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INTERNATIONAL COURT OF JUSTICE

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MUNLawS 2026

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INTRODUCTION

The following list of basic materials contains materials from international treaties, legal textbooks, international jurisprudence, and legal scholars' articles about law of the sea, regimes governing maritime passages, State responsibility and other related topics.

They are meant to provide the reader with a basic legal framework, the relevant legal principles, terminology, and treaty provisions necessary to identify and analyse the key issues arising from the facts of the case.

While the list is not exhaustive, it should provide a sufficient starting point for understanding the applicable legal framework and conducting further research into more specific questions.

The included materials should be regarded as necessary reading to ensure that all participants are adequately prepared for the conference and to facilitate an effective and meaningful simulation of proceedings before the International Court of Justice (ICJ).

TREATIES

The Treaty of Versailles¹

PART XII. PORTS, WATERWAYS AND RAILWAYS.

SECTION VI. CLAUSES RELATING TO THE KIEL CANAL.

NOTE:

This part of the Versailles Treaty illustrates the establishment of a specific legal regime governing the use and navigation of an international waterway, the Kiel Canal. Its provisions address, among other matters, the freedom of navigation through the Canal and the obligations imposed on Germany concerning access and non-discrimination.

ARTICLE 380.

The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality.

ARTICLE 381.

The nationals, property and vessels of all Powers shall, in respect of charges, facilities, and in all other respects, be treated on a footing of perfect equality in the use of the Canal, no distinction being made to the detriment of nationals, property and vessels of any Power between them and the nationals, property and vessels of Germany or of the most favoured nation.

No impediment shall be placed on the movement of persons or vessels other than those arising out of police, customs, sanitary, emigration or immigration regulations and those relating to the import or export of prohibited goods. Such regulations must be reasonable and uniform and must not unnecessarily impede traffic.

¹ *Treaty of Versailles*, 1919, 225 CTS 188.



ARTICLE 382.

Only such charges may be levied on vessels using the Canal or its approaches as are intended to cover in an equitable manner the cost of maintaining in a navigable condition, or of improving, the Canal or its approaches, or to meet expenses incurred in the interests of navigation. The schedule of such charges shall be calculated on the basis of such expenses, and shall be posted up in the ports.

These charges shall be levied in such a manner as to render any detailed examination of cargoes unnecessary, except in the case of suspected fraud or contravention.

ARTICLE 383.

Goods in transit may be placed under seal or in the custody of customs agents; the loading and unloading of goods, and the embarkation and disembarkation of passengers, shall only take place in the ports specified by Germany.

ARTICLE 384.

No charges of any kind other than those provided for in the present Treaty shall be levied along the course or at the approaches of the Kiel Canal.

ARTICLE 385.

Germany shall be bound to take suitable measures to remove any obstacle or danger to navigation, and to ensure the maintenance of good conditions of navigation. She shall not undertake any works of a nature to impede navigation on the Canal or its approaches.

ARTICLE 386.

In the event of violation of any of the conditions of Article 380 to 386, or of disputes as to the interpretation of these Articles, any interested Power can appeal to the jurisdiction instituted for the purpose by the League of Nations.



In order to avoid a reference of small questions to the League of Nations, Germany will establish a local authority at Kiel qualified to deal with disputes in the first instance and to give satisfaction so far as possible to complaints which may be presented through the consular representatives of the interested Powers.

The Convention of Constantinople²

NOTE:

This convention established the principle of free navigation through the Suez Canal. It regulated the Canal's use by vessels of all nations and ensured that navigation remained free and open in both times of peace and war. It therefore provides a foundational example of an international legal regime for an important artificial waterway and is useful for examining questions concerning freedom of navigation, non-discrimination, and the rights and obligations of the territorial State in relation to an international maritime passage.

Following is the text of the Convention, guaranteeing free passage through the Suez Canal, signed by Great Britain, Germany, Austria-Hungary, Spain, France, Italy, the Netherlands, Russia and Turkey.

Article I

The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.

Consequently, the High Contracting Parties agree not in any way to interfere with the free use of the Canal, in time of war as in time of peace.

The Canal shall never be subjected to the exercise of the right of blockade.

Article II

² *Convention of Constantinople*, 1888, 171 CTS 241.

The High Contracting Parties, recognizing that the Fresh-Water Canal is indispensable to the Maritime Canal, take note of the engagements of His Highness the Khedive towards the Universal Suez Canal Company as regards the Fresh-Water Canal; which engagements are stipulated in a Convention bearing date the 18th March, 1863, containing an exposé and four Articles.

They undertake not to interfere in any way with the security of that Canal and its branches, the working of which shall not be exposed to any attempt at obstruction.

Article III

The High Contracting Parties likewise undertake to respect the plant, establishments, buildings, and works of the Maritime Canal and of the Fresh-Water Canal.

Article IV

The Maritime Canal remaining open in time of war as a free passage, even to the ships of war of belligerents, according to the terms of Article I of the present Treaty, the High Contracting Parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the Canal, shall be committed in the Canal and its ports of access, as well as within a radius of 3 marine miles from those ports, even though the Ottoman Empire should be one of the belligerent Powers.

Vessels of war of belligerents shall not revictual or take in stores in the Canal and its ports of access, except in so far as may be strictly necessary. The transit of the afore- said vessels through the Canal shall be effected with the least possible delay, in accordance with the Regulations in force, and without any other intermission than that resulting from the necessities of the service.

Their stay at Port Said and in the roadstead of Suez shall not exceed twenty-four hours, except in case of distress. In such case they shall be bound to leave as soon as possible. An interval of twenty-four hours, except in case of distress. In such case they shall be bound to leave as soon as possible. An interval of twenty-four hours shall always elapse between the sailing of a belligerent ship from one of the ports of access and the departure of a ship belonging to the hostile Power.

Article V

In time of war belligerent Powers shall not disembark nor embark within the Canal and its ports of access either troops, munitions, or materials of war. But in case of an accidental hindrance in the Canal, men may be embarked or disembarked at the ports of access by detachments not exceeding 1,000 men, with a corresponding amount of war material.

Article VI

Prizes shall be subjected, in all respects, to the same rules as the vessels of war of belligerents.

Article VII

The Powers shall not keep any vessel of war in the waters of the Canal (including Lake Timsah and the Bitter Lakes) .

Nevertheless, they may station vessels of war in the ports of access of Port Said and Suez, the number of which shall not exceed two for each Power.

This right shall not be exercised be exercised by belligerents.

Article VIII

The Agents in Egypt of the Signatory Powers of the present Treaty shall be charged to watch over its execution. In case of any event threatening the security or the free passage of the Canal, they shall meet on the summons of three of their number under the presidency of their Doyen [senior member], in order to proceed to the necessary verifications. They shall inform the Khedivial Government of the danger which they may have perceived, in order that that Government may take proper steps to insure the protection and the free use of the Canal. Under any circumstances, they shall meet once a year to take notice of the due execution of the Treaty.

The last-mentioned meetings shall take place under the presidency of a Special Commissioner nominated for that purpose by the Imperial Ottoman Government. A

Commissioner of the Khedive may also take part in the meeting, and may preside over it in case of the absence of the Ottoman Commissioner.

They shall especially demand the suppression of any work or the dispersion of any assemblage on either bank of the canal, the object or effect of which might be to interfere with the liberty and the entire security of the navigation.

Article IX

The Egyptian Government shall, within the limits of its powers resulting from the Firmans, and under the conditions provided for in the present Treaty, take the necessary measures for insuring the execution of the said Treaty.

In case the Egyptian Government should not have sufficient means at its disposal, it shall call upon the Imperial Ottoman Government, which shall take the necessary measures to respond to such appeal; shall give notice thereof to the Signatory Powers of the Declaration of London of the 17 th March, 1885; and shall, if necessary, concert with them on the subject.

The provisions of Articles IV, V, VII and VIII shall not interfere with the measures which shall be taken in virtue of the present Article.

Article X

Similarly, the provisions of Articles IV, V, VII and VIII shall not interfere with the measures which His Majesty the Sultan and His Highness the Khedive, in the name of His Imperial Majesty, and within the limits of the Firmans granted, might find it necessary to take for securing by their own forces the defence of Egypt and the maintenance of public order.

In case His Imperial Majesty the Sultan, or His Highness the Khedive, should find it necessary to avail themselves of the exceptions for which this Article provides, the Signatory Powers of the Declaration of London shall be notified thereof by the Imperial Ottoman Government.

It is likewise understood that the provisions of the four Articles aforesaid shall in no case occasion any obstacle to the measures which the Imperial Ottoman Government may

think it necessary to take in order to insure by its own forces the defence of its other possessions situated on the eastern coast of the Red Sea.

Article XI

The measures which shall be taken in the cases provided for by Articles IX and X of the present Treaty shall not interfere with the free use of the Canal. In the same cases, the erection of permanent fortifications contrary to the provisions of Article VIII is prohibited.

Article XII

The High Contracting Parties, by application of the principle of equality as regards the free use of the Canal, a principle which forms one of the bases of the present Treaty, agree that none of them shall endeavour to obtain with respect to the Canal territorial or commercial advantages or privileges in any international arrangements which may be concluded. Moreover, the rights of Turkey as the territorial Power are reserved.

Article XIII

With the exception of the obligations expressly provided by the clauses of the present Treaty, the sovereign rights of His Imperial Majesty the Sultan, and the rights and immunities of His Highness the Khedive, resulting from the Firmans, are in no way affected.

Article XIV

The High Contracting Parties agree that the engagements resulting from the present Treaty shall not be limited by the duration of the Acts of Concession of the Universal Suez Canal Company.

Article XV

The stipulations of the present Treaty shall not interfere with the sanitary measures in force in Egypt.

Article XVI



The High Contracting Parties undertake to bring the present Treaty to the knowledge of the States which have not signed it, inviting them to accede to it.

Article XVII

The present Treaty shall be ratified, and the ratifications shall be exchanged at Constantinople, within the space of one month, or sooner if possible. In faith of which the respective Plenipotentiaries have signed the present Treaty, and have affixed to it the seal of their arms.

Done at Constantinople,
the 29th day of the month of October, in the year 1888.

United Nations Convention on the Law of the Sea (UNCLOS)³

Part III – STRAITS USED FOR INTERNATIONAL NAVIGATION

NOTE:

Part III of UNCLOS provides the central legal framework for straits used for international navigation and is therefore essential for analysing questions concerning maritime passages. The delegates are, however, encouraged to familiarize themselves with the entirety (or with as much as possible) of this convention.

SECTION 1. GENERAL PROVISIONS

Article 34

Legal status of waters forming straits used for international navigation

1. The regime of passage through straits used for international navigation established in this Part shall not in other respects affect the legal status of the waters forming such

³ United Nations, *United Nations Convention on the Law of the Sea*, 1982, 1833 UNTS 3.

straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil.

2. The sovereignty or jurisdiction of the States bordering the straits is exercised subject to this Part and to other rules of international law.

Article 35

Scope of this Part

Nothing in this Part affects:

- (a) any areas of internal waters within a strait, except where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such;
- (b) the legal status of the waters beyond the territorial seas of States bordering straits as exclusive economic zones or high seas; or
- (c) the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits.

Article 36

High seas routes or routes through exclusive economic zones through straits used for international navigation

This Part does not apply to a strait used for international navigation if there exists through the strait a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics; in such routes, the other relevant Parts of this Convention, including the provisions regarding the freedoms of navigation and overflight, apply.

SECTION 2. TRANSIT PASSAGE

Article 37

Scope of this section

This section applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

Article 38

Right of transit passage

1. In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.

2. Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.

3. Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention.

Article 39

Duties of ships and aircraft during transit passage

1. Ships and aircraft, while exercising the right of transit passage, shall: (a) proceed without delay through or over the strait;

(b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress; (d) comply with other relevant provisions of this Part.

2. Ships in transit passage shall:

(a) comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea;

(b) comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships.

3. Aircraft in transit passage shall:

(a) observe the Rules of the Air established by the International Civil Aviation Organization as they apply to civil aircraft; state aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation;

(b) at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.

Article 40

Research and survey activities

During transit passage, foreign ships, including marine scientific research and hydrographic survey ships, may not carry out any research or survey activities without the prior authorization of the States bordering straits.

Article 41

Sea lanes and traffic separation schemes in straits used for international navigation

1. In conformity with this Part, States bordering straits may designate sea lanes and prescribe traffic separation schemes for navigation in straits where necessary to promote the safe passage of ships.

2. Such States may, when circumstances require, and after giving due publicity thereto, substitute other sea lanes or traffic separation schemes for any sea lanes or traffic separation schemes previously designated or prescribed by them.

3. Such sea lanes and traffic separation schemes shall conform to generally accepted international regulations.

4. Before designating or substituting sea lanes or prescribing or substituting traffic separation schemes, States bordering straits shall refer proposals to the competent international organization with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the States bordering the straits, after which the States may designate, prescribe or substitute them.

5. In respect of a strait where sea lanes or traffic separation schemes through the waters of two or more States bordering the strait are being proposed, the States concerned shall cooperate in formulating proposals in consultation with the competent international organization.

6. States bordering straits shall clearly indicate all sea lanes and traffic separation schemes designated or prescribed by them on charts to which due publicity shall be given.

7. Ships in transit passage shall respect applicable sea lanes and traffic separation schemes established in accordance with this article.

Article 42

Laws and regulations of States bordering straits relating to transit passage

1. Subject to the provisions of this section, States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of all or any of the following:

- (a) the safety of navigation and the regulation of maritime traffic, as provided in article 41;
- (b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait;

(c) with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear;

(d) the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits.

2. Such laws and regulations shall not discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage as defined in this section.

3. States bordering straits shall give due publicity to all such laws and regulations.

4. Foreign ships exercising the right of transit passage shall comply with such laws and regulations.

5. The flag State of a ship or the State of registry of an aircraft entitled to sovereign immunity which acts in a manner contrary to such laws and regulations or other provisions of this Part shall bear international responsibility for any loss or damage which results to States bordering straits.

Article 43

Navigational and safety aids and other improvements and the prevention, reduction and control of pollution

User States and States bordering a strait should by agreement cooperate:

(a) in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation; and

(b) for the prevention, reduction and control of pollution from ships.

Article 44

Duties of States bordering straits

States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage.

SECTION 3. INNOCENT PASSAGE

Article 45

Innocent passage

1. The regime of innocent passage, in accordance with Part II, section 3, shall apply in straits used for international navigation:

- (a) excluded from the application of the regime of transit passage under article 38, paragraph 1; or
- (b) between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State.

