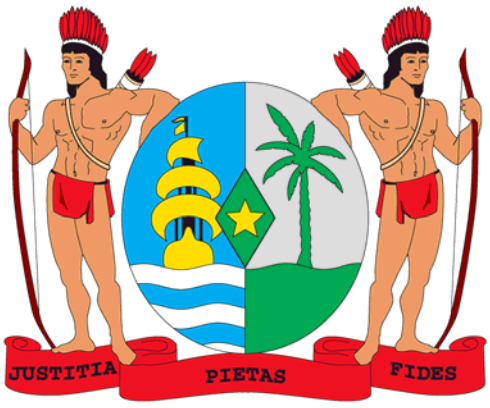


ARBITRATION UNDER ANNEX VII OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

REPUBLIC OF GUYANA

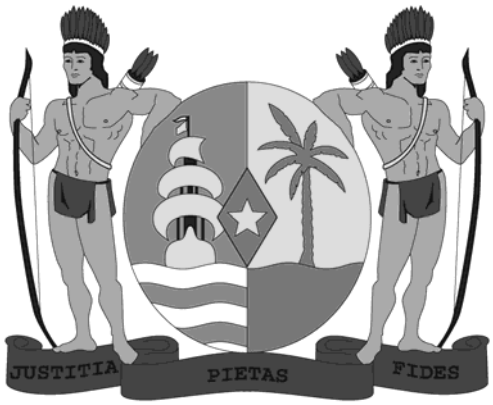
v.

REPUBLIC OF SURINAME

REJOINDER OF THE REPUBLIC OF SURINAME

VOLUME I

1 SEPTEMBER 2006



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CHAPTER 1

INTRODUCTION

1.1. This Rejoinder of the Republic of Suriname is submitted in response to Guyana's Reply dated 1 April 2006 and in accordance with Article 9.4 of the Rules of Procedure, as modified by the Tribunal by letter to the Parties of 1 March 2006. In the view of Suriname, the Reply does not establish the jurisdiction of the Tribunal, nor does it show that, if there is jurisdiction, anything other than Suriname's proposed 10º Line single maritime boundary would create the equitable solution required by the 1982 Convention on the Law of the Sea.

1.2. The Rejoinder will respond to the specific arguments of Guyana set out in the Reply. Before doing so, Suriname believes that it would be appropriate to recapitulate the context in which this dispute is set and the positions of the Parties as they now stand.

1.3. Guyana and Suriname are small developing South American countries, and both are members of CARICOM. Both countries were once parts of large colonial empires. Guyana was a colony of the United Kingdom until 1966, when it achieved its independence. Suriname was a colony of the Netherlands until 1954, when it became an autonomous part of the Kingdom of the Netherlands; in 1975, it became an independent state when it separated from the Kingdom. The United Kingdom and the Kingdom of the Netherlands failed to bequeath established territorial and maritime boundaries to the two countries. From their first meeting at Marlborough House in 1966, the territorial and maritime boundary disputes between Suriname and Guyana have been manifest, and they have remained so for 40 years.

1.4. The only binding agreement between Guyana and Suriname defining the extent of their respective territories is an Agreement of Cession made in 1799 between the Governors of Suriname and Berbice (now eastern Guyana). That Agreement provided that the "West Sea Coast of the River Corentin, up to the Devil's Creek, beside 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." The Agreement of Cession established that the entire Corantijn River continued to belong to Suriname.

1.5. In the 1930s, the United Kingdom and the Netherlands made an effort to resolve a number of territorial issues that had arisen in the intervening years. They envisaged the conclusion of a treaty that would record an acceptable comprehensive boundary settlement. As one element of the package, the Netherlands proposed to determine the boundary in the territorial waters by extending a line of a 28° bearing from a reference point located at 6° 00' 25" N; 57° 8' 10" W.

1.6. That proposal was made having reference to the then-available largest scale nautical chart and with the intention of protecting the Netherlands' navigational interests at the mouth of the Corantijn River.

1.7. When the Boundary Commissioners started their work related to the territorial waters delimitation they found that the location of 6° 00' 25" N; 57° 8' 10" W was actually in the sea, as the chart that had been used was incorrect. The Commissioners decided to recommend an

alternative reference point, at a place where "the ground was comparatively firm and did not appear to be subject to the erosion by the sea."[1]

1.8. The Boundary Commissioners further noted that a 28º bearing line was not suitable to protect the navigational interests of the Netherlands, but that a line with a bearing of 10° would do so by keeping both navigational approaches to the river, *i.e.*, the easterly channel and the westerly channel, under the control of the Netherlands. The Boundary Commissioners then erected two pillars on a hilltop above the west bank of the river, one at what Suriname refers to as the "1936 Point" and Guyana as "Point 61" and the other 220 meters further inland. The bearing of a straight line drawn from the second pillar to the first is exactly 10º East of true North. The Commissioners reported their recommendations to their respective Governments.

1.9. The Netherlands and the United Kingdom contemplated that the recommendations of the Boundary Commissioners, on the two pillars and the 10° Line to delimit the boundary in the territorial waters, would form part of the anticipated boundary treaty, but that treaty was never concluded. The intervention of World War II brought to an end that episode in the history of the boundary relationship of Suriname and Guyana.

1.10. Following World War II, interest in reaching a comprehensive boundary agreement revived, but again no agreement was ever reached between the Netherlands and the United Kingdom. During the 1950s, the pre-independence Governments in both Suriname and Guyana became involved in formulating their own boundary positions. Draft treaties were proposed by the United Kingdom in 1961, by the Netherlands in 1962 and by the United Kingdom in 1965. Those drafts reflected both the influence of local authorities on boundary positions and the fact that there was little common ground between the Parties in regard to (i) the area Guyana calls the New River Triangle, and Suriname calls the Upper Corantijn-Coeroeni triangle, (ii) whatever rights (if any) Guyana might have to use the Corantijn River, and (iii) where the maritime boundary might start and the direction in which it should run. Insofar as those draft treaties concerned the maritime boundary, they reflected that Suriname's position was that the boundary should be the 10° Line for both the territorial sea and the continental shelf (the drafts, of course, preceded the evolution of the concept of the EEZ) and that Guyana sought to abandon the 10° Line in the territorial sea and claim that the boundary of the territorial sea and continental shelf should be the equidistance line.[2]

1.11. Generally, this was the situation until about 1999. While serious efforts were made to resolve the differences between Guyana and Suriname, important differences persisted between them, and no agreement was reached. Insofar as the maritime boundary was concerned, Suriname maintained its 10° Line for all jurisdictional purposes.

1.12. Guyana, as prescribed by its 1977 Maritime Boundaries Act, adhered to the equidistance line for its exclusive economic zone and fisheries jurisdiction. However, contrary to its 1977 Act, Guyana in its oil practice used a straight line up to approximately the 200-meter isobath that ranged between 30° and 33°. Only in 1999 did Guyana for the first time

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[1] Report on the Inauguration of the Mark at the Northern Terminal of the Boundary Between Surinam and British Guyana (5 July 1936), at Memorial of the Republic of Guyana ("MG") filed on 22 February 2005, Vol. II, Annex 11, at para. 2.

[2] None of the draft treaties presented by either the United Kingdom or Guyana makes a reference to the 34° line.

issue a concession (to Esso) that was based upon an extension of that straight line significantly beyond the 200-meter isobath.

1.13. In 2000, one of Guyana's concessionaires, the CGX Company ("CGX"), moved a drilling rig into the disputed maritime area of overlapping claims, with Guyana's authority. There is no doubt that CGX knew that Suriname claimed the area in which the rig was preparing to drill. There is no doubt that the Government of Guyana knew that the area was in dispute. When Suriname learned of CGX's plan a month before the rig entered the area in dispute, it warned Guyana in writing against the proposed course of action.[3] Nevertheless, Guyana and CGX persisted and sent the rig to drill in the disputed maritime area. That action was a major escalation. It represented an attempt to create a *fait accompli* that would prejudice Suriname's interests.

1.14. As will be set forth in detail in this Rejoinder, two small patrol vessels from the Suriname Navy instructed the rig to leave Suriname's claimed area. The rig complied with those instructions and moved to a site in waters not claimed by Suriname. The Suriname Navy did its job in a thoroughly professional manner. There was no injury to persons or property. There was no violence or threat of violence.

1.15. Nonetheless, that incident gives rise to Guyana's Submission 3,[4] including charges, not cognizable here, that Suriname has violated the United Nations Charter. Following that incident, the Parties met long and often, both bilaterally and with the support and encouragement of their neighbors, to see if some accommodation of their differences could be achieved. Guyana's demands in this context were not acceptable to Suriname, for they required Suriname to accept Guyana's full control over oil and gas activities in the disputed area. Suriname's refusal to accede to Guyana's position gives rise to Guyana's Submission 4.

1.16. It was within that context, shortly after Barbados commenced Annex VII arbitration proceedings against Trinidad and Tobago, that Guyana commenced these proceedings, without prior notice to Suriname.

1.17. In this Arbitration, Guyana asks the Tribunal to delimit the single maritime boundary as a straight line with a bearing of 34º from the 1936 Point to the 200-nautical mile limit. In its Memorial, Guyana asserted that the Tribunal should not apply "an equidistance line drawn from modern charts" but, rather, should treat what Guyana describes as the Parties' "forty years of conduct" as an "historical special circumstance" justifying a 34º line, rather than an equidistance line, both in the territorial sea and in the area beyond it, out to 200 nautical miles. Guyana's position has undergone a dramatic change in its Reply. While its formal submissions remain the same, its arguments for the so-called "historical equidistance line" running at 34° to the 200-nautical mile limit rather than a true equidistance line are no longer the centerpiece of its presentation. Whereas Guyana's Memorial barely mentioned the provisional or "true" equidistance line, its Reply mentions the provisional equidistance line

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[3] *Note Verbale* No. 2651 from the Republic of Suriname to the Cooperative Republic of Guyana (11 May 2000), at MG, Vol. II, Annex 76.

[4] Submissions 1, 2 and 3 of Guyana's Memorial became Submissions 2, 3 and 4 in its Reply. *See* MG, p. 135; Reply of the Republic of Guyana ("RG") filed on 1 April 2006, para 10.1(4), p. 153. In this Rejoinder, Suriname refers to those Submissions as Guyana has referred to them in its Reply.

187 times.[5] It is difficult to escape the conclusion that it is now this provisional equidistance line which really represents Guyana's claim.

1.18. Suriname's position is unchanged. Suriname continues to maintain that the Tribunal lacks jurisdiction to hear Guyana's claim and that, even if there were jurisdiction, Guyana's Submissions 3 and 4 are inadmissible. In Suriname's view, there is no binding agreement between the Parties on the location of the land boundary terminus, and, absent such an agreement, the Tribunal cannot delimit a maritime boundary. The location of the starting point for such a boundary between adjacent states requires a determination of territorial sovereignty that is beyond the jurisdiction of a tribunal established pursuant to the 1982 Convention. Furthermore, Submissions 3 and 4 should be found inadmissible in any case. Guyana's attempt to turn a maritime boundary dispute into a case of state responsibility is without precedent, and in all events Guyana has no reason to complain because it brought the CGX incident on itself, and did so deliberately, and with unclean hands, in the hope of creating a *fait accompli* in its favor. As Suriname has shown, it has engaged in no unlawful act in connection with any of Guyana's contentions associated with Submissions 3 and 4.

1.19. In Section I of Chapter 2 of this Rejoinder, Suriname will analyze the three principal responses offered by Guyana to Suriname's Preliminary Objections to the Tribunal's jurisdiction and show that they are without merit.

First, the Rejoinder responds to Guyana's argument that there was an agreement (to which Guyana now refers as a "tacit" agreement) that the 1936 Point is in fact the land boundary terminus. As submitted in the Memorandum on Preliminary Objections and the Counter-Memorial and as shown herein, there has never been such an agreement.

Second, the Rejoinder responds to Guyana's argument that the 1936 Point is not inextricably linked to the 10° Line in the territorial sea because it was identified before (and therefore, Guyana presumes, was not originally "linked" to) the maritime boundary. That argument lacks logical or factual support, and rests on misconstructions of the historical record.

Third, the Rejoinder responds to Guyana's argument that even if the 1936 Point and the 10º Line were once linked, they are now "de-linked" because the reasons for accepting the 10° Line ceased to exist. The Rejoinder will show that there is no support for the proposition that Guyana advances, *i.e.*, that the establishment of the 1936 Point was unequivocal and the 10° Line was equivocal and subject to change; that proposition rests upon a misconstruction of the historical record by Guyana, and, in any case, Suriname's navigational interests at the mouth of the Corantijn remain operative. To the extent that there has been any acceptance by the Parties of the 1936 Point/Point 61 (as Guyana alleges), then that has been as part and parcel of an acceptance of the 10° Line to delimit the boundary of the territorial sea. If Guyana persists in opposing use of the 1936 Point and the 10° Line to delimit the territorial sea, then the terminus of the land boundary remains to be determined. It is submitted that this Tribunal has no jurisdiction to make such a determination of a land boundary.

1.20. Chapter 2, Section I of the Rejoinder will also address the power of a tribunal that is established pursuant to the 1982 Convention to construct a maritime boundary when a

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[5] Indeed, only once in all of the maps submitted with Guyana's Memorial did it show a true equidistance line drawn on a modern map, MG, Vol. V, Plate 41, and even that map also showed three other lines and did not show any basepoints for any of them.

territorial sovereignty dispute is an integral part of the maritime boundary problem between the Parties, and in this case, its resolution is a precondition to knowing where to start the maritime boundary line. In this regard, Guyana makes two additional arguments for the Tribunal's jurisdiction, neither of which, it says, would require the Tribunal to decide the location of the land boundary terminus.

1.21. First, Guyana submits that the Tribunal could simply draw a closing line across the mouth of the Corantijn River and begin to delimit the maritime boundary from the western end of such a line. In the circumstances of this case, that would be an improper exercise. By determining the western end of the river closing line and beginning a maritime delimitation from that point, the Tribunal would, in fact, be determining the end of the land boundary between Suriname and Guyana. The Tribunal has no authority to draw a closing line under Articles 9 and 10 of the 1982 Convention, as that would define the limit of the land territory of Suriname, nor does it have the authority to determine that territorial point.

1.22. Guyana's second additional argument is that the Tribunal could simply begin its maritime delimitation at a hypothetical point at sea, such as at the point where an equidistance line drawn from the 1936 Point meets the equidistance line drawn from Suriname's hypothetical Point X. As Suriname has shown in its Counter-Memorial, however, there are several problems with that contention, apart from the fact that no international court or tribunal has ever delimited a boundary between adjacent states beginning at a point other than the land boundary terminus absent the agreement of the Parties and that doing so would create a remarkable precedent of indefinite implication. As previously discussed,[6] Guyana's proposed approach would leave the entirety of the territorial sea and part of the maritime zones beyond undelimited, a proposition that would prejudice the future delimitation of the landward part of the maritime boundary when the terminus of the land boundary is later established. Guyana's approach also presumes the use of the equidistance method when there is no basis for such a presumption. In the Rejoinder, Suriname identifies other flaws in Guyana's proposed approach. As Suriname shows in Chapter 2, Guyana assumes that Point X was presented by Suriname as the northernmost potential land boundary terminus. Suriname did not present Point X for that purpose, and Point X is not in fact the northernmost potential land boundary terminus. Guyana's approach also assumes that the location of the land boundary does not affect the determination of the maritime boundary. As Suriname shows in Chapter 2 of this Rejoinder, that assumption is not correct. In short, Guyana's unprecedented approach cannot overcome the absence of agreement on the land boundary terminus.

1.23. Suriname maintains its position that because there was no agreement on the land boundary terminus, which is necessary for maritime delimitation between adjacent states, the Tribunal is without jurisdiction. However, Suriname further submits that if the Tribunal accepts Guyana's argument as to the binding nature of the 1936 Point, then by parity of reasoning it must also accept the corollary "agreement" reached in 1936 to delimit the maritime boundary on a bearing of 10˚ East of true North from that point, at least through the territorial sea.

1.24. In Section II of Chapter 2 of the Rejoinder, Suriname demonstrates that Guyana's Submissions 3 and 4 are inadmissible. With respect to Submission 3, concerning the CGX incident, Suriname shows that Guyana cannot properly seek reparations for a violation of its

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[6] *See* Counter-Memorial of the Republic of Suriname ("SCM") filed on 1 November 2005, para. 2.13, p. 9.

sovereignty at the same time that it seeks delimitation of a maritime boundary to include the area where the alleged violation occurred. Such a claim improperly assumes that the boundary claim has already been decided in Guyana's favor. Permitting such a claim to proceed would create incentives for states to engage in self-serving conduct with respect to disputed areas in a fashion prejudicial to pacific international relations. In further response to Submission 3, Suriname demonstrates that the clean hands doctrine is a recognized principle of international law that can serve as an equitable approach to ruling on the admissibility of a claim in an inter-state dispute. In this regard, Suriname demonstrates that Guyana did not act with clean hands regarding the CGX incident, in that Guyana knew that it was authorizing drilling in a disputed area and provoked the incident nevertheless. In the remainder of Section II of Chapter 2, Suriname demonstrates that Guyana's Submission 4 is also inadmissible under the clean hands doctrine. The only conduct relevant to Submission 4 is that occurring after the 1982 Convention became effective between the Parties on 8 August 1998, and all of the conduct occurring since that date demonstrates that the failure of the Parties to achieve any provisional or final agreement stemmed from Guyana's insistence that the CGX rig should be permitted to return to the drilling site and that all of Guyana's existing concessions, covering virtually the entire disputed area, should be respected.

1.25. In Chapter 3 of the Rejoinder, Suriname will address what should be the single maritime boundary in the event that the Tribunal were to decide that it has jurisdiction to determine it. In the Counter-Memorial, Suriname took issue with Guyana's "historical equidistance" line, showing that it was neither "historical" nor an "equidistance" line and that it divided the area in dispute in a manner that would be highly inequitable. Unlike Guyana's Memorial, Suriname's Counter-Memorial demonstrated the provisional equidistance line. The Counter-Memorial then showed that the provisional equidistance line is unfairly influenced by the relative positions of coastal convexities and concavities and cuts off the extension of Suriname's coastal front into the sea.

1.26. Accordingly, Suriname proposed that a more equitable and appropriate delimitation methodology was the bisector of the angle of the relevant coastal fronts. The angle bisector runs at 17º, which Suriname then submitted should be further adjusted to 10º in order to take into account the other relevant circumstances of the case.

1.27. Guyana's Reply takes issue with Suriname's approach. Guyana argues that Suriname's and Guyana's relevant coasts are not properly conceived and that the provisional equidistance line would divide the area equitably, although Guyana maintains its argument for a still more easterly line. All of Guyana's contentions about the alleged inequitability of Suriname's position are based on an evaluation of the relevant geographic circumstances that falls into the trap of trying to create a "virtual coastline," made up of artificial coastal lengths and area measurements, so as to support a pre-determined claim line. Given the relationship of the adjacent coasts of the Parties and the distorting effect that the coastal concavities and convexities in the two coastlines have on the provisional equidistance line, which Guyana misdescribes, Suriname's angle bisector method established from the coastal fronts facing the delimitation area, adjusted as necessary to account for relevant circumstances, is the most appropriate method of delimitation.

1.28. In the Reply, Guyana has abandoned its argument for the 34º "historical equidistance line" in all but name. Whereas in the Memorial Guyana argued that the Parties, by their conduct, had accepted the 34º line, Guyana now argues only that the Parties' conduct with

respect to the 34º line demonstrates that they believed that it achieved "an equitable solution." However, Guyana still offers not a shred of evidence that Suriname ever believed that the 34° line would be an "equitable solution." Guyana also argues, but with little force, that it would be equitable to adjust the provisional equidistance line toward a 34º line because of geography, namely to eliminate the effect of Suriname's Hermina Bank on the provisional equidistance line. Suriname responds by demonstrating that Hermina Bank is not a geographic anomaly but is located in full alignment with the rest of Suriname's relevant coast. The geographic anomaly that does exist in this case is the convexity on the western side of the mouth of the Corantijn River that acts as a headland and pushes the provisional equidistance line across the coastal front of Suriname so as to cut off its seaward projection. That coastal cut-off would be more pronounced still if the 34° line were to be accepted.

1.29. In Chapter 4 of this Rejoinder, Suriname will respond to Guyana's Submission 3, in the event the Tribunal finds it admissible. Suriname will demonstrate that Submission 3 has no place in this proceeding and, further, that Submission 3 is not linked to any issue concerning the interpretation or application of the 1982 Convention. Suriname will demonstrate that it was Guyana that breached its obligation to refrain from actions that could jeopardize or hamper the reaching of a delimitation agreement when it authorized drilling in a disputed area. The Rejoinder will also demonstrate that the 3 June 2000 incident was a reasonable law enforcement action that did not engage Suriname's state responsibility in any way. Suriname takes exception to Guyana's suggestion that Suriname's conduct was similar to that of Eritrea, which, as the Eritrea-Ethiopia Claims Tribunal held, was "a 'full scale' invasion of Ethiopia."[7] Nothing remotely similar to that occurred here.

1.30. In Chapter 5 of the Rejoinder, Suriname responds to Guyana's Submission 4, in the event the Tribunal deems it to be admissible. The Rejoinder will demonstrate that Suriname negotiated in good faith and that it was Guyana, not Suriname, that behaved unreasonably by asking Suriname repeatedly to accept and recognize oil concessions granted by Guyana in the disputed area without even sharing those concession documents and having no regard to Suriname's interests as a claimant to the same area.

1.31. Finally, Suriname is obliged to respond to the comments set out by Guyana in the Introduction to its Reply relating to the documents from the restricted Dutch archives and to the tone of Suriname's Counter-Memorial.

1.32. Guyana implies that the documents from the restricted Dutch archives that it has annexed to its Reply were withheld because Suriname believed they were prejudicial to its case. That is a serious charge, and it is not true.[8] Suriname had ample grounds to object to Guyana's request for access to the restricted archives at the Netherlands Ministry of Foreign Affairs. Among them, Suriname has indicated that those archives cover many sensitive

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[7] Eritrea-Ethiopia Claims Commission, Partial Award on the *Jus ad Bellum* (Ethiopia's Claims 1-8), para. 8 (19 December 2005). Awards of the Eritrea-Ethiopia Claims Commission are available at http://www.pca-cpa.org/English/RPC/#Eritrea-Ethiopia%20Claims%20commission.

[8] Suriname is confident that the Tribunal will review all of the documents fully and carefully rather than rely upon what Guyana may say about them. Suriname is also confident that the Tribunal will find Guyana's characterizations of those pre-independence documents to be inaccurate. In the Rejoinder, Suriname will address all of those documents that pertain to the boundary between Suriname and Guyana. The remainder, which pertain solely to the Suriname-French Guiana boundary relationship in the pre-independence period, in Suriname's view are irrelevant to the present proceedings and will not be addressed.

subjects which are not relevant in this dispute, including national security matters and matters pertaining to Suriname's other territorial disputes with Guyana.[9]

1.33. To accommodate Suriname's concerns, the Tribunal through its Order No. 1 of 18 July 2005 appointed an Independent Expert to review any proposal by a Party to remove or redact files. Following his review of the 20 restricted files requested by Guyana in its letter of 28 October 2005, the Independent Expert concluded that only five of those files "contain some documents that appear to be relevant to the dispute."[10] Thus, the majority of the files were deemed irrelevant. Three of the files from which the Independent Expert did not order any documents to be provided to Guyana were entitled "Boundary arrangements Guyana-Suriname," indicating that Suriname's concerns concerning the nature of the restricted files was well-justified.

1.34. The Reply reproduces several documents from the restricted archives which, it argues, "thoroughly undermine Suriname's case."[11] However, at least two of those supposedly "new" documents are also contained in the National Archives in The Hague[12] and so were always available to Guyana.[13] If those documents were so prejudicial to Suriname's case, it is curious that Guyana did not cite them in its Memorial. As to another of the supposedly damaging documents from the restricted archives, Guyana provides only a partial excerpt, and it omits a portion of the document that damages its own case. Annex R33 of the Reply reproduces only the first two pages of an internal document of the Netherlands Ministry of Foreign Affairs, memorandum 30/64 of 11 March 1964. The third page of the memorandum—omitted by Guyana—discusses the draft treaties that the Netherlands and the United Kingdom exchanged in 1961 and 1962[14] and shows that they had agreed to negotiate on the basis of those two draft treaties. The 1961 draft treaty of the United Kingdom proposed to delimit the territorial sea by a 10° Line and the continental shelf by an equidistance line. The 1962 draft treaty of the Netherlands proposed to delimit the territorial sea and the continental shelf by the 10° Line.

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9 *See* Letter of P.C. Saunders and H. Lim A Po, co-agents of Suriname, to the President of the Tribunal (27 December 2004).

10 Report: Examination of the Dutch Archive Files, section 7, enclosed in Letter of A. Joyce to the Parties (26 January 2006).

11 RG, para. 1.6, p. 2.

12 *See* Report of the Interdepartmental Commission of Experts on the Establishment of the Territorial Waters and the Continental Shelf of the Kingdom (3 June 1954), at SR, Vol. II, Annex SR6; Letter of the Prime Minister of Suriname to the Plenipotentiary Minister of Suriname in the Hague (12 February 1964), at SR, Vol. II, Annex SR7. The copies of these documents from the restricted archives that Guyana used are contained in, respectively, Annex R29 and R32 of the Reply. As can be appreciated, the copy of the letter of 12 February 1964 from the National Archives is much more legible than the copy contained in Annex R32 to the Reply.

13 The Memorial included a number of documents from the National Archives in the Hague. *See, e.g.*, Letter of the Dutch Boundary Commissioner Vice-Admiral C.C. Kayser to the Dutch Minister of Colonies (17 July 1936), at MG, Vol. II, Annex 41; Memorandum of S.D. Emanuels, Minister Plenipotentiary of Suriname in The Hague to the Prime Minister of Suriname (27 April 1964), at MG, Vol. II, Annex 42; Excerpts from report on the discussion held 30 November 1965 at the Office of the Secretary-General of the Netherlands Ministry of Foreign Affairs between Surinamese and Dutch delegations (30 November 1965), at MG, Vol. II, Annex 43; Excerpts from Briefing Note dated 20 June 1966 for the Dutch Deputy Prime Minister for a meeting with the Parliamentary Committee (21 June 1966), at MG, Vol. II, Annex 44.

14 The whole memorandum as produced to Guyana is included in Annex SR8. This Annex also contains a second copy of page 1 of the memorandum, as the handwriting included in the copy of Guyana is hardly legible.

The omitted portion of the document contradicts Guyana's assertion[15] that the Netherlands and the United Kingdom had agreed to delimit the continental shelf by applying the equidistance method.

1.35. Guyana's complaints concerning documents from the Netherlands archives are the more unconvincing in view of the fact that, notwithstanding Suriname's repeated requests, Guyana itself has failed to produce relevant documents that must certainly exist. As was reported in the local press at the time of the CGX incident in June 2000, Guyana offered CGX military support for its drilling expedition, an offer that, evidently, CGX refused.[16] Guyana also reportedly provided comfort notes to CGX after the incident.[17] Aware of those press reports, Suriname requested that Guyana provide to Suriname documents concerning communications between Guyana and CGX with respect to the proposed exploratory drilling in the disputed area. Guyana has maintained that no such communications exist.[18] It is most implausible that Guyanese authorities and their licensee never communicated in writing about an act that both knew to be provocative and a test of Suriname's resolve with respect to the maritime boundary dispute.

1.36. As for Guyana's comments about the tone of Suriname's Counter-Memorial, Suriname will confine itself to observing that Guyana's Memorial and Reply are replete with categorical statements and insinuations to the effect that Suriname has acknowledged Guyana's position to be an equitable position and has adopted it as its own. Those statements and insinuations are unsustainable. They are misrepresentations of Suriname's position which Suriname has felt obliged to draw to the attention of the Tribunal. Suriname will continue to point out to the Tribunal such misrepresentations whenever they occur.

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[15] RG, para. 3.48, pp. 51-52.

[16] *Crucial Oil Rig Talks on Today Alibux, Snijders Due*, Stabroek News, June 13, 2000; at SR, Vol. II, Annex SR37. (Because the original of this document is difficult to read, Suriname has transcribed the text for the Tribunal's convenience. Annexes SR3 and SR36 also include transcribed versions of the documents contained therein.)

[17] Gitanjali Singh & Desiree Jodah, *CGX Rig To Stay West Until Drill Feud Resolved, Suriname Coast Guard Threatened To Use Force*, Stabroek News, June 5, 2000, at SR, Vol. II, Annex SR36.

[18] Letter of P.C. Saunders to P.S. Reichler (8 November 2005); Letter of P.S. Reichler to P.C. Saunders (18 January 2006); Letter of P.C. Saunders to P.S. Reichler (2 March 2006); Letter of P.S. Reichler to P.C. Saunders (6 March 2006), collected at SR, Vol. II, Annex SR42.

CHAPTER 2

SURINAME'S PRELIMINARY OBJECTIONS SHOULD BE SUSTAINED

2.1. Guyana's Reply constitutes its first response to Suriname's position, expressed in its Preliminary Objections, that this Tribunal lacks jurisdiction over the maritime boundary dispute between the Parties because there is no agreement on the land boundary terminus, a question of sovereignty over land territory that must be decided before there can be a maritime boundary delimitation. The Reply also marks Guyana's first response to Suriname's Preliminary Objections to the admissibility of Guyana's Submissions 3 and 4. In Section I of this Chapter, Suriname demonstrates that Guyana's arguments for sustaining the Tribunal's jurisdiction over the maritime boundary dispute between the Parties are insufficient, and that the Tribunal lacks jurisdiction over this dispute. In Section II of this Chapter, Suriname shows that, even if jurisdiction existed, Guyana's Submissions 3 and 4 are inadmissible.

2.2. Suriname respectfully submits that the Tribunal should examine Guyana's arguments concerning jurisdiction with great care. As Suriname demonstrates in Section I below, Guyana's arguments rest almost entirely on distortions of the positions taken by Suriname and on misconstructions of the historical and factual record. For example, Suriname has never argued that "the Tribunal has jurisdiction if it rules on the merits in Suriname's favour, but it deprives itself of jurisdiction if it rules otherwise."[19] On the contrary, Suriname has consistently argued that the Tribunal lacks jurisdiction because the Parties have never agreed on the location of the terminus of the land boundary between them, so that the Tribunal lacks a starting point for any maritime delimitation. As Suriname demonstrates in Section I, far from establishing the existence of an agreement concerning the land boundary terminus, Guyana's Reply shows that no such agreement has ever existed. Suriname has also argued that if the Tribunal should conclude that the Parties or their predecessors did reach a binding agreement concerning the location of the land boundary terminus, then that agreement necessarily included an agreement that the boundary in territorial waters followed along the 10° Line. This is not an argument that the Tribunal only has jurisdiction to rule in Suriname's favor; rather, it is a form of pleading in the alternative, as Guyana knows.

2.3. Guyana's rhetorical excesses do, however, disclose one key aspect of the case before this Tribunal. The Tribunal has jurisdiction over the dispute if, and only if, there is an agreement on the land boundary terminus. That is why Guyana goes to such lengths to argue that "since 1936 the parties have mutually, consistently and unequivocally accepted Point 61 as the land boundary terminus."[20] It is also why Guyana makes such bold claims as that "until the filing of Suriname's Preliminary Objections on 23 May 2005, there is no evidence that Suriname has ever previously claimed linkage between Point 61 and the N 10 E maritime boundary line."[21] Both assertions are unfounded, as Suriname demonstrates below.

2.4. With respect to the admissibility of Submissions 3 and 4, Guyana's Reply is dismissive, devoting a mere two paragraphs (paras. 2.47 and 2.48) to discussion of them. The Reply urges that Suriname has not offered "a single judicial authority in support of its

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[19] RG, para. 2.3, pp. 15-16.

[20] *Id.* at para. 2.4, p. 16.

[21] *Id.* at para. 2.5, p. 16.

contention" that those submissions are inadmissible,[22] and it contends that whether Guyana has clean hands "can only be decided by the Tribunal upon a consideration of the merits."[23] Suriname's objections to the admissibility of Guyana's Submissions 3 and 4 are, in fact, substantial. In Section II, Suriname demonstrates that, although international tribunals have been understandably reluctant to apply the doctrine of clean hands to bar the admissibility of a claim in inter-state proceedings, the doctrine is fully available for application in that fashion by this Tribunal in this proceeding. Suriname also demonstrates that Guyana itself has disclosed its own unclean hands by the facts that it has admitted in its submissions to this Tribunal, so that the Tribunal need not delve into the merits of the dispute to find Submissions 3 and 4 inadmissible, but need only read Guyana's words.

2.5. In Section I below, Suriname shows why Guyana's contentions respecting the jurisdiction of this Tribunal lack merit. In Section II, Suriname demonstrates that Guyana's Submissions 3 and 4 are inadmissible.

I. The Tribunal Does Not Have Jurisdiction To Establish the Maritime Boundary

A. Introduction

2.6. In its Preliminary Objections, Suriname submitted that the Tribunal cannot decide the maritime boundary dispute between the Parties because there is no agreement on a question of sovereignty over land territory that must be decided before there can be a maritime boundary delimitation. Questions of sovereignty over areas that do not comprise part of the sea, in particular land territory including lakes and rivers, are not within the jurisdiction of this Tribunal conferred by Part XV of the 1982 Convention.[24]

2.7. Guyana appreciates that for this Tribunal to have jurisdiction over Guyana's maritime delimitation claim, Guyana must show that the Parties have agreed on the location of their land boundary terminus. That is why Guyana makes such efforts to support its claim that the Parties have agreed that the 1936 Point, which Guyana calls Point 61, is the land boundary terminus. Guyana reviews, with notable selectivity, the record of the work of the Mixed Boundary Commission in an effort to show that "the colonial powers mutually and unequivocally treated the Boundary Commission's actions as a definitive settlement of the land boundary terminus at Point 61."[25] Guyana also purports to show that Suriname has accepted the 1936 Point as the land boundary terminus in public statements and oil concessions. Guyana also claims that "until the filing of Suriname's Preliminary Objections on 23 May 2005, there is no evidence that Suriname has ever previously claimed linkage between Point 61 and the N10E maritime boundary line."[26] Guyana claims, as well, that Suriname has "never adopted a land boundary terminus other than Point 61."[27] Finally in this

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[22] *Id.* at para. 2.47, p. 31.

[23] *Id.* at para. 2.48, p. 31.

[24] Suriname believes that this point is beyond reasonable dispute, but for the sake of completeness it discusses the limitation of the jurisdiction of an Annex VII Tribunal to maritime matters in Part H below.

[25] RG, para. 2.16, p. 20.

[26] *Id.* at para. 2.5, p. 16.

[27] *Id.* at p. 22 (Part D).

vein, Guyana argues that the 1936 Point and the 10° Line are not inextricably linked, as Suriname has shown that they are, and Guyana contends, again misconstruing the historical record, that the colonial powers intended to adopt the 1936 Point as the land boundary terminus, but left open for variation in future years the bearing of a line indicating the maritime boundary between Guyana and Suriname.

2.8. Suriname refutes Guyana's arguments concerning jurisdiction in Section I of this Chapter. In Part B, Suriname demonstrates that the 1936 Point is not, and cannot be, the land boundary terminus for the dispositive reason that it is located landward of the low-water line. In Part C, Suriname addresses Guyana's historical arguments, demonstrating that the work of the 1936 Mixed Boundary Commission was not intended to be, and cannot be regarded as, definitive. Suriname also shows that it has never accepted the 1936 Point in isolation as the land boundary terminus, but has treated it only as a reference point to be used in conjunction with the 10° Line to determine the land boundary terminus and delimit the maritime areas beyond. In Part D, Suriname shows that there is no reason to relate the land boundary terminus to the 1936 Point, and that Suriname has in fact identified locations that are not linked with the 1936 Point as possible locations of the land boundary terminus, as has the United Kingdom. In Part E, Suriname refutes Guyana's contention that the 1936 Point and 10° Line are not inextricably linked, so that a line having a bearing other than 10° could be employed in conjunction with the 1936 Point for purposes of a maritime delimitation between the Parties.

2.9. In addition to its argument that the Parties have accepted the 1936 Point as their land boundary terminus, Guyana offers two alternative arguments to support its contention that the Tribunal has jurisdiction over this dispute. First, Guyana argues that the Tribunal may draw a closing line pursuant to Article 9 of the 1982 Convention and may thereby determine the location of the land boundary terminus even if the Parties have not agreed upon it. Second, Guyana argues that the Tribunal may effect a partial maritime delimitation by choosing a point sufficiently far offshore that the location of the land boundary terminus will not affect the computation of an equidistance line, and by then delimiting the maritime boundary between that point and the 200-nautical mile limit. In Part F below, Suriname demonstrates that the Tribunal lacks authority to draw a closing line under either Article 9 or Article 10 of the Convention, and that those Articles cannot be applied to resolve the territorial dispute between the Parties. In Part G, Suriname shows that the Tribunal lacks authority to effect a partial delimitation in the absence of an agreement between the Parties. In Part H, Suriname reviews the relevant precedents and the history of the Convention in order to confirm that the Tribunal lacks jurisdiction over territorial questions such as the location of the land boundary terminus, and that, in the spirit of restraint that has always informed the jurisprudence under the Convention, the Tribunal should decline Guyana's invitation to assume authority to decide such territorial questions in this proceeding.

