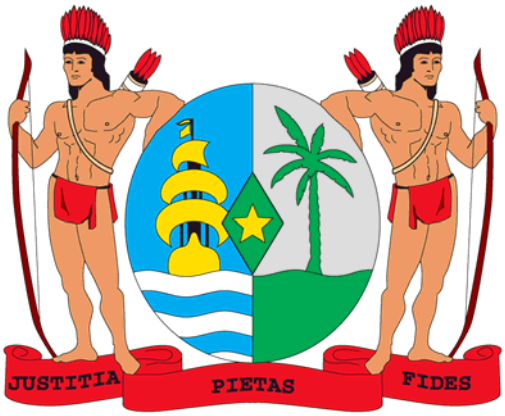

REPUBLIC OF SURINAME

PRELIMINARY OBJECTIONS

IN THE

ARBITRATION UNDER ANNEX VII OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

REPUBLIC OF GUYANA

v.

REPUBLIC OF SURINAME

MEMORANDUM

23 MAY 2005

MEMORANDUM

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CHAPTER 1

INTRODUCTION

I. Purpose of This Memorandum

1.1 This Memorandum on Preliminary Objections sets out the position of the Republic of Suriname that the Tribunal has no jurisdiction to entertain the proceedings against Suriname commenced by the Republic of Guyana by its Statement of Claim dated 24 February 2004 as now elaborated in its Memorial filed on 22 February 2005 and that the second and third submissions of Guyana are inadmissible.

1.2 In its Notification dated 23 March 2004 Suriname reserved "the right to present its views with regard to jurisdiction and any other preliminary matters to the full arbitral tribunal when it is constituted."[1]

1.3 Article 10.2 of the Rules of Procedure provides:

> A submission that the Arbitral Tribunal does not have jurisdiction or that the Notification or a claim made in the pleadings is inadmissible shall be raised either:
>
> > (a) where Suriname requests that the submissions be dealt with as a preliminary issue, not later than three months after the time of the filing of the Memorial . . . .

In accordance with this provision of the Rules of Procedure, Suriname requests that, as a preliminary matter, the Tribunal decide questions of jurisdiction and admissibility that are raised by the three submissions set forth in Guyana's Memorial.

II. The Contentions of Guyana

1.4 Chapter 11 of Guyana's Memorial sets out three submissions that may be summarized as follows: First, Guyana requests that the Tribunal fix a single maritime boundary on the bearing Guyana proposes "from the point known as Point 61 (5° 59' 53.8" north and longitude 57° 08' 51.5" west)".[2] Second, Guyana requests that the Tribunal find that Suriname has engaged in acts for which it is internationally responsible "in maritime areas within the sovereign territory of Guyana or other maritime areas over which Guyana exercises lawful jurisdiction."[3] In the main, this submission refers to an incident on 3 June 2000 in which Suriname prevented a drill ship acting pursuant to Guyana's authorization to Guyana's concession holder, the CGX Company,

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[1] Notification dated 23 March 2004, signed by the Honorable Maria E. Levens, Minister for Foreign Affairs, Republic of Suriname, Agent, under cover of a diplomatic note of the same date to the Embassy of the Republic of Guyana transmitting a letter from President Runaldo Venetiaan of Suriname to President Bharat Jagdeo of Guyana, at Annex 1. (All documents referred to herein in the form "Annex __" are Annexes to this Memorandum).

[2] Memorial of the Republic of Guyana, 22 February 2005 ("MG"), p. 135. Guyana Submission 1.

[3] MG, p. 135. Guyana Submission 2.

from drilling an exploratory well in the area of overlapping maritime claims between Suriname and Guyana. Third, Guyana requests that the Tribunal find that Suriname is responsible for not making "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."[4] Guyana seeks reparations in connection with its second and third submissions.

1.5 Guyana's submissions, and indeed its entire case, rest on the proposition that the dispute it brings to the Tribunal

> is exclusively concerned with the maritime boundary between Guyana and Suriname. Guyana's application does not concern – either directly or indirectly – any claim or other issues relating to the determination of any boundary other than the maritime boundary.[5]

Guyana goes on to assert:

> The parties have had a longstanding agreement as to the terminus of their land boundary, and the starting point for delimitation of their maritime spaces, at Point 61 . . . .[6]

1.6 There is no such agreement. Guyana's repetitious – but incorrect – assertions that there is such an agreement demonstrate that Guyana appreciates the essential necessity of an agreement on the land boundary terminus as a condition to the Tribunal's jurisdiction to hear its case.[7] Guyana asserts that its application "does not require the Annex VII Tribunal to make any

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4 MG, p. 135. Guyana Submission 3.

5 MG, para. 6.15, p. 75.

6 *Ibid.*

7 Guyana mentions this alleged agreement more than 25 times in its Memorial. *See, e.g.*, paras. 1.4, 2.10, 3.15, 5.18, 6.15, 7.29, and 8.5. The eight documents Guyana cites in Chapter 3, note 16 of its Memorial do not, contrary to Guyana's assertion, "demonstrate the mutual acceptance of Point 61 as the northern land terminus". Five of those documents illustrate that Suriname's willingness to accept Point 61, which is known to Suriname as the 1936 Point, was inextricably linked to the concurrent establishment of a 10° maritime boundary. *See* Report on the Inauguration of the Mark at the Northern Terminal of the Boundary Between Surinam and British Guiana (5 July 1936), at MG, Vol. II, Annex 11; Diplomatic Note from the Netherlands Charge d'Affaires in London to the British Secretary of State for Foreign Affairs (22 November 1937), at MG, Vol. II, Annex 62; Letter from S.W. Martin, Foreign Office to Lt. Cmdr. P. Beazley, Hydrographer's Office, Ministry of Defence with attached sections of draft treaty (18 November 1965), at MG, Vol. II, Annex 32; Letter from the Minister of Foreign Affairs of the Republic of Suriname to Kerry Sully, President, CGX Energy, Inc. (31 May 2000), at MG, Vol. II, Annex 49; Letter from Karshanjee Arjun, Ambassador of Guyana to Suriname to Clement Rohee, Minister of Foreign Affairs, with attached *Note Verbale* No. 2566/HA/eb from the Republic of Suriname to the Cooperative Republic of Guyana (31 May 2000), at MG, Vol. II, Annex 78. Two of the three remaining documents were authored by the British and cannot conceivably be said to "demonstrate mutual acceptance" by Suriname. *See* Letter from W. E. F. Jackson, Governor of British Guiana to the Secretary of State (19 September 1938), at MG, Vol. II, Annex 14; Diplomatic Note from the Secretary of State for Foreign Affairs to E. Teixeira de Mattos, the Netherlands Minister to the United Kingdom (1 November 1938), at MG, Vol. II, Annex 64. The last document (like the two authored by the British) merely serves to correct a typographical error in the coordinates of the beacon at the mouth of the Corantijn River and does not indicate Suriname's intent with respect to the 1936 Point. *See* Diplomatic Note from E. Teixeira de Mattos, the Netherlands Minister to the United Kingdom to Viscount Halifax, the British Secretary of State for Foreign Affairs (27 August 1938), at MG, Vol. II, Annex 63.

findings of fact or law as regards the land or riverine boundary between the two States."[8] However, if there is no such agreement, a question of sovereignty over land territory would need to be decided before the Tribunal could take up the case that Guyana brings. Matters of sovereignty over land territory are outside the jurisdiction of the Tribunal under the 1982 Law of the Sea Convention.

1.7 Furthermore, Guyana's second and third submissions raise serious questions about Guyana's good faith. They constitute a denial of the fundamental and inescapable fact that there is a maritime boundary dispute between Suriname and Guyana. They assume that Guyana is a free actor in the area of overlapping maritime claims, which it is not, and that Suriname has no legitimate interests in the maritime area in dispute, which is also not true. Guyana portrays itself as an aggrieved party, when in fact Guyana's recent petroleum policies have deliberately and unlawfully promoted an aggressive campaign to create a *fait accompli* in respect of the disputed maritime area.

III. Suriname's Position

1.8 It is Suriname's position that there is no agreement on the land boundary terminus. The point that Guyana claims to be the agreed upon terminus, which it calls Point 61, is known to Suriname as the 1936 Point. At most, the 1936 Point is an historical reference point; in the 1930s it was located approximately 270 meters inland.[9] Suriname does not deny that the 1936 Point has been one of the elements that the Parties and the colonial powers before them considered over the years as one of many possible elements of a comprehensive boundary solution, but no such solution was ever reached. The 1936 Point is not legally binding on Suriname for any purpose.

1.9 The dispute that Guyana brings to the Tribunal is a classic "mixed" dispute. Since the 1930s, this dispute has consisted of a number of elements. Proposed solutions for the land boundary terminus have always been linked to proposals on the location of the maritime boundary (first in the territorial sea and then on the continental shelf and the exclusive economic zone), the land boundary dispute over the area known as the Upper Corantijn-Coeroeni triangle[10] and questions concerning use of the Corantijn River.[11] As Suriname will demonstrate, none of

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[8] MG, para 6.15, p. 76.

[9] That distance can be established from two documents drafted by the Mixed Netherlands British Boundary Commission. *See* Report on the Inauguration of the Mark at the Northern Terminal of the Boundary Between Suriname and British Guiana (5 July 1936), at MG, Vol. II, Annex 11; Minute of the Third Conference of the Mixed Commission for the Definition of the Boundary Between British Guiana and Surinam (21 December 1938), at Annex 2. On the status and the work of that Commission *see infra* paragraphs 2.4 to 2.7.

[10] Guyana refers to this area as the New River triangle. This area encompasses more than 13,700 square kilometers of land territory that are in dispute between the Parties. It is a serious problem that Guyana blithely suggests is unrelated to the matter before the Tribunal. At paragraph 3.4 of its Memorial, Guyana states: "Although of historical interest, the New River Triangle is not part of the coastal area of either party, and has no connection with the sea or the dispute presently before the Arbitral Tribunal." That assertion is contradicted by more than 70 years of negotiations during which the matters have been dealt with as an interdependent whole. *See, e.g.*, Minutes of the Guyana/Suriname Border Commission (10 March 2003), at MG, Vol. II, Annex 88, paras. 36-45.

[11] The Corantijn River is the same river Guyana calls the "Corentyne". Herein, Suriname uses the official Surinamese spelling "Corantijn".

those issues has been resolved. Thus, there is no agreed land boundary terminus upon which the Tribunal can rely in its analysis of the maritime boundary between the Parties. For this reason, the Tribunal's jurisdiction fails for all of the claims made by Guyana since issues of territorial sovereignty do not arise under the 1982 Law of the Sea Convention and the issues of sovereignty over land territory permeate all three of Guyana's submissions.

1.10 Furthermore, it is Suriname's position that Guyana's second and third submissions are inadmissible. Guyana lacks both good faith and clean hands in making these claims against Suriname. As Suriname will demonstrate, Guyana's assertion that it "has exercised peaceful, continuous and uncontested jurisdiction over that part of the offshore area that forms the extent of its claim in the present proceedings"[12] is the wishful thinking of Guyana's counsel. It was Guyana's breach of a 1989 Presidential *modus vivendi* to provide for cooperative and mutually beneficial arrangements in the area of overlapping maritime claims and Guyana's continuing escalation of activities it authorized in the area of overlapping claims notwithstanding Suriname's claim, Suriname's restraint, and Suriname's objections that led directly to the 3 June 2000 incident that is the subject of Guyana's second submission. Guyana's insistence on its own position and interests, and its unwillingness to appreciate and take into account Suriname's legitimate interests in the area of overlapping claims pending a maritime boundary settlement, have contributed directly, in a real and substantial way, both before and after the 3 June 2000 incident, to the impasse that has hindered agreement on a joint cooperative effort in the area of overlapping claims, which is the subject of Guyana's third submission.[13]

1.11 This Memorandum on Preliminary Objections is organized as follows: Chapter 1 describes the Parties' positions. Chapter 2 sets out Suriname's observations on the land boundary terminus. Chapter 3 outlines additional relevant facts of importance for the Tribunal's consideration of Suriname's objection to the jurisdiction of the Tribunal. Chapter 4 addresses the question whether the Tribunal's jurisdiction extends to determinations of sovereignty over land territory and addresses the limitations that exist in connection with the Tribunal's authority to decide its own jurisdiction. Chapter 5 demonstrates that as a matter of international law Suriname is not bound by the 1936 Point. Chapter 6 addresses Guyana's second and third submissions and demonstrates that they have no legal or factual basis. Chapter 7 examines the admissibility of claims made by a party that did not act in good faith and lacks clean hands; and Chapter 8 concludes with Suriname's submissions to the Tribunal that this case be brought to a close.

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[12] MG, para. 1.5, p. 2.

[13] In the event that the Tribunal does not accept Suriname's Preliminary Objections, Suriname reserves the right to make counterclaims against Guyana and to invoke its rights under Articles 294(1) and 300 of the 1982 Law of the Sea Convention in this regard.

CHAPTER 2

THE LAND BOUNDARY TERMINUS

I. The Historical Basis

2.1 A legal understanding of the territorial relationship between Guyana and Suriname begins with reference to an agreement of cession made in 1799 between the Governors of Suriname and Berbice (now eastern Guyana).[14] That agreement provides in relevant part, as follows:

> That the West Sea Coast of the River Corentin, up to the Devil's Creek, besides the West Bank of the said River, hitherto considered belonging to the Government of the Colony of Surinam, be declared and acknowledged henceforth to belong to the Government of the Colony of Berbice.[15]

Guyana's Memorial acknowledges that agreement. Until today, however, there has been no specific legally binding understanding, either between the Netherlands and Great Britain or between Suriname and Guyana, as to the full scope of the legal implications of that cession of territory from Suriname to Berbice.

2.2 The colonial powers, just as the Parties after their independence, were generally in agreement that that arrangement meant that the boundary is located on the left (western) bank of the Corantijn River, leaving all of the river under the sovereignty of the Netherlands and later of Suriname after its independence.[16] However, following explorations of the interior, a question arose as to whether the upper reaches of the Corantijn River followed the New River (Netherlands position) or the Coeroeni River (British position).[17] The difference is an area that Guyana calls the New River Triangle.

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[14] At the time, both territories were colonies of the Netherlands but were occupied by Great Britain. After the Napoleonic wars, Suriname was restored to the Netherlands but Berbice was ceded to Great Britain by the 1814 Convention of London. *See* MG, para. 2.21 n.18, p. 11.

[15] *The Laws of British Guiana 1773-1870*, Vol. 1 (McDermott ed., 1870), at MG, Vol. II, Annex 2, at p. 51. This quotation is taken directly from the document in Guyana's Annex. Guyana states the quotation slightly differently in the body of its Memorial.

[16] The letter from the Prime Minister of the Netherlands to the Prime Minister of Suriname of 25 November 1975, the day Suriname attained its independence, observes in respect of this matter: "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 . . .". MG, Vol. II, Annex 46.

[17] For the position of Suriname see the previous footnote and the Communiqué of the meeting between the Prime Minister of Suriname and the Prime Minister of Guyana (10 April 1970), at Annex 5. The Communiqué observes:

> With a view to ensuring peaceful relations between the two countries the Prime Ministers agreed in principle that there should be an early demilitarisation of the border area of Guyana and Surinam in the region of the Upper Corentyne, and to the promotion of practical co-operation between Guyana and Surinam in the economic and cultural fields. They entertain the expectation that such co-operation would extend to activity over all areas of common interest to the two countries, including activity in the abovementioned region.

2.3 During the late 1920s and early 1930s, the colonial powers agreed that it was important that the boundary matters between Suriname and British Guiana be resolved, and they made an effort to do so.[18] The impetus for that undertaking was a British map that showed that the Upper Corantijn-Coeroeni triangle belonged to the British and that the boundary followed the thalweg of the river to the sea.[19] The Netherlands objected to that portrayal of the situation.[20] In 1930 the British proposed a deal: Great Britain would take the disputed land triangle while confirming that all of the river belonged to the Netherlands so long as British rights to use the river were guaranteed.[21] Apparently, the Netherlands was prepared to consider such an arrangement as part of a properly constituted, duly ratified boundary treaty, together with other proposals of the Netherlands set out in its correspondence with Great Britain.[22]

2.4 As part of the effort to develop a mutually acceptable comprehensive boundary treaty, the British and the Netherlands Governments began consideration of a draft boundary treaty as early as 1934.[23] The draft treaty contained a provision (Article 1(2)) that provided for the northern terminus of the land boundary to be determined by reference to the extension of a line of constant bearing from a known point to its intersection with the low-water line.[24] In the initial discussions between the two Governments they thought that the known reference point could be a police post that appeared on maps. When it finally became known in European capitals that the police post no longer existed, the Mixed Netherlands British Boundary Commission was given the task of recommending another point to be inserted into the same paragraph in the draft treaty. That task resulted in recommendations by the Mixed Commission that were forwarded to the Governments. Among those recommendations were that the reference point from which to determine the northern terminus of the land boundary should be at the 1936 Point and that the maritime boundary should extend from the 1936 Point at a 10° bearing.[25] Since the 1936 Point obviously was located well landward of the low-water line, the implication of the Commission's recommendation for the 1936 Point was that the land boundary ended at a point on the low-water line at a 10° bearing from the 1936 Point and that the 10° maritime boundary would extend from that low-water line point.

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[18] Relevant diplomatic correspondence is found at MG, Vol. II, Annexes 56-58.

[19] *See* Aide Memoire of the Netherlands (7 August 1929) at enclosure 1 of the British Foreign Office record, at MG, Vol. II, Annex 56.

