

**BACKGROUND AND STUDY OF THE SPECIAL AGREEMENT BETWEEN  
GUATEMALA AND BELIZE TO SUBMIT GUATEMALA'S TERRITORIAL,  
INSULAR AND MARITIME CLAIM TO THE INTERNATIONAL COURT OF  
JUSTICE.**

**By Gustavo Adolfo Orellana Portillo**

**To the Ministry of Foreign Affairs of Guatemala, especially the Belize Commission.**

**To my parents            Oscar Rigoberto Orellana Cordón (+)  
                                  Octavila Portillo Chacón de Orellana (+)**

**To my wife                Lilián Lisseth Lacs Palomo de Orellana**

**To my children          Oscar Gustavo and Laura Paulina**

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## **PROLOGUE**

On December 8, 2008, the Special Agreement between Guatemala and Belize to submit Guatemala's territorial, insular and maritime differendum to the International Court of Justice was signed at the headquarters of the Organization of American States. It included the commitment of both States of acceding to the jurisdiction of this organ in order to settle the existing territorial dispute. By signing this agreement, a longstanding process of negotiations that began in 1994 comes to a conclusion, allowing the State of Guatemala to claim its corresponding rights over Belizean territory and letting a judgment put an end to this dispute.

This document aims to explain the content of the Special Agreement that was signed between Guatemala and Belize, examining its purpose, object, as well as the national and international laws that were considered by the Governments at the time of negotiating and agreeing to each of its articles. Also, to make my own contribution in helping Guatemalans get to know this process and accept it with their vote through referendum, clearing the path for the submittal of the existing territorial dispute with Belize to the decision of the International Court of Justice.

In this document I include a light historical review of the most relevant facts and acts, focusing on recent events that allowed both governments to arrive to the signing of the agreement.

Guatemala has a chance for the Court to analyze and take cognizance of its territorial claim applying sources of International Law, and solving the territorial dispute in the land, insular and maritime areas by means of a judgment of mandatory compliance. This ruling will grant legal certainty to both countries regarding the territories they are entitled to and, in consequence, determine the boundaries between both states in benefit of their peoples.

Since I began serving my country, I have been part of Guatemala's effort to solve the territorial dispute with Belize. All the members of the Belize Commission at the Ministry of Foreign Affairs committed ourselves to the obligation of not addressing or issuing public studies on the subject in order to avoid contradictions between our own views and those of our Foreign Office. This commitment has been loyally observed; this is the first time I write about the Territorial Dispute, aiming to contribute to the exposure of the Special Agreement, so its approval can take us to the International Court of Justice.

Regarding the territorial dispute and the course of action to resolve it, the different governments we have served have respected the criteria and professional stance of the members of the National Council and Belize Commission. Their support has allowed our advice to direct us towards the signing of a *compromis* to appear before the International Court of Justice, which some years ago was thought impossible.

Regardless of criticism that has fallen on the Belize Commission for allegedly having taken the "hard line" at the Ministry of Foreign Affairs and having adopted an uncompromising position, our work has received the support of all Foreign Ministers; especially when there is proof that we have always acted in defense of our country's sovereign rights, and in reaction to the immutable position presented by the different Belizean governments, stating that not even an inch of territory will be returned to Guatemala.

It is fair to acknowledge that the effort of the Foreign Office has been constantly supported by the Ministry of Defense, which has maintained representatives at all times within the Belize Commission, acting with a high level of professionalism and safeguarding Guatemala's sovereignty.

We have traveled in this journey, from bilateral meetings in which Belizean officials ignored our claims for considering that the territorial dispute had ended the second Guatemala recognized Belizean independence, up to the signing by both

governments of the Special Agreement to submit the existing territorial dispute to the International Court of Justice.

This document is headed to explain the background that led to the signing of the Special Agreement, examine its historical, legal and political (internal and international) elements, the object in mind at the moment of drawing up each of its articles, as well as the positions of the parties during its negotiation.

While studying the Special Agreement, it must be kept in mind that it is an international treaty which maintains a delicate balance between each of the contracting countries' interests; it would have been useless to put together a text impossible to be accepted by either of the parties. Therefore, the agreement is product of long negotiations in which special care was given to the content of each article, enabling them to be legally and politically acceptable for the executive and legislative powers, as well as for the people of each country.

This study focuses, in the first place, on the commitment of both States to submit the differendum to the International Court of Justice, the road map to be followed, and some procedural aspects to substantiate the eventual process. Some of these elements are similar to those of other special agreements signed by States that have acceded to the International Court of Justice; but from the Guatemalan viewpoint, it also contains provisions that refer specifically to the internal procedure to be followed in our country.

This procedure requires the celebration of a referendum by which the people of Guatemala would authorize the Government to submit the territorial dispute to the International Court of Justice. My vote will definitely be issued, along with those of the citizens that will go to the ballot boxes to decide this important issue that has affected our country's independent life. I hope that in the near future we can foster full and respectful bilateral relations, like two neighboring and fraternal countries should, facing their futures and the great challenges posed by the modern world together.

The ideal means to solve this dispute is through a judgment issued by the International Court of Justice, given that it has not been possible throughout negotiations, as it is shown in this document along with its historical review, enumerating much of the efforts that were rejected or denied by the colonizing power.

Neither the Guatemalan nor the Belizean people are responsible for the existing dispute and do not deserve to continue carrying the weight that its continuance represents. England left us no options and did not accept resolving the dispute according to International Law as a civilized nation should have - especially a powerful empire such as the British -, plunging us into a territorial dispute.

Both nations are interested in obtaining legal certainty regarding their territories, not only because of sovereignty, but also responding to economic, investment, development, security, tourism, ecologic, resource exploitation and administrative issues, among others, which have been neglected and not taken proper advantage of. As long as there is no certainty regarding the country in which the investment is being done and the cooperation is given, these aspects will remain affected.

Belizeans and Guatemalans are interested in getting to know each other, develop fraternal ties, relate, work and build a common future together, all which has been denied to us by third parties that sowed mistrust among two populations. This, to avoid a mutual relationship that let us realize that we are one community with the same Mayan ancestors, that we share a common past, present and necessarily, a future. Either of our populations will be able to move away from the neighborhood; we will remain here for ever, so it is better to resolve our differences as good neighbors in a friendly fashion and in conformity with International Law.

Further on, it will be necessary to determine the actions to be enforced, based on International Law, for the United Kingdom to compensate the damages caused by its forceful intervention in the life of the Republic of Guatemala and its people, rights that have been continuously claimed by the Government throughout history.

Even though I am a member of the Belize Commission, I am compelled to clarify that this document portrays my personal stance on the Territorial Dispute between Guatemala and Belize, and does not reflect the position of the Ministry of Foreign Affairs or that of the Guatemalan Government. I take full responsibility for the content of this study, which has the purpose of explaining the Special Agreement signed between Guatemala and Belize to submit the territorial dispute to the International Court of Justice, and disseminate its content, object, purpose, as well as its corresponding procedure.

Personally, I am satisfied for having participated in this endeavor, to have had the opportunity and privilege of working with distinguished Guatemalans and experts on the subject, members of the Belize National Council and the Belize Commission; honorable citizens, proud of their nationality, jealously guarding that Guatemalan rights are not prejudiced. I have been able to share experiences with these personalities that have already filled a page in our country's history, with whom we have performed our work of permanent and discrete counsel, uninterested in the limelight, serving our country with a minimal budget, fulfilling me even more for the accomplished task.

I wish to thank my colleagues at the Belize Commission for their valuable contributions made to this document: Marithza Ruiz de Vielman, Ruben Alberto Contreras Ortiz, who recently passed away, Rolando Palomo González, Efraín Aguilera Vizcarra, Alberto Sandoval Cojulún, Antonio Castellanos López, and officers Otto Wantland Cárcamo and Carlos Antonio Lainfiesta. They all contributed to this book as if it was their own.

I also express my gratitude for the experience, effort and teachings of those who were part of the Belize Commission for many years, my respected colleagues and friends Alberto Herrarte González (r.i.p.), Francisco Villagrán Kramer, and Gabriel Orellana Rojas, and Gabriel Aguilera Peralta, as well as the officers of the Guatemalan Armed Forces who have unconditionally accompanied us during this process. The Belize

Commission has worked under the direction of its Foreign Ministers, who have given a decisive drive to the effort of reaching a final solution to the territorial dispute with Belize: Marithza Ruiz de Vielman, Eduardo Stein Barillas, Gabriel Orellana Rojas, Edgar Armando Gutiérrez Girón, Jorge Briz Abularach, Gert Rosenthal Koenigsberger and currently, Haroldo Rodas Melgar, whose support made the edition of this book possible.

To all I convey my admiration and respect for the work achieved in a professional and patriotic fashion for so many years, allowing the fulfillment of the set purpose of taking the existing territorial dispute with Belize to the present moment. Now, we stand before the possibility of submitting it to the International Court of Justice, which was always our main objective, but that sometimes believed it impossible to materialize. This feeling will be better understood once the reader has read about the efforts made throughout history to end this burden carried by the State of Guatemala: a territorial dispute provoked by the British occupation of this portion of Guatemala.

## **INTRODUCTION**

The territorial dispute originated by the occupation of the territory of Belize by British subjects since the XVII century has been a longstanding and unfair process for Guatemala, as well as frustrating the impossibility of recovering the territory that was unlawfully taken, extended by the usurper up to the area within the Guatemalan territory occupied today by the Belizean State.

Much effort has been put in by my country to resolve this territorial dispute in a dignified way; a dilemma that mutilated its territory and limited its connection with the Caribbean Sea, isolating and leaving it with only one small outlet to the Atlantic coast from the Department of Izabal.

The history of the British occupation in the Guatemalan territory of Belize is an example of how certain actions carried out by a power can be so calculated for its own benefit and in detriment of the deprived country. It is a story of malice, unfulfilled agreements and deliberate acts to ensure that an unlawful occupation could be wrongly justified as a way of attaining territory.

The historical posture of Great Britain and its support towards Belize rests on coercion placed on the Guatemalan State through their bilateral and multilateral relations, in order to deny our rights and avoid a solution from being reached. This was done to uphold its argument that the “usurpation” granted rights over the territory, which was acquired due to prescription in favor of Belize and to the exclusion of our country. Guatemala has repeatedly reserved its rights and keeps its objection alive in such a way that *derelictio* could never be argued nor prescription be justified. Above all, because Great Britain first, and Belize later, have sustained that their rights originate from the Convention of 1859, failing to consider that said convention also includes obligations that were not fulfilled, thus maintaining unavoidable responsibilities.

This document does not pretend to analyze the legal positions regarding the content of the claim, which will be the object of the memorial or petition presented in due time to the International Court of Justice. Nevertheless, it is important for the reader to know that the Belizean Government, in a vain attempt to justify the acquisition of territory by unlawful occupation, through communication of 8 June addressed to the Facilitators, literally states the following:

*“...The “usurpation”, which consists of a taking of possession in contradiction of the rights of Spain, starts the process of British acquisition of title by adverse possession which hardens into a firm title on the basis of historical consolidation. So, whatever the treaties of 1783 and 1786 may have said, they are overridden or bypassed by the fact of British possession for a long period prior to 1850.” (sic)<sup>1</sup>*

The Government of Guatemala, upon referring to the declaration put forward by Belize, expressed in paragraph 33 of a communication addressed to the Facilitators on 15 May 2001, that: *“In other words: the Belizean argument indicates that the appropriation or “possession of something belonging to another” carries as consequence the acquisition of title over the thing. Following this crooked reasoning, the thief that appropriates something belonging to another would also acquire each day after the theft a better title. The prescription that Belize alleges does not constitute a means of acquiring title over said islands and islets, because said territory never was terra nullius; but they belonged to the Kingdom of Spain, firstly, and then, by succession, to the Republic of Guatemala. The occupation has never had the acquiescence of Guatemala, and Belize has maintained it thanks to the threat of force imposed by the British Empire.”<sup>2</sup>*

The aforementioned pretensions and arguments of Belize imply then that the title over the territory of Belize was acquired by Great Britain even though the occupation was

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<sup>1</sup> Communication sent by the Government of Belize to the Facilitators on June 8, 2000. Publication made by the Belize Commission, Ministry of Foreign Affairs. Territorial Dispute Guatemala. Guatemala, page 126.

<sup>2</sup> Communication sent by the Government of Guatemala to the Facilitators on 15 May, 2001. Publication made by the Belize Commission, Ministry of Foreign Affairs of Guatemala, Op. Cit. Page 151.

illegitimate, and the fact that Guatemala had not retrieved it made it valid. This, regardless of the fact that the lawful title-holder of the territory claimed it uselessly, facing the military power of the usurper, who would have made use of force doubtlessly against Guatemala to remain in the occupied territory and in order to occupy further Guatemalan territory.

In fact, Great Britain has used force to solve many conflicts, such as the *Malvinas* (Falkland) Islands, without making a genuine effort to reach an agreement that acknowledges the rights of the Argentine people. On 28 March 2009, the Spanish journal *El País* informed that Argentine President Cristina Fernández de Kirchner stated with great clarity and firmness the need for the United Kingdom to comply with the United Nations' request of entering into negotiations oriented to solving the conflict of sovereignty in the islands; and...was clear in pointing out that in the XXI century, persistence over a colonial vision is not consistent with current world order.

The Argentine government has confirmed its claim to sovereignty over the archipelago in international fora, over which Argentina and the United Kingdom entered into a military confrontation in 1982. British sources have stated that Prime Minister Gordon Brown expressed his stance of not negotiating the sovereignty of the isles, and argued that it is a “self-determination issue” of its inhabitants.<sup>3</sup>

Author Antonio Remiro Brotóns refers to the *Malvinas* case: “*Experience has shown that a hardened attitude from the occupant power, validated by the imported local population, makes the peaceful return of territory to the country that legitimately claims it unfeasible, in the scenario of decolonization, while time is gained by said population to qualify as title-holders of the right to free self-determination.*”<sup>4</sup>

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<sup>3</sup> Diario El País web page.  
[http://www.elpais.com/articulo/internacional/Argentina/pide/Brown/negociación/Malvinas/elpepiint/20090320elpepiint\\_5/Tes](http://www.elpais.com/articulo/internacional/Argentina/pide/Brown/negociación/Malvinas/elpepiint/20090320elpepiint_5/Tes)

<sup>4</sup> Brotóns, Antonio Remiro (1997). *Derecho Internacional*. Madrid: McGraw Hill/Interamericana de España, S.A.U. page 121.

Resuming the study of the Guatemalan case, in 1939 Guatemalan historian David Vela wrote his book “*Nuestro Belice*” (Our Belize), which makes an excellent compilation and revision of documents related to the territorial dispute, considerations regarding the Guatemalan effort to solve the conflict and the British approach of putting it off with the clear objective of consolidating, with the passing of time, its position in regard to Guatemalan territory. Delaying this conflict resolution kept the English position over the territory and gave way to Belize’s independence. Arguments stated by David Vela at that moment unfortunately continue to be valid today.

*“Guatemala has exhausted all resorts, within the most conciliatory spirit, regarding the interests at stake and within the friendliest rules, regarding its relations with Great Britain. It has aimed to reach a fair and equitable solution to a controversy which was unilaterally prompted by England’s failure to fulfill a commitment reached upon good faith on our part and guaranteed by the British plenipotentiary’s most sacred word of honor, as well as the formal acceptance and solemn promises of Her Majesty’s government.*

*And this solution, in the most satisfactory form for Guatemala’s legitimate aspirations, falls as an ethical imperative regardless of the influence of the disparity in material strength; both nations are powers in this case, and if England has the power of armaments and political influence, Guatemala has the superior power of the law and the supportive sympathy of men of wholesome morale and vertical spirit to enforce justice...*

*The British government persists on avoiding the fulfillment of its obligations; therefore, as long as all material and intangible damages bared by Guatemala are not completely compensated, we should be allowed to – an even be forced to – neglect the whole convention of the year 59, which cannot remain in force regarding only our obligations and diminishing our national interests, at the same time it has expired or has no longer effect in the section that favors us and is under the responsibility of Great Britain. And in case things were to return to the original status quo of the treaty, Guatemala’s right of dominion and sovereignty to the vast extension of territory granted*

*to England is unquestionable, as well as the reintegration of lands that British subjects enjoyed in usufruct with limited title, deriving from the Spanish pacts of 1783 and 1786.”<sup>5</sup>*

As it has occurred in other cases in which its intervention has caused territorial conflicts yet to be resolved, the United Kingdom wants to outwardly profess a correct attitude, respectful of International Law, although it is evident that no will exists to consider other countries' rights, that like Guatemala, have been affected by the imperialist policy regarding territories considered strategic worldwide. Territorial conflicts still continue given the unwillingness of the United Kingdom to acknowledge their existence and the necessity of solving them in a timely fashion, in detriment of populations that have inherited disputes as such, being the case of Guatemala and Belize.

English occupation has caused tremendous material loss and damages for Guatemala, which have hindered economic, social, administrative and cultural development in a large portion of our territory. Our country lost great part of its Caribbean coast, which was the natural outlet to sea for the departments of Petén and the Verapaz lands.

Aside from bearing with the loss of its legitimate territory based on the use of force by the usurper, Guatemala has also been affected regarding its international relations. This has resulted in isolation, criticism and even accusation of being an imperialist nation, for the mere fact of demanding that its lawful right to claim the territory that was taken from it is recognized.

A campaign has been conducted by Great Britain first and recently by Belize against our country, appearing to be a victimizer instead of a victim.

Guatemala's position throughout this historical process has rested on the need of solving this territorial dispute through pacific means found in International Law. It is of essence that the territorial dispute is resolved in the land, insular and maritime areas, by

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<sup>5</sup> Vela, David. (1939) *Nuestro Belice*: Tipografía Nacional. Pages 182 and 183.

the highest legal existing organ, in order for future generations of Guatemalans to be able to build better, complete and generous bilateral relations with the Belizean people.

Belize needs to solve the territorial dispute in order to obtain legal certainty of the boundaries of its territory and to set the borders with its neighboring country. To continue taking advantage *de facto* of the territory, trusting that the *status quo* will further consolidate the possession with each passing day, will only delay even more the solution to be reached that will bring security and keep future conflicts away. Meanwhile, legal ambiguity does not attract neither public nor private investments in the conflict areas, let alone guarantee to which country this areas will be integrated to further on.

For geographic reasons, Belize's political, social and economic interests lie within the Central American region. Therefore, the resolution of the existing territorial dispute is convenient for that country. It is part of CARICOM and although it holds cultural and political roots with that region, it evidently belongs geographically to Central America, sharing a common future that cannot be overlooked.

Communications and ground transportation between Belize and Central America, through Guatemalan territory, are natural and should be expeditious. This type of communication will never exist with members of CARICOM, for its insular territories allow only maritime and air transportation, which for short distances, as contradictory as it may sound, is far more expensive. Additionally, great competition exists within countries of this globalized world, urging Belize to solve its controversy with Guatemala, for its own convenience.

The worst option is to continue in the current situation and refrain from solving the matter, reason why this specific moment in which we can turn to the International Court of Justice, with Belize's consent, is unique and should be taken advantage of.

Quoting renowned and respected Doctor Alberto Herrarte González, who wrote in the year 2000: *“Those of us who have contended for a long time that Guatemala was a victim of a number of adverse circumstances, which resulted in the loss of great part of its territory, cannot be expected to settle, due to political evasions, for the passive acceptance of a situation that was imposed upon us from the very beginning. It would be similar to the case where a person convicted in an extrajudicial manner, without having been heard and defeated in trial, demanded a fair trial, so costly for Rule of Law in contemporary times.*

*That is what is being demanded at present times. That a judicial solution to the problem is accepted, which means presenting it before an international court for its final decision. If Guatemala has rights, let it claim them; if it does not, let them be denied. The UN has repeatedly stated that the request to submit a controversy before a judicial organ should not be considered an act of animosity. On the contrary, judicial solutions are the fairest. Political solutions are always arbitrary”.*<sup>6</sup>

The Special Agreement between Guatemala and Belize to submit Guatemala’s Territorial, Insular and Maritime Claim to the International Court of Justice, signed on 8 December 2008, has exactly that purpose and has been negotiated in a way it can allow the State of Guatemala to demand its corresponding rights before the Court regarding the territory of Belize, and that a judgment finally puts an end to this dispute.

The work of the different governments of Guatemala since 1984 has been significant in meeting with its obligations and in making the necessary decisions to take this dispute towards a solution before the International Court of Justice.

In Guatemala’s case, according to transitory article 19 of the Political Constitution of the Republic, Congress has competence to submit any definitive agreement to referendum. If accepted by the Guatemalan people, a juridical procedure would begin, at

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<sup>6</sup> Herrarte Alberto. (2000) *La Cuestión de Belice, Estudio Histórico – Jurídico de la Controversia*. Guatemala. Page iii.

the end of which the International Court of Justice would issue a judgment that would finally put an end to the existing territorial dispute with Belize. Therefore, it is imperative that the Guatemalan population accepts the COMMITMENT in order for the Government of Guatemala to accede to the Court, for once the case is filed, the outcome could totally or partially favor Guatemala's pretensions, as well as there would be no turning back in the resolution regarding this conflict.

Hence, it is a responsibility for Congress to carry out its mandate, as long as it considers it convenient regarding the defense of Guatemala's rights, and submit the agreement to the approval of the Guatemalan people by means of referendum.

## CHAPTER 1

### 1.1. HISTORICAL SUMMARY OF THE TERRITORIAL DISPUTE

I believe it is relevant to include in this study a brief and slight historical summary of the Territorial Dispute with Belize, with the purpose of reviewing the most significant facts in more than 150 years of history, aiming to diffuse the subject in Guatemala, insufficient for so many years, having our younger generations basically no access to this issue. In order to make a responsible decision, first the people must be informed, and as of that moment be convinced of the need to solve the dispute.

Even so, I should clarify that this study does not pretend to make a deep historical run-through, because I believe its main objective of explaining the Special Agreement in the best way possible would be missed. On the other hand, excellent historical compilations have been written about the matter and I recommend them to those interested in better understand the territorial dispute. To that end, I have included in the bibliography some of this literature. Our teacher, dear colleague and friend, Doctor Alberto Herrarte González, who dedicated great part of his life to the study of the Territorial Dispute, prepared excellent historical and legal treatises. His book “*La Cuestión de Belice, Estudio Histórico-Jurídico de la Controversia*” (The Belize Issue, Historical-Legal Study of the Controversy), published in 2000, is an obligatory piece of literature to further understand the historical origin of the controversy and its legal analysis, reason why I highly recommend it.

Doctor Carlos Larios Ochaita included in his book “*Derecho Internacional Público*” (Public International Law), seventh edition<sup>7</sup>, an “Update on the legal state regarding the Belize case”, prepared by myself as a contribution to that publication. I use it in this document with some extensions of certain historical moments that I have

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<sup>7</sup> Larios Ochaita, Carlos. (2005). *Derecho Internacional Público*. (7th. Ed.). Guatemala: Litografía Nawal Wuj.

considered important. Especially, it is essential to understand the period that begins after Guatemala's recognition of Belizean independence and subsequent years in order to approach the Territorial Differendum with Belize as a State Issue, in accordance with efforts made by different Guatemalan governments, which in my view have reached their goal. This summary was duly revised by my colleagues at the Belize Commission.

Throughout history, Guatemala has definitely tried in several occasions to solve the Territorial Differendum, always finding opposition from Great Britain first and Belize later. Clearly, it is convenient for them to maintain *status quo* of the unlawful occupation of Belize's territory, which has of course meant great advantage for these States' interests against Guatemala's.

#### **1.1.1. BEFORE SIGNING THE 1859 CONVENTION**

Piracy became a phenomenon in several parts of the world during the XVI and XVII centuries. English pirates prowled through the Americas, but set their hide-outs along the shore of the Caribbean Sea, especially on the coasts of Central America that provided safe shelter.

*“...With the Peace of Paris in 1763, the Spanish Crown promised to refrain from bothering English subjects dedicated to logwood cutting; but did not define a specific territorial circumscription for this purpose... Spain and France engaged in war once again against England, due to the United States' independence; with the Peace of Versailles in 1783, a severe demarcation of territory was made for English occupation for the exclusive purpose of logwood cutting, from the Hondo to the Belize River, the origin of British occupation in Belize. The terms of the treaty were quite severe for Great Britain, declaring Spanish sovereignty over the territory granted in usufruct. In 1786 the Spanish Crown extended the grant from the Belize River to the Sibun River, by the treaty of 1786, therefore stretching across from the Hondo to the Sibun...”<sup>8</sup>*

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<sup>8</sup> Herrarte, Alberto. *La Cuestión de Belice*. Op. cit. pages 5 and 6.

The origin of Belize's settlement goes back to the years 1783 and 1786, dates when the Spanish Crown agreed, through treaties celebrated with Great Britain, to recognize the faculty of Britannic Crown subjects' to cut, carry and transport logwood and other woods, not excluding mahogany, and benefit from every other fruit or product of the land, in the area found within the Hondo and Sibun Rivers.

### **1.1.2. THE ANGLO-Guatemalan CONVENTION OF 1859**

After Guatemala's independence in 1821, the Federation of the United Provinces of Central America was formed, having an ephemeral life span due to weak cohesion among the countries. This historical event became a motivation for the British settlement to be expanded towards Guatemalan territory south of the Sibun, up to the Sarstoon River, while Guatemala made great efforts to keep the federation alive.