B. The 1936 Point Cannot Be the Land Boundary Terminus Because It Is Located Landward of the Low-Water Line

2.10. In its Reply, Guyana proclaims that "for 70 years, both Suriname and Guyana have referred to or treated" the 1936 Point as "the land boundary terminus,"[28] and the Reply repeats no fewer than 88 times the claim that the 1936 Point is the agreed terminus of the land

[28] *Id.* at para. 2.4, p. 16.

boundary between Guyana and Suriname. The 1936 Point cannot possibly be the location of the land boundary terminus, however. That is because the 1936 Point is located inland, and is indeed well landward of the high-water line on the western bank of the Corantijn. By definition, the land boundary terminus must be located at a point on the low-water line, which is where land and sea meet. The fact that the 1936 Point is not located on the low-water line is shown by Guyana's own Plate R19, which is inserted between pages 98 and 99 of Guyana's Reply; the Plate is reproduced as Figure 1 on the following page. Because the 1936 Point is not located on the low-water line, it is not, and cannot be, the land boundary terminus.

2.11. This analysis reveals the fundamental flaw in Guyana's entire argument on jurisdiction. Because the 1936 Point cannot be the land boundary terminus, in order to delimit the maritime boundary between Guyana and Suriname, the Tribunal must first select some point that is located on the low-water line as the land boundary terminus. Whatever rationale the Tribunal might choose for selecting such a point, it will be determining the land boundary between the Parties. The 1982 Convention does not confer the power to determine such a land boundary on an Annex VII Tribunal.[29]

2.12. Guyana attempts to gloss over the fact that the 1936 Point is not located on the low-water line, but the effort fails. For example, in paragraph 6.15 of the Reply, Guyana claims that the "correct starting point for the provisional equidistance line is Guyana's basepoint G1."[30] Guyana's justification for selecting that starting point for the provisional equidistance line is that "[b]asepoint G1 is positioned on the low-tide coast closest to Point 61."[31] In fact, Guyana's basepoint G1 is located about 1.4 kilometers from the 1936 Point. By inviting the Tribunal to connect the 1936 Point to its basepoint G1, Guyana is asking the Tribunal to determine a land boundary between Suriname and Guyana.

2.13. Precisely because the 1936 Point alone does not, and cannot, establish the terminus of the land boundary between Guyana and Suriname, Suriname believes that the 1936 Point can have juridical significance between the Parties only if it is regarded as inextricably linked with the 10° Line. The Tribunal could identify a land boundary terminus based on an agreement concerning the 1936 Point only if it found that there was also agreement on how the 1936 Point is to be connected to the low-water line; as Suriname has shown, the 10° Line has been adopted for making that connection.[32] As discussed further below, if (contrary to law and fact) the work of the Boundary Commission is to be taken as establishing the land boundary terminus, then it establishes that land boundary terminus at the point where the 10° Line intersects the low-water line. That point on the low-water line is located more than two kilometers away from Guyana's basepoint G1.

2.14. In the next Part, Suriname demonstrates that the Mixed Boundary Commission could not, and did not, bind the colonial powers with respect to the location of the land boundary

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[29] This obvious limit on the jurisdiction of an Annex VII Tribunal is comprehensively discussed in Part H below.

[30] RG, para. 6.15, pp. 109-10.

[31] *Ibid*. Strikingly, Guyana's description of basepoint G1 as being "positioned on the low-tide coast closest to" the 1936 Point entails another admission by Guyana that the 1936 Point is not located on the low-water line and so cannot be the land boundary terminus.

[32] *See* SPO, para. 2.4, p. 6; para. 2.7, p. 7; paras. 3.14-3.15, p. 18; paras. 5.6-5.14, pp. 24-27. *See also* SCM, paras. 3.1-3.13, pp. 15-19; paras. 3.27-3.30, pp. 24-25; paras. 4.56-4.72, pp. 57-62.

terminus between Guyana and Suriname, and that Guyana's contrary arguments lack merit. Suriname also shows that, contrary to Guyana's assertion, it has never accepted the 1936 Point as the land boundary terminus, but has always referred to the 1936 Point in conjunction with the 10° Line.

C. The Parties Have Never Agreed on the Location of the Land Boundary Terminus

1. *The Mixed Boundary Commissioners Did Not, and Could Not, Bind the Colonial Powers*

2.15. The linchpin of Guyana's argument respecting the purported agreement on the location of the land boundary terminus is its assertion that the Boundary Commission in 1936 fixed the land boundary terminus in a manner that was binding upon the colonial powers and upon Guyana and Suriname as their successors. That is a remarkable assertion. The Boundary Commission consisted of a Netherlands and a British section, headed by, respectively, Vice-Admiral Kayser of the Netherlands and Major Phipps of the United Kingdom. There can be no dispute that those individuals understood that their work was intended by the two Governments subsequently to be incorporated into a treaty that would be subject to negotiation and to all of the usual formalities for the conclusion and ratification of a treaty.[33] The notion that those two gentlemen could bind their respective Governments in the absence of a signed and ratified treaty is without support, either in the records pertaining to the Boundary Commission or in international law.[34] Such "evidence" as Guyana offers in support of its argument falls short.

2.16. Guyana points, first, to the fact that the Boundary Commission entitled its report "Report on the Inauguration of the Mark at the Northern Terminal of the Boundary Between Suriname and British Guiana."[35] For Guyana, this choice of title "indicates that the exercise was intended to be definitive."[36] It is plain from the content of the report, however, that the markers placed by the Boundary Commission were intended as reference points, and that the purpose of the Report was to provide coordinates for inclusion in a treaty. That is clear from the fact that the Commissioners placed *two* marks which together "indicate[d] the direction of

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[33] References to the preparation of a treaty abound in the papers relating to the work of the Mixed Boundary Commission. *See, e.g.*, Telegram No. 25 from the Foreign Office to the Colonial Office (24 April 1934) with early version of British Draft Treaty, at MG, Vol. II, Annex 6; Letter of H. Beckett, Colonial Office to the Under Secretary of State, War Office (22 June 1936), at MG, Vol. II, Annex 10; Letter of 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 to R. de Marees van Swinderen (4 July 1935), at MG, Vol. II, Annex 60; Diplomatic Note from Netherlands Charge d'Affaires in London to the British Secretary of State for Foreign Affairs (22 November 1937), at MG, Vol. II, Annex 62; Diplomatic Note from E. Teixeira de Mattos, 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; Letter of the Secretary of State for Foreign Affairs to the Netherlands Minister, enclosing Draft Treaty (4 July 1935), at SCM, Vol. II, Annex 1.

[34] As Suriname explained in its Preliminary Objections, because the Boundary Commission acted within the framework of the preparation of a draft treaty, its work must be distinguished from the work of a boundary commission charged with demarcating a boundary that has already been agreed upon by two states. SPO, para. 2.6, n.27, p. 7.

[35] RG, para. 2.10, pp. 17-18.

[36] *Ibid.*

the boundary line in the territorial waters."[37] Further, those markers were placed "on a True bearing of 10° E," this being the bearing selected so as to "leave the navigation channel in the same territory throughout its length" and thus avoid "[o]ther difficulties [that] would arise over lighting, buoys, etc." if another bearing were chosen.[38] There is nothing in the Report to suggest that the 10° Line selected by the Commissioners was any more or less definitive than their selection of locations for the markers.

2.17. Guyana also argues that "[t]he covering memorandum from the British Secretary of State to the Netherlands Minister Plenipotentiary in London makes clear that the Boundary Commission had full authority to fix the land boundary terminus at a point certain."[39] That covering memorandum, however, does not indicate that either colonial power had dispensed with the need for conclusion of a treaty in order to fix the boundary. On the contrary, the quotation provided by Guyana indicates that it was not considered "practicable for a treaty to be concluded . . . until a final settlement ha[d] been reached regarding those points in the boundary which are to be delimited by the Boundary Commissioners."[40] The point of the covering memorandum is that the treaty could not be prepared until the Boundary Commissioners supplied language concerning the location of the land boundary terminus for inclusion in the draft treaty. The covering memorandum does not indicate that the United Kingdom and the Netherlands were to be bound by the work of the Boundary Commissioners regardless of whether a treaty was concluded.

2.18. Guyana also refers to the body of the 1935 draft treaty as further evidence that "the Boundary Commission was authorized to fix the precise location of the land boundary terminus."[41] Here, too, however, Guyana merely assumes its conclusion. Guyana admits that the coordinates selected by the Boundary Commission "would then be incorporated into the final draft treaty."[42] There is nothing in the 1935 draft to support the conclusion that the colonial powers regarded themselves as bound concerning the location of the land boundary terminus in the absence of the conclusion and ratification of "the final draft treaty." Moreover, the 1935 draft treaty itself indicates that the location of the land boundary terminus was not to be at the point where the more northerly marker was placed, but at the point where a line connecting the two markers "intersects the shore line."[43]

2.19. Guyana further argues that the United Kingdom and the Netherlands must have intended the work of the Boundary Commissioners to be binding because "laying such a permanent marker" was "a serious endeavor" and that "[t]he nature of the marker and the effort involved in laying it indicate that the intention was to establish a permanent land

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[37] 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, p. 1.

[38] *Ibid.*

[39] RG, para. 2.11, p. 18.

[40] Letter of the Secretary of State for Foreign Affairs to the Netherlands Minister, enclosing Draft Treaty (4 July 1935), at SCM, Vol. II, Annex 1, para. 2.

[41] RG, para. 2.12, p. 18.

[42] *Ibid.*

[43] Letter of the Secretary of State for Foreign Affairs to the Netherlands Minister, enclosing Draft Treaty (4 July 1935), at SCM, Vol. II, Annex 1, Art. 1 (2).

boundary terminus."[44] However, the Boundary Commissioners could not have believed that their marker of itself constituted the land boundary terminus or was set at the land boundary terminus; they noted that it was placed far enough away from the sea to be safe from erosion and tidal forces.[45] Furthermore, the surrounding circumstances amply show that the location of that land boundary terminus was to be established and agreed upon by means of a comprehensive, binding treaty, not simply by the placement of reference markers. The monuments erected by the Boundary Commission served as reference points which made possible the identification of the land boundary terminus as the point where the 10° Line intersected the low-water line, as both the 1935 and the 1939 drafts of the treaty confirm.[46] There is simply no basis for Guyana's suggestion that the laying of a marker somehow, in and of itself, bound the Netherlands and the United Kingdom quite apart from the treaty-making process of which it was a part and which, it is common ground, was never completed. Guyana's argument suggests that the constitutional requirements of both states for the adoption of a treaty would have been made superfluous, without any indication anywhere in the historical record that such a result was intended.[47]

2.20. Guyana also argues that "[t]he Parties' actions immediately following the burial of the concrete and brass pillar at Point 61 reflect their understanding that the Boundary Commission had definitively fixed the land boundary terminus."[48] But the correspondence referred to—Major Phipps's report to his Government,[49] and an extract from Vice-Admiral Kayser's similar report[50]—is perfectly consistent with the intention of both Commissioners (and both Governments) to embody the work of the Boundary Commission in a final treaty. There is nothing in the correspondence to support the proposition that both states had agreed to be bound by the acts of the Boundary Commissioners without further documentation, governmental authorization or constitutional process.

2.21. In this vein, Guyana also refers to a letter of the Netherlands to the International Law Commission in 1953 as evidence that the Netherlands believed that the starting point for

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[44] RG, para. 2.13, pp. 18-19. Elsewhere, Guyana notes the comment of the British Commissioner that it would be "a comparatively simple matter to rebuild the direction pillar." *See id.* at para. 2.33, pp. 25-26 (quoting Letter of Major I. Phipps, Chief British Commissioner, British Guiana Brazil Boundary Commission, to the Under Secretary of State for the Colonies, Colonial Office (9 July 1936), at MG, Vol. II, Annex 12, para. 11), an observation that contradicts Guyana's claims about the "permanen[ce]" of the markers.

[45] 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, p. 1.

[46] *See* Letter of the Secretary of State for Foreign Affairs to the Netherlands Minister, enclosing Draft Treaty (4 July 1935), at SCM, Vol. II, Annex 1; Diplomatic Note from the Secretary of State to E. Michiels van Verduynen, Netherlands Minister to the United Kingdom, enclosing 1939 British Draft Treaty (25 November 1939), at MG, Vol. III, Annex 89.

[47] If Guyana's argument concerning the legal significance of the "laying of a marker" were to be accepted, then that reasoning would also establish that the three markers—two boundary markers and a wooden beacon—were deliberately placed on a straight line along an azimuth of 10° to identify the location and direction of the territorial waters boundary beginning a the low-water mark and following that azimuth.

[48] RG, para. 2.14, p. 19.

[49] Letter of Major I. Phipps, Chief British Commissioner, British Guiana Brazil Boundary Commission, to the Under Secretary of State for the Colonies, Colonial Office (9 July 1936), at MG, Vol. II, Annex 12, pp. 5-6.

[50] Letter from Dutch Boundary Commissioner Vice-Admiral C.C. Kayser to the Dutch Minister of the Colonies (17 July 1936) (original in Dutch, translation provided by Guyana), at MG, Vol. II, Annex 41.

maritime delimitation had been fixed.[51] But the very portion of the letter that Guyana cites makes clear that the treaty in which the boundary was supposedly "settled" was never finalized.[52] Further, the supposedly "settled" boundary described in the 1953 letter specified—in language omitted by Guyana—that the boundary in the territorial waters follows "the line drawn on a bearing of 10 East of the true North"[53]—the very same 10° Line that Guyana now purports to disavow.

2.22. Guyana's argument that the work of the Boundary Commissioners was intended to be definitive suffers another flaw. Because the draft boundary treaty was intended to produce a comprehensive negotiated settlement, it dealt not only with the maritime boundary, but also with the disputed territory in the south. At that juncture, officials of the Netherlands were prepared to consider ceding that disputed territory to British Guiana as one element of a comprehensive boundary settlement.[54] The same Boundary Commission whose work Guyana claims was binding with respect to the location of the land boundary terminus also addressed the location of the southern terminus of the land boundary between the two countries so as to reflect the concession the Netherlands was then prepared to consider. The Boundary Commission described such a southern point, which was reflected in the 1939 version of the draft treaty.[55] The willingness of the Netherlands to consider ceding the Southern territory is old history; both the Netherlands and Suriname have long maintained that the disputed territory in the south is part of the territory of Suriname. By inviting the Tribunal to conclude that the work of the Boundary Commission was definitive in the north, however, Guyana also seeks to involve the Tribunal in the territorial dispute between the Parties in the south. The Tribunal has no jurisdiction to pronounce on that long-existing territorial dispute.

2.23. In short, Guyana's argument that the Boundary Commission definitively fixed the land boundary terminus lacks support and should be rejected.

2. *Suriname Has Never Accepted the 1936 Point as the Land Boundary Terminus, but Has Only Referred to It as a Reference Point To Be Used in Conjunction with the 10° Line*

2.24. Guyana seeks to bolster its argument that the 1936 Point is the land boundary terminus by claiming that Suriname's position in these proceedings "is inconsistent with its own public pronouncements."[56] According to Guyana, Suriname had "repeatedly issued statements

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51 *See* RG, para. 2.15, pp. 19-20.

52 *Ibid.*

53 Information and Observations Submitted by Governments Regarding the Question of Delimitation of the Territorial Sea of Two Adjacent States, *Yearbook of the International Law Commission Yearbook*, 1953, Vol. II, Doc. A/CN.4/71 and Add. 1-2, 82-83 (1959), at RG, Vol. II, Annex R9.

54 For a fuller discussion of this point see SPO, paras. 2.2-2.7, pp. 5-7.

55 The work of the Commission is reported upon in the Report on the Inauguration of the Boundary Mark at the Trijunction Point of the Boundaries of British Guiana, Brasil and Dutch Guiana, at SR, Vol. II, Annex SR3. Article 2 of the 1935 Draft Treaty at SCM, Vol. II, Annex 1, provides that the location of the trijunction point between British Guiana, Suriname and Brazil was to be filled in as a result of the findings of the Commissioners. Article 2 of the 1939 Draft Treaty, MG, Vol. III, Annex 89, defines that trijunction point with the same geographical coordinates as those contained in the Report of the Boundary Commission.

56 RG, para. 2.17, p. 20.

claiming Point 61 as the land boundary terminus."[57] Although Suriname has occasionally referred in passing to the 1936 Point as though it were the actual land boundary terminus, the 1936 Point cannot be the land boundary terminus for the reasons stated above, and examination of the documents Guyana cites—and particularly of portions of those documents that Guyana has omitted from its quotations—shows that Suriname has always referred to the 1936 Point in combination with the 10° Line, and that Suriname has understood the 1936 Point to be a reference point to be used in combination with the 10° Line to delimit the territorial sea.

2.25. For example, Guyana quotes the Suriname Planatlas as stating that the 1936 Point is the "the most northern point on Suriname's border with Guyana, as well as the point of departure for the seaward dividing line between both countries."[58] Guyana omits the next sentence of the Planatlas, which states that "[t]his boundary is formed by running a line from the Kayzer-Phipps point [the 1936 Point] in a direction 10° east of true north, substantially parallel with the channel of the Corantijn River."[59] In fact, the Planatlas thus confirms Suriname's position that the 1936 Point and the 10° Line are inextricably linked.[60]

2.26. Similarly, Guyana misstates Suriname's communications in a 1989 exchange of diplomatic notes with Guyana. Guyana characterizes and purports to quote from a diplomatic note of Suriname, dated 23 January 1989, as follows:

> Suriname's response unambiguously recognised Point 61 as the land boundary terminus, stating that "the western sea boundary" of Suriname is "formed by" a "line" that is "drawn from latitude 5° 59' 53" and longitude 57° 08' 51" W [*i.e.*, Point 61]."[61]

However, that is not an accurate quotation from the document. The diplomatic note actually states that "the western sea boundary of the Republic of Suriname is formed by the line N 10° E drawn from latitude 5° 59' 53" and longitude 57° 08' 51" W."[62] The note does not state that the 1936 Point is the land boundary terminus, but uses the 1936 Point as a reference point to identify the location of the maritime boundary along the 10° Line. Guyana has chosen to omit the reference to the 10° Line.

2.27. Guyana also claims that "Suriname's official position that Point 61 is the land boundary terminus was underscored yet again at the Twenty-First Meeting of the Conference of Heads of Government of CARICOM on 2-5 July 2000."[63] According to Guyana, a formal

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[57] *Ibid.*

[58] *Ibid*.

[59] Suriname Planatlas (1988) (excerpts), at MG, Vol. II, Annex 47.

[60] Suriname's linkage of the 1936 Point and the 10° Line in the 1988 Planatlas is one of many documents that refutes Guyana's claim that "[t]here is no evidence showing linkage" at any time after the 1966 Marlborough House talks. RG, para. 2.35, p. 27.

[61] *Id.* at para. 2.18, p. 20.

[62] *See* Diplomatic Note from Embassy of Suriname to Guyana Ministry of Foreign Affairs (23 January 1989), at Memorandum of the Republic of Suriname on Preliminary Objections ("SPO") filed on 23 May 2005, Annex 6; *Note Verbale* from the Embassy of the Republic of Suriname to the Ministry of Foreign Affairs of the Co-operative Republic of Guyana (23 January 1989), at RG, Vol. II, Annex R13.

[63] RG, para. 2.20, p. 21.

description of Suriname's western boundary with Guyana "affirmed Point 61 as the land boundary terminus."[64] Here, too, however, Guyana omits the reference to the 10° Line that is contained in the document it cites, which states that from the 1936 Point "the boundary continues along a line 10 degrees East of True North, being the western limit of the Territorial Sea, the Exclusive Economic Zone and the Continental Shelf of Suriname."[65]

2.28. Guyana further claims that the oil concession practices of both Suriname and Guyana demonstrate that both Parties considered the 1936 Point to be the land boundary terminus. That assertion is misleading. As is demonstrated in the Memorandum on Preliminary Objections as well as in the Counter-Memorial, Suriname's oil concession practices have always reflected its position that the 1936 Point and 10° Line are inextricably linked. Since 1964, when Suriname considered the amendment of the 1957 Colmar concession, it defined the western limit as "the left bank of the Corantijn, being the territorial western boundary of the Country and then by its extension seaward into the territorial waters and across the continental shelf in the direction 10° east of true north."[66] Far from evidencing, as Guyana claims, "respect" for Guyana's claim of the 1936 Point as the land boundary terminus, a review of Suriname's practices regarding oil concessions shows Suriname's steadfast and consistent commitment to the connection between the 1936 Point and the 10° Line.

2.29. In sum, Suriname has always regarded the 1936 Point as a reference point to be used in conjunction with the 10 ° Line. Suriname next demonstrates that there are other possible locations for the land boundary terminus, and that both Suriname and the United Kingdom have recognized as much.

D. There Is No Reason To Relate the Land Boundary Terminus to the 1936 Point, and Suriname Has In Fact Identified Locations That Are Not Linked with the 1936 Point as Possible Locations of the Land Boundary Terminus, as Has the United Kingdom

2.30. It is common ground between the Parties that the location of the boundary between Suriname and Guyana, including the location of the land boundary terminus, must be determined by reference to the Agreement of Cession between the Governors of Suriname and Berbice (now Eastern Guyana) that was concluded in 1799. Guyana does not dispute the relevance of that Agreement, and frequently refers to it.[67] That Agreement provides in pertinent part:

> That the West Sea Coast of the River Corentin, up to the Devil's Creek, besides the West Bank of 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.[68]

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64 *Ibid.*

65 Description of the Western Boundary of the Republic of Suriname (28 June 2000), at MG, Vol. II, Annex 51.

66 Law No. 86, Government Gazette of Suriname (13 October 1964), at SCM, Vol. II, Annex 16.

67 *See, e.g.*, MG, para. 2.18, p. 10; para. 2.20, p. 11.

68 *The Laws of British Guiana 1773-1870*, Vol. 1 (McDermott ed., 1870), at MG, Vol. II, Annex 2, at p. 51.

2.31. The colonial powers, and the Parties as well after their independence, were generally in agreement that that definition implies that the Corantijn River is entirely within Suriname's territory, and that the land boundary is located somewhere on the western (left) bank of the Corantijn River.[69] Because the 1799 Agreement distinguishes between the sea coast and the west bank of the Corantijn, the Parties have generally been in agreement that under the 1799 Agreement, the terminus of the land boundary is located on the low-water line at the point at which the west bank of the Corantijn changes into the sea coast.[70] In its Reply, Guyana concedes that the land boundary terminus must be located at the point "where the river meets the sea."[71]

2.32. In its Reply, Guyana claims, erroneously, that the 1936 Point is that point. As previously shown, however, the 1936 Point cannot be the point where the riverbank changes into the coastline, for it is an inland point, located over a kilometer from the low-water line. In fact, neither the Parties nor their colonial predecessors ever agreed on the point at which the west bank of the Corantijn changes into the sea coast. Suriname's willingness to accept a maritime boundary based on the use of the 1936 Point and the 10° Line can only be understood as a willingness to compromise, not as an agreement that the 1936 Point is the land boundary terminus specified by the 1799 Agreement. And in fact, as demonstrated in the Preliminary Objections[72] and Counter-Memorial,[73] the Netherlands and Suriname have proposed locations for the land boundary terminus—the point where the river bank changes into the coastline—that are well to the north and west of the intersection with the low-water line of the 10° Line measured from the 1936 Point.

2.33. Guyana claims that "[a]ll of the sudden . . . Suriname has decided that Point 61 is no longer located at 'the point at which the river bank changes into the coastline.'"[74] But Suriname has never contended that the 1936 Point is the point at which the river bank changes into the coastline. As Suriname has shown,[75] the 1936 Point and 10° Line were not selected by reference to the 1799 Agreement. Rather, they were chosen based on the perception that the location of the 1936 Point in combination with the 10° Line to delimit territorial waters safeguarded the interests of the Netherlands in controlling navigation to and from the Corantijn.[76] In fact, Suriname has never identified the 1936 Point as the point at which the river bank changes into the coastline, and the paragraph of the Reply where Guyana asserts that Suriname has so identified the 1936 Point, paragraph 2.27, is unsupported.

2.34. In paragraph 2.27 of the Reply, Guyana claims that "since its independence in 1975, Suriname has uniformly and repeatedly given the coordinates for this location--where 'the river bank changes into the coastline'--as 'Latitude: 5° 59' 53.8" North, Longitude: 57° 08' 51.5" West'--the exact coordinates of Point 61." Guyana does not cite any source as support

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69 *See* SPO, paras. 2.1-2.2, p. 5.

70 For a discussion of the possible location of that point, see *infra* para. 2.65, p. 32.

71 RG, para. 2.26, p. 23 (footnote omitted).

72 SPO, paras. 2.15-2.18, pp. 10-11; paras. 3.11-3.12, p. 17; para. 3.14, p. 18; para. 5.6, p. 24; para. 5.14, pp. 26-27.

73 SCM, para. 2.11, n.28, p. 9; para. 3.46, p. 32; para. 3.48, pp. 32-33, para. 4.62, pp. 58-59.

74 RG, para. 2.27, p. 23.

75 SPO, paras. 2.1-2.13, pp. 5-9.

76 For a discussion, see SCM, paras. 3.3-3.13, pp. 15-19.

for that proposition, and it ignores documents cited by Suriname that prove the opposite.[77] Suriname has referred to the 1936 Point and its coordinates, but has never identified the 1936 Point as the point where the river bank changes into the coastline. Guyana next asserts in paragraph 2.27 that "both the Netherlands and Suriname have consistently regarded [the 1936 Point] as 'the left bank of the River Courentyne *at the sea*' since 1936," citing a 1935 Letter of the Secretary of State for Foreign Affairs to the Netherlands Minister, enclosing Draft Treaty (4 July 1935) and the 1939 British Draft Treaty. However, documents related to the selection of the 1936 Point by the Netherlands make clear its view that the river extended to the north of the 1936 Point. As Suriname showed in the Counter-Memorial, the Netherlands Minister for the Colonies consulted with the Minister of Defense on how to safeguard the interests of Suriname in supervising shipping traffic.[78] The Minister for Defense indicated that a closing line could be drawn in the river that lay considerably to the north of the 1936 Point.[79] The drawing of a closing line—which by definition identifies the limit between the internal waters in a river and territorial waters seaward of the closing line—shows that the point at which the river bank changes into the sea coast was not located near the point at which the Boundary Commission later established the 1936 Point. Under international law, a closing line cannot be drawn seaward of the mouth of a river.[80] Guyana also claims in paragraph 2.27 that "in 1965 Suriname's Dr. Essed referred to the same point in describing the starting point for maritime delimitation as 'the point on the west bank of the Corentijn, *where it meets the sea*." But Dr. Essed did not refer, in any way, to the 1936 Point. In short, there is no support for Guyana's assertion that Suriname has accepted the 1936 Point as "the point where the Corentyne River meets the sea, that is, where the riverbank changes to the coastline."[81]

2.35. Moreover, representatives of the Netherlands and Suriname on several occasions identified the point where the riverbank changes into the coastline—the land boundary terminus indicated by the 1799 Agreement—without reference to the 1936 Point. On 25 November 1975, the day Suriname attained its independence, the Prime Minister of the Netherlands wrote a letter to the Prime Minister of Suriname defining the territory of Suriname. That letter refers to the terminus of the land boundary at the mouth of the Corantijn as "the point where the river bank changes into the coastline."[82] Contrary to Guyana's insinuation,[83] there is nothing in the Prime Minister's letter that identifies the 1936 Point with the point "where the river bank changes into the coastline."

2.36. The Marlborough House Talks between Guyana and Suriname provide further support for Suriname's contention that the 1936 Point does not determine the point at which the river bank changes into the sea coast. The minutes of that meeting prepared by Guyana—produced by Guyana only after a request from Suriname—record that Dr. Calor, a member of the Suriname delegation, stated:

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77 *See, e.g.*, SPO, paras. 2.11-2.16, pp. 8-10.

78 SCM, para. 3.4, p. 16.

79 *Ibid.*

80 International law at present allows a coastal state to draw a closing line of 24 nautical miles, instead of ten nautical miles, which was the maximum breadth of closing lines when the Minister of Defense provided his advice in 1931.

81 *See* RG, para. 2.27, p. 23.

82 The letter is reproduced at MG, Vol. II, Annex 46.

83 *See* RG, para. 2.27, p. 23.

> In general the part in the Atlantic ocean consists of:
>
> (1) the territorial sea, and
>
> (2) the continental shelf.
>
> In order to draw the border line between the two countries it is necessary to know from which point this line will extend. It is necessary we communicate to you the intersection of the base line of the colony, because this base line divides the inland water from the territorial sea. This line demarcates the territorial sea just as the west line demarcates the land. At the point at which this line intersects the left bank there begins the demarcation of the territorial sea.[84]

Dr. Calor's statement made no reference to the 1936 Point, but instead observed that Suriname, the sovereign over the entire Corantijn River, could determine the extent of the internal waters in the Corantijn.

2.37. A *Note Verbale* from the Netherlands Ambassador in London to the British Principal Secretary of State for Foreign Affairs of 3 February 1966[85] reconfirmed that in accordance with the 1799 Agreement, and subsequently in accordance with the Treaty of London of 1815, the Corantijn is entirely included in the territory of Suriname.[86] The *Note Verbale* then continued:

> The land-boundary between Surinam and British Guiana thus having been established, the whole Corentyne from its source to its mouth is by right Surinam territory. Only the demarcation thereof still has to take place.[87]

The *Note Verbale* did not make any reference to the 1936 Point. That is telling since the *Note Verbale* referred to the demarcation of the land boundary from the source of the Corantijn to its mouth.

2.38. Guyana also contends that one instance in which the Netherlands identified a point other than that indicated by the 1936 Point as the land boundary terminus actually shows that Suriname "never adopted a land boundary terminus other than [the 1936 Point]."[88] Guyana misconstrues the record.

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[84] Minutes of a Meeting Held at Marlborough House, Room 6, London, 23 June 1966, Between Officials of the Governments of Guyana and Surinam To Discuss the Border Between the Two Countries, RG, Vol. II, Annex R12, at p. 4.

[85] On the significance of this *Note Verbale*, see also SPO, para. 3.6, p. 14; SCM, para. 2.16, pp. 10-11.

[86] *Note Verbale* from the Netherlands to the United Kingdom (3 February 1966), MG, Vol II, Annex 68, at para. 1.

[87] *Id.* at para. 2.

[88] RG, p. 22 (Part D).

2.39. As Suriname has shown,[89] in 1959 the Netherlands Hydrographic Office prepared a map that shows a closing line in the Corantijn that had its western anchor located at a point well to the north of the 1936 Point. According to Guyana:

> It is undisputed, however, that the point on the 1959 map was never regarded as marking the actual mouth of the Corentyne River, where the river debouches into the sea, and where the Dutch and the British had agreed to fix the land boundary terminus.[90]

The 1959 map and related documents tell a different story.

2.40. The request to prepare this map was contained in a letter from the Head of the Legal Affairs Department of the Netherlands Ministry of the Navy to the Head of Hydrography of 15 December 1958.[91] The letter observes:

> The Corantijn, together with its mouth, is considered as Surinamese territory in its entirety, based on old custom. There is no treatise on this offering any starting point to answer the question of where the river has to be considered to turn into the territorial sea.
>
> International law does not contain clear concrete rules for determining the desired baseline for situations such as that found in relation to the Corantijn. For this river and its mouth it would seem to be most appropriate to follow the principles generally accepted for determining the extent of bays where both coasts belong to the same state.[92]

If Guyana were correct that the 1936 Point had been adopted as the land boundary terminus, there would have been no need for the Head of the Legal Affairs Department in 1958 to propose a method to establish the point where the river turns into the territorial sea. By noting that a 24-nautical-mile line could be applied in the Corantijn, the letter suggests that the point where the river turns into the sea could be well to the north of the point shown on the 1959 map. A 24-nautical-mile closing line was not proposed because at that time the Netherlands had not yet accepted the length of 24 nautical miles as the applicable law.[93]

2.41. The letter of 15 December 1958 from the Head of the Legal Affairs Department shows three things: the 1936 Point was not considered to be the point at which the river bank changes into the sea; the point at which the river bank changes into the sea was considered to lie to the north of the 1936 Point; and both banks were considered to belong to Suriname. Guyana tries to refute these points by arguing that the British objected to the closing line

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89 SPO, paras. 2.14-2.16, pp. 9-10.

90 RG, para. 2.24, p. 22.

91 SPO Annex 13.

92 *Ibid*.

93 *Ibid*. As parties to the 1982 Convention, Suriname and Guyana have of course accepted such a maximum length under Article 10.

contained in the 1959 map prepared by the Netherlands Hydrographic Office,[94] but that "objection" was expressed only in an internal British document.[95] There is no evidence that the British ever raised the matter with the Netherlands. Accordingly, there is no basis for the Reply's suggestion that the Netherlands abandoned the closing line and its endpoints as a reaction to a British objection.[96] Neither the Netherlands nor Suriname has ever concluded that it could not establish that closing line in the Corantijn.

2.42. The terminus of the land boundary at the mouth of the Corantijn is also discussed in a lecture by the well-known commentator Dr. M.W. Mouton that was delivered on 18 January 1961, only a couple of years after the preparation of the 1959 map.[97] The lecture deals with the Convention of the Continental Shelf and includes a discussion of the application of the rule contained in Article 6 of that Convention regarding the delimitation of the continental shelf between neighboring states. Mouton observed that difficulties over the delimitation of the continental shelf will arise everywhere where there are difficulties regarding the delimitation of the territorial sea.[98] One of the examples Mouton used to illustrate these difficulties is the delimitation between Suriname and British Guyana. Mouton noted that the Corantijn is part of the territory of Suriname and then observed:

> and now it is quite a job with the course of this coast to find a point from which the dividing line has to be drawn according to the equidistance principle, as nobody knows where that sovereignty ends.[99]

Thus, Mouton observes that there did not exist an agreement on the northern terminus of the land boundary between Suriname and British Guiana.

2.43. It is not only Suriname and the Netherlands that have identified points other than the 1936 Point as the location of the land boundary terminus, where the river bank changes into the coastline. In an official document that Guyana chooses to ignore, the United Kingdom has also identified a location other than the 1936 Point as being that land boundary terminus.

2.44. In 1959, the United Kingdom placed the location of the land boundary terminus in an area substantially to the north of the area where the 1936 Point is located. As shown in Suriname's Memorandum on Preliminary Objections,[100] an official map of British Guiana published in 1959 shows that the land boundary between Suriname and Guyana extends some ten miles to the north of the area where the 1936 Point is located. Guyana's Reply does not address the 1959 official map, which disproves Guyana's claim that the 1936 Point has been

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94 RG, para. 2.24, p. 22.

95 *See id.* at para. 2.24, n.42, p. 22.

96 *See id.* at para. 2.24, p. 22.

97 M.W. Mouton, *Legal and Political Aspects of the Continental Shelf*, De Ingenieur No. 38, M1-M10 (1961), at SR, Vol. II, Annex SR26. Dr. Mouton worked as a lawyer at the Netherlands Naval Staff from 1952 until 1964. He was a member of the Netherlands delegation to the 1958 United Nations Conference of the Law of the Sea.

98 *Id.* at M8.

99 *Ibid*.

100 SPO Figure 2, following SPO p. 10; Map of British Guiana, published by British Directorate of Overseas Surveys (1959), at SPO Annex 22.

recognized both by the United Kingdom and the Netherlands, and later by Guyana and Suriname, as the land boundary terminus "continuously and unequivocally for the past 70 years."[101]

E. There Is No Support for Guyana's Argument That the 1936 Point Must Be Adopted but That the 10° Line Need Not Be

2.45. In its Reply, Guyana maintains that the 1936 Point and the 10° Line are not inextricably linked.[102] Guyana advances a two-tiered argument to support that contention. First, it argues that the 1936 Point and the 10° Line were determined independently, and that the 10° Line was intended to be subject to change.[103] Second, it argues that a change in circumstances justifies selection of a line other than the 10° Line as an azimuth to be connected with the 1936 Point to delimit the territorial sea. Both contentions are unsound and should be rejected.[104]

2.46. Suriname's Counter-Memorial explains how the 1936 Point and the 10° Line came to be determined.[105] As recounted there, the Netherlands had selected a point on the Western bank of the Corantijn and an azimuth in territorial waters of 28° that was designed to ensure that the Netherlands would have sovereignty over all of the area within which care for shipping—a much broader concept than navigation as such, to which Guyana refers[106]—could be expected to be provided by the state in whose territory the river is located.[107]

2.47. The Counter-Memorial also reviews documents—all from archives that were open to Guyana—which show recognition on the part of the Netherlands that the land boundary terminus could have been established to the north of the area where the 1936 Point was located.[108] That option apparently was not pursued because the location and azimuth then under discussion appeared to be sufficient to ensure that the Netherlands could care for shipping. There is nothing in the historical record to suggest that the Boundary Commissioners believed that they had identified the point where the river bank changes into the coastline. The records of their work do not mention the concept. Rather, they were preoccupied with finding a location with ground "[s]uitable for the constructions of pillars" that "did not appear to be subject to the erosion by the sea."[109]

2.48. Guyana argues that the 1936 Point and the 10° Line "were determined independently"[110] and that "[t]he work of the Mixed Boundary Commission in 1936

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101 RG, para. 2.1, p. 15.

102 *Id.* at para. 2.29, p. 24.

103 *Id*. at paras. 2.29-2.36, pp. 24-27.

104 *Ibid*.

105 SCM, paras. 3.2-3.13, pp. 15-19.

106 *See, e.g.*, RG, para. 1.20, p. 8; para. 2.33, pp. 25-26; para. 2.34, p. 26; para. 3.52, pp. 54-55.

107 SCM, para. 3.5, p. 16; para. 3.8, p. 17.

108 *Id.* at para. 3.5, p. 16.

