

Marcell Horváth<sup>1</sup>:

### The sovereignty of the Republic of Panama in the light of the Panama Canal Treaties

#### 1. Introduction

Since the discovery of America humanity had shown great interest of cutting through the American continent, dividing the Atlantic and the Pacific Ocean in order to find a new route instead of the very long and dangerous way round tip of the South American continent.

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.”*

My research theme is the international treaties related to the Panama Canal. But because it is a very large volume of material, in this paper I will only focus on only one very important aspect. During the analysis of the Treaties, I will deal in detail with the sovereignty of Republic of Panama and with the limitation of this sovereignty on the part of the United States.

As a starting point at first I will introduce the regulation of the Hay-Bunau-Varilla Treaty of 1903, which is the fundamental treaty in the history of the Panama Canal Treaties and it created a lot of conflicts in the question of the Panamanian sovereignty. This treaty had determined not only the Panama Canal but the life of Panama sinking the state to the quasi colonial status. The Torrijos-Carter Treaties of 1977 – which followed the previous Treaty – brought the changing in this unlawful situation. These Treaties theoretically arranged the situation and the Panamanian state regained possession of its sovereignty. But the United States with its unilateral and illegal modifications still made a problematical state in the question of the Panamanian sovereignty.

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## 2. The Sovereignty of the Republic of Panama on the grounds of the Hay-Bunau-Varilla Treaty of 1903

The Hay-Bunau-Varilla Treaty of 1903 was the first bilateral international treaty about the Panama Canal between the Republic of Panama and the United States, which “*was born together with the Panamanian State, if there was no Panama, there was neither the Treaty.*”<sup>2</sup> This Treaty is the base of the Panama Canal Treaties, which had determined the legal status of the Canal and at the same time the legal status of the Panamanian state for more than 70 years, and moreover it had questioned the sovereignty of the Republic of Panama. I can compose so that this Treaty “*established a protectorate making a colony out of Panama in political and economical sense.*”<sup>3</sup>

The question of sovereignty can be considered as a recurrent problem in the history of the Panama Canal Treaties. Basically the reason of the rejection of the Herrán-Hay Treaty of 1903, which was signed between Colombia and the United States and was the direct antecedents of the Hay-Bunau-Varilla Treaty, was that the Colombian Members of the Parliament regarded the grave violation of the Colombian sovereignty in the regulation of this treaty. Because the United States would have obtained many rights and powers in the territory of the Colombian State, which would have been really disadvantageous for Colombia, the Colombian parliament – partly under the pressure of the civilian population – didn’t approve the treaty and refused it.

This rejection led to the independence of Panama and to the signing of the Hay-Bunau-Varilla Treaty which was in fact the reproduction of the Herrán-Hay Treaty – but gave more advantages to the United States towards Panama. So it was no wonder that the whole Panamanian civil population disapproved this treaty from the beginning.

### 2.1. The Panamanian Sovereignty versus the Canal Zone

One of the most controversial questions of the Treaty is whether the Panamanian State had sovereignty in the Canal Zone or not?

The United States had all the rights over the Canal Zone, like a sovereign authority. With this, an important strip lost contact with the Panamanian state territory, so the Panamanian government had a titular sovereignty in this area. Because the Canal Zone was under separate administration, there, a different legal system – namely the US legal system – was dominant. This area set out a really different economic development. Moreover inhabitants of the Canal Zone were also

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<sup>2</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 Panamá*. No. 7. 1966 – 1967. Año VII. p. 170.

<sup>3</sup> RICARDO RIOS TORRES: El tratado Hay Bunau Varilla y la Nacionalidad Panameña. *TAREAS*, No. 15. abr. – jun. 1965. p. 38

different from the Panamanians, most were American citizens and citizens from Caribbean Islands while the Panamanians formed an insignificant minority. Properly speaking, the Treaty established “*an American extra territorial zone*”<sup>4</sup> in the Canal Zone.

The United States got an international easement in the Canal Zone for the using, the possession and direction of this area in order to construct, support, operate and protect the Panama Canal. The Panamanian State provided extensive – almost full-scale – powers for the United States to practice these spheres of authority, so the United States had all the rights, the powers and the authorities in the Canal Zone and it could practice them as it would had it been the sovereign power. On the other hand “*the US legislative power also agreed on that the United States’ rights and powers were limited, in other words the Canal Zone wasn’t a part of the territory of state of the United States.*”<sup>5</sup> For all of these rights the United States gave 10 million dollars as a single payment and it had to pay two hundred and fifty thousand dollars as an annual rental.

