

## CHAPTER 3

### THE SINGLE MARITIME BOUNDARY LINES CLAIMED BY THE PARTIES

3.1. Suriname holds that if the 1936 Point is accepted as the land boundary terminus, the maritime boundary with Guyana is the 10° Line from the 1936 Point. Guyana claims that the maritime boundary is the 34° line starting from the same point. The present Chapter sets out how the claims of Suriname and Guyana in respect of the maritime boundary have developed over time. The first section looks at Suriname and the second section deals with Guyana. The third section compares the positions of the Parties. This analysis demonstrates that Suriname has consistently taken the position that the maritime boundary follows the 10° Line, whereas the position of Guyana with respect to the claimed 34° line is actually quite inconsistent. This analysis also demonstrates that if there were agreement that the 1936 Point marks the land boundary terminus, that “agreement” was established only in combination with and is inextricably linked to agreement that the maritime boundary in the territorial sea follows the 10° Line.

#### I. Suriname’s Consistent 10° Line Position

3.2. This section first examines the genesis of the 10° Line. It demonstrates that the 10° Line boundary in the territorial waters and the 1936 Point were identified jointly and in combination. The section also illustrates Suriname’s consistent position with respect to the 10° Line.

##### A. The Genesis of the 10° Line and the Delimitation of the Territorial Waters

3.3. All of the Corantijn River is part of the territory of Suriname. That was the main consideration in establishing a boundary for the territorial waters between Suriname and British Guiana in the 1930s. The Netherlands’s sovereignty over the Corantijn made the Netherlands responsible for the “care for and supervision of” all shipping traffic in the river.<sup>55</sup> In those circumstances, it was considered appropriate that the Netherlands also should be the only state exercising sovereignty over the approaches to the Corantijn River.<sup>56</sup>

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<sup>55</sup> See, e.g., Letter of the Governor of Suriname to the Minister for the Colonies (16 January 1931), at SCM, Vol. II, Annex 10.

<sup>56</sup> This situation is analogous to cases in which sovereignty over a river is shared and navigational interests may lead to a deviation from the equidistance method in order to place the territorial sea boundary in the navigational channel. The presence of a navigational channel as a special circumstance was recognized both in the debates of the International Law Commission on draft articles on the law of the sea (see Yearbook of the International Law Commission, Vol. II, 1953, p. 216, para. 82) and the 1958 United Nations Conference on the Law of the Sea, (United Nations Conference on the Law of the Sea, Official Records, Vol. VI, Fourth Comm., Continental Shelf, 32d Mtg. at p. 93, para. 3, U.N. Sales No. 58.V.4, Vol. VI (9 April 1958)). In the Beagle Channel Arbitration between the Republic of Argentina and the Republic of Chile, the Court of Arbitration deviated from the strict median line to locate the boundary in one place in the habitually navigable track. Controversy Concerning the Beagle Channel Region (Argentina/Chile), Award, 18 February 1977, at para. 110. Navigational considerations also have played a role in bilateral delimitation agreements. For instance, the boundary established by the Agreement stipulating the Territorial Sea Boundary Lines between Indonesia and the Republic of Singapore in the Strait of Singapore of 25 May 1973 as a whole follows the deep-water channel in the Strait of Singapore with minor exceptions. See 1 *International*

3.4. In order to establish what would be an appropriate boundary in the territorial waters in the approaches to the Corantijn River, the Netherlands Minister for the Colonies addressed the following question to the Governor of Suriname:

how would the boundary have to be indicated at the mouth of the river, where the care for and the supervision of shipping traffic by the authorities of Suriname would commence?<sup>57</sup>

In his response, the Governor indicated that that concern could be met by establishing a closing line in the mouth of the river between Bluffpunt on the eastern bank of the river and the point 6° 0' 25" N and 57° 8' 10" W at its western bank.<sup>58</sup>

3.5. Upon the advice of the Governor, the Minister for the Colonies also consulted with the Minister of Defense concerning this matter. The Minister of Defense observed that the proposal by the Governor of Suriname might not cover all of the area within which care for shipping, e.g., buoyage, could legitimately be expected from the state in whose territory the river is located. The Minister advised the employment of a ten-nautical-mile closing line at the mouth of the river.<sup>59</sup> On the western bank of the Corantijn River that closing line was anchored at a point some two nautical miles to the northwest of the 1936 Point.<sup>60</sup> That closing line shifted the outer limit of the territorial waters almost two nautical miles seawards. Based on that concept, it was proposed that the boundary of the territorial waters of the Netherlands should follow an azimuth with a bearing of 28° from the point on the left bank of the Corantijn River originally proposed by the Governor of Suriname to the outer limits of the territorial waters.<sup>61</sup>

3.6. The proposal of the Netherlands Minister of Defense was the basis for the provision on the delimitation of the territorial waters that became included in the draft boundary treaty under negotiation between the Netherlands and the United Kingdom beginning in the early 1930s. Article 3 of a draft skeleton treaty prepared by the United Kingdom and submitted to the Netherlands by a note of 4 July 1935 (60013/35 [No. 46]) provides:

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*Maritime Boundaries* 1051 (J.I. Charney & L.M. Alexander, eds., Martinus Nijhoff Publishers 1993). The Agreement between the Government of the Republic of Estonia and the Government of the Republic of Latvia on the Maritime Delimitation in the Gulf of Riga, the Strait of Irbe and the Baltic Sea of 12 July 1996 does not apply the equidistance line in one area in order to leave an access route to the Latvian port of Ainazi in the Latvian territorial sea. See 4 *International Maritime Boundaries* 2996 (J.I. Charney & L.M. Alexander, eds., Martinus Nijhoff Publishers 2002).

<sup>57</sup> Letter of the Minister for the Colonies to the Governor of Suriname (18 November 1930), at SCM, Vol. II, Annex 9.

<sup>58</sup> Letter of the Governor of Suriname to the Minister for the Colonies (16 January 1931), at SCM, Vol. II, Annex 10.

<sup>59</sup> Letter of the Minister of Defense to the Minister for the Colonies (27 February 1931), at SCM, Vol. II, Annex 11.

<sup>60</sup> A copy of chart 222 (reproduced in SCM, Vol. II, Annex 12) depicts the 10-nautical-mile closing line, the outer limits of the territorial waters both taking into account that closing line and disregarding it, and the boundary of the territorial waters between Suriname and British Guiana.

<sup>61</sup> Letter of the Minister of Defense to the Minister for the Colonies (27 February 1931), at SCM, Vol. II, Annex 12. As can be appreciated from the copy of chart 222 on which information was included in connection with that proposal, the 28° line is a perpendicular to the ten-nautical-mile closing line and measured about five nautical miles in length. See SCM, Vol. II, Annex 12.

The boundary between the territorial waters of Surinam and British Guiana is formed by the prolongation seawards of the line drawn on a true bearing of 28° from the landmark referred to in article 1(2) above.<sup>62</sup>

The landmark referred to in Article 1(2) was a beacon that was yet to be erected. This was to be done by a joint commission before the treaty would be signed. In the interim, the draft skeleton treaty contained the coordinates originally suggested by the Governor of Suriname for the starting point of the territorial waters boundary (6° 0' 25" N and 57° 8' 10" W). A footnote to Article 1(2) in the draft skeleton treaty indicates that those coordinates were intended to give guidance as to where the beacon was to be placed.

3.7. The Netherlands and United Kingdom Commissioners took up this work in 1936. As the reporting on the activities of the Commission indicates, this was the first time work on the ground near the mouth of the Corantijn was carried out by the Commission. The Mixed Boundary Commission concluded that the point originally identified by the Governor of Suriname was actually in the sea because the chart to which it referred was incorrect as to longitude.<sup>63</sup> As a consequence, the Commissioners chose a point on the ground that resembled the point indicated on the Netherlands chart.<sup>64</sup>

3.8. Observations at the mouth of the Corantijn River revealed that the 28° azimuth line proposed by the Netherlands did not meet the purpose for which it was proposed, *i.e.*, to ensure that the Netherlands would have sole responsibility for the “care for and supervision of” all shipping traffic in the approaches to the river. The Report on the Inauguration of the Mark at the Northern Terminal of The Boundary between Suriname and Guyana explains this as follows:

The Netherlands Commissioner considered it was essential that the continuation of the Boundary in the territorial waters should leave the navigation channel in the same territory throughout its length. Other difficulties would arise over lighting, buoys, etc. A line drawn on a True Bearing of 28° E from the site selected for the Boundary Mark would not leave free the whole channel. The British Commissioner believed that the bearing of 28° was only chosen because it was thought that this would possibly allow a direction mark to be placed on the sandbank mentioned above.

The Mixed Commission therefore decided to indicate the direction of the boundary line in the territorial waters on a True bearing of 10° E, this direction being parallel to the mid-channel as indicated on the chart.<sup>65</sup>

3.9. The Mixed Commission established the location for two marks (“A” and “B”) on the ground, about 220 meters apart on a bearing of 10°. The geographical coordinates of the

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<sup>62</sup> See Letter of the Secretary of State for Foreign Affairs to the Netherlands Minister, enclosing Draft Treaty, (4 July 1935), at SCM, Vol. II, Annex 1.

<sup>63</sup> Report on the Inauguration of the Mark at the Northern Terminal of the Boundary Between Surinam and British Guiana, drawn up on 5 July 1936, at MG, Vol. II, Annex 11, at para. 2.

<sup>64</sup> *Id.* at para. 3.

