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### The controversial questions of permanent neutrality in the case of the Panama Canal

#### 1. Introduction

Since its construction the Panama Canal has played a very important role in the world's commercial history from the beginning. Many people had tried to find a new route instead of the very long and dangerous way round trip of the South American continent. And the best solution was cutting through the American continent. From the beginning the best route of this impossible idea had been searched for, but the solution was founded only in the dawn of the 20<sup>th</sup> Century. When after the failed French attempt, the American engineers provided proof of the human inventiveness and constructed the Panama Canal which has been open for the world trade "*pro mundi beneficio*" (for the world's benefit) since 1914. I would like to remark that obviously the Hungarians also played a significant role in the history of the Panama Canal which can be considered as a new Wonder of the World.

The technical designers of this masterpiece did not reckon with only one thing, namely that after 100 years the freighter had grown out of the dimensions of the Canal with the technical developing. Nowadays the largest cruiser that can pass through the Canal is the "*panamax ship*". Panamax is determined principally by the dimensions of the canal's lock chambers, each of which is 110 ft (33.53 m) wide by 1,050 ft (320.04 m) long, and 85 ft (25.91 m) deep. So the maximum dimensions that are allowed for a ship transiting the canal are: length: 965 ft (294.13 m); beam: 106 ft (32.31 m); draft: 39.5 ft (12.04 m). These dimensions do not satisfy all requirements of the shipping not at all. So after long-winded preparations in 2007 the Panamanian Government started its monumental expansion project that should be finished in 2014. With this expansion the Panama Canal could get back its former leadership in the world trade.

In this paper I will present the legal status of this important commercial route, that is to say I will present the permanent neutrality of the Panama Canal. The United States of America as the builder and sovereign administrator of the Canal played an important role in the formation of this neutrality such as in the whole history of the Panama Canal and in the life of the Republic of Panama. The U.S. government signed various treaties with the republic of Panama about the Panama Canal in which they declared its permanent neutrality and established the regulation of this neutrality. I will outline these rules through the treaties and shed light on some contradiction, moreover shed light on the American practice that seems illegal.

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## 2. The economic importance of the Panama Canal

Before I come to the point of my subject, at first I would like to speak about the economic importance of the Panama Canal.

Simon Bolivar in his Jamaican letter of 1815 wrote about Panama in this way: *“its marvellous location between two oceans that will make Panama the principal commercial centre of the universe. Its canals are going to shorten distances of the world establishing closer trade links between America, Europe and Asia and someday they are going to make the region prosper with the goods from the four corners of the world. Suddenly the world will observe that there is the capital of the world as Byzantium was in the ancient times.”* For nowadays it seems like that Bolivar’s prophecy becomes to materialize.

After the opening in 1914 the Panama Canal received the leading position in the trade traffic between Asia, the America’s West Coast and the America’s East Coast and Europe. However since the ‘70s the merchant vessels have been growing and many are now too big to pass through the Canal. And for the ‘90s the Canal's share of traffic between East Asia and America's East Coast has decreased to only 11% because the big shipping companies chose other routes. So since the mid-1990s it has become obvious that the bottleneck would need to be cleared or the Canal was in danger of becoming a backwater. Then the 2000 year brought a huge change in the life of the Canal. The Panamanian government obtained the whole administration of the Panama Canal opening a new period. In spite of the American ominous predictions the Panamanian government did and does its job perfectly. While the Americans ran it as a federal agency, setting tolls only to cover their costs. The Panamanians' approach was more commercial. They founded the Panama Canal Authority (ACP) which however a governmental, state-owned agency but it is working autonomously, and it can be regarded as a market participant that leads the profit. It segmented the market, adapted tolls to different cargoes and charged more for additional services, such as extra tugs and deckhands. Transit times became shorter and more predictable, attracting container lines. In 1995, 200,000 containers went through; in 2009 this number is 4.6m. The canal's share of traffic between East Asia and America's East Coast has risen from 11% to 40%.

According to the commercial approach and to the market’s change the ACP has raised its average tolls and these tolls have been risen by 70% since 1998. In the last year the Canal has revenues of \$2 billion and costs of only \$600 million. From this amount spare cash goes into the Panamanian treasury, so in the last fiscal year that ended in September, the Panamanian treasury received \$760 million.

However the Panama Canal has no monopolist in the market because of its limited dimensions, and the biggest container ships are compelled to choose other routes. So in 2007 the Panamanian government ceremonially started its expansion project after long-winded arrangements. This project is the biggest infrastructure improvement of the decade and its importance can be compared to the building of the Canal. The monumental expansion project that should be finished in 2014 costs \$5.25 billion, which is more than a fifth of Panama's GDP of the year 2008. \$3 billion will come from retained earnings of the Panama Canal, and the rest from bilateral and multilateral lenders, led by the Japan Bank for International Cooperation, the European Investment Bank and the Inter-American Development Bank.

According to the forecasts the total tonnage will rise from 280 million tonnes in 2005 to 510 million in 2025, thanks to the expansion. The ACP is also counting on a continued rise in its share of traffic between East Asia and the East Coast to about half, at the expense of America's West Coast ports and railways. Moreover the ACP considers the economic boom of South America and so on it considers the growing trade between China and the raw material owner countries – such as the Brazilian soya and iron ore, the Columbian coal, the Venezuelan oil in big bulk carriers soon have better access to China which might in turn affect the commodity prices, respectively the trade transport between eastern South America and Asia, and western South America and the American East Coast and Europe will take place through the Panama Canal. All of these naturally will produce an effect on the economic growing. According to the analysts the expansion will boost Panama's annual growth rate by 1.2 percentage points, helping GDP grow to 2.5 times the 2005 level by 2025 and this would lift 100,000 Panamanians out of poverty, so the expansion essentially will raise the living standards of the Panamanian people.<sup>2</sup>

But even in recent years its growth rate of the Panamanian's economy – thanks largely to the canal and the activity associated with it – has been the highest in Latin America: 7%-plus in 2004 and 2005, 8.5% in 2006, 12.1% in 2007 and 10.7% in 2008. For this reason the residents proudly call the narrow strip of prosperity along the canal a Latin American Singapore.