But the separation of the Canal Zone appeared not only in the ground of the administration and the direction, but naturally the legal system, and for this reason the jurisdiction were different from that of the Panamanian State.

After all we can ask if the United States had the whole supremacy in certain areas of the Panamanian territory of state, or it had only limited rights for the determined objects.

Numerous studies were born of this problem. The basis of the dispute was Article 3 of the Treaty, in which “*The Republic of Panama grants all the rights, powers and authority to the United States, within the zone mentioned and described in Article 2 of this agreement and within the limits of all auxiliary lands and waters mentioned and described in the above mentioned Article 2 which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.*”

One of the American opinions – what John Hay, the American Foreign Secretary shared and emphasized in the beginning of the 20<sup>th</sup> century – said that “*this article has the biggest importance in the Treaty, the whole treaty is inspired by this article. This Treaty gave the absolute sovereignty over the Canal Zone to the United States.*”<sup>6</sup> So with this article an “*extra-territoriality user zone*”<sup>7</sup> was established, called the Canal Zone, where the United States is wields sovereign power and authority.

The other theory – in contrast – said that there was no mention of the delegation of the sovereignty. The Republic of Panama retained its sovereign power over the Canal Zone, it didn’t dispose over it, only authorized the United States to practice certain rights in the interests of the mentioned objects, namely in the interests of “*construction, maintenance, operation, sanitation and protection of the Canal*”<sup>8</sup>.

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<sup>4</sup> KOVÁCS PÉTER: *Nemzetközi közjog*. Osiris kiadó. Budapest. p. 588

<sup>5</sup> OCTAVIO FABREGA: La cuestión de soberanía en la Zona del Canal. *Anuario de Derecho. Organo de Información de la Facultad de Derecho y Ciencias Políticas de la Universidad de Panamá*. No. 2. ene. 1956 – may. 1957. Año II. p. 220.

<sup>6</sup> FABREGA *ibid.* p. 210.

<sup>7</sup> KOVÁCS *ibid.* p. 589

<sup>8</sup> Article 2 of the Hay-Bunau-Varilla Treaty of 1903

The starting-point of this theory – what I present with the help of the study of Octavio Fabrega, the Panamanian ex-Foreign Secretary – is absolutely opposite of the mentioned theory, that is to say “*it is true that the Republic of Panama declared in Art. 3 that delegated the sovereignty in the Canal Zone with the exclusion of the own sovereignty, but this article has to be explained as only a part of the Treaty, so it has to be interpreted in harmony with the other orders of the Treaty.*”<sup>9</sup> That is to say this article has to be interpreted in the light of the whole Treaty, it has to be determined the significance of Article 3 with regard to complete meaning and objects of the Treaty, because the signatories’ intentions were not to order about the sovereignty, but their objects were the construction and the operation of an inter-ocean channel and to decide its regulation. As “*if the signatories’ intention would have been the delegation of the complete sovereignty in the Canal Zone, they had expressed it unambiguously.*”<sup>10</sup> – said Fabrega.

The representatives of this thesis – among them Fabrega – showed limited viewpoint over the Treaty’s articles that is why it was never suggested that the supremacy was delegated, because in their opinion these articles were against this hypothesis. Now I present some details of their thesis, which in their view justified their theory.

At first, one of their main arguments refers to Article 6 which said that an American-Panamanian mixed committee had to be established with the aim of dealing with the damages, which are caused during the realization of the Treaty’s main objects – construction, maintenance, operation, sanitation and protection of the Canal – and with the aim of supervising the dispossessions of the required properties. Setting out of this regulation the representatives of this thesis stated that “*if the United States practised sovereignty in the Canal Zone, this article would be inexplicable.*”<sup>11</sup> In this case – if the United States practised the whole sovereignty in the Canal Zone – the United States wouldn’t have to cooperate with the Panamanian side in a mixed committee, but it would have managed everything unilaterally.

Besides, Article 6 also said that “*the grants herein contained shall in no manner invalidate the titles or rights of private land holders or owners of private property in the said zone or in or to any of the lands or waters granted to the United States by the provisions of any Article of this treaty, nor shall they interfere with the rights of way over the public roads passing through the said zone or over any of the said lands or waters.*”<sup>12</sup> In their opinion all of these orders categorically refute the concept which says that the United States was granted the whole sovereignty, after all it granted only very restricted rights in the light of this article.

