

# LEGAL ASPECTS OF INTERNATIONALIZATION OF INTEROCEANIC CANALS

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Twice in the last twelve years the Suez Canal has fallen victim to the Middle East crisis. Today, the Canal remains blocked, with no sign as to when it may be reopened to traffic. Pursuant to the Security Council resolution unanimously adopted on November 22, 1967,<sup>1</sup> Dr. Gunnar Jarring, Special Representative of the Secretary-General, has been dispatched to the Middle East to help bring about a peaceful settlement<sup>2</sup> based upon principles which include the guarantee of "freedom of navigation through international waterways."<sup>3</sup> It may be noted that the free navigation principle was contained also in the draft resolutions submitted to the Security Council by the Soviet Union,<sup>4</sup> the United States<sup>5</sup> and one jointly by Mali, Nigeria and India<sup>6</sup> as well as one submitted to the General Assembly co-sponsored by twenty Latin American states, including Panama.<sup>7</sup> The invariable inclusion of this principle in all these proposals underscores the universal concern for a permanent and sound arrangement whereby international waterways could be converted into instruments of peace and progress, instead of being sources of war and destruction.

Halfway around the globe from Suez is the Panama Canal, itself, just a few years ago a scene of disorder and violence resulting in the severance of diplomatic relations between the United States and Panama.<sup>8</sup> Though the relations appear normal

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<sup>1</sup> S.C. Res. 242. This resolution was originally proposed by the United Kingdom delegation on Nov. 16, 1967. See U.N. Doc. S/PV.1379, Nov. 16, 1967, at 2-8.

<sup>2</sup> For reports on Dr. Jarring's latest activities, see N.Y. Times, July 5, 1968, at 1, col. 8.

<sup>3</sup> S.C. Res. 242, para. 2(a). For full text, see Rosenne, in this symposium, pp. 44, 56.

<sup>4</sup> U.N. Doc. S/8253; proposed on Nov. 20, 1967, U.N. Doc. S/PV.1381, Nov. 20, 1967, at 6-15.

<sup>5</sup> U.N. Doc. S/8229, based upon President Johnson's address of June 19, 1967 (57 DEP'T STATE BULL. 31 (1967)) and proposed by Ambassador Goldberg on Nov. 9, 1967, U.N. Doc. S/PV.1373, at 121-31.

<sup>6</sup> U.N. Doc. S/8227. See statements by the Indian and Nigerian delegations, Nov. 9, 1967, U.N. Doc. S/PV.1373, at 66-95.

<sup>7</sup> U.N. Doc. A/L.523/Rev. 1.

<sup>8</sup> Twenty-four persons were killed and several hundred wounded during a mob violence touched off by a flag incident. The incident occurred when American students hoisted only the American flag at the Balboa High School in the Canal Zone on January 9, 1964, in defiance of a 1963 agreement for Panamanian flags to be flown alongside those of the United States. See N.Y. Times, Jan. 13, 1964, at 1, col. 6; *id.*, Jan. 22, 1964, at 1, col. 2; *id.*, Feb. 17, 1964, at 1, col. 5. See also INTERNATIONAL COMMISSION OF JURISTS, REPORTS ON THE EVENTS IN PANAMA, JANUARY 9-12, 1964 (1964), submitted by the Investigating Committee of the Commission.

For earlier unrests and anti-American sentiments in Panama, see N.Y. Times, Aug. 30, 1956, at 1, col. 7; *id.*, Sept. 16, 1956, at 24, col. 3; *id.*, Sept. 22, 1960, at 14, col. 6; The Times (London), Dec. 24, 1957, at 5, col. 3; *America's Troubled Canal*, FORTUNE, Feb. 1957, at 129.

today, it would be self-deceiving to regard them as anything but a temporary calm before another storm, unless advantage could be taken of the present opportunity to seek a mutually satisfactory solution. And yet negotiation for a new canal treaty between the two countries is reportedly stalled because of disagreement over the composition of the membership of a proposed joint canal commission, with the United States insisting on five Americans and four Panamanians, and Panama demanding equal representation—five each—with the eleventh member to be appointed by the Secretary-General of the United Nations as his Special Representative.

How to get out of these canal quagmires remains a central problem of today. Since time does not permit a discussion of the legal and historical backgrounds of all the canals, the ensuing space will be devoted to a search for possible solutions on a long-term basis.

