

The Panamanian Assumption of Full Control of the Administration and Operation of the Panama Canal

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Abstract: Approximately the entire 20th century, the Panama Canal (including a strip of land bordering the canal known as the 'canal zone') was essentially controlled by the United States, a control which included the primary responsibility for its defence. With the onset of the new millennium, however, the canal reverted to exclusive Panamanian control. This contribution will briefly recall the legal basis of this watershed which dates from 1977 and indicate if the United States retains any residual powers as regards the Panama Canal in particular its defence.

1. INTRODUCTION

Just before the millennium drew to a close, the transfer of control over the Panama canal from the United States to Panama was completed. The accompanying festivities did not match up to the historical significance of this transfer due to the low key of the lustre added to it on the part of the United States: in order not to taint the incumbent President, and in particular, with a view to the forthcoming presidential elections, the incumbent vice-President with 'giving the canal away', the United States had left the honours to former President Jimmy Carter. From a historical point of view, however, the choice for former President Carter was an apt one, since the legal basis for the transfer is a treaty which was concluded by the Carter administration. To mark the occasion, this contribution will briefly recall the legal basis of the transfer, and indicate if the United States will retain any residual powers. The question of residual powers may also serve as a yardstick for evaluating the extent to which the Panamanian fear of what is designated, with a reference to a monster from a popular children's tale, as 'the hairy hand' (*mano peluda*),¹ is justified.

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1. S. Alonso, *Panama weet niet of de 'harige hand' echt vertrekt*, NRC Handelsblad, 14 December 1999.

2. A MAN A PLAN A CANAL, PANAMA: A FEW HISTORICAL OBSERVATIONS

A fortnight after declaring independence from Colombia on 3 November 1903, Panama renounced its rights to a zone of land, later known as the canal zone, in favour of the United States: I took the Isthmus, President Roosevelt concluded. On the basis of the bilateral Isthmian Canal Convention (also known as the Convention for the Construction of a Ship Canal to Connect the Waters of the Atlantic and Pacific Oceans, and as the Hay – Bunau-Varilla Treaty)² the United States, in exchange for its guaranteeing to protect and maintain the independence of Panama, was granted “in perpetuity the 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”. In addition, Panama conferred on the United States “all the rights, power and authority within the zone mentioned [...] 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”.³

The conclusion of the Isthmian Canal Convention entailed American control of the canal, the construction of which was completed in 1914.⁴ It also entailed the physical presence of Americans in Panama, in particular the canal zone, which included army bases and a notorious anti-guerilla training centre, the US Army School of the Americas, General Noriega’s *alma mater*. Both the control and the consequent presence of the United States caused tensions between the two states, which culminated in riots and a temporary suspension of diplomatic relations in 1964. Panama demanded a wholesale revision of the treaty regime and, wholly in accordance with an understanding reached in April 1974 to that effect,⁵ two treaties were concluded in 1977 after an earlier abortive attempt in 1967: the Panama Canal Treaty (hereinafter: the Canal Treaty),⁶ which termin-

2. The treaty dates of 18 November 1903; for the text, see the Internet Modern History Sourcebook (www.fordham.edu/halsall/mod/1903panama.htm). On Philippe Bunau-Varilla, a French national who, by way of reward for his contribution to securing the independence of Panama, was authorized to conclude this treaty on behalf of Panama, see H.M. Rubin, *The Panama Canal Treaties: Keys to the Locks*, 4 *Brooklyn Journal of International Law* 159-220 (1977), at 165 *et seq.*

3. Although this provision might seem to indicate otherwise, the canal-zone was not ceded by Panama, see M. Hartwig, *Panama Canal*, in R. Bernhardt (Ed.), *Encyclopedia of Public International Law*, Vol. 12, 282-289 (1990), at 285; see also Rubin, *supra* note 2, at 172-177. The US guarantee to maintain the independence of Panama was abrogated, by treaty, in 1936.

4. For information on the canal, including live operations at the Miraflores locks (click live camera), see www.pancanal.com.