There are some examples for the economic boom: Panama boasts the world's biggest shipping registry, which means business for lawyers and boat-servicing companies. Panama City's airport has become an important hub for travel between North and South America. Moreover Panama City gives home to dozens of banks, serving Colombians and Venezuelans with dollar savings as well as Central Americans. Not only the banks find excellent circumstances here, but thousands of companies choose Panama for its main office attracted by Panama's favourable tax treatment of offshore business. So despite the global recession, the skyline continues to sprout apartment towers of dizzying heights. At the Atlantic end of the Canal lies the Colon Free Zone, the world's second-biggest re-export centre, trailing Hong Kong. Last year \$9.1 billion-worth of merchandise was unloaded in Latin-America's biggest re-export centre.

This enormous project will bring a big boom not only in Panama and in Central-America, but in the international shipping industry as well. Thanks for the expansion can start the manufacturing of the new huge cruisers. No wonder if the bosses of the world's shipping firms has been sitting on the ACP's advisory board, started pressing for expansion as soon as Panama took over the Canal's administration.

We can see that the Panama Canal has a prominent economic role in the world trade that the expansion can increase. This project can stand Panama the way of the prosperity but it can increase the world's shipping industry and trade as well. For this reason it is worth examining its legal status if every nation's cruiser can use the Canal without any limitation in reality.<sup>3</sup>

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<sup>2</sup> Propuesta de Ampliación del Canal de Panama. Proyecto del Tercer Juego de Esclusas. 24 de abril de 2006. In: <http://www.pancanal.com/esp/plan/documentos/propuesta/acp-propuesta-de-ampliacion.pdf>

<sup>3</sup> HORVÁTH MARCELL: A Panama-Csatorna lehet a fejlődés kulcsa. In: [http://kitekinto.hu/latin-amerika/2010/02/09/a\\_panama-csatorna\\_lehet\\_a\\_fejldes\\_kulcsa](http://kitekinto.hu/latin-amerika/2010/02/09/a_panama-csatorna_lehet_a_fejldes_kulcsa)

### **3. The Permanent neutrality of the Panama Canal**

The Panama Canal has a very prominent economic importance since the commencement, because at the beginning of the last century, at time of the shipping trade's boom the Canal shorten the trade routes and became an important crossing place between the west and the east. For this reason the superpowers had tried to put the Canal's permanent neutrality in writing since the beginning. With this they wanted to make safe the unbroken and permanent commerce and that every nation's shipping could use the Canal and also that neither nation could dispose over the Canal – arbitrarily precluding other's use – and they had tried to make sure that the traffic will be undisturbed during wartime.

Moreover the Canal had/has not only an important role in the world trade, but it is an important political and military strategic point – especially for the USA. After all, the Canal shortens the routes of the battleships facilitating the quick mobilisations as well, and the Canal is the key for the expansion in Latin-America – the gateway to South America.

It is not accidental that the USA very early took interest in the possible construction of a canal between the two oceans at the middle of the 19<sup>th</sup> Century and had done its best to participate in the benefits of an inter-oceanic canal. One instrument of this ambition was to establish the neutrality of the Canal which in the beginning made safe that no one of the superpowers could get the upper hand over the growing USA. Then after Washington obtained the exclusive authority above the Canal, the neutrality became an instrument of justification. In other words the USA created the Canal's military defence hiding behind this neutrality and this American military defence system became the headquarter of the United States Southern Command which – besides the militarisation of the Canal and the Canal Zone – has been responsible for providing contingency planning, and operations in Central and South America, the Caribbean, their territorial waters, and for the force of U.S. military resources at these locations.

In the followings I present the history of the Canal's neutrality and I speak about the less known but more important Hungarian participants in the Canal's history. Then I come to the point of the analysis of the Canal's permanent neutrality in the light of the Panama Canal treaties.

#### **3.1. Historical antecedents**

The Panama Canal's neutrality has a long history, at first in 1846 was declared the neutrality of the Panamanian Isthmus and of the crossing traffic. Namely the USA and Colombia – precisely at that time called Republic of New Granada which included the later independent Panama as a province – signed the Mallarion-Bidlack Treaty which officially was entitled Treaty of Peace, Friendship, Navigation and Trade, and was initially meant to represent an agreement of mutual cooperation. Article 35 regulated several questions of the international law: firstly USA guaranteed the neutrality for Colombia so for the Panamanian Isthmus as well; and secondly it granted the USA significant transit rights over the Isthmus, as well as military powers. So the USA showed its interests in the area very early.

The next step was the Clayton-Bulwer Treaty, 1850 which was a contract about an inter-oceanic canal between the British Empire, as a superpower of that era and the USA, as a superpower of

the new era. This treaty actually was a compromise<sup>4</sup>, it was the setting of the *status quo*, for the reason that no one could get advantage, no one could get a favourable position concerning the canal, because the commercial importance of the later canal would have grown together with the growing economic power of these countries.

On the other hand this compromise can be considered as the victory of the USA, because in that time the USA was only a secondary power<sup>5</sup> that was in a different level in the world political sphere, but with this treaty could ascend and soon reach the level of the British Empire.

The other importance of this treaty was that “*it founded a general principle, namely the permanent neutrality of the future canal.*”<sup>6</sup> So now in this treaty two Great Powers declared the permanent neutrality of the inter-oceanic canal in international level for all of the nations in contrast with the Mallarino-Bidlack Treaty.

The treaty went into itemised details about this neutrality. The most important article declared that “*the governments of the United States and Great Britain hereby declare, that neither the one nor the other will ever obtain or maintain for itself any exclusive control over the said ship canal; agreeing that neither will ever erect or maintain any fortifications commanding the same or in the vicinity thereof, or occupy, or fortify, or colonize, or assume or exercise any dominion...*”<sup>7</sup> So according to the viewpoint of the Panamanian jurisprudence this article precluded the possibility of that either of the countries built any fortification or fortify military the Canal. However later we will see that practice of the 20<sup>th</sup> Century had contradicted this thesis.