There shall be no suspension of innocent passage through such straits.

Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal⁴

NOTE:

This treaty establishes a treaty-based regime of permanent neutrality for an international canal. It combines a general obligation of non-discriminatory access with provisions concerning the protection and security of the canal, providing that the canal shall remain open to peaceful transit by vessels of all nations. At the same time, the Parties are obligated to protect the canal against threats to its neutrality.

We have attached the treaty in its original form to preserve its structure.

⁴ *Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal*, 7 September 1977, 1161 UNTS 177.

No. 18342

**UNITED STATES OF AMERICA
and
PANAMA**

**Treaty concerning the permanent neutrality and operation
of the Panama Canal (with annexes). Signed at Wash-
ington on 7 September 1977**

Authentic texts: Spanish and English.

*Registered by the Secretary-General of the Organization of American States,
acting on behalf of the Parties, on 13 March 1980.*

**ÉTATS-UNIS D'AMÉRIQUE
et
PANAMA**

**Traité concernant la neutralité permanente et le fonctionne-
ment du canal de Panama (avec annexes). Signé à
Washington le 7 septembre 1977**

Textes authentiques : espagnol et anglais.

*Enregistré par le Secrétaire général de l'Organisation des États américains,
agissant au nom des Parties, le 13 mars 1980.*

TREATY¹ CONCERNING THE PERMANENT NEUTRALITY AND OPERATION OF THE PANAMA CANAL

The United States of America and the Republic of Panama have agreed upon the following:

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

Article II. The Republic of Panama declares the neutrality of the Canal in order that both in time of peace and in time of war it shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality, so that there will be no discrimination against any nation, or its citizens or subjects, concerning the conditions or charges of transit, or for any other reason, and so that the Canal, and therefore the Isthmus of Panama, shall not be the target of reprisals in any armed conflict between other nations of the world. The foregoing shall be subject to the following requirements:

- (a) Payment of tolls and other charges for transit and ancillary services, provided they have been fixed in conformity with the provisions of Article III (c);
- (b) Compliance with applicable rules and regulations, provided such rules and regulations are applied in conformity with the provisions of Article III;
- (c) The requirement that transiting vessels commit no acts of hostility while in the Canal; and
- (d) Such other conditions and restrictions as are established by this Treaty.

Article III. 1. For purposes of the security, efficiency and proper maintenance of the Canal the following rules shall apply:

- (a) The Canal shall be operated efficiently in accordance with conditions of transit through the Canal, and rules and regulations that shall be just, equitable and reasonable, and limited to those necessary for safe navigation and efficient, sanitary operation of the Canal;
- (b) Ancillary services necessary for transit through the Canal shall be provided;
- (c) Tolls and other charges for transit and ancillary services shall be just, reasonable, equitable and consistent with the principles of international law;
- (d) As a pre-condition of transit, vessels may be required to establish clearly the financial responsibility and guarantees for payment of reasonable and adequate

¹ Came into force on 1 October 1979, i.e., six months after the date of the exchange of the instruments of ratification, which took place at Panama on 1 April 1979, in accordance with article VIII. The instruments of ratification by the Government of the United States was accompanied by amendments, conditions, reservations and understandings* which were accepted in the instrument of ratification by the Government of Panama which likewise included certain understandings and declarations.**

* See p. 193 of this volume for the texts of the amendments, conditions, reservations and understandings made upon ratification by the Government of the United States of America.

** See p. 201 of this volume for the texts of the understandings and declarations made upon ratification by the Government of Panama.

indemnification, consistent with international practice and standards, for damages resulting from acts or omissions of such vessels when passing through the Canal. In the case of vessels owned or operated by a State or for which it has acknowledged responsibility, a certification by that State 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 shall be deemed sufficient to establish such financial responsibility;

- (e) Vessels of war and auxiliary vessels of all nations shall at all times be entitled to transit the Canal, irrespective of their internal operation, means of propulsion, origin, destination or armament, without being subjected, as a condition of transit, to inspection, search or surveillance. However, such vessels may be required to certify that they have complied with all applicable health, sanitation and quarantine regulations. In addition, such vessels shall be entitled to refuse to disclose their internal operation, origin, armament, cargo or destination. However, auxiliary vessels may be required to present written assurances, certified by an official at a high level of the government of the State requesting the exemption, that they are owned or operated by that government and in this case are being used only on government non-commercial service.

2. For the purposes of this Treaty, the terms "Canal," "vessel of war," "auxiliary vessel," "internal operation," "armament" and "inspection" shall have the meanings assigned them in Annex A to this Treaty.

Article IV. 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.

Article V. After the termination of the Panama Canal Treaty,¹ only the Republic of Panama shall operate the Canal and maintain military forces, defense sites and military installations within its national territory.

Article VI. 1. In recognition of the important contributions of the United States of America and of the Republic of Panama to the construction, operation, maintenance, and protection and defense of the Canal, vessels of war and auxiliary vessels of those nations shall, notwithstanding any other provisions of this Treaty, be entitled to transit the Canal irrespective of their internal operation, means of propulsion, origin, destination, armament or cargo carried. Such vessels of war and auxiliary vessels will be entitled to transit the Canal expeditiously.

2. The United States of America, so long as it has responsibility for the operation of the Canal, may continue to provide the Republic of Colombia toll-free transit through the Canal for its troops, vessels and materials of war. Thereafter, the Republic of Panama may provide the Republic of Colombia and the Republic of Costa Rica with the right of toll-free transit.

Article VII. 1. The United States of America and the Republic of Panama shall jointly sponsor a resolution in the Organization of American States opening to accession by all States of the world the Protocol to this Treaty whereby all the signatories will adhere to the objectives of this Treaty, agreeing to respect the regime of neutrality set forth herein.

¹ United Nations, *Treaty Series*, vol. 1280, p. 3.

2. The Organization of American States shall act as the depositary for this Treaty and related instruments.

Article VIII. This Treaty shall be subject to ratification in accordance with the constitutional procedures of the two Parties. The instruments of ratification of this Treaty shall be exchanged at Panama at the same time as the instruments of ratification of the Panama Canal Treaty, signed this date, are exchanged. This Treaty shall enter into force, simultaneously with the Panama Canal Treaty, six calendar months from the date of the exchange of the instruments of ratification.

DONE at Washington this 7th day of September, 1977, in duplicate, in the English and Spanish languages, both texts being equally authentic.

FIRMADO en Washington, a los 7 días de septiembre de 1977, en los idiomas inglés y español, siendo ambos textos igualmente auténticos.

For the United States of America:
Por los Estados Unidos de América:

[Signed — Signé]¹

President
of the United States of America
Presidente
de los Estados Unidos de América

For the Republic of Panama:
Por la República de Panamá:

[Signed — Signé]²

Head of Government
of the Republic of Panama
Jefe de Gobierno
de la República de Panamá

¹ Signed by Jimmy Carter — Signé par Jimmy Carter.

² Signed by Omar Torrijos Herrera — Signé par Omar Torrijos Herrera.

ANNEX A

1. "Canal" includes the existing Panama Canal, the entrances thereto and the territorial seas of the Republic of Panama adjacent thereto, as defined on the map annexed hereto (Annex B), and any other inter-oceanic waterway in which the United States of America is a participant or in which the United States of America has participated in connection with the construction or financing, that may be operated wholly or partially within the territory of the Republic of Panama, the entrances thereto and the territorial seas adjacent thereto.

2. "Vessel of war" means a ship belonging to the naval forces of a State, and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew which is under regular naval discipline.

3. "Auxiliary vessel" means any ship, not a vessel of war, that is owned or operated by a State and used, for the time being, exclusively on government non-commercial service.

4. "Internal operation" encompasses all machinery and propulsion systems, as well as the management and control of the vessel, including its crew. It does not include the measures necessary to transit vessels under the control of pilots while such vessels are in the Canal.

5. "Armament" means arms, ammunitions, implements of war and other equipment of a vessel which possesses characteristics appropriate for use for warlike purposes.

6. "Inspection" includes on-board examination of vessel structure, cargo, armament and internal operation. It does not include those measures strictly necessary for admeasurement, nor those measures strictly necessary to assure safe, sanitary transit and navigation, including examination of deck and visual navigation equipment, nor in the case of live cargoes, such as cattle or other livestock, that may carry communicable diseases, those measures necessary to assure that health and sanitation requirements are satisfied.

[ANNEX B]

[See map, p. 192 of this volume]

AMENDMENTS, CONDITIONS, RESERVATIONS AND UNDERSTANDINGS MADE UPON RATIFICATION BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA

AMENDEMENTS, CONDITIONS, RÉSERVES ET CLAUSES INTERPRÉTATIVES FAITS LORS DE LA RATIFICATION PAR LE GOUVERNEMENT DES ÉTATS-UNIS D'AMÉRIQUE

[SPANISH TEXT — TEXTE ESPAGNOL]

(a) ENMIENDAS:

(1) Al final del artículo IV, insértese lo siguiente:

“Una declaración correcta y autorizada de ciertos derechos y deberes de las Partes, conforme a lo anterior, está contenida en la Declaración de Entendimiento expedida por el Gobierno de los Estados Unidos de América el 14 de octubre de 1977 y por el Gobierno de la República de Panamá el 18 de octubre de 1977, la cual se incorpora por este medio como parte integral de este Tratado, a saber:

“Conforme al Tratado Concerniente a la Neutralidad Permanente y al Funcionamiento del Canal de Panamá (el Tratado de Neutralidad), Panamá y los Estados Unidos tienen la responsabilidad de asegurar que el Canal de Panamá permanecerá abierto y seguro a naves de todas las naciones. La interpretación correcta de este principio es que cada uno de los dos países, de conformidad con sus respectivos procedimientos constitucionales, defenderá el Canal contra cualquier amenaza al régimen de neutralidad y por consiguiente tendrá el derecho de actuar contra cualquier agresión o amenaza dirigida contra el Canal o contra el tránsito pacífico de naves por el Canal. Esto no significa ni se interpretará como un derecho de intervención de los Estados Unidos en los asuntos internos de Panamá. Cualquier acción por parte de los Estados Unidos estará dirigida a asegurar que el Canal permanecerá abierto, seguro y accesible y nunca estará dirigida contra la integridad territorial o la independencia política de Panamá.”

(2) Al final del primer párrafo del artículo VI insértese lo siguiente:

“De conformidad con la Declaración de Entendimiento mencionada en el artículo IV precedente: ‘El Tratado de Neutralidad dispone que las naves de guerra y las naves auxiliares de los Estados Unidos y de Panamá tendrán el derecho de transitar por el Canal de modo expedito. Esto tiene la intención, y así se interpretará, de asegurar el tránsito de esas naves por el Canal lo más rápidamente posible, sin trabas, con tramitación simplificada y, en caso de necesidad o emergencia, ponerse a la cabeza de la fila de las naves a fin de transitar rápidamente por el Canal.’”

(b) CONDICIONES:

(1) No obstante las estipulaciones del artículo V o cualquier otra estipulación del Tratado, si el Canal fuere cerrado o se interfiriera con su funcionamiento, la República de Panamá y los Estados Unidos de América, cada uno tendrá, independientemente, el derecho de tomar las medidas que cada uno considere necesarias, de conformidad con sus procedimientos constitucionales, incluyendo el uso de la fuerza militar en la República de Panamá, para reabrir el Canal o reanudar las operaciones del Canal, según fuere el caso.

[TRANSDUCTION — TRANSLATION]

(a) AMENDMENTS:

(1) At the end of Article IV, insert the following:

“A correct and authoritative statement of certain rights and duties of the parties under the foregoing is contained in the Statement of Understanding issued by the Government of the United States of America on October 14, 1977, and by the Government of the Republic of Panama on October 18, 1977, which is hereby incorporated as an integral part of this Treaty, as follows:

“Under the Treaty concerning the Permanent Neutrality and Operation of the Panama Canal (the Neutrality Treaty), Panama and the United States have the responsibility to assure that the Panama Canal will remain open and secure to ships of all nations. The correct interpretation of this principle 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.

“This does not mean, nor shall it be interpreted as, a right of intervention of the United States in the internal affairs of Panama. Any United States action will be directed at insuring that the Canal will remain open, secure, and accessible, and it shall never be directed against the territorial integrity or political independence of Panama.”

(2) At the end of the first paragraph of Article VI, insert the following:

“In accordance with the Statement of Understanding mentioned in Article IV

a) AMENDEMENTS :

1) A la fin de l'article IV, insérer ce qui suit :

«Une déclaration correcte et faisant foi de certains droits et devoirs des parties, en vertu de ce qui précède, et contenue dans la Déclaration d'accord publiée par le Gouvernement des Etats-Unis d'Amérique le 14 octobre 1977 et par le Gouvernement de la République du Panama le 18 octobre 1977, laquelle devient par la présente partie intégrante de ce Traité, à savoir :

«Conformément au Traité concernant la neutralité permanente et le fonctionnement du canal de Panama (ci-après dénommé le Traité de neutralité), le Panama et les Etats-Unis d'Amérique sont chargés de veiller à ce que le canal de Panama reste ouvert aux navires de toutes nationalités. L'interprétation correcte de ce principe est que chacun des deux pays, conformément à leurs procédures constitutionnelles respectives, défendra le canal contre toutes menaces au régime de neutralité et, par conséquent, aura le droit d'agir contre toute agression ou menace contre le canal ou contre le transit pacifique des navires par celui-ci.

Cela ne signifie pas un droit d'intervention des Etats-Unis d'Amérique dans les affaires intérieures du Panama ni ne sera interprété comme tel. Toutes les actions prises par les Etats-Unis auront pour but de veiller à ce que le canal demeure ouvert, sûr et accessible, et elles ne seront jamais dirigées contre l'intégrité territoriale ou l'indépendance politique du Panama.»

2) A la fin du premier paragraphe de l'article IV, insérer ce qui suit :

«Conformément à la Déclaration d'accord mentionnée à l'article IV ci-

above: "The Neutrality Treaty provides that the vessels of war and auxiliary vessels of the United States and Panama will be entitled to transit the Canal expeditiously. This is intended, and it shall so be interpreted, to assure the transit of such vessels 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."

(b) CONDITIONS:

(1) Notwithstanding the provisions of Article V or any other 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 processes, including the use of military force in the Republic of Panama, to reopen the Canal or restore the operations of the Canal, as the case may be.

