COMMISSIONED BY THE BAR ASSOCIATION OF BELIZE

LEGAL OPINION

The Belize/Guatemala Dispute

Prepared by: Prof.Stephen Vasciannie, CD

February 2019

1 Kinsale Avenue

Kingston 6

Jamaica

February 26, 2019

The Secretary
The Belize Bar Association

Attention: Ms Leslie Mendez

Dear Secretary,

Re: <u>The Belize/Guatemala Territorial Dispute -- Opinion</u>

I. BACKGROUND

By letter, dated January 14, 2019, under the caption "Instructions to Expert" you asked me to provide you with an updated legal opinion on the Belize/Guatemala territorial dispute.

The updated legal opinion is to be premised in part on the fact that in 2001, Sir Elihu Lauterpacht, Judge Stephen Schwebel, Professor Shabtai Rosenne and Professor Orrego Vicuna provided a legal opinion on the Belize/Guatemala dispute ("the 2001 Opinion"). The 2001 opinion found that Guatemalan claim – which was generally unsustainable – floundered in particular with reference to the 1859 Convention between Great Britain and Guatemala and a 1931 Exchange of Notes between both countries.

By way of background, the updated legal opinion should also bear in mind efforts at resolving the Belize/Guatemala dispute undertaken since 2001 under the auspices of the Organization of American States ("the OAS") and certain developments concerning the Sarstoon River that have occurred since about 2015. With regard to the Sarstoon River, your "Instructions to Expert" indicate that the Guatemalan Armed Forces ("the GAF") now requires Belizeans to obtain Guatemalan permission before traversing the Sarstoon River. This has prompted diplomatic protest notes from the Belizean authorities, in light of the Belizean view that the Sarstoon River forms the southern boundary of Belize, and that Belize has access to parts of the river.

Also by way of background, your "Instructions to Expert" notes that the Government of Belize has announced that a referendum is to be held on April 10, 2019 on the question whether Belizeans agree to have the International Court of Justice resolve the Belize/Guatemala dispute. If the dispute is submitted to the International Court of Justice and resolved, it could bring to an end a longstanding dispute of fundamental importance to the Belizean polity. If this dispute is resolved substantially in favour of Belize, the Guatemalan claims – some of which could even have an existential impact on the Belizean State – would be dismissed with some degree of finality. On the other hand, recognition by the Court of some aspects of Guatemala's claims could result in loss of parts of territory now held by Belize to be within the borders of Belize. The stakes then are extraordinarily high, and the case for careful review of the situation prior to the referendum is readily made.

II. EXPERT'S QUALIFICATIONS

The Instructions to Expert requests details of my qualifications. They are as follows:

International Law and Diplomacy

- Professor of International Law, University of the West Indies (UWI), Mona, since 2002: the only person to have held this professorship at UWI, Mona. Senior Lecturer in International Law, UWI, Mona (1994 to 2002).

- Member of the United Nations International Law Commission, Geneva (2007 to 2012); General Rapporteur of the International Law Commission, 2011.

- Jamaican Ambassador to the United States of America (2012 to 2015).

- Jamaican Permanent Representative to the Organization of American States (2012 to 2015).

- Chairman, Committee on Juridical and Political Affairs, Organization of American States (2014 to 2015).

- Chairman, Permanent Council of the Organization of American States (July to September 2012).

- Chairman, Jamaica National Group for Election of a Judge to the International Court of Justice (2012 to 2015).

- Deputy Solicitor General, Jamaica, and Head of the International Affairs Division of the Attorney General's Chambers, Jamaica (2005 to 2008).

- Member, Inter-American Juridical Committee of the Organization of American States (2004 to 2005).

- President, Conference on Maritime Delimitation of the Caribbean Sea (2005 to 2006).

- Head of Jamaican Delegation to various meetings of the Organization of American States General Assembly (2012 to 2015).

- Lead Counsel for Jamaica in two cases before the Inter-American Commission on Human Rights (2007).

- Counsel for Jamaica (team member) in two cases before the Judicial Committee of the Privy Council (2008).

- Consultant in International Law to the Law Firm of HyltonBrown in the Caribbean Court of Justice's International Law case concerning Shanique Myrie and the Government of Barbados.

- Consultant to the Government of Trinidad and Tobago in the Caribbean Court of Justice's International Law case concerning Trinidad Cement Limited and CARICOM.

- Consultant to the United Nations Conference on Trade and Development (UNCTAD) on International Law issues.

- Legal Associate, Wall Street Law Firm of Sullivan & Cromwell (1991 to 1994).

- Legal Consultant/Legal Advisor, United Nations Centre on Transnational Corporations (1989 to1991).

- Member of the Jamaican Bar (1996 to present).

- Member of the New York Bar (1990 to 1994).

- Research Fellow in International Law, St. Catharine's College, Cambridge University (1987 to 1988).

- Tutor in Public International Law (part-time), Oxford University (1984 to 1987).

- Doctor of Philosophy in International Law, Oxford University (1989).
- Master of Law, International Law Cambridge University; Starred First Class Honours Degree, First in Class (1984).
- Bachelor of Arts (Jurisprudence), Oxford University, First Class Honours (1983).
- Author of 5 books and more than 40 articles in learned journals (including *The British Year Book of International Law, The Cambridge Law Journal, The New York University Journal of International Law and Politics,* and *The Netherlands International Law Review*).

Other Qualifications

- President, University of Technology, Jamaica (2017 to present).
- Principal, Norman Manley Law School, Jamaica (2008 to 2012).
- Jamaican National Honour: Order of Distinction (Commander Class)(2016).
- Editor, West Indian Law Journal (2008 to 2012).
- Adjunct Professor, Stetson University Law School (2009 to 2011).
- Chairman, Air Policy Committee of the Jamaican Government (2005 to 2008).
- Smuts Visiting Research Fellow in Commonwealth Studies (2001 to 2002).

III. SPECIFIC TASK

The Instructions to Expert requests that I provide a "professional, impartial and expert opinion founded on international law on the Belize/Guatemala territorial dispute." That opinion should take into account:

"a) The strength and any possible weaknesses in the case for Belize;

b) Any legal developments since the 2001 Opinion;

c) GAF requiring persons to obtain permission from them to access the Sarstoon River has an impact on the case for Belize;

d) Whether the GAF preventing Belizeans from visiting the Sarstoon Island has an impact on the case for Belize; and

e) Whether the diplomatic protest notes sent to Guatemala regarding the actions of the GAF assist the case for Belize."

The opinion is set out in Attachment A.

Thank you for your kind consideration.

Yours sincerely,

Stephen Vasciannie

ATTACHMENT A

OPINION ON THE BELIZE/GUATEMALA DISPUTE

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ATTACHMENT A

OPINION ON THE BELIZE/GUATEMALA DISPUTE

I. SOURCES OF LAW

1. Belize and Guatemala face each other across a chasm of differences in the matter of the territorial extent of each country. Both countries adhere to legal positions based primarily on historical circumstances, but their appreciation of the significance of these circumstances is sharply divergent. In the matter of title to territory and boundary delineation, the International Court of Justice has tended to attach considerable importance to the historical background to particular claims. This is evident, for instance, in the Land, Island and Maritime Frontier Dispute Case (El Salvador v. Honduras)[1] and in the case of Certain Activities (Nicaragua v. Costa Rica):[2] in both these cases, the Court's decision turned in large part on the historical treatment of issues by the respective countries and on arguments based on history. Accordingly, it is to be expected that both Belize and Guatemala will build their claims before the Court on historical analysis, in the event that the dispute is brought to the Court.

2. The Court, in considering the claims of both countries will, of course, place the historical circumstances presented in the context of Public International Law. In this regard, the Court will attach the highest importance to the sources of International Law, as set out in Article 38(1) of its Statute. Article 38(1) of the Statute of the International Court of Justice indicates that, for any dispute, the Court shall apply:

> *"(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*

[1] ICJ Reports (1992), p. 351.

[2] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, ICJ Reports (2015), p. 665.

(b) international custom, as evidence of general practice accepted as law;

(c) the general principles of law recognized by civilised nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

As a matter of general method, therefore, the Court will apply conventions (treaties), customary international law, general principles, judicial decisions and the writings of highly qualified publicists. The result in the Belize/Guatemala dispute will turn on how the Court applies these sources in the factual context of the case.

3. The sources of International Law listed in Article 38(1) of the Statute of the Court are applied broadly in a hierarchical manner. Generally, primary importance is attached to treaties and custom, so that if a treaty is found to be directly applicable to a point in dispute, it will normally have determinative significance. The same is true for custom. And it would be fair to suggest that treaty rules and custom are to be treated on the same level in assessing the hierarchy of sources: this is correct, save in cases where the rule of customary law has the status of a *jus cogens* norm. *Jus cogens* norms have peremptory status in International Law, and so will trump rules even when those rules are clearly stated in treaties. But there are very few *jus cogens* norms in International Law and it is not likely that the Court in the case of Belize versus Guatemala will resolve the issues by relying on the concept of *jus cogens*. Accordingly, in assessing the claims of both Belize and Guatemala, it is likely that the Court will ascertain the relevant treaty provisions and customary law rules and apply these together as rules on the same level of authority. On particular points, if the Court finds that there is no applicable treaty or custom, then it will consider whether there are any applicable general principles of law. General principles of law may be principles drawn from International Law (e.g. the sovereignty of States) or they may be derived from national law systems (e.g. the concept of estoppel). Finally, as subsidiary means of determining the law, the Court may rely on judicial decisions and writings; these latter two sources, however, are to be placed at the foot of the hierarchy. In

this opinion, therefore, it is assumed that the Court will apply the sources of law in the following order:

First, treaties and custom on the same level;

Second, general principles of law, in order to fill any lacunae not covered by treaties and custom;

Third, judicial decisions and writings.