Enigmatically, the privileged geographical position of the Central American territory, within the heart of the Americas and the world, was one of the reasons that, together with political ambition and lack of vision on behalf of leaders at the time, prevented the Central American Federation from succeeding. This tragedy is a mistake we will have to pay for throughout past and upcoming history; the dream of a united Central America has vanished from the memory of our ancestors, and little about it is known by our citizens nowadays.

*“Our turbulent past was affected by the project of inter-ocean communication that became almost a natural fact within Middle America. After Spanish domination, world powers turned their eyes towards us and officials carrying special instructions, adventurous merchants, entrepreneurs, and unscrupulous speculators began to appear everywhere searching for fast profit or strong emotions. Great Britain was a country that accentuated its presence and influence during the first republican years of the Federation, as well as in the constituted State as an independent nation.”<sup>9</sup>*

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<sup>9</sup> García Laguardia, Jorge Mario. *Reflexiones en Torno a la Cuestión de Belice*, libro de Alberto Herrarte. Guatemala, 2001.

The interests of Great Britain in Central America became greater with each passing day, for geographical conditions made her ideal for the construction of an inter-ocean canal. Hence, maintaining English existing occupations in these territories and extending them bore special importance.

*“Relations between Great Britain and Central America first, and later with Guatemala, were determined by these main facts: a) The assurance of territory that included the grant of usufruct; b) the usurpations that had already begun, from the Sibun to the Sarstoon Rivers; c) occupation of the Bay Islands in Honduras, and d) later on, the Mosquito Coast (Mosquitia)...”*<sup>10</sup>

On April 19, 1850, the Clayton-Bulwer treaty was signed between the United States and Great Britain, by which they were bound to refrain from occupying, colonizing, or fortifying any given part of Central America, imposing upon Great Britain the obligation of not making further territorial advances in the settlement of Belize. Great Britain pointed out a reservation regarding its occupation in Belize, stating it had been granted in usufruct by the Spanish Crown. Even though the United States accepted the reservation, it took great care in not confirming or denying Britain’s rights, and whereas the Dallas-Clarendon treaty was signed later on in 1856, the treaty was never ratified.

Exhausted by the effort of maintaining the federation and trying to stop British advances over its territory, Guatemala signed the Aycinena-Wyke treaty with Great Britain on 1859, by which Guatemala ceded the area located between the Sibun and Sarstoon Rivers, in exchange of a particular compensation. It consisted on: *“conjointly to use their best efforts by taking adequate means for establishing the easiest communication...between the fittest place on the Atlantic Coast near the Settlement of Belize and the Capital of Guatemala...”* The convention was called the *boundary treaty*, in order to avoid violating the Clayton-Bulwer treaty, signed nine years earlier, in 1850,

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<sup>10</sup> Herrarte, Alberto. *La Cuestión de Belice*. Page 9.

between the United States and Great Britain, by which both powers were committed to refrain from occupying, colonizing or fortifying possessions within Central America.

### **1.1.3. THE 1863 CONVENTION**

The compensation mentioned in article VII of the 1859 Convention was not carried out, and on 5 August 1863, a Convention was signed whereas: “...*Her British Majesty undertakes to request that her Parliament authorizes the payment of FIFTY THOUSAND POUNDS STERLING to fulfill the obligation entered into according to article VII of the Convention of 30 April 1859...*”<sup>11</sup>

Under the argument of lack of timely ratification by Guatemala of the supplementary convention of 5 August 1863, Great Britain unilaterally resolved that the government itself was absolutely exonerated of obligations that the main treaty of 30 April 1859 imposed it, and the Foreign Office argued, through communication dated 13 January 1867, that “*Her Majesty's Government however regrets this termination of the affair less than they would do...But while these considerations diminish their regret...Her Majesty's Government declines to sign anew the Convention of 1863, and hold themselves now released from the obligation contracted by the 7th Article of that of 1859.*”<sup>12</sup>

### **1.1.4. DIPLOMATIC CORRESPONDANCE OF 1884**

In view of these negative responses, on 5 April 1884, Guatemala protested with all its energy for the *de facto* occupation that Great Britain maintained on the Guatemalan territory of Belize, without having fulfilled obligations that the 1859 Treaty imposed it, putting forward the following:

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<sup>11</sup> Herrarte, Alberto. (1980) *El Caso de Belice y la Mediación de Estados Unidos*. Guatemala: Editorial Académica Centroamericana. Page 56

<sup>12</sup> Herrarte, Alberto. *La Cuestión de Belice*. Op. cit. Page 34.

*“Under these circumstances, my Government believes that in the incessant efforts which it has made for a great number of years, it has exhausted all the means possible to reach an agreement, and that it has no other recourse than protesting against the disregard of its rights...which it makes against the recent de facto occupation on the part of Great Britain of an integral part of Guatemalan territory, declaring that while an absolute agreement on this point does not exist between the two countries, said occupation cannot prejudice Guatemala's rights at any time.”*<sup>13</sup>

### **1.1.5. CORRESPONDENCE BETWEEN THE YEARS 1931 AND 1935**

In 1931, Great Britain and Guatemala exchanged correspondence, which was unilaterally registered by the British government in the League of Nations, wrongfully conferring it the nature of treaty that had set boundaries and allowed to proceed with border delimitation. The British government's double standards became evident when it refused to fulfill obligations that article VII of the 1859 Convention imposed it, as well as considering itself liberated from compliance of the 1863 treaty, but pretending that the 1931 correspondence would imply obligations for Guatemala. This attitude is not worthy of a State, let alone the British Empire, which availed itself from territory that belonged to Guatemala.

In this regard, Doctor Villagrán Kramer analyzes the process and asserts that it did not conclude with boundary demarcation that logically and consequently would have derived from a real treaty.<sup>14</sup>

Briefly, given that analyzing the substance of the dispute is not the object of this study, I consider essential to put forward that the referred exchange of communications does not meet the necessary requirements to be considered an “international treaty”. Its unilateral deposit made by Great Britain before the League of Nations does not confer the

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<sup>13</sup> Vela, David, quoting the referred dispatch of 1884. *Op. cit.* Page 170.

<sup>14</sup> Villagrán Kramer, Francisco. *Elementos para el Análisis del Caso de Belice*. International Studies Magazine from the Institute of International Relations and Research for Peace, Guatemala: Year 8, Volume 8, number 15, January-June 1997, page 118.

nature and quality of an international treaty to a simple exchange of notes that was not ratified by the government of Guatemala. The Permanent Court of International Justice pronounced its advisory opinion in that same sense regarding the issue about the Treatment of Polish Nationals in Danzig of 10 September 1929, considering that “conventions, with a few particular exceptions, do not become compulsory but by virtue of their ratification.” (A Series, Number 23, page 107)<sup>15</sup>

The latter resolution is suitable for the case under analysis because it is contemporary with the mentioned communications of 1931, considered as applicable International Law to that specific time period. Doctor Villagrán Kramer refers “that arbitrator Huber pinpointed in 1928, during the well-known case of “Island of Palmas” (United States v. Netherlands), the rule of International Law which states that: “a judicial act must be observed under the light of law of the time and not the law in force at the moment in which the controversy relative to that act arises or is to be resolved.” (UN Reports of International Arbitral Awards, Vol. 2, p. 849)<sup>16</sup>

International Law at the time required, as it does today, that for agreements to be valid these should be ratified, i.e. that the State has manifested consent in compelling itself, hence complying with internal and international requirements. The exchange of communications was not ratified according to law, and some have pretended to grant it validity it does not have.

In 1933, in view of frequent diplomatic incidents and never-ending contraband and illicit trade in the Zapotillo Cayes, the government of Guatemala proposed to Great Britain that it would seem like an adequate solution to the existing discussion between both governments regarding the territorial dispute, that Guatemala could exercise surveillance of the islets of Zapotilla, under its jurisdiction. The government of Great Britain confirmed receipt but did not respond to the this proposal.

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<sup>15</sup> Villagrán Kramer, Francisco (2002). *Derecho de los Tratados*. (1st ed.) Guatemala: Supreme Court of Justice, Judicial Organ Modernization Unit, World Bank.

<sup>16</sup> Ibidem, Page 24.

“Further on, as recorded on the memoirs of our Secretariat of Foreign Relations corresponding to the years of 1934 and 1935, the English government became concerned about the boundary demarcation in the section located between the Gracias a Dios Rapids of the Sarstoon River and Garbutt’s Falls at the Viejo or Belize River. Their survey was done unilaterally, while our country made timely reservations of its rights and declared in an emphatic and definite manner that neither would it issue approval, nor even consider any matter regarding clarification or interpretation of the Anglo-Guatemalan treaty, or implementation of article VII, until the legitimate claim regarding the compensatory clause was satisfied. Having a simple observer attended on our behalf, Guatemala warned that the documents prepared by English engineers on their own account “*must not be presented for the signature of Guatemalan engineers, while the fundamental question established by article VII of the Convention of 1859 is unsettled*” (communication dated 17 November 1934 and 11 September 1935).”<sup>17</sup>

#### **1.1.6. ALTERNATE PROPOSALS OF THE GOVERNMENT OF GUATEMALA IN 1936**

In 1936, the government of Guatemala, moved by its effort and eagerness to solve the existing territorial dispute, made a series of alternative proposals, by far creative and in good faith, displayed in a diplomatic note, summarized as follows:

1. The government of Great Britain returns the territory of Belize to Guatemala, as the successor of Spain. In exchange, the government of Guatemala pays Great Britain, in compensation, the sum of 400,000 pounds sterling. The Republic of Guatemala completely relinquishes any claim whatsoever resulting of the non-compliance with the treaty.
2. If the former is not accepted, Great Britain pays Guatemala the sum of 400,000 pounds sterling and grants a strip of land south of Belize needed to give the Department of Petén an outlet to the sea. Said strip would be determined at the same latitude as Punta Gorda, including the Zapotillo Cayes.

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<sup>17</sup> Vela, David. (1939) *Nuestro Belice*. Guatemala: Tipografía Nacional. Page 175

3. If the former options are not acceptable, Guatemala proposes to approve the demarcation of the frontier with Belize, made unilaterally by Great Britain. In exchange, the government of Great Britain would pay Guatemala the sum of 50,000 pounds sterling plus interest at four percent annually as of the date the 1859 treaty was entered into. Great Britain would grant a strip of land south of Belize located at the same latitude as Punta Gorda, including the Zapotillo Cayes.

Great Britain did not respond to these proposals either.

### **1.1.7. ARBITRATION PROPOSAL OF 1937**

In 1937, the Government of Guatemala proposed to submit the Territorial Dispute to the decision of an arbitrator, considering the United States President, Franklin D. Roosevelt. The British Foreign Office's response was to accept submitting to arbitration the issues originated from the Anglo-Guatemalan treaty of 30 April 1859, which would be awaiting settlement between the governments of Great Britain and Guatemala. Nevertheless, it disagreed to the designation of President Roosevelt as arbitrator, because *"the issues in the present case are essentially of a legal character, involving difficult questions of law and interpretation which could not satisfactorily be decided by any tribunal other than a legal tribunal of high standing, and of all possible legal tribunals The Hague Court..."* (Note of 17 August 1937).<sup>18</sup>

Communication sent by the former Foreign Minister Carlos Salazar Argumedo, dated 22 September 1937, is an excellent statement of facts and legal analysis by which he responds to the note of the British government: *"I regret to have to inform Your Excellency that the Government of Guatemala is convinced that in the pending controversy there must be taken into consideration also aspects of a different character, aside of that of law and legal interpretation...The non-compliance with Article VII of the Convention of '59 and the non-ratification of the settlement of '63 have caused*

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<sup>18</sup> Vela, David. Op cit. Page 176.

*Guatemala, other than the material loss, intangible injuries of a different character which can be proved by reading the copious correspondence sustained by the two Governments since the middle of the last century; injuries which the arbitrator must take into consideration, precisely because the disagreement, subject of arbitration, refers to something different than the mere legal interpretation of the dead letter of the Convention.”*

At that point, an excellent opportunity to solve the existing territorial dispute by means of arbitration was missed, due to disagreement regarding the designation of an arbitrator and because for Guatemala the judgment should have been based on equity – *ex aequo et bono* – whereas for Great Britain it should have been based on law. I believe that The Hague Court would have ruled then, as today, in favor of the Guatemalan position, because either on Law or Equity the judgment would not have been far from an equitable solution.

The effort made at that moment to solve the dispute could not be carried out, and on 24 April 1940, through communication sent to the British Chancellor, Foreign Minister Salazar Argumedo: *“Through note dated 13 April of this year, I had the honor of declaring once again that His Majesty’s government, upon refusing to comply with article 7 – compensatory clause – of the 1859 Convention, gave the option to Guatemala to reject stipulations contained in the remaining articles of the pact, relative to the territorial cession of Belize. His Excellency then replies that His Majesty’s government cannot concur on the opinion that the 1859 Convention was a territorial cession, and, to explain that Great Britain does not refuse to fulfill the commitments that compel her concerning Guatemala, His Excellency deems convenient to suggest that such obligations will be reduced to those of article 7...I believe to have proven with abundant testimonies, gathered from official English sources, that the 1859 Anglo-Guatemalan Convention was a territorial cession par excellence, and in virtue of English non-compliance, this Convention has expired, having the Republic of Guatemala the right to claim the territory of Belize...”*

The previous communications embrace the obligation which would justify an eventual lawsuit against Great Britain for damages.

#### **1.1.8. DECLARATION BY THE GUATEMALAN CONGRESS IN THE YEAR 1946 REGARDING EXPIRY OF THE 1859 CONVENTION**

The Guatemalan Constitution of 1945 declared that Belize formed part of Guatemalan territory, and that negotiations leaning to its reincorporation were of general interest. This resulted in an immediate British protest, in the sense that Belize was British territory and that its boundaries had been established by the 1859 treaty.<sup>19</sup>

Upholding what was set forth in the Constitution, on 9 April 1946, by initiative of the Executive Power, Guatemalan Congress issued Decree number 224, which reaffirmed expiry of the 1859 Convention due to Great Britain's failure to comply, and stated that in consequence, *restitutio in integrum* of the territory of Belize to Guatemala applied.

This Decree represents a State action of outstanding importance and lays down the basis for the Political Constitution of the Republic of 1985 to establish an internal procedure designed to give a definite solution to the Territorial Dispute with Belize.

#### **1.1.9. PROPOSAL TO THE UNITED KINGDOM AND GUATEMALA BY MEDIATOR WEBSTER IN 1965**

In 1965, the facilitator nominated by the government of the United States to mediate in the Dispute regarding Belize and issue suggestions for its solution, recommended the following:

The government of the United Kingdom would relinquish all of its pretensions over Belize and the government of Guatemala, after a short period of time, would take on the task of assisting the government of Belize in the direction of its international relations,

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<sup>19</sup> Herrarte, Alberto. *La Cuestión de Belice*. Op.cit. Page 37

exercising international representation before other governments or international organizations.

He also recommended that the governments of Guatemala and Great Britain were to exercise Belize's defense, during a given period of time, meanwhile said defense was to be assumed completely by the government of Guatemala.

The Mediator suggested a type of integration of the territory of Belize to Guatemala that included free circulation of products and goods destined to Guatemala, free of tariffs, taxes, duties or other restrictions; Belizean duty-free areas, free circulation of people of both nationalities, free trade and cooperation to foster development and strengthening of agricultural, industrial and commercial activities in Guatemala and Belize; transportation and communication integration, protection and use of natural resources, as well as cultural and academic exchange.

Lastly, he proposed the creation of a binational administrative entity run by an international presidency with the task of undertaking such complete integration.

The proposal was welcomed by the governments of Guatemala and Great Britain, but was objected by the Belizean population, when it found out about it through a non official disclosure of information published in the "Daily Mirror" of Trinidad.

An analysis of this mediation and its background is well explained by Doctor Alberto Herrarte González in his book *EL CASO DE BELICE Y LA MEDIACIÓN DE LOS ESTADOS UNIDOS* (The Belize Case and the United States Mediation), published in 1980, which I recommend to the reader in order to gather more information about this historic phase.<sup>20</sup>

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<sup>20</sup> Herrarte González, Alberto (1980) *El caso de Belice y la Mediación de los Estados Unidos*. Guatemala: Editorial Académica Centroamericana.

### **1.1.10. DECOLONIZATION AND THE EMERGENCE OF BELIZE AS AN INDEPENDENT STATE**

Regardless of the lack of historical or legal foundation for English occupation in Belize to be regarded as colonial, the decolonization process that arose after the Second World War is the genesis of the State of Belize. This process was crystallized in the year 1960, when the UN General Assembly supported independence of territories that until that moment were colonial dominions.

Territories achieving their independence grouped together in the Commonwealth, which according to author Carlos Larios Ochaíta, is an *“Association of States that were part of the British Empire, which acceded suddenly or gradually to a greater or smaller grade of independence, having a common heritage; nowadays, it is a kind of very special international organization, with its own secretariat, and that, among others, has the goal of mutual cooperation in all areas of human activity.”*<sup>21</sup>

*“The United Nations General Assembly, through resolution of 14 December 1960, proclaimed the need to work towards quickly ending colonialism in all its forms. To this end, it adopted a Declaration regarding the granting of independence to colonial countries and peoples. Through this declaration, the Assembly claimed immediate measures to be taken in the territories...that had not yet achieved independence, for transmission of power towards the peoples of said territories, with the purpose of habilitating it for the enjoyment of complete independence...”*<sup>22</sup>

In 1975, the United Nations General Assembly adopted resolution 3432 (XXX), which Guatemala voted against, resolving to support Belize’s independence.

Although the origins for Belize’s establishment did not imply the nature of being a colony, because it arose from usurpation of territory performed by England in clear

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<sup>21</sup> Larios Ochaíta, Carlos, *Op. cit.* Page 67

<sup>22</sup> Sorensen, Max. (1994). *Manual de Derecho Internacional Público*. México: Fondo de Cultura Económico. Page 273

violation of Guatemala's territorial integrity, Belize's population developed as part of a group of nations that at a given moment aspired to independence and self-determination.

In conclusion, Guatemalan territory was torn by force and was economically exploited by England during several years, until it decided that Belize's independence was compatible with its interests, provided that the strongest political and economic bonds were maintained through the Commonwealth.

Guatemala was not only harmed regarding its territorial integrity, but Great Britain first and Belize later, have held a campaign that affects our international relations with some countries, especially those that for being ex-colonies, feel identified with Belize's stance.

#### **1.1.11. PROPOSALS OF 1977**

Following up on the aforementioned resolution issued by the UN General Assembly, an effort was made in 1977 by the governments of Guatemala and Great Britain to reach a settlement that included an area of continental territory south of Belize for Guatemala, as necessary compensation so that Belize's forthcoming independence was recognized.

The options that were analyzed, considered as base for the boundary-line south of Belize: in Guatemala's view, Monkey River, meaning all of Toledo District; and in Great Britain's view, Moho River, at the level of Punta Gorda.

The pro-independence government of Belize rejected this negotiation and maintained, as it does till this very day, that it would not give up one inch of its territory in favor of Guatemala, given that they were entitled to the whole territory.

#### **1.1.12. HEADS OF AGREEMENT BETWEEN THE UNITED KINGDOM, GUATEMALA AND BELIZE OF 1981**

Before Belize's independence in 1981, the "Heads of Agreement of 11 March 1981" were entered into in London, agreeing to a negotiated solution of the Territorial Dispute, by which Guatemala would accept Belize's independence. These are summarized as follows:

1. *Guatemala and the United Kingdom will recognize the independent State of Belize as integral part of Central America and will respect its sovereignty and territorial integrity in accordance with the existing and traditional boundaries, subject, in the case of Guatemala, to the conclusion of the treaty or treaties that are necessary to allow these heads of agreement to enter into force.*
2. *Guatemala will be granted those territorial waters that can guarantee permanent access to high seas, along with rights upon the sea bed.*
3. *Guatemala will have use and enjoyment of the Ranguana and Zapotillo Cayes and rights upon waters of the adjacent sea to said cayes.*
4. *Guatemala will have the right to facilities of duty-free areas in Belize City and Punta Gorda.*
5. *The road between Belize City and the Guatemalan border will be improved; a road between Punta Gorda and the Guatemalan border will be completed. Guatemala will have free transit through these roads.*
6. *Belize will allow construction of pipelines between Guatemala and Belize City, Dangriga and Punta Gorda.*
7. *In areas to be decided upon, an agreement will be reached between Guatemala and Belize for purposes related to control of pollution, navigation and fishing.*
8. *Joint exploration of minerals and hydrocarbons in areas of the seabed and continental platform will be agreed upon.*
9. *Guatemala and Belize will agree upon certain projects for development and mutual benefit.*
10. *Belize will have access to any given duty-free facilities in Guatemala, similar to those that Guatemala has access to in Belize.*

11. *Guatemala and Belize will enter into a treaty of cooperation in matters regarding mutual security and none of them will allow the use of its territory to support subversive activities against each other.*
12. *None of these provisions will be in detriment of any rights or interests of Belize or the Belizean people, save for that foreseen in these Heads of Agreement.*
13. *Guatemala and the United Kingdom will celebrate agreements with the purpose of reestablishing full and normal relations between them.*
14. *Guatemala and the United Kingdom will bring about the necessary actions to sponsor admission of Belize to the United Nations, the Organization of American States, the Central American organizations and other international organizations.*
15. *With the aim of carrying out the details that validate the previous provisions, a Joint Commission between Guatemala, United Kingdom and Belize will be established. Said Commission will prepare a treaty or treaties for signature of the undersigned in these heads of agreement.*
16. *Consequently, the controversy between Guatemala and the United Kingdom in regard to the territory of Belize will be honorably and finally settled.*

These Grounds of Understanding regarded the territorial cession to Great Britain as an already decided issue, whereas what Guatemala was supposed to receive was subject to be decided in the future. Fortunately, the proposals were rejected by Belize, for they meant a relinquishment of rights entitled to Guatemala.

### **1.1.13. BELIZE'S INDEPENDENCE**

During the XXXV sessions of the UN General Assembly, resolution 35-20 was adopted, in which the question of Belize's independence was separated from the territorial dispute with Guatemala. "...It resolved, on one hand, that Belize should turn into an independent State before the end of the XXXVI sessions, urging Great Britain to prepare such independence. On the other hand, the United Kingdom, along with the Belizean government, should continue making efforts to reach an arrangement with the

*government of Guatemala. The resolution was pronounced after intense lobbying in which unanimity was reached, with the exception of Guatemala...*

*Belize formally obtained its independence on 21 September 1981. It was recognized within the Commonwealth and in its Constitution it was declared that its boundaries with Guatemala were the ones set forth by the 1859 Treaty.”<sup>23</sup>*

In 1981 Belize declared its independence and fixed its territorial boundaries, stating in its Constitution that they were those established by the Anglo-Guatemalan Convention of 1859, and adding a complete list of islands and cayes adjacent to its territory. This action was taken even though neither of these islands nor cayes was included in the Anglo-Spanish treaties, which excludes any insular territory, except for San Georges Caye for sanitary purposes. The referred Anglo-Guatemalan treaty of 1859 does not mention any island whatsoever either.

#### **1.1.14. MEETINGS OF ROATAN OF 1990**

After Belize’s declaration of independence, meetings began to take place in 1987 with delegations from Guatemala, United Kingdom and Belize. The object of the meetings was to find an integral solution to the question of Belize. A Joint Commission was appointed, which would study the relations between Guatemala and Belize in a global view, in order to establish adequate solutions, proposing the signing of a general treaty subject to referendum in both countries.<sup>24</sup> In the Roatan Meeting of 9 July 1990, a draft was prepared but its final contents were not approved nor signed.

#### **1.1.15. THE RECOGNITION OF THE STATE OF BELIZE BY GUATEMALA**

*“...On August 14, 1991, the Secretariat for Public Relations of the Presidency of Guatemala issued a press release by which the President of the Republic declared that, in*

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<sup>23</sup> Herrarte, Alberto. *La Cuestión de Belice. Op. cit.* Page 41.

<sup>24</sup> Herrarte, Alberto. *La Cuestión de Belice. Op. cit.* Pages 43 and 44

*conformity with the Constitution and International Law, Belize's right to self-determination was recognized. Furthermore, it was stated that negotiations would continue and that all legal resorts would be exhausted for the definitive resolution of the territorial dispute.”*<sup>25</sup>

The Government of Belize supposed the existing territorial dispute had ended with Guatemala's recognition of Belize as a State, which was the easiest and most convenient way of continuing with the *de facto* occupation of the claimed territory. It maintained the *status quo* that obviously came in handy in order to continue taking advantage of the territory, and also, as long as time kept passing by, its position became strengthened with the objective of arguing prescription of territory in its own favor.

The Belizean position was not an original one. It was the same one the United Kingdom had assumed for a long time regarding our claim, occupying and exploiting a territory, regardless of the manifest opposition of Guatemala, which never faced the possibility of recovering it neither by feasible means nor in accordance with contemporary International Law.

With this recognition, Belize considered the territorial dispute with Guatemala a closed case and that it entailed recognition of all its occupied territory. It assumed that it was a logical consequence of recognition, ignoring the contents of the declaration that Guatemala had issued, in which, in spite of recognizing the independence of the State of Belize and its people's right to self-determination, it was stated that the territorial dispute remained unsettled.

