BELIZE

JOINT OPINION

by

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and

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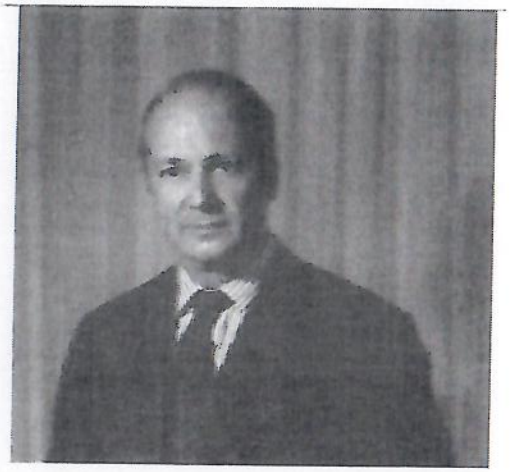

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OUTLINE

BELIZE

JOINT OPINION OF MR. E. LAUTERPACHT, Q.C. AND DR. D. W. BOWETT, Q.C.

I. INTRODUCTORY

1. We have been asked to advise on the question of title to the territory of Belize (formerly British Honduras). We do so exclusively in terms of relations between Belize and its western neighbour, Guatemala. The precise legal position which Guatemala adopts is not easy to identify—varying as it has from time to time and not always being fully self-consistent. Consequently, it may be simplest if we set out in positive terms what we understand to be the principal elements upon which British sovereignty in Belize rests to-day and upon which the integrity of Belize's eventual title to its territory as an independent State must also largely stand.

2. We shall, therefore, adopt in the main part of this Opinion primarily a chronological approach. It is essential, however, to appreciate that at the core of the problem lies a treaty—the Treaty of 1859 between Britain and Guatemala. From the British point of view, this treaty was no more than a boundary treaty, settling the limits of an area to which British title was already established. From the Guatemalan point of view, however, at any rate as developed subsequent to the Treaty, it was a treaty of cession conditional upon the fulfilment by Britain of an obligation to participate in the construction of a road. Since—so Guatemala contends—the condition has not been satisfied, the Treaty lapses, the basis of British sovereignty over Belize disappears and the territory must once again be seen as Guatemalan. We find ourselves in disagreement with virtually every element in the Guatemalan case (as we understand it).

3. **Summary of our views.** It may be helpful if we preface the principal part of this opinion with a summary statement of our views.

(*i*) The basic reliance of Guatemala upon the doctrine of *uti possidetis* is unsound. As a departure from the rules of international law generally applicable to the determination of title to territory, the concept of *uti possidetis* can operate only between those successor States of Spain in Latin-America which have agreed to accept its operation. The concept cannot be invoked for the determination of boundary disputes between a State which is a successor to Spain and one which is not.

(*ii*) Even if the doctrine were applicable, there is clear evidence that during the period of Spanish administration the northern part of the Territory was subject to the jurisdiction of the former Spanish provincial authorities of Yucatan (now in Mexico) and not of those who controlled the area now in Guatemala. As regards the southern part, while there is little evidence of administration by Yucatan, there is no evidence of administration by the province which became Guatemala.

(*iii*) Consequently, the title of Spain to the Territory, which undoubtedly existed before the beginning of the 19th century, did not pass to Guatemala. Nor was it retained by Spain for long after the rebellion of her Central American colonies in 1821. Instead, British administration of the Territory ripened into full sovereignty over the area by virtue of the dereliction of Spanish title from 1821 onwards leading to a vacuum which was filled by British

presence. Alternatively, British presence in the area, giving rise to no opposition from Spain, can be seen as the basis of a prescriptive acquisition of title by Britain. On either footing, British title to the Territory was effectively established by 1859.

(*iv*) In these circumstances, the 1859 Treaty between Britain and Guatemala cannot bear the construction which Guatemala seeks to put on it, namely, that it was a treaty of cession of the Territory by Guatemala to Britain conditional upon the use of best efforts to establish a communication route. Instead, the Treaty must be read in conformity with its wording, which indicates that it is a treaty for the settlement of the boundary between Guatemala and what was at that time already British territory.

(*v*) The fact that the terms of Article 7 of the 1859 Treaty have not been implemented —though arguably amounting to a breach by Britain of the Treaty—is in any event not a circumstance which supports the claim by Guatemala to regard the Treaty as at an end.

(*vi*) However, even if the operation of the Treaty were terminated, this could do no more than reconstitute the *status quo ante* which, as already stated, was one of British title to the Territory.

(*vii*) In any event—and especially under these conditions—there is no legal basis for excluding the operation of the concept of self-determination in accordance with standards currently applied in the international community, with consequences entirely adverse to the claim of Guatemala.

Note on the material used in the preparation of this Opinion.

4. We should explain that in the preparation of this Opinion we have made use only of materials in the public domain. These have included the *White Book* prepared by the Government of Guatemala, various histories of British Honduras and British official documents falling within the "open" period, i.e. up to 1948. We have not, however, been able to go over the whole diplomatic history of British Honduras from original papers and in a number of important respects we have relied upon the works, and accepted the conclusions, of historians who have made a special study of the problem.

The area of the Territory.

5. Before turning to the substantive part of the Opinion, however, it is important to be precise about the area with which the Opinion is concerned and which we frequently simply call "the Territory".

6. The present territory of Belize is the same as that of British Honduras. The essential elements of the boundaries of the Territory are (in approximate terms) that, in the north, they coincide with the Hondo River, in the south with the Sarstoon River. On west the boundary with Guatemala runs approximately north-south along the meridian of longitude 89° 9" west. In addition, the territory includes a number of offshore islands and bays.

7. The territory has not always had these dimensions; and one of the facts to be observed is that British settlement in this area expanded in the 18th and early 19th centuries southwards from the Belize and Sibun rivers to the Sarstoon river.

Main parts of the Opinion

8. The legal claim of Guatemala raises the following three main categories of issues;

(1) Was Guatemala sovereign over the Territory or any part of it immediately before the 1859 Treaty? If it was not, then there is no basis for its present claim, even if the 1859 Treaty had never been concluded or, having been concluded, was or became completely void.

(2) But let it be assumed that there is some basis on which the 1859 Treaty is an operative link in the chain of British title to Belize, what is the effect of the Treaty?

(3) What is the role of the principle of self-determination?

9. Each of these issues raises further sub-issues. At this stage, however, it is sufficient to indicate that we shall divide our Opinion into three principal parts corresponding with these three main sets of issues.

II. TITLE TO THE TERRITORY PRIOR TO 1859

A. Irrelevance of alleged "historic ties"

10. In passing, it is necessary to advert to the statement by the Government of Guatemala that "the Territory of Belize is an integral part of Guatemala, bearing in mind that their "historic ties" go back to times before Columbus when Guatemala and Belize were part of the ancient Maya Empire" and that these ties "continue to exist to-day in spite of the territorial usurpation of the last century".[1]

11. Looking at the question exclusively from the legal point of view, we are bound to point out that a statement of this nature can have no legal relevance to the question. Questions of sovereignty are determined—as will be seen—either by the conduct of States in relation to the disputed territory or by acts of self-determination. The historic ties of the inhabitants of a territory, whatever the nature or extent of these ties may be, have relevance only on the political plane.

B. The position prior to 1821.

1. Formal Spanish title.

12. Prior to 1821 there is no doubt that formal title to the Territory was vested in Spain. The date 1821 is significant because in that year the Spanish colonies in Central and South America overthrew the Spanish colonial regime, thus bringing to an end Spanish sovereignty in those areas over which new States effectively acquired possession and asserted their own sovereignty. The subsequent devolution of Spanish title is a matter to which we shall turn presently. For the moment our concern is to indentify what happened in the Territory during the period of Spanish sovereignty.

2. British activity.

13. British settlement in the Territory commenced in the 17th century. In 1763, under the Treaty of Paris, Spain conceded to British Subjects the right to cut logwood in the area, but without specifying precisely the geographical limits of the right. These rights were confirmed in the Treaty of Versailles of 1783 and were made more precise in Article VI which defined the area to which they applied as "le district qui se trouve compris entre les revieres

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1. See statement by the Minister for Foreign Affairs of Guatemala at the 30th Session of the General Assembly, 1975, G.A.O.R., Plenary Mtgs., 2372nd mtg.

Wallis, ou Belize, et Rio Hondo....." The Treaty of London in 1786 extended the area southwards to the line of the River Sibun. The rights thus granted to British subjects were merely usufructuary rights and involved no cession of territory.

3. Absence of Spanish administration

14. At the same time, it must be emphasized that the Spanish claim to title in the area now comprised in the territory was not backed by any significant display of administrative power. There was never any Spanish settlement in the area. As one historian puts it:

> "The land which is now called Belize was never occupied by Spain, nor was there a clear boundary between the territory under the jurisdication of the Captain-General of Yucatan and that under the Governor of Guatemala. It was generally believed that at least the area between the Hondo River and the Sibun came under the authority of Yucatan. Certainly it was from Yucatan, and not from Guatemala, that Commissioners were appointed to inspect the settlement in accordance with the terms of the Anglo-Spanish Treaties....." [1]

15. Indeed, Spanish activity seems to have been largely confined to these visits from the inspectors designed to ensure that the British settlements were being confined to the areas specified in the treaties. The last such visit seems to have occurred in 1796. Spain did, however, protest against the construction of three forts by the settlers as late as 1816. [2]

4. Growth of British administration

16. On the other hand, it is evident that there was a steady—though slow—development of British administration in the area.

17. In 1765 the mission of Admiral Burnaby to the territory reported a "state of anarchy and confusion" and Burnaby promulgated certain minimum laws, the so-called "Burnaby Code", which were designed to remedy this situation. The laws were to be administered by the local magistrates, an elected body who had been so elected annually by the settlers as early as 1738. The settlers had a rudimentary legislature in the form of the Public Meeting, and in 1784 after the settlers had returned to the territory, [3] they both confirmed the Burnaby Code and added new laws. The Public Meeting continued as a legislature until it was replaced by a Legislative Assembly in 1854.

18. The involvement of the British Crown in the rudimentary governmental administration began with the appointment by the Secretary of State for the Colonies of a Superintendent in 1784, an official who acted under the authority of the Governor of Jamaica. It was the Superintendent who in 1790 drew up a scheme of governmental administration for the territory, a scheme approved by the Law Officers of the Crown. The Superintendent was

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1. Dobson, *A History of Belize* (1973), p. 185. Burdon, *Archives of British Honduras* (1931), Vol. I, p, 9, supports the statement that Spain never occupied the territory, but points out that Spain did not regard her title as based on occupation.

2. Dobson, *op. cit.*, p. 81.

3. During the War with Spain in 1779 the British settlers were driven out of Belize and withdrew to the Mosquito coast further south. They returned to Belize after the peace concluded by the Treaty of Versailles in 1783. See C. H. Grant, *The Making of Modern Belize* (1976), pp. 30-41.

not, however, a Colonial Governor, and his instructions were different from the Commission issued to a Colonial Governor. This followed, of course, from the fact that the territory was not regarded as a Crown Colony, but rather as a British settlement in territory under Spanish sovereignty. As described in the British Act of 1817, for the more effectual Punishment of Murder and Manslaughter committed in places *not* within His Majesty's Dominions, Belize was

> "....a settlement, for certain purposes, in the possession and under the protection of His Majesty, but not within the territory and dominion of His Majesty."[1]

The Superintendent certainly issued Proclamations, and used the locally-elected Magistracy as a form of Executive Council, [2] for the settlements could scarcely function in a governmental "void". Indeed, the British Parliament in Westminister again legislated directly for the territory when in 1820 it enacted a law regulating the construction of vessels in the British Settlement in Honduras.[3]

19. Land grants, conferring title to land, appear to have been made as early as 1807 by the Superintendent, and this authority to grant title within the treaty limits was confirmed by Act of 28 October 1817.[4] Indeed, the Judicial Committee of the Privy Council was later to hold that by 1817 the Crown had acquired territorial sovereignty.[5]

20. The actual extent of the wood-cutting settlements went beyond the treaty limits, and this was reported by successive Superintendents. By 1802 the settlements were down to the Stann Creek and Deep River, by 1816 down to the Moho River, and by 1825 Superintendent Codd's report to London enclosed a map showing occupation as far south as the River Sarstoon. [6] The land occupied showed no evidence of any administration by Spain: it was virgin land, inhabited by few Indians, and the Superintendent's attempts to confine the settlements within the treaty limits proved quite ineffectual. The Honduras Almanack of 1826 stated the occupation of the coast down to the Sarstoon as a fact. [7]

5. Absence of British claim to title by conquest

21. Despite occasional reference to the possibility that the Battle of St. George's Cay in 1798,[8] during the War between Great Britain and Spain of 1797-1802, might form the basis for a British claim to title

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1. 57 Geo. III, Cap. 53.
2. A concept familiar enough in England where the lay magistracy, the Justices of the Peace, throughout the eighteenth and early nineteenth centuries had wide administrative powers in addition to their judicial functions.
3. I Geo, IV, Cap. 1X, s. V of which described the territory as "the British Settlements at Honduras in the Province of Yucatan".
4. Humphreys, *The Diplomatic History of British Honduras* (1961), p.- 14.
5. *A.G. for British Honduras v, Bristowe* (1880) 6 A.C. 143. The Judicial Committee was aware that formal annexation did not take place until 12 May 1862.
6. *Humphreys, op. cit.*, pp. 15—16.
7. *Ibid.*, p. 18.
8. This "battle" involved the repelling of a Spanish attack by sea on the English settlement in Belize. It is described by Dobson, *A History of Belize* (1973), 75-78 and Mendoza, *Britian and Her Treaties on Belize* (1947), pp. 63-64.

by conquest'[1] Such a claim has never been seriously pursued. The effective answer to such a claim is the provision in the Treaty of Amiens of 1802 for the mutual restoration of captured territories. This clearly serves to nullify any possibility of title by right of conquest.[2] The position is not altered by virtue of the fact that in 1835, when Britain formally requested from Spain the transfer of sovereignty over the territory, it did so by referring to conquest as the basis of British title from the Hondo down to the Sarstoon.[3]

6. Conclusion regarding the period before 1821.

22. The position in 1821 was, therefore, a curious one: Spain was sovereign in terms of legal title, but the British Crown was exercising all the powers normally associated with the exercise of sovereignty, a sort of *de facto* sovereign over the territory.

23. In this connection it is necessary to emphasize that the fact that Belize could be described in the Preamble to the Act of 1817 (see para. 19 above) as a settlement "not within the territory and dominion of His Majesty" is not conclusive of the position in international law distinguishes clearly between areas which are territories or dominions of the Crown for purposes of English law and "protectorates" which are not. But the distinction does not imply that the areas thus regarded as *not* being part of British dominions were, for purposes of international law, to be regarded as under the sovereignty of anyone else.r

C. The effect of the loss of Spanish control in South America in 1821

1. Replacement of Spanish by Guatemala

24. On 15 September 1821 the Kingdom or Captaincy-General of Guatemala—which consisted of several Provinces within the Spanish administration of Central America—declared its independence of Spain.

In the same year, the Province of Yucatan[4]—which further to the north, proclaimed its independence separately as "Mexico". Until it broke up in 1839 the Kingdom of Guatemala included what are now the independent States of El Salvador, Honduras, Nicaragua, Costa Rica and Guatemala, under the collective name of the Central American Federation. After 1839 what is now Guatemala was limited to those parts of the former kingdom or Captaincy-General which prior to 1821 had formed the Province of Guatemala.

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1. See, for example, a Statement by the representative of Guatemala in the Fourth Committee of the General Assembly, G.A.O.R., 20th Session, Fourth Committee, 2162nd mtg., para. 77 See also Bloomfield, *The British Honduras—Guatemala Dispute* (1953), at p. 11. A similar claim was made by H.M. Government in correspondence with the U.S. Government in 1850-1854, summarised in *British Digest of Internaitonal Law*, Vol. 2 pp. 644-647. The Law Officers of the Crown in 1882 continued to speak of the Crown's sovereignty over British Honduras as "acquired by conquest" see Further Correspondence respecting the Construction of a Canal across the Isthums of Pnama, Part II, 1881-82 (Conf. 4769, No. 95).
2. Article 3 provided that Britin should "restitue a la Republique Francaise eta ses allies..... toute les possessions et colonies qui leur appartenaient respectivement, et qui ont ete occupees ou conquises par les forces britanniques dans le cours de la guerre, a l' exception de .....". The named exceptions were Holy Island, Ceylon but not British Honduras. For text see 56 *Consolidated Treaty Series* (ed. Parry), p. 291. Moreover, in her 1826 Treaty with Mexico, Great Britain preserved the rights of British subjects under the 1786 Treaty with Spain. This is scarcely consistent with view that Great Britain had become sovereign by conquest in 1798.
3. See F.O. 72/441.
4. The history of these events is briefly described in the Arbitral Award on Honduras Borders Guatemala/Honduras, 23 January 1933, 2 UNRIAA, 1325; also in Dobson, op. cit., 181-183 or Bloomfield, *The British Honduras—Guatemala Dispute* (1953), p. 13.