Continuing the analysis, the other argument which they used to support their thesis, can be found in Article 13. The mentioned article says that the United States may import the listed goods at any time into the Canal Zone and auxiliary lands, free of custom duties, imposts, taxes, or other charges, and without any restrictions.<sup>13</sup> In the regulation it was enumerated in detail what could be the subject of the free importation for instance the power tools, materials, medicines, and

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<sup>9</sup> EUSEBIO A. MORALES: Artículo del Dr. Eusebio A. Morales sobre el tratado de 1903. *Revista Cultural Lotería*, No. 248-249. oct – nov. 1976. Panamá.. p. 48.

<sup>10</sup> FABREGA *ibid.* p. 210.

<sup>11</sup> FABREGA *ibid.* p. 212.

<sup>12</sup> Article 6.

<sup>13</sup> Article 13.

clothing, almost everything could be imported which was needed for the mentioned objects. In their opinion it concluded that there is no question of giving up the sovereignty, because if it was in this way, why would they set limits to the American rights. This restriction in advance precluded the possibility that the United States had the whole sovereignty, because it not only stated the list of the goods which could be imported, but it prescribed their objects of use.<sup>14</sup>

It can be stated that the representatives of this thesis established that Article 3 has to be interpreted in the light of the other Articles and in the light of the objects of the Treaty, and in this way it can be determined that the Panamanian state did not renounce sovereignty in the United States' favour.

In my opinion these findings are not complete; the theory itself studies the theme in a one-side approach. It only deals with the disproof and proof of why there was no question of the sovereignty's delegation. The representatives of this thesis endeavoured to present favourably the Treaty which granted clearly excessive advantages to the United States; they tried to balance the situation which overturned at the Panamanian State's cost with stressing that Panama held the whole sovereignty. But they forgot to explain how the rules of the Treaty can be interpreted, in other words what kind of rights the United States and the Republic of Panama have and how they can practice these rights.

Francesco Cosentini, the professor of the universities of Brussels and Turin, represents the European approach of this question. In his opinion "*the Treaty of 1903 didn't grant the United States absolute sovereignty, because sovereignty is inalienable and imperishable as it has a hand in the theory and the practice of the international law, but this Treaty gave the authority, that is to say it gave the representation and the practice of the sovereignty for the purposes, set in Article 2. On the other hand these purposes are so obscure and indeterminable terminus technicus that give possibility to extend the sovereignty in a forbidden way.*"<sup>15</sup> Over the years it could be observed that the American government took advantage of this and it extended the limited authority completely. The Panamanian State couldn't enforce even its personal supremacy, because the Panamanian citizens, who took part in the construction of the Canal, were exempted from the military service in accordance with the Treaty.

In the opinion of professor Cosentini, we can't make a comparison between the Panamanian State's case and other partly sovereign country as Turkey in the end of the 19<sup>th</sup> Century or China. These countries could delegate a part of their sovereignty and a part of their territory without affecting the internal life of their state too much as this delegation would have affected the internal life of their state. In 1878 the Turkish sultan granted the whole sovereignty over Cyprus to the United Kingdom, and he granted the whole supremacy over Bosnia to the Austrian-Hungarian Monarchy, holding the titular sovereignty in these territories. China gave up the direction of Port Arthur, Macao and Hong Kong in a lease contract.

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<sup>14</sup> FABREGA *ibid.* p. 214.

<sup>15</sup> COSENTINI *ibid.* p. 173

But the case of the Republic of Panama is really different, because the Canal Zone tore out a significant strip from the Panamanian territory of state dividing the state into two parts. Moreover it included the two most important Panamanian cities, Panama City and Colón so this area included the centres of the governmental and the economic organization and the life of the state. In fact *“the last surviving remains, symbols of the Panamanian sovereignty in the Canal Zone were partly the annual rent what the United States wouldn’t have paid, it had lost all of its rights, and partly those rights and powers which the Panamanian authorities gave up.”*<sup>16</sup>

In my opinion Cosentini’s viewpoint is more acceptable in this discussion of legal interpretation, because the first study only focused on and tried to present why the Panamanian State didn’t lose its sovereignty. One of their main arguments said that the Panamanian State did not grant its sovereignty because it regulated its supremacy and its rights, although the Panamanian part restricted the own rights and powers so much that almost ceased them. Their argumentation sounds cynical a little bit when they say that the Republic of Panama did not give up the supremacy, but it restricted it for the benefit of the United States and it could regulate it and extend its sovereignty whenever it wanted. But comes up the question how could the Panamanian government extend its supremacy over the Canal Zone in the light of Article 24 which says *“no change either in the Government or in the laws and treaties of the Republic of Panama shall affect any right of the United States without the consent of the United States.”*<sup>17</sup> After these I don’t think it is likely that the Panamanian government can extend its sovereign rights to the Canal Zone without restriction at any time. The Republic of Panama only had the right to set up its national flag but only in theory, because in practice the Panamanian State did not even have this right.

