

CHAPTER 8

SURINAME'S RESPONSE TO GUYANA'S SUBMISSION 3

8.1. Guyana's Submission 3 is as follows:

Suriname is internationally responsible for violating its obligations under the 1982 United Nations Convention on the Law of the Sea to make every effort to enter into provisional arrangements of a practical nature pending agreement on the delimitation of the continental shelf and exclusive economic zones of Guyana and Suriname, and by jeopardising or hampering the reaching of the final agreement; and that Suriname is under an obligation to provide reparation, in a form and in an amount to be determined, for injury caused by its internationally wrongful acts.⁴⁹⁵

I. The Relevant Facts

8.2. Guyana's Submission 3 portrays Suriname as deliberately being unwilling to work cooperatively with Guyana concerning the disputed maritime area. That is not true. Suriname has always been willing to identify non-prejudicial and mutually beneficial cooperative programs pending a boundary settlement, as evidenced by its undertakings pertaining to the 1989/1991 *modus vivendi* and MOU. By rejecting positions of Guyana that were not made in good faith, Suriname has engaged in no wrongful act that gives rise to its international responsibility. It is a fundamental principle of international law that one party cannot dictate an agreement to another party. However, Guyana has sought to do so. In this regard, it is important to recall what was said in Suriname's Preliminary Objections about the unyielding attitude of Guyana in the aftermath of the events of 3 June 2000.⁴⁹⁶

8.3. Immediately after the CGX incident, there was a Special Ministerial Meeting between Suriname and Guyana in Trinidad and Tobago. The Joint Communiqué of that meeting states:

The Ministers recognized that the current dispute over the concessions granted by Guyana was directly related to the wider issue of the border problem between Guyana and Suriname. They therefore determined that steps must *simultaneously* be taken to address this ongoing dispute over the border between the two countries even as they sought to put in place arrangements to end the current dispute over the oil exploration concessions. In this regard, reference was made to the concession granted by Guyana to CGX.⁴⁹⁷

8.4. Guyana thus acknowledged at this time that there are broader issues in dispute between the Parties. Guyana also promised that the full scope of the issues would be expeditiously addressed. However, contrary to that understanding, the record of subsequent meetings shows that Guyana's sole interest was to achieve not only Suriname's agreement to the return of the

⁴⁹⁵ MG, p. 135. Guyana Submission 3.

⁴⁹⁶ See SPO, para. 6.39, p. 42; para. 7.9, p. 47.

⁴⁹⁷ Joint Communiqué of Special Ministerial Meeting Between Representatives of the Governments of Guyana and Suriname, Port of Spain, Trinidad and Tobago (6 June 2000) (emphasis added), at MG, Vol. II, Annex 81 at pp. 1-2 (emphasis added).

CGX drill ship to its site in disputed waters but also Suriname's commitment that all of the terms and conditions of CGX's concession and Guyana's other concessions that pertain to the disputed area would not be disturbed by Suriname. However, Guyana refused to disclose to Suriname the terms and conditions of the relevant Petroleum Agreements, and has been unwilling to share relevant seismic data. In effect, Guyana has insisted that Suriname sign a blank check and it offered Suriname nothing of value in return.

8.5. The Special Ministerial Meeting was followed by a Joint Technical Committee meeting. The agreed record of the Joint Technical Committee meeting, found at Volume II, Annex 83 of Guyana's Memorial, illuminates the picture clearly:

Suriname reiterated the view that the problem of the rig cannot be solved in isolation but that the problem of the sovereignty over the area should be dealt with *simultaneously*.⁴⁹⁸