2. The doctrine of uti possidetis

25. The present claim of Guatemala to Belize rests upon the invocation by Guatemala of the concept of uti possidetis. An authoritative statement of the purpose and justification of the concept is to be found in the Award between Colombia and Venezuela in 1922 by the Swiss Federal Council:

> "When the Spanish colonies of Central and South America proclaimed their independence in the second decade of the nineteenth century, they adopted a principle of consituitional and international law to which they gave the name of *uti possidetis juris* of 1810 for the purpose of laying down the rule that the boundaries of the newly established republics should be the frontiers of the Spanish provinces which they were succeeding. This general principle offered the advantage of establishing an obsolute rule that in law no territory of the former Spanish America was without an owner. Although there were many regions that had not been occupied by the Spanish and many regions that were unexplored or inhabited by uncivilized natives, these regions were regarded as belonging in law to the respective republics that had succeeded the Spanish provinces to which these lands were connected by virtue of old royal decrees of the Spanish mother country. These territories, not occupied in fact, were by common agreement considered as being occupied in law by the new republics from the very beginning. Encroachments and illtimed efforts at colonization beyond the frontiers, as well as *de facto* occupation, became ineffective and of no legal consequence,"[1]

26. The utility of adopting the former Spanish administration boundaries is obvious. It can be seen from the statement above that *uti possidetis* operated primarily to resolve the question of sovereignty over the areas not evidently occupied by the authorities of one or another Province or Captaincy-General of Spain. But where an area was actually occupied there were only two possibilities: either the occupation conformed to the administrative boundaries (in the sense that the occupants were subject to that particular administrative authority) or it did not. If it did, there was no problem. It adhered to the successor State. If it did not, there then arose the need to determine which of two States was sovereign: one holding itself out as a successor to the Province which previously had possessed formal administrative authority in the area (the *de jure* approach); the other holding itself out as successor to the Province which had in fact performed administrative acts in the area (the *de facto* approach).

27. These alternatives were discussed in some detail in a case to which Gustemala was a party, and involving its south-eastern boundary with Honduras. There Guatemala invoked the *de facto* approach and Honduras the *de jure* approach. In the *Award on the Honduras Borders*, 1933, the Special Boundary Tribunal concluded essentially in favour of the Guatemalan approach, as the following extracts show:

> "Guatemala contends that by reference to the '*uti possidetis* of 1821' the Parties meant to have the line drawn 'in conformity with a fact rather than a theory, the fact being what the Spanish monarch had himself laid down or

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1. 1 *UNRIAA* 228: the original Award was in French. The English translation given above is taken from the Judgement of Judge Holguin in the *Case Concerning the Arbitral Award made by the King* of Spain on 23 December 1906 (Honduras v. Nicaragua) I.C.J. Reports, 1960, 226.

permitted, or acquiesced in, or tolerated, as *between Province and Province* (emphasis supplied), in 1821', and that the test of that line would be 'the sheer factual situation' as it was at that time. Honduras insists that the phrase '*uti possidetis* in Article V signifies '*uti possidetis juris*', and that a line could not be considered 'as being juridically based on a *uti possidetis de facto*'.

"In the Mediation proceedings, the representative of Guatemala referred to "the improper formula of *uti possidetis*;' stating that 'This principle in practice has divided the opinions of publicists, inasmuch as while some maintain that insolving the boundary questions by the *uti possidetis*;, they must consider only the fact of the possession without entering into the question of the title to the ownership, others think that the application of that formula would compel the study of titles of both jurisdictions and the granting to the nations, not precisely what they have possessed, but that which, according to the decrees of the sovereign, they had a right to possess. These opinios have been expressed in the formulas still more improper of *uti possidetis juris* and *uti poswidetis*; *facto*". The representative of Guatemala then pointed out that as between Guatemala and Honduras there was 'happily no room even to discuss which one of the two opinions must prevail', as the Treaty of 1914 had stated the test (in the provision above mentioned) 'with all possible clearness' and that by these stipulations 'the so-called principle of *uti possidetis juris* acquired binding force of law for the two High Parties'.

Honduras, by its counsel, definitely accepted the principle as thus declared by Guatemala.

The Parties derive different inferences from these former proceedings and the agreement therein as to the test then invoked. Guatemala urges that it was because of the failure of these proceedings and the unsatisfactoriness of that test, that the Parties in the present Treaty must be taken to have intended to prescribe a different test and hence deliberately used the expression '*uti possidetis* of 1821', as referring to the factual situation, instead of *uti possidetis juris*, as defining legal right. Honduras, on the contrary, refers to the former proceedings as showing an agreement between the two countries as to the 'principle of *uti possidetis* of 1821' and this is deemed to be continued by Article V of the Treaty of 1930, which is said to require the 'running' of a juridical line *de jure* between the two countries upon the *uti possidetis*, naturally *juris*, or 1821'.

"The expression '*uti possidetis*' undoubtedly refers to possession. It makes possession the test. In determining in what sense the Parties referred to possession, we must have regard to their situation at the moment the colonial regime was terminated. They were not in the position of warring States terminating hostilities by accepting the status of territory on the basis of conquest. For had they derived rights from different sovereigns. The territory of each Party had belonged to the Crown of Spain. The ownership of the Spanish monarch had been absolute. In fact and law, the Spanish monarch had been in possession of all the territory of each. Prior to independence, each colonial entity being simply a unit of administration in all respects subject to the Spanish King, there was no possession in fact or law, in a political sense, independent of his possession. The only possession of either colonial entity before indepen-

dence was such as could be ascribed to it by virtue of the administrative authority it enjoyed. The concept of '*uti possidetis* of 1821' thus necessarily refers to an administrative control which rested on the will of the Spanish Crown. For the purpose of drawing the line of '*uti possidetis* of 1821' we must look to the existence of that administrative control. Where administrative control was exercised by the colonial entity with the will of the Spanish monarch, there can be no doubt that it was a juridical control, and the line drawn according to the limits of that control would be a juridical line. If, on the other hand, either colonial entity prior to independence had asserted administrative control contrary to the will of the Spanish Crown, that would have been mere usurpation, and as, *ex hypothese*, the colonial regime still existed and the only source of authority was the Crown (expect during the brief period of the operation of the Constitution of Cadiz) such usurpation could not confer any status of 'possession' as against the Crown's possession in fact and law.

The question, then is one of the administrative control held prior to independence pursuant to the will of the Spanish Crown. The time for the application of this test is agreed upon by the Parties. It is the year 1821 when independence was declared. We are to seek the evidence of administrative control at that time.

"The colonial entities, described as Provinces, which respectively became on independence the States of Guatemala and Honduras, were districts or divisions of the Kingdom of Guatemala terminated and it had no successor save as the short-lived Central American Federation may be considered to be such. The present inquiry as to administrative control on the part of Guatemala and Honduras thus relates not to the authority of the Kingdom of Guatemala but to that enjoyed by the Governments of the provincial divisions which became the States of Guatemala and Honduras."[1]

28. It is critical to observe that, as thus authoritatively described, the function of the doctrine of *uti possidetis* was to divide territory between (in 19th century terms) the newly-emerged States of Central and Latin America which had rejected continued Spanish rule. The doctrine served to divide territory "as between Province and Province" (see the words emphasized in the first paragraph of the quotation in paragraph 27 above). And in making this division, the doctrine reflected the factual, not the formal, distribution of authority between the former Provinces. The only exception to succession on the basis of fact was where the province prior to independence "had asserted administrative control contrary to the will of the Spanish Crown". In other words, it would appear that where the limits of a Province were ill-defined or vague, their determination for purposes of succession would rest on actual administrative control. Where, however, they had been precise or could be readily identified, actual administration by a neighbouring authority in usurpation of right would not confer title.

3. **The limited relevance of *uti possidetis* in the present case.**

29. The fact that the concept of *uti possidetis* is so well established as a rule operating between the former colonies of Spain in America does not mean that it is necessarily applicable in the present case. When the present situation is looked at in terms of general inter-

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1. 2 UNRIAA, 1322-25.

national law, it is evident that what Guatemala advances as a case of *uti possidetis* is only a particular application of the rules relating to State succession. Guatemala contends that in respect of a certain part of the territory of Central it is the successor to Spain. But one must ask—what is the basis of the succession? It was not the consequence of a voluntary cession of territory by Spain. It took place as a result of rebellion. The legal consequences of rebellion are a reflection of the facts and the facts only. The rebels acquire from the original sovereign rights only over the territory which they actually occupy. Rights to any other areas can only come about as a result of grant by the original sovereign.

30. It so happens that because of local circumstances—the fact that most of the States in Central and Latin-America-rebelled against one sovereign, it was convenient for those States *inter se* to develop the concept of *uti possidetis*, especially for the purpose of dividing between them peripheral areas which had not specifically been the scene of active rebellion. But what was convenient *inter se* for the States of Spanish origin does not make law for others. As between these others, including British Honduras and the new States or Spain, the questions of title fall to be determined by more traditional rules—i.e. by the reference to the extent of occupation. The point was taken as early as 1825 by the British Law Officers when advising about sovereignty in Latin-America. H.A. Smith in *Great Britain and Law of Nations* introduces a reference to an Opinion of Robinson in 1825 by the following sentences (vol. I, p. 372)

> "We may now turn to the question of succession to territory. For reasons of practical convenience the new republics accepted as their frontiers the lines which divided the former Spanish vice-royalties. Since these lines ran for a large part through unsettled and unknown country, frontier disputes between the republics have been of common occurrence down to the present day, but the general principle of division along the Spanish lines was accepted as *between the repiblic themselves*. But this arrangement was not binding upon other States unless the other conditions governing international title were fulfilled."

Smith then cites Robinson's Opinion of 28 March 1825 to show "that he refused to admit the validity of a purely paper title unsupported by actual occupation and control Robinson questioned "whether the Recognition of (i.e. by) this Country (i.e. Britain) can justly extend further than to places within the actual possession and occupation of the new Government....." (ibid, p. 373).

31. Nearly twenty years later the same point was made by Lord Palmerston in relation to the dispute with Nicaragua regarding British rights in the Mosquito Coast. In denying Nicaragua's claim to the Port of Grey Town, Palmerston said:

> "Now in the first place I have to remark that, since the people of Nicaragua have never occupied any part of the Territory of Mosquito.....the sole pretence upon what the State of Nicaragua can claim a Right..... to any.....part of the Mosquito Territory is the allegation that the Mosquito Territory belonged to Spain, and that Nicaragua has inherited the rights of Spain over that Territory. But assuming for the sake of argument that Spain had Rights over the Mosquito, how can it be shown that those rights have devolved to Nicaragua? Has Spain ever conveyed such rights to Nicaragua by Treaty? Certainly not. Has Nicaragua obtained them by conquest? Equally not.
>
> "The People of Nicaragua revulted indeed against the King of Spain, and established by Force of Arms and de facto, their practical independence..... But the successful revolt of the People of Nicaragua could give them no right

with reference to Spain, except the right of self-government. The very principle on which their revolt was founded and which the success of that Revolt established goes to forbid them from practising towards other Nations that kind of oppression from which they had freed themselves. The fact of their having thrown off the yoke of Spain could give them no Right to impose their yoke upon the People of Mosquito.....Even supposing.....that the Crown of Spain had possessed Rights of Sovereignty over the Mosquito Territory, the People of Nicaragua might just as well claim a derivative Right from Spain to govern and to be Masters of Mexico, New Granada, or any of the neighbouring States of Central America, as to govern and possess by such a derivative Right the Mosquito Territory which was never occupied or possessed by the People of Nicaragua.

"The People of each of the revolted Districts of the Spanish American Provinces, established their own Independence and their own Right of self-government *within the Territory which they had actually occupied, but nothing more*....."

32. This position was supported by the Legal Opinion on which the Award of the Emperor of Austria as to the interpretation of the Treaty of Managua was based (*Great Britain v. Nicaragua*, 1881):

"The righful sovereignty over the territory inhabited by the Mosquito Indians.....had been long in dispute. On the one side it was claimed by those republics which had broken loose from Spain in the third decade of the present country, and which founded their claim to the Mosquito territory upon their succession to the rights of the mother country. The Spanish Crown had claimed from of old the sovereignty over the Mosquito Indies and this claim was expressly put forward by a decree in the year 1803 regulating the territorial demarcation and the administrative distribution of the coast territory. *But as neither Spain nor the colonies which had fallen away from her and attained independence had actually exercised the pretended rightful sovereignty, and consequently the asserted occupation lacked the essential element of taking possession in fact, the Mosquito Indians were able to maintain not only their actual freedom, but also their legislative independence, and to act as a separate community.* (*emphasis added*"[1]

33. Similar reasoning would appear to underly—albeit inarticulately, but nonetheless effectively—the decision in the arbitration relating to the *Boundary between British Guiana and Brazil*. It is significant that in approaching the determination of the extent of the sovereignty of the parties, the tribunal concerned itself exclusively with the indentification of the area of effective possession by each party. No suggestion appears to have been made that the rights of Brazil could to any extent rest upon the theoretical limits of the provinces to which Brazil succeeded; occupation alone was the test.

34. More recently, in a study committed specifically to the present question, Mr. Bloomfield has said this of the doctrine of *uti possidetis*:

"It became..... a principle by which the American Republics have decided to adjust their boundary differences. But in no case has the International Com-

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(*Ibid.*, pp. 377-8).

1. 5 Moore's *International Arbitrations* 4956.

> community recognised, as an institution of international law, the principle of *uti possidetis*. It remains, just like the Bull of Pope Alexander VI wherein it originates, derogatory to general international law, which insists on occupation as a basis for sovereignty. A rule derogating to generally accepted customary international law is binding only on those persons which have, by a convention, expressly agreed to it." (*The British Honduras—Guatemala Dispute* (1953, p. 94).

35. It is thus evident that, even if the concept of *uti possidetis* is invoked by Guatemala as the basis for its claim to title over the Territory, the necessity still remains for Guatemala to show that the authorities of that area over which the present Government of Guatemala now exercises control in fact exercised control over the Territory at the material period. Or, to put the same point in more specific terms, it is not sufficient for Guatemala to allege a general succession to Spain in respect of title to the Territory. The present State of Guatemala is today's reflection of the original Spanish administrative region which passed under the name of the Captaincy-General of Guatemala. It is, therefore, necessary for Guatemala to show that it was that Province rather than some other Spanish Province which exercised control over the Territory at the relevant time. On the basis of the material which we have examined—and to which we shall now refer—we reach the conclusion that Guatemala cannot show a degree of exercise of authority over any part of the Territory in the period prior to the lapse of Spanish rule sufficient to warrant any such conclusion.

4. Administrative history of the Belize area.

36. The history of the administration in this area has recently been closely examined by Dr. Humphreys in his work on the *Diplomatic History of British Honduras* (1961), particulary in Appendix I on "The Problem of Spanish Colonial Jurisdiction". We have not attempted to go over the ground he has covered and, though occasionally supplementing his statements with additional authority, will rely principally upon his analysis of this detailed and technical matter.

(*a*) The area north of the river Sibun

37. In this area there could—in any interprovincial dispute —have been only two contestants. One was the Intendencia de Merida de Yucatan, which formed part of the viceroyalty of New Spain. The other was the Captaincy General or Kingdom of Guatemala.[2] The jurisdiction of Guatemala over the inland regions to the west of the Territory, namely, Peten and Vera Paz was clear by as early as the end of the seventeenth century. The same was not true over the coastal areas which subsequently became the British settlement.

38. Dr. Humphreys writes of the matter in these terms:

> "The question whether this alien settlement within the confines of the Spanish Dominions lay under the jurisdiction of the Captain-General of Guatemala or under that of the Captain-General of Yucatan was not on that

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1. 11 UNRIAA, 21.

2. Prior to 1560 the position was different in that Yucatan was included in the Audiencia de los Confines (or Guatemala). By a royal decree of that year, Yucatan was separated from Guatemala and placed within the juridiction of the Audiencia of Mexico.

> appears greatly to have troubled the contemporary mind. The British settler in Belize, however, always believed that the land they occupied lay within the territory of Yucatan; and there is strong evidence to show that they were not alone in this belief."[1]

He cites, in support, the proposal of the Governor of Yucatan in 1736 to build a fort at the mouth of the Belize; the disavowal by the President of Guatemala in 1755 that he had any responsibility for the fortification of Belize in 1754, on the ground that it fell within the jurisdiction of Campeche; the Governor of Yucatan's specification of areas on the Belize river for woodcutting in 1764;[2] punitive raids against the settlement were undertaken from Yucatan—with Guatemala assisting only once in 1754; the fact that the Governor of Yucatan was charged with supervision of the Treaties of 1763 and 1783; and the statement by the President of Guatemala (sic) in 1784 that the area between the Hondo and the Belize came under Yucatan jurisdiction.