<sup>65</sup> *Id.* at para 4.

seaward of the two marks (mark A) accepted by the Commission were recorded as 5° 59' 53.8" N, 57° 08' 51.5" W.<sup>66</sup> Mark A is currently also known as the 1936 Point. The Mixed Commission also agreed on the construction of a wooden beacon visible from the sea.<sup>67</sup> As the Mixed Commission departed from the original instructions of the Governments of the Netherlands and the United Kingdom, it placed only the most seaward boundary block of Mark A. It was agreed to erect the other markers and the wooden beacon after both Governments had agreed to the changes proposed in the Report.<sup>68</sup> Through a note of 22 November 1937 (No. 2352), the Netherlands Government proposed that the proposed changes be included in the draft treaty.<sup>69</sup> The United Kingdom accepted that proposal through a note of 25 July 1938.<sup>70</sup> The wooden beacon was erected in 1938 at latitude 05° 59' 45.7" N and longitude 57° 08' 52.7" W. The low-water line (springs) was indicated to be about 520 meters away from the beacon on a true bearing of 10° East.<sup>71</sup>

3.10. The location of Mark A and the boundary in the territorial waters were both indicated on a copy of Netherlands chart 222 by the head of the Netherlands Boundary Commission.<sup>72</sup> That copy of chart 222 indicates that the boundary in the territorial waters extended for about 6.5 nautical miles along the azimuth of 10° from the point at which it intersected the low-water line.<sup>73</sup>

3.11. As far as can be ascertained from the copy of chart 222, the seaward terminus of that line was located at its intersection with the three-nautical-mile limit measured from the low-water line on the coast of British Guyana.<sup>74</sup> Thus, the 10° Line not only delimited all of the territorial waters of both states where these overlapped, but also served to limit Guyana's territorial waters from extending east of that line seaward of the area of overlapping territorial waters. This is confirmed by the text of the draft treaty that was submitted by the United Kingdom to the Netherlands in 1939, Article 3 of which provides:

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<sup>66</sup> *Id.* at para. 3.

<sup>67</sup> *Id.* at para. 5.

<sup>68</sup> Letter of C.C. Kayser, Head of the Boundary Settlement Commission, to the Minister of State, Minister for the Colonies (20 June 1937), at SCM, Vol. II, Annex 14.

<sup>69</sup> MG, Vol. II, Annex 62. Note No. 189 of 19 March 1938 of the Netherlands Minister to the Secretary of State of Foreign Affairs contained a correction to the note of 22 November 1937, indicating that the bearing N 10° O" should read N 10° E". See SCM, Vol. II, Annex 2.

<sup>70</sup> Note of British Foreign Office to Count John de Limburg Stirum (25 July 1938), at SCM, Vol. II, Annex 3.

<sup>71</sup> Minute of the Third Conference of the Mixed Commission for the Definition of the Boundary Between British Guiana and Surinam, at SPO Annex 2, at paras. 1 and 2. According to the Minute, Mark B was located "on a true bearing of 10° East from the Beacon and about 30 meters from it." See *id.* at para. 2.

<sup>72</sup> Letter of the Head of the Boundary Commission, C.C. Kayser, to the Minister of State, Minister for the Colonies (17 July 1936), at MG, Vol. II, Annex 41.

<sup>73</sup> Chart 222 with additions to illustrate the work of the Mixed Boundary Commission at the mouth of the Corantijn (boundary mark and the boundary in the territorial waters) sent by the Head of the Netherlands Boundary Commission, Admiral C. C. Kayser, to the Minister for the Colonies on 17 July 1936, at SCM, Vol. II, Annex 13.

<sup>74</sup> Presently, the point of intersection of the 10° Line starting from the 1936 Point and the three-nautical-mile limit of Guyana is located at the point with the geographical coordinates 6° 7' 57" N/ 57° 7' 26" W (WGS84). The distance between the latter point and the point at which the 10° Line intersects the low-water line is 6.5 nautical miles.

The boundary between the territorial waters of Surinam and British Guiana is formed by the prolongation seawards of the line drawn on a bearing of 10° East of True North of the landmark referred to in Article 1(2) above.<sup>75</sup>

3.12. As the above history makes clear, the 10° Line was selected as a boundary for the territorial waters because of, to use present day terminology, a special circumstance, namely the need to guarantee the Netherlands sole responsibility for the care for and supervision of all shipping traffic in the approaches to a river under its sovereignty. Thus, notwithstanding what is argued by Guyana in its Memorial, the determination of the 10° Line was not “motivated solely by considerations of administrative and navigational efficiencies,”<sup>76</sup> but reflected the fundamental considerations underlying the regime of the territorial sea and the principles applicable to its delimitation between states.

3.13. On the other hand, reasons of expediency did play a role in the selection of the 1936 Point. Although it was apparent that a closing line determined on the basis of the then applicable rules of international law was anchored on a point on the western bank of the Corantijn River to the north of the point proposed by the Governor of Suriname, the Netherlands did not insist upon that more seaward point. The Netherlands was interested in safeguarding its navigational interests. The 1936 Point in combination with the 10° Line guaranteed the Netherlands the sole control over the territorial waters in the approaches to the Corantijn River. The 1936 Point did not represent the point at which the river bank changes into the coastline.<sup>77</sup>

#### **B. Suriname’s Approach Regarding the Delimitation of the Continental Shelf and the Exclusive Economic Zone**

3.14. Guyana claims that “the parties have themselves sought over an extended period of time – in excess of forty years – to identify and then agree upon an equidistance line.”<sup>78</sup> Because this thesis is central to Guyana’s argument, it is important to consider what was actually done in practice to identify the equidistance line. As will be shown, it is much less than Guyana suggests. The Netherlands and the United Kingdom carried out some preparatory work to identify an equidistance line for the continental shelf at the end of the 1950s. Suriname and Guyana have never worked jointly to identify the equidistance line, much less agreed upon its use to delimit their maritime boundary.

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<sup>75</sup> MG, Vol. III, Annex 89. Article 1(2) of the draft treaty provides:

The beginning of the left bank of the River Courantyne at the sea shall be the point at which the prolongation of the line joining two concrete marks, on the left bank of the River Courantyne, intersects the shore-line. On this same line which has a true bearing of 10° East of True North, a large triangular wooden beacon, 10 metres high, visible from the sea, has been erected. The approximate position of the more seaward of the two concrete marks is:

Latitude 5° 59' 53.8" North.

Longitude 57° 08' 51.5" West of Greenwich.

<sup>76</sup> MG, para. 3.16, p. 19.

<sup>77</sup> See SPO, paras. 2.11-2.12, pp. 8-9.

<sup>78</sup> MG, para. 9.5, p. 108.

3.15. In the late 1950s the Netherlands and the United Kingdom considered the possibility of delimiting the continental shelf between Suriname and Guyana by application of the equidistance method. At first, a separate agreement on the continental shelf was considered.<sup>79</sup> That approach was soon set aside when it was agreed that the delimitation of the continental shelf would be one of the elements of a treaty settling all of the land and maritime boundary issues between Suriname and British Guiana. As will be further detailed below, the possibility of delimiting the continental shelf by application of the equidistance method was shortly thereafter completely abandoned.

3.16. The records that exist relating to the attempts to identify the course of the equidistance line show that this exercise was hindered by the absence of reliable data on the location of the low-water line. Internal correspondence between British officials in 1958 and 1959 shows that the use of different charts resulted in various different equidistance lines.<sup>80</sup> On more than one occasion, Commander Kennedy of the British Hydrographic Office pointed to the unreliability of the existing information on the baselines from which an equidistance line for the continental shelf had to be determined. In a letter of 15 January 1959 to Mr. Scarlett of the Colonial Office, Commander Kennedy observed:

you will remember when dealing with the limits of the oil concession, we had considerable difficulty in establishing a true median line in the area. This was on account of poor charting, divergences in the shape of the coastline, low-water lines etc. and the smallness of the scale of the various charts and maps which were available. This state of affairs still exists. You will recall that four so-called median lines were then drawn and a solution was arrived at by drawing a further line roughly through the middle of these as far as the 25 fathom depth contour. It would seem probable that negotiation on a technical level will have to take place before the boundary across the shelf is established and that if the boundary is to conform at all closely to a true median line, then the first thing to be agreed will have to be which chart is to be used.<sup>81</sup>

In a letter to Miss J.J. d'A Collings of the Foreign Office of 17 August 1959, Commander Kennedy observed:

All charting of the locality near the coastline north of 6° N latitude is extremely poor and little reliance should be placed on the charts there.<sup>82</sup>

3.17. The Netherlands authorities were equally aware of the unreliability of the data concerning the baselines of Suriname and British Guiana. In an exercise carried out by the Netherlands Hydrographic Office to identify the course of an equidistance line, part of the

<sup>79</sup> *Aide-Mémoire* from the Netherlands to the United Kingdom (6 August 1958), at MG, Vol. II, Annex 66; Diplomatic Note from the United Kingdom to the Netherlands (November 1958), at MG, Vol. II, Annex 67.

<sup>80</sup> See, e.g., Letter of C.M. Anderson of the Foreign Office to E.W.A. Scarlett of the Colonial Office (9 September 1958), at SCM, Vol. II, Annex 17, and Letter of R.H. Kennedy of the Hydrographic Office to E.W.A. Scarlett of the Colonial Office (15 January 1959), at MG Vol. II, Annex 24.

<sup>81</sup> Letter of R.H. Kennedy of the Hydrographic Office to E.W.A. Scarlett of the Colonial Office (15 January 1959), at MG Vol. II, Annex 24.

<sup>82</sup> Letter of R.H. Kennedy of the Hydrographic Office to Miss J.J. d'A Collings of the Foreign Office (17 August 1959), at SPO Annex 23.

baseline that was employed was a fictitious line, as there was no information as to the actual location of the baseline.<sup>83</sup> Commenting on the work of the Hydrographic Office, the Netherlands Minister of Foreign Affairs observed:

It will only be possible to chart the actual course of the boundary line, after the location of a number of points will have been established during negotiations to be conducted with the British Government, and after, to the extent necessary, an understanding will have been formed concerning certain geographical details by observation on the ground. Then, the boundary line will be established in common consultations with the concerned British authorities.<sup>84</sup>

3.18. The Netherlands and the United Kingdom were thus both aware that the unreliable data about the coastline made it impossible to define the equidistance line with any confidence and that before they could proceed, there had to be further consultations and, as the Netherlands indicated, observations on the ground. The fact that no such consultations or observations took place is proof that the initial proposal to define the continental shelf boundary between Suriname and British Guiana by application of the equidistance method was abandoned even before there was agreement on relevant basepoints to define such a line. There certainly was no agreement on the line itself.

3.19. Another development at the end of the 1950s, to which Guyana's Memorial gives little attention, was that the Government of Suriname initiated a policy for the exploration and exploitation of the natural resources of its continental shelf. Suriname's consistent position has been that the western limit of the continental shelf license area was never bounded by an equidistance line.