Moreover this treaty declared that the future canal would be devoid of any military action and “*they (Great Britain and the USA) will protect it from interruption, seizure, or Unjust confiscation, and that they will guarantee the neutrality thereof*”<sup>8</sup> and the canal had to be devoid of any military action even the contracting parties were the belligerents.

The other part of the neutrality was that “*the said canal may forever be open and free*”<sup>9</sup> for all of the nations with the same conditions, in other words it declared the freedom of the traffic that they had to guarantee even against the other.

Article 8 expanded the general protection of the neutrality over to “*any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America, and especially to the inter-oceanic communications*” giving a general character for this neutrality.

So we can summarize the definition of the permanent neutrality of the Canal in the followings: in the geographic territory of the canal must not carry into effect any military action, neither erect any fortification and its traffic will be free and open forever for everyone. The contracting parties have to guarantee this regalement.

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<sup>4</sup> EVERARDO BÓSQUEZ DE LEÓN: Panamá en la Encrucijada Durante la Primera Mitad del Siglo XXI. In. *Boris Blanco*: Relaciones entre Panamá y los Estados Unidos. Ministerio de Educación Panamá, 1973. p. 104.

<sup>5</sup> LUIS A. DIEZ CASTILLO: El Canal de Panamá y su gente. Panamá, 1990. p. 12.

<sup>6</sup> RAMON R. FRANCO V.: La Neutralidad Permanente en los Tratados del Canal. Instituto de Estudios Políticos e Internacionales. Panamá, 1997. p. 67.

<sup>7</sup> Article 1 of the Clayton-Bulwer Treaty

<sup>8</sup> Art. 5 of the Clayton-Bulwer Treaty

<sup>9</sup> Art. 5 of the Clayton-Bulwer Treaty

In the treatment of the historical antecedents I have to mention with patriotic proper pride that the Hungarians played an important role in “*the big enterprise*” in the construction of the Panama Canal.

While the two Great Powers came to an agreement with each other on the Canal, a third country, France came to the contest. A French company obtained the exclusive rights for the construction of the Canal from the government of Colombia and this company started the construction under the “*Great Frenchman*”, Ferdinand de Lesseps’ leadership who built the Suez Canal. However France didn’t participate in this undertaking at state level, but the whole French society ranged on Ferdinand de Lesseps’ side. Because of this reason we can speak about the French Canal which later ended in failure and so the whole French society fell with this enterprise and Panama became the scandal of France.

### Hungarians and the Canal

If we speak about the French Canal, we have to speak about the Hungarian General István Türr. Türr had a great military career, he served in the army of several monarchs, but he received the greatest merits in the service of Garibaldi, then in the service of the Italian king during the Italian War of Independence. Moreover he became one of the leaders of the Hungarian emigration after the Hungarian War of Independence, 1848-49. After his retreat he took on leadership in constructions of several canals, including the construction of the Panama Canal. In 1879 he founded a “*civil company for the financing of the preparation for the construction of an inter-oceanic canal*”<sup>10</sup>. This company, called the Türr syndicate – after him – received the exclusive rights from the government of Colombia to examine in its territory to find the best route for the Canal and to build the Canal. In the November of 1876 the syndicate sent an expedition under Lucien Bonaparte Napoleon Wyse’s leadership who was the nephew of Napoleon III. and was the brother-in-law of General Türr. This expedition was very successful to all intents and purposes, because it arrived back to Paris with the exclusive rights and alternatives of the route of the new canal. But it is poorly known that the expedition had a Hungarian participant, he was the engineer Béla Gerster.

But who was Béla Gerster? In the history of the Panama Canal’s construction this young Hungarian engineer had a very important role that unfortunately had fallen into oblivion. Béla Gerster was born in Kassa (Kosice) in 20<sup>th</sup> October 1850. He took a degree in the Technological University of Vienna, and in 1874 became a civil engineer of Vienna. Then in 1876 he participated in the expedition of the Türr syndicate with the task to locate the most suitable route of an inter-oceanic canal. Among those who took part in that expedition were Brooks, an English engineer, Barbiez, a French engineer, a French and an Italian assistant engineer, a French hydrographer, a naturalist and several sailors.<sup>11</sup> After his return Gerster was requested to work up scientifically the results of this expedition and he proposed an area between Panama and Colón for the route of the Canal that later was accepted by the Congress of Lesseps.

Nowadays Béla Gerster is rather known as the builder of the Corinthian Canal. After General Türr was granted permission by the Greek government to revive the long abandoned idea works of cutting through of the Corinthian Isthmus. Gerster made the plans in 1881, then he supervised

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<sup>10</sup> MARC DE BANVILLE: Canal Francès. La aventura de los franceses en Panamá. Ediciones Canal Valley, S. A. Panamá, 2005. p. 13.

<sup>11</sup> GERSTER BÉLA: A Panama földszoros átvágása tárgyában tett, előmunkálatokról. Földrajzi Közlemények 1878/6. szám, pp. 99.-104.

the whole project as the chief engineer of the canal building company. The construction lasted for 11 years (1882-1893) and Gerster wrote his experiences in his Hungarian-French bilingual book “A korinthusi földszoros és átmetszése” / “Cutting through the Corinthian Isthmus”. He also laid out a railway line from Athens to Larisa.

