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United States Sovereignty Over the Panama Canal Zone

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INTRODUCTION

On February 7, 1974, the United States and the Republic of Panama reached agreement on a number of joint principles to serve as guidelines for the negotiation of a new canal treaty.[1] These principles were the culmination of ten years of diplomacy; it was also an attempt to supplant the 1903 Convention with Panama for the Construction of a Ship Canal [hereinafter referred to as Treaty of 1903].[2] The joint principles embodied four substantive changes from the original treaty: 1) the length of the term should be reduced from perpetuity to a fixed termination date; 2) a substantial part of the Canal Zone should be returned to Panama; 3) rental payments from the United States to Panama should be greatly increased; and 4) Panama should be granted a role in the administration of the Canal.[3]

Until recently, the United States adhered to the position that the Treaty of 1903 ceded sovereignty over the Canal and Canal Zone to the United States.[4] Although the executive branch has modified its stance,[5] Congress still staunchly maintains the view that the United States does, in fact, govern the Canal Zone as sovereign.[6] Shortly after the 1974 Kissinger-Tack Agreement

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1. The joint principles agreed to by the United States and Panama subsequently served as the basis for three conceptual agreements that specifically dealt with the delicate issues of sovereignty and control in the Canal Zone. *See* 94th Cong., 1st Sess., 121 CONG. REC. H 9662 (1975). *See also* 70 DEP'T STATE BULL. 181 (1974) for the text of the joint principles on which the contextual agreements were based.

2. Convention With Panama for the Construction of a Ship Canal, *signed* Nov. 18, 1903, 33 Stat. 2234, T.S. No. 431 [hereinafter cited as Treaty of 1903]. The Treaty of 1903 is also referred to as the Bunau-Varilla-Hay Treaty.

3. *See* 70 DEP'T STATE BULL., *supra* note 1, at 184.

4. *See* text accompanying notes 26-28 *infra.*

5. *See* 73 DEP'T STATE BULL. 1 (1975).

6. The prevailing congressional view was expressed by Rep. Daniel Flood of Pennsylvania:

> Though the problems of the Panama Canal may appear highly complicated yet when reduced to their essentials they are relatively brief and simple. The crucial facts are: First. Under the 1903 Treaty, which was authorized by the Congress - Spooner Act of 1902 [32 Stat. 481] the United States acquired full sovereign rights, power, and authority over the Canal Zone in perpetuity for the construction, maintenance, operation, sanitation, and protection of the Panama Canal in accordance with the rules governing the operation of the Suez Canal.
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> . . . .
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> The Canal Zone is not a "leased" area, as so often misstated in the press and

was signed, Senator Thurmond introduced a resolution which reasserted the Senate position that the United States should retain "undiluted sovereignty" over the Canal Zone.[7] In the House of Representatives, the Snyder Amendment to an appropriations bill directed that "none of the funds appropriated in this title shall be used for the purpose of negotiating the surrender or relinquishment of any United States rights in the Panama Canal Zone."[8] These measures have received bipartisan support. Since both houses of Congress must consent to treaties by a majority vote[9] and the power to regulate or dispose of property belonging to the United States resides with Congress,[10] the current negotiations may well be an exercise in futility.

This note examines the Treaty of 1903 to determine what rights it granted to the United States. Additionally, the congressional view that United States sovereignty over the Canal and Canal Zone is strategically essential will be analyzed to determine whether United States interests are best served by this position.

I. BACKGROUND

In 1846, the United States acknowledged Colombian sovereignty over Panama as the *quid pro quo* for Colombian agreement that a canal should be built.[11] Subsequent negotiations resulted in the Hay-Hurran Treaty,[12] which was rejected by the Colombian Senate.[13] The chief objection to the proposed treaty was that it provided compensation which was not commensurate with the right to build the canal. Other provisions of the treaty would have granted the United States a zone ten kilometers wide, a one-

in reference works, but a grant in perpetuity under our full sovereign rights, power and authority and, in fact, constitutionally acquired domain of the United States.

94th Cong., 1st Sess., 121 CONG. REC. H10417 (1975).

7. 93d Cong., 2d Sess., 120 Cong. Rec. S4730 (1974).