[20] *Ibid.* The Netherlands Aide Memoire states: "As for the river itself, the contention has always been that not only the islands in it belong to Surinam, but also that the river itself is Surinam territory." The Netherlands correspondence also reaffirmed that the Upper Corantijn was the New River.

[21] Diplomatic Note on behalf of the British Secretary of State to the Netherlands Minister (18 October 1930), at MG, Vol. II, Annex 57.

[22] *Ibid.* In light of subsequent events, it is important to note that the Netherlands set out a number of other proposals in that correspondence that were not included.

[23] The text of this 1934 draft treaty is at MG, Vol. II, Annex 6. It was understood that the negotiating positions of the Netherlands Government would be subject to the approval of the Netherlands Parliament and that the treaty under negotiation would be subject to ratification by both Governments, as provided by Article 7 of the draft.

[24] Article 1(2) of the 1934 draft treaty provided: "The commencement of the left bank of the River Courantyne at the sea shall be deemed to be the point at which a line drawn on a true bearing of 28° from the known landmark or column on the left bank of the River Courantyne . . . intersects the shore line."

[25] The Report of the Mixed Commission is at MG, Vol. II, Annex 11.

2.5 The record is clear that the Mixed Commission's recommendation of the 1936 Point was made at the same time as, and was intrinsically linked to, its recommendation on the course of the maritime boundary. Guyana's Memorial admits as much: "At the time of the establishment of the land boundary terminus at Point 61, the Boundary Commissioners also developed a line delimiting the territorial waters adjacent to the two colonies."[26] However, there is more to it than that. The proposals of the Mixed Boundary Commission were also made at the same time as, and were intrinsically linked to, a proposed method to identify the point on the low-water line, thus marking a land boundary terminus from which the maritime boundary would extend.

2.6 The record is also clear that the recommendations of the Mixed Commission were not regarded as, or intended to be, binding on the Governments.[27] The Commission's recommendations were made independently by the Commissioners to their Governments and in essence were intended to be insertions into a treaty document under negotiation.[28]

2.7 In 1939, three years after the Mixed Commission made its recommendations on the terminus of the land boundary and the boundary in the territorial waters, Great Britain made a comprehensive boundary treaty proposal to the Netherlands.[29] The 1936 Point was included in the 1939 draft treaty submitted by Great Britain, but was only one of a number of elements of a set of politically expedient compromises that had been discussed with the Netherlands over a period of years as possible elements of a comprehensive solution.[30] Those proposed compromises differed from positions the colonial powers had taken on the various issues in earlier years and included the following: British willingness to accept the Corantijn River as a Netherlands river; the British proposal that the Netherlands drop claims to the Upper Corantijn-Coeroeni triangle; that both sides accept the 1936 Point as the reference point from which to determine the land boundary terminus on the low-water line; and that both sides accept a 10° bearing line to delimit the territorial sea boundary.[31]

2.8 Thus, Article 1(2) of the 1939 draft British proposal defined the proposed land boundary terminus as follows: "The beginning of the left bank of the River Courantyne at the sea shall be

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[26] MG, para. 3.15, p. 18.

[27] Accordingly, this is not a situation where legal effect may follow from a demarcation that was done in reliance upon a previously delimited boundary between two countries. *Cf.* Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962, p. 6.; Taba Award, Arbitral Award in the Dispute Concerning Certain Boundary Pillars Between the Arab Republic of Egypt and the State of Israel, I.L.R., 80 (1988), p. 226.

[28] Before the Mixed Commission began its work, the 1934 draft boundary treaty was being considered, and the tasks assigned to the Commission were intended to fill in certain specific provisions. *See* Note of the British Government (4 July 1935), at MG, Vol. II, Annex 60; Reply of the Netherlands Government (28 February 1936), at MG, Vol. II, Annex 61. For the draft treaty itself, dated 24 April 1934, *see* MG, Vol. II, Annex 6.

[29] *See* Diplomatic Note from the Secretary of State to E. Michiels van Verduynen, the Netherlands Minister to the United Kingdom, with attached 1939 British Draft Treaty (25 November 1939), at MG, Vol. III, Annex 89.

[30] The fundamental legal positions of Great Britain and the Netherlands were, of course, not prejudiced by their effort to negotiate a solution.

[31] For instance, the Aide Memoire from the Netherlands (7 August 1929) and the British response clearly sets forth the disagreement over the disputed land triangle and the ownership of the Corantijn River. *See* MG, Vol. II, Annexes 56 and 57.

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"[32]; and Article 3 of the proposal concerning the maritime boundary refers to the shoreline point defined in Article 1(2). Thus, one can see that even in the 1939 British proposal, the 1936 Point was only a reference point: the proposed land boundary terminus was actually located at another position on the low-water line.

2.9 It is speculative to say whether the Netherlands would have accepted the British 1939 treaty proposal if World War II had not intervened.[33] What is clear is that the Netherlands did not respond to Great Britain's 1939 treaty proposal before the war or thereafter. Following the war, diplomatic exchanges between the colonial powers elaborated upon and significantly expanded the scope of unsettled issues on a range of boundary questions, including the delimitation of the continental shelf. However, no agreement was reached on any of those issues.[34]

2.10 When Guyana attained its independence in 1966, the United Kingdom left it with those disputes unresolved.

II. The 1975 Netherlands Statement on Suriname's Boundaries

2.11 On the day in 1975 that Suriname attained its independence, the Prime Minister of the Netherlands wrote a letter to the Prime Minister 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.[35]

Thus this 10º line delimits both the territorial sea of Suriname and the maritime areas beyond the territorial sea. The formulation employed in the letter indicates that this is an all-purpose

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[32] *See supra* note 29.

[33] To support its perspective that the Netherlands would have ratified the 1939 draft treaty, Guyana's Memorial cites to a statement of the Government of the Netherlands presented to the International Law Commission. *See* MG, para. 3.19, p. 21. That statement of the Netherlands Government and the International Law Commission document in which that statement is found relate specifically to the territorial sea between two adjacent States. The statement of the Netherlands Government only confirms its position that the territorial sea boundary should follow the 10° line and stands for no other proposition.

[34] *See infra* Chapter 3, Section II.

[35] The full text of this letter with English translation is at MG, Vol. II, Annex 46.

maritime boundary, *i.e.*, it is the boundary for the continental shelf and the exclusive economic zone.[36]

2.12 The significance of the above definition of the northern terminus of the western land boundary is manifest. The letter's first paragraph stated: "Assuming that the territory of a country should be defined *as clearly as possible*…."[37] In 1975, therefore, the Netherlands considered that the land boundary terminus was "the point where the river bank changes into the coastline." Had the Netherlands considered that the 1936 Point had become binding, it stands to reason that the letter would have specified that in accordance with the consideration expressed in the letter's first paragraph, to define the territory of Suriname "*as clearly as possible*", the land boundary terminus was to be determined by reference to the 1936 Point. The fact that the 1936 Point was not mentioned confirms that the Netherlands did not consider it as a binding definition of the northern terminus of the western land boundary of Suriname under public international law.

III. The Location of the Land Boundary Terminus Has Never Been Determined or Agreed Upon as a Matter of International Law

2.13 The 1799 agreement of cession, as interpreted by the Netherlands in the 1975 letter, described the land boundary terminus between Guyana and Suriname as "the point where the river bank changes into the coastline." That phrase suggests a specific point to be agreed within a range of possible points, and the Parties have never agreed as to where the actual point is located. Of cardinal importance here is the fact that, however determined, this is a territorial point that falls outside of the legal framework of the 1982 Law of the Sea Convention and accordingly cannot be decided by the Tribunal. Wherever that point is, it is certainly not the 1936 Point, since that point is clearly not the point where the "river bank changes into the coastline". If "the point where the river bank changes into the coastline" is, as Suriname believes, north of the 1936 Point, then its location makes a significant difference in determining the rights of the Parties.

2.14 In this regard, it is important to take note of the reference at paragraph 3.36 of Guyana's Memorial to the Netherlands chart 222, prepared by the Netherlands authorities and provided to the British Government in June 1959. Guyana is interested in that chart because it portrays a "median line".[38] In fact, this chart shows a number of lines, including an equidistance line. The chart appears here as Figure 1.[39] The thinking behind the preparation of chart 222 appears from

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[36] 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.

[37] MG, Vol. II, Annex 46. (emphasis added).

[38] MG, para. 3.36, pp. 28-29.

[39] In the restricted Dutch archives there are two photocopies of this section of chart 222, one with handwritten notations and one without. The handwritten notations date from 1959 as indicated by the initials and date in the top right corner of the map and are not a later addition. The chart itself has not been found, nor has a photocopy of the full map sheet. The map that appears here as Figure 1 is the one without the handwritten notations, which presumably represents the map that was presented to the British Government. The one with the handwritten notations is found at Annex 14.

the detailed instructions given by the Head of the Legal Department of the Ministry of the Navy to the Head of the Hydrographic Office of the Navy.[40] Those instructions start out by indicating that there does not exist a treaty that indicates at which point the river changes into the territorial sea. To arrive at a possible solution, the instructions suggest drawing a closing line of 10 nautical miles. The instructions do not contain any reference to the 1936 Point.[41]

2.15 The most interesting aspect of that chart is not the "median line" but its identification of a land boundary terminus at the western end of a river closing line that is well to the north of the 1936 Point. The Netherlands explanatory note, which is the second document at Volume II Annex 27 of Guyana's Memorial, explains that the closing line was drawn as "a straight 10-mile line".[42] Thus, the proposed closing line was conservative, using even standards that predated the First United Nations Conference on the Law of the Sea.[43] The lateral equidistance line drawn by officials of the Netherlands is drawn not from the 1936 Point (or the point on the low-water line at a 10° bearing from the 1936 Point), but from this more northerly point. This demonstrates clearly that the Netherlands Government did not deem itself bound to abide by the 1936 Point. That the British government officials who received the chart so understood the Netherlands position is demonstrated by an internal letter among them.[44]

2.16 Figure 1 shows clearly that even as late as 1959, the Netherlands authorities were considering various possibilities for maritime boundary starting points.[45] At the same time, an official British map of Guyana, drawn in 1959, a portion of which is reproduced as Figure 2, shows a land boundary that extends farther north and west of the 1936 Point.[46]

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[40] *See* Memorandum from L.J. Van der Burg, Head of Legal Affairs Department, to Head of Hydrography (15 December 1958), at Annex 13.

[41] A letter from Commander Kennedy of the British Hydrographic Office to Miss Collings of the Foreign Office commenting on the copy of chart 222 submitted to the United Kingdom Government is included in Annex 23. (Because the original of this document is difficult to read, Suriname has re-typed it, for the Tribunal's convenience. Annexes 3 and 9 also include re-typed versions of the documents contained therein.) Annex 27 of Volume II of Guyana's Memorial provides a number of other documents relating to British consideration of chart 222. The first is a letter of 3 June 1959 from Miss Collings in the Foreign Office to Commander Kennedy. The second is a one-page "Explanatory Notes" provided by the Netherlands. The third document is undated but appears to be a summary of various British points of view prepared by someone in the Foreign Office. A reading of this third document makes clear that British officials were far from united on many of these questions. For the specific comments of Commander Kennedy, *see* Annex 23.

[42] MG, Vol. II, Annex 27, at document 2.

[43] As Commander Kennedy pointed out in his discussion of the Dutch chart, "if such a line be allowed. . .it could perhaps have a maximum length of 24 miles." Letter from Kennedy to Collings (17 August 1959), at Annex 23, p. 3.

[44] *Ibid.*

[45] The Netherlands chart 222 also shows a thalweg line that runs seaward perpendicular to the river closing line the Netherlands officials had drawn on the chart. It also shows the limit of a "license", presumably the license given by Guyana to the California Oil Company, which appears to extend along the 10° line for some distance and then deviate on a more easterly bearing. *See infra* Chapter 6, Section I. Also, on the copy of this chart that includes handwritten notations from 1959 and is found at Annex 14, it can be clearly seen that there is a handwritten notation that extends the 10° line indefinitely.

[46] As an official map of British Guiana, the full map sheet at Annex 22 shows the British claim to the Upper Corantijn-Coeroeni triangle, which Suriname contests.

Figure 1

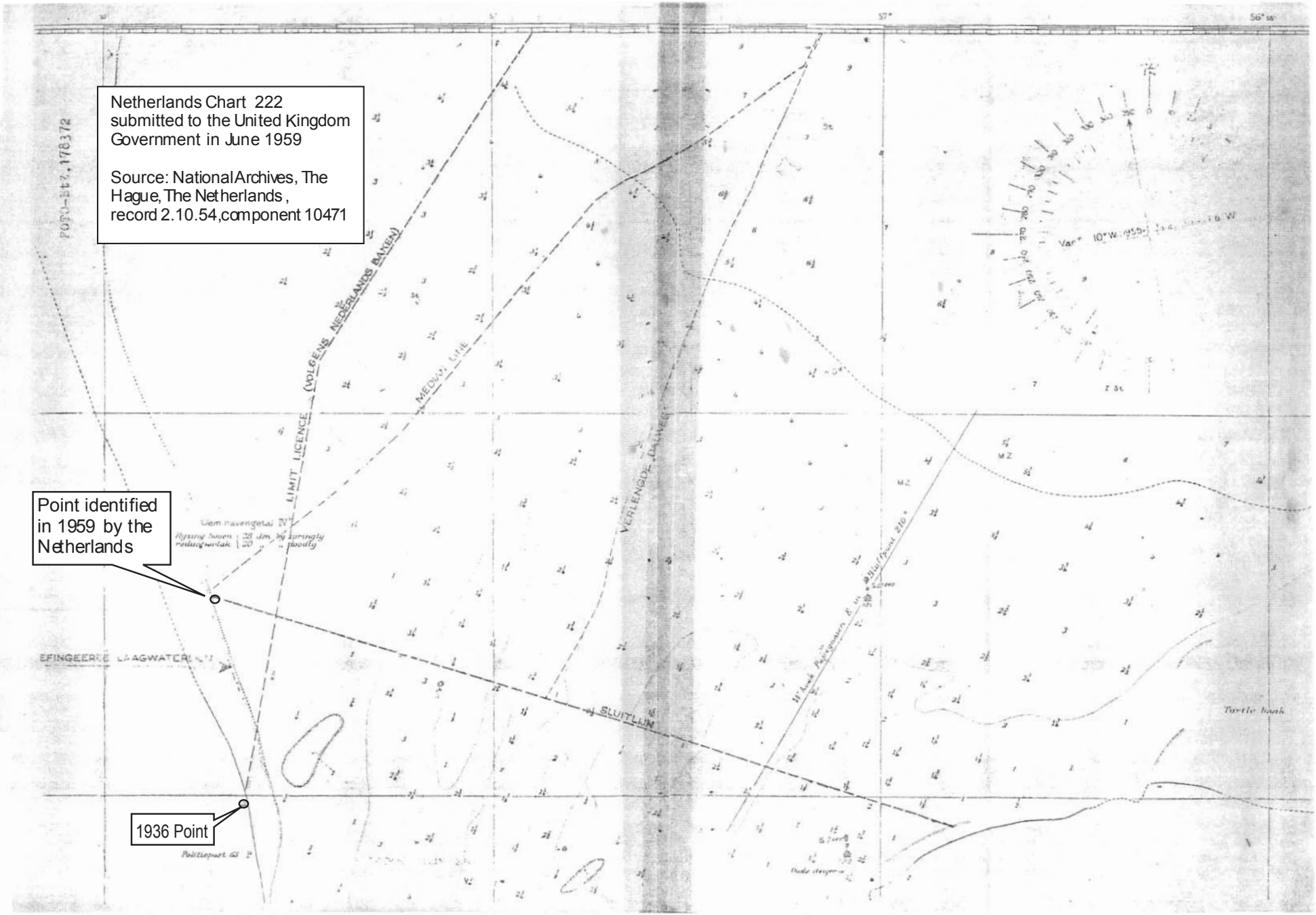
Netherlands Chart 222
submitted to the United Kingdom
Government in June 1959
Source: National Archives, The
Hague, The Netherlands ,
record 2.10.54,component 10471
Point identified
in 1959 by the
Netherlands
1936 Point
LIMIT LICENCE (VOLGENS NEDERLANDS BAKEN)
MEDIAN LINE
VERLENGDE GRENS
SLUITLIJN
Turtle bank

Figure 2


BRITISH GUIANA 7
59°
58°
57°
56°
Miles
REFERENCE
Boundaries Inter-Territorial
,, Provincial
,, Administrative Districts
Railways
Roads
Trails
Water Conservancy Area
Savannah
Landing Grounds and Pools
Administrative District Headquarters underlined in Red
Heights in Feet
ATLANTIC OCEAN
GEORGETOWN
New Amsterdam
Bartica
Suddie
Charity
Hampton Court
Anna Regina
Bush Lot
Pickersgill
Tiger Island
Zeelandia
Wakenaam I.
Leguan I.
Spring Garden
Essequibo
Buxton
Enmore
Helena
Mahaicony
Abary River
Lichfield
Rosignol
Gibraltar
Port Mourant
Plegt Anker
Mara
Schoolands
Skeldon
Corentyne
Coronie
Utrecht
Batavia
Commewyne River
Nickerie River
Coppename River
Saramacca River
Wismar
Three Friends
Malali Rapids
Omakwia
Ituni Township
Kwakwani
Kumaparu
Omai
Tumatumari
Saint Mary
Mowasi
Ebini Downs
Paradise
Kalkuni
Takama
Oreaila
Epira
Pirura
Post Arinda
Kurupukari
Maipuri Landing
Canister Fall
Itabru Fall
Wonotobo Fall
King Frederick William Falls
Makarapan Mt.
Apoteri
Kumaka
Surama
Annai
Karanambo
Rockstone
Gluck Island
Monkey Jump
Dora
Saint Cuthberts
Atkinson Field
Penal Settlement
Stampa
Manaka
Akwero
Hackney
Marlborough
Issororo
DEMERARA
BERBICE
DUTCH GUIANA
(SURINAM)

2.17 There are other points that could reasonably represent the point at which the "river bank changes into the coastline". For example, the west bank of the Corantijn River meets the seacoast of Guyana along a smooth and curving coastal configuration. In such situations, a point of transition between the riverbank and the coastline can be determined by the geometric method described at Annex 35.[47] When applied in these circumstances, this method identifies the point of transition at 6° 08' 32"N, 57° 11' 22"W, which is well north of the 1936 Point and also well north of the land boundary terminus identified on chart 222. Figure 3 shows the approximate relative locations of the 1936 Point, the point on the low-water line at a 10° bearing from the 1936 Point, the maritime boundary starting point identified by the Netherlands on chart 222 in 1959 and Point X identified by the application of proven geometric methods. Interestingly, Point X appears to be almost the same as the end of the land boundary drawn on an official British map in 1959, as shown in Figure 2.

