

# The Need for Precision in Formulating Disputes Brought to the International Court of Justice by Special Agreement, with Particular Reference to the 2008 Belize/Guatemala Special Agreement

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It is hardly necessary to recall that two methods are available to states for bringing disputes to the International Court of Justice (“the Court”) with a view to their settlement by binding decision. One is by a unilateral instrument, designated by the Statute of the Court (“the Statute”) as “written application”,<sup>1</sup> (and which will be referred to simply as “application”),<sup>2</sup> the other is by a bilateral instrument, consisting of a treaty between the two disputant states that the Statute designates as “special agreement”.<sup>3</sup> In either case the instrument instituting proceedings, i.e. the application or the special agreement,<sup>4</sup> as the case may be, must, in accordance with Art. 40, para. 1, of the Statute, indicate “the subject of the dispute”.

Of the two methods described, the present article deals only with the one involving special agreements, which are submitted to the Court by the two disputant states jointly or by only one of the two.<sup>5</sup> In so doing the article limits itself to the question as to the extent to which, in a special agreement, the “subject of the dispute” has to be formulated in a specific and precise manner. Following a general discussion of this question, the article concludes with a brief account of the problems that the special agreement

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<sup>1</sup> See Art. 40, para. 1, of the Statute.

<sup>2</sup> In practice the term “application instituting proceedings” is often used to refer to these instruments.

<sup>3</sup> See Art. 40, para. 1, of the Statute. It may be noted that, as shown by practice, for a bilateral treaty between the disputant parties to serve as a special agreement it is not necessary that it should be so entitled.

<sup>4</sup> The instrument instituting proceedings, i.e. an application or a special agreement, is submitted to the Court through its Registrar.

<sup>5</sup> See Art. 39, para. 1, of the Rules of Court. If the special agreement is submitted by only one of the disputant states, the Registrar communicates it to the other one. (Last-cited provision of the Rules of Court.)

signed on behalf of Belize and Guatemala on 8.12.2008, might raise in connection with the question.<sup>6</sup>

But, before that question is taken up, it is necessary to underline something that could hardly relate more closely to it, namely the rule that a dispute submitted to the Court, whether by application or by special agreement, should exist at the time the proceedings are instituted. Thus in 1939, the Permanent Court of International Justice held that it could not accept a claim that did not “form the subject of a dispute between” ... the parties “prior to the filing of the application” in the case.<sup>7</sup> And in 1974, the Court observed that “as a court of law [it] is called upon to resolve *existing* disputes between States.” (Emphasis added.)<sup>8</sup> It may be further observed that the rule forms part of the traditional customary law of arbitration between states.<sup>9</sup> It is, moreover, expressly mentioned in a booklet published by the Court for the general public.<sup>10</sup> The rule is thus one that could not be more firmly established.

If one does not go beyond the literal meaning of the requirement laid down in Art. 40, para. 1, of the Statute that the “subject of the dispute” be indicated in the special agreement, it could be deemed that inclusion therein of a very general indication of the subject of the dispute satisfies that requirement.

Thus a special agreement that, as regards the subject of the relevant dispute, provides merely that it can be any controversy (or controversies)<sup>11</sup> concerning terrorism arising between the two disputant states would be regarded as satisfying the requirement in question. In favor of this liberal view it can be argued that the hypothetical special agreement indicates the subject of the dispute to which it relates.

A number of cogent arguments can be found, however, to support the objection that the manner in which the dispute is described in the hypothetical special agreement just imagined is too general, or, if one prefers, vague, to be acceptable to the Court.

<sup>6</sup> For the English text of the special agreement (the authentic texts of which are in English and Spanish), see ILM 48 (209), 250. The Spanish text is available on the website of the Organization of American States.

<sup>7</sup> *Belgium v. Bulgaria*, Judgement of 4.4.1939, 83 (A/B77).