8.6. In response to Suriname's willingness to deal comprehensively with the problem, Guyana's proposals were focused on one thing only: the immediate return of the drill ship to its operation in disputed waters accompanied by an undertaking by Suriname not to impair in any way the Guyana-CGX operation or arrangements, then or in the future. What Guyana was prepared to offer Suriname for such an open-ended commitment was a series of hollow promises cloaked in fine language with no substance behind them. Guyana proposed to call "the area in dispute . . . a Special Area for the Sustainable Development of Guyana and Suriname."⁴⁹⁹ It was also prepared to place boundary negotiations on a fast track. It also proposed to establish an unspecified "transitional mechanism" for the Special Area.⁵⁰⁰ None of those proposals was necessarily a bad idea, but they had no meaning in a context in which Guyana insisted that Suriname immediately sign away its interest in part of the disputed area, that the drill ship resume its operations and that Suriname not impair but in fact accept Guyana's undisclosed agreements with CGX not only as they then existed, but also in the future. It is clear from the circumstances that no rational entity — no person and no country — would have acceded to Guyana's demand that the CGX operation in the disputed maritime area be reinstated without even having knowledge of the terms and conditions of the concession agreement and with no acknowledgement of Suriname's interests.

8.7. Guyana's unreasonable negotiating position is even more dramatically demonstrated by the text of a draft MOU prepared for and brought to the 6 June 2000 Ministerial meeting. Guyana includes that document as an Annex to its Memorial.⁵⁰¹ The text of the draft looks similar to the 1989 *modus vivendi* in that it calls for Suriname to respect Guyana's existing concessions "granted by the Government of Guyana up to and including June 14 1999." However, it is far removed from the mutually beneficial cooperation that characterized the 1989 *modus vivendi*. In 1989 there was one preexisting concession of Guyana (Lasmo/BHP) that Suriname agreed to respect. That concession covered only a relatively small part of the disputed maritime area and it was understood that Staatsolie would enter into a contract

⁴⁹⁸ Main Points, Guyana/Suriname Discussions, Paramaribo, 17-18 June 2000 (18 June 2000) (emphasis added) MG, Vol. II, Annex 83, at p.1.

⁴⁹⁹ *Ibid.*

⁵⁰⁰ *Ibid.*

⁵⁰¹ That draft MOU is found at MG, Vol. III, Annex 95. It is not referred to in the Joint Communiqué of the 6 June 2000, meeting but it was handed across the table at that time.

covering a different part of the disputed area. Furthermore, Suriname's "respect" was understood to extend only to matters relating to the early stage of offshore petroleum exploration. However, Guyana's proposal in 2000 was tied to the date of 14 June 1999. By that date Guyana had virtually blanketed the entirety of its claimed offshore area with concessions, three of which extended into the area of overlapping claims with Suriname, namely those with Esso, CGX and Maxus. Thus, the meaning of Guyana's proposal was that Suriname should agree that Guyana would have a free hand in the entirety of the disputed area with respect to all three of those concessions. In the practice of states, that draft does not reflect a good-faith proposal.

8.8. A further example of Guyana's unwillingness to come to mutually acceptable provisional arrangements of a practical nature is reflected in its stance at the meeting of the Presidents and Ministers of Foreign Affairs of Suriname and Guyana in July 2000, shortly after the CARICOM Summit in Canouan (St. Vincent and the Grenadines) at which the situation arising out of the 3 June 2000 CGX incident had also been discussed.⁵⁰² The meeting was held in Montego Bay, Jamaica, on 14-16 July, under the good offices of Prime Minister Patterson of Jamaica. Guyana, in paragraph 5.15 of its Memorial, portrays that meeting as one that was unsuccessful due to "Suriname rejecting all constructive proposals for dispute resolution put forward by Prime Minister Patterson." That is not true. The letters of President Wijdenbosch of Suriname to Prime Minister Patterson, of 20 July and 11 August 2000, demonstrate that Suriname was willing to sign the draft Memorandum of Understanding put forward by Prime Minister Patterson.⁵⁰³ Guyana retracted from its commitments and ultimately decided not to sign because it had not succeeded in singling out one matter from the whole of subjects covered by the consultations, *viz.*, Guyana's insistence on restoration of operations by CGX within seven days. The letters show that it was Guyana, not Suriname, that rejected the proposal put forward by Prime Minister Patterson.