(2) The instruments of ratification of the Treaty shall be exchanged only upon the conclusion of a Protocol of Exchange, to be signed by authorized representatives of both Governments, which shall constitute an integral part of the Treaty documents and which shall include the following:

"Nothing in the Treaty shall preclude the Republic of Panama and the United States of America from making, in accordance with their respective constitutional processes, any agreement or arrangement between the two countries to facilitate performance at any time after December 31, 1999, of their responsibilities to maintain the regime of neutrality established in the Treaty, including agreements or arrangements for the stationing of any United States military forces or the maintenance of defense sites after that date in the Republic of Panama that the Republic of

dessus: «Le Traité de neutralité stipule que les navires de guerre et navires auxiliaires des Etats-Unis d'Amérique et du Panama auront le droit de transiter promptement par le canal. Cela a pour objet, et telle en sera son interprétation, d'assurer aussi promptement que possible le transit de ces navires par le canal, sans aucun obstacle, aussi rapidement que possible, et, en cas de besoin ou d'urgence, de les placer en tête de file pour leur permettre de transiter rapidement par le canal.»

b) CONDITIONS :

1) Nonobstant les dispositions de l'article V ou toute autre disposition du Traité, si le canal est fermé ou si ses opérations font l'objet d'une entrave, les Etats-Unis d'Amérique et la République du Panama auront chacun, indépendamment, le droit de prendre les mesures qu'ils jugent nécessaires, conformément à leurs procédures constitutionnelles, y compris le recours à la force militaire en République du Panama, pour rouvrir le canal ou en rétablir les opérations, selon le cas.

2) Les instruments de ratification du Traité ne seront échangés qu'à la conclusion d'un protocole d'échange, lequel sera signé par les représentants à ce dûment autorisés des deux gouvernements et deviendra partie intégrante des documents du Traité, y compris ce qui suit :

«Aucune des dispositions du Traité n'empêchera ni la République du Panama ni les Etats-Unis d'Amérique, conformément à leurs procédures constitutionnelles respectives, de conclure un accord ou un arrangement entre les deux pays pour faciliter l'exécution à tout moment après le 31 décembre 1999, de leurs responsabilités concernant le maintien du régime de neutralité établi par le Traité, y compris les accords ou les arrangements relatifs à l'envoi de forces militaires américaines ou au maintien de camps de défense après cette date en République

Panama and the United States of America may deem necessary or appropriate.”

(c) RESERVATIONS:

(1) Before the date of entry into force of the Treaty, the two Parties shall begin to negotiate for an agreement under which the American Battle Monuments Commission would, upon the date of entry into force of such agreement and thereafter, administer, free of all taxes and other charges and without compensation to the Republic of Panama and in accordance with the practices, privileges, and immunities associated with the administration of cemeteries outside the United States of America by the American Battle Monuments Commission, including the display of the flag of the United States of America, such part of Corozal Cemetery in the former Canal Zone as encompasses the remains of citizens of the United States of America.

(2) The flag of the United States of America may be displayed, pursuant to the provisions of paragraph 3 of Article VII of the Panama Canal Treaty, at such part of Corozal Cemetery in the former Canal Zone as encompasses the remains of citizens of the United States of America.

(3) The President —

(A) Shall have announced, before the date of entry into force of the Treaty, his intention to transfer, consistent with an agreement with the Republic of Panama, and before the date of termination of the Panama Canal Treaty, to the American Battle Monuments Commission the administration of such part of Corozal Cemetery as encompasses the remains of citizens of the United States of America; and

(B) Shall have announced, immediately after the date of exchange of instruments of ratification, plans, to be carried out at the expense of the Government of the United States of America, for —

du Panama, que la République du Panama et les Etats-Unis d'Amérique peuvent considérer comme nécessaires ou appropriés.»

c) RÉSERVES :

1) Avant la date d'entrée en vigueur du Traité, les deux Parties commenceront à négocier un accord en vertu duquel la Commission américaine des monuments de guerre administrerait, dès la date d'entrée en vigueur dudit accord et par la suite, la partie du cimetière de Corozal située dans l'ancienne zone du canal où reposent les restes de citoyens des Etats-Unis d'Amérique. Cette administration serait exempte d'impôts et autres droits, et sans rétribution à la République du Panama conformément aux pratiques, privilèges et immunités associés à l'administration de cimetières en dehors des Etats-Unis d'Amérique par ladite Commission, y compris le déploiement du drapeau des Etats-Unis d'Amérique.

2) Le drapeau des Etats-Unis d'Amérique pourra être hissé, conformément aux dispositions du paragraphe 3 de l'article VII du Traité du canal de Panama, dans la partie du cimetière de Corozal située dans l'ancienne zone du canal où reposent les restes de citoyens des Etats-Unis d'Amérique.

3) Le Président :

A) Devra avoir annoncé, avant la date d'entrée en vigueur du Traité, son intention de transférer, conformément à un accord conclu avec la République du Panama, et avant la date d'expiration du Traité du canal de Panama, à la Commission américaine des monuments de guerre, l'administration de la partie du cimetière de Corozal où reposent les restes de citoyens des Etats-Unis d'Amérique; et

B) Devra avoir annoncé immédiatement après la date de l'échange des instruments de ratification, les plans qui seront exécutés aux frais du Gouvernement des Etats-Unis d'Amérique pour :

- (i) Removing, before the date of entry into force of the Treaty, the remains of citizens of the United States of America from Mount Hope Cemetery to such part of Corozal Cemetery as encompasses such remains, except that the remains of any citizen whose next of kin objects in writing to the Secretary of the Army not later than three months after the date of exchange of the instruments of ratification of the Treaty shall not be removed; and
- (ii) Transporting to the United States of America for reinterment, if the next of kin so requests, not later than thirty months after the date of entry into force of the Treaty, any such remains encompassed by Corozal Cemetery and, before the date of entry into force of the Treaty, any remains removed from Mount Hope Cemetery pursuant to subclause (i); and

(C) Shall have fully advised, before the date of entry into force of the Treaty, the next of kin objecting under clause (B)(i) of all available options and their implications.

(4) To carry out the purposes of Article III of the Treaty of assuring the security, efficiency, and proper maintenance of the Panama Canal, the United States of America and the Republic of Panama, during their respective periods of responsibility for Canal operation and maintenance, shall, unless the amount of the operating revenues of the Canal exceeds the amount needed to carry out the purposes of such Article, use such revenues of the Canal only for purposes consistent with the purposes of Article III.

(d) UNDERSTANDINGS:

(1) Paragraph 1(c) of Article III of the Treaty shall be construed as requiring, before any adjustment in tolls for use of the Canal, that the effects of any such toll adjustment on the trade patterns of the

- i) Transférer, avant la date d'entrée en vigueur du Traité, les restes de citoyens des Etats-Unis d'Amérique du cimetière de Mount Hope à la partie du cimetière de Corozal où reposent les restes de citoyens des Etats-Unis d'Amérique, à l'exclusion des restes de tous citoyens dont les parents les plus proches s'opposent à un tel transfert, par écrit au Secrétaire de l'armée, au plus tard trois mois après la date de l'échange des instruments de ratification du Traité; et
- ii) Transporter aux Etats-Unis d'Amérique, pour y être de nouveau inhumés, si le parent le plus proche le demande, au plus tard 30 mois après la date d'entrée en vigueur du Traité, les restes qui se trouvaient dans le cimetière de Corozal et, avant la date d'entrée en vigueur du Traité tous les restes qui ont été enlevés du cimetière de Mount Hope conformément à l'alinéa i; et

(C) Devra avoir spécifiquement notifié, avant la date d'entrée en vigueur du Traité, le parent le plus proche qui s'oppose, conformément au paragraphe B, i, à toutes les options disponibles et à leurs conséquences.

4) Aux fins de l'article III du Traité qui sont d'assurer la sécurité, l'efficacité et l'entretien approprié du canal de Panama, les Etats-Unis d'Amérique et la République du Panama, pendant les périodes d'exploitation et d'entretien du canal qui leur correspondent, devront, sauf si le montant des recettes d'exploitation du canal excède le montant nécessaire à ces fins, utiliser lesdites recettes uniquement à des fins compatibles avec les buts de l'article III.

d) CLAUSES INTERPRÉTATIVES :

1) Le paragraphe 1, c, de l'article III du Traité sera interprété comme exigeant que, avant tout ajustement du péage à verser pour l'utilisation du canal, les effets des ajustements sur les normes du trafic

two Parties shall be given full consideration, including consideration of the following factors in a manner consistent with the regime of neutrality:

- (A) The costs of operating and maintaining the Panama Canal;
- (B) The competitive position of the use of the Canal in relation to other means of transportation;
- (C) The interests of both parties in maintaining their domestic fleets;
- (D) The impact of such an adjustment on the various geographical areas of each of the two Parties; and
- (E) The interests of both Parties in maximizing their international commerce.

The United States of America and the Republic of Panama shall co-operate in exchanging information necessary for the consideration of such factors.

(2) The agreement "to maintain the regime of neutrality established in this Treaty" in Article IV of the Treaty means that either of the two Parties to the Treaty 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.

(3) The determination of "need or emergency" for the purpose of any vessel of war or auxiliary vessel of the United States of America or the Republic of Panama going to the head of the line of vessels in order to transit the Panama Canal rapidly shall be made by the nation operating such vessel.

(4) Nothing in the Treaty, in Annex A or B thereto, in the Protocol relating to the Treaty, or in any other agreement relating to the Treaty, obligates the United States of America to provide any economic assistance, military grant assistance, security supporting assistance, foreign military sales credits, or international military education and training to the Republic of Panama.

des deux parties, soient pris en considération, y compris les facteurs ci-après, d'une manière compatible avec le régime de neutralité :

- A) Les coûts d'exploitation et d'entretien du canal de Panama;
- B) La position compétitive du canal par rapport à d'autres moyens de transport;
- C) Les intérêts des deux Parties à maintenir leurs flottes nationales;
- D) L'effet d'un ajustement sur les différentes zones géographiques de chacune des deux Parties;
- E) Les intérêts des deux Parties à accroître au maximum le commerce international.

Les Etats-Unis d'Amérique et la République du Panama participeront à l'échange des informations nécessaires à la prise en considération de ces facteurs.

2) La décision «de maintenir le régime de neutralité établi par le présent Traité», qui figure à l'article IV, signifie que l'une ou l'autre des Parties au Traité peut, conformément à ses procédures constitutionnelles, prendre des actions unilatérales pour défendre le canal de Panama contre toute menace qui l'oblige à les prendre.

3) La décision relative à une «nécessité ou à une urgence» qui permet à un navire de guerre ou à un navire auxiliaire des Etats-Unis d'Amérique ou de la République du Panama de se porter en tête de file des navires en vue de traverser promptement le canal de Panama sera prise par le pays exploitant le navire.

4) Aucune disposition du Traité, de ses annexes A ou B, du protocole au Traité ou de tout autre accord relatif au Traité n'oblige les Etats-Unis d'Amérique à accorder une aide économique, une aide militaire, une aide en matière de sécurité, des crédits à la vente de matériels militaires à l'étranger, ou à l'éducation et à la formation militaires internationales à la République du Panama.

UNDERSTANDINGS AND DECLARATIONS MADE UPON RATIFICATION BY THE GOVERNMENT OF PANAMA

STIPULATIONS INTERPRÉTATIVES ET DÉCLARATIONS FAITES LORS DE LA RATIFICATION PAR LE GOUVERNEMENT DU PANAMA

[SPANISH TEXT — TEXTE ESPAGNOL]

La República de Panamá accede al canje de los instrumentos de ratificación del Tratado de Neutralidad expresado, en la inteligencia de que hay normas positivas de Derecho Internacional Público contenidas en tratados multilaterales de los cuales son Partes tanto la República de Panamá como los Estados Unidos de América y que, en consecuencia, obligan a ambos Estados a cumplirlas de buena fe, tales como los artículos 1, párrafo 2, y 2, párrafo 4, de la Carta de la Organización de las Naciones Unidas y los artículos 18 y 20 de la Carta de la Organización de los Estados Americanos.

Es también el entendimiento de la República de Panamá que las acciones que cada Parte pueda tomar en ejercicio de sus derechos y el cumplimiento de sus deberes según el referido Tratado de Neutralidad, incluidas las medidas para reabrir el Canal o restablecer su funcionamiento normal, si fuere interrumpido u obstaculizado, se efectuarán de modo consecuente con los principios de mutuo respeto y cooperación en que se basa la nueva relación establecida mediante dicho Tratado.

La República de Panamá declara que su independencia política, integridad territorial y libre determinación están garantizadas por la voluntad inquebrantable del Pueblo Panameño. Por ello la República de Panamá rechazará con unidad, decisión y firmeza todo intento de cualquier país de intervenir en sus asuntos internos o externos.

[TRADUCTION — TRANSLATION]

The Republic of Panama agrees to the exchange of the instruments of ratification of the aforementioned Neutrality Treaty on the understanding that there are positive rules of public international law contained in multilateral treaties to which both the Republic of Panama and the United States of America are Parties and which consequently both States are bound to implement in good faith, such as Article 1, paragraph 2 and Article 2, paragraph 4 of the Charter of the United Nations, and Articles 18 and 20 of the Charter of the Organization of American States.

It is also the understanding of the Republic of Panama that the actions which either Party may take in the exercise of its rights and the fulfillment of its duties in accordance with the aforesaid Neu-

La République du Panama accepte de procéder à l'échange des instruments de ratification du Traité de neutralité susmentionné étant entendu qu'il existe des règles positives du droit public international contenues dans les traités multilatéraux auxquels la République du Panama et les Etats-Unis d'Amérique sont tous deux parties et que les deux Etats sont par conséquent tenus d'appliquer en bonne foi telles que le paragraphe 2 de l'Article 1 et le paragraphe 4 de l'Article 2 de la Charte des Nations Unies ainsi que les articles 18 et 20 de la Charte de l'Organisation des Etats américains.

Il est également entendu par la République du Panama que les mesures que l'une ou l'autre des parties peut prendre dans l'exercice de ses droits et de ses devoirs conformément audit Traité de

trality Treaty, including measures to reopen the Canal or to restore its normal operation, if it should be interrupted or obstructed, will be effected in a manner consistent with the principles of mutual respect and co-operation on which the new relationship established by that Treaty is based.

The Republic of Panama declares that its political independence, territorial integrity, and self-determination are guaranteed by the unshakeable will of the Panamanian people. Therefore, the Republic of Panama will reject, in unity and with decisiveness and firmness, any attempt by any country to intervene in its internal or external affairs.

neutralité, y compris les mesures visant à rouvrir le canal ou à en rétablir le fonctionnement normal, si celui-ci devrait être interrompu ou entravé, seront prises d'une manière compatible avec les principes du respect mutuel et de la coopération sur lesquels est fondée la nouvelle relation établie par ce Traité.