39. The contray evidence referred to by Guatemala is the map used by the Spanish plenipotentiaries in negotiating the 1783 Treaty.[3] Dr. Humphreys, however, regards this as too primitive a map to have much evidentiary value. He also cites the instructions to the plenipotentiaries to the effect that "Walix"—the Belize river—formed the "extreme limits of the province of Yucatan." Moreover, another map used by the plenipotentiaries showed the boundary of Yucatan as reaching the coast at about 16° latitude, only just north of the Sarstoon.[4] The conclusion drawn by Dr. Humphreys is that the Belize River was regarded as the dividing line between Guatemalan and Yucatan authority, at least until 1786.[5] However, this line was not static. As the British settlements began to extend south of the Belize towards the Sibun river, so it was the Governor of Yucatan who was charged with executing the treaty of 1786. The Spanish inspectors or commissioners who visited the settlements came from Yucatan,[6] and the last such visit occured in 1796.....

There is no evidence of any act of administration from Guatemala. Thus Dr. Humphreys concludes:

> ".....long after 1786 the authority of the Captain-General of Yucatan was conceived to extend not merely to Belize but also to the Sibun".[7]

40. Guatemala argues, however, that in 1787 new boundaries were fixed between Guatemala and Yucatan, along the 17° 49' latitude[8] (i.e. north of the Belize river.), and that these new limits were shown on maps of 1802, used in the subsequent discussions between Mexico and Guatemala over boundaries in 1882. It is true that the Mexican Foreign Mi-

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1. *Op. cit.*, p. 169. He is here speaking of the area between the Hondo and the Belize Rivers. See also Bancroft, *History of Central America*, Vol, II, p. 629 (cited in *White Book*, p. 454) to the effect that it was the Governor of Yucatan who exercised control over the settlement on behalf of Spain. Also *Belize*, in "Mexico through the centuries", Vol. II, cited in *White Book*, pp. 462-3,467.
2. But this letter contained the phrase "y por lo que mira a la parte de Guatemala sobre las riberas del de Walix", which Humphreys suggests may indicate that the dividing line between Yucatan and Guatemalan administration may have been the Belize (Walix) river: *op. cit.*, p. 170.
3. *White Book*, Continuation, viii, p. 401.
4. Mapa que comprehende la major parte del reyno de Guatemala... Madrid, Archivo Historico Nacional, Estado 4203, and Estado, map 12 (the reference is given by Humphreys, p. 171, note 20).
5. *Op. cit.*, p. 172.
6. Mendoza, *op cit.*, pp. 87-88 dismisses this as mere administrative convenience.
7. *Ibid.*, p. 173.
8. *White Book*, Continuation, viii p. 497.

nister, when justifying to the Mexican Senate the 1893 Mexican/British Treaty fixing the northern boundary of British Honduras along the line of the River Hondo, stated that the Province of Yucatan terminated at that river, at least after 1787, and thereby sought to avoid the criticism that he had ceded Mexican territory to Britain. But Mexican scholars have denied the correctness of the Foreign Minister's statement.[1] Moreover, there appears to be no evidence of the claimed Spanish decree of 1787 said to have fixed the 17° 49' latitude as a boundary, nor is there evidence of the existence of the maps of 1802. Indeed, even Mendoza—whose commitment to the cause of Guatemala is manifest—also rejects the 17° 49' parallel as the boundary between El Peten and Yucatan' He says:" .....in reality, that boundary line is nowhere recorded between the Captaincies of Guatemala and Yucatan. We have carefully studied the Ordenanza etc', and we cannot find a single word on that subject, nor have we been able to find it anywhere else....."[2]

41. There is further cartographic evidence for the extension southwards, at least to the Sibun river, of the administrative authority of Yucatan.

42. In connection with the arbitration proceedings between Guatemala and Honduras, Guatemala published in 1929 a "reply" to a cartotraphic report by a Dr. Williams on behalf of Honduras. This reply was entitled: *Cartographia de las America Central* (Publication of the Boundary Commission), Tipografia Nacional, Guatemala, C.A. December 1929. It contained, amongst others, three maps relevant to the period before 1821.

(*i*) No. 32, map by Mana Elwe, Amsterdam, 1793. This is a copy of an earlier map by Otten, 1756. It shows Yucatan as covering most of the area, with Vera Paz lying to the south-west of the "Golfo de Guanajos" (equivalent to the Gulf of Honduras).

(*ii*) No. 35, Guthrie's map, 1809. It shows Yucatan as covering the whole of the peninsula and with striking clarity covering to both north and south the region described as "British Logwood Cutters".

(*iii*) No. 42, Tanner's map, 1822. This also has the word "Yucatan" running north-east along the peninsula and covering the region marked as "English Possession". These are shown as stretching south-east across the Belize river. Vera Paz is marked as lying south-west to the Gulf of Honduras.

43. In addition, Humboldt's Atlas of New Spain, published in 1812, shows the Intendencia de Merida de Yucatan extending far to the south of the Belize river. And this is significant because Humboldt himself identified the source of this depiction in the following terms: "Le Yucatan a ete ajoute d' apres la carte du Golfe du Mexique, publiee par le *Deposito hidrografico de Madrid*".[3]

44. On these points Dr. Humphreys concludes:

> ".....it seems that little weight can be given to the assertions of the Conde de la Cortina, repeated by Mariscal (the Mexican Foreign Minister) and by the White Book. There is no evidence to suggest that at the end of the eighteenth century the Captaincy-General of Guatemala exercised any authority either

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1. Fabela, Belice, *Defensa de los Derechos de Mexico*, pp. 192, 298, 317-18; Calderon Quijano, *Belice*, p. 15.
2. *Op. cit.*, p. 228.
3. See the introduction to Humboldt, *Atlas Geographique et Physique de la Nouvelle-Espagne* (Stuttgart, 1969, ed. Beck and Bonaeker), No. 2, p. 52.

in law or in fact over the area between the Hondo and the Sibun. In the eyes of Spain this area was and remained part of the old Captaincy-General of Yucatan and the new Intendencia de Merida de Yucatan."[1]

(*b*) **The area south of the river Sibun**

45. The position regarding the area south of the Sibun appears to be somewhat different. There is reason to suppose that the area of the Sibun as far as the Sarstoon may have lain within the theoretical limits of the Captaincy-General of Guatemala.[2] On some contemporary maps it is in this area that Vera Paz (which was part of this Captaincy-General), though not clearly demarcated, seems to extend. However, even if technically within the administrative limits of Vera Paz, there is no evidence of any actual administration by Vera Paz or the Captaincy-General of Guatemala.

D. The period 1821-1859

46. It is now appropriate to return to developments between 1821 and 1859. The material question is whether during that period Guatemala demonstrated a degree of control over the area either consistent with a claim to exercise sovereignty on a *uti possidetis* basis or sufficient to displace the effect of actual British possession.

1. British activity in the Territory

47. In the period following Spain's loss of control over its American colonies, Britain continued to maintain and develop its authority in the Territory—not merely to the Sibun river but beyond the Treaty limits as far south as the Sarstoon river. Superintendent Codd reported in 1825 that the latter was the effective southern boundary of the Territory.[3]

48. In 1834 the Council of British Honduras with the Superintendent, made a formal determination that the area of which the settlers were in full and undisturbed possession was bounded in the north by the Hondo and in the south by the Sarstoon.[4] Their concern was to prevent encroachments to the *west*, beyond Garbutt's Falls, for fear of trespass on Central American territory, and they seem not to have anticipated protest by Guatemala about the southern limits.[5] The Colonial Office supported the view that the settlement had actual possession of the coastal region of the Sarstoon and constructive possession of the unoccupied hinterland.[6] In 1837 the Superintendent began making grants of land outside the treaty limits, down to the Sarstoon, but these appeared to be by way of confirmation of existing settlements. The grants, like the earlier grants, were subject to a safeguard arrangement with Spain.[7]

49. Although Parliament had legislated for the territory in 1817, 1820 and 1833, the need for a comprehensive legal system was patent. Accordingly, in 1840 the Superintendent issued a Proclamation which, having recited the "imperfect state and undefined nature of the existing Laws and customs of this Settlement", declared the Law of England to be the Law "of this Settlement or Colony of British Honduras".[8]

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1. *Op. cit.*, p. 177.
2. Humphreys, *op. cit.*, p. 181. This was conceded as beyond doubt by Mexico in 1894: see *White Book*, p. 497.
3. *White Book*, p. 43.
4. Humphreys, *op. cit.*, p. 22.
5. *Ibid.*
6. Colonial Office Memorandum, 20 January 1835, cited by Humphreys, *ibid*, p. 23.
7. *Ibid.*, p. 25. This is accepted in the *White Book*, pp. 40, 55.
8. Burdon, *op. cit.*, Vol. II p. 411.

50. In 1814 the Governor of Jamaica, to whom the Superintendent was responsible, urged on the British Government that the Settlement should be regarded as a Colony. Lord Palmerston agreed and was prepared to notify Spain that the Settlement must be declared to be British territory.[1] But his successor, Lord Aberdeen, thought that whilst Spain would continue to acquiesce in the British Government of the territory she would not be prepared formally to cede sovereignty.[2]

51. In 1850 the settlers petitioned for Colonial status, but again no action to grant such status was taken.[3] Yet in 1851 the Law Officers of the Crown advised that, in their view, the Settlement had become part of the dominions of the Crown, and that the British Possessions Act and other statutes extended to it.[4] By a local Act, to which the Crown assent was given, a Legislative Assembly was established. Nonetheless, the reluctance to use the term "colony" persisted as Lord Clarendon was wishing to avoid any further misunderstandings with the U.S.A. at that time.[5]

52. In March 1861 the Settlers once more petitioned that the settlement should become "in name, what it really is in fact, a 'colony'".[6] The Law Officers repeated their earlier view that the settlement was, both *de facto* and *de jure*, part of the Crown dominions.[7] Eventually the Crown formalised the position; by Letters Patent of May 1862 British Honduras was formally declared a Colony.

53. In short, there is little doubt that the Crown exercised exclusive jurisdiction over the entire Settlement at least from 1796 onwards, when the last official Spanish visit was made. The Crown governed [8] and legislated for the territory to the exclusion of all other Powers and was *de facto* sovereign prior even before 1821. Subsequently, the consolidation of that title took place by stages. It was evidenced by Spain's abandonment of the territory, its acquiescence in British conduct and by the attitude of other States, in particular the United States, Mexico and, finally, Guatemala. The next following headings of this section will deal with the position of Spain, the United States and Mexico. The position of Guatemala will be treated separately in the section on the 1859 Treaty.

2. The conduct of Spain

54. Spanish conduct during the period following 1821 is particularly significant. As already indicated, there is no valid basis for the Guatemalan contentions that as a matter of general law the doctrine of *uti possidetis* applied to the position of Britain in the area or that, even if the doctrine did apply, it would operate to support a Guatemalan claim to title. Consequently, it is necessary to pursue the history of Britain's relations with Spain in respect of the territory because it is between those two States—and those two alone at that epoch—that the question of title fell to be determined.

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1. Palmerston's Minute, on Stephen to Leveson, 20 August 1841: F.O. 15/27.
2. Aberdeen's Minute, on Hope to Canning, 11 November 1841: F.O. 72/596.
3. Chatfield to Palmerston, 20 May 1850: F.O. 15/64.
4. Dodson, Romilly, and Cockburn to Grey, 14 March 1851: C.O. 123/94.
5. Humphreys, *op. cit.*, p. 60
6. *Ibid.*, p. 91.
7. 16 September: C.O. 123/107.

8. Although the first Superintendent was appointed in 1874, the earlier acts of administration by the Settlers are relevant to the consolidation of the Crown's authority, for it has always been held that English settlers could not establish sovereignty in their own right but only in the right of the Crown: see the precedents cited by Fawcett, *The British Commonwealth in International Law*, pp. 108-9.

55. In 1835, H.M.G. received information that Spain was willing to recognise the new States of South and Central America. The Colonial office [1] deemed the time opportune for the negotiation of a formal treaty of cession, by which Spain would cede to Britain the entire territory from the River Hondo down to the River Sarstoon. The British Ambassador in Madred was instructed accordingly, but the Spanish Government made no formal response to the approach.[2] The Spanish Foreign Minister appears to have indicated orally that he saw no difficulty in meeting the British request [3], but no treaty of cession was secured. However, in February 1836 the British Ambassador secured from the Spanish Foreign Minister an undertaking that, in any negotiations between Spain and Mexico, the issue of the northern boundary of the Settlement in Honduras would be excluded. But there was never, in the event, any formal treaty of cession.

56. Instead, it is evident that two elements continued to consolidate Britain's emerging sovereignty over the Territory. First, Spain in effect abandoned the Territory. Secondly, as already indicated, Britain maintained and extended its administration over the Territory. Whether this is looked at as occupation of a derelict territory in respect of which there was no competing title or as prescription against Spanish title, the result is the same. By the time that Britain came to make the 1859 Treaty with Guatemala the Territory was, in international law, British.

57. The abandonment or 'dereliction' of territory by one sovereign, though not common, is an accepted concept [4] and it leads to the possibility of occupation and sovereignty being established by another sovereign. Two elements are required, namely the physical withdrawal of occupation and the evidence of an intention not to return. In the words of Oppenheim:

> "....dereliction requires, first, actual abandonment of a territory, and secondly, the intention of giving up sovereignty over it. Actual abandonment alone does not involve dereliction as long as it must be presumed that the owner has the will and ability to retake possession of the territory."[5]

58. As we have seen, Spain never truly occupied the territory. Although she expelled the British settlers in 1779, they returned in 1783 and repulsed a further attempt by Spain to expel them in 1798. Thereafter Spain made no attempt to occupy the territory. Her last gesture nominal sovereignty—the protest over fortifications—occured in 1816. There is no record of any protest against the various sovereign acts by Britain, including the eventual conferment of Colonial status on the territory in 1862. Thus evidence of abandonment by Spain of its title is incontrovertible. While it is not possible to indentify a precise moment at which abandonment took place, it would seem reasonable to suggest that the successful revolts in 1821 in the rest of Central America induced in Spain a state of mind equivalent to an intention to abandon at that time. Certainly the indication in 1835 that she saw no difficulty in acceding to the British request for formal cession is inconsistent with any intention to reassert title thereafter.

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1. Memorandum of 20 January 1835: F.O. 73/452.
2. Villiers to Martinez de la Rosa, 5 April 1835: F.O. 72/441.
3. Villiers to Wellington, 4 May 1835: F.O. 72/442.
4. See Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926), Ch. VI, citing the examples of the abandonment by Spain of the Bahamas and Tobago, by England of Santa Lucia, and by Spain of British Honduras.
5. *International Law*, 7th Ed., Vol. I (Ed. Lauterpacht), p. 531.

59. The perfection of a British title as against Spain occured correspondingly through the process of acquisitive prescription. Again, in the words of Oppenheim:

> "....the Law of Nations recognises prescription both in cases where the State is in *bona fide* possession and in cases where it is not. The basis of prescription in International Law is nothing else than general recognition of a fact, however unlawful in its origin, on the part of the members of the Family of Nations. And prescription in International Law may therefore be defined as *the acquisition of sovereignty over the territory through continious and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order.*[1]

60. What is of singular importance is the point that there does not have to be a *lawful* origin for the title: the prescriptive title arises notwithstanding that the occupation may have been originally a trespass, an occupation *in bad faith.*[2] The relevance of this to the British occupation of Belize is clear. For not only did the British convert a unsufructuary right into an occupation as sovereign, but they extended that occupation beyond the limits agreed with Spain by treaty. These acts, originally trespasses against the sovereign. Spain, would not, however, defeat the development of a prescriptive 'title': on the contrary, they are typical of the type of circumstances in which a prescriptive title arises to acknowledge the legality of a situation which, in origin, may have been unlawful.

61. As to the other conditions required for the completion of aprescriptive title, namely, that the prescribing State must possess *a titre de souverain*, that the possession must be peaceful and uninterrupted, that it must be public and obvious, and that it must endure for a certain lenth of time—these were plainly satisfied by Great Britain. Thus one arrives at the conclusion that, at least as against Spain, Great Britain acquired a valid prescriptive title over the whole territory. Whether the title is equally valid against Guatemala depends, of course, on a separate consideration; for if Guatemala truly did become sovereign over the territory in 1821, the conditions for a prescriptive title would have to be satisfied by Great Britain in relation to Guatemala.