In 1994, the Government of Guatemala, through its Foreign Minister Marithza Ruiz de Vielman, reactivated the National Council of Belize, and after analyzing the recognition of the State of Belize by the Government of Guatemala as well as its implications, sent a diplomatic note addressed to the U.N. Secretary General, setting

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<sup>25</sup> Herrarte, Alberto. *La Cuestión de Belice*. Op. cit. Page 45.

Guatemala's position in view of Belize's independence and the recognition of its territory.

In this communication, the corresponding reserves are presented and it upholds that a territorial dispute indeed exists; that there are, therefore, no existing boundaries between the countries, and that Guatemala does not accept the contents of the Law of Maritime Spaces of Belize, in which maritime zones are unilaterally established, calculated from continental and insular territory that Guatemala claims. Also, that in violation of the United Nations Convention on the Law of the Sea, Belize pretends areas it is not entitled to in the Caribbean Sea. In its relevant information, the communication states the following:

1. *As provided in article 149 of its Political Constitution, Guatemala regulates its relations with other States in accordance with international principles, rules and practice; it fosters bonds of friendship, solidarity and cooperation with all countries, especially with neighboring States...*
2. *The Government of Guatemala – consistent with the principles of the United Nations Charter – in its international relations, abstains from resorting to threat or the use of force, respects the principles of sovereign equality of States and free self-determination of peoples, as well as it firmly believes that the adjustment or settlement of controversies among States must be accomplished through pacific means and in conformity with the principles of Justice and International Law.*
3. *The Government of Guatemala has always displayed its willingness to continue direct discussions with the Government of Belize in order to reach a final settlement to the existing territorial controversy between both States, yet to be resolved.*
4. *In their Joint Declaration dated 31 July 1992, the Governments of Guatemala and Belize stated their willingness to continue negotiations to reach a settlement to the existing controversy, placing special emphasis to the issue whereas Guatemala and Belize have not yet signed a bilateral treaty that finally establishes its*

- territorial and maritime boundaries; and that such treaty will be one of the expected outcomes of the negotiations.*
5. *The territorial claim that Guatemala maintains encompasses a territorial area currently occupied by Belize, and maritime spaces in the Caribbean Sea...*
  6. *Regarding the maritime spaces considered in the “Law of 24 January 1992 relative to Territorial Sea, Interior Waters and Exclusive Economic Zone of Belize and relative matters”, issued by the United Nations Legal Affairs Division, Guatemala presents formal reserve to any disposition that could jeopardize sovereignty and dominion over its Territorial Sea, its Continental Shelf and its Exclusive Economic Zone, including those decreed by the State of Guatemala with due and sufficient anticipation to the issuance of the mentioned Belizean Law, as well as those that result upon resolution of the existing territorial dispute...*
  7. *The Government of Guatemala confirms its willingness to continue with negotiations with the State of Belize to search for a pacific and impartial solution to the controversy that still remains unsettled...”<sup>26</sup>*

This action carried out by the Government of Guatemala, led to that through communication dated 22 March 1994 from the Ministry of Foreign Affairs, Belize expressed its “*earnest desire to continue direct discussions concerning whatever territorial dispute or difference Guatemala deems to linger*”. The importance of this declaration coming from an independent Belize rests in the acknowledgment of the existence of the territorial dispute that includes continental, insular and maritime areas; therefore, “acquiescence” cannot be argued against Guatemala in relation to the occupied Guatemalan territory and neither could it constitute grounds for a rule of evidence before an International Court. At this specific moment, a process consistent of studies, analyses and negotiations began, which has been maintained by both States to this very day.

The territorial dispute with Belize has been treated in a consistent and institutional manner as a permanent State issue by the different governments of Guatemala, and they continue in the effort to solve the controversy by means provided by International Law.

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<sup>26</sup> Archives of the Ministry of Foreign Affairs of Guatemala

#### **1.1.16. THE RULING ISSUED BY THE CONSTITUTIONAL COURT IN THE YEAR 1997**

Guatemalan jurists Alberto Herrarte González and Gabriel Orellana Rojas denounced unconstitutionality against the “*Convention between the Republic of Guatemala and Her British Majesty relative to the boundaries of “British Honduras” of thirty April of eighteen hundred and fifty nine.*” This action represents a valuable asset to Guatemala’s legal heritage on the subject because the Constitutional Court mentions in the substantial part of its ruling that the presented action refers to a Convention “*whose nullity and expiration as a whole came about by legitimate denunciation on behalf of the innocent party for its substantial violation and, in consequence, lacks validity and formality for the Guatemalan State...*”<sup>27</sup> In other words, for Guatemala’s highest constitutional court it is impossible to declare itself on the Convention’s conformity with the Guatemalan Constitution, given that it is not part of our legal system.

The Guatemalan Constitution states in transitory article 19 that: “*The Executive Power is entitled to perform the formalities leading to resolve the situation of Guatemala’s rights regarding Belize, in accordance with its national interests. Any final agreement will have to be submitted by Congress to a referendum procedure, as provided in article 173 of the Constitution. The Government of Guatemala will promote social economic and cultural relations with the people of Belize.*”

The existing territorial dispute between both States can be resolved by means provided by International Law, also known as political means of conflict resolution, or judicially before an international legal body. Belize had not accepted jurisdiction of an international court at that moment, reason why Guatemala tried to convince Belize to submit the dispute to means of pacific resolution prescribed in International Law. The OAS, our regional organism, as well as the UN Charters establish the obligation of States

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<sup>27</sup> Annex: Judgment of 27 August 1997 in file number 1129-96 of the Constitutional Court.

to solve their differences; therefore, it was considered that Belize could not ignore its international obligation.

#### **1.1.17. THE “CLARINADA” OF 1999**

The effort undertaken by the Government in convincing Belize to continue negotiating with Guatemala was intense. The Guatemalan Foreign Office constantly declared itself in favor of resolving the territorial dispute and that as long as this did not occur, the boundaries between Belize and Guatemala could not be set, for these were yet to be recognized. What existed was a mere reference line that did not consist of an international border.

The Government of Belize began, on its part, to pressure Guatemalan population living in the Adjacency Zone, aiming to pressure the Guatemalan Government to recognize the line as “boundary” and that Belize indeed exercised sovereignty over the territory claimed by Guatemala.

In 1999, the Belize Defense Force generated a series of incidents against Guatemalan farmers living in what is known as the adjacency zone between both countries, which resulted in crop burning and destruction, harassment on civilians, arrests of Guatemalans, even the assassination of Guatemalan citizen Samuel Ramírez y Ramírez.

All these incidents justified presentation on behalf of the Guatemalan Foreign Office of the corresponding letters of protest, bringing about as well the summoning of the Guatemalan Ambassador to Belize for consultations, twice. Frequency of the incidents led to the conclusion that they were all part of a strategy defined by Belize, executing actions of sovereignty in the area south of the Sibun River. This evidenced the Belizean intention of forcing Guatemala, through direct or third-party coercions, to recognize all of the occupied territory, which was considered an act of intervention.

On October 18 1999, the Government of Guatemala addressed a diplomatic note to the Belizean Government, confirming the existence of a Territorial Dispute, and informed of the decision of putting an end to the technical meetings or bilateral negotiations as means of “pacific solution of controversies”, mentioned in the UN and OAS Charters. From that point onwards, meetings would take place with the good offices first, and mediation afterwards, of the OAS.

This diplomatic note was called the “Clarinada” by its author Doctor Alberto Herrarte González, and became proof of the work that was being done within the Foreign Office to reach a legitimate transaction that would eventually solve the existing conflict with Belize. And, in spite of the pressure applied by Belize and other countries so that Guatemala would recognize the so-called “boundaries” of this State, the Government was determined to defend the existence of the Territorial Dispute.

Given its importance in the process of solving the dispute, I hereby refer to the substantial parts of the “Clarinada”, which literally state:

*“I have had to detail herein, in broad terms, all these facts in order to be able to express, on behalf of my Government and with the entire openness, the position of Guatemala in the present situation:*

*1. The Government of Guatemala contends that it must be devolved to Guatemala the territory belonging to the Federal Republic of Central America and, by succession, to the Republic of Guatemala, comprised from the Sibun River to the Sarstoon River, which formed part of the Province of Verapaz.*

*2. The Government of Guatemala protests for the de facto occupation that the State of Belize maintains over that territory, and in no way whatsoever acknowledges the existence of borders nor accepts the declarations of the Government of Belize regarding its claim to that territory. Likewise, the Government of Guatemala protests for the de facto occupation of the islands adjacent to Belize not included in the usufruct treaties.*

3. *The Government of Guatemala reserves any rights that could pertain to it for the illegal occupation of the territory under dispute.*

4. *The Government of Guatemala expresses its good will regarding the pacific settlement of this dispute, which due to its nature is of an evident legal character and should be resolved in accordance with the means which for these types of issues are set forth in article 36 of the UN Charter and article 26 of the OAS Charter.*

*In consequence, the Government of Guatemala formally proposes to the Government of Belize that this matter be submitted, either to international arbitration or to the International Court of Justice. In either case both Governments could submit, under common agreement, the issue to be resolved.*

*Your Excellency will agree with me that both our countries are compelled to settle the existing dispute by pacific means and in accordance with the nature of the issue. We are both Member States of the United Nations and of the Organization of American States. The whole context of the United Nations Charter is intended to foresee and settle the kind of conflicts which may threaten international peace and security, beginning with article 1, paragraph 1, which conclusively reads: "...to bring about by peaceful means and, in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations, which might lead to a breach of the peace."*

*Likewise, the Charter of the Organization of American States, in article 2, sets forth among its initial purposes: "...a) To strengthen the peace and security of the continent; c) To prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the Member States", and in article 3 it sets forth as principles: "...a) International Law is the standard of conduct of States in their reciprocal relations; b) International order consists essentially of respect for the personality, sovereignty, and independence of States, and the faithful fulfillment of*

*obligations derived from treaties and other sources of international law; c) Good faith shall govern the relations between States...; and g) The American States condemn war of aggression: victory does not give rights.” Finally, Guatemala and Belize are two neighboring countries which should live in peace and cooperate in the resolution of their common problems.*

*There are numerous resolutions and declarations of all types from both organizations confirming what was expressed herein above, such as UN General Assembly Resolution 2625 (XXV), which sets forth the obligation of all States to settle international disputes through peaceful means, adding that: “When attempting to reach that settlement, the parties will agree in using those peaceful means that they may deem adequate to the circumstances and the nature of the dispute.” That is, as it is said in International Law, the means should be functional. It is so expressed in article 33 of the United Nations Charter, in conformity with the provisions of Article 36.3, which reads: “...legal disputes should, as a general rule, be referred by the parties to the International Court of Justice.”*

*As I mentioned before to Your Excellency, my Government wishes that this matter, of an essentially legal nature, is settled by essentially legal means, rejecting any political proposal in which the primacy of our rights is not fundamentally acknowledged. If the Government of Belize also believes that its rights are indisputable, this difference in criteria may only be resolved through judicial means. As Your Illustrious Government may recall, almost all of the American countries have settled their territorial problems through arbitration or judicial means, and that following decolonization, a large number of Asian and African countries have resorted to such means to settle their own disputes.*

*I request from Your Excellency to be so kind as to let me know, at your convenience, the decision of Your Illustrious Government, and should this decision be affirmative, to agree in requesting the assistance of the Secretary General of the*

*Organization of American States, our regional institution, in order to proceed accordingly...”<sup>28</sup>*

The Government of Belize answered on 14 December 1999, in terms that consent to the possibility of continuing negotiations:

*“While Your Excellency will appreciate that my government does not share the version of history nor the interpretation of certain international instruments that are expressed in your letter, I think you will agree that it is undesirable to enter into a debate on those matters in this exchange of letters.*

*I would rather wish to stress our joint desire to seek a peaceful and satisfactory solution to our differences and to continue to cooperate in matters that are beneficial for both our peoples.*

*...With regard to your specific proposal that the dispute be referred to arbitration or to judicial resolution, I think you will agree that in a spirit of working together to achieve an amicable and mutually beneficial solution, it would be premature to seek to define the means of solution before engaging in a frank and open discussion at the highest levels...”<sup>29</sup>*

The position of the Guatemalan Government, stated on October 18, 1999, was based on the petition that Guatemala should be restituted with the territory that used to belong to the Federal Republic of Central America, and by succession to the Republic of Guatemala, comprising the area between the Sibun and the Sarstoon Rivers, as well as the adjacent islands to Belizean territory. The aforementioned constitutes a transaction effort, apart from the claim for compensation due to the illegal occupation north of the Sibun River up to the Hondo River, made first by Great Britain and Belize afterwards,

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<sup>28</sup> Ministry of Foreign Affairs of Guatemala. *Territorial Differendum Guatemala-Belize*, 2001. Pages 1 to 13.

<sup>29</sup> Ministry of Foreign Affairs of Guatemala. *Territorial Differendum Guatemala-Belize*. Guatemala. 2001. Pages 14 to 16.

over which the Spanish Crown had only granted rights of usufruct with the express provision that the title of sovereignty could never be pretended. Once continental and insular boundaries were defined between Guatemala and Belize, Guatemalan territory could therefore be defined, from which sea spaces could be calculated.

Belize attempted to rewind the process of conflict resolution amidst the bilateral negotiation, extending the technical negotiations between the governments of both countries, trying to underestimate Guatemala's position. Taking advantage of changes in administration and of the very same day of Alfonso Portillo Cabrera's Presidential inauguration, the Belizean delegation proposed that to avoid any more incidents in the area, the reference line between Guatemala and Belize should be cleared, with the obvious intention of marking a future boundary. Belize's intent was rejected by the Government of Guatemala, and Belize had no other option than to officially respond to the "Clarinateda".

On 8 June 2000, the Government of Belize, through its Foreign Minister put forward the following:

*"Allow me therefore, Excellency, to set out the Belize position with regard to the territorial claims put forward by your government:*

1. *Belize's title to its territory is not founded on treaties between Britain and Spain but rather on effective occupation and prescriptive title. In this respect there is absolutely no distinction between the area up to and the area south of the Sibun River. Its borders with Guatemala were agreed by the 1859 Treaty and subsequently demarcated, and include all the islands adjacent to the coast, as clearly implied in Article 1 of the said Treaty ("all the territory to the north and east of the line of boundary above described, belongs to Her Britannic Majesty").*
2. *Guatemala's territorial claim is therefore not based on juridical grounds, since there is no room for doubt on the legal and juridical elements of the case, but on*

*political grounds. The solution cannot therefore be found by juridical means but by a political process of dialogue.*

3. *Belize remains ready, as it has always been, to engage in a process of dialogue in order to enable our two countries to live in peace and harmony and to cooperate in the urgent task of ensuring the sustainable development of our countries and peoples. In particular, and in a spirit of good neighbourliness to assist in the development of Guatemala, Belize intends to remain true to its previous commitments, and remains prepared to restrict its rights to territorial seas in the south in order to assure Guatemala access to the high seas through its own territorial sea.*<sup>30</sup>

Even though this study does not aim to analyze neither the content of either of the positions of the parties nor the arguments that each one is to put forward, it is interesting to notice that in this note signed by Belize's Prime Minister, the Government of Belize underlines that his country states that its title over the territory does not arise from any treaty signed between Guatemala and Great Britain. Nevertheless, it mentions it further on as grounds for arguing that the islands are to be included as Belizean territory, based on the same 1859 treaty, although evidently the note's composition does not mention or express it implicitly.

It is also important to highlight that the Government of Belize considered at that point that neither was the territorial dispute of legal nature nor should it be submitted to a judicial solution, item that was modified later on resulting from the effort to solve the territorial dispute. It even attempted, in said communication, to make a kind concession to Guatemala, allowing it access to high seas, which is a right that the Law of the Sea guarantees to every State, even those lacking coast.

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<sup>30</sup> Belize Commission (2001). Territorial Differendum Guatemala-Belize. Ministry of Foreign Affairs of Guatemala, 2001. Page 29.

### **1.1.18. MEDIATION BY THE ORGANIZATION OF AMERICAN STATES IN THE YEAR 2000**

By suggestion of the Government of Guatemala, in view of Belize's attitude of refusing to comply with the commitments that were gradually reached in each bilateral meeting and also facing the growing incidents in the adjacency zone, both parties turned to the OAS, which has accompanied the process from that moment on. The OAS Secretary General played a role of good officer and mediator between the countries, leading to a better consolidation of the process and a pathway towards a judicial solution, without excluding the possibility of continuing working to accomplish a negotiated solution.

The OAS mediation was a process that will have to be analyzed in the future given the great advantage it brought for two countries in the American region that intend to resolve a dispute that arised due to a third-party intervention. This nation's imperialist and force-imposing policy left two innocent nations plunged into a conflict that must be resolved to face the bilateral future, in a world ever more competitive and demanding of major joint efforts from these countries.

The OAS mediation was immediately transformed into a facilitation process, which will be explained further on, that even though it did not arrive at a final solution to the conflict, it allowed the parties to exhaust resorts before knocking on the door of the International Court of Justice.

*“Guatemala turned to the Organization of American States (OAS) and requested the intervention of its Secretary General, César Gaviria, who acted as honor witness. Conversations were resumed on 14 March and three declarations were signed on 20 July, in which the creation of a Panel of Facilitators was agreed upon, as well as the integration of a Mixed Commission and the establishment of adequate communication mechanisms between the armed forces of both countries.”*

“The Organization of American States (OAS) was the special framework in which Guatemala and Belize signed the Agreement on Confidence Building Measures, on 8 November 2000, containing 12 measures of limited and temporary nature, oriented to avoid new incidents that hold back the process that aims to search for a final solution of the territorial dispute between both countries”.<sup>31</sup> This Agreement on Confidence Building Measures was signed by Foreign Minister Gabriel Orellana Rojas, on behalf of Guatemala, and the Ambassador with rank of Minister of Belize, Assad Shoman.

This document is an achievement for Guatemala because it embraces elements that are considered having contributed to security regarding the parties’ positions, as well as the acknowledgment of the existence of a territorial dispute, its scope and its legal nature. The primary objective of this document was the defense of Guatemalan inhabitants of the adjacent areas to the territory claimed by Guatemala, which had been affected by Belize’s position of wanting to exercise sovereignty, even though this led to clear violations of these peoples’ human rights. The reduction of incidents was far-reaching given that Belize’s excuse to continue had disappeared and also because now an independent and impartial entity was observing the occurrence of incidents: the same OAS that eventually would install an office in the adjacency zone.

The document acknowledges the existence of a territorial dispute and that it involves land, insular and maritime areas. This language had never been accepted by Belize, which had always persisted, as the United Kingdom did, in completely ignoring Guatemala’s pretensions and denying the existence of a territorial dispute. On the other hand, Guatemala recognizes the existence of a line called adjacency line and that it is no other than a referential marker, not an international boundary. In the author’s opinion, the language employed was very favorable for Guatemala’s interests.

Also, in this document, the Government of Belize acknowledges that the adjacency line does not represent the **international border between Belize and Guatemala**, and that as long as the territorial dispute is not resolved, there are no

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<sup>31</sup> Web page of the Ministry of Foreign Affairs of Guatemala. <http://www.minex.gob.gt>

recognized boundaries between them. They clearly recognize as well *that the reference markers DO NOT determine the international border between Guatemala and Belize*, and that reference monuments are being questioned, not constituting boundary indicators, therefore refuting that argued by Belize in several opportunities that these were final indicators between the countries.

I consider that the content of this agreement is a success for Guatemala because the Belizean Government itself has acknowledged that a boundary line marked by countries by mutual agreement does not exist yet and that, in consequence, a territorial dispute yet remains to be resolved. Right before entering into the Confidence Building Measures, the Government of Belize had sustained that its boundaries were defined by that established by the Anglo-Guatemalan Convention of 1859. But the fact that they accepted setting up of the Adjacency Line, means that Belize recognized that this is not the international boundary line between both countries, which will be taken into account by the International Court of Justice at the moment of issuing its judgment. The agreement literally puts forward in its substantial part:

- 1. These measures have a limited and temporary character, consistent with the goal of creating enough confidence between the parties so they are allowed to prevent or avoid incidents that can undermine progress towards the solution of the territorial dispute, object of this negotiation process. Therefore, confidence building measures that are proposed or accepted during the negotiation process will not constitute total or partial waiver of sovereignty to any territory (land, insular or maritime) claimed by any of the parties; they will not act in detriment of any right of the parties over said territory; they will not constitute precedent to the strengthening or weakening of the claim of any of the parties over any territory. Furthermore, the parties agree that neither one will use against the other, in any for a before which this territorial dispute is taken in the future, the fact that any of the parties has accepted, agreed, comply with or applied any of the confidence building measures herein included. In the application of these*

- confidence building measures, both parties will respect the principles of humanitarian law when circumstances call it for.*
2. *These measures are valid until 31 August 2001, unless its extension is mutually agreed by the parties, in writing and before its expiration date.*
  3. *With the sole purpose of aiding the acceptance and entry into application of these confidence building measures, and in accordance with the content of paragraphs 1 and 2, the Adjacency Line referred to by the confidence building measures will consist of a line that will generally run from south to north from the reference marker in Gracias a Dios in the south up to the reference marker in Garbutt's Falls, and from there up to the reference marker in Aguas Turbias in the north. **The usage of this line as Adjacency Line neither constitutes a determination of the Facilitators, nor an agreement between the parties in the sense that this line represents the international boundary between Belize and Guatemala. It is clearly reaffirmed that all rights and claims relating to this matter remain intact.***
  4. *Parties will work jointly to locate and identify all reference markers, found in concrete, lime or stone, located on or close by to the Adjacency Line. Parties will cooperate in the clearing of the area surrounding the reference markers, so they can be easily seen. Parties will also jointly prepare a complete map of the Adjacency Line, using the available technical assistance from friendly countries, identifying all markers and human settlements located less than a kilometer from the Adjacency Line (east or west). **Neither the acceptance of this recommendation, nor the location, identification or clearing of the areas surrounding the reference markers by neither of the parties, will be interpreted, in this or any other forum before which the territorial dispute between the parties could be submitted to, as a recognition, understanding or admission by Guatemala that said reference markers determine the international boundary between Guatemala and Belize.***
  5. *With the sole purpose of facilitating the acceptance and entry into force of these confidence building measures, and in accordance with the content of paragraphs 1 through 4, the territory located less than a kilometer from the Adjacency Line in any direction (either to the east or west), will be considered the Adjacency Zone.*

*It is explicitly reaffirmed that all rights and claims existing in regard to the territory located within the Adjacency Zone are to remain intact.*<sup>32</sup>

#### **1.1.19. FACILITATION PROCESS IN THE BELIZE-GUATEMALA DIFFERENDUM**

A few months before signing the Agreement on Confidence Building Measures, always upon request of the Government of Guatemala, and given the attitude of the Government of Belize refusing to neither enter into it nor submitting the case to an international court, as it had been put forward in writing by Guatemala, a facilitation process began under the aegis of the OAS. On 15 May 2000, with the good offices of the OAS Secretary General, parties agreed to appoint Facilitators “...whose role would consist of directing the negotiation process towards a final resolution of the territorial differendum...” having the responsibility of “*assisting the Governments of Belize and Guatemala to find formulae for a peaceful and definitive resolution of its territorial differendum*”. The Panel was conformed by two facilitators, one appointed by each State, and had the participation of the OAS Secretary General as Honor Witness. The term of the Commission expired on 31 August 2002.

Guatemala brought about the Facilitation Process before the OAS with the solid conviction that the Facilitators would truly make the legitimate effort of finding methods of bringing the positions of the parties closer together, and that at the end of the process, they would issue recommendations that could be submitted to the approval of the people of Guatemala, through a referendum, in accordance with Article 19 of the Constitution. Nevertheless, Guatemala was aware of the great challenge faced when having to conciliate a difference with ever so different positions from the governments of Guatemala and Belize, although it was confident that in the end, the Facilitators would recommend turning to an international juridical body.

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<sup>32</sup> Ministry of Foreign Affairs, Agreement on Confidence Building Measures of 8 November, 2000.

Guatemala set itself specific objectives regarding the Facilitation Process, which are summarized as follows:

In order to solve the existing Territorial Differendum with Belize, maintaining that given that it is a difference of juridical nature, it must be submitted to the international judicial bodies (International Court of Justice or International Arbitration), unless it were to be resolved satisfactorily by the conciliatory track.

The Facilitation Process was one of the means of pacific conflict resolution that had to be exhausted in pursuit of a juridical solution to the existing Territorial Dispute between Belize and Guatemala; International Law requires that before submitting any issue to the International Court of Justice or to an arbitration procedure, pacific means of conflict resolution must be exhausted.

If Facilitation does not put an end to the dispute, its submission to the International Court of Justice is considered the ideal resort of international juridical nature, to solve it.

Whether the difference is submitted to an international juridical body or a negotiated solution is reached, in which facilitation or other ways of solving the dispute are included, it must be submitted to the approval of the Guatemalan people by Congress, through referendum. Therefore, it must fulfill minimum expectations for success to be achieved in said referendum; otherwise, it would result in political fiasco.