2.18 This discussion demonstrates that the 1936 Point itself has no inherent scientific or legal merit. The colonial powers certainly considered the 1936 Point as a reference point leading to a possible land boundary terminus, but they never agreed to it in any legal or binding sense either as a required reference point or otherwise. The Netherlands considered itself free to continue to examine and propose other possible locations for the land boundary terminus and left Suriname in 1975 with a definition of its territory that makes no reference to the 1936 Point. As discussed below (Chapter 3, Section III), when the Parties met for the first time in 1966 to discuss boundary issues, they both made proposals for the land boundary terminus unrelated to the 1936 Point.

IV. The Precise Location of the Land Boundary Terminus Makes a Difference

2.19 The position of the land boundary terminus makes a substantial difference in the entitlements to maritime jurisdiction in this case. For example, if the land boundary terminus is at Point X and Suriname's 10° position prevails, Suriname would receive 2712 square kilometers (791 square nautical miles) more than it would receive if the land boundary terminus is at the low-water point that is on a 10° bearing from the 1936 Point.

2.20 To further demonstrate the importance of the location of the land boundary terminus, and without prejudice to Suriname's maritime boundary position of a 10° bearing line, Figure 4 is a diagram depicting two equidistance lines, one drawn from the low-water line at a 10° bearing from the 1936 Point and the other drawn from Point X. As Figure 4 shows, those two equidistance lines do not meet until they have extended approximately 15 nautical miles from the coast.[48] More than 248 square kilometers of maritime space is enclosed between those two equidistance lines.

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[47] Information on the low-water line and the high-water line represented in the figure contained in Annex 35 and in Figures 3 and 4 was compiled from nautical charts NL2228 and NL2228-1, which are produced by the Netherlands Hydrographic Office, and BA99A, BA572 and BA2687, which are produced by the United Kingdom Hydrographic Office (UKHO).

[48] The equidistance lines indicated in Figure 4 are without prejudice to the right of Suriname to establish a closing line in the Corantijn after the northern terminus of the land boundary with Guyana is established.

2.21 Any determination of a maritime boundary between States with adjacent coasts must start from an agreed starting point. The end of the land frontier separates the relevant coast of one party from the relevant coast of the other party. If the land boundary terminus is unknown, the principle that "the land dominates the sea" cannot be applied. The land boundary terminus is therefore the key ingredient in all delimitation methods. The application of the law of maritime delimitation in every case is dependent upon the location of the land boundary terminus.

2.22 Accordingly, the location of the land boundary terminus makes a difference. Here, there is no agreement as to that location and, as noted above and discussed below, the Tribunal has no jurisdiction to decide where it is.

Figure 3
Relative Locations of the 1936 Point, the Point on the Low-Water Line at a 10 ^{o} Bearing from the 1936 Point, the Point Identified in 1959 by the Netherlands and Point X

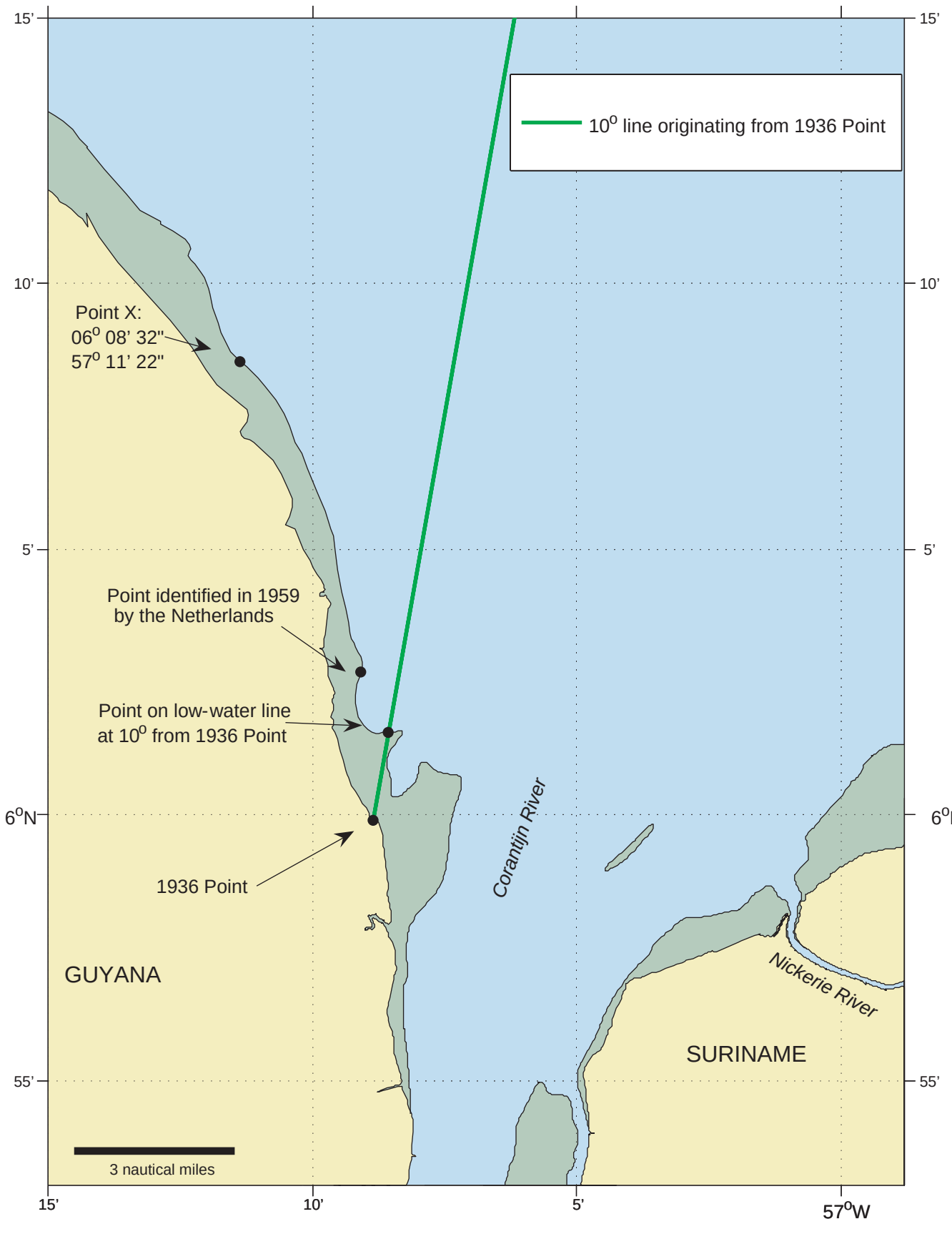
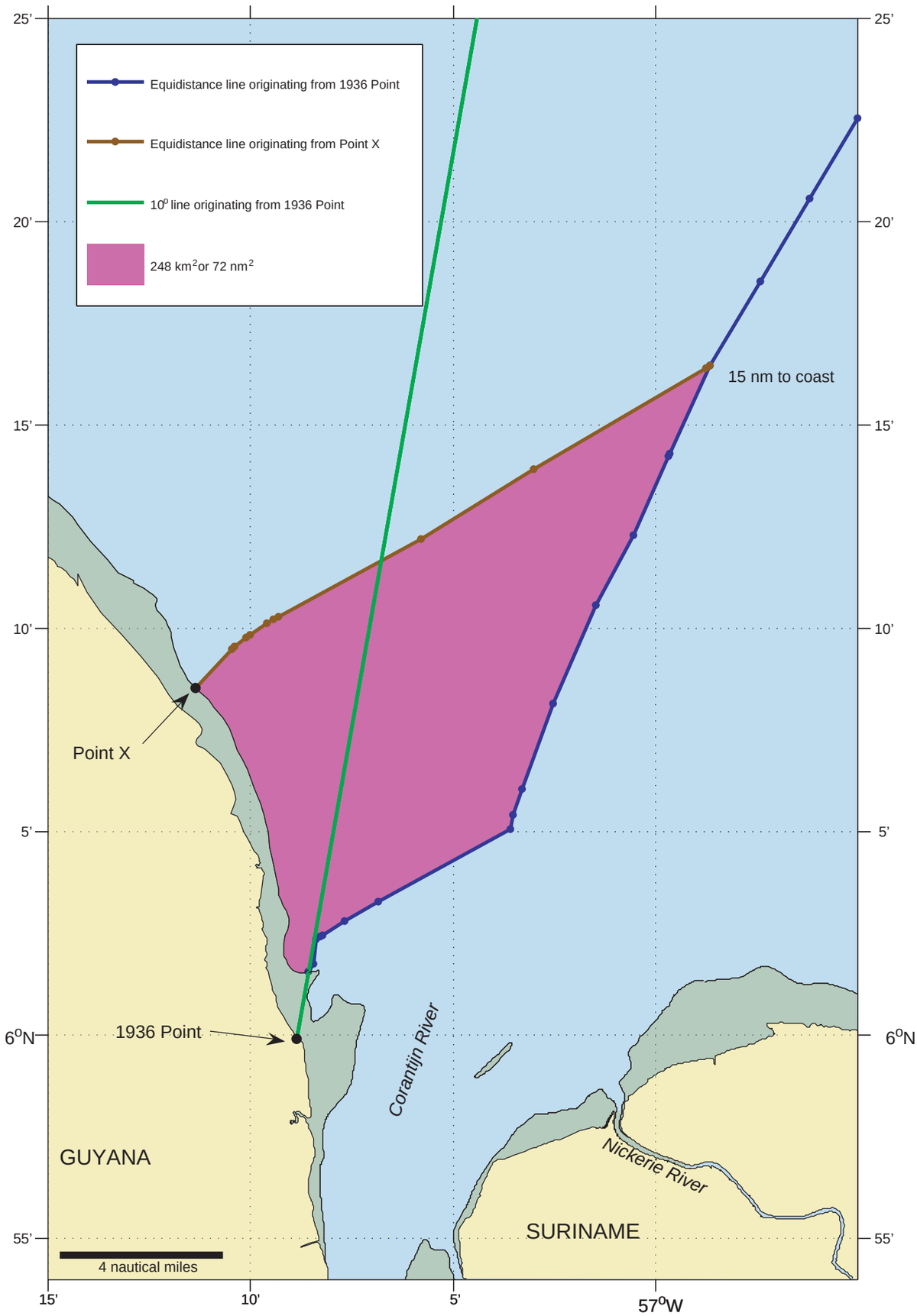


Figure 4
Equidistance Lines from Point X and 1936 Point



CHAPTER 3

ADDITIONAL FACTS OF RELEVANCE TO THE QUESTION OF THE TRIBUNAL'S JURISDICTION

I. The Mixed Character of the Boundary Dispute Between Suriname and Guyana

3.1 Guyana's Memorial portrays the situation as if an agreement had been reached on the location of the land boundary terminus in 1936 and that that agreement has carried forward to this day.[49] That is not correct. As already stated, Suriname does not contest the fact that the 1936 Point has had a place in the diplomacy and practice of the Parties and their colonial predecessors. However, Suriname does contest that the 1936 Point became a territorial point that is legally binding on the Parties.

3.2 This Chapter explains that the boundary issues between Suriname and Guyana have always been treated as a package with several components. Suriname's consistent position has been that the 1936 Point is at best a reference point that is linked to the 10° bearing line extending from that point to identify the land boundary terminus on the low-water line and, most important, to the further extension of that line as the maritime boundary line. Suriname's position is discussed in Section IV below.

3.3 The ongoing mixed nature of this dispute can be seen from the diplomatic correspondence relating to the CGX incident that Guyana cites in its Memorial.[50] In response to Suriname's diplomatic notes stating that unilateral drilling was not acceptable in the maritime disputed area, Guyana reintroduced issues associated with the Corantijn River itself, asserting that it "is a border river and as such attracts all the characteristics and features which such rivers bear in international law."[51] Thus, Guyana's assertion that maritime boundary issues and territorial issues are independent of each other is simply not the case, as its own documentation makes clear. This is a mixed dispute of several dimensions.

II. The Failure of Negotiations Between the Netherlands and the United Kingdom

3.4 Guyana claims that the colonial powers agreed on the land boundary terminus and points to the work of the Mixed Boundary Commission in 1936. Certainly the work of that Commission cannot be denied. However, the colonial powers did not reach a binding agreement on the work of the Mixed Commission or on any other open boundary matter, as shown above in Chapter 2, Section I. The parties clearly contemplated that a treaty would have been necessary to make the Commission's recommendations binding upon them.[52] Although there were many

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[49] *See supra* note 7.

[50] MG, para. 5.5 and 5.6.

[51] *Note Verbale* No. 353/2000 from the Cooperative Republic of Guyana to the Republic of Suriname (17 May 2000), at MG, Vol. II, Annex 77.

[52] Diplomatic correspondence between the parties and internal British correspondence at the time made clear that the parties expected a treaty to establish the boundary. *See, e.g.*, Letter from A.W.A. Leeper, Foreign Office, to Under Secretary of State, Colonial Office (24 April 1934), at MG, Vol. II, Annex 6; Letter from Sidebotham

diplomatic exchanges, and indeed possible openings, such a treaty was never signed, let alone ratified.

3.5 The fact is that the 1939 British treaty proposal, upon which Guyana relies to support its position both on the 1936 Point and the Upper Corantijn-Coeroeni triangle, was not even ready for signing.[53] It goes too far to speculate that it would have been signed or that it would have been ratified by both countries.[54] Indeed, the 1949 British draft treaty changed the overall equation of the 1939 British draft by providing for substantial new British rights regarding the use of the Corantijn River.[55] If there had been agreement on the work of the Mixed Commission, that would not have been possible. The Netherlands did not respond to the 1949 British draft proposal. The United Kingdom approached the Netherlands again with a draft treaty text 13 years later in 1962. This time the Netherlands sent the British a counter-proposal one year later, which indeed was the first specific and comprehensive Netherlands proposal to the British.[56]

3.6 The Netherlands proposal did not refer to the 1936 Point, but proposed that the land boundary should follow the thalweg of the Corantijn River to the sea and that the totality of the maritime boundary should follow the 10° line. The United Kingdom rejected the Netherlands proposal and three years later proposed a new draft treaty.[57] The Netherlands responded via a *note verbale* dated 3 February 1966.[58] In that communication the Netherlands rejected the British positions and called for a new negotiating effort in which the Governments of Suriname and Guyana would participate. Furthermore, the Netherlands in that statement, issued shortly before Guyana's independence, reaffirmed a number of important positions: that the Corantijn River "is entirely Surinam territory";[59] that the Corantijn River includes the Upper Corantijn or New River;[60] and "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."[61] There was no mention of the 1936 Point in that diplomatic note.

3.7 Thus, the colonial powers did not reach a legally binding agreement on any of the land or maritime boundary issues between Suriname and Guyana. The negotiations show only that the

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to Beddington (21 January 1935) at Annex 18; Letter from P.K. Boulnois, War Office, to Sidebotham (25 February 1935), at Annex 19; Letter from Sidebotham to H. Beckett (15 March 1935), at Annex 20; Letter from British Foreign Office to the Netherlands Minister (24 August 1936), at Annex 21.

53 *See supra* note 29.

54 The negotiations of the 1930s cannot be considered to have entailed a *quid pro quo*, in which the Netherlands accepted British sovereignty over the disputed land area and Great Britain accepted the Netherlands sovereignty over the entire River. The River was the Netherlands' territory in accordance with the 1799 Agreement and the 1814 Convention; by recognizing that, Great Britain was giving nothing away.

55 *See* Draft Treaty for the Delimitation of the Guyana-Suriname Border (30 September 1949), at Annex 9.

56 MG, Vol. III, Annex 91.

57 Note from British Principal Secretary of State for Foreign Affairs to the Netherlands Ambassador (29 November 1965), at Annex 3.

58 *Note Verbale* from the Netherlands to the United Kingdom (3 February 1966), at MG, Vol. II, Annex 68.

59 *Ibid.* at para. 1.

60 *Ibid.* at para. 2.