The good teamwork between General Türr and Gerster had endured for a long time and they had worked together in several projects. He participated in the development of General Türr’s monumental plans of water-supply engineering in Hungary. Later on he conducted the designing, construction and building of 13 major railway lines in Hungary. He also administered the works at the Danube-Tisa-Danube Canal as a chief engineer. He died in Budapest in 1923. In his birthplace, in Kassa there is a memorial plate that says in three languages (Hungarian, English and Slovakian): “*This is the birth-place of Béla Gerster (1850-1923), architect of the Corinthian Canal and co-architect of the Panama Canal.*”

So in the charge of the Türr syndicate Lucien Bonaparte Napoleon Wyse signed a contract with Colombia (Salgar-Wyse Treaty) in which he received the rights to construct the Canal<sup>12</sup>. With this treaty the syndicate rented the territory of the Canal from the Government of Colombia for 99 years and got the rights to build, maintain and operate the canal, but it was not only a right, it was a duty for it at the same time. Then Ferdinand de Lesseps bought these rights and became the father of the Panama Canal. If the Frenchs proudly say that Lesseps was the father of the Canal, we, Hungarians can proudly say that the godparents of the Canal were General István Türr who started this grand idea and Béla Gerster who made the plans for it.

But this French enterprise was not as successful than it might have been and ended in failure. This failure had many reasons, but the most important were the wrong technical conception for the construction of the Canal and the other – the biggest problem – was the excessive prodigality and embezzlement which led to the fraud of 1888 and led to the bribery scandal in that the very best of the French politicians got involved. This scandal sealed the hopeful dream’s fate which dream ruined several lives.

The last station of the historical antecedents is the Hay-Pauncefote Treaty, 1901 which was the second bilateral international treaty between Great Britain and the USA about the inter-oceanic canal. But for the 20<sup>th</sup> Century the power relations had changed, the USA became an economic and political Great Power and “*it became unambiguous that the USA wanted to obtain the whole control over the canal.*”<sup>13</sup> Moreover the course of Spanish-American War had highlighted the need for rapid access between the Atlantic and Pacific Oceans. So the U.S. Foreign policy experts began to question adherence to the Clayton-Bulwer Treaty which was actually the pledge of the USA and Great Britain to not take independent action in constructing an inter-oceanic canal. So in a world the Clayton-Bulwer Treaty was a big obstacle for the USA’s political expansion in Latin America. So the first step was that “*the USA repealed this treaty with the Hay-Pauncefote Treaty*”<sup>14</sup>, and made unambiguous that the USA had the exclusive rights for the Canal that the influence of Great Britain reinforced.

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<sup>12</sup> LUIS I. FITZGERALD N.: Historia de las Relaciones entre Panamá y los Estados Unidos. Editorial Sibauste. Panamá, 2002. p. 36.

<sup>13</sup> FRANCO Ibid. p. 69.

<sup>14</sup> JUDITH M. DE SALAMIN: El Imperialismo norteamericano. In. Boris Blanco: Relaciones entre Panamá y los Estados Unidos. Ministerio de Educación. / Panamá, 1973. 190

The Hay-Pauncefote treaty abolished the Clayton Bulwer Treaty and gave the USA the right to construct and control a canal across Central America. However the treaty handed all canal-building power over to the USA, it provided that all nations will be allowed to freely use and access the Canal and that the Canal should never be taken by force, so it maintained the permanent neutrality of the Canal.

The main points of the treaty were the following:

- The USA was authorized to construct and manage a Central American Canal
- The USA was to guarantee the neutrality of the canal and was authorized to fortify the area, if it is necessary.
- The Canal was to be open to all nations and the rates were to be fair and equal.

So with this treaty the USA as the only entitled party could start its canal project. The other importance of this treaty was that it established again the regulation of the Canal's neutrality and gave the Convention of Constantinople, 1888 which was an international treaty that established the regulation of the neutrality of the Suez Canal. However the Hay-Pauncefote Treaty was a bilateral agreement, but "*it held together all of the nations, if they accepted the rules of the Canal*"<sup>15</sup> which were the conditions of the Canal's using.

### 3.2. The Canal's neutrality in the lights of the Hay-Bunau-Varilla Treaty, 1903

The Hay-Bunau-Varilla Treaty – which was signed in 1903 through an adventurous way – was the first bilateral international treaty about the Panama Canal between the USA and the young Republic of Panama which treaty was born together with the Panamanian state. If there were no Panamanian state, neither this treaty was born. This agreement is the alpha and the omega of all of the Panama Canal Treaties, this agreement had determined the Canal's legal status and at the same time had determined the Panamanian state's legal status as well for 70 years. This treaty had determined the 20<sup>th</sup> Century of the Panamanian history so much that the demands on the revision of this treaty's rules became an essential and general political ambition of the Panamanian people. Because "*this treaty actually created a protectorate, it made Panama a colony both in the political and economic sense.*"<sup>16</sup>

This treaty is important for my subject as well, because it was the first international treaty about the Canal and about the Canal's neutrality which was operative in practice. So now I present the problem of the neutrality in the light of this treaty's rules.

The contracting parties set the construction of a ship canal across the Isthmus of Panama to connect the Atlantic and Pacific Oceans as an aim in the preamble of the treaty. The treaty's main controversial lines were the following, but I only discuss the first one:

- The principle of the permanent neutrality and the question of its compatibility with the right of the fortification.
- The Panama Canal Zone's legal status and its relation with the Panamanian state.

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<sup>15</sup> FRANCO Ibid. p. 77.

<sup>16</sup> RICARDI RIOS TORRES: El tratado Hay Bunau Varilla y la Nacionalidad Panameña. *TAREAS*, No. 15. abr. – jun. 195. Panamá, p. 38.

- The relation between the Panamanian sovereignty and the U.S. sovereign rights; namely how had effected the Republic of Panama's sovereignty
  - partly the U.S. sovereign rights over the Panamanian territory,
  - partly the U.S. right of intervention.

### The Canal's neutrality

The Hay-Bunau-Varilla Treaty's main, identifying rules were that:

- it declared the neutrality of the Panama Canal and its territory such as the Canal Zone;
- it declared that that the Canal would be open for all of the nations, namely it declared principle of the transport's freedom "*pro mundi beneficio*" ( for the world's benefit – as we can read this motto in the Panamanian arms of the nation).