4. Two additional points about the sources of International Law may be usefully made at this stage. One is that the International Court of Justice does not have a doctrine of *stare decisis* akin to that applied in common law systems of governance. Rather, the Court is guided by Article 59 of the Statute of the Court which states that:

> *"The decision of the Court has no binding force except between the parties and in respect of that particular case."*

Thus, neither Belize nor Guatemala should regard decisions of the International Court of Justice in previous cases on title to territory as automatically binding in their dispute: the International Court of Justice, in this regard, follows civil law traditions with which Guatemala will be more familiar than Belize. Significantly, however, neither the International Court of Justice nor individual States work on the assumption that the Court should disregard its previous decisions. On the contrary, the Court has shown a marked inclination to follow previous decisions or to distinguish decisions if it wishes to depart from them. This tendency is exemplified by the 2016 decision of the Court in the Marshall Islands Cases:[3] in this set of cases, the majority judgment, as well as several concurrent and dissenting opinions, showed marked reliance on precedents almost as if those precedents had binding force. In the circumstances, we may expect that both Belize and Guatemala will rely on earlier International Court of Justice decisions as authoritative but not binding sources.

[3] See, e.g. Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, ICJ Rep. 2016, p. 833.

5. Secondly, Article 38(1) of the Statute of the Court may depart from some national systems of law by listing the writings of publicists expressly as a source of law. The openness of International Law to writings may be criticized, for it allows scope for national bias to be introduced into the law. Perhaps for this reason, the International Court of Justice, in its majority judgments, does not expressly rely on individual writers, even as a subsidiary source. The Court does, however, sometimes rely on collective positions of writers when these positions are presented by the United Nations International Law Commission, as evidenced in the Gabcikovo-Nagymaros Project (Hungary v. Slovakia) Case[4]. This is not to say that the Court will pay no regard to writings in their deliberations. It is to suggest, however, that such writings are to be relied upon by advocates for their persuasive value, rather than as binding sources. They are material, not formal sources of law. In contrast to majority judgments which avoid reliance on writers, individual judges will on occasion cite authorities for particular propositions, and especially where they have the authority of time and veneration in their favour, some writers will carry great weight in their pronouncements. Here, it is to be noted that Belize has received a number of contributions from writers of the highest standing in International Law, including Sir Elihu Lauterpacht, Sir Derek Bowett,[5] Judge Stephen Schwebel, Professor Shabtai Rosenne and Professor Francisco Orrego Vicuna.[6] The documents produced by these authorities are valuable both in light of their contents and with reference to the status of the writers in modern International Law. It is to be noted, though, that Guatemala will seek to minimize their significance as sources of law, and present alternative authorities in support of their perspectives.

6. Finally with respect to legal method, it is to be noted that Article 2 of the Special Agreement between Belize and Guatemala to Submit Guatemala's Territorial, Insular and Maritime Claim to the International

[4] ICJ Rep. 1997, p. 7.

[5] See "Belize: Joint Opinion by Mr. E. Lauterpacht, Q.C. and Dr. D.W. Bowett, Q.C.", printed by the Government Printery, Belmopan, Belize, C.A. (18 September 1978).

[6] Lauterpacht, Schwebel, Rosenne and Orrego Vicuna, "Legal Opinion on Guatemala's Territorial Claim to Belize", January 2002 (Lauterpacht *et al*, Joint Opinion).

Court of Justice ("the Special Agreement") expressly contemplates the sources of law to be used. The language of Article 2 indicates:

> *"The Parties request the Court to determine in accordance with applicable rules of international law as specified in Article 38(1) of the Statute of the Court any and all legal claims of Guatemala against Belize to land and insular territories and to any maritime areas pertaining to these territories, to declare the rights therein of both Parties, and to determine the boundaries between their respective territories and areas."*

By expressly referring to Article 38(1) for the sources of International Law, Article 2 implicitly excludes reliance on Article 38(2) of the Statute: *inclusio unius est exclusio alterius.*[7] Article 38(2) of the Statute would have allowed Belize and Guatemala to agree that the Court could decide their case *ex aequo et bono.* In other words, the Special Agreement could have allowed Belize and Guatemala to have their case resolved on the basis of what is fair and equitable, regardless of what the strict requirements of the law may stipulate. But Belize and Guatemala did not pursue this option in the Special Agreement.[8] Instead, they opted for a strictly legal determination of their dispute, even though this could result in a final solution that could possibly be unfair to one or other party. This point, however, should not be overstated. Belize and Guatemala were well-advised to rely on the legal strictness of Article 38(1) because, as a matter of history, the dispute between both countries has presented itself as a legal dispute with both sides arguing points of entitlement based on law. Also, it should not be assumed that an approach relying exclusively on the law will not be fair, for the law itself may incorporate fairness in its terms. And, moreover, the legal approach

[7] In the Land, Island and Maritime Frontier Dispute(El Salvador/Honduras) Case, the ICJ noted that a reference to International Law and to the first paragraph of Article 38 "obviously excludes the possibility of any decision *ex aequo et bono*": ICJ Rep. 1992, paragraph 47.

[8] At an earlier stage in the history of this dispute, Guatemala was willing to have the matter resolved *ex aequo et bono*, rather than by reference to the terms of International Law. In its 1946 acceptance of the compulsory jurisdiction of the International Court of Justice for legal disputes, the Government of Guatemala stated: "This declaration does not cover the dispute between England and Guatemala concerning the restoration of the territory of Belize which the Government of Guatemala would...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 of the Court)": quoted in L.D. Bloomfield, The British Honduras-Guatemala Dispute (1953), p. 71.

is more likely to ensure finality in the decision than would the broad invocation of equity.

II. OUTLINE OF CLAIMS

(a) The Guatemalan Claim

7. In the course of its presentations to the International Court of Justice, Guatemala is likely to argue that it derives title to territory for a significant area of Belizean territory as a successor to the Spanish Empire. The entire territory of Belize will be said to have been subject to Spanish dominion up to 1821. In that year, with the independence of Spanish colonies in Central America, areas previously held by Spain came to be divided into separate, independent countries with borders said to be governed by the principle of *uti possidetis juris*. In keeping with this principle, Guatemala has argued that it derived title to the area of Belize which formed part of the province of Verapaz in the Captaincy General of Guatemala; the current State of Guatemala succeeded to this title (including title over particular islands) upon independence.

8. The Guatemalan claim also proceeds on the basis that the British presence in the territory of Belize prior to 1821 did not give rise to British title over any part of the area. Guatemala acknowledges the British presence, but notes that this presence was to allow British nationals to exercise rights of usufruct: the British nationals were allowed to cut logwood in parts of the territory. Lauterpacht and Bowett note that when the Treaty of Paris of 1763 accorded the right to logwood to the British, it did not specify the geographical limits of the right;[9] subsequently, in 1783, the Treaty of Versailles defined the area of British access to the area between the Wallis and Hondo rivers. In 1786, by the Treaty of London, the area for the rights of usufruct was extended southwards to the River Sibun.[10] For the Guatemalans, because the British rights were for usufructuary purposes only, no title to territory

[9] Lauterpacht and Bowett, *loc. cit.*, note 5, p. 3.

[10] *Ibid.*, p. 4.

flowed to the British; instead, title remained with the Spanish until independence. [11]

9. The next significant step in the structure of the Guatemalan claim concerns the 1859 Treaty between Guatemala and Britain. Guatemala maintains that this treaty is a treaty of cession according to which Guatemala, in return for valid consideration, would cede part its territory in Belize to Britain. For Guatemala, the valid consideration for this cession was to be in the form of a cart road or alternative river transport: Britain was required to contribute to the construction of a road or river transport facility leading from Guatemala City to the nearest point on the Guatemalan coast. As the road or its alternative was never built, Guatemala claims that a material provision in the 1859 Treaty was not fulfilled, and that this entitled Guatemala to terminate it. On this line of argument, the cession of territory delineated in the Treaty has not taken place. Guatemala further maintains that it has, in fact, terminated the 1859 Treaty, and consequently, it retains title to the area of Belize that it had from 1821.

10. The Guatemalan claim before the Court is likely to proceed on the basis that the northern part of Belize was transferred to Britain prior to 1821, and so, did not pass to Guatemala upon independence. Alternatively, it accepts that prior to 1821, the Spanish province that became Guatemala did not include the northern part of Belize. Accordingly, the Guatemalan claim before the Court is likely to pertain to the southern portion of Belize, essentially the area between the Sibun and Sarstoon Rivers, together with certain islands. In a Note to Belize, dated 18 October 1999, Guatemala defined its claim in the following terms:

> *"...(O)ver 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*

[11] In some statements, Guatemala has maintained that Spain allowed British access to cut logwood just as a "permission", and that by the time of independence, Britain had "illegally extended" its presence to the Sarstoon River in southern Belize: see, e.g., Report on a speech given by Guatemalan President Jimmy Morales on April 8, 2018 in the Department of Peten, Guatemala, in "Guatemalans to vote on taking Belize territorial dispute to the ICJ", The San Pedro Sun, April 12, 2018, [illegible].

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."[12]

11. In sum, the Guatemalan claim proceed on the basis that Guatemala derived title to Belizean territory in 1821. This claim pertains mainly to the area between the Sibun and Sarstoon Rivers. The legal basis for the claim is the *uti possidetis juris* principle which, for Guatemala, is binding as customary international law. The claim also rejects the idea that the 1859 Treaty between Guatemala and the United Kingdom operated to transfer title from Guatemala to the United Kingdom, and by extension to the current State of Belize.

(b) The Belizean Approach

12. The Belizean claim to the area may be traced historically to the activities of British nationals in Central America from the 17th century. As already noted, these activities pertained initially to the taking of logwood by the British, and they came to be authorized, as usufructuary rights, in treaties between Spain and the United Kingdom. The Belizean claim to title today does not depend on these treaties. Rather, it is argued that the British presence in the area from before 1821 formed the basis for acquisition of title by the time of independence of Spain's Central American colonies. The argument is that both before and following independence, neither Guatemala nor other Central American countries exercised sovereignty over the area of Belize. Gradually, the British settlers extended their control over the area: in the view of some writers, this "ripened to sovereignty" for Britain by 1859.[13]

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[12] Quoted in Lauterpacht *et al*, Joint Opinion, *loc. cit.*, note 6, page 7 at footnote 3.

