

Comments

THE PANAMA CANAL TREATIES: RATIFICATION OR NATIONALIZATION?

The Treaty of 1903 between the United States and Panama¹ governs the administration of the Panama Canal, and no longer reflects the balance of political power and interests, either foreign or domestic, of the two countries. As a result of the implementation of the Treaty of 1903, the governments of the United States and the Republic of Panama have endured an uneasy relationship for over seventy years. This relationship has been marked primarily by an apparent lack of agreement concerning their respective rights and obligations.²

For fifteen years the United States and Panama have been conducting negotiations with the objective of creating a new regime for the Panama Canal. Early in 1977, President Carter pledged that a new treaty, acceptable to the international community, Panama, and the United States, would be reached. Treaty negotiations were completed in August, 1977, and the treaty was signed by the two heads of state in early September of the same year.

The Canal treaty negotiations, however, struck a divisive chord both in the United States and in Panama. After years of disinterest by the United States public, the prospect of losing the Canal has taken on a life and death significance. Many Americans perceived the treaty negotiations as an indication of failing United States strength in the world. Some Panamanians, mostly ultra-leftists, view the American presence as an intrusion upon their sovereignty, and charge that the treaties are an outrageous sellout of Panamanian interests. This attitude strikes many Americans as a most unfortunate lack of gratitude for all that Panama has received from the United States; for the United States gave Panama not only its Canal, but also its existence.³

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, 38 Stat. 2234 (1903-05), T.S. No. 431 [hereinafter cited as Treaty of 1903].

2. See generally N. PADELDFORD, *THE PANAMA CANAL IN PEACE AND WAR* 45-79 (1943).

3. The role of the United States in supporting the Panamanian revolution has been

The population of Panama is economically dependent upon the operation of an inter-oceanic canal; yet, the natural resource inherent in Panama's geographical position is controlled by the United States under the Treaty of 1903. Panamanian objections to the exercise of authority by the United States have been a common topic for negotiation. While both nations have expressed a willingness to compromise on many of the issues, each nation has started from a different assumption. The United States has started from the premise that it enjoys full powers in the Canal Zone. On the other hand, Panama has started from the position that the United States had been accorded only limited rights in the Canal Zone, and has, in fact, been exceeding its powers under the Treaty of 1903.

The force of nationalism in Panama has been underestimated by the United States since 1903. As nationalistic pressures in Panama intensify due to Panamanian displeasure with the Treaty of 1903 and continued American presence, failure of the Senate to give its advice and consent to the newly negotiated treaty may force Panamanian authorities to consider a logical alternative; that is, unilateral termination of the Treaty of 1903 and nationalization of the Panama Canal.

This comment will examine three questions relevant to unilateral termination and nationalization: 1) what are the legal justifications for unilateral termination of the Treaty of 1903 and nationalization of the Panama Canal; 2) how does Panama's stance compare with Egypt's position when the nationalization of the Suez Canal occurred; and 3) what are the legal proscriptions against unilateral intervention by the United States? As a basis for these discussions, this comment will also provide some background regarding the history of the treaty negotiations and the positions espoused by both parties prior to President Carter and General Torrijos' signing of the new, though unratified, Canal treaty.

I. HISTORICAL BACKGROUND

The Treaty of 1903 made no provision for either its termination or revision. The circumstances surrounding the Treaty's drafting, coupled with the use of the words granting sovereignty "*in*

criticized severely. President Theodore Roosevelt sent three battleships to Panama with orders to maintain free and uninterrupted transit of the Panama railroad and to prevent the landing of any armed force with hostile intent, either government or insurgent. Thus, Colombia was successfully prevented from attempting to suppress the Panamanian revolution. See generally Hoyt, *Law and Politics in the Revision of Treaties Affecting the Panama Canal*, 6 VA. J. INT'L L. 290-94 (1966).

perpetuity,"⁴ appear to negate such intentions by either party at that time.⁵ In the years following its ratification the Treaty became so unacceptable to Panamanian nationalists that they were no longer willing to accept it peacefully. Panamanian discontent has resulted in two treaty revisions favorable to their interests, one in 1936,⁶ and another in 1955.⁷ The decade following the 1955 revision saw numerous clashes between Panamanian civilians and United States military forces.⁸

Former President Lyndon B. Johnson announced his decision in December of 1964 to negotiate a new Canal treaty with Panama.⁹ At the same time, congressional approval to begin to "plan in earnest" on the establishment of a new sea-level canal was disclosed.¹⁰ Negotiators from the United States and Panama prepared three drafts providing for the joint operation of the Canal by 1967. There was no subsequent ratification of any draft by either country. Negotiations were renewed in 1971, but proved fruitless.¹¹ The announcement by Secretary of State Henry A. Kissinger in February, 1974, of new negotiations with Panama, under a Statement of Principles, marked a renewed effort toward transferring the Canal and Canal Zone to Panama.¹² Strong congressional opposition was

4. Treaty of 1903, *supra* note 1, art. II, IV, V.

5. Hoyt, *supra* note 3, at 290-95.

6. The result of the 1936 revision was that the United States withdrew the guarantee of independence of article I, raised the annual payments to \$430,000 a year, and agreed to bar all commercial enterprise within the Zone except those directly concerned with shipping. Treaty with Panama on Friendship and Cooperation, Mar. 2, 1936, 53 Stat. 1807 (1939), T.S. No. 945. See generally Hunt, *The Panama Canal Treaties: Past, Present, Future*, 18 U. FLA. L. REV. 398 (1965).

7. The three significant provisions of the 1955 revision are: 1) the increase in the annuity from \$430,000 to \$1,930,000; 2) concessions made by the United States relating to the abandonment of about \$24 million worth of real estate and buildings no longer needed by the Canal Zone administration; 3) United States citizen and non-citizen employees guaranteed equality of pay and opportunity, and Panama now entitled to levy income taxes on all Canal Zone employees except United States citizens, armed forces personnel and dependents. Treaty with Panama on Mutual Understanding and Cooperation, Jan. 25, 1955, 2 U.S.T. 2273, T.I.A.S. No. 3297. See generally Fenwick, *The Treaty of 1955 Between the United States and Panama*, 49 Am. J. INT'L L. 543 (1955).

8. Rioting in 1963 resulted in the death of at least 20 persons and hundreds were injured. Subsequently, Panama severed diplomatic relations with the United States and filed charges of "aggression" in the United Nations. Diplomatic relations were restored about six months later. See Hoyt, *supra* note 3, at 299-300.

9. 52 DEP'T STATE BULL. 5 (1965).

10. *Id.*

11. 65 DEP'T STATE BULL. 732, 737 (1971).