8. 94th Cong., 1st Sess., 121 CONG. REC. H8121 (1975).

9. *See* U.S. CONST. art. II, § 2, cl. 2.

10. *See* U.S. CONST. art. IV, § 3, cl. 2.

11. Treaty of Peace, Amity, Navigation and Commerce with New Granada [Colombia], Dec. 12, 1846, 9 Stat. 881, T.S. No. 54.

12. S. Doc. No. 474, 63d Cong., 2d Sess. 277, 279 (1914). *See also* Telegram from Mr. Beaupré to Mr. Hay, [1903] FOR. REL. U.S. 179; N. PADELFORD, THE PANAMA CANAL IN PEACE AND WAR 21-22 (1942); M. DUVAL, CADIZ TO CATHAY: THE STORY OF THE LONG DIPLOMATIC STRUGGLE FOR THE PANAMA CANAL 380 (2d ed. 1947); S.Doc. No. 456, 63d Cong., 2d Sess. 277 (1914).

13. Telegram from Mr. Beaupré to Mr. Hay, [1903] FOR. REL. U.S. 222.

hundred year lease, and concurrent jurisdiction and power in the Canal Zone.

Shortly after Colombian disapproval of the treaty terms, Panamanian nationalists revolted and declared their independence from Colombia. The United States immediately stationed the *U.S.S. Nashville* in the port city of Colon as a warning to Colombia not to intervene.[14] Three days later, the United States officially recognized the fledgling republic,[15] and within two weeks the Treaty of 1903 was signed. In return for a guarantee that the United States would protect the independence of the new republic[16] and pay an annuity for the rights granted,[17] Panama agreed to United States "use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said Canal of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the Canal to be constructed."[18]

The terms of the Treaty of 1903 were far more favorable to the United States than those of the Hay-Hurran Treaty which had been rejected by the Colombian Senate. Although the monetary compensation was equivalent, the treaty with Panama provided that: 1) the Canal Zone was widened from ten kilometers to ten miles; 2) the grant was to be in perpetuity instead of a one-hundred year lease; 3) the United States was given exclusive jurisdiction within the Canal Zone and a right of eminent domain over land outside it, rather than concurrent jurisdiction; and 4) the United States obtained the right to maintain order in two principal Panamanian cities if the Republic of Panama should become incapable of doing so.

There have been two major amendments to the original treaty. In 1936,[19] the annuity was raised and the United States relinquished both the right to exercise eminent domain and the

14. *See* Hoyt, *Law and Politics in the Revision of Treaties Affecting the Panama Canal*, 6 VA. J. INT'L L. 289, 299-300 (1965).

15. *Id.* at 299.

16. Treaty of 1903 at art. I.

17. Treaty of 1903 at art. XIV.

18. Treaty of 1903 at art. II.

19. Treaty of Friendship and Cooperation with Panama, Mar. 2, 1936, 53 Stat. 1807, T.S. No. 945. This treaty provided that the Canal Zone constituted "territory of the Republic of Panama under the jurisdiction of the United States of America" but the provision has been interpreted by the United States as being of limited significance since it only referred to the landing of passengers and cargo. *Id.*, art. III, para. 6. *See* [1939] FOR. REL. U.S., vol. V, 750.

right to take action outside the Canal Zone. Additionally, the grant in perpetuity was limited to property inside the Canal Zone. A second amendment,[20] in 1955, further increased the annuity and also relinquished title to property which the United States held outside the Canal Zone. In 1964, an agreement was reached between the United States and Panama to adjust the rights of each State in the Canal Zone, but it failed to win Congressional ratification.[21]

II. SOVEREIGNTY OVER THE CANAL ZONE: TREATY INTERPRETATION

Support for Panama's claim to partial jurisdiction over the Canal Zone can be based upon the rules of treaty interpretation. The Vienna Convention on the Law of Treaties [hereinafter referred to as Vienna Convention][22] is the last in a series of international conventions which started with the 1928 Convention on Treaties adopted by the Sixth International Conference of American States.[23] Although not applied retroactively,[24] the provisions of the Vienna Convention which are considered in this note are common to all of these conventions on treaty interpretation and are generally accepted as customary international law.[25]

Textual Analysis

The question of sovereignty over the Canal Zone was in dispute as soon as the ink on the Treaty of 1903 was dry. Its interpretation was impeded by the ambiguous terms used to define the interests that the United States obtained and Panama relinquished. The United States has always maintained that Panama retained nothing more than "titular" sovereignty over the territory. Although Panama was still dependent upon United States

20. Treaty of Mutual Understanding and Cooperation with Panama, Jan. 25, 1955, T.I.A.S. No. 3297, 6 U.S.T. 2273.

21. 113 CONG. REC. 18942 (1967).

22. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF. 39/27 [hereinafter cited as Vienna Convention]. The text of the Vienna Convention may also be found at 8 INT'L LEG. MAT'S 679 (1969); 63 AM. J. INT'L L. 875 (1969). *See also* S. ROSENNE, THE LAW OF TREATIES: GUIDE TO LEGISLATIVE HISTORY OF VIENNA CONVENTION (1970).

23. For the text of this convention see IV HUDSON, INTERNATIONAL LEGISLATION 2378 (1971); *see also Harvard Research Draft Convention on the Law of Treaties*, 29 AM. J. INT'L L. 653 (Supp. 1935); McDougal, *The International Law Commission's Draft Articles Upon Interpretation: Textuality* Redivivus, 61 AM. J. INT'L L. 992 (1967).

24. Vienna Convention at art. 9.

25. *See* M. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 1 (1973).

protection from Colombian invasion, as early as 1904 Panama denied that the treaty implied either cession of territory or absolute transfer of sovereignty to the United States. In a letter to the United States Secretary of State, Panama's Foreign Minister concluded:

> My Government considers that the idea of the contracting parties is obscure in everything relating to these delicate questions of dominion and sovereignty; but after a careful study the conclusion may be arrived at that the two countries exercise conjointly the sovereignty over the territory of the canal zone, and that in the cases expressly specified in the . . . Treaty [of 1903] the use of such right belongs to the United States by virtue of delegation from the Republic of Panama, but in all that concerning which the treaty is silent the rights of the Republic of Panama remain unalterable and complete.[26]

The claim of coequal sovereignty was a bold assertion in light of the relationship between Panama and the United States in 1904. Secretary of State Hay, in his reply, did not deny the "titular" sovereignty of Panama over the Canal Zone, but called it "nothing more than a barren scepter."[27] Two years later, Secretary of War Taft affirmed United States recognition of the "titular" sovereignty of Panama over the Canal Zone, while expressing the opinion that its sole significance lay in its psychological effect.[28] It is clear from these early exchanges that the United States obtained something less than actual sovereignty over the Canal Zone. Precisely what the United States received can only be ascertained through interpretation of the Treaty of 1903.

The Vienna Convention contains the fundamental principle that a treaty should be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[29] This does not preclude contextual factors from consideration. Article 31 directs that such contextual factors include the preamble and annexes of the document, related agreements made by all parties and instruments made by less than all parties, subsequent prac-

26. Letter from Mr. de Obaldía, Minister of Panama, to Mr. Hay, Secretary of State, [1904] FOR. REL. U.S. 598, 602.

27. Letter from Mr. Hay to Mr. de Obaldía, [1904] FOR. REL. U.S. 613, 615.

28. Woolsey, *The Sovereignty of the Panama Canal Zone*, 20 AM. J. INT'L L. 117, 121 (1926). *See also* Note, *Legal Aspects of the Panama Canal Zone-In Perspective*, 45 B.U.L. REV. 64, 71-72 (1964).

29. Vienna Convention at art. 31, § 1.

tice establishing agreements, and relevant rules of international law.[30] Article 32 provides for supplementary means of interpretation,

> including preparatory work on the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.[31]

The body of the Treaty of 1903 is vague with regard to the nature of the interest in the Canal Zone that Panama transferred to the United States. When the preamble and the circumstances surrounding its signing are examined, however, the limitation upon United States interests becomes evident. The preamble specifies that the United States acquired "control of the necessary territory of the Republic of Colombia, and *the sovereignty of such territory being actually vested in the Republic of Panama.*"[32] This section of the preamble not only recognizes Panamanian sovereignty over the former Colombian territory, but also clearly relegates the United States interest to control rather than sovereignty.

