

# Legal Opinion on Guatemala's Territorial Claim to Belize

By Sir Elihu Lauterpacht  
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# CONTENTS

NOTES ON THE CONTRIBUTORS .....	PAGE 1
FOREWORD .....	PAGE 3
SUMMARY .....	PAGE 5
PART ONE .....	PAGE 7
	<b>paragraphs</b>
<b>I. Preliminary Points</b> .....	2-5
A. Geographical Scope of the Claim by Guatemala .....	2-3
B. Changes in Guatemala's Position .....	4
C. The Temporal Element .....	5
<b>II. Guatemala's Case</b> .....	6-7
<b>III. The Approach of the Present Opinion</b> .....	8-10
<b>IV. The Relevant Treaties</b> .....	11-68
A. The Law .....	73-95
1. Historical consolidation .....	75-77
2. Acquisitive prescription.....	78-79
3. The nature of the possession required.....	80-83
4. Acquiescence, estoppel and preclusion.....	84-87
5. The legal effect of unilateral declarations .....	88-89
6. Self-determination.....	90-95
B. The Facts.....	96-180
1. British and Belize presence in the area since long before 1850.....	97-122
2. Guatemalan acknowledgement of British title to the whole of British Honduras (Belize) .....	123-138
3. Absence of any Guatemalan presence in the area before and after 1850 .....	139-154
Maps of Guatemala .....	144-154
4. Guatemala's assertions and protests .....	155-161
5. Proposals for international adjudication of the dispute .....	162-180
<b>VI. Guatemala's Claim to the Islands</b> .....	181-188

PART TWO ..... PAGE 59

**paragraphs**

Consideration of Other Guatemalan Contentions ..... 189-216

**I. Guatemala's Argument Regarding the 1859 Convention as a Treaty of Cession: The Question of *Uti Possidetis* and the Clayton-Bulwer Treaty** ..... 190-207

A. Spanish Title Before 1821 ..... 191-193

B. *Uti Possidetis* ..... 194-200

C. The Clayton-Bulwer Treaty ..... 201-207

**II. Guatemala's Argument that the 1859 Convention was Imposed on Guatemala** ..... 208-210

**III. Guatemala's Argument Regarding Breach of the 1859 Convention and its Consequences** ..... 211-216

CONCLUSIONS ..... PAGE 67

**paragraphs**

**I. The Treaty Basis of the Title of Belize** ..... 217-219

**II. The Customary International Law Basis of the Title of Belize** ..... 220-227

APPENDICES ..... PAGE 69

**paragraphs**

**I. The Treatment of the Belize Question in the United Nations, 1945-1981** ..... 1-41

**II. The Doctrine of the *Uti Possidetis*** ..... 1-38

# NOTES ON THE CONTRIBUTORS



**Sir Elihu Lauterpacht**, CBE, QC, a British national, is a highly experienced academic and practitioner in the field of public international law. He has been active as an international litigator, advisor and arbitrator. Among the countries for which he has appeared in land and maritime boundary cases are Bahrain, Chile, El Salvador, Israel, Malta and Namibia. He is an ad hoc Judge of the International Court of Justice, and has been an arbitrator in a number of cases in the International Centre for the Settlement of Investment Disputes and in various other international cases. He has been a presiding Commissioner in the United Nations Compensation Commission and President of the World Bank and the Asian Development Bank Administrative Tribunals. He was for three years the Legal Adviser of the Australian Department of Foreign Affairs, and advises frequently on a whole range of international law matters.

He is an honorary Professor of the University of Cambridge where he taught for thirty-five years, and is the founder and first Director of the Research Centre for International Law.

Sir Elihu is a Member of the Institut de Droit International and an Honorary member of the American Society of International Law.



**Judge Stephen Schwebel**, a citizen of the United States of America, until recently the President of the International Court of Justice, has had great experience as a practitioner and judge in international law. He served in the U.S. Department of State as Assistant Legal Adviser for United Nations Affairs (1961-1966), Counsellor on International Law (1973) and Deputy Legal Adviser (1974-1981).

He was appointed arbitrator or president in 29 arbitral tribunals (1982-2001). He was a Judge of the International Court of Justice at the Hague from 1981 to 2000. From 1994 to 1997 he was Vice-President, and from 1997 to 2000 President, of the ICJ.

He is the author of several books and articles on international law, international arbitration and international relations. He is Honorary President of the American Society of International Law (1996-2001) and was awarded the Manley O. Hudson medal of that Society in 2000.



**Professor Shabtai Rosenne**, an Israeli citizen, has a wide-ranging experience as agent and representative in numerous cases before the International Court of Justice and in international arbitrations.

He is Professor and Visiting Professor in the Universities of Bar-Ian, Cambridge, Utrecht and Amsterdam, and Faculty Adjunct at the University of Virginia Law School. He is the author of the leading treatise on the International Court of Justice as well as of other books and articles on international arbitration, the law of treaties and the law of the sea. He is the General editor of the Commentary on the UN Convention on the Law of the Sea of the Center for Oceans Law and Policy of the University of Virginia.

He was a member of the United Nations International Law Commission (1962-1971) and the UN Commission on Human Rights (1968-1970). He is a member of the Institute of International Law and was awarded the Manley O. Hudson medal of the American Society of International Law in 1999.



**Professor Orrego Vicuña**, a Chilean national, has vast experience as an arbitrator and has participated widely in dispute settlement processes in the Americas, including those of Honduras/El Salvador and Chile/Argentina. He has been the senior legal advisor of the Organization of American States and a member of the inter-American Juridical Committee. He is a member of the panel for the settlement of disputes under the Vienna Convention on the Law of treaties, and Judge Ad-Hoc at the International Tribunal for the Law of the Sea.

He is the author of numerous books on international law, particularly on the law of the sea, and of dozens of articles in major international law journals. He is Professor of International Law and Director of the Institute of International Studies at the University of Chile, and visiting professor at several institutions world-wide, including the Hague Academy of International Law, Stanford University and the University of Paris, and has lectured at Universities from Trinidad to Tokyo, from Sao Paulo to Sydney.

He is a member of the Institut de Droit International and of the American Society of International law.

# FOREWORD

The Guatemalan territorial claim to Belize has adversely affected the security and development of Belize for decades. A boundary treaty was concluded between Britain and Guatemala in 1859, and the diplomatic exchanges between the British and Guatemalan governments from 1860 to 1950 hardly impacted on the daily lives of the people in the British colony. But the pursuit by Guatemalan governments of the claim since then, when it became clear that the Belizean people wanted independence from Britain, has had serious consequences for the Belizean people. It has distorted their political development, delayed their independence, limited their development potential and often caused grave concerns for their security.

Beginning in 1962, Belizean political representatives joined British officials in talks with Guatemalan authorities, talks that often held out the promise of a just settlement of the dispute only to founder on sudden and inexplicable reversals of the Guatemalan position. In 1975, the Belize government decided to internationalise its quest for independence with security and territorial integrity, and in 1980 Belize received virtually unanimous support at the United Nations for early and secure independence with all its territory. Belize became independent in 1981 against opposition and threats from Guatemala that compelled Belize to request Britain to maintain troops in the country for its defence.

In 1991, Guatemala finally recognised Belize as an independent State, and in 1993 the claim was on the verge of a definitive solution, with Guatemala agreeing to accept Belize's land borders as they had been defined in the 1859 Treaty, and Belize agreeing to give up some of its territorial sea rights in order to afford Guatemala an outlet to the high seas through its own territorial sea. But a constitutional crisis in Guatemala interrupted the process, and the following year the new Guatemalan government formally reinstated its claim, and later demanded that Belize cede to it more than half of its territory as the price for Guatemalan recognition of a truncated Belize.

Hopes that the new government installed in 2000 would negotiate a just settlement soon faded, as it began a policy of provoking military confrontations and encouraging peasant invasions. The new government insisted that the territorial dispute was eminently a legal one, and that the only possibility for a resolution was to submit the case to the International Court of Justice (ICJ) or arbitration.

The Belize government felt that this represented an unnecessary expense of time and money, and proposed a process under the auspices of the Organization of American States, with each country naming a Facilitator and both sides presenting their case to the Facilitators so that they could propose a just and durable solution. The process began in July 2000, and has been successful in implementing confidence-building measures along the border and in hearing the positions of both parties. The Facilitators are due to make their proposals by 15 December, 2001.

At the same time, however, conscious that if Guatemala remained intransigent the matter might indeed have to be submitted to the ICJ, the Belize government approached four eminent international lawyers and instructed them to write an Opinion that would, strictly on the basis of international law, consider whether Guatemala could validly question Belize's sovereignty over the territory of Belize, or any part of it. They were not



asked to prepare a brief for Belize's prosecution of a case, but rather an impartial Opinion well founded on international law, which would give a clear and unbiased opinion of the true situation in strict accordance with the law.

The Belize government chose a high-powered multi-national team of highly respected and renowned international lawyers headed by Professor Sir Eli Lauterpacht Q.C., a British lawyer with impeccable credentials as an academic and great experience as a practitioner of international law. It includes Judge Stephen Schwebel, a citizen of the United States of America who until recently was a Judge and President of the ICJ; Professor Shabtai Rosenne, an Israeli citizen who is considered a world expert on the jurisdiction and jurisprudence of the ICJ; and the highly respected and experienced Latin American jurist, Professor Francisco Orrego Vicuña, a Chilean national. Together they have spent over a year in extensive research and consultation, and have now submitted their opinion.

I am pleased to present this Opinion to the international community and in particular to the people of Belize and Guatemala, both of who wish fervently to live in peace and harmony with each other and to cooperate for a sustainable and just development that will benefit the peoples on both sides of this hitherto troubled border. I am sure that the Opinion will be particularly useful in helping Belizeans to make up their minds, if they were ever asked whether the matter should be submitted to the ICJ for a final resolution.

On behalf of the Government of Belize, I extend warm congratulations to our advisers for an excellent study, and express the hope that the clarity and certitude of their Opinion will contribute to consigning to the past the divisions that have retarded the harmonious cooperative development of two sister peoples for too long.

A handwritten signature in black ink, appearing to read 'Assad Shoman', with a stylized flourish at the end.

Assad Shoman

# SUMMARY

**Joint Opinion of Sir Elihu Lauterpacht CBE, QC, Judge Stephen M. Schwebel, Professor Shabtai Rosenne, and Professor Francisco Orrego Vicuña.**

1. This Opinion examines the claim by Guatemala to sovereignty over the territory of Belize.
2. That claim (so Guatemala contends) is based on the title which Spain possessed to the whole area of present Belize at the time when Guatemala became independent in 1821 and on Guatemala's succession to that title by operation of the doctrine of *uti possidetis*. Guatemala maintains that the 1859 Convention, which recognised the boundaries and thereby the extent of British Honduras, was a cession of territory dependent upon the performance by Britain of a provision in that Convention (Article VII) to participate in the construction of a cart road connecting Guatemala City to the Atlantic. Guatemala asserts that, as Britain did not meet its obligations under that provision, Guatemala was entitled to denounce the Convention, which it did, and the territory which Guatemala had thereby acknowledged as being the territory of British Honduras thereupon reverted to Guatemala.
3. In our view, the facts and the law of the matter do not support analysis along the lines suggested by the Guatemalan arguments set out above. This is because Guatemala's fundamental contention that the 1859 Convention was one of cession and has ceased to be operative is wholly contradicted not only by the facts and the law relating to the termination of treaties but also by a further treaty: the Exchange of Notes between Britain and Guatemala of 1931. That agreement can only have been concluded on the basis of the validity of the 1859 Convention in its entirety, by reason of its confirmation of the location of the two cardinal points identified by that Convention as marking the southern and western extremities of Belize. Nothing has happened since 1931 to deprive that Exchange of Notes of its validity and effect. Guatemala's contention that it was entitled to denounce the 1859 Convention, and did so in 1946, and that the 1931 Exchange of Notes fell with it, is unsustainable. Thus the arguments on which Guatemala has relied are not really to the point; and discussion of them diverts attention from, and obscures, the controlling feature of the situation - the 1931 Exchange of Notes. That international treaty obligation appears, until very recently, to have been overlooked or disregarded by Guatemala in its exposition of the case.
4. Quite apart from the position as a result of the treaties of 1859 and 1931, we are of the opinion that the facts on the ground - of British and Belize possession of the territory in question for virtually the last two hundred years, coupled with the absence of any evidence of Guatemalan activity in the disputed area - have by a process of historical consolidation (including acquisitive prescription) secured title first to Britain, and now to Belize, independently of the existence of the 1859 and 1931 agreements. These fundamental facts, of British possession and of the absence of any Guatemalan possession of Belize, were openly and frankly acknowledged by the Guatemalan Minister of Foreign Affairs in a letter to the Guatemalan Chamber of Deputies on 4 January, 1860, when the Guatemalan Government was seeking, and obtained, that Chamber's approval of the 1859 Convention.

5. Lastly, as a reflection and confirmation of the actual possession of the territory by Britain and Belize, of the soundness of their legal title to Belize and of the entitlement of an independent Belize to succeed to the whole of the colonial territory, weight must be given to the right of self-determination of the people of Belize manifested in their acquisition of independence in 1981 in accordance with the virtually unanimous opinion of Members of the United Nations repeatedly expressed between 1975 and 1981 in full knowledge of the existence and main features of the dispute.
6. The title of Belize extends to the islands in its possession appurtenant to its mainland territory.

# PART ONE

1. We have been asked to consider whether Guatemala can validly question the sovereignty of Belize over the whole or any part of its territory<sup>1</sup>. We can state our conclusion immediately and without qualification. The answer is "No". Belize possesses a good title to the whole of the territory, including the islands, that it presently administers, within the limits set by the Convention of 30 April 1859 between Britain and Guatemala relative to the boundary of British Honduras ("the 1859 Convention").

## I. PRELIMINARY POINTS

### A. Geographical Scope of the the Claim by Guatemala

2. We should at the outset observe that the geographical scope of the claim by Guatemala to sovereignty over the territory of Belize varied between (a) a claim to the whole of the territory of Belize falling within the boundaries delimited in 1859 and (b) a claim restricted to the southern portion of Belize, from the River Sibun southwards to the River Sarstoon. It now appears from the latest diplomatic exchanges<sup>2</sup> that Guatemala has committed itself to the lesser claim embracing only the southern portion of Belize.<sup>3</sup>

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<sup>1</sup> Terminology:  
For the sake of brevity, the expressions "Great Britain" or "the British Government" are throughout this Opinion shortened to "Britain"; the Government of Guatemala to "Guatemala"; and "the Government of Belize" to "Belize". We do not think that the use of the name "Belize" to refer to both the territory of British Honduras and to the Government of that State should lead to any confusion.

Abbreviations:

Burdon - Burdon, *Archives of British Honduras*, 2 vols (1931)

FOCP - Foreign Office Confidential Print

GFB - Guatemala's Facilitators Handbook. ("Documentos que se Citan en las Notas de Guatemala, 18-10-99 y la de 14-07-2000, Enviadas a Belize dentro del Diferendo Territorial.")

GWB - Guatemala's "White Book - Belize Question" (1938)

Humphreys - R. A. Humphreys, *The Diplomatic History of British Honduras, 1638-1901* (1961)

ICJ - International Court of Justice

ILR - International Law Reports

Mendoza - Mendoza, *Britain and her Treaties on Belize (British Honduras)*, (2nd ed., English translation, 1959)

PRO - Public Record Office

Unless otherwise stated, the English language versions of documents of which the original may have been in Spanish (e.g. communications emanating from Guatemala) have been taken either from the texts in the English version of the *GWB* or from the texts as they appear in the FOCP or PRO documents to which references are given or, occasionally, are translations made by Belize.

<sup>2</sup> See Guatemalan Note of 18 October 1999 to Belize and position taken by Guatemala before the Facilitators: letter of Guatemala of 24 January 2001; paragraph 67 of Guatemala's statement of 30 March 2001; and Guatemala's Replication of 15 May 2001, paragraph 7.

<sup>3</sup> This is our understanding of the following statement in the Guatemalan letter of 24 January 2001:

"Given the historical events stated, Guatemala's present position is to reclaim all the territory of the Province of Verapaz held by Belize, including the islands and adjacent sea, these latter having been explicitly excluded by the Anglo-Spanish Treaties 1783 and 1786 and which were not included in the British-Guatemalan Treaty of 1859."

See also the following statements in Guatemala's note to Belize of 18 October 1999:

"... over the area between the Sibun River and the Sarstoon River Guatemala claims sovereign rights, since such area had been an integral part of the Province of Verapaz... (I)n addition, Guatemala claims the adjacent islands which, except for St George Cay, were not part of the Concession Treaties of 1783 and 1786, and which were, furthermore excluded from such treaties... The Government of Guatemala contends that the territory which belonged to the Federal Republic of Central America and, by succession, to the Republic of Guatemala, specifically the area from the Sibun River to the Sarstoon River, which is an integral part of the Province of Verapaz, must be returned to Guatemala."

See also to the same effect the Guatemalan note to Belize of 23 March 2000, but with one possible qualification expressed in relation to the area between the River Hondo and River Sibun where: "Guatemala has recognised the right to self-determination of the people of Belize, without prejudice to my Government, when it has the chance, being able to present the action which corresponds."

3. Consequently, in this Opinion we focus principally on that southern area though what we have to say necessarily embraces also the northern portion. Additionally, the logic of our analysis also covers the islands presently under the administration or control of Belize. We refer to them specifically in Part Two below. The northern boundary of Belize, between it and Mexico, is not a subject of dispute and we refer to it only incidentally.

## B. Changes in Guatemala's Postition

4. We note that there has been some variation over the years in the scope of the legal claim advanced by Guatemala in its diplomatic correspondence. Initially, Guatemala's complaint against Britain was limited to the assertion that Britain had not fulfilled its obligations under Article VII of the 1859 Convention (which related to the building of a cart road from Guatemala City to Guatemala's Atlantic Coast). In 1884 this assertion was expanded into one that Britain's breach of the 1859 Convention entitled Guatemala to terminate that treaty and thus recover the whole of the territory of British Honduras. Indeed, in its letter to the Facilitators of 24 January 2001 Guatemala asserts expressly that it denounced the Treaty in 1884. But subsequently, in the course of even more recent diplomatic exchanges, Guatemala has turned again to the terms of the 1859 Convention as pertinent to the consideration of the present tensions between Guatemala and Belize. Guatemala has also changed its position regarding the date of its claimed termination of the 1859 Convention. The reference made on 24 January 2001 to the denunciation of the Convention in 1884 was replaced in Guatemala's Replication to the Facilitators of 5 May 2001 by the statement that "Guatemala decreed in 1946 the caducity of the said Treaty". However, we do not find it necessary to enter into the details of these changes of position since, in our view, in so far as the case is controlled by treaties, the Exchange of Notes concluded between Britain and Guatemala in 1931 manifestly treats the 1859 Convention as valid and effective. As will be fully developed below, this agreement of 1931 has never been denounced, cannot be denounced, and unquestionably remains in force.

## C. The Temporal Element

5. We approach the problem as it would, in our understanding, be viewed by an international tribunal at the present time. There are no doubt many interesting questions that can be discussed by reference to the position at various junctures in the past, but we do not see such a debate as really assisting in resolving the issue as it stands at present. We shall, in Part Two of this Opinion, and in the Appendices, have occasion to deal specifically with some matters from the past that figure in the arguments presented by Guatemala, such as the doctrine of *uti possidetis*, the meaning and effect of Article VII of the 1859 Convention, the effect of any breach of that Article on, in particular, the continuing validity of that Convention, and the timing and effect of Guatemala's allegations of breach of the Convention. But in Part One of this Opinion we limit ourselves to what we see as the essential basis of Britain's, and now Belize's, title to the territory of British Honduras, now Belize.

## II. GUATEMALA'S CASE

6. At the outset, it is necessary to emphasise that there is a major difference between the approach that we adopt in the present Opinion and the argument presented by Guatemala.
7. In summary, Guatemala's position involves the following assertions:
  - (i) the area of Belize was originally included within the domains of Spain;
  - (ii) within those domains, Belize formed part of the Province of Verapaz within the Captaincy-General of Guatemala;
  - (iii) during that period, extending until the acquisition of independence in 1821 by the United Provinces of Central America (which included Guatemala), the only rights that Britain acquired in the area were those granted by the Anglo-Spanish Treaties of 1783 and 1786. Those rights were limited to the area north of the Sibun River and were restricted in their scope;
  - (iv) upon the acquisition of independence the United Provinces of Central America, and subsequently Guatemala, succeeded to the sovereignty of Spain by operation of the principle of *uti possidetis juris*, subject to the treaty rights of Britain;
  - (v) the limitations in the Treaties precluded Britain from acquiring sovereignty over any part of Belize;
  - (vi) therefore the 1859 Convention between Britain and Guatemala operated as a cession of territory from Guatemala to Britain and not as a treaty establishing a boundary between the two territories;
  - (vii) the 1859 Convention contains a provision (Article VII) for the construction of a cart road from Guatemala City to the nearest point on the Guatemalan coast, to which Britain was required to contribute;
  - (viii) Britain's non-performance of its obligations under this Article entitled Guatemala unilaterally to terminate this Convention;
  - (ix) Guatemala has done so, the treaty is at an end and, as a result, the cession of the territory of Belize is no longer operative and it has reverted to Guatemala.

## III. THE APPROACH OF THE PRESENT OPINION

8. We have given careful consideration to the various presentations by Guatemala of its position. We believe that they are in a number of crucial respects so wrong as to make the Guatemalan case unsustainable. However, we do not respond to each of these contentions individually within the main body of the present Opinion. For reasons which we set out immediately below, such a discussion would be largely irrelevant to the considerations which at the present time control the question of sovereignty. So we reserve a number of these points for separate examination in the Appendices.
9. The real point in the present controversy is that the Guatemalan propositions do not address the two principal sets of considerations that in our view today control the issue of title to Belize. We discuss these considerations in the order in which the sources of international law to be applied by the ICJ are set out in Article 38(1) of its Statute: first, treaties – "international conventions, whether general or particular,

establishing rules expressly recognised by the contesting States"; second, customary international law - "international custom, as evidence of a general practice accepted as law". Each set of considerations is independent of the other and each is by itself quite sufficient to lead to the conclusion that we have already expressed, namely, that Guatemala's claims to the territory of Belize are legally unsustainable.

10. We must also refer to the support accorded to the legal position of Belize by the repeated discussion of its status at length and in depth in the United Nations. That body has been fully apprised of the claims of Guatemala as well as the position of Britain and Belize. But the General Assembly, notwithstanding its knowledge of Guatemala's claims, has concluded that the "inviolability" and "territorial integrity" "of all of Belize" must be preserved and has repeated the substance of this holding in no less than six resolutions from 1975 to 1980. In 1981 Belize became independent and was admitted to membership of the United Nations, against the express objection of Guatemala based on its claim that Belize formed part of its territory. The vote was 144-1 (Guatemala), with no abstentions.<sup>4</sup> This was preceded by a unanimously adopted recommendation of the Security Council.<sup>5</sup> This remarkable unanimity of international recognition of the status of Belize, of the exercise of its right of self-determination and of the entitlement of Belize to the preservation of its territorial integrity in its entirety is an important additional factor confirming the present title of Belize to the whole of its territory.<sup>6</sup>

#### IV. THE RELEVANT TREATIES

11. As to treaties, there are two that govern the matter: (A) the Convention of 1859 and (B) the Exchange of Notes of 1931.

##### A. The 1859 Convention

12. The 1859 Convention occupies a major place in the discussions between Guatemala, Britain, and, more recently, Belize.

##### 1. Introduction

13. The 1859 Convention contains seven substantive articles. Article I defines the boundary between Guatemala and British Honduras. Articles II-V are concerned with matters relating to the demarcation of the boundary. Article VI provides for free navigation in the channels forming the water-line of the boundary and for the allocation of islands within such channels. Article VII, which has turned out to be the centre of controversy in this matter, provides that the two parties "mutually agree conjointly to use their best efforts, by taking adequate means for establishing the easiest communication (either by means of a cart-road . . . or rivers . . . or both)"<sup>7</sup> between the capital of Guatemala and the fittest place on the Atlantic Coast near the settlement of Belize.

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<sup>4</sup> Resolution 36/3, 25 September 1981.

<sup>5</sup> Resolution 491 (1981), 23 September 1981.

<sup>6</sup> The details of the consideration of the matter in the United Nations are fully set out in Appendix I.

<sup>7</sup> Emphasis supplied.

14. Guatemala contends that the Convention is a treaty of cession by which Guatemala ceded to Britain territory that was previously Guatemalan territory; that Britain has not fulfilled its obligations under Article VII and is therefore in breach of the treaty; that that breach entitles Guatemala to treat the Convention as at an end; and, therefore, that the territory has reverted to Guatemala.
15. For reasons that we shall presently set out, these arguments do not establish that Guatemala possesses at the present time any title to any part of the territory of Belize. In particular, we take the view that even if every one, but the last, of the elements in the Guatemalan arguments just set out were correct, Guatemala's case would still founder on the rock of a rule well understood in international law and recently clearly restated by the ICJ in the *Libya/Chad* case, namely, that a boundary, once established by treaty, possesses a legal life of its own, independent of the fate of the treaty.<sup>8</sup>
16. In these circumstances, we have considered carefully the extent to which we should enter into the substance of all the Guatemalan arguments as hitherto advanced. We have reached the conclusion that, although to do so at this point is *logically* unnecessary, it would be inappropriate to fail to examine directly the contentions of Guatemala. Accordingly, we reserve for consideration in Part Two of this Opinion three of the arguments of Guatemala that, in our opinion are irrelevant to the main aspects of the title of Belize<sup>9</sup>. However, we shall have to touch on some aspects of them in the present Part.

## 2. The character and content of the 1859 Convention

17. In approaching the interpretation of the 1859 Convention, we follow the rules prescribed for the interpretation of treaties in the Vienna Convention on the Law of Treaties, 1969, which in this respect has been acknowledged by the ICJ as declaratory of customary international law and so is applicable even to earlier treaties<sup>10</sup>. The relevant provision is Article 31(1):

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

18. Approached thus, it is quite plain that the 1859 Convention is a *boundary* treaty (and not a treaty of cession, as Guatemala contends) by reason of the following provisions which all relate to the determination of a *boundary*:

### (a) The Title:

19. The Treaty is entitled in English "Convention between Her Majesty and the Republic of Guatemala, relative to the Boundary of British Honduras". The original text of the Treaty in Spanish is entitled "Convención entre la República de Guatemala y Su Magestad Británica, relativa a los límites de Honduras Británica".

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<sup>8</sup> See below, paras. 31-33.

<sup>9</sup> Namely, those relating to Guatemala's contention that the 1859 Convention was a treaty of cession, that the 1859 Convention was imposed on Guatemala and that relating to the alleged non-performance of Article VII of the 1859 Convention.

<sup>10</sup> Case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment of 13 December 1999, para. 18: "The Court has itself already had occasion in the past to hold that customary international law found expression in Article 31 of the Vienna Convention."



In that form it was submitted to the Guatemalan legislation and was so ratified.<sup>11</sup> There is, indeed, no discrepancy between the English and Spanish texts of all the relevant provisions of the Convention.

**(b) The Preamble:**

20. This commences with the words "Whereas the boundary between Her Britannic Majesty's Settlement and Possessions in the Bay of Honduras, and the territories of the Republic of Guatemala has not yet been ascertained and marked out; Her Majesty . . . and the Republic of Guatemala, *being desirous . . . to define the boundary aforesaid*, have resolved to conclude a convention for that purpose . . ." <sup>12</sup> The italicised words clearly represent the common intention of the Parties.
21. In this connection it may be recalled that the ICJ in the *Sovereignty over Frontier Land* case<sup>13</sup> specifically attached importance to the preamble of the pertinent treaty. The Court said, referring to the words of the preamble:

"This statement represents the common intention of the two States. Any interpretation under which the Boundary Convention is regarded as leaving in suspense and abandoning for a subsequent appreciation of the status quo the determination of the right of one State or the other would be incompatible with that common intention".<sup>14</sup>

Likewise, the Court of Arbitration in the *Beagle Channel* case observed:

"Although Preambles to treaties do not usually - nor are they intended to - contain provisions on dispositions of substance - (in short they are not operative clauses) it is nevertheless generally accepted that they may be relevant and important as guides to the manner in which the Treaty should be interpreted, and in order, as it were, to "situate" it in respect of its object and purpose."<sup>15</sup>

As Article 31, paragraph 2 of the Vienna Convention on the law of Treaties says:

"The context for the purpose of the interpretation of a treaty shall comprise, in addition to its text, including its *preamble and annexes*..."<sup>16</sup>

**(c) The substantive provisions:**

22. *Article I*  
Article I provides that:

"It is agreed between Her Britannic Majesty and the Republic of Guatemala that the boundary between the Republic and the British settlement and Possessions in the Bay of Honduras, as they existed previous to and on the 1st day of January, 1850, and have continued to exist up to the present time, was and is as follows . . ."

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<sup>11</sup> *GWB.*, pp.113, 121, 146.

<sup>12</sup> Emphasis supplied.

<sup>13</sup> *Belgium/Netherlands, ICJ Reports 1959*, p.209.

<sup>14</sup> *Ibid.*, pp.221-22.

<sup>15</sup> 52 *ILR* 132, para. 19.

<sup>16</sup> Emphasis supplied.

There then follow the details of the boundary, from the mouth of the River Sarstoon in the South passing along that river to the Gracias á Dios Falls, thence northwards to Garbutt's Falls and from there due north, until it strikes the Mexican frontier. Although there were some subsequent difficulties in applying those limits during the process of demarcation, the general effect of the limits as laid down does not appear to have been a matter of significant, if any, disagreement between Guatemala and Britain or Belize.

23. The definition of the frontiers of British Honduras necessarily carried with it acknowledgement that the territory bounded by those frontiers belonged to British Honduras and not to Guatemala, just as reciprocally the territory on the other side of the line belonged to Guatemala and not to British Honduras. Indeed, Article I continues:

"It is agreed and declared . . . that all the territory to the north and east of the line of boundary above described, belongs to her Britannic Majesty; and that all the territory to the south and west of the same belongs to the Republic of Guatemala".

This is, of course, the position as generally understood in international law. As has been stated by a Chamber of the ICJ in the *Burkina Faso/Mali* case, "the effect of any delimitation, no matter how small the disputed area crossed by the line, is an apportionment of the areas of land lying on either side of the line".<sup>17</sup> But that does not make the boundary treaty into a treaty of cession.

24. It is to be noted that Article I contains no words that can suggest that the treaty itself serves as a transfer of any title over any territory by Guatemala to Britain. Indeed, the words indicate the contrary, because the boundary is described as it existed some nine years prior to the Treaty, that is, as the boundary was on 1 January 1850, a date quite inconsistent with any idea of title being transferred by the Treaty. The Treaty is thus a reciprocal recognition of title on the part of both sides; it is not simply a treaty with solely prospective effect. The language in the last sentence of Article I quoted above, which acknowledges that all the territory to the north and east of the line belongs to Britain and all of the territory to the south and west of the line belongs to Guatemala, cannot be construed as a cession of territory by Guatemala to Britain any more than it can be construed as a cession of territory by Britain to Guatemala.
25. The fact that the British territory is described as "the British Settlement and Possessions in the Bay of Honduras" is in no way inconsistent with the area in question having been subject to British sovereignty. Areas under British sovereignty and forming part of British territory in international law did not have to be described as "colonies". In the case of British Honduras, there is the authority of a Privy Council decision for saying that Britain had territorial dominion "there as early as 1817".<sup>18</sup> Although there was a distinction in English law between "possessions", "settlements" and "colonies", that was a distinction operative solely in terms of British domestic law. It did not, and does not, operate in international

<sup>17</sup> ICJ Reports 1986, p.554 at p.563.

<sup>18</sup> See *A-G for British Honduras v. Bristowe (1880)* 6 H.L. Cas.143, at pp.143-144 and 147-148.

Two authoritative statements on the position in English law appear there.