But on the other hand, Cosentini’s study showed that though the Panamanian government didn’t give up its sovereignty expressly, it granted such a lot rights and powers to the United States and Articles of the Treaty were so indeterminable, that the United States could obtain and did obtain the whole supremacy over the Canal Zone. Partly the wording of the Treaty was so ambiguous that the American government could interpret it in such a way that was the best for their purposes; partly the Panamanian government renounced some significant rights and powers in the United States’ favour so the Panamanian side played a second fiddle to the United States.

## 2. 2. The Panamanian sovereignty and the United States’ right of intervention

Another question comes up in connection with the Panamanian sovereignty in the light of this Treaty; it is the United States’ right of intervention. This controversial authorization also produced a bitter controversy about the Treaty in the Panamanian political circles, because this order of the Treaty questioned the Panamanian sovereignty more than the privileged legal status of the Canal Zone.

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<sup>16</sup> COSENTINI *ibid.* p. 174.

<sup>17</sup> Article 24.

The American power of intervention was laid down in several articles of the Treaty and moreover the Panamanian legislation also set the seal on it by constitutional means.

In general it can be pointed out that for nowadays the prohibition of the inference in the internal affairs of a country is an accepted principle of the international law. “*This principle is in contact with the principle of the sovereignty at many points; it can be regarded as an international legal shield of the success of the territorial supremacy.*”<sup>18</sup> In the development of this principle the Monroe Doctrine played an important role. In other words the inference in the internal affairs of a country always affects the problem of the sovereignty; usually it can be regarded as an insult against the sovereignty.

On the other hand, we can ask whether this prohibition can be lifted, I mean if they can grant the rights to another country to intervene in the internal affairs of another country. How we can see that it happened in this Treaty on the part of the Republic of Panama. Then again we can ask how this delegation of the intervention’s right affected the supremacy of the Panamanian State. Does not the state’s sovereignty suffer injury if it authorizes another country to intervene in the internal affairs whenever it deems necessary? Does this state have the absolute sovereignty in fact, or can we only talk about a restricted and dependent state which has only a titular power and that we can almost call a protectorate?

The Treaty already stated in the first article that “*the United States guarantees and will maintain the independence of the Republic of Panama.*”<sup>19</sup> This statement does not provide the intervention in the internal affairs, but it lays down its basis. Basically this article is aimed at the United States giving the Panamanian State a share in both international and military protection against any aggression. That is to say, this right refers to the Panamanian foreign relations theoretically in the interest and for the benefit of the Republic of Panama. On the other hand in theory if the Panamanian government decided to unite with Colombia or with another country or it decided to organise a confederation and this act interfered with the American interests, could the United States intervene by the reason this granted right referring to the protection of the Panamanian independence? In my opinion the answer is yes, because the United States got the right of intervention and its practise was attached to the examination of the American government – which has always kept the own interests in view. After all if a fusion act of the state belongs to the internal legal authority of the state – and in my opinion it belongs to this area -, then in this case we can talk about the intervention in the internal affairs, if the supposed American intervention would be realized because of the union of the two states.

According to some Panamanian views, this article, which as a starting-point determined the whole Treaty, “*created a protectorate from Panama in this shape.*”<sup>20</sup> This statement is excessive a little bit, because the main characteristics of this legal institution can’t be founded in this case, in other words the real foreign representation is missing. Because the Panamanian Government hold its sovereignty in the foreign relations, we can’t talk about protectorate in the Panamanian case. The

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<sup>18</sup> KOVÁCS *ibid.* p. 225.

<sup>19</sup> Article 1.

<sup>20</sup> FERNANDO APARICIO: Panamá, 1903: La emergencia del Estado Nacional Mediatizado. *Revista Cultural Lotería*, No. 430. may– jun. 2000. p. 47.

United States had represented the Republic of Panama only militarily so much that the Panamanian State still hasn't got own regular army. I wonder whether how any country can defend its sovereign interests without a regular army. It is better if we compose as that the Treaty created a quasi-protectorate in Panama.