12. Joint Statement by the Honorable Henry A. Kissinger, Secretary of State of the United States of America, and His Excellency Juan Antonio Tack, Minister of Foreign Affairs of the Republic of Panama, in Panama City, February 7, 1974, 70 DEP'T STATE BULL.

voiced and remained an important consideration in the negotiations.¹³

In 1977, President Jimmy Carter, true to his campaign promises, continued to press the treaty negotiations toward an equitable agreement. In August, 1977, United States and Panamanian negotiators reached an agreement acknowledging that Panama has sovereignty over its own territory, which voided language in the Treaty of 1903 relating to United States sovereignty over the Canal Zone.¹⁴ On September 7, 1977, in a ceremony at the Washington, D.C. headquarters of the Organization of American States, President Carter and Brigadier General Omar Torrijos of Panama signed the new Canal Treaties that would relinquish ownership of the Canal to Panama by the year 2000.¹⁵

II. NEGOTIATING POSITIONS

A. *United States*

The policy of the United States in the Gulf of Mexico and in the Caribbean has been characterized by the pursuit of basically one value—*Power*.¹⁶ This objective has been justified in the name of “national interests” and “national security.”¹⁷ The exclusion of other first-rank powers in the Caribbean has been the cornerstone of the foreign policy pursued by the United States since the enunciation of the Monroe Doctrine¹⁸ in 1823.

The fundamental proposition of the Monroe Doctrine, as first set forth by President James Monroe, is that no European nation will be allowed to impose its sovereignty or system of government on any former colony in this hemisphere that had won its indepen-

184 (1974). See also Mazer, *Panama Canal Treaty-Statement of Principles Provides Guidelines for Negotiation of New Panama Canal in Complete Abrogation of Treaty as Amended*, 7 VAND. J. TRANS. L. 744 (1974).

13. 74 DEP'T STATE BULL. 727, 747 (1976). Midway through 1976, Ronald Reagan, in his campaign for the Republican presidential nomination, made the Panama Canal treaty negotiations an issue among conservative voters by declaring that President Gerald R. Ford was trying to give the Panama Canal away. On the Democratic ticket, Jimmy Carter stated he believed “we’ve got to retain that actual practical control,” but could “yield part of the sovereignty” over the Canal Zone and renegotiate United States payments to Panama. NEWSWEEK, May 10, 1976, at 36.

14. NEWSWEEK, August 22, 1977, at 28.

15. 77 DEP'T STATE BULL. 481-505 (1977).

16. See Hunt, *supra* note 6, at 400.

17. *Id.*

18. The “Monroe Doctrine,” so-called because of its enunciation in President James Monroe’s message at the commencement of the First Session of the 18th Congress, December 2, 1823; see W. TAFT, THE UNITED STATES AND PEACE 1-39 (1914).

dence. The Monroe Doctrine was positive in its declaration that the Western Hemisphere was no longer to be considered subject to future colonization by European powers. Existing European colonies in the Americas were excluded from the Monroe Doctrine, but the Doctrine was later modified to restrict all nations outside this hemisphere in their efforts to transfer existing sovereignty or to impose their dominion in an American territory.¹⁹

The conscious development of a policy based on the Panama Canal began contemporaneously with the negotiation of the Canal Treaties, and with the Cuban protectorate in the first years of the twentieth century.²⁰ Because the Canal was a prime factor in United States naval defenses, United States policy could not tolerate the risk of political disturbance or intervention that might block the Canal. Considering the possession of Puerto Rico and the existing protectorates over Cuba and Panama, this self-interested benevolence constituted the "Panama Policy"²¹ of the United States from 1898-1934.²² Thus, the motive of the Panama Policy has been the security of the Panama Canal.

Under the guiding hand of Secretary of State Cordell Hull, the "good neighbor" policy of President Franklin D. Roosevelt led to increasingly cordial Latin American relations throughout the 1930's.²³ The trend in the years thereafter was an acceptance by the United States of the advancement of Pan-Americanism,²⁴ and the principles later incorporated in the Charter of the Organization of American States.²⁵

19. For a more in depth discussion, see R. BARTLETT, *THE RECORD OF AMERICAN DIPLOMACY 168-87* (1956); S. BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES 384-96* (4th ed. 1955).

20. The primary concern of United States foreign policy between 1898 and the First World War was to consolidate the newly established position in the Caribbean and Central America, to make the necessary diplomatic arrangements for the construction and control of an inter-oceanic canal, and to assure the protection of the approaches to the canal from both coasts of the United States. See generally BEMIS, *supra* note 19, at 503-18; BARTLETT, *supra* note 19, at 534-43.

21. BEMIS, *supra* note 19, at 519-38.

22. The Panama protectorate, the Cuban protectorate, and the two protectorates in Hispaniola, Haiti and the Dominican Republic have since been liquidated. Inter-American relations and collective security are now under the auspices of the Organization of American States. See H. DE VRIES & J. RODRIQUEZ-NOVAS, *THE LAW OF THE AMERICAS 1-33* (1965) [hereinafter cited as DE VRIES].

23. BARTLETT, *supra* note 19, at 551-60; BEMIS, *supra* note 19, at 764-78.

24. Pan-Americanism may be described as a tendency, more or less pronounced, of the republics of the New World to associate in a neighborly fashion for mutual understanding of common aspirations, interests, and their realization. BEMIS, *supra* note 19, at 756-57.

25. DE VRIES, *supra* note 22, at 1-33.

It should be noted that over seventy years ago, strength and influence were the foundations of world order; the Treaty of 1903 reflected this power concept. The events surrounding the negotiation and ratification of the Treaty antagonized Latin America. Shortly thereafter, public opinion began to accuse the United States of seeking conquest in that part of the world that the Monroe Doctrine professed to have liberated from European influence.

Former Secretary of State Henry A. Kissinger stressed the need to avoid a situation in which the Canal could become a rallying ground for all Latin American resentment toward the United States.²⁶ He summed up the present United States position when he stated that “[w]e recognized that no agreement can endure unless the parties to it want to maintain it. Participation in partnership is far preferable to reluctant acquiescence.”²⁷

In the face of Panamanian demands, the United States position thus far has been to recognize the unfavorable political climate in Panama, and to try to achieve an accommodation that will safeguard, as much as possible, the most essential interests of the United States. To this end, the United States agreed to a Statement of Principles to be followed by the negotiation of a new treaty that will supercede all previous agreements between the United States and Panama relating to the Panama Canal.²⁸

B. Panama

Soon after the ratification of the Treaty of 1903, Panama expressed its displeasure with the one-sidedness of the treaty.²⁹ Subsequently, the United States twice agreed to amend it.³⁰ Although the United States made minor concessions to Panama after 1955,³¹ the call for the scrapping of the Treaty of 1903 by the Panamanian National Assembly,³² the eruption of anti-American riots in 1964,³³ and the subsequent break in diplomatic relations,³⁴ convinced then

26. 74 DEP'T STATE BULL. 215 (1976).