3.20. The earliest offshore petroleum arrangements of Suriname were with the Colmar Company. Those arrangements began in 1957. A law of Suriname concerning a concession for oil exploration enacted in January 1957 included the continental shelf and defined the western limit of the concession area by reference to the western boundary of Suriname.<sup>85</sup>

3.21. In 1964 Suriname authorized amendments to the agreement with the Colmar Company, which resulted in an amended agreement in 1965 and clarified the western limit of the Colmar concession as the 10° Line in respect of the territorial sea and the continental shelf.<sup>86</sup> Already in 1962, the 10° Line had been included in a Netherlands draft treaty proposed to the United Kingdom concerning the land and maritime boundaries between Suriname and British Guiana. As discussed in Suriname's Memorandum on Preliminary Objections and detailed in Chapter 5 in this Counter-Memorial, Suriname has consistently applied the 10° Line as the western limit

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<sup>83</sup> A chart depicting various lines prepared by the Netherlands Hydrographic Office that the Netherlands submitted to the United Kingdom in June 1959 indicates that most of the low-water line of British Guiana on that chart is a fictitious low-water line (in Dutch "gefingeerde laagwaterlijn"). See SPO Figure 1, following SPO p. 10.

<sup>84</sup> Letter of the Minister of Foreign Affairs of the Netherlands to the Plenipotentiary Minister of Suriname (3 March 1959), at SCM, Vol. II, Annex 15.

<sup>85</sup> Law No. 15 (26 January 1957), at SPO Annex 11.

<sup>86</sup> Law No. 86 (13 October 1964), at SCM, Vol. II, Annex 16. For more on the Colmar concession, see *infra* Chapter 5, Section I.

of its continental shelf in its oil concession practice.<sup>87</sup> For a discussion of Suriname's practice with regard to exercise of its fisheries jurisdiction, see *infra* Chapter 5, Section IV, and SPO, footnote 88.

3.22. The laws of Suriname currently define the extent of the continental shelf of Suriname as “the seabed and the subsoil of the seabed outside the territorial sea up to the outer edge of the continental boundary, or to a distance of 200 nautical miles from the baseline from which the breadth of the territorial sea is measured in the event that the continental boundary lies within 200 nautical miles.”<sup>88</sup>

3.23. Suriname established a 200-nautical-mile exclusive economic zone and extended its territorial sea from three to 12 nautical miles in 1978.<sup>89</sup> That legislation is also discussed in the Memorial of Guyana. Among other things, Guyana points out that the 1978 Law “did not, however, purport to define the lateral boundaries of the territorial sea or the EEZ, or to identify the principles according to which such boundaries should be determined.”<sup>90</sup>

3.24. Guyana seeks to exploit the absence of a reference to lateral limits in Suriname's 1978 Law by misrepresenting the contents of the explanatory memorandum with respect to the Bill of the 1978 Law. In particular, Guyana asserts that the explanatory memorandum:

referred explicitly to the 1958 Geneva Territorial Sea and Continental Shelf Conventions, and acknowledged that Suriname, was bound by both Conventions as a result of the Netherlands adherence. The *Explanatory Memorandum* also noted that “the law of the sea has been governed for years by customary international law” and cited the 1958 Geneva Continental Shelf Convention, Article 6(2) of which provided that in the absence of agreement the “boundary shall be determined by application of the principle of equidistance”.<sup>91</sup>

Apart from the fact that Article 6(2) of the Convention on the Continental Shelf not only refers to the absence of agreement but also contains the clause “and unless another boundary line is justified by special circumstances,” the explanatory memorandum, contrary to Guyana's assertion, does not make any reference to Article 6(2) of the Convention on the Continental Shelf. In addition, the context in which the reference to the Geneva Conventions is placed in the explanatory memorandum makes it clear that Suriname after independence did not become a party to the Geneva Conventions.<sup>92</sup> As discussed above, neither did Guyana.<sup>93</sup>

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<sup>87</sup> See SPO, para. 5.7. See also *infra* Chapter 5.

<sup>88</sup> Decree E-58 of 8 May 1986 (Mining Decree), at SCM, Vol. III, Annex 54. In connection with that definition, the Explanatory Memorandum to the Decree makes reference to Article 76 of the Law of the Sea Convention. *Id.*

<sup>89</sup> Law No. 26 (14 April 1978), at MG, Vol. III, Annex 104 concerned the extension of the territorial sea of the Republic of Suriname and the establishment of the economic zone adjacent thereto.

<sup>90</sup> MG, para. 4.13, p. 43. This assertion is repeated at MG, para. 7.19, p. 83.

<sup>91</sup> MG, para. 4.13, p. 43.

<sup>92</sup> MG, Vol. III, Annex 103.

<sup>93</sup> See *supra* para 2.17.



3.25. What the explanatory memorandum to the bill for the 1978 Law of Suriname and the 1978 Law itself do indicate is that Suriname took cognizance of the developments at the Third United Nations Conference on the Law of the Sea. In 1978, the Conference had reached general agreement on the extension of the outer limit of the territorial sea to 12 nautical miles and the acceptance of the 200-nautical-mile exclusive economic zone. In 1978 no agreement had yet been reached on the provisions concerning the delimitation of the exclusive economic zone and the continental shelf. The debate on that subject was dominated by the opposition between two groups, one of which supported equidistance and the other equitable principles. While Guyana was a member of the former group, Suriname was a member of the latter group.<sup>94</sup>

3.26. Guyana is correct that the 1978 Law of Suriname on its territorial sea and exclusive economic zone did not define the lateral limits of those zones. However, the implication that as a consequence these lateral limits remained undefined is incorrect. As has been shown above, Suriname consistently applied the 10° Line to delimit its maritime zones with Guyana. Upon the independence of Suriname, that position was formally confirmed by the Kingdom of the Netherlands, employing a formulation that indicates that the 10° Line was the limit of all existing or future maritime jurisdiction of Suriname. On 25 November 1975, the day that Suriname attained its independence, the Prime Minister of the Netherlands wrote a letter to the Prime Minister of the Republic of Suriname defining the territory of Suriname. The western boundary was defined as follows:

The western boundary is formed by the low-water line on the left bank of the Corantijn, from origin to mouth. The boundary therefore runs from a point to be further determined on the southern boundary to the origin of the Upper-Corantijn, next from this origin along the low-water line on the left bank of the Upper-Corantijn and the Corantijn up to the point where the river bank changes into the coastline and from this point along a line with a direction of 10° east of True North through the territorial sea, without prejudice to the rights which according to international law belong to the sovereign Republic of Suriname as a coastal State in the part of the sea area delimited by the continuation of this line.<sup>95</sup>

Thus this 10° Line has clearly been defined by the Netherlands and Suriname as marking Suriname's boundary with Guyana in both the territorial sea of Suriname and in the maritime zones beyond the territorial sea. The formulation employed in the letter indicates that the claim is to an all-purpose maritime boundary, *i.e.*, it is also the boundary for the continental shelf and the exclusive economic zone.<sup>96</sup>

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<sup>94</sup> Guyana was among the sponsors of the original proposals made by the group supporting equidistance. *See* Third United Nations Conference on the Law of the Sea ("UNCLOS III"), Vol. IX, Doc. NG7/2 (20 April 1978), at SCM, Vol. III, Annex 70. The original proposal was followed by two revisions issued as respectively UNCLOS III Doc. NG7/2/Rev.1 (25 March 1980) and UNCLOS III NG7/2/Rev.2 (28 March 1980). *See* SCM, Vol. III, Annex 70. Suriname was a co-sponsor of UNCLOS III Doc. NG7/10/Rev.2 (28 March 1980) submitted by the group supporting equitable principles. *See id.*

<sup>95</sup> The full text of this letter with an English translation is at MG, Vol. II, Annex 46.

<sup>96</sup> In its Memorial Guyana erroneously asserts that the 1975 letter "did not state that the N10E maritime boundary line extended beyond the limit of the territorial sea into the continental shelf area." *See* MG, para. 4.11, pp. 41-42 (emphasis removed).

## II. The Evolution of Guyana's Position

3.27. This section reviews the evolution of Guyana's position on the maritime boundary. In the Memorial, Guyana pays particular attention to various lines that it identifies as "historical equidistance lines." This section includes a discussion of how that terminology is employed and assesses whether these "historical equidistance lines," which are neither "historical" nor "equidistant," have any relevance for the delimitation of the maritime boundary between Suriname and Guyana.

### A. Acceptance of the 10° Line for the Territorial Waters Boundary

3.28. The 1939 draft agreement prepared by the United Kingdom<sup>97</sup> took into account the work of the Mixed Netherlands-United Kingdom Boundary Commission, which had completed its work in 1938. The Commissioners had proposed that the boundary in the territorial waters should follow the 10° Line that was identified in combination with the 1936 Point. The British Government accepted that the 10° Line was the territorial waters boundary and only abandoned that acceptance in November 1965.

### B. The Combined 10° Line/Equidistance Line Position

3.29. At the end of the 1950s, the United Kingdom considered the delimitation of the continental shelf between Suriname and British Guiana. The United Kingdom opted to delimit the continental shelf by the equidistance method but at the same time maintained the 10° Line starting from the 1936 Point as the boundary for the territorial sea between Suriname and British Guiana. For instance, in a letter to Mr. Scarlett of the Colonial Office Commander Kennedy of the Hydrographic Office observed:

the almost agreed boundary through the territorial seas (010 degrees from the concrete markers) is not drawn according to median line principles and so the boundary across the continental shelf cannot automatically continue for the intersection of the 010 degree line with the limit of the territorial sea is at a different point from that of the intersection of the median line with that limit. However there were strong reasons in 1936 why the line through the territorial sea should have run in an 010 degree direction, these, no doubt, the Dutch would still uphold. We can continue to abide, however, by the principles of the Geneva Convention of 1958 (Territorial Sea, Article 12 and Continental Shelf, Article 6) by treating this matter as "justified by special circumstances" and obtain agreement both to the use of the 010 degree line to the limit of 3 miles from the low-water mark, and thence to a point on an agreed line based on median line principles.<sup>98</sup>

Interestingly, excerpts from this same letter are also used by Guyana in its Memorial. Guyana seems to consider it of particular relevance that Commander Kennedy observed that the 10° Line was not drawn according to median line principles.<sup>99</sup> However, Guyana fails to quote the

<sup>97</sup> The draft agreement can be found at MG, Vol. III, Annex 89.