61 *Ibid.* at para. 8.

parties were seeking a set of compromises that might prove acceptable to both sides. Although their positions shifted in light of the considerations and politics and personalities of the day, they reached no agreement. All of those boundary problems were left to the successor States. An exchange in April 1966 between two British officials, Mr. S. W. Martin of the Foreign Office American Department and Arthur Watts, then an assistant to the Legal Advisor, is illustrative.

> Mr. Martin: "In the absence of a formal agreement it would be difficult to argue that the Netherlands Government was bound by their diplomatic correspondence"
>
> (….)
>
> Mr. Watts: "I agree that it is difficult . . . to say that the Dutch are committed (….) But the way in which the Mixed Frontier Commission was set up might well have involved an agreement (….)
>
> (….)
>
> I do not find [certain referenced papers] altogether reassuring. First, it seems to me that the statement which we have often quoted to the effect that the Dutch have accepted the Cutari river as the frontier is really only a statement that they would be willing to accept it as the frontier in the context of negotiating a treaty (which in the event was never concluded). Second, the Commission which fixed the tri-junction point was similarly part of the negotiation for that treaty, in the context of which its significance lies. I think we can continue to argue in general terms that Dutch acceptance of the Cutari as the frontier is evident in the discussions of the 1930s, but I think it would be unwise to lay stress on particular occurrences as demonstrating that acceptance since 'our 'position may not be wholly 'watertight'."
>
> Mr. Martin: "Thank you. This is rather what I feared."[62]

If there was no basis for an agreement on one aspect of the discussions between the colonial powers, then there was no basis for an agreement on any other aspect of those discussions. A month later, British officials confirmed to British Guiana officials that "the agreed basis for a treaty reached in 1939 now no longer exists."[63]

III. The Position of the Parties in 1966

3.8 Shortly after Guyana attained independence in 1966, Guyana and Suriname met for the first time to speak for themselves on boundary matters. Suriname was not yet independent, but it had the authority to speak on its own behalf on those questions, a matter that had been arranged

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[62] Note from American Department of FO (Mr. S.W. Martin) to Assistant Legal Advisor (Mr. Watts) (12 April 1966), at Annex 24.

[63] Minute by S.W. Martin (Foreign Office) (20 May 1966), at Annex 25.

internally between the Netherlands and Suriname and in diplomatic correspondence between the United Kingdom and the Netherlands.[64]

3.9 Guyana referred to that meeting – the Marlborough House Talks – in paragraphs 4.6 - 4.8 of its Memorial. Curiously, Guyana has made available *Suriname's* minutes of the meeting (in Dutch and English) at its Annex 69, Vol. II., but not its own version of those meeting minutes. Suriname further encourages a close reading of the record of its own minutes, which for ease of reference are included as Annex 17 to this Memorandum on Preliminary Objections.[65]

3.10 Guyana's Memorial states that the Marlborough House Talks "foundered on the parties' inability to reach agreement on the land boundary."[66] That statement implies that there was a potential maritime boundary agreement. However, there is nothing in those minutes that supports that conclusion. Guyana's Memorial sharply criticizes the position taken by Suriname on the maritime boundary at that meeting,[67] but does not state that Suriname ever renounced that position. In fact, Suriname has remained true to this day to the position it took on the maritime boundary issues at the Marlborough House Talks. The Marlborough House Talks did not reach agreement on any point and made clear a simple truth – which British/Netherlands diplomatic niceties had obscured – that the Parties were in disagreement on all relevant boundary issues, including the location of the land boundary terminus. In recognition of the inauguration of their boundary negotiations and the positions taken at that time, the Parties have always portrayed their subsequent boundary negotiations as a continuation of that first meeting in London.[68]

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64 Note from British Principal Secretary of State for Foreign Affairs to the Netherlands Ambassador (18 March 1966), at Annex 4. It is important to clarify here the constitutional position of Suriname at this time, since Guyana in its Memorial refers to the Netherlands as exercising "colonial" authority with respect to Suriname until its independence. That is not a correct reflection of the situation. On 15 December 1954 Suriname was no longer a colony of the Netherlands, but became an autonomous part of the reconstituted Kingdom of the Netherlands (then consisting of three countries: Suriname, the Netherlands Antilles and the Netherlands). The 1954 "Statute of the Kingdom" reserved some matters as exclusive competences to the Kingdom (in particular defense and foreign relations), while for all other matters, including natural resource policy, the three countries were fully autonomous. In 1962, Suriname was delegated the authority to negotiate with Guyana on behalf of the Kingdom with respect to the boundary issues. Suriname became independent in 1975. Thus, all references to the Netherlands in this Memorandum on Preliminary Objections relating to the period after 1954 and prior to 1975 are to the Kingdom of the Netherlands of which Suriname was then an autonomous part.

65 Suriname notes that the Dutch language version of the minutes included in Guyana's Annex does not include the even numbered pages. *See* MG, Vol. II, Annex 69. Moreover, the English translation is inaccurate in several respects. Suriname's Annex 17 contains the full Dutch text and an accurate English translation.

66 MG, para. 4.6, p. 38.

67 MG, para. 4.8, p. 40.

68 For instance, the Agenda of the Fourth Joint Meeting of the Suriname-Guyana Border Commission, 25-26 October 2002, provides as item 3: "Resumption of the London Conference of 23 June 1966." MG, Vol. II, Annex 87, Annex C. *See also* Minutes of the Fifth Joint Meeting of the Guyana/Suriname Border Commissions (10 March 2003), at MG, Vol. II, Annex 88; Communiqué of meeting between the Prime Minister of Guyana and the Prime Minister of Suriname (10 April 1970), at Annex 5; Agreement for Establishment of a Suriname-Guyana Commission, 8 February 1971, Guyana-Netherlands (on behalf of Suriname), 11411 U.N.T.S. 801 at Annex 15; 1971 Draft Treaty Between the Republic of Guyana and the Kingdom of the Netherlands for the Definition of the Frontier Between Guyana and Suriname, at MG, Vol. III, Annex 93.

3.11 At the Marlborough House Talks, Suriname began the discussion of the first agenda item (maritime delimitation) by pointing out that it would be necessary to know the starting point:

> Before being able to draw the boundary in the territorial sea and on the continental shelf, it is first necessary to know where this boundary should begin.[69]

The position taken by Suriname was that the starting point should be determined by reference to an appropriate closing line to be drawn separating the Corantijn River from the territorial sea, such closing line to be anchored on the west bank of the Corantijn River at a point marking the land boundary terminus.[70] Suriname argued for a closing line that would lie perpendicular to the main current of the Corantijn River.[71] Suriname gave no indication of acceptance of the 1936 Point at any time. On the contrary, Suriname stated that "we would like to reiterate explicitly that also in the 1930s there was never an agreement concluded between the relevant authorities".[72] For its part, Guyana proposed another point much less favorable to Suriname than the 1936 Point.[73]

3.12 Thus, the record of the Marlborough House Talks makes abundantly clear that the Parties were in disagreement on all relevant boundary issues from the outset, and, in particular, they were in disagreement on the location of the land boundary terminus. As the record clearly indicates, Suriname and Guyana each expressed at that meeting a different position on the location of the land boundary terminus, different from the 1936 Point or a point on the low-water line derived therefrom.

3.13 Unfortunately, following the Marlborough House Talks, the situation between the Parties deteriorated and the residue remains an abiding sore point to this day. It is relevant to the Tribunal's task for Suriname to point out that immediately following the Marlborough House Talks the dispute over the Upper Corantijn-Coeroeni triangle became heated, leading to an armed incident and to Guyana's occupation of the disputed land triangle with military forces. That led to a meeting between the Prime Ministers of Suriname and Guyana hosted by the Prime Minister of Trinidad and Tobago on 9-10 April 1970. The Communiqué from that meeting states "the Prime Ministers agreed in principle that there should be an early demilitarisation of the border area of Guyana and Surinam in the region of the Upper Corentyne."[74] It was also agreed to resume "the discussions between the parties which began in London . . . in the then existing

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69 Report of the Discussions Held Between Suriname and Guyana at Marlborough House, London, England, on 23 June 1966, at Annex 17, p. 3.

70 "Where this closing line intersects the left bank of the Corantijn, that is where the boundary line in the territorial sea and on the continental shelf starts." *Ibid.*

71 *Ibid.*

72 *Ibid.* at p. 11.

73 Guyana suggested that an appropriate river closing line would run between "the two points of the river where the first noticeable narrowing of the river begins, which means that the [river] closing line will have to run from Blufpunt on the Surinamese side to the Anna Morina Creek on the Guyanese side." *Ibid.* at p. 5.

74 Communiqué of meeting between the Prime Minister of Guyana and the Prime Minister of Suriname (10 April 1970), at Annex 5. That situation is still not resolved and Suriname maintains its objection to Guyana's control over disputed territory. *See* Agreed Minutes of the Fourth Joint Meeting of the Suriname and Guyana Border Commissions (25-26 October 2002), at MG, Vol. II, Annex 87, at p. 2.

spirit."[75] Within a year, the Parties had also agreed to establish a Suriname-Guyana Commission with a broad mandate. The mandate included the establishment of a "Special Committee charged with the responsibility of continuing the discussions . . . concerning the boundary . . . which were adjourned in London, June, 1966."[76]

IV. The Linkage of the 1936 Point to the 10° Line

3.14 The historical record is clear that when the Boundary Commissioners selected a reference point to mark the northern terminal of the land boundary, they also suggested that the maritime boundary (at that time limited to the territorial sea) should follow a bearing of 10°. Suriname always held that if the issues of the land boundary terminus and the maritime boundary were to be taken up in isolation from each other, it would argue for a land boundary terminus unrelated to, and north of, the 1936 Point. However, Suriname has been willing to accept the 1936 Point as the reference point for the maritime boundary between Suriname and Guyana if that maritime boundary were to run along a 10° azimuth to the outer limit of Suriname's maritime zones.[77] This has been a consistent position of Suriname. As Guyana's Memorial makes clear, it is Guyana that opposes such a solution.

3.15 All actions of Suriname have been consistent with that position. Even as Guyana's Memorial notes in connection with the diplomatic correspondence of Suriname concerning the 3 June 2000 incident, that correspondence consistently reiterates the basic Suriname position of linking the 1936 Point to the 10° bearing maritime boundary line.[78] Guyana, however, finds it to its advantage to reject this position and argue that there is an agreement between the Parties on the land boundary terminus that stands alone. However, Guyana cannot deny that Suriname's position has been consistent in insisting that the 1936 Point is inextricably linked to the 10° bearing line as the maritime boundary.

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[75] Communiqué of meeting between the Prime Minister of Guyana and the Prime Minister of Suriname (10 April 1970), at Annex 5.

[76] *See* Agreement for Establishment of a Suriname-Guyana Commission, signed 8 February 1971, at Annex 10.

[77] *See also infra* Chapter 5, para. 5.7.

[78] *See, e.g.*, MG, p. 92 n.6.

CHAPTER 4

THE JURISDICTION OF THE TRIBUNAL

I. The Jurisdiction of a Tribunal Constituted Under Annex VII of the 1982 Law of the Sea Convention Does Not Extend to Questions of Sovereignty over Land Territory

4.1 An Annex VII Tribunal derives its authority from Part XV of the 1982 Law of the Sea Convention. By virtue of the fact that Guyana and Suriname are contracting Parties to the Convention, they have consented to be bound by those provisions. Virtually every article in Part XV includes the phrase "interpretation or application of this Convention". Article 288(1), on jurisdiction, provides: "A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention . . . ". The Annex VII Tribunal's jurisdiction is thus limited by Article 288 to deciding disputes "concerning the interpretation or application" of 1982 Law of the Sea Convention and such other matters as are provided for in that article. Those matters do not include territorial matters.

4.2 The 1982 Law of the Sea Convention followed the 1958 Geneva Conventions and two earlier law of the sea conferences. Manifestly, its precursors and the present Convention are not concerned with land boundaries or other territorial issues. A brief review of the negotiating history of the 1982 Convention illuminates the point.

4.3 From the outset of the negotiations at the Third United Nations Conference on the Law of the Sea, it was generally accepted – indeed it was an integral part of the negotiation – that the new convention should include provisions on compulsory and binding dispute settlement to ensure that the substantive rules of the new convention would be enforceable. While that principle was widely accepted, its application to the question of maritime boundaries and other aspects of state sovereignty was both sensitive and controversial.

4.4 One of the luminaries of the negotiations was Galindo Pohl (El Salvador) who made one of the first "stage setting" statements about dispute settlement at the Conference. In that statement in 1974, he warned:

> even if the principle of strict legality were adopted, certain insurmountable obstacles, particularly with regard to constitutional and fundamental elements in the structure of States would remain. It was for that reason that among the exceptions to which obligatory jurisdiction did not apply were the questions directly related to the territorial integrity of States. Otherwise the convention would go too far and might dissuade a number of States from ratifying and even signing it.[79]

4.5 The fact that the new convention would not address territorial issues and thus that the dispute settlement mechanism would not have jurisdiction to do so, was an obvious and accepted point. As for maritime boundary questions apart from territorial questions, they were highly sensitive as well. A large group of States wished to see such disputes covered by the dispute

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[79] Third U.N. Conference on the Law of the Sea, Official Records, Vol. I, 2d Sess., 51st plen. mtg., at 213 (1975).

settlement mechanisms of the Convention. Another group took the opposite view. To achieve a consensus, compromise was required.

4.6 The compromise that emerged was that a State could choose to opt out of the Convention's adjudication or arbitration procedures for pure maritime boundary disputes if it accepted an alternative conciliation procedure set forth in Article 298(1)(a). However, the fact that Article 298(1)(a) contains an express exclusion of territorial disputes from the conciliation process required by that article does not imply that the Conventions' adjudication or arbitration procedures might take up such disputes if a State does not exercise its rights under Article 298 (1)(a). As Professor Bernard Oxman, one of the lead United States negotiators and a recorder of the negotiations in frequent contributions to the American Journal of International Law, said:

> While the exclusion for land territory disputes is drafted so that it does not literally apply to adjudication or arbitration under the Convention when a state does not elect to reject such procedures, it would seem that this is a mere drafting point. In any event, the same result seems implicit in the fact that the jurisdiction of a judicial or arbitral tribunal under the Convention is limited to the interpretation or application of the Convention. The Convention does not deal with questions of sovereignty or other rights over continental or insular land territory—questions that can hardly be regarded as incidental or ancillary.[80]

4.7 From the foregoing it is clear that an Annex VII tribunal does not have jurisdiction to decide a question of sovereignty over land territory.

II. The Tribunal's Authority to Decide Its Jurisdiction Is Limited to Determining Whether There Is an Unsettled Dispute Concerning Sovereignty over Land Territory

4.8 As noted above, the Tribunal's jurisdiction is limited by paragraph 1 of Article 288 of the 1982 Law of the Sea Convention to "any dispute concerning the interpretation or application of this Convention." Paragraph 4 of Article 288 provides: "In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal."

4.9 An international court or tribunal applying public international law has the competence to decide its own jurisdiction. In essence, therefore, such court or tribunal has the jurisdiction to determine whether the question presented to it falls within the scope of the parties' consent, either evidenced in an arbitral *compromis* or in the terms and conditions of another international agreement. In the present case, the Parties' consent to the jurisdiction of the Tribunal is framed by the limits of the 1982 Law of the Sea Convention.

4.10 The power of a court or tribunal to decide its jurisdiction is a procedural device that provides such court or tribunal with the exclusive power to decide the scope of its jurisdiction. Of course, that exclusive power has nothing to do with the limitations on its jurisdiction that are

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[80] Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: The Ninth Session*, 75 Am. J. Int'l L. 211, 233 n.109 (1981), at Annex 44.

provided by the constituent international agreement that brings the parties to the arbitration – in this case the 1982 Law of the Sea Convention. Once a tribunal determines that there is a legitimate matter in dispute that is outside its jurisdiction, it may not then proceed to decide that issue on the merits.

4.11 As set forth above, it is abundantly clear from the negotiating history of the 1982 Law of the Sea Convention that it was not intended in any way to address questions of territorial sovereignty, such as where a land boundary is located. As a matter of law, that legal question is governed by principles and rules of international law that are not addressed in the 1982 Law of the Sea Convention. There is nothing in Articles 15, 74 or 83 of the Convention pertaining to a land boundary terminus or its legal determination. Those articles, insofar as they pertain to lateral maritime delimitations between adjacent States, presume an agreed, defined land boundary terminus to mark the starting point for the maritime boundary delimitation.

4.12 This raises the question of the scope of the Tribunal's authority to decide its jurisdiction in the present case. Suriname submits that this authority is limited to examining whether there is an unsettled dispute concerning sovereignty over land territory, more specifically concerning the location of the land boundary terminus, the resolution of which is required before a maritime boundary can be delimited. If it finds that there is such a dispute, it has no jurisdiction to proceed any further.

4.13 In order to determine if an unsettled dispute exists, it is useful to refer to the definition of a "dispute" by the International Court of Justice. In paragraph 24 of its judgment of 10 February 2005 in the *Case Concerning Certain Property (Liechtenstein v. Germany)*[81], the Court stated:

> According to the consistent jurisprudence of the Court and the Permanent Court of International Justice, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties (see *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2,* p. 11*; Northern Cameroons, Judgment, I.C.J. Reports 1963,* p. 27*; Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 27, para. 35; *East Timor Judgment, I.C.J. Reports 1995*, pp. 99-100, para. 22). Moreover, for the purposes of verifying the existence of a legal dispute it falls to the Court to determine whether 'the claim of one party is positively opposed by the other' (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* p. 328).[82]

Moreover, in determining whether or not it has jurisdiction over the dispute submitted by the Applicant, it is for the Tribunal, not Guyana, to determine the proper characterization of that dispute. As the International Court of Justice stated in the 1998 Fisheries Jurisdiction case between Spain and Canada: "The Court's jurisprudence shows that the

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81 Judgment, I.C.J. 2005, para. 24, at http://www.icj-cij.org/icjwww/idocket/ila/index.htm.