5. Agreement on Principles to Guide Negotiators of a New Treaty on the Panama Canal. Joint Statement by US Secretary of State Kissinger and Minister of Foreign Affairs Tack of Panama, 7 February 1974, 13 *ILM* 390 (1974).

6. 16 *ILM* 1022 (1977); for documents implementing the Canal Treaty, such as the Agreement in implementation of Art. III, and the Agreement in implementation of Art. IV, see 16 *ILM* 1043 (1977).

ated and superseded the Isthmian Canal Convention, and the Treaty concerning the Permanent Neutrality and Operation of the Panama Canal (hereinafter: Neutrality Treaty),⁷ jointly known as the Panama Canal Treaties (as well as the Carter-Torrijos Treaties). The Canal Treaty regulated the operation and the defense of the canal until 31 December 1999 when the Treaty would terminate. The Neutrality Treaty, of indefinite duration, establishes a regime of permanent neutrality of the canal. The desired revision of the legal regime for the canal included, in essence, an end to American control of the canal on 31 December 1999, the date on which it would be relinquished and Panama would assume responsibility. The Panama Canal Treaties were therefore hailed as an end to an era of unequal relations, and the start of a partnership between the two states on an equal footing, or expressed in the language in use at the time, as 'good neighbours'.

3. THE REGIME BEFORE TRANSFER OR UNTIL 31 DECEMBER 1999

In virtue of the Canal Treaty, Panama reassumed control over the territory, formerly known as the canal zone. This reassumption entailed the end to the powers and activities of two US-government agencies: the Panama Canal Company and the Canal Zone Government. Those agencies were replaced by a new US-government agency, the Panama Canal Commission, which assumed the rights which the United States retained under the Treaty. This Commission was supervised by a board which included (a minority of) Panamanian members. In addition, a Panama Canal Consultative Committee was established, composed of an equal number of representatives of both states, which was assigned the task of advising both states on matters of policy affecting the operation of the canal. Apart from institutional provisions, which included procedures for the discontinuance *c.q.* transfer of activities which were previously exercised by the Panama Canal Company and the Canal Zone Government, the Canal Treaty contained a number of provisions which detailed the reassumption of Panamanian jurisdiction over the former canal zone, *inter alia*, by including a transitory regime of 30 months during which the criminal and civil laws of the United States applied concurrently with those of Panama, the United States retained police authority, maintained a police force, etc.

As to the rights which the United States retained, Panama granted the United States, for the duration of the Canal Treaty, that is until noon, Panama time, 31 December 1999, the rights necessary to regulate the transfer of ships through the canal, and to manage, operate, maintain, improve, protect and defend the Canal. These rights, which were to be exercised by the Panama Canal Commission, included making and enforcing rules pertaining to the passage of vessels through

7. 16 ILM 1040 (1977).

the canal, and collecting tolls for the use of the canal. As far as defense was concerned: both states committed themselves to protect and defend the canal, in particular to meeting danger resulting from an armed attack or other actions which would threaten the security of the canal or ships transiting it. For the duration of the Canal Treaty, however, the primary responsibility for protecting and defending the canal devolved upon the United States.

The Neutrality Treaty is primarily concerned with the international legal status of the canal. The Treaty opens with a unilateral declaration of Panama, which constitutes Article I, to the effect that the canal,⁸ as an international transit waterway, shall be permanently neutral, a declaration which is repeated in Article II in which the ratio of this permanent neutrality is added, namely ensuring that the canal, both in time of peace and in time of war, remain secure and open to peaceful transit by the vessels of all nations on terms of equality, so that the canal, and therefore the Isthmus of Panama, shall not be the target of reprisals in any armed conflict between other nations in the world. Although this construction, a unilateral declaration incorporated in a bilateral treaty is perhaps somewhat unusual, the unilateral determination of the status of the canal which is, and serves to underline the exclusive sovereign prerogative of Panama in this respect, had to precede the veritable bilateral provisions of the Treaty, such as in particular Article IV, which are based on the unilateral decision as to permanent neutrality of the canal. In Article IV, the United States and Panama agree to maintain the regime of neutrality established in this Treaty, and, in Article VII, to jointly sponsor a resolution in the OAS opening to accession by all states a Protocol to this Treaty in order to ensure their adherence to the objectives of the Neutrality Treaty. In the Preamble to this Protocol, reference is first of all made to the importance of maintaining the neutrality of the canal for the commerce and security of (note the order) the United States, Panama and the Western Hemisphere at large, and then to permanent access which is assured by the regime of neutrality, a regime which is also considered to ensure the absence of any hostile act against the canal. The two substantive articles of the Protocol stipulate that the parties to it acknowledge and agree to observe the regime of permanent neutrality for the canal as established in the Neutrality Treaty both in time of war and in time of peace.