<sup>98</sup> Letter of R.H. Kennedy of the Hydrographic Office to E.W.A. Scarlett of the Colonial Office (15 January, 1959), at MG, Vol. II, Annex 24.

<sup>99</sup> MG, para. 9.18, p. 114.

passage from Commander Kennedy's letter in which he indicated that the use of the 10° Line was justified by reference to the special circumstances clause contained in both Article 12 of the Convention on the Territorial Sea and the Contiguous Zone and in Article 6 of the Convention on the Continental Shelf.<sup>100</sup> Thus, Guyana's criticism that the 10° Line is not an equidistance line is beside the point.<sup>101</sup> Even Commander Kennedy recognized that the 10° Line conformed with the 1958 Conventions because it reflected the special circumstances pertaining to the maritime delimitation between Suriname and British Guiana. Suriname has never argued that the 10° Line is an equidistance line, but has certainly indicated the presence of circumstances that justify use of the 10° Line as a maritime boundary.<sup>102</sup>

3.30. Guyana also ignores Commander Kennedy's proposal on how to link the 10° Line territorial waters boundary to the proposed continental shelf boundary. Commander Kennedy's letter suggested: "use of the 010 degree line to the limit of 3 miles from the low-water mark, and thence to a point on an agreed line based on median line principles."<sup>103</sup> His language indicates that he proposed to draw a line connecting the 10° Line to "an agreed line based on median line principles."<sup>104</sup> By definition, such a connecting line could not be an equidistance line and could have taken any number of forms. Apart from the unreliable data on baselines noted above,<sup>105</sup> identification of such a connecting line was a further difficulty the Netherlands and the United Kingdom would have had to address had they pursued a continental shelf delimitation employing the equidistance method. There is, of course, no evidence that they did so.

### C. Disavowal of the 10° Line for the Territorial Sea Boundary

3.31. In 1965, the United Kingdom presented a new draft boundary treaty to the Netherlands.<sup>106</sup> Contrary to all previous British draft treaties, that draft treaty did not adopt the 10° Line to delimit the territorial sea between Suriname and British Guiana. Instead, Article VII of the 1965 draft treaty provided:

(1) The boundary between the territorial seas, the contiguous zones and the continental shelves, which appertain to British Guiana and Surinam respectively, shall be based on a line formed by the prolongation of the line joining two concrete marks (the positions of which are given in paragraph 2 of this Article) until it intersects the line of mean low-water spring tide level existing at the date of the present Treaty (the position of the point of intersection being ..... ) and then drawn in accordance with the principle of equidistance from the nearest points of the base lines from

<sup>100</sup> Letter of R.H. Kennedy of the Hydrographic Office to E.W.A. Scarlett of the Colonial Office (15 January, 1959), at MG, Vol. II, Annex 24.

<sup>101</sup> Apart from MG, para. 9.18, p. 114, Guyana notes that the 10° Line cannot be justified as an equidistance line numerous times. See, e.g., MG, para. 3.50, p. 36; para. 8.56, p. 105; para. 9.19, p. 116; para. 9.32, p. 119.

<sup>102</sup> In other sections of this Counter-Memorial, those circumstances are described in detail. See e.g., *infra* paras. 3.2-3.26 and *supra* Chapter 6, Section IV.

<sup>103</sup> Letter of R.H. Kennedy of the Hydrographic Office to E.W.A. Scarlett of the Colonial Office (15 January, 1959), at MG, Vol. II, Annex 24.

<sup>104</sup> *Id.*

<sup>105</sup> See *supra* paras. 3.16-3.18.

<sup>106</sup> MG, Vol. III, Annex 92.

which the territorial sea of British Guiana and Surinam respectively is measured.

(2) The two concrete marks mentioned in paragraph (1) of this Article are situated on the left bank of the River Corentyne, the approximate position of the seaward of the two marks being Latitude 5° 59' 53.8" North, Longitude 57° 08' 51.5" West of Greenwich, and the line joining the two marks having a true bearing 10° East of true North.<sup>107</sup>

In its Memorial, Guyana provided the following explanation for this change of approach:

The United Kingdom explained the change on the grounds that the original rationale put forward by the Netherlands for a N10E line in the territorial sea was no longer applicable. Specifically, the western channel of the Corentyne was no longer used (or usable) by commercial ships, which were larger and heavier than the ones that operated in the river mouth in the 1930s. Accordingly, there was no need for the supervision or maintenance of that channel, the factors which had been cited by the Netherlands in 1936 as a justification for the N10E boundary line.<sup>108</sup>

3.32. Guyana's explanation calls for a number of comments. The Memorial states that the United Kingdom "explained" the change of position, suggesting that the "explanation" was given by the United Kingdom to the Netherlands. However, the British correspondence that communicated the 1965 draft treaty did not contain any such "explanation"; it only noted that the amendments to an earlier British draft were made:

to provide for the division of the territorial sea, the contiguous zone and the continental shelf along the median line; this would accord with the conclusion of the 1958 Conference on the Law of the Sea and with settlements of a similar nature concluded since then.<sup>109</sup>

Paragraph 3.45 of Guyana's Memorial does not offer any evidence that the United Kingdom explained to the Netherlands the reasons for its rejection of the 10° Line, and Suriname knows of none. The document to which Guyana refers in paragraph 3.45 does not contain the explanation Guyana attributes to the United Kingdom.<sup>110</sup> The actual explanation for the United Kingdom's disavowal of the 10° Line may be a different one altogether. The reference in the British *Note Verbale* of 29 November 1965 to "settlements of a similar nature concluded since" the 1958 Geneva Conference on the Law of the Sea would rather seem to suggest that the United Kingdom, confronted with the 10° Line set out in the Netherlands's 1962 proposal, was trying to exploit the fact that in the North Sea, the Netherlands was strongly committed to the equidistance method, which was opposed by Germany, and that the Netherlands and the

<sup>107</sup> *Id.*

<sup>108</sup> MG, para. 3.45, pp. 32-33.

<sup>109</sup> *Note Verbale* No. A 1082/21 of 29 November 1965, at SPO Annex 3.

<sup>110</sup> That is a letter from the Governor of British Guiana Sir Ralph Grey to J.W. Stacpoole of the Colonial Office of 3 May 1963. See MG, Vol. II, Annex 30. The letter quotes a commentary by Mr. Shahabuddeen that "the median line method of dividing territorial waters would seem to result in a boundary more favourable to us than the one proposed by the Dutch". The letter does refer to the use of both channels of the river, but in a passage that is unrelated to the question of the boundary in the territorial sea.

United Kingdom had, in October 1965, signed an agreement on the delimitation of their continental shelf in the North Sea employing the equidistance method. Thus, the British Government seemed to hope that it could convince the Netherlands to abandon the 10° Line by referring to the Netherlands's European interests.<sup>111</sup>

3.33. Apart from the fact that the British explanation for abandoning the 10° Line in 1965 that Guyana now advances in its Memorial was never communicated to the Netherlands, that explanation also fails to appreciate the continuing validity of navigational interests as a special circumstance in the territorial sea. In fact, control over the approaches to the Corantijn River is not only relevant with respect to large commercial ships but control over small vessels and vessels with shallow draught is also important. In many instances, small vessels, not large commercial vessels, are the ones that engage in the kind of activities that threaten the peace, good order and security of the coastal state. Second, the responsibility for navigation in the approaches to the Corantijn River may not only require measures in the navigational channel itself but also in the areas directly bordering on the approaches. All these interests are safeguarded by the 10° Line of Suriname but ignored if the 34° line of Guyana were to be adopted.

3.34. Guyana's Memorial at paragraph 3.46 also states that in 1965:

The United Kingdom believed that the Netherlands was likely to agree that the maritime boundary in the territorial sea and the continental shelf should be based on equidistance (as the 1958 Conventions indicated) and would be "anxious to conclude an agreement with [the United Kingdom] rather than have to negotiate with [British Guiana]" following independence.<sup>112</sup>

This is another example of Guyana's incorrect reading of the historical record. The document to which the Memorial refers, a letter of instructions from G.S. Richie, of the Hydrographic Office, to A.H. Cooper, a captain of the British Royal Navy, does not express a belief that the Netherlands would likely agree on a delimitation in the territorial sea and the continental shelf based on equidistance.<sup>113</sup> The author of the document apparently was not even aware of a British proposal employing the equidistance method to delimit the territorial sea, as he refers to the British proposal using the 10° Line to delimit the territorial sea.<sup>114</sup> In any case, the British offer to delimit all of the maritime boundary based on equidistance did not provide a good starting point for reaching a negotiated settlement. Because of the new provision on the delimitation of maritime zones, the 1965 draft treaty was even more disadvantageous to Suriname than the draft treaty presented by the United Kingdom in 1961. In a note of 10 August 1962, the Government of the United Kingdom was notified that the Government of Suriname considered that the 1961 draft treaty did not provide a sufficient basis for fruitful negotiations.<sup>115</sup> There thus is no basis for the suggestion of Guyana that the Netherlands was

<sup>111</sup> That this is the real explanation for the change in the British position is also suggested by MG, para. 3.47, p. 34.

<sup>112</sup> MG, para. 3.46, p. 33.

<sup>113</sup> MG, Vol. II, Annex 33.

<sup>114</sup> *Ibid.*

<sup>115</sup> Letter of A. Bentinck, Royal Netherlands Embassy, to The Earl of Home (10 August 1962), at SCM, Vol. II, Annex 4. In addition, both British drafts provided that the land boundary followed the course of the Cutari

likely to agree to the 1965 proposal of the United Kingdom to delimit the territorial sea and continental shelf in accordance with the equidistance method.