82 *Ibid.*

Court will not confine itself to the formulation by the Applicant when determining the subject of the dispute."[83]

4.14 Suriname submits that for the Tribunal to determine in the present case that an unsettled dispute between the Parties exists, it is necessary and sufficient to determine that there is no agreement between the Parties as to the location of the land boundary terminus. That necessarily means that if there is a dispute between the Parties as to the location of the terminus, then the Tribunal lacks the authority to resolve it. As Suriname will demonstrate in the next Chapter, there is no binding agreement on the land boundary terminus. Thus, there is "a disagreement on a point of law or fact, a conflict of legal views or interests between parties". The claim of Guyana with respect to the location of the land boundary terminus is positively opposed by Suriname. Consequently, the Tribunal does not have jurisdiction to determine any question relating to the land boundary, including the land terminus, and accordingly it follows that the Tribunal does not have jurisdiction to determine the maritime boundary between the Parties.

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[83] Fisheries Jurisdiction Case (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432, 449, para. 30.

CHAPTER 5

AS A MATTER OF INTERNATIONAL LAW SURINAME IS NOT BOUND BY THE 1936 POINT

5.1 Guyana's Memorial asserts there is in fact an agreement between Guyana and Suriname with respect to the land boundary terminus at the 1936 Point. Guyana refers to this "agreement" at least 25 times in its Memorial. Nowhere, however, does it place the facts upon which it relies to show an "agreement" into a legal context; instead it uses loose language to describe what is, of course, essentially a legal and territorial question.

5.2 There are three ways in which the 1936 Point might have become binding on Suriname. First, the 1936 Point could have been included in a treaty instrument, to which Suriname and Guyana have succeeded or have given their consent to be bound and that has duly entered into force. Second, Suriname could have accepted the 1936 Point through acquiescence. Third, Suriname could have become estopped from claiming that the land boundary terminus is located at a different point.

5.3 As regards the first possibility, it is important to recall the status of the work of the Mixed Boundary Commission.[84] The work of that Commission was carried out in connection with the preparation of a comprehensive draft treaty on the boundary between the Netherlands and British colonies of Suriname and British Guiana. The Commission was not given a mandate or any power to make decisions. Recommendations of the commissioners were to be considered by the Governments of the Netherlands and the United Kingdom, and only if they were considered to be acceptable by both Governments would those recommendations be taken into account in the preparation of the text of the draft treaty.

5.4 It is common ground that the draft treaty, which the United Kingdom presented to the Netherlands in 1939, was never approved. Indeed, it was never even finalized for signature. As was observed above, at the Marlborough House Talks in 1966 and later in the conclusion of the 1971 Agreement between the Government of Suriname and the Government of Guyana on the Suriname-Guyana Commission, the Parties assumed that there was no mutual agreement in force. The various issues concerning the land boundary and the maritime boundary between Suriname and Guyana were regarded as open in 1966, and they remain open today. Thus, the conclusion is inescapable that the 1936 Point has not become binding upon Suriname by way of an international agreement. Guyana does not make an argument to the contrary.

5.5 The second possibility is that Suriname acquiesced in the 1936 Point. Acquiescence has been defined as "the inaction of a State which is faced with a situation constituting a threat to or infringement of its rights."[85] Thus, for acquiescence to apply, Suriname must remain silent over a long period in the face of Guyana's assertion of a position that is counter to Suriname's position. The situation between Suriname and Guyana is not of this character.

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[84] *See also* Chapter 2, Section I, paras. 2.4-2.6.

[85] I. MacGibbon, "The Scope of Acquiescence in International Law" in British Yearbook of International Law, Vol. 31, 1954, p. 143, at Annex 42.

5.6 The historical record shows that Suriname has not remained silent in the face of Guyana's assertion that the 1936 Point can be de-linked from the 10° line. In 1965, the United Kingdom for the first time proposed to de-link those elements of an integrated position. It presented a draft treaty to the Netherlands that proposed to delimit the territorial sea and the continental shelf by an equidistance line starting from the 1936 Point. In a *Note Verbale* of 3 February 1966 the Netherlands reacted to this proposal in the following terms:

> 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 of 10° East of the true North.[86]

In all subsequent efforts by Guyana to de-link the 1936 Point from the 10° line, Suriname has objected and demonstrated Suriname's position. For example, in the Marlborough House Talks in 1966 Suriname rejected Guyana's effort to de-link the 1936 Point from the 10° line when Guyana proposed an equidistance line from that point. Suriname also indicated that an independent legal determination of the land boundary terminus would result in a land boundary terminus north of the 1936 Point.

5.7 There can be no doubt about Suriname's position. Suriname's position, well-known to Guyana, has consistently been that the 1936 Point (as a reference point) cannot be viewed in isolation. When negotiations between the Netherlands and the United Kingdom started, the Netherlands was concerned about the location of the terminus of the boundary at the mouth of the Corantijn River and the boundary in the territorial waters. The 1936 Point and the 10° line were recommended jointly by the Mixed Commission for the purpose of guaranteeing the Netherlands' sovereignty over all of the territorial waters east of the 10° line. The indissoluble link of the 1936 Point to the 10° line marking the direction to the low-water line and thence to the maritime boundary beyond has been consistently maintained by Suriname. The manifestation of Suriname's position in the circumstances is illustrated by Suriname's oil concession practice. In 1964, Suriname's oil legislation specified that the western limit of its concession area extended from the 1936 Point across the territorial sea and the continental shelf along the 10° line.[87] In 1980 Staatsolie, Suriname's national oil company was established, and it was given a concession to all of Suriname's offshore area, including the area extending from the 1936 Point across the territorial sea and the continental shelf along the 10° line.[88]

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[86] *Note Verbale* from the Netherlands to the United Kingdom (3 February 1966), at MG, Vol. II, Annex 68, para. 8, at p. 6.

[87] *See* Law No. 86 (13 October 1964), at Annex 15.

[88] For further information on the Staatsolie concession see *infra* para. 6.15. Footnote 7, *supra*, lists examples of relevant historical diplomatic correspondence. There are more recent instances during which Suriname used the 10° line as its maritime boundary in combination with the 1936 Point. In 1992, Suriname presented a National Report to a Workshop of the Western Central Atlantic Fishery Commission of the Food and Agriculture Organization of the United Nations. The report indicated that Suriname proclaimed a 200 nautical mile exclusive economic zone in 1978 (Annex 30, at p. 63), and figure 1 to the report depicted the extent of the exclusive economic zone of Suriname (Annex 30, at p. 83). The Suriname Ministry of Foreign Affairs authored a *Note Verbale* dated 31 May 2000, informing the Embassy of Guyana in Paramaribo that "[t]he Government of the Republic of Suriname wishes to reiterate that from the point marked Latitude: 5° 59' 53".8

5.8 To the extent that Suriname has used the 1936 Point in its practice, it has always been linked to the 10° maritime boundary line while maintaining Suriname's position on the Upper Corantijn-Coeroeni triangle. Just as there is no agreement on the maritime boundary or land boundary between Suriname and Guyana, neither has the terminus of the land boundary alone been agreed upon through the acquiescence of Suriname. That Suriname's position is well-known is demonstrated by the materials collected in Annex 34.

5.9 Accordingly, the elements of acquiescence do not arise in this case. Both Parties have maintained positions that relate the 1936 Point to other aspects of the dispute between them. Neither Party has accepted the position of the other. The fact that one element is common to the comprehensive and integrated position of both Parties does not mean that either Party has accepted that element in isolation to the other aspects of its position.

5.10 The third possibility is that the terminus of the land boundary may have become binding on Suriname through an estoppel. In general terms, the rule of estoppel

> operates so as to preclude a party from denying before a tribunal the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment or the party making that statement has secured some benefit.[89]

Estoppel may not only result from a statement but also from inaction or silence. The concept of estoppel is closely linked to that of acquiescence. At times the inaction or silence of a State – sometimes amounting to acquiescence – may operate like an estoppel.

5.11 In the *Cameroon-Nigeria* case (Preliminary Objections),[90] Nigeria argued that Cameroon was estopped from bringing the dispute to the International Court of Justice because those States had agreed to deal with their dispute within a bilateral context. The Court said:

> An estoppel would only arise if by its acts or declarations Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the Court by bilateral avenues alone. It would further be necessary that, by relying on such an attitude, Nigeria had changed position to its own detriment or had suffered some prejudice (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 26, para. 30; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 118, para. 63).[91]

North, Longitude : 57° 08' 51".5 W, the direction of the boundary line in the territorial waters is on a true bearing of 10° East" (the *Note Verbale* is reproduced at MG, Vol. II, Annex 78). From the context in which that *Note Verbale* was presented (the plan of CGX to drill in the disputed area of the continental shelf), it is clear that this reference to territorial waters includes all maritime zones of Suriname.

89 D. W. Bowett, *Estoppel Before International Tribunals and its Relation to Acquiescence*, 33 British Year Book of Int'l L. 176, 176 (1957), at Annex 36.

90 Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 275.

91 *Ibid.* at p. 303, para. 57.

The Court held that Cameroon was not estopped because it had not attributed "an exclusive character"[92] to its negotiations with Nigeria, nor had Nigeria "changed its position to its detriment or . . . sustained prejudice."[93]

5.12 The same may be said here. Suriname has never indicated an acceptance of the 1936 Point as the only, or in the words of the *Cameroon-Nigeria* case, "exclusive", point to be used as the land boundary terminus. Suriname has always and unambiguously used that point only with the 10° line, which Guyana now rejects. Thus, Guyana could not have relied to its detriment on conduct indicating an acceptance of the 1936 Point in isolation because there was no such conduct.

5.13 In any event, the conditional position of Suriname, which relates the 1936 Point and the 10° bearing line, by its very nature cannot lead to an estoppel. As Professor Bowett has said:

> Where a representation is made conditionally, either in the sense it is made in the course of negotiations with a view to a settlement which does not materialize, or in the sense that it is made subject to conditions later unfulfilled by the other party, it cannot create a binding estoppel.[94]

In support of this statement, Professor Bowett referred to the Permanent Court of International Justice Advisory Opinion on the European Commission of the Danube. With reference to actions of France, Great Britain and Germany in that matter, the Permanent Court drew the following conclusion:

> It will suffice to observe that, though it is perfectly true that the three delegates of France, Great Britain and Italy, with a view to arriving at an amicable solution of the difficulties with which the Commission was faced, declared that they would agree to leave to the Roumanian authorities the enforcement of the regulations . . . it is equally true that this proposal was made dependent upon conditions which were not accepted by the Roumanian Government. No agreement was therefore reached, and the matter was left as it stood.[95]

The application of those teachings to this case is clear.

5.14 The facts demonstrate that Suriname's use of the 1936 Point has been linked to a 10° maritime boundary claim. Guyana has always been aware of Suriname's position and has known that indeed Suriname contended for possible locations for the land boundary terminus north of the 1936 Point if the land boundary terminus were to be determined in isolation from other boundary issues such as the maritime boundary. There is no statement or action or inaction of Suriname on which Guyana could have relied to its detriment. The core fact is that each side is

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92 *Ibid.*

93 *Ibid.* at p. 304.

94 D. W. Bowett, *Estoppel Before International Tribunals and its Relation to Acquiescence*, 33 British Year Book of Int'l L. 176, 191 (1957), at Annex 36.

95 Jurisdiction of the European Commission of the Danube between Galatz and Braila, Advisory Opinion, 1927, P.C.I.J., Series B, No. 14, p. 35.

well aware of the position of the other side in this ongoing mixed dispute, and this belies any argument that Guyana acted in reliance on Suriname's "actions" to its detriment.

5.15 As a matter of law, there is no agreement on the location of the land boundary terminus; the location of the terminus of the land boundary between Suriname and Guyana at the mouth of the Corantijn River must still be determined, and such determination is necessary for, and must precede, the legal determination of the maritime boundary between Suriname and Guyana. However, this Tribunal does not have jurisdiction to make such a territorial determination.

CHAPTER 6

GUYANA'S SECOND AND THIRD SUBMISSIONS HAVE NO LEGAL OR FACTUAL BASIS

6.1 Suriname respectfully submits that Guyana's second and third submissions should be dealt with as a preliminary matter and dismissed. Those submissions are not made in good faith, and the record clearly and unquestionably demonstrates that they are without any support. In short, this Chapter demonstrates that Guyana always knew that Suriname had a claim to the area in dispute, that Suriname never acquiesced to Guyana's claim, that Guyana's actions in the disputed area breached the Parties' *modus vivendi* agreement and that it was Guyana, not Suriname, that did not act in good faith.

6.2 This Chapter therefore examines (in Sections I, II and III) Guyana's charge that Suriname has through its oil concession practice acquiesced in Guyana's maritime boundary claim, which is the basis upon which Guyana rests its second submission. This Chapter then examines (in Sections IV) Guyana's third submission, that Suriname has breached its duty to cooperate, and demonstrates that that submission has no basis in fact and is not made in good faith.

I. The Facts Demonstrate That the Oil Concession Practice of the Parties Has Always Evidenced a Maritime Boundary Dispute

6.3 Both countries began authorizing companies to explore for petroleum resources on the continental shelf at about the same time in the late 1950s. Since then, both countries have made numerous arrangements with private companies, most lasting only for a few years. There is no basis for claiming that any of those arrangements has prejudiced the maritime boundary position of the issuing country.[96] Generally, those concessions or licenses (or after 1980 operating arrangements for Suriname) often covered both disputed and undisputed maritime areas (and sometimes land territory); to the extent they included disputed maritime areas, they might or might not have covered the entire disputed area.[97] Those arrangements accorded certain rights to companies for limited periods and were subject to early relinquishment if petroleum was not found. The history of oil concession practice in the offshore boundary region between Suriname and Guyana up to 2000 is a repetitious pattern of issuance of a grant to a company, exploration and relinquishment when petroleum was not found. Those grants or authorizations, when viewed against one another, clearly show an area of overlapping maritime boundary claims.

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[96] In making this statement Suriname does not concede that Guyana's concessions have been fully consistent with its present 34° line claim. The eastern limit of most of Guyana's concessions have in fact not followed that line precisely and indeed many have followed a 10° line for some distance from the coast. However, the general point remains true.

[97] For instance, Guyana's 1997 Maxus concession that Guyana highlights in its Memorial at para. 4.38, p. 56, and at Plate 27 in Volume V of its Annexes, does not cover a large part of the disputed area that Guyana claimed then or claims now.

6.4 Guyana's Memorial describes in extensive detail the concession that British Guiana entered into in 1958 with the California Oil Company.[98] The eastern limit of that concession followed the 10° line, or at least it was supposed to,[99] and then a 33° line seaward to the 25 fathom depth contour. What are missing from Guyana's portrayal of the California Oil Company concession are two key facts. First, the British Government confirmed to the Netherlands Government that the concession limits were intended to be without prejudice to agreement on a boundary line.[100] Second, the California Oil Company relinquished its concession by 1960.[101] After that, there was virtually no petroleum activity in the Guyanese offshore until 1965, when Guyana issued a concession to Shell with an eastern limit generally consistent with its boundary position.[102]

6.5 On the Suriname side, the earliest offshore petroleum arrangements were with the Colmar Company. Those arrangements began in 1957.[103] A law of Suriname concerning a license for oil exploration enacted in January 1957 included the continental shelf and defined the western limit of the license area by reference to the western boundary of Suriname.[104] In 1964, however, Suriname authorized amendments to the agreement with Colmar,[105] which resulted in an amended agreement in 1965 and clarified the western limit of the Colmar concession as the 10° line.

6.6 By those actions, the differences in the offshore boundary positions of Suriname and Guyana had become stark and apparent by 1964/1965. Those differences emerged prior to the independence of both countries, and they have remained to this day. British Guiana's 1965 offshore concession to Shell was limited on the east by a line running at a bearing of 33-34° from the coast, except for the near shore segment which ran at approximately 10-13°. That is noted in Guyana's Memorial at Plate 8 and paragraph 3.44. Guyana's Memorial is less clear, however, about the clarified western limits of Suriname's Colmar concession in the same year. [106] Nonetheless, at Annex 169 (Volume IV), Guyana's Memorial does include a description of that concession with a chart. Figure 5 is Suriname's rendition of the eastern limit of Guyana's 1965

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98 MG, para. 3.29, p. 25-26.

99 Evidently the first segment followed a 13° bearing line. Guyana has not explained why the concession limit is inconsistent with the British position.

100 Internal Memorandum from the Netherlands Ministry of Foreign Affairs (12 July 1958), at Annex 12. This explains why the Netherlands saw no need to protest the California Oil Company Concession. *See* MG, para. 3.32, pp. 26-27.

101 E. W. Clark et al., *Petroleum Developments in South American and Carribbean Area in 1960*, 45 Bulletin of the Am. Ass'n of Petroleum Geologists 1045, 1080 (1961), at Annex 26.

102 MG, Vol. III, Annex 107. It may be noted that the British Government assured the Netherlands Government that activities under the Shell concession were without prejudice to the establishment of a maritime boundary between Guyana and Suriname. Letter from the Netherlands Ambassador in London to the Minister of Foreign Affairs (13 October 1965), at Annex 28.