The question of the Canal's neutrality is more important for that reason a significant part of world trade is passing through this canal. So several international problems would arise and moreover it is also interesting that "*the USA assumed an obligation of the traffic freedom only for Great Brittan and Panama.*"<sup>17</sup> Moreover it is also controversial whether the U.S. right to fortify the Canal Zone and to intervene could be reconcilable with the permanent neutrality. To say nothing of that whether the U.S. illegal conduct – such as created and maintained military bases, military academies and military training camps – suited the neutrality's requirements.

Now after the review of the permanent neutrality I present the relevant rules of the treaty and I throw light on the problem of the neutrality and the right to fortify.

### The definition of the permanent neutrality

*"The neutrality is the legal obligation that the neutral state does not take part in any kind of martial fight on the side of any participants."*<sup>18</sup> In wartime the states can decide freely that they want to participate and to enter lists on the side of any power of war taking all of the consequences, or they can decide that they declare themselves neutral and stay away from the conflict. So we can say that "*the neutrality means that the state does not support any of the belligerent military, neither economic nor on another manner.*"<sup>19</sup> The neutrality is a classical legal institution of the international law which is based on the common right to not participate in a war and to have equal and neutral contact with every power at war. The rights and duties of the neutrality are the same, so the neutrality means not only that the neutral state does not intervene on the side of the powers of war, but it also means that the neutral state does not permit them to use its neutral territory.<sup>20</sup> "*The neighbouring neutral states cannot yield its territory, railways, harbours, airports, infrastructure to any powers of war, neither temporarily. They can freely trade with the non-belligerent and also can trade with the belligerents if this does not mean the supporting of one of the belligerent's forces.*"<sup>21</sup>

<sup>17</sup> BUZA LÁSZLÓ: A Nemzetközi jog tankönyve. Politzer Zsigmond és Fia kiadása. Budapest, 1935. p. 128.

<sup>18</sup> LINARES, J. E.: Derecho Internacional Publico. EUPAN. Panamá, 1980. p. 173.

<sup>19</sup> KOVÁCS PÉTER: Nemzetközi közjog. Osiris kiadó. Budapest, 2006. p. 560.

<sup>20</sup> FRANCO Ibid. p. 13.

<sup>21</sup> KOVÁCS Ibid. p. 560.

So actually the neutrality can be regarded as a limit of sovereignty, because in this case the neutral state does not have the right to warfare.

Now I go into details about the permanent neutrality, because the Panama Canal treaties also declared the permanent neutrality of the Canal.

The permanent neutrality is a matter of status when the neutral state or entity has no connection with war during this neutral status' continuance. "*This neutrality concerns not only states or international organizations, but it can be established in overland or water and airspace.*"<sup>22</sup> So the rivers, canals, isthmuses and certain territories can be declared neutral.

The permanent neutrality can be based on unilateral governmental declaration or on international treaty as well. "*But if the other states accept this neutrality, moreover if there are some state that guarantee this status, this neutrality will get the real importance.*"<sup>23</sup> However there are some authors who don't accept that the unilateral declaration can establish permanent neutrality. They dispute that declaration of neutrality has a legal effect; they think this declaration does not compel the other states, neither oneself. In other words the permanent neutrality cannot come from a unilateral declaration; on the contrary it has to originate from a multilateral international act.<sup>24</sup>

In my opinion this unilateral declaration of neutrality also has international legal effect, but it has a stipulation, to be more precise on the international level a bigger community of states has to admit it and if possible significant states guarantee the enforcement of this neutrality. Summarily we can say that the permanent neutrality usually is based on an international agreement, but it also can be established by unilateral act which is always completed by other states' reconcilements.

### **The permanent neutrality of the Panama Canal**

The declaration of permanent neutrality of the Panama Canal and the declaration of the traffic freedom were the most important rules of the Hay-Bunau-Varilla Treaty, 1903. As I showed all of the previous Panama Canal Treaties declared the Canal's neutrality, the last time the Hay-Pauncefotte Treaty established the principle of the neutrality and actually the rules of the Hay-Pauncefotte Treaty were defined as starting-point of the new agreement, of the Hay-Bunau-Varilla Treaty. Because Article 18 of Hay-Bunau-Varilla Treaty declared the following: "*The Canal, when constructed, and the entrances thereto shall be neutral in perpetuity, and shall be opened upon the terms provided for by Section I of Article three of, and in conformity with all the stipulations of, the treaty entered into by the Governments of the United States and Great Britain on November 18, 1901.*" This rule meant the following:

- Every nation's vessels – mercantile or warship – can use the Canal without restrictions.
- So any economic, political, military or other discrimination does not apply to vessels passing over the Canal which principle can be derived from the previous statement.
- The Canal can never be blocked and any act of war cannot be executed in its territory.

<sup>22</sup> QUINTERO: La llamada Neutralidad del Canal. *Dialogo Social*, No. 70. Panamá, ago. 1975. p. 48.

<sup>23</sup> KOVÁCS Ibid. p. 561.

<sup>24</sup> LINARES: Derecho... Ibid. p. 173.

- The USA has the rights to protect the Canal from disturbances and forbidden acts with its military police.
- Warships cannot equip themselves with supplies in the Canal Zone, except so far as may be strictly necessary.
- Warships cannot embark nor disembark troops and equipments or munitions, unless it may be absolutely necessary.
- The established rules are also valid within 3 miles from the Canal's entrances.
- The permanent neutrality also applies to the buildings and the auxiliary works of the Canal and to everything that is needed for the Canal's construction, maintenance and operation.

We can see that the rules of the permanent neutrality was enforced in the Canal's regulation and the USA solely guaranteed and maintained this special status – theoretically the USA also should have guaranteed the neutrality in that case when the USA was a belligerent.<sup>25</sup>

### The permanent neutrality and the right to fortify

The question of the compatibility of the permanent neutrality and the fortification, militarization rises highly from the controversial rules of the Hay-Bunau-Varilla Treaty. Namely can it be compatible with the permanent neutrality that the USA created and maintained fortification in this neutral territory according referring to the treaty's rules, and created and maintained military bases and military training bases overstepping the Treaty's rules.