109 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.

110 RG, para. 2.29, p. 24.

demonstrates the independence of [the 1936 Point] from the 10° Line."[111] Guyana claims that the 1936 Point was identified before the colonial powers adopted the 10° Line, and that, therefore, the former is binding upon the Parties, but the latter is not. Guyana's argument has no basis in fact.

2.49. In support of its argument that the Boundary Commission report "makes clear that the location of the land boundary terminus and the angle of the boundary line in the sea were determined separately, with priority given to the terminus,"[112] Guyana again alludes to the title of that report—"Report on the Inauguration of the Northern Terminal Point Mark of the Suriname/British Guiana Boundary." Guyana also claims that "it was only *after* the land boundary terminus had been definitively set at Point 61 that the Dutch Commissioner raised the subject of the angle of the boundary line in the sea."[113] Guyana ignores the content of the Boundary Commissioners' report. As that report makes clear, the Boundary Commissioners placed *two* monuments at inland points in connection with their work: one monument located at the 1936 Point, and another monument, located about 220 meters further inland, which, when connected with the marker at the 1936 Point, formed a straight line on a bearing of 10°. As was set forth in the 1939 draft treaty, the actual terminus of the land boundary indicated by the Commissioners' work was the point where that line "intersects the shore-line."[114] Thus, contrary to Guyana's suggestion, the 1936 Point is not the land boundary terminus, and it cannot be used to identify the land boundary terminus unless and until it is combined with another point to identify the azimuth along which the boundary runs. In that sense, the 1936 Point and the 10° Line are, undoubtedly, inextricably linked.

2.50. In support of its argument that the Parties agreed on the 1936 Point but regarded the 10° Line as mutable, Guyana again misconstrues the historical record. First, it refers to a letter of the British Boundary Commissioner dated 9 July 1936, in which, Guyana asserts, the British Commissioner agreed to change the azimuth for the boundary from 28° to 10° "on the understanding that it would be 'a comparatively simple matter to rebuild the direction pillar' should circumstances warrant."[115] However, the letter of the British Commissioner actually states as follows:

> we have placed the direction pillar so that it indicates the boundary on a bearing of 10° E, i.e. parallel to the line of the channel.
>
> 11. I trust that this amendment will meet with your approval. If there was any particular reason for the bearing of 28° E it is a comparatively simple matter to rebuild the direction pillar to indicate this bearing instead of the 10° E bearing. It would however be necessary to refer the matter to the Netherlands Government first, presumably, as the Netherlands Commission was very insistent that it was of vital importance from a

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111 *Id.* at para. 2.30, p. 24.

112 *Id.* at para. 2.31, pp. 24-25.

113 *Ibid*.

114 Diplomatic Note from the Secretary of State to E. Michiels van Verduynen, Netherlands Minister to the United Kingdom, enclosing 1939 British Draft Treaty (25 November 1939), at MG, Vol. III, Annex 89.

115 RG, para. 2.33, pp. 25-26 (emphasis added by the Reply).

> navigation point of view to have all the buoys under one control.[116]

Thus, the letter envisaged a change from a bearing of 10° to a bearing of 28° only if the British Government rejected the proposal of the Boundary Commission. Moreover, the letter indicates that the United Kingdom could not make this change unilaterally, but would require agreement by the Netherlands. The British and Netherlands Governments both accepted the proposal of the Boundary Commission to employ both the 1936 Point and the 10° Line. There is nothing in the work of the Boundary Commission or the exchanges between the Netherlands and the United Kingdom to suggest that the United Kingdom or Guyana could ever unilaterally discard the 10° Line and replace it with another line starting from the 1936 Point to delimit the territorial waters between Suriname and Guyana.

2.51. Similarly, Guyana misstates the significance of the letter of 20 June 1937 from the Dutch Boundary Commissioner to the Minister of State for the Colonies, which noted "only the concrete block indicating the boundary terminus has been erected for the present" and that "[t]he other markers and the beacon visible from the sea will be erected as soon as both Governments have given their approval to our proposals" for substituting the 10° Line for a 28° azimuth in the territorial sea.[117] Like his British counterpart, the Dutch Commissioner was merely noting that his work was not done until both Governments had agreed to the substitution of a 10° azimuth for the 28° azimuth that had originally been selected. Nothing in this exchange indicates any intention on the part of the Netherlands that, once selected, the 10° azimuth could be changed at will.

2.52. As a variant of its argument, Guyana contends that changed circumstances justify disregarding the 10° Line and selecting another azimuth to delimit the territorial sea. There is no basis in international law for such an approach. It is a fundamental principle of international law that changed circumstances may not be invoked with respect to a boundary,[118] a rule that the International Court of Justice has indicated applies to land frontiers and maritime boundaries alike.[119]

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[116] Letter of Major I. Phipps, Chief British Commissioner, British Guiana Brazil Boundary Commission, to the Under Secretary of State for the Colonies, Colonial Office (9 July 1936), at MG, Vol. II, Annex 12, para. 10-11.

[117] RG, para. 2.32, p. 25; Letter of C.C. Kayser, Head of the Boundary Settlement Commission, to the Minister of State, Minister for the Colonies (20 June 1937), at SCM, Vol. II, Annex 14. The Dutch Commissioner's reference to "the concrete block indicating the boundary terminus" should not be read to embody any agreement that 1936 Point itself constitutes the land boundary terminus. The Dutch Commissioner's language is perfectly consistent with Suriname's long-maintained position, namely that the two markers erected along the 10° Line, of which the marker located at the 1936 Point is the more northerly, form a line that establishes the land boundary terminus where it crosses the low-water line. It is only in that sense that the concrete block at the 1936 Point "indicat[es] the boundary terminus." It is also consistent with the language employed in both the 1935 and 1939 draft treaties, each of which employs two reference markers to indicate a point where the prolongation of the line joining the markers "intersects the shore line." *See supra* para. 2.18, p. 15.

[118] Vienna Convention on the Law of Treaties, *adopted* 22 May 1969, 1155 U.N.T.S. 331, art. 62(2)(a).

[119] In the *Aegean Sea Continental Shelf* case, the International Court of Justice stated: "Whether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same, and inevitably involves the same element of stability and permanence, and is subject to the rule excluding boundary agreements from fundamental change of circumstances." Aegean Sea Continental Shelf Case (Greece v. Turkey), Jurisdiction, Judgment, I.C.J. Reports 1978, pp. 35-36, para. 85. Guyana argues, weakly,

2.53. According to Guyana, by the early 1960s it "had become clear that the 'western navigational channel' in the Corentyne River was not being utilized."[120] Guyana is in error.[121]

2.54. As discussed in Suriname's Counter-Memorial, control of the approaches to the Corantijn is relevant not only in relation to the main navigational channel, but to all of the mouth of the Corantijn.[122] As the Counter-Memorial states, "the responsibility for navigation in the approaches to the Corantijn River may not only require measures in the navigational channel itself but also in the areas directly bordering on the approaches."[123] The Counter-Memorial also pointed out that control over the approaches to the Corantijn River is relevant not only with respect to large commercial vessels, but also with respect to small vessels and vessels with shallow draught, that can use the western channel.[124] As Mr. Eddie Fitz Jim, who served as harbor master at the Suriname Harbor and Pilotage Service from 1982 to 2003, observes:

> In all my years at the Harbor and Pilotage Service, sea-going vessels were mainly using the eastern channel of the Corantijn but other vessels, including vessels from Suriname and Guyana, were often also using the western channel. These other vessels included fishing trawlers and small freighters with a draft of 3 to 4 meters of water. Sea-going vessels were using the eastern channel not so much because of its better natural state (its breadth and depth), but because of its ease of navigation due to its proximity to the Nickerie River. The Nickerie River is beaconed and in its mouth there is a reconnaissance drum, which makes navigation easier.[125]

In short, even if the Tribunal were to conclude that the 1936 Point and the 10° Line are not inextricably linked, the considerations concerning care of shipping that led the Boundary Commissioners to recommend a 10° Line in connection with the 1936 Point remain relevant. In any case, Guyana has not shown any basis for concluding that the 1936 Point could be binding upon the Parties but that the 10° Line need not be regarded as binding.

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that these considerations of stability and permanence would not apply to the purported agreement concerning the 1936 Point and the 10º Line, *see* RG, para. 5.64, pp. 102-03, but Guyana is obviously mistaken in that regard.

120 RG, para. 2.34, p. 26.

121 Guyana is also mistaken in its repeated assertion that the Mixed Boundary Commission identified only the "possibility" of a navigation channel on the western side of the Corantijn River. *See id*. at para. 3.8, pp. 35-36; paras. 3.51-3.52, pp. 53-54. The joint report of the Mixed Boundary Commission makes clear that the 10° Line was selected in order to "leave the navigation channel in the same territory throughout its length." 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, at para. 3. The British Commissioner specifically noted that "the bearing of 28° from the site selected for the Northern Terminal Pillar would intersect the line of the Navigation Channel which is on a bearing of about 10° E." Letter of Major I. Phipps, Chief British Commissioner, British Guiana Brazil Boundary Commission, to the Under Secretary of State for the Colonies, Colonial Office (9 July 1936), at MG, Vol. II, Annex 12, at para. 10.

122 SCM, para. 3.33, p. 27.

123 *Ibid*.

124 *Ibid*.

125 Statement E. Fitz Jim, at SR, Vol. II, Annex SR18, at para. 4.

F. Articles 9 and 10 of the 1982 Convention Cannot Be Applied by the Tribunal

2.55. As an alternative argument for identifying the land boundary terminus and so overcoming Suriname's objection to the Tribunal's jurisdiction, Guyana argues that the Tribunal has power under Article 9 of the Convention to draw a closing line in the Corantijn that would establish the northern terminus of the land boundary. Guyana urges that the western anchor of such a closing line would be located at the 1936 Point.[126] As Suriname demonstrates, however, the Tribunal lacks such power both under Article 9, which Suriname believes is not relevant to the Corantijn, and under Article 10, which Suriname believes is the provision that would govern a closing line at the mouth of the Corantijn.[127]

2.56. Nothing in the 1982 Convention indicates that an Annex VII Tribunal has power to determine where the mouth of a river is located or to establish a closing line across the mouth of a river. Article 9 specifies that, in the case of a river flowing "directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-water line of its banks." Article 9 does not provide any guidance as to how the location of "the mouth of the river" is to be determined. The same applies in the case of Article 10. Because these determinations are left exclusively to the coastal state and entail a range of discretion, Article 16 of the 1982 Convention imposes special requirements on the coastal state regarding cartographic precision and public notice. Those requirements apply expressly to closing lines and other straight baselines drawn under Articles 7, 9 and 10. Article 16 obligates the coastal state to show such baselines "on charts of a scale or scales adequate for ascertaining their position," to "give due publicity to such charts or lists" and to "deposit a copy of each such chart or list with the Secretary-General of the United Nations."[128] The Convention clearly contemplates that the drawing of baselines is the responsibility of the coastal state. Determination of sovereignty over coastal points between which baselines might be drawn requires application of rules of law other than those contained in the 1982 Convention.

2.57. In drawing a closing line, the coastal state may wish to take into account a variety of legal, political, security and economic factors, as drawing a closing line will define the sovereignty of that state by distinguishing between internal waters and the territorial sea. Such determinations necessarily entail a range of discretion. Although an Annex VII Tribunal may have power to review closing lines (and other straight baselines drawn by a coastal state) for consistency with the 1982 Convention, such a Tribunal lacks power to construct a closing line where the coastal state has not attempted to do so.

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[126] RG, para. 2.37, p. 27. The Counter-Memorial observes that Article 9 of the 1982 Convention is not applicable to the Corantijn and also points to various questions raised by Guyana's suggestion to apply Article 9 to a situation like that involving the Corantijn River. SCM, para 2.9, p. 8.

[127] The Reply argues that Suriname "calls upon the Tribunal to interpret or apply Article 10" of the 1982 Convention. RG, para. 2.38, p. 28. Of course, Suriname has not done so. In fact, the Counter-Memorial observed:

> Thus, just as is the case with respect to Article 9 of the Convention, before the law of the sea question of drawing a closing line under Article 10 can be addressed, the determination of the extent of the land boundary requires the interpretation and application of other legal rules, that are *outside of the Law of the Sea Convention*.

SCM, para. 2.11, p. 9 (emphasis added).

[128] Article 16 of the 1982 Law of the Sea Convention.

2.58. The Reply contains several other, rather confused contentions concerning Articles 9 and 10 of the Convention. Guyana seems to argue that Article 10 is inapplicable to the Corantijn; Guyana does not seem to dispute that the Corantijn forms an estuary,[129] but evidently argues, though with no support, that the drawing of a closing line in the mouth of the Corantijn could only be governed by Article 9 because the mouth of the Corantijn does not constitute a bay within the meaning of Article 10. Guyana may also be arguing that an estuary cannot be included in the internal waters of the coastal state. In either case, Suriname respectfully disagrees and believes that the mouth of the Corantijn does form a juridical bay, and that Suriname could draw a closing line of up to 24 nautical miles across the mouth of the Corantijn if it wished. But whether a closing line in the Corantijn would be drawn pursuant to Article 9 or Article 10, the result would be the same: the closing line would be drawn by Suriname across the mouth of the estuary,[130] and all waters therein would form part of Suriname's territory. Neither Article empowers this Tribunal to draw such a closing line, because determining a closing line would require the Tribunal to determine a question of sovereignty over land territory and because the 1982 Convention reserves to the coastal state the right to establish closing lines.

2.59. Guyana also claims that Suriname could not draw a closing line across the mouth of the Corantijn under Article 10 of the Convention. According to Guyana, Article 10 may be applied only when a single state has sovereignty over both coasts of an estuary, and Guyana contends that Suriname does not have sovereignty over the western coast of the Corantijn.[131] Specifically, Guyana argues that "the low-water line of a sea or river does not constitute a 'coast' under any definition of the term. The coast begins where the low-water line ends, and it is not in dispute that the west 'coast' of the river belongs to Guyana."[132] As Guyana thus

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[129] RG, para. 2.41, p. 29. An estuary is "[t]he tidal mouth of a river, where the seawater is measurably diluted by the fresh water from the river." United Nations Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *Handbook on the Delimitation of Maritime Boundaries* 146-61 (2000), at SR, Vol. II, Annex SR25. There can be no doubt that the mouth of the Corantijn meets this description.

Guyana's apparent concession that the Corantijn forms an estuary is evidenced in historical records. For example, in a letter of 9 July 1927, the Hydrographer of the Netherlands Naval Department asked the United Kingdom Hydrographer if he had any new data about the river and its estuary. SR, Vol. II, Annex SR1. In reply, the Assistant Hydrographer informed the Netherlands Hydrographer that no additional data was available that would be of any assistance in compiling a new chart of the Corantijn River, thereby implicitly acknowledging the existence of an estuary. Letter of Captain Nares, Royal Navy, and Assistant Hydrographer to Hydrographer, Navy Department (18 July 1927), at SR, Vol. II, Annex SR2.

[130] *See*, for instance, the discussion of Article 9 of the Convention included in the publication *The Law of the Sea, Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (United Nations Office for Ocean Affairs and the Law of the Sea 1989), at SR, Vol. II, Annex SR24, which observes on page 27:

> [I]t can also be noted that estuaries are part of rivers and that in this present era of rising sea levels there are very few rivers which do not have estuaries.
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> 63. Secondly, article 9 gives no guidance on the selection of the basepoints of the closing line except the requirement that they must be on the low-water line of the river's banks. Although there is a reference to "the mouth of the river" this is a zone which can be difficult to define in some cases, i.e. especially along a low coast with a large tidal range.

Id. at p. 27.

[131] RG, para. 2.39, p. 28.

[132] *Ibid.* (footnotes omitted).

implicitly concedes, the low-water line along the western bank of the Corantijn is, indeed, part of the territory of Suriname.

2.60. This is not the only instance in which Guyana has recognized that the low-water line along the western bank of the Corantijn is part of the territory of Suriname. The report reproduced in Annex R3 to the Reply defines the low-water lines along the coasts of Suriname and Guyana. The report notes in respect of Suriname that the first low-tide point for Suriname, which it calls "Point SL001," "is the low-tide point closest to Guyana Point 61 (5° 59' 53.8" N, 57° 08' 51.5" W)."[133] The report defines Point SL001 as longitude -057 08'50.7" and latitude 005 59'53.3".[134] The report gives exactly the same coordinates for the first low-tide point of Guyana, GL001.[135] Points SL001 and GL001 are shown on Figure 2, which annotates Guyana's Plate R19 to show the location of certain basepoints identified in Annex R3. The report also recognizes that Point SL001 is part of the coast of Suriname. For instance, it is observed: "The total length of the low-tide coast, determined by the summing the distances between SL001 and SL 327.1 is 333 km."[136] As can be ascertained from Figure 2, basepoint SL001 is actually located landward of the low-water line. As is also shown in that Figure, the report presented by Guyana places six further basepoints of Suriname along the western bank of the Corantijn.

2.61. Suriname believes that Guyana's concession that Suriname has sovereignty over the low-water line disposes of Guyana's argument that Suriname could not draw a closing line under Article 10. Sovereignty over the low-water line on both banks of a river would appear to be sufficient to permit a coastal state to draw a closing line under either Article 9 or Article 10. An Article 9 closing line is to be drawn "between points on the low-water line"—points which Guyana concedes belong to Suriname. Likewise, under Article 10, the closing line is to be drawn "between the low-water marks"—again, territory belonging solely to Suriname within the mouth of the Corantijn. Thus, Guyana's argument that Suriname could not draw a closing line in the mouth of the Corantijn because it lacks sovereignty over the "coast" of the west bank would lack merit even if Articles 9 and 10 could be applied to resolve questions of territorial sovereignty between the Parties. For present purposes, however, what matters is that Guyana's argument that Suriname lacks a "coast" on the western bank of the Corantijn presents a further dispute between the Parties concerning the extent of their land territory that the Tribunal would have to resolve in order to effect a maritime delimitation. This Tribunal lacks power to resolve such a territorial dispute.

G. Guyana's Alternate Proposal That the Tribunal Effect a Partial Maritime Delimitation Is Without Foundation

2.62. As its final argument on jurisdiction, Guyana contends that "Suriname itself admits that beyond 15nm the location of the starting point does not affect maritime delimitation."[137] According to Guyana, therefore, "the Tribunal can still interpret and apply Articles 74 and 83 of the Convention, and at the very least, effect a partial delimitation of the maritime boundary

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[133] The Johns Hopkins University Applied Physics Laboratory, Calculations of Lines, Points, and Areas Related to the Coasts and Off-shore Areas of Guyana and Suriname (March 2006), at RG, Vol. II, Annex R3, at p. 3.

[134] *Id.* at p. 17, Table 2.

[135] *Id.* at p. 6, Table 1.

[136] *Id.* at p. 4.

[137] RG, para. 2.42, p. 29.

in the EEZ and continental shelf without deciding on any dispute over the land boundary terminus."[138] Guyana's analysis is flawed.

2.63. In the first place, Suriname did not "admit" that beyond 15nm offshore the location of the starting point for delimitation is irrelevant. Rather, Suriname presented an analysis, based on its hypothetical "Point X," to show that the course of an equidistance line varies substantially depending upon the starting point that is chosen. As Suriname demonstrated, an equidistance line commencing at Suriname's hypothetical Point X would not meet an equidistance line based on the land boundary terminus identified by reference to the 1936 Point and the 10° Line until a point 15 nautical miles offshore. Suriname thus showed that the location of the land boundary terminus matters in maritime delimitation, not, as Guyana would now have it, that that location does not matter at all.

2.64. Guyana's discussion of Suriname's hypothetical Point X fails to meet the substance of Suriname's argument. Initially, the Reply claims that "Suriname apparently had second thoughts" about Point X "because the idea was discarded in the Counter-Memorial."[139] But that is not the case. Point X was not discussed in the Counter-Memorial because the Counter-Memorial dealt with Suriname's arguments on the merits. Point X was raised in connection with Suriname's jurisdictional arguments and, as such, was fully discussed in Suriname's Memorandum on Preliminary Objections. Suriname did not "abandon" anything in this regard.

2.65. Guyana also claims that "one look at Suriname's depiction of 'Point X' . . . is sufficient to dispense with it" because Point X "is very clearly a long way from the actual mouth of the river."[140] That assertion may be based on a view that the estuary of the Corantijn River does not form part of the river,[141] but, if so, Guyana is simply wrong. The estuary of a river forms part of the river, and Guyana has not shown why that would not be the case for the estuary of the Corantijn River.[142] Suriname never contended that Point X actually was the land boundary terminus between Suriname and Guyana. On the contrary, as Suriname's Memorandum on Preliminary Objections made clear, Point X was located on the coast using a simple geometric method for purposes of showing that the location of the land boundary terminus has a significant effect upon any maritime delimitation. To that point, Guyana does not respond.[143] Moreover, Point X *does* represent a possible location of the land boundary terminus—the point where the river bank changes into the coastline. Indeed, the United Kingdom has recognized that that point could be substantially to the north of Point X. The 1959 official map of British Guiana shows the land boundary terminus as being located substantially north and west of Point X. Point X would, therefore, be a perfectly reasonable location for the land boundary terminus if the Parties had agreed to it.

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138 *Ibid.*

139 *Ibid*.

140 *Ibid*.

141 *See supra* para. 2.58, p. 30.

142 The extent of the western headland of the estuary of the Corantijn River is indicated in the figure contained in Annex 35 of Suriname's Preliminary Objections by an arcing gray band. Point X is clearly located on the headland of the estuary of the Corantijn River.

143 *See* RG, para. 2.28, p. 24.

2.66. Second, Guyana's conclusion that "beyond 15 nm the location of the starting point does not affect maritime delimitation"[144] can be reached only by supposing both that Point X is the most northern point that can represent the land boundary terminus, and that Guyana and Suriname agree on application of the equidistance method to delimit the maritime boundary. Neither of those suppositions is correct. As noted in Suriname's Memorandum on Preliminary Objections, Point X was offered by way of example,[145] and there are other points that could reasonably represent the point at which the "river bank changes into the coastline."

2.67. As discussed in Annex 35 of Suriname's Preliminary Objections, the difficulty in establishing the transition from the riverbank to the ocean coast on the western side of the Corantijn arises from the fact that it forms an arcing headland. The figure contained in Annex 35 identifies the extent of the headland (the area marked by the arcing gray band). As the figure indicates, the western headland of the Corantijn lies between a point just north of 6° N and a point just south of 6° 20' N. The Memorandum on Preliminary Objections illustrated one possible method that might be used to determine the transition point between the river bank and the ocean coast on the headland.[146] To establish the actual land boundary terminus, it will be necessary to interpret and apply the 1799 Agreement.[147]

2.68. The Reply offers little in response to Suriname's argument that the absence of an agreed land boundary terminus prevents the Tribunal from effecting a maritime delimitation. The Reply claims only that Suriname is not able to point to any authority in support of the proposition that "[a]ny determination of a maritime boundary between States with adjacent coasts must start from an agreed starting point" and that "[t]he application of the law of maritime delimitation in every case is dependent upon the location of the land boundary terminus."[148] The absence of precedent hardly proves that Suriname's position lacks merit. The absence of precedent flows from the fact that Guyana is the first state ever to bring a maritime delimitation dispute between adjacent states to a tribunal that has no jurisdiction over territorial issues on land in the absence of agreement on the terminus of the land boundary.

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144 *Id.* at para. 2.42, p. 29.

145 *See* SPO, para. 2.17, p. 11.

146 Suriname's Counter-Memorial offered a position on the western anchoring point of a closing line established in accordance with Article 10 of the 1982 Law of the Sea Convention. *See* SCM, para. 2.11, p. 9; A Hypothetical Closing Line Drawn in Conformity with Article 10 of the Law of the Sea Convention, at SCM, Vol. III, Annex 67. That point lies well to the north of Point X. It is situated on the headland that is depicted in Annex 35 to the Memorandum on Preliminary Objections.

147 The difficulty involved in identifying a natural entrance point on an arcing coast is noted in the publication *The Law of the Sea, Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* 29 (United Nations Office for Ocean Affairs and the Law of the Sea 1989), at SR, Vol. II, Annex SR24, in a discussion of Article 10 of the Convention:

> Some bays will possess a number of points which might be used, some will only have one natural entrance point, and others may possess smoothly curved entrances on which no single point is distinguished. A number of tests have been proposed for objectively identifying natural entrance points. Some may find those tests helpful but others may prefer to use other criteria. Article 10 is silent on the point.

Figure 16 C contained on page 31 of the publication, reproduced at SR, Vol. II, Annex SR24, shows an arcing headland that is very similar to the western headland of the Corantijn. The figure confirms the identification of the western headland of the Corantijn by Suriname as depicted in Annex 35 of the Memorandum on Preliminary Objections.

148 RG, para. 2.45, p. 30 (quoting SPO, para. 2.21, p. 12).

2.69. Citing the *Gulf of Maine* case, the Reply argues that "[t]o the contrary, the practice of the International Court of Justice indicates that an international tribunal may effect a partial maritime delimitation from a point at sea."[149] But the *Gulf of Maine* case in fact proves the opposite. In that case, the United States and Canada had agreed on a point at sea from which to start the maritime delimitation.[150] There is no such agreement between Suriname and Guyana. If anything, the *Gulf of Maine* case confirms that Guyana's proposed approach is unprecedented.

H. An Annex VII Tribunal Lacks Power To Determine Territorial Questions

2.70. Suriname maintains that it is self-evident that a Tribunal constituted under Annex VII of the 1982 Convention lacks power to determine questions concerning territorial boundaries, such as the question of the location of the terminus of the land boundary between Suriname and Guyana and the question of what course that boundary might take between an inland location such as the 1936 Point and the low-water line. Suriname believes that the jurisdictional limitation of an Annex VII Tribunal to maritime matters does not require discussion. Nonetheless, because Guyana has invited the Tribunal to make a determination concerning sovereignty over land territory, and because Guyana has largely failed to respond to Chapter 4 of Suriname's Preliminary Objections, which set forth its view that the jurisdiction of an Annex VII Tribunal does not extend to such questions of territorial sovereignty,[151] Suriname addresses the subject in this Part.

2.71. It is one of the best established principles of international law that states are not subject to a system of compulsory jurisdiction and that the jurisdiction of any tribunal is limited to the subject matter comprised within the consent given by the states appearing before it. The jurisdiction of this Tribunal is limited to disputes concerning the interpretation or application of the 1982 Convention. That Convention is concerned exclusively with the law of the sea and its regulation of maritime questions. The Convention does not regulate questions of sovereignty over land territory or the location of boundaries in areas that do not comprise part of the sea, notably land territory including lakes and rivers. There is nothing in the text or the *travaux préparatoires* of the Convention to suggest that states intended the Convention to regulate such sensitive matters, let alone subject them to compulsory jurisdiction.

2.72. The provisions of the Convention regarding coastal state jurisdiction over the sea assume the existence of a state with sovereignty over land territory (including rivers) that generates such jurisdiction where it reaches the sea. If the existence or boundary of that sovereignty is contested by another state, the question of sovereignty over that territory is beyond the reach of the Convention and its compulsory dispute settlement provisions.[152] That question must be addressed by other means consistent with the Charter of the United Nations.

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[149] RG, para. 2.45, p. 30.

[150] *See* Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Merits, Judgment, I.C.J. Reports 1984, pp. 252-255 (quoting Special Agreement between the Government of Canada and the Government of the United States of America of 29 March 1979, Article II(1)).

[151] SPO, paras. 4.1-4.7, pp. 19-20.

[152] This proposition has been regarded as self-evident with respect to the jurisdiction of the International Tribunal of the Law of the Sea (ITLOS) as well as an Annex VII Arbitral Tribunal with respect to disputes

2.73. Guyana proffers several ambitious schemes for circumventing the jurisdictional limitations of the Convention. As Suriname has shown, Guyana urges that the Tribunal should disregard the landward location of the 1936 Point. It has also urged the Tribunal both to disregard and to misinterpret the long and inconclusive history of discussions concerning boundary issues between the Parties and their predecessors. Guyana also urges the Tribunal to turn Article 9 of the Convention into a means of resolving territorial disputes, and it invites the Tribunal to begin a delimitation at some unidentified point offshore.[153] In proffering such schemes, Guyana is proposing that this Tribunal depart from the prudence and caution evident in the approach taken by every other tribunal that has exercised compulsory jurisdiction over the merits of a dispute under the 1982 Convention.

2.74. In a series of decisions rendered pursuant to its jurisdiction under Article 292 with respect to cases alleging violation of the Convention's provisions regarding prompt release on bond of detained vessels and crew, the International Tribunal for the Law of the Sea has made it clear that its jurisdiction in such cases does not extend to the merits of the arrest;[154] it also dismissed one case for lack of jurisdiction after raising that question *propio motu*.[155] Annex VII Arbitral Tribunals have shown similar prudence and caution, finding in the *Southern Bluefin Tuna* case that another agreement between the parties impliedly precluded jurisdiction under the Convention,[156] suspending proceedings in the *MOX Plant* case pending a determination by the European Court of Justice as to whether that Court had jurisdiction over the dispute,[157] carefully indicating that jurisdiction to render the award in the *Land*

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concerning the interpretation or application of the 1982 Convention. Judge Gilbert Guillaume, former President of the International Court of Justice, noting that a number of disputes between states relate both to sovereignty over land territory as well as maritime delimitation, observed that the ITLOS "a une compétence limitée aux océans" and that these disputes "ne sauraient relever de la compétence du Tribunal." Gilbert Guillaume, *La Cour Internationale de Justice À L'Aube du XXI*^{ème} *Siècle: Le Regard d'un Juge* 300 (2003), at SR, Vol. II, Annex SR39. Professor Robin Churchill observed, "Under Part XV any body dealing with a dispute is limited to disputes concerning the interpretation or application of the LOS Convention. Thus, if the maritime boundary at issue was to be determined with reference to territory that was in dispute …, the body concerned would probably not be able to determine the boundary because it would lack jurisdiction to settle the territorial issue." Robin R. Churchill, *The Role of the International Court of Justice in Maritime Boundary Delimitation*, *in* Oceans Management in the 21st Century: Institutional Frameworks and Responses 125, 136 (Alex G. Oude Elferink & Donald R. Rothwell eds., 2004), at SR, Vol. II, Annex SR40. Professor Bernard Oxman's comments to the same effect in 1981 were previously noted in paragraph 4.6, page 20 of Suriname's Preliminary Objections.

153 Guyana's suggestion that the Tribunal begin delimitation at some offshore point creates the additional problem that such an approach would leave the Parties without any resolution regarding the location of the boundary through the entire territorial sea and part of the maritime zones, as discussed in the Counter-Memorial. *See* SCM, para. 2.13, p. 9.

154 *See* The "Camouco" Case (Panama v. France), ITLOS Judgment, 39 I.L.M. 666, 678-79 (2000), paras. 59-60.

155 The "Grand Prince" Case (Belize v. France), ITLOS Judgment (20 April 2001), paras. 76-80, available at http://www.itlos.org/case_documents/2001/document_en_88.pdf.

156 Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), UNCLOS Award, 39 I.L.M. 1359, 1373 (2000), para. 66.

157 The MOX Plant Case (Ireland v. United Kingdom), Order No. 3, 42 I.L.M. 1187 (2003); The MOX Plant Case (Ireland v. United Kingdom), Order No. 4 (14 November 2003), available at http://www.pca-cpa.org/ENGLISH/RPC/MOX/MOX%20Order%20No4.pdf. An affirmative determination has now been made by the European Court of Justice. *See* Case C-459/03, Commission v. Ireland, Judgment of the European Court of Justice (30 May 2006), available at http://www.curia.europa.eu/en/content/juris/index.htm. The Court held that "by instituting dispute-settlement proceedings against the United Kingdom of Great Britain and Northern Ireland under the United Nations Convention on the Law of the Sea concerning the MOX plant located at Sellafield (United Kingdom), Ireland

Reclamation case was based on the joint request of the parties,[158] and deciding that there was no jurisdiction to prescribe a fisheries regime in disputed waters as urged by the Applicant in the maritime delimitation case brought by Barbados against Trinidad and Tobago.[159]

2.75. This restraint is equally evident in the jurisprudence of the International Court of Justice in maritime boundary litigation when it encounters jurisdictional limitations that arguably might, but ought not to be, circumvented. In the *Libya/Malta* case, notwithstanding the request of the parties in their special agreement to address the location of the entire line delimiting their respective rights to the continental shelf, the Court declined to do so in areas also claimed by Italy, even though Italy, whose petition to intervene had been denied, would not have been bound.[160] Guyana evidently sought to encourage such jurisdictional restraint late last year when it communicated its exclusive economic zone claims to the Annex VII Arbitral Tribunal established in the *Barbados v. Trinidad and Tobago* case.[161]

2.76. Suriname believes that the policy implications of a departure from jurisdictional restraint such as Guyana suggests in this case should be carefully assessed. The issue whether there would be compulsory and binding dispute settlement for maritime boundary disputes under the 1982 Convention was one of the most difficult issues at the Third United Nations Conference on the Law of the Sea. It was sensitive for more than one reason. One of the most important of those reasons was the concern of many states that the compulsory and binding jurisdiction relating to many law of the sea questions that was established by the new Convention would also tread upon territorial sovereignty questions. Those states were not prepared to see such questions absorbed into the dispute settlement framework of Part XV of the Convention.

2.77. This concern was removed as a stumbling block to consensus only when it was clear that Part XV, including even the non-binding conciliation process established under Article 298, would not touch upon such questions of territorial sovereignty. There can be little doubt that if this concern had not been allayed, the Convention would not have the widespread participation it enjoys.

2.78. One effect of the introduction of extended coastal state jurisdiction into international law is often to link sovereignty disputes over islands and other coastal territory with disputes concerning rights over the natural resources of marine areas extending well beyond the limits of the territorial sea. Today, there are a number of states that have territorial sovereignty

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has failed to fulfil its obligations under Articles 10 EC and 292 EC and under Articles 192 EA and 193 EA." *Id.* at para. 1.

158 Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v. Singapore), Award (1 September 2005), p. 7, para. 4, available at http://www.pca-cpa.org/ENGLISH/RPC/MASI%20Award.pdf.

159 In the Matter of an Arbitration Between Barbados and the Republic of Trinidad and Tobago (Barbados-Trinidad and Tobago), Award (11 April 2006), para. 217, available at http://www.pca-cpa.org/ENGLISH/RPC/BATRI/Award%20final%20110406.pdf

160 Case Concerning the Continental Shelf, Judgment (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, pp. 25-26, para. 21.

161 As is recorded in paragraph 40 of the Award, "On 28 October 2005 the President of the Tribunal was sent a letter by the Foreign Minister of Guyana, which provided information to the Tribunal regarding the outer limit of Guyana's Exclusive Economic Zone ("EEZ"). On 9 November 2005 the President responded to the Foreign Minister, acknowledging his letter and noting that it had been brought to the attention of the members of the Tribunal." *Barbados-Trinidad and Tobago*, para. 40.

disputes associated with their maritime boundary disputes. For example, two neighboring countries—China and Japan—are in the same legal circumstances as Suriname and Guyana with respect to jurisdiction of an Annex VII Tribunal under the 1982 Convention, as neither has made a declaration under Article 287 or Article 298. Echoing the position urged by Guyana in this arbitration, one of those countries could submit its maritime boundary dispute to an Annex VII Tribunal and assert that there really is no sovereignty dispute at all over the Senkaku/Daiyo Islands and that the tribunal could decide the maritime boundary on the grounds that there is no merit to the respondent's claim. The Convention does not authorize such mischief.

2.79. The agreement on a significant measure of compulsory jurisdiction in a global treaty of the geographic and substantive scope of the 1982 Convention is a milestone in the development of international law. A decision by a tribunal exercising such jurisdiction to deal with matters as sensitive as sovereignty over land territory without an express mandate to do so could provoke reactions that would have deleterious effects on that achievement, as well as discourage its emulation in other contexts. In this connection, it may be noted that states that are already party to the 1982 Convention retain the right to file declarations under Article 298 excluding compulsory jurisdiction over maritime boundary disputes and certain other matters,[162] to amend the Convention under Articles 312-316, and to withdraw from it under Article 317. It also may be noted that universal ratification of the Convention, articulated as an objective by the General Assembly of the United Nations in 1994 and on numerous occasions since then,[163] has yet to be realized. For this Tribunal to stretch its jurisdiction to address the longstanding territorial dispute between Guyana and Suriname could jeopardize the achievement of that aim.

2.80. In summary, because the Parties have not agreed on their land boundary terminus and the Tribunal lacks power to decide such a territorial question, the Tribunal lacks jurisdiction to delimit the maritime boundary between Suriname and Guyana.

II. Suriname Maintains Its Objections That Guyana's Submissions 3 and 4 Are Inadmissible

A. Introduction

2.81. In its Preliminary Objections, Suriname set forth its view that Guyana's Submissions 3 and 4[164] are inadmissible in this proceeding because in each instance Guyana has not acted with clean hands. Guyana has not made any substantial response to Suriname's position concerning its Preliminary Objection, but argues that the doctrine of clean hands can only be

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[162] In the last five years, several states have made declarations under Article 298 subsequent to becoming parties to the Convention, including Australia, Equatorial Guinea, the Republic of Korea, Mexico, the Republic of Palau, Slovenia, Spain and the United Kingdom. *See* U.N. Division for Ocean Affairs and the Law of the Sea, Declarations and Statements to the 1982 Law of the Sea Convention, http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm (last visited 18 August 2006).

[163] G.A. Res. 49/28, para. 3, U.N. Doc. A/RES/49/28 (19 December 1994); G.A. Res. 60/30, para. 2, U.N. Doc A/RES/60/40 (29 November 2005).