103 Law No. 15 (26 January 1957), at Annex 11.

104 *Ibid.*

105 Law No. 86 (13 October 1964), at Annex 15.

106 Indeed, Guyana admits: "The original Colmar concession . . . covered, on paper at least, the entire maritime area that is at issue in this Arbitration." MG, para. 4.26, p. 49. Contrary to the implication of Guyana's statement, the Colmar concession was very active for more than 10 years.

Shell concession and the western limit of the Colmar concession in 1965 as shown on the charts taken from Guyana's Memorial. As can be clearly seen, by 1965, before the independence of Guyana and Suriname and before the 1966 Marlborough House Talks, the respective western and eastern limits of Guyana's and Suriname's offshore petroleum concessions identified an extensive area of overlapping claims. This has remained the situation to this day. Inexplicably, however, Guyana's Memorial is nonetheless replete with statements such as the following that have no basis whatsoever: "It is also a historical equidistance line which has generally been relied upon in both parties' oil concessions and in their other practices from 1958 right up to the present day."[107] How Guyana can make such statements is beyond explanation. Its own annexes demonstrate an area of overlapping claims.

II. Guyana's Second Submission Fails Since There Has Been No Acquiescence in Guyana's Position in Light of the Ongoing Maritime Boundary Dispute

6.7 The essence of Guyana's argument that Suriname's police action on 3 June 2000 was wrongful and engages Suriname's international responsibility is that the incident occurred "within the sovereign territory of Guyana or other maritime areas over which Guyana exercises lawful jurisdiction."[108] In support of that remarkable assertion, Guyana argues that Suriname has acquiesced in Guyana's oil concession practice leaving it free to act as it wishes in the area of overlapping claims. That is simply incorrect.

6.8 In support of its unfounded position that "[u]ntil May 2000, there was no formal objection by or on the part of Suriname to any of Guyana's oil concessions"[109] Guyana quotes a passage from the separate opinion of Judge Roberto Ago in the *Tunisia-Libya* case.[110] In Judge Ago's view, prior to the independence of Libya and Tunisia, the French authorities (in Tunisia) had acquiesced in Italian actions (on behalf of Libya). Of course, the full Court did not see it that way in its judgment. Nonetheless, Judge Ago's point and his reliance on the famous article of MacGibbon emphasize that consent can be evidenced by silence or inaction. This is the burden of Guyana's claim.

6.9 The conduct of a State asserting a claim and of the State opposing such a claim is critical to the establishment of acquiescence. Inherent in the doctrine is the dual requirement that a claim must have been made and accepted. In the absence of an unequivocal claim, a State is under no obligation to give or to withhold its consent. Likewise, in the absence of an unequivocal acceptance, a claim is only a unilateral act. The conduct that allegedly constitutes acquiescence in or tacit acceptance of a claim must be clear and unequivocal.

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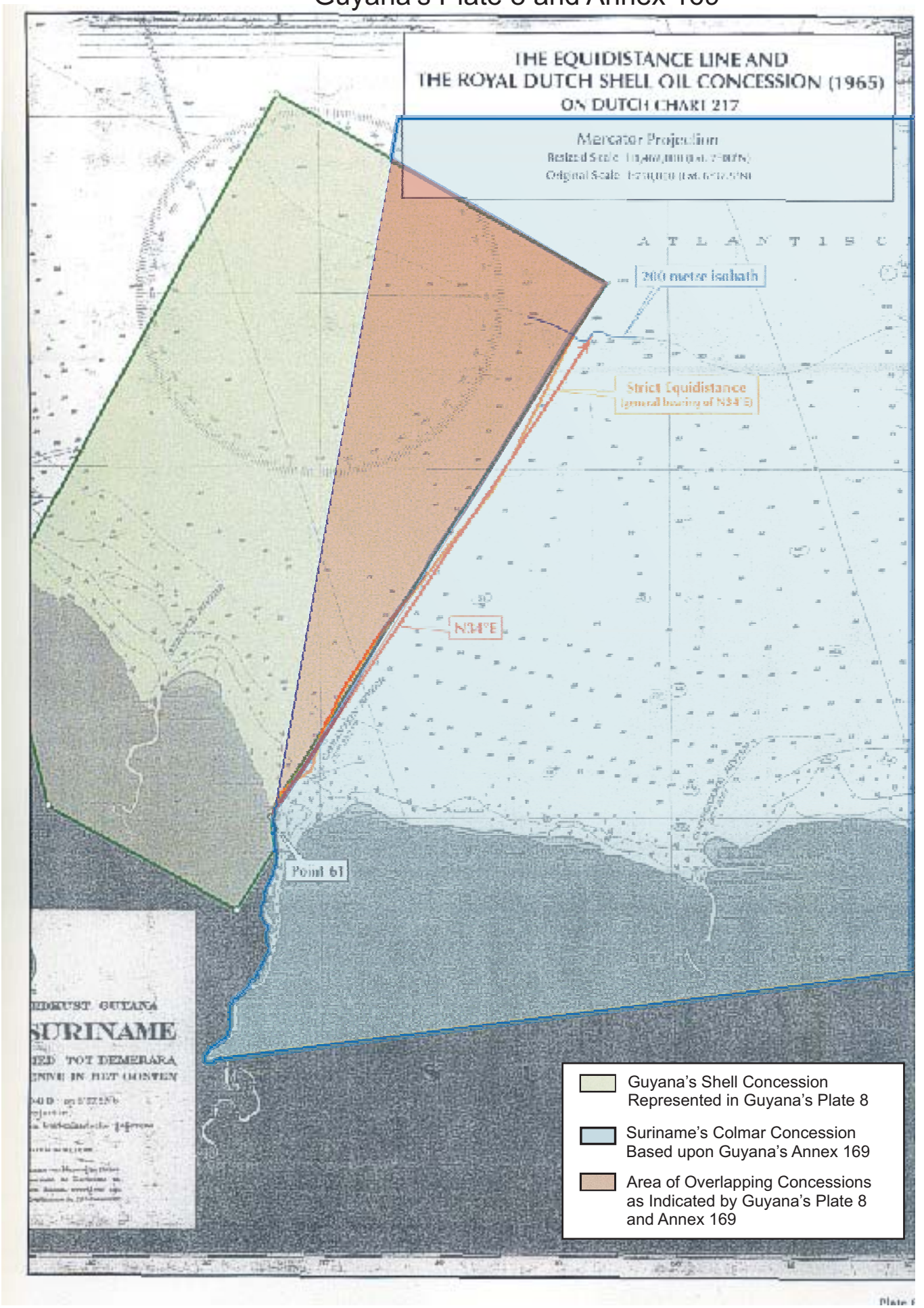
[107] MG, para. 7.29, p. 87.

[108] MG, Submission 2, p. 135.

[109] MG, para. 9.24, p. 117.

[110] MG, para. 9.24 n.36, pp. 117-18; s*ee also* Case Concerning the Continental Shelf, Merits, Judgment, (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982, p. 97.

Figure 5
Overlay of Concessions Shown in
Guyana's Plate 8 and Annex 169



6.10 Thus, in the article by MacGibbon that Judge Ago quoted, followed by Guyana in its Memorial, MacGibbon said as well:

> Perhaps the safeguard most necessary to a realistic and acceptable application of the doctrine of acquiescence lies in the demand that it be interpreted strictly. The purpose of insisting on circumspection in inferring the consent of a State from its inaction is to ensure that such acquiescence corresponds accurately with the implied intention of the acquiescing State, and to limit the benefits of acquiescence to claims which have been formulated in such a way that the acquiescing State has or ought to have knowledge of them.[111]

In light of that observation of MacGibbon, Suriname's intentions with regard to the area of overlapping claims are clear and do not qualify as acquiescence. Suriname, which has maintained a 10° maritime boundary claim from the outset, has not acquiesced in Guyana's petroleum practice up to the 34° line. The *modus vivendi* of 1989 and the follow-up Memorandum of Understanding of 1991, discussed in Guyana's Memorial,[112] do not demonstrate an intention on the part of Suriname to concede the area of overlapping claims to Guyana. The diplomatic efforts to deal with the plethora of boundary problems between Suriname and Guyana illuminated by the Marlborough House Talks in 1966 and reconstituted in formal bilateral meetings up to and after 3 June 2000 do not indicate that Suriname had given up or was giving up its maritime boundary claim.

6.11 Guyana tries to support its position – that Suriname has acquiesced in an "historic equidistance line", a line which is neither historic nor equidistant – from two sets of factual considerations. First, Guyana argues that the willingness of the Netherlands Government to entertain the possibility of using the equidistance method in the 1950s to delimit the maritime boundary amounts to acquiescence binding on Suriname. Whatever interest the Netherlands may have had in equidistance, the fact is that there was no consummation of an agreed equidistance line even at the technical level between the British and the Netherlands Governments. It is also noteworthy that by 1964/1965, a year before Guyana's independence and ten years before Suriname's independence, the oil concessions of the two sides, as shown on Figure 5, evidenced an area of overlapping claims between Suriname's 10° line and Guyana's 30-34° line. Second, Guyana tries to turn Suriname's restraint in not aggressively promoting petroleum development opportunities in the area of overlapping claims into "respect"[113] for Guyana's position. Of course, Suriname knew of Guyana's position, but that does not mean Suriname agreed with it. On the contrary, Suriname issued concessions for areas that included the disputed area to Colmar in 1964 and to Staatsolie in 1980. The Colmar concession was active until the late 1970s, and that Staatsolie concession is still fully in effect. Staatsolie entered into agreements for areas that also included the disputed area with IPEL in 1988 and with Pecten in 1993. The agreement with Pecten was in the spirit of the 1989 *modus vivendi*, and so was the "restraint" that Staatsolie observed in agreements that

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111 I. C. MacGibbon, *The Scope of Acquiescence in International Law*, 31 British Year Book of Int'l L. 143, 168 (1954), at Annex 42.

112 MG, paras. 4.32-4.37, pp. 53-55.

113 MG, para. 4.43, p.58.

were concluded thereafter. Even the Staatsolie 2002-2003 bid round map that Guyana uses at its Plate 30, which indeed shows that certain Staatsolie operating agreements do not extend into the disputed area, nonetheless also shows the Suriname claim line. The fact that Suriname has acted responsibly and in good faith by not insisting that all of its oil and gas contracts, which are supposed to assist the economic development of the country, also take on the boundary problem with Guyana, does not represent any form of acquiescence.

III. Guyana's Breach of the 1989 *Modus Vivendi* Led Directly to the 3 June 2000 Police Action by Suriname

A. The Events Preceding the 1989 *Modus Vivendi*

6.12 It does not seem necessary to Suriname to undertake here a full review on a year-to-year basis of all the facts pertaining to oil concession practice since 1965, one year before the Marlborough House Talks occurred. However, since Guyana's second and third submissions assert, incorrectly, that those facts illustrate that Suriname's oil concession practice has resulted in a *modus vivendi* between Suriname and Guyana that respects Guyana's boundary claim line rather than disputed overlapping maritime boundary claims, several key points must be mentioned.

6.13 First, as a matter of general information, to date there has been some offshore petroleum exploratory activity in both countries outside the area of overlapping claims, including the drilling of a number of wells in the undisputed areas offshore of both countries, but no commercial prospects have been discovered anywhere offshore of either country. Nonetheless, the area offshore of both countries – including the area of overlapping claims – remains of interest, even though it is widely understood in the petroleum industry that there is a maritime boundary dispute.

6.14 Second, to date the only well that has been drilled in the area of overlapping maritime boundary claims was drilled by Shell in 1974. Shell held concessions from both countries at that time and was embarked upon an exploratory offshore drilling program in both countries to assess the overall prospects throughout the region.[114] That well was abandoned in the same year it was drilled.

6.15 Third, in 1980 Suriname established its national petroleum company Staatsolie. From that date to the present, Staatsolie has held Suriname's concession to all of Suriname's offshore area up to its claimed line of 10°.[115] The fact that some joint venture arrangements that Staatsolie entered into with operating companies were limited to specific offshore areas not

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[114] Shell drilled and abandoned Mahaika 1 and Berbice 2 in Guyana's undisputed offshore area in early 1974. Abery 1 was drilled in December 1974 and abandoned in early 1975. Shell/Elf drilled Coronie 1 in Suriname's undisputed offshore in 1975, and it was abandoned the same year. *See* L. E. Hatfield et al., *Petroleum Developments in South America, Central America, and Caribbean Area in 1974*, 59 Am. Ass'n of Petroleum Geologists Bulletin 1756, 1767-68 (1975), at Annex 27; L. E. Hatfield, and C. H. Neff, *Petroleum Developments in South America, Central America, and Caribbean Area in 1975*, 60 Am. Ass'n of Petroleum Geologists Bulletin 1640, 1652, 1656 (1976), at Annex 28.

[115] At paragraph 4.15 of Guyana's Memorial, it is admitted that "Suriname granted Staatsolie a license covering the entire country (including maritime areas)." *See also* MG, Vol. IV, Annex 170 for the Suriname Decree No. E8 of 3 December 1980, relating to the granting of a license and concession to the State Oil Company.

including all or part of the area of overlapping claims does not mean that Suriname or Staatsolie acknowledged Guyana's boundary position as Guyana asserts.[116]

6.16 During the period between 1965 and early 1988 in the offshore area of Guyana and Suriname, both countries entered into arrangements with petroleum companies and some exploratory work was done, but those concessions or licenses were soon relinquished. [117] There is nothing in that record, however, that could lead one to conclude that one side or the other was not asserting its interests in a manner generally consistent with its national maritime boundary position. For instance, Guyana admits that in 1981 Staatsolie entered into a license with Gulf covering an area west of the 34° line and Guyana protested.[118] Guyana's point is sufficient to show that Guyana did not approve Suriname's action; however, it also demonstrates Suriname's action. It certainly does not demonstrate that Suriname agreed with Guyana's position. Likewise, Guyana refers to its complaint about negotiations between Suriname and IPEL in early 1989.[119] Suriname responded to that complaint with a diplomatic note affirming its 10° line maritime boundary position linked to the 1936 Point.[120] Guyana's complaints about Suriname's actions and interests in the area of overlapping claims simply demonstrate that there was an area of overlap, not that Suriname accepted Guyana's viewpoint.

6.17 Furthermore, Guyana's reference to Suriname's arrangements with IPEL fails to address the fact that from 1988 to April 1989 IPEL held an option with Staatsolie to negotiate a production sharing contract for the immediate offshore area extending up to the 10° line.[121] At the same time, in mid-1988, Guyana issued the LASMO/BHP concession, and the maps for that concession depicted the concession to include the area of overlap.[122] LASMO had been in

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116 Guyana, for instance, refers to a map published by Staatsolie showing the 2002-2003 bid round which it includes as Plate 30 in its Memorial. The map shows Suriname's 10° line claim but the offerings do not include blocks throughout the full extent of Suriname's offshore claim, either to the north, west or east. Guyana's suggestion that all offshore petroleum concessions and licensing activities are prejudicial if they do not extend fully to the boundary claim of the offering State exacerbates ongoing maritime boundary disputes and is a disincentive to economic development and investment. It is also at odds with Articles 74.3 and 83.3 of the 1982 Law of the Sea Convention and belied by Guyana's own concession offerings, for instance to Maxus in 1997, which covered only a relatively small portion of the area of overlapping maritime boundary claims.

117 The compendium of maps from international petroleum sources at Annex 34 demonstrates the changing nature of the various concession/licensing arrangements in Suriname and Guyana throughout this period, while both countries during the same period maintained their respective maritime boundary positions as these maps demonstrate.

118 MG, para. 4.28, pp. 50-51.

119 MG, para. 4.31, p. 52.

120 Diplomatic Note from Embassy of Suriname to Guyana Ministry of Foreign Affairs (23 January 1989), at Annex 13.

121 W. David Wiman, *Oil and Gas Developments in South America, Central America, Carribbean Area, and Mexico in 1988*, 73 Am. Ass'n of Petroleum Geologists Bulletin 328, 332 (1989), at Annex 29; *see also* the 1989 Petroconsultants Foreign Scouting Service map of Suriname and French Guiana, at Annex 34.

122 MG, para. 4.29, p. 51; Guyana Natural Resources Agency, *Press Release* (28 July 1988), at MG, Vol. III, Annex 141; *Guyana, Two More Oil Coys Sign Exploration Agreement*, Guyana Chronicle (29 July 1988), at MG, Vol. III, Annex 142; LASMO Oil (Guyana) Limited and BHP Petroleum (Guyana) Inc., Description of Contract Area - "Description of Area to be granted under Petroleum Licence pursuant to Article 3 of the Petroleum Agreement", at MG, Vol. III, Annex 143; *Guyana Awards Offshore Licenses to Two Combines*, Oil & Gas Journal (8 August 1988), at MG, Vol. III, Annex 144; LASMO Oil (Guyana) Limited and BHP

negotiations with Guyana for several years, and the maritime boundary problem between Suriname and Guyana had been one of LASMO's chief concerns. The notes of the meeting of 10 July 1986 between LASMO and Petrel representatives and petroleum officials of Guyana record that up to 20 percent of the area in which those companies were interested could be in dispute with Suriname.[123] IPEL relinquished its option with Suriname in accordance with its terms in early 1989, but the problems for both countries of potential difficulties in the area of overlap and the fact that an uncertain maritime boundary hindered petroleum development opportunities were apparent. Again, Guyana's Memorial provides the notes of a meeting dated 2 June 1989 between LASMO/BHP and Guyana's petroleum officials, ten months after the LASMO/BHP concession was granted, that contain a full section on the boundary problem, with optimism expressed by the government officials about an early settlement with Suriname.[124] Moreover, the maps shown to LASMO/BHP at its meetings with Guyana's petroleum officials depicted a line approximating Suriname's boundary claim running through the LASMO/BHP concession area.[125] It was concerns such as those raised by Guyana's own concession holders and by operators doing business with Suriname that quickly elevated governmental discussions to the Presidential level in 1989.

