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Potential Violations of the Panama Neutrality Treaty

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Chairman Cruz, Ranking Member Cantwell, and Honorable Members of the Committee:

I am Eugene Kontorovich, a professor at George Mason University's Antonin Scalia Law School, as well as senior research fellow at the Heritage Foundation's Margaret Thatcher Center for Freedom.[1] My research focuses on constitutional and international law.

I have been asked to discuss possible violations of the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, entered into on September 7, 1977, between the United States and Republic of Panama. I should say at the outset that determining whether a certain situation represents a violation of a given treaty is a mixed question of law and fact. It depends both on the treaty and its interpretation, as well as on the actual situation on the ground, the latter of which I have no special information about.

We shall see that under international law that each party to a treaty is entitled to determine for itself whether a violation has occurred. In our constitutional system, that determination is left primarily to the President, in part because of his superior and ongoing access to facts, much of which might not be public.

[1] The title and affiliation are for identification purposes. Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed here are my own and do not reflect an institutional position for The Heritage Foundation, its Board of Trustees, George Mason University, or the Commonwealth of Virginia.

What "Neutrality" Means

The Neutrality Treaty was part of a deal made with Panama and embodied in two instruments. In one, the Panama Canal Treaty, the United States agreed to cede the Panama Canal Zone and, as of 1999, the operation of the Canal, to Panama. In exchange for the United States ceding the control of the Canal which it built and then maintained and defended, Panama agreed to a special "regime of neutrality" of the Canal, which is set forth in a separate treaty.

Under international law, neutrality is a robust and detailed doctrine focused on third parties treating belligerents equally, or not affording them certain facilities, in time of war. The rules of neutrality are complex and detailed. Such rules were of great interest to the Framers, as they navigated the geopolitics of the Napoleonic Wars. The technicalities of neutrality are of somewhat less practical relevance today,[2] when states of declared war are uncommon, and belligerence falls in several shades of grey.

In any case, the neutrality spoken of by the Treaty is not the general doctrines of customary international law, but the specific "regime of neutrality"[3] that is "spelled out in the treaty itself," as Dean Rusk explained in Senate hearings at the time.[4] Indeed, the neutrality spoken of in this treaty is different from classic neutrality in several ways, as it applies in times of peace, and gives preferential treatment to U.S. warships and Colombian vessels. This is not general neutrality, but rather a relative neutrality that places the safeguarding of U.S. interests in a special position.

What Violates Neutrality

The essential features of the neutrality that must be preserved in the Canal are the non-discrimination among nations in the right of transit (Art. II); just and equitable tolls and fees (Art. III); exclusive Panamanian operation of the Canal (Art. V); and the prohibition of any foreign military or defense presence in the country (Art. V). A significant purpose of these provisions was to ensure foreign powers would not control the Canal.

Foreign Operation of the Canal

Article V provides that only Panama shall "operate" the Canal. Testifying about the meaning of the treaty in the Senate ratification hearings, the Carter Administration via Assistant Secretary of State for Legislative Affairs Douglas J. Bennet, Jr., emphasized that the treaty "prohibits *foreign operation* of the Canal, the garrisoning of foreign troops."[5]

This raises the question of whether the operation of the Canal or its appurtenant facilities by a private firm, neither American nor Panamanian, is consistent with the treaty. Article V appears primarily to be concerned about control by foreign sovereigns. If Panama signed a treaty with the People's

[2] *See* STEPHEN P. MULLIGAN, CONG. RSCH. SERV., LSB10735, INTERNATIONAL NEUTRALITY AND U.S. MILITARY ASSISTANCE TO UKRAINE (2022).
[3] Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, U.S.-Panama, Sept. 7, 1977, T.I.A.S. No. 10030, reprinted in 16 I.L.M. 1022 (1977), Art. I.
[4] See *Panama Canal Treaties: Hearings Before S. Comm. on Foreign Relations*, 95th Cong., 559–60 (1978) (statement of Dean Rusk, former U.S. Sec. of State).
[5] *Id.* at 673, 675 (1978) (statement of Douglas J. Bennet, Jr., Ass't Sec. of State for Legislative Affairs).

Republic of China, whereby the latter would operate the Canal on Panama's behalf, it would be a clear violation of the treaty. But what if Panama contracted for port operations with a Chinese state firm? Or even a private firm? The Suez Canal company was itself a private firm in which the United Kingdom was only a controlling shareholder, and yet it was understood to represent Anglo-French control over the Canal.

One analytic factor would be the degree of *de jure* or *de facto* control the foreign sovereign has over the company. Here, scenarios range from government companies in an authoritarian regime to purely private firms in an open society such as the United States. In between exists a spectrum of levels of governmental control and influence. The treaty is silent on the question of how much is too much. As we shall see, that is one of the many questions committed to the judgment and discretion of each party.

In a communist regime, distinctions between private and government-owned firms are not as absolute or clear-cut as in a Western liberal society. This is particularly the case for the People's Republic of China (PRC), which has an official doctrine known as "Military-Civilian Fusion," a top-level strategy of the CCP Central Committee since 2019.[6] Moreover, Panama has formally joined China's "Belt and Road Initiative" (BRI), a sprawling Chinese governmental policy to strengthen its strategic influence overseas. China has used the BRI to expand its overseas security footprint in Belt and Road countries.[7]

Another formal distinction of uncertain substantive value is that between Hong Kong and the PRC. When a Hong Kong company first won contracts to manage the ports on each side of the Canal— over vigorous U.S. objections[8]—the island was still a British Crown Dependency. Just a few months later, it was handed over to China; two years later, the Canal Zone was handed over by the United States to Panama. In the ensuing decades, China has cemented its control over Hong Kong far beyond what was contemplated in its agreement with the United Kingdom, culminating in imposition of Chinese security laws in 2020.