It would be useful to define the terms of reference at the outset for this paper. The term "internationalization" is open to many meanings: from mere advice or supervision by an international body to complete control and operation of a canal by an international authority. During the 1956 London Conferences on Suez, for example, no less than three versions of "internationalization" were given at different times. In the order of their presentation, they were: the "International Authority for the Suez Canal,"<sup>9</sup> which would assume operation of the Canal; the "Suez Canal Board,"<sup>10</sup> in which Egypt would participate; and the "Suez Canal Users Association,"<sup>11</sup> a consultative organ of the Canal's users and a possible instrument for limiting the financial powers of the new Egyptian authority operating the Canal. At a symposium on "International Control of the Suez Canal," given at the annual meeting of the American Bar Association in Hawaii in August 1967, both the speakers, John Laylin and Richard Young, discussed "internationalization" in terms of complete control and operation of the Canal by an international authority.<sup>12</sup> For the purpose of this paper, "internationalization" means *international supervision over national control or operation of interoceanic canals, pursuant to an international canals convention to be adopted by a United Nations diplomatic conference*. This paper starts from the premise that interoceanic canals, by virtue of their forming integral parts of the territories of the states through which they flow, are in principle under the jurisdiction and control of the territorial states.<sup>13</sup> Exception may be made, but

<sup>9</sup> Tripartite Proposal for the Establishment of an International Authority for the Suez Canal, Aug. 5, 1956, U.S. DEP'T OF STATE PUB. NO. 6392, *THE SUEZ CANAL PROBLEM*, JULY 26-SEPTEMBER 22, 1956, at 44 (1956).

<sup>10</sup> Attachment to the Aide Mémoire Delivered by the Suez Committee at Meeting with President Nasser, Sept. 3, 1956, *id.* at 306-09.

<sup>11</sup> Declaration Providing for the Establishment of a Suez Canal Users Association, Sept. 21, 1956, *id.* at 365-66.

<sup>12</sup> Laylin, *The Case for International Control*, 2 INT'L LAWYER 33 (1967); Young, *The Case for National Control*, *id.* at 39.

<sup>13</sup> General agreement obtains on the principle that, in point of law, a canal situated entirely within

only with the express consent of the territorial state, as in the case of the Panama Canal. At the same time, however, national control is not incompatible with international supervision because of international obligations inherent in an interoceanic canal. This paper is not concerned with the nature of the agency operating the canal, be it a private, public, or a joint enterprise.

Legal bases for transit rights through interoceanic canals are in many respects similar to those over land, sea and air. All seek to harmonize territorial sovereignty with the needs, interests and interdependence of the world community. Indeed, more than three hundred years ago, Grotius already maintained:

lands, rivers, and any part of the sea that has become subject to the ownership of a people, ought to be open to those who, for legitimate reasons, have need to cross over them; as, for instance, if a people . . . desires to carry on commerce with a distant people . . . it is altogether possible that ownership was introduced with the reservation of such a use, which is of advantage to the one people, and involves no detriment to the other. Consequently, it must be held that the originators of private property had such a reservation in view.<sup>14</sup>

In upholding this universal right of transit, Grotius was supported to varying extents by such other founders of international law as Pufendorf<sup>15</sup> and Vattel.<sup>16</sup> It may be of interest to note that in persuading Great Britain to accept the Clayton-Bulwer Treaty of 1850, U.S. Minister to France William C. Rives was instructed to assure Lord Palmerston "that the United States would not, if they could, obtain any exclusive right of privilege in a great highway *which naturally belonged to all mankind*."<sup>17</sup> Again in 1858, when consideration was given to the possible construction of an interoceanic canal through Nicaragua, Secretary of State Lewis Cass was represented by Lord Napier, British Ambassador in Washington, as saying that international law was "not a stationary law," and that a kind of natural right existed for all nations to avail themselves of the interoceanic passage.<sup>18</sup>

That the right of transit is imbued with a natural law quality has been not

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the territory of a state is in no way different from the land territory or the national rivers of that state. See 1 L. OPPENHEIM, *INTERNATIONAL LAW* 480, 484 (8th ed., H. Lauterpacht, 1955) (definition of "national waters"); W. HALL, *A TREATISE ON INTERNATIONAL LAW* 176 (8th ed., A. Higgins, 1924); J. BRIERLY, *THE LAW OF NATIONS* 233 (6th ed., H. Waldock, 1963); O. SVARLIEN, *AN INTRODUCTION TO THE LAW OF NATIONS* 157 (1955); Young, *The Case for National Control*, 2 *INT'L LAWYER* 39-40 (1967).