B. The 1989 *Modus Vivendi*

6.18 The 1989 Presidential meeting represented an acknowledgement of two basic propositions: first, that there was an area of overlapping maritime boundary claims and, second, that opportunities in that area should be mutually beneficial. Guyana purports to find in the same record justification for its unilateral authorization of CGX's drilling activity in the area of overlapping maritime boundary claims and a basis for its continuing position that it has a free hand in the area of overlapping maritime boundary claims.[126] For that reason, a thorough examination of the 1989 Presidential meeting and subsequent events is called for.

6.19 Guyana's Memorial reports upon the meeting of the Presidents that took place on 25 August 1989.[127] Guyana also sets out as an annex the full text of the agreed minutes, and it is appropriate to quote here the full text of those minutes insofar as the petroleum activities in the area of overlap are concerned:

Petroleum (Guyana) Inc., Co-operative Republic of Guyana Exploration License: Satira, 1988/1989 Work Programme and Budget (16 November 1988), at MG, Vol. III, Annex 145; Report on Guyana (Satira) Exploratory Advisory Committee Meeting No. 2, June 2nd, 1989, Georgetown, Guyana (19 July 1989), at MG, Vol. III, Annex 146.

123 Memorandum of the LASMO/Petrel Discussion of 10 July 1986 at the Office of the Deputy Prime Minister, Planning and Development (11 July 1986), at MG, Vol. III, Annex 138.

124 Report on Guyana (Satira) Exploratory Advisory Committee Meeting No. 2, 2 June 1989, Georgetown, Guyana (19 July 1989), at MG, Vol. III, Annex 146.

125 Guyana Natural Resources Agency, Petroleum Unit, Report on the Seismic Survey by Western Geophysical for London and Scottish Marine Oil and Broken Hill Proprietary, Completed During 29 May to 8 July 1989 (1 August 1989), at MG, Vol. III, Annex 147.

126 MG, para. 4.32, p. 53.

127 *Ibid.*

> The two sides recognized that there exists the potential for problems with respect to Petroleum Development within the area of the North Eastern and North Western Seaward boundaries of Guyana and Suriname respectively.
>
> They agreed that pending settlement of the Border Question, the representatives of the Agencies responsible for Petroleum Development within the two countries, should agree on modalities which would ensure that the opportunities available within the said area can be jointly utilised by the two countries.
>
> They further agreed that with respect to concessions already granted within the said area, by one or other of the parties, such concession shall not be disturbed.
>
> Appropriate modalities shall be put in place for ensuring that arrangements, satisfactory and beneficial to both countries, are reached.[128]

Quite obviously, the Presidents agreed that the area of overlap would be developed in a way that was mutually beneficial. On the one hand, Suriname conceded that Guyana's lone existing concession with LASMO/BHP would not be disturbed; on the other hand, both countries agreed that the opportunities in the area of overlap would be "jointly utilized" and that the modalities would be "satisfactory and beneficial to both countries".

6.20 Implicit in that understanding was that there was to be a fair sharing of burdens and benefits in the area of overlapping maritime boundary claims, not that one or the other Party would have a free hand. The understanding that Guyana's existing LASMO/BHP concession, which covered only the relatively small and near-shore portion of the area of overlap[129] could go forward in the early exploration phase without being disturbed by Suriname was conceded by Suriname on the understanding that Suriname/Staatsolie would enter into joint venture arrangements for other parts of the area of overlap. Thus, the underlying intention was for Suriname to find a joint venture partner to work in another part of the area of overlap.

C. Cooperation in the Oil Concession Practice of the Parties 1989-1997, Pursuant to the 1989 *Modus Vivendi*

6.21 Guyana's Memorial asserts, however, that the Presidential *modus vivendi* did not place any restraints on Guyana and that it was free to do as it wished. Guyana states:

> The Joint Communiqué did not preclude the issuance of new oil concessions.[130]

Guyana's Memorial then goes on to say that within two months after the Presidential meeting, Guyana issued two new concessions (to Petrel) that included portions of the area of overlapping

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[128] Agreed Minutes signed by Foreign Minister Rashleigh Jackson of Guyana and Foreign Minister Edwin Sedoc of Suriname (25 August 1989), at MG, Vol. II, Annex 71.

[129] MG, Vol. V, Plate 24. It may be noted that following the Presidential *modus vivendi* in August 1989 LASMO/BHP wrote to the petroleum authorities of Guyana on 12 October 1989, expressing satisfaction at the progress being made. *See* MG, Vol. III, Annex 148.

[130] MG, para. 4.32, p. 53.

claims, one such concession being shoreward of the LASMO/BHP area and the other being seaward.[131]

6.22 Thus, Guyana argues that the 1989 *modus vivendi* placed no restraints upon it and gave it a free hand in the area of overlapping claims. Suriname both takes issue with Guyana's facts and rejects its interpretation of events and the intentions behind the 1989 *modus vivendi*. It would have been a meaningless Presidential understanding if it had been contemplated that Guyana could arrogate the entire disputed area, and that Suriname's agreement not to disturb the LASMO/BHP concession meant that it had a similar obligation to respect any other concession that Guyana might enter in the future. Furthermore, it would have been extreme bad faith for Guyana to enter into two new concessions covering portions of the disputed area almost immediately after the Presidential meeting.

6.23 The facts appear to be different from what Guyana's Memorial asserts. Guyana's Memorial states:

> less than two months after the two Presidents had met, Guyana concluded two additional concession agreements with a Texas-based company called Petrel. Petrel paid for and received the rights to certain acreage, up to the N34E line.[132]

Those "concessions" are found at Annexes 149 and 150 of Volume III of Guyana's Memorial. Even a cursory examination of those documents demonstrates that they are less than "agreements to agree". The Government of Guyana and Petrel agreed only to enter into discussions about certain defined areas that the Government of Guyana asserted were within its territory. Thus, those ambiguous arrangements created no rights. So far as Suriname has been able to determine, they do not appear to have been announced in the petroleum publications of the time nor were they shown on the maps produced in oil industry publications.

6.24 Guyana's Memorial is incorrect when it tries to interpret the events of 1989 and the meaning of the 1989 *modus vivendi* to constitute Suriname's acceptance of exclusive rights for Guyana in the area of overlap. That is not what happened in 1989. Guyana's revisionist interpretation of those events is designed to create a rationalization to excuse its unilateral action to drill in a disputed area in 2000.

6.25 In fact, following the 1989 Presidential meeting, rather than a failed follow-on meeting process, which is portrayed as all Suriname's fault in Guyana's Memorial,[133] there was a series of meetings held between the Parties. It is clear from the record that Suriname and Guyana made progress in those meetings and that a "working document" had been prepared concerning the LASMO/BHP concession.[134] Furthermore, the record presented by Guyana in its Memorial

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131 *Ibid.*

132 *Ibid.*

133 MG, paras. 4.33-4.34, pp. 53-54.

134 Memorandum by Guyana Natural Resources Agency regarding Notes on Meetings with Mr. R. Bergval, Deputy Director, Exploration and Drilling, Staatsolie, Suriname, 22-23 February 1990 (23 February 1990), at MG, Vol. III, Annex 151; Letter from Barton Scotland, Deputy Chairman of the Guyana Natural Resources Agency to the Executive Chairman (28 February 1990), at MG, Vol. III, Annex 152; Brief Report on Visit by

shows that within this framework Suriname made other proposals. Guyana's own authorities reported that Suriname's proposals:

> will have to be considered in any future deliberations. They are:
>
> (1) An option for a period of time on the area north of LASMO/BHP for Suriname to try to contract to an oil company (PECTEN?)
>
> (2) Suriname presence on any rig during any drilling by LASMO/BHP.[135]

Those are ingredients of a cooperative arrangement and, as the above quotation indicates, Guyana clearly knew that Suriname was negotiating with the Pecten company concerning rights seaward of the LASMO/BHP area. That fact alone establishes beyond question that the interpretation of the 1989 *modus vivendi* by Guyana – that it permitted exclusive use for Guyana of the disputed area – is not correct.

6.26 The joint Suriname-Guyana effort to implement the 1989 *modus vivendi* led to the signing, on 25 February 1991, of a "Memorandum of Understanding – Modalities for Treatment of the Offshore Area of Overlap between Guyana and Suriname as it Relates to the Petroleum Agreement Signed between the Government of Guyana and the LASMO/BHP Consortium on 26 August 1988."[136] It was clearly intended that that Memorandum of Understanding would apply only to the LASMO/BHP concession and that other arrangements would be required for other areas and other concessions.

6.27 The principles set forth in the 1991 Memorandum of Understanding are worth noting: first, the area of overlap is defined by the 10° and 30° lines;[137] second, the LASMO/BHP concession would be honored; and third, a future meeting would be held. In the handwritten portion of the Memorandum initialed by both sides, it was agreed that the discussions would address what would happen if LASMO/BHP made a discovery.[138]

6.28 Thus, the essence of the understanding was that Suriname's willingness not to interfere with one specific pre-existing arrangement between Guyana and LASMO/BHP, extended only to the early exploratory phase. If there was to be any drilling during the exploratory phase, as Guyana's own notes profess,[139] Suriname required its representative to be present on the drilling rig. The implementation of such a requirement assumes coordination and cooperation and implies a process of notice and consultation leading to jointly agreed exploratory drilling in the

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Staatsolie Representative to Guyana Natural Resources Agency to Discuss Modalities for Area of Overlap (27 February 1991) ("Brief Report"), at MG, Vol. III, Annex 154.

135 Brief Report, at MG, Vol. III, Annex 154, at p. 3.

136 MG, paras. 4.35-4.37, pp. 54-55; Memorandum of Understanding - Modalities for the Treatment of the Offshore Area of Overlap Between Guyana and Suriname as it Relates to the Petroleum Agreement Signed Between the Government of Guyana and the LASMO/BHP Consortium on 26 August 1988 (25 February 1991), at MG, Vol. III, Annex 94.

137 Memorandum of Understanding, *supra* note 136.

138 *Ibid* at p. 2. The handwriting says: "It is understood that the Mechanisms will also treat any Petroleum Discovery in the area which form part of the Petroleum License by LASMO/BHP."

139 Brief Report, at MG, Vol. III, Annex 154, at p. 3.

area of overlap. Furthermore, as the 1991 Memorandum provides, if a discovery was made it was understood that additional arrangements would be required to determine how both sides would benefit from subsequent exploitation. Unfortunately, the future meeting was not held, and the course was not pursued. Guyana's Memorial at paragraphs 4.36 and 4.37 suggests that Suriname was at fault for the meeting breakdown. It is more likely that the reason was that LASMO/BHP soon relinquished its concession and the immediate need to deal with the area of overlap problem was eliminated.[140]

6.29 Nonetheless, the 1989 *modus vivendi* and subsequent actions brought about a pattern of restraint by both countries. Guyana paints a bleak picture of the situation between 1989 and 1997, but the case is otherwise. Although formal agreements were not concluded, cooperation at the working level and exchanges of information were commonplace. As envisioned in 1991, Staatsolie did in fact enter into an arrangement with Pecten that covered the area of overlapping claims. Pecten relinquished its license in 1995.[141] Moreover, cooperation between Staatsolie and Guyana's petroleum officials reached a high point in 1994 when President Cheddi Jagan of Guyana visited Staatsolie offices in Suriname.[142] That visit led to further exchanges and a meeting of officials in late November 1994 based upon an agenda proposed by Guyana, to which Suriname agreed, and that contained the following points:

> (c) Discussions related to the formulation of a working document which outlines terms for exploration of Guyana/Suriname border areas to the mutual benefit of both countries. This working document being pursuant to the 1991 Memorandum of Understanding signed by the respective countries.
>
> (d) Discussions related to the pursuit of a document which establishes a means by which present exploration in mutual border zones may proceed to the mutual benefit of Guyana/Suriname pending the resolution of justifiable claims.[143]

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[140] Guyana provides in its Annexes a number of documents associated with the LASMO/BHP concession and license, but none is the Petroleum Agreement between LASMO/BHP and Guyana. It appears, however, from the "Press Release" of Guyana's Natural Resources Agency, found at MG, Volume III, Annex 141, that the arrangements were signed on 28 July 1988 and they were for an initial three year period, renewable for two additional three year periods. It appears that LASMO/BHP did not renew its interest after the initial three year term and thus its arrangements with Guyana lapsed on 27 July 1991, only a few months after the 25 February 1991 MOU was signed.

[141] Pecten relinquished its Suriname holdings on 1 April 1995, as shown on the 1995 Petroconsultants Foreign Scouting Service map of Suriname and French Guiana, at Annex 34.

[142] Letter from B. Sucré, Guyana Geology and Mines Commission, to Managing Director, Staatsolie, and Director, Geologische Mijnbouwkumdige Dienst (22 August 1994), at Annex 31.

[143] *Ibid.*

Thereafter, the agreed minutes of a subsequent April 1995 meeting record the following exchange:

> It was at this point in the discussion, that unavoidably, the issue of the 'Area of Overlap' arose. Understandably, Staatsolie would be reluctant to pursue or continue technical co-operation with GGMC if it was perceived that Guyana was exercising territorial sovereignty over certain common areas.
>
> Staatsolie's position was:
>
> At this time, co-operation between Staatsolie and GGMC for Coastal Onshore Basin would not be threatened by the 'Area of Overlap' issue. Co-operation between Staatsolie and GGMC in the Offshore Basin would be practically impossible if Guyana negotiated a concession with a company and included in that concession, was the section of the common border area where the 'Area of Overlap' existed.
>
> Mr Jharap was of the opinion that some resolution to the issue must be negotiated before either country should explore in the 'Area of Overlap'. He declared that it was the responsibility of the Foreign Ministries of the respective Governments to urgently pursue the matter.
>
> Mr Sucré agreed with Mr Jharap, that there should evolve some resolution to the issue. He countered with the fact that Guyana's Foreign Ministry was eager to pursue the matter with Suriname, however, Suriname apparently was not as keen to deal with the issue.
>
> It was decided that the issue should not be further discussed as it did not fall within Staatsolie's [or] GGMC's mandate. It was intuitively obvious to both parties how this important, sensitive, emotional issue could unavoidably hinder the degree to which complete technical co-operation between Staatsolie and GGMC would be pursued and maintained.[144]

That 1995 exchange, recorded in agreed minutes, is flatly contrary to the claim in Guyana's Memorial that Suriname accepted Guyana's position.

D. Guyana's Breach of the 1989 *Modus Vivendi*

6.30 In 1997, Guyana changed its tax code in an effort to encourage petroleum exploration. Guyana's 1997 concession to Maxus was an immediate result of Guyana's new economic policy. It also marked a new effort by Guyana to assert its interests in at least some part of the area of overlap. Notably, Guyana's Maxus concession only covered part of the western side of the area of overlapping maritime claims, thus overlapping with Suriname's concession to Staatsolie, which had always covered the entire area of overlap. As a national oil company, Staatsolie had both the freedom and the obligation to act consistently with the 1989 *modus vivendi*. After 1997, Guyana's approach became more aggressive and ultimately exacerbated the situation.

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[144] Agreed Minutes for 27 April 1995 meeting of Staatsolie and Guyana Geology and Mines Commission (29 December 1995), at Annex 32.

6.31 At the political level, the Parties continued to make efforts to resolve the full scope of their boundary problems. A more formal process of meetings of National Border Commissions was initiated in 1995, with a first meeting 17-19 May 1995 and a second meeting commencing on 31 January 1996.[145] Those meetings made little progress, and efforts were made in early 1999 to reinvigorate the process. Suriname regrets that those meetings did not succeed. However, it recalls them here to point out the obvious fact that Guyana was fully aware of Suriname's position.

6.32 Moreover, on the petroleum front it was also obvious that there was a dispute. At Annex 34 is a compendium of maps from petroleum publications covering most years between 1977 and 2003 that demonstrate the reality that the two countries had two different maritime boundary positions that created an area of overlapping claims. Thus, Guyana's repeated assertions that there was and is an agreement as to the maritime boundary are simply untrue.

6.33 In 1998 Guyana entered into two arrangements with the CGX Company. In essence, from the information publicly available, those arrangements appeared to be like other arrangements of a similar kind that Guyana had entered into with private oil companies: a contract for a period of years to engage in certain exploratory obligations including drilling obligations. The CGX concession included areas of Guyana's offshore that were undisputed and that included petroleum prospects, as had earlier Guyana concessions. Although Suriname has never seen the full agreements, it understands that there was no requirement that the company drill in the area of overlapping maritime claims. At no time in 1999 or 2000 was Suriname informed by the Government of Guyana that CGX planned to drill a specific prospect in the disputed area or that Guyana wished to work out arrangements in accordance with the 1989 *modus vivendi* to facilitate such exploratory drilling on an agreed basis.