First, in the course of argument, the Solicitor-General, one of the Law Officers of the Crown, and thus speaking with the authority of the British Government, referred in the course of argument to the exercise by Britain after 1798 of " . . . such acts of sovereignty as occasion required. Royal proclamations were issued, and from 1807 justice was administered in the name of the King, and from 1817 Crown lands were granted by the

law.<sup>19</sup> When in 1862 British Honduras was formally created a Colony, part of the principal article in the Letters Patent that created it read as follows:

"Whereas *our territories in Honduras* have hitherto been known and designated as the Settlement of British Honduras, and the Government thereof has been administered by an officer designated the Superintendent for the affairs of Our said Settlement . . ." <sup>20</sup>

As the decision in *A-G for British Honduras v. Bristowe* shows, the Crown was treated as having assumed territorial dominion in British Honduras no later than 1817, even before Guatemala came into being, and regardless of the designation of the area in English law.

26. *Articles II-V*

Articles II-V contain provisions for the demarcation of the boundary by Commissioners appointed by each Party. Article IV requires that the Commissioners shall prepare a joint report accompanied with a map or maps. On 13 May 1861 the Commissioners signed a map of the part of the boundary lying a bit to the north of Garbutt's Falls and extending all the way south to Gracias a Dios on the River Sarstoon. The territory on each side of the boundary is clearly indicated as belonging, respectively, to Guatemala and British Honduras. Article VI deals with the boundary in water channels.

27. *Article VII*

Article VII of the 1859 Convention provides as follows:

"ARTICLE VII

"With the object of practically carrying out the views set forth in the preamble of the present Convention, for improving and perpetuating the friendly relations which at present so happily exist between the two High Contracting Parties, they mutually agree conjointly to use their best efforts, by taking adequate means for establishing the easiest communication (either by means of a cart-road, or employing the rivers, or both united, according to the opinion of the surveying engineers), between the fittest place on the Atlantic Coast, near the settlement of Belize, and the capital of Guatemala; whereby the

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superintendent on behalf of the Crown . . ."

Then, in delivering the judgment of the Privy Council, Sir Montague E. Smith, after mentioning the Treaties of 1763 and 1786, said in part:

"We now come to an important period, namely, the year 1798. In that year, during the war which commenced in 1796, an attack was made by the Spanish forces on the English settlers, which was repulsed, and the Spaniards withdrew from the territory. There appears to be no trace of their having re-occupied it. Down to this time the sovereignty of the territory had undoubtedly remained in the Crown of Spain; but no future attempt was made by the Spanish Crown to restore its authority, and its dominion seems to have been tacitly abandoned. The exact time when the Spanish Government can be said to have finally relinquished the territory, and the time when the British Crown assumed territorial sovereignty over it, are, as the Solicitor-General, who argued the case for the Crown, admitted, both undefined. There certainly seems to have been an interval between the abandonment of Spanish and the assumption of British sovereignty, though the length of that interval cannot be determined.

During the time when the country was unquestionably under Spanish dominion, a superintendent was appointed by the English Crown. Various powers were also conferred by it upon the English settlers, and amongst them the right of granting probate of testamentary documents. The country was formally declared to be a British colony, and formally annexed to the British dominions, by a proclamation of Her Majesty, dated on the 12th of May, 1862. The learned Chief Justice was of opinion that the Crown had not acquired or assumed territorial sovereignty in *Honduras* until this date. Their Lordships cannot concur in this view. Without going into the various acts previously done or exercised by the Crown with regard to this colony, or attempting to fix the precise date when the territorial sovereignty was first assumed, it is sufficient for the decision of this case to say that the fact, which is fully established, that grants of lands were made by the Crown as early as the year 1817, affords ample evidence that in that year at least the Crown had assumed territorial dominion in *Honduras*." (Emphasis supplied.)

<sup>19</sup> See generally Roberts-Wray, *Commonwealth and Colonial Law* (1966), pp.38-40, 45-47, 100 and 818-828.

<sup>20</sup> Emphasis supplied. See below, paras. 68 and 211-216.

commerce of England on the one hand, and the material prosperity of the Republic on the other, cannot fail to be sensibly increased, at the same time that the limits of the two countries being now clearly defined, all further encroachments by either party on the territory of the other will be effectually checked and prevented for the future.”

28. Guatemala advances this Article as the major component of its argument that the Convention is a treaty of cession, for it sees the Article as providing for compensation owed to Guatemala for parting with British Honduras.
29. As can be seen from the summary of Guatemala's position in paragraph 7 above, especially points (vi) to (ix), it would appear that the only role of the alleged breach of Article VII is to provide a basis for Guatemala's argument that the 1859 Convention has come to an end and that the territory has reverted to Guatemala.
30. We will not follow Guatemala into a discussion of the details of the fulfilment, or not, of Article VII. The allegation of Britain's non-performance of that Article relates only to the period of Britain's rule in British Honduras. Any responsibility of Britain that may have arisen during that period is Britain's alone and cannot have devolved upon Belize. Therefore, it is not for Belize to argue Britain's case in this connection nor for us to express any views on it. In any case, even if there had been a breach by Britain, this would not have justified termination of the Convention or occasioned reversion of the territory to Guatemala.<sup>21</sup>

### 3. The independent status of the boundary once established

31. In any case, we consider that detailed discussion of the points in the Guatemalan position just mentioned is not required, because the whole issue raised by reference to Article VII is resolved by our treatment of Guatemala's argument that the territory of Belize reverted to Guatemala on the termination of the Convention. As already stated, in our opinion this contention cannot as a matter of law be sustained. There is clear authority for the proposition that a boundary once established is not dependent for its continuing force upon the maintenance in being of the treaty from which it is derived.<sup>22</sup>
32. The most recent statement on this point is to be found in the *Libya/Chad* case already referred to, where the ICJ said:

“72. . . The establishment of this boundary is a fact which, from the outset, has had a legal life of its own, independently of the fate of the 1955 Treaty. Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasised by the Court (*Temple of Preah Vihear, ICJ Reports 1962, p.34; Aegean Sea Continental Shelf, ICJ Reports 1978, p.36*).

“73. A boundary established by treaty thus achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary. In this instance the Parties have not exercised their option to terminate the Treaty, but whether or not the option be exercised,

<sup>21</sup> See below, paras. 68 and 211-216.

<sup>22</sup> The same must be true, *a fortiori*, even if the 1859 Convention were a treaty of cession.

the boundary remains. This is not to say that two States may not by mutual agreement vary the border between them; such a result can of course be achieved by mutual consent, but when a boundary has been the subject of agreement, the continued existence of that boundary is not dependent upon the continuing life of the treaty under which the boundary is agreed."<sup>23</sup>

33. The applicability to the present situation of what the Court has held is obvious and inescapable. There is nothing novel in its observations and there is no ground to question their correctness. As long ago as 1916, Crandall, in his work on Treaties, said that "A treaty for the determination of a disputed line operates not as a treaty of cession, but of recognition".<sup>24</sup> More recently, O'Connell, in his major work on State succession, has affirmed that "if a boundary treaty merely defines a frontier, then it is instantly executed, and what is inherited is not the treaty but the territorial extent of the sovereignty".<sup>25</sup> Lastly, the independence of a boundary from the treaty which establishes it is implicit in the terms of Article 11 of the Vienna Convention on Succession of States in respect of Treaties:

"A succession of States does not as such affect:  
(a) a boundary established by treaty . . ."<sup>26</sup>

34. Even if each of the propositions of Guatemala that we have summarised were correct, the consequence of the rule stated by the Court would be that they are all without any relevant effect here. The disappearance of the 1859 Convention, for whatever reason, would affect neither the boundary nor, of course, the status of the territories lying on either side of the boundary. The boundary has "a legal life of its own". It has "a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary."<sup>27</sup>
35. Finally, whatever may have been the position regarding the validity of the 1859 Convention at any time prior to 1931, there took place in that year an Exchange of Notes between Britain and Guatemala which confirmed the effect of the 1859 Convention as regards the fixing of the southern and western points of the boundary – something quite inconsistent with any notion that the 1859 Convention had come to an end or that its determination of the boundary had ceased to be operative. To this agreement we now turn.

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<sup>23</sup> ICJ Reports 1994, 6, at p.37.

<sup>24</sup> Treaties, Their Making and Enforcement, 2nd ed., p.226, as cited in Hyde's International Law, vol. 2 (1945), p.1400, n.7.

<sup>25</sup> State Succession in Municipal Law and International Law, (1967), vol. II, p.273.

<sup>26</sup> 1978, 17 *International Legal Materials*, 1488, at p.1494.

Sir Humphrey Waldock, the Special Rapporteur of the International Law Commission on Succession in respect of Treaties, cites a number of authorities in his commentary on the relevant article of his draft e.g. Castren, who said "Treaties relating to frontiers having been executed and *having established a given legal situation*, that situation must be respected by any new sovereign of the territory . . ." (as cited in *Yearbook of the International Law Commission 1972*, vol. II, p.47. Emphasis supplied.); Fitzmaurice, who said: "A dispositive treaty is thus more of a conveyance than an agreement and as such is an instrument for the delimitation of sovereign competence within the impressed territory . . ." (as cited *ibid.*, p.46). Even more to the point is Professor T. Treves who says that boundary treaties are executed treaties and, as far as the executed provisions are concerned, it is not a case of succession in respect of treaties (*ibid.*, p.48). Likewise, the International Law Association in 1968 expressed the view that a boundary treaty is one that has spent its force so that in a situation of succession the succession is not to the treaty *but to the boundary*. (*Id.*)

<sup>27</sup> See para. 31 above.

## B. The 1931 Exchange of Notes

36. The second relevant treaty is the Exchange of Notes that took place between Britain and Guatemala on 25-26 April 1931 "respecting the Boundary between British Honduras and Guatemala".
37. This treaty has not assumed the same prominence in the discussion as has the 1859 Convention. Indeed, it is to be noted that the *GWB* produced by the Government of Guatemala in 1938, a work of some 500 pages which is the most extensive statement of Guatemala's position in the matter, does not accord this treaty any mention whatsoever.<sup>28</sup> The work by Mendoza, which is a publication of the Guatemalan Ministry for Foreign Affairs, makes only a cursory reference to this agreement in a chapter detailing the demarcation of the boundary, but seemingly without appreciating its legal significance.<sup>29</sup> No reference at all is made to the Exchange of Notes in the work by the Guatemalan author, Professor Carlos Garcia Bauer, entitled *La Controversia sobre el Territorio de Belize* (1958). Professor Garcia Bauer was, at the time of publication of the book, Minister of Foreign Affairs of Guatemala. In 1992 the Constitutional Court of Guatemala had occasion to consider the constitutionality of certain acts of the President of Guatemala regarding relations with Belize.<sup>30</sup> The judgement contains a summary of the general historical background to the Belize issues.<sup>31</sup> Yet even this high tribunal moves from 1880 to 1936 without any mention of the 1931 Exchange of Notes.<sup>32</sup> Nor is any reference made to it in Guatemala's subsequent diplomatic notes, in its statements in the UN or in the statements of its legal case in its notes to Belize of 18 October 1999 and 14 July 2000.
38. Yet there can be no question that this Exchange of Notes did take place and has in international law the standing and force of an independent treaty.<sup>33</sup> It marked the conclusion of a correspondence between Britain and Guatemala beginning at the end of 1928 when, in implementation of an agreement made orally between the British Minister in Guatemala and the Guatemalan Minister for Foreign Affairs, Guatemala was invited to send Commissioners to meet British Commissioners with a view to making arrangements for the survey of the frontier.<sup>34</sup> The Guatemalan Foreign Minister replied affirmatively on 3 January 1929 and made no reservation regarding the status of the boundary or Britain's title to British Honduras.<sup>35</sup> The Commissioners met first on 16 January 1929 and produced a "First Report of the Joint Commission on the Survey of the Southern Portion of the Boundary Line between Guatemala and British Honduras". They met again in May 1929 and the result of their work is recorded in a Second Report, the text of which was later reproduced in the 1931 Exchange of Notes.<sup>36</sup>
39. Further exchanges followed with a view to completing the demarcation of the

<sup>28</sup> The relevant pages of the *GWB* pass from the final item in the Second Part entitled "From the Convention of 1859 to 1884", namely, an internal Guatemalan note of 12 June 1884, at p.352, to the Third Part, entitled "From 1933 to Date". The 1931 Exchange of Notes finds no place either in the introduction to this Part, pp.255-379, or in the texts of the correspondence that follow.

<sup>29</sup> *Op. cit.*, p.248.

<sup>30</sup> 100 *ILR*, p.305.

<sup>31</sup> *Ibid.*, pp.314-320.

<sup>32</sup> See, in particular, *ibid.*, p.318.

<sup>33</sup> See Oppenheim's *International Law*, (9th edition), vol. I, p.1210; Aust, *Modern Treaty Law and Practice* (2000), p.21.

<sup>34</sup> Note of 28 December 1928, FO 371/15073, p.336.

<sup>35</sup> *Ibid.*, p.338.

<sup>36</sup> See below, para. 44.

frontier. In a note of 18 November 1929, the Guatemalan Foreign Minister referred to a request that he had made on 9 April 1929 to the British Minister

“to regard it as more natural with the object of arriving at a satisfactory agreement that the demarcation of the frontier should be considered as a *corollary to the convention* signed between Guatemala and the British Government on 30 April 1859, in which it would only be necessary to lay down the conditions under which the technical work would be carried out and to decide upon the date when the mixed commission of surveyors should assemble and conclude the work in a manner mutually satisfactory”<sup>37</sup>.

The note also dealt with details relating to the placing of “the boundary monuments” and establishment of “the correct frontier”. “The Guatemalan Government will be glad to assist by supplying the necessary elements so that with those supplied by the Government of Belize the demarcation of the boundary may be effected”.<sup>38</sup>

40. The reference in the Guatemalan Note to consideration of the demarcation of the frontier as a corollary to the 1859 Convention was understood by the British Minister in Guatemala, and was recorded by him in an internal memorandum, in the following manner:

“In 1928 the Governor of British Honduras had proposed the conclusion with Guatemala of an agreement to govern a survey and demarcation of the boundary, an agreement which should be replaced eventually after the completion of the survey and demarcation by a treaty between Great Britain and Guatemala to place formally on record the position of the boundary. Guatemala did not agree to the conclusion of the agreement as the approval of the Legislature would have been required and this would have caused delay. Furthermore, the Minister for Foreign Affairs *regarded the survey as a corollary of the treaty of 1859 and considered, therefore, an agreement to be unnecessary*”.<sup>39</sup>

41. The British Government, recognising that insistence on a formal treaty would cause long delay, agreed to the suggestion of the Guatemalan Foreign Minister that the demarcation should be considered as a corollary to the 1859 Convention. It took the view

“that the work recently accomplished [i.e. before 6 March 1931, the date of the instructions from the Foreign Office to the British Minister in Guatemala, see PRO, WO 181/9, C.85334/31 [No.3]] corresponds sufficiently with the procedure laid down in the Convention of 1859 for it to be possible to be treated as a belated fulfilment of that instrument; for the work has consisted in the definite settlement by agreement between Commissioners appointed respectively by the Governments of Guatemala and British Honduras of the position of the two terminal points . . . as laid down by Articles 1 and 2 of the Convention”.

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<sup>37</sup> FO 371/1/15073, p.341. Emphasis supplied. See also PRO WO 181./9 (c.75334/30 [No.5], p.4.

<sup>38</sup> *Id.*

<sup>39</sup> Memorandum attached to the British Minister's despatch of 13 December, 1930, CO123/332/7. Emphasis supplied.

The Minister was instructed

"to secure an exchange of notes under which HMG and the Government of Guatemala recognise the position of these two points . . .".<sup>40</sup>

and this was what was done in the 1931 Exchange of Notes.

42. The content of the 1931 Exchange of Notes is sufficiently important to warrant an extended consideration of it. As is standard in treaties constituted by an exchange of notes, the substance of the agreement is set out in the note of the party initiating the exchange and is repeated or referred to in the response of the other party which completes the exchange and makes it effective.
43. The exchange was initiated by a note from the British Minister to Guatemala dated 25 August 1931:

"The boundary between British Honduras and the Republic of Guatemala was laid down in the convention between the Republic of Guatemala and Her Majesty the Queen of Great Britain and Ireland, signed at Guatemala on the 30 April, 1859, article 1 (paragraph 2) of which defines the line as "beginning at the mouth of the River Sarstoon in the Bay of Honduras and proceeding up the mid-channel thereof to Gracias á Dios Falls; then turning to the right and continuing by a line drawn direct from Gracias á Dios Falls to Garbutt's Falls on the River Belize and from Garbutt's Falls due north until it strikes the Mexican frontier".

"It was further stipulated by article 2 of the convention that "Her Britannic Majesty and the Republic of Guatemala shall, within twelve months after the exchange of the ratifications of the present Convention, appoint each a Commissioner for the purpose of designating and marking out the boundary described in the preceding article. Such commissioners shall ascertain the latitude and longitude of Gracias á Dios Falls and of Garbutt's Falls, and shall cause the line of boundary between Garbutt's Falls and the Mexican territory to be opened and marked where necessary, as a protection against future trespass.

"In consequence joint commissioners were appointed in 1860 for this purpose, who marked *in situ* the position of the terminal points of the southern section of the boundary, namely, Garbutt's Falls and Gracias á Dios Falls. However, the full survey of the frontier was not completed at that time.

"The Governments of the United Kingdom and Guatemala are now desirous of completing the demarcation. As a first step towards this purpose, commissioners were reappointed, who met on the Sarstoon River on the 16 January, 1929, and who proceeded to inspect the terminal points of the southern section of the frontier. They inspected the concrete monument on the north bank of the Sarstoon river at Gracias á Dios, 900 yards up-stream from the mouth of the Chocon branch. On the 22 January, 1929, they inspected the piles of stones on either side of the Belize River at Garbutt's Falls, erected by the joint commissioners in 1861. They decided to accept these marks as

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<sup>40</sup> *Ibid.*, [No.4].



indicating the exact position of the two terminal points. The marks were then replaced by new concrete monuments, erected under the supervision of the commissioners, the monument at Garbutt's Falls being placed on the southern side of the river, and the former pile of stones being demolished. The work, both on the Belize and the Sarstoon rivers, was duly recorded in a report signed by the said commissioners at the Sarstoon River on the 29 May, 1929, of which I have received an original signed copy.

"I have the honour to inform your Excellency that I am authorised by His Majesty's Government in the United Kingdom to confirm, on their behalf and in accordance with article 3, paragraph 3, of the convention, this report as set forth in the accompanying copy, duly certified by me, to accept the concrete monuments erected by the said commissioners as correctly marking the terminal points aforesaid, and to state that they would be glad to receive a similar assurance on the part of the Government of Guatemala.

"The present note and your Excellency's reply will constitute the agreement between the Governments of the United Kingdom and Guatemala in the matter.

"I avail, etc.  
H. A. Grant Watson"

44. The report of the commissioners referred to in the fourth paragraph of the Note was appended to it as an enclosure:

"We, the commissioners appointed by the Governments of Guatemala and British Honduras to establish the permanent boundary marks at Garbutt's Falls, Belize River and at Gracias á Dios Falls, Sarstoon River, met at Fallavon, Belize River, on the 7th day of May, 1929. On the 8th we proceeded to demolish the pile of stones erected at Garbutt's Falls by the commissioners of 1861, and to erect in its place a concrete monument bearing on its top two copper plates marked "Guatemala" and "British Honduras" respectively. We completed this work on the 10th. From the 11th to the 15th we were engaged upon other work for our respective Governments, and on the 16th we left for Belize, where we arrived on the night of the 20th. Having made necessary preparations, we left Belize for Sarstoon River on the 24th and arrived at Gracias á Dios Falls on the 26th. There we erected a monument similar to that at Garbutt's Falls, which we finished on the 29th. We then proceeded down the river to Sarstoon Bar, where we separated.

"Signed at Sarstoon River Bar this 29th day of May, 1929.

Fernando Cruz,  
Commissioner for the Government of Guatemala

Fred W. Brunton,  
Commissioner for the Government of British Honduras."

45. The Guatemalan answer was dated the next day, 26 August 1931 and reads as follows:

"I have the honour to acknowledge receipt of your note of the 25th instant.

"The Government of Guatemala agree to accept the concrete

monuments erected at Garbutt's Falls and the Rapids of Gracias á Dios which were set up by the commissioners of both Governments, Engineers Fernando Cruz and Frederick W. Brunton, on the 8 and the 26 May 1929, on the frontier between Guatemala and British Honduras according to the report drawn up at the Sarstoon River Bar by both delegates on the 29th day of the same month. A copy of the report duly certified is enclosed herewith.

"These monuments, thus determined, form part of the boundary line between British Honduras and the Republic of Guatemala.

"I avail, etc.  
A. Skinner Klée"

The Guatemalan answer also appended the report of the commissioners.

46. The Guatemalan reply also carried the following attestation:

"The undersigned Sub-Secretary of Foreign Affairs certifies: that he has seen the report, which states:

(There then follows the text of the report of the Commissioners.)

And in order to annex it as an enclosure to note No. 11443 of this date I draw up, seal and sign the present certificate, compared with its original, in the City of Guatemala, on the twenty-sixth day of the month of August, nineteen hundred and thirty-one.

(Seal.) J. Ed. Girón."

47. In addition, in the official British version of the Exchange of Notes, also published in 1932,<sup>41</sup> the whole text of the 1859 Convention was included as an Appendix. It was also included in the League of Nations version.<sup>42</sup>
48. We have taken note of the fact that the Guatemalan note of 26 August 1931 does not fully mirror the language of the British Note of 25 August 1931, but limits itself to agreement to accept the concrete monuments at Garbutt's Falls and the Rapids of Gracias á Dios set up by the Commissioners of both countries "on the frontier between Guatemala and British Honduras".
49. Acceptance by Guatemala of the operation of the 1859 Convention is implicit in its reply because, other than on the basis of that Convention, there would be no relevance in the placing of monuments at those two locations; nor would there be any basis for referring to those locations as being "on the frontier between Guatemala and British Honduras". This interpretation is supported by the statement in the Guatemalan Note of 18 November 1929 that "the demarcation of the frontier should be considered as a corollary to the 1859 Convention".<sup>43</sup>
50. Nor can the Guatemalan note be read as a deliberate non-acceptance by Guatemala of the operation of the 1859 Convention as such but only as a *de facto* acceptance of the monuments, without prejudice to the legal basis on which they might have been established. The Guatemalan Note cannot be read in isolation from either the

<sup>41</sup> Treaty Series No. 9 (1932), Cmd. 4050.

<sup>42</sup> See below, para. 52.

<sup>43</sup> See para. 39 above.

earlier Guatemalan Note of 18 November 1928<sup>44</sup> or from the British Note which is explicit in tying the 1929 erection of monuments to the implementation of the 1859 Convention. It would not have been a sufficient rejection by Guatemala of the elaboration contained in the British Note for Guatemala to have remained silent on that point. If Guatemala did not want to accept the British approach, it should have said so. It did not; this could only have been for the reason that it realised that if it did say so expressly, Britain would not have accepted the Guatemalan Note as completing the proposed agreement; and for Guatemala that would not have been an acceptable outcome.

51. There is a second reason why it is not possible to accept the Guatemalan Note as merely an acceptance of the *de facto* situation. Such an acceptance would not have supported any Guatemalan denial of the existence of the 1859 Convention and, correspondingly, of the denial of the recognition of a valid British title to British Honduras east of Garbutt's Falls and the Rapids of Gracias á Dios. Even if Guatemala had viewed the 1859 Convention as non-existent, it remains evident that Guatemala was treating the existence of the boundary as a fact. And if the boundary was so acknowledged, it can only have been on the basis that the territory on the other side of the boundary belonged to another State, in this case, British Honduras.
52. It is significant also that Britain, having received the Guatemalan reply, did not regard it as failing to respond to the British Note of 25 April 1931, but treated it as combining with the British Note to "constitute the agreement between the Governments of the United Kingdom and Guatemala in the matter"<sup>45</sup> and proceeded, eight months later, on April 29, 1932, to communicate the text for registration with the League of Nations. It was published in the *League of Nations Treaty Series* in 1932.<sup>46</sup>
53. There is no record of any adverse Guatemalan reaction to this registration and publication or to the validity of this treaty. Indeed its existence is noted as a fact and without any qualification by Mendoza.<sup>47</sup> Sr Mendoza was Librarian of the Guatemalan Ministry of Foreign Affairs and the book bears on its flyleaf the following statement: "The Ministry for Foreign Affairs accepts this study which was submitted for its consideration . . .". Dr Francisco Villagrán Kramer, at that time a Member of the Council of Belize and a former member of the International Law Commission, in a study entitled "*Elements for the Analysis of the Case of Belize*", also referred, in paragraph 7, to the Exchange of Notes without considering its validity or effect.<sup>48</sup>
54. The controlling significance of this Exchange of Notes is inescapable. The following are principal points of importance:
55. The Exchange of Notes is and always has been a valid and effective treaty as between Britain and Guatemala. It has never been – indeed, could not be – denounced; nor, by virtue of its character, could it be subject to a limitation of time.

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<sup>44</sup> *Id.*

<sup>45</sup> See the final paragraph of the British Note.

<sup>46</sup> Volume 128, No.2946, p.427.

<sup>47</sup> At p.248.

<sup>48</sup> This article appeared originally in Spanish in the *Revista del Colegio de Abogados*, 1996. The "Council of Belize" is not an organ of Belize but of Guatemala.

56. As a treaty it controls the relationship of the parties in respect of the matters covered by it – to the exclusion of any denial of the continuing validity of the 1859 Convention. The situation is comparable to that considered by the ICJ in the *Libya/Chad* case.<sup>49</sup> In that case, Libya based its claim on “a coalescence of rights and titles: those of the indigenous inhabitants, those of the Senoussi Order . . . and those of a succession of sovereign States . . .”. Chad claimed a boundary on the basis of a Treaty of 1955; alternatively, it relied upon French *effectivités* (France having been its predecessor in title). However, both Parties recognised the 1955 Treaty as the logical starting point for the consideration of the issues before the Court and the Court did so too. The relevance of the case will be seen from the paragraphs that follow.

57. It is helpful to quote certain passages in the Court's judgment:

“The Court considers that Article 3 of the 1955 Treaty was aimed at settling all the frontier questions, and not just some of them. The manifest intention of the parties was that the instrument referred to in Annex I would indicate, cumulatively, all the frontiers between the parties . . . .<sup>50</sup>

“. . . The text of Article 3 clearly conveys the intention of the parties to reach a definitive settlement of the question of their common frontiers by reference to legal instruments which would yield the course of such frontiers. Any other construction would be contrary to one of the fundamental principles of the interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness . . . .<sup>51</sup>

58. The Court then examined the earlier treaties referred to in the 1955 Treaty and identified the frontier by reference to them. The following passage is particularly material to the present case:

“75. It will be evident from the preceding discussion that the dispute before the Court, whether described as a territorial dispute or a boundary dispute, is conclusively determined by a Treaty to which Libya is an original party and Chad a party in succession to France. The Court's conclusion that a Treaty contains an agreed boundary renders it unnecessary to consider the history of the “Borderlands” claimed by Libya on the basis of title inherited from the indigenous people, the Senoussi Order, the Ottoman Empire and Italy. Moreover, in this case, it is Libya, an original party to the Treaty, rather than a successor State, that contests its resolution of the territorial or boundary question. Hence there is no need for the Court to explore matters which have been discussed at length before it such as the principle of *uti possidetis* and the applicability of the Declaration adopted by the Organisation of African Unity at Cairo in 1964.

“76. Likewise, the effectiveness of occupation of the relevant areas in the past, and the question whether it was constant, peaceful and acknowledged, are not matters for determination in this case. So, also, the question whether the 1955 Treaty was declaratory or constitutive does not call for consideration. The concept of *terra nullius* and the nature of Senoussi, Ottoman or French administration

<sup>49</sup> *ICJ Reports* 1994, p.6.

<sup>50</sup> At p.24.

<sup>51</sup> At p.25.

are likewise not germane to the issue. For the same reason, the concepts of spheres of influence and of the hinterland doctrine do not come within the ambit of the Court's enquiry in this case. Similarly, the Court does not need to consider the rules of inter-temporal law. This Judgment also does not need to deal with the history of the dispute as argued before the United Nations and the Organisation of African Unity. The 1955 Treaty completely determined the boundary between Libya and Chad."<sup>52</sup>

59. The parallels between the *Libya/Chad* case and the present one are self-evident. Where the ICJ was able to apply a specific treaty to resolve the dispute, it did not find it necessary to look into the history of the area or to examine such matters as the principle of *uti possidetis*, the effectiveness of the occupation of certain areas, or the concepts of *terra nullius* and the hinterland doctrine. "The 1955 Treaty completely determined the boundary between Libya and Chad."<sup>53</sup>
60. The 1931 Exchange of Notes takes as its starting point the delimitation in the 1859 Convention. It contains no reservation by Guatemala regarding the validity, operation or effect of the 1859 Convention. Thus, whatever may have occurred between 1859 and 1931 and whatever has been invoked by Guatemala as affecting the validity, operation or effect of the 1859 Convention, must now be disregarded. The 1931 Exchange of Notes, in providing for the further demarcation of the boundary laid down in the 1859 Convention, serves as a reaffirmation or confirmation of the boundary aspects of that Convention.
61. As a treaty confirming a demarcation carried out pursuant to the directions given in Article 1 of the 1859 Convention, the 1931 Exchange of Notes necessarily carries with it an acknowledgement that the territory enclosed within the lines described in 1859, and confirmed in 1931, is territory belonging to Belize, to which Guatemala has no valid claim. As was stated by Judge Huber in the *Island of Palmas* case:

"Territorial sovereignty is, in general, a situation recognised and delimited in space, either by so-called natural frontiers as recognised by international law or by outward signs of delimitation that are undisputed, or else by legal engagements entered into between interested neighbours, such as frontier conventions, or by acts of recognition of States within fixed boundaries."<sup>54</sup>

A similar idea was expressed by the ICJ in the *Libya/Chad* case:

"The fixing of a frontier depends on the will of the sovereign States concerned. There is nothing to prevent the parties from deciding by mutual agreement to consider a certain line as a frontier, whatever the previous status of that line. If it was already a territorial boundary, it is confirmed purely and simply. If it was not previously a territorial boundary, the agreement of the parties to "recognise" it as such invests it with a legal force which it had previously lacked."<sup>55</sup>

62. Having accepted the operation of the 1931 Exchange of Notes for the ensuing

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<sup>52</sup> At pp.37 and 39.

<sup>53</sup> *Id.*

<sup>54</sup> 2 *UNRIIA*, at p.838.

<sup>55</sup> At p.22, paragraph 45.

years, Guatemala can no longer be heard to contend that the basis of that agreement, namely the 1859 Convention, is no longer valid. This can be expressed in terms of preclusion, estoppel, good faith or as an application of the maxim *allegans contraria non audienda*.<sup>56</sup>

63. The fact that the boundary between the southern point at Gracias á Dios and Garbutt's Falls was not at that time "opened" can make no difference. Once those two locations have been agreed on both sides, it is impossible to escape from the acknowledgement of the continuing operation of the 1859 Convention that that conveys.
64. The very fact of the reproduction of the 1859 Convention as an appendix to the Exchange of Notes, without objection from Guatemala, is itself a further acknowledgement of the continuing validity and effect of the 1859 Convention.
65. Guatemala has recently referred to the 1931 Exchange of Notes, but only in response to the written submissions of Belize made to the Facilitators in April 2001 along lines similar to those expressed earlier in this Opinion. Guatemala has asserted that the 1931 Exchange of Notes does not constitute an independent treaty and is an ancillary treaty derived from the 1859 Convention. The argument maintains that the Exchange of Notes refers to the fact that the markers erected in 1860 made of limestone would be replaced by concrete markers. The Notes

"therefore, are testimony of what was done, that is, they are linked and subordinate to the 1859 Treaty, without the existence of which they could not have been accepted, signed and executed. All these acts were carried out in good faith by Guatemala, expressly conditioned to the fulfilment by Britain of the obligation contained in Clause seven of the 1859 Treaty".