<sup>8</sup> *Nuclear Tests Case (Australia v. France)*, Judgement, I.C.J. Reports 1974, 253, para. 55. (Same dictum in para. 58 of the accompanying *New Zealand v. France* Judgement.)

<sup>9</sup> C. Rousseau, *Droit International Public*, Vol. V, 317, para. 304 A (1983).

<sup>10</sup> *The International Court of Justice*, 6<sup>th</sup> ed. 2013, 35.

<sup>11</sup> A special agreement may bring before the Court more than one dispute. An example of this is provided by the special agreement between El Salvador and Honduras in the *Case Concerning the Land, Island and Maritime Frontier Dispute* (Nicaragua intervening), which bore on several distinct disputes. See I.C.J. Reports 1992.

A textual argument derives from a provision of the Rules of Court, i.e. the second sentence of para. 2 of Art. 39 of those Rules. This sentence is to the effect that the notification of a special agreement to the Court's Registrar shall, "in so far as this is not already apparent from the [special] agreement, indicate the *precise* subject of the dispute". (Emphasis added) This sentence, incorporated in the Rules of Court in 1978, implies that, in describing the dispute it covers, a special agreement should do so with a minimum degree of precision.

This ties in with another way of viewing things. Since, as has been pointed out, a dispute submitted to the Court is one that has to be in existence at the time the proceedings are instituted, which means that it can normally be defined with a fairly high degree of precision, why should the states parties to the special agreement not include in it a definition of the dispute attaining such a degree of precision? This makes for a good administration of justice. As has been observed by commentators of the Statute, "[t]he Court cannot decide a case if the subject of the dispute [contained in a special agreement] is not delimited so that it becomes capable of being adjudicated upon".<sup>12</sup> And it is most reasonable to consider that the certainty that the Court will have an adequate dispute to adjudicate upon should exist *ab initio*. It is not very sensible to begin a task that may prove to be impossible to complete. And starting the proceedings without a proper definition of the dispute can be seen as a discourtesy to the judges, who will appreciate learning, from the very beginning, what can, through a definition, reasonably be known about the basic features of the case at that stage.

There is another, more subtle but equally (if not more) convincing consideration that strongly supports the position taken here. This is the observation made by an ex-president of the Court, *Eduardo Jiménez de Aréchaga*, "that, in order to determine the *exact points* which require decision in the operative part of a judgement, when the case has been brought by special agreement, it is rather to the terms of this agreement than to the submissions of the Parties that the Court must have recourse in establishing the *precise points* which it has to decide".<sup>13</sup> (Emphasis added) The *raison d'être* of this view, which clearly implies that there must be considerable precision in the formulation of the dispute, could not be clearer. A special

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<sup>12</sup> A. Zimmermann/C. Tomuschat/K. Oellers-Frahm (eds.), *The Statute of the International Court of Justice: A Commentary*, 2007, 897, para. 110.

<sup>13</sup> Separate Opinion of Judge *Jiménez de Aréchaga* (citing in support various opinions expressed by the Court and its predecessor) in the *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgement, I.C.J. Reports 1982, 101, para. 4. See also S. Rosenne, *The Law and Practice of the International Court*, 2<sup>nd</sup> revised ed. 1985, 586 and S. Rosenne, *The Law and Practice of the International Court*, 2005, 1228.

agreement is a *consensus ad idem* binding on the parties, and can accordingly not be altered without their mutual consent, whereas submissions, being purely unilateral in nature, can be altered at will by the party presenting them. The formulation of the dispute necessarily contained in a special agreement is thus to be regarded as a sort of backbone of the case. It should thus largely rule out the possibility that in response to a specific dispute, or claim, mentioned in a pleading by one party the other contends that at the time the proceedings were instituted the dispute or claim did not exist.