By way of introduction we have to state that “*there is a fundamental contradiction between the permanent neutrality established by Article 18 of the treaty and the possibility of fortification laid down by article 23.*”<sup>26</sup> In fact, some North American international legal authors say that the permanent neutrality generally is incompatible with the maintenance of the simple army or the construction of the fortifications. Indeed, they believe that the permanent neutrality precludes the possibility of establishing a fortress, and the same vice versa; fortress construction eliminates the neutral state.<sup>27</sup> According to other views the permanent neutrality precludes only the justification of those fortifications which supports only one of the warring parties. Generally the academic opinions agree that the principle of neutrality does not preclude the maintenance of an army and the establishing of the military facilities for reason of security, although it clearly precludes the possibility of the stationing of foreign military forces and the establishing of foreign military bases in the neutral territory. By this reason in wartime the neutral state also has the opportunity and the rights to conduct military actions, but only for the protection of the neutrality.

Then Article 23 declared that “*if it should become necessary at any time to employ armed forces for the safety or protection of the Canal, or of the ships that make use of the same, or the railways and auxiliary works, the United States shall have the right, at all times and in its discretion, to use its police and its land and naval forces or to establish fortifications for these purposes.*”

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<sup>25</sup> FRANCO Ibid. p. 85.

<sup>26</sup> FRANCESCO COSENTINI: Los Tratados y las Convenciones de la Zona del Canal de Panamá. *Anuario de Derecho. Organo de Información de la Facultad de Derecho y Ciencias Políticas de la Universidad de Panamá.* No. 7. 1966 – 1967. Año VII p. 172.

<sup>27</sup> QUINTERO Ibid. p. 50.

According to the rules of the Treaty we can state the following:

- Establishing fortifications in the Canal Zone is allowed.
- Only the USA is entitled to this and to use its continental army and navy in the mentioned territory.
- It is out of the question that the USA puts its air force into action or stations in the Canal Zone.
- These U.S. rights are limited; these can be applicable only for the reason of the Canal's protection and safety.
- The USA cannot exercise these rights on the time of peace, just and only on time of need, namely on wartime, as the Treaty clearly and explicitly states.<sup>28</sup>

This regulation partly agrees with those authors' view – and with my opinion as well – that says that military presence with defensive aim in the neutral territory is possible and acceptable. But over and above this the regulation is not compatible with the generally accepted principle which says that a foreign army must not be stationed nor fortifications erected in neutral territory. Therefore this regulation – in my view – queries the Canal's permanent neutrality, even if the Treaty expressly declares that these military acts are possible only when they actually are necessary.

In addition this regulation also contradicts the valid Hay-Pauncefote Treaty which prohibited the contracting parties – including the USA and Great Britain – from erecting fortifications in the declared neutral territory. The British Government rejected the first draft of the Hay-Pauncefote Treaty because of it would have given right to fortify the USA.<sup>29</sup>

Summarizing Article 23 not only coincides with the principle of permanent neutrality that was declared several times, but it also ignores the rules of the Hay-Pauncefote Treaty, and we have not even talked about the real U.S. practice which overstepped the Treaty's rules and simply violated these rules many times. “*While the Treaty declared the Canal's permanent neutrality, the U.S. practice ignored fully this legal statement, and it was fundamentally contrary to the objectives of the Hay-Bunau-Varilla Treaty.*”<sup>30</sup> Because:

1. Firstly, the Treaty only granted the rights to erect defensive fortifications. There is no doubt about that the Treaty talks about fortifications built in expressly order to defend and protect, and these cannot use for a belligerent act. So the regulations are fully incompatible with the fact that U.S. military bases created and maintained in the Canal Zone. The USA created 14 military bases in all types including air bases, which were unambiguously not covered by the Treaty. It is even worse that “*these military bases had not been used only for Canal's defence and protection, i.e. these had not suited the rules of the Treaty, so their creation was not legal. Their function was more than defence, their purpose was none other than these had served U.S. political and military objectives, in fact these were built for the headquarter of the United States Southern Command.*”<sup>31</sup> The U.S. government had continuously violated the signed Treaty ignoring that, but the international community tolerated this behaviour. “*The*

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<sup>28</sup> FRANCO Ibid. p. 89.

<sup>29</sup> QUINTERO Ibid. p. 51.

<sup>30</sup> FRANCO Ibid. p. 91.

<sup>31</sup> ADOLFO E. LINARES: Política exterior, Tratado de Neutralidad y bases militares. *TAREAS*, No. 104. ene. - abr. 2000. Panamá, p. 89.

*community of the nations had not approved it, but tolerated it by tactical reasons because of the USA had a privileged position during the First World War and thereafter. And it had only one reason, namely the USA had guaranteed the permanent neutrality of the Panama Canal.*<sup>32</sup>

2. Secondly, the USA committed another infringement regarding the permanent neutrality – as far as back – during the First World War. The treaty declared that the USA had to guarantee the Canal's neutrality and the traffic freedom for every nation's vessels; even it would have been belligerent. At the beginning of the First World War the USA declared itself neutral and met its obligations arose from this neutral status, i.e. the Canal was free and open to the warships of all nations. Then in 1917 when the USA entered the war, the U.S. government extended its regulation of warfare to all territories that were under its administration such as to the Canal and to the Canal Zone as well. On 23th May 1917 President Wilson proclaimed in a communication, that the USA did not authorize the commercial vessels or warships of the U.S. enemies and the allies of U.S. enemies to use the Canal. After it the U.S. army immediately took steps to carry out this proclamation and captured 6 German warships that were in the Canal Zone.

There arise some interesting questions: whether on what grounds proclaimed the U.S. President this regulation arbitrarily violating the rules of the Hay-Bunau-Varilla Treaty and the principle of the traffic freedom. Had the USA the right to change the essence of an international agreement?