8.9. After that attempt to reach agreement failed, a further meeting of Presidents Venetiaan and Jagdeo, of Suriname and Guyana respectively, was held on 29 January 2002. The Presidents agreed:

to request the Border Commissions to look at best practices and modalities that could assist the Governments in the taking of a decision regarding an eventual joint exploration.

It was agreed that a sub-committee of the Joint Suriname and Guyana Border Commission should be established to address this issue and to report to this Commission before its meeting in May.⁵⁰⁴

The sub-committee was indeed established and met several times but did not come to an agreed proposal on "best practices and modalities" for joint exploration. The main stumbling

⁵⁰² MG, Vol. II, Annex 54 contains the CARICOM Summit Statement on Guyana and Suriname. *See also* Statement by the President of the Republic of Suriname, H.E. Jules Albert Wijdenbosch, at the Twenty First Meeting of the Conference of Heads of Government of the Caribbean Community, Canouan, St. Vincent and the Grenadines, July 2-5 2000, at SCM, Vol. II, Annex 5.

⁵⁰³ *See* SCM, Vol. II, Annexes 6 and 7.

⁵⁰⁴ *See* Joint Declaration on the Occasion of the Official Visit of His Excellency Bharrat Jagdeo, President of the Republic of Guyana to the Republic of Suriname, January 28th-30th 2000, Paramaribo, Suriname (29 January 2002), at SCM, Vol. II, Annex 8, at p. 6.

blocks were the refusal of Guyana to “show its cards” in terms of concessions that it had granted, that were considered relevant for a sensible discussion about “best practices and modalities” for joint exploration, and the insistence of Guyana that the discussions should be expanded also to address joint exploitation. The subcommittee reported accordingly to the Joint Border Commission. In the Joint Border Commission, Guyana’s position remained unchanged.

8.10. Thus, Guyana proposed that Suriname accept and ratify the agreements that Guyana had entered into with oil companies without letting Suriname see those agreements even though Suriname was willing to sign a confidentiality agreement.⁵⁰⁵ As the leader of the Suriname delegation stated at the Fifth Meeting of the Border Commission on 10 March 2003: “Suriname could not be expected to step into any arrangement ‘blindfolded.’”⁵⁰⁶ The unyielding position of Guyana was vividly set out in the agreed record of the Fourth and Fifth joint meetings of the national Boundary Commissions (25-26 October 2002 and 10 March, 2003), which Guyana makes available at Volume II, Annexes 87 and 88 of its Memorial. Guyana’s approach made it impossible for there to be any agreement on provisional arrangements of a practical nature. Guyana’s interest always has been only to validate the agreements it has entered into with private companies and its sole purpose has been to seek Suriname’s acceptance of these agreements. Far from showing that Suriname breached its obligations under the 1982 Law of the Sea Convention, the record shows clearly that the consistent one-sided formulation of Guyana’s negotiating position concerning activities in the area of overlapping maritime boundary claims constituted a breach of its duty under Articles 74(3) and 83(3) to negotiate in good faith. It is in light of the facts mentioned above that Suriname maintains its position, expressed in its Preliminary Objections, that Guyana lacks clean hands with respect to its Submission 3.

II. The Law

8.11. As discussed in Chapter 7, the duty found in Articles 74(3) and 83(3) of the 1982 Law of the Sea Convention, is twofold: to “make every effort to enter into provisional arrangements of a practical nature” and “not to jeopardize or hamper the reaching of the final agreement.” While it is the latter of the obligations that relates to Guyana’s Submission 2 and was addressed in Chapter 7 above, it is the former that informs Guyana’s Submission 3.

8.12. The obligation to “make every effort to enter into provisional arrangements of a practical nature” establishes a mutual duty to negotiate in good faith. The obligation as such does not address the content of those arrangements. The obligation is to “make every effort” to identify and agree upon the same.