Although the Canal Treaty and the Neutrality Treaty are two independent treaties, they are connected in two ways: the instruments of ratification of the first one were to be exchanged at the same time as those pertaining to the second one. In addition, both treaties were to enter into force simultaneously, *i.e.* 6 months after the exchange of the instruments of ratification. The other connection consists of a few cross references, of which the following one is particularly

8. For the purposes of this Treaty (*cf.* Art. III paragraph 2 and Art. 1 of Annex A to the Neutrality Treaty), 'canal' is defined as including the Panama canal, the entrances thereto and the territorial seas of Panama adjacent thereto.

worth mentioning. In Article V of the Neutrality Treaty, reference is made to the termination of the Canal Treaty: after termination of the latter, only Panama shall operate the canal and maintain military forces, defense sites and military installations within its national territory.

4. THE ACTUAL TRANSFER OF POWERS: THE REGIME AFTER 31 DECEMBER 1999

The actual transfer upon termination of the Canal Treaty was, in effect, the culmination of a gradual assumption of power by Panama over the canal as laid down in the Canal Treaty. Reference was made to the assumption of jurisdiction over the canal zone upon entry into force of the Treaty subject to a 30 month transition period. In addition, a gradual transfer was foreseen of all real property and non-removable improvements thereon in the former canal zone. As far as the canal itself is concerned, a gradual assumption of power(s) had been detailed in the Canal Treaty. Panama was, for instance, to participate increasingly in the management, protection and defense of the canal. In particular, the function of administrator of the Panama Canal Commission, which was assigned to a national of the United States, would devolve on a national of Panama after 31 December 1989. In addition, a growing participation of Panamanian nationals at all other levels and areas of employment had been foreseen, with the objective of preparing, in an orderly and efficient fashion, for the assumption by Panama of full responsibility for the management, operation, and maintenance of the canal upon termination of the Canal Treaty. Although Panama would thus assume control of canal operations from the beginning of the new millennium onwards, maintaining the neutrality of the canal would continue to be shared with the United States on the basis of Article IV of the Neutrality Treaty:

The United States of America and the Republic of Panama agree to maintain the regime of neutrality established in this Treaty, which shall be maintained in order that the Canal shall remain permanently neutral, notwithstanding the termination of any other treaties entered into by the two Contracting Parties.

5. RESIDUAL POWERS OF THE UNITED STATES

5.1. Introduction

The Panama Canal Treaties were ratified on 16 June 1978, and entered into force on 1 October 1979. Upon signature and preceding ratification, however, the text of the two treaties had been subjected to numerous amendments (2), conditions (2), reservations (10), and understandings (11) by the United States, all of whom were accepted and endorsed by Panama in the Protocol of Exchange of Instruments of

Ratification.⁹ The main ‘changes’, a designation which should be taken as an attempt to apply a neutral term, regarded Article IV and Article VI paragraph 1 of the Neutrality Treaty,¹⁰ and concerned predominantly the position of the United States subsequent to the termination of the Canal Treaty.

5.2. The amendments, conditions, reservations and understandings

In October 1977, the United States and Panama issued a Statement of Understanding as regards the Neutrality Treaty,¹¹ at the initiative of the United States which was faced with domestic criticism that the Neutrality Treaty was insufficiently clear about the right of the United States to act against a threat to the canal from Panama itself.¹²

With regard to the responsibility for maintaining the neutrality of the canal, the Statement observed that:

The correct interpretation of this principle is that each of the two countries shall [...] defend the Canal against any threat to the regime of neutrality and consequently shall have the right to act against any aggression or threat directed against the Canal or against the peaceful transit of vessels through the Canal.