[164] Submissions 2 and 3 of Guyana's Memorial became Submissions 3 and 4 in its Reply. *See* MG, p. 135; RG, para 101(4), p. 153.

considered in connection with the merits.[165] In its argument on the merits, Guyana also purports to adduce additional facts to demonstrate that Suriname acted in a fashion that engages its international responsibility.[166]

2.82. In this Section of Chapter 2, Suriname responds to Guyana's arguments concerning the admissibility of its Submissions 3 and 4. With respect to Submission 3, in which Guyana seeks reparations for Suriname's action in directing the CGX rig to cease activities in disputed waters, Suriname's showing is twofold. First, Suriname shows that Guyana cannot seek reparations for what it calls a violation of its sovereignty at the same time as it seeks delimitation of a maritime boundary to include the area where the alleged violation occurred, because the former claim assumes an existing boundary.[167] Second, Suriname demonstrates that Guyana's Submission 3 is inadmissible because Guyana lacks clean hands with respect to the CGX incident. Specifically, Suriname demonstrates that the clean hands doctrine is a well-recognized principle of international law that can be pleaded in inter-state disputes; that the doctrine can be invoked to challenge the admissibility of a claim; and that Guyana has unclean hands with respect to the CGX incident, having deliberately provoked it. Suriname addresses only the admissibility of Guyana's Submission 3 in this Section; it presents only those facts concerning the CGX incident that Guyana has admitted and that are, therefore, undisputed. Because Guyana has omitted some important facts in its account of the CGX incident while misconstruing others, Suriname has included a detailed statement of the facts, supported by sworn statements from those who acted for Suriname at that time, in its discussion of the merits of Submission 3 in Chapter 4.

2.83. This Section of Chapter 2 also responds to Guyana's arguments concerning the admissibility of its Submission 4, in which Guyana seeks unspecified reparations for Suriname's purported violation of Articles 74(3) and 83(3) through its alleged refusal to enter into provisional arrangements of a practical nature both before and after the CGX incident. Specifically, Suriname demonstrates that the doctrine of clean hands applies to render Guyana's Submission 4 inadmissible.[168]

B. Guyana Cannot Seek Damages for What It Calls a Violation of Its Sovereignty at the Same Time That It Seeks Delimitation of a Maritime Boundary To Include the Area Where the Alleged Violation Occurred

2.84. In its Submission 3, Guyana asks this Tribunal to find Suriname "internationally responsible" under the 1982 Convention, the United Nations Charter, and general international law, for Suriname's alleged "use of armed force" against "the territorial integrity of Guyana" "and/or" against persons "lawfully present in maritime areas within the sovereign territory of Guyana" or "over which Guyana exercises lawful jurisdiction." Guyana seeks more than $33

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[165] RG, paras. 2.47-2.49, pp. 31-32.

[166] *Id.* at paras. 8.10-8.18, pp. 141-44.

[167] In Chapter 4, Suriname also shows that Guyana's claim that Suriname improperly used force in connection with the CGX incident does not raise any issue concerning the interpretation or application of the Convention.

[168] In its argument on the merits in Chapter 5, Suriname also shows that events occurring prior to 8 August 1998 cannot form the basis for a claim under the 1982 Convention because there was no treaty relationship between the Parties until then.

million in reparations. Suriname respectfully submits that Guyana's Submission 3 is inadmissible because it is predicated on the assumption that the disputed area, which is the subject of Guyana's Submission 2, belongs to Guyana. Consequently, Guyana's Submission 3 should be dismissed from further consideration in these proceedings.

2.85. That Guyana's Submission 3 is inadmissible is indicated by the fact that it is submitted with Guyana's request that this Tribunal resolve a long-standing dispute over the very maritime area where the incident complained of occurred. If that area is in dispute—and the very existence of this proceeding shows that it is—then Suriname's activity within the disputed area cannot have impaired "the territorial integrity of Guyana," nor can it have affected persons "lawfully present" within "maritime areas within the sovereign territory of Guyana." Guyana's Submission 3 assumes that the area was not in dispute and that the area was subject to its exclusive jurisdiction. Because the CGX incident took place in an area of overlapping claims, Guyana's Submission 3 lacks any foundation and is inadmissible.

2.86. It is not necessary for this Tribunal to delve into the detailed factual history of the CGX incident in order to conclude that Guyana's Submission 3 is inadmissible. It is sufficient to know that Guyana seeks reparations based on an alleged violation of sovereignty when, in fact, the activities complained of occurred in a disputed maritime area. That fact alone supports a finding of inadmissibility.

2.87. The International Court of Justice has never awarded reparations in cases where the subject of the case was disputed territory or maritime areas. The reasons for the Court's not doing so are numerous.

2.88. First, for a tribunal to award reparations for violations of state "sovereignty" based upon a boundary that the tribunal has to draw in that very same decision would be to allow the ex post facto application of that tribunal's decision to actions that were taken in the belief that the boundary was unsettled. Indeed, because the very act of delimitation by the tribunal proves that there was a boundary dispute, awarding reparations in that same opinion would impair a state's ability to defend its interests in a disputed maritime area.

2.89. Second, if any state action is potentially grounds for liability based upon some future tribunal decision, states will be emboldened to engage in conduct of the type engaged in by Guyana here. As discussed at length in Suriname's prior pleadings and in Chapter 4 below, the law enforcement action of Suriname that Guyana challenges in its Submission 3 was an appropriate response to Guyana's aggressive assertion of its right to the disputed area. To penalize Suriname's response would be to legitimize and encourage such tactics.

2.90. Third, by entertaining this claim of Guyana, and thus creating the possibility that Guyana will be rewarded for its assertive behavior, the Tribunal would create an incentive for other states involved in boundary disputes to make similar claims of title to disputed areas. States involved in such disputes would be encouraged to act with less restraint, not more. States would be encouraged to do as Guyana has done; that is, to behave as though the boundary disputes have already been resolved in their favor. To the extent that a state did not do so, it would be constrained either to engage in a responsive enforcement action, as Suriname has done, thereby risking claims for reparation, or else stand by passively, thereby permitting the other state to create "facts on the ground" to its advantage. In either case,

geopolitical stability would be impaired.[169] Such a regime would reward belligerence instead of diplomacy. Such a regime is not contemplated under the 1982 Convention, the United Nations Charter, or any principle of international law.

C. Guyana's Submission 3 Is Inadmissible Because Guyana Lacks Clean Hands

1. *The Clean Hands Doctrine Is a Well-Recognized Principle of International Law*

2.91. The clean hands doctrine is derived from the equitable maxim, "He who comes into equity must come with clean hands."

2.92. As a fundamental principle of jurisprudence, its lineage is distinguished.[170] It is recognized as a general principle of law and, as a basic tenet of international law, is relevant to, and may be dispositive of, inter-state disputes. Its invocation is a recurrent element of the equitable resolution of conflicts, but the concept is so well-accepted that its name need not be spoken for its mandate to be felt.

2.93. The clean hands doctrine stands for the principle that the complainant seeking equitable relief must not himself have been guilty of any inequitable or wrongful conduct with respect to the transaction or subject matter sued on. It is closely related to the principles that "He who seeks equity must do equity;" "No right of action can arise out of an immoral cause;" and "No right of action can arise out of fraud or deceit." It is also linked to the fundamental concept of good faith.

2.94. As Suriname demonstrates below, the clean hands doctrine is recognized in international law and can be pleaded in inter-state disputes.

a. The Equitable Principles Underlying the Clean Hands Doctrine Have Been Affirmed by the International Court of Justice

2.95. The equitable principles underlying the clean hands doctrine have been explicitly affirmed by the International Court of Justice and are well-accepted as being applicable to inter-state disputes.

2.96. The case of *Diversion of Water from the River Meuse* offers a clear articulation of this premise. In that case, the Court found that it was unable to affirm the Netherlands' request that Belgium be ordered to discontinue using a lock which diverted water from the River

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[169] Even if, under these circumstances, states continued to submit maritime boundary disputes to tribunals, then claims for reparations would necessarily become a feature of such disputes. For the Applicant State, the potential monetary payoffs of such additional claims would far outweigh litigation costs. For the Respondent State and the tribunal, however, defending against and deciding these claims, respectively, would entail a huge expenditure of time and financial resources.

[170] Stephen M. Schwebel, former President of the International Court of Justice, responded to the question "Is the doctrine of clean hands one that is supported in international law?" with the answer, "In my view, it is." Stephen M. Schwebel, *Clean Hands in the Court*, *in* Symposium, The World Bank, International Financial Institutions, and the Development of International Law 74, 74 (E.B. Weiss, A.R. Sureda & L.B. de Chazournes eds., 1999), at SR, Vol. II, Annex SR35.

Meuse, because the Netherlands itself had constructed a similar lock in the past.[171] Although the words "clean hands" are not employed, Judge Hudson's separate opinion invokes the equitable principles that undergird the clean hands doctrine. He states:

> It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party.[172]

Guyana contends in its Submission 3 that it and Suriname had entered into reciprocal obligations under Articles 74(3) and 83(3) of the Convention. If that is the case,[173] then, under the rationale of *River Meuse*, it is not permissible for Guyana to make a claim that Suriname violated this obligation when Suriname's alleged violation is a response to Guyana's prior violation.[174]

2.97. Similarly, the *Legal Status of Eastern Greenland* decision affirms the equitable maxim that "[A]n unlawful act cannot serve as the basis of an action at law,"[175] which again invokes the principle of unclean hands, if not the term itself. As was contended in Suriname's Preliminary Objections and Counter-Memorial, and is reiterated again below,[176] the only illegal action taken in this case was Guyana's issuing of concessions and authorization of drilling in a disputed maritime area. Under *Legal Status of Eastern Greenland*, Guyana's illegal action (and Suriname's response to it) cannot serve as the basis for a claim for relief against Suriname.

2.98. In addition, dissenting judges in other cases have indicated that the clean hands doctrine could have been invoked to reach a disposition of the case on alternative grounds. Those opinions offer the strongest and most explicit affirmations of the clean hands doctrine and indicate why it is rational, equitable and consistent with international law to bar the admissibility of a claim when the Applicant has unclean hands.

2.99. Most recently, the clean hands doctrine was affirmed by Judge Van den Wyngaert in her dissenting opinion in *Democratic Republic of Congo v. Belgium*.[177] In that case, the Democratic Republic of Congo (DRC) filed suit against Belgium for issuing an international

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[171] Case Concerning Diversion of Water from the River Meuse (Netherlands v. Belgium), 1937, P.C.I.J., Series A/B, No. 70, p. 22 ("The Court cannot refrain from comparing the case of the Belgian lock with that of the Netherlands lock at Bosscheveld. . . . In these circumstances, the Court finds it difficult to admit that the Netherlands are now warranted in complaining of the construction and operation of a lock of which they themselves set an example in the past. … [The Court] is thus unable to accord the Netherlands Government the benefit of its submission.").

[172] *Id.* at p. 77 (Separate Opinion of Judge Hudson).

[173] As Suriname demonstrates in Chapter 4, Guyana's Submission 3 does not concern any dispute between the Parties concerning interpretation or application of any part of the Convention, *see infra* paras. 4.5-4.11.

[174] *See infra* Chapter 2, Section II, Part D.

[175] Legal Status of Eastern Greenland (Denmark v. Norway), 1933, P.C.I.J., Series A/B, No. 53, at p. 77 [in file] (Dissenting Opinion of Judge Anzilotti) (according with opinion of majority).

[176] *See infra* Chapter 2, Section II, Part C.3.

[177] Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3.

arrest warrant for the DRC's Minister of Foreign Affairs, alleging violations of international humanitarian law. The DRC argued that the warrant violated its sovereignty and requested that the Court require Belgium to recall and cancel the warrant. The Court held that the warrant must be canceled because it "failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction…enjoyed by him under international law."[178]

2.100. In her dissenting opinion, Judge Van den Wyngaert argued that the DRC did not have standing because it "did not come to the Court with clean hands."[179] She stated:

> In blaming Belgium for investigating and prosecuting allegations of international crimes that it was obliged to investigate and prosecute itself, the Congo acts in bad faith. It pretends to be offended and morally injured by Belgium by suggesting that Belgium's exercise of "excessive universal jurisdiction" [] was incompatible with its dignity. However, as Sir Hersch Lauterpacht observed in 1951, "the dignity of a foreign state may suffer more from an appeal to immunity than from a denial of it". The International Court of Justice should at least have made it explicit that the Congo should have taken up the matter itself.[180]

2.101. Judge Van den Wyngaert went on to quote Sir Gerald Fitzmaurice, who argues that:

> 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.[181]

2.102. The strongest affirmation of the clean hands doctrine is found in another dissenting opinion that quotes Fitzmaurice, the opinion of Judge Stephen M. Schwebel in *Nicaragua v. United States*.[182] Here, the majority ruled that the United States violated international law by supporting guerrilla activities within Nicaragua. In his dissent, Judge Schwebel argued that Nicaragua did not have standing to bring such a complaint because Nicaragua, having been the "prima facie aggressor" and having "press[ed] false testimony on the Court in a deliberate

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178 *Id.* at p. 30, para. 70.

179 *Id.* at p. 160, para. 35 (Dissenting Opinion of Judge Van den Wyngaert).

180 *Id.* at pp. 160-61, para. 35 (Dissenting Opinion of Judge Van den Wyngaert).

181 *Id.* at p. 160, para. 35 n.82 (Dissenting Opinion of Judge Van den Wyngaert) (quoting Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, *in* 92 Recueil des Cours 119 (1957)). The Fitzmaurice article can be found in the Memorandum on Preliminary Objections as Annex 40.

182 Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14.

effort to conceal it[,] . . . d[id] not come before the Court with clean hands."[183] Consequently, Judge Schwebel concluded that:

> [Being] guilty of illegal conduct . . . Nicaragua had deprived itself of the necessary *locus standi* to complain of corresponding illegalities on the part of the United States, especially because, if these were illegalities, they were consequential on or were embarked upon in order to counter Nicaragua's own illegality - "in short were provoked by it".[184]

Indeed:

> Judgment in its favour [wa]s . . . unwarranted, and would [have been] unwarranted even if it [were] concluded—as it should not [have] be[en]—that the responsive actions of the United States were unnecessary or disproportionate.[185]

These affirmations of the clean hands doctrine, even though found in dissenting opinions, show that the doctrine can be used as a rational, equitable and expedient way of ruling on the admissibility of a claim in an inter-state dispute.

b. No Court or Tribunal Has Ever Rejected the Application of the Clean Hands Doctrine

2.103. Not only has the Court affirmed the equitable principles underlying the clean hands doctrine, and applied them in the *River Meuse* case, it has never rejected the doctrine despite opportunities to do so. Indeed, in several cases in which the doctrine was invoked, the Court rendered its decision on other grounds (for example, lack of *prima facie* jurisdiction), but it never rejected the clean hands doctrine when it did so. The Court rather has left the door open for litigants to plead unclean hands as a bar to the admissibility of an Applicant's claim.

2.104. The most recent occasion in which the Court declined an opportunity to reject the clean hands doctrine was *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[186] In that case, the General Assembly had requested that the International Court of Justice issue an advisory opinion on the legality of a wall that Israel was

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183 *Id.* at p. 272, para. 14 (Dissenting Opinion of Judge Schwebel).

184 *Id.* at p. 394, para. 271 (Dissenting Opinion of Judge Schwebel).

185 *Id.* at p. 272, para. 14 (Dissenting Opinion of Judge Schwebel). In writing his opinion, Judge Schwebel drew on Judge Morozov's dissent in *United States of America v. Iran*, which, while not endorsing the clean hands doctrine by name, did conclude that: "[By having] committed many actions which caused enormous damage to the [Respondent], the Applicant has forfeited the legal right as well as the moral right to expect the Court to uphold any claim for reparation." Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Merits, Judgment, I.C.J. Reports 1980, p. 53, para. 5 (Dissenting Opinion of Judge Morozov). *See also* Stephen M. Schwebel, *Clean Hands in the Court, in* Symposium, The World Bank, International Financial Institutions, and the Development of International Law 74, 74-78 (E.B. Weiss, A.R. Sureda & L.B. de Chazournes eds., 1999), at SR, Vol. II, Annex SR35 (offering further justification for his dissent in *Nicaragua v. United States*).

186 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136.

constructing in the Occupied Palestinian Territory, in and around east Jerusalem. The Opinion states:

> Israel . . . contended that Palestine [was] . . . responsibl[e] for acts of violence against Israel and its population which the wall [wa]s aimed at addressing, [and therefore] c[ould] [not] seek from the Court a remedy for a situation resulting from its own wrongdoing.[187]

Indeed, "Israel conclude[d] [that] good faith and the principle of 'clean hands' provide[d] a compelling reason . . . [for] the Court to refuse the General Assembly's request."[188] The Court, however, "d[id] not consider this argument to be pertinent . . . [as] it was the General Assembly which requested the advisory opinion" and not Palestine.[189] The Court did not make any statements that would adversely affect Israel's ability to raise the clean hands doctrine in a case in which Palestine itself (or another state) brought suit.[190]

2.105. A year earlier, the Court similarly declined to reject the clean hands doctrine when it was raised by the United States in *Islamic Republic of Iran v. United States*.[191] In that case, Iran brought suit against the United States for attacking its oil platforms in contravention of international law and a 1955 Treaty of Amity.

> The United States invite[d] the Court to make a finding "that the . . . measures against the platforms were the consequence of Iran's own unlawful uses of force," and submit[ted] that the "appropriate legal consequences should be attached to that finding."[192]

However, "[t]he Court note[d] that in order to make that finding it would have to examine Iranian and United States actions in the Persian Gulf during the relevant period."[193] In other words, it would have to investigate factual issues relevant to deciding the merits of Iran's claim. Having done so, the Court concluded "that the attacks on the oil platforms did not infringe the rights of Iran," making it "unnecessary for the Court to examine the argument of the United States [] that Iran might be debarred from relief on its claim by reason of its own conduct."[194]

2.106. The clean hands doctrine was also recently considered in *Yugoslavia v. Belgium*.[195] In that case, Yugoslavia instituted proceedings against Belgium for participating in NATO

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[187] *Id.* at p. 163, para. 63.

[188] *Ibid.*

[189] *Id.* at p. 164, para. 64.

[190] *Id.* at pp. 163-64, paras. 63-64.

[191] Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Merits, Judgment, I.C.J. Reports 2003, p. 161.

[192] *Id.* at p. 177, para. 29.

[193] *Ibid.*

[194] *Id.* at p. 208, para. 100.

[195] Legality of Use of Force (Yugoslavia v. Belgium), Order, I.C.J. Reports 1999, p. 124.

bombings in Yugoslavia, arguing that Belgium had violated international prohibitions on the use of force. Belgium "invoke[d] the 'clean hands' principle," claiming that "its actions [we]re taken with purely humanitarian intent to prevent gross violations of human rights . . . which ha[d] been perpetrated in Kosovo by the Applicant."[196] In that instance, the Court declined to consider the argument at the preliminary objections stage, and it proceeded to find that Yugoslavia lacked *prima facie* jurisdiction on other grounds. As stated by Judge Schwebel, however:

> In the ten cases brought by Yugoslavia against Members of NATO, the Court, having found a lack of *prima facie* jurisdiction, did not have to consider whether, if there were such jurisdiction, it should exercise its discretion to order or not to order provisional measures. Had the Court found *prima facie* jurisdiction, the Court would have had to consider exercising its discretion not to order interim measures of protection for, among other reasons, one of the Respondents' arguments: considerations of clean hands. And if, nevertheless, the Court had decided to issue Orders of provisional measures, arguably those measures would have had to have been framed so as to give effect to the equitable considerations that are at the heart of the general principles of law that the doctrine of clean hands embodies. [197]

Therefore, as in the two cases mentioned above, the Court's holding in *Yugoslavia v. Belgium* does not reject the clean hands doctrine, and indeed, maintains a position of openness towards future invocation of the doctrine.

2. *The Clean Hands Doctrine Can Be Invoked To Challenge the Admissibility of a Claim*

2.107. The International Court of Justice has never held that the clean hands doctrine cannot be invoked as a preliminary objection to the admissibility of a claim. Rather, the Court has concluded that, in certain cases, consideration of the doctrine was so intertwined with the merits of the claim that such consideration should be postponed to the merits phase.[198] Contrary to Guyana's assertion,[199] there is no indication in those rulings that the Court has adopted a general principle that the clean hands doctrine is to be considered only on the merits.

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[196] *See id*. at p. 184 (Dissenting Opinion of Vice-President Weeramantry).

[197] *See* Stephen M. Schwebel, *Clean Hands in the Court*, *in* Symposium, The World Bank, International Financial Institutions, and the Development of International Law 74, 78 (E.B. Weiss, A.R. Sureda & L.B. de Chazournes eds., 1999), at SR, Vol. II, Annex SR35.

[198] *Islamic Republic of Iran v. United States of America*, Reports 2003, pp. 176-79, paras. 27-30 (holding that addressing the United States' clean hands objection would necessarily entail investigating factual issues relevant to the merits of Iran's claim and therefore should be postponed to the merits phase). *See also* Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 255, para. 38 (noting that an objection based upon Applicant's failure to act in good faith, which sounded in clean hands, although it did not mention the doctrine explicitly, would have rendered the claim inadmissible if such failure indicated "an abuse of process").

[199] RG, para. 2.48, p. 31.

2.108. Moreover, contrary to Guyana's assertion,[200] the authorities cited by Suriname do support the proposition that unclean hands can bar admissibility. In his Hague Academy Lectures, Fitzmaurice argues that:

> [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.[201]

The concept of *locus standi in judicio* directly addresses the ability of the complainant to assert a claim, *i.e.*, its admissibility. Similarly, as noted above, both Judge Schwebel in his dissent in *Nicaragua v. United States*, and Judge Van den Wyngaert in her dissent in *Democratic Republic of Congo v. Belgium*,[202] argued, consistent with Fitzmaurice's position, that the Applicant lacked standing to bring a claim due to its unclean hands.[203] Moreover, the majority opinions in these cases did not contend that the clean hands doctrine spoke to the merits of the claim, but rather, in one case, found that the Applicant had clean hands and, in the other, dismissed the case for lack of *prima facie* jurisdiction.[204] Thus, the clean hands doctrine can be a bar to the admissibility of a claim, and, in this case, it should be.

2.109. Suriname further submits that, even if the Tribunal rejects the argument that Guyana's unclean hands are a bar to admissibility, the aforementioned cases indicate that the Tribunal must then consider the clean hands doctrine in deciding the merits of Submissions 3 and 4. Given the undisputed evidence demonstrating that Guyana's hands are unclean,[205] a merits ruling consistent with the clean hands doctrine would bar Guyana from recovery.

3. *The Undisputed Facts Admitted by Guyana Show That Guyana Has Unclean Hands with Respect to the CGX Incident*

2.110. As submitted above, the clean hands doctrine is an accepted principle of international law that is applicable to inter-state disputes and can be used to bar the admissibility of a claim. This Section establishes that, based on nothing more than the facts admitted by Guyana, which it cannot dispute, Guyana lacks clean hands with respect to the CGX incident, rendering Guyana's Submission 3 inadmissible.

2.111. First, there can be no dispute that the CGX drilling site was located within the disputed maritime area that both Guyana and Suriname have claimed. Guyana does not dispute that the Eagle drilling site, located at 7° 19' 37.366"N and 56° 33' 35.864"W, lies in the area between

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200 *Ibid*.

201 Sir Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 Recueil des Cours 119 (1957), at SPO Annex 40.

202 *See supra* Chapter 2, Section II, Part C.1.a.

203 *See ibid*. *See also* Stephen M. Schwebel, *Clean Hands in the Court*, *in* Symposium, The World Bank, International Financial Institutions, and the Development of International Law 74, 74-78 (E.B. Weiss, A.R. Sureda & L.B. de Chazournes eds., 1999), at SR, Vol. II, Annex SR35.

204 *See id.* at 78.

205 *See infra* Chapter 2, Section II, Part C.3.; *see also infra* Chapter 4, Section II, Part D; Chapter 5, Section III.

the 10° Line claimed by Suriname and the 34° line claimed by Guyana in these proceedings.[206] Although Guyana argues at length that Suriname had "respected" Guyana's concessions up to Guyana's 34° claim line, even Guyana admits, as it must, that "Suriname formally maintained a claim to the 10° line,"[207] indicating Guyana's knowledge that the area was in dispute.

2.112. Second, Guyana admits that it never notified Suriname that it had given permission to its licensee CGX to drill in the disputed area. Guyana argues that Suriname should have learned of that permission from CGX's press releases.[208] Nowhere does Guyana assert that it employed diplomatic (or any other) means to notify Suriname that it had authorized CGX to drill in the disputed area. Indisputably, it did not do so.

2.113. Third, Guyana admits that the first diplomatic contact between the Parties concerning the CGX incident was initiated by Suriname, and was made at a time when CGX could easily have been directed to drill in undisputed waters. As Guyana admits, on 11 May 2000, Suriname delivered to Guyana a *Note Verbale* demanding that Guyana refrain from permitting exploratory drilling in the disputed area.[209] That *Note Verbale* was delivered more than three weeks before the CGX rig reached the drilling site.

2.114. Fourth, Guyana admits that when it responded to Suriname's *Note Verbale*, it did not acknowledge that it had authorized CGX to drill in the disputed area, but instead failed to disclose the nature or the location of the activity it had permitted. In a *Note Verbale* dated 17 May 2000, Guyana stated that "any exploration/exploitation activity, which may be in progress at the present time with the permission or at the instance of the Government of Guyana, is being conducted in the territory of the Cooperative Republic of Guyana."[210] In that response, Guyana not only refused to acknowledge that the drilling was to occur in the disputed area, but purported to deny it.

2.115. In these circumstances, and based on the incontrovertible facts presented above, this Tribunal can, and should, rule that Guyana's Submission 3 is inadmissible. Guyana knew that Suriname also claimed the proposed Eagle drilling site, yet it permitted CGX to drill there, without providing notice to Suriname, and when Suriname protested the activity after learning of it from other sources, Guyana attempted to conceal the facts from Suriname. A state that so behaves lacks clean hands and should not be heard to seek relief from an international tribunal.

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[206] In their statements, both Mr. Edward Netterville and Mr. Graham Barber refer to the Eagle location as "the disputed area." Affidavit of Edward Netterville, former Rig Supervisor on the C.E. Thornton, at MG, Vol. IV, Annex 175, at para. 8; Affidavit of Graham Barber, former Reading & Bates Area Manager, at MG, Vol. IV, Annex 176, at para. 7.

[207] RG, para. 8.5, pp. 139-40.

[208] *Id.* at para. 8.6, pp. 140-41.

[209] MG, para. 5.4, p. 64; para. 10.14, p. 129; *Note Verbale* No. 2651 from the Republic of Suriname to the Cooperative Republic of Guyana (11 May 2000), at MG, Vol. II, Annex 76.

[210] MG, para. 5.4, p. 64; *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.

D. Guyana's Submission 4 Is Also Inadmissible Because Guyana Lacks Clean Hands

2.116. In its Submission 4, Guyana asserts that "Suriname is internationally responsible for violating its obligations under the 1982 Convention on the Law of the Sea to make every effort to enter into provisional arrangements of a practical nature" by allegedly "jeopardising or hampering the reaching of the final agreement," and Guyana claims that Suriname "has an obligation to provide a reparation, in a form and in an amount to be determined, for the injury caused by its internationally wrongful acts."[211]

2.117. In Chapter 5, Section I below, Suriname demonstrates that the obligations imposed by Articles 74(3) and 83(3) of the 1982 Convention can only address conduct occurring after 8 August 1998, the date when the 1982 Convention became effective as between Guyana and Suriname. In Chapter 5, Suriname also demonstrates that the two obligations imposed by Articles 74(3) and 83(3), first to "make every effort to enter into provisional arrangements of a practical nature," and second to refrain from steps that would "jeopardize or hamper the reaching of the final agreement," present differing issues for this Tribunal, and claims under those two clauses must be judged by different standards. The obligation imposed by the first clause of Articles 74(3) and 83(3), requiring parties to "make every effort" to enter into interim arrangements, is essentially aspirational, and it does not provide any basis on which a tribunal could substitute its judgment for that of the Parties with respect to the sufficiency of particular interim arrangements. So long as the Parties have participated in meaningful negotiations, there would be no basis for a tribunal to conclude that either party is in breach of its obligation to use best efforts to enter into provisional arrangements under Article 74(3) and 83(3). The second clause of Section 3 of those Articles, requiring states to refrain from steps that would "jeopardize or hamper the reaching of the final agreement," is in contrast relatively concrete, so that a tribunal could determine that a state's conduct is inconsistent with that obligation. In this Section, drawing upon the analysis presented above, Suriname demonstrates that Guyana's Submission 4 is inadmissible because Guyana does not approach the Tribunal with clean hands in connection with its claim for relief under Articles 74(3) and 83(3).

2.118. In its Memorial and its Reply, Guyana presents a lengthy—and erroneous—account of dealings between Guyana and Suriname with respect to their maritime boundary dispute prior to 1998, when the 1982 Convention came into force as between the Parties. As demonstrated in Chapter 5, that history is not relevant to this proceeding and cannot serve as any basis for a claim for relief. In its Reply, Guyana does not adduce any new evidence to respond to Suriname's showing in its Counter-Memorial that the failure of the Parties to reach any agreement after the CGX incident of June 2000 flows from Guyana's intransigence.

2.119. In its Reply, Guyana asserts that it gave Suriname "considerable amounts of information concerning its licensees, including CGX," but at the same time admits that it was "reluctant to disclose all the terms and conditions of the agreement, or the agreement itself."[212] In fact, the only information that Guyana provided to Suriname was a list of the companies to which Guyana had given licenses, with minimal information about the status of each, plus a copy of Guyana's Petroleum Legislation and a map showing that Guyana had blanketed

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[211] RG, para. 10.1, p. 153.

[212] *Id.* at para. 9.11, pp. 150-51.

virtually the entire disputed area with licenses.[213] Guyana purports to excuse its failure by stating that it required "explicit assurances from Suriname that it was committed to moving forward in a productive manner,"[214] but as Suriname has shown, Guyana's focus, and all of its proposals, concerned the return of the CGX drill ship to the disputed area and the recognition of the concessions with which Guyana had blanketed the disputed area.[215] In other words, Guyana claims that Suriname's international responsibility is engaged because it declined to acquiesce in Guyana's unilateral conduct. Such a claim, which seeks both to legitimize conduct of one state that is improper under international law and to penalize a legitimate response to that improper act, is subject to the clean hands doctrine and should be inadmissible.

2.120. Similarly, Guyana argues that the draft Memorandum of Understanding that it proffered at the 6 June 2000 Joint Ministerial Meeting "envisioned a sharing of any and all profits with Suriname," and it asserts that Suriname's refusal to agree to such an "arrangement" was so unreasonable as to violate Articles 74(3) and 83(3).[216] That Guyana's approach was unreasonable is readily apparent. Here, too, the undisputed facts, admitted by Guyana, show that Guyana acted with unclean hands. Guyana admits that it refused to provide full and open information concerning its existing concession agreement with CGX, and it does not dispute that it had issued concessions covering substantially the entire area in dispute between the Parties.[217] Neither the 1982 Convention nor any principle of international law requires one state to agree to something simply because another state demands it.[218] For that reason alone, the Tribunal should conclude that Guyana's Submission 4 is inadmissible even if it were persuaded that Guyana's proposals were made in good faith. The fact that Guyana's proposals were manifestly made in bad faith provides a further, fully sufficient, reason to conclude that Submission 4 is inadmissible.

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213 *See* Note No. 28/2003 of Embassy of the Republic of Guyana to Ministry of Foreign Affairs of the Republic of Suriname (23 June 2003) enclosing Ministry Note 577/03 (20 June 2003), at SR, Vol. II, Annex SR5.

214 RG, para. 9.11, pp. 150-51

215 SCM, para. 8.6, p. 120.

216 RG, paras. 9.12-9.14, pp. 151-52.

217 SCM, para. 8.7, pp. 120-21.

218 *See* The MOX Plant Case (Ireland v. United Kingdom), ITLOS Order (3 December 2001), paras. 54-60, available at http://www.itlos.org/case_documents/2001/document_en_197.pdf; Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), ITLOS Order (27 August 1999), paras. 56-60, available at http://www.itlos.org/case_documents/2001/document_en_116.doc.

CHAPTER 3

THE ESTABLISHMENT OF THE SINGLE MARITIME BOUNDARY IF THE TRIBUNAL DETERMINES IT HAS JURISDICTION TO DO SO

3.1. Chapter 3 of Suriname's Rejoinder is presented on the assumption that the Tribunal finds that it has jurisdiction to delimit the single maritime boundary between the Parties to a distance of 200 nautical miles from the coast. The effect of the Tribunal's Order No. 2 is to require Suriname to plead in the alternative but in doing so, Suriname's Preliminary Objections are maintained and are not prejudiced.

3.2. This Chapter accordingly addresses the establishment of the single maritime boundary. It is divided into six Sections:

- The Law of International Maritime Boundary Delimitation
- The Significance of the Conduct of the Parties
- The Geographical Circumstances in Which the Law is to be Applied
- Delimitation Methods
- The Guyana 34° Line
- The Suriname 10° Line and Its Equitable Characteristics

3.3. In these Sections, Suriname identifies and addresses the differences between the Parties. The Rejoinder will not repeat what is said in the Counter-Memorial, but it should be clear that Suriname maintains the positions set forth therein.

3.4. The differences between the Parties are clear. Suriname maintains that the single maritime boundary is a line intersecting the 1936 Point that extends from the low-water line to the 200-nautical mile limit at a bearing of 10° East of true North. Guyana maintains that the maritime boundary should extend from the 1936 Point to the 200-nautical mile limit at a bearing of 34° East of true North. Thus, both Parties ask the Tribunal to establish a single maritime boundary that is in fact a one-segment line following a specified bearing. The difference between the two claim lines is 24° of arc. The claim lines put approximately 31,600 square kilometers in dispute between the Parties.[219]

3.5. Guyana argues in its Memorial that its line is based on the equidistance method and finds support in the conduct of the Netherlands and the United Kingdom and, subsequently, the conduct of the Parties now before the Tribunal. Guyana refers to its position as the "historical equidistance line." In the Counter-Memorial, however, Suriname demonstrated that Guyana's 34° line is neither "historic" nor "equidistant."[220] In its Reply, Guyana has claimed a different rationale for its 34° line: coastal proportionality. Suriname will show in the Sections that follow that Guyana's 34° line is not justified by the relevant geographic circumstances and that the conduct of the Parties provides no support for that claim line.

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[219] *See* SCM Figure 1, following SCM p. 10.

[220] SCM, paras. 3.52-3.59, pp. 34-36.

3.6. In its Counter-Memorial, Suriname followed the practice of international courts and tribunals and examined the provisional equidistance line. Suriname demonstrated that the provisional equidistance line based on strict equidistance methods would create a boundary that is not equitable to Suriname. Suriname suggested that in light of the coastal geography another delimitation method should be employed—the angle bisector method. The angle bisector method makes use of the coastal fronts of the Parties that face the delimitation area. The bisector of the angle formed by the relevant coastal front of Guyana and the relevant coastal front of Suriname is 17°. Suriname presented the reasons why the 17° angle bisector should be adjusted to the 10° Line in light of the relevant circumstances. Suriname continues to hold that position and will address Guyana's criticisms in the Sections that follow.

I. The Law of International Maritime Boundary Delimitation

A. Introduction and Summary

3.7. Guyana summarizes the key legal differences between the Parties at paragraph 5.4 of its Reply:

(1) the relevance of the Parties' agreement that the Tribunal should delimit a single maritime boundary;

(2) the significance of certain geographic factors; and

(3) the Parties' inheritance of agreement on a delimitation of the territorial sea along the N10E line.

Those headings identify key differences, but further significant differences are subsumed beneath each heading. Guyana has left off this list and failed to address the legal relevance of conduct in the establishment of a single maritime boundary, while diminishing the role of geography in that context. Furthermore, Guyana has attributed to Suriname legal arguments that Suriname did not make, including those pertaining to apportionment, geographically disadvantaged states and analogies of Suriname to Germany or Cameroon. Guyana finds unfounded solace in recent case law and casts aspersions on older case law even though it relies itself on an "older" case.

3.8. Nothing in Guyana's presentation of the applicable law causes Suriname to change its position. In Part B below, Suriname will examine the decision in the *Barbados-Trinidad and Tobago* case. In Part C, Suriname will address the key differences between the Parties' interpretation and use of the applicable law. In Part D, Suriname responds to and corrects additional points raised in Chapter 5 of Guyana's Reply. In Part E, Suriname reaffirms its position that its boundary claim is based on the established jurisprudence and legally relevant geographical criteria.

B. The Barbados-Trinidad and Tobago Case

3.9. Following the filing of Guyana's Reply, the Arbitral Tribunal in the *Barbados-Trinidad and Tobago* case issued its Award.[221] Suriname appreciates that Guyana was not able to address that Arbitration Award in its Reply. However, Guyana will have ample opportunity to do so in the oral stage of these proceedings.

3.10. The Arbitral Tribunal in the *Barbados-Trinidad and Tobago* case considered a maritime boundary in very different geographic circumstances from those present in this case, but Suriname believes that the points made by the Arbitral Tribunal in that case confirm the central position of Suriname.