[13] Lauterpacht and Bowett, *loc. cit.*, note 5, pp. 3-6.

13. The idea that Britain had sovereignty over the area of Belize by 1859 is supported in part by the aforementioned treaty of that year between Guatemala and the United Kingdom. More specifically, Article 1 of the 1859 Treaty stated 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:*
>
> > *Beginning at the mouth of the River Sarstoon in the Bay of Honduras, and proceeding up the mid-channel thereof to Gracias a Dios Falls then turning to the right and continuing by a line drawn direct from Gracias a Dios to Garbutt's Falls on the River Belize, and from Garbutt's Falls due north until it strikes the Mexican frontier.*
>
> *It is agreed and declared between the High Contracting Parties that all the territory to the north and east of the line of boundary above described belongs to Her Britannic Majesty, and all the territory to the south and west of the same belongs to the Republic of Guatemala."*

14. For the United Kingdom and Belize, the statement in Article 1 of the 1859 Treaty represented an acknowledgement of existing borders of Belize and Guatemala in 1859. Not only does Article 1 stipulate what the boundary "was and is", it also expressly notes that this was the boundary existing "previous to and on the first day of January 1850". Article 1 also indicates that the boundary "has continued to exist up to the present time", another form of words intimating that the boundary between Guatemala and Belize predated 1859. Therefore, when read on its own, Article 1 of the 1859 Treaty offers strong support for the idea that the United Kingdom had established title to the territory of Belize prior to 1859, and that Guatemala had acquiesced to this fact. As will be considered further below, however, this position is not accepted by Guatemala.

15. On the assumption that Britain held good title to the area by 1859, the Belizean view is that this title has not been relinquished since that

time. Belize has sought to reinforce its perspective with reference to subsequent State practice. Britain and subsequently Belize have exercised effective control (*effectivites*) over the area as far south as the Sarstoon River from 1859. State actions in this regard have also included an Exchange of Notes between the United Kingdom and Guatemala which arguably acknowledges the validity of the boundary set out in the 1859 Treaty, as suggested by Lauterpacht *et al* in their 2002 Joint Opinion.[14] Belize also relies substantially on the concept of self-determination as reflected in the seminal United Nations General Assembly Resolution 1514 on the Granting of Independence to Colonial Territories and Peoples and on other resolutions of the General Assembly. For Belize, these resolutions support the position that title to territory rests in the State of Belize not only because it has derived valid title from the United Kingdom but also because Belizean independence is a clear exercise of the right to self-determination. Guatemala challenges this perspective.

III. LEGAL ISSUES

(a) Uti Possidetis Juris

16. Guatemala maintains that it received the full transfer of territory that now constitutes Belize from Spain. This transfer, it argues, was achieved pursuant to the concept of *uti possidetis juris*. For Guatemala, the *uti possidetis* principle is unequivocally a part of customary international law, and, in the context of South and Central America, it requires all States to respect the colonial boundaries of the Spanish Empire. Thus, in keeping with the *uti possidetis* principle, Guatemala asserts that in 1821, title to Belize passed from Spain to Guatemala because, prior to independence, the Belize area[15] fell within the Captaincy-General of Guatemala.

17. One important legal question, therefore, is whether the *uti possidetis* principle is opposable *vis-à-vis* the United Kingdom and Belize

[14] *Loc. cit.*, note 5, pp. 17-26.

[15] In the following discussion the term "Belize area" is used to denote the area between the Sibun and Sarstoon Rivers which is likely to be the primary region of contention in any matter before the International Court of Justice.

(as deriving title from the United Kingdom). In this regard, it may be noted, first of all, that the *uti possidetis* principle has received strong support from the high authority of the International Court of Justice in a number of cases pertaining to colonial boundary questions. So, for example, in the Frontier Dispute (Burkina Faso v. Mali) Case,[16] a Chamber of the Court expressly found that the principle – said to be one of a general kind[17] -- was applicable to "the regions of South America which were dependent on the Spanish Crown", and to "the vast territories of French West Africa".[18] In that case, the Chamber also considered whether *uti possidetis juris* applied with respect to colonial boundaries where more than one colonial power is involved. On this issue, the Chamber opined:

> "*The territorial boundaries which have to be respected may also derive from international frontiers which previously divided a colony of one State from a colony of another, or indeed a colonial territory from the territory of an independent State, or one which was under protectorate, but had retained its international personality. There is no doubt that the obligation to respect pre-existing international frontiers in the event of a State succession derives from a general rule of international law whether or not the rule is expressed in the formula* uti possidetis.[19]

18. This dictum suggests that *uti possidetis juris* could apply, as a matter of law, to require the United Kingdom to respect the existing boundaries in Central America at the time of independence of the Spanish colonies in 1821. The argument would be that the United Kingdom was obliged to respect the existing boundaries derived by former Spanish colonies from the Spanish Crown. In some of the literature on the Guatemala-Belize dispute, this argument is

[16] ICJ Reports 1986, p. 554.

[17] Para. 23.

[18] *Ibid.*

[19] The International Court of Justice thus regards *uti possidetis* as a rule of general international law, not a derogation from it: for an earlier, different view, see, e.g., L.D. Bloomfield, *loc. cit*, note 8, p. 94.

challenged.[20] Thus, it may be suggested that *uti possidetis juris* is a rule applicable only to former Spanish colonies because those States have expressly accepted it. In light of the Frontier Dispute (Burkina Faso v Mali) Case, however, the better view is that *uti possidetis juris* applies not only to former Spanish colonies *inter se*; it also applies to the United Kingdom in Central America, so that Belize must show regard to the principle in its arguments concerning title to territory and boundary delineation.

19. But application of the *uti possidetis* principle to the present dispute must be read subject to important considerations. The first is that the *uti possidetis* principle presupposes the existence of clear well-defined boundaries, based on administrative divisions in the Spanish Empire. In some instances, however, boundaries in question are imprecise or may even be non-existent. A Chamber of the International Court of Justice took notice of this problem in the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening) Judgment[21] in 1992. Here the Chamber remarked:

> "*when the principle of* uti possidetis *is involved the* jus *referred to is not international law but the constitutional or administrative law of the pre-independence sovereign, in this case, Spanish colonial law; and it is perfectly possible that the law itself gave no clear and definite answer to the appurtenance of marginal areas or sparsely populated areas of minimal economic significance.*"[22]

The Chamber also provided a framework for assessing claims when the *uti possidetis* principle led to uncertainty. Speaking in the context of disputed island territory, the Chamber held that:

(a) *Uti possidetis juris* should provide the starting point for the assessment;

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[20] See, e.g., Lauterpacht and Bowett, *loc. cit.*, note 5, paras. 29 to 35; J. Robert Maguire, "The Decolonization of Belize: Self-Determination v Territorial Integrity", Virginia Journal of International Law, Vol. 22(3)(1982), p. 849 at pp. 852-854.

[21] ICJ Rep. 1992, p. 559.

[22] Para. 333

(b) The Chamber would consider whether it was possible to establish the appurtenance in 1821 of each disputed island to one or other of the various administrative units of the Spanish colonial structure. To do this, the Chamber could consider legislative and administrative texts, as well as colonial *effectivites* (that is, activities on the ground that demonstrate effective control of territory);

(c) The Chamber would also consider the actions of the newly independent States in relation to the disputed islands in the period immediately after independence. This could throw light on the contemporary appreciation of States of what the situation had been in 1821.[23]

20. More recently, in the Territorial and Maritime Dispute Case (Nicaragua v. Colombia),[24] the International Court of Justice further acknowledged that in some instances the *uti possidetis* principle may speak with uncertainty. In this case, the Court concluded firmly that, with respect to certain disputed maritime features claimed by Nicaragua and Colombia, the principle afforded inadequate assistance in determining sovereignty because "nothing clearly indicates whether these features were attributed to the colonial provinces of Nicaragua or Colombia prior to or upon independence."[25] For the Court, therefore, neither Nicaragua nor Colombia had established title to the disputed territory by virtue of *uti possidetis juris*. Having found that *uti possidetis* was unhelpful in the case, the Court considered the elements that should be applied. These turned largely on the *effectivites* exercised over the disputed territory. Thus, the Court noted *inter alia* that:

(a) The activities to be considered should be undertaken *a titre de souverain*.[26]

(b) Such activities include in particular, but are not limited to, legislative acts, acts of administrative control, acts relating to

[23] *Ibid.*

[24] ICJ Rep. 2012, p. 624

[25] *Ibid.*, para. 65.

[26] *Ibid.*, paras. 72-80.

the application and enforcement of criminal or civil law, acts regulating immigration, acts regulating fishing or other activities, naval patrols and search and rescue operations.[27]

(c) Sovereignty over minor maritime features may be established by a relatively modest display of State powers.[28]

(d) The Court will take into account the extent to which acts *a titre de souverain* have been carried out by another State with a competing claim to sovereignty. In reiterating this rule, the Court expressly cited important dicta from the Permanent Court of International Justice in the Eastern Greenland Case that:

"*It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.*"[29]

(e) The Court may also take into account the extent to which third States recognize the sovereignty of one of the claimant States, and consider the evidence provided by maps.[30]

21. As a recent precedent of the International Court of Justice pertaining to the principle of *uti possidetis juris*, the Territorial and Maritime Dispute Case carries considerable weight as a precedent. It stands, at least, for the proposition that where there is uncertainty about the boundary to be derived from *uti possidetis juris*, the Court will consider the *effectivites* exercised by the claimant States, and will be

[27] In presenting this list, the Court paid regard to its 2007 decision in Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, ICJ Rep. 2007 (II), pp. 713-722, paras. 176-208.

[28] ICJ Rep. 2012, p. 624, para. 80.

[29] 1933 P.C.I.J. Series A/B, No. 53, p. 46.