The Statement nonetheless added that this interpretation was not to be construed as a right of intervention of the United States in the internal affairs of Panama: any action on the part of the United States would be directed at insuring that the canal remain open, secure and accessible, and never against the territorial integrity or political independence of Panama. Lastly, the Statement elaborated the provision contained in Article VI paragraph 1 of the Neutrality Treaty which provides that the vessels of war and auxiliary vessels of both states are entitled to transit the canal expeditiously: “This is intended, and it shall be so interpreted, to assure the transit of such vessels through the Canal as quickly as possible, without any impediment, with expedited treatment, and in case of need or emergency, to go to the head of the line of vessels in order to transit the Canal rapidly”.

This Statement of Understanding was, along with a number of ‘amendments’, ‘conditions’ and ‘reservations’, included in the United States instrument of ratifi-

9. 17 ILM 817 (1978). Note that the Treaties entered into force 6 months after the exchange of instruments was effective (1 April 1979).

10. For the text of Art. IV, *see above*; Art. VI paragraph 1 of the Neutrality Treaty runs as follows: “In recognition of the important contributions of the United States of America and of the Republic of Panama to the construction, operation, maintenance, and protection and defense of the Canal, vessels of war and auxiliary vessels of those nations shall, notwithstanding any other provisions of this Treaty, be entitled to transit the Canal irrespective of their internal operation, means of propulsion, origin, destination, armament or cargo carried. Such vessels of war and auxiliary vessels will be entitled to transit the Canal expeditiously.”

11. For the text, *see* 72 AJIL 138 (1978).

12. *See* J. Major, *Prize Possession. The United States and the Panama Canal 1903-1979*, at 349, 350 (1993).

cation of the Neutrality Treaty.¹³ The above-quoted interpretation of the principle of maintaining the neutrality of the canal, was, under the heading ‘amendments’, inserted after the end of Article IV of the Treaty. In addition, an ‘understanding’ was added to it to the effect that the agreement to maintain the regime of neutrality should be taken to mean that either of the two parties to the Treaty may take unilateral action to defend the Panama Canal against any threat, as determined by the party taking such action. Again under the heading of ‘amendments’,¹⁴ the elaboration of Article VI paragraph 1 of the Statement was included. This amendment too was supplemented by an ‘understanding’: determination of ‘need or emergency’ would be made by the nation operating the vessels referred to. Apart from amendments and understandings, two ‘conditions’ were added. The first one, known as the De Concini reservation after the US Senator responsible for its inclusion, stipulates that:

Notwithstanding the provisions of Article V or any other provision of the Treaty, if the Canal is closed, or its operations are interfered with, the United States of America and the Republic of Panama shall each independently have the right to take such steps as each deems necessary [...] including the use of military force in the Republic of Panama, to reopen the Canal or restore the operations of the Canal, as the case may be.¹⁵

The second one stipulates that nothing in the Treaty would preclude the United States and Panama from making any agreement or arrangement between them deemed necessary or appropriate to facilitate performance at any time after December 31, 1999, of their responsibilities to maintain the regime of neutrality established in the Treaty, including arrangements for the stationing of any United States military forces or the maintenance of defense sites after that date in Panama.

The Canal Treaty, too, was subject to ‘reservations and understandings’ which were included in the United States instrument of ratification.¹⁶ Although the Canal Treaty has expired, it would seem that the reservations and understandings attached to it will remain of legal relevance in so far as they touch upon the regime which applies after December 1999, as will be explained below. One of the reservations made is worth mentioning here as it sought to moderate the De Concini reservation to the Neutrality Treaty in reaction to Panamanian indignation at this

13. 17 ILM 827 (1978).

