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*Staff Judge Advocate
U.S. Southern Command*

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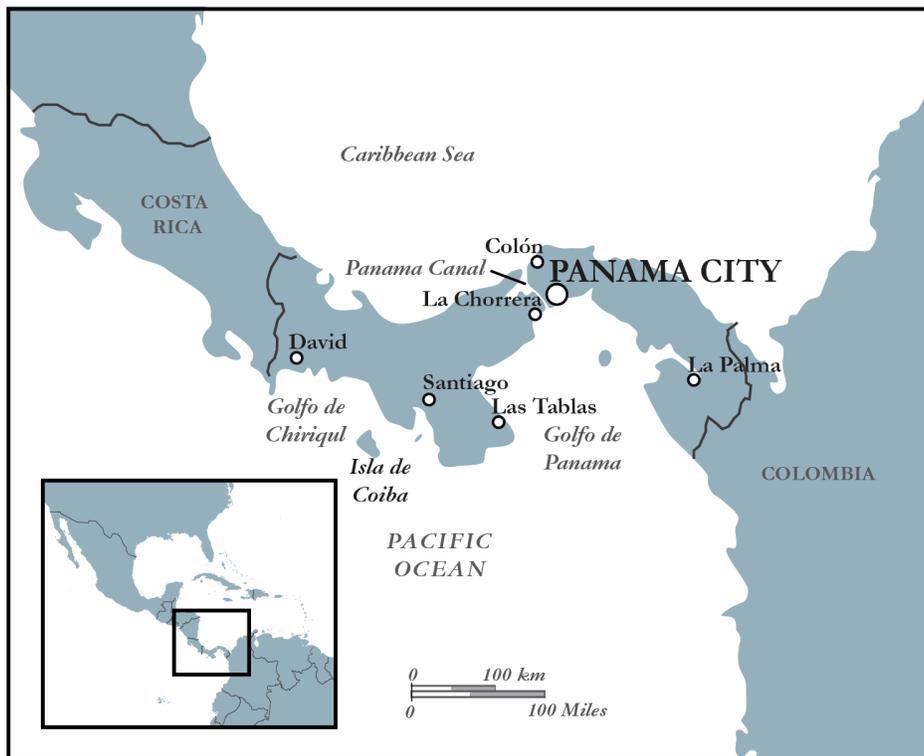
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Transit Rights Through the Panama Canal

*Staff Judge Advocate**
U.S. Southern Command

* Prepared by Captain Raul (Pete) Pedrozo, JAGC, U.S. Navy (Ret.); edited by Commander Dayton Krigbaum, JAGC, U.S. Navy and Lieutenant Commander Jessica Koningisor, JAGC, U.S. Navy; and approved by Captain William Dwyer, U.S. Coast Guard. The thoughts and opinions expressed are those of the author and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

Panama Canal. On November 3, 1903, Panama declared its independence from Colombia. Two weeks later, the United States signed a treaty with the new republic granting the United States an exclusive right to construct a ship canal across the Isthmus of Panama to connect the Atlantic and Pacific Oceans. Among other things, the treaty granted the United States sovereignty over a ten-mile-wide strip of land, in perpetuity, to construct and operate the canal in exchange for a one-time payment of \$10 million and an annual payment of \$250,000.¹ The United States also guaranteed the independence of Panama.² The canal was completed in 1914 and was operated by the United States until it was turned over to Panama on December 31, 1999, pursuant to the Panama Canal Treaty.³



Panama

Navigational Regime. Transit rights through the Panama Canal are governed by the Neutrality Treaty.⁴ The Treaty provides that the canal is an international waterway that is permanently neutral in times of peace and in

times of war and “shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality.”⁵ Accordingly, the canal and the isthmus of Panama “shall not be the target of reprisals in any armed conflict between other nations of the world.”⁶