The Treaty of 1903 stated that the grant to the United States was to be in perpetuity, and gave it the power to "possess and exercise *as 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."[33] The phrase "as if" manifests a desire to create only the semblance of sovereignty. This phrasing, coupled with the wording of the preamble to the treaty, indicates that power, but not dominion, over the Canal Zone was surrendered by Panama. While it can be argued that the Treaty of 1903 granted the United States exclusive sovereign rights,[34] a closer reading of the language quoted above leads to a different conclusion. The authority to act as sovereign to the exclusion of Panama refers only to the *exercise* of sovereign rights in the Canal Zone, and does not contemplate a transfer of sovereignty itself.

30. Vienna Convention at art. 31, §§ 2 & 3.
31. Vienna Convention at art. 32.
32. Treaty of 1903 at preamble (emphasis added).
33. Treaty of 1903 at art. III (emphasis added).
34. *See* note 6 *supra*.

Moreover, had a transfer of territory and sovereignty been intended, a less ambiguous mode of expression would have been employed. Indeed, proximate to the signing of the Treaty of 1903, the United States signed treaties which were more definite and certain in their terminology. In cases in which the United States has acquired undisputed sovereignty over foreign territory the language of the relevant treaties has clearly indicated that a cession was intended. Two examples of such acquisitions are Hawaii[35] and the Virgin Islands.[36] The treaty annexing the Hawaiian Islands to the United States declared:

> Whereas the Government of the Republic of Hawaii having in due form signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of whatsoever kind in and over the Hawaiian Islands and their dependencies.[37]

In the treaty which conveyed the Virgin Islands to the United States, the language employed left no doubt as to sovereignty:

> this convention cedes to the United States all territory, dominion and sovereignty possessed, asserted or claimed by Denmark in the West Indies; . . . Denmark guarantees that the cession made by the preceeding article is free of encumbrances of any reservations, privileges, franchises, grants or possessions . . . .[38]

In all instances where the United States has acquired territory, the language acknowledging United States sovereignty has been similarly explicit, usually employing the word "ceded."

From this brief review of the terms of the canal treaty it is evident that any claim of United States sovereignty over the Canal Zone is of questionable validity. A further examination of the Treaty of 1903, in light of the principles of the Vienna Convention, indicates that Panama probably has the right to denounce the treaty and would not be in violation of international law in insisting that the United States completely remove itself from the Canal Zone.

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35. Joint Resolution to Provide for annexing the Hawaiian Islands to the United States, July 7, 1898, 30 Stat. 750.

36. Convention between the United States and Denmark for cession of the Danish West Indies, Aug. 4, 1916, 39 Stat. 1706.

37. 30 Stat. 750.

38. 39 Stat. 1706.

Contextual Analysis: Panama's Right of Denunciation

The Vienna Convention recognizes the right of a nation to denounce a treaty it has made under certain circumstances.

> 1. A treaty which contains no provisions regarding its termination which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
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> . . . .
>
> (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.[39]

Subsection (b) of this article was added due to the belief that the "character of the treaty" may admit of a right to denounce by implication.[40] Because the nature of the Panamanian government at the time of signing makes the character of the Treaty of 1903 questionable, Panama may have such an implied right of denunciation.

The brief interval between the declaration of Panamanian independence and the signing of the Treaty of 1903 places in issue the free judgment of Panama's representatives since its independence from Colombia was uncertain. The continued existence of Panama as a nation was primarily due to the stationing of the *U.S.S. Nashville* in the City of Colon as a deterrent to Colombian intervention.[41] One commentator has stated that

> the revolt of Panama on November 3, 1903 was instigated and financed by agents of the French canal company, and the conspirators counted entirely on prompt intervention by the United States. Actual collusion was never proved, but the administration in Washington was aware of the conspiracy and ready to take advantage of it.[42]

An even greater cloud is placed upon the legitimacy of the incipient Panamanian government because the new Foreign Minister, Philippe Bunau-Varilla, was a French engineer who had previously served as an agent for the canal company.[43] Article 50 of the Vienna Convention states that

> [i]f the expression of a States' consent to be bound by a treaty

39. Vienna Convention at art. 56.
40. *See* T. ELIAS, THE MODERN LAW OF TREATIES 106-07 (1974).
41. *See* R. BAXTER & D. CARROLL, THE PANAMA CANAL 47 (1965).
42. Hoyt, *supra* note 14, at 293.
43. *Id.*

> has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.[44]

The conventions on treaty interpretation have not developed criteria for determining the precise point in time at which a declaration of independence is effective to establish sovereignty over a territory and thus create competence to sign a treaty.