14. Both this amendment and the one mentioned earlier are also known as the ‘leadership amendments’.

15. Senator De Concini was especially concerned with threats to the canal from Panama itself rather than from third parties which he considered adequately dealt with in the Neutrality Treaty. The main thrust of his amendment was, therefore, directed towards situations in which the canal is closed because of internal difficulties in Panama – he explicitly mentioned labour unrest, strikes, the actions of an unfriendly government, political riots or upheavals which might each alone or in combination cause a closure of the canal, UN Doc. A/33/73 (1978) Appendix II (Statement made by Senator Dennis De Concini in the Senate of the United States of America on 16 March 1978).

16. 17 ILM 820 (1978).

reservation,¹⁷ by emphasizing the principle of non-intervention in the internal affairs of Panama:

Pursuant to its adherence to the principle of non-intervention, any action taken by the United States of America in the exercise of its rights to assure that the Panama Canal shall remain open, neutral, secure, and accessible, pursuant to the provisions of the Panama Canal Treaty, the Treaty concerning the Permanent Neutrality and Operation of the Panama Canal, and the resolutions of ratification thereto, shall be only for the purpose of assuring that the Canal shall remain open, neutral, secure, and accessible, and shall not have as its purpose or be interpreted as a right of intervention in the internal affairs of the Republic of Panama or interference with its political independence or sovereign integrity.

As was mentioned earlier, this and all the other changes were accepted by Panama. The Panamanian instrument of ratification of the Neutrality Treaty includes both the Statement of Understanding and the various American amendments, reservations, conditions, and understandings to the Neutrality Treaty.¹⁸ In addition, the Protocol of Exchange of Instruments of Ratification on the Panama Canal Treaties contains the following statement:

Both governments agree that the Treaties, upon entry into force in accordance with their provisions, will be applied in accordance with the above-mentioned amendments, conditions, reservations and understandings.

The “above-mentioned amendments [...]” comprise the American reservations and understandings to the Canal Treaty.

As far as the earlier postulated continuing legal relevance of in particular the reservation to the Canal Treaty is concerned which sought to moderate the De Concini reservation to the Neutrality Treaty, the fact that the Canal Treaty has expired notwithstanding,¹⁹ a number of arguments could be adduced. First of all, it could be argued that the pertinent reservation should be taken into consideration to establish the meaning of Article IV of the Neutrality Treaty in the light of the totality of ‘changes’ to which it was subject.²⁰ In this regard it should be noted that the inclusion of the pertinent reservation in the instrument of ratification of the Canal Treaty is coincidental: after the Neutrality Treaty had been ‘passed’ by the US Senate and had resulted in the inclusion of the De Concini reservation, the Senate had yet to pass the Canal Treaty.²¹ Faced with Panamanian protest against

17. See UN Doc. A/33/73 (1978), letter from the permanent representative of Panama to the United Nations addressed to the Secretary-General with annexes. Rubin describes the aim of the moderation as follows: “to erase signals of a return to ‘colonialism’ and ‘gunboat-diplomacy’ which the De Concini reservation raised”, *supra* note 2, at 160.

18. 17 ILM 834 (1978).

19. Cf. Art. 70 paragraph I Vienna Convention on the Law of Treaties, 8 ILM 679 (1969).

20. See in particular Art. 31 paragraph 3 sub (a) Vienna Convention on the Law of Treaties, *id.*

21. It had been decided to discuss the Neutrality Treaty ahead of the Canal Treaty as most senators felt they would not be able to vote for the latter unless they were first assured in advance of certain rights