Transit rights are subject to the payment of tolls and other charges for transit and ancillary services, provided that the tolls and other charges are just, reasonable, equitable, and consistent with international law.⁷ Ships must also comply with applicable rules and regulations that are just, equitable, and reasonable, and are limited to those necessary for safe navigation and efficient, sanitary operation of the canal, to include ancillary services necessary for transit.⁸ Ships in transit are prohibited from committing hostile acts while in the canal.⁹

As a pre-condition of transit, vessels may also be “required to establish clearly the financial responsibility and guarantees for payment of reasonable and adequate indemnification, consistent with international practice and standards, for damages resulting from acts or omissions of such vessels when passing through the Canal.”¹⁰ For sovereign immune vessels, the flag State may certify “that it shall observe its obligations under international law to pay for damages resulting from the act or omission of such vessels when passing through the Canal.”¹¹

Warships and naval auxiliaries of all nations shall always “be entitled to transit the Canal, irrespective of their internal operation, means of propulsion, origin, destination or armament [or cargo], without being subjected, as a condition of transit, to inspection, search or surveillance.”¹² Nonetheless, such ships “may be required to certify that they have complied with all applicable health, sanitation and quarantine regulations.”¹³ Additionally, such ships are not required to “disclose their internal operation, origin, armament, cargo or destination.”¹⁴ Naval auxiliaries may be required to present written assurances certifying that they are government-owned or operated and are being used only on government non-commercial service.¹⁵

Warships and naval auxiliaries of both parties shall also be “entitled to transit the Canal expeditiously.”¹⁶ This article was amended by a Statement of Understanding issued by the United States on October 14, 1977, and by Panama on October 18, 1977, which was incorporated as an integral part of this Treaty prior to its entry into force. The statement clarifies that “expeditiously” shall be interpreted to mean that such vessels are assured transit through the canal “as quickly as possible, without any impediment, with expedited treatment, and in case of need or emergency, to go to the head of the line of vessels in order to transit the Canal rapidly.”¹⁷ In this regard, the

U.S. instrument of ratification indicates its understanding that the determination of “need or emergency” to go to the head of the line “shall be made by the nation operating such vessel.”¹⁸

Panama Canal Authority Maritime Regulations. Ships transiting the canal are subject to regulations adopted by the Panama Canal Authority (PCA). These regulations include: (1) Regulation for the Admeasurement of Vessels to Assess Tolls for the Use of the Panama Canal; (2) Regulation on the Procedure to Revise the Panama Canal Tolls Rates and Rules of Admeasurement; (3) Regulation for Navigation in Canal Waters; (4) Regulations on the Board of Inspectors of the Panama Canal Authority; and (5) Regulation on Sanitation and Prevention of Communicable Diseases.¹⁹ Warships and naval auxiliaries are not subject to the rules relative to the transportation of dangerous cargos contained in the regulations.²⁰ Warships and naval auxiliaries continue to maintain the privilege of sovereign immunity and right to expeditious transit granted by the Neutrality Treaty, and will comply with PCA regulations to the extent regulations do not infringe upon the vessel’s sovereign immunity or treaty rights. The toll on warships is “based on their fully loaded displacement.”²¹ Warships are required “to submit documents stating accurately the displacement tonnage at each possible mean draft.”²²

Defense of the Canal. Effective December 31, 1999, only Panama may maintain military forces, defense sites, and military installations on the isthmus.²³ Nonetheless, Article IV of the Treaty provides that both the United States and Panama agree to maintain the neutrality of the canal so that it “shall remain permanently neutral.”²⁴

Article IV was also amended by the 1977 Joint Statement of Understanding. The Statement emphasized that both “Panama and the United States have the responsibility to assure that the Panama Canal will remain open and secure to ships of all nations.”²⁵ The correct interpretation of this provision “is that each of the two countries shall, in accordance with their respective constitutional processes, defend the Canal against any threat to the regime of neutrality, and consequently shall have the right to act against any aggression or threat directed against the Canal or against the peaceful transit of vessels through the Canal.”²⁶ The amendment was not intended to mean, however, that the United States had a right to intervene in the internal affairs of Panama. On the contrary, any U.S. action would only be directed to ensure that the canal remains “open, secure, and accessible,” and would “never

be directed against the territorial integrity or political independence of Panama.”²⁷