27. 70 DEP'T STATE BULL. 181 (1974).

28. See note 12 *supra*.

29. FOREIGN REL. U.S. 586-607 (1905).

30. See notes 6 and 7 *supra*.

31. In 1960, President Eisenhower issued an executive order requiring the Panamanian flag to be flown with the United States flag in Shaler Triangle in the Canal Zone. 43 DEP'T STATE BULL. 558 (1960). See also 41 DEP'T STATE BULL. 859 (1959). In 1963, President Kennedy agreed to have the Panamanian flag flown with the United States flag by civilian authorities in the Zone. 43 DEP'T STATE BULL. 171 (1963).

32. N.Y. Times, Nov. 18, 1961, at 9, col. 2.

33. See Hoyt, *supra* note 3, at 299-300; Hunt, *supra* note 6, at 403-09.

34. *Id.*

President Johnson that a new treaty was necessary.³⁵

In its attacks upon the Treaty of 1903, Panama has stressed the fact that the Treaty was negotiated on their behalf by Philippe Bunau-Varilla, a French engineer who principally sought to serve his French masters. However, Panama has never maintained that this fact freed it from the bonds of the Treaty of 1903. Panama's failure to advance this argument is understandable because Bunau-Varilla was given the power to negotiate on their behalf, and Panama ratified the Treaty after it had been negotiated and signed.³⁶

In their continuing efforts to improve the terms of the bargain that they believe they made, Panama has taken a line that is frequently espoused in the world today. The American presence in the Canal Zone is, they proclaim, an insult to their sovereign dignity and an obstacle to their economic development. It is mere colonialism, based on a treaty rather than conquest.³⁷ Several reasons in support of this position are cited by the Panamanians: 1) the United States occupies a ten-mile-wide strip across the heartland of Panama's territory, cutting the nation in two and curbing the natural growth of its urban areas; 2) the United States rules as sovereign over this piece of Panama's territory, maintaining a police force, courts, and jails to enforce United States laws against its citizens, as well as against Panamanian citizens; 3) the United States government operates virtually all commercial enterprises within the Canal Zone, denying Panama the jurisdictional rights which would enable its private enterprise to compete; 4) the United States controls virtually all the deep water port facilities serving Panama; 5) the United States pays Panama only two million dollars annually for the immensely valuable rights it enjoys on Panamanian territory; 6) the United States operates a full-fledged government that has no reference to the host-Government of Panama; and 7) the Treaty of 1903 states that the United States can do all these things forever.³⁸ Because of these claims, Panama has received enthusiastic support from many economically deprived and Latin American nations.³⁹

Claiming that it retained whatever interest it had not expressly

35. 51 DEP'T STATE BULL. 887 (1964); 52 DEP'T STATE BULL. 5 (1965); see L. JOHNSON, *THE VANTAGE POINT* 180-85 (1971).

36. Smit, *The Panama Canal: A National or International Waterway?*, 76 COLUM. L. REV. 965, 974 (1976).

37. See generally Guevara, *Negotiating A Peaceful Solution to the Panama Canal Question*, 9 N.Y.U.J. INT'L L. & POL. 3-14 (1977).

38. 70 DEP'T STATE BULL. 455 (1974).

39. See 28 SCOR (1704th mtg.) 7, U.N. Doc. S/p.v. 1704 (1973).

surrendered,⁴⁰ Panama has argued that if it had absolutely renounced its dominion over the Canal Zone, the treaty language would make no sense.⁴¹ According to the Panamanian view, it was clear that, unless the treaty language was meaningless, there was never any intention to renounce these rights, and the United States had not meant to acquire them.⁴² The essence of Panama's position was "that the United States was merely in the position of a private lessee; that Panama had not relinquished dominion and sovereignty over the Canal Zone; that sovereignty was exercisable jointly; and that any rights not specifically contracted away remained in the full power of Panama."⁴³

The Panamanian claims, calculated to arouse nationalistic passion, are political rather than legal. Furthermore, even from a political point of view these claims cannot be reconciled with the most attenuated aspirations of the United States. In fact, the Panamanian claims appear to be phrased to disguise Panama's real aim. Quite understandably, that aim is to obtain complete control of Panama's principal resource in order to derive the greatest possible benefit.⁴⁴

III. UNILATERAL TERMINATION BY PANAMA OF THE TREATY OF 1903

A. *Legal Justifications for Nationalization*

Unilateral termination of the Treaty of 1903 by "nationalization"⁴⁵ would amount to a clear violation of the basic legal principle *pacta sunt servanda*.⁴⁶ International law, and the sanctity of contracts, is the natural result of the inevitability of social intercourse between nations. The binding force of contracts is an obligation that exists not only in relation to the contracting parties but

40. FOREIGN REL. U.S. 593 (1904).

41. *Id.* at 591-92.

42. *Id.* at 598, 601.

43. PADEFORD, *supra* note 2, at 48-49.

44. 70 DEP'T. STATE BULL. 453-54 (1974).

45. The *Institut de Droit International* tentatively adopted this definition:

Nationalization is the transfer to the State, by a legislative act and in the public interest, of property or private rights of a designated character, with a view to their direction to a new objective by the State.

44 ANN. L'INST. DROIT INT'L (II) 283 (1952).

46. The Latin translation is "observance of agreements." Few rules for the ordering of society have such a deep moral and religious influence as this principle of the sanctity of contracts. See Wehburg, *Pacta Sunt Servanda*, 53 AM. J. INT'L L. 775 (1959).

also within the international community as a whole.⁴⁷

Despite the fact that many contractual obligations have been breached during the course of history, the preservation of the principle pertaining to the sanctity of international contracts—*pacta sunt servanda*—is indeed remarkable. The breach of this principle has always been regarded as a wrong that entitles the wronged party to demand compensation.⁴⁸

Governments have always endorsed the principle *pacta sunt servanda*.