the De Concini reservation, a moderation of this reservation was thereupon included in the instrument of ratification of the Canal Treaty.²² Moreover, and more in general, it is worth mentioning that even though the two Panama Canal Treaties are formally two independent treaties, they have both been negotiated and throughout been treated as a unity, regulating both devolution, transfer and future rule,²³ and should, therefore, be read *in pari materia*.²⁴ Another possibility to construe the legal relevance of the pertinent reservation is in terms of ‘acquired rights’ which, in view of the absence of provisions which would impede reliance on ‘acquired rights’, remain unaffected by the termination of the Canal Treaty:²⁵ applying the notion of ‘acquired rights’ would entitle Panama to rely on the moderated version of the De Concini reservation to the Neutrality Treaty as included in the United States instrument of ratification of the Canal Treaty. Lastly, the pertinent reservation could be regarded as unaffected by the expiration of the Canal Treaty, hence be considered as an ongoing legal commitment in view of the fact that the text of the relevant reservation not only refers to action taken by the United States pursuant to the provisions of the Canal Treaty, but expressly also to action taken pursuant to the provisions of the Neutrality Treaty and the resolutions of ratification thereto. This argument proceeds, albeit to a certain extent, from the premise of unity of the Panama Canal Treaties to which the wording of the above-quoted phrase from the Protocol of Exchange of Instruments of Ratification on the Panama Canal Treaties (an integral part of the Treaty documents in virtue of one of the American conditions to that effect) lends force. In other words: that part which regards the transfer, and those powers which were expressly granted for a certain period of time (*i.e.* until 31 December 1999) has been executed *c.g.* expired, and another part, consisting of all those provisions (hence, powers) that regard the future regime, *i.e.* the period after 31 December 1999, continues to be in force.

5.3. Purport and legal validity of the amendments, conditions, reservations and understandings

Both the United States and Panama have emphasized the interpretative, hence limited nature of these ‘changes’. In order to assess their nature, a distinction should be made between Article IV of the Neutrality Treaty respectively the contents of the Statement of Understanding, and the subsequent ‘changes’, in particular the De Concini reservation. As far as Article IV is concerned, it would

which insured the operational neutrality of the canal, T. Stater, *Climax: Senate Ratification, 1977-1978*, in G. Harvey Summ, T. Kelly (Eds.), *The Good Neighbours. America, Panama, and the 1977 Canal Treaties* 75-96 (1988), at 86.

22. *Cf.* in this respect Art. 32 Vienna Convention on the Law of Treaties.

23. *See*, for instance, Major, *supra* note 12, at 353.

24. *See* H.G. Maier, “United States Defense Rights in the Panama Canal Treaties: The Need for Clarification of a Studied Ambiguity”, 24 *Virginia Journal of International Law* 287-322 (1984), at 300.

25. Analogous to the provision contained in Art. 70 paragraph 1 sub (b) Vienna Convention on the Law of Treaties.

seem that it, taken at face value, does not convey much, particularly not when the phrase 'agree to maintain the regime of neutrality' is compared to the explicit provisions of the Canal Treaty on protection and defense of the canal. The Statement of Understanding was nevertheless apparently merely the public explanation of the understanding reached among the two parties that the United States would retain the power to protect the canal, in exchange for its relinquishing control over the canal and the canal zone.²⁶ As far as the explanation is concerned, it should be taken as emphasizing the fact that this right would not extend to the internal affairs of Panama. As far as the subsequent changes are concerned, in particular the De Concini reservation, they in effect meant a return to the unfettered right such as belonged to the 1903 regime-era.²⁷ The interpretation which was subsequently added to it in the form of a reservation to the Canal Treaty, intended to match the more limited scope of the right to intervene as laid down in the Statement of Understanding.

The fact that some of the changes have expressly been designated as 'amendments' and others as 'reservations' would seem to belie their alleged mere interpretative character. Disregarding these designations and taking the above-mentioned explanation into consideration, the pertinent changes could be considered as interpretations of the commitment to maintain the neutrality of the canal as laid down in Article IV of the Neutrality Treaty. However, to the extent that the original wording of Article IV implies a shared responsibility, it would seem that the meaning of 'interpretation' is stretched beyond the ordinary language confines with the understanding that this provision includes the right for each of the two states to independently determine if and what action should be undertaken in this respect. On the other hand, the Carter administration apparently did not see any contradiction between shared responsibility and unilateral action: the implication of a shared responsibility which was expressly mentioned by President Carter,²⁸ was not considered to exclude unilateral action.²⁹

To the extent that the interpretations boil down to amendments of the original text of the Panama Canal Treaties, the question has been raised as to their legal validity. Interpretations which, in effect, constitute changes would normally necessitate renegotiation of the text. However, the express acceptance on the part of Panama of the various interpretations, even if they should be considered as amounting to modifications, arguably dispensed with the legal need to do so.