#### **1.1.19.1. SUMMARY OF THE FACILITATORS' PROPOSALS**

Proposals presented by the Facilitators were handed in to the governments on 16 September 2002, being rejected by the Government of Guatemala, as it is explained further on, and they encompass several elements that, according to the same document, are combined in such a way which should not be seen as separable. These are: the land boundary; the Santa Rosa community; territorial seas; exclusive economic zones and

continental shelves; the Belize-Guatemala-Honduras Ecological Park; the Development Trust Fund; Trade, Investment and Functional Cooperation; and submittal of the Territorial Dispute to the International Court of Justice or international arbitration.<sup>33</sup>

The recommendations say, in the introductory part, that: “*I. In the Terms of Reference for the Facilitators of the Belize-Guatemala Territorial Differendum, agreed at the Headquarters of the Organization of American States in Washington D.C. on 15 May 2000, between the Governments of Belize and Guatemala (hereinafter referred to as “the Parties”), identified the role of the Facilitators as being to assist the Governments of Belize and Guatemala to find formulae for a peaceful and definitive resolution of the territorial differendum between the two countries”.*

Due to its own juridical nature, a facilitation process is a means of solution of international disputes, regardless of its nature, in which the Panel of Facilitators carries out an impartial assessment of the dispute and attempts to define the terms of an agreement that can be acceptable for the parties in order to resolve the differendum. Facilitators’ recommendations are not definitive nor binding, given their nature and because they should be submitted to the consideration of the Guatemalan Congress, which then would decide if they were convenient to Guatemala’s interests and if they qualified to be submitted to approval of the people of Guatemala.

Facilitators were not considering issuing the recommendation of submitting the differendum to an international juridical organ. Facing the refusal by the Facilitators to consider this juridical solution and despite the solid stance displayed by Guatemala, including the possibility of the recommendations being rejected upon receipt, the Government of Guatemala decided to present its position in writing.

In view of the possibility of receiving an anticipated rejection of their proposals by the Government of Guatemala, the Facilitators addressed a letter to the Guatemalan

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<sup>33</sup> Belize Commission (2005). *The Facilitation Process of the Territorial Dispute. Proposals of the Facilitators, 30 August 2002*. Ministry of Foreign Affairs, Guatemala. July 2005.

and Belizean Foreign Ministers, dated 30 August 2002, which due to its relevance I proceed to transcribe:

“We firmly believe that the best interest of the Parties and the peoples of Belize and Guatemala require that our Proposals, presented to the Secretary General of the Organization of American States (OAS) on 30 August 2002, are accepted and approved through referenda in both countries. We consider it would constitute a tragedy, as much for Belize as for Guatemala, if the people of either of these countries would reject said Proposals. Therefore, both Parties will have to make their best effort to explain to their respective populations the benefits of the Proposals, aiming to urge positive results from the referenda. In the case where, in spite of the efforts made by the Governments of Belize and Guatemala, the peoples of Belize and Guatemala would reject these Proposals, an alternate resort should exist to resolve this Territorial Differendum, with the objective that it does not remain indefinitely unresolved. This would be the worst possible outcome. In consequence, we recommend that, in the unfortunate and unlikely case that the Proposals are rejected by the people of Belize or the people of Guatemala, or both – and only in that case – the Parties should agree to submit the Territorial Differendum to the International Court of Justice for its final and compulsory determination, or to another international arbitral tribunal that the Parties find suitable”.<sup>34</sup>

The attitude of the Facilitators was openly biased, which can, among other facts, be confirmed by their opposition to include within their proposals the recommendation of turning to the Court, and in an obvious and inappropriate attempt to pressure the Parties, making use of language that eagerly defends the goodness of their recommendations, consider a mistake and a tragedy to the interests of both countries to fail to adopt them as a definite solution to the dispute.

Notwithstanding the latter considerations, the Facilitation did become a highly relevant phase within the pathway to achieve a solution to the Territorial Differendum

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<sup>34</sup> Belize Commission (2005). The Facilitation Process of the Territorial Dispute. Recommendation of the Panel of Facilitators to the governments of Guatemala and Belize of 30 August 2002. Ministry of Foreign Affairs, Guatemala. July 2005, page 35.

according to that provided by International Law, and finally cleared the way for resorting to the International Court of Justice. This recommendation is considered an important achievement that the Government of Guatemala had sought throughout this long-standing negotiation process, facilitation being one of its stages, because never before had an accomplishment like this been obtained, an urging to both countries to take their territorial dispute to an international juridical body to resolve it.

#### **1.1.19.2. GUATEMALAN GOVERNMENT REACTION TO THE FACILITATORS' PROPOSALS**

I think the facilitators were not able to bring the positions of the Parties closer together in the process and that they did not make a genuine effort to “facilitate” it either; they failed to issue proposals that would entail an arrangement formula that could be acceptable and honorable to perform the necessary internal procedure of submitting them later on to approval by Congress. The Facilitator that was appointed by the Government of Guatemala adapted his position to the one sustained by the Government of Belize and the outcome was a series of recommendations that basically suggested maintaining *status quo* over the territory held by Belize; consequently, the unacceptable proposals for the Government of Guatemala were rejected.

The Belize Commission issued on 16 June 2003, a study on the content of the Facilitators' proposals, presenting the legal reasoning under a local and international scope, which made them unacceptable. Recommendations that ignored the position of one of the parties were destined – *ab initio* – to fail, and did not deserve being submitted to the approval of the Guatemalan Congress, even less to the consideration of the people of Guatemala through referendum. On the other hand, it is important to be fully aware that the Government of Guatemala always reserved the right to reject the recommendations, reason why the Executive Power exercised said right.

Due to its relevance, I literally transcribe the conclusions of this study:

- “27. *In consequence, the way the Facilitators’ Proposals are presented, they do not have the definitive character required by the Guatemalan Constitution; only draft treaties endorsed by the parties or duly signed conventional texts have that nature. And this is so because in the course of negotiations oriented to assure the treaty’s proper drawing-up, parties could agree to separate themselves from the text of the proposals and establish variations in importance towards them, as well as different systems to the ones proposed by the Facilitators. For example, in solid ground: a boundary different from the one established by the Facilitators. Also, submittal of the controversy to an international juridical organ requires the celebration of a special agreement.*
28. *In the “Terms of Reference for the Facilitators of the Belize-Guatemala Territorial Dispute” signed by the Foreign Ministers of Belize and Guatemala in the Bilateral Meeting that took place on 17-20 July 2000, in the headquarters of the Organization of American States in Washington D.C., it was agreed upon that Facilitators would have the responsibility of “assisting the Governments of Belize and Guatemala to find formulae for the peaceful and definitive resolution to their territorial differendum”; and that, towards that aim, would request that “Belize and Guatemala would hand in reports on facts, viewpoints, documents or any other information considered necessary by the Governments to the Facilitators, within a given time-frame, to help them identify specific issues in dispute between both countries.” This was requested with the purpose of allowing the Facilitators to present “their reports, conclusions and recommendations to both Governments.”*
29. *It was clearly understood that although Facilitators were appointed one by each State, they would not function as agents, lawyers or defense counsel of the appointing State, but would listen and receive reports, viewpoints or documents that each Party wished would be taken into*

*account, and together would perform the assessments, studies and pertinent considerations to be able to, without one imposing its criteria upon the other, propose equitable formulae of solution. Therefore, the performance of the Facilitators should have been receptive and impartial at all times, and they should have sought that each Party would yield reasonably in some aspects of their initial stance, disposing of rigid or inflexible positions.*

30. *While analyzing the Facilitators' Proposals included in the document dated 30 August 2002, it becomes evident that they are incongruous with the terms of reference and the objectives of the facilitation. Far from being true proposals of reasonable and equitable agreement, they embrace Belize's approach only, accepting the inflexible position displayed by this State in its written presentation of 30 April 2001, stating that "In advance, Belize puts forward that the possession over its territory is not to be surrendered. There is no possibility whatsoever of compromising matters that affect Belize's sovereignty to its continental and insular territory, as well as to its maritime spaces". They propose setting the land boundary that Belize has always pretended, applying in a veiled fashion the treaty of 30 April 1859 entered into by Guatemala and Great Britain, whose validity has been rejected by Guatemala in repeated occasions.*
31. *The Facilitators' proposals omit, without explanation, that posed by the Government of Guatemala in several documents and actions within the facilitation process, especially those encompassed in the written presentation of 30 March 2001 and in communication dated 20 February 2002 addressed to Facilitator Paul S. Reichler.*
32. *What was submitted to examination by the Facilitators was the existing territorial, insular and maritime dispute between Belize and Guatemala.*

*Since the terms of reference did not mention other responsibilities, it was clear enough that the matter fell, exclusively, under the scope of their competence. Nevertheless, Facilitators unexplainably included proposals regarding maritime delimitation with Honduras, Honduran rights in Guatemala's exclusive economic zone, as well as its participation in a three-party ecological park.*

33. *It cannot be assumed that Facilitators acted due to ignorance, because not only were they perfectly aware that Guatemala neither has a dispute with Honduras nor are formalities being carried out regarding maritime delimitation with said State; on the other hand, in the aforementioned communication of 20 February 2002, the Government of Guatemala let Facilitator Paul S. Reichler know the following:*

2. *“My Government acknowledges that it is essential and beneficial to define maritime spaces between Guatemala and Honduras. Therefore, it is pleased to have representatives from the Illustrious Government of Honduras participating in surveys and technical meetings leading to find a fast and equitable solution to this matter. Nevertheless, it must be taking into consideration, on one hand, that there is no differendum between Honduras and Guatemala; on the other hand, that this Facilitation process includes Belize and Guatemala only. It is important, of course, that the Illustrious Government of Honduras is aware of what is discussed and agreed upon between Belize and Guatemala regarding maritime and insular issues, given that this would simplify the forthcoming settlement that the Government of Guatemala would wish to make with the Illustrious Government of Honduras, once the Guatemala-Belize differendum is settled.”*

34. *Article 19 of Transitory and Final Dispositions of the Political Constitution of the Republic of Guatemala puts forwards that:*

*“The Executive Power is entitled to perform the formalities leading to resolve the situation of Guatemala’s rights regarding Belize, in accordance with national interests. Any final agreement will have to be submitted by Congress to the referendum procedure as provided by article 173 of the Constitution...”*

35. *It can be inferred from the aforementioned constitutional norm, on one hand, that the Constitution in force confirms the existence of rights corresponding to the State of Guatemala regarding the territory that Belize unlawfully holds; and on the other hand, that it authorizes the Executive Power to resolve this affair in agreement with national interests. This means, without contravening, distorting or harming them in any way. In this light, it remains absolutely clear that the Executive Power will be able to resolve such relevant, as well as longstanding issue, when as a result of the formalities it carries out, a complete agreement has been reached by Belize and Guatemala that settles the territorial differendum in a definitive manner, that said agreement is compatible with the Guatemalan Constitution, as well as with national interests, and is approved by the people through referendum.*

36. *Towards this end, it is imperative to keep in mind that, in conformity with that provided by article 142 of the Guatemalan Constitution: “The State exercises complete sovereignty over: a) National territory comprising of its soil, subsoil, interior waters, territorial sea in the extension provided by law, and space area extended over the latter; b) The contiguous zone of the adjacent sea to the territorial sea, for the exercise of certain activities acknowledged by International Law; and c) Natural and live resources in the seabed and sea subsoil, and those existing in the adjacent waters to the*

*coasts outside the territorial sea that consist of the exclusive economic zone, in the extension provided by law and in agreement with international practice.” And also that according to letter e) of article 121 of this supreme legal document “hydrocarbon deposits and minerals, as well as any other organic or inorganic substance found in the subsoil” are also considered property of the State.*

37. *In light of the aforementioned constitutional norms, it is easy to assess that Guatemala’s claim relative to the unlawfully held territory by Belize, is a matter of sovereignty and that, therefore, would constitute a transgression to the Guatemalan Constitution to accept as conciliatory settlement a total relinquishment of Guatemala’s rights regarding the claimed territory. (This is what the Facilitators’ proposals imply as they do not include any restoration whatsoever of any portion of continental territory unlawfully held by Belize). Such “settlement” would violate the territorial integrity of the State of Guatemala, would obviously not be in agreement with national interests, and would be null and void ipso jure, originating unavoidable legal responsibilities upon the public officials who would approve it.*
  
38. *If it were to accept the Facilitators’ proposals, the Government of Guatemala would also incur in disobedience of the judgment of the Constitutional Court, issued on 27 August 1997, in which said Court put forward that “The Convention between the Republic of Guatemala and its Britannic Majesty relative to the boundaries of British Honduras of thirty April, eighteen hundred and fifty nine, has expired, and its nullity in toto came to be due to legitimate termination announced by the innocent part given its substantial breach, and in consequence, is not in force and lacks application for the State of Guatemala, who can appeal its nullity before international bodies.”*

39. *The Belize Commission considers that for these recommendations to effectively have the character of minimal facilitation proposals, they should encompass the following elements:*

a) *Proposals should be integral: terrestrial, insular and maritime. The formula for insular and maritime settlement must be based on a proposal of continental settlement that includes restitution of territory, which for Guatemala is a priority and is unwaivable. In relation to the latter, one should also bear in mind that the Treaty of 1859 entered into by Great Britain and Guatemala, should not be used neither as foundation nor reference, for if it were, the Government of Guatemala would have constitutional impediment to admit it as well as to submit it to the decision of the people through referendum.*

b) *One should bear in mind as well that Guatemala does not recognize any validity whatsoever of the “reference markers” that according to Belize make up the boundary line. And in consequence, the safeguard clause agreed upon by both parties when accepting the establishment of the provisional adjacency zone should be observed; the clause warns that it does not constitute border demarcation nor can it be used by any of the parties as precedent or proof in any forum or tribunal.*

c) *Maritime space delimitation of Belize and Guatemala depends on the final resolution of the territorial differendum object of the facilitation.*

d) *Such delimitation cannot in any case begin from the base lines set by the State of Belize itself in its Law of Maritime Zones, enacted in January 1992. These contravene rules provided in the United Nations Convention for the Law of the Sea, suffer from evident lack of equity and were object of express reserve by the State of Guatemala.*

e) *Furthermore, delimitation must not respond to the system of equidistance, given that due to depressions and clefts presented in maritime coasts, its application would shut Guatemala in. On the contrary, it must be based on the system of equity.*

f) *Proposals must respect the sovereignty that the State of Guatemala has publicly exercised over its territorial sea since the year 1936, and not pretend to reduce it in any way.*

g) *Guatemala's exclusive economic zone should be truly exclusive. Pretending to grant rights for exploitation of resources to Belize and Honduras denatures it. On the other hand, access to said zone must allow easy and full navigation, exploitation and use of our piers in the Atlantic Ocean.*<sup>35</sup>

The transcribed legal opinion encompasses important elements for the reader that wishes to know more about the reasons which led to rejection of the Facilitators' Proposals.<sup>36</sup>

This study became the precedent for the action taken on 25 August 2003 by the Government of Guatemala, when through a brief but categorical communication signed by Vice Minister of Foreign Relations, Gabriel Aguilera Peralta, addressed to the Secretary General of the OAS, it rejected the Facilitators' Proposals. Alto, it suggested that the effort of pursuing a negotiated settlement to the territorial differendum should be continued, and in case this were not possible, to submit the dispute to an international juridical tribunal. The mentioned communication reads as follows:

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<sup>35</sup> Belize Commission (2005). *The Facilitation Process in the Guatemala-Belize Territorial Differendum*. July 2005. Ministry of Foreign Affairs. Guatemala. Pages 44 to 69.

<sup>36</sup> Belize Commission (2005). *The Facilitation Process in Territorial Differendum. Summary of the Opinion of the Belize Commission regarding the Facilitators' Proposals*. Ministry of Foreign Affairs. Guatemala. Page 44.

*“...After carefully analyzing the abovementioned document, my Government has arrived at the conclusion that the proposals and recommendations do not portray a sense of balance that lets us identify the interests and claims set forth by Guatemala, which in consequence make them unacceptable. Furthermore, proposals include provisions that contravene the juridical order of Guatemala.*

*Hence, the Government of Guatemala finds no political or legal conditions to submit them to referendum, and in consequence states that it does not accept the “Proposals of the Facilitators’ Panel”, in the way they have been presented.*

*In this regard and with the purpose of not ending the negotiated settlement of the territorial differendum and finding a formula of legitimate transaction that acknowledges the interests of the parties, the Government of Guatemala proposes that the Government of Belize accepts discussing in bilateral meetings summoned by the OAS, those provisions found within the recommendations which make it unfeasible for them to be submitted to referendum.*

*In the unfortunate case that an agreement was not reached, the Government of Guatemala deems convenient that the judicial or arbitral procedures recommended by the Facilitators should be considered by both governments in order to define the content and significance of the project of ‘compromis’.”<sup>37</sup>*

This communication embraces the firm decision of the Guatemalan Government to reject the Facilitators’ Proposals, in a constructive spirit, expressly leaving an open possibility to continue direct negotiations with Belize, as well as the eventual submittal of the case to the International Court of Justice.

This decision takes into consideration that the Guatemalan claim regarding the territory unlawfully held by Belize is a matter of sovereignty; and in consequence, it

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<sup>37</sup> Ministry of Foreign Affairs (2005). The Facilitation Process of the Territorial Differendum. Recommendations of the Facilitators Panel to the governments of Guatemala and Belize on 30 August 2002. Guatemala, page 70.

would constitute a transgression to the Constitution accepting as a conciliatory settlement what would have meant a total waiver of rights on behalf of Guatemala to the claimed territory (which is actually implied in the Facilitators' Proposals, while not including any restitution whatsoever of the territory unlawfully held by Belize). Such a settlement would undermine the territorial integrity of the State of Guatemala and, obviously, would not reflect upon national interests, would be null and void *ipso jure*, and would carry unavoidable legal responsibilities to public officials who would approve it.

#### **1.1.20. AGREEMENT ON A FRAMEWORK FOR NEGOTIATIONS AND CONFIDENCE BUILDING MEASURES**

On 7 September 2005, the governments of Belize and Guatemala signed the AGREEMENT ON A FRAMEWORK FOR NEGOTIATIONS AND CONFIDENCE BUILDING MEASURES, a bilateral document that established the procedure for the Parties to achieve a solution to the existing Territorial Differendum. Certainly, this agreement was not enough for the parties to turn to the International Court of Justice, given that the governments were not authorized to do so unless the constitutional requirements within each country were fulfilled, which in the case of Guatemala would have to necessarily be submitted by Congress to the approval of the people through referendum. This document constitutes the precedent to the Special Agreement recently entered into by both States, and was signed with the purpose of making one last effort to negotiate the territorial differendum, taking in the possibility of the OAS Secretary General to recommend to the Governments the submittal of the case to an international juridical body, which was finally accomplished.

The Framework for Negotiations sets forth in part B) number 1 that “*Belize and Guatemala agree, under the auspices of the Secretary General of the OAS, to commence a new round of negotiations, designed to reach an equitable solution of the Territorial Differendum between the countries that is general, definitive, honourable and permanent on the land, insular and maritime issues...*”

The purpose of the Framework for Negotiations is, according to that set forth in the document: “...*the reaching of an agreement to solve all the issues pertaining to the Territorial Differendum, that assures its approval in both countries within the constitutional and legal framework of each and that allows for the effective implementation of the said Agreement...*”<sup>38</sup>

The negotiation process was agreed upon by the Governments following the principle that states that “nothing is agreed until everything is agreed”, reason why the reached agreements on particular issues object of the differendum would not enter into force as long as there was not a definite agreement on the whole of the issues relative to it, and always in accordance with each country’s laws.

The language used in the Framework for Negotiations is of essence given that from that moment on, parties expressed their full acceptance of the content of the controversy, in the sense that said territorial differendum includes a claim upon the land, insular and maritime areas. In was considered in said agreement that if the States were to reach a settlement regarding any of the aforementioned areas in a negotiated fashion, it would have to be agreed upon in such a way that it would not imply a recognition on behalf of either of the parties of the positions of the other, or that it would affect the different areas of the territorial differendum.

Within the referred provision, it was also considered that the countries will not be allowed to use, in the future, affirmations nor arguments set forth in said document, nor interpret acceptance or waiver of positions on behalf of the delegations or governments. I believe that the inclusion of safeguard clauses is a very useful measure in any negotiation, mostly in this one, which implies sovereign interests of the States. We lawyers cannot resist making partial interpretations of declarations taken out of their original context, reason why safeguard clauses have always been the rule in the work

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<sup>38</sup> Belize Commission. Agreement on a Framework for Negotiations and Confidence Building Measures between Belize and Guatemala. Ministry of Foreign Affairs of Guatemala. [www.minex.gob.gt](http://www.minex.gob.gt)

performed by the Belize Commission regarding conversations or negotiations with the Belizean Government.

#### **1.1.20.1. NEGOTIATIONS FOR THE MARITIME AREA IN THE TERRITORIAL DISPUTE**

In the Framework Agreement for Negotiations it is clearly stated that the parties would perform integral negotiations that would include land, insular and maritime areas. Nevertheless, the Secretary General of the OAS suggested to the Parties: *“to initiate a negotiation process of the territorial differendum regarding the maritime area of the territorial differendum (sic)...Invite the Government of Honduras to participate in the Negotiation Process, requesting the appointment of negotiating delegates for said purpose.”*<sup>39</sup>

The General Secretariat considered that the maritime area of the territorial differendum had more chances of offering the possibility of finding agreements, taking the least possible time, which would simplify the later discussion of the land and insular matters between Guatemala and Belize. It also suggested inviting the Illustrious Government of Honduras to participate in the Negotiation Process, aiming to cover the following subjects: Base Lines, Territorial Sea, Exclusive Economic Zone and Continental Shelf.

However, given its nature and in agreement with rules provided by International Law of the Sea that are applicable, it is undeniable that the areas of maritime jurisdiction of the States are necessarily generated from the territory entitled to each country, and that in Guatemala’s case, the land territory from which such sea spaces are to be measured, are yet to be determined due to the existence of the territorial differendum.

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<sup>39</sup> Web page of the Ministry of Foreign Affairs, [www.minex.gob.gt](http://www.minex.gob.gt)

For these reasons, upon beginning this part of the negotiation, several specific and very important doubts arose, such as, How to determine the point from which the territorial sea or the exclusive economic zone should be calculated, if the claim sustained by Guatemala has not been resolved yet though an adjudication of territory on behalf of the International Court of Justice? How to ensure that any settlement regarding the sea does not imply recognition of claimed territories that could prejudice the result of the claim before the Court?

Guatemala participated in this negotiation with the purpose of making a genuine effort to reach agreements in the maritime area, which would comprise a legitimate transaction between the three neighboring and brotherly countries, as Foreign Minister Jorge Briz Abularach once declared. The obligation of negotiating in good faith as Guatemala did, is a minimal rule that is applied in negotiations of maritime spaces between States that have access to sea, playing a role in the delimitation, who must make an effort *bona fide* to define them by mutual agreement, as it was considered by the International Court of Justice in the case of the Continental Shelf in the North Sea in 1969.<sup>40</sup> This principle became the basis for negotiations of coding conventions on the Law of the Sea, which concluded in the United Nations Convention on the Law of the Sea of 1982.

Many of the sea delimitations around the world are pending conclusion because they depend on a territorial dispute. Obviously, the State that appeals for entitlement upon a territory it believes legitimately belongs to it, but is under the possession of another, is not willing to acknowledge the consequences of this fact regarding the sea, land and subsoil...It would be inconsistent to negotiate maritime space delimitation when a State is refuting the presence of another on the land territory which jurisdictional and maritime sovereignty would be calculated from.<sup>41</sup>

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<sup>40</sup> Brotóns, Antonio Remiro. Op. Cit. Page 664.

<sup>41</sup> Brotóns, Antonio Remiro. Op. Cit. Pages 670 and 671.

This difficulty in achieving agreements in the maritime areas, when territorial disputes are still pending, was identified by the Guatemalan Congress upon approving the United Nations Convention on the Law of the Sea, through Decree 56-96, setting forth in Article 1, that areas of maritime jurisdiction cannot be determined between Guatemala and its neighboring countries in the Caribbean Sea, referring to the territorial sea, continental shelf and exclusive economic zone.

*Article 1. The United Nations Convention on the Law of the Sea, which was concluded in Montego Bay, Jamaica, on 10 December 1982, is hereby approved, stating that based on article 310, its approval and ratification does not prejudice in any way whatsoever the rights that the Republic of Guatemala has over the territory of Belize, nor the historical rights it has over Amatique Bay, and that **its territorial sea and corresponding maritime jurisdiction zones will not be able to be determined** until the territorial differendum has been settled. Furthermore, Guatemala also puts forward that the cayes and islands are to be included in the territorial claim; therefore, they cannot prejudice the future delimitation of the maritime spaces in any way whatsoever.*

Said difficulties made it necessary for all the process to be considered as a single undertaking, where “nothing is agreed until everything is agreed”, and that agreements that were to be eventually reached in the maritime area would remain in suspense until the territorial differendum was settled in the terrestrial and insular areas.

Another element that made it difficult for negotiations to take place on maritime delimitation in the Caribbean was the participation of Honduras, upon suggestion of the OAS, due to the complexity that the Caribbean Sea poses within the three countries.