We advocate faithful observance of international agreements. Upholding the principle of the sanctity of treaties, we believe in modification of provisions of treaties, when need therefore arises, by orderly processes carried out in a spirit of mutual helpfulness and accommodation. We believe in respect by all nations for the rights of others and performance by all nations of established obligations.⁴⁹

As evidenced by the Panama Canal Treaty controversy, treaty arrangements aid international order and stability only as long as they accord with a realistic balance of interests and political forces.⁵⁰ The usefulness and relevance of treaties can be retained when revised as the political balance between the parties changes.⁵¹

A treaty that is to endure for all eternity and to be supported, without limitation in time, by the armed force of the contracting Powers, is as great an absurdity as a will that is to regulate for all time the descent of the property of the living. Nor can the world be ruled by a system of a perpetual and unbreakable international entail.⁵²

Treaties stand on their own, entirely apart from private contracts. The law of nations has always recognized the fact that such agreements necessarily are made subject to the general understanding that they shall cease to be obligatory as soon as the conditions upon which they were executed essentially are altered.⁵³ The princi-

47. *Id.* at 782.

48. *Id.* at 783.

49. From a speech on international affairs and American foreign policy by Secretary of State Cordell Hull (July 16, 1937) in 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 164 (Washington, 1943).

50. I OPPENHEIM, INTERNATIONAL LAW 747 (4th ed. McNair 1928).

51. See generally Garner, *Revision of Treaties and the Doctrine of Rebus Sic Stantibus*, 19 IA. L. REV. 312 (1933-34).

52. J. FISCHER-WILLIAMS, INTERNATIONAL PEACE AND INTERNATIONAL CHANGE (London, 1932) quoted in Garner, *supra* note 52, at 312.

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

ple that all treaties are concluded upon the tacit condition of *rebus sic stantibus*⁵⁴ has not been denied by any modern authority.⁵⁵

The common modern practice of limiting the length of treaties to relatively short periods of time and of providing that each state may revise stipulations is in deference to the doctrine of *rebus sic stantibus*.⁵⁶ The event that terminates a treaty is the disappearance of the foundation upon which it exists.⁵⁷ Where no method of procedure for revision or termination is provided, a demand for revision or termination is almost certain to be made eventually and justified upon the *rebus sic stantibus* doctrine.⁵⁸ The doctrine, therefore, is not applicable when the parties have made explicit that they wish their arrangement to continue irrespective of any change in circumstances. It can reasonably be argued that, by providing that the grant to the United States was made "in perpetuity," the parties intended the Treaty of 1903 to continue in effect regardless of any foreseeable or unforeseeable change in circumstances. Acceptance of this argument would preclude the application of a doctrine that merely fills gaps.⁵⁹

Though the doctrine of *rebus sic stantibus* is universally accepted in various forms, its precise meaning and the inferences to be drawn therefrom are the subject of some disagreement.⁶⁰ It is generally accepted that the principle is applicable only to executory treaties and to those which have been effective for an indefinite or relatively long period of time without a provision for optional denunciation by the parties.⁶¹ Moreover, general agreement holds that the change of conditions or circumstances which the doctrine contemplates must be "vital, fundamental, or essential" and not merely slight or trifling.⁶² Disagreement arises, however, as to whether the

54. The Latin translation is "at this point of affairs; in these circumstances." BLACK'S LAW DICTIONARY 1432 (4th ed. 1968). The term, as commonly defined, means "vital change of circumstances." OPPENHEIM, *supra* note 50, at 749; J. BRIERLY, THE LAW OF NATIONS 335-39 (6th ed. 1963). See also Vienna Convention on the Law of Treaties, art. 62, U.N. Doc. A/Con. 39/27 (1969); Lissitzyn, *Treaties and Changed Circumstances*, 61 AM. J. INT'L L. 895 (1967).

55. OPPENHEIM, *supra* note 50, at 747.

56. Garner, *supra* note 51, at 314.

57. BRIERLY, *supra* note 54, at 336; see also Taylor, *supra* note 53, at 197-99.

58. OPPENHEIM, *supra* note 50, at 751; Garner, *supra* note 51, at 314.

59. Smit, *supra* note 36, at 975.

60. OPPENHEIM, *supra* note 50, at 747 n.3.

61. Garner, *supra* note 51, at 314.

62. The change must not have been foreseen, or capable of being foreseen, by the parties and must not have been due to the action or inaction of the party invoking the rule. See OPPENHEIM, *supra* note 50, at 747.

continuation of circumstances existing at treaty formation must have been intended to be a condition under which the parties entered into the treaty.⁶³

One viewpoint suggests that the right of unilateral termination is a corollary to the rule of *rebus sic stantibus*. This view empowers a signatory to terminate a treaty when, in their opinion, conditions have changed to their detriment.⁶⁴ The phrase "to their detriment" is worthy of note. It follows, under this view, that the sanctity of contracts and contractual obligations depends merely upon whether the treaty is beneficial to one's own state. Unquestionably, this is a rejection of the principle of *pacta sunt servanda*. The rule *rebus sic stantibus*, therefore, more often may be recognized and applied without admitting a party's right to unilaterally terminate a treaty and free itself of its obligations therefrom.⁶⁵ As interpreted, the rule would not undermine the principle of *pacta sunt servanda*, but would provide a legal justification for a demand for revision or termination.

As noted *supra*, the doctrine of *rebus sic stantibus* does not state that one party to a treaty may unilaterally declare the treaty void when a change of conditions has supervened. Rather, it is a doctrine that states that a treaty becomes obsolete when an essential condition upon which it was concluded has disappeared.⁶⁶ The principle underlying the rule of *rebus sic stantibus* is just and necessary, especially in an age when fundamental changes are constantly taking place in a state's national and international life.⁶⁷ Moreover, such a principle is as necessary for international law and international intercourse as the principle of *pacta sunt servanda*.⁶⁸

Article V of the Charter of the Organization of American States, of which both Panama and the United States are members, states that the international order is based upon the faithful fulfillment of treaty obligations and from other sources of international law.⁶⁹ The principles of article V are particularly pertinent to the Panama Canal. However, these principles, from a legal point of view, constitute only a program and are not legally binding norms. They are general expressions of policy for the purpose of erecting

63. Garner, *supra* note 51, at 315.

64. BRIERLY, *supra* note 54, at 337.

65. Garner, *supra* note 51, at 318.

66. See notes 50 and 54 *supra*.

67. Garner, *supra* note 51, at 328.

68. OPPENHEIM, *supra* note 50, at 748.

69. Printed in DE VRIES, *supra* note 22, at 222.

legal norms which, in turn, may contain concrete obligations and provide sanctions for their violation.⁷⁰

