

# THE GUEST WORD

## A Legal Perspective on the Panama Canal Treaty

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For about 75 years international lawyers have believed that the rights of American warships to expeditious passage through the Panama Canal and American presence to support the neutrality of the canal are based upon universal rights and America's obligations under the Hay-Pauncefote Treaty of 18 November 1901 between the United States and Great Britain;

that the Hay-Bunau Varilla Treaty of two years later between the United States and Panama merely spells out the particular rights of the United States in Panama which Panama agreed were necessary and appropriate in the circumstances of that time.

Now, publicized objections to the term of the text signed by Presidents Carter and Torrijos promising mere "expeditious" passage to American warships transiting the canal seem to assume that American warship transit rights are particular rights resting on the 1903 agreement, and can be changed by a new agreement between the United States and Panama. There also seems to be some feeling that the American presence in the Canal Zone was intended to insulate the United States' particular interests in the canal from political changes in Panama. Despite the unaccountable silence of President Carter on the legal background of the new arrangements, the assumptions about expeditious passage and the political orientation of Panama's government are patently false.

As to the passage of warships, the Hay-Pauncefote Treaty commits the United States to rules taken from the 1888 Convention of Constantinople establishing the regime of the Suez Canal. In particular, the 1901 Treaty

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provides in its Article III:

1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nations . . . in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

2. The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the Regulations in force, and with only such intermission as may result from the necessities of the service . . . .

It might be noted that except for the "liberty" of the United States (but not the obligation) to maintain a protecting military police presence along the canal, United States warships are envisaged as receiving the same expeditious passage ("least possible delay") as the warships of any other belligerent; in the absence of a status of "belligerency," what would today probably be called an "armed conflict," there is no right of even expeditious passage, although there is an obligation of equality of treatment that might amount in practice to the same thing if other nations' warships routinely receive preference over vessels of commerce.

This regime is not dependent upon any agreement between the United States and Panama, and cannot be changed by any agreement between the United States and Panama. It rests on the 1901 Treaty between the United States and Great Britain, which has been cited often as valid vis-a-vis the entire world. That universal validity rests not on mere British assertion or the assertion of particular states claiming advantages under the Treaty, but on theory and reality. The position in theory has been analyzed with sophisticated depth often enough, and the analogy to the Anglo-American common law regarding "third-party beneficiary contracts" is sufficiently clear that it should suffice to point out that the United States has itself acknowledged the position and even asserted it on its own behalf as the basis for American initiative in the "Suez Canal Users Association" when questions arose in 1956 over the Egyptian nationalization of the Suez Canal Company; the United States is not a party to the Suez Canal's Constantinople Convention of 1888, but a third party beneficiary. The position in reality is also clear: many states, possibly all states using the Panama Canal, have an interest equal to that of the United States in maintaining the canal's complete neutrality and seeing that the conditions of use and charges of traffic remain just and equitable. Mexico and Canada have

ports on both the Atlantic and Pacific Oceans; trade between the Pacific coast states of Latin America and East and South Coast ports of the United States is as important to the Latin Americans as to the United States. Liberia would be at least as concerned as the United States with discrimination in the canal favoring Panamanian flag vessels.

As to the supposed rights of the United States to intervene in the Government of Panama, no such rights exist either under the Hay-Pauncefote Treaty or under the Hay-Bunau Varilla Treaty. Instead, in article XVIII of the Hay-Bunau Varilla Treaty, Panama agreed that article III of the Hay-Pauncefote Treaty and all other stipulations of that treaty between the United States and Great Britain would fix the regime of the canal. One of those stipulations was in article IV of the Hay-Pauncefote Treaty:

[N]o change of territorial sovereignty or of international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralization of the obligation of the High Contracting Parties under the present Treaty.

It is apparent from this language and from the form of all the other of the Hay-Pauncefote Treaty terms fixing the regime of the Panama Canal, that the United States has no "rights" in the Canal Zone absent Panama's consent, but has massive obligations owed to Great Britain and the rest of the world to assure the availability of the canal on terms of complete neutrality to all the world. To discharge that obligation a military base was established with Panamanian permission in 1903. But the military necessity of that base seems doubtful today. It might be necessary at some time to re-occupy the canal area, but the Hay-Pauncefote Treaty obligation of the United States does not extend to intervening in the non-canal situation of the government of Panama. Indeed, the Hay-Pauncefote Treaty clearly envisages the possibility that the territorial sovereignty or international relations of the area will change, and limits the impact of those changes on the United States to generalities and the obligations of the United States to maintain the regime specified in article III, quoted above in pertinent part. In this regard, the United States acts not to protect the particular interests of American shipping, military and commercial, but world shipping. If Panama cannot or will not maintain the regime of the neutrality of the canal vis-a-vis any state, and the United States cannot or will not, then a world-wide problem will be created in which the United States certainly should not permit itself to be placed in the position of a colonialist power seeking its particular advantage.

Viewed, thus, with an eye to the legal basis for American rights in Panama, it seems clear that publicized objects to the expeditious passage term and demands for an intervention term in the new treaty would materially expand,

not merely maintain, American rights in Panama. Furthermore, to insist on such an expansion will be viewed by all concerned states as inconsistent with the canal's neutrality. We are as tightly bound to Great Britain and all the canal users to maintain that neutrality as any state is to any international commitment. Since insisting on such an expansion would make it politically difficult to discharge our obligations should the need arise to act in Panama to assure continued neutrality of the canal and expeditious passage to belligerent warships, it is simply incomprehensible why the President has not publicized the legal position.