These developments may have a combined cumulative effect. It emerges that the operation of facilities proximate to the Canal is under the control of companies subordinate to a rival or even hostile power, known for its integration of civilian and military sectors and use of infrastructure development to project global power.

Foreign Security Forces

The presence of third-country troops or military infrastructure would manifestly violate Article V. But this does not mean that anything short of a People's Liberation Army base flying a red flag is permissible. The presence of foreign security forces could violate the neutrality regime even if they are not represented by organized military formations. Modern warfare has seen belligerent powers seek to evade international legal limitations by disguising their actions in civilian garb. From Russia's notorious "little green men" to Hamas terrorists in hospitals, bad actors seek to exploit the fact that international treaties focus on *sovereign* actors. Many of China's manmade islands in the South China Sea began as ostensibly civilian projects before being militarized.

[6] *See* U.S. Dep't of Defense, *Military and Security Developments Involving the People's Republic of China*, 28–30 (2023).
[7] *Id.* at 27.
[8] *The Security of the Panama Canal: Hearings before the S. Armed Serv. Comm.,* 106th Cong. (1999) (statement of Amb. Lino Gutierrez).

Indeed, this issue was discussed in the Senate ratification hearings, with Dean Rusk testifying that "informal forces" would also be prohibited under the Treaty.[9] (The question of Chinese influence over the canal was already discussed with concern by Senator Joe Biden during the mark-up hearings on the treaty.) Thus, the ostensible civilian character of the Chinese presence around the Canal does not mean China cannot be involved in violations of the treaty if, for example, the civilian presence includes agents of Chinese intelligence or security forces. It would hardly be surprising if these companies included agents of Chinese security services, but this is of course a factual matter.

Who Determines Neutrality Violations

The operations of Chinese companies have apparently not compromised traffic through the Canal in any way at this point. But the treaty is not merely violated when transit through the Canal is obstructed in wartime—indeed, such a treaty would leave the United States with no recourse until it is too late.

This leads to the question of who determines whether neutrality is being threatened or compromised. Under international law, states determine for themselves the meaning of their treaty obligations unless a dispute resolution mechanism is provided for. Unlike many other treaties, the Neutrality Treaty provides no clause referring disputes to some form of third-party resolution.

Instead, the treaty makes clear that each party determines for itself the existence of a violation. First, Article IV provides that each party is separately authorized to "maintain" the regime of neutrality. The Carter-Herrera Declaration, which is part of the full treaty, makes clear that both countries have "the responsibility" to "defend the canal against any threat to the regime of neutrality."[10] This is far from the language of the U.N. Charter, which requires an "armed attack" to trigger a right of self-defense—and even that language the United States interprets as allowing for preemptive self-defense. By contrast, the Neutrality Treaty makes explicit that the United States can act when it deems the neutral operation of the Canal threatened – that is, when the danger is still inchoate.

The Senate ratification amendments also indicate that "each of the two countries" shall separately be entitled to defend the neutrality regime. Indeed, this is the only plausible interpretation, as a requirement of joint-decision making would allow Panama to veto any U.S. action and violate the neutrality regime with impunity. Similarly, the Senate's understandings accompanying ratification make clear that Article V allows each party to take "unilateral action." Senator Jacob Javits said at the mark-up hearings that, while the word "unilateral" is abrasive, "we can decide that the regime of neutrality is being threatened and then act with whatever means are necessary to keep the canal neutral."[11]

How Neutrality Is Enforced

[9] *Supra* note 3 at 539–40 (statement of Dean Rusk, U.S. Sec. of State).
[10] Joint Statement of Understanding Issued Following a Meeting Between the President and Brigadier General Omar Torrijos Herrera of Panama (Oct. 14, 1977).
[11] *Hearings on Neutrality Treaty Before the S. Foreign Relations Comm.*, 95th Cong. 71 (1978) (statement of Sen. Jacob Javits).

There is no doubt that the treaty authorizes the use of force against threats to the neutrality of the Canal. This was a matter of general consensus in the ratification debates and is made explicit in the conditions attached by the Senate to the ratification. The Statement of Understanding issued by the United States and Panama also makes this clear, adding the limitation that any use of force many not be directed against the "territorial integrity or political independence of Panama." This phrasing means that while the treaty authorizes (but does not require) military force to remove threats to the neutrality of the Canal, such force can be used only as for as required to remove the threat. The treaty does not provide a basis for the reconquest of the Canal on a permanent basis.

The fact that the treaty allows the use of military force—in contexts when it would otherwise have been forbidden by international law—does not mean this should be the first recourse. Needless to say, any resort to arms should be not taken lightly and should only follow the failure of diplomacy. And as the Statement of Understanding notes, the treaty's allowance for military action does not substitute for the satisfaction of the "constitutional processes" of each party, which for us may, depending on the circumstances, require congressional authorization.

Senators, thank you for your attention.

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