<sup>14</sup> 2 *DE JURE BELLI AC PACIS LIBRI TRES* ch. 2, § 13 (1646), translated in *CLASSICS OF INTERNATIONAL LAW* 196-97 (J.B. Scott ed. 1925).

<sup>15</sup> 2 *DE JURE NATURAE ET GENTIUM LIBRI OCTO* ch. 3, §§ 5-7 (1688), translated in *CLASSICS OF INTERNATIONAL LAW* 354-61 (J.B. Scott ed. 1934).

<sup>16</sup> *LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* § 123 (1758), translated in *CLASSICS OF INTERNATIONAL LAW* 150-51 (J.B. Scott ed. 1916).

<sup>17</sup> SENATE COMM. ON FOREIGN RELATIONS, *THE PROPOSED INTEROCEANIC CANAL*, S. DOC. NO. 268, 56th Cong., 1st Sess. 2 (1900). (Emphasis added.)

Commenting on the Clayton-Bulwer Treaty, C. Davis of the Senate Foreign Relations Committee said: "In no instance has the Government of the United States intimated an objection to this treaty on account of the features of neutrality and its equal and impartial use by all other nations." *Id.* at 3.

<sup>18</sup> *Fontes Juris Gentium*, Ser. B, I, at 420 (1932).

only advocated by many publicists, but also implied in the *Corfu Channel Case*. In this case Albania contended *inter alia* that the Corfu Channel was not an international highway since it was only of secondary importance and not even a necessary route between two parts of the high seas. The International Court of Justice rejected that argument and said:

the decisive criterion is rather its [the strait's] geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation. Nor can it be decisive that this Strait is not a necessary route between two parts of the high seas, but only an alternative passage between the Aegean and the Adriatic Seas. It has nevertheless been a useful route for maritime traffic.<sup>19</sup>

In light of all the above, E. Lauterpacht was moved to suggest that the right of transit existed when (a) states claiming the right can justify it by reference to considerations of necessity or convenience, and (b) the exercise of the right will cause no harm or prejudice to the transit state.<sup>20</sup> It finds its counterparts in the municipal law sphere in such doctrines as the "right of way" and "way of necessity."

Despite its natural right quality, the right of transit remains what Mr. Lauterpacht would call an "imperfect right"—distinguishable from "perfect right" in the want of enforceability.<sup>21</sup> What is needed as an intermediate step is the conclusion of treaties to govern the exercise of that right. Since an "imperfect right" is nevertheless a legal right, states do not have an absolute freedom *not* to conclude such treaties. Uniform treaty provisions may in turn become a source of customary international law.<sup>22</sup>

But whether one traces the right of transit to natural law or customary international law origin, its codification on a world-wide basis is consistent with the modern development of international law. Article 23(e) of the Covenant of the League of Nations specifically obligated members "to make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League." Pursuant to this provision, a number of important treaties were concluded between the two world wars.<sup>23</sup> Since the establishment of the United Nations, the process of crystallizing customary international law into conventional international law has been quickened under Article 13(1)(a) of the Charter.<sup>24</sup> On the subject of freedom of transit, the Geneva Conventions on the Law of the Sea not only confirmed the right of innocent passage over the territorial sea

<sup>19</sup> [1949] I.C.J., 28.

<sup>20</sup> Lauterpacht, *Freedom of Transit in International Law*, 44 *TRANSACTIONS OF THE GROTIUS SOCIETY* 332 (1958-59).

<sup>21</sup> *Id.* at 347.

<sup>22</sup> See LORD McNAIR, *LAW OF THE AIR* 9 (3d ed., M. Kerr & A. Evans, 1964), in which he discussed the relationship between uniform rules in a series of international air navigation conventions and customary international law (international air law).

<sup>23</sup> *E.g.*, the two Barcelona Conventions of 1921 relating to Waterways of International Concern (1 M. HUDSON, *INTERNATIONAL LEGISLATION* 638 (1931)) and Freedom of Transit on Land (*id.* at 625); and the 1923 Conventions Relating to the International Regime of Railways (2 *id.* at 1130), and the Transmission in Transit of Electric Power (*id.* at 1173).

