Chapter II
CHAPTER II

INTERNATIONAL STATUS OF THE CANALS

Canals are inland waterways and are part of the state through which it runs. The waterway built within the territory of a state and not connecting two parts of the open seas, is called the national or internal canal. The navigation through national canals is under the exclusive jurisdiction of territorial sovereign of the respective states. Commercial ships, however, have a right of passage even in the absence of treaty, but warships may not be allowed without special arrangement or agreement. The international canals, on the other hand, are artificial waterways connecting two parts of the open seas and are subject to international regime. The freedom of navigation in such canals are guaranteed for the ships of all nations. The Permanent Court of International Justice paved the way to understand true nature of international canals. In case of S.S. Wimbledon, the Court held that:

"... The canal has ceased to be an internal and national navigable waterway the use of which by vessels of states other than the riparian state is left entirely to the discretion of that state, and that it has become an


international waterway intended to provide under
treaty guarantee easier access ... for the benefits
of all nations of the world."

The factors, therefore, decided the character of the
Canals: (a) geography, and (b) regime. If the Canals connect two
seas and navigation through them are guaranteed by international
regime, these are international canals. While the Canal within
the territory of state; navigation in them being exclusively
controlled by the state concerned are known as national canals.
For example the Corinth Canal. It connects the Gulf of Aegina with
the Gulf of Corinth and lies wholly within the Greek territory.
Greece exclusively controls its navigation. It is not covered by
international regime. It is to be noted that a canal connecting
to seas but not governed by international legal regime, is not an
international canal i.e. the Kiel Canal. The Kiel Canal was not

3. P.E. Corbett, Law and Society in Relations of States (New York; Harcourt Brace, and Company, 1951), p. 148; For details of
'S.S. Wimbledon Case' see PCIJ Series A, No. 1, 1923, p. 22;
Lester B. Orfield and D. Re Edward, Cases and Material on
International Law (New York: The Bobbs Merill Company, Inf.,1950),
pp. 271-88; Survey of International Affairs (British Institute
of International Affairs), 1920-22, pp. 233-34. The S.S.Wimbledon,
a British merchant vessel, had been charted by a French armament
firm to carry war materials from France to the Port of Danzig.
The cargo was destined for Poland then at war with the Soviet
Russia. On 21st March, 1921, the vessel was refused access to
the Kiel Canal by the German Authorities on the ground that such
passage was inconsistent with its obligations of Neutrality.
The British, French, Italian and Japanese governments filed
suit against the German government before the Permanent Court
of International Justice. On April 17, 1923, the Court decided
that the action of the German government in excluding the vessel
was in violation of the obligations assumed under the Article
300 of the Treaty of Versailles; see Glahn von Gerhard, n.1,
ppl 296-97.

an international canal though it connects two seas (the Baltic and North Seas) till the signing of Treaty of Versailles which established an international regime for it (Articles 350-356).

The German Supreme Court in the Kiel Canal Collision Case, 1950, held that: "the true character of an international waterway is freedom of navigation".

International regime of a canal may be established only by the consent of territorial sovereignty. The canal through which it runs forms part of the territory of that state, and according to the accepted principle of International Law of 'Territorial Sovereignty' nothing may be done without the consent of its sovereign. Undoubtedly, the ships of all nations under international regime enjoy right to navigation but the sovereign state may make such rules and regulations to protect its political, economical and strategical position and, of course, it has right to collect tolls. The sovereign may also recommend such other conditions as the sovereign find it necessary for the guidance, maintenance, and protection of the canal against destruction and damages.

The consent to international regime may either be expressed or tacit. The consent may be expressed either by a multilateral


treaty stipulating for freedom of navigation for all the nations, signed by all states or by some states and accepted by all non-signatories. An universal declaration that promise to allow freedom of navigation through the Canal to all nations is also express consent to establish international regime. Auto-limitations by the sovereign state permitting other nations to use the Canal is to be considered tacit consent creating international legal regime. A treaty between two or more states regulating navigation in an international canal may be used by the non-signatories, observing the rules and regulations of the treaty and such use may lead to international customs.

Status of the Suez Canal and Political Legacy

The Suez Canal was opened to the world navigation in 1869. There was not any set up of rules for navigation through the Canal, nor there was any precedent upon which its status based with respect to free navigation. Only the Viceroy of Egypt by the Concession of 1856, declared that:

"The Grand Maritime Canal from Suez to Pelusium and the ports appertaining thereto, shall always remain open as a neutral passage to every merchant ship crossing from one sea to another, without any distinction, exclusion or preference of persons or nationalities, on payment of the dues and observance of the regulations established by the Universal Company legessee for the use of the said Canal and its dependencies." 7

8. Ibid., pp. 34-35.
9. See Article XIV of the Act of Concession of 1856 (Appendix 'A').
Further, the Concession expressly forbade the Company to discriminate in favour or against of any ship, company or party.

Such a status of the Suez Canal was recognised by the Firman of Sultan, 1866. The Firman reserved for the Egyptian Government the right of occupying every position or strategic points it should deem necessary for the defence of country, but the exercise of such right should not obstruct the navigation.