Guatemala also contends that the Exchange of Notes "is part of the process of compliance with the 1859 Treaty". The conclusion, implied rather than expressed, is that the 1931 Exchange of Notes came to an end in 1946 when, as Guatemala claims, it declared the 1859 Convention at an end.

66. We recognise that the 1931 Exchange of Notes was linked to the 1859 Convention. That is no more than a statement of the obvious. But we cannot see how any conclusion adverse to the rights of Belize can be drawn from this statement. What matters is that the 1931 Exchange of Notes was an explicit reaffirmation by Guatemala of the existence and continuing validity in 1931 of the 1859 Convention. It had not come to an end by then. As is clear from the correspondence prior to the 1931 Exchange of Notes, the suggestion that the demarcation was a "corollary" of the 1859 Convention did not imply that the validity of the 1931 Convention was in any way linked to the performance of Article VII of the 1859 Convention. Nor is there anything else in the correspondence that supports the Guatemalan assertion that Guatemala's acts were "expressly conditioned to the fulfilment by Britain of the obligation contained in Clause seven of the 1859 Treaty".
67. So the only question that remains is whether something subsequent to 1931 could have brought both it and the 1859 Convention to an end. Guatemala has not identified anything; nor are we able to identify any act or omission between 1931

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<sup>56</sup> See Cheng, *General Principles of Law* (1953), pp.141-149.

and the purported Guatemalan denunciation of 1946 as providing good cause for that denunciation. And, we repeat, once established, the boundary had a life of its own, not dependent upon the survival of the 1859 and the 1931 treaties.

68. The above analysis disposes of the problems arising out of the effect of Guatemala's contentions regarding the non-fulfilment by Britain of its obligations under Article VII of the 1859 Convention on the title of Belize to the territory. Guatemala, in the light of its agreement to the 1931 Exchange of Notes, cannot be regarded as having maintained its assertion that the operation of the 1859 Convention is dependent upon the fulfilment of Article VII. Nor can Guatemala's contention that the 1859 Convention had come to an end be maintained. Nor can Guatemala's subsequent attempt to return to the question of Article VII affect the matter. It cannot undo the legally binding acceptance by Guatemala in the 1931 Exchange of Notes of the title-determining effect of the 1859 Treaty.

## V. CUSTOMARY INTERNATIONAL LAW

69. We now turn to the second element of title – the position in customary international law. In this connection, it is necessary to have regard to the fact of the occupation, presence and administration since before 1850 of Britain, and since 1981 of Belize, in the territory of Belize.
70. Let it be assumed, though only for the purposes of the present part of the discussion, that each of the following elements in the Guatemalan argument is correct,<sup>57</sup> namely, that under the Treaties of 1783 and 1786 Spain gave Britain no more than limited rights of *usufruct* in the area north of the Sibun River; that Guatemala succeeded to the rights of Spain in the area south of the Sibun River; that Article VII was an essential part of the 1859 Convention and could not be severed from it; that Britain did not fulfil its obligations under Article VII; and that the 1859 Convention was not an executed treaty and Guatemala was entitled to regard Britain's breach as so material as to justify Guatemala in treating the Convention as at an end.
71. In our view none of these assumptions, taken individually or collectively, serves to negate the current title of Belize which flows from the presence on the ground of Britain and of Belize continuously for some 175 years. This title can be described as being founded on the concept of historical consolidation, including that of acquisitive prescription. It does not depend upon conquest. It stems rather from the facts of long-standing and continuous British and Belizean governmental presence and activity. Moreover, it is supported by the right of the people of Belize to self-determination as recognised internationally in the debates in, and actions of, the United Nations in the period from 1975 until the achievement of independence by Belize in 1981.<sup>58</sup> Additionally, it is highly material that there is no evidence of any conflicting governmental activity by Guatemala on the ground anywhere in the territory of Belize.
72. To restate the point quite simply, the facts override all the legal arguments advanced by Guatemala. It does not matter that the rights of Spain may have been

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<sup>57</sup> Some of them will be examined in Part Two below.

<sup>58</sup> See Appendix I below.

breached in the period prior to the date of the independence of the Central American States in 1821; nor that Guatemala may have succeeded to Spain's authority and title in the area between present day Guatemala and the Atlantic; nor that the 1859 Convention may have reflected a bargain that may not have been fulfilled by Britain. None of these matters can affect the factual realities on which the title of Belize to its territory is based.

## A. The Law

73. However, before proceeding to examine the facts it will be convenient to set out the relevant legal considerations.
74. The idea that continuity of possession and administration over an extended period can override any notional title of a State that merely claims title to territory unaccompanied by possession and administration is one that is reflected in two closely associated concepts: historical consolidation and acquisitive prescription. While the latter assumes the existence of a prior title of the opposing claimant, the former avoids that issue by focussing on the facts of possession and administration to determine which State has done more to demonstrate its title. In addition, account must be taken of the related principles of acquiescence, estoppel and preclusion as well as the operation of the principle of self-determination.

### 1. Historical consolidation

75. The concept of historical consolidation has been explained by Sir Robert Jennings in his authoritative text on *The Acquisition of Territory* (1963), at pp.23-27. It makes the concept so clear that it is worth quoting it fully:

#### "HISTORICAL CONSOLIDATION OF TITLE

"This ambiguity in actual cases based essentially on effective possession suggests the question whether the various factors contributing to building a title cannot usefully and instructively be subsumed under the one heading of a process of 'consolidation', and regarded as being for essential purposes all part of one legal process, or 'mode' of acquisition of territorial sovereignty. This possibility has been advocated by Professor Charles de Visscher, elaborating a formula used in the Norwegian *Fisheries* case, in which he was a Judge. The passage is of such importance that it may be useful to cite it at some length:

4. *Consolidation by Historic Titles* The fundamental interest of the stability of territorial situations from the point of view of order and peace explains the place that consolidation by historic title holds in international law and the suppleness with which the principle is applied. It is for these situations, especially, that arbitral decisions have sanctioned the principle *quieta non movere*, as much out of consideration for the importance of these situations in themselves in the relations of States as for the political gravity of disputes concerning them. This consolidation, which may have practical importance for territories not yet finally organised under a State regime as well as for certain stretches of sea-like bays, is not subject to the conditions specifically required in other modes of acquiring territory. Proven long use, which is its foundation, merely represents a complex of interests and relations which in themselves have the effect of attaching a territory or an



expanse of sea to a given State. It is these interests and relations, varying from one case to another, and not the passage of a fixed term, unknown in any event to international law, that are taken into direct account by the judge to decide *in concreto* on the existence or non-existence of a consolidation by historic titles.

In this respect such consolidation differs from acquisitive prescription properly so-called, as also in the fact that it can apply to territories that could not be proved to have belonged formerly to another State. It differs from occupation in that it can be admitted in relation to certain parts of the sea as well as on land. Finally, it is distinguished from international recognition – and this is the point of most practical importance – by the fact that it can be held to be accomplished not only by acquiescence properly so called, acquiescence in which the time factor can have no part, but more easily by a sufficiently prolonged absence of opposition either, in the case of land, on the part of States interested in disputing possession or, in maritime waters, on the part of the generality of States.

“Thus, as Professor Johnson says, Professor de Visscher has ‘embraced under a single heading the notion of straightforward possession on the one hand and of adverse possession on the other hand. . . . Under the single heading of “consolidation” it is now possible . . . to include both “straightforward possession” and “adverse possession”.

“But the idea of historical consolidation is something more than a terminological reform. It opens the door to a mode of acquiring title that is, or at least may become, subtly different from what is found in the old learning about occupation and prescription. Prescription, as we have seen, is based upon a peaceable, effective possession – a possession as of a sovereign extending over a considerable period. But such a possession may not be self-evident in a disputed case. It must, therefore, be proved, and for the purpose of this demonstration, a great variety of evidences may be relevant – particularly the attitude of third States, because repute is always an important factor in any question concerning rights over land. But the notion of consolidation introduces something over and above the notion of *evidences* of sovereign possession; for these factors of repute, acknowledgement and so on then become, if I have understood this aright, not merely *evidences* of a situation apt for prescription but become themselves decisive ingredients in the process of creating title.

“. . . Now it must be acknowledged at once that this passage from Professor de Visscher's analysis is not just a suggestion *de lege ferenda*; it is a penetrating and illuminating observation of the way Courts actually tackle questions of title to territorial sovereignty. Thus it makes clear how recognition in varying forms, and acquiescence, and estoppels perhaps are given an important place in this scheme of things; and this is no doubt right.

“. . . it must be emphasised that however important all these various consolidating factors may be, it is still the fact of possession that is the foundation and the *sine qua non* of this process of consolidation.

“. . . It should be made quite clear, therefore, that the process of consolidation cannot begin unless and until actual possession is already an accomplished fact and that, although no time is laid down, it remains true that it cannot be completed until after a considerable period of possession as of a sovereign.

"... the whole tendency of consolidation is to make the origin of the possession of ever-diminishing importance. No doubt this is in a sense realistic.

"... 'What is of decisive importance ... is not indirect presumptions deduced

from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minguers groups.' "

76. A recent acknowledgement of the concept of consolidation is to be found in the first Award of the Arbitral Tribunal in the *Eritrea/Yemen* case. There, the Tribunal said:

"But an historic title has also another and different meaning in international law as a title that has been created, or consolidated, by a process of prescription, or acquiescence, or by possession so long continued as to have become accepted by law as a title. These titles too are historic in the sense that continuity and the lapse of a period of time is of the essence."<sup>59</sup>

77. The Tribunal also said:

Evidence of intention to claim the islands *à titre de souverain* is an essential element of the process of *consolidation* of title".

This sentence relates back to one in an earlier paragraph where the Tribunal said:

"The modern international law of the acquisition (or attribution) of territory generally requires that there be an intentional display of power and authority over the territory, by the exercise of jurisdiction and State functions, on a continuous and peaceful basis. The latter two criteria are tempered to suit the nature of the territory and the size of its population, if any."<sup>60</sup>

## 2. Acquisitive prescription

78. Although there has been some doctrinal controversy relating to the idea of acquisitive prescription, there can be no real doubt today that sufficiently long adverse possession of a disputed territory by one State can override the claim or title of another State which may originally have possessed title but has not in fact exercised it. The current position is authoritatively summarised in Oppenheim's *International Law* (9th edition, by Sir Robert Jennings and Sir Arthur Watts) at p. 706:

". . . Again, others, whilst not requiring possession from time *immemorial*, held that undisturbed continuous possession could under certain conditions produce a title for the possessor, if the possession had lasted for some time.

"This latter opinion seems to be in accordance with practice. There is no doubt that, in international practice, a state has been considered to be the lawful owner even of those parts of its territory of which

<sup>59</sup> *Eritrea/Yemen, Phase One: Territorial Sovereignty and the Scope of the Dispute* (1998), 114 ILR 2, at p.35

<sup>60</sup> *Ibid.*, p.69.

originally it took possession wrongfully, provided that the possessor has been in undisturbed possession for so long as to create the general conviction that the present condition of things is in conformity with international order. Prescription in international law was therefore defined in the previous edition of this work, as *the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order.*"

79. The application of the concept of acquisitive prescription was examined by the ICJ in the *Kasikili* case.<sup>61</sup> The Court first observed that "the Parties agree between themselves that acquisitive prescription is recognised in international law" and stated that "for present purposes the Court need not concern itself with the status of acquisitive prescription in international law"<sup>62</sup>. Nonetheless, the Court did examine at length the conditions under which title can be so acquired. It is hardly likely that the Court would have done this if it had taken the view that there is no doctrine of acquisitive prescription. The Court's consideration of the conditions required to complete a prescriptive title will be mentioned in paragraph 83 below.

### 3. The nature of the possession required

80. We should also recall the nature of the possession required to create and sustain title. It is important to bear in mind that the question of the title of Belize to its territory is not simply a matter of considering whether Belize has or has not title. It is also a matter of considering whether Guatemala has or has not title. In other words, one must look at both sides of the coin. It is the relative strengths of the cases of the two sides that must be considered. Even if there were imperfections in the title acquired by Britain, imperfections that are not apparent, it is still necessary, if that title is to be displaced, to show that Guatemala has a stronger title. This means that if Guatemala did acquire title to all or part of the territory of British Honduras by, as it claims, the operation of the doctrine of *uti possidetis* in 1821, it would still need to show that it had maintained that title throughout the relevant intervening period. As was stated by Judge Huber in the *Island of Palmas* case:

"If a dispute arises as to the sovereignty over a certain portion of territory, it is customary to examine which of the States claiming sovereignty possesses a title – cession, conquest, occupation etc. – superior to that which the other States might possibly bring forward against it. However, if the contestation is based on the fact that the other Party has actually displayed sovereignty, it cannot be sufficient to establish the title by which territorial sovereignty was acquired at a certain moment; *it must be shown that the territorial sovereignty has continued to exist and did exist at the moment which for the decision of the dispute must be considered as critical. This demonstration consists in the actual display of State activities, such as belongs only to the territorial sovereign.*"<sup>63</sup>

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<sup>61</sup> *Botswana/Namibia*, ICJ Judgment of 13 December 1999, paras. 90-99.

<sup>62</sup> *Ibid.*, paras. 96-97.

<sup>63</sup> 2 *UNRIAA*, at pp.838-839. Emphasis supplied.

81. As will be seen, at no time since 1821 (with two minor and transient exceptions)<sup>64</sup> has Guatemala ever attempted to assert, by governmental conduct specifically related to the area, whatever nominal title it may then have acquired. Once more, one may turn to Judge Huber:

"It seems therefore natural that an element which is essential for the constitution of sovereignty should not be lacking in its continuation. So true is this, that practice, as well as doctrine, recognises – though under different legal formulae and with certain differences as to the conditions required – that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title. *The growing insistence with which international law, ever since the middle of the 18th century, has demanded that the occupation shall be effective would be inconceivable, if effectiveness were required only for the act of acquisition and not equally for the maintenance of the right.* If the effectiveness has above all been insisted on in regard to occupation, this is because the question rarely arises in connection with territories in which there is already an established order of things. Just as before the rise of international law, boundaries of lands were necessarily determined by the fact that the power of a State was exercised within them, so too, under the reign of international law, the fact of peaceful and continuous display is still one of the most important considerations in establishing boundaries between States."<sup>65</sup>

82. Again, we may refer to Judge Huber:

"Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas. It is true that neighbouring States may by convention fix limits to their own sovereignty, even in regions such as the interior of scarcely explored continents where such sovereignty is scarcely manifested, and in this way each may prevent the other from any penetration of its territory. The delimitation of Hinterland may also be mentioned in this connection.

"If, however, no conventional line of sufficient topographical precision exists or if there are gaps in the frontiers otherwise established, or if a conventional line leaves room for doubt, or if, as e.g. in the case of an island situated in the high seas, the question arises whether a title is valid *erga omnes*, the actual continuous and peaceful display of State function is in case of dispute the sound and natural criterium of territorial sovereignty."<sup>66</sup>

83. In the Kasikili case, the conditions for prescription examined by the Parties were:

(1) whether possession was exercised *à titre de souverain*;

<sup>64</sup> See below, paras. 141-142.

<sup>65</sup> 2 UNRIIA, at p.839. Emphasis supplied.

<sup>66</sup> 2 UNRIIA, at p.840.

- (2) whether the possession was peaceful and uninterrupted;
- (3) whether the possession was public; and
- (4) whether the possession has endured for a sufficient length of time.<sup>67</sup>

The Court examined only the first condition and, having found that it was not satisfied, did not examine the remainder. But as will be seen from the facts that are set out below, all four conditions are satisfied in the present case and fully support the title of Belize.

#### 4. Acquiescence, estoppel and preclusion

84. We mention these principles because they are relevant as elements affecting not only the legal relations of States generally but also title to territory in particular. In the Temple case the ICJ attributed a determining role to the conduct of Thailand, first in its failure to react to a map which it subsequently sought to repudiate - a failure which the Court saw as amounting to acquiescence. Additionally, the Court considered that Thailand was precluded from asserting that the map had not been accepted by it because for fifty years it had not raised the point and during that time had enjoyed the benefit of a stable frontier.<sup>68</sup>
85. Again, in the *Case concerning the Arbitral Award of the King of Spain*, Nicaragua argued that the King's award was a nullity. The Court held that Nicaragua had recognised the award by express declaration and by conduct, as well as by not challenging it for a number of years. Though the Court did not use the terms estoppel, preclusion or acquiescence to explain its conclusion, the significance attached to Nicaragua's conduct is evident.<sup>69</sup>
86. Likewise, in the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras, though the Chamber of the Court attached major importance to the principle of *uti possidetis juris*, it nonetheless held that the application of the principle could be qualified by the conduct of the parties in the form of acquiescence or recognition. The Chamber said:

"If the *uti possidetis juris* position can be qualified by adjudication and by treaty, the question then arises whether it can be qualified in other ways, for example, by acquiescence or recognition. There seems to be no reason in principle why these factors should not operate, where there is sufficient evidence to show that the parties have in effect clearly accepted a variation, or at least an interpretation, of the *uti possidetis juris* position."<sup>70</sup>
87. Lastly, reference should be made to the acceptance by the arbitral tribunal in the Taba arbitration of the conduct of the parties as amounting to the recognition of the location of a subsequently disputed boundary-pillar, notwithstanding that the location of the pillar did not satisfy an express treaty requirement that pillars should be intervisible<sup>71</sup>.

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<sup>67</sup> *Loc. cit.*, para. 94.

<sup>68</sup> *ICJ Reports 1962*, 6, at p.23. See also the Separate Opinion of Vice-President Alfaro in the same case for an extended development of the associated principles of estoppel and acquiescence which he pointed out were accepted by Spanish jurists as "doctrina de los actos propios", *ibid.*, pp.39-51.

<sup>69</sup> *ICJ Reports 1960*, 192, at pp.470 and 473.

<sup>70</sup> *ICJ Reports 1992*, 351 at pp.401, 408 and 577.

<sup>71</sup> *Egypt/Israel*, 1988, 80 ILR 226, at pp. 306-7.

## 5. The legal effect of unilateral declarations

88. As will be seen in paragraphs 120 below, the factual position during the period from 1798 to 1859 was the subject of a letter to the Guatemalan House of Representatives from Sr Aycinena, the Guatemalan Minister of Foreign Affairs, dated 4 January 1860.<sup>72</sup> This statement is a significant confirmation of the facts described below relating to British possession of Belize. Its legal standing as a unilateral declaration made on behalf of the Government of Guatemala is also significant. The nature of such declarations was considered by the ICJ in the *Nuclear Tests* case.<sup>73</sup> The material paragraphs are as follows:

"It is well recognised that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.

Of course, not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound - the intention is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.

One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected."

The declarations in that case took the form of a number of statements made by the President of France and the French Ministers of Foreign Affairs and Defence.

89. As to the intention of the Guatemalan Minister of Foreign Affairs it must, as the Court said, "be ascertained by the interpretation of the act". As is evident, Sr Aycinena wished to be understood by the members of the House of

<sup>72</sup> Printed in W.M.Clegern "A Guatemalan Defense of the British Honduras Boundary of 1859", *Hispanic American Historical Review*, XL (1960), pp.570-81. The letter is formally addressed to "Señores Secretarios de la Cámara de Representantes".

<sup>73</sup> ICJ Reports 1974, 253 at pp. 267-8.

Representatives as truthfully conveying the Government's genuine understanding of the circumstances. It appears to us that Britain, as an "interested State" was entitled to "take cognizance" of the statement and "place confidence" in it.

## 6. Self-determination

90. A third, highly pertinent, aspect of customary international law is the development of the principle of self-determination. Rather than review the enormous amount of literature on this subject, we find it convenient to express our agreement with the views expressed in the latest and highly authoritative study of the subject, the work by Professor A. Cassese entitled *Self-Determination of Peoples - A Legal Reappraisal*.<sup>74</sup> Professor Cassese observes:

"Close scrutiny of the views of Governments, State practice and pronouncements of international bodies such as the UN General Assembly and the International Court of Justice warrants the conclusion that the UN Charter provisions on self-determination have been the starting point of a gradual law-making process generating two sets of legal standards; the treaty provisions of the UN Covenants of 1966 and a cluster of general norms. At the level of general international law one may discern the formation of a general *principle* and a number of customary *rules*".<sup>75</sup>

He also says that

"the conclusion is justified that self-determination constitutes a peremptory norm of international law".<sup>76</sup>

91. In the chapter of his work on "The impact of self-determination on traditional international law", Professor Cassese makes some highly pertinent statements regarding the relationship of the principle and the modes of the acquisition, transfer and loss of legal title over territory. First, he notes the gradual emergence of a set of legal obligations for those countries still enjoying sovereignty over colonial territories. Thus, he says:

"These obligations make it incumbent on those States to enable the people of colonial territories freely to choose whether to opt for independent statehood, or association or integration with an existing State. Thus, those obligations do not produce the immediate legal effect of rendering the legal title over colonial territories null and void. Rather, besides setting out a series of limitations and qualifications intended greatly to restrict sovereignty, they envisage a temporary legal regime that must of necessity lead to the eventual *extinction* of legal title. In a way, these obligations act as a sort of time-bomb: the holder of the sovereign title has to fulfil them knowing that by this action it will eventually have to relinquish its title."<sup>77</sup>

92. Moreover, he states:

". . . one of the consequences of the general principle of self-determination relates precisely to changes of territory, that is, to cases where

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<sup>74</sup> Cambridge, 1995.

<sup>75</sup> *Op. cit.*, pp. 126-27.

<sup>76</sup> *Ibid.*, p.140.

<sup>77</sup> *Op. cit.*, pp. 186-87.

sovereignty over a particular territory is transferred by one State to another by mutual agreement (obviously, acquisition of territory by force is no longer admissible in current international law). In the case of such transfers, the States involved are duty-bound to ascertain the wishes of the population concerned, by means of a referendum or plebiscite, or by any other appropriate means that ensure a free and genuine expression of will. It follows, of course, that any inter-state agreement that is contrary to the will of the population concerned would fall foul of the principle of self-determination."<sup>78</sup>

93. In these respects, Professor Cassese directly reflects the views of the ICJ. In the *East Timor* case the Court said:

"In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an erga omnes character, is irreproachable. The principle of self-determination of peoples has been recognised by the United Nations Charter and in the jurisprudence of the Court".<sup>79</sup>

94. A recent opinion by Judge *ad hoc* Thomas Franck in the International Court of Justice makes it abundantly clear that "historic title, no matter how persuasively claimed on the basis of old legal instruments and exercises of authority, cannot - except in the most extraordinary circumstances- prevail in law over the rights of non-self-governing people to claim independence and establish their sovereignty through the exercise of bona fide self-determination". The Judgment of the ICJ of 23 October, 2001 [*Application by The Philippines for Permission to Intervene in the Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipidan (Indonesia/Malaysia)*] considered the request of the Philippines to intervene "to preserve and safeguard the historical and legal rights of the Government of the Republic of the Philippines arising from its claim to dominion and sovereignty over the territory of North Borneo". The Separate Opinion of Judge Franck concurred with the decision of the Court but went into greater detail on the question of self-determination. "In essence", he said, "the Philippine claim is to North Borneo and not to bits of it. This is not a boundary dispute to which evidence of historic title and evidence of texts and efficacies might well be relevant. This is, in effect, a claim by the Philippines to one of the federated states of Malaysia". Judge Franck noted that the "the decisions of this Court confirm the prime importance of [the] principle of self-determination of peoples", and concluded that:

"Accordingly, in light of the clear exercise by the people of North Borneo of their right to self-determination, it cannot matter whether this Court, in any interpretation it might give to any historic instrument or efficacy, sustains or not the Philippine claim to historic title. Modern international law does not recognise the survival of a right of sovereignty based solely on historic title; not, in any event, after an exercise of self-determination conducted in accordance with the requisites of international law, the bona fides of which has received international recognition by the political organs of the United Nations. Against this, historic claims and feudal pre-colonial titles are mere relics of another international legal era, one that ended with the setting of the sun on the age of colonial imperium."

95. In our understanding, the position as here expressed applies as much to Guatemala

<sup>78</sup> *Ibid.*, p.190.

<sup>79</sup> *ICJ Reports 1995*, p.103, para.29. Emphasis supplied.



as to Britain. Both States are duty-bound to respect the right of the people of Belize to self-determination. The insistent reiteration by Guatemala of its claim to the "restoration" of Belize notwithstanding the clearly expressed wishes of the people of Belize to the contrary runs completely counter to the obligation of Guatemala to respect their right to self-determination. The facts of the situation will be set out more fully below. Appendix 1 sets out in full the application of by the United Nations General Assembly of the principle of self-determination to sustain the independence and territorial integrity of Belize.

## B. The Facts

96. In the light of the legal considerations set out above, the facts must now be looked at from two points of view: the evidence of British possession of the area of British Honduras (and of Belize Government administration of the whole of the territory of Belize) and the absence of any evidence of competing attempts at possession or acts of government by Guatemala.

### 1. British and Belize presence in the area since long before 1850

97. The presence of British settlers in the area of British Honduras north of the Sibun prior to 1850 has not really been brought into question. What matters more particularly is the extent and timing of British settlement between the Sibun and the Sarstoon prior to 1850<sup>80</sup>, that is to say, in the part of the country that lay outside the area covered by the Spanish grants. In respect of that part, it cannot be said that the British were there by virtue of Spanish licence.
98. By 1799-1800 Superintendent Barrow reported that Deep River, well to the south of the Sibun, had been occupied by the British.<sup>81</sup>
99. In 1802 he reported that settlers had by then occupied the south side of the River Sibun as well as other places "further to the southward, as Stand Creek, Deep River etc."<sup>82</sup>
100. Also in 1802 the Honduras Merchants Committee reported that the southern advance of settlers had brought them nearly in sight of the Spanish fortifications of Omoa – a place so far to the south of the Sarstoon as to be in the territory of what is today Honduras.<sup>83</sup>
101. In 1806 the settlers were again reported as having reached Deep River and in the same year the settlers sought protection for the mahogany cutters in the southern rivers, namely, Deep River, Golden Stream and Rio Grande.<sup>84</sup> At that time, further north, but still south of the Sibun, 38 settlers were said to be living at Mullins River. South of that river was Stann Creek, which was the usual watering place for ships of the British fleet. It was occupied by woodcutters who shipped considerable quantities of wood from there.<sup>85</sup>

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<sup>80</sup> The facts that follow are largely drawn from Humphreys. The presentation of the primary material from which these facts are derived would unduly lengthen this Opinion.

<sup>81</sup> Humphreys, *Op. cit.*, p.15.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* See also Burdon, II, p.91.

<sup>85</sup> *Id.*

102. In 1814 the settlers addressed a Memorial to the Prince Regent stating that woodcutting had advanced to the Moho River and asking for this river to be recognised as the southern boundary of the settlement – a river only a little more than 15 nautical miles north of the Sarstoon.<sup>86</sup> And this development was confirmed by Superintendent Arthur in 1816. As Humphreys pointed out<sup>87</sup> this advance took place in territory that was “solely occupied by Indians and where the writ of Spain had never run”. He also observed that these penetrations were not initially accompanied by agricultural settlement. A Colonial Office Memorandum of 20 January 1835 stated:

“The distance from the north of the Sarstoon to which that river is actually occupied by the British Settlers cannot be very correctly ascertained . . . but it seems sufficiently certain that where it is not occupied by the British, it is not occupied at all.”<sup>88</sup>

103. On 17 June 1825, a leading merchant in Belize, Mr Marshall Bennett, wrote to Mr Horton at the Foreign Office the following letter, which is here reproduced in full:

“Should His Majesty’s Government deem it expedient to make any arrangements with the Government of Guatemala and Mexico in which the British Settlement of Honduras may become a subject of discussion, it is humbly submitted that the boundaries which for a series of twenty years or more have been uniformly considered by the successive Superintendents as the limits of the settlement and which it would be by no means inconvenient for the Government of Guatemala and Mexico to confirm should be the limits as marked down in the accompanying Chart viz.

The South Bank of the River Hondo from its source to its mouth and to Latitude 18° 9” Longitude 87° 17” being the Northern boundary.

From the source of the said River Hondo Southward intersecting the River Walliz or Belize at a distance of 70 miles from the coast in a right line say Longitude 89° 49” to the source of the River Gorda [the name by which the Sarstoon was previously known] that being the Western Boundary.

From the source of the River Gorda Latitude 15° 37” Longitude 89° 49” to its mouth and from thence to Latitude 16° 40” Longitude 87° 17” the same being the southern boundary and extending from said Latitude and Longitude in a right line due north to Latitude 18° 9” Longitude 87° 17” that being the Eastern Boundary.”<sup>89</sup>

This shows that from as early as 1805 the Sarstoon was considered as the southern boundary of the settlement and its source as its western boundary.

104. By 1825 Superintendent Codd felt able to mark on a map sent to London the southern boundary at the Sarstoon.<sup>90</sup> In a letter to London, the terms of which merit extended quotation, he wrote:

“I . . . now transmit to you a sketch (not of actual survey) though

<sup>86</sup> *Ibid.*, p.16. See also Burdon, II, p.167.

<sup>87</sup> *Ibid.*, at p.17.

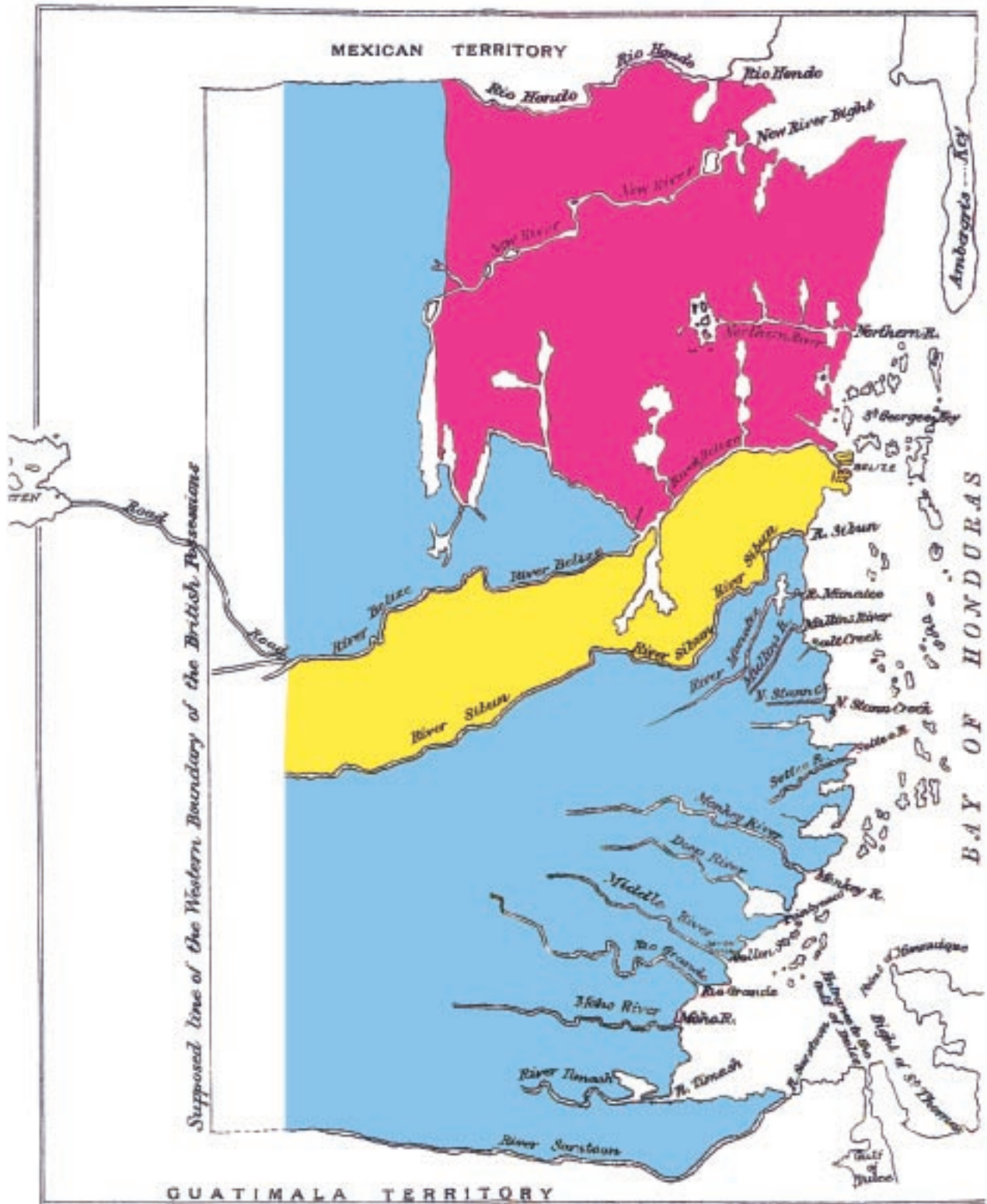
<sup>88</sup> FO72/452, pp. 252-253. Emphasis supplied. Extracts in Belize Response to Guatemala's Statement of 30 March 2001, April 2001, Annexes, Annex 11.