La République du Panama déclare que son indépendance politique, son intégrité territoriale et son autodétermination sont garanties par la volonté inébranlable du peuple panaméen. Par conséquent, elle rejette d'un seul bloc, fermement et résolument, toutes les tentatives que pourrait faire un pays pour intervenir dans ses affaires intérieures ou extérieures.

TEXTBOOKS

NOTE:

In order to understand and solve the hypothetical case before the Court, delegates should possess the basic knowledge of international public law. *International Law* by M. Shaw (9. edn) is among the most commonly used textbooks, as it provides the reader with the necessary basis of all major branches of international law. Below listed are chapters to which the participants ought to pay most attention, regarding the hypothetical case. They are welcome however, to help themselves with any other legal textbooks as well.

Malcom Shaw, *International Law*⁵

(MOST) RELEVANT CHAPTERS:

- 3. Sources
- 5. The Subjects of International Law
- 10. The Law of the Sea
- 11. Jurisdiction
- 13. State Responsibility
- 15. The Law of Treaties
- 18. The International Court of Justice

Yoshifumi Tanaka, *International Law of the Sea*⁶

(MOST) RELEVANT CHAPTERS:

- Part I THE DIVIDED OCEANS: INTERNATIONAL LAW GOVERNING JURISDICTIONAL ZONES
- 2. Maritime Limits: Baselines and Maritime Features
- 3. Marine Spaces Under National Jurisdiction I: Territorial Sovereignty
- 4. Marine Spaces Under National Jurisdiction II: Sovereign Rights

⁵ Malcolm N Shaw, *International Law*, 9th edn (Cambridge University Press, 2021).

⁶ Yoshifumi Tanaka, *The International Law of the Sea*, 4th edn (Cambridge University Press, 2023).

CASE LAW

Case of the S. S. Wimbledon (United Kingdom, France, Italy and Japan v. Germany)⁷

NOTE:

The S.S. Wimbledon case addresses the legal regime governing the Kiel Canal and the relationship between a State's sovereignty and its international treaty obligations concerning navigation.

The Corfu Channel Case (United Kingdom of Great Britain v. Albania)⁸

NOTE:

This case is helpful for the study of international maritime passages, as it concerns the right of navigation through an international strait and the obligations of the coastal State when it comes to vessels using such a passage. The International Court of Justice recognized the right of innocent passage through the Corfu Strait in peacetime for ships of all States and held that Albania had obligations to notify and warn vessels of the presence of mines in its territorial waters.

Barcelona Traction Case (Belgium v. Spain)⁹

NOTE:

The Barcelona Traction case is important for understanding the concept of *erga omnes* obligations, obligations that must be respected by the entire international community. It

⁷ *Case of the S.S. Wimbledon* (United Kingdom, France, Italy and Japan v Germany), Permanent Court of International Justice, Judgment, 17 August 1923, PCIJ Series A, No 1. Available at: <https://www.icj-cij.org/pcij-series-a>.

⁸ *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v Albania), International Court of Justice, Judgment, I.C.J. Reports 1949, p. 244. Available at: <https://www.icj-cij.org/case/1>.

⁹ *Barcelona Traction, Light and Power Company, Limited* (Belgium v Spain), International Court of Justice, Judgment, I.C.J. Reports 1970, p. 3. Available at: <https://www.icj-cij.org/case/50>.

provides the reader with the framework for assessing whether certain obligations relating to international maritime passages or other matters of common interest may be regarded as obligations owed to the entire international community, and how this concept might potentially be connected to the concept of objective legal regime.

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)¹⁰

NOTE:

The case between Nicaragua and USA addresses the matter of consequences of supplying weapons and support to armed groups.

¹⁰ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America), International Court of Justice, Judgment, I.C.J. Reports 1984, p. 392. Available at: <https://www.icj-cij.org/case/70>.

ARTICLES

NOTE:

Lastly, we have added two articles:

- 1.) Barbara Stepien, '**Legal Status of International and Internal Waterways**', in *The Legacy of the Wimbledon Case* (Brill, 2025), pp. 219–242. Available at:
https://brill.com/display/book/9789004707979/BP000009.xml?language=en&srsltid=AU7gw4VcR7aLL0wB_iXb2UTQPuVe_h0D5fZUKrgKs8JSTBnIF8O8gMv9.
- 2.) Cedric Ryngaert, '**Objective Regime**', *Max Planck Encyclopedia of Public International Law* (May 2023). Available at:
<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1447?prd=EPIL>.

They have been attached to this document in their original form, as available on the internet, in order to preserve the original form of the articles.

Legal Status of International and Internal Waterways

Barbara Stepień

Abstract

The emblematic *Wimbledon* case decided by the Permanent Court of International Justice (PCIJ) in 1923 still provokes debate on multiple legal matters. This Chapter examines the contemporary international regime of waterways, tracing its inception to the *Wimbledon* judgment and exploring whether including a broader array of waterways in an international regime with analogous regulation can be justified. To address judicial and scholarly attempts to theorize the existence of a unified legal regime on international waterways, the author explains the notion of international waterways, the concept of canal internationalization, and the problem of objective legal regimes. Multiple examples bolster the legal analysis, especially regarding the three main inter-oceanic canals of Kiel, Suez, and Panama. In conclusion, the author states that even though the analyzed scenarios do not support the existence of a unified international regime of waterways, the *Wimbledon* judgment marked a starting point in the development of the common framework for them and acts as a cornerstone for the concept of the objective legal regime.

1 Introduction: Earth's Cardiovascular System

The ubiquitous network of international and internal waterways, like the circulatory system of a living organism, surges as the lifeblood of global maritime connectivity. This metaphorical comparison with the vascular system likens the oceans to the main vital organs, providing the well-being of the entire maritime body. In drawing this parallel, straits and canals assume a pivotal role in facilitating the smooth movement of marine traffic, ensuring the exchange

of goods for the prosperity of nations. As in the case of veins and arteries, a notable resemblance exists between straits and canals. Nonetheless, careful examination reveals important differences between them, most obviously in their creation. While canals are crafted by human hand, straits represent natural formations. This crucial distinction is reflected in the legal and operational frameworks applicable to them. But is it so simple?

The wide variety of waterway types, categories, and characteristics poses significant challenges for legal scholarship in establishing a legal regime of international waterways. Therefore, during the last hundred years, scholars and international courts have focused on searching for common denominators, allowing them to provide for some generally applicable rules. The Permanent Court of International Justice (PCIJ) used this approach for the first time in the 1923 *Wimbledon* case, where the World Court searched for similarities between the Kiel, Suez, and Panama canals to compare applicable precedents and existing State practices.¹ Thus, the *Wimbledon* judgment –until today provoking debate on various legal matters analyzed in detail in this book – serves as a starting point for analyzing the development of the international regime of waterways during the last century.

This Chapter examines the contemporary international regime of waterways, tracing its inception to the *Wimbledon* judgment and exploring whether including a broader array of waterways in an international regime with analogous regulation can be justified. The remainder of this Chapter is organized as follows. Section 2) introduces the notion of international waterways, a narrower term than international watercourses entailing navigational characteristics and the possibility of substantial exploitation. Section 3) addresses judicial and scholarly attempts to theorize the existence of a unified legal regime on international waterways. It explains that the PCIJ first attempted to construct a systematic, unified legal regime, although on the disputable basis of a limited number of examples with significant legal differences. Section 4) addresses the internationalization of the Kiel Canal through the Versailles Peace Treaty, which set the stage for the *Wimbledon* case. Since the Versailles Peace Treaty had a limited number of State Parties but simultaneously conceded rights to other States, Section 5) addresses the concept of objective legal regimes. It examines the notion of objective legal regimes, the controversial concept of common interests, and the disputable competency that such regimes grant states to act on behalf of the international community. Section 6) takes

¹ *s.s. Wimbledon (United Kingdom, France, Italy & Japan v. Germany)* (Poland intervening), 1923 PCIJ Ser A, No. 1 (hereafter: *Wimbledon*).

a peek beyond the three main Canals, describing a dynamic of nationalization, namely, the assertion of the respective states to exercise jurisdiction over them, which partially reverses a tendency to understand that such waterways have an inherently international nature. Finally, Section 7) concludes that the available examples do not support the existence of an objective legal regime internationalizing waterways nor advance a notion that a homogeneous regulation may be derived from international law or state practice.

2 The Notion of an International Waterway

The metaphor of Earth's cardiovascular system sets the scene for a detailed analysis of the legal norms governing international waterways. Before analyzing whether a general international regime for waterways exists, the concept and criteria of an international waterway must be unpacked. An international waterway forms part of the broader concept of international watercourses.² The distinctive features of an international waterway are its navigational character³ and 'substantial' exploitation by merchant and naval shipping.⁴ However, this broad concept of an international waterway has not led to any binding legal definition, given its complications.⁵

The notion of an international waterway covers rivers, straits, and canals.⁶ Subsequently, they can be divided into artificial and natural waterways, which poses further legal complexities. Even though an inland canal could be compared to a river and an international canal to a natural strait, there are considerable differences in how they should be approached legally.

Furthermore, the differences between the interoceanic and *other* types of canals are also notable, especially in the context of this analysis. Whereas many canals and straits of international consequence exist, the maritime or

2 One definition of watercourse may be found in the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses. According to article 2 a) 'a watercourse is a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus'; article 2 b) states that an 'international watercourse' may be defined as 'a watercourse, parts of which are situated in different States'.

3 McCaffrey S.C., "International Watercourses", in Peters A. – Wolfrum R. (eds.), *Max Planck Encyclopedia of Public International Law* (Oxford: 2023) para. 1.

4 Baxter R., *The Law of International Waterways: With Particular Regard to Interoceanic Canals* (Cambridge: 1964) 3.

5 Ibidem, 3.

6 Ibidem, 3.

interoceanic canals linking two oceans are few;⁷ thus, they must be distinguished from the canals forming part of the international river systems.⁸ In the latter case, suffice it to say that their regime is often ‘assimilated to that of the rivers upon which they are dependent or which they link’⁹ as they aim to ‘duplicate or improve’ the existing river system.¹⁰ Purely in terms of rivers, their navigational character, the possible usage of their waters (e.g., for power generation, land irrigation, consumption, etc.) and their exact geographical location (e.g., in bordering regions of one or more countries) all contribute to the question of their national or international character.¹¹

In terms of international canals, central for the analysis in this Chapter, their transit capacity –translated into their significance for the world economy and well-being – is one of the decisive factors in their genuinely international nature. Even though there are numerous international canals from the geographical perspective, the world tonnage that passes through them reflects the international interest they represent, not only in littoral but also in non-littoral states. Consequently, while discussing the regime of international canals, scholarship usually focuses, similar to the PCIJ in the *Wimbledon* judgment on the Kiel, Suez, and Panama Canals, on what scholarship calls the interoceanic canals.¹²

Over the years, these artificial arteries of the world have raised many legal questions, ranging from sovereignty and neutrality issues to effects of reservations and interpretative declarations to third-party effects.¹³ The scholarly interest in their legal regime is strongly related to their economic and strategic importance for the international community. A complete comparative analysis of the history of legal developments of the Panama and Suez Canals

7 A maritime or interoceanic canal means a canal which links two different parts of the high seas or exclusive economic zones. Arcari M. – de Andrade M.C., “Canals”, in Peters A. – Wolfrum R. (eds.), *Max Planck Encyclopedia of Public International Law* (Oxford: 2023) para. 12.

8 Baxter, *The Law of International Waterways* 10.

9 Ibidem, 10.

10 For example, the provisions of the Versailles Peace Treaty on Elbe, the Oder, the Niemen and the Danube. Also provisions on Rhine and Moselle river systems, articles 361–362.

11 Baxter, *The Law of International Waterways* 16.

12 Ibidem, 12.

13 While this Chapter focuses on the legal status of international waterways, other chapters in this book address at length the concepts of sovereignty and neutrality through the relationship of international and national law to responsibility, among other things, also present in the *Wimbledon* case.

is beyond this Chapter's scope.¹⁴ Nonetheless, suffice it to say that their legal evolution may be considered more complicated than the Kiel Canal's.

3 In Search of a Common Denominator for International Waterways

The definitions and characteristics of international waterways established in the previous section allow us to delve into the complex analysis of the advances towards a common regime of international waterways. The plethora of different types and categories of waterways, sharing certain similarities but differing from one another, has thwarted efforts over the last hundred years in the international legal system to find one set of rules to regulate them. Nevertheless, scholars and international courts have attempted to systematize their legal regime, seeking common points for constructing broadly applicable rules.

The PCIJ was the first to employ such a method in the *Wimbledon* judgment, where it searched for parallels between the interoceanic canals as the basis for precedents and State practices. The World Court stated that:

The precedents therefore afforded by the Suez and Panama Canals invalidate in advance the argument that Germany's neutrality would have necessarily been imperiled if her authorities had allowed the passage of the 'Wimbledon' through the Kiel Canal, because that vessel was carrying contraband of war consigned to a State then engaged in an armed conflict. Moreover, they are merely illustrations of the general opinion according to which when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie.¹⁵

14 A Reader interested in a detailed analysis of the Suez and Panama Canals may consult respectively: Lawrence T.J., *The Suez Canal in International Law*, 2nd ed., (Cambridge: 1885); Huang T. F., "Some International and Legal Aspects of the Suez Canal Question", *American Journal of International Law* 51, no. 2 (1957) 277–307; Manyin Lee J. – Yin-cheung Wong E., "Suez Canal Blockage: An Analysis of Legal Impact, Risks and Liabilities to the Global Supply Chain", in Khvedelidze P. – Gechbaia B. – Goletiani K. (eds.), *MATEC Web of Conferences* 339 (2021) 01019; Smit H., "The Panama Canal: A National or International Waterway?", *Columbia Law Review* 76, no. 6 (1976) 965; Bakenhaus R.E. – Knapp H.S. – Johnson E. R., *The Panama Canal: Comprising Its History and Construction, and Its Relation to the Navy, International Law, and Commerce* (New York: 1915); Aguirre R.W., *The Panama Canal* (Leiden: 2010).

15 *Wimbledon*, 28.