> It must frequently be a delicate task to determine the precise moment when the authority of insurgents is sufficient to give them competence under international law to make treaties on behalf of the whole state, [in the case of Panama on behalf of a newly formed state] and when, correspondingly, the authority of the regularly constituted government is so undermined as to deprive it of the competence to act validly for the state. It is conceiveable, but difficult to verify, that in case of doubt, a residuary rule of international law points to the older government as competent to represent the state.[45]

It would appear that the competence of a newly emergent State should be clearly established before it can enter into treaties of major import. In the case of Panama, only two weeks elapsed between the revolt against Colombia and the signing of the Treaty of 1903. The treaty gave the United States rights to a significant portion of the isthmus of Panama and, in effect, divided the country in half. Under the circumstances, the validity of a broad surrender of property and authority is questionable, and the competence of the Panamanian government to surrender sovereignty is extremely doubtful.

III. Sovereignty Over the Panama Canal Zone: United States Case Law

Soon after the Treaty of 1903 was signed, the United States Supreme Court reviewed the status that the treaty conferred upon the Canal Zone. In *Wilson v. Shaw*,[46] it was held that the United States could build a canal in Panama because the Treaty of 1903 granted it title to the Canal Zone which was sufficient to meet constitutional requirements. The Court stated that "it is

44. Vienna Convention at art. 50.
45. H. Blix, Treaty-Making Power 145-46 (1960).
46. 204 U.S. 24 (1906).

hypercritical to contend that the title of the United States is imperfect, and that the territory described does not belong to this Nation, because of the omission of some of the technical terms used in ordinary conveyance of real estate."[47] The decision in *Wilson* is not determinative of the issue of sovereignty however; the Court refers to United States "title" to the Canal Zone rather than sovereignty.[48] Such bare title is analogous to holding a deed to a piece of land and does not support a claim of sovereignty.

Furthermore, when examined in conjunction with later Supreme Court cases, the decision of the Court in *Wilson* clearly does not stand for the principle that the United States obtained sovereignty over the Canal Zone for all purposes. In *David Kaufman & Son Co. v. Smith*,[49] the Court held that the Canal Zone was a foreign country for the purpose of the collection of duties, "in view of the treaty, between the Republic of Panama and the United States, and the various acts of Congress relating to such Zone . . . ."[50] In *Luckenbach S.S. v. United States*,[51] the Court held that the Immigration Act of 1917,[52] which concerns only foreign ports, was applicable to the ports in the Canal Zone on the basis of a Labor Department construction of the Immigration Act.[53] In *Vermilya Brown Co. Inc. v. Connel*,[54] the issue posed was whether the Fair Labor Standards Act[55] covered employees in an area of Bermuda which was under a ninety-nine year lease to the United States. Respondent argued that the Act was applicable to areas in which the United States was not sovereign, and specifically cited the Canal Zone as an example. The Court held that the Act covered both Bermuda and the Canal Zone.

> Where as here the purpose is to regulate labor relations in an area vital to our national life, it seems reasonable to interpret its provisions to have force where the nation has sole power, rather than limit the coverage to sovereignty. Such an interpretation is consonant with the Administrator's inclusion of the Panama Canal Zone within the meaning of "possession."[56]

47. *Id.* at 33.
48. *Id.*
49. 216 U.S. 610 (1910).
50. *Id.* at 611.
51. 280 U.S. 173 (1930).
52. Act of Feb. 5, 1917, ch. 29, 39 Stat. 874 (1917).
53. 280 U.S. at 182.
54. 335 U.S. 377 (1948).
55. 29 U.S.C. §§ 201 *et seq.* (1938).
56. 335 U.S. at 390.

In each of these cases, the Court passed upon only the limited issue of the scope of United States authority. At no time has the Court unequivocally held that the Canal Zone is sovereign territory of the United States.