<sup>89</sup> Enclosed in Horton to Planta, 9 July 1825, FO15/4. Emphasis added.

<sup>90</sup> Humphreys, p.12. See GWB, p.43.

"SKETCH OF THAT PART OF YUCATAN AT PRESENT POSSESSED BY THE BRITISH. 1826"

(REDUCED FROM MAP INCLOSED IN MR. COOKE'S LETTER TO MR. SECRETARY CANNING, 29TH. APRIL, 1826.)



N.B.—THE PART COLOURED RED DEFINES THE LIMITS OF THE TREATY OF 1763.  
THE PART COLOURED YELLOW WAS ANNEXED BY THE TREATY OF 1785.  
THE PART COLOURED BLUE HELD BY FORCE OF ARMS SINCE 1796,  
THE LAST ATTACK OF THE SPANIARDS.

sufficiently accurate for any reference with the explanation it appears to me to require of that part of the continent now occupied by the British.

That part of the Territory coloured red represents the limits defined in the Treaty with Spain in the year 1783. That coloured yellow was annexed by additional articles to the same Treaty in 1786 and the whole respected by the Spaniards until the year 1798 when they made an attack upon the Settlement and were defeated. The Treaty being thus violated the British from this time maintained possession by force of arms and did no longer confine themselves to the prescribed boundaries but cut Mahogany in every direction on the portion coloured green from the River Sarstoon adjacent to the Gulf of Dulce as far to the Northwards as the South of the Rio Hondo which is represented to me as the North and South limits of this Settlement.

The Settlers at present occupy to the extent of 200 miles to the west from the sea shore, but the Country in that direction is unexplored.

The nearest Spanish town West of the Settlement is called Peten. It is an insignificant place and might be taken as the Western boundary or back line in any new Treaty or even a North and South line from the source of the river Belize till it bears west of the sources of the Rivers Rio Hondo and Sarstoon respectively which would comprise all the country occupied by the Settlers. For that part defined by the Treaties of 1783 and 1786 have long since been nearly exhausted and two thirds of the wood now cut comes from without such limits.

...".<sup>91</sup>

105. In 1826, the first edition of *The Honduras Almanack* stated:

"The tract of territory now practically held by the British, occupies a line of sea coast of about 250 miles, from the Rio Hondo, the ultimate boundary of the Mexican Republic, to the river Sarstoon, on the commencement of the States of Guatemala (*sic*) . . .".<sup>92</sup>

106. A particularly cogent item of evidence is the map enclosed with a letter of 29 April 1826 from Mr Cooke to Mr Secretary Canning headed "Sketch of that part of Yucatan at present possessed by the British. 1826." This shows the northern part of Belize shaded red to indicate the area covered by the 1783 Treaty, the central part coloured yellow to indicate the area covered by the Treaty of 1786 and the southern part coloured blue "held by force of arms since 1798, the last attack of the Spaniards". The southern part extends to the River Sarstoon.<sup>93</sup> Also of significance, however, is the fact that a line is drawn due north from the River Sarstoon and is marked "Supposed line of the Western Boundary of the British Possession". Both these features confirm that by 1826 British possession extended as far south as the Sarstoon.

107. On 24 November 1827 Superintendent Codd, in reporting to Viscount Goderich on the boundary with Mexico, pointed out

"that the English, having previously been obliged to return from the

<sup>91</sup> FO 15/4, 8 July 1825, Edward Codd to R. Horton. The content of this letter is evidently known to Guatemala as it is noted in *GWB*, p.43.

<sup>92</sup> Humphreys, at p.11.

<sup>93</sup> This map is reproduced on the following page.

more Northern parts, had entrenched themselves as far Southward as the River Sarstoon and hold this area by truce as conquered from Spain, a right supported by the establishment of a Garrison".<sup>94</sup>

108. On 1 December 1827 Superintendent Codd reported to Viscount Goderich a threatened visit by a Guatemalan cruiser to drive away British vessels found loading to the south of the River Sibun. In view of the considerable mahogany works and property held by the settlers to the South of that River, he requested protection from the Admiral Commanding at Jamaica.<sup>95</sup> Nothing more is reported of this matter so presumably the Guatemalan action did not materialise.

109. On 26 June 1833 the Superintendent recommended to the Secretary of State the enactment of legislation for the better government of the Settlement. As regards the boundary, he stated: "The Treaties of 1783 and 1786 with Spain fix it at the River Sibun but the British have for very many years occupied the Country for near a hundred miles further to the Southward."<sup>96</sup>

110. By 1834

"at a meeting of judges and magistrates assembled in Council with the Superintendent, it was unanimously agreed that the area of which the settlers were in full and undisputed possession at the time of Central American Independence was bounded by the Hondo on the north, the Sarstoon on the south, and, in the west, by an imaginary line due north from Garbutt's Falls on the Belize to the Hondo and due south to the Sarstoon".<sup>97</sup>

111. A very large map entitled "Mexican Yucatan", inscribed at the top "Map D, Copy annexed to Memorial, dated Colonial Office 25 October 1834", shows the whole area of British Honduras.<sup>98</sup> No scale is given.

- It contains towards the top a number of manuscript annotations relative to the border between Mexico and British Honduras which need not be detailed here. Towards the south it marks clearly the River Sarstoon, on which is inscribed "'Sarstoon" The Southern British Boundary"'.<sup>98</sup>
- Slightly further to the west is the inscription "Supposed position of "Gracias á Dios Falls - Their true position to be determined by British and Guatemalan Commissioners".
- Towards the top right-hand corner (NE) there is the inscription: "All Keys and Islets which are situated between the Hondo and the Sarstoon are in active British occupation, and must be comprehended in the Treaties". A similar inscription appears towards the bottom right-hand corner (SE): "All Keys and Islets between the "Hondo" and the "Sarstoon" are in actual British occupation and must be comprehended within the Treaties of Boundaries".
- Towards the west there is the inscription: "These double red lines, inter-shaded yellow, mark the Western boundary of the British possessions to be determined by

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<sup>94</sup> Burdon, II, p.297.

<sup>95</sup> Burdon, II, p.297.

<sup>96</sup> Burdon, II, p.347.

<sup>97</sup> Humphreys, p.22.

<sup>98</sup> PRO, FO 925/1910.

Treaty with Guatemala".

This map should be read in conjunction with the extract set out in the footnote below from a Colonial Office Memorandum of 20 January 1835 of 261 manuscript pages entitled "Memorandum on the tenour of the instructions proper to be given for negotiations for the relinquishment by Spain of her rights over the territory occupied by the British in the Bay of Honduras".<sup>99</sup> The Instructions were possibly prepared for the use of Mr. Villiers in the approach that he made to Spain in April 1835.<sup>100</sup> But for present purposes, the extracts are significant as showing the extent of British possessions in the area and the corresponding absence of any Guatemalan presence there.<sup>101</sup>

112. A map dated September 1835 drawn by L. J. Hebert and printed at the Quarter Master General's Office, London, scale unstated, shows the whole area of British Honduras. This was evidently regarded as extending as far south as the River Sarstoon because it carries a straight line northwards from that river to pass through Garbutt's Falls marked as "Western Boundary". There is no indication of any Guatemalan settlement east of that boundary. The area to the west of it is marked "Unappropriated Territory" and carries the further inscription: "This is erroneously included by Arrowsmith in the Settlement of Belize; how much of it should be given to Central America and how much to Mexico seems to be unascertainable". The implication is clear: that the area to the east of the line was regarded as British.
113. From 1837 onwards the Superintendent began making Crown grants of land on the Deep River, the Moho and the Sarstoon, i.e. outside the old treaty limits.<sup>102</sup> In 1839 he was instructed by the British Government that objections should no longer be made to the cultivation of the soil but that revenue from this source should be treated as a territorial revenue of the Crown.
114. In the meantime, the British Government in London took the view that the boundaries of British Honduras extended from the Hondo in the north to the Sarstoon in the south and in the west lay along the line of longitude of Garbutt's Falls.<sup>103</sup>
115. On 5 April 1835 Britain sent Spain a note<sup>104</sup> requesting Spain formally to cede to Britain the area from the River Hondo in the north to the River Sarstoon in the

<sup>99</sup> FO72/452. This was a revised and updated version of an earlier Colonial Office Memorandum of 25 Oct. 1834.

<sup>100</sup> See Humphreys, pp. 38 and 39, and below, para. 44. For extracts, see Annex 11.

<sup>101</sup> "But whatever boundary shall be claimed from the mouth of the Hondo until we reach the upper Belize, we there leave behind the neighbourhood of Mexico and the obligations of resulting from the Treaty of 1826 with that Republick. The line on the Central American side may be drawn more boldly upon the basis of actual occupation and natural boundary.

The distance from the mouth of the Sarstoon to which that river is actually occupied by the British Settlers cannot be very correctly ascertained but it seems sufficiently certain that where it is not occupied by the British, it is not occupied at all.

In the absence of any accurate definition of the British occupation and in the absence of any occupants other than British to constitute a limitation, the occupation of the mouth and lower Stream of the Sarstoon, would seem to argue a constructive occupation of the whole river. For in possessing the mouth of the river we render it comparatively, if not entirely, useless to others; and in the absence of any lawful or possessory title on the part of any country the natural right to the river would seem to vest in that country which could make the most use of it.

It is proposed therefore to claim for the Southern boundary of the Settlement the river Sarstoon, from its mouth to its source assuming its source to be in 89°35' Long; as is laid down in Arrowsmiths Map of Feb. 15th 1832." (Colonial Office Memorandum of 20 January 1835 (Extract), FO 72/452 p.252-261.)

<sup>102</sup> Humphreys, p.66.

<sup>103</sup> *Ibid.*, p.37.

<sup>104</sup> *GFB*, p.184. See also Humphreys, p.38.

south, extending northwards as far as Garbutt's Falls and the parallel running through them to the Hondo and the Sarstoon. The area included the "waters, islands and keys lying between the coast and 87° 40' w. long. together with the islands of Ruatan and Bonacca". Guatemala attaches importance to this note as indicating that, by requesting a cession of the territory concerned, Britain was impliedly acknowledging the continuance of Spanish sovereignty over the area.

116. This conclusion fails to take account of, and give appropriate weight to, the words actually used in the note. The latter points out that since the failed Spanish attempt of 1796 to subjugate Honduras "the country has been held under a different title"; that from that date "the visits of the Spanish Commissioners to the settlement and other formalities, as provided for by the Treaty (of 1786) have ceased. The Settlers have no longer confined themselves within their ancient boundaries"; that "it is no part of the intention of the British Government to admit that any of the neighbouring States can have a right to dispute" the British tenure; and that because Spain was then considering recognising the independence of the Spanish American States (which had by then already in fact been independent for fourteen years) and the transfer to them of its ancient sovereignty, and "in such transfer the territory of the British Settlements may be inaccurately defined, the moment had now arrived for placing the claim of the British Crown, as to this settlement, on a clear and distinct footing."

117. The note speaks not of Spain ceding its rights, but rather more circumspectly of Spain

"ceding to Great Britain any right of Sovereignty which it may be conceived still rests, as regards the British Colony of Honduras, in the Crown of Spain . . . The actual sovereignty of Great Britain is an improbable matter of dispute - the Country has been long, and will, doubtless, long remain, under British Sway; it can answer the purpose of no country to question its tenure, but Spain is in a situation to accord an additional satisfaction in the possession of it."

The note reiterated that the districts were already in the occupation of the British settlers. The stated boundaries are "more extensive than those originally granted by Spain; but no more so than has been long tacitly acknowledged a British Settlement, or than is now and has been in the temporary or continual occupancy of the Colony." Moreover, the note adds, "there is as much courtesy in the demand, as there will be graciousness in frankly complying with it."<sup>105</sup> This approach produced no written response, though orally the Spanish Foreign Minister indicated that he foresaw no difficulty with the request.<sup>106</sup>

118. In 1843 there was published an Admiralty Chart, prepared in the period 1830-1839 by Commanders Owen and Barnett, entitled "West Indies from Cape Gracias á Dios to Belize". This shows the east coast of British Honduras as far south as the Gulf of Honduras and then east from there along the coast of what is now Honduras.<sup>107</sup> The chart is significant because:

<sup>105</sup> *GFB*, p.185. In the late 1830s immigrants from the Cayman Islands began to settle in Ruatan. In 1839 Superintendent Macdonald took possession of it. *De facto* possession was maintained thereafter. Magistrates were appointed for Belize in 1841. In 1852 Ruatan, Bonacca and four neighbouring islands were declared to be in the Colony of the Bay Islands. They subsequently became part of British Honduras. (Humphreys, p.50).

<sup>106</sup> *Ibid.*, p.40.

<sup>107</sup> The map is reproduced as Annex 12, of the Belize Response to Guatemala's Statement of 30 March 2001. See also Breton and Antochiw *Cartographic Catalogue of Belize* (1992), p. 102, no. 87, and Figure LIX, p. 87.

- (a) it shows the River Sarstoon, marking on it the Rapids of Gracias á Dios and places the word "Boundary" just south of the river; and
- (b) as an Admiralty Chart, it was a public document and could thus have been known to Guatemala. Guatemala has itself said that an Admiralty Chart "because of its origin must be considered an official map."<sup>108</sup> No record has been found of any Guatemalan protest in respect of the representation on this 1843 chart of the boundary of British territory being the line of the River Sarstoon.
119. The area of British Honduras as it stood in 1850 is shown on a sketch map included in a substantial memorandum by Sir Edward Hertslet, the Librarian of the Foreign Office, dated 20 February 1887, as extending from the Hondo in the north to the Sarstoon in the south and from the coast westwards as far as a line drawn northwards from Gracias á Dios Falls through Garbutt's Falls to the Blue Creek, a tributary of the Hondo. In wording reminiscent of Mr Cooke's map of 1826,<sup>109</sup> the area between the Sibun and the Sarstoon is marked "Occupied by the British by force of arms since 1798, the last attack of the Spaniards."<sup>110</sup>
120. There is in the preceding paragraphs ample evidence of effective British presence in the area stretching as far south as the River Sarstoon both before the independence of Guatemala from Spain in 1821 and during the period from 1821 to 1859. Additionally, the most striking confirmation of the situation thus evidenced is to be found in a Guatemalan document, namely, the letter addressed by Sr. de Aycinena, Minister of Foreign Affairs of Guatemala, to the Guatemalan House of Representatives on 4 January 1860 in connection with the proposal for the ratification by Guatemala of the 1859 Convention.<sup>111</sup> The Minister used such phrases as the following:
- Referring to the territories beyond the limits of the Spanish grants of 1783 and 1786, he said:
 

". . . which have been abandoned by Spain and not occupied by us, these areas continued to be occupied and exploited, before and after independence, beyond the limits established in the treaties with Spain. The English Government, considering this actual occupation as giving them legitimate title, defined the extent of the settlement as the river Sarstoon. We, in turn, after a few claims and protests, tacitly maintained the *status quo* without pursuing new initiatives . . ."<sup>112</sup>
  - Referring to the Clayton-Bulwer Treaty, the Minister said:
 

". . . it was agreed that the Settlement would not extend beyond its then current boundaries; that is, England's possession was recognized as legitimate title."
  - Again, in relation to the same Treaty, the Minister said:
 

". . . [T]hey mutually agreed on the meaning of the 1850 Treaty [the

<sup>108</sup> *GWB*, p.91.

<sup>109</sup> See above, para. 106.

<sup>110</sup> FOCP 5412, Doc. 1, p.29.

<sup>111</sup> The significance of this document may well be enhanced by the fact that though it is an official document of the Government of Guatemala, it was not included in the *GWB* - a volume which was represented by the Government of Guatemala as containing the relevant material bearing on the issue of title.

<sup>112</sup> The Minister did not particularise these "few claims and protests".



Clayton-Bulwer Treaty] in relation to Belize. That is, English possession was expressly recognised, declaring that the British Settlement had not [been] and is not included in said treaty; and with respect to the extension of territory, the limits were fixed as to the North, the Mexican province of Yucatan and as to the south, the Sarstoon river."

- Further on the Minister said:

"... On examining this situation, we could not fail to recognise that the right we had constantly alleged of being presumptive heirs of Spain's sovereignty, was considerably weakened due to our lack of means to take possession of these territories that had been deserted and abandoned by Spain herself and subsequently by us... It was recognised that we could not argue against the sovereignty already being exercised with full Spanish acquiescence in 1821 when we became independent... the truth was that since we had never taken possession of these territories, nor had we recognised them, nor maintained agents to represent us in them, it would make it impossible for us to determine or fix which part was occupied during Spanish rule and which part was occupied thereafter. This loomed as an insurmountable obstacle against materialising our claim."

121. The situation did not change after 1859. Throughout the territory of British Honduras (and now of Belize) the writ of the British Government, and since 1981 of Belize, has run in all its usual manifestations – adoption and application of legislation, functioning of the judiciary and maintenance of public administration.
122. If any further visual evidence thereof is required in respect of the decades following the 1859 Convention it is to be found in the map by Alfred G. Usher, FRGS, revised edition 1888, on a scale of 1:385,000, described as a "Map of British Honduras". It was published in London and was available for sale publicly at a price of £1.00. The map contains the following significant features:
  - (i) It shows the whole area of British Honduras, as delimited by the 1859 Convention, from River Hondo in the north to the River Sarstoon in the south.
  - (ii) It specifically shows the western boundary between British Honduras and Guatemala in the southern section running north-south carrying the words "Boundary Line settled by the Convention of Guatemala of 1860 (sic) – a straight line from the Rapids of Gracias á Dios to Garbutt's Falls (where dotted not opened)".
  - (iii) In the northern section the line carries the words "From Garbutt's Falls the line is due north until it strikes the Mexican frontier".
  - (iv) It depicts the areas of various land grants made throughout the area of British Honduras, including grants made in the southern section as far south as the River Sarstoon.
  - (v) It also carries lines indicative of the approximate position of lines of railway from Belize to the south-western frontier. There were no less than three such lines.
  - (vi) The area in the south-west, other than the parts marked as being covered by

land grants, is marked as "unexplored", and in the part covered by that word is an area which is marked as "Grant made 12th July 1867 by Lieut. Governor John Gardiner Austin, Esq., to Messrs. Putnam, Foster and others, and which was, about 1868, cancelled by the Crown."

## 2. Guatemalan acknowledgement of British title to the whole of British Honduras (Belize)

123. After 1850, there are numerous illustrations of Guatemalan acknowledgement of British title to British Honduras.

124. The first to be mentioned is the Boundary Map of 1861 showing the names "Guatemala" and "British Honduras" over the relevant territories and bearing the signature of the Guatemalan Commissioner.

125. On 10 May 1887 Guatemala protested at what was seen by it as a trespass on its territory in the neighbourhood of Plancha de Piedra in the region of Petén. As the Collector of Revenue at Petén put it:

"... I have just learnt from the Commander of the Revenue Guard of Plancha de Piedra, that on that side the said Colony has marked its limits some 1000 yards from the boundary line formerly known as being within our territory, towards the west, and from the same boundary line on our territory towards the north some 5 leagues, more or less."

The Guatemalan Minister, in forwarding this information to the British Legation in Guatemala said:

"I have considered it right to inform you of the foregoing, trusting that you will take such steps as you may deem advisable, in order that, should the advances mentioned... have been effected, HMG may give the necessary orders to prevent the same in the future."<sup>113</sup>

This is not the language of a Government that disputes the validity of the title of its neighbouring State to the adjacent territory on the other side of the border. It can only be regarded as evidence of Guatemalan acquiescence in the title of Britain to British Honduras.<sup>114</sup>

126. When, in July 1896, discussions took place between the British Minister to Guatemala and the President of Guatemala regarding the possibility of the construction of a railway line connecting the Guatemalan province of Petén with the Atlantic coast in British Honduras, the President indicated his willingness in principle to grant the concession for the line within Guatemala and raised no question regarding the title of Britain to British Honduras.<sup>115</sup> Nor did any reservation or qualification regarding title to British Honduras appear in the letter from the President of 18 January 1897 defining the conditions "with regard to the construction of a railway from the Department of Petén, on the frontier of British

<sup>113</sup> FOCP, 5622, Inclosure 1 in No.42.

<sup>114</sup> As the Foreign Office put it in a note to the Colonial Office on 8 November 1887:

"This assertion is satisfactory insofar as it is an admission that a well-defined boundary line was considered to exist between the Colony of British Honduras and the Republic of Guatemala at the point where the encroachments are said to have taken place". (FOCP, No. 5622, no.77, 8 p.75.)

<sup>115</sup> FOCP 6881, No.25, 23 July 1896.

Honduras, to the first of the important cities of the said littoral".<sup>116</sup> The President was assassinated soon afterwards and there was a change of government in Guatemala. The idea was pursued for a while; for example in the form of a request by the Guatemalan Minister for Foreign Affairs for a copy of the report of a survey of the route carried out by British engineers.<sup>117</sup> Again, no reservation was made by Guatemala as to British title to British Honduras.

127. In 1897 there was an implied acknowledgement of the title of Britain to British Honduras in the letter of the President of Guatemala of 18 January in which he defined the conditions which his Government would be prepared to make "with regard to the construction of a railway from the Department of Petén, on the frontier of British Honduras, to the first of the important cities of the littoral".<sup>118</sup> Negotiations were pursued between Guatemala and a private British company in 1901, but nothing came of them.
128. In 1902 the Guatemalan commandant stationed at a village just beyond the frontier at Garbutt's Falls requested permission to pass through a part of the territory of British Honduras for the purpose of proceeding to Yolloché, a place in Mexico.<sup>119</sup> Permission was refused. The episode reflects Guatemalan acceptance of the non-Guatemalan status of British Honduras.
129. Sometime after May 1908 Guatemala raised with Britain a question relating to the opening and clearing of part of the boundary between Plancha de Piedra and Benque Viejo. Britain replied that the failure to inform Guatemala was an oversight.<sup>120</sup>
130. In 1916, there was a further incident on the border which led to a Guatemalan protest and a British reply on 2 November.
131. In 1920, there appears to have been a joint survey of the boundary by engineers appointed by Guatemala and British Honduras.<sup>121</sup>
132. On 15 February 1923 Guatemala instructed its Consul in Belize to approach the Government of British Honduras regarding the possible joint demarcation of the boundary, but this suggestion appears to have been declined by Britain.<sup>122</sup>
133. The suggestion was then made by Guatemala, in response to a British proposal for demarcation, made on 5 December 1924, that British engineers should carry out the work and that it should be inspected by Guatemalan engineers before being approved.<sup>123</sup>
134. On 31 March 1925 Britain put forward a 17 point proposal for the procedure of demarcation, which was accepted by Guatemala on 21 January 1926 subject to five observations. The fifth of these read:

"The significance and comprehension of the present agreement are

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<sup>116</sup> FOCP 7057, p.5, Inclosure 1 in No.7.

<sup>117</sup> FOCP 7567, No.9, p.6.

<sup>118</sup> FOCP 7057, Inclosure 1 in No. 7.

<sup>119</sup> FOCP 8231, Nos. 1, 2 and 3.

<sup>120</sup> Mendoza, p.239.

<sup>121</sup> *Ibid.*, p.240.

<sup>122</sup> *Ibid.*, p.242.

<sup>123</sup> *Id.*

exclusively confined to the demarcation of the above mentioned boundary."<sup>124</sup>

This condition can serve only to reinforce the pattern of acceptance that there was some boundary between Guatemala and British Honduras - an acceptance that implied that British Honduras was entitled to the territory over which it exercised authority as far south as the Sarstoon. Mendoza reports that Britain accepted the Guatemalan proposal for the participation of Guatemalan commissioners; subject to certain changes which were accepted by Guatemala on 4 June 1926.<sup>125</sup>

135. In July 1927 Britain requested permission for one of its surveyors to cross to the southern bank of the Sarstoon River to make astronomical observations. Permission was granted on 2 August 1927.<sup>126</sup>
136. On 8 August 1927 Guatemala agreed that ocular inspection of the boundary might be carried out at the beginning of the dry season, but the details were not settled.<sup>127</sup>
137. On 3 January 1929 Guatemala informed Britain that its engineers would be ready to join the British engineers at the Sarstoon on 15 January,<sup>128</sup> and so took place the surveys which were recorded in the 1931 Exchange of Notes.
138. Reference may also be made to the acceptance of the boundary reflected in Guatemalan participation in the survey that led to the 1931 Exchange of Notes.<sup>129</sup>

### 3. Absence of any Guatemalan presence in the area before and after 1850

139. Now what conduct of Guatemala in relation to the area prior to 1850, or at all, can be set against the indications given above of the extent of British settlement and action there?
140. The only positive items of Guatemalan conduct that can be traced are two grants of land made in 1834 that included areas that fall within the limits claimed by Britain for British Honduras.
141. One was made to a British company, the Eastern Coast of Central America Commercial and Agricultural Company.<sup>130</sup> This company was granted some 14 million acres in the Guatemalan province of Verapaz - a grant which included the whole of the area of British Honduras between the Sibun and the Sarstoon. A map of 1837 illustrating the grant shows no Guatemalan settlements or towns in the area. The British company was warned by the British Government in 1835 that if it received from a foreign Government a grant of land "which is included within the limits of a British settlement, such persons must take the consequences of their connivance with the encroaching pretensions of such foreign Government". And in 1836 the Company was officially informed of the limits of the territory claimed by

<sup>124</sup> *Ibid.*, p.244.

<sup>125</sup> *Ibid.*, p.245.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Ibid.*, p.246.

<sup>129</sup> See para. 44 above.

<sup>130</sup> See *GFB.*, p.157.

Britain as belonging to the British settlements in the Bay of Honduras. The Company failed within a few years and its charter was forfeited.<sup>131</sup> There is no indication of any further attempt by Guatemala to grant these lands.

142. The other grant was made to a certain Colonel Galindo, an Irishman, who was a British subject. This lay between the Belize and the Hondo rivers.<sup>132</sup> Galindo was no more successful than the British company. He attempted to interest a Dutch company in his venture. This led Britain to inform the Dutch Government "in the most formal manner" that Britain denied the right of Guatemala to grant, and of Galindo to occupy, the lands in question. Galindo's venture ended in 1840 when he was killed in a battle.<sup>133</sup>
143. We recall here the maxim *actori incumbit probatio*. The burden rests upon Guatemala to prove its claims. Guatemala must show that it acquired from Spain the title that it now asserts. As yet, apart from the two grants just mentioned, Guatemala has never produced any evidence of having done anything since it became independent of Spain in 1821 to establish that it might have possessed authority over, or been in actual possession of, any part of the present territory of Belize. Guatemala has done no more than assert, by virtue of its own succession to the Captaincy-Generalship of Guatemala and the doctrine of *uti possidetis*, that it acquired a notional title to or authority over Belize. Guatemala has not shown that the authority of the Captaincy-Generalship of Guatemala extended to the area of what is now Belize, either in theory or, more to the point, in fact. And as regards the area south of the River Sibun it is appropriate to note the observation made by the Guatemalan Constitutional Court in its 1992 judgment mentioned above<sup>134</sup> to the effect that "the lack of people made it difficult to carry out monitoring and surveillance to protect the territory".<sup>135</sup>

## Maps of Guatemala

144. Reference may be made to maps which from time to time purport to show the extent of Guatemala. They may be treated as evidence of the general understanding of the position and, in some cases, also of official understanding. The absence from them of any indication of Guatemalan settlement or activity in the area confirms what is already evident, namely, that the area was never – and was never believed, even by Guatemala, to have been – in its possession.
145. A map dated 1775 entitled "The Bay of Honduras" by Thos. Jeffreys places the words "The Logwood Cutters" stretching across the northern part of the Yucatan Peninsula. It shows no settlements in the rest of what was to become British Honduras. The name "Verapaz" is drawn west to east across an area to the south of Coban – a location in Guatemala. Coban is the only town that appears in this part of the map.
146. A map dated 1825, edited by Brué, Paris, entitled "Carte Générale des États Unis Mexicains et des Provinces-Unies de l'Amérique Centrale", places the name "Colonie Anglaise" north of the River Belize and the name "Vera-Paz" across an

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<sup>131</sup> *Ibid.*, pp.42-43.

<sup>132</sup> Humphreys, p.42.

<sup>133</sup> *Ibid.*, pp.43-44.

<sup>134</sup> See para. 37 above.

<sup>135</sup> 100 *ILR*, at p.31.

area extending from Guatemala north-eastwards into the southern part of British Honduras. But the nearest marked Guatemalan towns are Coban and Cahabon,<sup>136</sup> both to the west of what came to be agreed as the western boundary of British Honduras.

147. A map of 1 March 1827 published in London by James Wyld, Geographer to His Majesty and the Duke of York, is entitled "Mexico and Guatemala, showing the Position of the Mines". It carries the words "British Settlements" across the area north of the River Sibun. The area to the south of that river and south-east of the mountain range, extending southwards to the Gulf of Dulce carries the name "Vera Paz". But there is no indication of any Guatemalan town or settlement in that area other than the town of "Cahaban", well to the south of the River Gorda. This town appears on later Guatemalan maps as "Cajabon", much further to the west and well inside what is indisputably Guatemalan territory. A later edition of the same map, published in 1873, clearly shows the 1859 boundaries and inserts the name Sarstoon against the river of that name, which was unnamed in the earlier edition. Even then, however, there is no indication of any significant named Guatemalan location east of Cahaban and certainly none east of the 1859 border.
148. A map, dated 1832, of the Departamento de Verapaz, by M. Rivera Maestre, engraved in Guatemala,<sup>137</sup> marks the name "Verapaz" vertically from north to south within Guatemala and as hardly touching the southern part of British Honduras. It does not show any Guatemalan settlement anywhere in the eastern area between the rivers Hondo and Sarstoon (unnamed). The most easterly town in Verapaz is Cajabon. This appears to be the map referred to in the geographical description of the area of the 1834 Concession<sup>138</sup> and it is also the one referred to in the award in the *Guatemala/Honduras Boundary case, 1933*,<sup>139</sup> as being an officially published map.
149. In 1837 the Directors of the British Company of Agriculture, Commerce and Colonisation produced a map of the "Territory of Verapaz ceded by the Federal Government of Central America" to the Directors of the Company. The copy of the map held in the Royal Geographical Society in London shows the boundaries of the Territory. The coastal littoral north of the Sarstoon and east of the Cham or Chiman Mountains and south of the Cockscomb Mountains bears no names of Guatemalan settlement, the whole of that southern area carrying only the description "District of Livingston", Livingston being a named place marked just south of the mouth of the Sarstoon.
150. Reference should again be made to the 1861 Boundary Map signed by both the British and Guatemalan demarcation Commissioners.<sup>140</sup>
151. There is an 1876 map of Guatemala, the significance of which derives from the fact that it is stated to be "Levantado y publicado por orden del Smo. Gobierno ("made and published by order of the Government"), prepared by Herman Au, engineer, engraved and printed in Hamburg by Charles Fuchs and published by L. Friederichsen & Co, Hamburg. It also carries the notation "Depositado para

<sup>136</sup> The spelling of this name varies from map to map.