[30] ICJ Rep. 2012, p 624, paras. 95-102.

inclined to find in favour of the claimant which can demonstrate greater exercise of sovereign rights. The main pronouncements of the Court in this case were made in the context of title to territory over islands, but that does not provide grounds for distinguishing this case from the dispute between Guatemala and Belize: the Court's dicta are stated in generalizable terms, and in some instances, such as the reference to the Eastern Greenland Case quoted above, the Court itself makes no distinction between insular versus continental land masses. Bearing these considerations in mind, it is fair to suggest that, if title to the territory of Belize was uncertain in 1821 because the boundaries of the Spanish Empire were unclear, the *uti possidetis* principle will not be definitive. Instead, the Court will consider which State – Spain or the United Kingdom -- effectively exercised control over the Belize area *a titre de souverain* up to 1821. The Court would also consider the practice in the post-1821 period, and in particular, the *effectivites* exercised by Guatemala, on the one hand, and the United Kingdom on the other, in order to determine which State had sovereignty over the Belize area in 1821.

22. On the historical point, there are contending views. For example, Cleghern suggested that under Spanish law the territory north of the River Sibun belonged to the Captaincy General of Yucatan, which was in turn a part of the Viceroyalty of New Spain.[31] He suggested further that the territory south of the River Sibun was a part of the Captaincy General of Guatemala.[32] From this perspective, on independence Mexico and Guatemala derived title to the areas north and south of the River Sibun, respectively. A part of Cleghern's historical viewpoint is that the Spanish title to both areas was reflected in the treaties completed from in the period from 1763 to 1814: "from them it may be presumed that title remained with Spain even after 1815". Lauterpacht and Bowett take a different view. They maintain that:

> *"there is little doubt that the (British) Crown exercised exclusive jurisdiction over the entire (British) Settlement at least from 1796 onwards, when the last official Spanish visit was made. The Crown*

[31] Wayne M. Cleghern, "New Light on the Belize Dispute", American Journal of International Law (1958), p. 280 at p. 281-282.

[32] *Ibid.*

governed and legislated or the territory to the exclusion of all other Powers and was de facto *sovereign prior even before 1821."*[33]

In the circumstances, therefore, it is fair to suggest that there was uncertainty as to the border, for the purposes of the *uti possidetis* principle. And if this is so, then, reliance on the Territorial and Maritime Dispute Case would suggest that Court will look at *effectivites* and other considerations in the area of Belize to determine title. When reference is made to *effectivites*, then certainly, from the time of the 1859 Treaty through to Belizean independence in 1981, the United Kingdom exercised legislative, administrative and judicial control, a fact which augurs strongly in favour of the Belizean claim to title.

23. In the preceding discussion, it has been assumed that the boundary for determining the *uti possidetis* is unclear. This situation would give rise to certain implications noted above. But what if the boundary for Guatemala under the *uti possidetis* principle is deemed to be clear and precise by the Court? Would the Court be required to rely exclusively on *uti possidetis* without regard for *effectivites* and other considerations? In the Frontier Dispute (Burkina Faso v. Mali) Case, the Court considered this issue in the following terms:

> *"The role played in this case by ...* effectivites *is complex. Where the act corresponds exactly to law, where effective administration is additional to the* uti possidetis juris, *the only role of* effectivite *is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing legal title, preference should be given to the holder of the title. In the event that the* effectivite *does not coexist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The* effectivites *can then play an essential role in showing how the title is interpreted in practice."*[34]

[33] Lauterpacht and Bowett, *loc. cit.*, note 5, p. 16, para. 53.

[34] ICJ Rep. 1986, p. 554, para. 63

The final scenario mentioned in the foregoing passage has already been addressed, that is, situations where the boundary line is unclear. The three other scenarios, however, provide possible lines of argument for both Guatemala and Belize. To take the situations noted in the passage:

(a) It cannot realistically be contended that effective administration over the Belize area coincides with the *uti possidetis* principle; for, in the Belize case, the likely argument would be that Guatemala holds title by *uti possidetis* while the United Kingdom and then Belize have been able to demonstrate *effectivites* from some time before 1859. On the other hand, Belize could argue that it holds legal title to the Belize area through means other than *uti possidetis*, and it has also demonstrated *effectivites*.

(b) Where the title is held by one State, but the *effectivites* are shown by the other, the title must rest with first State. It is anticipated that this will be a central part of the Guatemalan argument in any case before the Court; for Guatemala will maintain that it holds title by virtue of the *uti possidetis* principle. Whether or not Guatemala would prevail on this argument will depend on whether, in fact, Guatemala derived title over the Belize area from Spain. The evidence on this point is uncertain as a matter of history. The United Kingdom had settlers in the Belize area, and if the British title had crystallized by 1821, then it would have remained with them, in keeping with rules of State succession.[35] In addition, Guatemala's standing as the lawful holder of the title will also turn on whether Guatemala relinquished that title at any time subsequent to 1821. This point is considered further below.

(c) Where there are *effectivites*, but there is no clear title, then the *effectivites* are to be taken into account. It is anticipated that this will be one line of argument presented by Belize. Belize would challenge the validity of the putative Guatemalan title derived from *uti possidetis*, suggest that there is no clear title, and then rely on its

[35] *Cf.* Mendoza, who argued that on 30th April 1859, Great Britain "*did not possess any title whatsoever* to her occupancy of British Honduras, not even to that zone comprised between the Hondo and Siboon rivers, and that the British *had not occupied* any part o the neighbouring territories which they claimed, despite marauding and trespassing beyond the boundaries of the concession of 1786": Jose Luis Mendoza, Britain and Her Treaties on Belize (British Honduras): Guatemala Has the Right to Reinstate the Entire Territory of Belize (1946)(translation by Lilly De Jongh Osborne), p. 125 (emphasis in original).

effectivites as evidence of its title. This would be a strong argument. As a matter of history, title to at least parts of the territory of Belize has been in question from prior to 1821. The automatic transmission of title to Guatemala from Spain by the *uti possidetis* principle would disregard British occupation of some parts of Belize, without justification.[36] It would also imply that *uti possidetis*, which was originally based on the premise that Spain's successor States agreed to transfer of title *inter se*, has the power to trump normal rules of State succession to title: this is also unjustifiable. If Britain did, in fact, have title to Belize before 1821, it is suggested that *uti possidetis* could not displace that title.[37]

24. In summary, therefore, if *uti possidetis juris* is applied without qualification, and if it is assumed that Britain had title to no part of the territory of Belize prior to 1821, then Guatemala would have acquired title to the area of Belize upon independence. On the other hand, there is evidence that, from the period before 1821, there were uncertainties concerning title to territory, and in that context, international law would require the Court to consider the *effectivites* and other factors in determining which State had title to the area in 1821 and in the post-1821 period. The weight of these considerations supports the view that the United Kingdom held title to the area between the Sibun and Sarstoon Rivers from 1821. On this basis, the United Kingdom may be deemed to have held title over the Belize area when the United Kingdom and Guatemala negotiated the 1859 Treaty. The matter, however, is not entirely free from doubt.[38]

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[36] On this point, Humphreys wrote: "The area between the Sibun and the Sarstoon Rivers, it is true, seems to have been thought of, during the colonial period, as lying within the jurisdiction of the Captaincy General of Guatemala. But,... there is no evidence of administrative control of this area by the old Captaincy General; there is no evidence of occupation; and there is no evidence of any jurisdictional act performed within the area by the Captaincy General either before 1800 or between 1800 and 1821, at a time when the Belize settlers were extending the limits of British occupation both to the west and to the south of the original boundaries of the settlement: R.A. Humphreys, The Diplomatic History of British Honduras (1961), p. 181.

[37] J. Robert Maguire, *loc. cit.*, note 20, pp. 853-854.

[38] Dobson suggests that neither the British settlers nor the British Government maintained a consistent attitude to the question of title. For example, in 1800 the Law Officers of the Crown said that the Bay of Honduras was a British possession and that, consequently, foreign ships could not trade there. This opinion, she notes, "was not upheld for long": Narda Dobson, A History of Belize (1973), p. 80. For her

(b) The 1859 Treaty

25. The 1859 Treaty between Guatemala and the United Kingdom occupies a central place in the present dispute, and has therefore been subject to both extensive diplomatic exchange and academic assessment.[39] Some of the main points pertaining to the Treaty may turn ultimately on documentation that is not currently available, but the information at hand is sufficient to allow for at least tentative conclusions.

(i) The Main Treaty Terms

26. The treaty terms of most significance to the dispute are to be found in Articles 1 and 7. Article 1 has already been set out above.[40] It delineates the boundary between Britain's "settlement and possessions in the Bay of Honduras", on the one hand, and the territories of Guatemala, on the other. The area north and east of the boundary was "agreed and declared" to belong to Britain, while the area south and west to Guatemala. Article 1, therefore, denotes the area of the modern Belize. If this article were to be treated as determinative in the dispute, Belize would prevail. Significantly, however, Guatemala maintains that Article 1 is not in effect as a matter of law. As also noted above, Guatemala's view is that the 1859 Treaty was a treaty of cession, and so, the terms of Article 1 represented an attempt by Guatemala to cede some of its territory to the United Kingdom in that year. Under this interpretation, the cession did not occur because the United Kingdom failed to meet its reciprocal obligation under Article 7 of the Treaty.

27. Article 7 of the 1859 Treaty reads as follows:

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review of British Government actions from 1798 to 1862, see pp. 95-125: these actions provide evidence of *effectivites*.

[39] The full text of the 1859 Treaty is reproduced, for instance, in William J. Bianchi, Belize: The Controversy between Guatemala and Great Britain Over the Territory of British Honduras in Central America (1959), pp. 59-62.

[40] *Supra*, para. 32.

"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 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 other either party on the territory of the other will be effectually checked and prevented for the future."

The core obligation set out in Article 7 therefore seems to be for the United Kingdom and Guatemala "conjointly to use their best efforts" to establish the easiest means of communication, by cart-road or river transport, between a point on the Atlantic coast near the Belize settlement and the Guatemalan capital. The cart-road was not built, nor were rivers employed for the specified purpose. Thus, for Guatemala, the United Kingdom did not fulfil its core obligation, and so, the treaty came to an end. With the Treaty at an end, Article 1 and the purported cession of territory to the United Kingdom also fell, in Guatemala's view.