The doctrine of *rebus sic stantibus*, as applied to international treaties, has been recognized by national tribunals in a number of European countries.⁷¹ In the United States it was so recognized by the Federal Court of Claims in *Hooper v. United States*,⁷² which held that the United States was justified in abrogating the treaties concluded with France in 1778, in part, on the ground of an essential change of conditions following their conclusion. The argument has also been made regarding a similar abrogation of the Hay-Pauncefote Treaty of 1901⁷³ by the Treaty of 1903.⁷⁴ Municipal courts have indicated a disposition to recognize and apply the rule of *rebus sic stantibus*, albeit under various names, in the interpretation of contracts in private law.⁷⁵

The merits of the rule of *rebus sic stantibus*, as a principle underlying a system of just and harmonious international relations, are not affected by any procedural difficulties in its application. The doctrine may be the only means of escape from what may have become an intolerable situation resulting from changes of conditions. Commentators have admitted that when, owing to a change of conditions, treaty obligations become so onerous as to thwart the development to which a state feels itself entitled, it is certain, human nature being what it is, that the state will disregard its obligations whether it has legal justification or not.⁷⁶ It may be, therefore, that if international law insists too rigidly on the binding force of treaties, it will merely defeat its own purpose by encouraging their violation.⁷⁷ It may be urged that the goal of stability would be furthered, rather than frustrated, by the development of legal devices for the purpose of terminating those relationships which have come to be resented as intolerably burdensome and which the com-

70. See Kunz, *The Bogota Charter of the Organization of American States*, 42 AM. J. INT'L L. 568 (1948).

71. Germany, Austria, Switzerland, France, Czechoslovakia, and Egypt. See Garner, *supra* note 51, at 321-25.

72. 22 Ct. Cl. 408 (1887).

73. Treaty with Great Britain to Facilitate the Construction of a Ship Canal, Nov. 18, 1901, 32 Stat. 1903, T.S. No. 401. This treaty was an abrogation of an earlier treaty that afforded joint protection over any proposed canal route. The treaty also carried over a guarantee of the neutrality of any canal constructed. See Hoyt, *supra* note 3, at 301-02.

74. See Taylor, *supra* note 53, at 197.

75. In France and England the analogous doctrines of *imprévision* and *frustration* are an established part of the jurisprudence of those countries. See Garner, *supra* note 51, at 320.

76. *Id.* at 318-20.

77. BRIERLY, *supra* note 54, at 169.

munity is no longer interested in enforcing. Stability and change are not necessarily antagonistic goals. In a changing world, stability must be envisaged as dynamic rather than static, for it requires continuous adjustments within the community. Orderly change serves to maintain the general equilibrium and to prevent catastrophic and destructive upheavals.⁷⁸ Circumstances in Panama, as perceived by the Panamanians, may warrant application of the doctrine if the new Treaties do not receive the advice and consent of the United States Senate.⁷⁹ Indeed, Panama might take some pleasure, however brief, in turning the doctrine against the very nation that, by pioneering reliance on it, greatly enhanced its international respectability.⁸⁰

IV. PANAMA-SUEZ CANAL COMPARISON

A. *The Sovereignty Issue*

It is necessary to recognize that acts of nationalization invariably have been recognized as being within the "sovereignty"⁸¹ of the nationalizing nation-state. When an action of nationalization has taken place, notably with regard to Iran's oil fields⁸² and the Suez Canal,⁸³ it has usually been justified on the basis that an agreement need be recognized as valid only so long as it contributed to the welfare of the state, rather than on a strict *rebus sic stantibus* basis. This is a state's exclusive right which cannot, under any circum-

78. See Lissitzyn, *supra* note 54, at 897.

79. See text accompanying notes 30-35 *supra*. In making its decision whether to apply the doctrine, Panama must consider the effect of world opinion. The consequences of violating a rule of international law calls for the consideration of possible reactions from other states. Fisher, *Bringing Law to Bear on Governments*, 74 HARV. L. REV. 1130, 1135 (1961). However, such considerations ignore the influence on world public opinion of the strident nationalism sweeping Third World nations. See Hunt, *supra* note 6, at 424-25. It would appear that the United Nations, and its Security Council, have felt the effect of Third World influence, particularly in regard to the Panama Canal treaty negotiations. See 68 DEP'T STATE BULL. 490, 497 (1973).

80. See Lissitzyn, *supra* note 54, at 908-11.

81. Sovereignty is defined as the supreme, absolute, and uncontrovertible power by which any independent state is governed; supreme political authority; paramount control of the constitution and frame of government and its administration; the self-sufficient source of political power from which all specific political powers are derived; the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation; also a political society, or state, which is sovereign and independent. BLACK'S LAW DICTIONARY 1568 (4th ed. 1968).

82. The Oil Nationalization Act was passed unanimously by both Houses of the Iranian Parliament in March, 1951.

83. See generally Huang, *Some International and Legal Aspects of the Suez Canal Question*, 51 AM. J. INT'L L. 277 (1957).

stances or conditions, be relinquished or resigned.⁸⁴

The Egyptian Government asserted that nationalization of the Suez Canal Company for a public purpose, accompanied by an offer to pay compensation, was a legitimate exercise of the powers of sovereignty and was a matter which fell within its domestic jurisdiction.⁸⁵ The governments of the United States, the United Kingdom, and France conceded the general right of a state to nationalize economic enterprises which have the national character of the nationalizing state if adequate, prompt, and effective compensation is paid. However, they challenged the arbitrary and unilateral manner in which the Egyptian Government exercised that right in relation to the Suez Canal Company.⁸⁶

The Treaty of 1903 stimulated debate over "the sovereignty question," a critical issue in the Panama Canal treaty negotiations. Egyptian sovereignty over the Suez Canal was never challenged.⁸⁷ The Egyptian Government did not cede away the land over which the Suez Canal flows.⁸⁸ By comparison, Panama ceded control of the land for the Panama Canal to the United States under article III of the Treaty of 1903, which appears to be a general grant of sovereignty.⁸⁹ Panama, taking advantage of the ambiguity, has asserted that in the context of the entire treaty the grant of sovereignty to the United States is subject to serious limitation.⁹⁰ The suppositional language in article III is read by some to mean that the United States is not the ultimate sovereign.⁹¹ The United States steadfastly adhered to the view that the net effect of articles II and III of the Treaty of 1903 was to give the United States exclusive

84. Hunt, *supra* note 6, at 419.

85. 11 U.N. SCOR (736th mtg.) 2, U.N. Doc. S/p.v. 736 (1956).

86. 11 U.N. SCOR (735th mtg.) 3-24, U.N. Doc. S/p.v. 735 (1956); 11 U.N. SCOR (738th mtg.) 6-13, U.N. Doc. S/p.v. 738 (1956).

87. Huang, *supra* note 83, at 300.

88. *Id.*

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

Treaty of 1903, *supra* note 1, art. III (emphasis added).