The Court has recognized that "the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States should receive such inhabitants."[57] Oppenheim states that

> the object of cession is sovereignty over the ceded territory, [and] all such individuals domiciled thereon as are subjects of the ceding State become *ipso facto* by the cession subjects of the acquiring State. The hardship involved is the fact that in all cases of cession the inhabitants of the territory who remain lose their old citizenship and are handed over to a new sovereign whether they like it or not . . . .[58]

In previous instances where the United States has obtained sovereignty over territory, *e.g.*, Hawaii,[59] Alaska,[60] Puerto Rico,[61] Guam,[62] and the Virgin Islands,[63] the inhabitants have been given the opportunity to become United States citizens. While under domestic law the United States may not be compelled to offer citizenship to resident aliens, the fact that this option was not offered to residents of the Canal Zone indicates that there is a special character distinguishing it from other territories. Congress, by its inaction, has tacitly accepted this distinction.

IV. Panama's Right to Nationalize the Canal and the Canal Zone Under Emergent Principles of International Law

United States recognition of Panama's "titular" sovereignty over the Canal Zone may have been devoid of significance at the turn of the century, but with the passage of the United Nations General Assembly Resolution 1803[64] it attained new import. The resolution, which the United States voted for, recognized every

57. Downes v. Bidwell, 182 U.S. 244, 268 (1901).

58. 1 Oppenheim, International Law 551 (8th ed. Lauterpacht 1955) (foonotes omitted).

59. Act of Apr. 30, 1900, ch. 339, § 4, 31 Stat. 141.

60. Act of July 27, 1868, ch. 273, 15 Stat. 240.

61. Act of Apr. 12, 1900, ch. 191, § 7, 31 Stat. 79.

62. Act of Aug. 1, 1950, ch. 512, § 5, 64 Stat. 385.

63. Act of July 22, 1954, ch. 558, § 3, 68 Stat. 497.

64. G.A. Res. 1803, 17 U.N. GAOR Supp. 17, at 15 (1962).

nation's permanent sovereignty over its natural resources and wealth.

> 1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the wellbeing of the people of the State concerned.
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> . . . .
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> 3. . . . due care [must] be taken to ensure that there is no impairment for any reason, of that State's sovereignty over its natural wealth and resources.[65]

The Treaty of 1903 represents something less than an absolute cession of territory. If the Canal Zone is considered a natural resource, the United States would thus be bound to recognize Panama's permanent sovereignty pursuant to article 1 of Resolution 1803.

Panama has long expressed this belief, based upon the unique geographic features and position of the Panamanian isthmus.[66] A United States case dealing with the issue of whether land, per se, can be considered a natural resource lends support to this view. In *Snyder v. Board of Commissioners*,[67] it was held that:

> to the extent to which a given area possesses elements or features which supply a human need and contribute to the health, welfare, and benefits of a community, the same constitute natural resources.[68]

As a natural resource, the Canal Zone would be subject to nationalization pursuant to Resolution 1803. Nationalization has been defined as "the act of transferring an economic activity from the private sector to the public sector."[69]

The negotiations between the United States and Panama revolve around transferring the economic interests of the United States in the Canal Zone.[70] Article 3 of Resolution 1803 directs that economic activity should not impair the State's sovereignty,

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65. *Id.* at 15-16.

66. Letter from Panamanian Minister (Alfero) to the Secretary of State, [1923] FOR. REL. U.S., vol. II, 638.

67. 125 Ohio St. 336, 181 N.E. 383 (1923).

68. *Id.* at 339, 181 N.E. 384.

69. Kouatly, *Issues in Private Property and Nationalization*, 42 INS. COUNCIL J. 386, 394 (1975).

70. *See* note 66 *supra*.

and the operation of the Panama Canal clearly represents a serious infringement upon Panamanian sovereignty.