3. Relations with Mexico

62. The consistency of the British position in relation to the Territory is reflected in its relations with Mexico. Though the process took nearly seventy years, eventually in 1893 Mexico agreed that the River Hondo both *is* and *was* the boundary of British Honduras, thus recognizing that the territory was British and that Mexico's rights did not extend south of that river.

63. The principal elements in reaching this conclusion were as follows:

(*a*) In 1825 in the course of negotiations with Britain for a Commercial Treaty, Mexico proposed that the conditions under which British rights in Belize were exercised under the 1783 and 1786 Treaties with Spain should remain in force "for that part of the territory of

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1. *Op. cit.*, 527. Emphasis supplied.
2. To the same effect see Johnson, "Acquisitive Prescription in International Law" 27 *B.Y.I.L.* 332-1950. Also Verykios, *La Prescription en droit international* (1934), pp. 74-75: "A quoi bon exigir une telle condition en droit international, alors qu'elle ne sera jamais remplie? Carnous pretendons que, specialement pour les territores hatites, l'Etat possesseursera toujours de mauvaise foi."

the United States of Mexico to which they apply".[1] The draft was rejected by Britain on the ground that it would have recognised "Mexico's right to territory which she possesses neither *de jure de facto*....."[2] The eventual treaty of 1826,[3] Article 14, contained no provision asserting territorial rights either Mexico or Great Britain, but preserved the rights of British subjects under the 1786 Treaty with Spain and any other concession by Spain.

64. (*b*) The 1826 Treaty contemplated "further arrangements", but these were not made. A joint survey of the boundary was agreed to in 1839 but never carried out. Nor was Britain prepared to regard Mexico as successor to Spain in regard to the British-Spanish Treaty of 1786. [4]

65. (*c*) In 1864, by a decree of 19 September promulgated by the Imperial Commissioner for Yucatan, Mexican sovereignty was asserted over the whole of what was by now the British Colony of British Honduras. [5] Although the subject of a formal British protest, this decree was not in fact withdrawn' [6] A projected Treaty of Commerce with Mexico, signed in 1866, contemplated settlement of the Belize question by treaty or arbitration, but this was never ratified. In 1886 diplomatic relations between Great Britain and Mexico were severed and not renewed until 1884.

66. (*d*) Not withstanding the absence of diplomatic relations, in 1872 HMG addressed a claim for compensation to the Mexican Minister of Foreign Affairs, arising from the incursions into British Honduras of marauding Indians coming from Mexican territory.[7] This explict assertion of sovereignty by HMG was repeated when a similar claim was made in 1878. However, the Mexican reaction differed on the two occasions. In 1872 Mexico simply repudiated responsibility on the ground that the marauders were a savage tribe, illicitly supplied with arms from British Honduras territory. [8] But in 1878 the Mexican Minister of Foreign Affairs retorted by a claim that the territory of British Honduras in fact belonged to Mexico. [9] This claim was rejected by HMG. [10]

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1. Humphrey's, The Diplomatic History of British Honduras 1638-1901 (1961)., p. 26, citing Fabela, *Belice Defensa de los Derechos de Mexico* (1944), p. 195.
2. Canning to Ward, 9 September 1825: F.O./ 50/9.
3. Hertslet's Commercial Treaties, Vol. III, p. 253.
4. Mexico in 1849 called on Britain to observe Article 14 of that Treaty, as to prevent the arms trade across the frontier with indigenous Indians; by Britain rejected the Mexican claim to have succeeded to those treaty rights: Humphreys, *op. cit.*, pp. 65-6. There is additional evidence of Mexican attempts to succeed to Spain's treaty rights and, therefore, to sovereignty over the territory. When in the negotiations leading to the 1836 Mexican-Spanish Treaty, Mexico had attempted to insert an article referring to the 1783 and 1786 Treaties and the northern border of the British Settlement, Spain, in implementation of its promise to Britain, refused to accept this, See Humphreys, *op. cit.*, p. 28.
5. Humphreys, *op. cit.*, p. 133 Maximilian's government published a similar decree on 3 March 1865: see Clegern, *British Honduras* (1967, p. 137.)
6. Memorandum by Hertslet on the British Right of Sovereignty over Belize, or British Honduras, Foreign Office, 20 February 1887: (Conf. 5412), pp. 37-8.
7. Earl Granville to Mexican Minister of Foreign Affairs, 2 December 1872: Correspondence respecting the Boundary question of British Honduras, 1872-73: (Conf. 2640). No. 3. The matter of the Indian tribes north of the Hondo was complicated. The marauders who invaded British Honduras were the Icaiche, but these were often in open hostility with the Santa Cruz and it was the latter who received arms from British Honduras and who were regarded by the Mexican Government as rebels.
8. Sr. Lafraquire to Earl Granville, 12 February 1873, *Ibid.*
9. See the refutation in the Memorandum by Mr. Scarlett respecting the Boundary Question of British Honduras, No. 1 and Humphreys, *op. cit.*, p. 142.
10. Marquis of Salisbury to Mexican Minister for Foreign Affairs, 8 June 1878, F.O. 50/434.

67. (e) Negotiations between Mexico and HMG were resumed in 1880 and Mexico proposed a draft declaration which would have reserved Mexican rights over Belize. The proposal was rejected by HMG. Negotiations resumed in 1886, but proved abortive, and were again resumed in 1892, this time culminating in the Treaty of 8 July 1893, [1] a treaty finally ratified in 1897.[2] This treaty of 1893 recognised the River Hondo as the boundary between Mexico and British Honduras, thus, in effect, abandoning the Mexican claims:

> "It is agreed..... that the boundary between the Republic and the Colony of British Honduras was, and is, as follows:—
>
> '.....the River Hondo, which it follows in its deepest channel, passing west of Albion Island, continuing up Blue Creek until the said creed crosses the meridian of Garbutt's Falls at a point due north of the point where the boundary lines of Mexico, Guatemala, and British intersect.....' "

4. Relations with the U.S.A.

68. The question of Britain's title to the Territory arose in U.S.—British relations only at a relatively late stage in the period under review and the material developments extend beyond the date of the 1859 Treaty. However, in view of the eventual American acceptance of the British position, the facts may conveniently be referred to at this point.

69. Article 1 of the Clayton-Bulwer Treaty of 19 April 1850,[3] embodied a joint renunciation by both the U.S.A. and Great Britain of territorial ambitions in certain areas where such ambitions might bring about exclusive control over projected trans-Isthmian canal.

> ".....agreeing that neither will ever erect or maintain any fortifications commanding the same, or in the vicinity thereof, or occupy, or fortify, or colonize, or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America....."

The phrase "or any part of Central America" was somewhat broad and HMG was concerned to have a clear understanding that it did not embrace British Honduras. Thus, in ratifying, an explicit declaration that the Treaty did not apply to "Her Majesty's Settlement at Honduras, or to its dependencies" was made. [3] The U.S. Secretary of State confirmed this understanding by a Note of 4 July 1850:

> "To this settlement and these islands the Treaty we negotiated was not intended by either of us to apply. The title to them it is now, and has been my intention throughout the whole negotiation to leave, as the Treaty leaves it, without denying, affirming, or in any way meddling with the same, just as it stood previously." [4]

70. That the U.S.A. wished to maintain a non-committal, or "neutral" attitude on the question of title to the territory was further emphasised in the Secretary of State's Memorandum stating:

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1. Hertslet's *Commercial Treaties*, Vol. 20, pp. 796, 802.
2. Hertslet's Commercial Treaties, Vol. VIII, p. 969.
3. Written declaration of 29 June, 1850: *ibid.*, Vol. X, p. 643.
4. *Ibid.*, pp. 645-6.

> "....I wrote him (Sir H.L. Bulwer) my note of the 4th July, acknowledging that I understood British Honduras was not embraced in the Treaty of the 19th of April last, but, at the same time, carefully declining to affirm or deny the British title in their settlement or its alleged dependencies." 1

71. But even then a difference remained as to what area was understood by the term "British Honduras". For some four years later the U.S.A., in a statement to HMG, referred to "the Belize Settlement lying between the Rio Hondo and the Sibun, the usufruct of which for a special purpose, and with a careful reservation of his sovereign rights over it, had been granted by the King of Spain to the British under the Treaty of 1786" 2 and the statement continued by referring to the area between the Sibun and the Sarstoon in these terms:

> "It is presumed that the encroachments of these settlers south of the Sibun have been made without the authority or sanction of the British Crown, and that no difficulty will exist in their removal. "3

72. HMG was not prepared to accept implication that, whatever by the status of its title north of the Sibun, the settlements below the Sibun down to the Sarstoon were a mere trespass. The Secretary of State replied in a statement delivered to U.S. Minister in these terms:

> "....Her Majesty's Government not only has to repeat that the Treaties with Old Spain cannot be held, as a matter of course, to be binding with respect to all the various detailed portions of the old Spanish-American Monarchy, but it has also to observe that the Treaty of 1786 was put an end to by a subsequent state of war between Great Britain and Spain; that during that war the boundaries of the British Settlement in question were enlarged; and that when peace was re-established between Great Britain and Spain no Treaty or a political nature, or relating to territorial limits, revived those Treaties between Great Britain and Spain which had previously existed." 4

73. The U.S.A., with some justification, declined to accept this statement of a "title by conquest", pointing out that if the extension of the settlement south of the Sibun took place *after* the 1809 Treaty of Alliance terminated the war (as the U.S.A. believed to be the case) the argument had no substance. And if it occurred before 1809, then it was extraordinary that Great Britain did not in the Treaty make clear that it intended to assert sovereignty over the area occupied. 5 It may also be added that the notion of "title by conquest" was quite imcompatible with HMG's later approach to Spain to have a formal cession of the title by treaty.

74. Indeed, the U.S.A. went on to question even the nature of the British title within Belize proper.6

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1. *Ibid.*, p. 647.
2. Reproduced in Memorandum by Sir E. Hertslet etc. (Conf. 5112) pp. 11-13.
3. *Ibid.*
4. *Ibid.*
5. *Ibid.*, pp. 15-16.
6. Ibid., p. 16 The whole correspondence is in *Correspondence with the United States respecting Central America*, 1855, and in Manning, *Diplomatic Correspondence*, Vol. VII.

> "It is, however, distinctly to be understood that the Government of the United States acknowledge no claim of Great Britain within Belize, except the temporary 'liberty of making use of the wood of the different kinds, the fruits, and other produce in their natural state,' fully recognising that the former Spanish sovereignty over the country belongs either to Guatemala or Mexico."

75. It must be said; in passing, that it could not be expected at that time that the U.S.A. would take an objective and impartial view of the British claim to title; on the contrary, it was part of the policy of the United States to contain and, where possible, diminish the European possessions in the New World. A change of party (the Democratic victory) in 1853 may also have influenced the policy of the U.S. Government at that time.

76. The disagreement between the U.S.A. and Great Britain was sought to be resolved by Article II of the Clarendon-Dallas Treaty of 1856, [2] which, having referred to the Settlement as "bounded on the north by the Mexican province of Yucatan, and on the south by the River Sarstoon" re-affirmed that it was excluded from the terms of the 1850 Treaty and expressed the hope that the limits of the said Belize "*on the west*, as they existed on the said 19th of April 1850" should be settled by HMG in agreement with Guatemala within the next two years. This Treaty was never ratified, because of HMG's objection to other articles,[2] but it indicated a preparedness on the part of the U.S.A. to accept the British title, down to the River Sarstoon, subject to settlement of the *western* boundary with Guatemala.

E. Conclusion

77. On the basis of the material examined in this section, we reach the conclusion that the rebellion against Spain in 1821 of its colonies in Central America did not by itself change the position regarding sovereignty over Belize. While for their own purposes *inter se*, the republics of Central American Republic (or later the Republic of Guatemala) and Britain. As between these two States the only law relevant to questions of sovereignty was the traditional law. This related title to effective occupation.

78. Even prior to 1821 British settlers had gradually extended their settlements south of the Sibun River towards the Sarstoon and by 1834 had been long enough involved in the environs of the Sarstoon to warrant their obtaining land grants from the authorities of the Settlement. To the extent that the movements of British settlers went beyond Treaty limits, their actions affected Spain, not Guatemala. This was because the rebellions against Spain were operative only in the areas under control of the new States. Spain's reaction to those encroachments was one of acquiescence and there can be no doubt that by 1859 British presence as far south as the Sarstoon River had Crystallized into valid title.

79. The position might have been different had there been any Guatemalan exercise of authority or control over the area in question. But there was not. This is a key element in the situation. It must be borne in mind that in the face of actual British presence in Belize for over a century, more is required to establish Guatemalan sovereignty than the mere assertion on its part of a title based on *uti possidetis*. Evidence of actual Guatemalan sovereign presence in the area, sufficient to counter the fact of British presence, is required. We have not been able to find any such evidence. Nor is any to be found in the place where it might most be expected, namely, the Guatemalan *White Book*. And it is to be noted that the ab-

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1. Correspondence respecting Central America, 1856-60: *Parl Papers* 1861, Vol. LXVIII, No. 1.
2. Those concerned the Bay Islands, not the boundaries of British Honduras.

sence of evidence of Guatemalan presence in the area, which is relevant in a dispute over sovereignty between Guatemalan and Britain, is also material to Guatemala's invocation of *uti possidetis*. For, as has been established in relations between Guatemala and her neighbours, what matters is *uti possidetis*. in fact, not in theory.

III THE 1859 TREATY

A. Introductory

80. We now turn to examine the 1859 Treaty. On the British approach to the problem, its relevance is slight. British title to Belize existed before, and independently of, the Treaty. The Treaty could only become material if in some way it reduced pre-existing British title. As will presently be seen, this was not the case. On the Guatemalan approach to the matter, the Treaty of 1859 is the controlling instrument. Guatemala contends that without the Treaty, Britain would have no title in Belize; that the Treaty is one of cession; that its operation is conditioned by the requirement that a cart-road be built in accordance with Article 7; that that condition has not been satisfied; that Guatemala is accordingly entitled to end the Treaty; that it has done so; and that title has now revested in Guatemala.

81. We have reached the conclusion that every element in the Guatemalan approach is wrong, with the possible exception of the proposition that Britain is in breach of Article 7. That possibility, however, even if established would not serve to vest in Guatemala title to Belize.

82. It will be convenient to approach the problems connected with the 1859 Treaty by way, in the first place of a statement of material developments.

B. Material developments

1. Background to the Treaty

83. As early as 1825 the Colonial Office regarded as urgent and important a treaty with Guatemala so that "the limits of the territory of Honduras as they exist *de facto* should be secured to the Crown".[1] The mention of *de facto* limits obviously referred to the fact that the British Settlements had been extended beyond the treaty limits, the River Sibun, southwards for more than a hundred miles to the River Sarstoon. [2] The view of HMG was that this extension of the settlement was a matter for discussion with Spain alone. [3]

84. The Government of the Central American Republic (of which Guatemala was a part until 1839) appeared willing to negotiate a treaty with Great Britain and in 1826 sent an envoy to London for that purpose although he was recalled in 1831. [4] The evidence of the attitude of HMG at this time suggests that, whilst willing to contemplate a Treaty of Commerce with Guatemala, the question of boundaries was a matter for discussion with Spain, not Guatemala. Indeed, in 1833 Lord Chatfield, appointed as British Consul to Guatemala, was instructed *not* to negotiate with Guatemala over boundaries. [5] Then in

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1. Colonial Office to Foreign Office, 23 September 1825: F.O. 15/4.
2. See Report of Superintendent of 1833, referred to in Burdon, *op. cit.*, Vol. II, p. 347.
3. Foreign Office to Colonial Office, 19 February 1834: F.O. 15/15.
4. Dobson, *op. cit.*, pp. 187-8.
5. Burdon, *op. cit.*, Vol. II, p. 372.

1834 the Government of Guatemala took a step which could only be interpreted as a claim to sovereignty: it made two grants of concessions to land within the territory regarded by HMG as within the limits of the British Settlement" [1] HMG warned the persons interested that the concessions had no validity; and there is no evidence they ever became effective. [2]

85. In 1838 the Constituent Assembly of Guatemala invited the inhabitants of the settlement to send a deputy to the Constituent Assembly. This, too, was an implied assertion of sovereignty. Great Britain protested and the legislative decree was repealed. [3]

86. The conclusion of the proposed Treaty of Amity, Commerce and Navigation between Great Britain and Guatemala was achieved in 1847. It contained no territorial provisions, but the Guatemalan negotiator, in a separate Note to his British counterpart, recorded that the Treaty "in no way involves or affects the rights of the Republic of Guatemala in the boundary matter relative to the concessions in the territory of Belize.....". "In addition, referring to the British-Mexican Treaty of 1826 (and Article 14 in particular), he rejected the notion that Mexico had any rights in the territories of the "concession of Belize". [4] This Note was treated as an unacceptable reservation by HMG, so the treaty was never ratified. Only in 1849, when a second Convention was agreed, without the Guatemalan reservation, did the Convention come into force. Mendoza says of this Treaty that Britain thereby "officially recognised the Republic with the same jurisdiction as the former Spanish province including the territories of the concessions granted by His Catholic Majesty in 1783 and 1786".[5] However, neither the text nor the *travaux preparatoires* support this assertion.