1. *The Geographic Foundation of the Single Maritime Boundary*

3.11. The Arbitral Tribunal in *Barbados-Trinidad and Tobago* addressed the question of the single maritime boundary and adopted the view of the prevailing jurisprudence that the relevant circumstances associated with the single maritime boundary are geographic. This is the position of Suriname but not that of Guyana. It is worth quoting paragraphs 227-228 of the Arbitration Award:

> 227. The trend toward harmonization of legal regimes inevitably led to one other development, the establishment for considerations of convenience and of the need to avoid practical difficulties of a single maritime boundary between States whose entitlements overlap.
>
> 228. The step that followed in the process of searching for a legal approach to maritime delimitation was more complex as it dealt with the specific criteria applicable to effect delimitation. This was so, at first because there was a natural reluctance on the part of courts and tribunals to give preference to those elements more closely connected to the continental shelf over those more closely related to the EEZ or *vice versa*. The quest for neutral criteria of a geographical character prevailed in the end over area-specific criteria such as geomorphological aspects or resource-specific criteria such as the distribution of fish stocks, with a very few exceptions (notably *Jan Mayen*, I.C.J. Reports 1993, p. 38).[222]

The Award of the *Barbados-Trinidad and Tobago* Arbitral Tribunal confirms without exception the approach that Suriname has taken to the applicable law relating to the delimitation of the single maritime boundary in this case.

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[221] In the Matter of an Arbitration Between Barbados and the Republic of Trinidad and Tobago (Barbados-Trinidad and Tobago), Award (11 April 2006), available at http://www.pca-cpa.org/ENGLISH/RPC/BATRI/Award%20final%20110406.pdf (hereinafter "Arbitration Award").

[222] *Id.* at pp. 69-70, paras. 227-228.

2. *Resource-Related Criteria*

3.12. In this connection, the Arbitral Tribunal noted that resource-related criteria have been treated cautiously in the jurisprudence and that they have not generally been applied as a relevant circumstance.[223] It referred to the adjustment made by the Court in the *Jan Mayen* case as "most exceptional" and noted that the role of such factors had been limited in *Gulf of Maine* to when "catastrophic results" would follow.[224]

3.13. These comments came in the context of a case where arguments relating to fishing and oil concession practice were central to the positions of the parties, especially Barbados. Concerning Barbados' argument for a substantial deviation from the equidistance line to account for Barbados fishing interests, the Arbitral Tribunal concluded that Barbados had not proved its factual contentions. The Arbitral Tribunal then went on to add:

> even if Barbados had succeeded in establishing one or all of its core factual contentions, it does not follow that, as a matter of law, its case for adjustment would be conclusive. Determining an international maritime boundary between two States on the basis of traditional fishing on the high seas by nationals of one of those States is altogether exceptional.[225]

In response to Barbados' argument that Trinidad and Tobago had acquiesced in Barbados' jurisdiction north of the equidistance line (or was estopped) on the grounds of Barbados' oil concession related conduct, the Arbitral Tribunal concluded:

> Seismic surveys sporadically authorised, oil concessions in the area and patrolling, while relevant do not offer sufficient evidence to establish estoppel or acquiescence on the part of Trinidad and Tobago.[226]

The Arbitral Tribunal cited to the *Cameroon-Nigeria* case when it found that "oil wells are not in themselves to be considered as relevant circumstances, unless based on express or tacit agreement between the parties"[227] and that seismic activity "is not pertinent to the definitive determination of a maritime boundary."[228]

3. *The Relevant Coasts*

3.14. The Arbitral Tribunal examined the relevant geographic circumstances. Regarding the importance of the identification of the relevant coasts, the Arbitral Tribunal said:

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223 *Id.* at p. 73, para. 241.

224 *Ibid.*

225 *Id.* at p. 83, para. 269.

226 *Id.* at p. 108, para. 363.

227 *Id.* at pp. 108-09, para. 364, pp. 108-09.

228 *Ibid.*

> The identification of the relevant coasts abutting upon the areas to be delimited is one such objective criterion, relating to the very source of entitlement to maritime areas.[229]

The Arbitral Tribunal denied that the relevant coast is determined by the coast that contributes the basepoints for drawing the provisional equidistance line:

> But relevant coastal frontages are not strictly a function of the location of basepoints, because the influence of coastlines upon delimitation results not from the mathematical ratios discussed above or from their contribution of basepoints to the drawing of an equidistance line, but from their significance in attaining an equitable and reasonable outcome, which is a much broader consideration.[230]

Further,

> if coastal frontages are viewed in the broader context referred to above, what matters is whether they abut as a whole upon the disputed area by a radial or directional presence relevant to the delimitation, not whether they contribute basepoints to the drawing of an equidistance line.[231]

3.15. The Arbitral Tribunal concluded that "the orientation of coastlines is determined by the coasts and not by baselines" and that the coastal fronts that are clearly abutting on the disputed area of overlapping claims are relevant circumstances.[232] In the end, as in this and every other case, it is one's appreciation for what coast "abuts" upon the area to be delimited that leads to the identification of a relevant coast. While the Arbitral Tribunal made reference to both a "radial" and "directional presence,"[233] its analysis and its Award are only consistent with the view that it is the coasts that face frontally into the delimitation area that are relevant, not any coast facing in any direction that theoretically might radiate a 200-nautical mile arc into the delimitation area.

4. *The Issue of Length of Relevant Coasts*

3.16. The Arbitral Tribunal made clear the role that coastal length might play in its assessment of relevant geographic circumstances. It noted that "coastal length has come to have a particular significance" but not "because the ratio of the parties' relative coastal lengths might require that the determination of the line of delimitation should be based on that ratio."[234] As it stated at paragraph 237 of the Award:

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[229] *Id.* at p. 70, para. 231.

[230] *Id.* at p. 100, para. 329.

[231] *Id.* at p. 101, para. 331.

[232] *Id.* at p. 102, para. 334.

[233] *Id.* at p. 101, para. 331.

[234] *Id*. at p. 72, para. 236.

> decisions of international courts and tribunals have on various occasions considered the influence of coastal frontages and lengths in maritime delimitation and it is well accepted that disparities in coastal lengths can be taken into account to this end, particularly if such disparities are significant.

And further, at paragraph 239, the Award states:

> The reason for coastal length having a decided influence on delimitation is that it is the coast that is the basis of entitlement over maritime areas and hence constitutes a relevant circumstance that must be considered in the light of equitable criteria. To the extent that a coast is abutting on the area of overlapping claims, it is bound to have a strong influence on the delimitation, an influence which results not only from the general direction of the coast but also from its radial projection in the area in question.

3.17. The Arbitral Tribunal noted Trinidad and Tobago's contention that the difference or disparity in the length of relevant coasts (the coastal fronts abutting on the area of overlapping claims) was 8.2:1 in favor of Trinidad and Tobago and that this significant disparity required an adjustment in the provisional equidistance line. As the Arbitral Tribunal said, it was the existence of the significant coastal front of Trinidad and Tobago abutting directly on the area subject to delimitation that required such an adjustment.[235]

5. *Proportionality*

3.18. The Arbitral Tribunal distinguished between significant disparities in coastal length being taken into account in constructing a delimitation line, and the use of proportionality as only a "final check upon the equity of a tentative delimitation to ensure that the result is not tainted by some form of gross disproportion."[236] It concluded:

> the Tribunal concludes that proportionality is a relevant circumstance to be taken into consideration in reviewing the equity of a tentative delimitation, but not in any way to require the application of ratios or mathematical determinations in the attribution of maritime areas. The role of proportionality, as noted, is to examine the final outcome of the delimitation effected, as the final test to ensure that equitableness is not contradicted by a disproportionate result.[237]

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[235] *Id.* at p. 110, para. 372.

[236] *Id.* at p. 72, para. 238; *see also id.* at p. 73, para. 240.

[237] *Id.* at pp. 102-03, para. 337.

6. *Delimitation Method*

3.19. Concerning delimitation method, the Arbitral Tribunal respected and applied the common procedure to first identify the provisional equidistance line, and then to examine it in light of the relevant circumstances.[238] The Arbitral Tribunal said:

> a provisional line of equidistance is posited as a hypothesis and a practical starting point. While a convenient starting point, equidistance alone will in many circumstances not ensure an equitable result in the light of the peculiarities of each specific case.[239]

Elsewhere the Arbitral Tribunal said: "no method of delimitation can be considered of and by itself compulsory."[240]

7. *Other Delimitations in the Region*

3.20. The Arbitral Tribunal considered an argument made by Trinidad and Tobago that it was required to take into account other delimitations in the region. The Arbitral Tribunal rejected that view, except insofar as another delimitation might identify the limit of the area claimed by one of the parties to the proceeding.[241]

8. *Conclusion*

3.21. Suriname believes that the *Barbados-Trinidad and Tobago* Arbitration Award summarized certain key points in the international law of maritime boundaries as follows:

- Non-geographic factors are not likely to be relevant circumstances in the establishment of a single maritime boundary.
- Geographic factors pertaining to the coastal fronts that abut on the area to be delimited are to be examined as relevant circumstances.
- Proportionality (that is comparisons of ratios of lengths of coasts and maritime areas) is not relevant to construct the single maritime boundary.
- Delimitation methods other than equidistance may prove of greater utility in the circumstances of a particular case.
- Regional considerations have no role in the establishment of the single maritime boundary between parties before an international court or tribunal.

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238 *Id.* at pp. 73-74, para. 242.

239 *Ibid.*

240 *Id.* at p. 94, para. 306.

241 *Id.* at pp. 103-05, paras. 339-49.

3.22. In Suriname's view, these points are all embodied in the position of Suriname set forth in the Counter-Memorial. Furthermore, these points are at odds with the position of Guyana expressed in its Memorial and Reply.

C. The Differences Between the Parties

3.23. In Suriname's view, there are three overriding legal differences between the Parties. One concerns the implication of the Parties' agreement that the Tribunal should delimit a single maritime boundary. Guyana suggests that the sole implication is procedural, meaning that the Tribunal must first delimit the territorial sea and then engage in a separate operation to delimit the exclusive economic zone/continental shelf. Suriname disagrees; it does not believe a two-step process is inherent in the single maritime boundary. More important, however, Suriname believes the case law is abundantly clear (as recently reaffirmed in the *Barbados-Trinidad and Tobago* Arbitration Award) that when delimiting a single maritime boundary international courts and tribunals look to relevant circumstances that are common to all forms of delimitation—namely, geographical circumstances.

3.24. The second major difference concerns the place of the equidistance method. Suriname believes that the common practice is to examine the provisional equidistance line as a procedural first step in maritime boundary analysis. Guyana's view is radically different as it ascribes a legal presumption to the equidistance method, a position that was rejected at the Third United Nations Conference on the Law of the Sea and has not been sustained since.

3.25. The third overriding difference pertains to the agreement between the Parties on the 10° Line in the territorial sea.

1. *The Single Maritime Boundary*

a. The Single Maritime Boundary and Articles 15, 74 and 83 of the 1982 Convention

3.26. Guyana has requested that the Tribunal delimit a single maritime boundary, and Suriname agrees. Suriname believes that this agreement has broader legal implications than does Guyana. Guyana apparently believes a single maritime boundary is a convenient option that only imposes a procedure on the Tribunal to determine first the territorial sea boundary applying Article 15 of the Convention and then in a second step to determine the boundary to the 200-nautical mile limit applying Articles 74 and 83. In Suriname's view, the broader legal implication of the request for a single maritime boundary is related to the relevant circumstances to be taken into account in the equitable solution to be established by the Tribunal.

3.27. It was open to Guyana to request the establishment of a territorial sea boundary in accordance with Article 15, an exclusive economic zone boundary in accordance with Article 74 and a continental shelf boundary in accordance with Article 83. It did not do so. Instead, it requested a single segment line of constant bearing to divide all forms of jurisdiction authorized by international law.

3.28. Without doubt, as Guyana has noted, the International Court of Justice in both the *Qatar-Bahrain* case and the *Cameroon-Nigeria* case approached the establishment of the single maritime boundary in those cases in a two-step procedure. However, that two-step

procedure does not arise out of the fact that the Court was determining a single maritime boundary. In both of those cases the two-step procedure was a rational way for the Court to proceed in its analysis in the circumstances of those cases. In *Qatar-Bahrain*, in the close geographic circumstances of the Hawar Islands and the Qatar Peninsula, it made sense to assess the territorial sea considerations in those circumstances separately from the different geographic circumstances prevailing in the open Persian/Arabian Gulf, where the boundary line moves from one between opposite coasts to one between adjacent coasts.

3.29. In *Cameroon-Nigeria*, the case logically broke down into two parts: the inshore territorial sea area, where Cameroon argued that there was a binding agreement (and the Court so found), and the offshore area beyond "Point G" where that was not the issue.[242]

3.30. In both cases, Suriname submits that the Court would have proceeded as it did even if the mandate had not referred to a single maritime boundary. Thus, the single maritime boundary does not carry with it a two-step methodology as Guyana argues. A two-step method may make eminent good sense in some situations—a three-step method might be required in others—and a single-step is all that is required in others. The reason that a single step might be sufficient in some cases is simply that the relevant geographic circumstances may suggest such a procedure.

3.31. Guyana also argues that Suriname is trying to avoid Articles 15, 74 and 83 of the Convention.[243] Suriname's position is actually that these Articles must be applied within the framework of the Parties' request for a single maritime boundary. This means that the relevant circumstances to be weighed are the objective circumstances of geography.

3.32. To illustrate this point, Suriname reviewed the development in the jurisprudence of the single maritime boundary in paragraphs 4.4-4.17 of the Counter-Memorial. Guyana's response to these paragraphs is that they are more in the way of an "academic treatise."[244] Guyana refers to these paragraphs as "a lengthy and academic excursus."[245] But Guyana does not contest Suriname's analysis. Instead, Guyana remains content with its argument that a two-step method is required; it does not address the basic point that the case law on the single maritime boundary has rejected conduct-based arguments similar to those made by Guyana.

b. The Diplomatic Record from 1958-1966 Would Only Be Legally Relevant in the Establishment of the Single Maritime Boundary If It Demonstrated an Agreement on the Continental Shelf Boundary, and It Does Not

3.33. Guyana believes that the diplomatic contacts between the United Kingdom and the Netherlands, along with various internal memoranda and other records made by officials of those countries pertaining to attempts to establish the continental shelf boundary in the period 1958-1966, are legally relevant in this case. Guyana says this "appears to be the first maritime

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[242] The seaward end point of the Parties' agreement, "Point G," is approximately 15 nautical miles from the coast.

[243] RG, para. 5.3, pp. 79-80.

[244] *Id.* at para. 5.1, p. 79.

[245] *Id.* at para. 5.6, p. 81.

delimitation on record in which one of the Parties seeks to airbrush history out of the proceedings."[246] In Suriname's view, the point is the opposite: this appears to be the first maritime delimitation on record in which one of the Parties bases its maritime boundary claim on the diplomatic interactions of the predecessor states even when it admits that they did not reach a maritime boundary agreement. At paragraph 7 of the Statement of Claim, Guyana acknowledges:

> Despite several attempts, Guyana and Suriname, and their colonial predecessors the United Kingdom and the Netherlands, have never concluded an agreement on the delimitation of their adjacent maritime boundary in the Corentyne offshore area.

3.34. Yet the Tribunal is referred to numerous documents from the archives of the Netherlands and the United Kingdom in that period. In those documents, officials report on their discussions and sometimes their musings. As is discussed below, those documents do not advance Guyana's position.

3.35. The fact that the Netherlands in 1958 made a specific stand-alone proposal referring to the equidistance method as mentioned in Article 6(2) of the 1958 Continental Shelf Convention is not contested. But the record also shows that the United Kingdom did not act on that proposal until 1961 and, when it did, it vitiated any prospects for an agreement by reasserting the British claim to what it referred to as the New River Triangle. There was no agreement that became binding on Suriname and Guyana when they became independent.

3.36. Guyana admits that Guyana and Suriname did not succeed to a binding international agreement from their predecessors. Guyana nonetheless argues that the historical record shows there was "an unequivocal agreement" between the United Kingdom and the Netherlands to use the equidistance method in this case.[247] Where is that agreement? The British and Dutch Governments know how to write international agreements—in the form of treaties, exchanges of diplomatic notes constituting agreements, or Memoranda of Understanding. They did not do so. Moreover, the final three draft treaty proposals, in 1961 by the United Kingdom, in 1962 by the Netherlands and in 1965 by the United Kingdom, make clear that by the early 1960s there was no common boundary position whatsoever. By 1962, the Netherlands' proposal did not refer to equidistance but to the 10° Line.

3.37. While historical background information is informative and of general interest, it hardly amounts to a legally relevant circumstance. This is not a territorial sovereignty case, where recourse to colonial archive documents might shed some light on colonial *effectivités* that might be relevant to determining sovereignty in a post-colonial dispute. Nor is it a case where the Tribunal is called upon to determine the facts at the time of independence so as to identify the *uti possedetis juris*. Nor is there even one agreed equidistance line that Guyana can find in all of the documents. The only agreed line in the history of this maritime boundary dispute is the 10° Line in the territorial sea which Guyana now contests.

3.38. The pre-independence history is not legally relevant to the establishment of a single maritime boundary under the law that is binding on the Parties before the Tribunal.

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[246] *Id.* at para. 1.28, p. 11.

[247] *Id.* at para. 4.24, p. 67.

c. Conduct Pertaining to Oil Concessions Is Not Legally Relevant Conduct in the Establishment of the Single Maritime Boundary

3.39. The most recent statement of the International Court of Justice on oil concession conduct is set out in the *Cameroon-Nigeria* case. There the Court reviewed the arguments made by the parties in that and prior cases. The Court concluded, at paragraph 304 of its Judgment, which is quoted by Suriname at paragraph 4.16 of the Counter-Memorial, that only if there is an express or tacit agreement may such conduct be taken into account. In summary the Court stated:

> oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. Only if they are based on express or tacit agreement between the parties may they be taken into account.[248]

As noted above, the Arbitral Tribunal in the *Barbados-Trinidad and Tobago* case noted this holding with approval.

3.40. Guyana does not argue that there is an express or tacit agreement between the Parties relating to oil concession limits. There was none. One can only conclude that the law is clear and that since there is no express or tacit agreement on oil concession limits in this case, the conduct of the Parties pertaining to their various oil concessions is not legally relevant to the establishment of the single maritime boundary.[249]

d. The Principle of Non-Encroachment and the Cut-Off Effect Are Particularly Pertinent in the Delimitation of a Single Maritime Boundary Between Adjacent States

3.41. Guyana argues that non-encroachment is not a principle of international law.[250] However, the quotations that Guyana relies upon for its argument all refer to encroachment or non-encroachment or cut-off as principles, or criteria or circumstances of relevance in the delimitation process.[251] Indeed, Guyana seems to admit that non-encroachment can be applied as a criterion as long as it is not applied "in a mechanical fashion."[252] Moreover, at times all it seems that Guyana is showing is that encroachment is not something that can be completely avoided.[253] Indeed, the issue cannot be avoided. In any situation of adjacent states, unless the coasts are in a straight line (and the maritime boundary is perpendicular to that coast), a

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[248] Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening), Merits, Judgment, I.C.J. Reports 2002, pp. 447-48, para. 304.

[249] For a discussion of the Parties' conduct showing that Guyana's contentions concerning that conduct lacks merit, see Section II, Part A.2 below.

[250] RG, para. 5.42, pp. 95-96.

[251] *Id.* at para. 5.43, p. 96 (quoting Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Merits, Judgment, I.C.J. Reports 1984).

[252] RG, para. 5.45, p. 97.

[253] *Id*. at para. 5.42, pp. 95-96.

maritime boundary will cut off the extension of the coastal front of one or both to some extent. The point is that one party should not have to absorb all the consequences of cut-off; it must be shared in an equitable manner.

3.42. However, notwithstanding Guyana's recognition of some role for encroachment, what Guyana means by encroachment is fundamentally different from what Suriname means by encroachment. To Guyana, encroachment or cut-off occurs when a state is deprived of an area that it would receive by application of the equidistance method. This is quite a different concept from the principle of non-encroachment accepted in the cases, which refer to cutting off the natural prolongation of a state, or to put it another way, cutting off the seaward projection of the coasts of a state.

3.43. It is instructive that Guyana makes no reference to the *St. Pierre and Miquelon* case, where non-encroachment was central to the decision. Indeed, the *St. Pierre and Miquelon* case illustrates clearly that the idea underlying the Court's words on this issue in the *North Sea Continental Shelf* cases has application to a wide range of geographical situations and is not limited to states with geographical situations similar to that of Germany. In this case, since Guyana's 34° line runs roughly perpendicular to Guyana's coastal front, it permits the uninterrupted perpendicular extension of Guyana's coast while cutting off the perpendicular extension of the adjacent relevant Suriname coastal front. This is the most egregious form of cut-off, because the encroachment is completely one-sided. If the same criterion—that is, a comparison with perpendiculars to the coastal front—is applied to Suriname's 10° Line, it can be seen that the encroachment affects both sides, as Suriname's coast projects due north.

3.44. In this case of a single maritime boundary, running seaward from adjacent coasts that form an angle where they meet, the most effective way to deal with the encroachment that occurs because the projections of the coasts of Suriname and Guyana overlap is to bisect the angle formed by the adjacent coasts. In this case, such a bisector projects seaward at a bearing of 17°.

2. *The Legal Role of the Equidistance Method*

3.45. Both Parties now accept that an initial step in delimitation is the drawing of a provisional equidistance line. What appears to be agreement, however, masks substantial disagreement. Suriname constructed a provisional equidistance line as a procedural first step in the analysis of this maritime delimitation problem.[254] Guyana means something quite different by its reference to the provisional equidistance line.

3.46. Guyana takes the view that the provisional equidistance line could be "shifted" or deviated from only if there are "special circumstances."[255] There are two aspects to Guyana's position that must be noted. First, Guyana does not appear to contemplate that a method other than equidistance has any basis in law. In Guyana's view, only adjustments from the provisional equidistance line might be called for. Thus, Guyana rejects outright any use of bisectors or perpendiculars.[256] In short, Guyana does not accept that another delimitation

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[254] SCM, paras. 6.16-6.18, p. 96, and SCM Figure 31, following SCM p. 96.

[255] RG, para. 1.22, p. 9.

[256] *Id.* at para. 7.54, p. 136.

method could ever be justified. Provisional equidistance means that the result may be adjusted, but it remains a form of equidistance nevertheless.

3.47. Second, Guyana uses the term "special circumstance" throughout its pleadings. Such use is revealing. The term "special circumstances" is a throwback to Article 6 of the 1958 Convention on the Continental Shelf. It is not found in Articles 74 and 83 of the 1982 Convention. The reason it is not found in Articles 74 or 83 is that it is a term that is associated with equidistance and thus was unacceptable to the large group of states that formed the "equitable principles" camp at the Third United Nations Conference on the Law of the Sea. The term that has developed in the delimitation of the exclusive economic zone and the continental shelf has been "relevant circumstances."[257]

3.48. The distinction is more than verbal. "Relevant circumstances" under the contemporary law are factors that can be taken into account in deciding whether a proposed boundary line produces an equitable solution. "Special circumstances" under the approach of the 1958 Continental Shelf Convention are factors that justify adjusting or displacing equidistance. The distinction is that the latter involves a presumption in favor of equidistance while the former does not. That is to say, under the 1958 regime, those who supported the equidistance/special circumstances rule argued that equidistance was the norm and special circumstances were the exception. This view was forcefully promoted by the "equidistance camp" at the Third Conference, but it was just as forcefully rejected by the "equitable principles" camp; thus, no consensus could be reached to reinstate Article 6 of the 1958 Continental Shelf Convention into the new Law of the Sea Convention. It was only when all references to equidistance and to modifying circumstances were removed from the text that consensus on Articles 74 and 83 was reached.[258]

3.49. Thus, the contemporary law has not developed as implied by Guyana. The idea of a legal presumption in favor of equidistance was rejected. At the same time, once it became clear that contemporary law does not give any legal priority to equidistance, examining the provisional equidistance line in delimitation became accepted as a procedural starting point.

3.50. This, then, is a fundamental error in Guyana's approach to the law. Guyana treats the provisional equidistance line as if there was a presumption in favor of equidistance, only to be rebutted if there are "special circumstances." Guyana's notion of the law, although couched in terms of the 1982 Convention, is no more than a particular application of the old Article 6 rule—an application that was rejected both at the Third United Nations Conference on the Law of the Sea and in the subsequent jurisprudence.

3.51. In both *Cameroon-Nigeria* and *Qatar-Bahrain*, the Court noted that the "equidistance/special circumstances" rule applicable to the territorial sea is closely related to the "equitable principles/relevant circumstances" rule applicable to the continental shelf and exclusive economic zone, statements that are referred to by Guyana. But Guyana's position is the reverse of the position of the Court. The Court was indicating that the way the equitable principles/relevant circumstances test is applied in respect of the continental shelf and the exclusive economic zone—that is to say a "balancing up" of the various relevant criteria to

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[257] Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening), Merits, Judgment, I.C.J. Reports 2002, p. 441, para. 288.

[258] Annex SR23 contains the seven negotiating texts for Articles 15, 74 and 83, which demonstrate the textual evolution of the delimitation provisions of the 1982 Convention.

achieve an equitable result—is the way the Article 15 rule should be applied in the territorial sea. The Court was not resurrecting a rigid version of the old Article 6 rule.

3.52. The belief in the primacy of equidistance is found throughout Guyana's Reply. The relevant coasts are to be measured by reference to the basepoints that determine the equidistance line.[259] The notion of encroachment or cut-off exists only to the extent that there is encroachment on what a state would otherwise be entitled to by the application of the equidistance method.[260] All of this involves the assumption that equidistance is the natural order of things. But that is not what the Third United Nations Conference on the Law of the Sea decided. Equidistance is a useful procedural benchmark—what the Arbitral Tribunal in the *Barbados-Trinidad and Tobago* case referred to as a "hypothesis"[261]—but it has no necessary, dispositive role in the determination of the single maritime boundary.

3. *The Agreement in the Territorial Sea*

3.53. The purpose of this Part C.3 is to address the establishment of the single maritime boundary if the Tribunal determines that it has jurisdiction to do so and that the 1936 Point is binding on the Parties. It is Suriname's position that if the Tribunal finds that the 1936 Point is binding on the Parties, it has no basis for rejecting the 10° Line as the territorial sea boundary.

3.54. The United Kingdom walked away from the 10° Line as the boundary in the territorial sea in 1965 in order to create negotiating leverage with the Netherlands. Guyana now in its pleading before the Tribunal has taken a more elaborate position. It argues that one aspect of the work of the 1936 Boundary Commission became legally binding (somehow) but that the other aspect of its work did not. How this could happen is unclear to Suriname. In Suriname's view, if the 1936 Point is established, so is the 10° Line established in the territorial sea.[262]

3.55. It is worth noting that even after the adoption of the 1958 Territorial Sea and the Contiguous Zone Convention, both the United Kingdom and the Netherlands continued to abide by the 10° Line in the territorial sea. Even the 1961 British proposal, which is said to be the basis of Guyana's current position, proposed that the 10° Line should extend from the 1936 Point for six miles. As was noted in Suriname's Counter-Memorial, Commander Kennedy held that the 10° Line in the territorial sea could be justified as a special circumstance under the 1958 Convention.[263] That the Netherlands insisted in the early 1930s that the territorial sea boundary should preserve its interest in controlling the navigation in both approaches to the Corantijn River is clear. That was a legitimate interest then, and it remains one today.[264] It is also clear that the 1936 Point and the 10° Line were established in combination and that there is no basis for separating the two.

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259 RG, para. 3.18, p. 39.

260 *Id.* at para. 5.46, p. 97.

261 In the Matter of an Arbitration Between Barbados and the Republic of Trinidad and Tobago (Barbados-Trinidad and Tobago), Award (11 April 2006), para. 242, available at http://www.pca-cpa.org/ENGLISH/RPC/BATRI/AWARD%20final%20110406.pdf.

262 *See* discussion in Chapter 2, Section I, Part E above.

263 SCM, para. 3.29, p. 24.

264 Statement E. Fitz Jim, at SR, Vol. II, Annex SR18, at para. 4.

D. Responses to Other Arguments Made in Chapter 5 of Guyana's Reply

1. *Guyana's Arguments About the Qatar-Bahrain and Cameroon-Nigeria Cases Support Suriname's Position*

3.56. In Chapter 5 of its Reply, Guyana refers to the *Qatar-Bahrain* and *Cameroon-Nigeria* cases in support for its proposition that the Tribunal must address the single maritime boundary in two operations. Suriname has responded to that argument in paragraphs 3.28-3.30 above.

3.57. Elsewhere Guyana claims that Suriname has sought to avoid these two cases.[265] In fact, Suriname has invoked these cases repeatedly, as demonstrated by the seven quotations and 27 citations to them in the Counter-Memorial.

3.58. What is most noteworthy about these two cases is that they support the fundamental point that in the establishment of a single maritime boundary, the conduct of the parties is not treated as a relevant circumstance unless there is an express or tacit agreement between those parties. Guyana avoids what the Court said about oil concession conduct at paragraph 304 of the *Cameroon-Nigeria* Judgment. Concerning *Qatar-Bahrain*, Guyana tries but fails to discredit the fact that in that case the Court did not give any relevance to a line between oil concession limits that had been imposed upon the Parties for many years.[266]

2. *Guyana's Attribution to Suriname of Arguments Not Made*

a. Apportionment

3.59. Paragraphs 5.24-5.28 of Guyana's Reply are placed under a heading: "The 1982 Convention and International Law Do Not Allow the Tribunal to Apportion Maritime Areas by Reference to General Considerations of Equity." Suriname agrees. At no place in the Counter-Memorial did Suriname request the Tribunal to enter into a process of apportionment based on general considerations of equity.

3.60. These paragraphs in Guyana's Reply, which contain extensive quotations from the case law, appear to be in reaction to the Section in Suriname's Counter-Memorial entitled: "The Requirement to Divide Any Area of Overlapping Coastal Front Entitlements Equitably." Of course, it is a requirement of the 1982 Convention that the delimitation of the exclusive economic zone and continental shelf "achieve an equitable solution." An equitable solution is the same thing as an equitable result. The way an equitable solution or equitable result is brought about in international maritime boundary law and practice between adjacent states is, in the view of Suriname, to divide the area of overlapping coastal front projections equitably.

3.61. Furthermore, Guyana's criticism of Suriname in this regard is singular, since Guyana uses almost the same form of words that it criticizes. For instance, Guyana refers to its 34°

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[265] RG, para. 7.10, p. 122.

[266] *Id.* at para. 4.48, n. 108, pp. 77-78.

line as "Guyana's proposed line of N34E, which divides the relevant maritime area equitably . . . ."[267]

3.62. The International Court of Justice is clear on the difference between equity and equitable result. Guyana even quotes from the Judgment of the Court in the *Cameroon-Nigeria* case to the effect:

> The Court is bound to stress in this connection that delimiting with a concern to achieving an equitable result, as required by current international law, is not the same as delimiting in equity.[268]

The case law has always made this distinction.

3.63. It remains, however, to try to understand why Guyana raises this issue and argues that Suriname seeks an apportionment in equity. Ultimately, it appears only that Guyana does not agree with Suriname's position. In particular, Guyana takes exception to the reliance that Suriname places on the *North Sea Continental Shelf* cases and *Gulf of Maine*. In this regard, it says of Suriname's arguments: "The approach is misconceived: the geographical circumstances are very different . . . ."[269] That criticism does not transform Suriname's position, which is founded in the law, into a call for equitable apportionment. Nor does it mean that the *Gulf of Maine* and the *North Sea Continental Shelf* cases are irrelevant to this case. Guyana's effort to characterize Suriname's position as an argument in equity is unpersuasive.

b. Geographically Disadvantaged States

3.64. Another characterization of Suriname's position is also unfounded. Chapter 5.II.B of Guyana's Reply is entitled: "The 1982 Convention and International Law Do Not Correct the Effects of History and Geography by a Redistribution of Territorial or Jurisdictional Maritime Zones in Favour of States that Claim to be 'Geographically Disadvantaged.'"

3.65. Suriname is not a Geographically Disadvantaged State within the meaning of the 1982 Convention. It has made no argument to that effect.

c. Suriname Does Not Claim To Be Germany or Cameroon

3.66. Throughout the Guyana Reply the assertion is made that Suriname believes it is the Federal Republic of Germany or Cameroon. Suriname has indeed relied on the Judgment of the Court in the *North Sea Continental Shelf* cases. Suriname, however, has not relied upon Germany's argument that it was entitled to "a just and equitable share" of the North Sea. Thus, rather than addressing the important elements of the Court's analysis in that case,

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[267] *Id.* at para. 7.53, p. 136.

[268] *Id.* at para. 5.27, pp. 90-91 (quoting Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening), Merits, Judgment, I.C.J. Reports 2002, p. 444, para. 294).

[269] RG, para. 5.25, p. 88.

Guyana apparently prefers to draw analogies that do not fit, and in all events were not argued by Suriname.

3.67. Even more interesting is Guyana's reference to the *Cameroon-Nigeria* case. As noted above, Guyana indicates that Suriname tried to avoid this case.[270] Yet Suriname, at paragraph 4.40 of the Counter-Memorial, referred to that judgment noting that conduct-based arguments did not prevail in that case (notably oil concession conduct and oil well practice). Suriname also quoted from the Court's judgment at paragraph 4.18 of the Counter-Memorial in relation to the legal regime of the single maritime boundary. In all, Suriname cites to the case 11 times in its Counter-Memorial.

3.68. Guyana adds to its error when it suggests Suriname is trying to be Cameroon. Suriname has no such aspirations; nor has Suriname set out arguments comparable to those made by Cameroon. Cameroon's argument for a maritime boundary with Nigeria implicated the rights of third states (Sao Tome and Principe and Equatorial Guinea); it was based on taking into account the coastline of virtually all the mainland coasts of the Gulf of Guinea, including that of a third state (Gabon), which the Court declined to do.[271] There is nothing comparable in Suriname's position.

E. Reaffirmation of Suriname's Position on the Law To Be Applied

1. *The Delimitation of the Territorial Sea Has Been Determined*

3.69. Suriname maintains its position that there is no agreement on the location of the land boundary terminus and, accordingly, that this Tribunal is without jurisdiction to decide the single maritime boundary. However, if the Tribunal decides that the 1936 Point is legally established and binding on the Parties and that it may identify a land boundary terminus, Suriname maintains that by parity of reasoning the Tribunal must also find that the 10° Line is legally established as the boundary in the territorial sea and binds the Parties on the same basis. Suriname's position on the territorial sea boundary is set out in paragraphs 4.56-4.72 of the Counter-Memorial.

3.70. Guyana argues that the 1936 Point is the agreed land boundary terminus and binding on the Parties, but that the 10° Line as the boundary in territorial waters is not agreed and not binding on the Parties. There is no basis in fact or in logic for an argument that the 1936 Point is legally established while the 10° Line must be disregarded.

3.71. As is set forth in Chapter 2, Section I, Part C, the historical record demonstrates that the 1936 Point and the 10° Line were established in combination by the Boundary Commission. Both the 10° Line and the 1936 Point were identified in the 1939 British draft treaty. The Netherlands and the United Kingdom regarded both as boundary elements established in combination and promoted them as such during negotiations that took place between 1936 up through the British proposal of 1961. Guyana's position now is nothing more than the negotiating position adopted by the United Kingdom in 1965, when it retained as its position those elements of the Boundary Commission's work that it favored (the 1936

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[270] *Id.* at para. 7.10, p. 122.

[271] *Cameroon v. Nigeria*, I.C.J. Reports 2002, pp. 442-43, para. 291.

Point) and rejected those that it no longer favored (the 10° Line). That British negotiating position is not legally binding on the Parties.

3.72. The final negotiating proposals exchanged prior to Guyana's independence, the Netherlands proposal of 1962 and the British proposal of 1965, demonstrate that there was no agreement on the 1936 Point/10° Line. If there were such an agreement, however, Guyana cannot now escape the 10° Line by arguing a change of circumstances. The abiding nature of boundary agreements is established beyond any doubt, and the doctrine of fundamental change of circumstances (even if present, and Suriname does not concede it to be present here) cannot be invoked as a ground for invalidating a boundary agreement.[272]

3.73. Further, if there was agreement on the 1936 Point/10° Line, the agreed territorial sea boundary extends to the 12-nautical-mile limit under international law.[273] The Counter-Memorial supported this position by reference to the award of the Arbitration for the Delimitation of the Maritime Boundary between Guinea-Bissau and Senegal.[274] The Reply rejects Suriname's reliance on the award.[275] First, Guyana submits that the present case between Suriname and Guyana has to be distinguished from that between Guinea-Bissau and Senegal because in the latter case, there was an agreement (an Exchange of Letters of 1960) and there was "no equivalent agreement between the United Kingdom and the Netherlands."[276] This statement is really no more than a repetition of Guyana's argument that the 1936 Point has been accepted by Suriname and Guyana, but the 10º Line has not. Second, the Reply argues that the 1960 Agreement did not specify outer limits of territorial waters; did not link the delimitation to any special circumstances; and followed the same line in the continental shelf.[277]

3.74. The Reply provides a number of arguments that in Guyana's view distinguish the 1960 Agreement from the situation with respect to the 10º Line:

> the 1936 Commissioners' report and the practise of the States thereafter up until the early 1960s was explicitly limited to a potential western navigational channel, only up to the then limit of the territorial sea, and not applicable to any continental shelf, which did not exist.[278]

As is set out in Chapter 2 of the Rejoinder, Guyana's argument that the 10º Line could be discarded in the view of changed circumstances is mistaken.[279] In addition, just like the 1960 Agreement, the delimitation of the territorial waters between Suriname and Guyana concerned all of the territorial waters of both Parties without specifying what that outer limit was.[280]

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272 *See* SCM, paras. 4.65-4.72, pp. 59-62; *see also supra* para. 2.52, p. 27.

