal company went into the hands of the receiver on February 4, 1889, and the New Panama Canal Company, headed by Philippe Bunau-Varilla, was active without appreciable success from 1894 until 1899.⁹

During the Spanish-American War the need for a waterway across the Isthmus was strikingly demonstrated by the voyage of the *Oregon*, steaming at flank speed from Puget Sound to Cuban waters by way of the Magellan Straits, a distance three times that it would have been had the Canal been built. This exploit, coupled with the conquest of the Philippines, bringing new American responsibilities in the Pacific far from the center of power on the Atlantic seaboard, awakened anew the interest of the United States in a canal route.

On March 30, 1899, Congress authorized an investigation of the probable canal routes, and the Hay-Pauncefote Treaty of November 18, 1901, gave the United States the right to construct a waterway across Central America without British interference.¹⁰ This treaty was the result of negotiations that led to the proclamation of a condition of neutrality in accordance with the Convention of Constantinople of 1888 for the Suez Canal, a condition incorporated by reference into the Hay-Bunau-Varilla Treaty. Thus was the canal power struggle between the United States and the Western European powers finally resolved.

After a bitter fight the proponents of the Panamanian route, aided by Bunau-Varilla of the New Panama Canal Company, were successful over those who favored Nicaragua. On June 29, 1902, President Theodore Roosevelt signed the Spooner Bill, which provided for a canal through Panama. The French offer to sell their concession had been accepted by the Washington Government. The State Department then proceeded to negotiate with Colombia for the canal with the result that the Hay-Herran Treaty was signed by the United States on January 22, 1903. The United States was granted a one-hundred-year

8. Senate Comm. on Foreign Relations, *Diplomatic History of the Panama Canal*, S. Doc. No. 474, 63d Cong., 2d Sess. 272 (1914).

9. BUNAU-VARILLA, PANAMA 28-154 (1920).

10. *Id.* at 292.

lease on a zone of land ten kilometers wide across the Isthmus for an initial payment of \$10 million and an annuity of 250,000 dollars to begin nine years after the ratification of the treaty.¹¹

The Bogotá Government, privately hoping for greater concessions, rejected the treaty on August 12, 1903. This action fanned the flames of revolution, which had long smouldered in Panama. At this juncture Bunau-Varilla, whose perspectives must always be considered in light of his financial interest in the sale of the New Panama Canal Company's concession, arrived on the scene in Washington. Through a combination of chance meetings and adroitly arranged interviews with President Roosevelt and other highly placed officials, he learned that the United States was still interested in the Panamanian route and would not be averse to a Panamanian revolution.¹² In his search for a means of inaugurating a rebellion without the financial aid of the United States and without an express promise of its military cooperation, he decided that the United States might supply the vessels required to prevent Colombian troops from being landed on the Isthmus under the guise of carrying out the provisions of article 35 of the treaty of 1846.¹³

Bunau-Varilla, after extracting a promise from the Panamanian leader, Amador, that he would be appointed minister to the United States to negotiate the treaty by which the prospective Panamanian Republic would grant the route of the proposed canal, disclosed his plans to Amador and used his Washington contacts to have the revolution carried through in accordance with his plans. Bunau-Varilla characterized his planning and direction of the revolution as a "struggle . . . for the defence and triumph of the greatest moral interest which the French genius has ever had abroad."¹⁴

On November 6, three days after the revolution began, the United States recognized the insurgent government as the *de facto* government of Panama. On November 13, *de jure* recognition was granted, and Bunau-Varilla was received officially in Washington as the minister of the Republic of Panama.¹⁵

Thus began the work of the new Panamanian minister, by nationality a Frenchman and, in his own words, a man who considered he "had the moral right to annul, by political action at Panama, the fatal effect which political action at Bogotá was bound to have on the gigantic French interests of which I was the sole defender."¹⁶

11. *Diplomatic History of the Panama Canal*, *supra* note 8, at 277-88.

12. BUNAU-VARILLA, PANAMA 294-97 (1920).

13. *Id.* at 314.

14. *Id.* at *v.*

15. *Id.* at 364-66.

16. *Id.* at 303.

Knowing that a commission was being sent from Panama to aid him in negotiating a treaty, Bunau-Varilla persuaded Secretary of State Hay of the necessity of haste if the United States was to get all the concessions it desired — concessions that would readily be forthcoming as long as Hay had only Bunau-Varilla with whom to deal.¹⁷

Under such circumstances Hay and Bunau-Varilla proceeded to draw up a treaty giving the United States the right to construct a canal across the Isthmus. The Frenchman drafted the convention and Hay hastened to accept it with only minor changes. It was signed at 6:40 in the evening of November 18, 1903, in Hay's drawing room. Two hours later the Panamanian Mission arrived in Washington to help negotiate the treaty.¹⁸

The Panamanian Mission, faced with a *fait accompli*, refused to ratify the treaty; they insisted it must be sent to Panama for ratification. Bunau-Varilla resolved to obtain the ratification from the government itself, before the arrival of the treaty at Panama. His first dispatches to this effect were answered negatively. On November 25 he sent a cablegram threatening the Panamanian Government with the acute displeasure of Secretary Hay and the impending arrival of a Colombian envoy seeking a reversal of the position of the United States with promises of new concessions. Bunau-Varilla ended his cablegram with an ultimatum that he would resign if the treaty was not immediately ratified.¹⁹ This blunt threat brought the desired notification of promise of ratification of a treaty which had not yet been seen.

The provisions of the Hay-Bunau-Varilla Treaty of November 18, 1903, were summarized as follows by President Roosevelt in his message to Congress on December 7, 1903:²⁰

By the provisions of the treaty the United States guarantees and will maintain the independence of the Republic of Panama. There is granted to the United States in perpetuity the use, occupation, and control of a strip ten miles wide and extending three nautical miles into the sea at either terminal, with all lands lying outside of the zone necessary for the construction of the canal or for its auxiliary works, and with the islands in the Bay of Panama. The cities of Panama and Colon are not embraced in the canal zone, but the United States assumes their sanitation and, in case of need, the maintenance of order therein; the United States enjoys within the

17. *Id.* at 367, 374.

18. *Id.* at 377.

19. *Id.* at 383-85.

20. Message from President Theodore Roosevelt to the opening session of Congress, December 7, 1903, in H.R. Doc. No. 1, 58th Cong., 2d Sess. 1 (1903).

granted limits all the rights, power, and authority which it would possess were it the sovereign of the territory to the exclusion of the exercise of sovereign rights by the Republic. All railway and canal property rights belonging to Panama and needed for the canal to pass to the United States, including any property of the respective companies in the cities of Panama or Colon; the works, property, and personnel of the canal and railways are exempted from taxation as well in the cities of Panama and Colon as in the Canal Zone and its dependencies. Free immigration of the personnel and importation of supplies for the construction and operation of the canal are granted. Provision is made for the use of military force and the building of fortifications by the United States for the protection of transit. In other details, particularly as to the acquisition of the interests of the New Panama Canal Company and the Panama Railway by the United States and the condemnation of private property for the uses of the canal, the stipulations of the Hay-Herran treaty are closely followed, while compensation to be given for these enlarged grants remains the same, being ten millions of dollars payable on exchange of ratifications; and, beginning nine years from that date, an annual payment of \$250,000 during the life of the convention.

Thus the destitute little Republic of Panama, with an area of about 30,000 square miles and a population of less than half a million, became a participant in the process of agreement with the most powerful state in the Western Hemisphere. The process was inevitably affected by the low degree of governmentalization of the internal social processes as well as the lack of any resource base except its geographic position athwart one of the world's great highways of transportation. There was a complete lack of industrialization and the new republic received no help from states other than the United States in its revolution and later in its treaty negotiations. It must be noted that the basic situation is little changed today. The population is now estimated by the United Nations at a little over a million, but basically the population is still dependent economically upon the natural resource inherent in its geographical position, a resource controlled by a powerful United States.

The role of the particular individuals cannot be overemphasized here. Whenever states make agreements, the subjectivities which are important to shared commitment, and which a subsequent interpreter must seek, are the subjectivities of individual human beings, the authoritative and controlling negotiators.²¹ In this particular in-

21. McDougal, Lasswell & Miller, *op. cit. supra* note 5, at 10.

stance the role of Bunau-Varilla was affected by certain specific characteristics, such as his formal authority (both as minister of the Republic of Panama and the director of the New Panama Canal Company), his skill and intelligence, as well as more general conditioning factors, such as his intense primary loyalty to France and French financial interests.