Over and above Article 1 Article 7 is the other very controversial disposition of the Treaty, which authorized the United States to maintain the public order in the cities of Panama and Colón and the territories and harbours adjacent thereto in case the Republic of Panama should not be, in the judgment of the United States, able to maintain such disposition.<sup>21</sup> Strictly speaking this article is the Panamanian reproduction of Article 35 of the Mallarino-Bidlack Treaty of 1843 which was the first Panama Canal Treaty between the United States and Colombia in the history and in which the United States guaranteed the sovereignty to Colombia.<sup>22</sup>

The mentioned article can be interpreted in such way that if necessary as a result of any special occurrence, the United States runs to help the Panamanian State "merely from good intention" to restore and to stabilize the public order and the peace. On the other hand we can also state that "*this article deprived the Panamanian people from the right of the revolution sacrificing itself to the huge party to contract (to the United States) and at the same time it granted the right of the intervention to the United States.*"<sup>23</sup> With this article the Panamanian State declared the American right of the intervention and its enforcement was attached to an obscure and subjective condition, namely to the judgment of the United States. Moreover the Panamanian constitution, Article 136 also confirmed this order, so the Panamanian government raised this right to constitutional position.

Article 23 completed this absolute right, which granted the right to the United States to use its police and its land and naval forces or to establish fortifications for these purposes 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.<sup>24</sup>

After all we can state that the United State got a really extensive right of intervention owing to "generosity" of the Panamanian government. With these order the United States obtained the right of intervention in the whole Panamanian territory of state, not only in the Canal Zone. So, this right infringed more and more the Panamanian sovereignty making an American colony from the Panamanian State which became a dependent country for a long time.

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<sup>21</sup> Article 7.

<sup>22</sup> HENRY D. TURNER: Vicios constitucionales del tratado de 1903. *Dialogo Social*, No. 70. Panamá, ago. 1975. p. 110.

<sup>23</sup> APARICIO *ibid.* p. 48.

<sup>24</sup> Article 23.



### 3. The Torrijos-Carter Treaties of 1977

The Republic of Panama and the United States signed the Torrijos-Carter Treaties with all due ceremony in Washington in 1977. The ceremonial signing took place in the headquarters of the Organization of American States, where general Omar Torrijos, the Panamanian premier represented the Panamanian State and James 'Jimmy' Carter, the president of the United State acted for the American party.

At the same time they signed two bilateral international treaties:

- The Panama Canal Treaty which provided that from 12:00 on 31<sup>th</sup> December 1999, Panama would obtain the full control of Canal operations and become primarily responsible for its defence; and
- The Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal and is commonly known as the Neutrality Treaty, where the United States held the permanent right to defend the canal from any threat that might interfere with its continued neutral service to ships of all nations was supplemented by a protocol agreement.

The Republic of Panama ratified the both treaties with a two-thirds majority in a plebiscite held on October 23, 1977. The United States' Senate ratified the first treaty on March 16, 1978 and the second treaty on April 18. So both treaties came into effect on 1 October 1979.

#### 3.1. The Panama Canal Treaty

The Panamanian people achieved the purpose of their 70 years old struggle with the signing of this Treaty in 1977; the Republic of Panama regained the sovereignty over its own territory of state and got the control over the Canal's direction from the end of 1999. Somebody said that "*the Yankees gave us a homeland, but what a bill they made out!*"<sup>25</sup> It is true that the Panamanian people had to pay a lot to settle this bill.

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;

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<sup>25</sup> MORALES PADRÓN, F.: El Caso del Canal de Panamá. *Revista Cultural Lotería*, No. 336-337. mar – abr. 1984. Panamá. p. 12.

- The Panamanian national independence was realized as a result of the historical fight.<sup>26</sup>

Now I present the new articles which brought a change to the regulation of the Panama Canal and which changed the controversial question of the Panamanian sovereignty.

The first article abrogated all of the prior treaties and related agreements concerning the Panama Canal beginning with the Hay-Bunau-Varilla Treaty of 1903; and admitted that the absolute Panamanian territorial sovereignty existed in the Canal Zone. But the Republic of Panama, as territorial sovereign, again grants the rights necessary to regulate the transit of ships through the Panama Canal, and to manage, operate, maintain, improve, protect and defend the Canal to the United States of America, for the duration of this Treaty.<sup>27</sup> So although they clearly put the real Panamanian sovereignty down in writing, the United States still held the same rights that practiced before. We can say that nothing changed; only the Panamanian government got the sovereignty on paper. Nevertheless this regulation can be regarded as a great leap forward, because the United States could practise these rights for the duration of this Treaty, namely until 31<sup>th</sup> December 1999. So it can be appraised as a Panamanian victory, but naturally the Panamanian State had to give concessions for this victory.