<sup>137</sup> In the *Atlas Guatemalaco men ochas cartas*.

<sup>138</sup> See para. 140 above.

<sup>139</sup> 2 *UNRIIA* at p.1327.

<sup>140</sup> See paras. 26 and 124 above.

Centro-Americano con los Sres. Hockmeyer & Co. in Guatemala and Retaluleu". The scale is 1:700,000. The map clearly shows the southern boundary line along the River Sarstoon and from the point of the meeting between that river and the River Gracias á Dios, the straight line drawn in a north-north-westerly direction. The region to the east of the boundary is called "Belize". There is no indication of any Guatemalan town or settlement in the area south of the River Sibun (or, indeed, elsewhere in Belize). The area of the Republic is stated to be 38,800 square miles and manifestly does not include Belize.

152. A map of 1881 of "Les Isthmes Interocéaniques d'après la Carte publiée par le Commodore Ammen dans le Bulletin de la Société de Géographie Américaine" simply labels the whole area of British Honduras as "Yucatan Anglais" and shows no Guatemalan settlements in the south of the area.
153. A "croquis", dated 1887, showing "Los Limites de la Republica de Guatemala" by E. Rockstroh shows the boundary as laid down in the 1859 Convention. No Guatemalan settlement is shown east of the western boundary of British Honduras.
154. An undated (probably late 19th century) map of Guatemala, drawn by J. Gavarette and published by Machado, Yrigoyen y Ca shows the whole territory of Guatemala, but depicts quite clearly the boundaries of British Honduras under the name "Colonie de Belize" in accordance with the 1859 Convention. It contains no indication of Guatemalan presence in British Honduras.

#### 4. Guatemala's assertions and protests

155. There have, over the years, been a number of protests by Guatemala against British sovereignty over British Honduras, especially in the United Nations in the period from 1945 until the independence of Belize in 1981, as well as since then.<sup>141</sup> There have also been two assertions of title advanced in the Guatemalan Constitution. In the 1945 Constitution, Guatemala inserted a Transitory Clause 1 which read as follows:

"Guatemala declares that Belize is part of its territory and considers of national importance actions directed towards securing its effective re-incorporation into the Republic." (Translation)

A similar provision was inserted in the 1956 Constitution. Does this repetition of protests and assertions serve to maintain in being such rights (if any) as Guatemala may have had to the territory of British Honduras or any part of it – especially having regard to the fact that there is no evidence of any actual exercise of authority by Guatemala or of Guatemalan presence on the ground at any time?

156. We recall in this connection two important statements of principle.
157. The first consists of certain observations of Justice Hughes, Chief Justice of the United States and former Judge of the Permanent Court of International Justice, the President of the Arbitral Tribunal in the *Guatemala/Honduras Case*, 1933, in relation to the disputed parts of the boundary between the two countries:

"While no State can acquire jurisdiction over territory in another

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<sup>141</sup> See Appendix I below.

State by mere declarations on its own behalf, it is equally true that these assertions of authority by Guatemala (and other acts on her part disclosed by the evidence), shortly after independence, with respect to the territory to the north and west of the Motagua river, embracing the Amatique coast region, were public, formal acts and show clearly the understanding of Guatemala that this was her territory. These assertions invited opposition on the part of Honduras if they were believed to be unwarranted. It is therefore pertinent to inquire as to what action, if any, was taken by Honduras at or near the time of independence in relation to the territory now under consideration and in answer to the above-mentioned proceedings of Guatemala."<sup>142</sup>

158. The second statement was made by the late Judge Sir Gerald Fitzmaurice, Legal Adviser of the British Foreign Office and later Judge of the ICJ:

"It is true that an opposition, even if persistently maintained, may end by losing all legal force because of its insufficient character. In short, protests, in order to preserve (or rather to go on preserving) the rights of the protesting State, and prevent the acquisition of a prescriptive right by the acquiring State, must be effective. Put in another way, this means that diplomatic protests will not indefinitely preserve rights<sup>143</sup> or prevent the process of prescription unless they constitute the sole lawful means in the circumstances by which the State concerned can act, and can endeavour to keep its position intact.<sup>144</sup> If, however, other means are available, e.g. a proposal for reference to international adjudication, or taking the matter before some competent international organisation, a mere continuance of diplomatic (i.e. paper) protests will not serve indefinitely to keep the position open.<sup>145</sup> It comes to this, that reliance on routine protests, when means are available *which, if used, would or might bring the matter to an issue*, can in the end be construed as a constructive abandonment by the State of its *rights* – a tacit acquiescence in the situation, debarring it, as has been said (United Kingdom Written Reply in the *Fisheries* case), 'from further questioning what has become part of the established legal order'. However, all this still means no more than that acquiescence will, in fact, be *presumed* in certain circumstances, despite a formal attitude of protest – not that acquiescence can be dispensed with."<sup>146</sup>

159. Applying, first, the words of Chief Justice Hughes, Guatemala cannot have acquired jurisdiction over the territory of British Honduras by mere declarations on its own behalf. Insofar as these protests and assertions indicate a belief that British Honduras was part of the territory of Guatemala, we note that Britain reacted with opposition on each occasion.

<sup>142</sup> 2 UNRIAA., p.1327.

<sup>143</sup> [Footnote 1 on p.159 of original text.] Clearly, protests must initially have this effect and continue to do so for some time - in fact for a reasonably long period. What this will be must depend on the circumstances.

<sup>144</sup> [Footnote 2 on p.159 of original text.] Again, due regard must be had to the circumstances in applying this principle, and at least some regard to the practical aspect. For instance, it might be open to a State to follow up its protests by action which, though strictly lawful, might be regarded as unduly provocative, e.g. the giving of armed protection to its merchant vessels or civil aircraft under certain conditions. Again, the habitual rejection on principle by certain States of all reference to international adjudication, or the near-certainty of a 'veto' if the matter were brought before an international organisation, might sufficiently account for not going beyond a protest.

<sup>145</sup> [Footnote 3 on p.159 of original text.] Of course, once arbitration or judicial settlement has been proposed, *and rejected, or not taken up by the acquiring State*, continued protest, even if only diplomatic, will retain all its preventive force.

<sup>146</sup> *The Law and Procedure of the International Court of Justice*, Vol. 1, pp.158-159.



160. Applying next the words of Sir Gerald Fitzmaurice, it appears to us that any effect that might have been attributed to the Guatemalan protests was negated by Guatemala's failure to institute legal proceedings when it was open to it to do so. This is a matter that we consider in the next section.
161. Accordingly, we consider that the mere repetition of protests and assertions by Guatemala, unaccompanied by any further action, has been ineffective to preserve for Guatemala such rights, if any, as Guatemala may have had.

## 5. Proposals for international adjudication of the dispute

162. We turn now to consider what may be the effect, if any, of the various proposals that have been made to submit the differences between Guatemala and Britain or Belize to arbitration or judicial settlement.
163. On 30 June 1880 Guatemala suggested that the difference between the two countries might be submitted to "the impartial decision of the head of some friendly State."<sup>147</sup> But the "difference" to which this suggestion referred related solely to "the clarification and compliance" with Article VII of the 1859 Convention. At that time Guatemala had not raised any question relating to Britain's title to the territory of British Honduras and title was, therefore, not in issue. Britain replied on 18 April 1880 that it could not "admit that there is any ground for submitting the question to arbitration."<sup>148</sup> When, on 4 April 1884, Guatemala for the first time suggested that the alleged breach of Article VII of the 1859 Convention might have led to that treaty not being in force and protested at the de facto occupation by Britain of an integral part of Guatemalan territory, the suggestion for arbitration was not renewed.
164. In our view, this early proposal by Guatemala cannot be regarded as effective to maintain any Guatemalan title because the offer was not of adjudication of the question of title, but only of adjudication of the alleged breach by Britain of Article VII of the 1859 Convention.
165. This, by itself, is a sufficient reason to exclude the effectiveness of the first Guatemalan proposal for adjudication. But even if it were not, all Guatemala's conduct prior to 1931 must be considered in the light of the conclusion of the 1931 Exchange of Notes. As indicated earlier in this Opinion,<sup>149</sup> in our view the effect of that Exchange of Notes was to confirm the efficacy of the 1859 Convention, the alleged termination of which had been, in Guatemala's contention, the basis of Guatemala's claim to the territory of British Honduras. Thus, the 1931 Exchange of Notes put an end to the effect, if any, of all assertions relating to title made by Guatemala before that time. After 1931 the only protests that Guatemala might effectively have made would have been ones relating to post-1931 breaches of the 1859 Convention and of the 1931 Exchange of Notes. It is in relation to such breaches (if any) that we must examine proposals for adjudication that have been made since that date.
166. On 31 January 1940 Britain took the unusual step of publishing in the British

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<sup>147</sup> *GWB*, p.335.

<sup>148</sup> *GWB*, p.338.

<sup>149</sup> See above, paras. 36-68.

Honduras Gazette Extraordinary an announcement that it was informing Guatemala of Britain's willingness to submit to the Permanent Court of International Justice the dispute arising out of Guatemala's allegation of the non-fulfilment by Britain of Article VII of the 1859 Convention to be dealt with under Article 38 of the Court's Statute, "which enables the Court to take into account questions of equity when giving its final decision." As an alternative, Britain indicated that it was prepared to consider recourse to an arbitral tribunal under the summary procedure of Chapter 4 of the Hague Convention of 1907 for the settlement of disputes. As a further alternative, Britain stated its willingness to accept a reference to an *ad hoc* tribunal of three members of which the third member, or umpire, would be nominated by President Roosevelt.

167. This announcement reflected the terms of a longer note sent to Guatemala on 29 January 1940 in which, additionally, the issues were elaborated as follows:
- (i) is there still any practical method by which the original obligations laid down in Article VII can be effectually carried out?;
  - (ii) if the answer to (i) is in the negative, whether and, if so, to what extent, Britain is responsible for failure to carry out the mutual obligations under Article VII?; and
  - (iii) having regard to any responsibility of Britain, by what method, applying all relevant legal and equitable principles, shall Britain now discharge its obligations under Article VII?
168. Britain's offer was made conditional upon Guatemala consenting to a final delimitation and marking of the boundary, to take place in a mutually convenient manner immediately after the tribunal would have pronounced its final award.<sup>150</sup>
169. On 3 February 1940 Guatemala replied, agreeing to accept the third alternative. However, as to the terms of reference of such an arbitral tribunal, Guatemala contended that Britain's previous attitude had left Article VII "without effect and therefore also the whole of the stipulations of the treaty". Guatemala was of the view that by reason of the non-fulfilment of Britain's obligations, Guatemala had "the right to recover the territory ceded to" Britain and also that Britain's non-compliance had caused Guatemala material and moral damages. Accordingly, Guatemala was

"of opinion that the tribunal should take into account all these points and not the mere interpretation of Article VII . . . One of the principal points to be settled by the Tribunal is whether Britain is legitimately occupying the territory of British Honduras, or whether on the contrary Guatemala has the right to put forward pertinent claims."

<sup>150</sup> FO doc. A1412/54/8th, No.57. It is not to be excluded that Guatemala could have, if it had wished, made use even of Britain's declaration, made on 19 September 1929, under the Optional Clause of the Statute of the Permanent Court of International Justice, by which it accepted the jurisdiction of that Court as compulsory, though on condition of reciprocity, for a period of ten years "over all disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to the said ratification". Evidently the dispute that had arisen prior to 1929 between Guatemala and Britain could not have been brought within the terms of this acceptance. But if Guatemala could have identified a treaty dispute arising after 1929 in regard to situations subsequent to that date, it could have brought proceedings. Admittedly, the jurisdiction of the Court in such a case would not have been beyond dispute; but if Guatemala had been sufficiently serious about the matter, the attempt could have been made. One difficulty in Guatemala's way, however, which was of Guatemala's, not Britain's, making, was that Guatemala's own declaration of 17 December 1926 under the Optional Clause, which was subject to ratification, was never ratified. The texts of the declarations are in Hudson, *Permanent Court of International Justice, 1920-1942*, (1943), pp.689 and 691.

Guatemala concluded that if Britain agreed to look in this light at the question to be decided, it would be easy to agree on the concrete points to place the tribunal in a position to resolve the dispute.<sup>151</sup>

170. On 4 March 1940 Britain replied to Guatemala saying that while Britain adhered to its offer to submit to arbitration the question as framed on 29 January, it would dispute the validity of any claim by Guatemala to the cession of territory.

Nonetheless, the British Note said if Guatemala is

“of the opinion that a claim for a cession of territory can and should be brought within the scope of the dispute, it will be open to Guatemala to bring it forward at such time and in such a manner as they may think best, and to seek a ruling of the Tribunal upon it.”<sup>152</sup>

171. Although this note left it open to Guatemala to raise the questions of the status of the 1859 Convention and the title of Britain to British Honduras, it was not read in that way by Guatemala. In a note of 7 March 1940 Guatemala stated that

“the time has passed for examination of the method of giving effect to the fulfilment of the obligations under the extinct convention of 1859, which lost all force and legal validity because Britain for nearly a century has declined to carry out the solemn compensatory obligation in favour of Guatemala. Furthermore, there is no question of cession of territory . . . The tribunal should decide whether or not, as this instrument (the 1859 Convention) is null and void, the status quo is that prior to 1859, and also decide which compensations and indemnities are just and equitable.”<sup>153</sup>

172. In the correspondence that followed, Guatemala's position underwent some change. Instead of saying that the 1859 Convention had been brought to an end, it said that Britain's breach of Article VII “had given Guatemala the option of repudiating Article I of the agreement.”<sup>154</sup> This was repeated in a further Guatemalan note of 24 April 1940 expounding at length the whole of Guatemala's case: the repudiation by Britain of Article VII gave Guatemala the option of repudiating in its turn the remaining articles of the 1859 Convention. The Note stated that

“this country (Guatemala) sustains the nullity of the 1859 agreement and claims the restitution of Belize . . . For this reason Guatemala does not agree to the proposal of Britain to reduce the matter to a mere legal interpretation of Article VII of the 1859 Convention.”<sup>155</sup>

173. Nothing more was done during the remainder of the Second World War. After the end of the war, Britain, on 13 February 1946, made a declaration under the Optional Clause of the Statute of the ICJ, accepting for a period of five years the jurisdiction of the Court

“. . . in all legal disputes concerning the interpretation, application or validity of any treaty relating to the boundaries of British Honduras, and over any questions arising out of any conclusion which the Court

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<sup>151</sup> *Ibid.*, Enclosure 2.

<sup>152</sup> *Ibid.*, p.109.

<sup>153</sup> *Ibid.*, pp.109-110.

<sup>154</sup> Note of 13 April 1940, *ibid.*, p.111.

<sup>155</sup> *Ibid.*, p.113.

may reach with regard to such treaty."<sup>156</sup>

This declaration was renewed in 1951 for a further period of five years.

174. This opened the way to Guatemala, if it had wished to test the effectiveness of its protests, to initiate proceedings against Britain at any time between 1946 and 1956. Guatemala did not pursue this option. The position of Guatemala thus fell squarely within the terms of Fitzmaurice's statement:

" . . . if, however, other means [not protest] are available, e.g. a proposal for reference to international adjudication . . . a mere continuance of diplomatic (i.e. paper) protests will not serve indefinitely to keep the position open."<sup>157</sup>

As is evident from the context of this statement<sup>158</sup>, the proposal for international adjudication must be in relation to the rights of the protesting State. This necessarily implies a proposal for adjudication according to law. A proposal that a decision be reached *ex aequo et bono* would not be such a proposal.

175. At the same time, we recall the qualification expressed by Fitzmaurice in the passage quoted above.<sup>159</sup>

"Of course, once arbitration or judicial settlement has been proposed, *and rejected, or not taken up by the acquiring State*, [here, Britain] continued protest, even if only diplomatic, will retain all its preventive force."

In our understanding, this does not apply when, as here, the offer of adjudication is made not by the protesting State [here, Guatemala] but by the *acquiring* State [here, Britain] and is not taken up by the protesting State [Guatemala]. In that case, the continuing protests of the protesting State [Guatemala] cannot be legally effective.

176. On 27 January 1947 Guatemala made a declaration under the Optional Clause of the Statute of the ICJ in which it accepted for a period of five years the jurisdiction of the Court in all legal disputes. But it *expressly excluded*

". . . the dispute between England and Guatemala concerning the restoration of the territory of Belize, which the Government of Guatemala would, as it has proposed, agree to submit to the judgment of the Court if the case were decided *ex aequo et bono*, in accordance with Article 38(2) of the Statute."

The offer thus made by Guatemala, limited to a decision *ex aequo et bono*, was not taken up by Britain.

177. The Guatemalan declaration, though made by the protesting State, is self-evidently not one that falls within the terms of Fitzmaurice's statement<sup>160</sup> because it is not an offer to adjudicate on the basis of law, but only on an *ex aequo et bono* basis i.e. on a basis that is not one of law. Since the dispute is really one about law, namely, the

<sup>156</sup> ICJ Yearbook 1946-47, para 158.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> See above, para. 158.

issue of title to British Honduras, Guatemala's offer to submit to adjudication on some other basis is obviously not one that can operate to preserve its legal claim. Moreover, it may be observed in passing, the fact that Guatemala was only prepared to adjudicate on an *ex aequo et bono* basis was a tacit admission that it did not think that its case would withstand legal scrutiny.

178. Subsequent to the independence of Belize, Guatemala, on 18 October 1999, indicated in general terms a willingness to submit its differences with Belize to the ICJ or arbitration. The words used by Guatemala were as follows:

“. . . the Government of Guatemala formally proposes to the Government of Belize that the matter be submitted either to international arbitration or to the International Court of Justice. *In either case, the two governments could submit, by common agreement, the issue to be resolved or adjusted.*"<sup>161</sup>

179. However, this proposal could not change the pre-existing legal position. We note, in particular, that the Guatemalan proposal did not amount to an unconditional acceptance of the jurisdiction of an international tribunal to decide the matter in accordance with law<sup>162</sup>, comparable to the British declaration of 13 February 1946. Instead, the reference to "common agreement" by Guatemala merely amounted to a proposal to negotiate about the issue to be submitted to the tribunal. This would only have given rise to prolonged discussion since Guatemala would undoubtedly have insisted on introducing a reference to Article VII of the 1859 Convention and Belize would have insisted on limiting the issue to the question of the boundary. Even more pertinently, Guatemala indicated by its use, in the emphasised part of the sentence of the words "or adjusted", that it would be proposing yet again that the matter be resolved *ex aequo et bono*. Belize did not reply to this proposal and Guatemala did not repeat it, even though it used some of the phraseology of its letter in subsequent notes to Belize.
180. We conclude, therefore, that this, Guatemala's latest proposal to submit the dispute to adjudication, does not meet the condition stated by Fitzmaurice for the effective maintenance of Guatemala's legal position. But even if the Guatemalan proposal had taken the form of an unconditional acceptance of the jurisdiction of the ICJ to decide the case on a strictly legal basis, this should not have changed the legal situation, by then long established, of Guatemala's acceptance of the title of Belize.

## VI. GUATEMALA'S CLAIM TO THE ISLANDS

181. In addition to the mainland territory of Belize, Guatemala also claims all the offshore islands under the control of Belize with the exception of St George's Caye and its immediate neighbours.<sup>163</sup> The Guatemalan argument is that St Georges Island was the only island expressly included in the Spanish grant of *usufruct* by the 1786 Treaty and that otherwise there was no grant by Spain to Britain of any rights over the adjacent islands which therefore remained under Spanish sovereignty and eventually devolved upon Guatemala.

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<sup>161</sup> Emphasis supplied.

<sup>162</sup> As opposed to *ex aequo et bono*.

<sup>163</sup> Guatemala, Submission to Facilitators, 30 March 2001.

182. We find this contention unpersuasive. The islands were evidently as much the subject of British and subsequently Belize occupation as the area of Belize south of the Sibun.

183. A map annexed to a Colonial Office Memorandum dated 25 October 1834 shows the whole area of British Honduras. It bears an inscription in the top right-hand corner (NE) stating:

"All Keys and Islets which are situated between the Hondo and the Sarstoon are in active British occupation, and must be comprehended in the Treaties."

A similar inscription appears in the SE corner of the map.<sup>164</sup>

184. On 20 January 1835 a Colonial Office memorandum on the subject of the boundaries of British Honduras stated:

"With respect to the Islands and Keys, the British claim might be defined as embracing all the Islands and Keys within thirty miles of the coast between the mouth of the Hondo and the mouth of the Sarstoon, or in other words, the Islands and Keys comprehended between 15° 55' and 18° 30' N.Lat; between the Meridian of the Easternmost point of Light House Reef.

This would include all the Islands of which there has been any occupation or any question of claim by Great Britain . . ." <sup>165</sup>

185. The "waters, islands and keys lying between the coast and 87° 40' W. Long. together with the islands of Ruatan and Bonacca" were also specified in the British note to Spain of 5 April 1835.<sup>166</sup> As was indicated in the declaration made by the United States at the time of the ratification of the Clayton-Bulwer Treaty, the Treaty was understood not to be applicable to

"the British settlement in Honduras (commonly called British Honduras, as distinct from the State of Honduras), *nor the small islands in the neighbourhood of that settlement, which may be known as its dependencies*. To this settlement, and these islands, the Treaty we negotiated was not intended by either of us to apply."<sup>167</sup>

186. The same considerations therefore apply to the determination of title to the islands as do to the adjacent mainland. Title to the islands does not rest upon any grant by Spain but rather upon the fact of long and effective possession by Britain and the absence of any competing Spanish or Guatemalan presence on them. Consequently, the scope and effect of the Anglo-Spanish Treaties of 1783 and 1786 are quite irrelevant. We observe that Guatemala appears to treat the islands as appurtenant to the adjacent mainland territory, for that is the only basis on which Spain could have had any sovereign rights over them at the time of the 1783 and 1786 Treaties. The fact that the 1859 Convention does not expressly refer to the islands thus makes no difference to the legal situation. However, it should be observed that when Mr Stevenson initiated the negotiations relative to the boundary with the Guatemalan representative, Sr Martin, in 1857, part of Mr

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<sup>164</sup> See above, para. 111.

<sup>165</sup> FO72/452, p.252.

<sup>166</sup> See above, para. 111.

<sup>167</sup> Clayton to Bulwer, 4 July 1850, FOCP, 892 (1856-'60), p.555. Emphasis supplied.

Stevenson's description of the boundary read as follows:

"East, from the Hondo to the Sarstoon, on the shores of the Bay of Honduras, including all the Cays and islets off the mainland within the same latitude."<sup>168</sup>

Although the express reference to the cays and islets did not appear in the final text of the treaty, the British internal correspondence provides an explanation of its omission. A letter of 16 February 1859 from the Earl of Malmesbury to Mr Wyke, states that

". . . the proposed line of demarcation . . . is not exactly the same in terms as the line described by Mr Stevenson to M. de Francisco Martin. In the first place, it has been deemed unnecessary to describe, in a treaty with Guatemala, the sea-frontier, or any more of the land-frontier than that which relates to the territory of Guatemala . . ."<sup>169</sup>

In these circumstances, there is no ground for assuming that the original British intention as thus evidenced was the subject of any objection by Guatemala. Indeed, the amplitude of the provision in Article 1, paragraph 3, of the 1859 Convention, that

". . . all the territory to the north *and east*<sup>170</sup> of the line of the boundary above described belongs to Her Britannic Majesty . . .",

is sufficient in the circumstances to cover the position of the islands appurtenant to the eastern mainland coast.

187. We note more generally in this connection the reference in the *Yemen-Eritrea* award to the question of

"how far the sway established on one of the mainland coasts should be considered to continue to some islands or islets off that coast which are naturally "proximate" to the coast or "appurtenant" to it."

The Tribunal observed:

"This idea was so well-established during the last century that it was given the name of the *portico doctrine* and recognized as a means of attributing sovereignty over off-shore features which fell within the attraction of the mainland."<sup>171</sup>

The Tribunal accepted the relevance of these doctrines of international law to the case before it. There is no reason why the same rules should not apply in the present case.

188. In short, there is no ground on which it is possible to distinguish the question of the islands from the question of the mainland. In our view, just as the mainland undoubtedly belongs to Belize, so do the islands.

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<sup>168</sup> Mr Stevenson to the Earl of Clarendon, 24 June 1857, FOCP 5490, p.173.

<sup>169</sup> FO Confidential 1022, 1 November 1861, p.175.

<sup>170</sup> Emphasis supplied.

<sup>171</sup> 114 *ILR* p.121, para. 463.

## PART TWO

### CONSIDERATION OF OTHER GUATEMALAN CONTENTIONS

189. As already stated, we consider that the reasoning set out in Part One of this Opinion is sufficient by itself to establish the title of Belize to the territory within the limits set by the 1859 Convention. That reasoning entirely overrides the various considerations hitherto advanced by Guatemala in support of its claim and thus renders superfluous any discussion of those points. Nonetheless, as indicated, we shall briefly express our views regarding these contentions advanced by Guatemala.

#### I. GUATEMALA'S ARGUMENT REGARDING THE 1859 CONVENTION AS A TREATY OF CESSION: THE QUESTIONS OF *UTI POSSIDETIS* AND THE CLAYTON-BULWER TREATY

190. Guatemala's argument that the 1859 Convention is a treaty of cession rests upon the propositions (I) that the territory of British Honduras was Spanish until the date of the independence of Guatemala in 1821 and (II) that Guatemala inherited that territory from Spain by virtue of the doctrine of *uti possidetis*. (III) There is also a third Guatemalan argument. Guatemala argues that it had title to Belize in 1859 when the 1859 Convention was concluded. The 1859 Convention was worded as it was in order to conceal the fact that it was a treaty of cession, the conclusion of which by Britain would have violated the terms of a treaty that Britain had previously concluded with the United States, namely, the Clayton-Bulwer Treaty of 1850.

#### A. SPANISH TITLE BEFORE 1821

191. There is no need to question that at the time of the conclusion of the Treaties of 1783 and 1786, by which Spain accorded to Britain certain rights in Belize north of the River Sibun, Spain had, by the legal standards then operative, title to Belize; and this was acknowledged by Britain. It need hardly be said, however, that the Papal basis of Spain's title then would not, in the absence of acts of possession sufficient to exclude any other claimant, be effective to support that title today by reference to the standards applicable now.

192. It is also a fact that in the years following 1786 the British settlers began to occupy areas lying outside the limits laid down by the Treaties. Spanish authority in Belize withered away and after 1798 ceased entirely to exist in that area.

193. The indications of the lapse of Spanish title in the area have been detailed above where the facts relating to British presence in the area south of the Sibun River prior to 1821 - and the corresponding dispossession of Spain - are set out as part of the history of British presence in the area over the much longer period of the past 200 years. There is no need to recapitulate those facts here.



B. *UTI POSSIDETIS*<sup>172</sup>

194. Guatemala has based its claim to have inherited Spain's title on the operation of the doctrine of *uti possidetis juris*. This doctrine, at least in the view taken by Guatemala in the past (as shown in its contentions in its boundary dispute with Honduras), operates only in relation to territory that was actually under the authority and control of Spain or of its provincial administration.<sup>173</sup>
195. As the title of Spain and hence that of any local Spanish administration had already by 1821 been attenuated to the point of disappearance there was no title to which Guatemala could succeed and Guatemala therefore did not acquire title to Belize by operation of the doctrine of *uti possidetis*.<sup>174</sup>
196. However, even Guatemala's claim that authority over the whole of Belize was during the period of Spanish sovereignty vested in the Captaincy-Generalship of Guatemala cannot be assumed to be correct. As will be shown in Appendix II, there is significant support for the contention of Mexico that the Captaincy-General of Yucatan exercised authority at least over the northern part of Belize, and even perhaps over the southern part.
197. If that contention is correct, then it casts considerable doubt on the existence of Guatemala's authority over both the northern and the southern part of Belize. Guatemala's claim on the basis of *uti possidetis* was originally, it will be recalled, one of succession to the whole of Belize. Only recently has Guatemala limited its claim to the southern part of Belize. What is totally lacking is any proof of Guatemala's authority, formal or actual, over any part of present day Belize during the period of Spanish sovereignty. This is to be contrasted with the evidence of the authority of the Captaincy-General of Yucatán.
198. Even if Guatemala did acquire some title to the area of British Honduras on the basis of the doctrine of *uti possidetis*, that would, as the doctrine was understood at that time and for many years after, have operated only as against other States deriving their title by succession from Spain. As Chief Justice Hughes said in the *Guatemala/Honduras Boundary Dispute*, the system of *uti possidetis* operated on the basis that both States involved in the boundary dispute were part of the Spanish colonial regime and that the only source of authority was the Spanish Crown.<sup>175</sup> The concept would, therefore, not then have applied as against third States and thus would not have served to vest a title in Guatemala capable of overriding Britain's possessory title.
199. It need hardly be added that the concept of *uti possidetis* has in recent years come to be regarded in wider terms - as recognising generally the stability of frontiers inherited by new States from the previous sovereign of the area. Thus, in the *Burkina Faso/Mali* case, a Chamber of the ICJ said:

"Although there is no need, for the purposes of the present case, to show that this is a firmly established principle of international law where decolonization is concerned, the Chamber nonetheless wishes

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<sup>172</sup> The subject of *uti possidetis* is further considered in Appendix II.

<sup>173</sup> See *Guatemala/Honduras Boundary Dispute*, 1933, 2 UNRIAA, pp.1322-1323.

<sup>174</sup> See above, paras. 194-200.

<sup>175</sup> 2 UNRIAA, at p.1323.

to emphasise its general scope, in view of its exceptional importance for the African continent and for the two Parties. In this connection it should be noted that the principle of *uti possidetis* seems to have been first invoked and applied in Spanish America, inasmuch as this was the continent which first witnessed the phenomenon of decolonization involving the formation of a number of sovereign States on territory formerly belonging to a single metropolitan State. Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power."<sup>176</sup>

But the modern view cannot be applied retroactively to the concept as it operated in 1821.

200. In any event, even assuming that the doctrine of *uti possidetis juris* was sufficient originally to have vested in Guatemala title to the area of Belize, the title thus vested could not have survived in the face of continuing adverse British possession and Guatemala's acquiescence in it.<sup>177</sup>

### C. THE CLAYTON-BULWER TREATY

201. Guatemala has argued that the 1859 Convention was so worded by Britain as not to create the impression that it involved a cession of territory that would be in conflict with the terms of the Clayton-Bulwer Treaty of 1850. Though constantly repeated by Guatemala, the argument is not persuasive.
202. It is to be noted that in 1847 even before the Clayton-Bulwer Treaty, the question of Belize was seen by Guatemala as a *boundary* matter rather than one regarding title. When in June of that year a treaty of amity, commerce and navigation was signed between Guatemala and Britain (though never ratified), the Guatemalan representative declared that

" . . . it has not been believed that the said treaty might affect in any way, nor involve the rights of the Republic of Guatemala in the pending boundary question with the British Government, as far as the concessions in the territory of Belize are concerned . . . I received the understanding in which we have proceeded . . . considering that the treaty signed on June 25 (1847) in no way involves or affects the rights of the Republic of Guatemala in the *boundary* matter relative to the concessions in the territory of Belize . . ."<sup>178</sup>

The British Consul in Guatemala, to whom the Guatemalan note had been addressed, replied that he had no instructions on the subject, but that

"I conceive that the Treaty . . . need not affect any arrangement which the Government of this Republic may desire to conclude at a future

<sup>176</sup> ICJ Reports 1986, p.554, at pp.469-473.

<sup>177</sup> See the express acknowledgement of this possibility in the decision of the Chamber in the *Land, Island and Maritime Frontier Case* (para. 86 above).