3.35. The Government of the Kingdom of the Netherlands reacted to the British note presenting the 1965 draft treaty through a *Note Verbale* of 3 February 1966.<sup>116</sup> With respect to the terminus of the land boundary and the maritime boundary, the note observed:

Contrary to what was stated on this subject in the draft treaty submitted by the United Kingdom, the Government of the Kingdom of the Netherlands consider that the sea-boundary between Surinam and British Guiana should run from the West bank (left bank) of the Corentyne at its mouth, across the territorial sea and the continental shelf with a bearing 10° East of the true North.<sup>117</sup>

#### **D. Guyana's Adoption of the 34° Line for the Continental Shelf and an Equidistance Line for the Exclusive Economic Zone**

3.36. Only in 1966, during the Marlborough House talks, did Guyana for the first time confront Suriname with the position that the boundary of the continental shelf should follow an azimuth of 34°. Guyana did not offer a rationale for its position, it simply asserted, without support, that a boundary drawn in accordance with the equidistance method means a line of 33 to 34 degrees.<sup>118</sup> The report of the Marlborough House meeting reveals that in 1966 Guyana did not make any allusion to its oil concession practice, although Guyana now asserts that that practice is the main justification for its claim that the 34° line constitutes the maritime boundary between Suriname and Guyana. The relationship of the 34° line to the equidistance line and the significance this has for the delimitation between Suriname and Guyana are further discussed in Chapter 3, Section II, Part F below.

3.37. After 1966, the practice of Guyana in respect of the eastern boundary of its maritime zones with Suriname has been far from uniform. First, the 25 February 1991 Memorandum of Understanding ("MOU") on modalities for treatment of the offshore area of overlap between Guyana and Suriname as it relates to the petroleum agreement between the Government of Guyana and the Lasmo/BHP Consortium signed on 26 August 1988, defines the area of overlap as "the Area bounded by the lines North 10° East and North 30° East."<sup>119</sup> The definition of the eastern limit of the area of overlap along the 30° azimuth obviously differs significantly from the 34° line.

3.38. Second, Guyana's practice in respect of the eastern limit of its 200-nautical-mile zone is wholly at variance with the 34° line. All of that practice points to the use of the equidistance line as the limit of the Guyanese exclusive economic zone. That line is the actual equidistance line, *i.e.*, a line every point of which is equidistant from the nearest points on the baselines

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and not the Upper-Corantijn, whereas it was the position of the Kingdom of the Netherlands and Suriname that the Upper-Corantijn constituted the boundary.

<sup>116</sup> MG, Vol. II, Annex 68.

<sup>117</sup> *Ibid.*

<sup>118</sup> Report of the discussions held between Suriname and Guyana at Marlborough House, London, England on 23 June 1966, commencing at 10.30 a.m. SPO Annex 17 at p. 4 of the English translation.

<sup>119</sup> MG, Vol. III, Annex 94. Guyana asserts that the 30° figure is an error, MG, at note 119, p. 55, but it offers no support for that assertion.

from which the breadth of the territorial sea is measured. It has no relation to Guyana's so-called "historical equidistance line" presented in its Memorial.<sup>120</sup>

3.39. As Guyana sets out in paragraph 4.12 of the Memorial, in 1977 Guyana adopted the Maritime Boundaries Act 1977.<sup>121</sup> The Act extended the territorial sea to 12 nautical miles and provided for the establishment of a 200-nautical-mile exclusive economic zone. The Act contains the following provision on the delimitation of Guyana's maritime boundaries:

The maritime boundaries between Guyana and any State whose coast is adjacent to that of Guyana in regard to their respective territorial seas, continental shelves, exclusive economic zones, fishery and other maritime zones shall be determined by agreement between Guyana and such States and pending such agreement shall not extend beyond the line every point of which is equidistant from the nearest point on the baseline from which the breadth of the territorial sea of Guyana and such State is measured.<sup>122</sup>

According to that provision, in the absence of agreement all maritime zones of Guyana are bounded by the equidistance line whenever they overlap with any adjacent state, that is, Suriname and Venezuela. The definition of that line indicates that it is to be determined according to the methodology that is generally applied to define an equidistance line. No provision is made in the 1977 Act for using historical baselines or adopting a lateral limit following an azimuth. A comparison of the equidistance line between Suriname and Guyana defined in accordance with the principles contained in section 35(1) of Guyana's own Maritime Boundaries Act 1977 to the 34° line claimed in this proceeding shows that the latter has no similarity whatsoever to the former. *See* Figure 3.

3.40. Moreover, Guyana has employed an equidistance line to define the extent of its fishery zone. As Guyana indicates in the Memorial:

Under Article 36(1) of the 1977 [Maritime Boundaries] Act, the Minister of Agriculture, who is responsible for Lands and Surveys, caused a special chart to be created which depicts Guyana's Fishery Zone.<sup>123</sup>

Guyana euphemistically states that "[t]he Zone depicted in the chart lies to the west of the N34E line that is the subject of this arbitration . . . ."<sup>124</sup> It certainly does. The chart is reproduced at Plate 35 of Volume 5 of the Memorial of Guyana. A comparison of the line shown on that chart with the equidistance line and the 34° line shows that the line on the chart broadly coincides with the equidistance line and has no relation to the 34° line. *See* Figure 4.<sup>125</sup> The chart showing Guyana's fishing zones has also been reproduced in a number

<sup>120</sup> For a discussion of the "historical equidistance lines" presented by Guyana, *see infra* Chapter 3, Section II Parts E-F.

<sup>121</sup> MG, Vol. III, Annex 99.

<sup>122</sup> *Id.* at section 35(1).

<sup>123</sup> MG, para. 4.45, pp. 59-60.

<sup>124</sup> MG, para. 4.45, p. 60.

<sup>125</sup> The "Fishery Zone 'Eastern Boundary'" line shown at Figures 4 and 5 was derived by georeferencing the map at Plate 35 (MG, Vol. V), digitizing the eastern boundary depicted there and plotting that digitized line on the map at Figures 4 and 5.

of National Reports of Guyana presented to the Western Central Atlantic Fishery Commission of the Food and Agriculture Organization of the United Nations.<sup>126</sup> Guyana has not offered any explanation for the discrepancy between the line it uses to delimit its fishery zone and the strict application of the principles contained in its own legislation, to say nothing about the discrepancy with the 34° line claimed in this proceeding.

3.41. The information Guyana provides in its Memorial on fisheries enforcement activities confirms that the 34° line it claims here has never been used by Guyana to define the lateral limit of its 200-nautical-mile zone. Figure 5 presents the information on arrests of fishing vessels that was provided by Guyana in Annex 196 contained in Volume IV of its Memorial. The Figure shows clearly that Guyana has never exercised fisheries enforcement jurisdiction in the area between its own fishery line and the claimed 34° line.<sup>127</sup>

3.42. Guyana's case for the 34° line is almost exclusively built on its oil and gas practice. In Guyana's perspective, the delimitation of the exclusive economic zone seems a mere afterthought to the delimitation of the continental shelf. In just three paragraphs of Chapter 9 of the Memorial (paragraphs 9.43-9.45) Guyana deals with the delimitation of the exclusive economic zone. This is in stark contrast to the more than 40 paragraphs of Chapter 9, Section II dealing with the delimitation of the continental shelf. As far as the exclusive economic zone is concerned, Guyana merely observes that the regimes of the continental shelf and the exclusive economic zone overlap with respect to hydrocarbons in the subsoil and that there is a considerable and fairly representative body of practice to determine one boundary for both the continental shelf and the exclusive economic zone.<sup>128</sup> As the above review of Guyana's legislation and its fishing practice shows, Guyana itself did not believe that these arguments justified an exclusive economic zone along the 34° line until it brought this case against Suriname. Prior to the bringing of this case, the area of overlap of the exclusive economic zones of Suriname and Guyana was bounded by Suriname's 10° Line and an equidistance line, not a 34° line.<sup>129</sup>

#### **E. The Various Purported Equidistance Lines Employed in Guyana's Memorial**

3.43. The Memorial of Guyana identifies various equidistance lines between Suriname and Guyana and addresses them in considerable detail. Guyana tries to tie its 34° line to those equidistance lines. In view of the importance Guyana attaches to those various equidistance lines, this section scrutinizes what is said by Guyana in that connection.

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<sup>126</sup> See, e.g., United Nations Food and Agriculture Organization, "National Report of Guyana", Western Central Atlantic Fishery Commission, National Reports Presented ("FAO") and Stock Assessment Reports Prepared at the CFRAMP/FAO/DANIDA Stock Assessment Workshop on the Shrimp and Groundfish Fisheries of the Guiana-Brazil Shelf, Port-of Spain, Trinidad and Tobago, 7-18 April 1997, FAO Fisheries Report 600, FIRM/R600, at SCM, Vol. III, Annex 64.

<sup>127</sup> In addition, it shows that in exercising fisheries enforcement, Guyana has generally respected the 10° Line of Suriname.

<sup>128</sup> MG, paras 9.43 and 9.45, pp. 122-123.

<sup>129</sup> Guyana's call for a single maritime boundary cannot be supported by reliance on purported oil practice alone. As discussed in Chapter 4, *supra*, in a case calling for a single maritime boundary, there is no basis for an emphasis on criteria that pertain to the seabed rather than the water column, or *vice versa*. See *infra*, Chapter 4, Section I, Part B.