26. See Major, *supra* note 12, at 346, 347, 349, 353, 354; "So while the United States relinquished its mandate to operate the canal, the mandate to defend it stood, through an everlasting watch on the isthmus, beyond the moment of American withdrawal. The price of Panamanian liberty, as after 1903, was to be eternal American vigilance", *id.*, at 377, 378.

27. Their acceptance was needed to win a majority in the Senate in support for ratification of the Panama Canal Treaties, see Major, *id.*, at 349 *et seq.*

28. See the letter of transmittal forwarding the Panama Canal Treaties to the Senate, 72 AJIL 135 (1978).

29. Cf. the statement contained in a report President Carter forwarded to the Senate in 1977: "The [Neutrality] Treaty does not limit in any way the measures the United States might take to ensure the maintenance of the neutrality regime", 72 AJIL 137 (1978).

Another, albeit related, challenge to the legal validity of the changes is based on Article 46 of the Vienna Convention of the Law of Treaties and assumes that the interpretations to which Panama consented constitute substantial alterations of the original texts. It concerns the possibility that Panama would invoke the fact that its consent to be bound to the Panama Canal Treaties has been expressed in violation of the constitutional requirement that treaties pertaining to the canal and canal zone need to be submitted to a national plebiscite. The two Treaties were in fact submitted, and accepted, but the changes were not so submitted: that is, only the contents of the Statement of Understanding had been made public a few days preceding the plebiscite. Whether or not this course of action should be considered as invalidating Panama's consent to be bound,³⁰ even if Panama's consent was indeed expressed in violation of the said constitutional requirement, the more relevant question would be, considering the time which has elapsed since its ratification of the Panama Canal Treaties, if Panama, should it so desire, would at this point in time be legally entitled to invoke Article 46. Many years have elapsed since Panama expressed its consent to be bound to the Panama Canal Treaties. Moreover, American control over the canal and former canal zone has been transferred to Panama wholly in accordance with the terms of the Canal Treaty. It would seem, therefore, that Panama, on account of its past conduct evincing acceptance of the Panama Canal Treaties subsequent to ratification, is estopped or precluded from invoking Article 46 in order to free itself from the Neutrality Treaty as interpreted *c.q.* modified at the time of the exchange of instruments of ratification regarding the Panama Canal Treaties.³¹

6. CONCLUSION

6.1. Residual powers

As far as the contents of the various changes are concerned, it would seem that they salvage part of those powers the United States held under the Canal Treaty pertaining to the defense of the canal. As regards the precise scope of the right to maintain the neutrality of the canal, recourse should be had not only to the relevant provisions of the Neutrality Treaty and pertinent amendments and accompanying

30. For an analysis, see Th. Meron, *Article 46 of the Vienna Convention on the Law of Treaties (Ultra Vires Treaties): Some Recent Cases*, 49 BYIL 175-199 (1978), at 182 *et seq.*

31. Both the period of time which has elapsed and the fact that Panama has relied on the Canal Treaty for the transfer of the canal may arguably outweigh doubts, if any, as regards the *bona fides* of the United States concerning the possible violation of the Panamanian constitutional requirement, in particular as regards the 'changes' other than those contained in the Statement of Understanding are concerned. See on the question of America's good faith, Meron, *supra* note 30, at 185 *et seq.* Note in this regard the fact that Panama in its instruments of ratification in which the American amendments etc. are endorsed expressly refers to its ratifying the Panama Canal Treaties "by means of the plebiscite stipulated by Article 274 of its Political Constitution".