The Concession of 1856 and the Firman of 1866, however, did not set up proper rules for navigation and consequently an international regime was not established. The Concession of 1856 allowed the free use of the Canal by merchant vessels only. It said nothing about the passage of warships through the Canal, and did not provide rules concerning the passage of warships of belligerent states and, therefore, no provisions were made prohibiting war-like activities in the Canal. It was, in fact, silent about warships. The freedom of navigation through the Suez Canal which was proclaimed by the Egyptian government and accepted by the Sultan constituted a declaration but not an obligation. However, it should be noted, that in the beginning due to absence of any rule, the warships of belligerent states used the Canal freely. For instance, in 1870-71, French and German warships passed through the Canal.

10. Ibid.

Meanwhile, Britain had become heavily dependent on the Suez Canal. The control of the Canal by then had become strategically and commercially very important from its point of view. During the construction period, the British Government attitude was uncompromising and against it. In 1875, the British Government purchased Egyptian shares of the Company and began to control the Company's operation and navigation through the Canal in the absence of any international or national agreement.

Disraeli was undoubtedly determined that the Khadive shares in the Canal should belong to Britain and no other power or interest. Commercially and strategically to British Empire, it was "Key to India". Although British Parliament passed a Bill on August 15, 1875, approving the Government's action on the Suez. The matter first came before the legislature for proceeding. The Opposition, whose chief spokesman was Gladstone, focus on the manner of purchase and the alleged lack of benefits to Britain from transaction. Disraeli replied to both charges and made it clear that his original motive was not commercial but political.

In 1882, revolt broke in Egypt which endangered the free navigation through the Canal. The British forces intervened in Egypt and occupied all places of the Canal that were necessary to safeguard it. Britain did it under the authority of Egyptian Pasha

and in the interest of the Canal and to protect it.

The Russo-Turkish War, 1877, raised question for the first time with regard to its status. The British Government had announced that any attempt to blockade or otherwise, interfered with the Canal or its approaches would be regarded by Her Majesty's Government as a menace to India and a grave injury to the commerce of the world. During the war, though no hostile act was committed within the Canal. But the situation led to provide an arrangement to safeguard the Canal from hostilities, damage or interruption. In early 1880s, the traffic through the Canal increased. Hence, the Maritime nations realised that the bilateral contracts between the Pasha of Egypt and the Suez Canal Company did not provide sufficient guarantees for free passage of ships in time of peace and war. No international agreement defining the status of water-way existed. The passage of ships was not a right but a privilege granted the Sultan to other nations. Only rights granted by contract to a private company could be invoked, but nations in case of dispute could not base any claim on such right. Thus, Britain pressurised other powers to enter into an agreement to preserve

13. Halford L. Hoskin, *The Middle East* (New York; MacMillan Company, 1954), p. 60. In 1882, the Sultan did not sent troops. It was left to Britain and France to take whatever action might become advisable. Britain had undoubtedly done her best to secure corporate intervention and invited France and later on Italy to participate but met with refusal. By a decree, Khedive, recognised the occupation to re-establish order in Egypt. See Benno Avram, n. 11, p. 32.

and guarantee the freedom of navigation. Lord Granville, the then British Foreign Secretary, took the lead by proposing a draft destined to serve as a basis for a convention on an international status for the Canal. He stated that:

"We wish to suggest that free passage through the Canal in time of peace and war be secured to all sea-faring nations under an international guarantee of the powers." 15

Negotiation, therefore, began. In 1885, the Seven Powers Ambassadorial Conference held at Paris. At the conference, the international regime of the Suez Canal was discussed and prepared the way for the definite Suez Canal Convention. A provision for an International Canal Commission was incorporated in the draft treaty at the French initiative. But the conference ended without taking any conclusion. Further, in 1887, Anglo-Ottoman Negotiation took place to frame an agreement. It provided that:

"The Maritime Canal shall always be free and open both in time of peace and war for the passage of warships and merchant ships without distinction of the flags on payment of the dues in conformity with the regulations actually in force or with those which may hereafter be promulgated..." 16

This convention was ratified by Britain but the Sultan did not ratify it because the provision of Article V of the convention

Further, in 1888, the British Foreign Office prepared another draft convention which was accepted by all the powers concerned. Consequently, on October 29, 1888, the convention was signed by the representatives of nine powers, namely, Great Britain, France, Germany, Austria-Hungary, Italy, Russia, Spain, Turkey, and the Netherlands, at Constantinople. It is known as the Convention of Constantinople of 1888 or the Suez Canal Convention of 1888.

In accordance to its preamble, the convention established a definite system "destined to guarantee at all times for all powers the free use of the Suez Maritime Canal". Article I of the convention provided that the Canal is to be freed and opened both during time of peace and war to every ships of commerce and war without distinction of flag. The Canal cannot be blockaded. The

18. Provision of Article V of this Convention was not acceptable to France and Soviet Russia. Article 5 of the Convention of 1887 provided that: "At the expiration of the three years from the date of the present Convention, Her Britannic Majesty's Government will withdraw its troops from Egypt. If at that period the appearance of danger, in the interior or from without, should render necessary the adjournment of the evacuation, the British troops will withdraw from Egypt immediately after the disappearance of this danger". Nevertheless "the Government of Her Britannic Majesty is authorised by this Convention to send, if there are reasons to fear an invasion from without, or if order and security in the interior were disturbed, troops into Egypt, which will take the measures necessary to remove these dangers. In taking these measures, the Commanders of these troops will act with all the regard due to the right of the sovereign powers"; see J.C. Hurewitze, no. 12, Vol. I, p. 202.