<sup>24</sup> See Lee, *The International Law Commission Re-examined*, 59 *AM. J. INT'L L.* 545, 567 (1965).

and straits,<sup>25</sup> but also called for agreement between land-locked states and coastal states with a view to ensuring the former the right of free access to the sea.<sup>26</sup> The right was subsequently amplified and systematized by the 1965 Convention on Transit Trade of Land-locked States.<sup>27</sup>

With the completion of the codification of transit rights of land-locked states and, earlier, those over the territorial sea and air, the logical next step would be codification of the law of interoceanic canals for reasons set forth below.

In his excellent treatise, *The Law of International Waterways*, Professor Baxter outlined four premises upon which rights of passage through interoceanic canals have been based:<sup>28</sup> The first is the doctrine of "international servitude," which Professor Baxter regards as occupying "at best a questionable position in international law." He explained that even though *The S.S. Wimbledon*<sup>29</sup> offered an opportunity for the Permanent Court of International Justice to decide the question of free passage on that doctrine, the Court expressly declined to do so.

The second is the doctrine of third-party beneficiaries: States not parties to a treaty conferring rights upon them may in their own right assert the rights so conferred. This doctrine has been used to justify third states' rights to the many interoceanic canals treaties, in particular, the Constantinople Convention of 1888,<sup>30</sup> the Hay-Pauncefote Convention of 1901<sup>31</sup> and the Hay-Varilla Convention of 1903.<sup>32</sup> However, not only is there a serious doctrinal dispute over the validity of third states' rights, but the Permanent Court itself did not apply the doctrine with consistency.<sup>33</sup> Even if such rights exist, they may be terminated or modified by the original parties to the treaty. Although the Draft Articles of the Law of Treaties adopted by the International Law Commission in 1966 recognize the validity of third states' rights,<sup>34</sup>

<sup>25</sup> See Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, section 3, Right of Innocent Passage, 516 U.N.T.S. 205, 52 AM. J. INT'L L. 834, 837 (1958).

<sup>26</sup> Convention on the High Seas, April 29, 1958, art. 3, 450 U.N.T.S. 82; [1962] 13 U.S.T. 2312; T.I.A.S. No. 5200.

<sup>27</sup> U.N. Doc. TD/TRANSIT/9, July 9, 1965. This Convention came into force on June 9, 1967. See MULTILATERAL TREATIES IN RESPECT OF WHICH THE SECRETARY-GENERAL PERFORMS DEPOSITARY FUNCTIONS: LIST OF SIGNATURES, RATIFICATIONS, ACCESSORIES ETC., AS OF 31 DECEMBER 1967, at 182 (1968).

<sup>28</sup> The following passages are, unless otherwise noted, summarized from R. BAXTER, *THE LAW OF INTERNATIONAL WATERWAYS* 177-84 (1964).

<sup>29</sup> [1923] P.C.I.J., ser. A, No. I, at 24.

<sup>30</sup> 15 G. MARTENS, *NOUVEAU RECUEIL GÉNÉRAL DE TRAITÉS* (2d ser.) 414 (1885-86); 76 BRITISH AND FOREIGN STATE PAPERS 4 (1884-85).

<sup>31</sup> Treaty with Great Britain to Facilitate the Construction of a Ship Canal, 32 Stat. 1903 (1901); T.S. No. 401.

<sup>32</sup> Convention with the Republic of Panama for the Construction of a Ship Canal to Connect the Waters of the Atlantic and Pacific Oceans, 33 Stat. 2234 (1903); T.S. No. 431.

<sup>33</sup> Compare the court's decision in Case Concerning Certain German Interests in Polish Upper Silesia, [1926] P.C.I.J., ser. A, No. 7, at 28-29, and the Chorzow Factory Case, [1928] P.C.I.J., ser. A, No. 17, at 45, with that in the Case of the Free Zones of Upper Savoy and the District of Gex, [1929] P.C.I.J., ser. A, No. 22, at 20.

<sup>34</sup> See International Law Commission, art. 32, Draft Articles on the Law of Treaties, U.N. Doc. A/CN.4/190, July 22, 1966; 21 U.N. GAOR, Supp. 9 (A/6309/Rev. 1); [1966] 2 Y.B. INT'L L. COMM'N 181.

as well as limit the original parties' freedom to revoke or modify the treaty creating such rights,<sup>35</sup> they remain to be adopted by diplomatic conferences scheduled for 1968 and 1969.<sup>36</sup>

The third view is that "treaties which open rivers and canals to general or limited use by the vessels of states other than the parties to the instrument in question are dispositive in nature," hence creating "real rights which are attached to a territory and are therefore not dependent upon the treaty creating them." These real rights are said to exist independently of international servitudes. Again, this view is open to the same criticism as that directed against third states' rights. In addition, it is not clear whether this doctrine can satisfactorily account for legal privileges which may be claimed by states not parties to the dispositive treaty nor successors to the original parties.