2' **The beginnings of the negotiations for the 1859 Treaty**

87' On 14 February 1857 the Minister of Guatemala in Paris, Sr. Martin, informed the Guatemalan Government that he would be visiting London, to initiate the negotiation of a boundary treaty, and to solicit just compensation for the territory unduly invaded by the English in Belize". [6]

88. The first conversations in the negotiation occured in May 1857' In his reports to Guatemala, Sr. Martin always referred to "the boundary treaty", not to a "treaty of cession"' [7] This expression was also used in correspondence emanating from the Government in Guatemala to Sr. Martin, [8] as well as in communications to the British Government.

89. In June 1857 Mr. Stevenson (the British Superintendent in Belize) explained to Sr. Martin (the Guatemalan Minister) "the extent of the British occupations, beyond the original limits of the Spanish Treaties as they existed on and for many years to the 1st of January 1850, and also the nature and foundation of the British claim to a line of boundary that would cover all such actual occupations and effectually prevent all future trespasses by either party.....that many of these actual occupations had existed for periods ranging between thirty, forty and fifty years....." [9] Mr. Stevenson added that "upon that point (occupation), however, I have no hesitation in saying that I believe all the information I have received and furnished to have been perfectly correct". The proposed southern boundary stretched along the Sarstoon to the Gracias a Dios Falls.

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1. One concession was to a London Company, the other to Colonel Galindo.
2. Humphreys, *op. cit.*, pp. 41-44.
3. Dobson, *op. cit.*, p. 193; burdon. *op. cit.*, Vol. II, p. 406.
4. For the text see *White Book*, pp. 66-77; Bloomfield, *op. cit.*, p. 19.
5. Mendoza, *op. cit.* 96.
6. *White Book*, p. 72.
7. *Ibid.*, p. 75.
8. *Ibid.*, p. 75.
9. *Ibid.*, p. 79.

90. On 8 July 1857, Sr. Martin presented to the British Government a Guatemalan proposal for the "boundary" treaty. [1] Because it differs in so many respects from the 1859 Treaty—and because these respects are so significant —it is necessary to set out some of its salient details:

(*i*) In the Preamble, paragraph 1 referred to "the British Settlement in British Honduras on the coast and within the self same territory of the Republic of Guatemala".

(*ii*) The second paragraph of the Preamble spoke of the concessions granted by Spain in 1783 and 1786 as relating to "territory located in the region then known as the Kingdom of Guatemala, within his dominions in America" and continued "the former could not acquire it for her own sovereignty and property.....".

(*iii*) Article I provided:

> "The Republic of Guatemala now and forever relinquishes in favour of Great Britian her property and sovereign rights over that part of the territory comprised within the natural and recognized boundaries within her dominions, settled at the present time by subjects of Her Britannic Majesty and known by the name of the Settlement of British Honduras".

(*iv*) Article V provided:

> "As a compensation for the renunciation made by the Republic of Guatemala in article I of the present Treaty, Her Majesty the Queen of the United Kingdom of Great Britain and Ireland.....promises to give her effective and positive guaranty against any enterprise which might be attempted with detriment to the Republic by adventures without any legally recognized national character.....".

(*v*) Article VI provided:

> "The Government of Her Britannic Majesty to carry out the above mentioned guaranty, does not bind herself to anything besides the use of her maritime forces she constantly maintained on the east and west coasts of America for the protection of her commerce and subjects.....".

91. This approach was expressly approved by the Guatemalan Government on 2 September 1857. [1] But on 15 September 1857 Sr. Martin reported to his Foreign Minister that he did not think that it would be possible to obtain from the British Government "the compensations' for which he had asked in his draft "since they give no importance whatever to the Settlement, nor do they obtain advantage therefrom. They would gladly enter into a boundary treaty only to legalize the situation" [3]. And their matters appear to have rested for nearly a year and a half.

3. The instructions given to Mr. Wyke

92. On 16 February 1859 Mr. Wyke (a British official) was instructed to enter into negotiations with the Guatemalan Government to settle the question of the limits between

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1. For text, see Mendoza, Britain and Her Treaties on Belize (2nd ed., 1959), p. 127.
2. *White Book*, p. 83.
3. *Ibid.*, p. 85.

Belize and Guatemala. He was told that HMG were desirous that the limits of British Honduras should be established on the basis of the actual British occupation, as described in a draft Convention which was forwarded to him and which he was instructed to propose to the Guatemalan Government. He was also told to be "exceedingly careful not to accept any part of the proposed boundary as a cession from the Republic of Guatemala, or to accept, as it were, a title to any part of the British occupation from the Republic,." One reason for the emphasis of the British position was the anxiety of HMG to avoid any breach of the terms of the Bulwer-Clayton Treaty of 1850. The instructions said:

> "It is, in short, absolutely necessary that the line of boundary to be established by the proposed Convention should therein be described, not as involving any cession or new acquisition from the Republic of Guatemala (in which case the United States might contend that Great Britain had violated the self-denying clause of the Treaty of 1850), but, as it is in fact, simply as the definition of a boundary long existing, but not hitherto ascertained." [1]

93. Wyke reported that he encountered much difficulty with the Guatemalan Government, who would not hear of surrendering unconditionally what they claimed to be their rights. Wyke himself observed that this opposition was the more difficult to overcome since in point of fact the English "had no right, *beyond that of actual possession*, to the tract of country between the Rivers Sibun and Sarstoon, which formerly belonged to the ancient Kingdom of Guatemala". [2] So he developed the plan of finding some inducement to Guatemala to agree to his terms, while at the same time avoiding the situation in which he might be seen to be receiving title to any part of the British occupation from Guatemala. He therefore proposed that both Parties engage to use their best efforts conjointly to construct a cart-road. This proposal became Article 7 of the 1859 Treaty. [3]

4. The terms of the Treaty

94. The recital began:

> "Whereas the boundary between Her Britannic Majesty's settlement and possessions in the Bay of Honduras, and the territories of the Republic of Guatemala, has not yet been ascertained and marked out....."

Article 1 provided:

> "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

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1. Text in: F.O. Confidential (5490), p. 1; and Parl. Pap. 1860, lxviii, (2478), p. 171. The line, as proposed in the instructions and incorporated in Article I of the Treaty, would begin "at the mouth of the River Sarstoon, in the Bay of Honduras, and proceed up the mid-channel of that river to Gracias a Dios Falls; it would then turn northward, and continue by a line drawn direct from Gracias a Dios Falls to Garbutt's Falls, on the River Belize; and from Garbutt's Falls due north until it strikes the Mexican frontier".
2. *Ibid.*, p. 2.
3. *Ibid.*, p. 3.

turning to the right and continuing by a line drawn direct from Gracias a Dios Falls 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 that all the territory to the south and west of the same belongs to the Republic of Guatemala.

95. Articles 2-6 dealt with the appointment of boundary commissioners and the consequential task of demarcating on the ground the boundary agreed in Article 1.

96. Then came Article 7, in the following terms;

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

5. The interpretation of Mr. Wyke

97. In a report dated 30 April 1859 Mr. Wyke explained that early in the negotiations it soon became evident that he would need to find an inducement to persuade the Guatemalan Government to agree to his terms. He said:

"……it struck me that the compensation they claimed might in some sort be afforded if we aided them in the construction of a practicable cart-road……whereby the old commercial relations with Belize would be renewed, and both Contracting Parties mutually benefitted without either appearing to receive a favour from the other……"

"……I at last succeeded in getting this Government to accept the Convention word for word, and without a single alteration, on the condition that an Additional Article should be added to it……"

98. In conclusion Mr. Wyke expressed the hope that he had not incurred the displeasure of HMG

"for having so far exceeded my instructions, when, by so doing, I consider that I have obtained a double advantage at the price of, comparatively speaking, a trifling sacrifice".1

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1. Parl, pap. 1860, lxviii, (2478), p. 251.

99. Within two weeks of the receipt of Mr. Wyke's despatch on 16 June 1859, the Foreign despatched—on 30 June—British ratification of the Treaty.[1]

6. The Guatemalan view

100. On 17 September 1859 ratifications of the Treaty were exchanged. On that occasion the Guatemalan plenipotentiary wrote to the British plenipotentiary that

> "it has been very satisfactory to his Excellency (the President of Guatemala) that the Article relative to the opening of the road, *proposed on our part*, and acceded to by Mr. Wyke, has been fully approved of by HMG....." [2]

101. The Treaty was laid before the Guatemalan Chamber of Representatives in January 1860, together with a justificatory report, In it Sr. Aycinena, the Foreign Minister, stated, *inter alia*, that Spain had abandoned the territories outside the Treaty lines, that they had never been in the actual possession of Guatemala and that she had never exercised any act of sovereignty over them. [3]

C. Questions relating to the 1859 Treaty

102. The Treaty has occasioned three questions: first, was it in effect a treaty of *cession* whereby Guatemala ceded the territory to Great Britain; second, is Great Britain in breach of the treaty, especially by reference to Article 7; and third, if so, what is the legal consequence of such a breach?

1. Was the 1859 Treaty a treaty of cession?

103. Two elements are relevant to determining whether the 1859 Treaty was a treaty of cession. The first consists of the words actually used. The second is the intention of the parties.

(*a*) The words of the Treaty

104. The actual wording of the Treaty is more consistent with the notion that it is a boundary treaty than that it is a treaty of cession.

105. The preamble refers to the fact that the boundary between British territory and that of Guatemala has "not yet been ascertained and marked out". It states also that the Parties are desirous "to define the boundary aforesaid" and "have resolved to conclude a convention for that purpose". There is no suggestion anywhere in the preamble or in the text that the Treaty is really one of cession.

106. The same is true of the wording of the operative articles. The principle article speaks only of the boundary. But more than that, it is expressed so as to be declaratory of an existing situation. Thus: "It is agreed ....that the boundary ....*was and is* as follows". That is evidently inconsistent with any idea of cession by virtue of the Treaty.

107. And if there could be any doubt left on this score, it is put at rest by the additional words which describe

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1. *Ibid.*, p. 257.
2. Parl. pap 1860, lxviii, (2478) p. 300.
3. See Humphreys, *op. cit.*, p. 88.

"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....."

108. Yet again, in the last paragraph of Article 1, when providing that the territory to the north and east of the described boundary is British, the verbs used are "it is agreed and declared". The word "declared" necessarily refers to a situation already existing and its use in this context is again incompatible with the idea of cession.

109. The only provision which can be invoked (and has by Guatemala been invoked) for the purpose of converting the Treaty into one of cession is Article 7. But for the Article to achieve this something quite specific would be required to counteract the effect of the earlier provisions. One might, perhaps, have expected words such as: In consideration of the transfer of territory effected by Article 1". But nothing like that can be found in Article 7.

110. Indeed there are two indications within the text of Article 7 itself which confirm that it was seen by both parties as being fully consistent with the "boundary-fixing" character of the Treaty. First, the reference to the preamble in the opening lines of Article 7, though not specifically directed to the part dealing with the definition of the boundary, makes it clear that in including Article 7 the Parties had not overlooked the Preamble as a whole. The second point is more striking. At the end of Article 7 there appear the words "the limits of the two countries being now clearly defined". This is not the kind of language which one would have expected if in fact the Article was either intended to serve the purpose of changing the treaty to one of cession or of reflecting such a change.

(*b*) The intention of the parties

111. It is clear from the passages cited in paragraphs 92-3 above—the instructions to Mr. Wyke and his report—that HMG had no intention of becoming a party to a treaty of cession. More than that, it is evident from a comparison of the Guatemalan draft of 8 July 1857 and the Treaty as finally adopted that the initial attempt by Guatemala to express the agreement in terms of cession was entirely repudiated by Britain and that Guatemala accepted that repudiation. This last point is emphasized by the terms of Sr. Aycinena's presentation to the Guatemalan Chamber of Representatives in January 1860.

112. We have, of course, considered whether Mr. Wyke's observations that the British claim was not valid outside the old treaty lines runs counter to this evidence of intention as derived from the text. Our conclusion is that they do not affect the situation. The instructions given to Mr. Wyke were clear and, despite his own misgivings, it is also clear that the British Government did not feel that the text as adopted departed from those instructions. Also, it appears to us that Mr. Wyke in making his assessment of the situation did not appreciate the significance of the absence of any effective Guatemalan presence or administration in the areas occupied by the British settlers. So, while Mr. Wyke's views cannot be ignored, they do not in our view change the position to be derived from the texts and Sr. Aycinena's report.

(*c*) Irrelevance of the Clayton-Bulwer Treaty argument

113. Guatemala has suggested that the language of the Treaty does not reflect the alleged intention that it should serve as a transfer of title because Britain wished to avoid the accusation by the United States that she was acquiring territory in Central America in viola-

tion of the 1850 Clayton-Bulwer Treaty.[1] Two considerations run counter to this argument. First, as has been shown, it was understood by both the USA and Great Britain that the 1850 Clayton-Bulwer Treaty excluded British Honduras. Second, Article II of the 1856 Clarendon-Dallas Treaty between Great Britain and the USA had not only accepted the Rivers Hondo and Sarstoon as the northern and southern frontiers of the settlement but had incorporated an expression of hope that Great Britain would conclude a Treaty with Guatemala within the next two years agreeing the boundary in the west. [2] In short, the 1859 Treaty, far from being regarded as a violation of the 1850 Clayton-Bulwer Treaty, was exactly what the United States expected. If any further evidence of this were needed, it can be found in the expressions of satisfaction with which the US Government greeted the 1859 Treaty: the US Representative in London, Mr. Buchanan, on December 1860, referred to the agreement as "entirely satisfactory to his Government". [2]

(*d*) The role of Article 7

114. Despite the fact that we are of the opinion that the 1859 Treaty is not a treaty of cession, we cannot leave the question without some reference to the role of Article 7. Guatemala contends that the British undertakings in Article 7 represent the price which Britain was prepared to pay for the cession of territory by Guatemala. And on that basis Guatemalan seeks to change the significance of the languagge which appears in the earlier Articles and which, in our view, so clearly marks the treaty as one defining boundaries. We acknowledge that some function must be attributed to Article 7, especially in the light of Mr. Wyke's reference to the necessity for an "inducement". But the role which we see Article 7 playing is not that of an "inducement" to part with territory,. It represents rather the *Quid pro quo* to Guatemala for agreeing to abandon a *claim*. Up to that date Guatemala had been asserting—contrary to British contentions—a claim to the territory of Belize. By the 1859 Treaty Guatemala was agreeing to the definition of the boundary of Belize and, as we see it, agreeing for a price to abandon the pretence that the territory or any part of it remained Guatemalan.

2. Is Britain in breach of the 1859 Treaty?

115. We now turn to consider the Guatemalan allegation that Britain is in breach of the 1859 Treaty by virtue, so it is asserted, of the fact that Britain has not fulfilled its part of the undertaking in Article 7 to use its best efforts, conjointly with Guatemala, for establishing the easiest communication by means of a cart-road, or employing the rivers, between the fittest place on the Atlantic coast near the settlement of Belize and the capital of Guatemala.

116. In order to assess the validity of this Guatemalan contention, it is necessary to look fairly closely at the course of developments. And for this purpose it may be helpful to reply in large part upon Guatemala's own collection of materials—the so-called *White Book*.

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1. See *White Book*, p. 105.
2. The fact that this Treaty was not ratified was not connected with question of Belize.
3. *Miller, Treaties of the US*, Vol. V, p. 802. It is, of course, true that over twenty years later, in1882, the USA did allege that the 1859 Treaty with Guatemala violated the 1850 Clayton-Bulwer Treaty: see the communication by Mr. Frelinghuysen, US Secretary of State to the British Foreign Office,- 31 May 1882, (*British and Foreign State Papers*, Vol. 73, pp. 892, 898). This communication suggested that the breach lay in extending the Settlement beyond its limits as they existed in 1850 and in converting the Settlement into a Colony. This view of the US Government is, of course, completely at variance with the view it took in 1860 and it would be difficult to treat it seriously as an argument based on a breach made after so long a delay. The motivation of the USA was probably that she herself wished to get out of the 1850 Treaty because it tied her hands in relations to plans for a trans-Isthmian canal.

(*a*) **Developments, 1859—1863**

117. At the outset, it is appropriate to notice that the obligations established by Article 7 were far from precise. First, they were not expressed as resting exclusively upon Britain. They were stated in terms of conjoint use of best efforts to take adequate means to establish and objective which was itself not set out in exact terms. This objective was "the easiest communication" between the fittest place on the Atlantic Coast near the settlement of Belize and Guatemala City. The precise mode of communication was left uncertain; it could be by a cart road, or employing rivers, or both. Thus the subsequent conduct of the parties becomes the more significant as an aid to the indentification of the true content of the provision.