273 *See* SCM, paras. 4.67-4.72, pp. 60-62.

274 *See id.* at paras. 4.68-4.71, pp. 60-62.

275 RG, para. 5.67, pp. 103-04.

276 *Ibid.*

277 *Ibid.*

278 *Ibid.*

279 *See supra* para. 2.52, p. 27.

280 *See* SCM, para. 4.67, p. 60.

Finally, contrary to what the Reply submits, the award does not indicate that its ruling on the territorial sea depended on the existence of a continental shelf boundary beyond the outer limit of the territorial sea.[281] The Tribunal observed that the territorial sea, the contiguous zone and the continental shelf were expressly mentioned in the 1960 Agreement and existed at the time of its conclusion.[282] In the present situation, the territorial waters were expressly mentioned in connection with the selection of the 10º Line, and the concept existed in the 1930s. As the award expressly observed in connection with its discussion of the exclusive economic zone, the Tribunal in that case was not concerned with the evolution of the content or even the extent of that concept.[283] The award thus indicates that under the principles of intertemporal law a change in the breadth of the territorial sea is not a reason to discard an existing boundary delimiting that territorial sea. In sum, none of the arguments of Guyana to distinguish the award from the present situation holds water.

3.75. The object and purpose of choosing the 10° Line was that navigation entering the river would be regulated by the Netherlands/Suriname and would not be subject to regulation by the United Kingdom/Guyana. Thus, the question is not just a technical issue of intertemporal law regarding the breadth of the territorial sea, but rather one of applying the contemporary law of the sea in light of the object and purpose of the agreement on the 10° Line. In this connection, an examination of the broad unilateral regulatory and enforcement powers of the coastal state with respect to navigation in the territorial sea in the 1982 Convention, as set forth in articles 19, 21, 22, 23, 25, 211(4) and 220(2)-(6), suggests that the application of the 10° Line to the full 12-nautical-mile territorial sea is required in order to achieve the object and purpose of the agreement.

2. *The Single Maritime Boundary in This Case Is Based on Relevant Geographic Features*

3.76. As demonstrated in Chapter 4 of Suriname's Counter-Memorial, the jurisprudence of the International Court of Justice and arbitral tribunals establishes that a single maritime boundary is to be based on the geographical circumstances of a case. In Suriname's view, there is no aspect of the conduct of the Parties in this case that meets the applicable tests of legal relevance. Suriname maintains its position that the present dispute can and should be resolved exclusively on the basis of the coastal geography of the delimitation area.

3.77. The coastal geography is of fundamental importance, as the coast is the basis of title to maritime areas.[284] It is Suriname's sovereignty over the coastline facing the delimitation area that gives rise to and validates Suriname's claim of title to the maritime area in front of that coast.

3.78. Maritime boundary delimitation between adjacent states takes place in the area of the overlap of coastal front projections. Suriname acknowledges that the coastal front projections of the Parties meet and overlap. Such areas of overlap must be divided equitably in light of relevant geographical circumstances, and the boundary dividing an area of overlapping coastal front projections must not unduly "cut off" the seaward projection of the coast of either

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[281] *See* para. 85 of the Award, quoted at SCM, paras. 4.70-4.71, p. 61.

[282] *See ibid.*

[283] *See ibid*.

[284] *See* SCM, paras. 4.19-4.22, pp. 45-46.

neighboring state. This is the principle of non-encroachment, and it requires that delimitation should accord to each party its own natural prolongation, "without encroachment on the natural prolongation of the land territory of the other."[285]

3.79. In considering the delimitation method to be applied in a given area, it is common practice to begin with the equidistance line. Suriname has done so. As discussed in Chapter 4 of Suriname's Counter-Memorial and below, the equidistance method does not produce an equitable result when employed in these geographic circumstances. The reason it does not do so is that it responds to incidental coastal features of the geographical situation. In doing so, as it often does in adjacent state situations, it cuts off the projection of the coastal front of one of the states—in this case it cuts off the projection of Suriname's coastal front. Accordingly, another delimitation method is required to create an equitable solution.

3.80. There is no dispute that Suriname and Guyana are adjacent states. The coastlines of Suriname and Guyana change direction in the vicinity of the land boundary terminus and form an angle where they meet. The bisector of the angle that is formed by the adjacent coastal fronts of Suriname and Guyana extends from the coast at a bearing of 17° and would appear to create an equal division of the area where the maritime projections of the coasts of Suriname and Guyana meet and overlap. Suriname maintains that there are reasons based in geography to adjust the line formed by the angle bisector to the 10° Line in order to achieve an equitable delimitation as required by the 1982 Convention.[286]

II. The Significance of Conduct of the Parties

3.81. At one place in its Reply, Guyana states that

> conduct is significant not because it has a legally binding effect *per se*. Rather, it is relevant because *it may tend to prove or disprove a party's contentions about the equitableness of the boundary line it is advocating* (or opposing) in formal proceedings. Suriname itself acknowledges the point.[287]

Suriname not only acknowledges the point, Suriname believes this is a fair summary of the role that the facts of conduct have in this case: without agreement, and both Parties agree that there is no agreement here, the facts pertaining to conduct are only relevant to understanding what each Party truly thinks about its own formal claim. Where conduct does not rise to the level of agreement, it produces no binding legal effect, and its utility for a tribunal is limited to understanding the true positions of the Parties. That is, the facts of conduct expose each party's true, as opposed to formal, claim.

3.82. Suriname believes that the facts related to conduct set forth by both Parties in the written pleadings thus far—diplomatic conduct, oil conduct, legislative conduct, fisheries and law enforcement conduct—demonstrate conclusively that conduct provides no indication of an agreement, express or tacit, between the Parties as to the location of their maritime boundary.

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[285] North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Merits, Judgment, I.C.J. Reports 1969, p. 53, para. 101.

[286] *See* SCM, paras. 6.45-6.60, pp. 102-06.

[287] RG, para. 4.6, p. 60 (emphasis added).

In its Reply, Guyana appears to agree. At no place does Guyana argue that the 34° line has become binding on Suriname through the legal operation of acquiescence. Nor does Guyana argue that Suriname is estopped from challenging the 34° line. Guyana also does not argue that there is an express or tacit agreement between the Parties pertaining to the 34° line. Indeed, Guyana distinguishes its position from the "express or tacit agreement" standard that has been set forth in recent jurisprudence as the test for relevant conduct.[288] Further, the references to a *modus vivendi*,[289] prominent in the Memorial, no longer appear in the Reply.

3.83. And yet, Guyana continues to argue that its 34° line is based in the conduct of the Parties (both Parties), and that the Tribunal should impose it on Suriname for that reason. For example, Guyana writes that, "notwithstanding their formal positions, the actions of the Parties indicate that they *all* regarded as equitable the delimitation produced by the [N34E] historical equidistance line claimed by Guyana."[290] More than once Guyana writes that the Parties' oil conduct "crystalised around" the 34° line.[291] Guyana continues with: "The conduct of the Parties thus demonstrates that, regardless of their formal legal positions and the absence of an agreement (tacit or otherwise), they each understood that a delimitation along the N34E historical equidistance line would be equitable."[292]

3.84. The facts presented by both Parties simply do not support these contentions, but rather contradict them at every turn. This is clear even upon a cursory inspection of the facts. Deeper inspection only confirms the vast difference between Guyana's conduct arguments and the facts of conduct in this case. For Guyana to continue this line of argument is to ignore decades of overlapping oil practice, diplomatic deadlock, and fisheries and other law enforcement activity, not least that by Suriname in June 2000 against the CGX drill ship, all of which conduct is evidence of a notorious, long-lived, public, and contentious maritime boundary dispute: a dispute evidenced not only in the formal claims of the Parties, but in the conduct of the Parties—deeds and actions conducted by the Parties in support of their boundary claims over the decades.

3.85. Early in the Rejoinder, Guyana took issue with what it referred to as the "tone" of Suriname's Counter-Memorial.[293] In the Counter-Memorial Suriname called Guyana's argument that the Parties' oil conduct "demonstrates respect for the [N34E] historical equidistance line as the maritime boundary between the two States"[294] a "gross misrepresentation of the facts."[295] Later in the Counter-Memorial, Suriname called similarly unfounded statements regarding fisheries conduct "slippery and misleading."[296] The tone of Suriname's Counter-Memorial was born of exasperation and incredulity. In its Reply, Guyana provided no additional evidence of conduct that might support its argument. Instead, Guyana

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288 RG, para. 4.7, pp. 60-61.

289 MG, para. 4.1, p. 37; para. 7.34, p. 88; para. 9.25, p. 118.

290 RG, para. 4.2, p. 59.

291 *Id.* at para. 4.48, n 108, pp. 77-78; para. 5.56, p. 101.

292 *Id.* at para. 5.56, p. 101.

293 *Id.* at para. 1.5, p. 2.

294 MG, para. 4.21, p. 47.

295 SCM, para. 5.10, p. 67.

296 *Id.* at para. 5.81, p. 90.

complained about Suriname's tone and continued its conduct drumbeat with unfounded statements like those above in the apparent hope that the lack of evidence to support such assertions would go unnoticed. Having chastised Suriname for its "tone," Guyana could be expected to provide new facts to back up its interpretations. Guyana provided none.

3.86. Suriname stands by its criticisms of Guyana's conduct argument. Those criticisms are well-founded. Suriname and Guyana have both presented voluminous evidence of the Parties' conduct in this case. Suriname set forth the facts of conduct in some detail in the Counter-Memorial. These facts largely complemented and augmented the facts of conduct earlier presented by Guyana in its Memorial. With rare exception the conduct itself—in other words, what happened—is not in dispute. What is in dispute is what that conduct means for this delimitation.

3.87. Guyana believes that conduct is relevant to the delimitation of the single maritime boundary between Suriname and Guyana; that is, to the actual drawing of the maritime boundary between the Parties. Specifically, Guyana believes that the facts of conduct in this case demonstrate an understanding between the Parties that "a delimitation along the N34E historical equidistance line would be equitable."[297]

3.88. In contrast, Suriname believes that conduct is legally irrelevant and unhelpful for the primary exercise at hand: establishing the maritime boundary between the Parties in accordance with the applicable law. The conduct of the Parties is not instructive because it does not indicate any agreement between the Parties. At best, conduct is evidence only of the claims of the Parties. Each Party's unilateral conduct provides an indication of the content and longevity of each Party's formal claim. Conduct that aligns with a Party's formal claim indicates that its formal claim represents that Party's true claim. Conduct that consistently diverges from a Party's formal claim, such as Guyana's equidistance position under its EEZ legislation and fisheries enforcement, indicates that the formal claim may be an exaggerated version of that Party's true claim.

3.89. In the following paragraphs Suriname reviews the facts of conduct and demonstrates that they expose the true positions of the Parties and then reviews the appropriate standard for the legal relevance of conduct and measures the conduct of the Parties against that standard to confirm that conduct is not legally relevant—and still less, determinative—in this delimitation.

A. Conduct of the Parties in This Case

1. *Diplomatic (1958-1968)*

3.90. Guyana maintains that the diplomatic history in the period 1958 and following demonstrates a commitment on the part of the Netherlands to use the equidistance method for the continental shelf boundary between Suriname and Guyana. Guyana tries to build its case for the 34° line on that foundation. However, Guyana overstates what the record shows, and its argument runs headlong into two insurmountable obstacles: as discussed in Part E below, equidistance and the 34° line share no geographic or geometric similarities; and a brief flirtation with equidistance ended with finality in the exchange of treaty proposals in 1961 and 1962 and cannot be considered "agreement" by any standard that is relevant to the establishment of the single maritime boundary between Suriname and Guyana.

[297] RG, para. 5.56, p. 101.

3.91. On the whole, the story is not complicated. In the following paragraphs, Suriname will establish the following points:

- after 1954 within the Kingdom of the Netherlands Suriname determined its own boundary positions;
- after 1954 the role of the Netherlands Foreign Ministry was one of advisor to Suriname, and spokesman for Suriname at the international level;
- the 1958 proposal by the Netherlands for an agreement on a continental shelf boundary in keeping with Article 6(2) of the Continental Shelf Convention was not acted upon by the United Kingdom;
- the United Kingdom took three years to respond and when it did so at the end of 1961 it proposed a comprehensive treaty addressing all boundary issues in a way most favorable to Guyana;
- the 1961 British proposal was unacceptable to Suriname, and in 1962 the Netherlands put forward a new comprehensive proposal affirming the 10° Line; and
- after 1962, the diplomatic documents show that there was no forward movement on this issue, and soon preoccupations with Guyana's independence and boundary issues in the North Sea became motivating factors in the diplomacy of the metropolitan countries.

a. The 1954 Charter of the Kingdom of the Netherlands

3.92. In 1954, Suriname ceased being a colony. It became responsible for its own internal affairs. Foreign affairs and defense remained responsibilities of the Kingdom of the Netherlands, but Suriname determined its own treaty relationships and therefore also its own boundary positions. As a result, the officials of the Netherlands Foreign Ministry might advise Suriname on boundary policy, but they did not formulate it. Annex SR44 contains a brief overview of the constitutional situation within the Kingdom of the Netherlands during this time.[298]

b. The 1958 Proposal of the Netherlands and British Reaction

3.93. By 1957-1958, both Suriname and Guyana were in the early stages of considering offshore petroleum programs, and the need for a continental shelf boundary became apparent. The Netherlands took the initiative and in an *aide mémoire* of 6 August 1958[299] set out a substantive and a procedural proposal. Concerning substance, the Netherlands proposed that Article 6(2) of the Continental Shelf Convention form the basis of an agreement.[300]

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[298] The Constitutional Position of Suriname Within the Kingdom of the Netherlands Between 15 December 1954 and 25 November 1975, at SR, Vol. II, Annex SR44.

[299] *Aide Mémoire* from the Netherlands to the United Kingdom (6 August 1958), at MG, Vol. II, Annex 66.

[300] *Ibid.* It may be recalled that at this time neither the Netherlands nor the United Kingdom had formally approved the Continental Shelf Convention, nor had it entered into force.

Concerning procedure, the Netherlands proposed to record the agreement in an exchange of notes (divorcing the continental shelf issue from other boundary issues) to which a map would be attached showing the agreed line.[301]

3.94. It is entirely speculative to consider whether the Parties would have ever agreed on a line to be put on a map. The role of special circumstances in this context, the 10° Line territorial sea boundary, and the need to connect the 10° Line to the Article 6(2) line were all complications to be resolved. What we do know is that the United Kingdom did not take the opportunity to resolve the continental shelf boundary on that basis. Instead, it continued working on a draft of a comprehensive boundary treaty, bringing in all the land and river problems. It took three more years for the United Kingdom to complete its draft and to make the proposal that it did in December 1961.

3.95. It is clear why the United Kingdom did not take the opportunity offered by the Netherlands' proposal in 1958. The records of the British Foreign Ministry set out the negotiating calculus of British officials and indicate that the United Kingdom intended to make adjustments in the offshore, or at a minimum withhold agreement on the offshore, in order to get what it wanted on the territorial issues.

3.96. One document that records this policy choice is the same document that has a prominent place in Guyana's pleadings to support Guyana's argument that in 1958 the two sides were in *agreement* on the continental shelf matter.[302] It is a communication between two British officials, one Scarlett from the Colonial Office and one Anderson from the Foreign Office, and is dated 16 October 1958. It is found in Volume II, Annex 23 of Guyana's Memorial. The document makes clear that at this time British officials understood that the matter of the "New River territory" was going to be a big problem. As Scarlett said:

> I fear this can only mean that agreement on the terms of the Treaty is something that lies a very long way ahead of us unless we have ourselves some levers to move matters a little more speedily. Agreement on the boundary of the continental shelf might prove useful as such a lever, so we now have an added reason for treating this as part of the Treaty as a whole rather than as a matter to be dealt with separately by an Exchange of Notes.[303]

3.97. Another similar document, found at Annex SR12 to this Rejoinder, dated 20 November 1958, is from Killick in the Foreign Office to Etherington-Smith in the British Embassy in The Hague. It says:

> For your own information, we did consider taking up the Dutch idea of the separate Exchange of Notes to cover the Continental Shelf, but there are certain points in the Draft Treaty on which we rather expect that the Dutch may make some trouble, and we

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[301] *Ibid*.

[302] *See, e.g.*, MG, para. 3.33, pp. 27-28.

[303] Letter of E.W.A. Scarlett of the Colonial Office to C.M. Anderson of the Foreign Office (16 October 1958), at MG, Vol. II, Annex 23.

> have therefore decided that it would be best to keep the Continental Shelf issue, on which we know they want an agreement, up our sleeves in case we need a lever to encourage them to accept some of our other proposals. The point on which we feel there may be difficulty is the old chestnut of the New River territory.[304]

3.98. Another document, found at Annex SR13 to this Rejoinder, dated 21 November 1958 between Killick and Scarlett makes the same point.[305] These messages predate the diplomatic note sent at the end of November by the United Kingdom in which it politely welcomed the proposal of the Netherlands but set it aside and indicated it was drafting a treaty which would contain provisions for the delimitation of the continental shelf.[306]

c. The 1961 British Proposal and Suriname's Reaction

3.99. The British proposal, presented at the end of 1961, caused an immediate and negative reaction in Suriname.

d. The 1962 Treaty Proposal of the Netherlands Ended Any Suggestion of Common Support for the Equidistance Method in This Case

3.100. On 17 September 1962, the Netherlands proposed a draft treaty that employed the 10° Line to delimit the territorial sea and the continental shelf, a position that has been maintained by Suriname up to the present.[307] The proposal was designed to open up new negotiating possibilities to overcome the deadlock brought about by the 1961 British proposal. Annex SR4 is a copy of the *Aide Mémoire* of the Netherlands to the United Kingdom that transmitted the new 1962 proposal to the United Kingdom and made all this clear.[308] Thus, whatever interest the Netherlands had in equidistance/special circumstances as referred to in Article 6(2) of the Continental Shelf Convention as a delimitation method for the boundary with Guyana in 1958 had ceased, and this had been communicated formally to the United Kingdom. Guyana's Reply takes issue with the fact that the 1962 treaty proposal of the Netherlands to the United Kingdom brought to an end any period of mutual endorsement of the equidistance method. The Reply says that neither the wording of the proposed treaty text itself nor internal documents support this view.[309] Guyana's contention is not supportable.

3.101. The 1962 proposal of the Netherlands was a comprehensive boundary proposal that responded to the comprehensive British proposal of 1961. It will be recalled that concerning maritime areas, the 1961 British proposal set out a 10° Line in the territorial sea, and a

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304 Letter of J.E. Killick of the Foreign Office to R.G.A. Etherington-Smith of the British Embassy in the Hague (20 November 1958), at SR, Vol II, Annex SR12.

305 Letter of J.E. Killick of the Foreign Office to E.W.A. Scarlett of the Colonial Office (21 November 1958), at SR, Vol. II, SR13.

306 Diplomatic Note from the United Kingdom to the Netherlands (November 1958), at MG, Vol. II, Annex 67.

307 SCM, paras. 3.61-3.62, p. 37. For the analysis supporting these conclusions see SCM, paras. 3.14-3.26, pp. 19-23. The draft treaty is reproduced at MG, Vol III, Annex 91.

308 *Aide Mémoire* (17 September 1962), at SR, Vol. II, SR4.

309 RG, para. 4.27, p. 68.

segmented equidistance line for the continental shelf.[310] The 1962 response of the Netherlands likewise was a comprehensive proposal. Its only provision concerning the maritime area is Article 4 which states:

> In the sea and on the bottom of the sea the frontier shall follow the line with a true bearing 10° East of true North from the end of the "thalweg" mentioned in Article 2, Paragraph 1.[311]

3.102. Guyana maintains that the 1962 treaty proposal of the Netherlands was not comprehensive in that it did not, for some reason, address specifically the continental shelf, and that the language of Article 4 should be understood to be limited only in its application to the territorial sea.[312] Guyana's contention is not supported by the diplomatic context. Notably, shortly after receipt of the proposal of the Netherlands, on 30 October 1962, British officials, including Sir Ralph Grey, the Governor of British Guiana, and P. J. Allott of the Foreign Ministry Legal Office, met in London to review the proposal and to plot strategy. The report of that meeting indicates that those officials understood that the Dutch proposal "suggested an alternative method of dividing the territorial waters in the continental shelf."[313]

e. Documents That Post-Date 1962 Simply Confirm the Foregoing Summary of Events and Reflect New Preoccupations

3.103. Guyana's Reply submits nine documents from the period post-1962 pertinent to the Suriname-Guyana situation that were found in the restricted archives of the Netherlands Foreign Ministry.[314] Guyana believes that these documents assist its arguments and

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[310] Article VII of the 1961 proposal states:

> The boundary between the territorial seas and contiguous zones (so far as they respectively attend) and the continental shelves of British Guiana and Surinam shall be formed by the prolongation seawards of the line drawn on a bearing of 010 degrees referred to in Article I (2) to a distance of 6 miles from the more seaward of the concrete marks referred to, thence on a bearing of 033 degrees for a distance of 35 miles, thence on a bearing of 038 degrees for a distance of 28 miles, thence on a bearing of 28 degrees to a point of intersection with the edge of the continental shelves as defined by international law.

1961 British Draft Treaty: British Guiana-Surinam Boundary, at MG, Vol. III, Annex 90.

[311] Letter of Royal Netherlands Embassy to R.W. Piper, West Indian Department, Colonial Office (17 September 1962) with 1962 Dutch Draft Treaty: Treaty between the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland establishing the frontier between Surinam and British Guiana, at MG, Vol. III, Annex 91.

[312] RG, para. 4.27, pp. 68-69.

[313] Note of Meeting Held in the Governor's Room, Colonial Office (30 October 1962), SR, Vol. II, Annex SR14.

[314] Letter regarding the Arrangement of Boundaries of J.A. Pengel, Prime Minister of Suriname (12 February 1964), at RG, Vol. II, Annex R32; Memorandum to Director, Western Hemisphere, regarding the Borders between Surinam and British Guyana and Surinam and French Guyana (11 March 1964), at RG, Vol. II, Annex R33; Memorandum regarding the Continental Shelf of Suriname (9 April 1964), at RG, Vol. II, Annex R34; Preparatory Memorandum for Meeting with Prime Minister of Surinam (29 April 1964), at RG, Vol. II, Annex R35; Short Report of the discussions held on 2, 16 and 23 April 1964 at the Department of Foreign Affairs about a proclamation relating to the continental shelf of Surinam (April 1964), at RG, Vol. II, Annex R36; Memorandum from E.O. Baron van Boetzelaer on Border Arrangement Surinam/British Guyana (19 November 1965), at RG, Vol. II, Annex R37; Memorandum on Surinam–British Guyana Boundary (31 March 1966), at RG, Vol. II, Annex R38; Memorandum from Legal Affairs to Minister regarding

"thoroughly undermine Suriname's case."[315] It also says that the "documents speak for themselves."[316] Suriname agrees that the documents speak for themselves. The documents upon which Guyana places so much emphasis confirm the summary of the preceding paragraphs and demonstrate the growing dilemma faced by officials of the Foreign Ministry of the Netherlands as they confronted the continental shelf boundary matter with the Federal Republic of Germany in the North Sea. Suriname will briefly review these documents below but would emphasize the importance of studying the whole of each document and its bureaucratic and historical context.

3.104. The first of the nine documents is a briefing/policy paper submitted by the Prime Minister of Suriname to the Netherlands Foreign Ministry dated 12 February 1964.[317] Guyana submits the document in support of its argument about the Suriname-French Guiana relationship.[318] More to the point in these proceedings, the document records the position of Suriname relating to the boundaries with Guyana including that the boundary in the territorial sea and continental shelf is the 10° Line.

3.105. The second document is Memorandum 30/64 of 11 March 1964.[319] This is a briefing paper prepared in the Netherlands Foreign Ministry. It was prepared in reaction to the foregoing memorandum dated 12 February 1964 from the Prime Minister of Suriname, which had among other things affirmed the 10° Line position of Suriname.[320] The author of the document sets out a summary of the history of the matter and refers to equidistance and the related notes from 1958 and 1959. As can be seen, a handwritten note on the Dutch original of the memorandum observes that "Suriname later came back from that position."[321]

3.106. The third document is a record of a committee of the Foreign Ministry of the Netherlands dated 9 April 1964.[322] This document mostly records an unresolved discussion

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Delimitation of the Continental Shelf (27 June 1966), at RG, Vol. II, Annex R39; Memorandum from Legal Affairs to Director, Western Hemisphere, on Draft Memoranda to Georgetown and Paris regarding border issues (18 October 1966), at RG, Vol II, Annex R40.

315 RG, para. 1.6, pp. 2-4.

316 *Ibid*.

317 Letter regarding the Arrangement of Boundaries of J.A. Pengel, Prime Minister of Suriname (12 February 1964), at RG, Vol. II, Annex R32.

318 RG, para. 3.48, pp. 51-52.

319 Memorandum to Director, Western Hemisphere, regarding the Borders between Surinam and British Guyana and Surinam and French Guyana (11 March 1964), at RG, Vol. II, Annex R33.

320 Letter regarding the Arrangement of Boundaries of J.A. Pengel, Prime Minister of Suriname (12 February 1964), at RG, Vol. II, Annex R32.

321 This handwritten note is included on the first page of the original of Memorandum 30/64 contained at RG, Vol. II, Annex R33. The Dutch text reads "Daarvan is Suriname naderhand teruggekomen." This handwritten note is not included in the translation provided by the Reply. The handwritten note is more legible on another copy of the first page of memorandum 30/64. *See* SR, Vol. II, Annex SR8.

Another handwritten note in the margin of this section of the memorandum discussing the exchange of notes reads: "Only in principle" ("Alleen in beginsel" in Dutch). That handwritten note is not legible on the copy of page 1 of memorandum 30/64 reproduced in Annex R33 of the Reply. The note can be read from the copy of the first page of memorandum 30/64 included in Annex SR8 to this Rejoinder.

322 Memorandum regarding the Continental Shelf of Suriname (9 April 1964), at RG, Vol. II, Annex R34.

about whether Suriname could make a unilateral proclamation of its boundaries. It does note that "Suriname does not wish to observe the equidistance principle."[323]

3.107. The remaining documents submitted by Guyana are directly related to the situation in which officials of the Netherlands Foreign Ministry found themselves when called upon both to address the situation with Germany while doing their duty with regard to Suriname. Negotiations between the Netherlands and Germany began in 1964 and the Special Agreements instituting proceedings in the *North Sea Continental Shelf* cases were signed on 2 February 1967.[324] During those years, as one would expect, officials of the Netherlands were faced with the challenge to support the Netherlands boundary position vis-à-vis the Federal Republic of Germany and the different position of Suriname vis-à-vis Guyana. Thus, it should not be surprising that the records of the Foreign Ministry include documents that underscore the difficulties that Foreign Ministry officials face in such contexts.

3.108. Thus the fourth paper is dated 29 April 1964 and is an internal Foreign Ministry note about an upcoming meeting between the Prime Minister of Suriname and the Foreign Minister of the Netherlands.[325] It is the first of the documents that records the concern about the impact of Suriname's position on the Netherlands' position in the North Sea. All this paper says about the boundary between Suriname and Guyana is that "it will be proposed delaying the proclamation for some time in order not to weaken the negotiating position in the discussion with the Germans about the continental shelf in the North Sea."[326]

3.109. The fifth paper is a report of a set of meetings between Suriname and Dutch officials dated 2, 16 and 23 April 1964.[327] Guyana also submits this document in connection with its argument about the Suriname-French Guiana situation.[328] What Guyana neglects to mention is that the same report also records that:

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[323] *Ibid.*

[324] Negotiations between the Federal Republic of Germany and the Netherlands and the Federal Republic of Germany and Denmark concerning the delimitation of the continental shelf in the North Sea led to the establishment of partial boundaries in December 1964 and June 1965. See North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Merits, Judgment, I.C.J. Reports 1969, p., 17, para. 6. When separate negotiations failed to reach any further agreement, tripartite negotiations between the three took place in February-March, May and August 1966. *Id.* at p. 18, para. 9. Throughout these negotiations, the Netherlands and Denmark held the view that the equidistance method must be used to delimit their boundaries. *Id.* at pp. 17-18, paras. 7-9. An agreement on the continental shelf boundary based on equidistance was signed by the Netherlands and Denmark on 31 March 1966. *Id.* at p. 18, para. 9. The Federal Republic of Germany protested that agreement in an Aide-Memoiré dated 25 May 1966. *Ibid.* When it became clear that no agreement could be reached, the three states agreed to submit their dispute to the International Court of Justice. *Ibid.* Special Agreements to submit the dispute to the International Court of Justice were initialed in August 1966 and signed on 2 February 1967. *Id.* at para. 10, p. 18.

[325] Preparatory Memorandum for Meeting with Prime Minister of Surinam (29 April 1964), at RG, Vol. II, Annex R35.

[326] *Ibid.*

[327] Short report of the discussions held on 2, 16 and 23 April 1964 at the Department of Foreign Affairs about a proclamation relating to the continental shelf of Surinam (April 1964), at RG, Vol. II, Annex R36.

[328] In its Reply, Guyana states that this document confirms that Suriname, the Netherlands and France reached "agreement" that this boundary should be based on equidistance, and that an "agreement in principle was reached on a boundary line along an azimuth of N30E, which Suriname considered a straight-line or simplified version of the equidistance line." *See* RG, para. 1.6, pp. 2-4. The document does not state

> [w]ith regard to the Western boundary, it was agreed that as long as no other boundary line has been determined by agreement, the boundary will be a line with a bearing of 10° East of the True North . . . .[329]

The report further notes that "[s]pecial circumstances justify a deviation from the equidistance line in this case."[330] It also records the concern that Suriname's position was in some respects similar to arguments made by Germany to justify deviation from the equidistance line vis-a-vis the Netherlands.[331] It was out of this concern that "the Netherlands asked Suriname to wait with issuing the proclamation [on the continental shelf] until agreement has been achieved in principle in the Dutch-German negotiations; this would involve a delay of approximately two months."[332]

3.110. The sixth document is a one page internal memorandum dated 19 November 1965,[333] some 17 months after the date of the document previously mentioned. Guyana submits this one page document for the general proposition that "[i]nternally, the Dutch Foreign Ministry referred to the 'weakness, not to say the impossibility' of Suriname's boundary claim, which it considered 'exaggerated and unrealistic.'"[334] A review of the entire document shows that it is entirely unclear what aspect of Suriname's position was so regarded, as the criticism was reserved for unspecified "certain border areas" and "(part of) their [Suriname's] claims." The author notes that discussions would be held both to "obtain a clear insight into the wishes of Suriname" and to try to convince Suriname of the Dutch view.[335]

3.111. The seventh document, dated 31 March 1966, is a report of discussions between the Foreign Minister of the Netherlands, the Prime Minister of Suriname and other government officials of the two countries.[336] In the words of Guyana, this document records that "the Netherlands Foreign Minister 'emphatically pointed out' to Suriname's Prime Minister that Suriname 'must not deviate from the equidistance principle for the delimitation of the continental shelf.'"[337] It is useful to look at the entire paragraph that Guyana quotes from. It states in full:

> M. also emphatically pointed *that if Surinam wishes to achieve anything with British Guyana*, it must not deviate from the

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anything about any agreement between Suriname, the Netherlands and France. It only describes Suriname's preferred line with a view to upcoming negotiations with France.

329 Short Report of the Discussions Held on 2, 16 and 23 April 1964 at the Department of Foreign Affairs About a Proclamation Relating to the Continental Shelf of Surinam (April 1964), at RG, Vol. II, Annex R36.

330 *Ibid.*

331 *Ibid.*

332 *Ibid.*

333 Memorandum from E.O. Baron van Boetzelaer on Border Arrangement Surinam/British Guyana (19 November 1965), at RG, Vol. II, Annex R37.

334 RG, para. 1.6, pp. 2-4. *See also id.* at para. 4.18, p. 64.

335 Memorandum from E.O. Baron van Boetzelaer on Border Arrangement Surinam/British Guyana (19 November 1965), at RG, Vol. II, Annex R37.

336 Memorandum on Surinam–British Guyana Boundary (31 March 1966), at RG, Vol. II, R38.

337 RG, para. 1.6, pp. 2-4.

> equidistance principle for the delimitation of the continental shelf. As regards the triangle in the South, one of Surinam's powerful trump cards is that it owns the Corantine River, with which it can apply pressure in various ways if necessary. References could be made to this without resorting to threats during the discussions in London.[338]

3.112. The language of the statement is clear—the Foreign Minister of the Netherlands did not instruct Suriname. He advised Suriname of his view that *if* Suriname wished to make progress in reaching agreement with Guyana, then Suriname should adhere to equidistance. This statement cannot be read as the ultimatum Guyana suggests. If anything, this report, which predates the Marlborough House meeting by a few months, confirms the reality of the relationship between the officials of the Netherlands Foreign Ministry and Suriname. Those officials might not have appreciated Suriname's position and they might have given Suriname negotiating advice, but they did not dictate Suriname's boundary position.

3.113. Whatever the officials of the Netherlands Foreign Ministry may have thought about Suriname's positions, the document records the Netherlands' position that it was not legally bound by previous discussions with the British. It says: "the Kingdom is not bound by this."[339] This document clearly demonstrates that the Government of the Netherlands did not believe it had any commitment that equidistance would apply to the continental shelf boundary as Guyana contends.[340]

3.114. The eighth document is an internal memorandum of the Netherlands Foreign Ministry dated 27 June 1966 that reports on what occurred at the Marlborough House meeting a few days earlier.[341] The memorandum was evidently authored by Professor Willem Riphagen, the senior legal advisor to the Ministry in charge of the boundary situation with the Federal Republic of Germany and soon to become Agent for the Netherlands in the *North Sea Continental Shelf* cases. On the basis of this document, Guyana submits that:

> the Netherlands criticised Suriname for attempting "to claim a larger part of the CS than that country is entitled to, according to the equidistance principle" and resolved to "expressly instruct the Suriname delegation never to appeal to the view that the delimitation of the Suriname CS should deviate from the equidistance line *in law*."[342]

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338 Memorandum on Surinam–British Guyana Boundary (31 March 1966), at RG, Vol. II, Annex R38 (emphasis added).

339 *Ibid.*

340 RG, para. 4.18, p. 64.

341 Memorandum from Legal Affairs to Minister regarding Delimitation of the Continental Shelf (27 June 1966), at RG, Vol. II, Annex R39.

342 RG, para. 4.30, pp. 69-70. *See also* RG, para. 1.6, pp. 2-4; para. 4.20, p. 65; para. 7.9, pp. 121-22. It should be noted that the comma in the translation provided by the Reply between "entitled to" and "according to the equidistance principle" is not included in the original Dutch text of the Memorandum. The difference is clear. The original Dutch text of the memorandum of 27 June 1966 and a translation into English are contained in RG, Vol. II, Annex R39.

3.115. It is apparent that Professor Riphagen was concerned about the effect of Suriname's boundary position on the Netherlands' case in an eventual World Court proceeding with Germany:

> As you know, there is a dispute between the Netherlands and Germany about the delimitation of the CS, in which the Netherlands upholds the equidistance principle and Germany claims a larger part of the CS, inter alia, by appealing to "special circumstances". It appears that this dispute will be submitted to the International Court of Justice in the near future.
>
> If it were to become apparent that the same Kingdom has adopted a different *legal* position in another part of the world from that which it adopts in the Netherlands, *the chance of winning this case becomes extremely unlikely.*
>
> This is a typical case in which the interests of the different parts of the Kingdom do not coincide, and the Kingdom must nevertheless adopt one position. After all, it is not possible to construct a legal position in this case which would work to the advantage of Surinam, but not to the advantage of Germany, and therefore to the disadvantage of the Netherlands.
>
> * * * *
>
> [I]f Suriname continues to adopt a legal position vis-à-vis third states which *deviates* from the equidistance principle, this will be *fatal* for the Dutch position before the Court.[343]

Clearly, Professor Riphagen's purpose in drafting the document was to advise the Government about possible prejudice to the Netherlands in dispute settlement proceedings with Germany.

3.116. Second, since this is an internal memorandum, the Netherlands of course did not criticize Suriname as Guyana indicates. Rather, the memorandum simply makes the self evident point that if Suriname's position became evident to the Court it could undermine the credibility of the Netherlands' position in its case with the Federal Republic of Germany.[344]

3.117. Finally, the memorandum of Professor Riphagen does not "resolve" to expressly instruct the delegation of Suriname on a position to take in the future, as stated by Guyana in its Reply. Rather, the memorandum of Professor Riphagen observes and proposes:

> it appears to me that the Government of the Kingdom should expressly instruct the Surinam delegation never to appeal to the

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[343] Memorandum from Legal Affairs to Minister regarding Delimitation of the Continental Shelf (27 June 1966), at RG, Vol. II, Annex R39.