Also relevant here is a study recently produced by a number of countries on how to bring disputes to the Court.<sup>14</sup> From para. 68 of this study, published in Switzerland, it is clear that disputes brought to the Court by special agreement must be “*specific*” and “*defined*”.<sup>15</sup> This is in line with the annual reports submitted by the Court to the United Nations General Assembly, where it is affirmed that “the Court’s jurisdiction *ratione materiae* can ... be founded, in the case of a specific dispute, on a special agreement concluded between the States concerned”. (Emphasis added.)<sup>16</sup>

An advantage of a precise formulation of the dispute over an imprecise one is that it is more likely than the latter to make clear that the dispute is in existence at the time of institution of the proceedings.

It may be noted finally that the requirement that the dispute be formulated precisely forms part of the traditional customary law of arbitration of disputes between states.<sup>17</sup>

As could hardly not be the case, the Court cannot accept an instrument meant to institute proceedings that is not in conformity with the Statute or the Rules of Court. This would be the case, for example, of a special agreement providing that the procedure is to consist only of an oral, or only of a written, part, which would fly in the face of para. 1 of Art. 43 of the Statute. An illustration of the Court’s power, or rather obligation, to react negatively to an instrument instituting proceedings that does not appear to comport with the Statute and/or the Rules of Court is provided by the Court’s initial reaction to the special agreement instituting proceedings in the case on de-

<sup>14</sup> The publication, in the six official languages of the United Nations, is entitled, in English, Handbook on Accepting the Jurisdiction of the International Court of Justice. It was published in 2012 in Switzerland, and produced by that country as well as Botswana, Lithuania, the Netherlands, the United Kingdom and Uruguay. (It is available on Google.)

<sup>15</sup> It is worth noting that in the French text of the publication the word “concret” is used to qualify the disputes fit for submission to the Court.

<sup>16</sup> See para. 53 of the report submitted in 2016. GA Official Records, 71<sup>st</sup> regular session, Supplement No. 4. (The French version speaks of “un litige déterminé”.)

<sup>17</sup> C. Rousseau (note 9, same para.), same page, observes that a special agreement calling for arbitration should relate to a “litige concret nettement déterminé” and that this is implied by the inclusion of the adjective “special” in the term “special agreement”.

limitation of the maritime boundary in the Gulf of Maine area between Canada and the United States.<sup>18</sup>

There has not been any case where the indication of a dispute brought to the Court by special agreement has raised any problem as a result of that indication not having been precise.<sup>19</sup> The same goes for the Permanent Court of International Justice, with regard to which *Manley O. Hudson* has pointed out that in all the special agreements submitted to it “definite questions ... [have been] formulated upon which the Court is asked to give its decision”.<sup>20</sup>

Mention should be made of a case submitted to the Court by a special agreement, between Colombia and Peru, consisting of two distinct parts. The first of these was an agreement between the two disputant states entitled “Act of Lima”, dated 31.8.1949. This “Act” was capable of constituting a special agreement (although not so entitled), but was deficient in that, although it gave a fairly good idea of what the corresponding dispute was about, it did not formulate the description of that dispute with considerable precision. It was thus observed in the Act of Lima that the parties had not been able to agree on a definition of the dispute, for which reason it was further stated in the Act of Lima that the dispute, widely reported on in the press, was to be defined in an application to be submitted to the Court by one of the two parties. This was done by an application dated 15.10.1949, submitted to the Court by Colombia on that date (which was also the date of submission to the Court of the text of the Act of Lima).<sup>21</sup> This most unusual way of proceeding, which has never again been applied, clearly shows that in the opinion of Colombia and Peru it was necessary that the Court should have a precise definition of their dispute.

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<sup>18</sup> See paras. 1, 2 and 3 of the judgement, delivered on 12.10.1982 and the Court’s order of 20.1.1982. The difficulties were overcome by consultations between the Court and the parties.