The general objectives of both parties in making the Hay-Bunau-Varilla Treaty have not changed with the passage of years. The United States still proclaims the Canal's chief value is as a safeguard to its power position in the Caribbean. Some emphasis is still placed upon the desire to promote commerce and investments and there is perhaps a desire, evidenced by various projects of the Alliance for Progress, to help the people of the area along the road to progress. Panama, while demanding recognition of her sovereignty in the Canal Zone, nevertheless has seemed more interested in the economic benefits to be derived from her most valuable resource. She is left with the freedom to pursue this objective more single-mindedly since the very serious health problems of her peoples were alleviated early in the history of the Canal. The intensities with which Panama has affirmed her demands concerning sovereignty have reflected the necessity and utility of nationalistic demands as a domestic political device, a device used increasingly throughout the world.

Normally the outcome phase in the making of a treaty is the moment, after past differences have been reconciled and before future differences arise, when the parties integrate and express their shared expectations of common commitment to a future policy.²² This phase was never satisfactorily resolved in the history of the Hay-Bunau-Varilla Treaty, and here lies the key to decades of dispute over proper interpretation of the agreement. Although it was signed by representatives of both governments, it is apparent from his memoirs that the perspectives of Bunau-Varilla, the drafter as well as Panama's signer, were not those of Panama. Furthermore, the promise of ratification was extracted from the Panamanians before they had read the treaty. It is true that the Government of Panama subsequently acknowledged the irreversibility of its commitment but this must be attributed to the diplomatic, economic, and military strategies coercively employed by the United States. The importance of differences in power position between the two nations is a matter easily observed. Scarcely less important were differences in capabilities for the production of goods, scientific development and intelligence services, the capacities of statesmen and negotiators (with the exception of Bunau-Varilla), solidarity in the community, and loyalty of allies.

22. *Id.* at 16.

The United States has suffered from a guilty conscience ever since the treaty was negotiated. Secretary Hay's view of the treaty was expressed in a letter to Senator Spooner February 20, 1904, describing it as "fully advantageous to the United States, and, we must confess, not so advantageous to Panama You and I know very well how many points are in the treaty to which any patriotic Panamanian would object."²³ Such feelings have persisted and through the years have resulted in numerous concessions by the United States.²⁴

That lack of consensus about the content of their commitment has existed since the treaty's inception is evidenced by the demands which were immediately forthcoming from Panama and which have continued until the present time. These demands have led to lengthy negotiations which, from time to time, have resulted in revisions of the treaty. As a result of the 1936 revision the United States withdrew its guarantee of independence, raised the annual payments to 430,000 dollars a year, and agreed to bar all commercial enterprise within the Zone except that directly concerned with shipping.²⁵

A second revision of the treaty was signed and ratified in 1955.²⁶ Principal among concessions made by the United States was an increase in the annuity from 430,000 dollars to \$1.93 million yearly. In addition, the United States gave Panama about \$24 million worth of real estate and buildings no longer needed by the Canal Zone administration. United States citizen and noncitizen employees were guaranteed equality of pay and opportunity. The United States also agreed to build a high-level bridge over the Pacific entrance to the Canal. Under the treaty revision Panama is enabled to levy income taxes on Panamanian citizens and those of third countries employed by Canal Zone agencies; United States citizens and members of the armed forces are exempt.

Since that time varied demands, heightened by the Egyptian seizure of the Suez Canal, have been made. Following a series of riots and incidents in the fall of 1958, President Eisenhower issued an order that the Panamanian flag be flown alongside that of the United States in the Canal Zone.²⁷

23. ALFARO, MEDIO SIGLO DE RELACIONES ENTRE PANAMA Y LOS ESTADOS UNIDOS 22 (1959).

24. Fenwick, *The Treaty of 1955 Between the United States and Panama*, 49 AM. J. INT'L L. 543, 546 (1955).

25. General Treaty of Friendship and Cooperation With Panama, March 2, 1936, 53 Stat. 1807, T.S. No. 945.

26. Treaty of Mutual Understanding and Cooperation With the Republic of Panama, January 25, 1955, 2 U.S.T. & O.I.A. 2273, T.I.A.S. No. 3297, 243 U.N.T.S. 211.

27. N.Y. Times, Dec. 3, 1959, p. 13, col. 1.

By unanimous vote on November 16, 1961, the Panamanian National Assembly called for a scrapping of its existing treaty with the United States regarding the Canal Zone.²⁸ On November 17, 1961, Secretary of State Rusk promised discussions concerning a new treaty "early in 1962."²⁹ Discussions between President Kennedy and President Chiari did take place in Washington in June 1962. The two presidents found "a basis for solution," at least on paper, to many emotional problems, among them the flying of Panamanian flags in the Canal Zone; the encouragement of greater Panamanian sales to the Canal Zone; equal labor opportunities and wages for Panamanians employed by the canal company, and the withholding by the United States of income taxes of non-American workers on behalf of Panama.³⁰ Notably missing, however, was any mention of a new treaty, though the two leaders did agree that the matter of increased payments would be considered by high level representatives of both governments. Ambassador Farland and Canal Zone Governor Fleming decided, in implementation of Presidents Kennedy and Chiari's agreement that both the Panamanian and United States flags would be flown at "appropriate" places, that the best way to satisfy the obligation at schools within the Zone would be to fly no flags there at all.³¹ Thus the American flag at Balboa High School was taken down during the 1963 Christmas vacation. When the United States students returned and found no flag flying, they themselves raised the United States flag on the school flagpole. Soon thereafter a group of Panamanian high school students attempted to raise the Panamanian flag on the same pole; they were turned away by the Zone police, and soon full scale riots erupted between Panamanians and Zonians. During the course of the next four days the casualty list numbered more than twenty dead, hundreds injured, and property damage in the millions. As an aftermath Panama severed diplomatic relations with the United States and filed charges of aggression against the United States with the United Nations Security Council. During the three months that followed, the Inter-American Peace Committee of the Organization of American States sought to restore normal relations between the two countries. The two countries remained stalemated, however, over the vital point whether a firm advance commitment should be made for the writing of a new Panama Canal treaty. Finally, on April 3, 1964, an accord was reached which resulted in resumption

28. N.Y. Times, Nov. 18, 1961, p. 9, col. 2.

29. 45 DEP'T STATE BULL. 918, 925 (1961).

30. N.Y. Times, Nov. 17, 1963, p. 52, col. 1.

31. Statement by Mr. Califano, Counsel for the United States, at 1964 Hearings in Panama Before O.A.S. and International Commission of Jurists, *THE SIXTH HAMMARSKJÖLD FORUM, THE PANAMA CANAL* 51 (1965).

of diplomatic relations.³² Even so, the accord studiously avoided the use of the terms "discussions" and "negotiations."³³

Against this background special representatives of both governments began meeting in Washington soon after President Robles took office in October. Panamanians insisted the meetings in Washington were not for the purpose of "discussing," but rather to "negotiate." And negotiations, to most Panamanians, meant a new treaty. It was at this point, in December of 1964, amid reports of lack of progress in the November meetings, that President Johnson made his surprise announcement that the United States would "plan in earnest" to replace the Panama Canal with a sea-level channel linking the Atlantic and Pacific Oceans.³⁴ Simultaneously he announced his decision to negotiate a new treaty with Panama on the existing canal. Several months later, on September 24, 1965, in a televised press conference called for the purpose, President Johnson spoke of the progress made and of the areas of agreement reached thus far. (The text of President Johnson's speech appears in the APPENDIX.) Foremost among these areas is an agreement to abrogate the 1903 treaty. Significantly, perhaps, he spoke almost in the same breath of concurrent negotiations which *might* lead to construction of the new canal in Panama. The implications of the coupling of the two earlier announcements, the two later announcements, and the course of the negotiations during the intervening months will be examined in detail in a later portion of this article.

Returning now to a consideration, in inverse order, of the questions originally posed:

(1) Why has the world community made no move toward internationalizing the Panama Canal, thus assuring the most inclusive possible use of such a vital waterway?

(2) Why has Panama taken no unilateral action to terminate the Hay-Bunau-Varilla Treaty of 1903?