After all we can say that during the drafting of the Hay-Bunau-Varilla Treaty, 1903 the USA on the one hand simply ignored the rules of the previous international agreements, on the other hand created inconsistency between the Articles of the Treaty. Moreover the U.S. Canal's administration fundamentally violated each and every obligatory contractual requirement. But the USA could do this, because the international community turned a blind eye to these infringements, as the USA had guaranteed the neutrality of the Panama Canal by oneself. "*After all at least the Hay-Bunau-Varilla Treaty created the regulation of the Panama Canal and through it the principle of permanent neutrality had to predominate – at least on paper.*"<sup>33</sup>

### 3.3. The permanent neutrality of the Torrijos-Carter Treaties, 1977

The mentioned Hay-Bunau-Varilla Treaty had been effective and regulated the Canal's neutrality for more than 70 years. Then finally, for the years of '70s – after long struggles – the new Panamanian leader, General Omar Torrijos achieved a review of the Treaty of 1903 with a view to create a new regulation and to sign a new treaty. Then on 7<sup>th</sup> September 1977 the Republic of Panama and the USA ceremonially signed the Torrijos-Carter Treaties in Washington. The signature took place in the centre of Organization of American States (OAS), the Republic of Panama was presented by Omar Torrijos and the USA by President Jimmy Carter.

They signed two treaties in the same time:

- The Panama Canal Treaty
- The Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal and is commonly known as the Neutrality Treaty.

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<sup>32</sup> COSENTINI Ibid. p. 172.

<sup>33</sup> FRANCO Ibid. p. 89.

The Republic of Panama ratified the treaties on 23th October 1977, but the USA lingered and only ratified in April of 1978. So the Treaties came into force on 1<sup>st</sup> October 1979.

### **The Panama Canal Treaty**

With the Panama Canal Treaty the Panamanian fight of 70 years achieved its purpose. This Treaty abrogated the controversial Hay-Bunau-Varilla Treaty and created a new Canal regulation. Therefore, the Republic of Panama received back sovereignty over the whole Panamanian territories and got the control of Canal from the date of 31<sup>st</sup> December 1999.

The main political and national effects of the treaty are the following:

- The Republic of Panama regained the whole supremacy over the Canal Zone;
- The Republic of Panama got a real participation in the management of the Canal;
- The Treaty produced a comparatively equal relations between the two signatories;
- The Panamanian national independence was realized as a result of the historical fight.<sup>34</sup>

### **The Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal**

The Republic of Panama and the USA signed besides the Panama Canal Treaty, the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal that I call as Neutrality Treaty in the following. Now I present the rules of the Treaty throwing light on the new controversial problems.

The main differences between the two Treaties are on the one hand that while the Panama Canal Treaty became invalid at the end of 1999, the Neutrality Treaty does not have an ending point of its duration. This treaty talks about permanent neutrality, in other words it is valid for perpetuity. On the other hand the Panamanian people and the public opinion argued heatedly against the Neutrality Treaty because of the unilateral and controversial U.S. reservations that the U.S. government handed in later without any negotiations.

In Article 1 the Republic of Panama declared that the Canal, as an international transit waterway, will be permanently neutral in accordance with the regime established in this Treaty. Moreover the same regime of permanent neutrality will apply to any other international waterway that may be built either partially or wholly in the territory of the Republic of Panama.<sup>35</sup> It is interesting that only the Panamanian Party declared this permanent neutrality and the USA didn't make a declaration about the question, however it stood for the success. We can see that this new regulation of the Neutrality Treaty is more disadvantageous for the Republic of Panama than the Treaty of 1903 which only extended the neutral regime to the Canal.<sup>36</sup>

In Article 2 the Republic of Panama declared the neutrality of the Canal in order that both in time of peace and in time of war it shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality. This rule expressly emphasises the prohibition of

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<sup>34</sup> EDWIN FABREGA: Los Tratados Torrijos – Carter. Revista Cultural Lotería, No. 305-309. ago. - dic. 1981. p. 241.

<sup>35</sup> Article 1 of the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, 1977

<sup>36</sup> JUIO E. LINARES: Tratado concerniente a la neutralidad permanente y al funcionamiento del Canal de Panamá de un colonialismo rooseveltiano a un neocolonialismo senatorial. Litografía e imprenta LIL. S. A. Panamá, 1983. p. 71.

discrimination which principle always has to succeed. The Treaty makes the following stipulations:

- Payment of tolls and other charges for the using.
- Observation of the provisions of Article 3.
- The requirement that transiting vessels commit no acts of hostility while in the Canal.
- Maintenance of the Treaty's rules and conditions.<sup>37</sup>

The rules are clear and the established order is ensured for everybody with the equal conditions.

In Article 4 the USA undertook that it would maintain the regime of the Canal's permanent neutrality together with the Republic of Panama.<sup>38</sup> This meant a guarantee not only for Panama, but for all of the nations as well.

Article 5 declared that “*after the termination of the Panama Canal Treaty, only the Republic of Panama shall operate the Canal and maintain military forces, defence sites and military installations within its national territory.*” With this provision they wanted to make it clear that the granted U.S. rights would come to an end from the year of 2000 and after this year only and exclusively the Republic of Panama would provide for the Canal's neutrality and for the defence of this neutrality. Later on we will see that it is not so simple in the light of the DeConcini Reservation.

Article 7 created a Protocol and ever country can sign it adhering to the objectives of the Neutrality Treaty and agreeing to respect the regime of permanent neutrality. Till now 40 nations have signed and adhered to the Protocol – Hungary has not signed yet.<sup>39</sup>

Summing up, the Neutrality Treaty established the regime of the Panama Canal's permanent neutrality which unilaterally declared the Republic of Panama, but the USA undertook to participate in the protection and defence of this regime and for this reason it obtained again several rights that ended originally in the year of 2000. The Republic of Panama ratified both treaties on 23<sup>rd</sup> October 1977 in accordance of its Constitution, but the U.S. Senates was slow in the ratification. As the Panama Canal had always a significant strategic military and economic importance for the USA, the U.S. Senate did not really want to show an inclination towards returning the granted rights so simply. Therefore during the Neutrality Treaty's discussion – which also had defensive and military aspects – they proposed many modifications and made exactly 13 changes in the 8 articles of the Neutrality Treaty<sup>40</sup>, but from the point of my subject the most important was the DeConcini Reservation.