19. See Appendix 'D'.

contracting parties pledged not to violate the provision or to interfere in the free use of the Canal. The Convention of 1882 also prohibited by Article IV that no right of war, no act of hostility, and any act intended to obstruct the free navigation is to be committed within the Canal, in its ports of access within three sea miles from these ports.

The Convention of 1882 reserved "The sovereign rights" of the Sultan and the rights and immunities of the Pasha of Egypt. Article X authorised the Sultan and the Pasha to take measures that "might find it necessary ... for securing by their own forces the defence of Egypt and the maintenance of public order". But the Convention provided under Article XI that "the measures which shall be taken in the cases provided in Articles IX and X of the present treaty shall not interfere with the free use of the Canal. Egypt and Turkish governments, the Convention stipulated, shall take necessary measures for ensuring the execution of the said Convention and agents of signatories powers in Egypt shall be charged to watch over its execution. In case of any event threatening the security or free passage, the agents shall inform the Egyptian Government the danger in order that government may take proper steps to protect the Canal and its free passage. The Convention also stipulated for an international supervision of any work or the dispresentation of any assemblage on either bank of the Canal which might interfere with the liberty and security of navigation.

20. Ibid.
21. See Article VIII, Ibid.
The Convention of Constantinople was ratified by all contracting powers, except France, with the British rights. Britain declared itself free to disregard the terms of the Convention, and refused to accept the international supervision during the duration of its occupation. The British temporary occupation of Egypt, meanwhile, had become one of indefinite duration. Consequently, it preserved its right to utilize the Canal for safeguarding position in Egypt. France refused to ratify the Convention and it did not come into force. However, France eventually accepted the position under the Anglo-French Declaration of April, 1904, which resulted in the immediate application of the Convention of 1888. Even the Article VIII (2) remained in abeyance. The reservation of certain rights put the Convention at the mercy of Britain, which could, according to her interest, permit or refuse its application.

The Convention of 1888 undoubtedly established a legal regime in the Canal protecting and safeguarding it from acts of hostilities, damage and any attempt to close it to the detriments of world navigation. But there are many shortcomings. The regime established by this Convention whether nationalised or internationalised the Canal remained unsettle in the doctrine. The Convention, in fact, incorporated norms similar to those regulating maritime neutralisation and other inspired by the customary regime of the high

---

Another shortcoming of the Convention was the lack of an appropriate international guarantee for its application. It did not provide that the signatories guaranteed the free use and security of the Canal. No doubt, the 'preamble' of the Convention expressed desire to set up a system of security for the Canal but did not actually set up one. The setting up of an International Supervision Commission provided by Articles VIII and IX remained powerless as Britain opposed from the start. The powers of the Commission were nevertheless limited to suggestions and its recommendation not being compulsory on the Egyptian or the Turkish authority. The Convention stipulated that the rules laid down in Articles IV, V, VII and VIII should not impede the measures which the Sultan and the Pasha of Egypt found necessary in order to ensure by their own forces the defence of Egypt and the maintenance of public order. But, if they intended to make use of their exceptional rights, they could do so only after informing and on advised by the powers signatories to the London Declaration of 1905.

Since 1886, the Canal was being freely used by commercial


and warships of all nations alike. In 1914, Britain declared Egypt as its "Protectorate", which was nominally under Turkish suzerainty, and assumed "de facto" responsibility for defence, enforcement and control of international arrangement governing the navigation of the canal. The Peace Treaties which concluded at the end of World War I transferred to Britain all of the powers respecting the Suez Canal. Germany by the Treaty of Versailles (Article 152); Hungary by the Treaty of Trianon (Article 91); and Austria by the Treaty of St. Germain (Article 107) consented to transfer all powers conferred on the Turkish Sultan by the Convention of 1878 to the free navigation of the Suez Canal to Britain. Therefore, the Convention of 1878 was revised and Turkey renounced all its rights and little over Egypt by the Treaty of Lausanne in 1923.

Meanwhile, in 1922, Britain declared Egypt as an independent state as the result of which the Suez Canal became a part of Egyptian

25. 'Protectorate' or a protected state arises in practice when a state puts itself by treaty under the protection of a strong and powerful state, so that the conduct of its most important international business and decision on high policy are left to the protecting state, J.G. Starke, An Introduction to International Law (London: Butterworths, 1963), p. 130.


territorial water. But the Declaration of Independence also contained provision of reservation regarding the Canal which it had been continuously preserving since 1888. Britain had taken sole responsibility for the security of the Canal and defence of Egypt against all direct or indirect foreign aggression or interference. Therefore, the special position particularly related to imperial communication and other interests of Britain remained unaffected.

The "reservation" position and rights of Britain undoubtedly affected the free-navigation and international status of the Canal. It contributed to strain the relation of Britain and Egypt. Between 1922 and 1936 several attempts were made to reach a common ground of understanding between two states but all failed because of Britain's unwillingness to contemplate surrendering the protection of the Suez Canal either to Egypt or to the League of Nations. In 1936, an alliance was made. The Anglo-Egyptian Alliance recognised the complete sovereignty of Egypt but acknowledged the fact that the Suez Canal was not only a universal means of communication but also an essential means of communication between different parts of the British empire. Consequently, Article VIII of the Treaty of 1936 recognised that:


"Until such time, as the High Contracting Parties agree that the Egyptian Army is in a position to ensure by its own resources the liberty and entire security of navigation of the Canal, authorise His Majesty the King and Emperor to station forces in Egyptian territory in the vicinity of the Canal ... with a view to ensuring in co-operation with the Egyptian forces the defence of the Canal". 31

This article secured to Britain substantially the same rights as had been held earlier. Any right pertaining to Britain by virtue of the Convention of 1888 were nowhere altered except that Egypt too became legally responsible for all acts done by Britain in the name of the Canal security and defence.