(3) Why is the United States negotiating a new treaty if it is under no legal compulsion to so do?

32. For the best resumé of events leading to and subsequent to the January 1964 riots see *Reports on the Events in Panama, Jan. 9-12, 1964*, prepared by the Investigating Committee appointed by the International Commission of Jurists, Geneva, Switzerland.

33. Previous talks and a proposed accord had broken down over the interpretation of the Spanish word "negociar." The United States insisted it should be interpreted as "discuss" while Panama was equally insistent that it meant "negotiate." Baxter & Carroll, *Working Paper: The Panama Canal*, in THE SIXTH HAMMARSKJÖLD FORUM, THE PANAMA CANAL 4-6 (1965). See also Geyelin, *The Irsome Panama Wrangle*, *The Reporter*, April 9, 1964, pp. 14-17.

34. N.Y. Times, Dec. 19, 1964, p. 1, col. 8.

There is, of course, an easy way with such questions. The United States is strong — the Republic of Panama is weak. An infinite number of variations may be played on such a theme, but the easy way is no way at all for the scholar intent upon a policy-oriented analysis of a given problem. It is with the intention of illuminating the background against which new treaty arrangements are assuming shape that these questions are posed and discussed.

INTERNATIONALIZATION

The policies at stake in internationalization of the present Panama Canal (or a proposed sea level trans-isthmian canal, whether or not it transits Panama) are those of balancing the exclusive interests and competences now claimed and exercised by the United States and Panama with the world community's inclusive interests in a waterway which serves all maritime powers directly and all others indirectly. President Truman recommended to the Potsdam Conference that the Panama and Suez Canals and other waterways vital to maritime commerce be placed under the United Nations.³⁵ His recommendation went unheeded, and since then exclusive interests have rapidly prevailed over inclusive interests: the Danube is Communist controlled and the Suez Canal is controlled by the intensely nationalistic United Arab Republic.

Ideally, internationalization of the Panama Canal would entail a bilateral termination of any existing treaty between the United States and Panama, followed by negotiations satisfactory to both nations which would result in internationalization. The situation is, in fact, not so simple. Panama has repeatedly denounced internationalization.³⁶ Inquiry as to Panama's vehement stand evokes varied responses, ranging from the Panamanian's "derogation of sovereignty" cry to Yankee insistence that Panama is fearful only of losing the bargaining power derived from pitting the claims of nationalism against the United States.³⁷ The United States is in official agreement with Panama in rejecting internationalism. Both the Eisenhower and

35. TRUMAN, YEAR OF DECISION 377 (1955). See also radio address of President Truman, August 9, 1945, 13 DEP'T STATE BULL. 208, 212 (1945). President Truman's recollection of just what he said was called into question by Secretary of State Dulles on August 28, 1956, in *The Suez Canal Problem, July 26-September 22, 1956*, 6392 DEP'T STATE BULL. 295, 298 (1956).

36. N.Y. Times, Nov. 10, 1961, p. 2, col. 3; N.Y. Times, Aug. 21, 1956, p. 4, col. 5. A recent and notable exception, perhaps attributable to the heat of the moment, was Panamanian U.N. Representative Aquilino Boyd's demand in the U.N. that the Canal Zone either be handed back to Panama or internationalized with special privileges for Panama. N.Y. Times, Jan. 12, 1964, p. 24, col. 8.

37. Travis & Watkins, *Control of the Panama Canal: An Obsolete Shibboleth?*, 37 FOREIGN AFFAIRS 407, 418 (1959).

Kennedy administrations have been on record as opposing such a step,³⁸ and it can be inferred that the Johnson administration is similarly disinclined toward such a step in view of recent pronouncements on the negotiations in progress.³⁹

Despite the positions stated by the United States and Panama, it is entirely possible that at some future time the world community may claim that its broad interests lie in internationalizing the Canal in order to stabilize maritime expectations.⁴⁰ The most frequent claims heard today involve tolls and are usually pressed by private associations or individual users,⁴¹ but other users' claims have arisen in connection with rights of passage both in wartime and peacetime. More specialized claims have been presented with respect to alleged discriminatory action during peacetime against the users of certain nation-states.⁴²

It has been suggested that the United Nations or the Organization of American States are appropriate groups to operate such an internationalized Canal.⁴³ Although such suggestions have usually been premised on control conditioned upon new treaty arrangements satisfactory to both nations and pursuant to the bilateral termination of the original treaty, claims may well be made that these groups should take the initiative in "freeing" the Canal Zone should either Panama or the United States prove excessively recalcitrant.

Such a policy would, of course, necessitate use of strategies of coercion rather than strategies of persuasion. Nevertheless, coercion of the world community of users by the parties to the treaty would at some point justify community-wide coercion if such action would reduce the incidence of coercion in the whole context.

Aside from the present power position of the United States and its status in the Organization of American States, it is difficult to envision such action by the Latin American members of the OAS. For over a century their greatest fear has been that of intervention, and the provision of the OAS charter forbidding intervention in the external or internal affairs of a sister state is far more sacred than that calling for joint solidarity in the face of enemy attack.⁴⁴ This

38. BENTON, *THE VOICE OF LATIN AMERICA* 153 (1961).

39. N.Y. Times, Jan. 12, 1964, p. 1-E, col. 1.

40. See Fenwick, *Legal Aspects of the Panama Case*, 58 AM. J. INT'L L. 436, 440-41 (1964) for suggestion that the canal is already an "international public utility" and raising the question whether the treaty has not long since lost in part its bilateral character and become an obligation to all the world.

41. Fenwick, *The Treaty of 1955 Between the United States and Panama*, 49 AM. J. INT'L L. 543, 544 (1955).

42. N.Y. Times, April 28, 1962, p. 51, col. 4.

43. Travis & Watkins, *supra* note 37, at 417.

44. Durling, *La Intervención de los Estados Unidos en los asuntos internos de*

assertion is borne out by an examination of the various agreements entered into since the Act of Chapultepec and the Rio Treaty and by the bitterness of the San Jose Conference in 1960, the second Punta del Este Conference in 1962,⁴⁵ and the aftermath of the United States' involvement in the Dominican Republic during recent months.⁴⁶

As for the United Nations, the organization's past action indicates it would do no more than intervene to keep the peace in areas where uncontrolled violence has already arisen, such as Korea, the Congo, and the Suez. The United Nations would probably be as reluctant as the OAS to attempt termination of the agreement, though not necessarily for the same reasons. The chief inhibiting factor against United Nations action is the bipolarity of power within the organization. With both the United States and Russia exercising the veto power in the Security Council, little could be accomplished there. Furthermore, Russia would not lightly shake the balance of power by endorsing a type of action which might in turn be used against the Communist bloc. General Assembly action, in addition to the latter consideration, would probably reflect the fear of the small "uncommitted" nations of coercions suffered as recent colonies and the large Latin American bloc's aversion to intervention in any form. (These observations are predicated on the continuance of a bipolar power distribution, however, and would not necessarily hold true should the distribution become unipolar or, perhaps, triangular.)

Even among those in the United States who advocate internationalization, considerable controversy exists as to the proper control organization.⁴⁷ Advocates of control under the OAS argue that the

Panama, 3 UNIVERSIDAD DE PANAMA ANUARIO DE DERECHO 165 (1958); N.Y. Times, Jan. 12, 1964, p. 4-E, col. 1; N.Y. Times, Nov. 26, 1961, p. 3-E, col. 1.

45. N.Y. Times, Feb. 14, 1962, p. 1, col. 4, at 8, col. 3.

46. Particularly galling was the September 20, 1965, resolution passed by the United States House of Representatives asserting the right of unilateral intervention if necessary to prevent a Communist takeover in the hemisphere. For reaction in Latin America generally and Panama in particular, see *La Estrella de Panama*, Oct. 5, 1965, p. 1, col. 2; *La Estrella de Panama*, Oct. 1, 1965, p. 21, col. 1. For adverse United States reaction, see Editorial, *Cause and Latin Effect*, *Miami Herald*, Sept. 25, p. 6-A, col. 1.