understandings (including the moderated version of the De Concini reservation) but also to the Charter of the United Nations and the Charter of the Organization of American States. Apart from the general legal obligation to take the relevant provisions of both Charters into consideration, it is worth mentioning that the Panamanian instrument of ratification of the Neutrality Treaty refers expressly, by way of ‘understanding’, to Article 1 paragraph 2, and Article 2 paragraph 4 of the Charter of the United Nations, and Articles 18 and 20 of the Charter of the Organization of American States, an understanding which was also included in the Protocol of Exchange of Instruments of Ratification on the Panama Canal Treaties, hence was endorsed by the United States. In both cases the understanding follows on the Panamanian acceptance of the various American amendments, conditions, reservations and understandings. The reference should, therefore, be taken as emphasizing, once again, that the power the United States retains is a limited one, particularly also in a geographical sense: it is strictly confined to the (neutrality of the) canal (and does not even extend to a strip of land bordering the canal, but does include the entrances to the canal and the adjacent territorial waters of Panama). If this interpretation would seem to be far-fetched, it should be noted that the Panamanian instrument of ratification of the Canal Treaty,³² a Treaty which granted the United States *expressis verbis* the right to protect and defend the canal, included an identical understanding, which likewise sought to exclude from this right the territorial integrity and political independence of Panama.³³ Both the Statement of Understanding and the moderated version of the De Concini reservation on the one hand, and the above-mentioned provisions of the Charters of respectively the United Nations and the Organization of American States on the other hand, serve to delimit the power and the latitude of the United States: its right is confined to respond to any threat and any aggression against the regime of neutrality, against the canal, and against the peaceful transit of vessels through the canal, and its response should solely be aimed at insuring that the canal remain open, secure and accessible, and not be directed to the political independence or territorial integrity of Panama.

6.2. Lastly: the temporal proximity of the ‘mano peluda’

However circumscribed, the United States retains the right to maintain the regime of neutrality of the Panama canal, to revert to the language of Article IV of the

32. 17 ILM 825 (1978).

33. Any attempt to justify the United States military intervention in Panama in December 1989 (labelled ‘Operation Just Cause’) to secure the arrest of General Noriega, the military leader and effective ruler of Panama at the time, *inter alia*, on the basis of its right to protect and defend the canal would fail since there was no evidence that the canal or its operation faced any threat from Noriega’s forces which would necessitate such a course of action (see V.P. Nanda, *The Validity of United States Intervention in Panama under International Law*, 84 AJIL 494-503 (1990), at 501; the General Assembly accordingly demanded “full respect for and strict observance of the letter and spirit of the Torrijos-Carter Treaties”, UN Doc. A/Res/44/240 (1989).

Neutrality Treaty, consequently any Panamanian fears in this regard are, from a legal point of view, justified.

Speculations on the possibility that the United States would actually invoke this right any time soon abounded in press reports dating of the time of the actual transfer. Reference was made in this context to the possibility that Panama may be drawn into the Colombian civil war – Marxist guerrilla fighters cross the border on a regular basis – a possibility which could have repercussions for the neutrality of the canal, which in turn could trigger an American intervention. In addition, reference was made to the fact that the management of the terminal ports of Balboa and Cristóbal has been boarded out, for the duration of 20 years, to a Chinese company alleged to be a cloak of the Chinese army. Whether these reports in fact substantiate tangible and imminent dangers to the neutrality of the canal remains to be seen. As it is, the likelihood the United States would intervene on these accounts is counterbalanced by the diminished strategic value of the canal as a result of the end to the Cold War, the termination of the strategic relationship between Panama and the United States on the basis of the Canal Treaty (which includes termination of the *primary* responsibility for defense of the canal the United States held during the life of the Treaty) and the concomitant absence of an American military presence in Panama, both of which serve to relegate the latter to a status almost identical to that of any other Latin American state.³⁴ In addition, it would seem more likely that Panama will be preoccupied not so much with the possibility of unilateral action on the part of the United States, but rather with the loss of revenue following the departure of United States personnel and their dependants, the responsibilities the actual control and management of the canal entail, such as the maintenance of the current installations, the modernization of the canal, and last but not least, convincing foreign investors, badly needed to exploit both the reverted areas and the transferred properties, of Panamanian stability despite the absence of American military personnel.

34. See M. Falcoff, *Panama's Canal. What Happens When the United States Gives a Small Country What it Wants* (1998), at 98, 99, 111.