In 1938, an Anglo-Italian Agreement concluded which reaffirmed liberty of transit through the Suez Canal. Article VIII of this agreement declared significantly that:

"The Government of the United Kingdom and the Italian Government hereby reaffirm their intention always to respect and abide by the provisions of the Convention signed at Constantinople ... which guaranteed at all times and to all powers the free use of the Suez Canal". 32

The declaration was also communicated to the Egyptian


Government by two identical notes from the British and Italian governments respectively. The Egyptian Government took note of the intention of both governments and agreed to associate themselves therewith.

By the autumn of 1944, Egyptian Government and political leaders demanded the evacuation of Egypt's territory by all foreign troops and surrender full control of the Suez Canal to it.

In the light of the experience of World War II, the entire strategy of imperial defence ought to be changed. In fact, the British interest in India and elsewhere in the East were of less consequences than earlier but other interests replaced them. The increasing world demand for petroleum and its products and the discovery of new oil deposits in the Persian Gulf area demanded a dependable route of passage between the Mediterranean and the Indian Ocean. With the beginning of the Cold War, the Middle East oil assumed more greater importance for the defence of Western Europe. Significantly the British bases in Palestine made the control of the Canal and Canal Zone much more important for the security of its interest. The new developments forced Britain to agree to revise the Treaty of 1936. In October, 1947, Prime Minister Sidky Pasha and the British Foreign Minister, Ernest Bevin, concluded an agreement at London. By this agreement Britain agreed to withdraw all forces from Egypt, including the Suez Canal Zone.

33. See the Annexure of Article VIII of Anglo-Italian Agreement, 1938, Ibid.
by September, 1949, upon the conclusion of a military alliance, providing for the joint defence of Egypt in time of stress. But this agreement was of no result. The Egyptian leaders believed that this agreement provided the right of return of the British troops to the Suez Canal Zone and in Egypt any time on one or other pretext.

In 1947, Egypt carried their case to the United Nations Security Council on the basis of Articles 25 and 57 of the UN Charter concerning the settlement of disputes. The Council was requested to direct the total and immediate evacuation of the British troops from Egypt, and also from Sudan. But the Security Council took no action on Egypt's proposal. The Security Council in fact was unwilling to take action particularly in view of the existing treaty and, thus, recommended to direct negotiation. Then the Egypt's Prime Minister turned to the United States to send a military mission to Egypt to replace that of Britain. But the request was not acceded to because of its position vis-a-vis


the Panama on Panama Canal.

However, the Anglo-Egyptian negotiation continued but did not reach to any agreement in part because of the preoccupation of Egypt and Britain with the Jewish-Arab conflict in Palestine. The Egyptian interference with the British shipping in the Canal during the Arab-Israeli conflicts contributed to the widening gap in Anglo-Egyptian relations. It also added appreciably to the growing conviction that time had not yet come when the defence of the many national and international interests, dependent on the maritime highway, could safely be left in Egypt hand. Anglo-Egyptian negotiation with respect to the base was began in 1950 and continued till the fall of 1951.

Eventually in 1954, the British and Egypt governments signed the Agreement Regarding the Suez Canal Base and thereby terminated the Treaty of 1936. The agreement secured total evacuation of British forces from Egypt within twenty months. The sole responsibility for the maintenance of the Suez Canal was transferred to Egypt. Both parties expressed determination to uphold the Convention of 1888. However, Egypt bound to facilitate the base as may be necessary in "event of an armed attack on any country which is a party to the treaty of Joint - Defence between Arab League

or Turkey.

In 1956, the 'Nationalisation of the Suez Canal Company' was proclaimed by the Egyptian President Nasser. Therefore, all rights and obligations of the Company were transferred to it. The nationalisation of the Canal Company threatened British and French interests in the Canal and region as a whole. On October 29, 1956, Britain and France together with Israel had taken military action against Egypt in order to safeguard their interests in the Canal - both politically and economically. But the international reaction against this tripartite aggression led to the cessation of hostilities and then evacuation of their aggressive forces.

After the end of hostilities, Egypt had become the sole guarantor of the Suez Canal and the Canal Company which was controlled by the Britishers since 1875. The Egyptian Government after takeover of the Canal declared that it recognizes the Canal


38. See Infra, Chapter IV.

39. See Infra, Chapter V.
regime established by the Convention of 1888. In April, 1957, a declaration was made regarding the arrangements for operations, tolls, management and Canal Code etc. of the Suez Canal in accordance with the Convention of Constantinople of 1888, and the United Nations Charter. It declared that:

"It remains the unaltered policy and firm purpose of the Government of Egypt to respect the terms and spirit of the Constantinople Convention of 1888 and the rights and obligations arising therefrom. The Government of Egypt will continue to respect, observe and implement them", and "to afford and maintain free and uninterrupted navigation for all nations within the limits of and in accordance with the 40 provision of the Constantinople Convention of 1888".