47. See Senator Dirksen's criticism of Senator Fulbright's recent suggestion that an international consortium including the United States and Russia among others cooperate in building a new canal. Fulbright said the same idea could be applied to revised operation of the present canal. *Miami Herald*, March 7, 1965, p. 1, col. 1. Senator Aiken, upon his return in 1960 from a Panamanian junket, proposed internationalization of the canal under auspices of either the United Nations or the O.A.S. SENATE FOREIGN RELATIONS COMM., 86TH CONG., 2D SESS. REPORT ON LATIN AMERICA, VENEZUELA, BRAZIL, PERU, BOLIVIA, AND PANAMA 15 (Comm. Print 1960).

Canal is no longer vital to the security of the United States;⁴⁸ that the economic interests of the United States would be protected by internationalization; and that hemispheric internationalization would provide important dividends in the ideological controversy.⁴⁹ It has even been suggested that the Canal Zone could provide a home for the OAS, if the OAS wanted it as a home, thus softening the criticism that the organization is in part controlled by Washington purely because of its physical location.⁵⁰ Suggestions have also been made that a canal so controlled could (through its toll revenue) help support the OAS and its projects.⁵¹

Advocates of control under the United Nations charge, however, that such an operation is subject to the same objections which have been made against a Danube Commission made up only of riparian powers. It has been said:⁵²

Internationalization under the United Nations would leave unimpaired the real interests of the United States, namely, the preservation of the Canal and access to it, good service at low cost, and a voice in the operation of the Canal. The security of the Canal would be, if anything, enhanced. Already hopelessly vulnerable, an internationalized Canal might seem to a potential aggressor a less attractive target than one under the exclusive jurisdiction of the United States.

In any case, the United States would be entitled to come to the defense of the Canal, if defense were feasible, by acting within the United Nations under Article 51 of the Charter or the "uniting for peace" procedures. Such action in defense of an international agency would enjoy moral and practical sup-

48. Travis & Watkins, *supra* note 37, at 417. See also Travis & Watkins, *The Time Bomb Explodes*, *The Nation*, Jan. 27, 1964, pp. 83-85. But see Baldwin, *Panama Canal's Value*, *N.Y. Times*, Jan. 16, 1964, p. 14, col. 7.

49. BENTON, *THE VOICE OF LATIN AMERICA* 154 (1961); Kantor, *United States—Latin American Relations: Impact of the Kennedy Administration*, in 28 *VITAL SPEECHES OF THE DAY*, 142-46 (Dec. 1961).

50. BENTON, *THE VOICE OF LATIN AMERICA* 153-54 (1961). It should be noted that control under the O.A.S. would effectuate one of the chief aims of the Peruvian Aprista Movement. The program as set forth by Haya de la Torre on May 7, 1924, called for the internationalization of the Panama Canal. On May 30, 1924, it was changed to call for "*Interamericanización del Canal de Panama*." *La Estrella de Panama*, Oct. 5, 1965, p. 4, col. 2. See also Kantor, *The Ideology and Program of the Peruvian Aprista Movement*. U. of Cal. Publications in Political Science, Vol. 4, No. 1, p. 27 (1953); Kantor, *United States-Latin American Relations: Impact of the Kennedy Administration*, in 28 *VITAL SPEECHES OF THE DAY* 142-46 (Dec. 1961).

51. BENTON, *THE VOICE OF LATIN AMERICA* 154 (1961).

52. Travis & Watkins, *Control of the Panama Canal: An Obsolete Shibboleth?*, 37 *FOREIGN AFFAIRS* 407, 417 (1959).

port which the defense of an exclusive interest claimed by the United States could not evoke.

Regardless of the controlling device, advocates of internationalization generally agree that the United States could expect good service at reasonable cost from an international agency and that the genuine interests of the United States would be enhanced by such an arrangement.

One must face facts, however, and the fact is, as previously mentioned, that both the United States and Panama oppose internationalization. Unless these states reverse their present positions, an action which appears improbable on the part of the United States and even more improbable on the part of Panama, internationalization can be accomplished only by community-wide coercion of the two nations.

There is little in the trend of decisions to indicate that internationalization will occur, except, perhaps, for the somewhat dubious example of the international accords reached on Antarctica. And in Antarctica, of course, the world community was confronted with an uninhabited area of relatively low use. Nevertheless, the required impetus for internationalization might be provided by Panamanian nationalization of the present Canal or attempted nationalization of the projected new canal, whether by Panama or some other Central American riparian power.

In such an event it would be relevant to consider the arguments advanced on the subject when Egypt nationalized the Suez Canal. Generally, exponents of internationalization argued that the Suez Canal was a unique international public utility of vital concern to the world community and therefore beyond any single state's jurisdiction to nationalize.⁵³ More specifically, it was argued that the Suez Canal Company acquired an international status by virtue of the 1888 Convention of Constantinople and by other factors such as the international composition of the company's shareholders.⁵⁴ These latter factors would have little relevance in the Panamanian situation, but the argument based upon the 1888 Convention has considerable relevance. That convention states the desire of the contracting parties to establish a canal system designed to "guarantee at all times, and for all the powers, the free use of the Suez Maritime Canal."⁵⁵ This same concept was expressly written into the Hay-Pauncefote

53. U.N. SECURITY COUNCIL OFF. REC. 11th year, 735th meeting 3-24 (S/PV.735) (1956).

54. *Ibid.*

55. Lauterpacht, *The Contemporary Practice of the United Kingdom in the Field of International Law—Survey and Comment II*, 6 INT'L & COMP. L.Q. 126, 128 (1957).

Treaty concluded by the United States and Great Britain in 1901.⁵⁶ Then the United States incorporated section 1 of article III of the Hay-Pauncefote Treaty by express reference in article XVIII of the Hay-Bunau-Varilla Treaty.⁵⁷ Thus, a much stronger argument could be made as to the international status of the Panama Canal than was made for such status in the case of the Suez, for the 1888 Convention was not considered incorporated into the Suez concession agreements. In the case of Panama, not only is there express incorporation by reference; but the status derives from the same instrument which set up the Canal and that instrument is a treaty rather than a concession agreement. Presumably the still valid Hay-Pauncefote Treaty would dictate the inclusion of a similar provision in any treaty providing for a new canal, thus laying the basis for a similar argument with respect to such a canal.⁵⁸

Although the arguments involving status under the 1888 Convention of Constantinople were not considered persuasive enough to determine the international status of the Suez Canal, such arguments, augmented by the additional factors mentioned, might prevail in the Panamanian or some similar situation. At any rate, such an argument could be seized upon if the world community felt the necessity of legally justifying community-wide coercion resulting in internationalization. In summation, despite the arguable merits of internationalization, there is little reason to predict such a course given the past trends and the present situation in Latin America.

NATIONALIZATION

Although individual Panamanian claimants⁵⁹ have in recent years loudly demanded unilateral termination of the Hay-Bunau-Varilla Treaty, frequently as a vote-getting device exploiting rampant na-

56. See Article III, Hay-Pauncefote Treaty, Senate Comm. on Foreign Relations, *Diplomatic History of the Panama Canal*, S. Doc. No. 474, 63d Cong., 2d Sess. 293 (1914).

57. *Id.* at 301.

58. *But see* Taylor, *The Panama Canal: The Rule of Treaty Construction Known as Rebus Sic Stantibus*, 1 GEO. L.J. 193, 197 (1913).

59. The foremost example is former National Assemblywoman Thelma King, an outspoken anti-American Panama City attorney and columnist specializing in foreign affairs. She played an active role in the anti-American rioting of January 1964, inciting the demonstrators with her radio broadcasts and her daily column in *La Hora* (Panama). See King, *Panama Debe Denunciar La Nulidad de la Convención de 1903 y Concertar un Nuevo Tratado*, 4 UNIVERSIDAD DE PANAMA ANUARIO DE DERECHO 277 (1959-1960). See also as a representative column by King, *Han Llegado Dos Negociadores Norteamericanos*, *La Hora* (Panama), June 2, 1965, p. 13, col. 7.

tionalism,⁶⁰ official demands have thus far called for bilateral termination incidental to negotiations for a new treaty.⁶¹ These official demands would seem to have been met by President Johnson's recently announced decision to abrogate the 1903 Treaty and to draft a new one offering Panama a share in management and profits of the waterway and "effectively recognizing Panama's sovereignty over the area of the present Canal Zone."⁶² As nationalistic pressures further intensify, however, unilateral termination of the proposed new treaty may be considered by Panamanian authorities. Such action might well be triggered by a United States decision to build a sea-level canal through some country other than Panama, though both politics and economics seem to favor a Panamanian route.⁶³ Thus, both from the standpoint of future outcomes and past history, a study of the past trend of decision in this area has relevance.