118. It is appropriate, therefore, to note the following items:

(*i*) It is to be observed that the Guatemalan *White Book* in presenting material relating to the period immediately after the conclusion of the 1859 Treaty does so on what appears to be a selective basis. Thus, while it includes documents reflecting the views of critics of the Treaty it omits the statements made at that time by the Guatemalan Government in support and justification of the Treaty. Without knowing the contents of the ommitted documents, it is not possible to assess the significance of the mission. In the present context, however, it is sufficient to refer to the document which appears at pp. 113-119 of the *White Book* and is there introduced by the following heading:

> "The Highly Important Vote of the Councellor of State, Pedro J. Valenzuela, against the Boundary Convention. There is no Guaranty for Guatemala in the Vagueness of Article 7, and England will never comply with her Agreement".

In the course of his statement Mr. Valenzuela said of Article 7:

> ".....it has the disvantage that such a provision is so indefinite because it does not fix time, quality, duration or to other circumstances, that any obstacle arising there from would easily frustrate the undertaking; if it had at least been stipulated that the cession of that land would not take place, but that the Government could recover it in case the road should not be constructed in a proper manner, there might then have been a probable balance in the contract".[1]

He continued later;

> ".....the compensation which has been discussed in my opinion nothing more than a formula of words which may delude momentarily; but which well considered is reduced to nothing.....To trust the interests of a nation to the simple word of the government of another, to hand over immediately and with full dominion a part of its frontier territory without any condition is not prudent nor proper for a foresighted government". [2]

119. (*ii*) On the same date as ratification of the Treaty were exchanged, 12 September 1859, the British Consul in Guatemala conveyed to the Guatemalan Government a note confirming the British Government's approval of Mr. Wyke's acceptance of Article 7

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1. *White Book*, p. 114.
2. *Ibid.*, p. 115.

"whereby the two parties engaged to cooperate for the establishment of a line of communication" and asking

> "to be made acquainted with the views of the Guatemalan Government as to the best means of giving effect to that article". 1

120. (*iii*) On 17 September 1859 the Guatemalan Government responded in terms which indicated their view that "the line of communication" referred to in the British note should be a "road" and desired that without delay "it (Article 7) be put into execution and a work be undertaken by the two government.....". The note proposed the immediate despatch of an engineer to commence the surveying and mapping of the line of communication. 2

121. (*iv*) By January 1860 more specific ideas were in evidence. The next material document which the *White Book* prints is a note from the Guatemalan Foreign Minister to the Guatemalan Envoy to France and Britain, Sr. Martin, dated 2 January 1860, expressing the view—based on Sr. Martin's reports of his conversations with British officials and the Minister's conversation with Mr. Wyke in Guatemala—that

> "H.M.'s Government must assist us, furnishing us the engineers and directors of the work, as well as in the payment of the labourers; we contributing on our part the material necessary and seeing that there are labourers to work at fair wages".

The same note recorded Guatemala's view.

> "that for the time being the most essential (idea) is the dispatch of the engineers and the practical road director who should come to study the ground, to see which are the most appropriate places to open the road; we reserving the right to state later what should be done to carry out the plan". 3

122. (*v*) At about the same time—in January 1860—Captain Wray R.E. was sent to Guatemala to make a report and estimate regarding the construction of a road. On 6 January 1861 he reported that the construction of such a road as was contemplated by the Treaty would cost £121,315 for materials and manual labour, besides £24,115 for the scientific direction of the work—totalling £145,465. 4 This sum exceeded the original estimates of both parties.

123. (*vi*) In the meantime, however, the tone of the correspondence passing between Sr. Martin and the Guatemala Foreign Minister suggests that the two Governments were not *ad idem* in their understanding of Article 7. In a note of 15 April 1860, to the Guatemalan Foreign Minister Sr. Martin says he hopes to go to London and adds:

> ".....I shall try to talk to the Minister to make him understand the true sense of Article 7".

Sr. Martin asserts that the obligation assumed by Britain was that it would pay the skilled and day labourers, whereas, apparently, the British Foreign Minister thought that the expenses of material and labourers would be borne by the Guatemalan Government. 5

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1. *Ibid.*, pp. 126-127.
2. *Ibid.*, p. 128.
3. *Ibid.*, p. 114.
4. F. O. Confidential (5490), p. 7.
5. *White Book*, p. 147

124 (*vii*) Between pages 149 and 165 the *White Book* then prints correspondence passing between the Guatemalan Foreign Minister and Sr. Martin, as well as between Mr. Wyke and the Guatemalan Foreign Minister and Sr. Martin respectively, the effect of which was to show:

(*a*) that while the Guatemalan Government believed that Britain was going to pay the expenses of the skilled, expatriate, personnel plus all the wages of the labourers, Mr. Wyke appeared to think that the British Government were going to pay only half the wages of the labourers;

(*b*) that the original estimate of £80,000 as being the total cost of the venture was wrong, and that the cost was likely to be double that;

(*c*) that Guatemala appeared to expect that Britain would meet £100,000 of this cost; and that the two sides eventually agreed that the coastal terminus should be Izabal rather than Santo Tomas.

125. (*viii*) By June 1861, Sr. Martin is reporting to the Guatemalan Foreign Minister that the British Government expects to pay no more than £50,000. 1

126. (*ix*) In September 1861 the Guatemalan Foreign Minister informed Sr. Martin that if the British Government

> "insists, in spite of our good right, that the expenses of the road are to be paid in half in the sense which Lord John Russell understands",

he might make "this equitable settlement". 2

127. (*x*) The differences of view partly summarized in a memorandum prepared by the Guatemalan Foreign Minister on 2 September 1861. He interpreted the terms of Article 7 as requiring Britain to pay more than half the cost. He stressed the undertaking that the parties would conjointly use their "best means for the execution of the work" which he did not see as reflecting an obligation to contribute equal shares. 3

128. (*xi*) On 27 January 1862, the British Minister in Guatemala in a note to the Guatemalan Foreign Minister said that the terms of Article 7 "are so vague that a total difference of opinion has apparently existed in this interpretation". He conveyed a proposal for the British Government that

> "the two Governments shall each pay down a sum of £25,000 towards the expense of contructing the road, and that the scientific superintendence shall be exclusively at the charge of HMG, while the cost of providing the materials required at the various points shall be exclusively defrayed by the Government of Guatemala". 4

129. (*xii*) Yet on 13 May 1862, the British Minister still found it necessary to write that, as a result of a conversation with the Guatemalan Foreign Minister, he apprehended

> "that a serious difference of opinion may exist between HMG and that of Guatemala respecting the share to be borne by each in making the projected road to the Atlantic".5

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1. *Ibid.*, p. 166.
2. *Ibid.*, pp. 174-175.
3. *Ibid.*, pp. 176-178.
4. *Ibid.*, pp. 180-181.
5. *Ibid.*, p. 195.

130. (*xiii*) There was further correspondence in 1862 between the British Minister and the Guatemalan Foreign Minister which reflected the continuing absence of agreement between the two sides. 1

131. (*xiv*) In May 1863 the Guatemalan Government proposed to the British Government a Convention to "supplement" the 1859 Treaty. The draft proposed that HMG should contribute £60,000 and "any other indispenable expense" and should also designate and send to Guatemala a skilled engineer, with assistants, to direct the project. This contribution would be accepted by Guatemala as full compliance with Article 7 of the 1859 Treaty. 2 After further exchanges an Additional Convention was concluded on 5 August 1863.

132. **Conclusions relating to the period** 1859-1863 The reason why we have set out in some—but by no means complete-detail the nature of the differences which emerged between the Parties regarding the interpretation of Article 7 of the 1859 Treaty is that—as will be seen —this has a direct bearing upon the consequences of the failure, presently to be described, to bring into force the supplementary convention of 1863. For immediate purposes, it is sufficient to note that by their conduct in the period 1859-63, the parties showed that Article 7 taken by itself left unsettled the means of communication to be adopted, the coastal terminus of the line of communication and, above all, the division of obligation between the parties, especially with regard to the nature and extent of Britain's material contribution.

(*b*) **The** 1863 **Convention and after**

133. It is now necessary to refer more fully to the 1863 Convention— its terms and its fate.

134. In the Additional Convention of 5 August 1863 it was agreed that HMG would recommend to Parliament to provide £50,000 in order to fulfil the obligation established by Article VII of the 1859 Treaty. This sum was to be paid in five equal annual instalments.

135. The date fixed for the ratification of the additional Convention was on or before 5 February 1864. By that date Guatemala had not ratified it. On April 1864 the Guatemalan Minister in London asked for one year's extension of the time for exchange of ratifications. The reason he gave was that conditions of civil war in Guatemala had made it impossible for the Guatemalan President to take the necessary action. At the same time, the Guatemalan Minister used language which led HMG to believe that this was not the true reason for the Guatemalan failure to ratify, but rather that they were waiting to see if the canalization of the River Motagua could be effected. 3 The British Government declined to accede to the Guatemalan request, taking the view that if the Government of Guatemala chose to put off the exchange of ratifications beyond the term fixed, the 1863 Convenion for the present fell to the ground and the British Government would not consent reopen the discussion.

136. In May-June 1866 the Government of Guatemala made a further attempt to persuade the British Government to agree to ratification of the 1863 Convenant. In so doing, it proposed two 'clarifications" of the text. The first was that the engineers and other skilled labourers who were to be in charge of the construction of the road might be procurred

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1. See *ibid.*, pp. 201-202, 205-208, 212-213, 214, 215, 216, 217. 219, 220, 221, 222, 224-225, 229-232, 233, 234-237.
2. *Ibid.*, pp. 236-237.
3. Test in F.O. Confidential (5490), p. 7.

in Europe "or in any other place" (in contrast with the original text which contemplated procurement in Europe only). The second clarification was that, as regards the proof to be given by the Guatemalan Government to the British Government of the satisfactory termination of each portion of the road, it should be understood that the Guatemalan Government's obligation "is to prove *bona fide* that work has been adequately done for this purpose" (whereas the original text had spoken only of "satisfactory proof" and had required that the work be verified to the satisfaction of the two Governments by a person appointed for that purpose).

137. The British Government read these proposals for "clarification" as amounting to suggestions for modification of the Convention. This interpretation strengthened the British Government's adherence to its position that the Convention had lapsed.

138. The British reply of 29 August 1866 [1] is of some importance. After quoting Article VII of the 1859 Treaty, it said that "It cannot be denied that Her Majesty's Government have used their best efforts to discover what adequate means could be found" and cited the activities of the survey expedition. The Note then referred to the 1863 Convention as laying down "a new plan" which, by reason of non-ratification by Guatemala, had fallen to the ground. But the Note did not stop at this point. It specifically raised the central issue. "The question then remains in what manner shall the provisions of the Treaty of 1859 be carried into effect?" It made the point that "the end originally contemplated" cannot be executed at such a cost as "to render it remunerative in a pecuniary point of view to either of the Governments" and asked whether it would not be better if the project should be abandoned "by mutual consent". If the Guatemalan Government were to agree, that would be the end of the matter. But if it were not to agree, then

> "it will be for them to suggest a method of proceeding which shall give sufficient security to HMG for the work being undertaken in an economical manner, for an equal share of the expense being borne by Guatemala, and for the commercial result being such as to justify the large outlay which, in any case, must be necessary'. [2]

139. In urging HGM to permit ratification of the 1863 Convention, the Guatemalan Minister on 21 December 1866 said that Article VII of the 1859 Treaty had been introduced at the express desire of the Guatemalan negotiator as a "decorous Form" of compensation for the abandonment of Guatemala's territorial rights on Belize. [3] The British Foreign Secretary replied on 3 January 1867 that it was his duty to state in the most explict manner that HMG never admitted the existence of Guatemalan territorial rights in Belize, that the boundary had existed since the explusion of Spain, that the definition of the boundary involved no element of cession and that the British negotiator had been expressly prohibited from admitting into treaty anything which might bear that construction. [4] The Foreign Secretary also explained that the reason why Britain had not agreed to the Guatemalan request for an extension of time for ratification of 1863 Convention was that the prospect of obtaining Parlimentary sanction for the proposed contribution of £50,000 had disappeared because the state of things in the country had materially changed to a point at which "probably no Government would possess influence enough to obtain such a vote as

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1. *White Book*, p. 272.
2. *Ibid.*, p. 11.
3. F.O. Confidential (4982), p. 10.
4. Text in F.O. Confidential (5490), p. 12.

would be required". The prospect in 1864 was doubtful: "but.....it was quite certain, in the opinion of HMG, that the House of Commons would not sanction it in 1867". 1

140. Finally the Foreign Secretary made the point that by signing the Convention of 1863 and being ready to ratify it in 1864 at the appointed time, HMG

> "had done all that was incumbent upon them to fulfil the engagement of the Convention of 1859, and were thus released from the obligations of the latter Convention by the conduct of the Guatemalan Government itself". 2

141. The immediate reaction of the Guatemalan Government was contained in Sr. Martin's reply of 13 September 1866. 3 He made clear his disagreement with the British assessment of the uneconomic character of the proposed road, indicated that Guatemala could not offer better conditions of security and said that he could not see "what more could be asked".

142. Further communications on the subject of the 1863 Convention were made by the Guatemalan Government in December 1866, August 1867 and in September 1869. In the third note (of 24 September 1869) the Guatemalan Minister referred to a speech by Mr. Layard in the House of Commons on 16 May 1862 in which he acknowledged that the agreement to construct the road was the "equivalent" of "certain concessions".4 The British Foreign Secretary reiterated on 15 November 1869 that be cause of the Guatemalan delay in ratification "the state of affairs had materially changed" and whole question had "lost its interest". 5

At the same time, he reiterated that

> "the territory which composes the British Colony of Belize was maintained by Great Britain against the hostile attack of Spain while the two countries were at war, long before the Republic of Guatemala had any existence. It was not restored to Spain after the war, nor did Spain ever take any steps to regain it. Guatemala never at any time, or in any way, had possession of it, and could have no sort or right or claim to or over any part of it".6

143. A request by the Guatemalan Government in 1878 to reopen discussion on the matter was declined by HGM, as was a suggestion of arbitration which the Guatemalan Government made in 1880. 7

(c) Assessment of the question of breach as at 1880.

144. At this point it is convenient to attempt some answer to the question of whether by 1880 Britain was in breach of Article 7 of the 1859 Treaty. We choose 1880 simply becuse the fact that in that year Guatemala proposed arbitration indicates that by that date Guatemala considered that there existed a justifiable dispute relating to the performance of the Treaty.

145. While we shall presently be referring to various expressions of British official opinion regarding the question of British fulfilment of Article 7 of the 1859 Treaty, we should

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1. *Ibid.*, p. 13.
2. *Ibid.*
3. *White Book*, p. 274.
4. *Ibid.*, p. 14.
5. F.O. Confidential (5490), p. 14.
6. *Ibid.*
7. F.O. Confidential (4982), p. 17.

say now that it seems to us to be far from evident that Britain was by 1880 in breach of the Treaty. As already stated, the reason why we have extended the description of the course of events from 1859 to 1863 was to show that both parties were agreed that Article 7 was so vague as to be inoperable for practical purposes. It could only be implemented by a further specific agreement. This was achieved in the 1863 Convention. But the Convention never entered into force and lapsed. We recognize that there may be scope for an argument that the 1863 Treaty represented an agreed interpretation of the 1859 Treaty and that in consequence its terms set a standard of performance which Britain was required to meet even though the Convention never became operative. However, such an argument, so it appears to us, fails to take into account the elaborate history of negotiation which led up to the 1863 Convention. From this history it is evident that the Convention was not simply an "interpretation". It was not limited to recording an accord between the parties on a particular interpretation of Article 7 to which, on an objective approach, a third party could have said the words as used necessarily led. The fact is that the 1863 Convention contained a truly "legislative" element which added specific content to Article 7 of the 1859 Treaty. Thus, when the 1863 Convention lapsed, the parties were thrown back to the vagueness of Article 7 of the 1859 Treaty.

146. This is not to say that when the 1863 Treaty lapsed Article 7 of the 1859 Treaty ceased to be a legally binding obligation. Not at all. It remained binding, but with no more content than it orginally possessed. And as we have seen, the Parties were at one in their inability to attribute specific content to it. In these circumstances, we find it impossible to say that the fact that no line of communication has been built between the coast of Belize and the capital of Guatemala means that Britain, and Britain alone, is necessarily in breach of Article 7 of the Treaty. The only way in which Britain can be fixed with a breach of the 1859 Treaty is by showing that it has not made a good faith effort to "agree conjointly" with Guatemala to use its best efforts to establish the easiest communications between the places contemplated in the Treaty.