The fourth theory is that dedication of a waterway by a state to international use, if relied upon, creates legally enforceable rights in favor of the shipping of the international community. Such dedication may take the form of a treaty, a unilateral declaration, or perhaps even a concession. This dedication-reliance theory is preferred by Professor Baxter, who improved upon the Permanent Court of International Justice's decision in *The S.S. Wimbledon*,<sup>37</sup> wherein the Court spoke of Kiel as "an artificial waterway connecting two open seas . . . permanently dedicated to the use of the whole world." According to Professor Baxter, "Justice does not demand that third states acquire any rights until there has been actual international use of the waterway." Such rights should not be gained by third states "unless the dedication has induced them to make some measurable use of the canal or of the river and to make it one of their shipping routes."<sup>38</sup>

While this theory is of much jurisprudential interest, it may at best justify the rights of nonsignatories to the use of the existing major canals, which have already been so "dedicated." It would not, however, justify third states' rights to the use of any new canal, *e.g.*, the proposed sea-level canal in Central America, if the canal builder or the territorial state refuses to give similar dedication. In the absence of such a dedication, may third states' shipping or cargoes be barred or discriminated against? To answer affirmatively would surely violate the natural right of transit or customary international law governing canals usage.

A better solution would be for the United Nations to convene a diplomatic conference which would synthesize customary international law on canals into conventional international law; standardize the various rules and regulations pertaining to navigation, neutralization, jurisdiction over vessels in transit, tolls and other administrative matters; and, in general, harmonize the interests of the users with those

<sup>35</sup> International Law Commission, *supra* note 34, art. 33.

<sup>36</sup> See G.A. Res. 2166(XXI) of Dec. 5, 1966, 21 U.N. GAOR, Supp. 16, at 95 (A/6316).

<sup>37</sup> See note 29 *supra*.

<sup>38</sup> Baxter, *supra* note 28, at 183.

of the proprietors or operators of the canals. As has been stated earlier, customary international law has increasingly been crystallized into conventional international law,<sup>39</sup> which means relations between states are more and more governed by treaties to which they are signatories. This emphasis on treaty as the basis for rights and duties of signatories is reflected in the increasing number of multilateral treaties concluded by diplomatic conferences under the United Nations auspices, the most recent of which are the Vienna Conventions on Diplomatic and Consular Relations.<sup>40</sup> The proposed United Nations conference on interoceanic canals and the resultant convention would merely follow this codification trend, while simultaneously filling a most important gap which has given rise to innumerable disputes and conflicts. At the same time, since the convention must be signed and ratified by both the territorial and user states, it would be based on the sovereign equality of states, free of the "unequal treaty" stigma associated with some of the earlier canals treaties. This treaty approach would also avoid the difficulties inherent in the four theories which have been used to justify the free navigation of the interoceanic canals by all nations. In addition, it would constitute, especially to the naturalists, the requisite intermediate step to transform a hitherto "imperfect right" of transit to a "perfect right."<sup>41</sup>

More specifically, with respect to the Panama Canal, both the United States and Panama could stand to gain by the internationalization of the existing as well as the projected sea-level canals. For the United States, its agreement to internationalization would not impair its real interests in the operation and security of the Canal.<sup>42</sup> Such an agreement would be consistent with its advocacy of the internationalization of the Suez Canal proposed during the London Con-

<sup>39</sup> See note 23 *supra*.

<sup>40</sup> For the background and significance of these Conventions, see LUKE T. LEE, *THE VIENNA CONVENTION ON CONSULAR RELATIONS* (1966); Cahier & Lee, *Vienna Conventions on Diplomatic and Consular Immunities*, INT'L CONC. No. 571 (forthcoming in January 1969).

<sup>41</sup> See text accompanying notes 21 and 22 *supra*.