<sup>19</sup> It may be noted that, since the Court may interpret a special agreement, a lack of clarity in the indication in it of the subject of the corresponding dispute could be remedied by the Court’s interpretation thereof. This appears to have been done by the Chamber of the Court that dealt with the *El Salvador v. Honduras Land, Island and Maritime Frontier Case* with respect to one of the disputes involved. (See para. 326 of the 1992 Judgement on the merits in that case.) But it is impossible to interpret away the lack of specificity from which the Belize/Guatemala special agreement suffers.

<sup>20</sup> *M. O. Hudson*, *The Permanent Court of International Justice, 1920-1942*, a Treatise, 1943, 437.

<sup>21</sup> The texts of the Act of Lima and the application by Colombia are contained in the Court’s judgement. *Colombian-Peruvian Asylum Case*, Judgement of 20.11.1950, I.C. J. Reports 1950, 266. See I.C.J. Reports 1950, 267 et seq.

We turn now to the above-cited special agreement signed by Belize and Guatemala on 8.12.2008, the purpose of which is to bring to the Court a long standing-territorial dispute.

In its Art. 2, the special agreement (not yet in force)<sup>22</sup> defines the subject of that dispute.<sup>23</sup> In English it is indicated to be “any and all legal claims by Guatemala against Belize to land and insular territory and to any maritime areas pertaining to those territories”.<sup>24</sup> This formulation is most anomalous: In addition to not even indicating how many Guatemalan claims there are and their nature, on a literal interpretation the formulation would, as observed by a Guatemalan author, allow Guatemala to claim the whole of the territory of Belize, whether continental, insular or maritime, thus effecting a legal destruction of Belize.<sup>25</sup> From the observations that have been made

<sup>22</sup> The special agreement has been approved by the legislatures of Belize and Guatemala. But to enter into force it must further be approved by referenda to be held in both countries, neither one of which has yet taken action to that effect. The referendum to take place in Guatemala (termed “consulta popular” in Guatemala’s constitution) is very seriously bogged down by a series of difficulties other than those set forth in this article and most of which are not of a legal nature. (These difficulties are described by the present author in articles published by the Guatemalan daily “La Hora” on 28. and 30.4.2016 and, 2., 3. and 6.5.2016.) It is thus certain that the special agreement is nowhere near coming into force.

<sup>23</sup> For background information on the dispute, see Oxford Public International Law, MPEPIL, Belize Dispute, Hazel Fox, Jan. 2009, and, particularly, AJIL 40 (1946), 383, AJIL 52 (1958), 280, and AJIL 55 (1961), 459, containing writings by, respectively, *J. L. Kunz*, *W. M. Clegern* and *D. A. G. Waddell*; see also *W. J. Bianchi*, The Controversy between Guatemala and Great Britain over the Territory of British Honduras in Central America, 1959, reviewed by *W. M. Clegern* in AJIL 54 (1960), 203 et seq., and *E. Rainbow Willard*, How to Get Less than You Bargain for: Adjudicating the Guatemala-Belize Territorial Dispute at the I.C.J., Emory Int’l L. Rev. 23 (2009), 739 et seq. Also useful are *A. Herrarte*, Colonialismo territorial en América: el caso de Belice, 1979 and *A. Herrarte*, La cuestión de Belice, Estudio histórico-jurídico de la controversia, 2000. By a letter to the Prime Minister of Belize dated 18.10.1999, the Foreign Minister of Guatemala stated that Guatemala’s territorial claim against Belize was limited to the part of the territory of Belize that was not the object of the concessions granted by Spain to Great Britain in the 18<sup>th</sup> century, i.e. almost half the territory of Belize. This is presumably the extent of the territorial claim against Belize that Guatemala would place before the Court. The text of the letter is available on Google. (Click on “transcripción de carta a Belice enviada por Eduardo Stein en 1999 en donde afirma la posición de Guatemala en cuanto a reclamo territorial”).

<sup>24</sup> In Spanish “toda y cualquier reclamación legal de Guatemala en contra de Belice sobre territorios continentales e insulares y cualesquiera áreas marítimas correspondientes a dichos territorios”. (It may be noted that the reference in the special agreement to “cualquiera áreas marítimas correspondientes a dichos territorios” (“any maritime areas pertaining to those territories”) appears to be one to future disputes, which the Court could not possibly accept.)