(ii) A Treaty of Cession?

28. Various responses have been offered to the Guatemalan line of argument. In the first place, it has been argued that the 1859 Treaty was not a Treaty of cession; it was, rather, a treaty confirming the boundary line between Guatemala and the territory of Belize. There is force in this argument. The Preamble to the 1859 Treaty indicates, *inter alia*, that the parties regard the definition of a boundary as "desirous" and that they resolve to conclude the Treaty "for that purpose." At the same time, no part of the Preamble contains reference to the cession of territory. Similarly, the terms of Article 1 contemplate that the Treaty is essentially about the confirmation of a boundary line rather than a cession. Article 1 refers to the boundary which existed from January 1, 1850 "up to the present time", an approach taken in 1859 which

suggests confirmation of a pre-existing line. And further, Article 1 expressly states that it is "agreed and declared" that the territory on either side of the boundary belonged to Guatemala and Belize, respectively: the declaratory language again suggests that Article 1 did not imply that territory was being ceded from one country to another. For Humphreys, therefore, Article 1 "constituted a clear recognition of a pre-existing frontier and a pre-existing sovereignty."[41] The *travaux preparatoires* of the Treaty reinforce the notion that the Treaty was not one of cession. So, for example, instructions from the British Government in respect of the negotiations stipulated that the boundary line should not be described as "involving any cession or acquisition from the Republic of Guatemala, but, as it is in fact, simply a definition of boundary line existing but not hitherto ascertained."[42]

29. The evidence that the 1859 Treaty was not completed as a treaty of cession is quite strong.[43] If the Treaty had clearly involved the cession of territory to the United Kingdom by Guatemala, there would be grounds for the view that, upon the failure of the United Kingdom to satisfy its obligations under Article 7, the cession would have fallen away: the territory ceded would have reverted to Guatemala as their territory. As is suggested here, however, if the Treaty involved only the confirmation of a boundary line, then, the failure concerning Article 7 would not necessarily mean that Guatemala would gain title to the territory. The drawing of a boundary line did not imply any acknowledgement that Guatemala had title to the Belizean territory prior to 1859. On the contrary, because the line was "declared" to confirm title to territory as of 1850, it is not likely that breach of Article 7 would mean require the re-transfer of territory from the United Kingdom to Guatemala.

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[41] R.A. Humphreys, *loc. cit.*, note 35, p. 78. Bianchi cites various "Spanish-American writers" to the same effect, Bianchi, *loc. cit*, note 39, p. 65..

[42] L.D. Bloomfield, *loc. cit.*, note 8, p. 99; Parliamentary Papers, Correspondence with respect to Central America, 1858-1860, p. 172. Bloomfield indicates that these instructions were presented under the signature of the Earl of Malmesbury.

[43] On this point, Bianchi notes: "It is no exaggeration to conclude, if language be any criterion, that the only topic with which the signatories to this convention were in fact concerned was the boundary between Guatemala and Belize or British Honduras": Bianchi, *loc. cit.*, note 39, p. 64.

(iii) Article 7 Implications

30. Article 7 is couched in vague terms, so it is somewhat difficult to identify the point at which breached may have occurred.[44] The commitment was to use "best efforts", and while the United Kingdom did make efforts, one would be hard-pressed to argue that the criterion of "best" was achieved. Neither the cart road nor river transport was completed with British contribution. Also, in the period following 1859, efforts to complete an agreement in 1863 to supplement the 1859 Treaty were unsuccessful. Thus, it is fair to suggest that the United Kingdom did not satisfy its obligation under Article 7.[45]

31. On the assumption that the United Kingdom was in breach of Article 7, the question then is what legal implications follow from this breach. Generally, the implications of a breach of treaty will depend on whether or not the breach is material. Article 60(1) of the Vienna Convention specifies that a material breach of a bilateral treaty by one party entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.[46] In light of this rule, if the United Kingdom's putative breach of Article 7 was material, Guatemala was legally entitled to terminate the 1859 Treaty. Was the putative breach material? According to Article 60(3) of the Vienna Convention, a material breach may arise from "the violation of a provision essential to the accomplishment of the object and purpose of the treaty."[47] There may be scope for the view that Article 7 of the 1859 Treaty was essential to the object and purpose of the Treaty. On this

[44] For strong criticism concerning the language and meaning of Article 7, see, e.g., Bianchi, *loc. cit.*, note 39, pp. 66-68.

[45] Article 7 also placed a best efforts obligation on Guatemala, but the United Kingdom has not sought to establish that Guatemala's failure in this regard has carried implications for the title to Belizean territory.

[46] For the Court's holding that the rules on the termination of a treaty relationship may be regarded as customary law, see the Advisory Opinion on The Legal Consequences for States of the Continued Presence of South Africa in Namibia, ICJ Rep. (1971), p. 47.

[47] Article 60(3)(b). A material breach may also arise from the repudiation of a treaty, a factor not present in the Guatemala/Belize dispute: Article 60(3)(a), Vienna Convention on the Law of Treaties.

reading, the Treaty had two main objects and purposes: one concerned the clarification of the boundary line, and the other required the development of the transport facility. The failure of the United Kingdom to contribute to the latter objective could arguably be treated as a material breach by Guatemala. In the circumstances, Guatemala would have been entitled to terminate the Treaty. Now, if Guatemala terminated the Treaty, there would have been a reversion to the *status quo ante*: in Guatemala's view, this would mean that title to Belizean territory would have been re-transferred to Guatemala. In contrast, the United Kingdom's view would be that title would remain with the United Kingdom, which was declared to be the holder of the title from at least 1850. The result from the material breach approach, therefore, turns essentially on the legal situation which prevailed in the period immediately before the Treaty entered into force.

32. Two additional points need to be made concerning the question of material breach. First, bearing in mind that a material breach would have granted Guatemala the right to terminate the Treaty, it has been argued that Guatemala waived this right through the effluxion of time. The Treaty was completed in 1859, and there were continuing efforts to clarify and implement the Treaty in 1863. Thereafter, it was not until 1940 that Guatemala denounced the Treaty.[48] Consequently, approximately 60 years elapsed between the date of the Treaty and the attempted denunciation. In this period, Guatemala may be held to have acquiesced in the position that the Treaty was valid. After the passage of so many years, the Treaty, would no longer have been voidable.[49] It would have remained valid, and the boundary line set out therein would be in force up to the present time. But this argument is incomplete. If the 1859 Treaty is deemed to have remained in force by virtue of acquiescence with the passage of time, then it is also true that Article 7 would have remained in force as well. This would mean that, unless there are other considerations to be taken into account, the Treaty commitment to for Guatemala to recognize the boundary line of January 1850 as valid between both parties would remain linked to the British

[48] Lauterpacht and Bowett, *loc. cit.*, note 5, p. 44, para. 178.

[49] Article 45 of the Vienna Convention on the Law of Treaties stipulates, *inter alia*, that a State may no longer invoke a ground for terminate a treaty if the State, having become aware of the relevant facts, must by reason of its conduct be considered as having acquiesced in the validity of the treaty.

commitment to construct the cart road or provide suitable river transport.

33. Secondly, In 1931, Guatemala and the United Kingdom completed an Exchange of Notes. The Exchange of Notes reflects the fact that between 1928 and 1931, the United Kingdom and Guatemala undertook efforts to delineate the boundary between the Belize area and Guatemala in accordance with the terms of the 1859 Treaty.[50] The Exchange of Notes, a valid treaty, incorporates the 1859 Treaty in terms that give renewed validity to the 1859 Treaty. It therefore strengthens the argument that Guatemala did not opt to terminate the 1859 Treaty even though the United Kingdom was, or appeared to be, in breach of Article 7. There is force in the argument that the 1931 Exchange of Notes provides evidence of Guatemalan acquiescence in the continuation of the 1859 Treaty. Again, however, it should be noted that if this is correct, it would mean that the Article 7 commitment would also have remained in place under the Treaty. Up to the time of the 1940 denunciation of the Treaty by Guatemala, the United Kingdom had not satisfied the requirements of Article 7.

34. As to material breach, therefore, the United Kingdom's failure to satisfy the terms of Article 7 may have opened the way for Guatemala to terminate the Treaty. This it did, belatedly in 1940. If the termination by Guatemala was valid, then the parties returned to the *status quo ante*, and the International Court of Justice would need to assess the boundary question and title to territory in light of the situation 1859. If, on the other hand, if Guatemala is deemed by the Court to have acquiesced in the continuation of the 1859 Treaty with the passage of time, or by reaffirming the Treaty through the 1931 Exchange of Notes, the British obligation under Article 7 would have remained in effect up to the time of the formal termination of the Treaty. The Treaty commitment in respect of the boundary line would therefore have continued to be subject to the terms of Article 7.

35. In the event that the breach of Article 7 of the 1859 Treaty was not to be regarded as material, then arguably Guatemala would not have had the right to terminate the entire Treaty. It would have been open to Guatemala to take countermeasures against the United Kingdom,

[50] Lauterpacht *et al*, Joint Opinion, pp. 17-26.

proportional to the prior wrong. It is unlikely that the failure to build the cart road or river facilities would have been treated as a minor breach, but a minor breach would not plausibly have led to an adjustment of title to territory.

(iv) Boundary Stability

36. International Law tends to favour boundary stability in the context of treaties. So, for example, Article 11 of the Convention on Succession of States in respect of Treaties (1978)[51] provides that a succession of states does not affect a boundary established by treaty. Similarly, Article 62 of the Vienna Convention on the Law of Treaties indicates that the rule concerning fundamental change of circumstances may not be invoked as a ground for terminating a treaty if the treaty establishes a boundary.[52] In both these cases, preference is given to the permanence of boundaries set out in treaties.