147. The fact that Article 7 refers to the establishment of "the easiest communications" means that the content of the obligation will necessarily alter as and when alternative communications develop. Hence the general character of any agreement which the Parties could conceivably have contemplated reaching would have been bound to alter as alternative means of communication developed between Guatemala and the coast of Belize.

148. At the same time, we recall that in its note of 29 August 1866 the British Government specifically reminded the Government of Guatemala that if the latter did not agree that Article 7 of the 1859 Treaty should be abandoned by mutual consent, it would be for them "to suggest a method of proceeding". We bear in mind too that the Guatemalan Government in its reply of 13 September 1866 adhered to its view that the road should be built and that in December 1866 the Guatemalan Government invited the British Government to study the matter again and proposed further negotiations. 1 Yet the British reply of 3 January 1867 was quite negative in content. It rested upon the purely legal position that the 1863 Convention had not been ratified in time and restated the belief that the benefit of the proposed road would be much less than originially contemplated. It put forward no constructive proposal. Moreover, in refusing in 1880 to agree to arbitration, Britain excluded all possible means of finding a constructive solution to the controversy.

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1. *White Book*, p. 287.

149. In these circumstances, although we cannot indentify a precise breach by Britain of Article 7 of 1859 Treaty, we find it hard to say that Britain used her "best efforts" to implement Article 7. We would emphasize, however, that the obligation in Article 7 was a joint one and, in a sense, to pose the question of breach in terms of breach by Britain alone—as Guatemala has done—is to mistate the issue. To express the question in these terms is impliedly to suggest that Guatemala alone stood to benefit from the contemplated construction of some means of communication and that Guatemala alone was injured by the fact that a cart road was not built. The basis of this suggestion is never expressed and by some inarticulate process (possibly reflecting the fact that Britain was the richer nation which benefited, so Guatemala contended, by the earlier articles of the Treaty) the issue has come to be stated solely in terms of injury to Guatemala and of Britain's alleged responsibility therefore.

150. However when the matter is probed more deeply, it must be recalled that Article 7 creates obligation for *both* parties with the stated object of benefitting *both* parties. We have already placed emphasis on the words "they mutually agree conjointly to use their best efforts." It is now appropriate to point also to the words "whereby the commerce of England on the one hand, and the material prosperity of the Republic on the other, cannot but be sensibly increased". This is the language of *common* benefit; not of benefit to Guatemala alone.

151. In such a situation it is, of course possible in theory for one party alone to incur the sole responsibility for the failure to achieve the common end which both agreed to pursue. But the facts would have to show that that party had by its action alone, and in the face of continuous, consistent and perfect endeavour by the other to achieve the common object, led to the frustration of the endeavour. However, those are not the facts in the present case. Guatemala's contribution to the adjectives. Whatever may have been open to criticism in Britain's behaviour, Guatemala itself contributed significantly to the failure to implement Article 7. We need mention no more than the facts that Guatemala did not ratify the 1863 and that it did not respond Convention positively to the British proposal made in 1866 that if Guatemala wanted to maintain Article 7 it should "suggest a method of proceedings". Yet these are important facts and must be seen as having contributed to the situation of which Guatemala now complains.

152. In short, while we can find elements of legal responsibility in Britain's actions and attitudes after 1863, we do not consider that Britain's conduct can be assessed in isolation from that of Guatemala or that when a comprehensive look is taken at the conduct of both parties the situation is one which warrants Guatemala's assertion of a "unilateral breach" by Britain entitling Guatemala to regard the 1859 treaty as at an end. In any case, the question —despite emphasis laid upon it by Guatemala—does not control the question of title to Belize.

153. In section which follows we explain in detail why it is that even if Britain was in breach of the 1859 Treaty, Guatemala is not now entitled to treat any such breach as an effective ground for terminating the Treaty.

(*d*) The position after 1880

154. As we read the history of relations between Britain and Guatemala subsequent to 1880, it contains nothing which materially alters the above stated conclusion.

155. We note with respect the now public views of Sir Edward Hertslet, the Librarian and Keeper of the Papers of the Foreign Office from 1857 to 1896, who performed in his time

many of the functions of a legal adviser to the Foreign Office, as well as those of various Law Officers of the Crown. Thus, in June 1884, Hertslet expressed some doubt as to whether HMG had indeed used its "best efforts" to make the road. He questioned whether the collapse of the 1863 Convention had cancelled the obligations under the 1859 Treaty. [1] He suggested that the Law Officers should be asked for an opinion. They reported that

> "it may well be urged that there is a moral obligation, if not something more, to take some steps to give effect to Article VII of the Convention of 1859". [2]

The Lord Chancellor also expressed the view

> 'that the obligations of Great Britain under the Treaty of 1859 are such as to justify the suggested application to Parliament (for a grant of £10,000 a year for five years)."

He "adhered" to the views expressed by the Law Officers and concluded thus:

> "I cannot think it is a sound view that HMG, by incurring expense for a preliminary survey, and signing and being ready to ratify the Convention of 1863, have used their best efforts by taking adequate means for establishing the easiest communication between the fittest place on the Atlantic coast and the capital of Guatemala.
>
> "The delay which has taken place and the changed circumstances may no doubt require a modification of the original scheme; but as there seems to be no doubt that recognition of British rights to certain disputed territory in Article I of the Treaty of 1859 was obtained in consideration of the understanding contained in Article VII, it would appear to be only right that some substantial effect should be given to that Article". [3]

156. It is, we believe, worthy of comment that despite the care which Hertslet generally bestowed upon his analysis of events, he does not appear to have considered specifically the significance of the developments between 1859 and 1863. Moreover, he seems to have regarded the obligation of Article 7 which was "to agree conjointly to use their best efforts" as the same as an obligation resting upon HMG alone to use its best efforts to build a road—an indentification which we do not share. The Law officers, it may be noted, assessed the situation in terms of "moral" rather than "legal" obligations as did the Lord Chancellor.

157. Although there have over the past century been intermittent exchanges between Guatemala and Britain regarding the matter, we do not see those exchanges as materially alterning the position. The century of unsettled controversy between Britain and Guatemala from 1880 to 1978 may seem a long period to pass over without detailed examination, but we feel that it is unnecessary to enter further into it because the historical core of the dispute was fully established by 1880. Activity thereafter, though having some diplomatic importance, has not really changed the basic condition of things. In any event, even if a breach was established as alleged, we do not see it as sufficient to bring the 1859 Treaty to an end or otherwise to restore title to Guatemala. To this latter aspect of the matter we now pass.

3. What is the legal consequence of any breach by Britain?

158. The next question for consideration is, therefore, whether the allegation of breach of Article 7 if established is sufficient to bring the 1859 Treaty to an end.

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1. Memorandum of 17 June 1884. F. O. Confidential (4982), p. 18.
2. Text of opinion in F.O. Confidential (5490), p. 18.
3. Quoted in Memorandum of 2 June 1886 F.O. Confidential p. 3.

159. The Guatemalan argument [1] is to the effect that the 1859 Treaty as a whole is thereby invalidated, and that, since the 1859 Treaty was a treaty of cession, the territory reverts to Guatemala. As indicated earlier, there is no real basis for regarding the 1859 Treaty as a treaty of cession. Even on the most favourable construction, the most that total invalidity of theTreaty would secure for Guatemala would be the revival of her claims as they existed in 1859. In short, the Treaty, which otherwise estops Guatemala from contesting the British title tothe territory, would be removed as evidence of an estoppel and as a binding engagement. But to invalidate the Treaty would not as such give Guatemala any greater claim than she possessed in 1859. Nonetheless, we address ourselves to the problem because it is as well to grapple with each of the principal issues raised in the Guatemalan arguments.

160. The question, therefore, is whether Guatemala is entitled to repudiate or terminate the 1859 Treaty as a whole because of the alleged breach by Britain.[2]

161. The existence of a breach by one party to a Treaty provision serves to make the Treaty *voidable*, not void; that is to say, the breach may in certain circumstances afford a ground for termination, but any such termination flows from the decision of the innocent party to treat the Treaty as terminated, and does not flow automatically from the breach.

162. As Oppenheim puts it;

> "Violation of a treaty by one of the contracting States does not *ipso facto* cancel the treaty; but it is within the discretion of the other party to cancel it on this ground." [3]

163. The point is of some importance because, although the treaty was concluded in 1859, the termination (if it occured at all) could only have occurred when Guatemala elected to treat the whole treaty as terminated, that is to say in 1940. There are in any event, four separate issues to be considered.

(*a*) Is the breach by HMG sufficiently "material" to justify termination?

164. It is not *any* breach of a Treaty which entitles the innocent party to treat as terminated. Although the writings of jurists disclosed considerable variation on this point, [4] many make a distinction between a breach of provisions which are "essential",[5] or "fundamental", [6] or "grave", [7] or contained a "fundamental benefit" [8] and those which were not or did not.

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1. The Guatemalan Chancellor's letter of 22 February 1940 stated:
   ".....the Government of Guatemala considers that the Government of His Britannic Majesty has relinquished article VII of the Convention of 59, and therefore all the stipulations of the aforesaid Convention.....
2. "The Government of Guatemala believes that because of the situation arising from the non-fulfilment of the obligations on the part of Great Britain, it has the right to regain possession of the territories ceded to Great Britain when adjusting the boundaries referred to in the Convention of 1859." Cited in Mendoza, *op. cit* p. 279.
3. *International Law*, Vol. I, 6th Ed. (Ed. Lauterpacht), p. 843. To the same effect see McNair, *Law of Treaties* (1961), p. 553; American Law Institute's Restatement If the Law, Second, Foreign Relations law of the U.S. (1965), pp. 484-487, s. 158. This remains the contemporary law. See the Report of the I.L.C. (Yearbook of the I.L.C., 1966, Vol. II p. 254): "The Commission was agree that a breach of a treaty however serious, does not *ispo facto* put an end to the treaty..... "
4. For a comprehensive survey of the views of jurists see Frangulis, *Theorie et Pratique des Traites*, pp. 135-6; Gyorgy Haraszti, *Some Fundamental Problems of the Law of Treaties* (1973), pp. 310-315.
5. Opphenheim, *op. cit.*, p. 853.
6. McNair, *op. cit.*, p. 571.
7. *Haraszti* . op. cit., p. 322.
8. American Re-statement, *loc cit.*, s. 158, Comment, para. e.

165. The international Law Commission opted for a distinction between "material" and "non material" breaches, preferring this to one, between "fundamental" and other breaches. The rule as adopted in the Vienna Convention on the Law of Treaties— the most authoritative contemporary statement of the law—is contained in Article 60:

"Article 60

(1) A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.....

(3) A material breach of a treaty, for the purpose of this article, consists in:

(*a*) a repudiation of the treaty not sanctioned by present Convention, or

(*b*) the violation of a provision essential to the accomplishment of the object and purpose of the treaty."

166. We can ignore (3) (*a*)—since HMG has not repudiated the treaty. Thus, the essential question is whether Article 7 can be regarded as "essential to the accomplishment of the object and purpose of the treaty" for only in such a case will the breach of Article 7 be a "material" breach

167. It will be recalled that the 1859 Treaty was essentially a boundary treaty, and that Article 7 was not included in the earlier draft with which Wyke had been equipped. Certainly it is clear that Wyke felt it necessary to include Article 7 in order to get the agreement of the Guatemalan Government. But if the object and purpose of the treaty was to agree on the boundaries, it is evident that Article 7 providing for the construction of the cart-road was quite extraneous to that primary object and purpose. In short, though perhaps essential to secure Guatemalan consent, it was by no means essential to the actual demarcation of the boundary. The 1859 Treaty would have remained a perfectly coherent, sensible treaty without Article 7, and the object and purpose could have been achieved without Article 7. It is therefore doubtful whether any breach by HMG of Article 7 constitutes a "material" breach so as to justify termination by Guatemala.

168. This view is reinforced by looking at the benefits which Guatemala secured, quite apart from the benefit for which she hoped from Article 7. The Guatemalan Government had wanted certain benefits from the treaty, and those were the benefits which the Government had referred to prior to the treaty, namely

(*i*) A settled frontier to avoid, giving to the U.S.A. an excuse for intervention; [1]

(*ii*) Protection from filibustering by having the British on the coast; [2]

(*iii*) The presence of a powerful, friendly neighbour; [3]

(*iv*) The security of Guatemalan territory to the west, and the benefits of a stable, recognised frontier. [4]

Thus, it would be wrong to regard Article 7 as the *only* benefit to derived by Guatemala, and the fact that Guatemala derived other and substantial benefits from the 1859 Treaty reinforces the view that any breach of Article 7 was not sufficiently fundamental or "material" so as to justify the termination of the entire Treaty?

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1. The Foreign Minister (Manuel Pavon) to Wyke, reported by Wyke to Lord Clarendon, 27 November 1853; F.O. 15/79.
2. Martin's instructions to Aycinena, 16 June 1857: *White Book*, p. 76, also p. 80.
3. Draft of the Guatemalan Government dated 17 July 1857: *ibid.*, p. 80.
4. See the *Beagle Channel Award* (1977), para. 118; also *Temple of Preah Vihear Case. I.lJ. Rert.* 962 .3: "When two countris establish a frontier between them, one of the primary objects is to achieve stability and finality". The *White Book*, p. 71, refers to the "thought that the determination of a boundary would protect the rest of the territory against te aggressor's invasions". See also Guatemalan Draft of 17 July 1857, *ibid.*, p. 80.

(*b*) Is Guatemalan justified in terminating the *whole* Treaty?

169. This is yet a further consideration. It does not necessarily follow that, even with a "material" breach, the innocent party is entitled to terminate the whole treaty. For where the provision breached is severable, that is to say, capable of being regarded as a distinct provision the fulfilment of which is not essential to the whole object and purpose of the treaty, the innocent party may be entitled to terminate or repudiate that provision only. To cite McNair:

> ".....some common-sense limit must be placed upon the unity and indivisibility of the sum total of the provisions of a treaty, and that, as in other matters such as the effect of war upon treaty stipulations, the circumstances may be such, and the treaty may be so framed, that one stipulation can be severed from the rest as if it had formed the content of a separate and independent treaty..... and that the breach of a stipulation so severable does not create a right to abrogate the whole treaty....." [1]

170. Similarly, Article 60(1) of the Vienna Convention on the Law of Treaties refers to a material breach as a ground for terminating or suspending the treaty "in whole or in part". And Article 44, which deals specifically with the separability of treaty provisions, provides that, whilst termination will normally operate on the treaty as a whole, this will not be so in the follow-case

> "3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:
>
> (*a*) the said clauses are separable from the remainder of the treaty with regard to their application;
>
> (*b*) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party to be bound by the treaty as a whole; and
>
> (*c*) continued performance of the remainder of the treaty would not be unjust."

171. These texts suggest strongly that Article 7 is severable. The reasons given above for the view that a breach of Article 7 is not "material" also support the view that Article 7 is severable from the rest of the 1859 Treaty. It was not essential to the boundary treaty, it required a totally different method of application from the other clauses (hence the abortive 1863 Convention), and its non-fulfilment did not deprive Guatemala of all the benefits of the treaty. To say that Article 7 was necessary to induce the Guatemalan Government to sign is not the same as saying Article 7 was an "essential basis of the consent" of Guatemala. For example, in an exchange of territory, the cession of the one part is the *quid pro quo* for the cession of the other—an "essential basis of the consent". But where, in boundary treaty, some additional inducement is included, as was Article 7, that additional inducement is included, as was Article 7, that inducement goes to making the bargain more attractive but it does not necessarily form an "essential basis of the consent" in the sense that Guatemala's obligations would only be explicable on the basis of HMG's obligations under Article 7. Indeed, this is the more so when one recalls that Article 7 did not include simply obligations on HMG, but *joint* obligations on both parties. There is, of course, the counter-argument

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1. *Op. cit.*, p. 571

that Article 7 must be regarded as an essential basis of Guatemala's consent (and therefore non-severable) because that was all Guatemala got out of the treaty. But this would be to ignore the other, and quite substantial, benefits which Guatemala did in fact derive from the Treaty.

172. Thus, one may question whether the breach of Article 7 is "material"; one may question whether, even if "material", the breach entitles Guatemala to terminate the whole treaty; and one may similarly question whether Article 7 is not severable from the remainder of the Treaty. In the final analysis, however, it is not these questions which defeat the Guatemalan claim but a quite different point, namely, that Guatemala in any event failed to invoke the supposed ground for termination within a reasonable time.

(c) Did Guatemala terminate the Treaty in good time?