<sup>178</sup> *GWB*, pp.66-67. Emphasis supplied.

time with Great Britain respecting boundaries."<sup>179</sup>

203. As the documents show, at the time when Britain was drawing up its instructions to its negotiator, Mr Wyke, it did not regard the prospective delimitation as a cession, though it was concerned to ensure that the treaty was not seen as such by the United States Government and, therefore, as a possible breach of the Clayton-Bulwer Treaty of 1850. There really was no need for Britain to be so concerned about the matter. At the time of the conclusion of that Treaty Britain had been at pains to ensure that its terms were not to be viewed as applicable to British Honduras by making a declaration "that Her Majesty does not understand the engagements of that Convention to apply to Her Majesty's settlement at Honduras, or to its dependencies". True, the United States replied (by Mr Clayton) in guarded terms: ". . . I understood British Honduras was not embraced in the treaty of the 19th of April last, but, at the same time, carefully declining to affirm or deny the British title in their settlement or its alleged dependencies."<sup>180</sup> In other words, Mr Clayton was acknowledging that the Treaty did not apply to British Honduras, but reserved his position as to whether Britain had a good title to the country.

204. The inapplicability of the Clayton-Bulwer Treaty of 1850 to British Honduras was, however, subsequently acknowledged in the "Separate Articles" of the Clarendon-Dallas Treaty of 1856. Article II (1) provided:

"That *Her Britannic Majesty's settlement called Belize or British Honduras*, on the shores of the Bay of Honduras, bounded on the north by the Mexican province of Yucatan, and on the south by the River Sarstoon, *was not and is not embraced in the Treaty entered into between the Contracting Parties on the 19th day of April, 1850*, and that the limits of the said Belize, on the west, as they existed on the said 19th of April, 1850, shall, if possible, be settled and fixed by Treaty between Her Britannic Majesty and the Republic of Guatemala, within two years from the exchange of ratifications of the instrument; which said boundaries and limits shall not at any time hereafter be extended."<sup>181</sup>

205. When the Treaty came before the United States Senate for its consent, the Senate was only prepared to approve it subject to certain changes. According to a note from the British Ambassador in Washington to the Foreign Secretary of 16 April 1857, one of these changes involved the deletion from the provision above quoted of the words which indicated the boundaries of Belize or British Honduras; and the settlement of those limits was referred to negotiation, not only with Guatemala, as prescribed by the Treaty, but also with the Republic of Honduras.<sup>182</sup> Nonetheless, the Resolution of the Senate, as actually adopted, and as sent by the United States Ambassador in London to the British Foreign Secretary, contains no such amendment to Article II (1) of the Additional Articles, but only one to Article II (2) unconnected with Belize.<sup>183</sup> This latter amendment was not acceptable to Britain, which proposed a variation of the amendment.<sup>184</sup> The United States did not agree to this and no further progress was made with that Treaty.

<sup>179</sup> *Id.*, p.67. Emphasis supplied. When, in 1849, Guatemala and Britain signed and ratified a Treaty of Friendship, Commerce and Navigation, Guatemala did not seek to make any reservation comparable to the one that it had expressed in relation to the abortive 1847 Treaty.

<sup>180</sup> Memorandum attached to the text of the Treaty as printed in Parry's *Consolidated Treaty Series*, Vol 102, p.47. See also *GWB.*, p.47.

<sup>181</sup> FOCP 892 (1856-60), Inclosure in No.11, p.37, at p.41; *GFB.*, p.122; *GWB.*, p.65. Emphasis supplied.

<sup>182</sup> *Ibid.*, p.44.

<sup>183</sup> *Ibid.*, p.47.

<sup>184</sup> *Ibid.*, p.62.

206. But the fact that the Clarendon-Dallas Treaty did not enter into force does not mean that its terms have no relevance in the present situation. Regard may properly be had to its wording, not as containing a legal obligation, but as evidencing a fact, namely, the acknowledgement by the United States that the southern boundary of British Honduras was at the Sarstoon River and that a British claim to that limit did not conflict with the terms of the Clayton-Bulwer Treaty.<sup>185</sup> The judgment of the ICJ in the *Qatar/Bahrain* case (16 March 2001), para. 89, contains the following statement that exactly covers the situation: "The Court observes that signed but unratified treaties may constitute an accurate expression of the understanding of the parties at the time of signature".
207. Another development that confirms the inapplicability of the Clayton-Bulwer Treaty arose out of the protest to Guatemala on 1 October 1859 by the United States Minister in Guatemala that the 1859 Convention involved a violation of that Treaty. The Guatemalan Foreign Minister replied on 18 October 1859 saying that "if there were a motive to protest", the protest should have been directed to Britain, not to Guatemala, since "it is not incumbent upon the Government of this Republic to discuss this question, nor is it competent to judge of it - having no part in it."<sup>186</sup> On 12 July 1860, the Acting Secretary of State of the United States, in a note to the Guatemalan Minister in the United States, disclaimed the protest, saying that it was not approved by the United States Government, the 1859 negotiations having been "in harmony with the understanding of the subject entertained here and at London."<sup>187</sup>

## II. GUATEMALA'S ARGUMENT THAT THE 1859 CONVENTION WAS IMPOSED ON GUATEMALA

208. Guatemala has at times suggested that the 1859 Convention was imposed on her.<sup>188</sup>
209. When an allegation of this kind was considered by the International Court of Justice in the *Fisheries Jurisdiction* cases the Court said:

"it is . . . clear that a court cannot consider an accusation of this serious nature on the basis of a vague general charge unfortified by evidence in its support."

Referring to the negotiations that led to the agreement then under consideration, the Court said that the history of the negotiations

"reveals that these instruments were freely negotiated by the interested parties on the basis of perfect equality and freedom of decision on both sides. No fact has been brought to the attention of the Court from any quarter suggesting the slightest doubt on this matter."<sup>189</sup>

210. The same is true in the present case. The facts simply do not bear out Guatemala's

<sup>185</sup> Guatemala impliedly acknowledges the disadvantageous effect of the Treaty in *GWB*, p.63, where it says: "The . . . Treaty . . . aggravated the situation of Guatemala still more, weakening its legal defence . . .". See also Mendoza.

<sup>186</sup> See Manning, *Diplomatic Correspondence of the United States, Inter-American Affairs 1831-1860*, vol. IV, at pp.773 and 797.

<sup>187</sup> *Ibid.*, p.173. Emphasis supplied.

<sup>188</sup> E.g. in the statement made by them in the General Assembly of the United Nations at the time of the admission of Belize when it was said that Britain "forced" Guatemala to sign the Convention and that the Convention was "imposed" on Guatemala. (See GAOR, 36th session, *Official Records*, 13th plenary meeting, del.A/36/P.V.113.

<sup>189</sup> *ICJ Reports 1973*, 14 (para. 24) and 59 (para. 24).

contention. The diplomatic documents of both Great Britain and Guatemala contain no indication of any threat of force or suggestion of duress by Great Britain in the period in which the treaty was under negotiation, i.e. between 1857 and 1859. None of the adverse votes in the Guatemalan legislature on the occasion of the ratification of the 1859 Convention refers to any such threat by Great Britain to secure Guatemala's acceptance of the Convention, beyond general and vague references to the "inevitable expansionism of a highly industrialised colonial power."<sup>190</sup>

### III. GUATEMALA'S ARGUMENT REGARDING BREACH OF THE 1859 CONVENTION AND ITS CONSEQUENCES

211. Guatemala has at various times contended that Article VII of the 1859 Convention imposed obligations on Britain and that Britain's failure to comply with those obligations led to the Convention's becoming "null and void."<sup>191</sup> In the words of Guatemala's representative in the General Assembly on the occasion of the admission of Belize into the United Nations, "that pledge was never kept and the Convention was therefore null and void, since the conditions on which Guatemala entered into the contract were not fulfilled."<sup>192</sup> We have already indicated our opinion that any responsibility for non-performance of that Article relates only to the period of Britain's rule in British Honduras and has not devolved upon independent Belize. Here we consider only Guatemala's argument regarding the effect of the alleged breach of Article VII on the 1859 Convention as a treaty establishing the boundary of Belize.<sup>193</sup>
212. By way of preface, however, we observe that in so far as the alleged breach occurred before the Exchange of Notes of 1931, that Exchange of Notes, as an entirely independent agreement, operated as a confirmation of the 1859 Convention.<sup>194</sup> As such, without prejudice to any possible claims of Guatemala against Britain arising before that Exchange of Notes, the Exchange of Notes extinguished any possible claim by Guatemala that the alleged breach rendered the Convention void. Nothing that has occurred since the Exchange of Notes serves to eliminate that effect or to transmute possible Guatemalan claims against Britain into possible Guatemalan claims against Belize.
213. Assuming, *arguendo* and without prejudice to the positions of Britain or Guatemala regarding any alleged breach of Article VII, that Britain is in breach of Article VII, the question arises of the effect of *that* breach, if duly confirmed, on the continuing validity of the boundary that the 1859 Convention established and the Exchange of Notes of 1931 confirmed. The point of departure of this examination is to be found in the law of treaties. That law does not recognise any breach of a treaty as automatically leading to the termination of the treaty, and *a fortiori* to the nullification of a boundary established by that treaty. At most, a confirmed breach of a treaty gives to the injured party the right to call for the termination of the

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<sup>190</sup> GWB, pp.110, 113, 121.

<sup>191</sup> For the text of Article VII, see para. 27 above.

<sup>192</sup> Official Records of the General Assembly, 36th session, 13th Plenary Meeting (25 September 1981), A/35/PV.13, p.229.

<sup>193</sup> We should however point out that Article VII, which was introduced into the Convention at Guatemala's request, imposes its obligations on both parties "conjointly to use their best efforts". It is beyond the scope of this Opinion to examine the extent to which either party used its best efforts to fulfil the obligations of that Article.

<sup>194</sup> As pointed out earlier, the Exchange of Notes is an independent treaty, even if it refers to the implementation of the Convention of 1859.

treaty, not unilaterally to proclaim its termination, or repudiate it. It would then be the treaty that is terminated, in so far as it imposed any further executory obligations on either side (and it will be recalled that Article VII imposed obligations on both parties), and not any boundary established by that treaty.

214. The position today is clarified by Article 60 of the 1969 Vienna Convention on the Law of Treaties.<sup>195</sup> That Convention distinguishes between what it terms a "material" breach of a treaty, and other breaches. A "material breach" of a treaty is defined as "(a) a repudiation of the treaty not sanctioned by the present Convention, or (b) the violation of a provision essential to the accomplishment of the object and purpose of the treaty". A material breach of a bilateral treaty by one of its parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.<sup>196</sup> The question is, therefore, whether the alleged unilateral breach by Britain of Article VII is a material breach as thus defined. This can be reformulated as the question whether Article VII is a provision that is essential to the accomplishment of the object and purpose of the 1859 Convention.
215. The object and purpose of that Convention are set out in detailed terms in its preamble, which we have mentioned in paras. 20-21 above. Given the character and content of the 1859 Convention and the circumstances in which Article VII came to be included in it, it is clear that Article VII was never conceived as being essential to the accomplishment of the purpose and object of the Convention. It was at most included, as Guatemala puts it, "in order to compensate us for the mutilation, when we consented that Great Britain extend the limits of Belize as far as the Sarstoon river in territory absolutely Guatemalan"<sup>197</sup>. As the representative of Guatemala stated in his speech at the 13th plenary meeting of the 36th session of the UN General Assembly, it was "an inducement, a compensatory clause". Such a clause might have been needed to procure the conclusion of the 1859 Convention. That was a question between Guatemala and Britain. But it is not and cannot be a provision essential to the accomplishment of the object and purpose of the Convention as a boundary treaty. That object and purpose was the establishment of the boundary between the two countries and was accomplished when the Convention entered into force.
216. Since, in our opinion, the alleged non-fulfilment by Britain of Article VII is not a "material breach" of the Convention, the question arises whether regarding it as a simple "breach" has any relevance to the matter. We answer that question in the negative. In the words of the ICJ:

"... it is only a material breach of the treaty itself, by a State party to the treaty, which entitles the other party to rely on it as a ground for termination of the treaty. The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties".<sup>198</sup>

<sup>195</sup> 1155 UNTS 331.

<sup>196</sup> Dealing with a bilateral treaty the ICJ has held, in the *Gabcikovo-Nagymaros Project* case, that Article 60 of the Vienna Convention is "in many respects" a "codification of existing customary law." (*ICJ Reports 1997* at p.38 (para. 46).) That passage of the Judgment goes on to explain that the effects of a denunciation of a treaty that does not meet the conditions *inter alia* of Article 60 are expressly excluded from the scope of the Convention through Article 73, and involve the international responsibility of the State.

<sup>197</sup> *GWB*, p.108.

<sup>198</sup> *Gabcikovo-Nagymaros Project case*, *ICJ Reports 1997* at p.65 para.106.

Leaving aside the special problem of material breach, breach of a treaty thus comes within the scope of the general rules on State responsibility. It would be, in the words of the International Law Commission, a breach of an international obligation of Britain, and as such an internationally wrongful act attributable to Britain, and only to Britain.<sup>199</sup> Leaving out of consideration whether possible breach of Article VII by Guatemala itself has not contributed to the breach, the normal consequences of breach do not extend to repudiation of the treaty. At most they would consist of such traditional processes as reparation, either as agreed or as determined after appropriate proceedings.<sup>200</sup> As we have shown, the possibility of judicial settlement of claims arising from the breach of the Convention certainly existed between 1946 and 1956, and possibly even earlier. It is clear that whether under the law of treaties or any other basis, alleged breach by Britain of its obligations under Article VII has no effect whatsoever on the continued validity of the 1859 Convention. It accordingly has no effect on the boundary established by that Convention. This is, and remains, the boundary originally established between Guatemala and British Honduras, and now effective between Guatemala and Belize.

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<sup>199</sup> Draft articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission, reproduced in the Report of the International Law Commission on the work of its fifty-third session (2001), Ch. IV, doc. A/56/10.

<sup>200</sup> Para. 174 above.

# CONCLUSIONS

## I. THE TREATY BASIS OF THE TITLE OF BELIZE

217. The title of Belize to its territory is supported, in the first instance, by two treaties: the 1859 Convention and the 1931 Exchange of Notes. Both these treaties are valid and binding. The definition of the boundary in the first of these treaties establishes that the territory to the west and south of the defined boundary is Guatemalan and that the territory on the east and north of the defined boundary belongs to Belize. The identification of the boundary pillars in the 1931 treaty inescapably indicate that the territory on the west belongs to Guatemala and that on the east belongs to Belize. The territory of Belize thus defined corresponds to the territory of Belize today.
218. The 1859 Boundary Convention is a boundary treaty and not a treaty of cession of Guatemalan territory to the United Kingdom. The Guatemalan contention that the 1859 Convention has been terminated because of alleged non-fulfilment of Article VII of the Convention by the United Kingdom cannot be sustained.
219. Even if the 1859 Convention could lawfully have been terminated by Guatemala this would not have re-established any Guatemalan claim to the territory of Belize. For one thing, at no time prior to 1859 did Guatemala have any title to the area of Belize, whether by way of succession to Spain or otherwise, which it could have ceded to Britain. So there was no Guatemalan title that could have reverted to it upon the alleged ending of the 1859 Convention. For another, even if Guatemala had had title to Belize prior to 1859, the boundary established by the Convention, and the British title to the territory of Belize that it acknowledges, acquired an independent life that would have survived regardless of the demise of the Convention.

## II. THE CUSTOMARY INTERNATIONAL LAW BASIS OF THE TITLE OF BELIZE

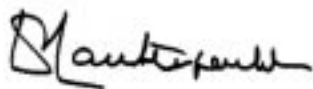
220. The title of Britain and, since independence, of Belize is also sustained by considerations of customary international law.
221. Britain acquired title to the territory of Belize by occupation beyond the limits of the Anglo-Spanish Treaties of 1783 and 1786 as far south as the River Sarstoon prior to the acquisition of independence by Guatemala in 1821. There was thus no basis on which Guatemala could validly invoke the doctrine of *uti possidetis juris* in support of its claim to Belizean territory. Nor has Guatemala ever occupied, possessed or administered any part of the territory of Belize. Its claim is a paper claim without substance.
222. In the period from 1821 to 1850 Britain further consolidated its title to Belize by a process of historical consolidation of title or of acquisitive prescription both of which are fully recognised by international law.
223. Guatemala has both actively and passively acquiesced in and accepted Britain's title to Belize during the period prior to the independence of Belize. Guatemala had



dealings with Britain in relation to the territory of Belize which could only have taken place on the basis of British title. Until relatively recently, Guatemala did not protest against British title, but only complained of the alleged non-fulfilment of Article VII of the 1859 Convention.

224. It was open to Guatemala to have challenged Britain's title in the period 1946-1956 by proceedings in the International Court of Justice, but it did not do so. Guatemala has never been willing to have its claim adjudicated on a basis of law, but only on an *ex aequo et bono* basis, which means a basis other than law. This limited willingness to adjudicate on a non-legal basis cannot serve to preserve any legal rights that Guatemala may claim and confirms the absence of a legal basis for Guatemala's claim.
225. The right of Belize to its territory is confirmed by the principle of self-determination, a well-established norm of modern international law. The people of Belize were entitled to determine their future. They did so at the time of independence in 1981. Their right to do so was consistently recognised virtually unanimously by the Members of the United Nations and Belize was admitted as a Member State of the United Nations in the full knowledge by its Members of Guatemala's claims. No State has recognised Guatemala's claim.
226. The title of Belize extends also to the islands and islets lying off the mainland shore. The right of Belize to those islands flows from its title to the adjacent mainland to which the islands are appurtenant as well as from Britain's occupation of those islands. The legal dependence of these islands upon the mainland was recognised even as early as 1850.
227. On the basis of international law and on the evidence considered, Belize has good title to all its territory including the islands and islets lying off the mainland shore. The claim to Belizean territory by the Republic of Guatemala is without merit and in our opinion would be regarded as such by the International Court of Justice.

(Signed)



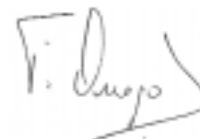
Sir Elihu Lauterpacht QC



Professor Shabtai Rosenne



Judge Stephen M Schwebel



Professor Francisco Orrego Vicuña

13 November, 2001

# APPENDIX I

## THE TREATMENT OF THE BELIZE QUESTION IN THE UNITED NATIONS, 1945-1981

1. The question of Belize was regularly considered by the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (the "Committee of 24"), the Fourth Committee of the United Nations General Assembly, and the General Assembly in plenary session, from the inception of the United Nations until the independence of Belize in 1981.
2. The context of this consideration was the transmission of information by the United Kingdom on non-self-governing territories for which it was responsible. It was the practice of Guatemala on each occasion when the report of the Secretary-General in which reference was made to such information provided by the United Kingdom in respect of British Honduras to enter a reservation stating that Guatemala did not recognise British sovereignty over this territory.<sup>1</sup> Britain on each occasion stated that it did not accept the Guatemalan position.
3. In the course of that repeated and extended consideration, Guatemala expounded its claims to the whole, or, more often and fully, the south, of the territory of Belize, setting out the arguments about the incursions of the British colonists and colonialism, *uti possidetis*, and the non-performance by the United Kingdom of its obligation to construct a cart road under the 1859 Treaty and the consequent nullity of that Treaty, considered in the body of the Opinion. The United Kingdom for its part, and spokesmen of Belize as well, responded fully to Guatemala's contentions. The arguments of Guatemala initially attracted a measure of support among some other Central American States (apart notably from Mexico), as well as a few South American States and the Inter-American Juridical Committee, whereas a much larger number of States, led by those of the Caribbean, gave full support to the position of the United Kingdom and Belize. But in the end it was Guatemala alone that failed to support resolutions affirming the "territorial integrity" of Belize, "inviolable" and "intact" within its traditional borders, and Guatemala alone that voted against the admission of Belize to membership in the United Nations. Belize was admitted as a Member of the United Nations in 1981, having acceded to statehood on 21 September 1981. While the resolution admitting it does not refer to the geographical extent of the State so admitted (nor do resolutions admitting other Members), antecedent resolutions make it plain that, in the view of virtually every Member of the United Nations apart from Guatemala, the borders of Belize are those that obtained under British rule. In the light of these resolutions and the debates that led to their adoption, it may be concluded that the international community recognizes the State of Belize as comprising the whole of the land territory which Belize maintains that its borders encompass.
4. The United Kingdom accorded Belize full internal self-government in 1964. As early as 1961, the United Kingdom announced that Belize could become dependent

<sup>1</sup> Such reservations were made in the Fourth Committee and/or the plenary meetings of the General Assembly and are mentioned annually in the Yearbook of the United Nations.

when it so wished. But independence was delayed by Guatemala's position that its territorial claims against Belize must be settled before a change in the status of Belize, a position that was accompanied by threats to use force to preserve what it saw as its rights. That position became increasingly unacceptable to the great majority of the Members of the United Nations, as demonstrated in a series of resolutions adopted in 1975 and thereafter.

5. General Assembly Resolution 3432 (XXX) of 8 December 1975 provides:

The General Assembly,

Having considered the question of Belize,

Having examined the relevant chapter of the report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples,

Having heard the statements of the representatives of Belize,

Reaffirming the principles established in the Declaration on the Granting of Independence to Colonial Countries and Peoples set out in its resolution 1514 (XV) of 14 December 1960, in particular the principle that all peoples have the right to self-determination, by virtue of which right they freely determine their political status and freely pursue their economic, social and cultural development,

Firmly convinced that the principles referred to above apply to the people of Belize with no less force than to the people of other colonial Territories,

Noting the firm desire of the Government and people of Belize, which has been frequently expressed for many years past, to exercise their right to self-determination and to proceed to independence as soon as possible in peace and security and with their territory intact,

Bearing in mind the repeated assurances by the Government of the United Kingdom of Great Britain and Northern Ireland, as the administering Power, that it stands ready, in accordance with resolution 1514 (XV), to take the formal steps necessary for Belize to exercise its right to self-determination and independence,

Regretting that certain differences of opinion between the administering Power and the Government of Guatemala concerning the future of Belize have hitherto prevented the people of Belize from exercising their right to self-determination and independence in peace and security, in accordance with their freely expressed wishes,

Considering that these differences of opinion can and should now be speedily resolved by negotiations carried out in close consultation with the Government of Belize and in full acceptance of the principles referred to above,

1. Reaffirms the inalienable right of the people of Belize to self-determination and independence;
2. Declares that the inviolability and territorial integrity of Belize must be preserved;

3. Calls upon all States to respect the right of the people of Belize to self-determination, independence and territorial integrity and to facilitate the attainment by them of their goal of a secure independence.
  4. Calls also upon the Government of the United Kingdom of Great Britain and Northern Ireland, as the administering Power, acting in close consultation with the Government of Belize, and upon the Government of Guatemala to pursue urgently their negotiations for the earliest possible resolution of their differences of opinion concerning the future of Belize, in order to remove such obstacles as have hitherto prevented the people of Belize from exercising freely and without fear their inalienable right to self-determination and independence;
  5. Declares that any proposals for the resolution of these differences of opinion that may emerge from the negotiations between the administering Power and the Government of Guatemala must be in accordance with the provisions of paragraphs 1 and 2 above;
  6. Requests the two Governments concerned to report to the General Assembly at its thirty-first session on the progress made in implementing the present resolution;
  7. Requests the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples to continue its examination of the question.<sup>2</sup>
6. It will be observed that in this resolution the General Assembly affirms that the people of Belize "have the right to self-determination"; notes that that people and their Government wish to exercise that right to proceed to "independence as soon as possible in peace and security and with their territory intact"; considers that any resolution of differences between the administering Power and Guatemala should be speedily resolved "in full acceptance" of the foregoing principles; reaffirms "the inalienable right of the people of Belize to self-determination and independence"; declares that "the inviolability and territorial integrity of Belize must be preserved"; calls upon all States to respect that "territorial integrity"; and declares that any proposals for resolution of differences with Guatemala "must be in accordance" with the foregoing provisions.
  7. This resolution was adopted after exchanges in the Special Committee and the Fourth Committee that lend its provisions particular significance. In a letter of 5 November 1975, Guatemala asserted that Belize "forms part of the territorial integrity and national unity of the Republic of Guatemala".<sup>3</sup> A note verbale attached to that letter contended that Belize is "a Territory illegally occupied by the United Kingdom...on the basis of no right other than the precarious right of usufruct limited to the cutting of timber in a small area, which, however, was subsequently extended illegally to areas that affect the national territorial, geographical and economic integrity of Guatemala..." That note challenged the competence of the General Assembly to adopt a resolution passing upon the merits of Guatemala's differences with the United Kingdom.

<sup>2</sup> 2431st Plenary meeting, 8 December 1975.

<sup>3</sup> A/C.4/796.

8. Guatemala further transmitted a copy of a note of 8 November 1975 to the Organization of American States which maintained that, "The territory of Belize is part of the Guatemalan nation and an integral part of its territory..."<sup>4</sup>
9. In reply, the Premier of Belize, Mr. George C. Price, maintained that Belize was confronted with either becoming free or condemned to choose between indefinite prolongation of colonial rule or "dismemberment and the imposition of a new colonialism".<sup>5</sup> He rehearsed the weaknesses of Guatemala's "anachronistic claim" and observed that the existing boundaries had been "recognized and defined by a Convention concluded between Great Britain and Guatemala in 1859".<sup>6</sup> Eighty years later, however, Guatemala alleged that breach of a conjoint obligation to build a road between Guatemala City and the Atlantic coast caused the entire Convention to lapse. Guatemala's claim was "entirely fictitious, unfounded and unjust".<sup>7</sup> "The only issue that might arise was between the United Kingdom and Guatemala concerning the failure to build a cart-road as stipulated in the 1859 Convention. He did not see why the Belizeans should have to pay the price of the unfilled promises of a century earlier by giving up their independence".<sup>8</sup> Guatemala's proposal that Belize should surrender a substantial part of its territory as the price for the independence of the remainder was in "direct violation" of the principles of self-determination and territorial integrity clearly set out in the Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>9</sup> Paragraph 6 of that Declaration provides that, "Any attempt aimed at the partial or total disruption of the national unity or territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." Thus Mr. Price submitted that, because the Declaration speaks of the territorial integrity "of a country, not of Member States," it "was intended to apply equally to non-independent countries and help them to move forward to independence with their territory intact. The intention was to prevent the dismemberment of such countries before they attained independence." There was no question of the dismemberment of Guatemala; "Belize had never been a part of Guatemala, nor had it ever been governed or administered by the Guatemalan Government".<sup>10</sup> Mr. Price concluded that "only a categorical affirmation by the United Nations of their rights to self-determination and territorial integrity would break the deadlock and permit Belize to go forward to a secure independence".<sup>11</sup>
10. A no less significant predicate for the interpretation of the resolutions of the General Assembly affirming the "territorial integrity" of Belize was provided by the representative of the United Kingdom, Mr. Richard. Deploring "the shadow cast by a neighbouring country, which claimed the whole of Belize as part of its own national territory"<sup>12</sup>, Mr. Richard maintained, first, that "Guatemala accepted that it had at no time physically occupied the territory currently called Belize, nor had it ever exercised any direct authority over the Territory since the foundation of the Republic of Guatemala in 1821". Nor indeed had Spain, the previous imperial

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<sup>4</sup> A/C. 4/805.

<sup>5</sup> A/C.4/SR.2162, para.8.

<sup>6</sup> *Ibid.*, para.13.

<sup>7</sup> *Ibid.*, para.14.

<sup>8</sup> *Ibid.*, para.28.

<sup>9</sup> *Ibid.*, para.30.

<sup>10</sup> *Ibid.*, paras.32-33.

<sup>11</sup> *Ibid.*, para.37.

<sup>12</sup> *Ibid.*, para. 57.

Power, "effectively occupied the Territory for many years before that".<sup>13</sup> Second, Guatemala and the United Kingdom had signed a boundary Convention in 1859, which defined the limits of what was currently Belize.<sup>14</sup> That was not a treaty of cession but a boundary treaty constituting "a clear recognition by Guatemala of the pre-existing frontier and a pre-existing British sovereignty over Belize". Third, in the Convention, the two Parties had agreed "conjointly to use their best efforts" to ease communications between Guatemala City and the Atlantic coast by means of either a road or river link. The United Kingdom had used its best efforts, offering to pay towards the construction of a road, and in 1863 the two sides had signed a convention to that effect, unfortunately never ratified by either side. In 1931, Guatemala and the United Kingdom concluded an exchange of notes which had fixed on the ground the terminal points of the frontier as defined in the 1859 Convention. Again there was no issue as to United Kingdom sovereignty over Belize. Yet in 1939 and 1946, Guatemala had suddenly produced a claim to Belize on the grounds that the 1859 Convention had been breached, that the Convention itself was invalid and therefore, that the United Kingdom had no sovereignty over the Territory. A gap of 76 years would seem to be a lengthy delay in the prosecution of such a claim.<sup>15</sup> Guatemalan demands that Belize become an associated state of Guatemala, or cede a substantial part of its territory to Guatemala, were unacceptable and incompatible with the principle of self-determination.<sup>16</sup> But arrangements for the unimpeded access of Guatemalan goods by land and sea, free-port facilities, and joint exploration and exploitation of territorial waters, were possibilities.<sup>17</sup>

11. The representative of Guatemala, Mr. Skinner Klee, in the course of the same debate in the Fourth Committee, set out what he saw as the history and elements of Guatemala's case. He challenged the competence of the General Assembly to pass upon a legal dispute between two States; Belize was not a colony properly so-called, but part of Guatemala and hence governed by paragraph 6 of the Declaration on the Granting of Independence to Colonial Countries and Peoples which precluded the dismemberment of a country, in this case, Guatemala. In any event the General Assembly should be informed of the essentials of Guatemala's claims, which he proceeded to set out more extensively than this Opinion can reproduce. Spain's title acquired through discovery, conquest and possession, was based "on solid grounds". British pirates had hidden themselves along the coasts of Central America; subsequently British loggers "engaged in robbery of the forests". Treaties concluded between Great Britain and Spain in the 18th Century included express recognition of Spanish sovereignty over Belize while according British settlers rights to cut timber in the north of Belize. The Definitive Treaty of Peace of 1802 ended hostilities between Great Britain and Spain, restored the timber concessions and put an end to any possibility of British title by way of conquest. When Central America achieved independence in 1821, Great Britain required recognition of its settlements, but Guatemala reserved its rights. The Convention of 1859 was coerced but it did accord Guatemala compensation in the form of assistance in building a road to the Atlantic. The United Kingdom failed to carry out that obligation. Agreement by Guatemala to the unilateral demarcation of the frontier by British engineers in 1931 was subject to British implementation of the

<sup>13</sup> *Ibid.*, para.59.

<sup>14</sup> *Ibid.*, para.60.

<sup>15</sup> *Ibid.*, para.61.

<sup>16</sup> *Ibid.*, para.63.

<sup>17</sup> *Ibid.*, para.65.