Status of the Panama Canal and American Rights

Formally the Panama Canal was declared open for world navigation on July 22, 1920, in conformity with the laws of the United States. But it was being used since 1914. The formal opening for traffic was postponed due to the World War I. Rules for the regulations of free navigation through the Canal had been set up before the opening. The Panama Canal was exclusively the United States Government undertaking and had accepted the responsibility to maintain its freedom of navigation on terms of entire equality. This policy is evidenced in documents of highest official character which now stands as a silent witness to international regime of the Canal.

Henry Clay, the then Secretary of State, urged consideration of a construction of a canal upon the Congress of Panama in 1826.

40. See Appendix "E"
He said that:

"The benefit of the Canal ought not to be exclusively appropriated to any one nation, but should be extended to all parts of the globe upon payment of a just compensation or reasonable tolls".\(^{41}\)

In 1835, the United States Senate passed a resolution urging the President to negotiate with the governments of New Granada and Central America or other nations for the purpose of construction of the Canal as well as for the purpose of securing "the free and equal right of navigation of such canal to all nations on the payment of reasonable tolls as may be established...".\(^{42}\)

President Cleveland in his first message to the Congress said that:

"Whatever highway may be constructed across the barrier dividing the two great maritime areas of the world must be free for the world's benefit, a trust for mankind".\(^{43}\)

In an interview with Lord Palmerstone, the United States Minister to France, Mr. Rives said to him that:

"... The United States sought no exclusive privilege or preferential right of any kind in regard to the proposed communication and their sincere wish, if it should be found practicable, was to see it dedicated to the common use of all nations, on the most liberal terms and a footing of perfect equality for all, that the US would not, if they could, obtain any exclusive right or privilege in a great highway which naturally belonged to all mankind".\(^{44}\)

---

42. P.C. Hains, Ibid.
43. Ibid.
44. Ibid., p. 356.
International status and rules for free navigation through the Panama Canal were regulated by the Treaty of New Granada and the United States of 1846, the Clayton-Bulwer Treaty of 1850, and the Hay-Pauncefote Treaty of 1901. The subsequent treaties and declarations made by the United States and the Republic of Panama also governed and recognized the international status of the Canal.

In 1846, the governments of Granada (later on succeeded in Colombia) and the United States signed a Treaty of Peace, Amity, Navigation and Commerce which guaranteed right of transit across the isthmus of Panama. Article 35 of the Treaty provided that:

"The right of way or transit, across the isthmus of Panama upon any modes of communication that now exist or that may be hereafter constructed, shall be free and open to the Government and citizens of the United States, for the transportation of any articles ..., of lawful commerce", and that

"No other tolls or charges shall be levied or collected upon the citizens of the United States, or their said merchandise thus passing any road or canal that may be made by the Government of the New Granada".45

On the other hand, the United States guaranteed the New

Granada perfect neutrality over the isthmus and free transit from one sea to the other without interruption while this treaty exists. However, this treaty did not refer to the purposes for which a canal should be used when built other than commerce. This treaty, in fact, granted the United States control over the territory with the provision of free access to the route. In submitting the treaty, to the Senate, the United States President Polk said that:

"In entering into the mutual guaranteed proposed by the thirty-fifth article of the treaty, neither the Government of the New Granada, nor that of the United States has any narrow or exclusive view. The ultimate object ... is to secure to all nations the free and equal right of passage over the isthmus*. 46

The Clayton-Bulwer Treaty was concluded between the United States and Britain for the purpose of construction, protection and maintenance of the Canal, and the freedom of transit across the said canal as a ship communication between two ocean on equal terms to all. Article V of this treaty stipulated that:

"The contracting parties further engage, that when the said canal shall have been completed, they will protect it from interruption, seizure or unjust confiscation, and that they will guarantee the neutrality thereof, so that the said canal may forever be open and free and ... secure*. 47

46. N.J. Padelford, n. 41, pp. 4-5; P.C.Hains, n. 41, pp. 355-56.
Consequently, this treaty provided an international guarantee and protection of any means of interoceanic communication that might be constructed in Central America or at the isthmus of Panama. But the protection and guarantee granted in this treaty was conditional. The treaty stated that if both or either governments establish or adopt such regulations concerning the navigation as are contrary to the spirit and intention of this treaty, either by making unfair discriminations in favour of the commerce of one nation over the commerce of other, or by imposing oppressive exactions or unreasonable tolls upon the passengers or vessels, then the either party may withdraw from the treaty.

The Cass-Yrisarri Treaty signed between the United States and Nicaragua in 1857 also has a bearing upon transit across the isthmus. Under its terms both nations were agreed to share equal right over any interoceanic route to be constructed. General Cass, Secretary of State, asserted in a communication that "the United States demanded no exclusive privileges in the interoceanic passage of the isthmus".

With a view to giving to the United States the right to build a canal between two oceans, the governments of the two nations concluded the Hay-Paunceforte Treaty on November 18, 1901. The

50. See Appendix B.
treaty superseded the Clayton-Bulwer Treaty of 1850, which had pledged that Britain and the United States never to obtain or maintain exclusive control over any means of communication. The Hay-Pauncefote Treaty provided that "a canal may be constructed under the auspices of the Government of the United States, directly or indirectly", and that the United States "shall have and enjoy all the rights incident to such construction, as well as exclusive right of providing for regulation and management of the Canal". The treaty, however, allowed the United States to negotiate the necessary arrangements for an exclusive jurisdiction over a canal and adjacent zone. This treaty also provided exclusive rules for regulation and maintenance of free navigation through the Panama Canal.