In Article 2 the signatories eliminated the controversial concept of the perpetuity; and they set limits to the Treaty's duration, namely at noon, Panama time, December 31, 1999, when this Treaty will terminate and the Panama Canal will get under the Panamanian supremacy and direction.

Article 3 ended the Canal Zone Government, that is to say the Canal Zone was wound up as a political entity. Moreover, from the Treaty's coming into force, the Republic of Panama, as territorial sovereign, will have the governmental spheres of authority and the governmental scopes of duties, so among others the Panamanian State will be responsible for providing, in all areas comprising the former Canal Zone, services of a general jurisdictional nature such as customs and immigration, postal services, courts and licensing.<sup>28</sup> The Republic of Panama got the sum of ten million United States dollars (US\$10,000,000) per annum for the foregoing services.

Besides Article 3 – for safety's sake – again put it in writing that in the future too the United States had all of the rights that had had before.<sup>29</sup> But this article established a new organ, the Panama Canal Commission. This United States Governmental agency got the task of the direction of the Panama Canal; this organ took over the Panama Canal Government's duties. But now the Panamanian State could delegate representatives and could participate in the direction of

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<sup>26</sup> EDWIN FABREGA: Los Tratados Torrijos – Carter. *Revista Cultural Lotería*, No. 305-309. ago. - dic. 1981. p. 241.

<sup>27</sup> Article 1 of the Panama Canal Treaty of 1977.

<sup>28</sup> Article 3.

<sup>29</sup> Article 3: The Republic of Panama, as territorial sovereign, grants to the United States of America the rights to manage, operate, and maintain the Panama Canal, its complementary works, installations, and equipment and to provide for the orderly transit of vessels through the Panama Canal.

the Canal as well.<sup>30</sup> This Commission did not have any international character. However they talked about a bilateral organ, in real it worked by and in conformity with the laws of the United States.<sup>31</sup> So from 1977 the Panamanian State obtained the rights for taking part in the life of the Panama Canal and could enforce the sovereign interests in the Canal Zone – that's another matter that it was only on paper, the practice usually showed different.

Article 4 regulated the protection of the Canal; it stated that The United States of America and the Republic of Panama commit themselves to protect and defend the Panama Canal for the duration of the Treaty. Accordingly, they established a Combined Board comprised of an equal number of senior military representatives of each Party in order to facilitate the participation and cooperation of the armed forces of both Parties in the protection and defence of the Canal. These representatives shall be charged by their respective governments with consulting and cooperating on all matters pertaining to the protection and defence of the Canal, and with planning for actions to be taken in concert for that purpose.<sup>32</sup> So with this the Panamanian government obtained an increasing role in the protection of the Canal as well.<sup>33</sup>

On the other hand, besides these reductions, this Article also laid down that the United States could endeavour to maintain its armed forces in the Republic of Panama in normal times at a level not in excess of that of the armed forces of the United States in the territory of the former Canal Zone. That is to say, the asserted Panamanian object, namely not to permit the legalization of the American military presence in the Republic of Panama, not only failed to realize, but “*the Panamanian dictatorship confirmed the American military presence for 23 years, till the year of 2000.*”<sup>34</sup> Which they hadn't given to the United States for 70 years – although it had carried on its unlawful behaviour -, now the Panamanian government gave it willingly questioning the results that reached in the area of the sovereignty and questioning the permanent neutrality of the Panama Canal.

Then Article 5 laid down the principle of non-intervention and precluded the possibility of the American intervention in the Panamanian territory of state<sup>35</sup>, securing the Panamanian sovereignty and the integrity of the Panamanian State. But later we can see that this definitive statement was vain, because the unilateral reservations of the United States which gave to the other Treaty ignored this ordinance.

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<sup>30</sup> Article 3: The Panama Canal Commission shall be supervised by a Board composed of nine members, five of whom shall be nationals of the United States of America, and four of whom shall be Panamanian nationals proposed by the Republic of Panama for appointment to such positions by the United States of America in a timely manner.

<sup>31</sup> GEORGES FISHER: El Canal de Panamá: nuevos problemas. *TAREAS*, No. 54. mar. – jul. 1982. p. 5.

<sup>32</sup> Article 4.

<sup>33</sup> ELIODORO VENTOCILLA: Soberanía y Territorio. *La Estrella de Panamá* 1. oct. 1979. p. A-14.