1859 Convention. Guatemala deferred its claims until after the Second World War and, in signing the United Nations Charter, had made a clear reservation respecting Belize. It had negotiated thereafter repeatedly and extensively both with British and Belizean authorities. But pending a negotiated solution acceptable to Guatemala, any declaration of the right of independence of Belize would breach the territorial integrity of Guatemala and exceed the competence of the General Assembly.<sup>18</sup> The latter should not arrogate to itself the powers of an arbitral tribunal or an international court of justice;<sup>19</sup> the General Assembly "was not an assembly of geographers competent to determine the limits and borders of the Republic of Guatemala".<sup>20</sup>

12. The interventions of third States in the debate over Belize were mixed. The majority who spoke supported the position of the United Kingdom and Belize, but the position of Guatemala attracted support from a number of Central and South American States.
13. When the draft resolution on Belize came to plenary session, the representative of Guatemala, Mr. Maldonado Aguirre, maintained that debate in the Fourth Committee had resulted in a "hasty vote" after insufficient consideration of the merits of the case. He challenged the capacity of the General Assembly to "adjudicate on a Territory in dispute or attempt to define the nature of a dispute".<sup>21</sup> He expressed concern over the Fourth Committee's adoption of a resolution that would permit the breakup of national unity and allow for recommendations based on "emotional solidarity".<sup>22</sup> He warned that if "our Belizean compatriots should take this seriously and, led by their secessionist enthusiasm, should pretend to take unilateral initiatives which could seriously affect our territorial integrity and offend Guatemalan dignity...they would force us to show them, very much against our will, that law is more important than peace. Belize is a Guatemalan problem which can only have a solution endorsed by Guatemalans."<sup>23</sup> The draft resolution adopted by the Fourth Committee "cannot have any legally binding force...it will be a mere formal expression of opinion which will be devoid of any intrinsic value or binding force. We reject it because it is biased, unjust and illegal."<sup>24</sup> In prejudging the results of negotiations, the General Assembly was "arrogating to itself functions which the Charter has not conferred upon it".<sup>25</sup> At the 2372nd plenary meeting, the Minister of Foreign Affairs of Guatemala further elaborated Guatemala's position on Belize, maintaining that the 1859 Treaty was imposed on Guatemala and that moreover Great Britain "never discharged its sole obligation contracted under the 1859 Convention". That failure and British rejection of Guatemalan proposals for international arbitration or adjudication was the reason why Guatemala declared the 1859 Convention to be invalid.<sup>26</sup> In reply, the British representative stated that, "if construction of the cart road would settle this dispute, perhaps even at this late hour my Government would be prepared to consider constructing one".<sup>27</sup> To that, Guatemala replied: "We are not now asking

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<sup>18</sup> *Ibid.*, paraas.71-106.

<sup>19</sup> A/C.4S/R.2163, para.45.

<sup>20</sup> *Ibid.*, para.47.

<sup>21</sup> United Nations General Assembly, Thirtieth Session, Official Records, 2431st Plenary Meeting, paras.57, 73.

<sup>22</sup> *Ibid.*, para.80.

<sup>23</sup> *Ibid.*, para.81.

<sup>24</sup> *Ibid.*, para.82.

<sup>25</sup> *Ibid.*, para.84.

<sup>26</sup> Official Records, 2372nd Meeting, paras.81-82.

<sup>27</sup> *Ibid.*, para.377.

for a road to be built...in any bilateral convention, the fulfillment of obligations by one party is subject to fulfillment of obligations by the other; that is why we consider that this Convention of 1859 is null and void, because Great Britain did not provide the compensation or consideration that the Treaty called for".<sup>28</sup>

14. Resolution 3432 (XXX) was adopted by a roll call vote of 110 to 9, with 16 abstentions.
15. At the following session of the General Assembly, Resolution 31/50 (XXXI) on the Question of Belize was adopted in the following terms:

The General Assembly,

...

Noting that negotiations have taken place between the Government of the United Kingdom, as the administering Power, acting in close consultation with the Government of Belize, and the Government of Guatemala, pursuant to the provisions of Paragraphs 4 and 5 of resolution 3432 (XXX),

Regretting that these negotiations have not resulted in the removal of such obstacles as have hitherto prevented the people of Belize from exercising freely and without fear their inalienable right to self-determination and independence,

1. Reaffirms the inalienable right of the people of Belize to self-determination and independence;
  2. Reaffirms that the inviolability and territorial integrity of Belize must be preserved;
  3. Calls upon all States to respect the right of the people of Belize to self-determination, independence and territorial integrity, to facilitate the attainment of their goal of a secure and early independence and to refrain from any action that would threaten the territorial integrity of Belize;
  4. Calls also upon the Government of the United Kingdom of Great Britain and Northern Ireland, as the administering Power, acting in close consultation with the Government of Belize, and the Government of Guatemala to pursue vigorously their negotiations in accordance with the principles of General Assembly resolution 3432 (XXX), in order to reach an early conclusion;
  5. Requests the two Governments concerned to report to the General Assembly at its thirty-second session on such agreements as may have been reached in the negotiations referred to above;
  6. Requests the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples to continue its examination of the question.<sup>29</sup>
16. It will be seen that this resolution reaffirms that "the inviolability and territorial integrity of Belize must be preserved". It further calls upon all States to respect the right of the people of Belize to self-determination, independence and "territorial

<sup>28</sup> *Ibid.*, para.393.

<sup>29</sup> 85th Plenary meeting, 1 December 1976.



integrity". These provisions, and the debates that led to their adoption, again demonstrate that, in the view of the General Assembly, the territory of Belize encompasses the territory within the borders of what then was a British colony.

17. Following adoption of resolution 3432 (XXX), representatives of the United Kingdom, together with the Premier of Belize, engaged in extended negotiations with representatives of Guatemala. They did not achieve agreement. But negotiations were continuing when the General Assembly returned to the question of Belize. In view of that fact, and of the extended character of debate on Belize at the Thirtieth Session, debate at the Thirty-First Session was relatively abbreviated. Spokesmen of Belize made it clear that Guatemala continued to demand cession of territory of Belize as a condition of accepting its independence; that this demand was wholly unacceptable; and hence that reaffirmation by the General Assembly of the territorial integrity of Belize was sought. That reaffirmation proved to be forthcoming.
18. A year later, in 1977, the situation before the General Assembly remained much the same. Accordingly, Resolution 32/32 (XXXII) was adopted. The text of the Resolution in pertinent part reads:

The General Assembly,

....

Reaffirming the principles established in the Declaration on the Granting of Independence to Colonial Countries and Peoples, set out in its resolution 1514(XV) of 14 December 1960, in particular that all peoples have the right to self-determination, by virtue of which right they freely determine their political status and freely pursue their economic, social and cultural development,

Noting that, in the Bogota Declaration of 6 August 1977, it was agreed that "a solution of the Belize question should be found by the peaceful methods consecrated in the charters of the Organization of American States and the United Nations, and in accordance with respect for its territorial integrity and with the principle of the free self-determination of peoples",

Noting that, in July 1977, negotiations took place between the Government of the United Kingdom, as the administering Power, acting in close consultation with the Government of Belize, and the Government of Guatemala, pursuant to the provisions of paragraph 4 of resolution 31/50,

Deeply regretting the interruption of the negotiations and the continued failure of the parties concerned to negotiate an agreement in conformity with the principles established in resolutions 3432 (XXX) and 31/50,

Concerned that the obstacles placed in the way of the people of Belize to prevent them from exercising their right to self-determination and independence without fear have not yet been removed,

Convinced that the people of Belize should be assisted in a practical manner to exercise freely and without fear their inalienable right to self-determination, independence and territorial integrity,

1. Reaffirms the inalienable right of the people of Belize to self-determination and independence;

2. Reaffirms that the inviolability and territorial integrity of Belize must be preserved;
  3. Calls upon the Government of the United Kingdom of Great Britain and Northern Ireland, as the administering Power, acting in close consultation with the Government of Belize, and the Government of Guatemala to pursue vigorously their negotiations in strict conformity with the principles of General Assembly resolution 3432 (XXX), in consultation as appropriate with other especially interested States in the area, with a view to concluding the negotiations before the thirty-third session of the General Assembly;
  4. Also calls upon the parties involved to refrain from any threats or use of force against the people of Belize or their territory;
  5. Urges all States to respect the right of the people of Belize to self-determination, independence and territorial integrity, and to render all practical assistance necessary for the secure and early exercise of that right;
  6. Requests the Governments concerned to report to the General Assembly at its thirty-third session on the outcome of the negotiations referred to above;
  7. Requests the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples to remain seized of the question and to assist the people of Belize in the exercise of their inalienable rights.<sup>30</sup>
19. It will be seen that, once again, the General Assembly emphasized respect for the "territorial integrity" of Belize and reaffirmed that "the inviolability and territorial integrity of Belize must be preserved."
20. The Prime Minister of Belize reported to the General Assembly on the negotiations with Guatemala that had taken place in the summer of 1977. Guatemala had expressed the fear that an independent Belize would be used as a base to attack Guatemala; Belize had offered a non-aggression pact and co-operative defence arrangements. Guatemala expressed concern that its access to the high seas would be impaired by Belize's territorial sea; Belize had offered to negotiate a seaward boundary which would provide Guatemala with guaranteed and permanent access to the high seas through Belize's territorial sea. Belize had offered the use of port facilities, road access and free transit as well. The United Kingdom negotiators had also offered a substantial contribution to a major Guatemalan development project designated by Guatemala, to satisfy the Guatemalan complaint that a cart road envisaged in the 1959 border treaty had never been built. But Guatemala responded that these proposals did not meet its needs: cession of land in the southern part of Belize was essential. Guatemala had made that demand against the background of a threatened invasion. But "any solution which involved the cession of territory would offend the terms of United Nations resolutions on territorial integrity".<sup>31</sup>
21. The General Assembly returned to the question of Belize in 1978. Essentially the same arguments were rehearsed; essentially the same resolution, denominated

<sup>30</sup> 83rd Plenary meeting, 28 November 1977.

<sup>31</sup> A/C.4/32/SR.22, paras. 7-11, 15, 23.

33/36, was adopted anew, in the following terms:

The General Assembly,

....

Recalling that, in the Bogota Declaration of 6 August 1977, it was agreed that "a solution of the Belize question should be found by the peaceful methods consecrated in the charters of the Organization of American States and the United Nations, and in accordance with respect for its territorial integrity and with the principle of the free self-determination of peoples",

Bearing in mind the relevant parts of the Declarations of the Conference of Ministers for Foreign Affairs of Non-Aligned Countries, held at Belgrade from 25 to 30 July 1978,

Reiterating its conviction that the people of Belize should be assisted in a practical manner to exercise freely and without fear their inalienable right to self-determination, independence and territorial integrity.

Deeply regretting the continued failure of the parties concerned to conclude an agreement in conformity with the principles established in General Assembly resolutions 3432 (XXX), 31/50 and 32/32, and the resultant delay in the speedy achievement of the secure independence of Belize,

1. Reaffirms the inalienable right of the people of Belize to self-determination and independence;
2. Reaffirms that the inviolability and territorial integrity of Belize must be preserved;
3. Urges the Government of the United Kingdom of Great Britain and Northern Ireland, acting in close consultation with the Government of Belize, and the Government of Guatemala to pursue vigorously their negotiations with a view to settling their differences over Belize, without prejudice to the right of the people of Belize to self-determination, independence and territorial integrity, and further the peace and stability of the region, and in this connexion to consult as appropriate with other especially interested States in the area;
4. Requests the Governments concerned to report to the General Assembly at its thirty-fourth session on the outcome of the negotiations referred to above;
5. Calls upon the parties involved to refrain from any threats or use of force against the people of Belize or their territory;
6. Recognizes that it is the responsibility of the United Kingdom, as the administering Power, to take all necessary steps to enable the people of Belize to exercise freely and without fear their right to self-determination and to a firm and early independence;
7. Urges all States to respect the right of the people of Belize to self-determination, independence and territorial integrity, and to render all practical assistance necessary for the secure and early exercise of that right;

8. Requests the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples to remain seized of the question and to assist the people of Belize in the exercise of their inalienable rights.<sup>32</sup>
22. At that Thirty-Third Session, the representative of the United Kingdom described rather more fully "a new approach...aimed at eliminating the original cause of the dispute" in these terms:

Now, however, his Government believed that it should make known publicly what those proposals were. His country had been engaged in negotiations with the Government of Guatemala for three years in an attempt to find a settlement. The Guatemalans had wanted territory to be included in a settlement and, while the United Kingdom had been prepared, without commitment, to examine that possibility, it had proved to be unacceptable, not only to the representatives of the people of Belize, but also to other States in the region, including some Latin American members of the Organization of American States, which had been concerned at the implications of any change in Latin American boundaries. Thus, after consultation with the Belizean parties and in conformity with the Memorandum of Understanding which they had signed on 5 June 1978, the Secretary of State for Foreign and Commonwealth Affairs had suggested to the Guatemalan Minister for Foreign Affairs at their meeting in New York in September 1978 that a new approach should be adopted aimed at eliminating the original cause of the dispute...

Guatemala's claim to the Territory of Belize had first been formulated in 1939 on the grounds that article VII of the 1859 Treaty, by which Guatemala had recognized the then-existing boundaries of Belize, had not been fulfilled. The fact that the road from Guatemala City to the Caribbean coast referred to in that article had never been built jointly had led to Guatemala's current claim. A road to the Caribbean coast had subsequently been built by the Guatemalans alone. Successive Guatemalan Governments had stressed the need for better access to the Guatemalan province of Peten, which was adjacent to Belize, and the United Kingdom had therefore proposed in September 1978 that it would help with a major road project which would aid in developing the Peten. That project would be the modern equivalent of the provisions of article VII of the 1859 Treaty. The United Kingdom had also proposed that Guatemala should enjoy free port facilities in Belize City and should have access by road to the port. The free port facilities would enable Guatemala to import and export goods from the Peten by the most direct route and free of customs formalities. The Guatemalan Government had also stressed the need for secure, permanent and guaranteed access to the sea from its Caribbean ports and, while it currently enjoyed such access, it believed that it might be deprived of it after Belize became independent. The United Kingdom had therefore proposed that a seaward boundary should be agreed by treaty as part of the settlement, guaranteeing Guatemala permanent secure access from its ports to the high seas through its own territorial sea. Such an agreement would eliminate all doubts and problems for the future. The United Kingdom had further suggested that a separate treaty of amity and mutual security should be concluded between Belize and Guatemala, with provisions covering non-aggression and subversion, to ensure the security of the area. The provisions would include limitations on the stationing of foreign, but not British, armed forces.

<sup>32</sup> 81st Plenary meeting, 13 December 1978.

... His delegation believed that those proposals were constructive and fair to both sides. Guatemala's complaint that the road envisaged under the 1859 Treaty had never been built would be satisfied. In addition, it would gain greatly improved communications to aid in the development of the Peten, and permanent access to its Caribbean ports through its own territorial sea would be guaranteed by the treaty. Belize would gain security once the problem had been settled and the Guatemalan claim had been withdrawn, and would have an agreed seaward boundary which would eliminate future disputes. The settlement of the problem would enable Belize to move towards secure independence and to concentrate on the development of the country, which had been inhibited by the uncertainty caused by the dispute".<sup>33</sup>

23. In 1979, at its Thirty-Fourth Session, the General Assembly restated its by now standard approach as follows in Resolution 34/38:

The General Assembly,

...

Taking note of the part of the Political Declaration adopted by the Sixth Conference of Heads of State or Government of Non-Aligned Countries, held at Havana from 3 to 9 September 1979, relating to Belize, in particular the statement that the Conference reiterated its unconditional support for the Belizean people's inalienable right to self-determination, independence and territorial integrity and condemned all pressure or threats to prevent full exercise of that right,

Reaffirming the principles established in the Declaration on the Granting of Independence to Colonial Countries and peoples, set out in its resolution 1514 (XV) of 14 December 1960, in particular that all peoples have the right to self-determination, by virtue of which right they freely determine their political status and freely pursue their economic, social and cultural development,

Recognizing the special responsibility of the United Kingdom of Great Britain and Northern Ireland, as the administering Power, to take urgent and necessary steps to enable the people of Belize to exercise freely and without fear their right to self-determination and to the firm and early independence of all of their territory,

Noting with regret the continuing failure of the parties concerned to settle their differences in a manner which will not prejudice the right of the people of Belize to self-determination, independence and territorial integrity in accordance with the relevant resolutions of the General Assembly,

1. Reaffirms the inalienable right of the people of Belize to self-determination, independence and the preservation of the inviolability and territorial integrity of Belize;
2. Urges the Government of the United Kingdom of Great Britain and Northern Ireland, acting in close consultation with the Government of Belize, and the Government of Guatemala to continue their efforts to conclude their negotiations without prejudice to the right of the people of Belize to self-determination, independence and territorial integrity and in furtherance of the peace and stability of the region and, in this connexion, to consult as appropriate with other specially interested States in the region;

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<sup>33</sup> A/C.4/33/SR.27, paras.16-18.

3. Requests the Governments concerned to report to the General Assembly at its thirty-fifth session on any arrangements which have been made to enable the people of Belize to exercise freely and without fear their right to self-determination and an early and secure independence;
  4. Calls upon the parties concerned to refrain from exerting any pressure or the use of threats or force against the Government and people of Belize to prevent the full exercise of their inalienable right to self-determination, independence and territorial integrity;
  5. Urges all States to respect the right of the people of Belize to self-determination, independence and territorial integrity and to render all practical assistance necessary for the secure and early exercise of that right;
  6. Requests the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples to remain seized of the question and to assist the people of Belize in the early exercise of their inalienable rights.<sup>34</sup>
24. In 1980, at its Thirty-Fifth Session, the General Assembly added new elements in Resolution 35/20. In affirming the territorial integrity of Belize and the right of the people of Belize "to the secure and full independence of all their territory", it declared that Belize should become an independent State before the conclusion of the Thirty-Sixth Session, and called upon the United Kingdom to convene a constitutional conference to prepare for the independence of Belize and to continue to ensure "the security and territorial integrity of Belize". Its resolution principally provided:

The General Assembly,

...

Welcoming the fact that, in accordance with General Assembly resolution 34/38, negotiations have recently taken place between the Government of Guatemala and the Government of the United Kingdom in close consultation with the Government of Belize and that the respective positions of both sides were clarified with a view to continuing the process of negotiations,

Noting with regret, however, that despite their efforts and good faith it has not yet proved possible for the parties concerned to agree upon a settlement of their differences,

Convinced that the differences that exist between the United Kingdom and Guatemala do not in any way derogate from the inalienable right of the people of Belize to self-determination, independence and territorial integrity and that the continuing inability of the parties to resolve such differences should no longer delay the early and secure exercise of that right,

Recognizing the special responsibility of the United Kingdom, as the administering Power, to take immediate steps to enable the people of Belize to exercise freely and without fear their right to the secure and full independence of all their territory,

1. Reaffirms the inalienable right of the people of Belize to self-determination,

<sup>34</sup> 75th Plenary meeting, 21 November 1979.

- independence and territorial integrity, and urges all States to render all practical assistance necessary for the secure and early exercise of that right;
2. Declares that Belize should become an independent State before the conclusion of the thirty-sixth session of the General Assembly;
  3. Calls upon the United Kingdom of Great Britain and Northern Ireland to convene a constitutional conference to prepare for the independence of Belize;
  4. Calls upon the parties concerned to respect the principle that the threat or use of force should not be applied to prevent the people of Belize from exercising their inalienable right to self-determination, independence and territorial integrity;
  5. Urges the Government of the United Kingdom, acting in close consultation with the Government of Belize, and the Government of Guatemala to continue their efforts to reach agreement without prejudice to the exercise by the people of Belize of their inalienable rights and in furtherance of the peace and stability of the region and, in this connexion, to consult as appropriate with other specially interested States in the region;
  6. Calls upon the Government of the United Kingdom, as the responsible administering Power, to continue to ensure the security and territorial integrity of Belize;
  7. Requests the relevant organs of the United Nations to take such actions as may be appropriate and as may be requested by the administering Power and the Government of Belize in order to facilitate the attainment of independence by Belize and to guarantee its security and territorial integrity thereafter;
  8. Welcomes the declared intention of the Government of Belize to apply for membership in the United Nations upon attainment of independence, in accordance with Article 4 of the Charter of the United Nations;
  9. Calls upon Guatemala and independent Belize to work out arrangements for post-independence co-operation on matters of mutual concern;
  10. Requests the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples to remain seized of the question and to assist the people of Belize in the early exercise of their inalienable rights.<sup>35</sup>

25. Guatemala's reaction was sharply negative. It was cast in these terms:

"When a sovereign nation, such as Guatemala, invoked rules of law in support of its attempt to resolve a territorial dispute, that did not involve, however remotely, any threat or illicit act. The United Kingdom's failure to implement the terms of the 1859 Convention, in particular article VII, had voided the entire Convention, which had thus lost all validity. Since there was no means of validating it, the situation was merely the *de facto* one which had existed before the signing of the

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<sup>35</sup> 57th Plenary meeting, 11 November 1980.

instrument. Guatemala sought a solution to the dispute with the United Kingdom by the peaceful means set forth in Article 33 of the United Nations Charter. Guatemala was willing to consider any proposal which did not distort the nature of the dispute. It was therefore astonished that attempts were now being made to hasten independence for the territory of Belize without having resolved the dispute with Guatemala. It would be irresponsible to attempt to establish a new State with uncertain frontiers and territory subject to negotiation and, therefore, to continual revision by various means.

"37. On more than one occasion, his delegation had rejected the Fourth Committee's intervention in making recommendations on the controversy; the dispute was of a legal and territorial nature and, as it was subject to settlement by direct negotiations, any intervention by outside parties and any attempt to impose parameters on the negotiations were unacceptable".<sup>36</sup>

26. By this stage of repeated United Nations consideration of the question of Belize, Guatemala's position was wholly isolated. The representative of the United Kingdom, in associating himself with the resolution, stated that his Government would do its utmost to ensure that the people of Belize "achieved independent statehood with their existing territory intact...".<sup>37</sup> The representative of Guyana maintained that it was clear from the statement of the Belize Leader of the Opposition "that the entire people of the Territory were united in denying Guatemala's territorial aspirations. In that regard, they had the overwhelming backing of the international community, as expressed in General Assembly resolution 33/36".<sup>38</sup> The representative of Jamaica likewise supported Belizeans' "right to self-determination and early independence within their existing territory...".<sup>39</sup> The representative of Mexico declared that Mexico had for years advocated the right of the people of Belize to self-determination. "That people had distinct social and cultural characteristics, and an undeniable right to self-determination, independence and territorial integrity".<sup>40</sup>
27. The Deputy Prime Minister of Belize, Mr. Rogers, recalled that the House of Representatives had joined the Government in "opposing all proposals for the settlement of the Anglo-Guatemalan dispute which might involve the cession of Belizian territory or the erosion of Belizian sovereignty".<sup>41</sup> The Government of Belize had participated in the Anglo-Guatemalan negotiations for the previous 19 years in an effort to promote a settlement of differences without prejudice to the sovereignty and territorial integrity of Belize. During those negotiations, "Guatemala had tried to hold to ransom Belize's inalienable right to independence. Guatemala had indicated that it would allow Belize to become independent, provided that it gave up territory or gave Guatemala control of the economy and foreign affairs of Belize...Belize was prepared to continue participating in negotiations but was not prepared to allow Guatemala to exercise a veto over Belizian independence".<sup>42</sup> The General Assembly's Resolution declared that the people of Belize should be enabled "to exercise freely and without fear their right to the secure and full independence of all their territory" before the conclusion of

<sup>36</sup> A/C.4/35/SR.17, para.37.

<sup>37</sup> A/C.4/35/SR.19, para.19.

<sup>38</sup> *Ibid.*, para.21.

<sup>39</sup> *Ibid.*, para.26.

<sup>40</sup> A/C.4/35/SR.15, para.44.

<sup>41</sup> A/C.4/35/SR.19, para.93.

<sup>42</sup> *Ibid.*, paras.93-95.



the next session of the General Assembly. The moment was ripe for independence, and for the exercise of Belize's right to "self-determination...and territorial integrity".<sup>43</sup> Only the representative of Guatemala spoke in reply.

28. Resolution 35/20 was adopted in plenary session by a vote of 139 to none, with 7 abstentions. Guatemala did not take part in the voting.<sup>44</sup> In the Fourth Committee, Guatemala was the sole State to vote against the Resolution.<sup>45</sup>

The Admission of Belize to the United Nations.

29. On the day of its independence, 21 September 1981, Mr. George Price, Prime Minister of Belize, applied on behalf of Belize for membership in the United Nations. The Security Council two days later recommended to the General Assembly that Belize be admitted to membership. On 25 September 1981, the General Assembly decided "to admit Belize to membership in the United Nations".<sup>46</sup> Before the vote admitting Belize to membership, the representative of Guatemala took the floor to record that Guatemala had expressed to the Security Council its opposition to the admission of Belize, and had called on the Security Council rather to deal with Guatemala's dispute with the United Kingdom. He then restated the claims of Guatemala in respect of Belize. He declared that the General Assembly "can vote as it sees fit...but that will not change the facts, for the dispute exists, and the new nation, Belize, is located within Guatemalan territory." One of the elementary attributes of a State is a territory; "In the case of Belize, it does not have its own territory. It exercises jurisdiction over an area, but this is solely the result of force...The territory of Belize is part of the territory of Guatemala. This is set forth in the Constitution of Guatemala...For these reasons we believe and proclaim that Belize is not qualified to become a Member of the United Nations, for it does not fulfil the requirements of Article 4 since it is not a State because it does not have its own territory".<sup>47</sup>
30. For its part, the United Kingdom observed that, from midnight, 20 September 1981, it had recognized Belize as a fully independent sovereign State. "We recognized all the Territory of Belize which the United Kingdom administered before that date as now coming under the sovereignty of the new State...Independence has now come."<sup>48</sup>
31. In the vote to admit Belize, only Guatemala voted against its admission. The vote was 144 to 1 with no abstentions.<sup>49</sup>

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<sup>43</sup> *Ibid.*, para.99.

<sup>44</sup> United Nations General Assembly, Thirty-Fifth Session, Official Records, 57th Plenary meeting, 11 November 1980, p.997.

<sup>45</sup> Thirty-Fifth Session, Agenda Item 18, Annexes, pp.5-6.

<sup>46</sup> Resolution 36/3.

<sup>47</sup> United Nations, General Assembly, Thirty-Sixth Session, Official Records, 13th Plenary meeting, 25 September 1981, paras.20, 24.

<sup>48</sup> *Ibid.*, para.45.

<sup>49</sup> *Ibid.*, para.48.

## CONCLUSIONS

32. The following conclusions may be drawn from the resolutions of the United Nations on the question of Belize, its admission as a Member of the United Nations, and the position that Guatemala has expressed thereon.
33. First, it is plain that the multiple resolutions of the General Assembly on the question of Belize assume and affirm its territorial integrity, intact and inviolable. That is to say, it is the position of the international community (apart from Guatemala) that the territory of Belize encompasses "all" of the territory that was administered by the United Kingdom in Belize before Belize attained independence.<sup>50</sup> The resolutions of the United Nations and the proceedings that led to their adoption admit of no other conclusion. By adopting those resolutions, the General Assembly did not in law determine the borders of Belize for it is not empowered to determine the borders of States; those borders in any event had been earlier determined, as described in this Opinion. Nonetheless, the fact that the States Members of the United Nations (with, in the end, only the exception of Guatemala) voted for the resolutions described above, having heard the positions of the two sides presented in some detail, can hardly be seen as other than recognition that the territorial integrity of Belize embraces its pre-independence borders, "intact" and "inviolable".
34. Second, the resolution admitting Belize to membership in the United Nations, on its face, no more defines its territory than has any other resolution of the United Nations admitting any other Member. Admission of a State does not certify the borders of the admitted State, whether they are uncontested (as is generally so), or contested (as in the cases of Jordan, Israel and Somalia, among others). Of course, the premise of the resolution admitting Belize is that - contrary to the position of Guatemala - Belize is a State, admitted because it is peace-loving and accepts the obligations of the Charter and, in the judgment of the Organization, is "able and willing to carry out these obligations".<sup>51</sup> But, in this case, there is an exceptional, added element of definition - or recognition - of the borders of the State so admitted. The multiple resolutions of the United Nations quoted above, in referring to "all the territory" and to the "territorial integrity" of Belize within borders "inviolable" and "intact", do appear to define or recognize those borders. The resolutions indicate that the General Assembly, in implementing its authority enunciated in Resolution 1514 (XV), has promoted the self-determination and independence of a colonial territory within the whole of the colonial borders of that territory.
35. Third, the argument of *uti possidetis juris* advanced by Guatemala in support of the borders allegedly obtaining when it attained independence in 1821 may equally be mustered in favor of Belize when it attained independence in 1981. As Guatemala emerged from a colonial status in 1821, so did Belize emerge in 1981; and if the concept of *uti possidetis* has acquired universal, contemporary force with the Cairo Declaration of 1964 and the judgment of a Chamber of the International Court of Justice in the *Burkina Faso/Mali* case, then Belize may invoke that doctrine in support of the "intact" and "inviolable" colonial borders that existed when it became independent.

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<sup>50</sup> As Resolutions 34/38 and 35/20 expressly specify.

<sup>51</sup> Article 4 of the Charter.

36. Fourth, the argument of Guatemala that the United Kingdom acted unlawfully in unilaterally granting Belize independence despite the pendency of Guatemala's claims is untenable. What rule of international law did the United Kingdom violate in so acting? It had hardly failed to engage in negotiations pursuant to Article 33 of the United Nations Charter. Far from acting precipitately or unilaterally, repeated resolutions of the United Nations General Assembly, adopted over a period of years, called on the United Kingdom to promote the independence of Belize while Resolution 35/20 recognized "the special responsibility of the United Kingdom, as the administering Power, to take immediate steps to enable the people of Belize to exercise freely and without fear their right to the secure and full independence of all their territory" and called upon the United Kingdom to convene a constitutional conference to that end. In responding to those resolutions, the United Kingdom acted in deliberate conformity with the will of the international community.
37. Fifth, while Guatemala is correct when it argues that the United Nations General Assembly is not an arbitral or adjudicatory body authorized to settle a border dispute, it indisputably is endowed by treaty with the authority to admit an entity - which must be a State - as a Member. The State so admitted thereafter enjoys the prerogatives of membership and the protection of the provisions of the Charter.

## APPENDIX II

### THE DOCTRINE OF *UTI POSSIDETIS*

1. This Appendix examines the application of the *uti possidetis* doctrine as invoked by Guatemala in support of its claim that it succeeded to Spanish title over Belize. It should be read in conjunction with Part Two, Section I, B, of the main Opinion and will not repeat all the points made there. While the question of *uti possidetis* has become entirely irrelevant by reason of the fact that the title of Belize to its territory has been recognized by Guatemala in two treaties we nonetheless address it because of the prominence given to it in Guatemala's arguments.
2. The present discussion will show in particular that this doctrine cannot prevail over a title that derives from long adverse possession and is recognised by treaty. It will also show that the concept of *uti possidetis* as invoked by Guatemala today could not operate in relation to States whose territorial titles do not derive from the Spanish Crown, certainly not at the time of Central American independence in 1821. In any event, whatever may have been the extent to which in theory Guatemala may have inherited Spanish title in Central America, Guatemala did nothing in the area of Belize to maintain such a title in the face of growing British possession *à titre de souverain* in that area.<sup>1</sup>

#### 1. Spain's title to the territory of Belize.

3. In the long diplomatic history of colonial confrontations between Spain and Britain, as between Spain and other powers, the former had often relied on the general title of sovereignty assigned to it by Pope Alexander VI in 1493.<sup>2</sup> Whatever the merits of such a general title, it had to be translated into effective acts of occupation and jurisdiction since otherwise rival powers would inevitably have taken the lead in establishing their own territorial claims, as in fact happened in the Americas and elsewhere. From the very outset the question of nominal legal titles versus effective occupation has characterized territorial disputes throughout the world, not least in this particular area.
4. The peninsula of Yucatán, today a part of Mexico, was because of its position in the Caribbean basin much visited by pirates and buccaneers from the early days of colonization. Activities by pirates were reported as early as 1570.<sup>3</sup> The long extension of its coasts, scarce population and limited or non-existent defenses, have been identified as the main reasons explaining the growing presence, first of unwanted visitors and, later, of logwood cutters and settlers.<sup>4</sup> As early as 1638 British settlers appear to have developed logwood activities in present day Belize;<sup>5</sup>

<sup>1</sup> For the early history of settlement in this area, reference has been made principally to specialist secondary authorities including: Humphreys, *The Diplomatic History of British Honduras, 1638-1901* (1961), (hereinafter cited as "Humphreys"); José Antonio Calderón Quijano, *Belize 1633 (?)-1821*, (1944), (hereinafter cited as Calderón); Isidro Fabela, *Belice*, (1994 ed.), (hereinafter cited as "Fabela") and S. Duran-Bachler, *The Latin-American Doctrine of Uti Possidetis*, The Graduate Institute of International Studies, Geneva (1972) (Diploma thesis).