Figure 3

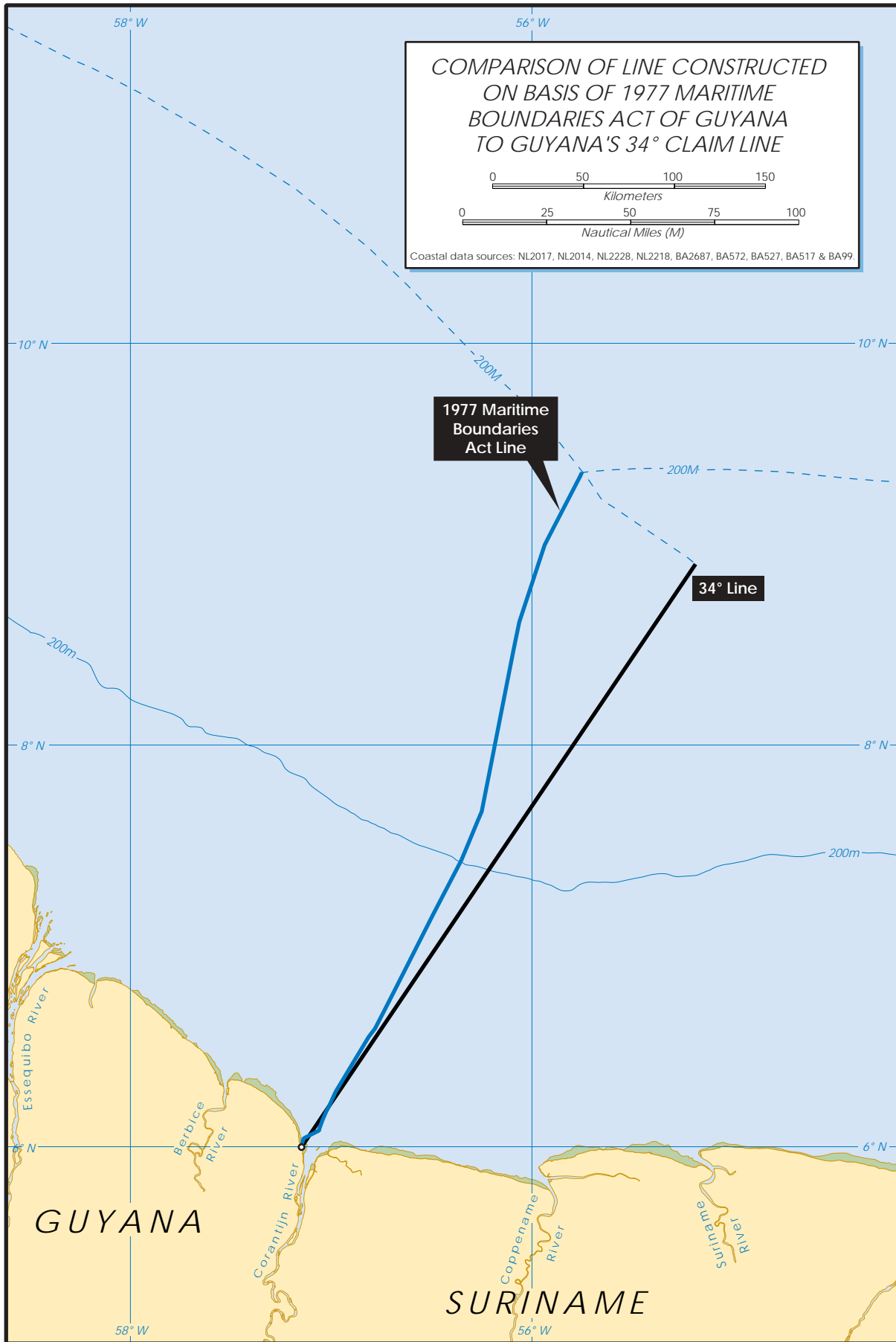


Figure 4

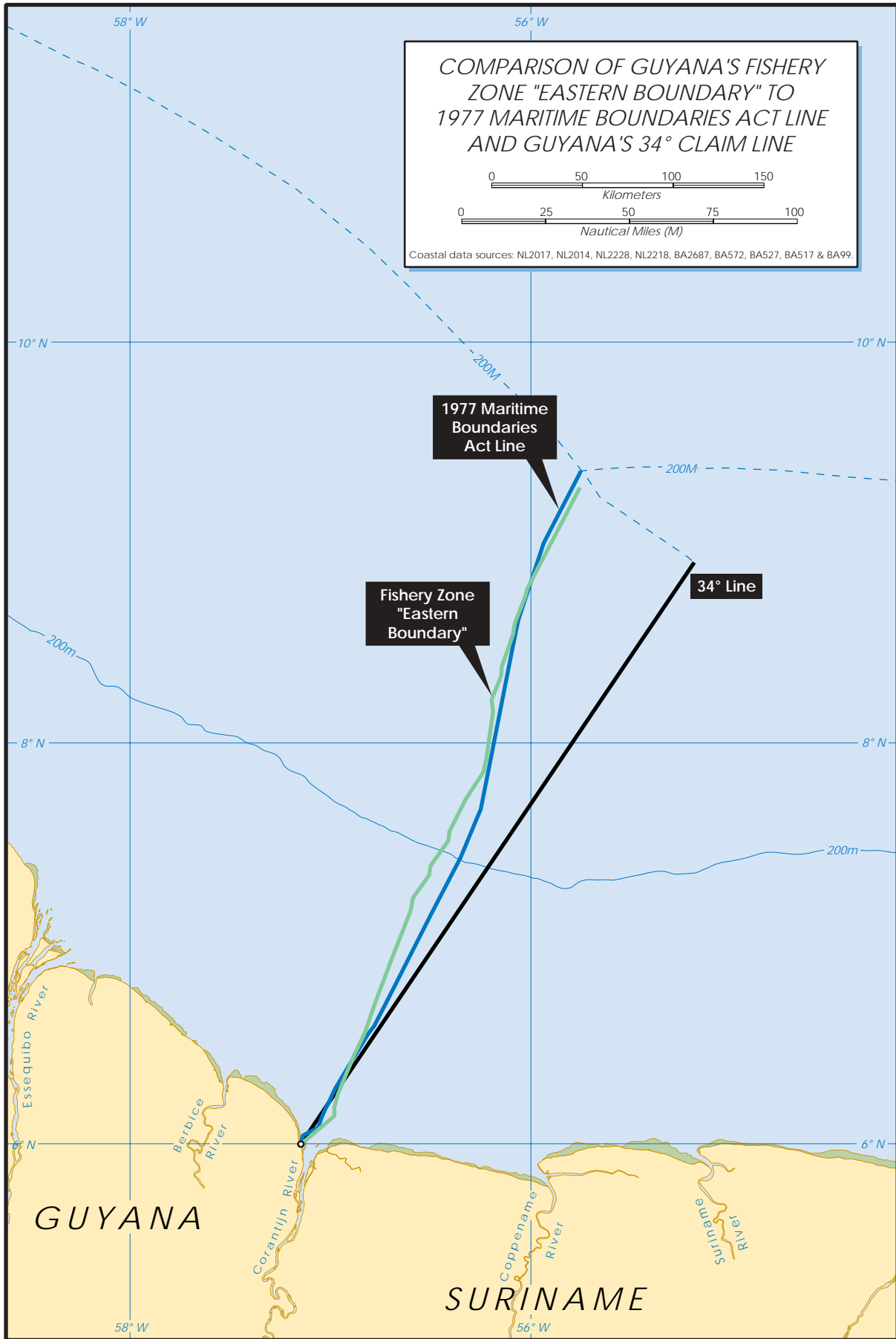
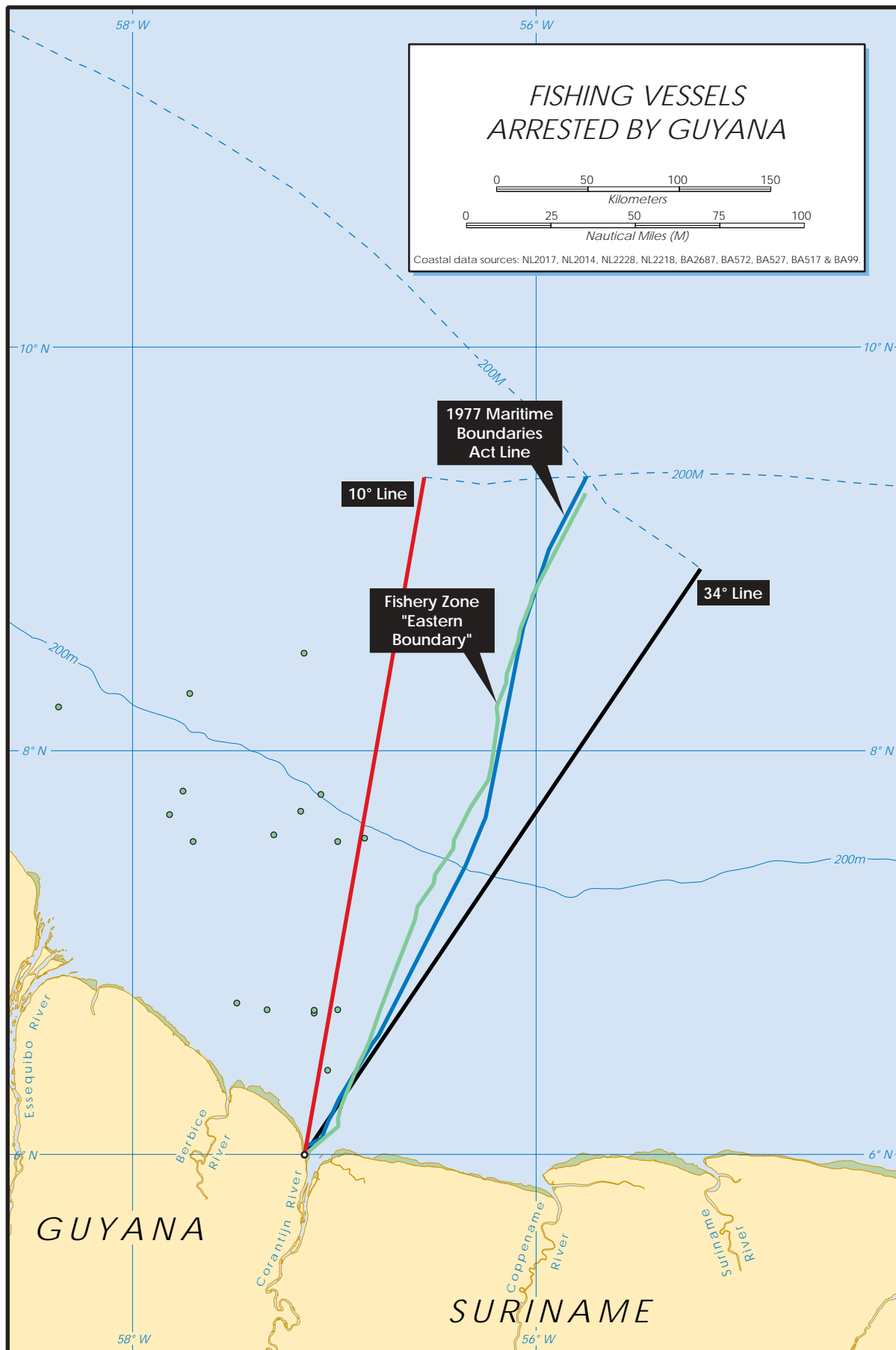