<sup>25</sup> *G. A. Orellana Portillo*, Antecedentes y Análisis del Acuerdo Especial entre Guatemala y Belice para someter el Reclamo Territorial, Insular y Marítimo de Guatemala a la Corte Internacional de Justicia, 2009. The only limit this author, in theory, one would think, appears to see to the extent of Guatemala’s claims would be that it should leave Belize with some continental or insular territory, even if no more than just a few square miles. (P. 117 of the book

above, it should be clear that, given its extreme generality, or vagueness, the formulation in question might well bring the parties into serious difficulties before the Court.<sup>26</sup>

Is there a way for Belize and Guatemala to avoid the predicament they might thus face if their special agreement having come into force, they submit it to the Court? Application of the method used by Colombia and Peru that has been discussed would involve amending their special agreement. This would be embarrassing, particularly since both legislatures have approved it. Alternatively the two countries could make use of the possibility also discussed of rendering the definition of the dispute sufficiently clear in their notification of it to the Court. But this would also involve, at least indirectly, amending the special agreement. In each country the legislature would therefore have to approve this procedure. And it appears that a similar difficulty would apply to the holding of the referenda, since the people of each country would have to be informed of the language to be inserted in the notification of the special agreement to the Court, which would involve amending it. Thus in each country the special agreement would have to be approved, by referendum, as amended. Both executives would accordingly feel embarrassment, before both their peoples and their legislatures, and be at a loss on just how to proceed.

The perspectives for the long-dormant Belize/Guatemala special agreement, which is of course liable to be rejected in either one of the referenda or both, are thus rather uncertain. It is nevertheless of interest to examine, as has been done in this article, specifically and in general, the most interesting of the legal issues the special agreement raises, namely the need to formulate in a special agreement the corresponding dispute in a precise and specific manner.

It may be added that if the special agreement makes its way to the Court, the latter may find itself on the horns of an unpleasant dilemma: On the one hand the Court will be reluctant to reject the special agreement, thereby missing the opportunity to settle a dispute that, in addition to being substantively and historically of great significance, seriously poisons the relations between the two disputant states;<sup>27</sup> but on the other hand the Court

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published in Guatemala) (It may be noted, however, that before the Court, Belize might claim that the letter from the Guatemalan Foreign Minister cited in note 23 above constitutes a unilateral act binding on Guatemala that limits its claims as indicated in that letter.)

<sup>26</sup> In 2012 the present author published a book in Guatemala covering all the problems of a legal nature, and others, that he detected in the Belize/Guatemala special agreement. See "El Arreglo judicial del diferendo con Belice: análisis crítico del 'Acuerdo Especial' de 2008".

<sup>27</sup> Since 2000, a Belize-Guatemala peace process has been under way, with the support of the Organization of American States (OAS), which maintains an office at the provisional bor-

may feel that it cannot accept the special agreement without establishing a jurisprudence not quite consistent with principles that are basic to its proper functioning.

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der between the two countries to promote good neighborliness and cooperation between the two sides. Since 2005, that process has been assisted by a “Group of Friends”, composed of the European Union plus 19 states, including Canada, Costa Rica, Germany, Mexico, Spain, Sweden, Turkey, the United Kingdom and the United States, which countries have provided financial support to the peace process. Everyone involved strongly and without exception advocates submission of the underlying Belize/Guatemala dispute to the Court. Hence if, once the special agreement has come into force and it is submitted to the Court, the latter were to reject it, the Court would be pouring a large bowl of ice-cold water down the throats of the participants in the peace process. Firm backing to that process, including submission of the dispute to the Court, has been given by a Declaration in Support of Belize and Guatemala unanimously adopted by the OAS General Assembly on 14.6.2016.

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