Articles III and IV of the treaty setting forth rules to be adopted as a basis for "the neutralisation of such ship canal" were substantially same as embodied in the Suez Canal Convention of 1888. Its main provisions were as follows:

1. The Canal shall be free and open to the use of commercial and war vessels of all nations on terms of entire equality. There shall be no discrimination against any such nation, or its citizens or subject in respect to conditions or charges of traffic or otherwise. Therefore, conditions and tolls levied shall be just and equitable.

2. The Canal shall never be blockaded, nor any right of war or act of hostility be committed within it. The treaty, however, authorised the United States to maintain military force along the
canal as may be necessary to protect it against lawlessness and disorder.

3. All work necessary for the construction, maintenance and operation of the Canal was immune from attack or injury that impaired the useful part of the Canal. These provisions of the treaty was to be applied to waters adjacent to the Canal within three sea mile limit of either end.

Therefore, the Treaty of 1901, established the legal regime of the Panama Canal on the line of the Suez Canal. But a comparison of two shows that there is no clause as in the Suez Canal Convention guaranteeing the free passage of the Canal in time of war as in time of peace without distinction of flag (Article I). The Hay-Pauncefote Treaty did not specify that American Canal must be kept free and open in time of war as in time of peace to all vessels of all nations. The United States and Britain were the only parties agreeing to observe the rules set for in Article III of the Treaty. The United States was not restricted to enforce the rules laid down in the treaty. There were no guidelines for the use regarding the modes of enforcement of the rules and regulations of the treaty. It may restrict or prohibit the navigation through the Canal for vessels which it may have reason

91. Ibid.

92. The status of the Panama Canal was discussed by the Permanent Court of Justice in the S.S. Wimbledon Case, see P.C.I.J. Series A, No. 1, pp. 25-26; The Suez Canal - Selection of Legal Documents, n. 23, p. 58.
to believe will not abide by the rules. It may add other rules and regulations. Violation of the rules by a vessel of a state having strained relations with the United States would constitute an infraction of law of its country. Under some circumstances it might be regarded as an act of war, and as a "casus belli". It would not, however, except in case of Britain, amount to a violation of a treaty as other states were under no treaty obligation. The only limitations imposed by this treaty upon the exclusive right of regulation and management accorded to the United States was that:

"No change of territorial sovereignty or of the international relations of the country or countries traversed by the before mentioned canal shall affect the general principle of neutralisation or the obligation of the High Contracting Parties under the present Treaty".  

Nevertheless, these limitations were contractual only with the British Government. It should be noted that there was no express authorisation of the right of fortification or taking of measures in the name of military defence. But there was also no

53. N.J. Padelford, n. 41, p. 36.
54. See Article IV of the Hay-Pauncefote Treaty, Appendix D.
55. The Senate of the United States refused to consent to the treaty with Great Britain signed in 1900 containing the clause; "The High Contracting Parties will immediately upon exchange of ratifications of this convention, bring it to the notice of the other powers and invite them to adhere to it", Moore, n. 45, Vol. III, p. 211.
provision which prohibited such fortification unlike the Suez Canal Convention.

The legal regime established by the Hay-Pauncefote Treaty was confirmed and recognized by the Hay-Bunau-Varilla Treaty of 1903. Article XVIII of the Treaty provided that:

"The Canal, when constructed, entrance thereto shall be neutral in perpetuity and shall be open to the ships of all nations upon the terms provided by section I of the Article III, and in conformity with the stipulation of the Hay-Pauncefote Treaty".57

The Treaty of 1903, it should be noted, granted to the United States to possess and exercise all the rights, powers and authority in the Canal Zone, auxiliary lands and waters as the sovereign of the territory. Thus, Panama was entirely excluded from the exercise of any such sovereign rights. The Treaty of 1903 further conceded 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, the United States shall have right, at all times and in its description, to use its police and its land and naval forces or to establish fortifications for these purposes".58

On the basis of the treaties of 1901 and 1903, the nations of the world have given right to use the Canal always subjected

56. Article XI of the Constantinople Convention, see Appendix D.
57. See text of the Hay-Bunau-Varilla Treaty of 1903, Appendix C.
58. Ibid. (Article XXIII of the Treaty).
to the stipulations of the existing treaties. The United States as builder and owner of the Canal possessing exclusive rights to control navigation through the Canal. Though the principle of free navigation through Canal is part of general International Law, the provision of free navigation of ships of all foreign nations both during peace and war, cannot be said to have been "internationalised". The Panama Canal was under the jurisdiction of the United States subject to the exercise by it of sovereign rights and authority by virtue of the Treaty with Panama. Except as limited by Treaty arrangements with Britain and Panama, the United States had complete and exclusive right to control the Canal and to regulate vessels passing through it as it may see fit.