90. Because most of the provisions of the Treaty of 1903 are related to the singular purpose of construction, maintenance, operation, sanitation, and protection of the Panama Canal Zone, it would seem that the Republic of Panama has some basis for its contention that the grant of sovereignty under article III is limited to that purpose. See generally Note, *Legal Aspects of the Panama Canal Zone—In Perspective*, 45 BOSTON U.L. REV. 64 (1965).

91. See Guevara, *supra* note 37, at 6-11.

control over the Canal Zone as if it were sovereign.⁹² Subsequent recognition of Panama's titular sovereignty over the Canal Zone appeared to be an insignificant price to pay for the restoration of Panamanian confidence. Such confidence had been severely eroded in the wake of the unrest of the late 1950's and early 1960's.⁹³ Nonetheless, this and other revisions of the Treaty of 1903⁹⁴ have not altered the basic cause for disagreement which concerns the nature of Panama's grant of sovereignty to the United States and its geographical extent.

Under the traditional concept of sovereignty,⁹⁵ Panama was hardly an independent nation after concluding the Treaty of 1903. The United States guarantee of independence⁹⁶ was vital to Panama's existence. Article II of the Treaty of 1903 gave the United States power to take all adjacent lands deemed necessary for the construction, maintenance, operation, sanitation, and protection of the Canal.⁹⁷ However, due to *ipso facto* acknowledgment of independence by the Treaty of 1903, Panama was accepted into the community of nations with equal and independent status.⁹⁸ Moreover, because of two minor revisions of the Treaty of 1903,⁹⁹ the political fact is that two independent nations each share attributes of sovereignty in the Panama Canal Zone today.¹⁰⁰

B. Concession Agreements vs. Treaties

Prior to nationalization by Egypt in 1956, the Suez Canal was

92. For a discussion of official positions on this issue taken by the United States, see PADELDFORD, *supra* note 2, at 48-51.

93. See note 31 *supra*.

94. See notes 6 and 7 *supra*.

95. In the nineteenth century there existed three major conditions of world politics: 1) the nation-state held a position of sole importance; 2) the stability of the world system depended upon the independence of each state; 3) economics was domestically and internationally of no political concern. B. KAPLAN & N. KATZENBACH, *THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW* 76 (1961).

96. Treaty of 1903, *supra* note 1, art. I.

97. *Id.*, art. II.

98. In this regard, United States influence and the desire of the large nations of Europe to have the canal constructed should not be discounted. See BEMIS, *supra* note 19, at 515.

99. See notes 6 and 7 *supra*.

100. Panama maintains the right to tax its citizens in the Canal Zone while the United States maintains sole legal jurisdiction within the area. When the new Treaty takes effect, Panama will take immediate control over 65 percent of the Canal Zone; remaining control shall pass into Panamanian hands on December 31, 1999. Panamanian courts will assume civil jurisdiction over the entire Zone immediately, and assume criminal jurisdiction in three years.

operated by concessionary grants.¹⁰¹ Agreements between the state and an individual or business association not possessing the nationality or the national character of that state are of recent development in international law.¹⁰² Oil in the Middle East, Latin America, and Africa, as well as basic minerals and other extractive products in all parts of the world, are exploited under the concessions system. A concession has been distinguished from a treaty. A concession is primarily an international economic development contract or an instrument of coordination whereby a state and foreign investor establish a complementary system of economic relationships for a period defined by the instrument.¹⁰³

Juridically, the term "concession" might signify: 1) in international law, a grant by one state to another of political rights within its territory; or 2) in municipal law, a grant of exclusive or non-exclusive rights, privileges, or franchises affecting public interest to an individual, a public or private corporation, a state or other governmental body, or a mixed "public-private" corporation whereby the state and the private party are joint concessionaires.¹⁰⁴ The second group embraces those grants or concessions extended under the terms of international treaties and grants by the state, in the free exercise of its sovereignty or public powers, for the purpose of attracting foreign investment.¹⁰⁵

The Egyptian Government claimed that the "former" Suez Canal Company was an Egyptian company and was subject to Egyptian law.¹⁰⁶ The governments of the United States, the United Kingdom, and France disputed Egypt's claim and asserted that the Suez Canal Company had international status and was subject to international law.¹⁰⁷ By the agreements of 1854 and 1856, the Suez

101. See Huang, *supra* note 83, at 300.

102. Carlston, *International Role of Concession Agreements*, 52 NW. U.L. REV. 618 (1957).

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

104. See generally Carlston, *supra* note 102, at 634-43.

105. *Id.* An outstanding characteristic of the concession is that the grant is not made under legal compulsion, but at the absolute discretion of the conceding state. The grant is not a concession, in the strict sense, if the element of discretion is lacking. The subject matter of concessions has fallen into two main categories: 1) public utilities and 2) the exploitation of natural resources. The concession may also be a monopoly on canal building, import and export trade, or may be for general commerce. The Suez Canal was a monopoly by concession. See Huang, *supra* note 83, at 293.

106. See note 85 *supra*.

107. The following reasons were given: 1) by virtue of the 1888 Convention completing the system embodied in the concessions; 2) by virtue of the Declaration of 1873 by Turkey; and 3) by virtue of other surrounding international factors. In addition, France claimed *sui*

Canal Company was granted a concession "to operate" the Canal, but was not granted ownership of the land over which the Canal flows.¹⁰⁸ At the end of the concession in 1966, the Egyptian Government was to resume possession of the Canal without paying compensation for the Canal itself, although compensation would be paid for materials and supplies of the company.¹⁰⁹ The Concession Agreement of 1866 specifically provided that the Canal and all its appurtenances remained under Egyptian territorial jurisdiction.¹¹⁰

Under the Treaty of 1903, the United States Government, rather than private individuals, is the sole owner and operator of the Panama Canal Company.¹¹¹ Because the Panama Canal Company is at least partially an instrument of the United States Government, the nationalization of the Panama Canal would involve only public international law rather than both private and public international law, as in prior cases of nationalization.¹¹² By definition, then, the Treaty of 1903 is outside the context of previous nationalizations which invariably involved concessions.

C. Compensation

In order to constitute legal expropriation by nationalization the taking of private property must be for reasons of public good.¹¹³ It is also universally recognized in the municipal laws of nations that there can be no taking of private property without just and adequate compensation.¹¹⁴ However, the realities of the modern industrial world render full compensation from Panama unlikely.¹¹⁵ The principle of just compensation gives way to considerations of the debtor's political instability or its capacity to pay.¹¹⁶ The Egyp-

generis, that the Company was also amenable to French law and public international law. For a more in depth examination, see Huang, *supra* note 83, at 280-89.