In addition, notwithstanding Article V or any other provision of the Treaty, if the canal is closed, or its operations are interfered with, the United States and Panama “shall each independently have the right to take such steps as each deems necessary, in accordance with its constitutional processes, including the use of military force in the Republic of Panama, to re-open the canal or restore the operations of the canal, as the case may be.”²⁸ This means that “either of the two Parties . . . may, in accordance with its constitutional processes, take unilateral action to defend the Panama Canal against any threat, as determined by the Party taking such action.”²⁹

Protocol to the Neutrality Treaty. The Neutrality Treaty required that the United States and Panama jointly sponsor a resolution in the Organization of American States (OAS) calling on all States to accede to a Protocol to the Treaty whereby all signatories would adhere to the objectives of the Treaty and agree to respect the neutrality of the canal.³⁰ Parties to the Protocol acknowledge the permanent neutrality of the canal and associate themselves with the Treaty’s objectives.³¹ The parties also “agree to observe and respect the regime of permanent neutrality of the Canal in time of war as in time of peace, and to ensure that vessels of their registry strictly observe the applicable rules.”³² The Protocol was opened for accession on October 1, 1979, and currently has forty States parties.³³

1. Convention for the Construction of a Ship Canal (Hay-Bunau-Varilla Treaty) arts. II, III, XIV, Nov. 18, 1903, 33 Stat. 2234, T.S. No. 431.

2. *Id.* art. I.

3. Panama Canal Treaty (with annex, agreed minute, related letter, and reservations and understandings made by the U.S.) art. II, Sept. 7, 1977, 1982 U.N.T.S. 3.

4. Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, with Annexes and Protocol, Sept. 7, 1977, 33 U.S.T. 1, T.I.A.S. 10029, 1161 U.N.T.S. 177 [hereinafter Neutrality Treaty].

5. *Id.* art. II.

6. *Id.*

7. *Id.* arts. II(a), III(1)(c).

8. *Id.* arts. II(b), III(1)(a)–(b).

9. *Id.* art. II(c).

10. *Id.* art. III(1)(d).

11. *Id.*

12. *Id.* art. III(1)(e).

13. *Id.*

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14. *Id.*
 15. *Id.*
 16. *Id.* art. VI(1).
 17. Joint Statement of Oct. 14, 1977, by President Carter and General Torrijos, 13 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1547 (Oct. 17, 1977).
 18. U.S. Senate, Understandings to the Neutrality Treaty, *supra* note 4, at (d)(3).
 19. *See* Panama Canal Authority Maritime Regulations (2022), <https://pancanal.com/en/maritime-services/maritime-regulations/>.
 20. Regulation for Navigation in Canal Waters, Agreement No. 360 art. 118 (Dec. 12, 2019), <https://pancanal.com/wp-content/uploads/2021/07/Acuerdo-360.pdf>.
 21. The Regulation for the Admeasurement of Vessels to Assess Tolls for the use of the Panama Canal, art. 22, https://pancanal.com/wp-content/uploads/2021/07/Regulation_for_Admeasurement_2019.pdf (last visited Apr. 28, 2022).
 22. *Id.*
 23. Neutrality Treaty, *supra* note 4, art. V.
 24. *Id.* art. IV.
 25. Joint Statement, *supra* note 17.
 26. *Id.*
 27. *Id.*
 28. U.S. Senate, Conditions to the Neutrality Treaty, *supra* note 4, at (b)(1).
 29. U.S. Senate, Understandings to the Neutrality Treaty, *supra* note 4, at (d)(2).
 30. Neutrality Treaty, *supra* note 4, art. VII(1).
 31. Protocol to the Neutrality Treaty, *supra* note 4, art. I.
 32. *Id.* art. II.
 33. *See* Signatories and Ratifications to the Protocol to the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, <http://www.oas.org/juridico/english/sigs/h-9.html> (last visited Apr. 28, 2022).