On August 24, 1912, the construction of the Panama Canal was completed. President Taft approved an Act passed by the Congress. It provided for opening, maintaining and operating the Canal and Canal Zone. The Act also authorised the President to prescribe the tolls to be charged from the vessels using the Canal. Under Section V of the Act, the President exempted American shipping from payment of tolls engaged in the Coastwise or intercoastal trade for the use of the Canal. Consequently, a controversy arose

with Britain over the tolls payment. The British Government viewed the exemption as a violation of the Hay-Paunceforte Treaty, 1901, and breach of faith that would lead higher tolls for foreign ships. The Treaty of 1901 provided that the Canal should be open and free to the ships of all nations on terms of equality, and so that there would be no discrimination in respect of the conditions or charges of traffic or otherwise. The British Government lodged protest through its Charge d'Affaires at Washington. The communication indicated the opinion of his government that to exempt all American shipping from the payment of tolls would involve violation of the treaty. The method of charging would contravene its spirit and would not be in accordance with the obligation of the Hay-Paunceforte Treaty. The British Government said that the United States was bound to open the Canal to the British and American vessels upon terms of "equal treatment", on the ground that "any system by which particular vessels or classes of vessels were exempted from the payment of tolls would not comply with the stipulations of the Treaty". The British Government asked the adjudication of the dispute under the arbitration treaty of 1908.

In replying to the British protest, the Secretary of State Knox sought refuge in the pretext that at the time the protest was made no tolls had been collected from the British vessels from which American vessels had been exempted. He argued that:

---

The effect of Act and the Proclamation together will be to subject British vessels as a matter of fact to inequality of treatment, or to unjust or inequitable tolls in conflicts with the terms of the Hay-Paunceforte Treaty, the question will then be raised as to whether the United States is bound by the Treaty both to take into account and to collect tolls from American vessels, and also whether under the obligations of that Treaty British vessels are entitled to equality of treatment in all respects with the vessels of the United States. 62

President Taft remarked that "when the treaties are properly construed, owing the Canal and paying for it as we do, we have the right and power, if we choose, to discriminate in favour of our own ships".

During the Presidential campaign, President Wilson had approved the Act. But he soon became convinced that the British Government had a case and that the nation’s honours was at stake. Therefore, he was advised by influential persons and the United States officials, including officials of the Canal, either to repeal or suspend the tolls clause before the Canal was actually opened to navigation. Ambassador Bryce asserted that power to fix tolls at lower rate for American vessels amounted, nevertheless to a denial of the right of equality of treatment to British shipping, and was, therefore, inconsistent with the treaty of 1901. He urged to settle the issue amicably. President Wilson, therefore, abolished the clause of tolls exemption in 1914 on ground that, "it constitutes

62. Ibid., 1913, pp. 540-47.

63. See the Memorandum of the Panama Canal Act of 1912, AJIL, No. 4, October, 1912, pp. 980-84.
a mistaken economic policy from every point of view, and is, moreover, in plain contravention of the Treaty with Great Britain..."

The Panama Canal was unofficially opened in 1914. The Treaties of 1901 and 1903, as well as Act of 1912, provided for the application of rules, and to exercise rights and duties established thereupon by the laws of the United States. The rules contained in Article III of the Hay-Pauncefote Treaty came into force and the status of the Canal was clearly fixed.

Since the opening of the Canal, it has been a primary policy of the United States to handle the passage of ships quickly, to avoid delay and require them to comply with formalities and regulations essential for the safety, guarantee and protection of the Canal. Consequently, the United States Government issued on July 9, 1914, Rules and Regulations for Operation and Navigation of the Panama Canal, and approaches thereto, including all waters under its jurisdiction. All ships, coming within its jurisdiction and masters of the ships or their agent, desiring to use the Canal and terminal ports or any parts, must observe them. Revision and

additions have been made from time to time. According to the Rules and Regulations, the United States has jurisdiction over the vessels of all nations using the Canal. The modes of the regulation of the navigation through the Canal were vested in the hands of the US President by the US Congress itself who the Governor of the Canal Zone controlled it. The powers conferred by the Acts have been amplified to meet the new situation, and therefore possible to revise the Rules and Regulations expeditiously in time.

The passage of the ships is determined exclusively by the Canal’s authorities and in such order as they may see fit. After entering the limits of the Panama Canal, three marine miles from the terminals of the Canal proper, the ship became subject to the Port Captain and other Canal officials. It may proceed into the Canal or on to the high seas only after obtaining express permission or clearance. Permission to proceed through the Canal may be accorded only after the Canal’s authorities have examined all the papers of the ship, and satisfied themselves that there is nothing which might endanger the structures pertaining to the Canal or render the ships liable to obstruct the Canal; and determined that there are no unsettled disputes or claims involving the violation

of the laws of the United States, or the Canal Zone, or the Rules and Regulations of the Canal. Not only this, the various Acts provided detail rules and regulations concerning the passage and control of vessels in time of national emergency or war; health and sanitation within the Canal Zone and vessels calling at Zone; carriage of prohibited goods, explosive and fire arms, maritime quarantine, and custom services etc. They also provided penalties and punishment for the violations of rules and regulations which govern the navigation of the Panama Canal and adjacent water. Any action by a vessel or person causing damages or injury, constructing or attempting to obstruct any part of the Canal or its locks or approaches may lead to punishment and penalties.