<sup>42</sup> In their elucidating article, *Control of the Panama Canal: An Obsolete Shibboleth?*, 37 FOREIGN AFFAIRS 417-18 (1959), Professors Martin B. Travis and James T. Watkins wrote:

"Internationalization would leave unimpaired the real interests of the United States, namely, the preservation of the Canal and access to it, good service at low cost, and a voice in the operation of the Canal. The security of the Canal would be, if anything, enhanced. Already hopelessly vulnerable, an internationalized Canal might seem to a potential aggressor a less attractive target than one under the exclusive jurisdiction of the United States. In any case, the United States would be entitled to come to the defense of the Canal, if defense were feasible, by acting within the United Nations under Article 51 of the Charter or the 'Uniting for Peace' procedures. Such action in defense of an international agency would enjoy moral and practical support which the defense of an exclusive interest claimed by the United States could not evoke. . . .

"Good service at a reasonable cost could also be expected from an international agency. Indeed, from a strictly economic standpoint internationalization would offer every hope of bringing an improvement. Less exposed to special-interest pressures than is the United States Congress, a Panama Canal Commission [under the United Nations] could more readily determine an optimum toll schedule for facilitating the flow of traffic and yet building up reserves for needed improvements. And, finally, participation in the operation of the Canal would be ensured as long as the United States remained one of the principal users."





mistakes. It has sought a balance of interests between land-locked states and transit states. But above all, it contains a compulsory arbitration clause as an integral part of the convention. Because of the importance of this convention, its major provisions may be briefly summarized.

Article 2 (freedom of transit) obligates contracting states to "facilitate traffic in transit without discrimination as to the place of origin, departure, entry, exit or destination or in any circumstances relating to the ownership of the goods or the ownership, place of registration or flag of vessels." The Contracting States agree to "apply administrative and customs measures permitting the carrying out of free, uninterrupted and continuous traffic in transit,"<sup>50</sup> as well as to charge reasonable rates for the use of transit facilities so as to "facilitate traffic in transit as much as possible."<sup>51</sup> In case of an emergency<sup>52</sup> or war<sup>53</sup> or on grounds of public health and security,<sup>54</sup> exceptions may be made to the above provisions. The danger of abuse of these exceptions is, however, minimized by Article 16, which provides for compulsory arbitration in the event that a dispute arising from the interpretation or application of the provisions of the Convention (including those concerning security and emergency measures) could not be settled by direct negotiation or other peaceful means within a period of nine months. An arbitration commission would be created to consist of three members: one to be appointed by each of the disputing parties, with the third to be mutually agreed upon between the parties, or, failing an agreement within three months, to be appointed by the President of the International Court of Justice. If any of the parties fail to make an appointment within three months, the President of the International Court of Justice shall fill the remaining vacancy or vacancies.<sup>55</sup> Unlike the Geneva Conventions on the Law of the Sea and most

<sup>50</sup> *Id.*, Art. 5.

<sup>51</sup> *Id.*, Art. 4.

<sup>52</sup> *Id.*, Art. 12.

<sup>53</sup> *Id.*, Art. 13.

<sup>54</sup> *Id.*, Art. 11.

<sup>55</sup> This provision was designed as a safeguard against the exigency in which one of the parties might refuse to appoint its own representative to an arbitration commission, thus throwing a monkey wrench into the arbitral process. It may be recalled that in the peace treaties concluded in Paris in 1947, Bulgaria, Hungary and Rumania agreed that all persons within their jurisdiction would be entitled to basic human rights and fundamental freedoms. Provisions were made for disputes concerning the interpretation or execution of the treaties to be settled by certain procedures which included arbitration by a treaty commission. The commission would be composed of one representative of each party and a third member, selected by mutual agreement of the two parties from nationals of a third country. Should the two parties fail to agree within a period of one month upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either party to make the appointment.

Failure of these countries to appoint their representatives to the treaty commissions following charges of their violations of human rights prompted the General Assembly to request advisory opinions from the International Court of Justice in October 1949. Among the questions were whether the three states were obligated to appoint their representatives to the treaty commissions and, if so, whether the Secretary-General would be authorized to appoint the third member of the commission upon the request of one party in the event the other party failed to appoint its representative. The Court, while holding that the obligation of the three states to appoint their representatives to the treaty commissions existed, interpreted the terms of the treaties restrictively to preclude the possibility of the Secretary-General's

of the other recent multilateral conventions which resort to compulsory judicial settlement by the International Court of Justice under optional protocols, the 1965 Convention, by including the disputes clause in the text itself, has the merit of leaving no potential dispute incapable of resolution while at the same time avoiding the cumbersome machinery of the International Court of Justice, whose impartiality and efficacy have been much questioned anyway, especially by developing countries, since the *South-West Africa* case.<sup>56</sup>