<sup>34</sup> CARLOS BOLÍVAR PEDRESCHI.: El Canal de Panamá y los Tratados Torrijos-Carter. In: JUAN A. TACK: *El Canal de Panamá*. EUPAN. Panamá, 1999. p. 231

<sup>35</sup> Article 5: Employees of the Panama Canal Commission, their dependents and designated contractors of the Panama Canal Commission, who are nationals of the United States of America, shall respect the laws of the Republic of Panama and shall abstain from any activity incompatible with the spirit of this Treaty. Accordingly, they shall abstain from any political activity in the Republic of Panama as well as from any intervention in the internal affairs of the Republic of Panama. The United States of America shall take all measures within its authority to ensure that the provisions of this Article are fulfilled.

The last article connected with sovereignty was Article 7 which talked about the flag. It said that the Panamanian nation flag had to be hoisted in the whole Panamanian territory of state including the former territory of the Canal Zone. The flag of the United States might be displayed, together with the flag of the Republic of Panama, at the headquarters of the Panama Canal Commission, at the site of the Combined Board.

Summing up “*the colonial dependence of Panama came to end in 1<sup>st</sup> October 1979, when this Treaty went into effect.*”<sup>36</sup> Comparing the advantages to the disadvantages we can say that this Treaty was a huge leap forwards the Panamanian independence which was fulfilled in 31 December 1999, when the Panamanian people got rid of the “north giant” – however not completely. But we have to see that for reaching these results the Panamanian government had to sacrifice a lot from its sovereignty.

### 3.2. The Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal of 1977

In 1977 the Republic of Panama and the United States 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.

The main differences between the two Treaties are partly that the Panama Canal Treaty became invalid at the end of 1999 and 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; partly the Panamanian people and the public opinion argued heatedly against the Neutrality Treaty because of the unilateral and controversial American reservations hath the American government handed in later without any negotiations.

In the first article 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. The same regime of 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>37</sup> It is interesting that only the Panamanian Party declared this permanent neutrality and the United States didn't make a declaration about the question, however it stood for the success. Article 4 said that “*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>38</sup>

Article 5 said that after the termination of the Panama Canal Treaty, only the Republic of Panama will operate the Canal and maintain military forces, defence sites and military installations within

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<sup>36</sup> VENTOCILLA *ibid.* p. A-14

<sup>37</sup> Article 1 of the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal of 1977

<sup>38</sup> Article 4.

its national territory. With this order they wanted to make it clear that in the year of 2000, the granted rights of the United States would come to an end and after it the Panamanian State would exclusively take care of the protection of the Canal's permanent neutrality. In the following chapter we will see that it is not so simple in the light of the DeConcini Reservation.

Summing up, the Neutrality Treaty established the regime of the permanent neutrality of the Panama Canal that the Republic of Panama declared unilaterally. But the United States undertook to participate in the protection of this regime and for this reason it obtained a lot of rights which ended originally in the year of 2000.

### 3.3 DeConcini Reservation

The Republic of Panama ratified both treaties on October 23, 1977 in accordance of the Constitution, but the United States Senates was slow in the ratification. As the Panama Canal had always a significant strategy-military and economic importance for the United States, the United States Senate did not really show an inclination towards returning the granted rights so simply. For this reason during the discussion of the Neutrality Treaty – which had defensive and military aspects – they proposed many modifications and made exactly 13 changes in the 8 articles of the Neutrality Treaty.<sup>39</sup>

The American party sent the modifications to the Panamanian Foreign Ministry who didn't raise any objections to it, so the United States Senates ratified first the neutrality Treaty then the Panama Canal Treaty as well. On 16 September 1978 the signatories changed the ratification documents, so with this act the Panamanian government reached a tacit agreement on these modifications and reservations.

On the other hand, Article 274 of the Panamanian Constitution stated clearly that the Panamanian people had to confirm every treaty and agreement which refers to the Panama Canal by plebiscite. But this order did not work in regard to these reservations; the Panamanian people couldn't make a decision about these modifications. Moreover, Article 39 of the Vienna Convention on the Law of Treaties (1969) declared that “*a treaty may be amended by agreement between the parties.*”<sup>40</sup> But this modification was not discussed bilaterally by the two parties, neither was accepted by the Panamanian people.<sup>41</sup>

In some authors' opinion, because these modifications did not go through the way of the ratification and opposed the international law, legal force was not connected with these reservations.<sup>42</sup> In this case we can ask the question if these modifications which were anti-

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<sup>39</sup> LUIS N. FITZGERALD N: Historia de las Relaciones entre Panamá y los Estados Unidos. p. 161

<sup>40</sup> Article 39 of the Vienna Convention on the Law of Treaties (1969)

<sup>41</sup> OYDEN ORTEGA DURÁN.: Neutralidad, defensa y no intervención en los Tratados Torrijos – Carter. *TAREAS*, No. 83. ene. - abr. 1993. p. 9.