The ICJ Statute acknowledges the mechanism of intervention (article 63) in favor of third parties, whose interests of juridical nature could be affected by a Court decision; those regarding maritime delimitation in enclosed and semi-enclosed seas have offered, due to its nature itself, the best opportunity to put intervention into practice. The situation on the border delimitation between El Salvador and Honduras had to reach the

Court in order for a request of third-party intervention to be considered for the first time in history; it was Nicaragua's request, and it was taken in a very limited manner, referring only to the juridical situation of the waters in the Fonseca Gulf (Judgment of 13 September, 1990).<sup>42</sup>

The negotiation effort in the maritime area ended without reaching any agreements and in that regard, the Secretary General of the OAS stated in communication of 19 November 2007, the following:

*“As of March 2006, the Negotiation Group has met in several opportunities at the ministerial and technical level, with representatives from the Governments of the three countries, under the facilitation and coordination of my Special Representative...With participation of the three countries, several high-level technical meetings have taken place, with the purpose of reaching agreements regarding maritime territory, which could be used as a provisional framework and later be ratified or revised depending on the results of the land issue, a far more complex and difficult matter to solve. Unfortunately, after more than a year of negotiations, and even in view of the possibility of continuing them in the maritime area, if the Parties so consider it, not even a hint of agreement has been reached nor have the positions of the Parties come closer together, so that a successful conclusion of this process is actually glimpsed, not even in a tentative manner.”*<sup>43</sup>

#### **1.1.20.2. RECOMMENDATION OF THE SECRETARY GENERAL**

Although great effort was put into the negotiation, governments of both countries were conscious at all times that reaching a solution that would be acceptable for both parties implied enormous difficulties. Absolutely confronted in their positions, parties were aware of the possibility that this phase would conclude without any agreements, like many others throughout history. Therefore, the parties decided to include in the

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<sup>42</sup> Brotons, Antonio Remiro. Op. cit. Pages 682 and 683.

<sup>43</sup> Belize Commission. Communication of 19 November 2007. Ministry of Foreign Affairs. [www.minex.gob.gt](http://www.minex.gob.gt)

Framework Agreement for Negotiations a window of possibility for the Secretary General to recommend that the parties would take their controversy before an international jurisdictional body for its settlement.

This recommendation was not binding, but it made it easier for Guatemala and Belize to enter into an agreement that included a “*compromis*” of turning to the Court, understanding that the final decision required previous fulfillment of the legal internal requirements in each country. The following extract is taken from the Framework Agreement for Negotiations:

*“...if the Secretary General – of the OAS - determines that it is not possible to arrive at an agreement on some of the issues, he shall recommend that the Parties submit those to either the International Court of Justice or an International Court of Arbitration, Juridical Bodies established under International Law for the solution of controversies*

*The Parties agree to submit the recommendation of the Secretary General to the appropriate authorities of their respective countries for their consideration and decision*

*The Secretary General shall assist the Parties to reach an agreement on which of the Juridical Bodies is more adequate, on the matters that will be submitted to the same, and the procedures that must be followed to go to such Body...”<sup>44</sup>*

At the time of writing up this text, the recommendation of the Secretary General of the OAS had to be broad enough to allow the governments to determine, at the right moment, which international jurisdictional body was to fit their interests for submitting the territorial differendum, in their own views.

According to International Law, the jurisdictional options are limited to the International Court of Justice or an International Court of Arbitration. The Secretary

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<sup>44</sup> Ministry of Foreign Affairs (2005). *Agreement on a Framework for Negotiations and Confidence Building Measures between Belize and Guatemala*. Ministry of Foreign Affairs. Guatemala.

General of the Organization of American States, through his recommendation, privileged the first option as the most suitable to settle a controversy that involves the highest interests a State can have, such as its territory and sovereignty, elements that make up a State and whose existence depends upon.

It is also important to highlight that the mentioned submittal of the dispute to an international juridical body was considered to be done in a joint and voluntary fashion by both countries. In consequence, a “special agreement” was to be negotiated, establishing the object and procedure to be followed to go to the Court, after meeting the internal legal requirements of each country. In Guatemala’s case, according to its Constitution, Congress should submit it to referendum to be duly approved.

As history has confirmed, Great Britain in the past and Belize nowadays, have systematically refrained from submitting the dispute to international jurisdiction, given that they have maintained illegal and forceful occupation of territory entitled to Guatemala, taking advantage of *status quo* exercised over the territory, and due to the lack of precise rules that compel States to settle their controversies through procedures of submittal and compulsory jurisdiction.

Hence, the recommendation of the Secretary General, in the sense that the parties seek solution to the territorial differendum through the International Court of Justice or an International Court of Arbitration, constitutes a historical milestone for the regional organism, which is contributing to the creation of International Law in its development to overcome the lack of juridical certainty implied by the absence of coercion in the settlement of controversies.

The Secretary General of the Organization of American States addressed a communication dated 19 November 2007 to the Foreign Minister of Guatemala, stating the following in this regard:

*“...After having examined the mechanisms for conflict resolution offered by contemporary international law, and in compliance of that provided for in paragraph 5 of the Agreement on a Framework for Negotiations and Confidence Building Measures, I have come to the conclusion that the procedure to settle this dispute must be of judicial nature, be it an arbitration tribunal appointed on mutual agreement by the parties or the International Court of Justice.*

*Above all, I consider it necessary to remind the Foreign Minister that the Governments of Guatemala and Belize enjoy absolute liberty to choose the procedure to which they wish to submit the territorial differendum that affects them. Neither of the States has signed what is known as the “optional clause”, provided for in article 36, paragraph 2 of the Statute of the International Court of Justice, through which a State declares acceptance of its jurisdiction as compulsory **ipso facto** and without a special agreement, to settle controversies that could be presented with other States that accept the same obligation.*

*Therefore, both countries can agree upon that the settlement of the controversy be trusted to a court of international arbitration, which is the other alternative suggested in paragraph 5 of the Agreement on the Framework for Negotiations and Confidence Building Measures. In this option, Parties can come to exercise greater control regarding the constitution of the organ, as well as the development of the procedures (that in arbitral bodies tend to be briefer than those developed before the International Court of Justice). In these, parties must come to an agreement not only regarding the formulation of the question to be submitted to the tribunal for its settlement, but also the composition of the Tribunal and the way in which the procedure must be developed.*

*The opinion of the undersigned Secretary General is, therefore, nothing but a recommendation presented to two sovereign States that, as such, can agree upon the procedure they consider most suitable to the defense of their interests and the material costs they are willing to settle.*

*Under this light, given that we are dealing with a dispute in which the highest national interests of the involved countries are at stake, where what is under discussion is a territorial recovery of significant and transcendental importance that affects the territorial integrity of both countries, I allow myself to recommend that the States submit this matter to the International Court of Justice.*

*The International Court of Justice is one of the main organs of the United Nations and has competence to settle international disputes that are submitted to it by States parties of its Statute. (Belize and Guatemala are parties to the Statute by the mere fact of being Member States of the United Nations). Its duty is to decide over the controversies based on international law, unless the Parties in dispute request that the same be settled **ex aequo et bono**, that is, applying equity and justice criteria in lieu of issuing a judgment based exclusively on law...”<sup>45</sup>*

The contents of the note of the Secretary General constitute another achievement for the Government of Guatemala in taking all of the necessary steps prior to submitting the territorial differendum before the International Court of Justice. The merit of the note rests in the description of the effort put in by Guatemala and Belize to settle the Territorial Differendum through non-judicial means, and that in view of not having reached a negotiated agreement, it is now necessary for both countries to consider settling it through judicial means.

### **1.1.20.3. ACCEPTANCE OF THE RECOMMENDATION OF THE SECRETARY GENERAL OF THE OAS BY GUATEMALA AND BELIZE**

Through note sent by Foreign Minister Gert Rosenthal on 17 December 2007, the Government of Guatemala expressed itself on the matter informing that it found the recommendation that the States submit the issue before the International Court of Justice

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<sup>45</sup> Web page of the Ministry of Foreign Affairs. [www.minex.gob.gt](http://www.minex.gob.gt)

reasonable. It stated that said recommendation was considered the ideal path to follow, that in that sense the Government of Guatemala had been upholding its stance for some time now, without underestimating the overcoming of obstacles of elevated costs of judicial procedures and the fulfillment of steps required by each country's legislation.

On its part, the Government of Belize, through note dated 29 May 2008 addressed to the Secretary General of the OAS put forward that, subject to the approval of the Belizean people, the necessary steps would be taken to act according to the recommendation of the General Secretariat, in the sense of taking the matter to the International Court of Justice.

On 16 June 2008, Foreign Minister Haroldo Rodas Melgar confirmed the Guatemalan position to the Secretary General of the OAS, stating the following:

*"I confirm to Your Excellency the position of the government of Guatemala, put forward by our Foreign Ministry through note date 17 December 2007, whereas it accepts submitting the differendum before the International Court of Justice. I reiterate that the submittal of the differendum to the jurisdiction of said organ will be done once the constitutional requirements pertaining to the State of Guatemala have been fulfilled.*

*I would also like to ratify my wish for negotiations for the adoption of a Special Agreement (compromis) to begin as soon as possible, which will allow the parties to turn to this highest-level international jurisdictional organ. I trust that Your Excellency, as much as the General Secretariat, will continue to accompany the process that will further on take us to the suggested juridical body."<sup>46</sup>*

In the latter communications, the government of Guatemala stated that it agreed to the recommendation issued by the Secretary General, by which it was achieved that our regional organization, which includes the participation of Guatemala and Belize and

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<sup>46</sup> Belize Commission. Reference 114000115708/COMBEL. Ministry of Foreign Affairs. Guatemala, 16 June 2008.

fosters the purpose of solving disputes between member States, would assert with the approval of both governments, its recommendation that the Territorial Differendum would be taken before the International Court of Justice. Even though this recommendation is not binding for the States, it constitutes the precedent that gave way to the negotiation of the Special Agreement.

With these foregoing expressions put forward by the governments of Guatemala and Belize, the last process of negotiation under the aegis of the OAS concludes and a new phase begins, which will take us to the International Court of Justice, once the constitutional requirements of each country are met, especially those regarding the celebration of referenda.

#### **1.1.21. NEGOTIATION, INTERNAL CONSULTATIONS AND SIGNATURE OF THE SPECIAL AGREEMENT**

Guatemala's Foreign Minister, through his communication of acceptance of the Secretary General's recommendation, stated the determination that both governments would be summoned to initiate the process of negotiation of the Special Agreement that encompassed the acceptance of the States to submit themselves to the International Court of Justice, requesting that such negotiation process would continue to be developed under the aegis of the General Secretariat of the OAS.

The negotiation of the Special Agreement was a difficult and complex exercise because it was necessary that Guatemala's sovereign interests would remain duly protected in terms that were acceptable to Belize. Otherwise, this agreement could not have been reached. This delicate balance was achieved after very demanding negotiations, finally arriving to the signature by Guatemala and Belize of the agreement whose merits are further on analyzed.

In fact, several meetings took place between the delegations of Guatemala and Belize in the OAS Headquarters. Several drafts were printed up that included a footnote

with the purpose of guaranteeing that the texts were not final but *ad referendum*, considering that “*the project would be submitted to the consideration of the governments of the respective Parties and subject to changes they deemed necessary*”. This way, the language of the final text was balanced and adequate to protect the rights and positions of both governments in the Territorial Differendum.

The *compromis* was included in an instrument that the parties named Special Agreement, given that it encloses provisions relative to internal legislation of the parties that are normally not included in agreements signed by other countries who have taken their differences to the International Court of Justice. In other words, this international treaty carries great relevance because, subject to the fulfillment of internal formalities of the parties, it encompasses the formal commitment of the governments of Guatemala and Belize of submitting the Territorial Differendum to the jurisdiction of the International Court of Justice, and nurturing a process that will grant final solution to this controversy, through a compulsory judgment.

Due to the great significance of this Special Agreement, having the favorable opinion of the government’s competent authorities, a Governmental Agreement was issued by the Ministers Council authorizing the signing by Guatemala’s Minister of Foreign Affairs. I proceed to transcribe in a summarized fashion some of the obtained opinions to support the mentioned governmental agreement.

The Belize Commission, advisory organ of the Ministry of Foreign Affairs of Guatemala in all matters regarding the Territorial Differendum with Belize, expressed its collective stance on the draft of the Special Agreement on 28 October 2008, stating the following in regard to the content of the main provisions of the agreement:

*“Article 2: This article describes the Object of the Litigation and has been formulated in broad terms in order to keep from restricting in any way any of the pretensions the government of Guatemala would decide to include in the petition. In other words, the object has been written in comprehensive terms which extend*

*jurisdiction of the ICJ to any Guatemalan legal claim, in order to reach an integral settlement in the land, insular and maritime areas...*

*Article 5: The Belize Commission accepts the creation of the Binational Commission because in the latest version of the project its faculties have not been limited; that is, its frame of action has not been reduced to establishing territorial boundaries. On the contrary, the text mentions in general terms the faculty of “demarcating borders”, phrase that in no way excludes maritime or insular territories upon which the Court has an opinion on...*

*Article 7: the composition is correct in legal terms because it compliments the competence of Congress in that concerning the submittal to referendum of the decision of turning to the ICJ. The commitment acquired by the Foreign Office is limited to carrying out the formalities which are provided for to that effect within our internal legal system...Furthermore, with all due respect, in a unanimous and collective fashion, the Belize Commission hereby issues favorable opinion regarding said text and recommends that, once the legal procedure to be applied is supported, it is submitted for approval by the President of the Republic, so that if he deems it appropriate, the same proceeds to be approved in Council of Ministers, prior to being signed by the Minister of Foreign Affairs.”<sup>47</sup>*

The Director General of Juridical Affairs, International Treaties and Translations, on 17 November 2008, through memorandum 15200007208, issued his legal opinion on the Special Agreement and, with the clarity that distinguishes Ambassador Guillermo Sáenz de Tejada, expressed the following:

*“The text of the project is considered in general terms to be acceptable for Guatemala, given that it encompasses the determination to put an end to any and every difference between Guatemala and Belize regarding the Guatemalan claim over continental and insular territories and its maritime areas; the submittal by the parties to*

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<sup>47</sup> Belize Commission, Ministry of Foreign Affairs. Memorandum 11400030908, dated 28 October 2008.

*the International Court of Justice of the differendum including any claim Guatemala might have towards Belize in order for it to decide on said claim, declaring the rights of the parties and determining the border line in each countries' respective territories and areas; suggests the procedure to be accepted by the Court; the parties accept the judgment issued by the same as final and compulsory and they commit to comply with it and execute it in good faith (Article 96 of the United Nations Charted and Article 60 of the Statute of the International Court of Justice); parties agree upon the composition and terms of reference of the Binational Commission, which will have the task of demarcating the boundaries according to the decision taken by the Court; and establishes the form in which the Special Agreement will enter into force. Also, it covers the commitment of the parties to carry out the formalities provided for within their internal systems to submit to referendum the decision of requesting the Court to settle the controversy, as well as it determines the text of the question which each one of the Parties will submit before their peoples through referendum simultaneously.*

*Regarding internal legislation and order, it is deemed that the Special Agreement should be approved by Congress and ratified by the President of the Republic in order to be in the capacity of proceeding to exchange ratification instruments, act by virtue of which the Special Agreement will enter into force.*

*Given the special nature of the case, the procedure for the Special Agreement to enter into force, in regard to Guatemala, would be the following:*

- 1. Signing of the Special Agreement by the Minister of Foreign Affairs of Guatemala.*
- 2. Forwarding of the Special Agreement to Congress by the President of the Republic.*
- 3. Based on Article 19 of transitory and final provisions of the Political Constitution of the Republic, and only as mere administrative procedure, submittal to Referendum by Congress of the Republic and forwarding to*

*the Electoral Supreme Tribunal so that it carries out the corresponding summoning.*

4. *Summoning of the Referendum by the Electoral Supreme Tribunal*
5. *If the Referendum were to be favorable, Congress would have to decide, based on Article 171 of the Constitution regarding the approval of the Special Agreement and therefore, the submittal of Guatemala to the jurisdiction of the International Court of Justice.*
6. *Ratification of the Special Agreement of the Special Agreement.*
7. *Publication in the official journal of the text of the Special Agreement and its pertinent ratification instrument.*
8. *Exchange between the Parties of the ratification instruments and notification of the commitment included within the Special Agreement to the Secretary General of the International Court of Justice...*<sup>48</sup>

As Ambassador Guillermo Sáenz de Tejada pointed out in his legal opinion, the Special Agreement contains not only the *compromis* itself, but also covers the internal procedure that must be carried out so that, through simultaneous and corresponding referenda in Guatemala and Belize, the Agreement can be approved by the Honorable Congress of the Republic and ratified by the President of the Republic, which makes it unique in its kind regarding other agreements of *compromis*.

The draft of the Special Agreement was submitted by the Ministry of Foreign Affairs for study and assessment by the National Solicitor General's office, which issued its opinion through communication number 4959-08, dated 26 November 2008, on the convenience of signing and ratifying the Special Agreement between the Governments of Guatemala and Belize, to submit the land, insular and maritime claim of Guatemala to the International Court of Justice, expressing that the Agreement reflects the recommendation issued by the Secretary General of the Organization of American States on 19 November 2007 and is based on Article 5 of the Agreement on a Framework for

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<sup>48</sup> Director General to the General Direction of Juridical Affairs, International Treaties and Translations. Opinion number 15200007208 of 17 November 2008. Ministry of Foreign Affairs. Guatemala 2008.

Negotiations and Confidence Building Measures between Belize and Guatemala of 7 September 2005.

The National Solicitor General's office considered that it can be "*established that the mechanisms carried out and all formalities that were well enough oriented to arrive at the draft of the Special Agreement to be signed between the Government of Guatemala and the Government of Belize to submit before the International Court of Justice the land, insular and maritime claim of Guatemala, have been deemed as adequate for said purpose...*" whereby it proceeds to esteem "*that the issuance of the Special Agreement between Guatemala and Belize to submit Guatemala's territorial, insular and maritime claim to the International Court of Justice is adequate and convenient.*"<sup>49</sup>

The Ministry of National Defense was also previously consulted on the convenience of signing the Special Agreement. Through legal opinion with reference 2409/2008/DJE/JAMS/SATA/fhuy of 27 November 2008, its Juridical Department considered "*...convenient that the Special Agreement would be signed and ratified by Guatemala, with the purpose of beginning a final settlement between both countries, achieving Guatemala its land, insular and maritime claim.*"<sup>50</sup>

Later on, through communication number DIGEPOL/MDN/MTGF-gsb-415-2008 of 28 November 2008, the Ministry of National Defense stated that it did not find any inconvenience for the Government of Guatemala to sign and ratify the Special Agreement between Guatemala and Belize to submit Guatemala's Land, Insular and Maritime Claim to the International Court of Justice.<sup>51</sup>

Lastly, the General Direction of Juridical Advisory and Consulting Body of the President of the Republic of Guatemala, General Secretariat of the Presidency, issued

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<sup>49</sup> Legal opinion issued by the National Solicitor General's office number 4959-08, dated 26 November 2008. Ministry of Foreign Affairs. Guatemala, 2008.

<sup>50</sup> Legal opinion of the Juridical Department of the Army, number 2409/2008/DJE/JAMS/SATA/fhuy dated 27 November 2008. Ministry of Foreign Affairs. Guatemala, 2008.

<sup>51</sup> Ministry of National Defense, communication number DIGEPOL/MDN/MTGF-gsb-415-2008, dated 28 November 2008. Guatemala, 2008.

legal opinion 508-2008 of 21 November 2008, including an assessment of the background of the Special Agreement, quoting the three Constitutions that anteceded the one in force in our country, all of which conclude that “...*Guatemala has always sustained its territorial differendum in relation to the territory of Belize, first under the rule of the United Kingdom of Great Britain and Northern Ireland, and later on directly against Belize...*”<sup>52</sup>

The legal opinion obtained from the General Secretariat of the Presidency is a juridical document of great precision, making a thorough analysis of the national and international pertaining rules, including the Special Agreement itself, putting forward the following:

*“The contents of this agreement point out the parameters of the statement that Guatemala and Belize will submit to the International Court of Justice to settle their border dispute, in a definitive manner. Within it, they define in a joint fashion the reasons that motivate them to turn to the international organ, a commitment both States undertook within the national and international juridical framework, given that it involves rules provided for in the United Nations Charter, the Statute of the International Court of Justice, the Organization of American States Charter and the Vienna Convention on the Law of Treaties, as well as our own Political Constitution. It also involves the observance and respect for principles of law in general, as well as of international law in particular, such as the principle of Consent regarding the submittal of the differendum to the consideration of the International Court of Justice, the pacific settlement of international controversies, juridical equality of the States, pacta sunt servanda, the right of self-defense, among others.”*

Once the mentioned legal opinions were all gathered, the Special Agreement was taken into consideration by the President of the Republic in order for him to authorize the signing of the document, which he did through Governmental Agreement in Council of

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<sup>52</sup> General Direction of Juridical Advisory and Consulting Body of the President of the Republic of Guatemala, General Secretariat of the Presidency. Legal opinion 508-2008, dated 21 November 2008. Guatemala, 2008

Ministers (number 316-2008), granting the necessary legal and political support to proceed to enter into the agreement on behalf of the governments by means of their Foreign Ministers. This governmental decree reads as follows:

*“Article 1. (It is hereby authorized) That the State of Guatemala signs the Special Agreement between Guatemala and Belize to submit Guatemala’s land, insular and maritime claim to the International Court of Justice.*

*Article 2. That the Minister of Foreign Affairs, in the exercise of his duties, shall sign on behalf of the State of Guatemala, in Spanish and English languages, the aforementioned special agreement.*

*Article 3. The text of the special agreement, in Spanish as well as in English, which by virtue of the present governmental agreement is entrusted to be signed by the Minister of Foreign Affairs, reads as follows: ...*

*Article 4. Once the Special Agreement transcribed into this Governmental Agreement is signed, the Executive Branch will forward it to the Congress of the Republic for the purposes provided for in article 19, Transitory and Final Provisions of the Political Constitution of the Republic of Guatemala.*

*Article 5. The present governmental agreement enters into force immediately and shall be published in the Diario de Centro América (official journal).”<sup>53</sup>*

Soon after, the “Special Agreement between Guatemala and Belize to submit Guatemala’s Land, Insular and Maritime Claim to the International Court of Justice” was signed by Foreign Minister Haroldo Rodas Melgar and Foreign Minister of Belize Wilfred Elrington on 8 December 2008, in the headquarters of the Organization of American States.

Said Special Agreement was forwarded by the General Secretariat of the Presidency to the Congress of the Republic, with the object of putting it under its consideration for approval, if the Legislative Branch deemed it convenient, in order for it

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<sup>53</sup> *Diario de Centro América*, Volume CCLXXXV, number of publication 98, pages from 8 to 10, 8 January 2009. Guatemala.

to forward it when the time is right to the Supreme Electoral Tribunal, which will issue the pertinent summoning for referendum.

## **CHAPTER 2**

### **2.1. PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES**

Guatemala has maintained throughout history that a territorial dispute exists as a result of the illegitimate occupation, by Great Britain first and by Belize afterwards, of territory that it is entitled to. Hence, Guatemala's claim must be settled in the form of restitution of the land, insular and maritime areas. On the other hand, Belize maintains that such territorial dispute does not exist and that therefore, no such restitution of territory proceeds.

Guatemala has attempted to settle this dispute and submit it to the decision of the International Court of Justice, given that it is the ideal juridical means to obtain acknowledgement of its rights over the land, insular and maritime territory unlawfully occupied by Belize. Also, it is the only way of obtaining legal certainty regarding its territory.

The positions of Guatemala and Belize regarding the existing controversy are radically different, and as a result, the possibility of a negotiated solution has always been a complex task, which in diverse moments of history has been frustrated for several reasons. Any final solution must be approved by the Guatemalan population, so if the same does not imply the restitution of land, insular and maritime territory, its approval should become quite difficult as well as its effects regarding Guatemala's rights would be substantial.

In order to achieve this purpose, it is necessary for the States to submit their controversies to the jurisdiction of the International Court of Justice through a *compromis*

that regulates it that way, objective which was achieved when the Special Agreement was signed.

Special agreements are true international treaties that aim for the expression of consent of the States to go to the international tribunal, which in turn would be authorized to settle the existing dispute between the parties. This is necessary because one of the great flaws of International Law is that a procedure that necessarily and compulsorily arrives to a solution of controversies among States does not currently exist. As Doctor Antonio Remiro Brotóns explains in his book on International Law: “...*the obligation of settling disputes exclusively through pacific means goes hand in hand with another goal: that of compulsory jurisdiction, which basically consists on the previous acceptance on behalf of the States, of the submission of their disputes to an arbitration or judicial procedure to be initiated unilaterally, unless the parties commonly agree upon choosing other means of settlement. It was sensibly thought of, many years ago, that generalizing this obligation would produce the proscription of war. It became necessary to abandon the use of force, but also, a fair, final and binding solution had to be sought for every dispute...Hundreds are the bilateral treaties of peaceful settlement entered into mostly during the first third part of the XX Century, which with greater or lesser technical perfection, in combination or not with previous experimentation with political methods (negotiation, conciliation) and with a variable number of exceptions, that call for compulsory arbitration or judicial settlement. There are also abundant arbitration clauses found within treaties eager to adequately settle problems of interpretation and application of its provisions.*”<sup>54</sup>

One of the defects in International Law is the lack of compulsory jurisdiction for the assessment of controversies that arise between States, reason why the celebration of a Special Agreement that includes the commitment of Guatemala and Belize to turn to the Court, once the pertaining legal constitutional requirements have been met, is necessary.

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<sup>54</sup> Brotóns, Antonio Remiro. Op.cit. Page 843.

## 2.2. CLASSIFICATION OF THE MEANS OF PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

The following pages present a summary of the means for settling international disputes as provided for in International Law, aiming to illustrate the reader on the efforts undertaken by Guatemala to exhaust them, before reaching the signing of the Special Agreement.