108. *Id.* at 300.

109. *Id.*

110. *Id.*

111. Treaty of 1903, *supra* note 1, art. VIII, XXII.

112. Prior instances of nationalization involved concession agreements between governments and private companies that had been for the development of a natural resource. The claim was made that the nationalization was in the public interest even though the assets of a private company also were taken. See Kuhn, *Nationalization of Foreign-Owned Property in its Impact on International Law*, 45 AM. J. INT'L L. 709 (1951); Carlston, *supra* note 103, at 266-67.

113. BRIERLY, *supra* note 54, at 284.

114. See, e.g., U.S. CONST. amend. V.

115. Kuhn, *supra* note 112, at 710.

116. *Id.* This was recognized by the United States in the negotiation of the settlement of claims of United States citizens against the Federal People's Republic of Yugoslavia by the

tian decree nationalizing the Suez Canal Company provided for the payment of the price of stock on the Paris Exchange on the day prior to nationalization. This was followed by alternative offers to pay the average exchange price over the preceding five years or to submit the matter to arbitration.¹¹⁷

The Panama Canal's presence and operations have a tremendous influence on Panama's economy.¹¹⁸ It is likely that, in the event of nationalization, Panama could locate sufficient financial backing to continue the operation of the Canal.¹¹⁹ Currently, however, the United States pays Panama \$2.3 million a year out of the operating revenues of \$160 million for the right to run the Canal, while the Panama Canal Company operates at an annual loss of \$7 million.¹²⁰ It is important to recognize that the Egyptian expropriations dealt with privately owned enterprises, not enterprises owned by the United States Government and operated under an international treaty. Thus, in the event the Panama Canal is nationalized, chances of adequate compensation for the expropriated property and facilities appear remote.

V. COMBATting UNILATERAL INTERVENTION

A. Background

New nations emerging from the dissolution of colonial empires exhibit sensitivity to actions which may be interpreted as interference in domestic politics or as threatening their newly acquired status.¹²¹ A necessary corollary to the political independence of a nation is the duty of others not to intrude or intervene in its internal affairs.¹²² The predominant role, politically and economically, of the United States in the Western Hemisphere magnifies its actions in scope and effect. During the period that followed the Latin American wars of independence until the Spanish-American War, intervention as well as the fear of possible intervention in Latin American affairs was attributed primarily to European sources. The

agreement of July 19, 1948. The sum of \$17 million was accepted as a lump sum for property nationalized although the market value was much greater.

117. See *supra* note 85, at 3.

118. 65 DEP'T STATE BULL. 733 (1971). Panama's share of the benefits derived from the Canal under a new treaty, which is a percentage of a gross revenue royalty based on tonnage, would be considerably higher than the present annual payment of \$2.3 million. See also 70 DEP'T STATE BULL. 184 (1974).

119. See Hunt, *supra* note 6, at 424.

120. TIME, July 25, 1977, at 28.

121. DE VRIES, *supra* note 22, at 16.

122. BRIERLY, *supra* note 54, at 138.

Monroe Doctrine of 1823 was an attempt by the United States to spread a protective shield around the newly independent Latin American states. Subsequently, the new Republics of Cuba and Panama gave the United States the power to intervene if their independence was in danger. The intervention was to be for the purpose of maintaining order, or protecting life, liberty and property.¹²³

The Latin American preoccupation with unilateral intervention by the United States was offset to a considerable extent by the "Good Neighbor Policy" of President Franklin D. Roosevelt's Administration and World War II arrangements for consultation and collective security.¹²⁴ Following the establishment of peace, representatives of all American republics joined together to promote unity in the Western Hemisphere. The result of the conferences was the Inter-American Treaty of Reciprocal Assistance, commonly known as the Rio Treaty.¹²⁵

B. *The Rio Treaty*

The Rio Treaty has a character distinct from all previous Inter-American treaties. Where the latter were treaties of a regional system and independent from the League of Nations, the Rio Treaty is a regional treaty within the system of the United Nations.¹²⁶ References to the Charter of the United Nations are frequent in the Rio Treaty¹²⁷ which is based on the strict legal obligation of solidarity against aggression; this solidarity is founded upon the exercise of individual and collective self-defense rights under article 51 of the United Nations Charter.¹²⁸ Built entirely on the concept of "armed attack," the Rio Treaty can only be a system of self-defense, rather than a system of sanctions.¹²⁹ The monopoly over the use of force is in the hands of the Security Council; the member-states can resort to force only under article 51 and against an armed attack.¹³⁰

123. The Platt Amendment of 1902 was incorporated into the Constitution of Cuba and into a perpetual treaty (1903) between the United States and Cuba. The Treaty of 1903 with Panama gave these rights to the United States. See S. BEMIS, *THE LATIN AMERICAN POLICY OF THE UNITED STATES—AN HISTORICAL INTERPRETATION* 139, 150, 283 (1943).

124. DE VRIES, *supra* note 22, at 4.

125. 62 Stat. 1681, T.I.A.S. No. 1838, reprinted in DE VRIES, *supra* note 22, at 238-42. The treaty consists of a preamble and twenty-six articles. See also Kunz, *The Inter-American Treaty of Reciprocal Assistance*, 42 AM. J. INT'L L. 111 (1948).

126. *Id.* at 119.

127. Rio Treaty, *supra* note 125, arts. 1, 2, 3, 5, 7, 10, 15, 24.

128. See note 126 *supra*.

129. *Id.* at 120.

130. Rio Treaty, *supra* note 125, art. 3, par. 4.

The Rio Treaty formally condemns war. Under Article I, the contracting parties agree not to resort to the threat or use of force in any manner inconsistent with the Charter of the United Nations. Member-states are obligated to submit every controversy *inter se* to those Inter-American procedures in force for peaceful settlement. This should be done before referring the controversy to the General Assembly or to the Security Council of the United Nations.¹³¹ In addition to the right of self-defense under article 51 of the Charter of the United Nations,¹³² American nations have the duty to protect themselves from attack under the Rio Treaty¹³³ which imposes a double duty on the American state not under attack to provide individual assistance to the state attacked and to be available for consultation.

A special procedure is available in the case of an armed attack by one American state upon another.¹³⁴ In this case not only does the victim of the aggression have the right to resort to individual self-defense, but, at the request of the victim, the duty of other individual American states arises, and they must assist in collective self-defense and be available for consultation. Those measures which each state may take individually, or which may be agreed upon as collective measures are, pursuant to articles 41 and 42 of the Charter of the United Nations,¹³⁵ either diplomatic or economic measures¹³⁶ or the use of force.