The Hay-Bunau-Varilla Treaty itself made no provision for termination or for revision; and a study of the history of its drafting, coupled with the use of the words granting sovereignty "in perpetuity" would seem to have negated such intentions on the part of either party. Thus the problem, from the standpoint of community perspectives, became one of maintaining an appropriate balance between the honoring of the reasonable expectations of the parties to the treaty (that is, maintaining a reasonable stability in the relations between the two nation-state participants in the world power process) and permitting or encouraging a continual, progressive reformulation of policies to keep them in accord with the changing perspectives and conditions of the parties.⁶⁴

In more traditional terms the problem might be considered as a need to balance the doctrines of *pacta sunt servanda*⁶⁵ and *rebus sic stantibus*.⁶⁶ The former doctrine, whether regarded as a principle of

60. N.Y. Times, March 15, 1964, p. 28, col. 1; N.Y. Times, Feb. 9, 1964, p. 1-E, col. 1; N.Y. Times, Jan. 19, 1964, p. 1-E, col. 1.

61. See President Chiari's letter to President Kennedy and the Panamanian National Assembly's supporting resolution in Documentos, 5 UNIVERSIDAD DE PANAMA ANUARIO DE DERECHO 252-55 (1962). See also N.Y. Times, Jan. 12, 1964, p. 25, col. 4; Panama Tribune, May 29, 1965, p. 1, col. 7.

62. See APPENDIX.

63. Stratton, *Sea-Level Canal: How and Where*, 43 FOREIGN AFFAIRS 512, 515-16 (1965). See also Natanson, *Only Panama Really Wants To Have a Canal*, Miami Herald, Feb. 7, 1965, p. 5-H, col. 1.

64. In this formulation I have drawn upon the teaching materials, The Public Order of the World Community at 338, prepared by Professors McDougal, Lasswell, and Burke and on file in the Yale Law Library. See also Kunz, *The Law of Nations, Static and Dynamic*, 27 AM. J. INT'L L. 630, 634-35 (1933); McDougal & Lans, *Treaties and Congressional—Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 338-41 (1945).

65. Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT'L L. 775 (1959).

66. BRIGGS, THE LAW OF NATIONS 917 (2d ed. 1952); Garner, *Revision of Trea-*

international law or a pre-juridical postulate, tells us that agreements between nations, like those between individuals, are to be performed. The latter doctrine, a definition upon which the majority of writers cannot agree, might nevertheless be described as a tacit condition, said to attach to all treaties, that they shall cease to be obligatory as soon as the state of facts and conditions upon which they were founded has substantially changed.⁶⁷ This conflict of doctrines has concerned men as early as Aquinas, who on principle demanded that contracts be performed even with regard to enemies, but said also that, if the circumstances existing in reference to persons or objects at the time of making the contract had changed, nonperformance of the contract was excusable.⁶⁸ Seventeenth and eighteenth century followers of Grotius, such as Pufendorf and Vattel, were unanimously in favor of the sanctity of contracts. Opponents of the sanctity of contracts on the international level, represented by Spinoza and Hegel, argued that contracts would be valid only so long as they contributed to the welfare of the state, thereby undermining international law.

The present theory of international law seems to adhere to the phrase *pacta sunt servanda*, and considers the binding force of contracts as an obligation which exists, not only vis-à-vis the contracting parties, but also vis-à-vis the international community as a whole.⁶⁹

Particularly pertinent in the present context is article V of the Charter of the Organization of American States, of which both Panama and the United States are active members. This article states that international order is based, among other things, upon the faithful fulfillment of the obligations arising from treaties and from other sources of international law.

Regardless of the world community's interest in the sanctity of international agreements, however, the fact is that agreements are not always obeyed. They are frequently terminated, and in the absence of an appropriate world arena and institution for the performance of this function, it is performed largely by the parties to the agreements, making application of certain inherited doctrines. These doctrines authorize termination both by new agreement between the parties based on mutual consent and by unilateral decision without the consent of some parties.

More difficulty is presented in attempting to justify unilateral decision without the consent of all parties. The doctrine *rebus sic stantibus* has developed in response to this need. This doctrine has had various formulations, some based on the original intention of

ties and the Doctrine of *Rebus Sic Stantibus*, 19 IOWA L. REV. 312 (1933-1934).

67. BRIGGS, *THE LAW OF NATIONS* 918 (2d ed. 1952).

68. Wehburg, *Pacta Sunt Servanda*, 53 AM. J. INT'L L. 775 (1959).

69. *Id.* at 782.

the parties, some requiring resort to independent international tribunals, and so on.⁷⁰ The practice of states clearly indicates, however, that such bases are not required; and it has been suggested that, in the absence of appropriate international institutions, it is better to accept this practice as a matter of preference and to recognize this doctrine in its most flexible formulation, relying upon the ordinary sanctions of reciprocity and retaliation to minimize its abuse.⁷¹ Thus formulated, the doctrine may be justified only when the circumstances existing at the time of entering into the contract have changed to such an extent that either contracting party has the right to demand the revision or termination of the contract—a right which must be exercised in good faith. It must be emphasized that the doctrine does not condone arbitrary termination or alteration.

Various bases for unilateral Panamanian decisions have been advanced. One basis, which Panama has intimated at various times over the years but has never pressed (due, she suggests, to fear of United States power), is that of violation by the United States. Although violation of the Treaty by the United States would not have automatically terminated the Treaty, there is considerable doctrinal support for the view that Panama could by her own unilateral act terminate the Treaty as between herself and the United States for the alleged violations.⁷² This view, which is supported by many writers, has been approved by the United States courts.⁷³ It is of great importance to note, considering that Panama never formally pressed claims on such a basis, that in each of the cases the courts held that, although the treaties involved might be voidable because of violation by the other party, the injured parties had failed to exercise in a timely manner their rights to terminate the treaties, and the courts regarded them as remaining in force.⁷⁴ Thus, Panama would seem to have been precluded from using this argument as it related to past violations.

Other bases which have been argued by various parties in various situations, none of which is applicable to the Panamanian-United States Treaty, are the severance of diplomatic relations,⁷⁵ changes in

70. Harvard Research in International Law, Draft, *Art. 28 Rebus Sic Stantibus*, *The Law of Treaties*, 29 AM. J. INT'L L. 1096-1126 (Supp. 1935).

71. McDougal, Lasswell & Burke, *The Public Order of the World Community* at 348 (unpublished teaching materials in Yale Law School Library).

72. Harvard Research in International Law, Draft, *Art. 27 Violation of Treaty Obligations*, *The Law of Treaties*, 29 AM. J. INT'L L. 1077, 1081-84 (Supp. 1935).

73. *Ware v. Hylton*, 3 U.S. (3 Dallas) 199, 261 (1796); *In re Thomas*, 23 Fed. Cas. 927 (No. 13,887) (C.C.S.D.N.Y. 1874); *Charlton v. Kelly*, 229 U.S. 447, 473 (1913).

74. Harvard Research, *supra* note 72, at 1077-96.

75. Presumably, the severance of relations by Panama in the wake of the

extent of territory, changes in governmental institutions in one of the parties, the extinction of a state party to the agreement, nonperformance by the other party, and war.

One is brought finally to a consideration of the claim which is potentially most significant in the termination category: The Canal is subject to nationalization, a unilateral practice and prescription of the ownership of and the exclusive competence over the waterway. Where such action has been taken, notably with regard to Iran's oil fields and the Suez Canal, it has usually been justified by an Hegelian argument that an agreement would be valid only so long as it contributed to the welfare of the state, rather than on a strict *rebus sic stantibus* basis. Thus Iran argued that "the oil resources of Iran, like its soil, its rivers and mountains, are the property of the people of Iran They are part of the foundations on which stand our national sovereignty," and this patrimony could not be bargained away by officials.⁷⁶ On this same theory Egypt asserted that irrespective of the concessions act, the state could not be replaced in computing the demands of public interest.⁷⁷ This was a state's exclusive right, which could not in any circumstances or under any condition be relinquished or resigned.