Solutions of controversies in contemporary International Law have two characteristics that can be accurately defined; one, that States are compelled to settle them peacefully, and the other, that States have the liberty to choose the means that International Law makes available to them.

International disputes were defined by the Permanent Court of International Justice in the following manner: “*A difference or disagreement on a point of law or fact, a conflict of legal views or of interests between two or more persons*” (Mavrommatis Palestine Concession Case, 1924)<sup>55</sup>

Doctor Manuel Diez de Velasco points out the following elements that are to be present when considering the existence of an international dispute: a) the persons involved must be subjects of International Law and, in most cases, differences arise between States; b) the dispute implies a disagreement between the parties in the matter at glance not only pertaining juridical issues – interpretation of one or several clauses in a treaty -, but also issues of fact – boundaries between two States or on the marking of a concrete position in a boundary -, and c) in order for an international dispute to exist, it is necessary for it to have been determined as such by the parties through direct conversations, unilateral actions or other means capable of establishing its true content, allowing it to be impartially identifiable.

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<sup>55</sup> Diez de Velasco, Manuel. Op. cit. Page 735.

Differences have also been classified as jurisdictional and non-jurisdictional differences, depending on the existence of agreement between the parties to submit them to arbitral or judicial settlement. As it is widely known, within the current state of International Law, none of its subjects can be submitted to a procedure of arbitral or judicial settlement without their consent.<sup>56</sup>

The means for peaceful settlement of disputes are divided according to International Law into POLITICAL OR NON-JURISDICTIONAL MEANS and JURISDICTIONAL MEANS. Political or non-jurisdictional means are direct negotiation, good offices, mediation, enquiry and conciliation; jurisdictional means include the International Court of Justice and International Arbitration.

The United Nations Charter sets forth in Article 33, regarding the PACIFIC SETTLEMENT OF DISPUTES: “1. *The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.*”

In a similar way, Articles 24 and 25 of the Charter of the Organization of American States, regarding PACIFIC SETTLEMENT OF DISPUTES, set forth the following: “*International disputes between Member States shall be submitted to the peaceful procedures set forth in this Charter...The following are peaceful procedures: direct negotiation, good offices, mediation, investigation and conciliation, judicial settlement, arbitration, and those which the parties to the dispute may especially agree upon at any time.*”

### **2.2.1. POLITICAL OR NON-JURISDICTIONAL MEANS**

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<sup>56</sup> Ibid. Pages 735 and 736.

Diplomatic negotiation, good offices, mediation, enquiry and facilitation are known as the POLITICAL OR NON-JURISDICTIONAL MEANS of settlement of disputes.

These means can be used by States voluntarily given that their selection does not require a specific order or deadline in which they have to be carried out. Their finalization can occur at any given moment during the process, and conclusions or recommendations that arise are not binding for the States taking part in the controversy, unless they expressly accept it.

Regarding these political means, in the case of the Statute of East Karelia, the Permanent Tribunal of International Justice considered that: *“it is perfectly established in International Law that no State can be forced to submit its disputes with other States to mediation, arbitration or any other means of pacific settlement, without its consent.”*<sup>57</sup>

#### **2.2.1.1. DIPLOMATIC NEGOTIATIONS**

Diplomatic negotiation is the main means of pacific settlement of international disputes. Diplomatic negotiations, aside from being the autonomous method of settlement par excellence, play a multiple role in the pacific settlement of controversies, insofar as they can be the prologue or epilogue necessary for other procedures to take place where a third party could intervene.”<sup>58</sup>

#### **2.2.1.2. THIRD-PARTY INTERVENTION: GOOD OFFICES AND MEDIATION**

When diplomatic negotiations come to a stagnation point or become frustrated for any given circumstance that makes it impossible for the parties to continue, and keep trying to find a solution to the dispute bilaterally, the possibility of a third party

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<sup>57</sup> Diez de Velasco, Manuel. Op. cit. Page 736.

<sup>58</sup> Brotóns, Antonio Remiro. Op. cit. Page 832.

intervention arises to try to bring the parties closer together again and resume negotiations. Third-party intervention can be applied in the form of GOOD OFFICES or MEDIATION, depending on the degree of intervention that parties grant to the third party.

*“GOOD OFFICES refer to the most modest degree of intervention, in which the third party that renders them is limited to exercising its moral or political influence to establish or reinstate relations between the parties in dispute, therefore facilitating the material organization of the direct negotiations between them...some have called good offices, facilitation...*

*As it happens in good offices, the first mission of **MEDIATION** consists in bringing the parties together, although the mediator is authorized to propose the heads of negotiation as well and intervene within it as means of communication, suggestion and arrangement of positions, without attempting, nevertheless, to impose a solution.”<sup>59</sup>*

#### **2.2.1.3. ENQUIRY**

This means of settlement of disputes *“is oriented to obtaining an impartial and detailed knowledge of the facts that originated the controversy, expert’s research or investigation that is commonly entrusted to a professional organ, denominated enquiry, investigation or fact-determination commission.”<sup>60</sup>*

#### **2.2.1.4. FACILITATION**

International facilitation can be defined as *“the intervention of an organ without political authority of its own in the settlement of an international difference, benefiting from the trust of the parties in dispute, in charge of examining all of the aspects of the same and proposing a solution that is not compulsory for the parties.”*

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<sup>59</sup> Ibid. Page 836.

<sup>60</sup> Ibid. Page 838.

*“Facilitation consists on the impartial instruction of a professional organ, the facilitation commission, of all of the aspects of the controversy, aiming to produce a proposal for its settlement. Facilitation is different from the enquiry because: 1) the assessment of the commission extends to the matters of fact and law in the dispute and 2) the report presented to the parties includes an assertion of the substantial recommendations to solve the controversy.”*<sup>61</sup>

## **2.2.2. JUDICIAL OR JURISDICTIONAL MEANS**

Judicial or jurisdictional means of settlement of disputes are two: International Arbitration and the International Court of Justice.

### **2.2.2.1. INTERNATIONAL ARBITRATION**

In order to define international arbitration, we can refer to the Conventions of The Hague for pacific settlement of international disputes of 1899 and 1907, which set forth that *“arbitration has for its object the settlement of disputes between States by Judges of their own choice and on the basis of respect for Law. Recourse to arbitration implies an engagement to submit in good faith to the Award.”* Given the elements that compose it, this definition is useful for the characterization of the form and scope of the arbitration agreement, the subjects capable of deciding, the arbitration organ, the applicable law and the legal effects of their decision.

States are not compelled to submit to the jurisdiction of any arbitral tribunal, unless they expressly agree to do so by means of an international treaty or agreement that includes their decision of settling a controversy. The commitment can be contained within an agreement by which parties decide to settle an existing dispute, or through general treaties of pacific settlement, arbitration clauses included in a general treaty or through a facultative clause, as provided for in Article 36.2 of the Statute of the

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<sup>61</sup> Ibid. Page 840.

International Court of Justice, by which the parties decide to settle any future dispute that may arise between them, by submitting it to international arbitration.

Subjects of International Law, which are the States, par excellence, as part of the society of nations, and international organizations in a second stance, can be parties in an international arbitration.

Arbitral tribunals are formed by decision of the States party to a controversy themselves contained in the special agreement entered into to that effect, and therefore, the composition of said arbitral organ takes place in accordance with the interests, need and requirements of each dispute. It is an organ formed and composed *ad hoc* to the controversy which will be submitted to resolution.

The arbitral organ can be formed by only one umpire or by mixed commissions of an uneven group of umpires. Composition of such an arbitral organ will again be decided by the States party to the controversy, who will have to consider the interests they are submitting to their decision. The selection of its members will be determining, for the award or resolution of the arbitral tribunal will be compulsive for the States.

The arbitral organ will apply the law that the States agree upon, who will point out which conventions, international custom or other legal sources they wish to be taken into consideration by the arbitral organ for the settlement of the dispute they are submitting to it. Strictly, the arbitral tribunal will be restricted to the application of rules of Law the States instruct. The arbitral organ must be subjected to the agreement of the parties regarding the applicable law, being the parties able to choose, arrange in order of importance and fix in time the rules and principles over which the judgment (award) is to be founded on. It will be of great importance and responsibility for the States to choose the applicable law, because the result of the award will also depend on that.

The arbitral procedure is developed according to the rules established by the parties to the special agreement, and in case they don't express themselves on this matter,

the tribunal will be able to determine such procedure. Also, the parties can adopt the procedures provided for in the Conventions of The Hague, as well as the general deed and model of rules of arbitral procedure, which are of a substituting nature of proven effect.

The award is compulsory and final for the parties in dispute and must be executed in good faith, according to Article 37 of the 1907 Convention and Article 31 of the Model of Rules of Arbitral Procedure, which implies that the results of the award will have to be applied in a total and strict fashion by the parties. The award is not subject to appeal by any superior tribunal, therefore having such definitive nature, substantiating itself in one sole judgment.<sup>62</sup>

The definitive nature of the arbitral award is one of its most important characteristics because governments will have to be convinced to refer disputes to a third party who is completely trusted by them to receive that power of decision. The arbitral tribunal will be in charge not only of the object of the dispute but also the criterion to be kept in mind in order to make a decision according to the parties. The tribunal will have to announce an award that settles a problem in conformity with the bases agreed upon by the parties to that effect.<sup>63</sup>

I believe the previously mentioned advantages of arbitration also constitute disadvantages, given that governments could be submitting their most expensive interests, such as their territorial integrity and sovereignty to judges who could at a given moment lean towards a position that could indeed affect them. This is a far too high risk to take in a case such as the territorial differendum with Belize, which makes the International Court of Justice, as the OAS Secretary General advised, the ideal international mechanism of judicial settlement.

#### **2.2.2.2. THE INTERNATIONAL COURT OF JUSTICE**

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<sup>62</sup> Brotóns, Antonio Remiro. Op. cit. Pages 852 to 862.

<sup>63</sup> Merrills, J.G. (1998), *International Dispute Settlement*. United Kingdom: Cambridge University Press. Pages 115-116.

Judicial settlement is the procedure by virtue of which the parties submit their dispute to solution before an international tribunal that is of a permanent character, made up of independent judges selected before the arising of the dispute according to statutory rules, which acts in conformity with a pre-established procedure, and which issues compulsory judgments on the basis of the respect for International Law. The only universal and general judicial organ, insofar as it can resolve all kinds of matters of legal order that the States submit to it, is the International Court of Justice.<sup>64</sup>

The International Court of Justice is the principal judicial organ of the United Nations system, having duties of a judicial and advising character, organized in such a way it can work in a permanent fashion to entertain disputes that arise between States and to give advisory opinions requested by competent organs of the United Nations, such as the General Assembly and the Security Council. (Article 1 of the United Nations Charter)

The Court is the only international judicial organ authorized to take cognizance of all the differences of legal nature that could come to cause controversies between States, or situations of fact that would eventually cause international juridical consequences. It is also the only body competent to entertain controversies that arise between independent States who have, of course, accepted to submit to the jurisdiction of the same. This gives advantages to said organ that no other tribunal enjoys, that is, general competence regarding the matter and universal competence regarding the States that can be party to a controversy before the Court.

The Court carries out a double mission: the settlement of disputes submitted to it by States according to International Law, and the issuing of advisory opinions on legal questions referred to it by organs and agencies of the United Nations authorized to that effect.

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<sup>64</sup> Brotóns, Antonio Remiro. Op. cit. Pages 863 and 864.

All Member States of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice and, in consequence, it is considered that they have expressed their consent of submitting themselves to the rules of said judicial body and that these apply as compulsory to them in the cases in which they have expressly accepted it. The Statute of the Court was adopted in the Conference of the United Nations that took place in San Francisco on 6 June 1945, setting forth the following in Articles 2 to 18:

- The Court shall be composed of a body of independent judges, elected from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in International Law. As a whole, the Court must represent the main forms of civilization and of the principal legal systems of the world.
  
- The Court shall consist of fifteen members, no two of whom may be nationals of the same State. The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration, for periods of nine years. Every three years the Court proceeds to renew a third of its judges, who do not represent their respective Governments but are independent judges. A State party to an issue before the Court that does not have a judge of its nationality among its members will be able to choose a special judge for that issue in particular.
  
- The Court is currently composed of judges of the following countries: Japan, Slovakia, China, Sierra Leona, Jordan, United States, Germany, France, New Zealand, Mexico, Morocco, Russian Federation, Brazil, Somalia and United Kingdom. The Registrar of the Court is of Belgian nationality and the Deputy-Registrar is of French-American nationality.

- The Statute also establishes that no member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature, nor act as agent, counsel, or advocate in any case. Neither are they allowed to participate in the decision of any case in which they have previously taken part as agent, counsel, or advocate for one of the parties, or as member of a national or international court, or of a commission of enquiry, or in any other capacity.
  
- In exercise of its judicial duties, the Court has contentious competence to entertain and settle disputes between States through judgments that are compulsory and binding. As it has been previously mentioned, the foundation for the contentious jurisdiction of the Court is based on the consent of the States party to the dispute. It refers to a principle that has been reiterated in several judgments (PCIJ - Mavrommatis Palestine Concession Case, 1924; Aegean Sea Continental Shelf, 1978; Land, Insular and Maritime Border Dispute, 1992).
  
- The International Court of Justice has jurisdiction to entertain and settle matters in which the States have expressly accepted its competence, in any of the following ways:
  - By virtue of a special agreement (*compromis*) entered into by the States with the purpose of submitting the dispute to the Court.
  - By virtue of a jurisdictional clause. This is the case in which the States are parties to a treaty that includes a provision that foresees accepting the jurisdiction of the Court in the event that a dispute regarding disagreement over the interpretation or application of said treaty was to arise in the future. Nowadays, more than three hundred treaties and conventions include a clause of such type.
  - Through the reciprocal effect of declarations made by them under the terms provided for in the Statute, whereby each has accepted the

jurisdiction of the Court as compulsory in relation to any other State that accepts the same obligation. Declarations of **66** States are currently in force.

- Nevertheless, a given number of these declarations contain reservations excluding certain categories of dispute. In the event of a dispute arising as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

The procedure to be followed by the Court in disputes that are submitted to it by the States is defined within its Statute and Rules of the Court, adopted under its Statute in 1978. Since then, these Rules have been subjected to several modifications (the latest entered into force in 29 September 2005). The procedure consists of a written part (exchange of written proceedings between the parties) and an oral part (hearings during which the agents and counselors present their pleadings).

Since the Court employs two official languages (English and French), all that is written or said in one language is translated to the other. After the oral part, the Court meets behind closed doors to deliberate and later on reads the judgment in open court. The judgment is final and without appeal. Any State considering that the other party has stopped complying with a judgment of the Court can submit the matter to the United Nations Security Council.<sup>65</sup>

The International Court of Justice is the most representative international judicial organ in the world; it is a permanent tribunal, which makes it the best organized and highest-respected of its kind; its judges are considered the most outstanding and renowned jurists, having the mission of issuing a decision that is considered to be as impartial as possible.

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<sup>65</sup> Web page of the International Court of Justice. <http://www.icj-cij.org/homepage/sp/files/notice.pdf>

The Court has pronounced 102 judgments since 1946 regarding questions such as land boundaries, maritime delimitations, territorial sovereignty, non-use of the force, violations of International Humanitarian Law, non-interference in the internal affairs of the States, diplomatic relations, taking of hostages, right to asylum, nationality, guardianship, right of way, and economic law, among others.

The Court shall apply international conventions and treaties, international custom, general principles of law, judicial decisions and the teachings of the most highly qualified publicists as sources of law to base their decisions on.

Fifteen cases are currently pending decision:

1. *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*
2. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*
3. *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*
4. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*
5. *Territorial and Maritime Dispute (Nicaragua v. Colombia)*
6. *Certain Criminal Proceedings in France (Republic of Congo v. France)*
7. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*
8. *Maritime Dispute (Peru v. Chile)*
9. *Aerial Herbicide Spraying (Ecuador v. Colombia)*
10. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*
11. *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*
12. *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*
13. *Jurisdictional Immunities of the State (Germany v. Italy)*

14. *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*<sup>66</sup>

The tremendous value found in the fact that the International Court of Justice has *universal* and *general* competence is beyond discussion, because the States can turn to a previously constituted tribunal, to which all issues arising that can become a controversy among them can be taken before it. It is also of immeasurable jurisprudential value that its decisions are widely recognized, which are useful as guide for the States to get to know the rules that will be applied at the moment of establishing rights and obligations, and for the Court itself to have a safe basis to follow on at the moment of pronouncing a judgment on a certain dispute. Even though they are compulsory only for the parties in dispute and in relation to the case that has been decided upon, its judgments and advisory opinions are, due to their authority, important links in the formation of jurisprudence, and in the precision itself of the existence, content and quality to oppose of the general rules of the law discussed therein.<sup>67</sup>

The jurist Max Sorensen states the following in this regard:

*“The Court is a judicial organ and its duty is to give judicial solutions to disputes. The judicial solution consists on a decision made on juridical basis and equality of the parties. They suppose the elimination, in first instance, of the relative position of power of the parties as an influential factor on the decision or, as it is often said, “depolitization” of the relation between the parties; the application of the judicial technique to determine the facts and applicable law and a decision in accordance with law. In diplomacy, the relative position of power of the parties will influence the reached solution, but it has the advantage of granting the parties the opportunity to participate in the decision-making process. The decision made by a third-party, even if it is reached within judicial means, denies this participation. The jurisdiction of the Court is now based on the consent of the parties; it does not have duties regarding the execution. The*

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<sup>66</sup> Web page of the International Court of Justice. <http://www.icj-cij.org/homepage/sp/files/notice.pdf>, as consulted on 24 July 2009.

<sup>67</sup> Brotóns, Remiro Antonio. **Op. cit. Page...**

*pre and post-adjudication phases of the Court's work remain, to a large extent, intimately related to diplomacy.*"<sup>68</sup>

Settlement before the International Court of Justice embraces the highest securities to which a State that has a territorial dispute can have access to, such as the case of Guatemala, which deserves the greatest possible impartiality. Reasonable doubts will always exist as to the conduct of a judge upon entertaining a specific case, given that due to the eventual subjectivity of human nature, an inequitable judgment could result. Aware of this possibility, I firmly consider that we stand before the ideal judicial body, which will allow us to settle this dispute with the safety it deserves.

### **CHAPTER 3**

#### **3.1. STUDY OF THE SPECIAL AGREEMENT BETWEEN BELIZE AND GUATEMALA**

The Special Agreement includes the commitment of both governments to take to the International Court of Justice the settlement of their territorial differendum, after the internal constitutional requirements of each country have been met, which will take us to the respective and simultaneous referenda for the peoples of Guatemala and Belize, as holders of the sovereignty, to approve this procedure.

The *compromis* itself consists of an achievement of great value for Guatemala. It is the conclusion of a long effort undertaken by the Government of Guatemala since 1994, immediately after the recognition of independence of Belize on behalf of Guatemala. Also, for us who work aspiring to reach a solution to the Territorial Differendum, based on International Law, it is quite fulfilling to be able to hand in this dispute in this phase in which the mandate granted by the Constitution to the Executive Power, through the Guatemalan Foreign Office, has been successfully carried out.

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<sup>68</sup> Sorensen, Max. Op. cit. Pages 661 and 662.

The Special Agreement will enter into force once the peoples of both countries have expressed their consent, through referenda that must take place simultaneously, in the sense that any legal claim on behalf of Guatemala against Belize over land and insular territories, and any given maritime areas pertaining such territories, is submitted to the International Court of Justice for its final settlement, and that the same determines the boundaries of the respective territories and areas of both countries.

The Special Agreement has two very well defined sections: the first one refers to the COMMITMENT itself by which both countries submit the existing territorial dispute to the jurisdiction of the International Court of Justice, and the second one refers to the INTERNAL PROCEDURE that must be fulfilled by the States to enable the *compromis* to be approved by the peoples of each one of the countries through referendum, which in the case of Guatemala are the approval by Congress and ratification by the Executive Power. This is a necessary formality for the Special Agreement to be considered binding and compulsory for both countries.

The International Court of Justice is the jurisdictional organ of the United Nations created to take cognizance of disputes that arise between member States of this organization. Nevertheless, the jurisdiction of the Court does not automatically cover all disputes that arise between States, and an express agreement between the parties is necessary in order for them to submit their dispute to the Court. Submittal to the jurisdiction of the Court can be done in different ways: by means of a special agreement, generally known as *compromis*, through a treaty or convention in force in which the submittal to the Court has already been contemplated, or through a facultative clause based on Article 36 (2) of the Statute of the Court.

The content of the Special Agreement is negotiated taking into account the highly valued interests of the States regarding sovereignty and territorial integrity, the International and Internal Law, the legal and political interests of the States, as well as the social-economic needs of two nations that have inherited a dispute that obstructs the path

to the common future of the region and the modern world as good neighbors, since the point in time when England usurped our territory.

This assessment is an effort to explain the contents of the Special Agreement and the motivations of both governments which were present at the moment of composing each one of the articles, in order to allow the reader to form its own opinion on the same, and interpret it in the light of International Law and Guatemala's sovereign interests.

### **3.1.1. THE PREAMBLE**

The preamble of the Special Agreement sets forth the following:

*Wishing to finally put an end to any and all differences regarding their respective land and insular territories and their maritime areas;*

*Bearing in mind the recommendation of the Secretary General of the Organization of American States of November 19, 2007, based on article 5 of the "Agreement on a Framework for Negotiations and Confidence-Building Measures between Belize and Guatemala" of September 7, 2005, that the Parties submit the dispute to the International Court of Justice;*

*Whereas said recommendation has been formally accepted by both Parties, subject to the approval of their citizens in national referenda;*

The latter considerations included in the preamble of the Special Agreement are concise, brief, but have the appropriate information in order to express the intention of the parties during the process that has been carried out to arrive at a solution of the territorial dispute and the objective sought to be achieved before the International Court of Justice.

The content of the preamble is important regarding the interpretation of the rules that make up an international treaty. The Vienna Convention on the Law of Treaties sets forth that *“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes...”*

In the preamble, the intention of both countries of putting an end to **any and all differences** regarding their respective land, insular and maritime territories is expressed. I wish to highlight that as of the preamble itself, the integral nature of the pretensions of Guatemala, covering the mentioned areas, were able to be clearly stated.

If the peoples so approve it, all subjects and elements of the territorial dispute in their different areas will be submitted to the International Court of Justice, aiming to conclude this dispute in a full and final manner. The intention of the parties of turning to a juridical body is that after the judgment has been pronounced by the Court at the end of the judicial procedure, there are no pending matters that require a new instance or that become obstacles which could affect the pleasant bilateral relations between Guatemala and Belize.

The content of the Special Agreement is composed in a broad fashion so that Guatemala can request settlement of all its legal claims that according to its own criteria make up the territorial dispute, which will be specifically defined in the Petition and that could include, in theory, all of the territory that Belize occupies.

To take this matter to the International Court of Justice is a complex process that requires great efforts on behalf of Guatemala and confirms its high spirit of respect for International Law. This is a claim in which the Guatemalan and Belizean peoples are not directly responsible for; a territorial differendum that was caused by the imperialist policies of the greatest colonizing power throughout history, which refused to settle it in a

dignified way and took every advantage possible, due to its position regarding its relations with Guatemala, in order to take over the territory of Belize.

The decision to undertake a Special Agreement that aims to turn to the International Court of Justice has its immediate background in the recommendation made by the Secretary General of the OAS to that effect, in his communication dated 19 November 2007, addressed to the Guatemalan Foreign Minister. The process entailed a series of organized steps that were seriously thought about and carried out in advance to arrive at a declaration that would stimulate the States to settle their dispute for their own common welfare.

The possibility of the countries taking the territorial dispute to an “international juridical body” was foreseen within the recommendation of the Secretary General, that as I mentioned before, could be the International Court of Justice or an International Arbitration Court, which evidently was decided by the countries in favor of the first option.

The preamble also foresees the fulfillment of the internal constitutional requirements of each country. Special care was taken for the Special Agreement to clearly establish matters concerning national referenda to be carried out in each country, to request the approval from their peoples for the submittal to the jurisdiction of the International Court of Justice. In the case of Guatemala, the subject of referenda is provided for in Transitory Article 19 of its Political Constitution, in which the procedure is stated for Congress to authorize it, enabling the approval on behalf of the people to take the dispute to the Court.

### **3.1.2. THE COMMITMENT OF THE PARTIES**

The Special Agreement sets forth in Article 1:

*“Pursuant to Article 36(1) of the Statute of the International Court of Justice (hereinafter, the “Court”), the Parties agree to submit to the Court the dispute described in Article 2 of this Special Agreement.”*

The aforementioned article includes the expression of will from the Governments to submit the dispute to the jurisdiction of the International Court of Justice for its settlement. This expression is based on the customary principle of International Law known as *ex consensu advenit vinculum*, found in the Vienna Convention for the Law of Treaties, in compliance of Article 36 (1) of the Statute of the Court, which sets forth that: *“1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.”*

The United Nations is based on the principle of sovereign equality of all its Member States, which means that all States are equal and their international relations are based on the respect of such parity. No State or international organization exercises compulsory jurisdiction over the other, which in a certain way is a result of the juridical nature of the States themselves and of one of its essential elements: sovereignty.