C. *The Concept of Self-Defense*

The term "collective self-defense" is a misnomer. It is not self-defense, but defense of another state; it corresponds, in municipal law, not to self-defense, but to the defense of others. Neither is "collective self-defense" an action in the name and by the authority of

131. *Id.*, art. 2.

132. Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Reprinted in DE VRIES, *supra* note 22, at 246.

133. Rio Treaty, *supra* note 125, art. 3, par. 2.

134. *Id.*, art. 7.

135. U.N. CHARTER art. 41, 42, reprinted in DE VRIES, *supra* note 22, at 245.

136. Some of those measures are recall of chiefs of diplomatic missions, breaking of diplomatic relations, breaking of consular relations, complete or partial interruption of economic relations or of rail, sea, air, postal, telegraphic, telephonic, and radio-telephonic or radiotelegraphic communications. Rio Treaty, *supra* note 125, art. 8.

the United Nations. It is not a means to realize collective security. It is an autonomous exercise of force legalized by the Charter only under the conditions and within the limits of article 51.¹³⁷

Self-defense may be distinguished from self-help. Self-help is a procedure for realizing and enforcing the law in a primitive legal order. Self-defense, as a truly juridical institution, presupposes an advanced legal order and international self-defense is tied closely to an advanced international organization. The notion of international self-defense depends upon the illegality of war or, as stated by the Charter, on the illegality of the force used by individual states.¹³⁸ Self-defense is to be further distinguished from the "state of necessity." Self-defense is full justification; it is a right as well as an excuse. As in municipal law, self-defense under article 51 is not a procedure to enforce the law. It is not designed to punish the aggressor or to obtain indemnities, nor is it an enforcement action by the United Nations; rather, it serves primarily to repel an illegal armed attack. Self-defense in municipal and international law presupposes an illegal attack. Consequently, the right of self-defense under article 51 cannot be exercised against the legal use of force such as an enforcement action by the United Nations, or the exercise by a state of the right of self-defense.¹³⁹

D. Precedent for Invoking the Rio Treaty

On February 4, 1964, the Panamanian representative to the Organization of American States presented a request for a meeting of consultation as provided by the Rio Treaty. The basis for invoking the Rio Treaty was the alleged unprovoked armed attack against the territory and civil population of Panama by the armed forces of the United States stationed in the Canal Zone.¹⁴⁰ Has the precedent of invoking the Rio Treaty for a situation constituting less than an act of aggression, involving the independence and territorial integrity of a state, weakened the treaty as the chief instrument of maintaining law and order in the Western Hemisphere? Article VI of the Rio Treaty provides that, when the conditions for the invocation of the Treaty have been met, a group of foreign ministers referred to as the Organ of Consultation confer to agree upon

137. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 875 (1947).

138. *Id.* at 875-76.

139. *Id.* at 876-77.

140. See generally Fenwick, *Legal Aspects of the Panama Case*, 58 AM. J. INT'L L. 437 (1964).

the measures to be taken to meet the threat to peace.¹⁴¹ It was clear that the conditions of article VI were not met, but political motives concerned with the revision of the Treaty of 1903 took precedence over a technical interpretation of the Rio Treaty. It would appear that if Panama were to peacefully nationalize the Canal, the United States would be effectively precluded from intervening under the Rio Treaty.

VI. CONCLUSION

For seventy years the United States has operated the Panama Canal for the nations of the world more as a public service than as a business. Nevertheless, over the years the Canal Zone has become an increasingly troublesome issue. Under the Treaty of 1903, the United States instituted jurisdiction over the courts, schools, jails, and police force of the Canal Zone. It established what the Panamanians regarded as a colonial enclave, splitting their country in two. The opposition and resentment which increased over the years predictably led to violence. These developments, culminating in a dangerous and explosive atmosphere, were clear indications that the Treaty of 1903 had become a constant source of potential hostility and that, in the mutual interest of both nations, a new treaty arrangement was necessary.

The Treaty of 1903 specifically gave the United States certain rights and authority which it would have "if it were the sovereign." It is clear, these words would not have been necessary if the United States were in fact intended to be sovereign. The simple fact, therefore, is that while the United States exercised virtually complete jurisdiction over that part of the Panamanian territory which comprises the Canal Zone, the United States does not and never had actual sovereignty. In today's world, all the original assumptions existing at treaty conception have been reversed. It is submitted, therefore, that in light of what appears to be a vital change in circumstances the doctrine of *rebus sic stantibus* provides a viable legal justification for unilaterally terminating the Treaty of 1903 and nationalizing the Panama Canal in the event the new Canal treaties are rejected.

More differences than similarities are apparent when comparing the Panama and Suez Canal situations. There was no question regarding Egypt's complete sovereignty over the Suez Canal, while the "sovereignty question" was a continuing controversy between

141. Rio Treaty, *supra* note 125, art. 6.

Panama and the United States. Also, the Suez Canal Company merely held a concession for the operation of a canal, not a grant of territory through an international treaty. In the case of an expropriation of private property in violation of international law, such as the breach of its concession agreements by Egypt, there is an obligation to make adequate and prompt compensation. Panama's situation is quite different from Egypt's, and a demand for compensation for expropriated property probably would be ignored.

History suggests that when the United States adopts a foreign policy that evokes substantial resentment in a country, anti-American forces exploit that resentment to their own ends. The Panama Canal issue involves far more than the relationship between the United States and Panama. It is an issue which affects United States-Latin American relations generally; all the Latin American countries have joined with Panama in urging the adoption of a new treaty. Indeed, the problem significantly affects the relationship between the United States and the entire Third World, because the Third World nations have made this issue a common cause. The United States position is seen as the last vestige of a colonial past which evokes bitter memories and deep animosities.¹⁴² In the final analysis, ratification of the Panama Canal Treaty will result in more gain than loss to United States foreign policy.¹⁴³

Jeffery C. Stearns

142. 68 DEP'T STATE BULL. 497 (1973).

143. As this comment proceeded into the final stages of publication, the United States Senate was engaged in a bitter debate concerning ratification of the two Panama Canal Treaties. Opponents of ratification, however, were largely unsuccessful in attempts to revise or defeat the Treaties.

On March 16, 1978, the Senate gave its approval to the Treaty with Panama, by a vote of 68-32. L.A. Times, Mar. 17, 1978, at 1, col. 4.

On April 18, 1978, the Senate approved the second of the two Treaties by an identical vote of 68-32. The second Treaty provides the mechanism by which Panama will gradually take over control of the Canal during the next 22 years. L.A. Times, Apr. 19, 1978, at 1, col. 6.