The Agreement of 1936 between the United States and Panama provided that both parties will cooperate upon such measures as may be necessary for the maintenance, sanitation, efficient and continuous operation, and protection of the Canal and to preserve its neutrality. This Treaty ended the United States "de facto protectorate" over Panama. However, this treaty authorised the United States to take measures whenever necessary for the security of the Canal and of Panama in an aggression or an international conflagration in order to ensure the effective operation and protection of the Canal in which two countries are jointly and

---

In 1959, the United States and Panama concluded the Treaty of Mutual Understanding and Cooperation. It increased the annuity to be paid for the lease of the zone and permitted Panama to tax Panamanian workers in the Canal Zone. Further, on September 25, 1965, a joint statement was made for the negotiation of a new treaty—regarding the Canal to keep open at all times to the vessels of all nations on a non-discriminatory basis. But no such formal treaty came into force.

The terms of the Treaty by which the Panama Canal and Canal Zone was ceded to the United States in 1903 had bedevilled relations between the two countries ever since. In 1974, agreement was reached on principles for a new treaty by which the United States would surrender its jurisdiction over the Canal Zone, but negotiations continued for a further three years. Therefore, in 1977 negotiation resulted in the signing of two new treaties by the governments of Panama and the United States i.e. the Panama Canal Treaty and the Treaty Concerning the Permanent Neutrality


and Operation of the Panama Canal. In March and April, 1978, the
United States Senate ratified the two treaties and on October 1,
1979, they finally came into effect.

Coming into force, the Panama Canal Treaty acknowledged
the Republic of Panama's sovereignty over its Territory and
"terminated and superseded" the prior treaties pertaining to the
Panama Canal, as:

(a) the Isthmian Canal Convention between the United States and
Panama signed on November 19, 1903;

(b) the Treaty of Friendship and Cooperation of March 2, 1936,
and the Treaty of Mutual Understanding and Cooperation and
the related Memorandum of Understanding reached on January
25, 1955, between the United States and Panama;

(c) all other treaties, conventions, agreements and exchanges
of notes between the United States and Panama concerning
the Panama Canal which were in force prior to the entry
into force of this Treaty; and

(d) provisions concerning the Panama Canal which appear in
other treaties, conventions, agreements and exchange of notes
between the United States and Panama.

70. Walter La Feber, The Panama Canal: Crisis in Historical
For progress of the negotiation for the revision of the Treaty
of 1903 see Department of State Bulletin, April 29, 1974,
pp. 453-57; June 23, 1975, pp. 851-83; December 22, 1975,

71. Article I of the Panama Canal Treaty see Appendix F.
In accordance with the terms of the Treaty, Panama has assumed territorial jurisdiction over the Canal and Canal Zone lands. However, under Article 1(2) Panama grants to the United States of America for the duration of this Treaty, the rights necessary to regulate the transit of ships through the Panama Canal, and to manage, operate, maintain, improve, protect and defend the Canal. It also guarantees to the United States of America the peaceful use of the land and water areas which it has been granted the rights to use for such purposes pursuant to this Treaty and related agreements.

The Treaty further provided that Panama shall participate in the management and protection of the Canal, and both parties shall cooperate to assure uninterrupted and efficient operation of the Panama Canal. Under Article III(2,c), Panama grants to the United States the responsibilities to "make and enforce all rules pertaining to the passage of vessels through the Canal and other rules with respect to navigation and maritime matters in accordance with the Treaty and related agreements. The Panama will lend its cooperation, when necessary in the enforcement of such rules."

The Panama Canal Treaty was concluded for a fixed period of 72 years and will come to an end on December 31, 1999 (Article II(2)). Therefore, provisions were inserted in it according to which the Canal will remain under the control of the United States. It is only after 1999 when the Panama will assume its control.

72. See the Panama Canal Treaty, 1977, Appendix F.
Under the second Treaty concerning the Permanent Neutrality and Operation of the Panama Canal, Panama declares that:

"The Canal, as an international waterway, shall be permanently neutral in accordance with the regime established in this Treaty. The same regime of neutrality shall apply to any other international waterway that may build either partially or wholly in the territory of the Republic of Panama".73

Under Article II, Panama further declares that:

"The neutrality of the Canal to 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, so that there will be no discrimination against any nation, or its citizens or subjects, concerning the conditions or charges of transit, or for any other reasons and so that the Canal, and therefore the Isthmus of Panama, shall not be the target of reprisals in any armed conflict between other nations of the world".74

The tolls and other charges for transit have been fixed by Article III(c) - just, equitable and reasonable in consistent with the principles of International Law. For the purposes of the security, and efficient and proper maintenance of the Canal, the Treaty provides certain rules and regulations. However, a provision was also inserted in this Treaty which stipulated under Article V 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".

73. Article of the Treaty, concerning the Permanent Neutrality and Operation of the Panama Canal, see Appendix G.

74. Ibid.
On October 1, 1979, the Treaties of Panama Canal came into force. Consequently, Panama assumed control of the former Canal Zone. The Canal was placed under a joint body, the Panama Canal Commission which was established to perform the mission, previously accomplished by the Panama Canal Company, of managing, operating and maintaining the Panama Canal. The Supervisory Board of the Commission consists of five United States and four Panamanian citizens. Until December 31, 1989, the Administrator of the Canal will be a United States citizen and from January 1, 1990, until December, 1999, the Administrator will be a Panamanian citizen. The United States military forces will remain in Panama until the year 2000, and the United States will be entitled to defend the canal's neutrality thereafter also.

The proposition of these treaties, one can conclude that, though they have a bearing statutes upon the international status of the Panama Canal, in general, the rights and powers of the United States to control and defend the Canal as such remains as the Treaty of 1903. With minor changes, the Treaties of 1977, are just only the revision of the former Treaty.