Figure 5



3.44. A first point concerns the significance that has been accorded by the Parties to the equidistance method. Guyana asserts that:

this appears to be the first case before an international court or tribunal in which the parties have themselves sought over an extended period of time - in excess of forty years - to identify and then agree upon an equidistance line. It is a central part of Guyana's case that those efforts and related conduct should be taken into account in achieving an equitable solution.<sup>130</sup>

How Guyana can make the claim that the Parties have sought over a period of more than 40 years to identify and then agree upon an equidistance line is incomprehensible. It is simply not true. The record shows that at the end of the 1950s, the United Kingdom and the Netherlands considered the possibility of identifying an equidistance line to delimit the continental shelf. Those attempts showed that there were considerable difficulties involved in identifying an equidistance line due to, *inter alia*, the limited and unreliable data on baselines.<sup>131</sup> Accordingly, further attempts to "identify and then agree upon an equidistance line" were never undertaken.<sup>132</sup> Suriname has consistently taken the position that the 10° Line is the maritime boundary between Suriname and Guyana.<sup>133</sup> In other words, the position of Suriname has been and remains that there are circumstances that make the equidistance method inapplicable because it does not lead to an equitable solution. There were only one or two years in which the Netherlands and the United Kingdom separately considered the effects of the equidistance method for the delimitation of the continental shelf, but not the territorial sea, between Suriname and British Guiana. There is no way that that short time can be turned into the 40-year period referred to by Guyana in its Memorial. Thus, what in Guyana's own words is "a central part of Guyana's case"<sup>134</sup> has no factual basis whatsoever.

3.45. In Chapters 8 and 9 of its Memorial, Guyana presents three equidistance lines. In Chapter 8 Guyana focuses on equidistance in the territorial sea and in Chapter 9 Guyana looks at equidistance within the 200-nautical-mile zone. The three lines were calculated by Guyana on the basis of the baselines that have been taken from Netherlands Chart 217 and British Chart 1801, both from the 1950s and recent US NIMA charts.<sup>135</sup> As is indicated by Guyana, it has used Netherlands Chart 217 and British Chart 1801 because those were the best charts available to Commander Kennedy and the British and Netherlands Governments in the 1950s.<sup>136</sup> However, the Memorial does not show the equidistance lines calculated by either

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<sup>130</sup> MG, para. 9.5, p. 108.

<sup>131</sup> See *supra* paras. 3.16-3.18.

<sup>132</sup> In this connection, it is telling that the 1965 draft treaty submitted by the United Kingdom, which was rejected as a basis of negotiations by the Netherlands and Suriname, did not even attempt to define the course of the equidistance line, but only indicated that a list of coordinates remained to be inserted in Article VII(3) of the draft. MG, Vol. III, Annex 92. Guyana is thus incorrect in stating that the "1965 line" referred to in Plate 15 (MG, Vol. V) of the Memorial is the equidistance line proposed by the United Kingdom in its draft treaty of November 1965. See MG, para. 4.12, p. 42.

<sup>133</sup> See *infra* Chapter 3, Section III, Part A.

<sup>134</sup> MG, para. 9.5, p. 108.

<sup>135</sup> MG, para. 8.41, p. 102; para. 9.27, p. 118.

<sup>136</sup> MG, para. 9.26, p. 118.

Commander Kennedy or the Netherlands Hydrographic Office in the 1950s, although Guyana suggests otherwise.<sup>137</sup>

3.46. First, as was shown by Suriname in its Memorandum on Preliminary Objections, the Netherlands created a hypothetical closing line at the mouth of the Corantijn River to the north of the 1936 Point in connection with the calculation of the equidistance line for the continental shelf.<sup>138</sup> Guyana does not take either the different land boundary terminus or that closing line created by the Netherlands into account in its calculations of the equidistance lines based on British Chart 1801 and Netherlands Chart 217.<sup>139</sup> Second, Commander Kennedy recognized that in the territorial sea, the boundary between the Netherlands and the United Kingdom was formed by the 10° Line.<sup>140</sup> As Guyana repeatedly concedes in the Memorial, the 10° Line is not an equidistance line.<sup>141</sup> Still, Guyana, in its Memorial in Plate 38<sup>142</sup>, attributes a line to Commander Kennedy that clearly deviates from the 10° Line. Third, as the discussion set out in Chapter III, Section II, Part B, above, demonstrates, both Commander Kennedy and the Netherlands Hydrographic Office were very much aware that they were only providing a first approximation of the baseline. To argue that it is possible to determine the “historical equidistance line” with any certainty is thus not in accordance with the historical record.<sup>143</sup>

3.47. Guyana nevertheless asserts that it presents the equidistance lines “which existed in the 1950s.”<sup>144</sup> As demonstrated above, that assertion is simply not true. Moreover, trying to ascertain what equidistance line may have existed in the 1950s is irrelevant. To define the actual equidistance line between Suriname and Guyana, recourse should be had to the baselines of both states as they are defined in conformity with the Law of the Sea Convention.<sup>145</sup> There is nothing in the Convention that indicates that the baselines as they existed more than 40 years ago have any relevance today. Guyana concedes as much at paragraph 8.16 and following of its Memorial, in which it identifies the relevant charts for establishing the baselines of Suriname and Guyana.<sup>146</sup>

3.48. The various equidistance lines presented by Guyana in the Memorial are of interest from another perspective. The courses of those various equidistance lines differ widely. Equidistance lines in the territorial sea are compared on Plate 38 between pages 104 and 105 of Volume I of the Memorial. The three equidistance lines in the territorial sea diverge

<sup>137</sup> For instance, Guyana submits:

The line which Commander Kennedy developed - the historical equidistance line - has served as the basis for Guyana’s equidistance line consistently ever since. MG, para. 9.6, p. 109.

<sup>138</sup> SPO, paras. 2.14-2.16, pp. 9-10.

<sup>139</sup> See MG, Vol. V, Plate 38.

<sup>140</sup> See *supra* Chapter 3, Section II, Part B.

<sup>141</sup> See, e.g., MG, para. 3.50, p. 36; para. 8.56, p. 105; para. 9.19, p. 116; para. 9.32, p. 119.

<sup>142</sup> MG, Vol. V.

<sup>143</sup> On the various uses of the term “historical equidistance line” by Guyana see *infra* Chapter 3, Section II, Part F.

<sup>144</sup> MG, para. 8.41, p. 102.

<sup>145</sup> Suriname identifies and discusses the provisional equidistance line using modern information and methods in Chapter 6.

<sup>146</sup> Footnote 435, *infra*, of this Counter-Memorial sets out Suriname’s position on the relevant charts and relevant baselines.

significantly, at times being almost two nautical miles apart, suggesting, if they were drawn correctly, that the coastline is subject to significant accretion and erosion and is shifting. The equidistance line based on the US NIMA Charts is clearly incorrect, as it does not take into account part of the baseline depicted on the Plate. Finally, as was noted in paragraph 3.46 *supra*, the equidistance lines on Plate 38 of Guyana's Memorial<sup>147</sup>, although they purport to give the Netherlands and British views in the 1950s, do not take into account the fact that in the 1950s the Netherlands employed a land boundary terminus to the north of the 1936 Point in combination with a closing line across the mouth of the Corantijn River to calculate the equidistance line.

3.49. The divergence of the various equidistance lines becomes even more apparent from Plate 41, included between pages 118 and 119 of Volume I of the Memorial, which shows the equidistance lines up to the 200-nautical-mile limit. At a point at about 40 nautical miles from the coast, the equidistance line developed on the basis of the US NIMA Chart begins to diverge significantly from the two equidistance lines that, according to Guyana, have been calculated on the basis of the British chart 1801 from the 1950s and the Netherlands chart 217 from the same period.

3.50. The divergence between the various equidistance lines is of importance in determining the appropriate method of delimitation for the maritime boundary between Suriname and Guyana. If the divergence is due to changes in the coastline due to accretion or erosion over time, that may be reason enough, by itself, for choosing a different delimitation method. Such accretion and erosion could exacerbate the disproportionate effect of minor protuberances and concavities on an equidistance line. The International Court of Justice in *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* recalled the following observation in the *Libya/Malta* continental shelf case:

the equitableness of an equidistance line depends on whether the precaution is taken of eliminating disproportionate effect of certain 'islets, rocks and minor coastal projections' to use the language of the Court in its 1969 Judgment. ([case concerning *North Sea Continental Shelf*], *I.C.J. Reports 1985*, p. 48, para. 64).<sup>148</sup>

The present case falls squarely within that observation. Care must be taken to ensure that 'minor coastal projections' do not have a disproportionate effect on the course of the maritime boundary. Minor changes in the baseline result in significant shifts of the equidistance line. Guyana itself has recognized the unstable nature of the relevant baselines.<sup>149</sup> Plate 41 of Guyana's Memorial<sup>150</sup> and its various renditions of the equidistance line demonstrate the basic problem. Accordingly, as demonstrated in Chapter 6 below, the Tribunal should consider a method of delimitation that does not result in substantially different lines simply because of minor changes in the configuration of the baselines of the Parties.

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<sup>147</sup> MG, Vol. V.

<sup>148</sup> Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001, para. 246.

<sup>149</sup> See MG, para. 2.6, p. 8, where reference is made to the "active local processes of sediment transport and coastal erosion."

<sup>150</sup> MG, Vol. V.

3.51. Large shifts in the equidistance line caused by minor changes in the baselines demonstrate that the equidistance method does not lead to an equitable result. But the opposite is not true. The relative stability of an equidistance line over time does not prove its equitable nature. The equidistance method should be used only if it leads to an equitable result. As will be shown below, an equidistance line does not lead to an equitable result and therefore should not be used in this case.<sup>151</sup>

#### **F. Guyana's "Historical Equidistance Line" Is Neither Historical Nor Equidistant**

3.52. Guyana frequently employs the term "historical equidistance line." A comparison of the various places in which the term is used shows that it has not been used consistently. Guyana uses the term in two distinct ways: first, to describe Commander Kennedy's work in the 1950s and 1960s; second, as a proxy for the 34° line. For example, at paragraph 9.6 on page 109 of Volume I of its Memorial, Guyana observes: "The line which Commander Kennedy developed - the historical equidistance line - has served as the basis for Guyana's equidistance line consistently ever since." In contrast, at paragraph 9.23 on page 117 of Volume I of its Memorial, Guyana claims: "Over time, the N34E line emerged as a historical equidistance line ..." and further, at paragraph 9.46 on page 123 of Volume I of its Memorial Guyana refers to "a historical equidistance line generally following the line of N34E ...."