Over the years, scholarship has been critical of the PCIJ's reasoning in *Wimbledon*, which relied on State practice in merely two questionably similar cases, the Panama and Suez Canals, including a limited number of State parties.¹⁶ In his dissenting opinion, Judge Schücking criticized such a comparison, noting different characteristics of the canals, the circumstances of their construction, and the applicable legal regimes.¹⁷ On the other hand, Judges Anzilotti and Huber also argued in their dissenting opinion, that the treaties regulating the other two canals included provisions in time of war, which was not the case of Kiel Canal.¹⁸ Judge Schücking supported this view, also highlighting that the Kiel Canal was never neutralized like the other two canals.¹⁹

Even though the Court's line of reasoning could probably be better supported, its search for common points of comparison seemed unavoidable. In 1885, Lawrence reflected upon the precedents regarding international canals, stating that:

Now, since there are no precedents to guide us, and since the analogies applicable to the case are many and diverse, we are forced to the purely negative conclusion that, agreement apart, International Law does not afford any rules for the conduct of states in reference to the Suez Canal... If we ask for precedents, none are forth coming; if we reason from analogy, we are lost in confusion; if we search for an agreement, we cannot find one.²⁰

Although resolved many years ago, the *Wimbledon* judgment was the first attempt to systematize the international law of waterways and remains the starting point of any attempt at a legal reconstruction of the international law of waterways.

4 Internationalization of Canals

The explored conceptual framework and complex legal nature of international waterways pose a challenge to creating a uniform legal regime for international

16 *Wimbledon*, 25–29. Feinäugle C., “Wimbledon, The”, in Peters A. – Wolfrum R. (eds.), *Max Planck Encyclopedia of Public International Law* (Oxford: 2023) para. 16.

17 *Wimbledon*, Dissenting Opinion by M. Schücking, 46–47.

18 *Wimbledon*, Dissenting Opinion by M.M. Anzilotti and Huber, 39–40.

19 *Wimbledon*, Dissenting Opinion by M. Schücking, 46–47.

20 Lawrence, *The Suez Canal* 56–57.

waterways. Furthermore, the internationalization of the mentioned interoceanic canals at different historical periods constitutes a critical moment in analyzing their legal statutes. This concept, examined in detail in this section, marks a crucial departure from traditional sovereignty principles enjoyed by the riparian States towards a more open, international legal framework. The transition of the legal status of the Kiel Canal based on the Versailles Peace Treaty discussed below is one example of this.

The construction of the Kaiser-Wilhelm-Kanal took eight years, starting on 3 June 1887.²¹ It operated solely under German sovereignty during the first 25 years (1895–1919), which was also confirmed by the PCIJ in the *Wimbledon* judgment.²² Its status changed after World War I, when the Treaty of Peace between the Allied and Associated Powers and Germany (Versailles Peace Treaty) was signed on 28 June 1919, entering into force on 10 January 1920. Since then, the Kiel Canal emerged in the place of the Kaiser-Wilhelm-Kanal.

Part XII Section VI (Articles 380–386) of the Versailles Peace Treaty regulated the Kiel Canal. Article 195 of the Versailles Peace Treaty also obligated Germany to demilitarize its approaches to an indicated area to provide all nations free passage into the Baltic Sea. Article 380 of the Versailles Peace Treaty stated, ‘The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality’.

21 On 16 March 1886 Reichstag passed the Imperial Law Concerning the Creation of the North Sea – Baltic Canal (Reichsgesetz betreffend die Herstellung des Nord-Ostseekanals). An extensive debate on the necessity of the Canal’s construction followed the legislation. Two opposite views were competing. Chancellor Bismark, supporting the Canal’s construction, aimed to obtain a delicate equilibrium between the powers in the region. As the British navy had a prevalent position therein, Bismark saw a possibility of strengthening the Reich’s position on both seas – North and Baltic – by providing its navy a shortcut between them. Opponents of the Canal based their skepticism on unproportionally high, in their opinion, construction costs in comparison to possible benefits. Field Marshal von Moltke was one of the main opponents of the Canal. On 23 July 1873 during his intervention in Reichstag he stated that it would be possible to build a second fleet for the cost of the Canal. Another reason against it was the lesser strategic military importance of the Canal since Helgoland belonged to the Brits. Bismark resolved the latter issue, however, by the onset of negotiations with the British Government on the exchange of Helgoland for Zanzibar. Based on Article XII (1) of the Agreement between Germany and Great Britain respecting Zanzibar (known as Heligoland-Zanzibar Treaty) Helgoland was handed over to the German Empire in 1890. Bohmer A., ‘One Hundred Years: The Kiel Canal in International Law’, *German Yearbook of International Law* 38 (1995) 327; Hattenhauer Ch., ‘Heligoland’, in Peters A. – Wolfrum R. (eds.), *Max Planck Encyclopedia of Public International Law* (Oxford: 2023) para. 5.

22 *Wimbledon*, 23.

Article 380 constituted what doctrine calls an *internationalization* of a canal.²³ This term has two understandings: a territorial and a functional one.²⁴ While the first refers to a scenario when some territory of a State comes under the control, safeguard, or administration of another State or a group of States, the second – the functional one – has a more limited nature.

The scholarship distinguishes three categories of functional internationalization: 1) when a special international organization gains authority to exercise jurisdiction within the State's territory, leading to a corresponding restriction of the State's sovereignty, 2) when States acting as 'custodian' of the international community exercise specific functions beyond their national jurisdiction for the benefit of the global community, and 3) when a special international regime, with more limited approach, is established to regulate parts of a territory, which remain under the sovereignty of the respective State.²⁵ In such a situation, the State is sovereign, although bound to comply with certain obligations aiming to benefit the interests of other States or the international community. International supervision may be exercised over fulfilling the State's obligations, sometimes delegated to a concrete international organization (a mechanism known as indirect international administration).²⁶

The concept of functional internationalization in maritime navigation was further expanded by the right to transit passage through straits used for international navigation,²⁷ which was embodied in Part III of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).²⁸ However, the mentioned provisions regulate the natural straits and do not apply to artificial waterways such as canals.²⁹ State practice shows that even though the right of transit passage through straits used for international navigation became a part of general international law, there is still no consensus on its exact content and

23 For examples of the terminological usage, see Bohmer, "One Hundred Years" 328; Arcari – de Andrade, "Canals" para. 12; Arcari M. – de Andrade M.C., "Suez Canal", in Peters A. – Wolfrum R. (eds.), *Max Planck Encyclopedia of Public International Law* (Oxford: 2023) paras. 5 and 22; Baxter, *The Law of International Waterways* 43.

24 Wolfrum R. – Pichon J., "Internationalization", in Peters A. – Wolfrum R. (eds.), *Max Planck Encyclopedia of Public International Law* (Oxford: 2023) para. 2.

25 Ibidem, para. 16.

26 Ibidem, para. 16.

27 A Reader interested in straits used for international navigation may consult: Stelakatos-Loverdos M.C., "The Contribution of Channels to the Definition of Straits Used for International Navigation", *The International Journal of Marine and Coastal Law* 13, no. 1 (1998) 71.

28 Wolfrum – Pichon, "Internationalization" para. 23.

29 Mahmoudi S. – Ratcovich Leopardi M., "Transit Passage", in Peters A. – Wolfrum R. (eds.), *Max Planck Encyclopedia of Public International Law* (Oxford: 2023) para. 13.

the scope of its application.³⁰ In 1949, the International Court of Justice (ICJ) pronounced this right for the first time in the *Corfu Channel Case*,³¹ where it stated that:

It is...generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.³²

The Kiel Canal case and Article 380 of the Versailles Peace Treaty fall under the second type of functional internationalization. Through them, a special international regime was created, and the Canal transformed from an internal to an international waterway. The PCIJ confirmed this in its *Wimbledon* judgment, stating that:

[The] canal has ceased to be an internal and national navigable waterway, the use of which by the vessels of States other than the riparian State is left entirely to the discretion of that State, and that it has become an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world.³³

The cases of Panama and Suez Canals were similar in this regard. The 1901 Hay-Pauncefote Treaty stated that the Panama Canal was 'free and open to the vessels of commerce and of war of all nations observing these Rules'.³⁴ Also, the 1888 Convention Respecting the Free Navigation of the Suez Maritime Canal (Constantinople Convention) provided that '[T]he Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag'.³⁵

30 Ibidem, para. 38.

31 Lowe V. – Tzanakopoulos A., "The Development of the Law of the Sea by the International Court of Justice", in Tams Ch. J. and Sloan J. (eds.), *The Development of International Law by the International Court of Justice* (Oxford: 2013) 191.

32 *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, ICJ Reports 1949, 28.

33 *Wimbledon*, 21.

34 The 1901 Hay-Pauncefote Treaty, article 3.

35 The 1888 Convention Respecting the Free Navigation of the Suez Maritime Canal, article 1.

The applicable treaties regulating the legal status of the Kiel, Panama, and Suez Canals were concluded between several States. Nonetheless, all established an international legal status of waterways, granting rights to third States not parties to the conventions. Thus, the legal nature of such a mechanism must be examined. Scholarship has termed them *objective legal regimes*.

5 Objective Nature of ‘Objective Legal Regimes’

The internationalization of canals, akin to the internationalization of territories, is frequently cited as an example of an objective legal regime.³⁶ What are objective legal regimes? And why has scholarship occasionally posited that they constitute the basis for an arguable international common regulation of waterways?³⁷

5.1 The Notion of an Objective Legal Regime

Objective regimes are controversial.³⁸ They refer to a situation when a treaty generates *erga omnes* effects, binding third States that are not State Parties to a particular treaty.³⁹ As the creation of rights or obligations *vis-à-vis* third States is not subject to their acceptance, it questions the sacred principle of international law *pacta tertiis nec nocent nec prosunt* (hereinafter, *pacta tertiis*) stating that a treaty does not create obligations or rights for a third State without its consent.⁴⁰ Thus, they are considered to be an exception to the established rule.⁴¹

The doctrine of objective regimes dates back primarily to the XIX century when the major European powers were establishing territorial and peace settlements as a consequence of wars.⁴² Nevertheless, it was not until the XX century

36 Barnes R.A., “Objective Regimes Revisited”, *Asian Yearbook of International Law* 9 (2000) 133.

37 As the creation of an objective regime for the Kiel Canal is central to the analysis presented in this book, these and other related questions are also explored in other chapters from various perspectives. For in-depth analysis of this topic, see Chapter Four in this volume: ‘The s.s. Wimbledon Judgment: General International Law, Objective Regimes, Self-Contained Regimes, and the Fragmentation of International Law: Then and Now’ by Fitzmaurice M. and Rydberg A.

38 Ryngaert C., “Objective Regime”, in Peters A. – Wolfrum R. (eds.), *Max Planck Encyclopedia of Public International Law* (Oxford: 2023) para. 3.

39 Ibidem, para. 1; Salerno F., “Treaties Establishing Objective Regimes”, in Cannizzaro E. (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford: 2011) 225.

40 Ryngaert, “Objective Regime”, para. 3.

41 Barnes, “Objective Regimes Revisited” 139.

42 Ryngaert, “Objective Regime”, para. 10.

when the International Law Commission (ILC), drafting the 1969 Vienna Convention on the Law of Treaties, debated the codification of the objective regime and its inclusion in the text of the convention. Two Special Rapporteurs, Fitzmaurice and his successor Waldock, advocated, although from two different perspectives, for objective regimes therein.⁴³ In 1960, Fitzmaurice proposed draft articles 14 and 18 of his Fifth Report, which aimed to 'describe the types of cases that have been regarded as having *erga omnes* effect under the old public law theory'.⁴⁴ However, the ILC did not analyze Fitzmaurice's proposal. Subsequently, in 1964, Waldock suggested a more extensive and different approach to the content of article 63, where he also included the third states' rights to object to the creation of an objective regime.⁴⁵ His proposal was, however, not accepted by the International Law Commission.⁴⁶

Article 63 (1) stated that:

[a] treaty establishes an objective regime when it appears from its terms and from the circumstances of its conclusion that the intention of the parties is to create in the general interest general obligations and rights relating to a particular region, State, territory, locality, river, waterway, or to a particular area of the sea, sea-bed, or airspace; provided that the parties include among their number any State having territorial competence with reference to the subject matter of the treaty, or that any such State has consented to the provision in question.⁴⁷

Whereas the concept of objective regimes did not explicitly appear in the 1969 Vienna Convention, it is possible to trace it to the 1978 Vienna Convention on Succession of States in respect of Treaties, where Articles 11 and 12 supported the view that the succession of states would not affect the boundary arrangements and reaffirmed their legitimacy even in the case of succession.⁴⁸ Although the notion of an objective regime does not appear explicitly in the

43 Fitzmaurice M., "Third Parties and the Law of Treaties", *Max Planck Yearbook of United Nations Law Online* 6, no. 1 (2002) 72.

44 Fitzmaurice, "Third Parties" 73; United Nations, *Yearbook of the International Law Commission 1960* 11 (New York: 1961) 80.

45 Draft article 63, para 2 of the 1969 Vienna Convention on the Law of Treaties. United Nations, *Yearbook of the International Law Commission 1964* 11 (New York: 1965) 26–27.

46 Salerno, "Treaties" 225; Fitzmaurice, "Third Parties" 74.

47 United Nations, *Yearbook of the International Law Commission 1964* 26.

48 For a more extensive analysis of the objective regime in the 1978 Vienna Convention on Succession of States in Respect of Treaties, see Chapter Four by Fitzmaurice M. and Rydberg A in this volume.

1978 Vienna Convention, it was categorized as such by the International Law Commission during the preparatory works on the convention.⁴⁹ Consequently, as they do not explicitly appear in any of the international conventions, objective regimes are mainly doctrinal constructions.⁵⁰

5.2 *Is a Common Interest So Common?*

The fundamental principle of international law and relationships – *pacta tertiis* – arises from the State's sovereignty.⁵¹ Whereas it aims to safeguard the State's interests, it also creates practical problems in reaching an agreement related to common interests⁵² between the States. Given that a treaty-making process, from negotiations to entry into force, is rather lengthy, there arises a danger that once it is concluded, the common interest may no longer exist.⁵³

Advocates of objective regimes have highlighted the weakness of the international law-making process and the lack of an objective form of drafting international law to address the international collective interest.⁵⁴ As a supranational institution or body competent to prepare binding international regulations and impose them *de facto* on States does not exist, creating objective regimes could constitute a remedy when the agreement cannot be achieved through negotiations. Therefore, some scholars claim that a collective interest, as the central feature of an objective regime, can 'legitimize' the departure from the *pacta tertiis* principle and the establishment of an objective regime.⁵⁵

Klein underscored that the 'decisive criterion for establishing whether an objective regime valid *erga omnes* exists is whether or not a general interest is served'.⁵⁶ Similarly, Lauterpacht agreed that *ius cogens* and *ordre public* recognized the category of general interest,⁵⁷ and he stated that: '[A]s international

49 United Nations, "Draft Articles on Succession of States in Respect of Treaties with Commentaries", *Yearbook of the International Law Commission* II (1974) 204.