<sup>2</sup> Calderón, p.52.

<sup>3</sup> Calderón, p.41.

<sup>4</sup> Calderón, p.40.

<sup>5</sup> Humphreys, p.1. See also Gordon Ireland, *Boundaries, Possessions, and Conflicts in Central and North America and the Caribbean*, (1941), 120-128; and Stephen L. Craig, *British Honduras, Past and Present*, (1952), Chapter XIV.

and it is certain that between 1662 and 1670 this activity became regular.<sup>6</sup>

5. Spanish colonial authorities were well aware of the threat that these settlements and activities posed to the preservation of their sovereignty over the area. The occupation in 1663 of Isla de Términos in the Yucatán peninsula, and of a point on the eastern coast close to Honduras, later to be known as Belize, were clearly identified as significant dangers in this respect.<sup>7</sup>
6. Expeditions were accordingly organized by Spanish authorities from time to time to re-establish their authority over the areas occupied by settlers or unwanted visitors. Early efforts were reported in 1620, followed by a never-implemented Royal Decree of 1629 creating a naval Coast Guard.<sup>8</sup> Further expeditions took place in 1699, 1703, 1716, 1722, 1724, 1726, 1733, 1748, 1751, 1754, 1779 and 1798. All these expeditions were organized by the governors of Yucatán. Only in two instances was there Honduran involvement<sup>9</sup> and only in one was there marginal Guatemalan participation.<sup>10</sup> These activities have an important bearing on the question of *uti possidetis*, as it appears that Mexico rather than Guatemala had a closer connection with the Spanish title to the area, as will be developed more fully below.
7. The very fact that these expeditions had to be organized every few years clearly shows that Spain did not have full control over all the territories in the area under its nominal authority. Moreover, while Spain succeeded in establishing its authority over the Yucatán peninsula it was less successful in respect of the area of Belize. There, in spite of occasional setbacks, foreign settlers continued to develop their activities.
8. In fact, a process of continuing intensification of jurisdictional activity took place, first by the settlers themselves and later by Britain itself, including acts of a sovereign nature, accompanied by a gradual expansion of the area of settlement. It is not necessary to recount in detail this development of British activity in the area before 1798. All of this had the effect ultimately of limiting the area of the Spanish title. Suffice it to say, that in all this period there is scarcely any evidence of the involvement of the Captaincy-General of Guatemala in matters relating to what is now Belize.

## 2. Indications that the authority of Yucatán extended into Belize to the exclusion of the authority of Guatemala

9. It is instructive to review in summary form a number of indications of the extension over Belize of the authority of the Captaincy-General of Yucatán to the clear exclusion of the authority of the Captaincy-General of Guatemala.<sup>11</sup>

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<sup>6</sup> Calderón, p.49.

<sup>7</sup> Calderón, p.48.

<sup>8</sup> Calderón, p.41.

<sup>9</sup> Expeditions by Alonso Fernández de Heredia, 1748, Calderón, p.138.

<sup>10</sup> Calderón, p.145.

<sup>11</sup> For cartographic evidence of the extent of Yucatán, see *Cartografía de la América Central*, published by Guatemala in connection with the arbitration with Honduras in 1929, with particular reference to items No. 32, 35 and 42, showing Yucatán extending south along the Gulf of Honduras. See also generally Archivo General de Indias: *Catologo de Mapas y Planos. Guatemala*, 1985.

- 1703-1706** During this period, reconnaissance of the coast of Belize was ordered by Don Alvaro de Rivaguda, Governor and Captain-General of Yucatán.<sup>12</sup>
- 1723** A Spanish Royal Decree (Real Cédula) of 21 June 1723 instructed Don Antonio de Coretayre y Terreros, the Governor and Captain-General of Yucatán, to expel the British from Belize.<sup>13</sup>
- 1724** In July 1724 the expedition just referred to was mounted by the Captain-General of Yucatán. In December of the same year, the Viceroy of New Spain was ordered by a Royal Decree to provide the necessary assistance to the Captain-General of Yucatán.<sup>14</sup>
- 1726** In response to a Royal Decree of 22 December 1725 the Marqués de Casafuerte reported yet another expedition by the Captain-General of Yucatán in an attempt to expel the British settlers from Belize.<sup>15</sup>
- 1733** Another expedition against Belize was organised by the Captain-General of Yucatán.<sup>16</sup>
- 1734** A 1734 map, *Plano de la Provincia de Yucathan*, copied in 1764, shows Yucatán as extending southwards into what is now the northern part of Belize.<sup>17</sup>
- 1737** Another expedition against Belize was organised by the Captain-General of Yucatán.<sup>18</sup>
- 1752** In 1752 the Captain-General of Guatemala for the first time purported to intervene in the area. An expedition was mounted by the President of the Audiencia of Guatemala, José Vásquez de Prego, but when news of it got to Madrid he was severely admonished by the Minister for the Indies, Marqués en Ensenada. The President was reminded that his duties concerned the settlements of Rio Tinto and Laguna Azul, under the jurisdiction of Guatemala, and not those of the eastern coast of Yucatán that depended upon the Governor of Campeche.<sup>19</sup> Guatemala did, however, provide troops for the support of another major expedition organized in compliance with a Royal Decree of 26 June 1752, but these operated only in western areas (Laguna Coba, Hacienda San Miguel) in the Guatemalan heartland, aiming at conducting hostilities against Belize from the rear.<sup>20</sup>
- 1755** On 25 February 1755 the Governor of Guatemala responded to a petition by the British Governor Knowles stating that he had "no jurisdiction in the matter of the demolition of the fort at Belize and the return of the logwood cutters".<sup>21</sup>

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<sup>12</sup> Fabela, p.69.

<sup>13</sup> *Id.*

<sup>14</sup> *Ibid*, p.73.

<sup>15</sup> *Ibid*, p.77.

<sup>16</sup> *Ibid*, p.79.

<sup>17</sup> See Breton and Antochiw, *Cartographic Catalogue of Belize* (1992), (hereinafter "Cartographic Catalogue"), p.54 and Figure XX, no.31.

<sup>18</sup> Fabela, p.79.

<sup>19</sup> Marqués de Ensenada a José Vásquez de Prego, Presidente de la Audiencia de Guatemala, 24 September 1752, as discussed in Calderón, p.144.

<sup>20</sup> Calderón, p.144-145.

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

- 1763** An important milestone in the history of the area was reached in the Treaty of 1763. Spanish sovereignty over the territory was recognized by Britain and permission was obtained by Britain to undertake some limited economic activity. Under this agreement, Britain also undertook to destroy fortifications erected by the settlers and Spain undertook not to permit those settlers to "be disturbed or molested under any pretence whatsoever".<sup>22</sup> When the question of the precise boundaries of the British settlement arose it was the Governor of Yucatán who in December 1763 ordered the settlers to cease their operations in the River Hondo and restrict themselves to the River Belize; protests followed and soon thereafter, on orders from Madrid, they were reinstated in their original positions.<sup>23</sup>
- 1764** A map dating from 1764 appears likely to have been drawn at the direction of the Governor of Yucatán.<sup>24</sup> Although it bears the words "Ultimo de la Provincia de Yucatan" north of the Rio Hondo, the "Provincia del Peten Itza" is marked well to the west and the "provincia de Goathemala" is marked even south of the Gulf of Dulce.
- 1771** In August 1771 John Botham, the Captain of a British vessel, addressed to Antonio Oliver, the Governor of Yucatán, a request that the felling limits be extended from Cabo Catoche (at the northern end of the Yucatán peninsula) to Cape of Honduras, far south of the present southern boundary of Belize, thus indicating the region over which it was then believed that the authority of Yucatán extended.<sup>25</sup>
- 1783-84** A highly relevant episode occurred during the implementation of the Treaty of 1783. While Spain made preparations for the delivery of the area to British Commissioners with the intervention of the Governor of Yucatán, Lord North informed the President of the Audiencia of Guatemala, José de Estacheria, through the Governor of Jamaica, that British Commissioners would come to the Belize River for the marking and transfer of the territory. The President of the Audiencia of Guatemala then wrote to the Spanish Minister for the Indies indicating that "this marking should be made by the Government of Yucatán since all the territory involved in this demarcation is part of it".<sup>26</sup> The boundary was then marked and the area formally delivered to British Commissioners by the Governor of Yucatán on 27 May 1784.<sup>27</sup>
- 1787** By the treaty of 14 July 1786,<sup>28</sup> in return for the evacuation of the Mosquito Shore and adjacent islands, Spain extended the concessions in the area of Belize southwards to the Sibun River and permitted the occupation of the Island of St. George's Key.<sup>29</sup> The wood cutting areas were enlarged but other plantations were prohibited. Spanish sovereignty was again preserved, no fortifications were to be built, there was to be no system of government for

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<sup>22</sup> *Definitive Treaty of Peace between France, Great Britain and Spain*, Paris, 10 February 1763, Article XVII.

<sup>23</sup> Humphreys, p.4-5.

<sup>24</sup> *Cartographic Catalogue*, p.56 and Fig. XXI, no.32.

<sup>25</sup> See *Cartographic Catalogue*, p.55.

<sup>26</sup> Calderón, p.266, note 53, with citation to the Note from José Estacheria to José de Galvez, Guatemala, 12 January 1784.

<sup>27</sup> Humphreys, p.5.

<sup>28</sup> Convention of London, 14 July 1786, and discussion by Calderón, at 271.

<sup>29</sup> Humphreys, p.6.

the settlers and Spanish and British Commissioners were to inspect the area twice a year.<sup>30</sup> Marks were to be built and the lands were assigned to the settlers by the Governor of Yucatán in 1787.<sup>31</sup>

- 1789 When, pursuant to the 1786 Treaty, the committee of inspection toured the areas of the British settlements, it was the Governor of Yucatán, Lucas de Galvez, who entrusted the task to Lt. Gual, an officer stationed in Campeche in the Yucatán.<sup>32</sup>
- 1792 Similarly, it was the provisional governor of Yucatán who organised the next visit of inspection, entrusting it once more to the same Lt. Gual who had carried out the first inspection.<sup>33</sup>
- 1798 When war started again between Britain and Spain in 1796, Yucatán (not Guatemala) again sought to assert its authority. In 1798 Field-Marshal Arthur O'Neill, Governor of Yucatán, launched the last major attack on the settlements but was defeated in the battle of St. George's Key on 16 September 1798.<sup>34</sup>
- 1803 By the Treaty of Amiens of 1802 peace was re-established between Britain and Spain. Britain agreed to restore to Spain all possessions occupied or conquered during the war with the exception of the Island of Trinidad.<sup>35</sup> The Governor of Yucatán even went so far in 1803 as to contend that Britain was bound to surrender completely its settlement in Belize.<sup>36</sup> In the course of that year, however, he accepted that no change had taken place in the legal status of Belize.<sup>37</sup>
10. In short, by reference to this summary review, it is evident that the province of Spain that appeared to have authority over the area of Belize was the Captaincy-General of Yucatán, not that of Guatemala. And this position was recognised not only by the authorities in Spain but also by those in Guatemala. Hence there is no basis for Guatemala's contention that it succeeded to the title of Spain in Belize by virtue of *uti possidetis juris*; there is no evidence that the territory of Belize fell within the administrative authority of the Captaincy-General of Guatemala.

### 3. *Uti possidetis* in Latin American practice

11. Guatemala's invocation of the concept of *uti possidetis juris* starts from the assumption that any territory that had once been under Spanish rule passed to Guatemala without qualification.<sup>38</sup>
12. This understanding of *uti possidetis*, is, however, far from that which is found in the practice of Latin American States, including Guatemala, and in the relevant judicial

<sup>30</sup> Humphreys, p.6.

<sup>31</sup> Fabela, pp.132-6.

<sup>32</sup> *Cartographic Catalogue*, p.59.

<sup>33</sup> *Id.*

<sup>34</sup> Humphreys, p.8.

<sup>35</sup> Humphreys, p.10-11.

<sup>36</sup> Humphreys, p.11.

<sup>37</sup> Humphreys, p.12.

<sup>38</sup> See, for example, the letter by the Minister of Foreign Affairs of Guatemala to the Minister of Foreign Affairs of Belize, dated July 14, 2000, Section 5; and see generally the *GWB* and *Mendoza*.



and arbitral decisions.

13. In its origins in Latin America *uti possidetis* was meant to accomplish two main purposes. The first was to provide a legal standard for the settlement of border disputes between the seceding States. It was assumed that each would have retained the boundaries pertaining to the relevant Spanish provincial or territorial administrations. The second purpose was to provide a legal defense in respect of post-colonial occupation or other adverse actions that third States might take in the continent.<sup>39</sup> This original meaning was expressed by the Swiss Federal Council in its well known Award of 1922 in the arbitration between Colombia and Venezuela:

"When the Spanish colonies of Central and South America proclaimed their independence in the second decade of the nineteenth century, they adopted a principle of constitutional and international law to which they gave the name of *uti possidetis juris* of 1810 for the purpose of laying down the rule that the boundaries of the newly established republics should be the frontiers of the Spanish provinces to which they were succeeding. This general principle offered the advantage of establishing an absolute rule that in law no territory of the former Spanish America was without an owner. Although there were many regions that had not been occupied by the Spanish and many regions that were unexplored... these regions were regarded as belonging in law to the respective republics that had succeeded the Spanish provinces to which these lands were connected by virtue of old royal decrees of the Spanish mother country. These territories, although not occupied in fact, were by common agreement considered as being occupied in law by the new republics from the very beginning. Encroachments and ill-timed efforts at colonization beyond the frontiers, as well as *de facto* occupation, became ineffective and of no legal consequence".<sup>40</sup>

14. This meaning of *uti possidetis* is indeed quite different from that which has been now invoked by Guatemala. First, *uti possidetis* was intended to provide a standard for the determination of boundaries between the newly formed States, that is, for the drawing of the line separating their respective sovereignties, and not for the attribution of territory in the sense of determining sovereignty over large areas of disputed land. Exceptionally it has been used also for the latter aspect, mainly in connection with islands where no internal boundary has to be drawn<sup>41</sup>, but this is a development unrelated to its main function and practice.<sup>42</sup> In cases of continental territorial disputes the role of attribution has been marginal and in many such instances the determination is more related to the role of *effectivités* than to the extent of a legal title.<sup>43</sup> In most cases where *uti possidetis* has been used its role has been to determine the precise drawing of a boundary line.
15. Second, the main function of *uti possidetis* is to establish a presumption that applies to the title of the newly independent State. But in itself the title of the successor cannot be any better than the title of the predecessor. In the present case,

<sup>39</sup> Marcelo G. Kohén: *Possession contestée et souveraineté territoriale*, 1997, 437-441. Hereinafter cited as "Kohén".

<sup>40</sup> *Arbitrage entre la Colombie et le Venezuela*, Sentence Arbitrale du 24 Mars 1922, 1 UNRIAA, p. 228., as translated into English in the Opinion of Judge Urrutia Holguín in the *Case Concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, ICJ Reports 1960, p.226.

<sup>41</sup> For a discussion of the cases of Aves Island, Trinity Island and Isla de Pinos, see Kohén, pp.443-444.

<sup>42</sup> For a discussion of these functions, see Kohén, pp.441-446.

<sup>43</sup> For a discussion on these aspects see Kohén, pp.444-446, and Luis Ignacio Sánchez Rodríguez: "*L'Uti Possidetis et les effectivités dans les contentieux territoriaux et frontaliers*", RCADI, Vol. 263, 1997, 149, pp.163-166.

Guatemala's title depended upon that of Spain, and the latter had already been attenuated in respect of Belize before Guatemala's independence. It follows that lack of effective occupation and loss of Spanish title over the territory cannot be undone by a mere presumption. On the contrary, it has been accepted that any presumption as a means of strengthening the title may be rebutted by historical evidence about actual occupation and the exercise of jurisdiction.

16. Third, the Latin American States never agreed to reject effective occupation as a basis of title. In fact, reliance on occupation has been part of the continuing practice of the region. This is what gave rise to *uti possidetis de facto* or simply *uti possidetis*, as opposed to *uti possidetis juris*. Guatemala herself has also supported and argued the *uti possidetis de facto*, which in fact is legally indistinguishable from effective occupation.<sup>44</sup> Guatemala cannot now convincingly change its interpretation of the principle.
17. Fourth, the operation of the presumption against the effects of foreign occupation in Latin America relates only to post-colonial occupation as the principle did not exist until the moment of independence. It does not relate to situations that existed before independence as these had already affected the title of Spain and its successors.<sup>45</sup>
18. It should also be borne in mind that, as discussed in the main body of this Opinion, *uti possidetis juris* can only operate, if at all, in relation to territory that was actually under the authority and control of Spain.<sup>46</sup> The doctrine refers to the boundaries of Spanish administrative divisions. As understood at the time of independence and for many years after, the doctrine could not operate against States that did not derive their title by succession from Spain, as was the case with the British title to Belize. British title was independent of the question of Spanish internal administrative boundaries and was based on possession and historical consolidation. The fact that in recent years *uti possidetis* has been more broadly applied so as to ensure generally the stability of frontiers inherited by new States from the previous sovereign of the area, giving rise to what has been called *uti possidetis universalis*, cannot alter the extent of the concept as it operated in 1821, nor can it be applied retroactively. The practice of Latin America in this respect, to be examined next, confirms that the doctrine applied only between the successor States of Spain. It did not even apply to the determination of boundaries with Brazil, the country with the most boundaries in South America, as that country derived its title from the Portuguese sovereign.
19. The diplomatic practice of Latin American countries regarding *uti possidetis* varies considerably. It is clear, however, that there have always been two main interpretations: one which regards *uti possidetis* as incapable of being affected by occupation and other territorial factual situations; the other which allows the facts to prevail over theory.
20. Occasionally, *uti possidetis juris* has prevailed over any consideration relating to *de facto* possession. Thus, an 1894 treaty between Honduras and Nicaragua required the Commission to "consider fully proven ownership of territory and...not

<sup>44</sup> G. De Lapradelle: *La Frontière*, 1928, p.86 et seq., and discussion by Nesi, *Uti Possidetis Juris nel Diritto Internazionale* (1996) p.7.

<sup>45</sup> Nesi, pp.3-4.

<sup>46</sup> See Opinion, paragraphs 195-201.

recognize juridical value to '*de facto*' possession alleged by one party or the other".<sup>47</sup> But this was an express treaty provision and even these peremptory terms did not prevent the Commission from following a well-defined natural boundary line and granting compensation for any departure from proven titles.<sup>48</sup>

21. But in most cases it is *de facto* possession that has had the most prominent role. For example, the treaties concluded by Brazil with the neighbouring States that were successors to Spain (namely, Venezuela, Colombia, Peru, Bolivia, Paraguay, Argentina and Uruguay) refer not to *uti possidetis juris* but to *uti possidetis* alone, thus reflecting the Brazilian interpretation that boundaries should be established on the basis of the effective occupation existing at the time that Brazil became independent or at the time of conclusion of the respective treaty. In fact all such boundaries were drawn by reference to effective occupation and not on the basis of legal acts of the colonial period.<sup>49</sup> Also Paraguay relied on *uti possidetis de facto* in its territorial dispute with Bolivia.<sup>50</sup>
22. **This meaning of *uti possidetis* has also been acknowledged in the writings of publicists. For example, Andrés Bello, a distinguished Latin-American jurist, wrote in 1857 that "[t]he *uti possidetis* of the epoch of the emancipation of the Spanish colonies was the natural possession of Spain, what Spain possessed really and effectively, with some title or without title; not what Spain had the right to possess and did not possess".<sup>51</sup>**

#### 4. Relevant precedents in international arbitration and adjudication.

23. The view previously held by Guatemala on *uti possidetis* has also been confirmed by arbitral decisions and other precedents, some involving Guatemala herself. The arbitral award of 6 June 1904 rendered by the King of Italy in the dispute between Great Britain and Brazil concerning the boundary of British Guyana held that  

"...occupation cannot be held to have been accomplished except by an effective, uninterrupted and permanent possession, in the name of the State; and mere affirmation of the rights of sovereignty, or the manifest intention of a will to make the occupation effective, is not sufficient".
24. Again, the Commission established under the 1894 treaty between Honduras and Nicaragua not having completed its task, a sector of the boundary was submitted to the arbitration of the King of Spain. In his award of December 23, 1906,<sup>52</sup> the arbitrator followed the natural boundary claimed by Honduras and not strictly the line of *uti possidetis juris* argued for by Nicaragua. Because of this, and alleging excess of power, Nicaragua applied to the International Court of Justice for nullification of the award.

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<sup>47</sup> Treaty of October 7, 1894 between Honduras and Nicaragua (Tratado Gómez-Bonilla), Article 2, par. 4, and comments by Nesi, pp.43-44.

<sup>48</sup> *Ibid.*, Article 2, para. 6.

<sup>49</sup> Julio A. Barberis: "La conception brésilienne de l'*uti possidetis*", *Liber Amicorum* Judge Mohammed Bedjaoui, 1999, pp.49-62. See also Nesi, pp.48-51.

<sup>50</sup> Kohen, p.449.

<sup>51</sup> Andrés Bello writing from Lima on 11 September 1857, as quoted by the Brazilian Foreign Minister in his Report to the President on the negotiation of the boundary treaty of 8 September 1909 between Brazil and Peru: *O Tratado de 8 de Setembro de 1909 entre os EE. UU. do Brasil e a República do Peru*, 1909, pp. 9-10.

<sup>52</sup> II UNRIIAA, 115.

25. The Court, however, considered the complaint "without foundation inasmuch as the decision of the arbitrator is based on historical and legal considerations (derecho histórico)...".<sup>53</sup> From the views expressed by two Latin American judges sitting in the case it is apparent, however, that the Court did not accept the argument that *uti possidetis juris* was the legal principle governing the determination of the boundary.<sup>54</sup> This was indeed the first time the International Court of Justice was confronted, albeit rather indirectly, with the principle of *uti possidetis juris*, and the fact that it considered that it could be reconciled with factual realities was already an indication of the meaning that would later be given to this concept.
26. In the boundary dispute between Guatemala and Honduras, the Agreement of Arbitration concluded by the parties gave the Tribunal the power to derogate from *uti possidetis juris*. Guatemala argued in this connection that the decision should be based on "the sheer factual situation" existing in 1821, "in conformity with the fact...the fact being what the Spanish monarch had himself laid down, or permitted, or acquiesced in, or tolerated, as between Province and Province...".<sup>55</sup> In support of this position Guatemala further recalled the view it had maintained in the mediation effort undertaken by the United States in 1918-1919, in the context of which Guatemala had referred to "the improper formula of *uti possidetis*" and that the only relevant aspect should be the "factual situation".<sup>56</sup> The reliance of Guatemala on occupation, permission, acquiescence and tolerance is highly relevant to the instant controversy with Belize.
27. On the basis of the Guatemalan argument, the arbitral tribunal had no difficulty in concluding that the

"expression '*uti possidetis*' undoubtedly refers to possession. It makes possession the test...In determining in what sense the Parties referred to possession, we must have regard to their situation at the moment the colonial regime was terminated...".<sup>57</sup>

The Tribunal then discussed administrative control, including the difficulty of finding trustworthy information on unexplored territories, the fact that there were "great areas in which there had been no effort to assert any semblance of administrative authority" and "the conduct indicating royal acquiescence in colonial assertions of administrative control".<sup>58</sup>

28. The Tribunal also resorted to "equity and justice", particularly in affirming that "...advances in good faith, followed by occupation and development, unquestionably created equities which enterprises subsequently undertaken would be bound to consider".<sup>59</sup> It held expressly that "priority in settlement in good faith would appropriately establish priority of right".<sup>60</sup> All of the above is also relevant

<sup>53</sup> *Honduras v. Nicaragua*, as cited supra note 40, p.215.

<sup>54</sup> Opinions by Judge Moreno Quintana and Judge *ad hoc* Urrutia Holguin, at 217, 226, respectively, and comments by Nesi, pp.70-71.

<sup>55</sup> For the views of Guatemala and Honduras in this context, see 2 *UNRIAA*, pp.1322-1325.

<sup>56</sup> Nesi, pp.72-73.

<sup>57</sup> Award of 23 January 1933, 2 *UNRIAA*, p.1324.

<sup>58</sup> *Ibid.*, and discussion by Nesi, p.73-75. The difficulties associated with the determination of colonial boundaries have been highlighted by important scholarly works. J.R.V.Prescott: *Political Frontiers and Boundaries* (1987), pp.203-204, with reference to the relevant literature.

<sup>59</sup> Award of 23 January 1933, p.1359.

<sup>60</sup> *Ibid.*

as an expression of the legal standard governing the present dispute between Guatemala and Belize.

29. As this decision shows, *uti possidetis* does not have the all-encompassing effect of permitting legal title to prevail over occupation. In fact, title acquired on the basis of occupation can compete with colonial titles; and the presumption accompanying the principle would no longer operate automatically, if it ever did.
30. In the dispute between El Salvador and Honduras decided by a Chamber of the International Court of Justice the parties held different views about the meaning of *uti possidetis*.<sup>61</sup> Honduras sought to rely exclusively on this principle; El Salvador argued in favor of considering additional criteria. The Chamber accepted as a matter of principle the prevalence of *effectivités* over *uti possidetis*, although in practice it did not apply this view to all the disputed sectors as it considered that the *effectivités* were not sufficiently proven to derogate from the principle.<sup>62</sup> However, in respect of some sectors the decision followed a different approach and *uti possidetis* became rather marginal. These other approaches included acquiescence, effective occupation and recognition,<sup>63</sup> particularly in respect of the determination of sovereignty over the islands. Equity *infra legem* was also mentioned by the Chamber.
31. It is also important to note that the overriding effect of treaty-established boundaries over colonial titles and the operation of *uti possidetis* was also recognized in the *Beagle Channel Arbitration*. The Court of Arbitration noted that it was common ground between the Parties that the boundary settlement established in the treaty of 1881 between Argentina and Chile prevailed over any claim based on *uti possidetis*, even as a means for the interpretation of the treaty.<sup>64</sup> As regards the Argentinean contention that the Treaty must be read in the light of the doctrine of *uti possidetis* and that that principle must prevail in the event of any irresolvable conflict or doubt as to its meaning or intention, the Court pointed out that
- "in the particular case of the 1881 Treaty, no useful purpose would be served by attempting to resolve doubts or conflicts regarding the Treaty, merely by referring to the very same principle or doctrine, the uncertain effect of which in the territorial relations between the Parties had itself caused the Treaty to be entered into, as constituting the only (and intendedly final) means of resolving this uncertainty."<sup>65</sup>
- This consideration is directly applicable to the role of the 1859 Boundary Convention between Britain and Guatemala in relation to which the same concept applies.
32. Similarly, it must also be recognized that any argument based upon *uti possidetis* must give way to the subsequent conduct of the parties. In the *Burkina Faso/Mali Frontier Dispute* case the Court considered an argument developed by Burkina Faso that Mali had accepted a solution to the dispute outlined by a Mediation Commission of the Organization of African Unity which sat in 1975. As to this, the Court said:

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<sup>61</sup> *Case concerning the Land, Island and Maritime Frontier Dispute, El Salvador/Honduras, Nicaragua Intervening*, ICJ Reports 1992, 351.

<sup>62</sup> Kohen, p.478.

<sup>63</sup> *Case cit.*, *supra* note 62, paras. 66, 79; see also Nesi, pp.86-87.

<sup>64</sup> *Argentina/Chile Beagle Channel Arbitration*, 52 ILR 77, pp.124-125.

<sup>65</sup> *Ibid.*, p.133.

"Since this argument from acquiescence would, if correct, make it unnecessary to endeavour to establish the frontier inherited from the colonial period, it should be dealt with at the outset as a preliminary question."<sup>66</sup>

33. The decision in the *El Salvador-Honduras* case mentioned above is also meaningful in identifying the legal effects of acts done *à titre de souverain*. From 1798, and in some matters even before that date, British jurisdictional acts in connection with Belize were made *à titre de souverain*, that is with the intention of their being the acts of the sovereign authority. The Chamber said:

"[P]ossession backed by the exercise of sovereignty may be taken as evidence confirming the *uti possidetis juris* title. The Chamber does not find it necessary to decide whether such possession could be recognized even in contradiction of such a title, but in the case of the islands, where the historical material of colonial times is confused and contradictory, and the accession to independence was not immediately followed by unambiguous acts of sovereignty, this is practically the only way in which the *uti possidetis juris* could find formal expression so as to be judicially recognized and determined".<sup>67</sup>

34. Applying this approach, the Chamber then determined that El Salvador had exercised State power over the island of Meanguera and its dependency of Meanguerita, just as Honduras had done in respect of El Tigre,<sup>68</sup> without timely protest by either party. The Chamber held that

"[t]he evidence as to possession and control of an island by one Party without protest by the other, as pointing to acquiescence...and the display and exercise of sovereignty...coupled in each case with the attitude of the other Party, clearly shows however, in the view of the Chamber, that Honduras was treated as having succeeded to Spanish sovereignty over El Tigre, and El Salvador to Spanish sovereignty over Meanguera and Meanguerita".<sup>69</sup>

In this manner acts *à titre de souverain*, even those done after independence, were held to prevail over *uti possidetis juris* strictly understood.

## 5. Conclusions about the role of *uti possidetis* in the claim by Guatemala.

35. The British title to the territory of Belize was the result of a gradual process of consolidation and of territorial extension. Acquiescence by Spain was significant in this process as reflecting its gradual abandonment of jurisdiction and interest in the area. What began as unacceptable incursions evolved into tolerated settlements, legal recognition of the status of such occupation and, finally, acceptance of the exercise of jurisdiction by Britain. From 1798 jurisdiction was generally exercised *à titre de souverain*. Recognition followed in due course by the United States, Mexico and Guatemala.
36. Four conclusions can be reached in the light of this evolution: first, that at the time

<sup>66</sup> ICJ Reports 1986, p.570.

<sup>67</sup> Case cit., supra note 62, para. 347.

<sup>68</sup> Ibid., para. 361.

<sup>69</sup> Ibid., para. 368.

of independence of Central America in 1821 Spain had no effective authority over the territory of Belize or, at best, only a nominal claim. Second, that Britain had a title based on the effectiveness of its own occupation, at that stage including also the necessary *animus* and the *corpus*. Spanish protests about British activities had been scant and had long ceased to be made. Third, that, in any event, there is evidence that the area of Belize fell under the authority of Yucatan, not of Guatemala, so that, on any basis, Guatemala could not be the beneficiary of the operation of the doctrine of *uti possidetis juris*.<sup>70</sup> Fourth, there is clear evidence, set out in the main Opinion, that whatever title Guatemala may conceivably have inherited at the time of independence in 1821, the conduct of Britain subsequent thereto was sufficient to extinguish that title and vest it in Britain and now in Belize.

37. Whatever Guatemala acquired as a title from Spain already had limitations built in it. Under the doctrine of *uti possidetis* Guatemala possessed no more than Spain, nor could its legal title be improved by mere succession. The objective of the doctrine of preventing foreign occupation of *terra nullius* was not applicable to this situation, first, because the *terra* was not *nullius* and, second, because that aspect of the principle applies only to occupation taking place after independence, not before. Occasional protests by Guatemala were certainly not enough to prevent the consolidation of the British title based on a substantial and continuous economic, commercial, jurisdictional and diplomatic activity.
38. The 1859 Convention put an end to whatever applicability the doctrine of *uti possidetis* may have had. As from the ratification of the Convention, the extent of the legal title of each country was reflected in the treaty. Moreover, the effect of the 1859 Convention was confirmed by the 1931 Exchange of Notes. This is yet another reason why the claim by Guatemala to any part of Belize based on *uti possidetis* as a means for the attribution of territory cannot be upheld.

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<sup>70</sup> For indications of this, see above paras. 25, 29, 34, 36, 39, 42 and 61.





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