Acceptance of the Panamanian demand that a substantial part of the Canal Zone should be returned to Panama is ultimately in the interest of the United States. If Panama nationalized the Canal Zone, in whole or part, pursuant to Resolution 1803, it would have to provide the United States with adequate compensation. The requisite standard for compensation of alien property is one of the most controversial issues in international law today.[71] The orthodox position, usually espoused by the United States, is that "prompt, adequate and effective" compensation is required,[72] that is, full compensation must be paid before, or soon after, the taking in the legal currency of the country whose property was nationalized. Commentators are nearly unanimous in condemning this position as both unjust and unrealistic.[73] Professors Dawson and Weston consider that "appeals to this somewhat metaphysical standard of 'prompt, adequate and effective' compensation are not only unrealistic in light of extensive foreign wealth deprivations but frustrate efforts to achieve at least minimum stability of interaction in a world of violent and radical change."[74] Although no generally accepted standard of compensation has been so widely adopted as to be considered customary law, most theories prevalent today link the standard of compensation to the equities of the situation.[75] The United States could not expect significant compensation for any Panamanian nationalization if those equities were taken into account.

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71. *See generally* Domke, *Foreign Nationalizations*, 55 AM. J. INT'L L. 585 (1960); Herz, *Expropriation of Foreign Property*, 35 AM. J. INT'L L. 243 (1941); Hyde, *Permanent Sovereignty Over Natural Wealth and Resources*, 50 AM. J. INT'L L. 854 (1956); Katzarov, *The Validity of the Act of Nationalization in International Law*, 22 MODERN L. REV. 639 (1959); Kuhn, *Nationalization of Foreign Owned Property and its Impact on International Law*, 45 AM. J. INT'L L. 709 (1951); Re, *The Nationalization of Foreign Owned Property*, 36 MINN. L. REV. 323 (1952); Rubin, *Nationalization and Compensation, A Comparative Approach*, 17 U. CHI. L. REV. 458 (1950); Ujlaki, *Compensation for the Nationalization of American Owned Property in Bulgaria, Hungary and Rumania*, 1 N.Y.L.F. 265 (1955).

72. *See* Dawson & Weston, *"Prompt, Adequate and Effective"; A Universal Standard of Compensation?*, 30 FORDHAM L. REV. 727 (1962) for an excellent critical analysis of this standard.

73. *See* note 71 *supra* for commentators who take such a position.

74. *See* Dawson & Weston, *supra* note 72, at 757.

75. *See* Francioni, *Compensation for Nationalization of Foreign Property: The Borderland Between Law and Equity*, 24 INT'L & COMP. L.Q. 225 (1975).

V. INTERNATIONALIZATION OF THE PANAMA CANAL

Congressional opponents of a new treaty with Panama which would entail a lessening of United States power have often asserted that continued presence in the Canal Zone is necessary to protect freedom of passage through the Canal and to promote the economic interests of the United States in the area.[76] Free access of United States vessels to the Canal would fulfill such interests. The United States should take steps to ensure the internationalization of the canal, and then negotiate a gradual transition to full Panamanian sovereignty.[77]

It has been argued that such a transfer of control to Panama would entail a threat to the security interests of the United States due to the close relationship between the Cuban and Panamanian governments. If the transfer is coupled with internationalization of the Canal, however, United States military vessels would have unimpaired access. It is unlikely that a United States withdrawal from the Canal Zone would ever result in the closing of the Canal. Panama is economically dependent upon the Canal for revenue, and the United States is the largest user of the Canal facilities.[78] Despite political liaisons with Cuba, it would be to Panama's benefit to keep the Canal open to United States shipping. Furthermore, relinquishment of the Canal and Canal Zone to Panama would alter the political climate in Latin America and foster better United States-Panamanian relations.

The Process of Internationalization

Freedom of passage of ships through interoceanic waterways during both war and peace is firmly established in international law.[79] The Hay-Paunceforte Treaty of 1901[80] established the prin-

76. *See* note 6 *supra*.

77. Internationalization 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.

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

78. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACTS OF THE UNITED STATES 601 (1975).