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<sup>37</sup> Article 2 of neutrality Treaty

<sup>38</sup> Art. 4.: ‘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.’

<sup>39</sup> VICTOR VEGA REYES.: Estudios jurídicos sobre el Canal de Panamá. Imprenta de la Universidad. Panamá, 2000. p. 200.

<sup>40</sup> LUIS N. FITZGERALD N: Historia de las Relaciones entre Panamá y los Estados Unidos. p. 161

## DeConcini Reservation

Dennis DeConcini, a Democratic U.S. senator from Arizona sponsored this disputable amendment – called DeConcini Reservation – to the Neutrality Treaty during the discussion. Essentially the DeConcini Reservation reserve the right for the USA to take any required steps including the use of military force in the Panamanian territory to reopen the Canal, if it is necessary.<sup>41</sup> It is clear and unambiguous – at least for the Panamanian public opinion – that it means the USA can practise its right of intervention in the future as well. However, DeConcini himself emphasized frequently during the discussion of his proposal that “*there is no question of that it can be interpreted as the United States’ right of intervention, after all every intervention violates the essential norm of the self-determination of the states.*”<sup>42</sup> Besides DeConcini, Jimmy Carter, the U.S. President regularly pointed out in his public speeches that “*any American act, which would be put into effect by reason of this right, can only be directed towards the protection the permanent neutrality of the Canal, and never towards the violation or the restriction of the integration and independence of the Panamanian State.*”<sup>43</sup> In spite of these reassurances, in the opinion of the Panamanian lawyers and analysts the matter is that the USA obtained again the right to intervene – partly by reason of this reservation the American invasion of Panama took place in 1989 and partly by reason of this reservation the USA army captured the Panamanian General Manuel Noriega, the political leader of Panama.

So, because of this right to intervene, the public opinion argued so heatedly against this Reservation. Because the Reservation gave the USA the permanent unilateral right to take whatever steps it deemed necessary, including the use of the military force, to keep the canal open and this right will be valid after the duration of the Panama Canal Treaty as well, namely this right of intervention – we also can call it a military characteristic right – doesn’t have termination, it will be valid for the perpetuity. However the Reservation stated clearly the objects of this right, but the historical precedents show us that the defence and liberty of the Canal may be and is interpreted very extensively.

But the controversial Reservation contradicted some order of both treaties. At first it contradicted Article 5 of the Neutrality Treaty, because this article said that after the termination of the Panama Canal Treaty, only the Republic of Panama can maintain military forces, defence sites and military installations within its national territory. Then we can put the question whether the USA can or can’t use its military force in the Panamanian territories after the termination of the Panama Canal Treaty. Because this question not only queries the regime of the Canal’s permanent neutrality, but also queries the Panamanian sovereignty.

After these I have to mention Article 19 of the Vienna Convention, which said that the reservation has to be compatible with the objects and purposes of the treaty.<sup>44</sup> So, if the object of

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<sup>41</sup> DeConcini Reservation. Notwithstanding the provisions of Article V or any 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, in accordance with its constitutional procedures, including the use of military force in the Republic of Panama, to reopen the Canal, as the case may be

<sup>42</sup> JULIO E. LINARES: Tratado concerniente a la neutralidad permanente y al funcionamiento del Canal de Panamá de un colonialismo rooseveltiano a un neocolonialismo senatorial. Litografía e imprenta LIL. S.A. Panamá, 1983. p. 172.

<sup>43</sup> ORTEGA: Neutralidad... Ibid. p. 8.

<sup>44</sup> Article 19: A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

the Neutrality Treaty is that to create a new regime of permanent neutrality that guarantee exclusively the Republic of Panama and the Republic of Panama takes care of the direction and the protection of the Canal, the USA, as a signatory has to respect it and conclusion the USA cannot practise its right to intervene<sup>45</sup>, because it is contrary to the Neutrality Treaty, to the principle of the permanent neutrality, moreover to the rules of the international law. So in my opinion the DeConcini Reservation was never valid, because it was contrary to the rules of the international law. But if it had been valid, it would have become invalid with the termination of the Panama Canal Treaty's duration, namely in the year of 2000.

#### **4. Conclusion**

The Panama Canal has always played a very prominent role not only in America but in the entire world's economic life during its long history. In the beginning of the last Century its construction had a stimulant effect to the world trade and now its expansion may cause a similar effect in the beginning of the new Century. But we can see that besides its economical importance the Panama Canal has a significant political and military role in Latin America. Among other things the Canal's neutrality declared so early in the middle of the 19<sup>th</sup> Century and had been repeated several times, because of the reason of that nothing can disturb the peace of the Canal and all nations can use it.

However this real neutral status only arrived on 31<sup>st</sup> December 1999, when the Republic of Panama obtained all rights to the Panama Canal, and since then only the Republic of Panama has guaranteed the Canal's neutrality and the traffic freedom. Because before the USA had took care of the Canal's neutrality. And however the rules were unambiguous from the beginning, because they defined them in accordance with the international law, but the U.S. direction had interpreted very particularly these rules and had had practice that came into conflict with adopted rules of the Panama Canal Treaties, moreover with the norms of the international law. Among the illegal acts the most problematical and controversial was that the USA had stated its army and had maintained fortifications, military bases in the neutral territory without any legal authorization.

In this paper I tried to throw light on that the USA had ignored both the rules of the treaties and the rules of international law exploiting its position of power and had interested its own purposes. For this reason the U.S. government had done its best to achieve the best for itself. The USA even made unilaterally some internationally disputable supplements just to keep its controversial rights in the name of the Canal's permanent neutrality. But the U.S. government could do it, because the international community had turned a blind eye to it and had tolerated it...

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(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

<sup>45</sup> ORTEGA: La neutralidad del Canal... Ibid. p. 42.