Sovereign equality of the States is one of the pillars on which international relations are built on, and constitutes a right that exists since the origins of the modern State and International Society. Nevertheless, it is the origin of one of the flaws of International Law, because compulsory jurisdiction from the Court does not currently exist to settle controversies that arise between States.

The United Nations Charter, in its Article 2 (3) includes a declaration in which it urges all members to *“settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”* Even though this declaration is of great significance in the conflict resolution process, it does not constitute a compulsory provision, being more of an aspiration of the States to settle their differences.

Clearly expressing it in his book *Instituciones de Derecho Internacional Público* (Institutions of Public International Law), Doctor Manuel Diez de Velasco quotes that: “*One of the typical expressions of the egalitarian structure of the International Community consists on the impossibility for a State to reach a solution to a controversy in which it is party to through a judgment, without the consent of the State with which the particular dispute has arisen. According to International Law, the initiation of a legal procedure is not possible based on the will of only one of the contenders. Therefore, consent is an essential element within an international procedure, for, as it has been explained ‘international justice is facultative and the Tribunal’s competence continues to be founded on the consent of the States’.*”<sup>69</sup>

A State cannot take another to the International Court of Justice, if it has not expressly accepted the jurisdiction of said organ. This submittal had not been previously accepted by the Belizean State; but now, the fact that Belize has admitted to settle the territorial dispute through the Court is an important diplomatic achievement for Guatemala.

With the decision embraced in the Special Agreement, Guatemala has concluded an enormous effort uninterruptedly carried out by its governments in the past few years, reaching the goal of settling the dispute through pacific means provided by International Law. Upon entering into an agreement of disposition to take the dispute to the International Court of Justice in an explicit fashion, once the constitutional rules and requirements of each country have been met, the parties are stating the commitment of their peoples before the International Community of applying the Law in their relations as members of such society.

The Territorial Differendum will have to be settled by the Court, pursuant to that stated by the Special Agreement. The approval of submitting the dispute to the Court rests in hands of the Guatemalan and Belizean peoples, who will make the decision

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<sup>69</sup> Diez de Velasco, Manuel. Op. cit. Page 755.

through national referenda to take place simultaneously in each country. Sovereignty of the States is deposited within the people, reason why it has competence to decide whether an international tribunal will settle a matter that would come to affect its territory. In this regard, that written by Doctor Diez de Velasco is illustrative, in the following sense:

*“The contentious procedure within the International Court of Justice is initiated by two means that are essentially differentiated by the moment in which the matter is taken to the Tribunal. According to the first, the issue is taken by the parties through notification of commitment, which constitutes the previous and formal agreement between States to submit a concrete question to the Tribunal under certain conditions. According to the second, the matter is taken by one of the parties through written request – petition – addressed to the Secretary, which implies that the parties have previously and in a general manner accepted the competence of the tribunal, upon having accepted in time and form the facultative clause provided for in Article 36 of the Statute.”*<sup>70</sup>

Through the Special Agreement, Guatemala and Belize have come to the commitment, which once the internal formalities of each country have been concluded, will allow the specific submission of Guatemala’s territorial claim, given that previous acceptance in a general manner on behalf of the countries to the competence of the Tribunal does not exist. Furthermore, any other difference or dispute that would eventually arise in the future between Guatemala and Belize could not be submitted to an international tribunal, unless a new agreement was to be entered into.

### **3.1.3. INTERVENTIONS**

Regarding the case of the existing Territorial Differendum between Guatemala and Belize, there is a possibility that Honduras may practice a third-party intervention within the trial that takes place in the Court. Honduras included a pretention of sovereignty over the Zapotillo Cayes within its 1982 Constitution, and although it does

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<sup>70</sup> Diez de Velasco, Manuel. (1997) *Instituciones de Derecho Internacional Público*. Madrid: Editorial Tecnos. Page 763.

not have historic background, it can be foreseen that it may consider itself affected by the development of the eventual trial, due to the fact that Guatemala's territorial claim includes land, insular and maritime areas. Among the insular areas are the Zapotillo Cayes, as part of the islands that Guatemala claims as hers. Additionally, as above explained, our country considers itself entitled to maritime areas pertaining the land and insular territories it is awarded, which includes areas in the territorial sea, continental shelf and exclusive economic zone that meet in the Honduras Gulf and that used to belong to one of the three countries.

The geographic conformation of the Honduras Gulf does not allow these areas of maritime jurisdiction to be generated from the coast of a State without them being restricted and reciprocally affected by the areas that correspond to the adjacent State or one that is located right in front, such as the case of Guatemala, Belize and Honduras in the Caribbean Sea. This will evidently cause Honduras to file a third-party intervention before the International Court of Justice.

In the cases in which the interests of a third State are affected, this State can intervene, according to that provided for in Article 62 of the Statute of the Court, which states the following:

*“1. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.*

*2. It shall be for the Court to decide upon this request.”*

The effect over legal interests of third parties entailed by delimitation of maritime spaces, particularly if they are enclosed or semi-enclosed, has brought about within this category of controversies, the accumulation of most of the requests of intervention based on Article 62 of the Statute.

Third-party interventions are extremely rare, and the first successful one occurred precisely in the matter of the insular and maritime dispute that confronted Honduras against El Salvador (1990). It is the only case in which intervention has been authorized within strict limitations, and has allowed the Court to determine that the absence of a bond between the original parties and the third party is not an obstacle for an intervention to be filed by the latter, if it only pursues the protection but not the recognition of its rights. The procedural situation of the third party is limited to a *status* of pure interventionist that is not a party to the process itself; by this figure, the rights and obligations conferred to the parties by the Statute and Rules of the Court, especially the faculty to appoint judges *ad hoc*, are forbidden for third parties, as well as the *res judicata* nature of the judgment, which under strictly juridical terms, will not be subject to opposition by the third party, not even in the concrete applicability of the object of its intervention.

It appears to be that these types of interventions simply intend to allow third States to let the Court know the concrete way in which its legal interests are affected so that it can take consequent actions, limiting the exercise of its competence in such a way that these interests are not damaged.<sup>71</sup>

We will probably have the intervention of Honduras as third interested party, concerning the Zapotillo Cayes and the adjudication and delimitation of the maritime spaces in the Honduras Gulf between the three parties, within the course of the eventual process followed before the International Court of Justice.

#### **3.1.4. APPLICABLE LAW AND THE PURPOSE OF THE COMMITMENT**

Article 2 of the Special Agreement sets forth the following:

*Article 2: The Parties request the Court to determine in accordance with applicable rules of international law as specified in Article 38(1) of the Statute of the Court any and*

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<sup>71</sup> Brotóns, Antonio Remiro. Op. cit. Page 879.

*all legal claims of Guatemala against Belize to land and insular territories and to any maritime areas pertaining to these territories, to declare the rights therein of both Parties, and to determine the boundaries between their respective territories and areas.*

This article is of great significance and importance because it embraces the object of the controversy which will be submitted to the jurisdiction of the Court, meaning the subject which the process will be about; it also establishes the Law agreed upon by the parties to be applied by the Court.

#### **3.1.4.1. APPLICABLE LAW**

For the composing of the aforementioned article, contents and scope of Article 38 (1) of the Statute of the International Court of Justice were taken into consideration, for including the authorized list of the sources of International Law.

The principal sources of International Law are treaties, international custom and the general principles of law; the subsidiary or auxiliary sources include, according to the Statute itself, judicial decisions and the teachings of the most qualified publicists of the various nations. Strictly speaking, principal sources are to be compulsorily applied on behalf of the International Court of Justice and it will remain under the Tribunal's criteria to apply the subsidiary rules, whose function is merely auxiliary to determine the exact content of the juridical rules, mainly custom and the general principles of Law, or help interpret the latter as well as international treaties.<sup>72</sup>

Sources of International Law also include others that are not mentioned in Article 38 of the Statute, whose application is obviously not compulsory, but would influence the international judges' attitude. The best example is resolutions from governmental international organizations, which do not require compulsory observance from the States because they have the quality of being declarations. Representatives of the member States participate in the writing-up of these resolutions, and although these have not gone

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<sup>72</sup> Diez de Velasco, Manuel. Op. cit. Page 97.

through the internal legal procedure of expression of will for its content to turn compulsory, the fact that they have been issued by State representatives determines that such resolutions can gradually create Law. Some jurists have even come to automatically consider them international custom.

Article 38 (1) of the Statute sets forth that: “1. *The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*

- a. *international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*
- b. *international custom, as evidence of a general practice accepted as law;*
- c. *the general principles of law recognized by civilized nations;*
- d. *subject to the provisions of Article 59, judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”*

According to some, the Special Agreement should have authorized the application of the procedure *ex aequo et bono* within the eventual trial before the Court. That same doubt and concern arose within the Belize Commission, and although it was finally impossible for this to succeed, I wish to set on the record that during the negotiations for the Special Agreement, efforts were made to include this procedure. With all due respect to such opinions, a brief summary follows with the motivations that did not permit the procedure to be included.

Article 38 (2) of the Statute of the Court sets forth: “2. *This provision shall not prejudice the power of the Court to decide a case **ex aequo et bono**, if the parties agree thereto.”*

In light of the latter provision, the International Court of Justice could apply the procedure *ex aequo et bono* if the States previously agree to it, expressly and in writing,

within the commitment. In our case, Belize did not accept to sign the special agreement under those terms.

At this point, it is important to differentiate that the Court has the faculty, ordinarily, to pronounce judgments that are to be as equitable as possible, in application of the principal and subsidiary sources of International Law. Application of the Law must aspire to the settlement of controversies between States in an equitable manner, therefore in a fair manner. This equity is called *infra legem*, because it complements application of the rules included in treaties, international custom or another authorized source. But instead, it is very different to that provided for in Article 38 (2), referring to the express authorization that parties must give so that in an extraordinary case before the Court, the matter can be settled applying the procedure *ex aequo et bono*, that is to say *contra legem*, if the parties have agreed thereto.

The second resolution of the Institute for International Law states “*that the international judge cannot inspire himself on equity to pronounce a judgment without him being bound to the Law in force, unless all of the parties grant clear and express authorization for that purpose*”<sup>73</sup>

In the case of the frontier dispute Burkina Faso / Republic of Mali in 1986, the International Court of Justice resolved: “Obviously the Chamber cannot judge *ex aequo et bono* in this case. The Chamber must also discard any resort to equity *contra legem* in this case, not having received from the parties the mission to proceed to an arrangement of their respective interests. The Chamber will not apply equity *praeter legem* either. It will, however, have regard to equity as it is expressed in its feature *infra legem*, meaning that form of equity which constitutes a method of interpretation of the law in force and one of its attributes. In fact, as the Court has stated ‘It is not only about arriving at an equitable solution, but about arriving at an equitable solution based on applicable law’ ...”

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<sup>73</sup> Diez de Velasco, Manuel. Op. cit. Page 98.

“One must resolutely separate extra-legal equity from equity as a principle of law. Based on this weighing of interests, extra-legal and in free form (although more comprehensible) criteria of equity *ex aequo et bono*, the International Court can decide under this procedure, when the parties authorize it to that effect (Article 38, number 2 of the ICJ Statute). Up to this moment, a competence of this sort, with difficult effects to be assessed, has not been granted to the Court.”<sup>74</sup>

The International Court of Justice is not allowed to apply the procedure *ex aequo et bono* if it was to give way to a judgment that is contrary to a specific international law, that is to say *contra legem*, unless it is expressly accepted by the parties, which has not yet occurred in the history of the Court. It is improbable that a State would accept the application of equity *contra legem* in the above explained form, for it could be violating or affecting sovereign rights it is entitled to according to Law. In any case, if a judgment is being pursued that is equitable in application of international law provided for in Article 38 (1), it will not be necessary to authorize application of paragraph 2 of said article, for a judgment based on law will be equitable.

#### **3.1.4.2. OBJECT OF THE DISPUTE**

The Special Agreement mainly comprises the object of the case that the parties will submit to the International Court of Justice. In the matter of Guatemala and Belize, the negotiation for determining said object presented great difficulties because the governments have not yet reached an agreement on this subject. On one hand, Guatemala deems this is a territorial dispute that would have as object the restitution of land and insular territories, as well as maritime jurisdiction areas pertaining to these territories; on the other hand, Belize considers this dispute refers merely to frontiers.

In view of the positions of the Governments of Guatemala and Belize, the achieved composition is regarded as an important diplomatic success, given that what is

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<sup>74</sup> Herdegen, Matthias. (2005). *Derecho Internacional Público*. México: Universidad Nacional Autónoma de México, Fundación Konrad Adenauer. Page 161.

stated as object of the commitment is that the Court determines: “...any and all legal claims of Guatemala against Belize to land and insular territories and to any maritime areas pertaining to these territories, to declare the rights therein of both Parties, and to determine the boundaries between their respective territories and areas”. This means that the Court will have to take cognizance of all, with no exceptions, the legal claims of Guatemala against Belize to “land and insular territories and to any maritime areas” that generate as of the territories that are granted to Guatemala through a judgment.

The latter composition does not limit the object of the petition; it does not leave any area that cannot be claimed by Guatemala. Furthermore, there would not be a limitation within this composition, in theory, to claim ALL of the territory occupied by Belize. And with the signature of the Special Agreement, Belize accepted this and granted competence to the International Court of Justice to assess and settle any Guatemalan claim. It was deemed ideal that the object of the dispute be established in general and broad terms, so that Guatemala could be free to define its pretensions at the moment of turning to the Court. When that moment comes, it is important to take into consideration that the territory of a State encompasses:

*“A State’s territory comprises not only the land territory itself, the waters found within it (rivers, lakes, lagoons...) and its corresponding subsoil, but also certain maritime adjacent spaces to its coasts, -interior waters and territorial sea...in which the soil and corresponding subsoil are included, as well as air space overlying on the land territory and referred maritime spaces...”<sup>75</sup>*

Guatemala’s Constitution does not include a definition regarding the territory of Guatemala, as other countries’ constitutions do, and chooses to define territory by mentioning the areas which it comprises, that is, the land, maritime and air space extended over the same. In fact, Article 142 sets forth that:

*“The State exercises full sovereignty over:*

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<sup>75</sup> Diez de Velasco, Manuel. Op. cit. Pages 335 and 336.

- a) The national territory integrated by its soil, subsoil, interior waters, territorial sea to the extent established by law, and the air space extending over the same.*
- b) The contiguous zone to the adjacent sea to the territorial sea, for the exercise of certain activities recognized by international law; and*
- c) The natural and live resources found in the sea bed and subsoil, as well as those existing in the adjacent waters to the coasts outside of the territorial sea, which constitute the exclusive economic zone, in the extent established by law, according to international practice.”*

Considering the mentioned constitutional provision, upon composing Article 2 of the Special Agreement, the land, insular and maritime areas of territory claimed by Guatemala were included in the same. Regarding air space, the object claimed will be the overlying space to the State’s land and maritime territory.

The maritime areas referred to by the Special Agreement are the territorial sea, continental shelf and exclusive economic zone which generate from the land and insular territories that the Court comes to assign to Guatemala through the judgment that puts an end to the trial. Just by detailing the object of the petition, the International Court of Justice will be able to acknowledge the land bases from which the maritime spaces will be generated that correspond to each one of the countries.

Within the judgment, the Court will have to make an integral declaration, including the spaces that correspond to Guatemala according to the United Nations Convention on the Law of the Sea and settle in one judgment alone all the existing disputes between our countries. When the judgment comes, the Court will define which are the land and insular bases necessary to determine the maritime spaces, and at that point there will exist no limitation whatsoever for it to proceed to include them in their judgment.

In this regard, Transitory Article 19 of the Guatemalan Constitution states the duty of the Executive Branch “...*to carry out the formalities which lead to the settlement of the situation of the rights of Guatemala regarding Belize, in accordance with national interests...*”, which constitutes a State position different to those found in previous constitutions.

Through judgment pronounced on 3 November 1992, upon considering the content of the abovementioned constitutional article, the Constitutional Court takes into account that “...*Belize’s declaration of independence in 1981 modifies the mentioned situation, given the international recognition of Belize as an independent State, which brings the creators of the Political Constitution of 1985 to modify the constitutional text: a greater flexibility is established to settle the situation of the rights of Guatemala, it does not reiterate the content of previous texts regarding the obligatory replevy of the territory in total, and it authorizes the Executive Power to carry out the necessary formalities that lead to ‘settle’ the situation of the mentioned rights...*”<sup>76</sup>

The trial will end with a judgment that definitely settles the territorial dispute submitted to the jurisdiction of the International Court of Justice. The pronounced judgment will settle the territorial claim of Guatemala over the land, insular and maritime territory and will grant Guatemala the areas it is entitled to, which Belize unilaterally occupies today. The judgment will also have to accurately establish the boundaries which will correspond to each one of the countries, and consequently, will order that said limits are marked in the field, thus completing the phases of demarcation of the eventual border. In other words, the judgment pronounced by the International Court of Justice will have to be executed, under the supervision of a demarcation Commission mentioned in the Special Agreement, under Article 5.

Boundary demarcation implies a series of actions determined by International Law, at the end of which one could accurately establish where the boundaries should be

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<sup>76</sup> Gazette number 26, Constitutional Court, accumulated files number 290-91 and 290-91, pages 9 of the judgment of 3 November 1992.

located within the territory of both neighboring countries. The first step is to determine the territory that belongs to a State, based on documents and effective possession that entitles it to said territory. The territory corresponding to a State must be set and agreed upon through a boundary treaty that must be negotiated and concluded by the sovereign States. If the boundaries have not been able to be set by mutual agreement between the parties, International Law states that the case is to be submitted to an international tribunal that, by means of a judgment or arbitral award, determines such territories, granting them to the corresponding State.

Once the territory has been determined or granted, boundary delimitation must follow, which will be included in the same treaty or convention entered into by the States for the granting of territory, in which the boundaries of the territory are described, when the agreement has been reached by negotiation. Otherwise, it will be included in a judgment, when the boundaries have been determined by an international tribunal.

Once the territory has been determined through an international treaty or judgment, the boundaries must be materially marked in the field, setting them physically in the territory, phase in which bilateral commissions are given the task of marking through boundary markers, stones or posts placed according to that provided for by treaties or the respective judgment.

The phases for establishing a border between two States are the following: 1) determination of entitlement to sovereignty over a given territory; 2) delimitation of the border, defining the dividing line in abstract (on paper: international treaty or judgment); and 3) demarcation, taking that previously agreed upon to the field through external markers (boundary stones, posts...). A fourth phase could be added, which is the densification of markers in the border, complementing, concluding and binding to the final purpose (an accurate, complete and definitive border), as mentioned by the

Permanent Court of International Justice in the Boundary Issue between Turkey and Iraq, 1925.<sup>77</sup>

### **3.1.5. PROCEDURE BEFORE THE INTERNATIONAL COURT OF JUSTICE**

Regarding the procedure of the case before the Court, the Special Agreement states:

*“Article 3:*

*1. The procedure shall consist of two stages: one for presentation of written pleadings and another for oral hearings.*

*2. The Parties request that the Court authorizes the following written procedure:*

*a) The Government of Guatemala shall submit a Memorial within twelve months of the date on which this Special Agreement was notified to the Registrar of the Court;*

*b) The Government of Belize shall submit a Counter-Memorial within twelve months of the date on which it was notified of the submission and contents of the Memorial presented by Guatemala;*

*c) The Government of Guatemala may submit a Reply within six months of the date on which it was notified of the submission and contents of the Counter Memorial;*

*d) The Government of Belize may submit its Rejoinder within six months of the date on which it was notified of the submission and contents of Guatemala’s Reply;*

*e) The Court may, ex officio or if both Parties so agree, prescribe or authorize the presentation of additional pleadings.*

*3. The Court may extend these deadlines at the request of either of the Parties.*

*4. The foregoing provisions are without prejudice to any question as to the burden of proof which might arise.*

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<sup>77</sup> Brotóns, Antonio Remiro. (1997) *Derecho Internacional*. Madrid. McGraw-Hill / Interamericana de España, S.A.U. Pages 554-559.

5. *All other procedural matters shall be governed by the provision of the Statute and Rules of the Court.*”

Article 3 of the Special Agreement describes the procedure to be followed in regard to the trial before the International Court of Justice. The time-limits that are to be observed in this process are fixed by common agreement in this article. The international legal basis to determine the process is found within the Statute of the International Court of Justice, where everything relative to the organization and competence of the Court, as well as trial procedure and advisory opinions and other matters, is regulated.

The process before the International Court of Justice consists of two well determined phases, one is the written phase and the other is the oral phase, as established in Article 40 of the Statute of the International Court of Justice. Once the case has been initiated before said tribunal by means of notification of the agreement to the Registrar, the process begins as described in Article 3 of the Special Agreement. Guatemala will have to present a Memorial within 12 months of the date of notification, considering the petition as filed.

The Special Agreement states that Guatemala will present a Memorial, Belize will answer with a Counter-Memorial, then Guatemala could present a Reply and finally Belize could present a Rejoinder. Deadlines are established in the Agreement, in which each memorial must be presented before the Court, having fixed the points of fact and law, the arguments, proof and pretensions of the parties before the Tribunal.

The “memorial” and “counter-memorial” are mandatory, which are basically the petition or complaint, and reply or plea of the petition or complaint. The parties also have the faculty of presenting later on a “reply” and a “rejoinder”. Article 43 of the Statute of the International Court of Justice states the following, in this regard:

*“Article 43:*

1. *The procedure shall consist of two parts: written and oral.*
2. *The written proceedings shall consist of the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies; also all papers and documents in support.*
3. *These communications shall be made through the Registrar, in the order and within the time fixed by the Court.*
4. *A certified copy of every document produced by one party shall be communicated to the other party.*
5. *The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel, and advocates.*

The order and number of the written presentations is regulated in Article 46 of the Rules of the Court. In the eventual trial between Guatemala and Belize, given that it is based on a specific “*compromis*”, the Court will strictly consider that agreed upon by the same in that sense. That agreed upon by the parties responds to the complementary procedure adopted by the Rules of the Court, which states the following:

“*Article 46:*

1. *In a case begun by the notification of a special agreement, the number and order of the pleadings shall be governed by the provisions of the agreement, unless the Court, after ascertaining the views of the parties, decides otherwise.*
2. *If the special agreement contains no such provision, and if the parties have not subsequently agreed on the number and order of pleadings, they shall each file a Memorial and Counter-Memorial, within the same time-limits. The Court shall not authorize the presentation of Replies unless it finds them to be necessary.”*

Article 49 of the Rules of the Court refers to each one of these written presentations, in the following way:

*“Article 49*

- 1. A Memorial shall contain a statement of the relevant facts, a statement of law, and the submissions.*
- 2. A Counter-Memorial shall contain: an admission or denial of the facts stated in the Memorial; any additional facts, if necessary; observations concerning the statement of law in the Memorial; a statement of law in answer thereto; and the submissions.*
- 3. The Reply and Rejoinder, whenever authorized by the Court, shall not merely repeat the parties’ contentions, but shall be directed to bringing out the issues that still divide them.*
- 4. Every pleading shall set out the party’s submissions at the relevant stage of the case, distinctly from the arguments presented, or shall confirm the submissions previously made.”*

The oral phase of the procedure before the International Court of Justice is detailed in the Rules of the Court, articles 54 to 72, which within its substantial parts set forth the following:

*“...Upon the closure of the written proceedings, the case is ready for hearing. The date for the opening of the oral proceedings shall be fixed by the Court...The Court shall determine whether the parties should present their arguments before or after the production of the evidence; the parties shall, however, retain the right to comment on the evidence given...The order in which the parties will be heard, the method of handling the evidence and of examining any witnesses and experts, and the number of counsel and advocates to be heard on behalf of each party, shall be settled by the Court after the views of the parties have been ascertained...The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted...At the conclusion of the last statement made by a party at the hearing, its agent, without recapitulation of the arguments, shall read that party’s final submissions...A verbatim record shall be made by the Registrar of every hearing, in the official language of the Court which has been used...One certified true copy of the*

*eventual corrected transcript, signed by the President and the Registrar, shall constitute the authentic minutes of the sitting for the purpose of Article 47 of the Statute. The minutes of public hearings shall be printed and published by the Court.”*

The contentious procedure before the International Court of Justice ends with the judgment pronounced by said tribunal, settling the matter submitted to its jurisdiction. Articles 54 to 60 of the Statute of the Court refer to this subject, stating the following:

*“When, subject to the control of the Court, the agents, counsel, and advocates have completed their presentation of the case, the President shall declare the hearing closed...The deliberations of the Court shall take place in private and remain secret...All questions shall be decided by a majority of the judges present...The judgment shall be signed by the President and by the Registrar. It shall be read in open court, due notice having been given to the agents...The decision of the Court has no binding force except between the parties and in respect of that particular case...The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.”*

### **3.1.6. LANGUAGES TO BE USED DURING THE PROCESS**

Article 39 of the Statute of the International Court of Justice sets forth that:

*“1. The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment shall be delivered in French. If the parties agree that the case shall be conducted in English, the judgment shall be delivered in English...3. The Court shall, at the request of any party, authorize a language other than French or English to be used by that party.”*

Aiming to allow Guatemala to use the Spanish language in the process presented before the International Court of Justice, it was so agreed upon in Article 4 of the Special

Agreement because it is not one of the official working languages of the International Court of Justice.