79. As early as 1888 the Convention of Constantinople, a multilateral treaty, guaranteed freedom of passage by and for the signatory states - Great Britain, Germany, Austria-Hungary, Spain, France, Italy, the Netherlands, Russia, and Turkey. This Convention

ciple of freedom of passage through the proposed Canal, at least as between the signatories, the United States and Great Britain.[81] The treaty provided that the Canal should be "free and open to the vessels of commerce and of war of all nations . . . on terms of entire equality."[82] The United States has the power to grant the rights of navigation to all nations pursuant to the Hay-Paunceforte Treaty:

> The United States may come to believe that she is bound to allow the free use of the canal and that nations using it, that they have a right to do so. In that moment the international community would be endowed with the right to navigate such as an international canal. . . . The initial stipulation of the Hay-Paunceforte Treaty in favour of all nations would thus have been transformed into an international right.[83]

The right to navigate through artificial interoceanic waterways such as the Panama Canal has been recognized under international law. The Permanent Court of International Justice held that the right existed in the *Case of The S.S. Wimbledon*.[84] In that case, a British ship carrying munitions to Poland for use in the Russo - Polish War attempted to pass through the Kiel Canal, which was controlled by Germany. Both Great Britain and Germany were neutral, and Germany did not wish to jeopardize that neutrality by allowing arms for belligerent States to pass through the Canal. The Court held that Germany was required to permit all vessels to pass through the Canal pursuant to the Treaty of Versailles,[85] which stated that the Kiel Canal was to be "free and

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provided that States not parties could ratify it and thereby receive its benefits. "A similar provision in the first text of the Hay-Paunceforte Treaty was rejected by the United States Senate on the grounds that the United States should not be contractually bound by an agreement which would create rights and duties as between the United States and third States." R. BAXTER, THE LAW OF INTERNATIONAL WATERWAYS 175 (1964) (citations omitted). *See* OPPENHEIM, *supra* note 58, at 480-81.

80. Treaty with Great Britain to Facilitate the Construction of a Ship Canal, Nov. 18, 1901, 32 Stat. 1903, T.S. No. 401 [hereinafter cited as Hay-Paunceforte Treaty].

81. The motive of the United States in signing this treaty with Great Britain was not to insure that the Canal remained open to all nations without discrimination. In 1850, the United States and Great Britain had previously entered into the Clayton-Bulwer Treaty, 3 MOORE, INTERNATIONAL LAW DIGEST 130 (1906), in which Great Britain gave up claims to parts of Nicaragua so that the United States could build a canal in Nicaragua. In return, the United States agreed to stringent limitations, *i.e.*, the right of free passage, on its authority over any canal built between the Atlantic and Pacific oceans. *Id.* at 203.

82. Hay-Paunceforte Treaty, 32 Stat. at 1904.

83. J. OBIETA, THE INTERNATIONAL STATUS OF THE SUEZ CANAL 34 (1960).

84. [1923] P.C.I.J., ser. A, No. 1.

85. Treaty of Peace Between the Allied and Associated Powers and Germany, *done*

open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality."[86] As evidence of customary international law requiring interoceanic waterways to be left open in times of war or peace, the Court cited the position adhered to by the United States prior to World War I that all ships be allowed to pass through the Panama Canal.[87]

Explicit international recognition of the Panama Canal as an international waterway would necessarily require approval by the United States and Panama.

> The legal status of the waterway is not to be determined by reference to . . . abstract concepts but by a consideration of the relations established among Panama, the United States, the user nations by treaty and by the customary law which state practice has established for this and similar waterways. In so far as freedom of passage is concerned, the law governing the Panama Canal is . . . a general body of canal law, which establishes rights and duties for the proprietor of the waterway and for the users. So long as the present regime of the Panama Canal is maintained, the relation of the operator of the waterway to the adjacent territorial sovereign is, by contrast, not a question of general international law but of particular international law having application to the Republic of Panama and the United States alone.[88]

The economic interests of the United States would be served by the internationalization of the Panama Canal. This would permit both the protection of United States economic interests and a renewal of the rights which Panama lost in the ambiguous Treaty of 1903. The United States should accept a partial transfer of power in the Canal Zone on amicable terms, rather than further strain United States-Panamanian relations. The question that opponents to the renegotiation of the Treaty of 1903 should ask is not whether the United States gained sovereignty over the Canal Zone in 1903, but whether the United States should assert such claims in the face of vehement Panamanian opposition. The foreign policy interests of the United States are best served by rapprochement with Panama.

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June 28, 1919, 112 BRIT. AND FOR. STATE PAPERS 1 (1919); 2 Bevans 43.

86. [1923] P.C.I.J. at 24.

87. *Id.* at 25.

88. Baxter, *supra* note 79, at 87.