[344] *Ibid.*

> view that the delimitation of the Surinam CS should deviate from the equidistance line *in law*.[345]

In any event, the Netherlands never communicated any such instruction to the delegation of Suriname, which had told the delegation of Guyana at the Marlborough House talks a few days earlier that Suriname's position was that the continental shelf boundary in law should follow the 10° Line.[346]

3.118. The final document offered by Guyana is an internal memorandum of the Netherlands Foreign Ministry dated 18 October 1966—again, apparently authored by Professor Riphagen.[347] Guyana submits this document to establish that:

> [t]he Dutch specifically concluded, and advised Suriname, that the so-called "navigation channel" that Suriname invokes in these proceedings in support of its 10° claim is not in law a "special circumstance."[348]

3.119. Again, it is clear in the document that Professor Riphagen was preoccupied with the Netherlands' position vis-à-vis the Federal Republic of Germany in the North Sea and was anxious to keep the entire Kingdom united behind equidistance without regard to any special circumstances:

> Our only hope lies in an *absolute* commitment to the equidistance line rejecting all factors based on history, navigation or "equity."[349]

3.120. These documents relied on by Guyana do little more than indicate normal internal tension between various parts of the Kingdom of the Netherlands. They do not indicate, as Guyana claims, that the Netherlands considered that an equidistance line was an equitable solution to delimit the continental shelf boundary between Suriname and Guyana.[350] They instead reflect the Netherlands' understanding that Suriname would argue "special circumstances" were present that justified Suriname's 10° Line position. And they record that the Netherlands did not believe it was bound to any of the proposals that had been made to the United Kingdom over a long period of time.

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345 *Ibid.*

346 The memorandum observes "during its discussions with the delegation of Guyana regarding the delimitation of the CS between the two countries, the Surinam delegation in London adopted the point of view that this delimitation should not follow the equidistance line, but should follow a different course, on the grounds of 'special circumstances' (in the sense of Art. 6 of the Geneva Convention on the CS)." *Ibid.*

347 Memorandum from Legal Affairs to Director, Western Hemisphere, on Draft Memoranda to Georgetown and Paris regarding border issues (18 October 1966), at RG, Vol. II, Annex R40.

348 RG, para. 1.6, pp. 2-4.

349 Memorandum from Legal Affairs to Director, Western Hemisphere, on Draft Memoranda to Georgetown and Paris Regarding Border Issues (18 October 1966), at RG, Vol. II, Annex R40 (translation by Suriname). The translation provided by Guyana refers to "fairness," instead of "equity." The Dutch term "billijkheid" employed in the text of the memorandum from 18 October 1966 is used to refer to "equity."

350 RG, para. 4.23, pp. 66-67.

3.121. Professor Riphagen did not succeed in keeping the Suriname situation away from the knowledge of the Germans. Ironically, the same legal article by Siegfried Werners that Guyana promotes at para. 3.49 of its Memorial for the proposition that the Suriname 10° Line was not in keeping with the Dutch position in the North Sea,[351] was referred to in the pleadings of the Federal Republic of Germany in support of its argument that the narrow view of special circumstances there propounded by the Netherlands was not consistent with the claims of Suriname.[352] Suriname never has pretended to be Germany, as Guyana would have the Tribunal believe.[353] Nor does Suriname argue that the Court took note of the German reference to Suriname's boundary position in the pleadings in the case. Suriname does consider, however, that much of what the Court said in the *North Sea Continental Shelf* cases about the application of the law to the relevant geographical circumstances still holds true, and holds true in this case.

2. *Oil Concessions*

a. The Facts Pertaining to the Location of the Concession Limits Authorized by the Parties

3.122. In the Memorial, Guyana repeatedly implied that the oil concession limits of the Parties—that is, the eastern limits of Guyana's concessions and the western limit of Suriname's concessions—throughout history have been aligned along the 34° line. Guyana repeats those same assertions in its Reply. The facts are otherwise. As early as 1957, in its Colmar concession, Suriname authorized a concession that extended to its western boundary,[354] which it spelled out in 1964 as "the left bank of the Corantijn, being the territorial western boundary of the Country and then by its extension seaward into the territorial waters and across the continental shelf in the direction 10º east of the true north."[355] In fact, the western limit of Suriname's oil concession area has always conformed to its 10° Line claim, and as early as 1976 Suriname's concessions extended along the 10° Line to the 200-nautical mile limit. Guyana's eastern limits of its concession areas have varied, and until 1999 the offshore limits of those concessions have roughly corresponded to the 200-meter isobath.[356]

3.123. In its Counter-Memorial Suriname reviewed, "at great length" according to Guyana,[357] the limits of the Parties oil concessions on a year-to-year basis. That exercise demonstrated the true facts—that the respective limits of the oil concession areas have overlapped on a consistent basis, and that this has been known both in the petroleum industry and by the officials of both countries responsible for petroleum matters.

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351 Siegfried E. Werners, *Complications of a Border Dispute*, Netherlands Lawyers Journal, Vol. 43, No. 9 (1968), at MG, Vol. II, Annex 45.

352 Argument of Professor Jaenicke, North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), I.C.J. Pleadings, Oral Arguments, Documents, Vol. II, pp. 47-49.

353 RG, para. 3.10, p. 36.

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

355 Law No. 86, Government Gazette of Suriname (13 October 1964), at SCM, Vol. II, Annex 16, at Art. 1.

356 The 200-meter isobath marks the approximate location where the first section of the provisional equidistance line changes into the second section. *See* SCM Figure 32, following SCM p. 98.

357 RG, para. 4.31, p. 70.

3.124. To the extent that oil concession areas are of interest in maritime boundary cases, it is because they arguably indicate an area to which a state believes it has an entitlement. Guyana's Reply did not contest the accuracy of the depictions of the limits of the various concessions as shown in Suriname's Counter-Memorial on a year-to-year basis. It called these depictions, however, a "rhetorical device" because they were set out chronologically[358] and it charged that Suriname created the impression that it "was far more active than it really was."[359] Yet another criticism of Suriname's "lengthy" presentation of the facts was that the depiction of the Staatsolie concession area running up against the 10° Line was "a concession by Suriname to itself and therefore constitutes little more than a restatement of Suriname's formal claim to the 10° line."[360] That is the point. By government action, Suriname manifested its claim up to the 10° Line, and it did so year after year.

3.125. Even though Suriname's Counter-Memorial set forth the facts pertaining to the limits of oil concessions, Guyana continues in its Reply to make unfounded assertions about Suriname's "respect" for Guyana's oil concession limits. For instance, paragraph 7.59 of the Reply states:

> Over the past 20 years . . . in the awarding of oil concessions by both Guyana and Suriname, the historical equidistance line has been extended up to the 200 nm limit of the continental shelf and EEZ.
>
> * * * *
>
> In fact, Suriname largely respected the historical equidistance line in the issuance of its own oil concessions, both before and after the 1982 Convention.

Such statements are baseless. They are misleading because they imply that Suriname joined in with and acknowledged Guyana's 34° line as its own. Suriname did not do so.

3.126. Moreover, such statements as the above could only refer to the recent period starting in 1999 when a service contract was issued to Burlington Industries, and later to Repsol and Maersk, in which Suriname's authorities did not open the disputed area to those service contractors. Because they did not do so, Guyana now maintains that Suriname has "respected" Guyana's claim line, and thus that Suriname "understood that a delimitation . . . by means of the 34° historical equidistance line would be equitable."[361]

3.127. What Suriname actually "understood" was that it had consistently upheld its claim to a 10° Line delimitation, and it understood that there was no need, indeed no interest, in licensing a contract area that was disputed for the sole purpose of promoting its long-held boundary position. Suriname's boundary claim was as clear in 1999 as it was in 1962 and as it is now. The Suriname boundary claim line appears on the very Burlington Industries map that Guyana now uses to demonstrate the limits of the Burlington contract area and to say that those

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358 *Ibid*.

359 *Ibid.*

360 *Id*. at para. 4.33, pp. 70-71.

361 *Id*. at para. 7.44, pp. 132-33.

contract limits prejudice the Suriname boundary claim. The exercise of good sense by the petroleum authorities in Suriname is used by Guyana, over and over again, to attribute to Suriname in these proceedings "respect" for Guyana's boundary claim. According to Guyana, the Burlington contract "ignored Suriname's 10° claim in deference to a line approximating the historical equidistance line."[362] Suriname naturally did not ignore its own claim and did not defer to Guyana's. Rather, Suriname exercised restraint in an attempt to avoid further exacerbating an acute dispute with its neighbor.

3.128. In retrospect, it became clear that Suriname's restraint was in vain when Guyana sent the CGX rig into the disputed area in May and June of 2000. However, even in those circumstances, Suriname did not respond by extending the Burlington service contract area into the disputed area, although there was cause to do so. Annexes SR9, SR10 and SR11 contain internal correspondence from January 2001 indicating Staatsolie's representation of Burlington's interest to expand its service contract area into the disputed area and the decision of the Surinamese Government not to accede to that request for "geopolitical reasons."[363]

3.129. Guyana's oil conduct arguments continue past the June 2000 CGX incident to include two additional service contract areas licensed to Repsol in April 2004 and Maersk in November. There Guyana also argues that Suriname prejudiced its position when, following the June 2000 incident, it limited two other service contracts to areas not in dispute.

> the Repsol and Maersk concessions, like the Burlington concession, were further manifestations of the Parties' long-standing recognition of the fairness of the historical equidistance line.[364]

It defies logic, as well as the dispute settlement process, for Guyana to argue that Suriname's restraint in not allowing service contractors into the disputed area is tantamount to recognition that Guyana's boundary claim is the right and equitable boundary. It appears that Guyana's view of proper conduct is for states always to act aggressively and to ensure that all their service contract areas always reflect national boundary claims; when they do not do so, they have prejudiced their position. Suriname is confident that Guyana's view will not be sustained.

3.130. Major international oil companies do not wish to become involved in boundary disputes, and countries that are interested in developing their offshore resources do not focus efforts on disputed areas. For that reason, the Burlington, Repsol and Maersk service contracts were limited to areas not in dispute.

3.131. Moving from oil concession limits to exploration activity that has occurred within those limits, Guyana also suggests that more seismic activity has taken place in the disputed area under its concessions than under Suriname's concessions. Suriname does not contest that

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362 *Id.* at para. 4.34, p. 71.

363 Letter of E. Jharap, Director of Staatsolie, to F.R. Demon, Minister of Natural Resources (8 January 2001), at SR, Vol. II, Annex SR9; Letter of R.R. Venetiaan, President of Suriname, to F.R. Demon, Minister of Natural Resources (18 January 2001), at SR, Vol. II, Annex SR10; Letter of F.R. Demon, Minister of Natural Resources, to E. Jharap, Director of Staatsolie (29 January 2001), at SR, Vol. II, Annex SR11. It may be noted that much of the Burlington service contract area is now held by Occidental.

364 RG, para. 4.35, p. 71.

more seismic activity may have occurred under Guyana's concessions. By world standards, the overall level of either country's activity is not great. While maps of seismic activity are common in maritime boundary cases, no international court or tribunal has ever found seismic activity to be a relevant circumstance for delimitation or indeed significant in that regard. In respect of the *Aegean Sea* case,[365] the Arbitral Tribunal in the *Barbados-Trinidad and Tobago* case stated:

> While the issue of seismic activity was regarded as significant by the International Court of Justice in the *Aegean Sea* case . . . , the context of that decision on an application for provisional measures is not pertinent to the definitive determination of a maritime boundary.[366]

The International Court of Justice in the *Aegean Sea* case held that ". . . it is clear that neither concessions unilaterally granted nor exploration activity unilaterally undertaken by either of the interested States with respect to the disputed areas can be creative of new rights or deprive the other State of any rights to which in law it may be entitled . . ." and the Court recorded that Turkey "recognized that seismic research 'cannot establish rights in the areas where this research is carried out.'"[367] Accordingly, as with other oil and gas conduct, unless there is an express or tacit agreement, which there is not in this case, any greater amount of seismic conduct carried out under Guyana's authority in the disputed area does not meet the established standard of legal relevance.

3.132. In conclusion, Guyana contends that Suriname, which has maintained a 10° Line maritime boundary claim since at least the time of the 1962 Netherlands treaty proposal and as later expressed at the Marlborough House talks in 1966, which issued to its national oil company a concession to the 10° Line, which escorted Guyana's drill ship out of waters east of the 10° Line in 2000 (an action which Guyana claims "crystallized"[368] the dispute), nonetheless recognized "the fairness of the historical equidistance line" when it did not extend recent service contracts into the disputed area. Guyana's argument lacks credibility in the face of the volumes of uncontested oil facts of conduct presented in this case.

3.133. The oil facts of conduct give rise to no agreement between the Parties, but they can usefully confirm or reveal each Party's true boundary position. Suriname's true position, as manifested in its oil conduct, is the 10° Line. Neither Guyana's true position, nor its formal position in these proceedings, is revealed by its oil concession practice, which has had various eastern limits, and until its 1999 concession to Esso, did not extend much beyond the 200-meter isobath.

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365 Aegean Sea Continental Shelf Case (Greece v. Turkey), Request for the Indication of Interim Measures of Protection, Order, I.C.J. Reports 1976, p. 7, para. 16.

366 In the Matter of an Arbitration Between Barbados and the Republic of Trinidad and Tobago (Barbados/Trinidad and Tobago), Award of the Tribunal (11 April 2006), pp. 108-09, para. 364 (available at http://www.pca-cpa.org/ENGLISH/RPC/BATRI/Award%20final%20110406.pdf).

367 *Greece v. Turkey*, I.C.J. Reports 1976, p. 10, paras. 29-31.

368 MG, para. 3.1, p. 13.

b. The 1991 Memorandum of Understanding ("MOU")

3.134. In the Reply, Guyana made it a point to distinguish between the periods that pre-date and post-date the 1982 Convention. The 1991 MOU post-dates the 1982 Convention. Guyana seeks to diminish the importance of this understanding by noting that it never formally entered into force.[369] Nonetheless, the MOU defined the disputed area as that area between the 10° and 30° lines, and it ushered in a period of cooperation that lasted until about 1997, when Guyana began unilaterally to issue concessions in the disputed area. It is Suriname that has always been willing to operate in the spirit of this MOU, while Guyana has not.[370]

3. *The Parties' Fisheries and Law Enforcement Conduct*

3.135. Figure 3 of Suriname's Counter-Memorial compared the equidistance line defined in accordance with the clear language of section 35(1) of Guyana Maritime Boundaries Act of 1977 with the 34° line claimed by Guyana in this proceeding. In response, Guyana's Reply argues that the Act

> neither included, described nor made reference to a particular boundary line. Suriname's "1977 Maritime Boundaries Act Line" is thus a complete fiction.[371]

The Reply goes on to argue

> [i]n reality, the 1977 Maritime Boundaries Act and its use of "equidistance" are best understood by reference to what had come before.[372]

That, the Reply submits, is Guyana's reference to the 34° line.[373] Whatever the Reply may say, the 1977 Act contains a very precise equidistance requirement. No technical expert would have a problem replicating the exercise that was carried out by Suriname to identify the equidistance line described in Guyana's legislation.

3.136. Guyana's own practice respecting its true equidistance boundary position is further evidenced in the report it submitted to the FAO's Western Central Atlantic Fishery Commission containing a description of the exclusive economic zone of Guyana.[374]

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369 RG, para. 4.36, pp. 71-72.

370 *See* SPO, paras. 6.12-6.38, pp. 32-42.

371 RG, para. 4.45, pp. 75-76.

372 *Ibid*.

373 *Ibid.*

374 *See* SCM, para 3.40, pp. 29-30. United Nations Food and Agriculture Organization, "National Report of Guyana," Western Central Atlantic Fishery Commission, National Reports Presented ("FAO") and Stock Assessment Reports Prepared at the CFRAMP/FAO/DANIDA Stock Assessment Workshop on the Shrimp and Groundfish Fisheries of the Guiana-Brazil Shelf, Port-of Spain, Trinidad and Tobago, 7-18 April 1997, FAO Fisheries Report 600 FIRM/R600, at SCM, Vol. III, Annex 64. The report notes "The EEZ, for statistical purposes, has been divided into Fishing Zones which are defined according to the degrees of longitude within which they lie, with each zone being separated from the other by an interval of 30 degrees (Shepherd and Charles, 1995). *See* Figure 1 for the Statistical Fishing Zones of Guiana [sic]." *Id.* at 21.

3.137. Furthermore, in its Reply, Guyana observes that it does not dispute Suriname's Counter-Memorial when it points out that Guyana's fisheries zone limit "'broadly coincides with the equidistance line and has no relation to the 34 degree line.'"[375] Guyana's Reply, however, seeks to diminish this admission by arguing that "with very few exceptions, it [Suriname] too confined its exercise of fisheries jurisdiction to its own side of the equidistance line."[376] Guyana's attempt is to promote the equidistance line and, for support, Guyana refers to Figure 29 of the Counter-Memorial.[377] A close examination of that figure and the information on which it is based show that most of the inspections made by Suriname's authorities that have taken place in the area bounded by the 10° and 34° claim lines have taken place to the west of the provisional equidistance line. Out of 17 inspections, 14 were made in the area between the 10° Line and the provisional equidistance line. This is shown on Figure 3, which adds the equidistance line to Figure 29 of the Counter-Memorial and identifies inspections as occurring either east or west of that line. The Reply's suggestion that Suriname limited itself in its law enforcement to the area to the east of the provisional equidistance line is thus unfounded. To the contrary, as has been demonstrated, the western boundary of Suriname's law enforcement activities has been the 10° Line.[378]

3.138. The fisheries enforcement information provided by Guyana, shown on Figure 5 of the Counter-Memorial, depicts a contrasting situation. While the eastern limit of Guyana's claimed fisheries jurisdiction is the equidistance line, Guyana's practice apparently has been to seldom enforce its fisheries jurisdiction east of the 10° Line.

3.139. Other fisheries-related data supports the view that Suriname has always adhered to the 10° Line as the limit of its claimed area. Three research expeditions—in 1966, 1969 and 1970—organized under the auspices of the Netherlands and conducted by the Dutch scientific research vessels H NL M S Snellius and H NL M S Luymes, gathered scientific information in the waters off the coasts of French Guiana, Guyana and Suriname. Two publications report on the species of starfish (Asteroidea) that were found on the continental shelf of the "three Guyanas." The publications specify the location of stations where starfish where collected. The first publication, *The Asteroids of the Coastal Waters of Surinam*, includes a list of stations at which starfish were collected from the continental shelf of Surinam.[379] The second publication, *Asteroidea (Echinodermata) from the Guyana Shelf*, lists stations on the continental shelf of Suriname, French Guiana and Guyana.[380] The location of the stations ascribed to Suriname and to Guyana are plotted in Figure 4. The figure shows that stations off the coast of Suriname extend up to the 10° Line. The stations off the coast of Guyana are all located to the west of the 10° Line.

Figure 1 of the report to which reference is made contains the same eastern limit of Guyana's exclusive economic zone as included in Figure 4 of the Counter-Memorial.

375 RG, para. 4.46, p. 76 (quoting SCM, para. 3.40, p. 29).

376 RG, para. 4.46, p. 76.

377 *Ibid.*

378 SCM, para. 5.84, n.425, pp. 90-91.

379 J.H.C. Walenkamp, *The Asteroids of the Coastal Waters of Surinam* 3-11 (E.J. Brill 1976), at SR, Vol. II, Annex SR28.

380 J.H.C. Walenkamp, *Asteroidea (Echinodermata) From the Guyana Shelf* 3-7 (E.J. Brill 1979), at SR, Vol. II, Annex SR29.

3.140. Suriname does not argue that this research activity constitutes the express or tacit agreement of Guyana respecting Suriname's 10° Line. However, Suriname does believe it clearly demonstrates the understanding of the authorities of the Netherlands of the continental shelf claims of Suriname. In this regard, it may also be recalled that it was and is well understood that starfish are a sedentary creature of the continental shelf.[381]

3.141. Another similar demonstration of Suriname's continental shelf claims involving the Snellius concerns hydrographic and geophysical survey activities conducted on Suriname's continental shelf in 1966. Annex SR27 contains relevant pages from the Hydrographic newsletter reporting on the survey work.[382] The maps in those pages clearly depict that the work of the Snellius extended to, and was limited by, the 10° Line.

4. *Conclusion*

3.142. Contrary to Guyana's interpretation of conduct related to this maritime boundary dispute, the following may be said:

- from 1936 to 1965 the Netherlands and the United Kingdom both respected the 10° Line as the boundary in the territorial sea;

- the Netherlands and the United Kingdom did not consummate any formal understanding about equidistance nor is there any evidence that they jointly identified the equidistance line or jointly used an equidistance line in practice; the Netherlands' 1958 proposal to negotiate a continental shelf boundary based on Article 6 (2) of the Continental Shelf Convention bears no relation to Guyana's modern N34E claim, was limited to the delimitation beyond the territorial sea, and was overtaken by the 1962 treaty proposal of the Netherlands for the 10° Line;

- the outer western limit of Suriname's oil concession area has always coincided with the 10° Line since 1964 (*see* map of the Colmar concession at Figure 6 of the Counter-Memorial), but the outer eastern limits of Guyana's oil concessions have never coincided as a matter of lateral extent, nor as a matter of distance from the coast, with its modern N34E claim; nonetheless, the claims of the Parties pertaining to their offshore petroleum areas have always overlapped, evidencing the duration of the maritime boundary dispute;

- the western limit of Suriname's Burlington service contract area established in 1999 could not be mistaken by Guyana's officials as a renunciation of Suriname's boundary position, nor is it credible to say that the limits of that service contract area or others rendered by Suriname after the June 2000 incident meant that Suriname believed Guyana's boundary claim to the entire disputed area was an equitable solution;

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381 *See Examination of Living Resources Associated with the Sea Bed of the Continental Shelf with Regard to the Nature and Degree of Their Physical and Biological Association with Such Sea Bed*, Food and Agriculture Organization of the United Nations, U.N. Doc. A/CONF.13/13 (1957), at SR, Vol. II, Annex SR22.

382 *Scientific Investigations on the Shelf of Surinam, H. NL. M. S. Snellius, 1966* 3-11, 83-85 (Hydrographer of the Royal Netherlands Navy Hydrographic Newsletter Special Publication No. 5, 1967), at SR, Vol. II, Annex SR27.

- Guyana's legislative conduct pertaining to its exclusive economic zone consistently coincides with Guyana's true boundary position—the equidistance line. Suriname's legislative conduct consistently coincides with its true boundary position—the 10° Line; and

- Guyana's enforcement of its fisheries laws is evidence of its respect for the equidistance line; indeed it has seldom enforced its fisheries laws east of the 10° Line. Suriname's enforcement activity is evidence of its consistent 10° Line position.

3.143. As will be demonstrated in the following Section, none of this conduct, considered separately or when taken together, comes close to meeting the test for legal relevance and therefore should not be taken into account in this delimitation. Nonetheless, the conduct does reveal the true positions of the Parties.

B. The Conduct of the Parties in This Case When Measured Against the "Express or Tacit Agreement" Test

3.144. Guyana's position on the relevance of conduct is based entirely on a brief excerpt from the judgment in the *Tunisia-Libya* case, oft-quoted in Guyana's Reply and reproduced below. The Court wrote:

> . . . it is evident that the Court must take into account whatever indicia are available of the line or lines which the Parties themselves may have considered equitable or acted upon as such.[383]

3.145. Guyana calls this "a distinct test for the relevance of conduct."[384] Of course, this is less a test than a truism. It *is* evident that international courts and tribunals may not simply ignore facts that could bear on their assessment of the Parties' arguments and claims, or on the ultimate task of delimiting a boundary that provides an equitable solution. But the question is whether that conduct is legally relevant for the delimitation itself. As the excerpt above implies and as the subsequent maritime boundary jurisprudence confirms, conduct is legally relevant only if it indicates—notwithstanding the formal positions of the Parties—an express or tacit agreement on the location of the boundary.

3.146. Following a thorough review of the boundary jurisprudence on the role of oil conduct, the Court in *Cameroon-Nigeria* recently held:

> Overall, it follows from the jurisprudence that, although the existence of an express or tacit agreement between the parties on the siting of their respective oil concessions may indicate a consensus on the maritime areas to which they are entitled, oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. *Only if they are based on*

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[383] Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Merits, Judgment, I.C.J. Reports 1982, p. 84, para. 118.

[384] RG, para. 5.55, p. 100.

> *express or tacit agreement between the parties may they be taken into account*. In the present case there is no agreement between the Parties regarding oil concessions.
>
> The Court is therefore of the opinion that the oil practice of the Parties is not a factor to be taken into account in the maritime delimitation in the present case.[385]

3.147. The Court considered the facts of conduct, found that they indicated no agreement, and discarded them as irrelevant to the delimitation itself. The Court did so notwithstanding that the evidence before it demonstrated it was delimiting a maritime boundary in an area of very highly concentrated petroleum exploration and exploitation activity.[386]

3.148. Most recently, the Annex VII Arbitral Tribunal in *Barbados-Trinidad and Tobago* affirmed this test.[387] The Tribunal found no express or tacit agreement in the activities, or conduct, of the Parties in that case.

> The Tribunal accordingly does not consider that the activities of either Party, or the responses of each Party to the activities of the other, themselves constitute a factor that must be taken into account in the drawing of an equitable delimitation line.[388]

3.149. "Express or tacit agreement" is a test that has been developed and applied over decades of boundary jurisprudence, right up to the most recent maritime boundary case.[389] It is a clear test. If conduct reveals an express or tacit agreement, it may be taken into account in the delimitation. If conduct reveals no agreement, it may not be taken into account in the delimitation.

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385 Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening), Merits, Judgment, I.C.J. Reports 2002, pp. 447-48, para. 304 (emphasis added).

386 SR Annex SR41 is Figure 10.4 from Nigeria's Rejoinder depicting the extensive existing oil and gas infrastructure in that delimitation area.

387 In the Matter of an Arbitration Between Barbados and the Republic of Trinidad and Tobago (Barbados/Trinidad and Tobago), Award (11 April 2006), pp. 108-09, para. 364, available at http://www.pca-cpa.org/ENGLISH/RPC/BATRI/Award%20final%20110406.pdf.

388 *Id.* at p. 109, para. 366.

389 In Chapter 7 of the Reply, Guyana criticizes Suriname for taking refuge in older case law that predates the 1982 Convention. RG, para. 7.11, p. 122. Guyana says specifically that "Suriname seeks to avoid the most recent International Court of Justice Judgments in *Qatar/Bahrain* and *Cameroon/Nigeria*." *Id.* at para. 7.10, p. 122. Suriname has shown above that it has not avoided those two cases, and it states again that it makes no apology for referring and relying upon the *North Sea Continental Shelf* cases and *Gulf of Maine*.

It is extraordinary, however, that Guyana makes this charge in light of its conduct-based arguments. It is curious for two reasons. First, the only case that Guyana relies on for its arguments about the relevance of conduct in the establishment of the single maritime boundary is an "old" case—namely the *Tunisia-Libya* case, a continental shelf case no less—that predates the 1982 Convention and, indeed, predates the emergence of judicial consideration of the single maritime boundary in the *Gulf of Maine* case. Second, more recent case law, namely the *Cameroon-Nigeria* case, has established a stricter test—namely the requirement of an express or tacit agreement. Guyana acknowledges that it does not seek to meet the standard set out in the Court's Judgment in *Cameroon-Nigeria* and instead falls back on the "indicia" formula of the *Tunisia-Libya* continental shelf case. *Id*. at para. 4.48, n.372, pp. 77-78.

3.150. The express or tacit agreement test is also a strict test. In fact it is a test that has never been satisfied in a maritime boundary case.[390] While Guyana bases its conduct argument on an excerpt from the judgment in the *Tunisia-Libya* case, a case in which the Court came close to finding a tacit agreement, Suriname notes that at no place in its Memorial or Reply has Guyana addressed the facts of that case. Suriname reviewed those facts at paragraphs 5.45-5.55 of its Counter-Memorial. They included 60 years of fisheries law enforcement by the colonial powers using a line perpendicular to the general direction of the coast, and eight years of aligned oil concession practice which fell along the same perpendicular to the general direction of the coast. Both corresponded to the direction of the last segment of the land boundary. Notably, the aligned oil concession practice was intentional, the concessionaire was the same in both countries, and the compromise alignment allowed fields to be developed on either side. Even then, the oil conduct did not reveal a tacit agreement.[391] Instead, it was just one of many factors, including "the general configuration of the coasts of the Parties,"[392] that led the Court to conclude that, in the nearshore portion of the delimitation area, a 26° line would produce an equitable result.

3.151. There is nothing remotely comparable in the facts of this case, and certainly nothing that approaches agreement. Therefore, as both Parties have noted, conduct creates no legally binding effect here, and, as would seem clear from the facts, has no legal relevance to the delimitation.

3.152. Nonetheless, Guyana continues to attempt to elude the rule of legal relevance and to insist that conduct should be taken into account in this delimitation. Applying its "indicia" formula, in the teeth of actual facts and a clear rule of law, Guyana finds three reasons that conduct should be taken into account in this delimitation.[393] First, Guyana argues that conduct "establishes the beliefs of the Parties as to the method of maritime delimitation that best ensures an equitable result,"[394] implying that the Parties share a single belief as to *the* method. Not surprisingly, *the* method of delimitation that Guyana promotes would be "by means of the 34° historical equidistance line."[395] Guyana reaches this conclusion even though the Parties in this case have never agreed on a delimitation method from their first meeting in 1966 at Marlborough House to the present. Thus, for more than 40 years the Parties have been in dispute on this matter, and it is hard to understand how Guyana can continue to make such assertions about shared belief and mutual understanding in light of these uncontested facts.

3.153. Guyana's second reason that conduct should be taken into account is that conduct shows no one thought the 10° Line was an equidistance line.[396] Suriname does not argue otherwise. Furthermore, Suriname does not argue that Guyana regarded the 10° Line to be an

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390 In the midst of its oil conduct analysis in *Tunisia-Libya*, the Court wrote: "It should be made clear that the Court is not here making a finding of tacit agreement between the Parties . . . ." Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Merits, Judgment, I.C.J. Reports 1982, p. 84, para. 118.

391 *Tunisia/Libyan Arab Jamahiriya*, 1982 I.C.J. 18, p. 84, para. 118.

392 Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia / Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985, pp. 210-11, para. 35.

393 RG, paras. 7.41-7.43, p. 132.

394 *Id.* at para. 7.41, p. 132.

395 *Id.* at para. 7.44, pp. 132-33.

396 *Id.* at para. 7.42, p. 132.

equitable solution, except in the territorial sea. Suriname does, however, argue that Suriname regarded, and continues to regard, the 10° Line as an equitable solution throughout the maritime zones, as indicated by its own consistent unilateral conduct.

3.154. Guyana's third reason that conduct should be taken into account is that it shows that "both Parties awarded oil concessions that consistently respected the historical equidistance line."[397] At this point in the pleadings, Suriname must assume either that this is a mistake in the Reply, or that the drafter of this section of Guyana's Reply did not have the opportunity to read Suriname's Counter-Memorial or to review the many annexes concerning oil conduct attached to both the Counter-Memorial and Guyana's own Memorial. These documents demonstrate that, without exception, not a single oil concession—Suriname's or Guyana's—"respected the historical equidistance line." Guyana's N34E historical equidistance line does not coincide with any of Guyana's own concession limits, which range between 30°-33°, much less with Suriname's further west along the 10° Line. From the very earliest of oil concessions to the present there have consistently been significant areas of overlapping concessions in the area in dispute. This can be confirmed with the primary documents and third-party documents provided by both Parties.

3.155. Despite the overwhelming evidence to the contrary, Guyana continues its drumbeat with statements like:

> The fact that Suriname awarded oil concessions respecting a 33° line after 1982 is especially significant, and it is understandable that Suriname would be defensive on conduct that undermines its central argument.[398]

3.156. This is yet another of Guyana's tendentious arguments, found throughout Guyana's pleading, that unjustifiably attribute to Suriname an intention to conform to Guyana's position. As noted above, what Guyana presumably makes reference to here are the three oil service contracts that Staatsolie has granted since 1999 that do not extend into the disputed area to any significant extent. The reason they do not is in order not to exacerbate a longstanding dispute.

3.157. It is Suriname's conclusion that the conduct of the Parties has no legally binding effect in the establishment of the single maritime boundary in this case. Other than conduct related to the 10° Line in the territorial sea, there is no conduct here that approaches an express or tacit agreement. Thus, the conduct of the Parties should not be taken into account in this delimitation. Ultimately, it is for this Tribunal to apply that test and to decide whether the conduct here reveals agreement. Suriname respectfully submits that agreement could not possibly be found on these facts and that therefore conduct is not relevant and may not be taken into account in this delimitation. The only limited value of the facts of conduct in this case is as evidence of the Parties' true positions. Suriname believes that a close look at conduct confirms Suriname's 10° Line position and reveals that Guyana's position has appeared to be the equidistance line until very recently.

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[397] *Id*. at para. 7.43, p. 132.

[398] *Ibid*.

III. The Geographical Circumstances in Which the Law Is To Be Applied

3.158. Guyana's Reply addresses the geographic circumstances relevant in this case and the provisional equidistance line even though both subjects were largely missing from the Memorial. Guyana's examination now leads it to some contradictory conclusions. On the one hand "Guyana submits that the geography in the area is generally unremarkable,"[399] while on the other hand, later in the same paragraph, Guyana concludes that "[t]he geographic circumstances justify a shift in the provisional equidistance line toward the 34° historical equidistance line."[400] That shift of the provisional equidistance line in the area, which Guyana describes as geographically unremarkable, provides Guyana with 12,000 square kilometers of additional maritime space. The difference between the provisional equidistance line and the line that Guyana claims is shown on Figure 34 of Suriname's Counter-Memorial, which is reproduced here as Figure 5.

3.159. This Section responds to Guyana's presentation on the geographical circumstances set out in Chapter 3 of the Reply. It will also address the reports of Dr. Robert W. Smith and the Applied Physics Laboratory at John Hopkins University that Guyana has obtained to support its position.[401] In summary, Suriname finds that the report of Dr. Smith reprises Chapter 3 of Guyana's Reply, and that the report of the Applied Physics Laboratory at John Hopkins University is divorced from anything to do with determining the relevant coasts associated with a maritime delimitation problem.

A. The Relevant Coasts

3.160. It is necessary in maritime delimitations to determine the relevant coasts. These are the coasts that face—or abut upon—the area being delimited. Since the relevant circumstances related to the establishment of a single maritime boundary are the relevant geographic circumstances, there is a basic need to identify the abutting coasts that are to be taken into account for that purpose. The exact form of words used by international courts and tribunals to describe the process of determining the relevant coasts has varied, but the concept is clear. It is well understood that the relevant coasts of the Parties are not the entirety of the coasts of the adjacent or opposite states. The relevant coasts are those coasts that abut upon or face the area to be delimited.

3.161. In its Memorial, Guyana addressed the subject as follows:

> The determination of those parts of the coasts which are relevant to the delimitation of the maritime boundary (in relation to the territorial sea and the maritime spaces beyond) involves the

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399 *Id.* at para. 1.24, p. 9. *See also id.* at para. 3.2, p. 33.

400 *Id.* at para. 1.24, p. 9. This statement is in marked contrast to paragraph 2.2 of Guyana's Memorial which states: ". . . the configuration of the coast and absence of features such as islands and low-tide elevations inform the location and direction of the equidistance line and point to the absence of equitable considerations which might be invoked to justify any change to that line." MG, para. 2.2, p. 7.

401 Robert W. Smith, Independent Report on the Guyana-Suriname Coastal Geography and the Impact on Maritime Boundary Delimitation (March 2006), at RG, Vol. II, Annex R1; The Johns Hopkins University Applied Physics Laboratory, Calculations of Lines, Points, and Areas Related to the Coasts and Off-shore Areas of Guyana and Suriname (March 2006), at RG, Vol. II, Annex R3.

> identification of the coastal fronts that generate legal entitlements to the maritime area in dispute.[402]

Guyana then proposed that the relevant coast of Guyana runs from the 1936 Point to a set of particular geographic coordinates, and that the relevant coast of Suriname runs from the 1936 Point to a different set of particular geographic coordinates. The Memorial does not say why Guyana thought these coasts are the relevant coasts, but it describes them as extending along the low-water line for a distance of 255 kilometers on the Guyana side and 224 kilometers on the Suriname side.[403]

3.162. In the Counter-Memorial Suriname took the position that the relevant coast of Guyana is its coast that runs from the west bank at the mouth of the Corantijn River to the Essequibo River. In Suriname's view this is the coast that when projected seaward converges and overlaps with the seaward projection of the relevant coast of Suriname.[404] The Suriname relevant coast is the coast that runs from the west bank at the mouth of the Corantijn River to Warappa Bank.[405]

3.163. The Reply of Guyana takes issue with Suriname's identification of the relevant coasts because, in its view, the relevant coasts should be the coasts of the adjacent states that contribute the basepoints used to construct the provisional equidistance line to the 200-nautical mile limit.[406] This also appears to be the basis for the relevant coasts identified by Guyana in its Memorial, although it did not say so there.

3.164. Guyana cites to two sources to support its view. First, it refers to the *Jan Mayen* case.[407] The *Jan Mayen* case was about the boundary that runs between the opposite coasts of Greenland and Jan Mayen. In other words it was a case about a boundary between two islands that face each other—one quite small (Jan Mayen) and the other (Greenland) large enough to be considered an opposite mainland. Guyana provides a map of the geography in the *Jan Mayen* case at Annex R25 in Volume II of its Reply. The area being delimited was the area between the two opposing coastlines. That the Court there found that the coasts relevant to its analysis were the opposite coasts that contributed to the equidistance line between them is hardly extraordinary in those circumstances and is of little utility in a case where the adjacent relevant coasts have somewhat different general directions and thus form an angle where they meet.

3.165. The second source that Guyana cites to support this proposition is the Report of Robert W. Smith. It would appear, however, that Dr. Smith at no place asserts that the determination of the relevant coasts by reference to the basepoints for determining the equidistance line has a role to play in the assessment of the relevant geographic circumstances pertaining to the

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402 MG, para. 8.35, p. 101.

403 *Ibid.*

404 SCM, para. 6.12, p. 95.

405 *Id.* at para. 6.9, p. 94.