37. This preference has also arisen in the context of treaty interpretation at the International Court of Justice. In the Territorial Dispute (Libyan Arab Jamahiriya v. Chad) Case,[53] the Court considered the significance of a 1955 Treaty between the parties on the delineation of a boundary. Article 11 of the Treaty provided that the Treaty was concluded for 20 years and that it could be terminated by either party after 20 years, or, with one year's notice, at any subsequent time.[54] Simultaneously, Article 3 of the Treaty specified a boundary which was "recognized" by the parties.[55] The Court relied on Article 3 to resolve the dispute, and in the course of its assessment emphasized the importance of boundary stability. The Court expressly noted that the boundary would have permanent status, even in the face of the termination

[51] United Nations, Treaty Series, Vol. 1946, p. 3.

[52] Article 62(2)(a).

[53] ICJ Rep (1994), p. 6.

[54] Para. 72.

[55] Para. 42.

provision in Article 11. In a passage which merits substantial quotation, the Court held:

> *"72. These provisions (Article 12) notwithstanding, the Treaty must, in the view of the Court, be taken to have determined a permanent frontier. There is nothing in the 1955 Treaty to indicate that the boundary agreed was to be provisional or temporary; on the contrary it bears all the hallmarks of finality. 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 emphasized by the Court...*[56]
>
> *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, 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 lie of the treaty under which the boundary is agree."*

38. Lauterpacht *et al* in their Joint Opinion suggest that these Court *dicta* are "obvious and inescapable" in their applicability to the Belize/Guatemala situation.[57] The crux of their argument is that the boundary in Article 1 of the 1859 Treaty has achieved a permanence which prevails whether or not the 1859 Treaty is terminated. In keeping with this approach, there is considerable scope for the view that even if the United Kingdom is held to have failed to meet its obligation under Article 7 of the 1859 Treaty and Guatemala has successfully withdrawn from the Treaty, the boundary in Article 1 remains in place as a

[56] Here the Court cited The Temple at Preah Vihear Case, ICJ Rep. 1962, p.34, and the Aegean Sea Continental Shelf Case, ICJ Rep. 1978, p. 36, in support of its position.

[57] Lauterpacht *et al*, Joint Opinion, *loc. cit*, note 6, p. 16, para. 33.

permanent boundary in view of the approach taken in the Territorial Dispute (Libyan Arab Jamahiriya v. Chad) Case on the finality of boundaries.[58]

39. This conclusion, however, must be offered subject to one caveat. The Court's position presupposes that the boundary which is to be given permanent effect is not provisional; it is an established boundary with the hallmarks of finality. The question, then, is whether the boundary contemplated in Article 1 of the 1859 Treaty has the requisite characteristics. On one view it does, because the boundary contemplated in Article 1 is not stated to be subject to any qualification: Article 1 expressly states that the boundary is "agreed", and that it is "agreed and declared". Moreover, the boundary in Article 1 could readily have been made "subject to the terms of Article 7" but it was not: this suggests that the Article 1 boundary was established in the Treaty, without qualification. It is to be expected that the countervailing view – that Article 1 must be read in the context of Article 7 – will be presented by Guatemala. This view, however, will be undermined by the fact that the boundary in the Territorial Dispute (Libyan Arab Jamahiriya v. Chad Case remained as a permanent boundary. That boundary provision could possibly have been read as subject to other provisions in the same way that one could argue that Article 1 of the 1859 Treaty should be read as subject to Article 7; and yet, the Court did not regard the 1955 boundary rule as provisional. In the circumstances, Libya/Chad provides strong support for the proposition that the boundary in Article 1 of the 1859 Treaty remains validly in place today, even if the Treaty is not in force.

(c) Self-Determination

40. One of the main points in support of the Belizean claim to the territory now within its jurisdiction is self-determination. From well before the First World War self-determination has influenced State practice in international relations. The United Nations Charter lists equality and self-determination among its core purposes and various United Nations General Assembly Resolutions, such as Resolution 1514, the Declaration on the Granting of Independence to Colonial Countries and Peoples, have given substance to the concept both under the

[58] *Ibid.*, para. 34.

Charter and in customary international law. In various cases, the International Court of Justice has upheld the validity of self-determination in the *lex lata.* Thus, for example, in the Namibia Advisory Opinion, the Court held that self-determination applied to all non-self-governing territories, while in the Western Sahara Case, the Court provided guidance on ways in which self-determination may be implemented in practice. More recently, the Court has found in the Advisory Opinion on Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 that although Resolution 1514 is formally a recommendation, "it has a declaratory character with regard to the right to self-determination as a customary norm."[59] Belize, therefore, is on firm legal ground when it invokes self-determination. In essence, it does so to argue that the people of Belize constitute a unit for the purposes of self-determination, and that, as a matter of course, the vast majority of persons in Belize are unequivocally of the view that the territory of Belize should remain with unchanged boundaries.[60]

41. In applying the principle of self-determination, Belize may reinforce its position by reference to the fact that some General Assembly Resolutions refer directly to the exercise of self-determination by Belize. Resolution 35/20 of 1980, which supported the independence of Belize, exemplifies this position.[61] Among other things, Resolution 35/20 recalled that the Non-aligned Movement had reiterated its unconditional support for the Belizean people's inalienable right to self-determination, independence and territorial integrity,[62] reaffirmed the principles

[59] Advisory Opinion of 25 February 2019, para. 152.

[60] In some instances, decisions concerning self-determination have been taken pursuant to referenda, but the International Court of Justice has noted that in some cases this is unnecessary: see, e.g., the Western Sahara Advisory Opinion, ICJ Rep. 1975, p. 33, para. 59: "The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a 'people' entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances." The Belizean vote for self-determination would fall in the category of the "totally unnecessary" both with respect to independence and with respect to whether the Belizean State should lose any of its territory to Guatemala.

[61] United Nations General Assembly Resolution 35/20, 11th November 1980, [illegible] ga/res/35/a35r20e.pdf.

[62] Preambular paragraph 6.

enshrined in General Assembly Resolution 1514[63] and expressed the conviction that existing differences between the United Kingdom and Guatemala should not "in any way" derogate from the right of Belizeans to self-determination, independence and territorial integrity.[64] On this basis, the General Assembly declared that Belize should become an independent country by 1981.[65] The Resolution also called upon the United Kingdom to continue to ensure the security and territorial integrity of Belize,[66] and called upon Guatemala and independent Belize to work out arrangements for post-independence cooperation.[67] The emphasis placed on the territorial integrity of Belize and the substantial support for the Resolution should not go unnoticed. They reflect a solid core of support within the United Nations for Belizean title to territory within the country's current borders – primarily on the basis of the self-determination of peoples.

42. But although the case for Belizean self-determination will be a factor in any litigation between Belize and Guatemala, the discussion is not one-sided. The leading General Assembly Resolution on self-determination – Resolution 1514 – sets out two propositions that appear, in some senses, to conflict with each other in the case of Belize. These propositions are found in paragraphs 2 and 6, respectively. According to paragraph 2:

> *"All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."*

This provision works clearly and directly in favour of the Belizean position in the territorial dispute. But, on the other hand, paragraph 6 of the Resolution states:

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[63] Preambular paragraph 7.

[64] Preambular paragraph 10.

[65] Operative paragraph 2.

[66] Operative paragraph 6.

[67] Operative paragraph 9.

"Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations."

This provision could possibly allow Guatemala to argue that the exercise of self-determination by Belizeans pursuant to paragraph 2 could lead at least to the partial disruption of Guatemala. Guatemala's argument would be that it has title to territory over some or all of Belize by virtue of historic title, and as such, its territorial integrity would be disrupted if Belizean self-determination is fully recognized. Judge Crawford, writing extra-judicially,[68] highlights the conflict between paragraphs 2 and 6 of Resolution 1514 mainly through a discussion of the Western Sahara Case. He notes that the majority judgment of the Court was able to rely on self-determination essentially because the pre-colonial entities – Morocco and Mauritania – did not have ties sufficient to overcome the right of self-determination among the people of Spanish Sahara.[69] So, the Court was not obliged to resolve the conflict between paragraphs 2 and 6 in that case.

43. The matter, however, seems to have been addressed by the Chamber of the Court in the Frontier Dispute (Burkina Faso v. Mali) Case. In this case, the Chamber expressly considered the relationship between self-determination and the *uti possidetis juris* principle. Although the Chamber did not address the question by reference to Resolution 1514 and its conflicting paragraphs, it held that where the *uti possidetis* and self-determination principles are in conflict, the former should prevail. The Chamber held:

"At first sight this principle (uti possidetis) conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course to preserve what has been achieved by peoples who have struggled for their independence and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice..."

[68] James Crawford, The Creation of States in International Law (1979), pp. 377-380.

[69] *Ibid.*, p. 379. Some judges were divided on the point: see Judges Dillard, who maintained that self-determination was the "cardinal principle" and it cannot be overridden by territorial claims of third States; *cf.* Judge Petren, who gave both co-ordinate status: both cited by Crawford, at pp. 379-380.

In light of this, the Chamber noted, African countries have consented to respecting colonial frontiers and to take account of it in the interpretation of the principle of self-determination.

44. It is appropriate to conclude, therefore, that if Guatemala is able to demonstrate that it has historical title from the colonial period over the territory of Belize, it could trump Belize's self-determination rights on the basis of the Burkina Faso v. Mali Case. But this will be extremely difficult, for, the Guatemalan historical claim is subject to various qualifications, and does not seem to be stronger than the historical claims of Belize, which are supported by *effectivites*. In addition, the United Nations has accepted this position. Thus, in Resolution 35/20 noted above, the General Assembly assumed that the territorial integrity to be preserved was not that of Guatemala, but that of Belize. Resolution 35/20 presupposed that Belizean independence would not have disrupted the integrity or national unity of Guatemala, and emphasized the importance of preserving the integrity of Belize. In the Chagos Islands Advisory Opinion, the International Court of Justice attached considerable – even decisive -- importance to the practice of the United Nations General Assembly in addressing matters of decolonization.[70] With this in mind, the case for Belizean title to the entire territory now under its jurisdiction is considerably strengthened by the General Assembly's insistence that the territorial integrity of Belize was to be respected in the decolonization process. This insistence may be taken as affirmation by the international community that, at the time of its independence from the United Kingdom, Belize succeeded to the entire area within its jurisdiction and control.