It is necessary to note at the outset that the various acts of nationalization invariably have been taken as acts within the "sovereignty" of the nationalizing nation-state. The claim asserted by the Egyptian Government was that the nationalization of the Suez Canal Company for a public purpose, accompanied by an offer to pay compensation, was a legitimate exercise of the power of sovereignty, and was a matter which fell within its domestic jurisdiction.⁷⁸ This raises the basic issue of who is sovereign in the Canal Zone, for the trend of decisions indicates that the lawfulness of nationalization under both public and private international law depends upon sovereignty. The article III grant to the United States of Canal Zone sovereignty "in perpetuity" would have proved a difficult obstacle to overcome had Panama attempted nationalization during the life of the 1903 Treaty.⁷⁹

1964 riots would benefit only the United States in this respect.

76. U.N. SECURITY COUNCIL OFF. REC. 6th year, 560th meeting 6 (S/PV.560) (1951).

77. HATEM, FACTS ABOUT THE SUEZ CANAL AND NATIONALIZATION, CANAL FACTS AND DOCUMENTS 153 (1956).

78. U.N. SECURITY COUNCIL OFF. REC. 11th year, 736th meeting 2 (S/PV.736) (1956).

79. For these arguments see Benedetti, *El Problema de la Soberanía en la Zona del Canal*, 2 UNIVERSIDAD DE PANAMA ANUARIO DE DERECHO 239-47 (1961-1962); Fábrega, *La Cuestión de Soberanía en la Zona del Canal*, 2 UNIVERSIDAD DE PANAMA ANUARIO DE DERECHO 205-24 (1956-1957); Testa, *Nuestra Bandera y Nuestra Soberanía en la Zona del Canal*, 5 UNIVERSIDAD DE PANAMA ANUARIO DE DERECHO 249-52

The various arguments she has advanced to prove retention of certain attributes of sovereignty will be passed over, however, in view of the express recognition of Panamanian sovereignty over the Canal Zone in the proposed treaty.

Assuming this difficulty were overcome, under either treaty Panama would face the difficulty of analogizing the concession agreements involved in prior nationalizations and the international treaties governing the Panama Canal.⁸⁰ This would be an exceedingly arduous task for the trend of decision indicates that a concession agreement is not a treaty.⁸¹ The Permanent Court of International Justice recognized this distinction in the *Chorzow Factory* case,⁸² in which the nationalization of a factory was held illegal on the basis of direct violation of a treaty, but recognized the competence of a nation-state over nationalization of property within its territory granted as a concession. A concession has been distinguished from a treaty as primarily an international economic development contract, or an instrument of coordination whereby a state and a foreign investor establish a complementary system of economic relationships for a period defined by the instrument.⁸³ By definition, then, the Hay-Bunau-Varilla Treaty is in a major respect outside the context of previous nationalizations which have invariably involved concessions.

A related issue is that of ownership. Here again Panama is faced with a unique situation. Under the 1903 Treaty the United States Government, rather than a private company, is the sole owner and operator of the Panama Canal Company. Under the proposed treaty the United States Government will still be the major investor and presumably will bear the larger responsibility for its operation. Since the Panama Canal Company is and will remain at least partially an instrument of the United States Government, the nationalization of the waterway would involve only public international law instead of both private and public international law, as has been the case in prior instances of nationalization. And, as noted previously, public international law does not authorize a nation-state to nationalize local assets in violation of a treaty as opposed to a concession agreement.

Bearing in mind the legal difficulties Panama must overcome in justification of nationalization, consideration will now be given to the

(1961-1962). See also speech by Minister of Foreign Relations Miguel J. Moreno, Jr., Nov. 28, 1959 in *La Política Exterior de Panama* 67-73 (1960).

80. For an attempt to so do see Panamanian Academy of International Law, *Declaración sobre los canales de Suez y Panama*, 2 UNIVERSIDAD DE PANAMA ANUARIO DE DERECHO 225-27 (1956-1957).

81. JESSUP, A MODERN LAW OF NATIONS 109 (1948).

82. P.C.I.J. ser. A, No. 17, at 46, 47 (1928).

83. Carlston, *Concession Agreements and Nationalization*, 52 AM. J. INT'L L. 260 (1958).

points most pertinent to the Panama Canal situation which were raised in prior nationalizations and expropriations. The situation which has created a spate of analogies is, of course, the nationalization of the Suez Canal by Egypt in 1956.⁸⁴ Upon close analysis, however, one finds the differences in the two situations more marked than the similarities. It has already been noted that there was no question as to Egypt's complete sovereignty over the Suez Canal; also noted was the fact that the Universal Suez Company held merely a concession for operation of a canal, not a grant of territory. And though Egypt's opponents argued that the Suez Canal had acquired international status by virtue of the 1888 Constantinople Convention on neutrality and other factors, such as the international composition of the shareholders of the company, personnel, and manner of operation of the Canal,⁸⁵ strong proof was adduced by Egypt of her own ownership of the Canal, of the Egyptian national character of the Universal Suez Company and of its submission to Egyptian law.⁸⁶ Surely Panama could not have adduced proof sufficient to overcome the dissimilarities in the two situations.

One of the grounds utilized by Egypt as a justification for nationalization was that the Universal Suez Company did not maintain the Canal properly and did not carry out needed expansion.⁸⁷ Again a difference between Panama and Suez is apparent, for the Universal Suez Company was expressly bound by the concession agreement to expand facilities and to maintenance of a specified degree. The Hay-Bunau-Varilla Treaty contains no similar provisions. Furthermore, in practice the Panama Canal Company has continually improved and expanded service and facilities.⁸⁸ It is unlikely that such a pattern will be disrupted when the proposed treaty becomes effective.

Finally, in discussing the Suez nationalization, it is necessary to mention the role of the United Nations and its judicial organ, the International Court of Justice. As a means of ending the armed conflict which began after Egypt seized control of the Suez Canal on July 26, 1956, the United Nations arranged a ceasefire that is policed by a "peace-keeping" force, known as the United Nations Emergency Force, which has become a long-term enterprise. More important,

84. See authorities cited note 79 *supra*.

85. U.N. SECURITY COUNCIL OFF. REC. 11th year, 735th meeting 3-24 (S/PV.B5) (1956).

86. U.N. SECURITY COUNCIL OFF. REC. 11th year, 736th meeting 1-14 (S/PV.736) (1956).

87. HATEM, *op. cit. supra* note 77, at 90.

88. See each PANAMA CANAL COMPANY AND CANAL ZONE GOVERNMENT ANN. REP. under heading "Canal Improvement Program." The most spectacular recent improvement is the \$20 million Thatcher Ferry Bridge, a fixed bridge across the Panama Canal mouth on the Pacific side. N.Y. Times, May 16, 1962, p. 82, col. 6.

for purposes of this article, in April 1957, as a sequel to its seizure of the Suez Canal, the Egyptian Government deposited with the United Nations a declaration stating how it proposed to operate the Canal. It pledged itself to abide by the Convention of 1888 that established the international character of the Canal's use. In a later declaration, on July 18, Egypt formally recognized as compulsory the jurisdiction of the International Court of Justice in all legal disputes that might arise over the interpretation of the Convention or other treaty provisions relating to the Canal.⁸⁹

Probably the most pertinent instance of nationalization, from Panama's standpoint, is that of the Iranian oil fields and oil industry in 1951. Here again, however, one finds a situation in which a private company of international character was operating under a concession granted by a nation-state which is admittedly sovereign in the territory concerned. Oil-rich Iran contracted with the Anglo-Iranian Oil Company, of which the British Government was the majority stockholder, for the operation of the oil industry within its territory. After the company had made substantial investments of capital and techniques in the development of Iran's oil industry, the Iranian Government nationalized the foreign-owned enterprise in an exercise of its sovereignty.⁹⁰ The British Government began proceedings against Iran in the International Court of Justice and the Court granted an interim measure of relief designed to maintain the *status quo* until the merits of the jurisdictional argument were decided. The Court finally decided that it lacked jurisdiction in the matter under the optional clause because of the reservations made by Iran at the time she acceded to jurisdiction under that clause. Since the concessionary contract could not be categorized as a treaty, the Court held that it was unable to exercise jurisdiction.⁹¹

Even though the Court refused to consider the case on its merits, its jurisdictional determination holds important implications in the event Panama nationalized the Canal and the United States sought relief before the Court. First, the Connally Reservation⁹² attached to the acceptance of the Court's compulsory jurisdiction may be used

89. COYLE, *THE UNITED NATIONS* 114 (1960).

90. FORD, *THE ANGLO-IRANIAN OIL DISPUTE OF 1951-52* (1954).

91. *Anglo-Iranian Oil Case*, [1951] I.C.J. Rep. 89.