The question concerning the desirability of including a permanent machinery in a United Nations-sponsored convention for the purpose of supervising the implementation of its provisions has not been answered with uniformity. On the one hand, there are, for instance, the International Civil Aviation Organization, a specialized agency,<sup>57</sup> charged with the functions of implementing the provisions of the Convention on International Civil Aviation,<sup>58</sup> and the Commission on Narcotic Drugs, the responsible arm of the various instruments of narcotics control.<sup>59</sup> On the other hand, central supervisory organs are lacking in such treaties as the Geneva Conventions on the Law of the Sea and the Convention on Transit Trade of Land-locked States.

In choosing between these precedents, consideration should be given to whether the nature of the subject matter is such as to lend itself to centralized supervision and whether such supervision is warranted in the light of the present situation. Applying these tests to the canals, it would appear that a central supervisory organ ought to be established with a balanced representation among transit states, major users and third states. The reasons for such an organ, say an International Canals Commission, may be briefly explained.

In the first place, the number of interoceanic canals, both actual and potential, is small, which in itself would facilitate supervision. Since interoceanic canals share many similar characteristics and problems, a regular exchange of information and experiences through the proposed commission would be of mutual benefit. Indeed, the commission might even render technical assistance to improve existing canal facilities or help develop new canals.

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appointment of the third member unless both parties to the dispute had appointed their representatives to the commission. See Advisory Opinion on Interpretation of Peace Treaties with Bulgaria, Hungary and Rumania, in [1950] I.C.J. 77, 226-30.

<sup>56</sup> *South West Africa, Second Phase, Judgment*, [1966] I.C.J. 6

<sup>57</sup> See Agreement between the United Nations and the ICAO, which came into force on May 13, 1947; text in YEARBOOK OF THE UNITED NATIONS 1946-47, at 741-45.

<sup>58</sup> The Convention was signed in Chicago on December 7, 1944, text in *id.* at 728-40.

<sup>59</sup> The Single Convention on Narcotic Drugs of 1961 came into force on December 13, 1964, to replace gradually the nine former international narcotics instruments adopted between 1912 and 1953. While the Economic and Social Council remains the chief policy-making body in the international narcotics control systems, the responsible arm is the Commission on Narcotic Drugs assisted by the International Narcotics Control Board, which came into existence in March 1968. YEARBOOK OF THE UNITED NATIONS, 1964, at 339-44; U.N. OFFICE OF PUBLIC INFORMATION, INTERNATIONAL CONTROL OF NARCOTIC DRUGS (1965); and annual reports of the Commission on Narcotic Drugs.

Shipping concerns throughout the world are constantly affected by changes of canal tolls, transit facilities, sanitary and customs regulations, pilotage, jurisdiction over vessels in transit, and emergency measures. Among the functions of the proposed commission might well be the collection and periodic publication of such information as well as traffic statistics.

Where a dispute has arisen over the interpretation or application of the provisions of the proposed convention, the commission might perform the services of fact-finding, mediation, or bringing the arbitral machinery into play. Upon the settlement of the disputes, the commission should publicize the nature and fact of the dispute as well as the terms of the settlement, thereby building up a useful body of case law.

But, above all, the establishment of an international canals commission linked to the United Nations could not fail to have a certain stabilizing influence over the tension-ridden canals of the world.

Will the United Nations, having assisted in the Suez clearance operation in 1957<sup>60</sup> and the stabilization of the military front since 1967, be prepared to take the next forward step toward a long-term settlement of the world's canal problems by calling a diplomatic conference on interoceanic canals and cooperating in the implementation of the ensuing convention?

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<sup>60</sup> The initial costs for clearing the Suez Canal, which amounted to about \$8,200,000, were borne by the United Nations. See Clearance of the Suez Canal, Report of the Secretary-General 12-13 (A/3719) (1957). Reimbursement was secured through a 3% surcharge on Canal tolls beginning in September 1958 over a two and one-half year period. G.A. Res. 1212(XII), 12 U.N. GAOR, Supp. 18, at 59 (A/3805); Reimbursement of the Cost of Clearing the Suez Canal, Report by the Secretary-General, Aug. 1, 1958 (A/3862); Financial Report and Accounts for the Year Ended 31 December 1961 and Report of the Board of Auditors, 17 U.N. GAOR, Supp. 6, at 7-8 (A/5206).