50 Ryngaert, "Objective Regime", para. 3.

51 Chinkin Ch., *Third Parties in International Law* (Oxford: 1993) 25.

52 The concept of a common interest is also referred to in the doctrine as collective, public or general interest. Thus, the mentioned terms are employed interchangeably in this Chapter to describe the same idea of an interest shared by all or a group of States. Feichtner I., "Community Interest", in Peters A. – Wolfrum R. (eds.), *Max Planck Encyclopedia of Public International Law* (Oxford: 2023) paras. 1–2.

53 Fitzmaurice M. and Rydberg A. also offer an interesting analysis of common interest in Chapter Four in this volume.

54 McNair A., *The Law of Treaties* (Oxford: 1961) 259; Barnes, "Objective Regimes Revisited" 99.

55 Barnes, "Objective Regimes Revisited" 140.

56 Klein E., *Statusverträge Im Völkerrecht: Rechtsfragen Territorialer Sonderregime, Beiträge Zum Ausländischen Öffentlichen Recht Und Völkerrecht* (Berlin-Heidelberg- New York: 1980) 352.

57 Ibidem, 353.

society is transformed into an integrated community, a departure from the accepted principle (*pacta tertiis*) becomes unavoidable, in particular in the sphere of international peace and security'.⁵⁸ Moreover, Lauterpacht emphasized that Article XXVII of the League of Nations' Covenant and Article 2(6) of the United Nations Charter imposed a limit on the principle that the treaty should not impose obligations upon third States, which was the general interest of the entire international community.⁵⁹

Nonetheless, not all scholars have accepted the notion. Opposition to objective regimes firmly claims that the notion of common interest is rather vague and, thus, can be subject to possible strategic usage by strong States in pursuing their policy aims. Such usage would allow them to attribute their own aims and goals to shared interests.⁶⁰

Given that common interest remains a largely undetermined concept, the debate on objective regimes seems to rely partially on ascribing normative content to it. Scholarship has been divided on how to define common interest and what aims may be considered as covered by it. While some scholars considered that world peace and security, and consequently demilitarization and neutralization, were primary candidates,⁶¹ others identified international settlements of a territorial dimension,⁶² especially the boundary agreements,⁶³ as suitable examples. The peace settlements and territorial arrangements concluded in the XIX and XX centuries,⁶⁴ such as the Versailles Peace Treaty,⁶⁵ are also often cited as examples. Moreover, the International Court of Justice recognized the

⁵⁸ Lauterpacht H., *Oppenheim's International Law* 8th ed., I (Oxford: 1955) 528.

⁵⁹ Ibidem, 529.

⁶⁰ Chinkin, *Third Parties* 142.

⁶¹ For example, the neutralization of the Congo Basin based on the 1885 General Act of the Conference of Berlin respecting the Congo. Ryngaert, "Objective Regime", para. 11.

⁶² For example, the 1713 Treaty of Utrecht, the 1990 Treaty on German Re-unification. Barnes, "Objective Regimes Revisited" 105. According to Crawford, "[M]ultilateral territorial settlements may well possess certain special features as a matter of general international law" Crawford J.R., *The Creation of States in International Law*, 2nd ed. (Oxford: 2007) 318.

⁶³ The 1978 Vienna Convention on Succession of States in respect of Treaties, articles 11 and 12 support this view by reaffirming the legitimacy of boundary agreements *vis-à-vis* a succession of States. See also *Free Zones of Upper Savoy and the District of Gex (France v Switzerland)* (Judgment of 7 June 1932) PCIJ Series A/B No. 24 and No. 46. Also *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Judgment of 15 June 1962) ICJ Reports 1962, 6.

⁶⁴ Chinkin, *Third Parties* 142.

⁶⁵ Barnes, "Objective Regimes Revisited" 105.

internationalization of territories on multiple occasions as one of the exceptions to the *pacta tertiis* principle.⁶⁶

More recently, the ICJ, while analyzing the emergence of new peremptory norms of general international law under Article 64 of the 1969 Vienna Convention, also pointed out that a concept of general interest exists:

newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan.⁶⁷

In *Wimbledon*, the PCIJ ruled that the new international regime of the Kiel Canal would be ‘for the benefit of all nations of the world’.⁶⁸ The World Court based its decision on grammatical, structural, and teleological methods of treaty interpretation.⁶⁹ It also extensively focused on grammatical interpretation, particularly of Article 380 of the Versailles Peace Treaty, although this was subsequently criticized.⁷⁰

Moreover, the World Court, while analyzing the intention of the treaty’s authors, stated that it was to ‘facilitate access to the Baltic by establishing an international régime, and consequently to keep the canal open at all times to foreign vessels of every kind’.⁷¹ The World Court’s considerations on

66 *International Status of Southwest Africa*, Advisory Opinion, ICJ Reports 1950, 132 including the *Separate opinion by Sir Arnold McNair*, 153–155. Also, *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objection), ICJ Reports 1992, 240, 251–253. *Free City of Danzig and the ILO Advisory Opinion*, 1930 PCIJ Ser. B, No. 18.

67 *Gabcikovo-Nagymaros Case (Hungary v Slovakia)* ICJ Reports 1997, 67.

68 *Wimbledon*, 21.

69 Feinäugle, “Wimbledon, The”, para. 15. A Reader interested more in the PCIJ’s methods of interpretation employed in *Wimbledon*, especially the restrictive interpretation of the limitations of rights of a sovereign State, may consult Kwiecień R., “The Permanent Court of International Justice and the Constitutional Dimension of International Law: From Expectations to Reality”, in Tams Ch. J. and Fitzmaurice M. (eds.), *Legacies of the Permanent Court of International Justice* (Leiden: 2013) 373–74; Wittich S. “The PCIJ and the Modern International Law of Treaties”, in Tams Ch. J. and Fitzmaurice M. (eds.), *Legacies of the Permanent Court of International Justice* (Leiden: 2013) 89–123.

70 Feinäugle, “Wimbledon, The”, para. 15.

71 *Wimbledon*, 23.

the authors' intentions were crucial in this context as it was one of the decisive factors in establishing an objective regime. The PCIJ later confirmed this approach in the *Free Zone Case*, while referring to a method in which an objective regime emerged, stating that:

it cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour [...] it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such.⁷²

Later, the ICJ underscored in the *North Sea Continental Shelf* cases that the third States interested in the establishment of rights or obligations for them should search for a prescribed basis for it:

In principle, when a number of States, including the one whose conduct is invoked, and those invoking it, have drawn up a convention specifically providing for a particular method by which the intention to become bound by the régime of the convention is to be manifested—namely by the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way. Indeed if it were a question not of obligation but of rights,—if, that is to say, a State which, though entitled to do so, had not ratified or acceded, attempted to claim rights under the convention, on the basis of a declared willingness to be bound by it, or of conduct evincing acceptance of the conventional régime, it would simply be told that, not having become a party to the convention it could not claim any rights under it until the professed willingness and acceptance had been manifested in the prescribed form.⁷³

5.3 *The States' Competence to Act on Behalf of the Community*

An objective regime gains legitimacy by the State parties' competence to act on behalf of the community to protect the common interest.⁷⁴ Over the years, three views on this matter arose in the doctrine: territorial competence, the

72 *Free Zones of Upper Savoy and the District of Gex*, 1932 PCIJ Ser. A/B, No 4, 147–148.

73 *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), ICJ Reports 1969, 25–26.

74 Barnes, "Objective Regimes Revisited" 135.

Great Powers theory, and the 'liberal approach' to competence.⁷⁵ Territorial competence refers to a situation with a territorially competent State among the contracting parties. The Great Powers theory suggests that a group composed of the most dominant States is capable of imposing its will on the others.⁷⁶ Lastly, the 'liberal approach' simply means that the 'manifestation of actual State interest' is predominant over the strict adherence to territorial requirement.

The Versailles Peace Treaty is an example of the Great Powers' competence, as a group of the victorious powers drafted its provisions in the aftermath of World War I.⁷⁷ Nevertheless, the Great Power theory also has its deficiencies as it refers only to a concrete, usually post-war period when international stability is a priority. It also fails to recognize the need to participate in a decision-making process by the 'lesser States' and does not provide for their inclusion in the extra-territorial regimes (e.g., Zones of Peace or Antarctica).⁷⁸ Moreover, it challenges the fundamental rule of equality between the States. The Great Power theory was also subject to judicial opinions and decisions. For example, in the Aaland Islands case, the Committee of Jurists indicated that: 'An examination of the political conditions in which this agreement was entered into shows that the convention, in reality, has a much more extended bearing... the provisions settled upon in Paris between the Powers and Russia went beyond the limit of purely Swedish interests'.⁷⁹

On the other hand, in the *Southwest Africa Advisory Opinion*, it was stated that:

From time to time it happens that a group of great Powers, or a large number of States both great and small, assume a power to create by a multi-partite treaty some new international regime or status, which soon acquires a degree of acceptance and durability extending beyond the limits of the actual contracting parties, and giving it an objective existence. This power is used when some public interest is involved, and its

⁷⁵ Ibidem, 135.

⁷⁶ For interesting remarks on the 'Great Powers' theory on competence, refer also to Chapter Four by Fitzmaurice M. and Rydberg A in this volume.

⁷⁷ Schorkopf F., "Versailles Peace Treaty (1919)", in Peters A. – Wolfrum R. (eds.) *Max Planck Encyclopedia of Public International Law* (Oxford: 2023) para. 3.

⁷⁸ Barnes, "Objective Regimes Revisited" 137.

⁷⁹ *Aaland Islands Case*, League of Nation Official Journal, Special Supplement No. 3, (1920), 17.

exercise often occurs in the course of the peace settlement at the end of a great war.⁸⁰

Exploring the concept of objective legal regimes allows a better understanding of the implications for the international community and the international law they generate, particularly for the legal status of international waterways. Objective regimes underpin the delicate interplay between the established legal principles related to the State's sovereignty, especially *pacta tertiis*, and the global community's evolving needs. Thus, the internationalization of the Kiel Canal under Article 380 of the Versailles Peace Treaty may be considered a creation of an objective regime of an international waterway as all the indicated requirements necessary to create and 'legitimize' an objective regime, as analyzed above, were met.⁸¹

6 From Internationalization to Nationalization of the International Canals

In the end, XX century history and the political, economic, and military situation in the international arena did not allow for any further development of the idea of objective regimes of international canals or any general international regime of international waterways. Important shifts in political power, economic interests, and legal interpretations have influenced the balance between international cooperation and national sovereignty.

Even though the three interoceanic canals – Kiel, Suez, and Panama – were either internationalized or their management was private since their inaugurations, they all became nationalized and 'returned' to the riparian States over the years. One could say that this reversal was critical for the ongoing quest for a cohesive international legal framework for international waterways that often had to reconcile opposite interests at play.

80 *Separate opinion by Sir Arnold McNair to International Status of Southwest Africa, Advisory Opinion, ICJ Reports 1950, 29.*

81 Fitzmaurice and Rydberg arrived at a similar conclusion, further expanding on the concept of an objective legal regime for the Kiel Canal. They underscored that, even though the Versailles Peace Treaty provisions established its basis, the subsequent recognition of the Kiel Canal's objective regime depended on a more general international consensus. Thus, a complex relationship between treaty provisions and norms of international law must always be considered. See Chapter Four by Fitzmaurice M. and Rydberg A in this volume.

On 14 November 1936, the German Government issued the Memorandum on German waterways (German Memorandum) stating that it no longer considered the provisions of the Versailles Peace Treaty as binding on the Kiel Canal, which awoke different reactions of the State Parties, ranging from protests to silence.⁸²

Instead, Germany drafted a new regulation stating that:

The navigation of waterways within German territory is open to all countries at peace with the German Reich. No differentiation takes place in the treatment of German and foreign ships. This also applies to shipping fees. The German Government assumes that this will be reciprocated on the waterways of the other participating countries.⁸³

In this way, the German Memorandum *de facto* terminated the international status of the Kiel Canal, although its lawfulness has been questioned over the years, and the scholarship has analyzed the impact of Germany's unilateral act on the Versailles Peace Treaty.⁸⁴ According to Bohmer the outbreak of World War II could also be a possible reason for the termination of the international status of the Kiel Canal, although opinions among scholars vary on this matter.⁸⁵

Regarding the Suez Canal, suffice it to say that at the beginning, it was managed by a private company – Universal Suez Maritime Canal Company – based on the 1854 Concession granted by the Viceroy of Egypt to the Canal's constructor.⁸⁶ The Canal was inaugurated in 1869, and the Constantinople Convention has governed it since 1888.⁸⁷ The following years were, as in the case of the other canals, full of political tensions between the interested states. Finally, on 26 July 1956, the operator of the Suez Canal – the Company and its assets – was nationalized by a presidential decree.⁸⁸ Egypt's decision was supported by the

82 Two States – Czechoslovakia and France – issued a protest memorandum on 2 of December 1936. The same day, three countries, Great Britain, Yugoslavia and Poland, expressed their regret over the German decision. Rumania expressed a similar position on 3 of December 1936. The rest of the State Parties did not react. Bohmer, "One Hundred Years" 333.

83 Ibidem.

84 Ibidem, 333–38.

85 Ibidem, 339.

86 Arcari – de Andrade, "Suez Canal", para. 2.

87 Lee – Wong, "Suez Canal Blockage" 3.

88 Decree of Gamal Abdel Nasser on the nationalisation of the Suez Canal Company (Cairo, 26 July 1956, Law No. 285 of 1956).

examples of the Turkish Straits, Gibraltar, and Panama, which individual States unilaterally controlled.⁸⁹ What is interesting is the fact that the examples of both natural straits and artificial canals were invoked to bolster the same claim.