92. The Connally Reservation provides that the United States unilaterally may determine which matters are within its domestic jurisdiction, and thus outside the jurisdiction of the International Court of Justice. For conflicting views of the Connally Reservation, the repeal of which has been recommended by the A.B.A. House of Delegates, see Collier, *Judicial World Supremacy and the Connally Reservation*, 47 A.B.A.J. 63 (1961); Gambrell, *The United Nations, the World Court, and the Connally Reservation*, *id.* at 57; Ober, *The Connally Reservation and National Security*, *id.* at 63.

against the United States by Panama in denying jurisdiction (due to the reciprocity implied in such a reservation); second, the Court would certainly be dealing with an international treaty rather than a concessionary agreement, and, assuming both nations acknowledged the Court's jurisdiction as to treaty interpretation, the Court would not be able to avoid deciding the controversy on the jurisdictional grounds of the Anglo-Iranian situation.

As a final observation on the case, it should be noted that Britain turned to the Security Council for help, but without success.⁹³ It is doubtful that the United States would find much help in the Council under similar circumstances.

Some mention should be made of the petroleum and agrarian expropriations by Mexico in the 1930's and of the recent Cuban expropriations in almost every economic area. It is important to recognize that in both cases the expropriations dealt with privately owned enterprises, not enterprises owned by the United States Government and operated under an international treaty.

In the case of the Mexican expropriations, the United States agreed that any government had the sovereign right to expropriate private property within its borders in furtherance of public purposes.⁹⁴ The United States insisted, however, that legality depended upon adequate and prompt compensation.⁹⁵ The demand of promptness would seem to have little meaning, however, since Mexico was allowed twenty-five years in which to pay for the 1938 expropriation of foreign oil companies.

The necessity of adequate and prompt compensation seems even more questionable as a result of the Cuban expropriations. Again, the United States recognized Cuba's right to expropriate private property owned by foreigners, conditioned upon adequate and prompt compensation.⁹⁶ Apparently there have been few instances of compensation and present Cuban conditions militate against payment of compensation in the foreseeable future. The inaction of the United States under such circumstances is perhaps indicative of a broader trend.⁹⁷

93. Shwadran, *The Anglo-Iranian Oil Dispute of 1948-1953*, 5 MIDDLE EASTERN AFFAIRS 193, 214 (1954).

94. 5 DEP'T STATE BULL. 399, 400 (1941).

95. Kunz, *The Mexican Expropriations*, 17 N.Y.U.L. REV. 327 (1940).

96. In protesting against expropriation of real property under the Cuban Agrarian Reform Law, the State Department expressed its support of soundly conceived land reform programs, but stated that "their attainment is not furthered by the failure of the Government of Cuba to recognize the legal rights of United States citizens who have made investments in Cuba in reliance upon the adherence of the Government of Cuba to principles of equity and justice." 42 DEP'T STATE BULL. 158 (1960).

97. The Cuban Claims Act of 1964, 78 Stat. 1110 (1964), 22 U.S.C.A. §1643

Opponents of nationalization of the Suez Canal made much of the argument that Egypt was incapable of operating the Canal. To meet the expected breakdown the Canal Users' Association was established.⁹⁸ This proved to be an unnecessary step, for the Egyptian Canal Authority has functioned quite successfully. Nevertheless, it is to be expected that the same argument would be voiced were Panama to nationalize the Panama Canal, and with better reason, for men with far more skill are required for the operation of the Panama Canal with its complex locks than for the sea-level Suez Canal.

Other opposition would probably center upon Panama's financial limitations. In this respect it is pertinent that the World Bank has lent large sums to Egypt for widening and deepening the Suez Canal, and Panama might find help from the same source. The qualification must be noted, however, that Egypt received such aid from the World Bank only after four years' proof that she was capable of running the Canal. It is possible, of course, that financing might be undertaken by some one foreign government or an international consortium, either private or public.⁹⁹

If a projection were made purely on the basis of past decisions, there would seem to be little chance for Panama to successfully terminate the 1903 Treaty or its proposed successor by unilateral decision. There is little in the legal arguments made in prior nationalizations to justify similar action by Panama. Such a projection ignores

(Supp. 1964), which amends the International Claims Settlement Act of 1949 by adding a new Title V authorizing the Foreign Claims Settlement Commission to receive and determine in accordance with applicable substantive law, including international law, the amount and validity of certain claims by United States nationals against the Government of Cuba, is unique in its provision for adjudication of claims for purposes of evaluation only; the act contains no provision relating to any decision as to the time, form, or manner of payment of eventual compensation. See H.R. REP. NO. 1759, 88th Cong., 2d Sess. 3 (1964). For the suggestion that underdeveloped nations, or nations desiring to reorganize their economic or social structures, are entitled to deal with foreign investments in a manner not permitted to the capital exporting countries, see Baade, *The Problems of Expropriation: A Study of the Issues*, 11 VA. L. WEEKLY DIGEST COMP. 86 (1960) and Kuhn, *Nationalization of Foreign-Owned Property*, 45 AM. J. INT'L L. 709 (1951). Also pertinent in this context is *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 430 (1964).

98. WATT, DOCUMENTS ON THE SUEZ CRISIS 16 (1956).

99. See report in *The N.Y. Times*, Aug. 16, 1964, §1, p. 3, col. 1, that France has expressed interest in promoting a new canal across the Isthmus and that private investors in Tokyo have also shown considerable interest in such a venture. Presumably an expansion and conversion of the present canal under Panamanian control would interest them if indeed it is more economic to expand and convert than to build anew elsewhere. Another possibility is financing by ADELA (the acronym for the Atlantic Community Development Group for Latin America), a new and wide-ranging consortium of private business corporations and big banks. *N.Y. Times*, July 4, 1965, §3, p. 1, col. 7.

the most important factor of all, however; that factor is the strident nationalism sweeping the world's less developed countries. Although the United States would seem to have the force of the law on its side, little aid could be expected from the United Nations, its Security Council, or the World Court, nor, for varied reasons, would the United States likely find much support in the court of public opinion.¹⁰⁰ Thus the United States would be reduced to the use of the strategy of coercion. That the United States, using such a strategy, could prevail is unquestioned; whether it would use it, and in sufficient degree, is problematical.¹⁰¹

THE NEW TREATY

Why is the United States discussing a treaty revision if there is no legal compulsion to so do? On September 24, 1965, President Johnson dramatically announced: "In order to meet their present and future needs the two countries are negotiating separately a new and modern treaty to replace the 1903 Treaty and its amendments . . . and a treaty under which there might be constructed across Panama a new sea-level canal."¹⁰² As recently as February 14, 1964, in a Voice of America radio interview, Secretary of State Rusk had said, when asked about the need for a sea-level canal: "It may be decades before one is needed. It certainly will be at least a decade before one could be built, and that would require careful negotiation with a country or countries about engineering surveys and sites and costs and things

100. See, for example, the resolution supporting Panama's demand for a new canal treaty adopted by the recently formed Latin-American Parliament, N.Y. Times, Dec. 13, 1964, §1, p. 76, col. 1. The executive committee of this same group met in Lima in November 1965 to condemn the United States House of Representatives' resolution discussed in note 46 *supra*. It is also unlikely that the United States would be supported in the U.N. by its traditional allies, France and Great Britain, in view of the lack of United States support for them during the Suez crisis. See Krock, *The Panama Crisis*, N.Y. Times, Jan. 19, 1964, §4, p. 13, col. 1. See also N.Y. Times, Jan. 12, 1964, p. 24, col. 4.

101. See report of retired Chief of Naval Operations Burke's speech in which he explores the United States "guilt complex" about using power. N.Y. Times, April 17, 1962, p. 72, col. 1. Though at first glance the United States presence in Santo Domingo would seem to give the lie to Admiral Burke's thesis that "we have become dangerous to the world" because of what he called an unrealistic desire to "have peace without the use of power," it actually supports his further allegation that "no one really knows what we will do because we ourselves do not know." Certainly the inconsistency of our use of power in Cuba, Suez, Korea, Vietnam, Indonesia, Angola, Panama, and now in Santo Domingo indicates a "paradox of policy." See Geyelin, *The Irsome Panama Wrangle*, The Reporter, April 9, 1964, p. 14; Krock, *The Panama Crisis*, N.Y. Times, Jan. 19, 1964, §4, p. 13, col. 1.