<sup>42</sup> OYDEN ORTEGA DURÁN.: La neutralidad del Canal de Panamá y el año 2000. *TAREAS*, No. 86. ene. - abr. 1994. p. 39.

constitutionals and were inconsistent with the international law, were in force; and if they were in force, they applied to the signatories? In my opinion, that modification which is inconsistent with both the international law and the national law, it can't be valid, so it cannot be effective – although practice showed the contrary.

Now, I present the DeConcini Reservation. Dennis DeConcini sponsored an amendment – called DeConcini Reservation – to the Neutrality Treaty. This reservation granted to the United States the right to take such steps as it deems necessary, including the use of military force in the territory of the Republic of Panama, to reopen the Canal.<sup>43</sup> That is to say, this modification gave the United States the authority to deploy its military forces within Panamanian territory unilaterally in perpetuity to protect the canal. It is clear – at least for the Panamanian public opinion – that it means the United States can practice 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>44</sup> Besides DeConcini, Jimmy Carter, the president of the United States 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>45</sup> In spite of it, in the opinion of the Panamanian lawyers and analysts, the matter is that the United States obtained again the right of intervention. For this reason the public opinion argued so heatedly against this Reservation because it gave the United States 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, Article 5 of the Panama Canal Treaty clearly ruled out every American intervention in the Panamanian territory. Then we can put the question whether how can the Reservation be reconciled with this order? So, is every American intervention completely impossible or can they intervene in the interest of the defence and protection of the Canal?

The Reservation also 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

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<sup>43</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>44</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>45</sup> ORTEGA: *Neutralidad...* *ibid.* p. 8.

military forces, defence sites and military installations within its national territory. Then we can put another question whether the United States can or can't use its military force in the Republic of Panama after the termination of the Panama Canal Treaty. These questions queried again 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>46</sup> So, if the object of the Treaty is that exclusively the Republic of Panama takes care of the direction and the protection of the Canal, the United States, as a signatory has to respect it and conclusion the United States cannot practise its right of the invention.<sup>47</sup> In my opinion the DeConcini Reservation became invalid with the termination of the Panama Canal Treaty's duration, namely in the year of 2000.

#### **4. Conclusion**

The Hay-Bunau-Varilla Treaty of 1903 was the first in the line of the Panama Canal Treaties between the United States and the Republic of Panama. It was the starting-point which had determined the regime of the Panama Canal from the beginning and at the same time it sealed the Panamanian State's fate, because this Treaty was valid – apart from some modifications – till the signing of the Torrijos-Carter Treaties in 1977.

It was a really notable treaty from the point of view of the international law as well, and I wanted to present a significant aspect of this Treaty, namely that how the orders of the Treaty referred to sovereignty of the Panamanian State, and how far these restricted the success of the Panamanian sovereign authority. As the Panamanian government gambled away its sovereignty over the Panamanian territory of state, they sacrificed it for the ambitious interests of the United States. Strictly speaking this Treaty was the reward for the foundation of the Panamanian State in 1903 which realized the owing to the powerful and full-scale American assistance.

For this reason, I discussed the regulations and controversial orders of the fundamental treaty, because without these orders we cannot understand what the reasons were that reached to the other significant treaties, the Torrijos-Carter Treaties of 1977. These treaties were the beginning of a new area, these brought the Panamanian independence, but we cannot forget that the Panamanian people had to pay dearly for it. However, these treaties changed the unlawful status of the Panama Canal radically, but they also contained many awkwardness which violated the

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<sup>46</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;

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

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

<sup>47</sup> ORTEGA: *La neutralidad del Canal...* *ibid.* p. 42.

Panamanian sovereignty again, for example the controversial, unilateral and subsequent American modifications and reservations which contradicted the international law, expressly the DeConcini Reservation. But it is true that with these Treaties the Panamanian realized their historical object: they obtained the direction of the Panama Canal and with it the Panamanian state integrity fulfilled.

Summing up, the Panama Canal Treaties of 1977 neither lived up to the whole Panamanian expectations. They terminated the former dependent colonial status that was established the Panama Canal Treaty of 1903, but the United States implemented another colonial clause to protect its military, economic interests in Panama till the year of 2000. And from the year 2000 Panama is an independent and autonomous state which has the absolute sovereignty – theoretically.