3.53. The confusion that Guyana causes by the various uses of the term "historical equidistance line" is well illustrated by paragraph 9.29 on page 119 of Volume I of its Memorial, which reads:

The Arbitral Tribunal should take as its starting point for the delimitation of the continental shelf (and the exclusive economic zone) the historical equidistance line which has been given effect consistently by the United Kingdom and Guyana since 1957, and to which Suriname had not, until very recently, manifested its objection.<sup>152</sup>

If Guyana's assertion that the 34° line is the "historical equidistance line" is correct, then the statement that the United Kingdom has given consistent effect to that line is not correct. On the other hand, if the "historical equidistance line" is the line developed by Commander Kennedy, it is not the 34° line.

3.54. The use of the term "historical equidistance line" to refer to several different lines may be intended to give the 34° line some credibility. However, the 34° line was never presented as an equidistance line to the Netherlands during the negotiations with the United Kingdom, nor was it presented by the United Kingdom to the Netherlands under any other guise. As is set out in Chapter 3, Section II, Part B above Commander Kennedy encountered serious difficulties in his attempts to define an equidistance line. However, he did not suggest using a line starting from the 1936 Point along an azimuth of 34° to resolve the problem. The draft treaty presented by the United Kingdom in 1961 employed a line consisting of a number of

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<sup>151</sup> See *infra* Chapter 6.

<sup>152</sup> MG, Vol. II, Annex 92. The assertion that Suriname had not protested the claim of Guyana until very recently is addressed in para. 3.59 below.

segments with different bearings. In 1965 the United Kingdom presented a further draft treaty that made no attempt at all to identify the equidistance line.<sup>153</sup> It provided in Article VII(3):

In implementation of the principle of equidistance mentioned in paragraph (1) of this Article the boundary shall be arcs of Great Circles between the following points in the sequence given below:-

(List of co-ordinates)<sup>154</sup>

The United Kingdom was clearly not proposing the delimitation of the maritime boundary by a single line segment.

3.55. Guyana refers to the equidistance line developed by Commander Kennedy as an “historical equidistance line.” Commander Kennedy did his work almost 50 years ago, so in that sense his work is historical. However, the line Commander Kennedy developed has only historical significance. It has no relevance to the identification of a present-day provisional equidistance line between Suriname and Guyana.

3.56. Guyana’s other assertion, that the 34° line is an “historical equidistance line” or that the “historical equidistance line” has a general bearing of 34°, seems to be based on two propositions. First, Guyana submits that the various equidistance lines it presents show a very close similarity to the 34° line between the 12-nautical-mile limit and the 200-meter isobath.<sup>155</sup> Second, Guyana argues that:

by their consistent conduct subsequent to the adoption of the 1982 Convention, especially in grants of oil concessions and related activities, the parties have extended the N34E historical equidistance line beyond the 200-metre isobath to the 200-mile limit of the continental shelf.<sup>156</sup>

Neither proposition is corroborated by the facts. Both are wrong.

3.57. The assertion of Guyana that “between the 12 miles and the 200-metre isobath, the historical and modern equidistance lines are very similar”<sup>157</sup> is not confirmed by the depiction of those lines on Plate 41 of Guyana’s Memorial.<sup>158</sup> The modern equidistance line presented by Guyana (labeled “US NIMA Charts” on Plate 41) lies considerably to the west of the other two equidistant lines presented by Guyana.

3.58. As far as the maritime area beyond the 200-meter isobath is concerned, even Guyana has to recognize that there is no relationship whatsoever between the 34° line and the various

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<sup>153</sup> At MG, Vol. III, Annex 92. Guyana is thus incorrect in stating that the “1965 line” referred to in Plate 15 (MG, Vol V) of its Memorial is the equidistance line proposed by the United Kingdom in its draft treaty of November 1965. See MG, para. 4.12, p. 42.

<sup>154</sup> MG, Vol. III, Annex 92.

<sup>155</sup> MG, para. 9.27, p. 118.

<sup>156</sup> *Id.* at para. 9.28, p. 118.

<sup>157</sup> *Id.* para. 9.27, p. 118.

<sup>158</sup> MG, Vol. V.



equidistance lines it presents.<sup>159</sup> The only support for the 34° line invoked by Guyana is the claimed conduct of the Parties and the Netherlands and the United Kingdom.<sup>160</sup> However, there is no basis for the assertion that the conduct of the Parties has led to the acceptance of the 34° line. Suriname has consistently maintained the position that the maritime boundary is the 10° Line, and Suriname's conduct has always been consistent with that position. On the other hand, as is discussed below in Chapter 3, Section III, Part B, the conduct of Guyana does not reveal the same consistency. Guyana has used an equidistance line in its 1977 Maritime Boundaries Act and to define the lateral limit of its 200-nautical-mile zone for fisheries purposes, while using various azimuths to mark the eastern limit of the area in which it offers oil concessions.

3.59. Guyana also asserts that until recently neither the Netherlands nor Suriname ever objected to the 34° line.<sup>161</sup> That assertion is not only wrong, it is completely beside the point. The 34° line was first presented by Guyana to Suriname during the 1966 meeting at Marlborough House.<sup>162</sup> At that meeting Suriname indicated to Guyana that the maritime boundary followed the 10° Line from a land boundary terminus yet to be established,<sup>163</sup> a position that Suriname has consistently maintained ever since. One cannot seriously argue that the maintenance of a 10° Line position is not at the same time an objection to a 34° line position. In such situations that continue over time, a formal protest about the position asserted by Guyana each time it is asserted is hardly necessary:

failure by a state to lodge a formal protest may be discounted where it adequately demonstrates its rejection of the acts or assertions of another state by continuing itself to perform acts which can only be construed as a rejection of those acts or assertions.<sup>164</sup>

### III. A Comparison of the Evolution of the Positions of the Parties

#### A. Suriname's Consistent Practice

3.60. Suriname has consistently advanced the position that its maritime boundary with Guyana follows the 10° Line. Suriname has maintained that position with respect to its territorial sea, continental shelf and exclusive economic zone, as is clearly demonstrated by its national legislation and practice.<sup>165</sup>

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<sup>159</sup> See MG, Plate 41, found at MG, Vol. V. Beyond the 200 meter isobath all the equidistance lines presented by Guyana lie considerably to the west of the 34° line. At the 200-nautical-mile limit the distance between the 34° line and the three equidistance lines is respectively 43 (US NIMA Charts), 41 (historical Netherlands Chart 217) and 46 (historical British Chart 1801) nautical miles.

<sup>160</sup> See, e.g., MG, para. 9.28, p. 118.

<sup>161</sup> See, e.g., *id.*, para. 9.29, p. 119; para. 9.46, p. 123.

<sup>162</sup> See SPO Annex 17.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Oppenheim's International Law* 1195 (R. Jennings & A. Watts eds., 9th ed., Longman 1992), at SPO Annex 69.

<sup>165</sup> For a discussion of the practice of Suriname, see *supra* Chapter 3, Section I; *infra* Chapter 4, Section III; *infra* Chapter 5; and SPO, para. 5.7, p. 24.

3.61. Only for a brief period at the end of the 1950s did the Netherlands even entertain the idea of defining the continental shelf between Suriname and British Guiana by using equidistance. However, that idea, which in all events did not envision the delimitation of territorial waters by the equidistance method, raised difficulties that would have to be overcome before an equidistance line could be identified with any confidence or precision.<sup>166</sup>

3.62. Those difficulties were never overcome, and by the early 1960s the idea of an equidistance continental shelf boundary had been abandoned. In 1962 the Netherlands proposed a draft boundary treaty between Suriname and Guyana, that employed the 10° Line to delimit the territorial sea and the continental shelf,<sup>167</sup> a position that has been maintained by Suriname up to the present.

### **B. Guyana's Inconsistent Practice**

3.63. Guyana asserts that it has consistently applied the 34° line in its practice. That is not correct. Until the meeting of June 1966 between Suriname and Guyana at Marlborough House, the United Kingdom had presented a number of proposals to the Netherlands to delimit the territorial sea by either the 10° Line (before 1965) or the equidistance line (in 1965) and to delimit the continental shelf by the equidistance line. After 1966, Guyana's claim to a 34° line is almost exclusively based on the eastern limits of some concessions in its oil and gas practice, which for some unknown reason extend outside of the area described in its 1977 Maritime Boundaries Act. As far as the exclusive economic zone and fisheries jurisdiction are concerned, Guyana has applied an equidistance line that has no relationship to the 34° line. In other words, until Guyana initiated this case, the area of overlap of the exclusive economic zones of Suriname and Guyana was bounded by Suriname's 10° Line and an equidistance line, not a 34° line.

3.64. There is no justification for the 34° line of Guyana either in fact or law. The 34° line is not an equidistance line, either "historical" or in any other form, and the difference between the provisional equidistance line based on modern data and the 34° line is easily ascertained and significant. Guyana's Memorial lacks any credible explanation as to why it abandoned the equidistance line and claimed the 34° line instead. The only reason proffered by Guyana to justify the 34° line as a maritime boundary is the oil and gas conduct of the Parties, but that conduct is in reality far different from what Guyana claims and does not even come close to justifying a 34° line as a maritime boundary, especially when it is measured against the relevant rules of international law, an analysis to which this Counter-Memorial will now turn.<sup>168</sup>

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<sup>166</sup> See, e.g., *supra* Chapter 3, Section I, Part B. See also SPO, para 2.20.

<sup>167</sup> The draft treaty is reproduced at MG, Vol. III, Annex 91.

<sup>168</sup> As this Counter-Memorial will demonstrate in Chapter 6, the 34° line actually represents the projection of the coastal front of Guyana.