In the case of Panama, the last package of international treaties governing the Panama Canal included the 1977 Panama Canal Treaty and the Treaty concerning the Permanent Neutrality and Operation of the Panama Canal.⁹⁰ Panama regained complete control over the Canal when the first treaty terminated on 31 December 1999. The Constitution of Panama, title XIV, addressed the new regime of the Panama Canal, stating that it was an '*inalienable patrimony of the Panamanian Nation*'.⁹¹

Further analogies, often marking differences, between the legal norms regulating international straits and canals may be found in the events of the XX century. For example, the provisions of the 1920 Treaty of Sevres regarding the Turkish Straits, which was never ratified, mirrored the 1888 Constantinople Convention on Suez Canal provisions. Similarly, the 1901 Hay-Pauncefote Treaty on the Panama Canal, especially Article 3, also borrowed text from the 1888 Constantinople Convention. Some authors even suggested that the similarities between the two treaties established the foundation for '*un droit commun des canaux internationaux*'.⁹²

In 1936, the Montreux Convention Regarding the Regime of the Straits (Montreux Convention) was adopted, establishing the freedom of transit and navigation through the natural straits of Bosphorus and Dardanelles for the vessels of all States.⁹³ It granted Turkey the authority to regulate access to the Black Sea, striking a compromise between international navigational rights and Turkey's concerns about security and sovereignty. Furthermore, based on the Montreux Convention, Turkey holds strong discretionary power over the transit of warships through the Straits depending on the circumstances, such as during peacetime, times of war, and when perceiving imminent threats.⁹⁴ A further

89 Baxter, *The Law of International Waterways* 43.

90 The mentioned treaties are also known as the Panama Canal Treaties and the Torrijos-Carter Treaties. Arcari M. – de Andrade M.C., "Panama Canal", in Peters A. – Wolfrum R. (eds.), *Max Planck Encyclopedia of Public International Law* (Oxford: 2023) para. 22.

91 The constitutional amendment was introduced by Public Law (Legislative act) No. 1 of 27 December 1993 (Gaceta Oficial de Panamá No 22674).

92 Guillien R., "Un Cas de Dédoublément Fonctionnel et de Législation de Fait Internationale: Le Statut Du Canal Du Suez", *La Technique et Les Principes Du Droit Public; Études En l'honneur de Georges Scelle* 2 (Paris: 1950) 743.

93 Plant G., "Dardanelles and Bosphorus", in Peters A. – Wolfrum R. (eds.), *Max Planck Encyclopedia of Public International Law* (Oxford: 2023) para. 3.

94 The 1936 Montreux Convention, Section 2.

example of the related legal complexities is the ongoing Russo-Ukrainian armed conflict and the ‘closure’ of the Black Sea by Turkey, which raised questions on its legal grounds, given the absence of explicit clarification from Turkey regarding its reliance on Articles 19 or 21 of the Montreux Convention.⁹⁵

Additionally, the new Istanbul Canal project sparked a discussion on the legal framework of waterways and the possible applicability of the Montreux Convention to it. Conversely, the Corinth Canal, established in 1893 and consistently under Greek jurisdiction, underpins an individualistic approach to waterway governance. Another example supporting this view was the creation of the Panama Canal Authority (Autoridad del Canal de Panamá – ACP), overseeing the administration, functioning, conservation, maintenance, and modernization of the Canal and related activities.⁹⁶ As the ACP may restrict access to the Canal for vessels not complying with the existing regulations on navigation, transit, pollution prevention, hazardous cargo regulations, and others, the Canal is governed by a ‘specific treaty system’.⁹⁷ Probably, for similar reasons, Judge Krylov, in his dissenting opinion on the ICJ *Corfu Channel* case, underscored that ‘there is no such thing as a *common* regulation of the legal regime of straits. Every strait is regulated individually (...). The legal regime of all those straits is defined by the respective international conventions’.⁹⁸ And this opinion seems to still be valid today.

7 Conclusions

More than a hundred years later after the *Wimbledon* judgment, legal scholarship still cannot clearly answer the question of whether the international regime of waterways exists and if the applicable regulations are more customary or treaty-based in nature. In 1885, Lawrence wrote that there were no guidelines on how to approach the regulation of the interoceanic canals. Then, in 1923, the PCIJ stated that the legal status of artificial canals should be assimilated to the natural straits.⁹⁹ Years later, the initially internationalized or privately managed canals, such as Kiel, Panama, and Suez, returned to the riparian States. Currently, all the major international canals are regulated by

95 Pedrozo R., “Closing the Turkish Straits in Times of War”, *International Law Studies* 99 (2022) 519–520.

96 The organization and competencies of the ACP were established by the Public Law no 19 of 11 June 1997 (Ley No 19 de 11 de Junio de 1997, Gaceta Oficial de Panamá No 23309).

97 Arcari – de Andrade, “Panama Canal” para. 45.

98 *Corfu Channel Case, Dissenting Opinion by Judge Krylov*, 74.

99 *Wimbledon*, 28.

particular international treaties and generally remain under the coastal states' national control.

Other examples present during the last century regarding similar, although distinctive, scenarios affecting different types and categories of waterways – rivers, canals, and straits – whether natural or artificial in nature, do not really permit the determination of any particular customary law development of this area of international law. Baxter suggested that the fact that each of these waterways is usually regulated by a concrete international treaty 'handicapped rather than aided' the development of the customary regulations.¹⁰⁰ On the other hand, he underscored that 'certain principles of international law having common application to a particular category of international waterways or to two such types of watercourse' could be drawn from the *Wimbledon* and *Corfu Chanel* cases.¹⁰¹ Kwiecień augmented this view, stating that 'the practice of shaping custom cannot be based only on the activity of the parties to law-making treaties. The states that have not accessed must also participate in this practice'.¹⁰²

Nevertheless, the *Wimbledon* judgment marked the starting point in developing the common framework for international waterways and set a cornerstone for the objective legal regime. Currently, even if in the light of the 1969 Vienna Convention on the law of treaties and customary law, the *raison d'être* of an objective legal regime may seem questionable, the evolving nature of international law must be considered. Moreover, since the *Wimbledon* decision, scholars and international courts have searched for common denominators, state practices, and widely applicable rules to govern the world's veins and arteries. Even though the existence of the common regime of international waterways is, at present, rather questionable, *Wimbledon* greatly impacted the development of international law in many areas, analyzed in detail in other parts of this book.

To summarize, political shifts and legal challenges mark the continuous evolution of the applicable legal framework for international waterways. This Chapter underscores the legal struggle between national sovereignty and the international community's collective interests, a struggle crucial for establishing the rules for global maritime routes. As past precedents and emerging global challenges strongly shape international law, the international waterways framework will develop further. As the maritime arteries of global trade and connectivity continue to evolve, so too must the legal order prevailing at sea.

100 Baxter, *The Law of International Waterways* 48.

101 Ibidem, 48.

102 Kwiecień R., "The Formal Sources of International Law, the Relationship between Treaties and Custom, and the International Law-Making Process", *Australian Year Book of International Law* 40 (2022) 65.

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Oxford Public International Law



Objective Regime

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A. Notion

1 In principle, a treaty is only binding on States parties to it, in accordance with the maxim *pacta tertiis (nec nocent nec prosunt)*. It has been argued, however, that some treaties create 'objective regimes', which generate effects *erga omnes* (→ *Obligations erga omnes*). This means that they establish rights and obligations also for States non-parties, often without such States having the option to formally accede to the treaty. Objective regimes would constitute an exception to the *pacta tertiis* principle.

2 Treaties that are considered as establishing objective regimes typically have a territorial dimension, such as → *peace treaties*, treaties providing for the → *neutralization* or → *demilitarization* of a State or territory, treaties delimiting → *boundaries*, or treaties establishing a regime for international waterways (such as → *canals* or rivers [→ *International Watercourses*]). Treaties establishing objective regimes could arguably overcome the tyranny of State → *consent* in contemporary international law, and fill the gaps left by the limited law-making activities of international organizations in relation to international community needs (Salerno [2011] 240–41).

3 The notion of objective regimes does not as such feature in the relevant treaties, but is first and foremost a doctrinal construction. The notion is controversial, as it overrides the hallowed principle that a treaty 'does not create either obligations or rights for a third State without its consent', codified in Art. 34 Vienna Convention on the Law of Treaties ('VCLT'; → *Vienna Convention on the Law of Treaties* [1969]).

4 While the VCLT features a section on treaties and third States (Arts 34–38 VCLT; → *Treaties, Third-Party Effect*), it subjects the creation of treaty obligations or rights for third States to the latter's consent. As to obligations, Art. 35 VCLT requires the third State's express acceptance in writing, while as to rights, Art. 36 requires the third State's assent, although 'assent shall be presumed so long as the contrary is not indicated'. Finally, Art. 38 notes that a rule set forth in a treaty can become binding upon a third State as a customary rule of international law, a process that also requires the third State's consent to be bound (→ *Customary International Law*). In contrast, objective regimes, at least in some doctrinal iterations, would allow treaties to be 'objectively' binding on third States without consent being required.

B. Discussions in the ILC

5 The notion of objective regime was discussed by two Special Rapporteurs of the → *International Law Commission (ILC)* in its work on the law of → *treaties*, which culminated in the adoption of the VCLT. The notion was eventually discarded, however, at least in the context of VCLT codification.

6 In 1960, Special Rapporteur Fitzmaurice proposed a draft Art. 18, pursuant to which in respect of peace treaties, treaties on neutralization or demilitarization, and treaties of a dispositive (in rem or territorial) character, 'all States are under a duty to recognize and respect situations of law or of fact established by lawful and valid treaties tending by their nature to have effects *erga omnes*' (UN ILC Special Rapporteur G Fitzmaurice 'Fifth Report on the Law of Treaties' [1960] 80). Fitzmaurice's proposal was not discussed by the ILC, however.

7 In 1964, Fitzmaurice's successor, Special Rapporteur Waldock, proposed to the ILC draft Art. 63 para. 1, pursuant to which '[a] treaty establishes an objective régime when it appears from its terms and from the circumstances of its conclusion that the intention of the parties is to create in the general interest general obligations and rights relating to a particular region, State, territory, locality, river, waterway, or to a particular area of sea, sea-bed, or air-space; provided that the parties include among their number any State having territorial competence with reference to the subject-matter of the treaty, or that any such State has consented to the provision in question' (UN ILC Special Rapporteur H Waldock 'Third Report on the Law of Treaties' [1964] 26). Interestingly, Waldock attempted to reconcile his concept of objective regime with the *pacta tertiis* principle, where he allowed third States to object to the creation of such a regime. Indeed, draft Art. 63, para. 2, provided that '(a) A State not a party to the treaty, which

expressly or impliedly consents to the creation or to the application of an objective régime, shall be considered to have accepted it' and '(b) A State not a party to the treaty, which does not protest against or otherwise manifest its opposition to the régime within a period of X years of the registration of the treaty with the Secretary-General of the United Nations, shall be considered to have impliedly accepted the régime' (UN ILC Special Rapporteur H Waldock 'Third Report on the Law of Treaties' [1964] 26–27).

8 The majority of ILC members rejected Waldock's proposal. They were mainly concerned over imperial overreach by the Great Powers, which, under the doctrine, might have the power to impose their will on lesser States (→ *Superpowers and Great Powers*). Most notably, ILC member Jiménez de Aréchaga stated that, on the basis of the doctrine, 'certain groups of States might acquire a sort of legislative power over the rest of the world', which 'would be exercised mainly by the Great Powers' (UN ILC 'Law of Treaties' [1964] 101). Jiménez de Aréchaga also decried the heavy burden which would be imposed on States, especially developing States, 'to review every treaty entered into by other States and to place on record their disapproval of any treaty they thought might fall within the category described in [Art 63] paragraph 1' (UN ILC 'Law of Treaties' [1964] 101) (→ *Developing Countries*). For the ILC majority, ultimately, any third-party effects of treaties were to be explained by reference to (what would become) Arts 34–38 VCLT.

9 While the doctrine of objective regimes was set aside for the purpose of incorporation in the VCLT, the doctrine appears to have been relied on in the Vienna Convention on the Succession of States in Respect of Treaties (1978) (→ *State Succession in Treaties*). Articles 11 and 12 of this Convention—which has been ratified by only 23 States Parties—provide, inter alia, that a succession of States does not as such affect boundaries or obligations relating to the use of territory established by a treaty. This means that successor States cannot call into question the territorial regimes established by this treaty. The ILC Commentary to these articles explicitly characterizes such a treaty as establishing an objective regime (UN ILC 'Draft Articles on Succession of States in respect of Treaties' [1974] 204). Also the VCLT, for that matter, has given treaties establishing a boundary a certain 'objective', or at least in rem, status, insofar as Art. 62 (2) (a) provides that '[a] fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty ... if the treaty establishes a boundary'. It is of note that the UN → Human Rights Committee takes the view that State succession also does not affect the protection offered by the → International Covenant on Civil and Political Rights (1966), stating that 'once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant' (UN HRC 'General Comment No 26' para. 4). Accordingly, the Committee considers the Covenant to establish an objective regime, at least for the purpose of State succession. In the literature, this reasoning has been extended to all human rights treaties (Kamminga [1996]).

C. Practice

10 The doctrine of objective regime was developed against a background of the major European powers imposing territorial settlements in the aftermath of international crises. Most notably, in 1815, at the Congress of Vienna, England, Russia, Austria, and Prussia redrew the post-Napoleonic European political landscape by creating the German Confederation, neutralizing Switzerland, and extending the territory of the Netherlands to Belgium ('Final Act [General Treaty] of the Congress of Vienna'; → *Vienna Congress [1815]*). To the extent that the lesser powers were present at the Vienna Congress, they simply had to accept the decision of the major powers.

11 Throughout the 19th century, the major European powers, known as the → *Concert of Europe*, also imposed permanent neutrality on Belgium and Luxembourg (1839), neutralized the Congo Basin (General Act of the Conference of Berlin respecting the Congo [1885]), and created free navigation in the → *Suez Canal* (Convention respecting the Free Navigation of the Suez Maritime Canal [‘Convention of Constantinople’] [1888]). These settlements were considered as binding on all States and thus had *erga omnes* effects, arguably in the interest of international stability and peace.

12 It has been claimed that also international practice of the second half of the 20th century points to the existence of objective regimes. Examples that are typically cited (eg. Subedi [1994] 174–85) are the neutralizations of Laos and Cambodia (1962, 1992), the internationalization of the → *Panama Canal* (Panama Canal Treaty [1977]; Neutrality

Treaty [1977]), territorial settlements under UN Security Council resolutions, eg, regarding Iraq (UNSC Res 687 [1991]; UNSC Res 833 [1993]), the demilitarization of → *Antarctica* (Arts IV and X Antarctic Treaty [1959]; see on the latter treaty also Simma [1986]), the *Protocol on Environmental Protection to the Antarctic Treaty* (1991), and treaties providing for nuclear weapon-free zones (eg, the *1967 Treaty for the Prohibition of Nuclear Weapons in Latin America* [‘Treaty of Tlatelolco’]).