6.34 Suriname cannot be held to have been put on notice of CGX's drilling plans merely by the company's press releases, which is all that Guyana's Memorial offers as proof of the company's plans.[146] Indeed, quite apparently, if one sifts through those early press releases, one can only discern an interest by CGX to drill at the earliest time and that it had several prospects, including a major prospect—called Horseshoe West—that was outside the area of overlapping maritime claims. It was not until 10 April 2000 that CGX announced in a press release issued in Toronto that the company planned to drill in the Eagle prospect, which falls in the disputed area.[147]

6.35 Guyana never informed Suriname at a governmental level of any of that. As far as Suriname's authorities were aware, CGX was acting like any other company holding a concession from Guyana in disputed and undisputed waters. However, less than three weeks after the company's press release, the drilling plans had become known in Suriname via the "grapevine". It had become a public issue leading Guyana's ambassador to Suriname to report to

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145 *See* Agreed Minutes of 17-18 May 1995 Meeting of the Border Commissions of Guyana and Suriname (18 May 1995), at Annex 7; Agreed Minutes of 31 January-1 February 1996 Second Joint Meeting of the Guyana and Suriname National Border Commissions (1 February 1996), at Annex 8.

146 CGX Press Releases (1998-2000), at MG, Vol. III, Annex 158.

147 *Ibid.*

his Government on 28 April 2000 of the difficulties ahead.[148] There can be no doubt that Guyana knew the area was claimed by Suriname, that it deliberately failed to notify Suriname, that it deliberately failed to develop with Suriname an agreed approach to drilling in the area of overlap and that it deliberately allowed its concession holder to attempt to undertake drilling operations in an area that it knew full well, as the above history demonstrates, was claimed by Suriname. It is clear that Guyana intended to create a *fait accompli* in an area of overlapping claims.

6.36 Once the matter was known to the Government of Suriname, it cautioned the Government of Guyana against its proposed course of conduct in a diplomatic note dated 10 May 2000.[149] That occurred just one month after the company announced its specific plans in a press release issued in Canada and well before the drill ship arrived on the east coast of South America.[150] There was more than enough time for Guyana to retreat or revise the drilling plans. However, Guyana determined to proceed in the full knowledge that it proposed to drill in disputed waters.[151] Accordingly, Suriname had no choice on 3 June 2000 but to request that the drill ship leave the area of overlapping claims.[152] The drill ship did so without incident and moved to the uncontested site of Horseshoe West, outside of the disputed area, and took up its drilling activity in that location.[153]

6.37 Guyana claims the continental shelf area that it awarded to CGX. Suriname claims the part of that area that lies east of the 10° line. The area in which CGX proposed to drill is virtually in the middle of the area of overlapping claims. Guyana justifies its authorization to CGX to drill in that area as consistent with its law and its maritime boundary claim. It may just as well be said that consistent with Suriname's law and maritime boundary claim, the CGX operation was illegal. Further, while Guyana's Memorial portrays Suriname's action in militaristic terms, in fact it was a police action to expel an intruder, and it was accomplished without need to use force.

6.38 That the CGX incident marked a turning point is clear. It signaled a new and aggressive posture by Guyana to authorize and conduct activities in the area of overlapping claims that were intended to create facts on the ground and to arrogate the entire area in dispute. It left Suriname with no choice but to protect its interest and take the necessary steps to halt drilling in the area of

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148 Letter from Karshanjee Arjun, Ambassador of Guyana to Suriname to Clement Rohee, Minister of Foreign Affairs with the attached article, *Guyana Drills For Oil in Suriname's Territory*, De Ware Tijd (28 April 2000), at MG, Vol. II, Annex 35.

149 *Note Verbale* No. 2651 from the Republic of Suriname to the Co-operative Republic of Guyana (11 May 2000), at MG, Vol. II, Annex 76.

150 Suriname's first diplomatic note directly related to the CGX drilling operation was dated 11 May 2000. MG, Vol. II, Annex 76. Its second note was dated 31 May 2000. MG, Vol. II, Annex 78.

151 Guyana's response to Suriname's note of 11 May 2000 was dated 17 May 2000 and it completely dodged the issue by asserting that whatever might be happening was happening in Guyana's territory. *See* MG, Vol. II, Annex 77.

152 Guyana notes at MG, para. 10.22, p. 131 that Suriname could have made use of the legal procedures that Guyana now invokes. The same could be said of Guyana prior to its initiating a crisis.

153 *Canadian Rig to Drill Elsewhere*, Oil Daily, 20 June 2000, at Annex 35. Suriname understands that CGX's drilling at Horseshoe West did not find petroleum.

overlapping claims unless done pursuant to a common agreement pursuant to the understandings reached at the Presidential level in August 1989.

IV. The Record Does Not Support Guyana's Third Submission and Demonstrates Guyana's Failure to Negotiate in Good Faith

6.39 In light of Guyana's third submission and its false portrayal of Suriname's unwillingness to work cooperatively with Guyana, it is important to take due account of the unyielding attitude of Guyana in the aftermath of the events of 3 June 2000. Immediately thereafter, on 6 June 2000, there was a Special Ministerial Meeting 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.[154]

Thus, there was an understanding that the full scope of the issues would be expeditiously addressed. However, contrary to that understanding, the record shows that for the next few weeks Guyana's sole interest was to achieve not only Suriname's agreement to the return of the 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 would not be disturbed by Suriname. That proposal was boldly accompanied with Guyana's refusal to allow Suriname even to see the terms and conditions of the agreement under which CGX was operating under Guyana's authorization. In effect, Guyana wanted Suriname to sign a blank check with regard to CGX.

6.40 The Special Ministerial Meeting was followed on 17-18 June 2000 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*.[155]

6.41 Guyana's proposals were all focused on the immediate return of the drill ship to its operation in disputed waters, including the requirement that Suriname not impair in any way the Guyana-CGX operation or arrangements, then or in the future. What Guyana was prepared to offer Suriname for this 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

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[154] Joint Communiqué of Special 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.

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

Special Area for the Sustainable Development of Guyana and Suriname."[156] 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.[157] None of those proposals was necessarily a bad idea, but they had no meaning in a context within which Guyana was insisting 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 Guyana's agreements with CGX then or in the future.

6.42 What is clear from the record is that both countries understood that they each claimed the area and that Guyana insisted it was entitled to a free hand nevertheless. It is also clear that but for Guyana's insistence that the CGX operation in the disputed area recommence immediately and that Suriname must respect the CGX concession, there were elements of the discussion upon which progress could have been made. It is also clear from the circumstances that nobody – no person and no country – would have acceded to Guyana's demand that the CGX operation be reinstated without even having knowledge of the terms and conditions of the concession agreement.

6.43 Guyana's unreasonable position is even more dramatically demonstrated by the text of a draft MOU prepared for and brought before the 6 June 2000 Ministerial meeting, which Guyana includes as an annex to its Memorial.[158] The draft looks much like 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 14 June 1999." However, it is far removed from the spirit of mutually beneficial cooperation that characterized the 1989 *modus vivendi*. In 1989 there was one preexisting concession (LASMO/BHP) that Suriname agreed to respect that covered only a part of the disputed maritime area, with such "respect" understood to extend only to matters relating to the early stage of offshore petroleum exploration. However, by 14 June 1999, the critical date for purposes of Guyana's proposal, Guyana had virtually blanketed the entirety of its offshore area with concessions, some of which extended into the area of overlapping claims, including those with ESSO, CGX and Maxus. 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 of those concessions. In the practice of States, that draft does not reflect a good-faith proposal.

6.44 When the two sides returned to negotiations two years later, Guyana's position had not changed. Guyana simply wanted Suriname to 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.[159] 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'."[160] The unyielding position of Guyana is vividly set out in the agreed record of the Fourth and Fifth meetings of the national Boundary Commissions (23-25 October 2002 and 10 March, 2003), which Guyana makes

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156 *Ibid.*

157 *Ibid.*

158 This 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.

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

160 *Ibid.* at para. 17, p. 5.

available at Volume II, Annexes 87 and 88 of its Memorial. Guyana's approach made it impossible for there to be any agreement. Guyana's interest always was only to validate the agreements it had entered into with private companies, and its purpose was to seek Suriname's acceptance of these agreements. Far from showing that Suriname breached its obligations under the 1982 Law of the Sea Convention in this regard, 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 to negotiate in good faith.

CHAPTER 7

GUYANA'S SECOND AND THIRD SUBMISSIONS ARE INADMISSIBLE BECAUSE GUYANA DID NOT ACT IN GOOD FAITH AND LACKS CLEAN HANDS

7.1 Guyana defends its authorization of drilling activity done pursuant to the CGX concession on the grounds that it was within its authority to do so under its national law and that the location was under its jurisdiction. As Suriname has shown, however, the location was not under Guyana's jurisdiction, but was in an area in dispute. Guyana knew full well that there was no maritime boundary agreement. The action it authorized was designed to create a *fait accompli* in an area of overlapping claims. It was a deliberate act to create facts on the ground even though Guyana's entitlement to the area had never been confirmed. It marked a serious escalation in the nature of government-authorized activities in the area of overlap, totally outside the spirit of cooperation to which both sides had agreed in 1989 and 1991.

7.2 The attitude of Guyana can continue to be seen in its Memorial. It goes so far as to argue that Staatsolie's recent practice of not authorizing its joint venture partners to operate in the area of overlap led Guyana to believe that it could conduct drilling activities in the area of overlap. Guyana's Memorial even denigrates the fact that there is an area of overlapping claims by calling it the "so-called" area of overlap.[161] Furthermore, Guyana's Memorial is replete with disingenuous statements such as the following: "Until May 2000, the Netherlands and Suriname had never objected to the historical equidistance line as applied by Guyana, up to the 200 metre isobath or beyond, or its practice in relation thereto."[162] Of course, no one had ever heard of the "historical equidistance" line prior to the filing of Guyana's Memorial, but such statements are misleading and nothing short of preposterous. Guyana ignores the 10° line formally proposed by the Netherlands in 1962 and reconfirmed as Suriname's position in 1966,[163] the 1989 *modus vivendi* and 1991 MOU and Suriname's consistent practice along the 10° line. The presentation of Guyana's Memorial is an after-the-fact rationalization of the events. Under the circumstances, Suriname submits that Guyana's cynical and selective rendition of the facts concerning activities in the area of overlap is inconsistent with the principle of good faith.

7.3 No one in Guyana's government who was well informed could possibly have believed that drilling activities, without notice or consultation, in the area of overlapping maritime boundary claims would be tolerated. When questioned, Guyana's politicians defended the effort

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[161] MG, para. 10.21, p. 131.

[162] MG, para. 9.46, p. 123.

[163] *See supra* paras. 3.5 and 3.6.

to drill as a "normal matter" in a disputed area.[164] That defense was incorrect; unilateral drilling is not "normal" in disputed areas. It is unlawful.[165]

7.4 Guyana knew that Staatsolie held Suriname's petroleum concession extending up to Suriname's 10° bearing maritime boundary claim.[166] Guyana tries to excuse its actions by arguing that since certain joint venture arrangements between Staatsolie and operating companies do not extend into the disputed area, Guyana thought that Suriname would have no objection if Guyana arrogated the entire disputed area in which it would be free to do as it wished and that Suriname would accept all such actions. The position that Guyana ascribes to Suriname would be unheard of in the practice of States. It is completely denied by the record. As a matter of advocacy, Guyana penalizes Suriname for acting with restraint while at the same time condemning it for taking appropriate police action to prevent drilling activity in the disputed area. Guyana's proposition is illogical and utterly without foundation. As Suriname has shown, it is Guyana's effort to make the disputed area its own that led directly to the 3 June 2000 incident. The unyielding position of Guyana made it impossible to negotiate interim arrangements of a practical nature.

7.5 The Tribunal should "refuse[] relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper."[167] The Tribunal should not allow Guyana to invoke the Tribunal's authority to promote Guyana's interests without reference to the breaches of international law by Guyana that gave rise to the measures of which it now complains.

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164 *See* Letter from Karshanjee Arjun, Ambassador of Guyana to Suriname, to Clement Rohee, Minister of Foreign Affairs, with attached article, *Oil Drilling in Disputed Area Normal Matter, Says Guyanese Vice President* (11 May 2000), at MG, Vol. II, Annex 37. Guyana's effort to portray Suriname's reaction to the effort to drill in the disputed area as politically motivated cannot obscure its own attitudes and, indeed, lack of regard for the fact that CGX was sent to drill in a disputed area.

165 This matter was broached in a dictum by the International Court of Justice in its Order of 11 September 1976 on provisional measures in the *Aegean Sea Continental Shelf Case* (Greece v. Turkey). The Court distinguished seismic exploration activities of a transitory character carried out by Turkey, which did not involve the establishment of installations on or above the seabed of the continental shelf, from operations involving the actual appropriation or other use of the natural resources of the areas of continental shelf which are in dispute (I.C.J. Reports 1976, pp. 10-11, paras. 30-31). It has been observed that the Court's Order implies that under article 83(3) of the Convention on the Law of the Sea, exploratory drilling is generally prohibited (Rainer Lagoni, *Interim Measures Pending Maritime Delimitation Agreements*, 78 Am. J. Int'l L. 345, 365-66 (1984), at Annex 41). A similar conclusion in respect of Article 83(3) is reached by Churchill and Lowe, who argue that the same rule also exists in customary international law (R.R. Churchill and A.V. Lowe, *The Law of the Sea* 192 (3rd ed., Manchester University Press 1999), at Annex 38; *see also* Robin Churchill and Geir Ulfstein, *Marine Management in Disputed Areas: The Case of the Barents Sea* 82-88 (Routledge 1992), at Annex 39). As is observed by Ong "States themselves would seem to be under no illusion about the illegality of such unilateral actions." (David M. Ong, *Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?*, 93 Am. J. Int'l L. 771, 799 (1999), at Annex 43). A brief review of State practice by Bundy indicates that unilateral drilling in a disputed area can lead to serious problems and has been met by forceful protests of other States (Rodman R. Bundy, *Natural Resource Development (Oil and Gas) and Boundary Disputes* in *The Peaceful Management of Transboundary Resources* 23, 26-27 (Gerald H. Blake et al. eds., Graham and Trotman 1995), at Annex 37).

166 "Suriname granted Staatsolie a license covering the entire country (including maritime areas . . .)." MG, para. 4.15, p. 44.

167 Diversion of Water from the Meuse (Netherlands v. Belgium), 1937, P.C.I.J., Series A/B, No. 70, p. 77 (separate opinion of Judge Hudson) (quoting 13 Halsbury's Laws of England (2d ed. 1934) at 87).

7.6 The principle that a party in litigation may not attempt to reap advantages from its own wrong – *nullus commodum capere de sua injuria propria* – is well-established in international law.[168] The principle that a party that has engaged in wrongful conduct loses the right to demand judicial relief is also recognized in the writings of scholars and jurists.[169]

7.7 Sir Gerald Fitzmaurice rightly indicated that a State may be debarred from complaining of actions taken by another State when it provoked those actions through its own unlawful conduct:

> [A] State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality – in short were provoked by it. In some cases, the principle of legitimate reprisals will remove any aspects of illegality from such counter-action. But even where the acts remain *per se* illegal, it may be that the State suffering from it is deprived by its own prior illegality of juridical grounds of complaint.[170]

7.8 Therefore, Guyana's second and third submissions should be dismissed. The principles of good faith and clean hands, doctrines of universal application, hold that States wishing to bring a claim before an international tribunal must have acted properly and correctly prior to the events giving rise to the claim. By authorizing drilling operations in an area of known overlapping claims, Guyana did not do so.

7.9 Finally, Guyana's third submission implies that Suriname bears sole responsibility for the fact that the Parties, other than the 1989 *modus vivendi* and 1991 MOU, have not heretofore been able to agree on other arrangements pertaining to the area of overlap. Suriname categorically rejects that implication. It has participated in good faith in 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.[171] Guyana has set forth categorical and unyielding positions in all the discussions subsequent to 3 June 2000 that Suriname should accept Guyana's concessions in the area of overlapping claims without even being able to see the terms of those concessions.

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168 The Permanent Court of International Justice applied the principle that a State may not profit from wrongdoing in the context of treaty relations. Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 31; Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928, P.C.I.J., Series B, No. 15, pp. 26-27; *see also* Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950, p. 244 (dissenting opinion of Judge Read) (stating that there can be no doubt that, as settled in the Chorzów Factory Case, a State should not be permitted "to profit from its own wrong" in any judicial proceeding); *see also* Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 Recueil des Cours, at 117-19 (1957), at Annex 40.

169 *See, e.g.*, Fitzmaurice, *supra* note 168, at 117-19; *see also* Case Concerning Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1986, pp. 392-394 (dissenting opinion of Judge Schwebel).

170 Fitzmaurice, *supra* note 168, at 119.

171 *See* North Sea Continental Shelf, I.C.J. Reports 1969, pp. 47-48 (citing Railway Traffic between Lithuania and Poland, 1931, P.C.I.J., Series A/B, No. 42, p. 116).

The inflexible position of Guyana demonstrates Guyana's failure itself to comply with the duties found in Articles 74(3) and 83(3) of the 1982 Law of the Sea Convention.

CHAPTER 8

SUBMISSIONS

Based upon the materials presented in this Memorandum on Preliminary Objections and the evidence submitted to the Tribunal, Suriname respectfully requests the Tribunal to adjudge and declare that:

1. The Tribunal does not have jurisdiction to determine Guyana's Claim.

2. In the event the Tribunal does not uphold Suriname's first submission, Guyana's second and third submissions are inadmissible.

For the foregoing reasons, the Tribunal should bring these proceedings to a close forthwith.

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Maria E. Levens
Minister for Foreign Affairs
Republic of Suriname
Agent
23 May 2005