102. See APPENDIX.

of that sort."¹⁰³ Mr. Rusk's comments ignored completely the fact that the June 1962 talks in Washington with Panamanian representatives were expressly premised on a contemplated sea-level canal.¹⁰⁴ Senator Fulbright, in his now famous "Old Myths and New Realities" speech in the Senate on March 25, 1964, listed among the "myths" still cluttering United States foreign policy the "myth" that there is "something morally sacred" about the 1903 Treaty on the Panama Canal.¹⁰⁵ Mr. Fulbright said it was preposterous to regard United States honor and prestige at stake in a controversy with a small, weak nation such as Panama, and he saw no reason why the United States should balk at renegotiating the 1903 Treaty. The White House called Mr. Fulbright's views "very interesting" but said that the speech did not "represent the policy of the Administration on Panama."¹⁰⁶

What accounts for this sudden reversal in Administration policy? Have the needs of the United States for a sea-level canal changed so rapidly? During the 1964 Hammarskjöld Forum on the Panama Canal, a question from the floor was addressed to Mr. Farland, United States Ambassador to Panama in the years 1960-1963:¹⁰⁷

If there is no question but that a treaty with Panama drawn up today would recognize the rights of the traversed country to sovereignty and to partnership with the United States, why would it not be a dramatic reassertion of our renewed moral leadership in the world for President Johnson to say: "Now we want to treat with you on the basis of the international mores of today, your retained sovereignty, and our partnership with you"?

The Ambassador replied:

I think we should take such a position. Ours is the greatest country in the world. We cannot be minimal in our approach, especially to a smaller nation.

Perhaps Professor Baxter, speculating during the same forum about the future of the Canal and the possibility of a new canal, forecast President Johnson's announcement and at the same time clarified the goals such a policy is intended to achieve: "If the usable life of

103. Voice of America radio interview, Feb. 14, 1964, 50 DEP'T STATE BULL. 330, 335 (1964).

104. As stated by ex-Ambassador Farland, THE SIXTH HAMMARSKJÖLD FORUM, PANAMA CANAL 57 (1965).

105. N.Y. Times, March 29, 1964, §4, p. 1, col. 4.

106. *Ibid.*

107. THE SIXTH HAMMARSKJÖLD FORUM, *supra* note 104, at 58.

the existing Panama Canal is limited, perhaps a holding operation is called for, in which there might be a graceful yielding to some of Panama's demands, at the same time that the United States maintains its control over the Canal Zone."¹⁰⁸ This somewhat cynical proposal is compatible with Baxter's emphasis upon bargaining when he seeks to locate himself between the two extremes of doing justice and of bargaining. Unfortunately there is support for such an emphasis in President Johnson's choice of words: "a treaty under which there *might* be constructed across Panama a new sea-level canal." (Emphasis added.) That the word "might" conceals a lightly veiled threat intended as a counter in the bargaining seems all too probable in light of the near-unanimous agreement that the new canal will indeed transit Panama.¹⁰⁹ Such a conclusion is buttressed by the publicity accorded the search for "alternate" trans-isthmian routes both at the time of the President's original pronouncement and during the months since.¹¹⁰

In the area of international relations it is frequently difficult to explain momentous decisions in terms of traditional legal norms. It is all too easy for the moralist to explain President Johnson's decision as simply a change of heart or a long overdue recognition of Panama's right to join the United States in shaping and sharing the values inherent in the isthmian enterprise; the pragmatist, with equal facility, can explain it in Professor Baxter's terms as a "holding operation." Each is at once both right and wrong.

Is there, after all, an explanation satisfactory in terms of international legal norms? It is submitted that there is: the developing doctrine of *rebus sic stantibus* has won the day. Conditions have indeed changed and though the President has not invoked the doctrine explicitly in reaching his decision, it is implicit in his every pronouncement. But one must realize that this unusual departure from the norm of *pacta sunt servanda* is not altogether altruistic. In the not too distant future the present canal will be outmoded, and, unless the new canal closely parallels the present one, it will be abandoned. Thus the United States would find itself in the position of seeking termination of a "perpetual" treaty. At such a juncture it would be to Panama's economic advantage to argue *pacta sunt servanda*; the

108. *Id.* at 42.

109. Stratton, *Sea-Level Canal: How and Where*, 43 FOREIGN AFFAIRS 513-18 (1965); Miami Herald, Feb. 7, 1965, §H, p. 5, col. 1.

110. See references cited note 109 *supra*. See also N.Y. Times, Dec. 20, 1964, §1, p. 1, col. 5; *Id.* §4, p. 1, col. 3; N.Y. Times, Dec. 27, 1964, p. 26, col. 1. For report of bitter Panamanian reaction to the announcement on April 16, 1964, by President Johnson that the United States and Colombia had agreed to begin an immediate study of the feasibility of a sea-level canal to be cut through Colombian territory, see N.Y. Times, April 18, 1964, p. 10, col. 3.

United States would have to adopt explicitly Panama's old argument of *rebus sic stantibus*. Such a reversal and such explicit approval of a doctrine, which, more often than not, would be inimical to the interests of a nation powerful enough to arrange treaties generally weighted in its favor, has been avoided by the current willingness to negotiate. In addition to this long-term advantage, the United States, in implementing its present policy, has reaped a dividend in the ideological controversy.

APPENDIX

TEXT OF JOINT PRESIDENTIAL STATEMENT ON PROGRESS OF TREATY NEGOTIATIONS

September 24, 1965

The President of the United States of America and the President of the Republic of Panama announced today that areas of agreement have been reached in the current treaty negotiations along the following lines:

In order to meet their present and future needs the two countries are negotiating separately a new and modern treaty to replace the 1903 Treaty and its amendments—a base rights and status of forces agreement—and a treaty under which there might be constructed across Panama a new sea level canal.

The two countries recognize that the primary interest of both countries lies in ensuring that arrangements are provided for effective operation and defense of the existing Panama Canal and any new canal which may be constructed in Panama in the future.

With respect to the status of the negotiations on a new treaty to replace the 1903 Treaty and its amendments, general areas of agreement have been reached. The details of these areas of agreement are the subject of current negotiations.

The purpose is to ensure that Panama will share with the United States responsibility in the administration, management and operation of the Canal as may be provided in the treaty. Panama will also share with the United States in the direct and indirect benefits from the existence of the Canal on its territory.

The areas of agreement reached are the following:

1. The 1903 Treaty will be abrogated.
2. The new treaty will effectively recognize Panama's sovereignty over the area of the present Canal Zone.
3. The new treaty will terminate after a specified number of years or on the date of the opening of the sea level canal whichever occurs first.
4. A primary objective of the new treaty will be to provide for an appropriate political, economic and social integration of the area used in the canal operation with the rest of the Republic of Panama. Both countries recognize there is need for an orderly transition to avoid abrupt and possibly harmful dislocations. We also recognize that certain changes should be made over a period of time. The new canal administration will be empowered to make such changes in accordance with guidelines in the new treaty.
5. Both countries recognize the important responsibility they have to be fair and helpful to the employees of all nationalities who are serving so efficiently and well in the operation of the canal. Appropriate arrangements will be made to ensure that the rights and interests of these employees are safeguarded.

The new treaties will provide for the defense of the existing canal and any sea level canal which may be constructed in Panama. United States forces and military facilities will be maintained under a base rights and status of forces agreement.

With respect to the sea level canal, the United States will make studies and site surveys of possible routes in Panama. Negotiations are continuing with respect to the methods and conditions of financing, constructing and operating a sea level canal, in the light of the importance of such a canal to the Republic of Panama, to the United States of America, to world commerce and to the progress of mankind.

The United States and Panama will seek the necessary solutions to the economic problems which would be caused by the construction of a sea level canal.

The present canal and any new canal which may be constructed in the future shall be open at all times to the vessels of all nations on a non-discriminatory basis. The tolls would be reasonable in the light of the contribution of the Republic of Panama and the United States of America and of the interest of world commerce.