It was taken into consideration that the official language in Guatemala is the Spanish language, according to Article 143 of the Political Constitution, therefore establishing the following in Article 4 of the Special Agreement:

*“The Parties may submit their cases in the English or Spanish languages, provided that any pleadings or documents submitted in Spanish shall be accompanied by a translation into English.”*

### **3.1.7. EXECUTION OF THE JUDGMENT**

Submittal on behalf of the States to the jurisdiction of the International Court of Justice is not mandatory, but must be expressly convened by the parties by means of a special agreement, once the corresponding internal rules have been observed. However, the judgment pronounced in an international judicial procedure is mandatory for the States party to a dispute.

Given that a jurisdictional body endowed with coercive powers does not exist within International Law, compliance of the judgment of the Court is not submitted to any procedure of forceful execution, but it is based on the principle of good faith. However, the parties can settle within the agreement the measures that are to be adopted for the execution of the judgment (for example, in a boundary dispute, the creation of a demarcating commission for the decided frontier in the judgment). In any case, if one of the parties was to discontinue compliance of the obligations imposed upon it, it would incur in international responsibility...Like arbitral awards, the judgments of the Court do not imply a procedure of mandatory compliance, but are protected, nevertheless, by Article 94.2 of the United Nations Charter, where the party damaged by the breach of the judgment can file a request of intervention by the Security Council. However, it will only take action if it deems it necessary, issuing recommendations or measures with the

aim of causing the judgment to be carried out. For example, the Security Council commissioned a group of observers in 1994 to verify, at the request of Libya and Chad, the execution of the judgment concerning a territorial dispute.<sup>78</sup>

The Special Agreement between Guatemala and Belize is subjected to the same rules as the rest of international treaties, among which the principle *pacta sunt servanda* is found, having the feature of being a primary or fundamental rule, leading to consider that, in essence, the other customary and conventional rules are secondary. This is a general rule of International Law, found within the Vienna Convention on the Law of Treaties of 1969.<sup>79</sup>

Concerning the obligations of the parties of meeting the terms of international treaties they enter into, Article 26 of the Vienna Convention embraces the principle *pacta sunt servanda*, in the following way: “*Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*”

Mandatory compliance of treaties is affirmed regarding the parties, adding that said compliance must be carried out in good faith, given that security of international relations rests on this axiom, which would become compromised if compliance or non-compliance of international treaties were left to the intention of the parties. *Pacta sunt servanda* is a principle of Natural Law that indicates that States must abide by the pacts they enter into. “Obligation of respecting treaties lies on awareness and sentiment of justice. Respect for treaties is one of the necessary bases of the world’s political and international organization”. (Bluntschli)

Compliance of judgments and its subsequent execution is gathered in Article 94 of the United Nations Charter, which is a compulsory rule for the organization’s member States and in consequence, obligatory for Guatemala and Belize, stating that:

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<sup>78</sup> Brotóns, Antonio Remiro. Op. cit. Pages 861, 882, 883.

<sup>79</sup> Villagrán Kramer, Francisco. *Derecho de los Tratados*. Op. cit. Page 75.

1. *Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.*
2. *If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.*

These considerations were taken into account in the Special Agreement signed between Guatemala and Belize in order to include an article that refers to the execution of the judgment to be eventually pronounced by the Court, in the following way:

*Article 5: The Parties shall accept the decision of the Court as final and binding, and undertake to comply with and implement it in full and in good faith. In particular, the Parties agree that, within three months of the date of the Judgment of the Court, they will agree on the composition and terms of reference of a Bi-national Commission to carry out the demarcation of their boundaries in accordance with the decision of the Court. If such agreement is not reached within three months, either Party may request the Secretary General of the Organization of American States to appoint the members of the Bi-national Commission and to prescribe its Terms of Reference, after due consultation with the Parties.*

The fact that the aforementioned rule includes a part concerning the appointment of a bi-national commission cannot go unnoticed; it will have the objective of executing the judgment pronounced by the Court, especially regarding the demarcation of the boundaries that result from such judgment. In its judgment, the Court must adjudicate the areas of the territory that correspond to each of the States, given that Guatemala claims an integral part of the territory occupied by Belize, consisting of land, insular and maritime areas.

After the judgment has been pronounced the resulting decision will have to be taken to the field, especially in regard to the marking of the eventual frontier between

both countries, by means of markers or posts. The judgment will establish land, insular and maritime areas that are adjudicated to Guatemala, properly describing them so that the bi-national commission consequently proceeds to demarcate the boundary, having executive powers only, in accordance to that resolved by the Court, and placing appropriate boundary markers in the land and the sea.

### **3.1.8. ENTRY INTO FORCE**

*“Entry into force of a treaty defines the moment in which the same acquires mandatory force. This entry into force, which in bilateral treaties tends to coincide with the act that expresses the definitive consent of the States to abide by the treaty, can also be manifested within multilateral treaties through conditioning facts, freely determined by the parties, such as a fixed date, a certain number of ratifications or accessions, or any other conventionally settled circumstance.”<sup>80</sup>*

Article 6 of the Special Agreement foresees matters regarding its entry into force and the time-limits of the procedure to submit the dispute to the International Court of Justice.

Entry into force of an international treaty is not a legal act, but the result of the addition of the legal acts of the parties to it, or of a given condition settled by them. The legal effect of the treaty depends on compliance of the suspensive condition consisting on the gathering of a required number of expressions of disposition, so the treaty binds each and every one of the signing States.

In this case, entry into force will only be effective, as agreed upon by the parties, once the referenda have been carried out and the result is positive in both countries. This means, when the peoples of Guatemala and Belize approve the submittal of the Territorial

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<sup>80</sup> De la Guardia, Ernesto. *Derecho de los Tratados Internacionales*. Buenos Aires: Editorial ABACO by Rodolfo Depalma, Buenos Aires, 1997. Page 166.

Differendum to the International Court of Justice, and approval by the legislative powers and ratification by both Heads of State immediately takes place afterwards.

Lastly, the exchange of ratification instruments between the States must take place. After having carried out the mentioned exchange of instruments, the Special Agreement must be registered before the United Nations and before the Organization of American States. Once the Memorial has been presented, the Registrar of the International Court of Justice will confirm that the Special Agreement has been registered before the United Nations General Secretariat.

The Special Agreement sets forth the following in Article 6:

***“The Special Agreement shall enter into force upon the exchange of instruments of ratification, and remain in force unless and until terminated by agreement of the Parties.”***

The previous article was composed in such a way that it reflects the internal laws of Guatemala and Belize, which provide a specific procedure that already has been mentioned in this study. The Vienna Convention on the Law of Treaties of 1969 sets forth in Article 13 that relative to the manifestation of consent by the States to abide by a treaty, ratified through the exchange of instruments.

In legal opinion dated 17 November 2008 from the General Direction of Juridical Matters and International Treaties of the Ministry of Foreign Affairs, the procedure to be followed from the signature of the Special Agreement up to its entry in to force is described, after the exchange of ratification instruments and notification of the Agreement takes place, in the following way:

“Given the special nature of the case, the process for the Special Agreement to enter into force, in regard to Guatemala, would be:

1. Signing of the Special Agreement by the Foreign Minister of Guatemala.

2. Forwarding of the Special Agreement to Congress by the office of the President of the Republic.
3. Based on Article 19 of the transitory and final provisions of the Political Constitution of the Republic, and as a mere administrative formality, submittal to referendum by Congress and forwarding to the Supreme Electoral Tribunal for the according summoning.
4. Summoning to referendum by the Supreme Electoral Tribunal.
5. If the referendum has a favorable result, decision by Congress based on Article 171 of the Political Constitution of the Republic, regarding approval of the Special Agreement and therefore, submittal on behalf of Guatemala to the jurisdiction of the International Court of Justice.
6. Ratification of the Special Agreement by the President of the Republic.
7. Publication in the *Diario de Centroamérica* (official gazette) of the text of the Special Agreement and the ratification instrument.
8. Exchange of ratification instruments between the Parties and notification of the commitment contained in the Special Agreement to the Registrar of the International Court of Justice...<sup>81</sup>

In the Special Agreement between Guatemala and Belize it is established that after fulfilling the already described internal requirements of both countries, they will proceed to EXCHANGE INSTRUMENTS, marking the specific moment in which the Agreement will enter into force at the international level. Before this exchange, neither of the States could submit the Territorial Differendum unilaterally to the International Court of Justice because the Agreement is not yet of compulsory compliance.

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<sup>81</sup> Belize Commission. Legal opinion 15200007208 dated 17 November 2008, issued by the Director General of Juridical Matters and International Treaties of the Ministry of Foreign Affairs.

### **3.1.9. SUBMITTAL OF THE COMMITMENT TO REFERENDUM OF THE PEOPLES OF GUATEMALA AND BELIZE**

The internal legal procedures that must be followed to achieve the entry into force of the commitment includes as step *sine qua non* the referenda that must be carried out simultaneously in each country, for the peoples to approve submitting the Territorial Differendum to the jurisdiction of the International Court of Justice. The Special Agreement states the following:

#### *Article 7*

- 1. The Parties commit themselves to undertake the procedures set forth in their respective national systems to submit to referenda the decision to bring to the International Court of Justice the final settlement of the territorial dispute.*
  
- 2. The referenda shall take place simultaneously in both countries on a date to be agreed between the Parties.*
  
- 3. The question to be submitted to referenda shall be: “Do you agree that any legal claim of Guatemala against Belize relating to land and insular territories and to any maritime areas pertaining to these territories should be submitted to the International Court of Justice for final settlement and that it determine finally the boundaries of the respective territories and areas of the Parties?”*

The contents of Article 7 of the Special Agreement is original and has no precedent on other commitments signed by other countries to submit their conflict resolution to the jurisdiction of the International Court of Justice, given that the same describes the internal procedure that will be necessary for it to be possible to present the Territorial Differendum before the Court for its settlement. This provision will have legal effects towards the internal laws of each country and it is established within it, with great clarity, that the agreement of taking the case before the International Court of Justice will

only enter into force and become binding once the internal procedures pertaining to the local legislation of each State have been fulfilled.

Special care was taken at the moment of negotiating the Agreement, including articles relating to the process that must be carried out based on the internal constitutional law of the countries, especially the Guatemalan law. The Political Constitution of the Republic defines the procedure that must be followed to reach agreements that come to definitely settle the Territorial Differendum with Belize, and which are the internal competent bodies that are to approve the submittal to the jurisdiction of the International Court of Justice. Transitory Article 19 of our Constitution states:

***“Article 19.- Belize. The Executive Branch is empowered to carry out the formalities oriented to settle the situation of the rights of Guatemala regarding Belize, in accordance with national interests. Any definitive agreement must be submitted by Congress of the Republic to the procedure of referendum foreseen in Article 173 of the Constitution...”***

The Political Constitution of the Republic of Guatemala dedicates this article to the Territorial Differendum with Belize. This provision is the only one that refers to the power bestowed upon the Executive Branch to carry out formalities that are oriented to the settlement of the dispute, protecting the Nation’s rights and interests.

The Government of Guatemala has framed in the mentioned constitutional article its efforts to settle the situation of the rights of Guatemala regarding Belize. Article 7 of the Special Agreement entered into by Guatemala and Belize is composed in such a way that it includes a description of the internal procedure that must be followed in Guatemala, pointing out the competent authorities for each one of the steps that must be taken to achieve turning to the International Court of Justice. Strict respect upon Guatemalan constitutional laws is reflected in the contents of the Special Agreement to settle the Territorial Differendum.

The Governments of Guatemala have always made an effort to find a solution that complies with that ordered by our Constitution and that, at the same time, is framed within the means of pacific settlement of disputes provided by International Law, without affecting the rights considered to assist Guatemala. In that sense, a path has been planned that has used up all of those political solutions or “non-judicial” means up to the present date, giving the dispute the possibility of being settled through a judicial body.

Article 7 of the Special Agreement has the purpose of complying with that provided in transitory Article 19 of the Constitution, in the sense that it should be the people of Guatemala who approve every definitive agreement reached to resolve the situation of the rights of Guatemala in regard to Belize. The definitive solution will be to submit the Territorial Referendum before the International Court of Justice, given that it is considered that once the memorial has been filed and the judicial process takes place, a judicial mechanism will conclude in a judgment of mandatory compliance that will definitely settle the controversy that Guatemala has with Belize. Therefore, prior to presentation of the petition on behalf of Guatemala, the submission of the Territorial Referendum to the jurisdiction of the Court will have to be approved by the people of Guatemala, through referendum.

The Honorable Congress of the Republic is the competent organism of the State of Guatemala to submit the commitment of turning to the International Court of Justice to referendum, pursuant to Article 173 of the Political Constitution of the Republic, which sets forth:

*“Article 173.- (Added) Referendum. The political decisions of special relevance will have to be submitted to the procedure of referendum by all citizens. The referendum will be summoned by the Supreme Electoral Tribunal under the initiative of the President of the Republic or Congress of the Republic, who will accurately fix the question or questions to be submitted to the citizens. The electoral constitutional law will regulate all related to this institution.”*

The Special Agreement foresees that the referenda take place simultaneously in both countries in a previously convened date between the Parties, for it is the only way of ensuring that the results in one country will not influence the referendum carried out in the other. It could not be done in any other way, if the objective remains to be that the populations in both countries agree upon the approval, in a democratic way, of submitting the Territorial Differendum to the International Court of Justice.

The Agreement provides that the same question be directed to the peoples of Guatemala and Belize, to avoid the approval from having different ends or purposes. Approvals on behalf of both peoples based on different questions, could even submit different matters to the jurisdiction of the Court.

According to the Special Agreement, the question to be submitted to referendum will be: *Do you agree that any legal claim of Guatemala against Belize relating to land and insular territories and to any maritime areas pertaining to these territories should be submitted to the International Court of Justice for final settlement and that it determine finally the boundaries of the respective territories and areas of the Parties?*

The Special Agreement is a regulating instrument that has the purpose of submitting the resolution of the Territorial Differendum to the jurisdiction of the Court, as defined in Article 2 of the same. Upon determining the question to be submitted to the peoples through referendum, negotiators considered that its contents should be the same as the object of the commitment, meaning the same as Article 2 of the Agreement. Therefore, the content of the question raised to the people of Guatemala should reflect the manifestation of consent to submit the dispute to the Court, which will determine the rights of Guatemala over the land, insular and pertaining maritime areas, as provided for in Article 2 of the Special Agreement.

The question will have to be approved and formally fixed by Congress, who is empowered to do so, based on Article 173 of the Political Constitution of the Republic, and the summoning will have to be made by the Supreme Electoral Tribunal.

Populations of both countries will be benefited by settling the territorial dispute, because it will avoid conflict that could eventually arise for not having a complete definition of the territories that correspond to each country. Solution of the differendum is an advantage to both populations because it will allow Guatemala and Belize to have legal certainty upon the territories that each one is entitled to, through a judgment of mandatory compliance pronounced by the International Court of Justice.

### **3.1.10. NOTIFICATION**

*Article 8: This Special Agreement shall be notified to the Registrar of the Court jointly or by either of the Parties within a month after referenda in both countries have approved submission of the dispute to the Court.*

After the referenda have approved that the Territorial Differendum is to be submitted to the International Court of Justice, there is a time-limit of one month for the Special Agreement to be notified to the Court's Registrar, so that he is aware of the decision of both countries to submit themselves to its jurisdiction.

Within that time frame, Guatemala must meet the internal requirements of approval on behalf of Congress and ratification from the President, as provided for by the Political Constitution, and then proceed to the *exchange of instruments of ratification* between both countries, as well as the registration of the Special Agreement before the General Secretariat of the United Nations, as set forth in the agreement in Article 9, which is later on analyzed.

Immediately after notification, the timeframe of 12 months will start to run for the presentation, by Guatemala, of the memorial before the International Court of Justice.

Regarding notification of the agreement, the Statute of the International Court of Justice explains it in Article 40, which states:

- 1. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated.*
- 2. The Registrar shall forthwith communicate the application to all concerned.*

Upon composing the article regarding notification of the agreement to the International Court of Justice, that established in Article 39 of the Rules of the Court was considered, which further explains this matter. Also, that notification can be done jointly or separately, as it was convened between Guatemala and Belize, requiring that the original document or certified copy of the agreement that includes the agreement would be enclosed, where the exact subject of the dispute and the identity of the parties to it must appear, as long as it is not clearly established in the Special Agreement. In regard to this subject, it must comply with the contents of Article 2 of the related agreement that includes the object of the Territorial Differendum of Guatemala against Belize.

Article 39 of the Rules of the Court sets forth the following:

- 1. When proceedings are brought before the Court by the notification of a special agreement, in conformity with Article 40, paragraph 1, of the Statute, the notification may be effected by the parties jointly or by any one or more of them. If the notification is not a joint one, a certified copy of it shall forthwith be communicated by the Registrar to the other party.*
- 2. In each case the notification shall be accompanied by an original or certified copy of the special agreement. The notification shall also, in so far as this is not already apparent from the agreement, indicate the precise subject of the dispute and identify the parties to it.*

Concerning this subject, jurist Manuel Diez de Velasco points out the following: “The date in which the process is initiated is useful to begin to count the time-limits and to verify if the competence of the Tribunal indeed exists. Then, the object of the litigation is fixed and the secretary or registrar of the Tribunal forwards a copy of the petition or notification of the agreement to the Secretary General of the United Nations, the members of the United Nations and the rest of the States who have the right to appear before the tribunal (articles 40 of the Statute and 42 of the Rules)”<sup>82</sup>

### **3.1.11. REGISTRATION**

Article 9 of the Special Agreement states the following, in regard to registration:

*This Special Agreement shall be registered with the Secretariat of the United Nations pursuant to Article 102 of the United Nations Charter, jointly or by either of the Parties. At the same time it will be brought to the attention of the Organization of American States.*

The previous article asserts the spirit of the Member States of abiding by the contents of article 102 of the United Nations Charter to that effect, regarding registration of the treaty. This formality is a requirement that is also established in the Vienna Convention on the Law of Treaties, for all conventions or international agreements that have entered into force, for which the parties to them will, jointly or separately, have to send it to the administrative unit of the Organization itself, which is the General Secretariat. It has the duty of giving it the proper publicity before the rest of the Member States regarding the existence of the agreements reached between the countries. “Even though the obligation is imposed by the Charter (of the UN), in practice, it only includes the Member States of the Organization; the States which are not part of it, tend to register their treaties in the General Secretariat as provided for by the ILC (International Law Commission).”<sup>83</sup>

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<sup>82</sup> Diez de Velasco, Manuel. Op.cit. Page 764.

<sup>83</sup> De la Guardia, Ernesto. Op cit. Page 343.

Once it has received the agreement, the General Secretariat of the United Nations proceeds to give it proper publicity immediately, making it of the cognizance of all the member States of said organization, so they can issue declarations they deem pertinent. Article 102 of the UN Charter, quoted in the Special Agreement itself, sets forth the following:

1. *Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.*
2. *No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.*

Paragraph 2 of the previous article confers important effects to the registration of treaties and even provides that lack of compliance would entail as consequence that its effects could not be invoked before any organ of the United Nations system, granting this registration and later publication, the beginning of the treaties' entry into force.

“The rule does not establish the nullity of the treaty as sanction, but the treaty will not be able to be invoked before the United Nations organs. In this light, in the case of Guinea Bissau and Senegal, in which Guinea Bissau filed nullity of the agreement of 1977 between Portugal and France, which settled the land boundary between both newborn countries, the arbitration tribunal pointed out that nullity of such treaty did not proceed given that no law had been violated which forced registration of said treaty and, later on, that the arbitration tribunal before which the lack of registration and publication of the treaty was filed as cause for nullity, was not a United Nations organ.”<sup>84</sup>

The object of this Special Agreement is to submit the Territorial Differendum to the decision of the International Court of Justice, which indeed is a United Nations organ, as it was explained before. Therefore, the lack of registration of the agreement would

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<sup>84</sup> Villagrán Kramer, Francisco. *Derecho de los Tratados*. Op. Cit. Page 90.

entail as consequence that the same could not be invoked by the parties to it before said Court, leaving its main purpose unfulfilled.

This eventuality would cause the object of the treaty to lose its legal effects, and that all efforts to reach the agreement would be left without substance. Therefore, the Special Agreement foresees that the same be registered jointly or separately by the Governments of Guatemala and/or Belize, to avoid that once the internal procedures described in the previous paragraph, one of the Governments was to omit such registration and therefore suspend the treaty's provisions. "...article 102 of the Charter provides that it is not celebration but entry into force of a treaty which originates the obligation of registering it in the United Nations General Secretariat."<sup>85</sup>

The Special Agreement also foresees that along with registration before the United Nations, it is made of the cognizance of the Organization of American States, because even when the international juridical effect and the jurisdiction of the Court have initiated, it must be recognized that due to the support and work of our regional organism, through its General Secretariat, the signing of the Special Agreement was accomplished.

The signing of the Special Agreement had its background and basis on all the bilateral work carried out under the aegis of the OAS, arriving at the signing of the "Agreement on a Negotiation Framework and Confidence Building Measures between Belize and Guatemala" on 7 September 2005, in which it was agreed upon that the General Secretariat could recommend that the parties would submit their dispute to the International Court of Justice.

This Negotiation Framework also states that the Secretary General of the OAS will assist the Parties to reach an agreement regarding the most adequate juridical body, the subjects to be taken before the same, and the procedure to turn to said body. Furthermore, that the organization will support by means of technical advisory, and will

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<sup>85</sup> De la Guardia, Ernesto. Page 343.

make efforts to obtain the necessary financial aid in order to back up this process in its different stages and allow the Parties to reach the objective of settling the dispute.<sup>86</sup>

The parties have granted the OAS the faculty to continue supporting the process, even until the eventual judgment is pronounced by the International Court of Justice, which will really constitute the reaching of the objective of settling the dispute, reason why the parties have included in the Special Agreement the provision of informing the OAS about the entry into force of the agreement. It is not merely a rule of protocol, but it implies the right of the States to search for assistance within the OAS at any given moment during the process and the commitment of the organization to give such assistance, even in the financial sphere, which will be defining to successfully achieve compliance of the agreement.

### **3.1.12. CLOSING**

*In witness whereof the undersigned have signed the present Special Agreement, in the English and Spanish languages, both versions being equally authentic.*

As mentioned before, the Special Agreement respects the internal constitutional provisions of each State, and in that sense the same is composed in the English and Spanish languages, meeting with the terms of Article 143 of the Political Constitution of the Republic of Guatemala to that effect, which sets forth that the official language is Spanish.

It is worth mentioning this last provision of the Special Agreement, which states that both versions, in English or Spanish languages, are equally genuine to the effects of the treaty itself and its future interpretation. Provisions of the Vienna Convention on the Law of the Treaties were obviously taken into consideration to this effect, regarding interpretation of a treaty written in several languages, setting forth the following:

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<sup>86</sup> Agreement on a Negotiation Framework and Confidence Building Measures between Belize and Guatemala. Ministry of Foreign Affairs of Guatemala.  
[http://www.minex.gob.gt/index.php?option=com\\_remository&Itemid=115&func=startdown&id=25](http://www.minex.gob.gt/index.php?option=com_remository&Itemid=115&func=startdown&id=25)

**“33. Interpretation of treaties authenticated in two or more languages**

1. *When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.*
2. *Aversion of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.*
3. *The terms of the treaty are presumed to have the same meaning in each authentic text.*
4. *Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”*

In the previous article, the Vienna Convention acknowledges equality of languages and the equal genuineness of the respective texts upon the inexistence of a specific clause in the opposite sense. This provision incorporates in the text of the Project the reference to the “object and purpose” of the treaty as the decisive criteria in regard to the differences between the dissimilar texts (paragraph 4)”.<sup>87</sup>

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<sup>87</sup> De la Guardia, Ernesto. Op. cit. Page 228.

#### **4. EPILOGUE**

As a Guatemalan, it is my deepest wish that soon the epilogue of the Territorial Differendum between Guatemala and Belize can be written, and concluding, in accordance with the Guatemalan Constitution, the controversy produced due to the illegal and forceful occupation of the Guatemalan territory of Belize on behalf of England.

1. The existing Territorial Differendum with Belize must be submitted to the International Court of Justice by virtue of not being able to resolve it through the conciliatory way, given that the positions of Guatemala and Belize in regard to the existing controversy are radically opposite.

2. The means of pacific settlement of controversies have been completely exhausted and efforts have been restlessly made to settle the Territorial Differendum with Great Britain first and with Belize afterwards, as successor State, reason why it is imperative that the same is submitted to the jurisdiction of the International Court of Justice, because it is considered the ideal legal avenue to obtain recognition of our right over the land, insular and maritime territory usurped by Belize.

3. Great Britain in the past and Belize later on, desisted from submitting the dispute to international jurisdiction, so the recommendation from the Secretary General of the Organization of American States made to the parties of turning to the International Court of Justice, as well as the acceptance on behalf of Belize and Guatemala, constitute important achievements in Guatemalan foreign policy, consistently followed during several years.

4. The Special Agreement between Guatemala and Belize to submit the Land, Insular and Maritime Claim of Guatemala to the International Court of Justice, signed on 8 December 2008, constitutes the commitment by which both countries accept submitting the land, insular and maritime controversy to said international body for settlement.

5. The Government of the Republic of Guatemala has done its part by carrying out the formalities it should to settle the existing Territorial Differendum with Belize, and it is duty of the Honorable Congress of the Republic to submit it to approval by the people of Guatemala, through referendum, to take said dispute to the jurisdiction of the International Court of Justice for its definitive settlement.

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## **6. ANNEXES**

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