173. There is overwhelming authority for the proposition that, if the right to terminate for a material breach is to be validly exercised, it must be exercised within a reasonable time after the breach. [1] Indeed one of the well-known precedents for this proposition relates to Belize itself. The U.S. had taken the view that in extending the area of settlement and converting the settlement into a colonly, HMG was in breach of the Clayton-Bulwer Treaty of 1850. Nonetheless, Secretary of State Olney, in a memorandum of 1896, conceded that the U.S. had, in effect, forfeited any right to treat the treaty as terminated by the breach because the U.S. had not acted within a reasonable time but had, on the contrary, continued to treat the treaty as a valid, subsisting treaty. He said:

> "In no instance have the former failed to deal with the treaty as a binding obligation—in no instance, when occasion justified it, has this Government failed to call upon Great Britain to comply with its provisions—while, during the first ten years of the life of the treaty, when it might have been abrogated, either for violations by Great Britain or with the latter's consent, the United States steadily insisted upon holding Great Britain to its obligations. Under these circumstances, upon every principle which governs the relations to each other, either of nations or of individuals, the United States is completely estopped from denying that the treaty is in full force and vigor." [2]

174. The International Law Commission treated the matter in its Report on the Law of Treaties in terms of the circumstances leading to a loss of the right to terminate a treaty. Speaking of this provision, the Rapporteur, Sir Humphrey Waldock, said':

> "Article 47 was intended by the Commission to apply to certain grounds of invalidity and termination a rule giving effect to the principle of *preclusion* (estoppel) found in cases such as that concerning the *Temple of Preah Vilhear*..... an implied agreement to be bound notwithstanding a right orginally to invoke a particular ground of invalidity or termination."[3]

175. The reasoning was, therefore, that a State continuing to regard a treaty as valid was precluded or estopped from invoking a ground for termination: in short, reasoning iden-

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1. McNair, *op. cit.*, p. 571; American Law Institute, Re-statement, *loc. cit.*, S. 158(1); Harvard Draft Convention of the Law of Treaties, 29 A.J.I.L., Suppl. 1935, Article 27; Detter, *Esays onthe Law of Treaties* (1967, p. 93: Haraszti, *op. cit.*, p. 323.
2. 3, Moore, *Digest of International Law*, 1906, pp. 207-8.
3. Fifth Report on the Law of Treaties, *Yearbook of the I.L. C.* 1966, Vol. II, pp. 6-7.

tical to that used by Secretary of State Olney. It is based on the need for the State to invoke the ground for termination within a reasonable time. As Sir Humphrey Waldock said:

> ".....the fundamental concept is that a State must invoke a ground for invalidity, termination or suspension within a reasonable period of time, having regard to all the circumstances of the particular case." 1

176. The particular provision of the Vienna Convention dealing with the loss of a right to invoke a ground for termination is Article 45:

Article 45:

> "A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:
>
> (*a*) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or
>
> (*b*) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be."

177. It is clear from this text that once knowledge of the facts regarded as constituting a breach is acquired the "innocent" party must exercise its right to terminate within a reasonable time and must not by its conduct "acquiesce" in the continued validity of the treaty. It is also clear that loss of the right to terminate by acquiescence, by "implied" consent— for that is the principle of Article 45 (*b*)—was a proposition actively opposed by Guatemala at the Vienna Conference. Guatemala was one of 8 States supporting an amendment to delete paragraph (*b*). 2 But this amendment was rejected 3 and there is no doubt that the right is, and always was, lost by "acquiescence".

178. It remains to consider the conduct of Guatemala in the light of this principle. Guatemala knew all the facts upon which any allegation of a breach of Article 7 might rest by 1864, when HMG declined to allow Guatemala the extension of time for which she asked in order to ratify the 1863 Convention implementing Article 7. At the very least Guatemala knew of the facts and believed a breach to exist in 1880 for in that year Guatemala proposed arbitration. 4 This is only explicable on the basis that Guatemala believed HMG to be in breach of the 1859 Treaty. Yet it took another 60 years—until 1940—for Guatemala to allege formally that she regarded the Treaty as terminated.

179. During those 60 years the conduct of Guatemala can only be explained in terms of her "acquiescence" in the Treaty, as the following illustrations demonstrate:

> (*i*) In 1884 the Guatemalan representative, Medina, whilst adverting to the alternatives that the 1859 Treaty must be either fulfiled *in toto* or terminated, put HMG to the election rather than electing, on behalf of the Guatemalan Government to regard the Treaty as terminated. 5

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1. *Ibid.*,. p 7..
2. *Official Records of the Vienna Conference*, 1st Sess. 1968, (A/CONF. 39/C.I/L. 251 and Add. 1-3), p. 390
3. *Ibid.*, . p 401, rejected by 47 votes to 20 with 27 absentions at the 69th Meeting of the Committee of the Whole.
4. Ante, paragraphs 143 and 144.
5. See Letter to Lord Granby dated 5 April 1884 in *White Book*, p. 344.

(*ii*) In 1916, 1924, 1929 and 1933 joint British/Guatemalan boundary demarcation projects were undertaken. These necessarily pre-supposed that the boundary to be demarcated on the ground was that already defined in the 1859 Treaty. [1] The Exchange of Notes of 25 and 26 August 1931 [2] is the clearest recognition of this. The Note from HMG provided:

> "The boundary between British Honduras and the Republic of Guatemala was laid down in the Convention (of) 30th April 1859, Article 1....."

The Guatemalan reply made no objection to this recital.

(*iii*) The Guatemalan Government continued to demand that HMG should implement the Treaty, a course of action totally inconsistent with regarding the Treaty as terminated for breach. For example, as late as 4 March 1933, in the context of a further request from the British Charge d' Affaires for the appointment by Guatemala of Engineers to examine a demarcation carried out unilaterally by British engineers, the Guatemalan reply from Minister Klee was in these terms;

> "....I would desire to be informed by His Britannic Majesty's Government whether, in compliance with the Convention of April 30, 1859, it would be prepared to put into due effect the bilateral stipulations contained in article VII of said convention." [3]

Indeed, the Guatemalan Chancellor made an express demand that:

> "....on the part of His Majesty's Government the express statement be made that it is prepare to satisfy, on its part, the obligation which pertains to it by article VII of the Convention of April 30, 1859. " [4]

And on 24th April 1934, Chancellor Klee, before accepting the report on boundry demarcatio, sought clarification and agreement "as to the manner in which the British Government is to comply, on its part with the obligations assigned to it by article VII of that Convention." [5] Moreover, the Guatemalan Government regarded the *whole* treaty as continuing in force, for in May 1934 Chancellor Klee stated:

> "....the Government of Guatemala, in order to authorise the demarcation of the frontier defined in the convention of April 30, 1859 must know whether His Majesty's Government are prepared to comply integrally with that pact, through due satisfaction of the compensatory stipulations of its article VII." [6]

180. As late as 11 September 1935, Chancellor Klee in a formal note to HMG was referring to 'the absolute necessity of giving effective compliance to article VII of that Convention". [7] And in March 1938 Guatemala again "renews it's demand for integral compli-

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2. See the Guatemalan Note of 1 May 1933: "the Government of Guatemala accepts that the engineers of the Colony of Belize proceed with the demarcation of the boundary withGuatemala, precisely in theplace established by the Convention of 1859.....": cited in Mendoza, op cit., p. 253. *WhiteBook*, pp.364, 367.
3. Martens, 3rd Ser. XXVI (1933), 42-48.
1. Cited Mendoza, *op. cit.*, pp. 251-252.
2. *Ibid.*, p. 253.
3. *Ibid.*, p. 255.
4. *White Book*, p. 413.
5. *Ibid.*, p. 424.

ance with the Convention of 1859....." [1] Thus, the conclusion must be that as late as 1938. some 60 years after the claimed breach of Article 7, Guatemala had not attempted to terminate the Treaty but, on the contrary, was insisting on full compliance by HMG. [2] There could scarcely be a clearer illustration of "acquiescence". The sudden desicion in 1940 to terminate was thus far too late to have any effect in law.

IV. SELF-DETERMINATION

181. The principal part of this Opinion has been devoted to an examination of the question of title to Belize in terms of traditional international law. Our concentration in this respect has reflected the emphasis which in the public exposition of its case Guatemala has placed upon such elements as *uti possidetis* and Article 7 of the 1859 Treaty. We feel that we have said enough to show that in terms of the traditional law of nations the claim by Guatemala to Belize cannot be upheld.

182. There is, however, room for a brief suplement to our statement of the traditional law. As is well known, questions of title in international law must be determined by reference to the concepts of law operative at the various stages in the history of the territory in question (the so-called principle of "inter-temporal law"). One does not judge the validity of a nineteenth century title by twentieth century standards, nor of a twentieth century title by nineteenth century rules. So, to look at the matter to-day excluively in terms of concepts such as occupation and the fulfilment of treaty obligations one hundred and twenty years old may not be sufficient if the current approach to the determination of rights in territory requires consideration of other factors. In the present situation, it is obviously necessary to advert to the concept of self-determination.

183. There is no need at this stage of an already long opinion to develop in any detail the concept of self-determination. It is the subject of a substantial literature. [3] It is irreversibly established in the practice of States and of the United Nations. It has found expression in at least two 'major General Assembly resolutions:

(*a*) the Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514 (XV)' The resolution provides *inter alia*;

> "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.
>
> "5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.
>
> "6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purpose and principles of the Charter of the United Nations."

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1. *Ibid.*, p. 432.
2. Report of the I.L.C. to the General Assembly, *Yearbook* of the I.L.C. 1966 Vol. II, p. 225.
3. See, for example, A. Rigo Sureda, *The Evolution of the right of self-determination: a study of U. N. Practice* (1973): *Decolonization, Fifteen Years of the U.N. Declaration on the Granting of Independence to Colonial Countries and Peoples* a Publication of the U.N. Dept. of Political Affairs, Trusteeship and Decolonisation, Vol. II, No. 6. December 1975; Umozurike, Self-Determination in International Law (1972).

(*b*) the 1970 Declaration on Principle of International Law concerning Friendly Relations and Cooperation among States also contains comparable provisions:

> "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter, all peoples have the right freely to determine, without external interference, their political status ....and every State has the duty to respect this right in accordance with the provisions of the Charter.
>
> Every State has the duty to refrain from any forcible action which deprives peoples..... of their right to self-determination and freedom and independence.
>
> Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country."

184. The International Court of Justice has also recognized the place of the concept in contemporary international law. In its Advisory Opinion of 21 June 1971 on *Namibia* the Court spoke of the development of international law in regard to non-self-governing territories as follows:

> "A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), which embraces all peoples and territories which 'have not yet attained independence'." (*I.C.J. Reports* 1971, p. 31.)

It went on to state:

> ".....the Court must take into consideration the changes which have occured in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of Law, through the Charter of the United Nations and by way of customary law" (ibid).

The Court then concluded:

> "In the domain to which the present proceeding relate, the last fifty years, as indicated above, have brought important developments. These developments leave no doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the court, if it is faithfully to discharge its functions, may not ignore," (*Ibid.*, pp. 31 f.)

The validity of the principle was again re-affirmed in the Advisory Opinion on *Western Sahara* (*I.C.J. Reports* 1975, esp. at pp. 31-33).

185. More to the point, even, the specific applicability of the concept to the status of Belize has been massively accepted by the international community. This is evidenced by the views of the Commonwealth Heads of Government as expressed at Kingston, Jamaica in 1975 and again in London in June 1977, in the Declaration of the Fifth Conference of Ministers of Foreign Affairs of Non-Aligned Countries, held in Lima, Peru in August 1975, and by the Heads of State and Government of the Non-Aligned Countries in Colombo, Sri Lanka in August 1976; in the Conference of CARICOM Heads of Government held in St. Lucia in July 1974; and; most importantly, by resolutions of the United Nations General Assembly. By Resolution 3432 (XXX) of 8 December 1975,[1] the Assembly.

1. Adoped by 110 to 9, with 16 absentions.

"1' *Reaffirms* the inalienable right of the people of Belize to self-determination and independence;

"2' Declares that the inviolability and territorial integrity of Belize must be preserved;

"3. Declares that any proposals for the resolution of these differencs of opinion that emerge from the negotiations between the administering Power and the Government of Guatemala must be in accordance with the provisions of paragraphs 1 and 2 above;

....."

186. This resolution was reaffirmed, in virtually identical terms, on 1 December 1976 in Resolution 31/50 and again on 28 November 1977 in Resolution 32/32. The terms of these resolutions could scarcely be more emphatic' and it will be noted that they are specifically addressed to the issue of partition of the territory, declaring that the territorial integrity of Belize must be preserved.

187. However, it appears that Guatemala rejects not only the competence of the General Assembly to express a view on the dispute—and especially on the application of the principle self-determination to that dispute—but also rejects the principle itself in its application to Belize.

188. There is really no substance in the Guatemalan objections to the Assembly's competence. Examination of the General Assembly's action in relation to self-determination over the past twenty or more years shows that in so far as self-determination is viewed by the Assembly as an international legal right of all peoples, a State may not oppose the Assembly's expression of interest on the basis that the matter must be left exclusively to the negotistions of the parties. There have been many examples of the exercise of the Assembly's competence concurrently with negotiations between the parties (Algeria, 1961; West Irian, 1955, Gibraltar, 1967, the Falkland Islands, 1976; Timor, 1975). Indeed, the practice of the Assembly is to retain a "watching brief" over negotiations between the parties concerned to ensure that the outcome is consistent with the right of self-determination.

189. The second Guatemalan objection to the application of the principle of self-determination to Belize lies in the Guatemalan view that self-determination cannot prejudice a State's right to recover its territory. Indeed, in 1960, when General Assembly Resolution 1514 was being voted on, Guatemala proposed (but later withdrew) the following addition:

> "the principle of self-determination of peoples may in no case impair the right of territorial integrity of any state *or its right to the recovery of territory*". [1]

190. There are obvious difficulties in the Guatemalan position. First, as shown earlier it is not possible to sustain the Guatemalan claim to any part of the territory of Belize; all that Guatemala has is a possible claim against the United Kingdom for non-fulfilment of Article 7 of the 1859 Treaty. Second, the Guatemalan claim overlooks the fact than save perhaps for a small minority, the people of Belize do not wish for union or association with Guatemalan but clearly want complete independence. [2] Thus, whilst there may be some

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1. G.A.O.R., 15th sess. Plen. Mtg. 947th, A/L.325, Emphasis added.
1. See text of the letter dated 6 June 1977 from the Hon. George Price, Premier of Belize to Commonwealth Heads of Government.

justification for the Guatemalan view that self-determination does not impair a State's right to recover territory where the inhabitants of that territory themselves wish for reunion with the claimant State, it is an entirely different matter to suggest that a claim to recovery of territory prevails over the right of self-determination to the extent that the claim must succeed despite the contrary wishes of the inhabitants. Such a view would, in many areas of the world, produce a complete negation of the right of self-determination. And it has certainly not be accepted by either the General Assembly or the International Court of Justice—as is evidenced by the sentence in the Court's Advisory Opinion on *Western Sahara* in which it stated—without any adverse comment—that all General Assembly resolutions on the self-determination of Western Sahara "were adopted in the face of reminders by Morroco and Mauritania of their respective claims that Western Sahara constituted an integral part of their territory".. [1]

191. It is important to emphasis that in the present dispute there is a direct conflict between the Guatemalan claim and the right of self-determination. The fact that the General Assembly has thrown its weight behind the latter is scarcely surprising. For on the One hand we have a claim to territory based upon the *uti possidetis* of 1821, but relating to territory never actually occupied by either Spain or Guatemala, and on the other hand we have a principle—the right of self -determination—which may be viewed as part of the contemporary *jus cogens*, a premptory norm of international law, and which has proved to be amongst the most influential of all the principles governing United Nations action.

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1. I.C.J. Reports 1975, p. 35*M*

V. CONCLUSION

192. This brings us to the close of this Opinion in which we have examined the question of title to Belize. As we began the Opinion with a summary of our views there is no need to repeat what has already been said. We conclue only by emphasizing the essentials: that the territory was British before 1859; that the 1859 Treaty is, therefore, not a treaty of cession; that it is arguable that Britain may have been in breach of Article 7 of the 1859 Treaty, but that any such breach, can in no way establish a title to Belize in Guatemala; and, finally, that in any event contemporary international law requires regard to be had to the principle of self-detrmination—the effect of which is emphatically to exclude the Guatemalan claim.

E.L.
D.W.B.
18 September, 1978.

3 Essex Court,
Temple, E.C. 4.

"This booklet contains the full text of an Opinion on the question of title to the territory of Belize prepared by two well-known and experienced British inter-national lawyers, Mr. E. Lauterpacht, Q.C. and Dr. D. W. Bowett, Q.C. It should be emphasised that Counsel were not asked to produce a brief in support of the position of the Government of Belize. Instead, to use the words in which the case was sent to them, they were requested to write an opinion 'dealing with the legal history and status of Belize in international law and in particular with the merits of the Guatemalan claim to Belize'. The tradition of the English Bar is that the response to a request of this nature is met in as objective a manner as possible".