8.13. Prior to becoming contracting parties to the 1982 Law of the Sea Convention, the Parties had reached an understanding in the 1989/1991 *modus vivendi* and MOU about how to act in the disputed area in cooperation. That understanding included several important elements: the “respect” to be shown by Suriname for Guyana’s concession holder (Lasmo/BHP) was to be mirrored by Guyana’s “respect” for Suriname’s contractor in another part of the disputed area (PECTEN); that “respect” meant that the other party would not issue

⁵⁰⁵ Minutes of the Fifth Joint Meeting of the Guyana/Suriname Border Commissions Ministry of Foreign Affairs, Monday, March 10, 2003 (24 March 2003), at MG, Vol. II, Annex 88, at paras. 13-23, pp. 4-7.

⁵⁰⁶ *Id.* at para. 17, p. 5.

an overlapping concession or license or interfere with transitory seismic work.⁵⁰⁷ The understanding did not, however, contemplate unilateral drilling or exploitation of resources; both such activities would necessarily have to be decided by specific further understandings.

8.14. Thus, the 1989/1991 *modus vivendi* and MOU was truly a provisional arrangement of a practical nature. It was balanced – both sides were entitled to authorize certain activities in the disputed area. It was practical, as it was directed at the early stages of petroleum exploration. It was provisional in that it only dealt with a limited set of issues and clearly did not purport to answer all the questions.

8.15. The model of the 1989/1991 *modus vivendi* and MOU is Suriname's position. Suriname's cooperative approach was what the Parties should have reconstituted as a first step following the 3 June 2000 incident.

8.16. Guyana, however, opted for unilateralism. Guyana practiced no restraint. Guyana aggressively asserted its interest throughout the disputed area. Guyana entered into contracts with oil companies covering much of the disputed area and then demanded that Suriname accept and honor those contracts in their entirety, including such benefits that would derive solely to Guyana if one of its concession holders were to find petroleum. Guyana's demand of Suriname, played over and over in the aftermath of the 3 June 2000 incident, is obviously unreasonable and could never be seriously considered by any state in the same position as Suriname.

III. Guyana, Not Suriname, Breached Its Duties Under Articles 74(3) and 83(3) of the 1982 Law of the Sea Convention

8.17. Suriname does not bear responsibility for the fact that the Parties, other than in the 1989 *modus vivendi* and 1991 MOU, have not heretofore been able to agree on how that arrangement could be reconstituted or other provisional arrangements of a practical nature pertaining to the disputed maritime area could be reached. Suriname categorically rejects Guyana's charge formulated in its third submission. Suriname has participated in good faith in all the various efforts over the years in which the question was addressed. The International Court of Justice and other international arbitral tribunals have repeatedly made clear that an obligation to negotiate does not imply an obligation to reach agreement.⁵⁰⁸

8.18. Guyana has, however, taken the unyielding position that Suriname should accept, recognize and not interfere with Guyana's concessions in the area of overlapping claims. The inflexible position of Guyana constitutes a failure to comply with the duty to negotiate in good faith found in Articles 74(3) and 83(3) of the 1982 Law of the Sea Convention.

⁵⁰⁷ As indicated in the figures accompanying Chapter 5, Section I, Part C, the spatial extent of the Pecten service contract did overlap that of the Lasso concession areas; however, the two concessions were not contemporaneous. Guyana's Lasso concession was relinquished in 1991, two years before the 1993 issuance of Suriname's Pecten service contract.

⁵⁰⁸ See *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Merits, Judgment, I.C.J. Reports 1969, pp. 47-48, paras. 86-87 (citing *Railway Traffic between Lithuania and Poland*, 1931, P.C.I.J., Series A/B, No. 42, p. 116).

8.19. Suriname has engaged in no wrongful act by refusing to accede to Guyana's demands. If the Tribunal does not uphold Suriname's Preliminary Objection, Guyana's third submission should be dismissed; moreover, the Tribunal should find that Guyana has engaged in an unlawful act in this regard by not negotiating in good faith.