45. In his comprehensive review of actions taken by Belize at the United Nations in respect of the self-determination claim, Assad Shoman explains the situation in the following terms:

> *"...(W)e successfully turned the tables on Guatemala at the UN, when it tried to argue that (its) territorial integrity trumped Belize's right to self-determination under paragraph 6 of Resolution 1514 ... Guatemala*

[70] In the Chagos Islands Case, the Court noted that "the obligations arising under international law and reflected in the resolutions adopted by the General Assembly during the process of decolonization of Mauritius require the United Kingdom, as the administering Power, to respect the territorial integrity of that country, including the Chagos Archipelago": ICJ Reports 2019, Advisory Opinion of 25 February 2019, para. 173,

tried to argue that this meant that its supposed right to territorial integrity of the Belize territory that it said belonged to it overruled Belizean peoples' right to self-determination, but it ended up not getting a single vote in its favour. That is because the paragraph was understood by States as an important prohibition on the dismemberment of non-self-governing territories by the administering power prior to independence. Indeed, in the pro-Belize resolutions (1975-1980) this recognition that territorial integrity forms part of the full exercise of the right of the peoples of colonial territories to self-determination was repeated 17 times as an inalienable right to territorial integrity."[71]

IV. RECENT GAF ACTIVITIES AND IMPLICATIONS

46. The territorial dispute between Belize and Guatemala has prompted substantial diplomatic exchange at the highest levels in both countries, several initiatives through the Organization of American States, various United Nations resolutions and the establishment of different *ad hoc* groups to address particular issues. The dispute has now prompted the realistic prospect of the submission of the case to the International Court of Justice. Against this background of a longstanding dispute with various public initiatives, it is hardly surprising that there have been significant incidents and periods of tension in some parts of the disputed regions between Belize and Guatemala.

47. In recent years – and particularly since 2015 – a notable zone of tension has been in the Sarstoon region, concerning both Sarstoon River and Sarstoon Island. In keeping with its overall claim, Belize maintains that it has sovereignty over the Sarstoon River to the mid-channel of the waterway, and sovereignty over the entire island.[72] This claim is based on the boundary provisions of Articles 1 and 6 of the 1859 Belize/Guatemala Treaty. In contrast, Guatemala retains the view that both the Sarstoon River and Sarstoon Island belong to it, a claim based

[71] Assad Shoman, Guatemala's Claim to Belize: The Definitive History (2018), p. 423.

[72] See, e.g., "Belize Does Claim Sarstoon Island, CEO/Foreign Affairs Tells Reporter", BBN, June 25, 2016, [illegible].

ultimately on the Guatemalan perception of how the *uti possidetis juris* principle should apply in Central America. The recent tension in the region has manifested itself primarily in certain actions by the Guatemalan Armed Forces (the "GAF") and in Belizean reactions thereto. The GAF has, for example, required persons to obtain permission from them to access the Sarstoon River and has prevented Belizeans from visiting Sarstoon Island. Guatemala has also had military personnel patrolling the island. At the same time, some nationals of Belize have proceeded along channels of the Sarstoon River believed to be on the Belize side of the river and have visited Sarstoon Island without seeking or obtaining Guatemalan permission. This situation has prompted instances of challenge and resistance.

48. For example, in August 2015, the Government of Guatemala opposed the construction of a Belize Coast Guard Forward Operating Base on Sarstoon Island. This led to considerable tension between Guatemalan and Belizean naval personnel. It also prompted a Belizean civil society group, the Belize Territorial Volunteers, to undertake an effort to assert that Belize retains sovereignty over Sarstoon Island. This group included approximately 130 persons. Upon arriving at Sarstoon Island, they were told by the Guatemalan military personnel there that they were trespassers and should leave the island. They reportedly remained for some time, and undertook actions such as the raising of a Belizean flag and singing the Belizean national anthem.

49. In response to this episode, Dean Barrow, the Belizean Prime Minister, while commending the patriotism of the Belize Territorial Volunteers, noted the dangers involved in their activity, including the risk of confrontation with the Guatemalan Navy and overcrowding of expedition boats. On this occasion, the Prime Minister also explained the position of the Belizean Government concerning the situation in the Sarstoon area. After pointing out that Belize was not relinquishing any land to Guatemala, including especially the Sarstoon Island, the Prime Minister added:

> *"Every Tuesday the Belize Defense Force takes a replacement contingent of soldiers to our side of the Sarstoon River to our military outpost at Cardenas, and brings back down the River the troops being rotated out from Cadenas. In doing this, and consistent with our assertion of sovereignty, we ask neither leave nor license from*

the Guatemalans. Indeed our BDF (Belize Defense Force) are routinely challenged by the Guatemalans and frequently told to turn back. Our soldiers never retreat and are never deterred by these standoffs. They always complete their mission, even when they are threatened by the Guatemalan Navy with the ramming of their boat and/or a firefight. So the fact is that our security forces protect and defend our Sarstoon River sovereignty on a continuing basis, operationally demonstrated every Tuesday of every week of every year without fail."[73]

50. In light of the tension in the Sarstoon area, the Government of Belize sought to close off the area from Belizeans by Statutory Instrument in April 2016.[74] This instrument was revoked in May 2016.[75] A constitutional challenge to the Statutory Instrument by the opposition People's United Party was struck out by the Belizean Chief Justice in October 2016, some months after the revocation of the instrument.[76] But the incidents have recurred. For instance, in September 2018, armed members of the GAF reportedly challenged members of the Belize Territorial Volunteers and other civilians on the Sarstoon River as they headed to the island. The GAF was said to be on three vessels, with a Guatemalan gunboat docked in the distance.[77] The Government of Belize protested against this incident, with John Saldivar, the Minister of National Security underlining that the Government consistently protests in respect of Guatemalan incursions:

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[73] "PM Barrow Confirms Guatemalan Military Hostility in Sarstoon Area", The San Pedro Sun, August 26, 2015

[74] Statutory Instrument 42 of 2016; Government of Belize Press Office, "Government of Belize Places Temporary Restrictions on Movement in Belize's Portion of the Sarstoon River for One Month", April 29, 2016.

[75] Government of Belize Press Office, "Government of Belize Revokes Sarstoon Prohibition Statutory Instrument", May 24, 2016; "Agreement Reached on Sarstoon, SI Revoked", BBN, May 24, 2016, https//www.breakingbelizenews .com/2016/05/24/agreement-reached-sarstoon-si-revoked.

[76] "Chief Justice Drops Claim over Sarstoon SI", News 5, October 6, 2016, edition. channel5 belize.com /archives/136114.

[77] "Opposition Leader: We Need a Sarstoon Protocol", News 5, September 19, 2018, edition.channel 5belize.com/archives/172160.

> *"Clearly we are concerned about the Guatemalan activity in and on that river, it's a clear violation of International Law with respect to observing our sovereignty and territorial integrity and that is the reason we have protested. At all times that this has happened we have had the Ministry of Foreign Affairs send a note to the Guatemalans about their actions."*[78]

More recently, in October 2018, the Ministry of National Security in Belize announced that it would be conducting excursions up the Sarstoon River to afford Belizeans first-hand knowledge of the area.[79]

51. What, then, are the implications of these developments for Belizean case in relation to the dispute with Guatemala?

(a) Evidently, Guatemala hopes that by closing off access to the Sarstoon River and Sarstoon Island, it will either obtain title to both the river and the island or it will confirm title to these areas.

(b) If the objective is to obtain title, then the actions by Guatemala will amount to an attempt at annexation of areas not currently belonging to Guatemala. Guatemala would be seeking to obtain title by one of the traditional modes of acquiring territory, most probably prescription. For title to be acquired by prescription, Guatemala would need to establish that Belize has "slept on its rights", that is, Guatemala would need to establish that it has had undisturbed continuous possession over the area for some length of time.[80] Although the period of time is not specified for prescription, activity by Guatemala since 2015 would not be sufficient for title to be acquired. More importantly, title will not pass to Guatemala if Belize continues to protest, for protests will ensure that Guatemala's claim is not undisturbed. In this regard, the Government of Belize would be well-

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[78] "Protest Note Sent to Guatemala over Sarstoon Incident", September 19, 2018, Love FM News, lovefm.com/protest-note-sent-guatemala-sarstoon-incident.

[79] "Ministry of National Security Leads Excursions Up Sarstoon River", News 5, October 24, 2018, Interview with (Ret.) Col. George Lovell, CEO, Ministry of National Security, edition.channel5belize.com/archives/173998.

[80] Robert Jennings and Arthur Watts, Oppenheim's International Law, 9th ed. (1992), p. 706.

advised to seek support from other countries in ensuring that Guatemalan activity in the Sarstoon area is challenged through diplomatic means.

(c) Guatemala may also seek to argue that it is acquiring title to territory over Sarstoon Island by occupation. Occupation arises in respect of unoccupied territory owned by no one (*terra nullius*).[81] Sarstoon is reportedly uninhabited, but, as is evident from the claims of Belize and Guatemala, it is already owned by one or other of these States. Occupation would not, therefore, constitute a legitimate mode of acquiring title by Guatemala at this time.

(d) By seeking to control access to the river and the island, Guatemala may be attempting to confirm its title to the area, based on the other elements of its claim, such as *uti possidetis juris* and the termination of the 1859 Treaty. This approach will falter as long as Belize continues to protest. By protesting Guatemala's activities in relation to the river and the island, Belize ensures that it is not giving acquiescence to the Guatemalan approach.

(e) Guatemala may also be preparing the ground for an argument that it is exercising effective control or *effectivites* concerning the Sarstoon area. Again, however, this approach will be effectively undermined if Belize continues to protest against the actions by Guatemala which imply or indicate that Guatemala is in control of the territory.