13 Furthermore, the *1967 Outer Space Treaty* (Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies), the regime for the deep-seabed, the regime for high seas fishing, and a number of environmental protection regimes have been cited as examples of objective regimes creating rights and obligations for third parties, arguably without the latter’s consent being required (Barnes [2000]; → *Outer Space*; → *International Seabed Area*; → *Fisheries, High Seas*).

D. Judicial Decisions

14 A limited number of decisions of international commissions and tribunals, and opinions or declarations of individual judges, appear to support the notion of objective regime. The most relevant decisions date back to the first half of the 20th century, and pertain to post-conflict international settlements designed by the Great Powers.

15 In 1920, a Committee of Jurists was appointed by the Council of the League of Nations to clarify the status of the → *Åland Islands*, the → *Permanent Court of International Justice (PCIJ)* still being *in statu nascendi* at the time. Strikingly, the Committee cited ‘the objective nature of the settlement of the Åland Islands question’ by the *Paris Peace Treaty of 30 March 1856*, concluded between France Great Britain, Russia, Prussia, Austria, and Turkey, which placed the Åland Islands under a permanent regime of demilitarization (*Report of the International Committee of Jurists* [1920] 16). The Committee recalled that the Great Powers of Europe ‘have, on many occasions since 1815, and especially at the conclusion of peace treaties, tried to create true objective law, a real political status the effects of which are felt outside the immediate circle of contracting parties’ (*Report of the International Committee of Jurists* [1920] 18). According to the Committee, the Åland Islands settlement was ‘[l]aid down in European interests’, and ‘any State in possession of the Islands must conform to the obligations binding upon it’, regardless of whether it is a party to the 1856 Treaty (*Report of the International Committee of Jurists* [1920] 18).

16 In 1923, the PCIJ, in the *Wimbledon* case, appeared to consider the regime governing the → *Kiel Canal*, which links the → *North Sea* to the → *Baltic Sea*, to be an objective regime (→ *Wimbledon, The*). Article 380 of the *1919 Treaty of Versailles*, the peace treaty which ended the state of war between Germany and the Allied Powers, stipulated that ‘[t]he Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality’. The PCIJ interpreted this provision as ‘facilitat[ing] access to the Baltic by establishing an international régime, and consequently to keep the canal open at all times to foreign vessels of every kind’, per the intention of the authors of the treaty (*Wimbledon* 23). Thus, the Versailles Treaty was considered to create obligations *erga omnes*.

17 In 1950, the → *International Court of Justice (ICJ)* obliquely referred to the doctrine of objective regimes in its advisory opinion on the *International Status of South-West Africa*. It ruled that the mandate held by South Africa over South West Africa ‘was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object—a sacred trust of civilization’ (*International Status of South-West Africa [Advisory Opinion]* 132). Accordingly, its status was not affected by the dissolution of the → *League of Nations* under whose auspices the mandate system was established (→ *Mandates*). While the continuation of the mandate over South West Africa could possibly be explained by the doctrine of succession, Judge McNair, in his separate (concurring) opinion, was more explicitly of the view that the mandate system was an international regime ‘extending beyond the limits of the actual contracting parties, and giving it an objective existence’ (*[Separate Opinion of Judge McNair]* [1950] ICJ Rep 146, at 153). As will be explained below, McNair was also one of the main scholarly proponents of the doctrine of objective regime.

18 A year earlier, in 1949, the ICJ, in the context of the international legal personality of the → *United Nations (UN)*, famously held in the → *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* that ‘fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing *objective international*

personality, and not merely personality recognized by them alone, together with capacity to bring international claims’ (at 185 [emphasis added]). While this opinion does not pertain to international territorial settlements or regimes, it does recognize that a limited number of States could establish a new entity with *erga omnes* effects. In the case, this meant that Israel, a third State, was under an obligation to recognize the international legal personality of the United Nations, and its right to demand → reparations from Israel in relation to injuries suffered by a UN representative.

19 Finally, a reference to objective international law, even if not to objective regimes proper, can be found in a declaration by Judge Bedjaoui attached to the ICJ’s 1996 advisory opinion on the Legality of the Threat or Use of Nuclear Weapons (→ Nuclear Weapons Advisory Opinions). In this declaration, he stated, in relation to concepts such as obligations *erga omnes*, rules of → ius cogens, or the → common heritage of mankind that ‘[t]he resolutely positivist, voluntarist approach of international law still current at the beginning of the century ... has been replaced by an *objective conception of international law*, a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of States organized as a community’ (Declaration of President Bedjaoui [1996] ICJ Rep 268 para. 13 [emphasis added]).

E. Scholarship

20 None of the treaties discussed above refers explicitly to the notion of objective regime. In essence, the notion is a creation of legal doctrine, which endeavors to systematize relevant practice. Only few writers have addressed objective regimes in detail.

21 McNair was arguably the first writer to coin and elaborate on the notion of objective regime. He did so in a number of successive publications. In 1925, McNair wrote that the *pacta tertiis* maxim has certain qualifications, and that there are treaties which ‘have a law-creating effect beyond the immediate parties’, citing in particular the 1815 treaties of the Vienna Congress, the 1856 Treaty of Paris, the peace treaties concluding the First World War, and treaties regarding navigational rights (McNair [1925] 122). In 1930, he considered that such treaties ‘settle the political affairs of a group of countries in a particularly solemn and semi-dictatorial fashion which likens the arrangement to a governmental act imposed from above upon the parties affected, rather than to a voluntary bargain between them’ (McNair [1930] 112). In 1961, McNair linked this quasi-legislative role of particular States to the doctrine of *erga omnes* effects, arguing that certain kinds of treaties have *erga omnes* effects based on ‘some inherent and distinctive juridical element in those treaties’, in particular the decision of a group of States to grant real rights or rights in rem (eg, a boundary treaty or a treaty of → cession), or act in the public interest in relation to a situation with a certain permanence (McNair [1961] 255).

22 McNair’s ideas subsequently influenced ILC Special Rapporteur Waldock’s 1964 attempt to devote a VCLT article to objective regimes (see above). Waldock’s failure to convince the ILC did not put the issue doctrinally to rest. Most notably, in 1980, Klein, writing in German, produced the first book-length treatment of the subject (*Statusverträge im Völkerrecht: Rechtsfragen territorialer Sonderregime*, with a summary in English at the end of the book). Klein characterized treaties establishing objective territorial regimes as ‘status treaties’ (*Statusverträge*), provided that they are concerned with a land or maritime territory, that the intention of the parties is to establish a regime in the interest of the international community and to create a regime which is valid for third parties, and that at least one of the parties has a territorial competence with reference to the subject-matter of the treaty (Klein [1980] 351–53). According to Klein, the masters of the treaty can settle the matter *erga omnes* under the following condition: ‘From the assertion made by the contracting parties to serve the general interest and from the participation of the power which has territorial competence for the settlement, there results such a strong legal claim that the attribution of the asserted competence must be admitted by those States which have not objected to this claim’ (Klein [1980] 356). What is striking is that Klein attached legal consequences to the masters of the treaty’s mere assertion to serve the general interest, although he compensated this statement by explicitly allowing third States to resist the *erga omnes* effect of the objective regime thus created.

23 In 1996, Ghanbari Jahromi carried out, for the first time, a book-length English-language study of objective treaty regimes. Ghanbari Jahromi argued that the doctrine of objective regimes is not *lex lata*, as it is hardly supported by → State practice. He added that it should not be *lex ferenda* either, as it negates the *pacta tertiis* and *res inter alios acta* principles that are central to the contemporary theory of international law (Ghanbari Jahromi [1996]

354–59). He observed that most of the claimed *erga omnes* effects of objective regime can in fact be explained by the consent-based rules on the effects of treaties on third States stipulated in the VCLT, including the possibility that the regime has become binding on the basis of customary international law (Arts 34–38; Ghanbari Jahromi [1996] 359). Ghanbari Jahromi’s analysis of the doctrine and practice of objective regimes is most cogent. Unfortunately, perhaps because his study was not published commercially, it has not had a major impact on the field (yet).

24 A critical stance toward the existence of objective regimes is also taken by M Fitzmaurice in her wide-ranging study on ‘Third Parties and the Law of Treaties’ (2002). Fitzmaurice observed that fundamental legal questions as to the very existence and legal nature of objective regimes remain unresolved (Fitzmaurice [2002] 82), and that ‘there is no theory in international law that really justifies the existence of such régimes in a fully convincing manner’ (Fitzmaurice [2002] 136). Analysing the practice and judicial decisions that are typically cited as supportive of the existence of objective regimes, she argued that any perceived third-party effects of the relevant regimes in fact flow from Arts 34–38 VCLT, whereas other regimes may only have granted benefits but not rights (eg, the Panama Canal Treaty), while the binding force *erga omnes* of yet other regimes (eg, the Antarctic Treaty) may have been negated by certain States (ibid 84–136).

25 Salerno, writing in 2011, was equally critical of the capacity of parties to a treaty establishing an objective regime to compel third States to respect the treaty’s provisions, but nevertheless took the view that ‘third states must take into consideration the reasons that led the states parties to establish such a regime’ (Salerno [2011] 242). He based this approach on the → abuse of rights doctrine, meaning that third States are barred from fully exercising their freedom in case the treaty establishing the objective regime is closely connected to ‘generally recognized principles’ (Salerno [2011] 242). To a certain extent, this echoes ILC Special Rapporteur Fitzmaurice’s draft Art. 18, pursuant to which, regarding a number of treaties (establishing objective regimes), ‘all States are under a duty to recognize and respect situations of law or fact established by lawful and valid treaties tending by their nature to have effects *erga omnes*’ (UN ILC Special Rapporteur G Fitzmaurice ‘Fifth Report on the Law of Treaties’ [1960] 80). Under such an approach, objective treaties can at most create indirect effects, although it is not exactly clear what this would mean in practice.

26 Lately, the doctrine of objective regime has mainly caught the attention of international environmental lawyers, who consider the *erga omnes* effects of the doctrine to be particularly useful to more comprehensively address global environmental threats. Thus, Barnes observed that a number of environmental regimes, notably regarding marine pollution, driftnet fishing, and ozone depletion, ‘manifest objective characteristics’, and believed that ‘objective environmental regulation will continue to develop’ (Barnes [2000] 130)—while nevertheless admitting that objective regimes may not yet have crystallized as *lex lata* (Barnes [2000] 145). Rayfuse (2000) and Fitzmaurice (2002), in contrast, took the view that this may be wishful thinking given the lack of State practice to the effect that such treaties bind third parties.

27 From a doctrinal perspective, global environmental treaties do not fit well with the original conception of objective regimes, insofar as such treaties may not include among their number any State having a particular territorial competence over the subject-matter, and are not meant to ‘settle’ a situation after a period of military or political upheaval. In 2021, Soares de Oliveira argued, however, that for ‘some objective environmental legal situations, the element of territorial competence ... can be supplemented by an *ad hoc* emergency environmental competence’, which would ensure the *erga omnes* validity of the objective environmental regime (Soares de Oliveira [2021] 68).

28 Also outside the field of international environmental law, the doctrine of objective regime is occasionally invoked by contemporary writers to conceive of the *erga omnes* effects of specific treaties. For instance, certain objective effects vis-à-vis non-parties have been ascribed to the UN Charter, especially the provisions relating to dispute-resolution by the UN Security Council (Chinkin [1993] 108). Pergantis (2020), for his part, applied the doctrine to the Final Agreement between Greece and henceforth North Macedonia of 17 June 2018 (‘Prespa Agreement’), which explicitly provides that the parties shall use the official name ‘Republic of North Macedonia’ *erga omnes* (Art. 1 Prespa Agreement; → North Macedonia). While he concluded that the contracting parties may have lacked the relevant intent to create an objective regime (Pergantis [2020] 83), he argued, moving forward, that

such an intent may possibly be derived from the parties' subsequent practice, as well as that third States may tacitly agree to the regime (Pergantis [2020] 84–85; → *Tacit Agreements*).

F. Assessment

29 Noteworthy scholarly efforts have been made to theorize a purported practice of objective treaty regimes creating *erga omnes* effects vis-à-vis third States. Still, the doctrine remains somewhat obscure and controversial. Also the relevant practice is, on closer inspection, far from conclusive.

30 The doctrine may have existed in an era of Great European Powers imposing settlements by dint of treaty regimes, which contained quasi-legislation creating rights and obligations for lesser powers not party to the treaty regime without the latter's consent being required. This 'public law' conception of objective regime has become obsolete, however. Imperial imposition of law is no longer in keeping with basic tenets of contemporary international law, in particular sovereign equality and the requirement of State consent to be bound (→ *States, Sovereign Equality*).

31 This explains why 20th century legal scholars, such as Waldock and Klein, have mitigated the public law conception of objective regime by requiring, one way or the other, express, implied, or presumed consent, non-objection, or → *acquiescence*, as a condition for third parties to be bound by an objective treaty regime. If third-party assent is required for the regime to become binding, however, it is no longer objective. The third-party effects of the regime may then be explained by other doctrines, in particular the existing VCLT regime for third-party effects (Arts 34–38), and customary international law. For instance, in 2019, the Appeals Chamber of the → *International Criminal Court (ICC)* ruled, in relation to the prosecution and arrest of Omar Al Bashir, the head of State of Sudan, a State non-party to the *Rome Statute* (the treaty establishing the ICC), that *Art. 27 (2) Rome Statute*, which considers official capacity to be irrelevant before the ICC, 'reflects the status of customary international law' (*Prosecutor v Omar Hassan Ahmad Al-Bashir [Judgment in the Jordan Referral re Al-Bashir Appeal]* [2019] para. 103) and that 'there is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law vis-à-vis an international court' (para. 113). The Appeals Chamber did not consider the parties to the Rome Statute to have established an objective regime that ipso facto created third party effects.

32 The doctrine of objective regime may nevertheless be attractive to overcome contemporary global governance challenges, especially in the environmental field, but perhaps also in the human rights field. International human rights and environmental treaties may then ipso facto create binding legal regimes, even for States non-parties to the treaties. It remains the case, however, that the doctrine is poorly compatible with the current decentralized international legal system and the principle of consent.

33 Concluding, the doctrine of objective treaty regimes has little theoretical and practical purchase in contemporary international law, given the predominance of the *pacta tertiis* principle. Obviously, this has not stopped the major powers from imposing their legal will on less powerful States by means of various hegemonic legal practices. They may do so by coaxing the latter into joining treaties, but also by enacting non-consent-based unilateral regulation 'in the international interest'.

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