(f) In addition to protesting Guatemala's activities concerning the Belize portion of the river and the island, Belize should also continue to ensure that its own legislative, administrative and judicial reach includes the Sarstoon area. This will continue to confirm Belize's *effectivites* in relation to all areas of its claim.

52. In some cases, international tribunals have paid attention to the concept of the critical date in territorial disputes. In brief, the critical date is the time at which it is accepted that a dispute has arisen.[82]

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[81] *Ibid.*, p. 686.

[82] Jennings and Watts, *loc. cit.*, note 80, pp. 710-712.

Actions taken by States after the critical date are taken to be irrelevant in determining title to territory, for it may be assumed that these late actions are designed to influence the result of the dispute. In the Territorial and Maritime Dispute Case, the International Court of Justice referred to the critical date in the following terms:

> *"...(I)n the context of a dispute related to sovereignty over land ... the date upon which the dispute crystallized is of significance. Its significance lies in distinguishing between those acts* a titre de souverain *occurring prior to the date when the dispute crystallized, which should be taken into consideration for the purpose of establishing or ascertaining sovereignty, and those occurring after that date..."*[83]

Also, in the case of Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras),[84] the Court described acts occurring after the critical date as "in general meaningless" for determining title as they could have been taken "strictly with the aim of buttressing claim to title". The identification of the critical date for the Belize/Guatemala dispute may not be a straightforward task given the longstanding nature of the situation. Clearly, though, the critical date preceded 2015. So, it is not at all likely that the actions of Guatemala since 2015 in relation to the Sarstoon area will have implications on title passing to Guatemala, unless Belize acquiesces to this. Indications are that the actions of Guatemala today in relation to the Sarstoon area are being taken "strictly with the aim of buttressing title to territory."

53. The Government of Belize has adopted the practice of sending protest notes to Guatemala regarding the actions of the GAF. This is important and should continue. The GAF, for the purposes of International Law, is an organ of the Guatemalan State, and its actions

[83] Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, ICJ Rep. 2012, p. 652, para. 67.

[84] ICJ Reports 2007(II), pp. 697-698, para. 117.

are attributable to the State.[85] Belize must keep Guatemala fully informed of its responses when it is of the view that Guatemala is in breach of International Law. Belize is also correct to presume that it has sovereign title over the Sarstoon area, so that any actions that appear to challenge this title must be the subject of diplomatic protest. So, diplomatic protest is necessary, but is it sufficient? In the circumstances of the Belize/Guatemala dispute, the answer to this question is yes. To be sure, the strength of the Belizean protests will be reinforced by the presence of military forces, for this will underline the seriousness that Belize attaches to the situation.[86] But, on the other hand, as the Government of Belize has noted, in some situations, confronting the GAF, as, for instance through the Belizean Territorial Volunteers, may give rise to physical danger. The Government therefore needs to balance the risk to persons against the additional strength it receives by backing up its protests with action. International law frowns on the use of force and promotes the peaceful settlement of disputes. Thus, the peaceful approach taken by the Government of Belize cannot weaken their approach as a matter of International Law.

54. Finally, diplomatic protests will help to preventing an estoppel arising against Belize in relation to the Sarstoon area. In the Temple at Preah Vihear Case,[87] one of the bases for the decision of the International Court of Justice was that Thailand had, in effect, allowed Cambodia to assume that it had accepted the correctness of certain maps and had approached the Temple in the form of a visit. Thus, Thailand was estopped from denying title to the Temple to Cambodia. In this case, Belize must continue to protest to ensure that no such estoppel arises.

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[85] Article 4, International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the 53rd Session, International Law Commission (2001), General Assembly, Official Records, 56th Session, Supp. 10.

[86] For the view that for purposes of developing customary international law, State practice should be more than words, see Judge Read in the Anglo-Norwegian Fisheries Case, ICJ Reports 1951, at p. 191.

[87] Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)(Merits), Judgment of 15 June 1962, ICJ Rep. 1962, p. 6 at especially at pp. 25-26, 30-31.

V. CONCLUSION

55. This opinion has presented an independent analysis of the Belize/Guatemala dispute from the standpoint of International Law. It has sought to incorporate the main positions that have been advanced in the legal literature on the subject, and has placed emphasis on the methods and concepts used by the International Court of Justice in cases concerning title to territory.

56. The strongest case for Belize in any litigation before the International Court of Justice will include some or all of the following elements:

(a) The United Kingdom, as the predecessor in title to the area of Belize under challenge, obtained title to the area through the process of occupation which began in the 17th century, and which by 1821 had crystallized as a right.

(b) In 1821, when Guatemala gained independence, it obtained title to territory over areas which were within the Captaincy General of Guatemala previously held by Spain, pursuant to the principle of *uti possidetis juris*. Guatemala did not, however, gain title to the area of Belize under challenge. This was so because title to the area was already vested in the United Kingdom. The principle of *uti possidetis juris* would not work to deprive the United Kingdom of territory which was by 1821 vested in the British Crown.

(c) Alternatively, in 1821, title to the area was uncertain, either because the boundary for the area was uncertain or because there were competing claims between the United Kingdom and Guatemala. The International Court of Justice has held where a boundary is uncertain, then considerations in addition to *uti possidetis* will apply. In particular, the Court will look at the *effectivites* in relation to the area under consideration. Similarly, where there are competing claims to an area, the Court will examine the *effectivites*. When the *effectivites* are considered, the United Kingdom claim will prevail, for, without doubt, the United Kingdom exercised effective control and jurisdiction over the area of Belize from at least 1859, and there is no evidence of any similar exercise of control and jurisdiction by Guatemala over the area.

(d) The 1859 Treaty between the United Kingdom and Guatemala served to confirm British title over the area of Belize, from 1850. The Treaty did not cede title from Guatemala to the United Kingdom. Rather, it was a boundary treaty that affirmed the boundary of Belize, as held by the British. The provision in Article 1 of the Treaty setting out the boundary was not a *quid pro quo* for the provision in Article 7 concerning the construction of a cart road or alternative river transport.

(e) The Article 7 stipulation concerning the construction of a cart road or alternative river transport was not satisfied by the United Kingdom. With the United Kingdom in breach, Guatemala may have had the option of terminating the Treaty, but it did not exercise this option for about 60 years. On this view, the Treaty remained in place up to the point of Belizean independence, and did not undermine the territorial integrity of Belize. The Treaty commitment in Article 7 could still be applicable, as a Treaty commitment vis-à-vis the United Kingdom, but it would not apply to Belize as the successor State to the United Kingdom.

(f) Alternatively, when Guatemala sought to denounce the 1859 Treaty in 1940, it was successful, and so, the Treaty is no longer in force. The Treaty commitment in Article 7 would no longer be applicable to the United Kingdom. With reference to the Libya/Chad decision of the International Court of Justice, the boundary between the United Kingdom and Guatemala set out in Article 1 survived the termination of the Treaty.

(g) In modern practice, rules respecting the self-determination of peoples have passed into the *corpus* of International Law. These rules, which have received validity mainly through resolutions of the United Nations General Assembly, work significantly to the advantage of Belize. These rules indicate that the people of Belize have the right of self-determination, a conclusion which is supported by Resolution 35/20 of the General Assembly. Resolution 35/20, on the Question of Belize also affirmed the territorial integrity of Belize and supported its independence. The affirmation of the territorial integrity of Belize and self-determination of its people strongly reinforces the view that the international community that the State of Belize should not be

dismembered along the lines suggested by Guatemala. The very recent Chagos Islands Advisory Opinion of the International Court of Justice attaches considerable significance to resolutions of the General Assembly in determining issues of decolonization. Belize emerged from decolonization as a single unit, with full support from the United Nations as a single unit.

57. The main weakness of the Belizean case arises from the fact that this dispute turns on questions of history about which opinions differ. Determining the date at which the original British title to the area stretching to the Sarstoon River is not an easy matter. Another possible point of weakness arises from the colonial context in which this dispute emerged. Two postcolonial States, Guatemala and Belize, will be called upon before the Court to rely on arguments originating from the imperial Governments of Spain and the United Kingdom to justify their positions. From the point of view of Belize, it may be seem paradoxical that this postcolonial State, which emerged into independence through the modern process of self-determination, now finds itself pressed to defend its territory on the basis of 17th century log cutters, equivocal 19th century negotiators, a British Government that ostensibly failed to meet its obligations to share in the cost of building a cart road or some suitable riparian alternative. The Belizean case may also face a particular challenge concerning Article 7 of the 1859 Treaty. The Court could take the view that Article 7 cannot be ignored: it is or was a British commitment that was never fulfilled. Thus the Court may wish to find some way of giving effect to Article 7 if it is to uphold the Belizean boundary. As Shoman reports, Judge Hudson, who prepared an opinion on the Guatemala/Belize dispute, was also concerned about the problem of Article 7, and contemplated a compensatory payment on the part of the United Kingdom.[88] The United Kingdom's liability under Article 7 is, however, not a certainty, and, on the present writer's reading of the law, it does not have an impact on the drawing of the Belizean boundary. Finally, it is important to ensure that the British and Guatemalan archives are fully surveyed to ensure that all key documents are available to the lawyers as they prepare for litigation. In addition to strengthening the case for Belize, this will also prevent the possibility of surprise in the litigation, an ever present risk when more than 300 years of documentary evidence have to be assessed.

[88] Assad Shoman, *loc. cit.*, note 71, p. 427.

58. This opinion has also looked at recent developments relating to the Sarstoon River and Sarstoon Island, stemming from activities of the Guatemalan Armed Forces in respect of both the river and the island. To the extent that the Guatemalan Armed Forces are not recognizing the boundaries set out in Article 1 of the 1859 Treaty, they are violating International Law. Their motive, presumably, is to set in train the idea that they are in effective control of these areas, as the basis for title to territory. As long as Belize protests and repeats its protests frequently and widely, there will be no change in the legal status of the areas in question in favour of Guatemala.

Stephen Vasciannie

February 26, 2019

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