406 RG, para. 3.13, p. 37; para. 3.17, p. 39.

407 Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993, p. 38.

establishment of a single maritime boundary. Instead, what he said is something quite different:

> [S]ince it is the provisional equidistance line that is being analyzed for its appropriateness, it would seem reasonable that the last controlling coastal point on each State's coastline would provide the appropriate end point.[408]

The legal purpose of identifying relevant coasts is separate and apart from the construction of the provisional equidistance line.

3.166. The *Barbados-Trinidad and Tobago* Award confirms that relevant coasts are not determined by reference to the basepoints used to establish the equidistance line to the 200-nautical mile limit. As the Arbitral Tribunal said:

> [R]elevant coastal frontages are not strictly a function of the location of basepoints . . . but from their significance in attaining an equitable and reasonable outcome, which is a much broader consideration.[409]

3.167. Thus, the relevant coasts that Guyana proposes—defined by equidistance basepoints—are not mandated by legal method. Those relevant coasts running from the 1936 Point, to Devonshire Castle Flats west of the Essequibo River for Guyana, and to Hermina Bank for Suriname, were chosen for an unfounded reason, not because they represent the coasts that face the delimitation area. It is to be noted, however, that Guyana apparently recognized that its equidistance basepoint method for selecting the relevant coasts was subject to doubt. Thus, it obtained a report from the Applied Physics Laboratory at John Hopkins University.

3.168. As Suriname understands it, the purpose of this report was to determine the longest coastline length that "leaves an amount of sea on the landward side of the line that is exactly equal to the amount of land on the seaward side."[410] Guyana portrays the result as representing the "facing" coastlines of the Parties. In other words, this exercise is Guyana's response to Suriname's position that the relevant coasts are those that face the delimitation area. However, the stated objective, quoted above, was to create the longest possible line—a hypothetical coastline—that leaves equal areas of sea and land on either side. That objective and the report of the Applied Physics Laboratory do not assist in identifying the coasts that face the area to be delimited.

3.169. The lines identified by the Applied Physics Laboratory extend on the Guyana side almost all the way to Punta Playa and on the Suriname side almost all the way to the border

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[408] Robert W. Smith, Independent Report on the Guyana-Suriname Coastal Geography and the Impact on Maritime Boundary Delimitation (March 2006), at RG, Vol. II, Annex R1, para. 46.

[409] In the Matter of an Arbitration Between Barbados and the Republic of Trinidad and Tobago (Barbados/Trinidad and Tobago), Award (11 April 2006), p. 100, para. 329, available at http://www.pca-cpa.org/ENGLISH/RPC/BATRI/Award%20final%20110406.pdf.

[410] RG, para. 3.34, p. 47.

with French Guiana.[411] It might have just as well been said that all of the coasts of the Parties are the relevant coasts to inform the delimitation.

3.170. Guyana's effort to find an objective mathematical way to determine the relevant coasts fails. Suriname notes what the arbitration tribunal said in the case between Newfoundland and Labrador and Nova Scotia in relation to the identification of relevant coasts:

> This involves a practical judgement, not a merely geometrical concept; it needs to have regard to the zone to be delimited and the respective claim lines of the parties.[412]

In the case of adjacent states, some parts of the coast of each neighboring state will face the area to be delimited and others will not. The area to be delimited is not the whole of the maritime area that one party could claim in the absence of the other, as Guyana's appurtenant and relevant maritime area approach would suggest. Nor is the area to be delimited necessarily limited to the area in dispute, or the area between the Parties' claims. In making a practical judgment to identify the relevant coasts, the Parties' claims should be considered together with the coastal configuration. In this coastal configuration, where the relatively straight coasts of adjacent mainland states meet at an angle, the relevant coasts are those that form that angle and that face the area to be delimited with that particular neighbor. Suriname's coast east of Warappa Bank faces the area to be delimited with French Guiana, not Guyana. Guyana's coast west of the Essequibo faces the area to be delimited with Venezuela, not Suriname. Suriname reaffirms its determination that the relevant coast of Guyana in this case is that which runs between the west bank at the mouth of the Corantijn River to the Essequibo River and that the relevant coast of Suriname is that which runs between the west bank at the mouth of the Corantijn River to Warappa Bank.

B. Coastal Fronts and Their Relationship to Delimitation Method

3.171. The determination of the relevant coasts leads to the identification of two other relevant geographic criteria. One such criterion is that of the direction of the relevant coasts, and the other criterion is the length of the relevant coasts. Viewing the relevant coasts as simplified straight lines, both with respect to the direction of those coasts, and as to their length, is usually helpful in evaluating the geographic circumstances associated with the coasts of neighboring countries and identifying an appropriate delimitation method, particularly when those countries are adjacent neighboring states.

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[411] Guyana claims that Suriname "ignores" the Award of 3 October 1899 of the Arbitral Tribunal delimiting the land boundary between the Colony of British Guiana and the United States of Venezuela, set forth at RG, Vol. II, Annex R1. *See* RG, para. 1.27, p. 10; para. 3.24, p. 43; para. 5.20, pp. 86-87. Guyana is mistaken in that regard. Suriname has not made any argument concerning that arbitral award in the present proceedings. Rather, Suriname has pointed out the indisputable fact that a portion of the coast of Guyana is also claimed by Venezuela, and it has demonstrated that that portion of the coast is not relevant to a maritime delimitation between Guyana and Suriname. *See* SCM, para. 6.23, p. 98.

[412] Arbitration Between Newfoundland and Labrador and Nova Scotia Concerning Portions of the Limits of Their Offshore Areas as Defined in the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act and the Canada-Newfoundland Atlantic Accord Implementation Act, Award of the Tribunal in the Second Phase (26 March 2002), p. 74, para 4.20, available at http://www.nr.gov.nl.ca/mines&en/publications/offshore/dispute/phaseII.pdf.

3.172. The reason for assessing the direction of the relevant coasts is to consider whether and how that criterion is or may be relevant in the choice or application of delimitation method. For instance, when a provisional equidistance line (established from basepoints on the actual coasts) is viewed in relation to the general directions of the two neighboring relevant coasts, a judgment can be made about the equitable character of the provisional equidistance line or lines formed by other delimitation methods in the circumstances.

3.173. In this case, the relevant coasts of Suriname and Guyana form an angle where they meet at the west bank at the mouth of the Corantijn River. They form an angle because the coast of South America changes direction at that place. Because of this change of direction of the coast, the relevant coast of Guyana and the relevant coast of Suriname face seaward in different general directions. Suriname's coast generally faces north, and the coast of Guyana, according to Dr. Smith's report, "generally faces northeastward."[413]

3.174. Nevertheless, Guyana disputes that there is a change in the direction of the coast.[414] Elsewhere, it refers to a different part of Dr. Smith's report to support the contention that on a "continental scale one can also discern a concavity formed by the coastlines on either side of where the Corantyne River meets the Atlantic Ocean . . . ."[415] But the issue is not the broad macro-geographical configuration of the northeast coast of South America, but rather the relationship of the relevant coasts of Guyana and Suriname to each other and their relationship to the maritime area to be delimited.

3.175. A glance at a map makes this relationship immediately clear. The 1936 Point was determined to lie at latitude 5° 59' 53.8" North by the 1936 Boundary Commission. That is basically at 6° N latitude and as can be discerned upon examination of virtually any map in these proceedings the general direction of the Suriname coast runs east from there basically along that latitude to Warappa Bank where it begins to turn southward. Guyana's coast does not continue westward along 6° N latitude. It runs generally northwest by west and runs in that general direction to the Essequibo River.

3.176. While it is clear that Suriname's relevant coast runs basically due east, Guyana's Reply charges that Suriname asserted in the Counter-Memorial that its coastline is "deeply concave."[416] Guyana does not provide a citation to support its statement, and one can search the Counter-Memorial and not find any such statement by Suriname. To be sure, Suriname noted the various concavities and convexities along the respective relevant coastlines in its consideration of the provisional equidistance line, but at no place did it imply that its coast overall was "deeply concave" and squeezed between two neighboring coasts, like the Federal Republic of Germany in the *North Sea Continental Shelf* cases. To the contrary, the entire presentation of Suriname's Counter-Memorial concerning Suriname's relevant coast was to the effect that it generally runs due east from the west bank at the mouth of the Corantijn River along about the 6° N latitude all the way to Warappa Bank. Guyana appears to agree with the basic proposition that Suriname's relevant coast runs generally west to east and that it faces

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413 Robert W. Smith, Independent Report on the Guyana-Suriname Coastal Geography and the Impact on Maritime Boundary Delimitation (March 2006), at RG, Vol. II, Annex R1, para. 15.

414 RG, para. 7.31, p. 129.

415 Robert W. Smith, Independent Report on the Guyana-Suriname Coastal Geography and the Impact on Maritime Boundary Delimitation (March 2006), at RG, Vol. II, Annex R1, para. 9.

416 RG, para. 3.10, p. 36.

north, but only reaches that conclusion after addressing an argument that Suriname did not make. In this regard, it is also clear that whether one takes Suriname's proposal for its relevant coast—the 1936 Point to Warappa Bank—or Guyana's proposal for Suriname's relevant coast—the 1936 Point to Hermina Bank—the conclusion is the same: Suriname's relevant coast runs from west to east and faces north.

3.177. However, at no place in its Reply does Guyana address the general direction of its relevant coast. Instead its focus, at paragraphs 3.12-3.13, is to try to describe the combined coasts of the two countries as a sort of shallow concavity. This of course is inconsistent with Guyana's recognition that the relevant coast of Suriname generally runs west to east along about 6° N latitude, and it is inconsistent with Dr. Smith's report that the coast of Guyana "generally faces northeastward."[417]

3.178. In its Counter-Memorial, Suriname showed that Guyana's 34° line is perpendicular to the general direction of Guyana's relevant coastal front. This means that Guyana's coastal front runs from the starting point to the northwest at a 304° bearing,[418] more in a northwest by west direction than due northwest.

3.179. Because the coastal front of Guyana runs at a bearing of 304° and the coastal front of Suriname runs at 90°, the bearing lines of those coastal fronts form an angle at their intersection, and that angle can be applied in the application of the delimitation method if appropriate in the circumstances.

3.180. Guyana refers to the fact that Suriname's depictions of the coastal front lines of Guyana and Suriname do not intersect, and it asserts that there is something wrong with Suriname's analysis of the geographic circumstances.[419] Guyana even says that since the two lines do not intersect, they do not form an angle.[420] Of course, mathematically, unless two bearing lines are parallel, those two bearing lines will intersect and form an angle. The second segment of the boundary in *Gulf of Maine* (discussed below) demonstrates this geometric truth.

3.181. Another geographic criterion related to the relevant coast pertains to the length of the relevant coast. This is a matter that has been somewhat confused in the case law, and the recent Award in *Barbados-Trinidad and Tobago* has gone a long way to clarify the situation. Both Parties in this case have suggested that the Tribunal should adjust the line created by their preferred delimitation method because of a disparity in the length of the relevant coasts in their favor. As noted above, the Parties view those relevant coasts differently. In the Counter-Memorial, Suriname suggested that one reason for an adjustment of the 17° angle bisector line was that the Suriname relevant coast is longer than the relevant coast of Guyana. In the Reply,

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[417] Robert W. Smith, Independent Report on the Guyana-Suriname Coastal Geography and the Impact on Maritime Boundary Delimitation (March 2006), at RG, Vol. II, Annex R1, para. 15.

[418] It may be noted that the relevant coast that Guyana postulates for itself running to Devonshire Castle Flats when considered as a straight line runs at a bearing of 316°. Likewise the Guyana coast identified by the Applied Physics Laboratory at John Hopkins University when considered as a straight line runs at a bearing of 315°.

[419] In its graphics in the Counter-Memorial, Suriname did not depict the coastal front lines of Suriname and Guyana meeting to demonstrate that the coastal front of Guyana in fact is set seaward from that of the coastal front line of Suriname due to the Berbice-Corantijn convexity discussed below.

[420] RG, para. 3.7, pp. 34-35.

Guyana suggested that its relevant coast is longer than that of Suriname, and accordingly it now uses precise coastal proportionality ratios as a *post hoc* justification for its 34° line.

3.182. Suriname believes that its relevant coast stands in relation to Guyana's relevant coast at a ratio of 1.56:1.00. Guyana believes that its relevant coast stands in relation to Suriname's relevant coast at a ratio of 1.41:1.00. In either event, neither of these ratios is a substantial disparity such as the *Barbados-Trinidad and Tobago* Arbitral Tribunal found to exist in that case. However, it is not ruled out that disparities in relevant coastal length, even when not "significant," can be taken into account. Suriname maintains that it has correctly identified the relevant coasts, that they stand in a 1.56:1.00 ratio in Suriname's favor, and that it is appropriate to take this into account as a relevant geographic circumstance.

C. The Issue of Coastal Concavities and Convexities

3.183. The relevant coasts of Suriname and Guyana, of course, are not perfectly smooth. As Guyana correctly notes, there are no major promontories, islands, or other coastal features that render those coastlines extraordinary. Thus, the relevant coasts can easily be represented by coastal front lines representing the relevant coast. That does not mean, however, that the coastal configuration of the relevant coasts should not be examined. The reason the various sinuosities along the relevant coasts need to be examined is to see what effect they may have on the application of any delimitation method to the coastal geography—particularly the application of the equidistance method.

3.184. To this end, Suriname pointed out in its Counter-Memorial various convexities along the Guyana coast and concavities along the Suriname coast. Suriname did not say that Guyana's whole relevant coast is convex or that Suriname's whole relevant coast is concave.[421] Overall, these coasts are relatively straight and form an angle where they meet, as discussed above. However, as Suriname demonstrated in the Counter-Memorial, the provisional equidistance line extends from these coasts at a particular orientation that cuts across the coastal front of Suriname, and it changes direction significantly two times before it reaches the 200-nautical mile limit. The reason for examining the coastal configuration is to assess the reason for the original orientation of the provisional equidistance line and the reasons why the orientation of the provisional equidistance line changes as it moves seaward. The reason why the provisional equidistance line adopts one course and then changes direction to a different course is directly related—indeed, mandated—by the methodology that relies on basepoints that do not sit on a smooth coast but on a natural coast of many sinuosities.

3.185. Guyana argues that in its first section the provisional equidistance line follows a direction approximating its 34° claim line. Suriname does not agree that the provisional equidistance line begins as a 34° line. Instead, using both Parties' versions of the provisional equidistance line, Suriname has calculated the general direction of the first section of the provisional equidistance line to be approximately 28°. The stark difference between the provisional equidistance line and Guyana's 34° claim line will be addressed in Part E below. Although not a 34° line, the provisional equidistance line nonetheless clearly cuts diagonally across Suriname's coastal front. What causes this encroachment? The answer is the coastal

[421] In its Reply, Guyana claims that in its discussion of the relevant coasts, Suriname has engaged in "nothing less than a refashioning of geography." RG, para. 5.33, pp. 92-93; *see id.* at para. 3.4, p. 34. Suriname has not sought to "refashion" geography, but to present the geography that is actually relevant to this delimitation.

configuration immediately on either side of the 1936 Point that is out of alignment with the basic configuration of the relevant coasts of the Parties.

3.186. Figure 6, which reproduces Figure 32 from Suriname's Counter-Memorial, shows the provisional equidistance line starting from the 1936 Point and its relevant basepoints. The answer to the question posed in the preceding paragraph is as follows: the direction of the first segment of the provisional equidistance line is caused by the basepoints that lie along the convexity in Guyana's coast between the west bank at the mouth of the Corantijn River and the Berbice River. As Suriname noted in its Counter-Memorial: "This rounded or arcing coastline protrudes seaward relative to the adjacent coast of Suriname. . . ."[422] This particular section of convex Guyana coastline contains over 80 percent of Guyana's basepoints for constructing the provisional equidistance line. Although they are located over no more than a total of 46 kilometers of Guyana's relevant coast as presented by Guyana, those basepoints on Guyana's convex coastline east of the Berbice River have a controlling influence over the provisional equidistance line for more than 319 kilometers/172 nautical miles or 80 percent of its length. Those basepoints are located close to the starting point of the provisional equidistance line, but, in relation to the starting point, are not aligned with the general direction of the relevant coast of Guyana. Thus, those basepoints push the provisional equidistance line across the coastal front of Suriname.

3.187. As noted above, the problem here is compounded by the recessed (concave) coast of Suriname immediately east of the 1936 Point between the Corantijn and Coppename Rivers. While Guyana's basepoints between the Berbice and Corantijn Rivers are out of alignment with the relevant coast of Guyana and push the equidistance line toward Suriname, Suriname's corresponding coast is recessed in relation to the relevant coastal front of Suriname, and does not supply basepoints to counteract the effect of the basepoints located on Guyana's coast between the Berbice and Corantijn Rivers.

3.188. Of course, Suriname does not argue that, overall, its coast is concave, or that overall Guyana's coast is convex. Suriname argues only that there is a convexity in Guyana's coast at a critical location and a concavity in Suriname's coast at a critical location, that these coastal configurations are out of alignment with the relevant coastal fronts and are thus anomalies when compared to those relevant coastal fronts, and that in tandem they have a distorting effect on the provisional equidistance line in its critical initial stage. In this regard, Guyana's caricature of Suriname as an aspiring Germany, while evocative, misses the point. The use of the terminology of concavity and convexity suggests that a coast can recede, or protrude, in relation to a neighboring coast, without requiring that the coasts have the same configuration as the coast of Germany. The question is whether a coast protrudes or recedes in relation to the other coast and how this affects the construction of a provisional equidistance line.

3.189. Suriname does not claim to be Germany, but what the Court said about equidistance lines and coastal configurations in the Judgment of the *North Sea Continental Shelf* cases still holds true and is applicable here. The Court was well aware of the broader geographical situation of neighboring coasts in the North Sea, but it also spoke of the effect that minor coastal configurations have on the equidistance line. At paragraph 89 of the Judgment, the Court said:

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[422] SCM, para. 6.11, p. 95.

> The slightest irregularity in a coastline is automatically magnified by the equidistance line as regards the consequences for the delimitation of the continental shelf.[423]

3.190. Earlier in the Judgment at paragraph 59, referring to maps and diagrams prepared by the parties, the Court said:

> [T]he distorting effects of lateral equidistance lines under certain conditions of coastal configuration are nevertheless comparatively small within the limits of territorial waters, but produce their maximum effect in the localities where the main continental shelf areas lie further out.[424]

3.191. One of the diagrams the Court was referring to is shown here at Figure 7. It was part of the argument of Professor Jaenicke and can be found at page 29 in Volume II of the Pleadings in the case.[425] The point of this diagram simply is that if the basic coastal orientation of two countries forms a straight line, but if State A has even a very small headland that protrudes only one kilometer from that straight line, that headland will have dramatic effects on the equidistance line. It was this specific diagram that the Court was referring to when it said at paragraph 8 of the Judgment:

> It will suffice to mention here that, for instance, a deviation from a line drawn perpendicular to the general direction of the coast, of only 5 kilometres, at a distance of about 5 kilometres from that coast, will grow into one of over 30 at a distance of over 100 kilometres.[426]

Dr. Smith has commented on this diagram in his writings as follows:

> With a straight coastline and no headland, the equidistant line would be the perpendicular line to the coast at the land boundary terminus. As the headland of one state protrudes further seaward, the equidistant line "diverts" toward or "encroaches" upon the neighboring state (State B on graph).[427]

As Dr. Smith's commentary in the cited article recognizes, the diagram used by Dr. Jaenicke illustrated this effect of a small headland on the equidistance line only to a distance less than 60 nautical miles from the coast. If extended to 200 nautical miles, the effect will be even more dramatic, as the map produced by Dr. Smith in his article depicts.

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[423] North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Merits, Judgment, I.C.J. Reports 1969, p. 49, para. 89.

[424] *Id.* at p. 37, para. 59.

[425] Argument of Professor Jaenicke, North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), I.C.J. Pleadings, Oral Arguments, Documents, Vol. II, pp. 23-24.

[426] *North Sea Continental Shelf*, I.C.J. Reports 1969, pp. 17-18, para. 8.

[427] Robert W. Smith, *Geographic Considerations in Maritime Boundary Delimitations*, *in* Rights to Oceanic Resources: Deciding and Drawing Maritime Boundaries (Dorinda G. Dallmeyer & Louis DeVorsey, Jr. eds., 1989), at SR, Vol. II, Annex SR32, at p. 7.

3.192. The relevant coasts of Suriname and Guyana together form an angle, not a straight line. Suriname's relevant coast runs west to east; there is no difference between the Parties on this point. Guyana's relevant coast runs generally in a northwest by west direction. Depending on how Guyana's relevant coast is evaluated, one might say that it runs at one specific bearing or another—but no matter how it is evaluated, it clearly runs in a direction different from that of Suriname's coast, and it runs generally in a northwest by west direction. But the provisional equidistance line does not respect that general relationship of the two relevant coasts. It is influenced at the outset by the coastal configuration immediately to Guyana's side of the 1936 Point. That configuration has the same influence on the equidistance line in this case as is shown on Professor Jaenicke's headland diagram which the Court noted.

3.193. Thus, the original orientation of the provisional equidistance line is disadvantageous to Suriname because of the convex nature of Guyana's coast that contributes the basepoints for the first part of the provisional equidistance line and the corresponding relatively few basepoints on Suriname's recessed coastal configuration leading toward the Coppename River. It is only when Suriname's basepoints on Hermina Bank come into play that the provisional equidistance line turns (in its second segment) along a bearing that is more in keeping with the orientation of the relevant coasts of the Parties to the case. Guyana's Reply has discovered Hermina Bank and calls it "an irregular feature of the coastline that should be discounted in order to achieve an equitable solution."[428] Elsewhere it refers to Hermina Bank as a "convex irregularity."[429] Hermina Bank is not a geographic anomaly. It is aligned along the relevant coast of Suriname that runs along 6° N latitude, as Guyana recognizes. The effect of the basepoints on Hermina Bank is simply to counter the influence of basepoints on Guyana's convex coast between the Corantijn and Berbice Rivers that cause the first segment of the provisional equidistance line to swing out in front of the coastal front of Suriname.

3.194. This examination of the coastal concavities and convexities that fall along the relevant coasts of the Parties demonstrates that the direction taken by the provisional equidistance line as it leaves the coast in its first segment is not consistent overall with the orientation of the relevant coastal fronts of the Parties. Guyana's argument that the basepoint on Hermina Bank has an undue effect on the provisional equidistance line makes the case against equidistance in this circumstance because it illustrates the problem with equidistance in adjacent state situations: it is not the coast that controls the direction of the boundary, but rather it is isolated points on neighboring coasts and their relative position to one another. For this reason, Suriname believes the angle bisector method should be employed, which in fact is simply the median line between two generalized representations of the coastal fronts of the Parties.

D. Guyana's Relevant Maritime Area Does Not Properly Identify the Area To Be Delimited

3.195. The area to be delimited in this case lies in front of the relevant coasts of the Parties. Suriname depicted its view of the area to be delimited at Figure 33 of the Counter-Memorial. For Suriname, the area to be delimited is the area where the coastal front projections of Suriname and Guyana converge and overlap. Guyana has countered with what it calls the area of appurtenance and relevance. Guyana creates this area on the theory that the relevant coasts in this case project radially. It suggests that all of the ocean space that is within 200 nautical

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[428] RG, para. 7.59, pp. 137-38.

[429] *Id.* at para. 7.53, p. 136.

miles in all directions of the relevant coasts of both countries is the area that the Tribunal should evaluate as potentially relevant to its work.

3.196. Guyana's "appurtenant and relevant maritime areas" appears to be a version of the radial projection approach that Canada took in the *Gulf of Maine* case. "Appurtenance" is nothing more than adjacency, and the Chamber in the *Gulf of Maine* case rejected Canada's arguments about adjacency as "just one more, still unconvincing, endeavour" to instill the idea that equidistance is a principle of customary international law.[430] The approach also bears some relationship to the arguments of Nova Scotia in the Newfoundland and Labrador-Nova Scotia arbitration over their offshore areas, which, although a delimitation between Canadian provinces, was decided on the basis of international maritime boundary law.[431] Those arguments, too, were rejected.

3.197. Guyana's approach to the area to be delimited, likewise, is without foundation and should be rejected. It confuses the basis of entitlement with the needs of delimitation. Suriname does not see how the maritime area that is in front of Guyana's coast west of the Essequibo River is attributable to Suriname in any form whatsoever, even if it is in fact within 200 nautical miles of the coast of Suriname. The relevant coasts and relevant areas must be concepts that help in the delimitation process. Suggesting that Guyana has a claim all the way to Suriname's as yet undefined border with France does not do so.

3.198. In the jurisprudence of maritime boundary delimitation, international courts and tribunals have referred to both radial and directional projection of coastal fronts. These two different ways of looking at coastal projections have their appropriate place in particular geographic configurations and for particular purposes. Radial is a way of understanding, generally, how coasts generate maritime entitlement. Directional is a way of understanding, not the full possible extent of a single coastal states' maritime entitlement, but the maritime area upon which a particular relevant coast abuts. When two adjacent states abut upon the same maritime area and their potential entitlements to that area converge and overlap, that is the area to be delimited. For this reason, especially in adjacent state situations, directional projection of the relevant coasts creates a useful perspective on the area to be delimited, while radial projection, in this context, is at best of little use and at worst an attempt to contrive a *post hoc* proportionality rationale for the claimed line.

3.199. The effort to create comparative ratios of coastal lengths and maritime areas by manipulating coastline length and maritime areas smacks of reviving "proportionality" as a method of delimitation. To the extent international courts and tribunals have ever used proportionality, it has only been as a general check at the end of a delimitation to confirm that a particular boundary solution is not an inequitable one. Guyana has fallen into this trap and has produced relevant coasts and relevant areas that almost exactly create identical ratios. With reference to Map A on Plate 18 of the Reply, Guyana states:

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[430] Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Merits, Judgment, I.C.J. Reports 1984, p. 297, para. 106.

[431] *See* Arbitration Between Newfoundland and Labrador and Nova Scotia Concerning Portions of the Limits of Their Offshore Areas as Defined in the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act and the Canada-Newfoundland Atlantic Accord Implementation Act, Award of the Tribunal in the Second Phase (26 March 2002), p. 48, para. 2.35, available at http://www.nr.gov.nl.ca/mines&en/publications/offshore/dispute/phaseII.pdf.

> [T]he N34E line divides this area in almost the identical proportion as the ratio of the Parties' relevant coastlines: 1.39 to 1 (division of the relevant maritime area) and 1.40 to 1 (lengths of the relevant coastlines).[432]

Such perfection cannot go unnoticed, but only serves to validate the holding in a number of cases to the effect that such proportionality exercises are not the way to go about the delimitation process.

IV. Delimitation Methods

3.200. This Section addresses delimitation methods. Delimitation methods, in the main, are basically geometric methods applied to coastal geography. In and of themselves, these methods are not rules or principles, they are mathematical applications. Rules and principles guide and direct whether such a mathematical application should be employed in any particular case. This Section will address the equidistance method proposed by Guyana and the angle bisector method proposed by Suriname. In this context, the expert opinion of Thomas D. Rabenhorst obtained by Guyana to criticize Dutch Nautical Chart NL 2218 will also be addressed.[433]

3.201. Equidistance is a commonly used delimitation method in uncomplicated geographical situations, particularly between opposite states. Other methods of particular usefulness in adjacent state situations include a perpendicular to the general direction of the coast, a bisector of the angle of the relevant coastal fronts, and an extension of the direction of the land boundary. Enclaving is another method. It is the law that directs which method should be employed, and not *vice versa*.

3.202. Given the controversy at the Third United Nations Conference on the Law of the Sea on the delimitation articles—that is to say, the debate between the equitable principles camp and the equidistance camp in connection with the negotiation of what became Articles 74 and 83—it cannot be denied that if it had been believed that equidistance was a rule of law under the Convention, the Convention would not have been adopted, let alone have entered into force. The Convention did not constitute a win for either the equitable principles camp or the equidistance camp.

3.203. Subsequently, the International Court of Justice and arbitral tribunals found it convenient as a matter of procedure to examine the provisional equidistance line as a first step to determine an equitable maritime boundary. The provisional equidistance line is the result of mathematical method applied to geography. As such, it is objective, but as noted long ago, that does not mean it will create an equitable result. Thus, modern international practice begins by examining the provisional equidistance line and asking whether another method should be employed or the equidistance method adjusted so as to lead to an equitable result.

3.204. In its Counter-Memorial, Suriname set out the provisional equidistance line, examined it, and determined that the bisector of the angle of coastal fronts was a more appropriate method in the circumstances. Guyana, too, set out a provisional equidistance line in its Reply

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[432] RG, para. 7.50, p. 135.

[433] Thomas D. Rabenhorst, Analysis of Recent Shoreline Revisions to the 2005 Edition of Dutch Nautical Chart NL 2218 (March 2006), at RG, Vol. II, Annex R2.

that is comparable to that of Suriname, but nonetheless continues to promote a single-segment 34° line to the 200-nautical mile limit and asserts that it results from the equidistance method.

3.205. This Section addresses the application of the equidistance method that resulted in the provisional equidistance lines created by the Parties and the angle bisector method proposed by Suriname.

A. Equidistance

3.206. Guyana's Reply asserts that Suriname is trying to "diminish the role of equidistance."[434] There is no doubt that Suriname believes an angle bisector method is more appropriate in the geographic circumstances of the case. Suriname, however, has not avoided equidistance in its pleadings. In its Counter-Memorial, Suriname set out the provisional equidistance line in detail, and concluded that a different delimitation method should be employed. Suriname is quite prepared to continue to demonstrate why it believes that equidistance is not appropriate in this case and to address the contrary arguments of Guyana.

3.207. In its Memorial, Guyana hardly referred to the provisional equidistance line. In the Reply, Guyana now repeatedly announces that the Parties are in agreement on the provisional equidistance line and suggests that other South American maritime boundaries are equidistance lines. Those contentions are explored in the following paragraphs.

1. *Differences Regarding the Provisional Equidistance Lines*

3.208. It should not come as a surprise that competent geographers on the Suriname and Guyana teams have constructed provisional equidistance lines that are similar. There are, however, some important differences. These differences result from the coastline depictions on the nautical charts used to identify the basepoints from which the provisional equidistance line is constructed and from assumptions that must be made in applying the equidistance method. These assumptions are required since the 1936 Point is not located on the low-water line of the coast—that is to say, it is not a land boundary terminus, as has been shown in Section I of Chapter 2.

a. In General

3.209. Suriname has used the following nautical charts to prepare its provisional equidistance line: NL 2228, 2228-1, 2014, 2218; BA99A, 572, 2687, 527.[435] Guyana has used US NIMA 24370, 24380.[436]

3.210. Suriname has identified 14 basepoints on its coast and 19 on Guyana's coast. There are 33 turning points in Suriname's provisional equidistance line. Guyana identified 11 basepoints on Suriname's coast and 16 on Guyana's coast. There are 26 turning points in Guyana's provisional equidistance line.

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[434] RG, para. 5.17, pp. 85-86.

[435] Charts Used to Derive Basepoints Used to Construct the Provisional Equidistance Line, at SCM, Vol. III, Annex 68.

[436] RG, para. 3.21, pp. 41-42.

3.211. The difference between the areas delimited by the two provisional equidistance lines is approximately 90 square kilometers overall. The most noticeable difference occurs at the beginning of the provisional equidistance line as it leaves the coast; there is a much smaller difference at the very end of the provisional equidistance line as it approaches the 200-nautical mile limit. If the differences at the two extremities are removed, the remaining overall difference (approximately 57 square kilometers) is spread throughout the remainder of the length of the line.

b. Inshore

3.212. Plate R19 from Guyana's Reply, reproduced following page 13 as Figure 1**,** demonstrates the difference between the Parties concerning the provisional equidistance line in the inshore sector. There is approximately 33 square kilometers of area between the two provisional equidistance lines shown on this Figure.

3.213. What are the reasons for this difference? It may be that a very minor part of this difference results from the different nautical charts used. However, there are two main reasons for the difference.

3.214. First, it may be observed that the 1936 Point is not on the low-water line. Indeed, as shown on Guyana's Plate R19, it is located well above the high-tide line. Accordingly, if one is going to determine a provisional equidistance line in these circumstances, an assumption must be made about how the territorial boundary—that is to say the land boundary—runs from the 1936 Point to the low-water line. As demonstrated in Section I of Chapter 2, Suriname believes this is an assumption that an Annex VII Arbitral Tribunal constituted under the 1982 Convention cannot make. However, to illustrate the provisional equidistance line in this Chapter 3, a way must be found to reach the low-water line. Therefore, the point that Suriname has chosen on the low-water line is a point that lies at a 10° bearing from the 1936 Point. This is the methodology adopted by the Boundary Commissioners in 1936.[437] Guyana has chosen the point on the low-water line that is closest to the 1936 Point. These two starting points are located approximately 2.2 kilometers apart, when measured in a straight line.

3.215. Second, the Parties have a different view—that is to say a dispute pertaining to territory—concerning the ownership of the west bank of the Corantijn River. This is again a territorial issue and it has implications throughout the length of the Corantijn. Again, as addressed in Section I of Chapter 2, in Suriname's view the Tribunal cannot decide this matter. Suriname is sovereign over the River and it is sovereign over both banks of the River. If a provisional equidistance line is to be drawn, the low-water line south and east of the starting point belongs to Suriname and the low-water line north and west of the starting point belongs to Guyana.[438] This is the low-water line to be used to construct the provisional equidistance line. This is what Suriname has done to construct the blue-dashed provisional equidistance line shown on Guyana's Plate R19. However, Guyana disagrees. It says: "Suriname does not have sovereignty over the coast at the location of its basepoint S1 and accordingly no

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[437] SPO, para. 2.4, p. 6.

[438] Of course, it would be open to Suriname to establish a river closing line across the mouth of the Corentijn once the land boundary terminus is established, and this could be used by Suriname in establishing the provisional equidistance line.

basepoint should be located there in favour of Suriname."[439] It would appear that this is further evidence that the territorial sovereignty in the vicinity of the land boundary terminus is disputed. Moreover, Guyana appears to go even further in its written pleadings and states: "Guyana does not accept that Suriname has sovereignty over the entirety of the river . . . ."[440]

3.216. Suriname disagrees with these statements.[441] Moreover, the awkward result of Guyana's various positions on basepoints, baselines and related matters at the mouth of the Corantijn River is seen in the construction of Guyana's provisional equidistance line. Guyana says that "[t]he correct starting point for the provisional equidistance line is Guyana's basepoint G1."[442] But equidistance lines do not start at basepoints, and Guyana's G1 on Plate R19 is not the actual starting point of Guyana's provisional equidistance line. Rather it is Guyana's first controlling basepoint. Together with Guyana's basepoints G2 and S1, it determines the actual starting point of the equidistance line which is represented by the white circle just above the label 'Suriname's provisional equidistance line' on Plate R19. That is the first turning point provided in Guyana's Annex R26 of the Reply. The solid black line segment between G1 and this first turning point is not part of the provisional equidistance line, but an arbitrary filler line used to anchor Guyana's provisional equidistance line to shore. Guyana's provisional equidistance line is only a partial provisional equidistance line. Of course, this only illustrates further the problem with delimiting a lateral maritime boundary between adjacent states that have not agreed to the location of their land boundary terminus.

c. Offshore

3.217. At the very end of the provisional equidistance line, there is a difference which relates to the contested Suriname basepoint on Vissers Bank. At Annex SR43 of this Rejoinder Suriname sets forth the facts associated with chart NL 2218 and responds to the opinion of Thomas D. Rabenhorst. Suriname stands behind the coastline depiction on that chart.[443] That chart was far along in the process of preparation by the time this case was started, and there is no basis for Guyana's suggestion that it was prepared for the purpose of this case. Guyana's suggestion that it was prepared for the purpose of placing a basepoint in the particular place that this one is placed on Vissers Bank is without merit.

3.218. Guyana does not seem to be particularly upset about the Vissers Bank basepoint when it comes to the construction of the provisional equidistance line. However, for the record, the Reply is incorrect when it states that this basepoint does not alter the plotting of the provisional equidistance line.[444] The differences in the two provisional equidistance lines in the far offshore area, while relatively small, amount to 0.042 square kilometers and affect the last nautical mile of the length of the provisional equidistance line. What Guyana seems most upset about is that using Guyana's theory of how one determines relevant coasts, the Vissers Bank basepoint would indeed lengthen Guyana's rendition of Suriname's relevant coast. But

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439 RG, para. 6.14, p. 109; para. 7.19, p. 125.

440 *Id.* at para. 6.27, p. 113.

441 *See supra* Chapter 2, Section I.

442 RG, para. 6.15, pp. 109-10.

443 Article 5 of the 1982 Law of the Sea Convention provides that ". . . the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State."

444 RG, para. 1.10, p. 5.

Guyana's theory of relevant coasts has been discredited, and in all events it is Suriname's position that its relevant coast extends beyond Vissers Bank to Warappa Bank. Thus, the Vissers Bank basepoint debate need not be addressed further in the Rejoinder. The facts are set forth at Annex SR43.

3.219. However, the debate about the Vissers Bank basepoint illustrates the fact that any equidistance line is a line that is equidistant relative to a coastline as it appears or is depicted at any given moment. The coastline of Guyana and Suriname confounded the British and Dutch hydrographers, who never agreed on the depiction of the coast so that they could jointly draw an equidistance line. Although Dr. Smith suggests in his report that accretion and erosion are not enough to affect the equidistance line,[445] Suriname submits that statement is not correct. As Dr. Jaenicke's headland diagram at Figure 7 illustrates, small changes in the shape or presence of low-tide features along a coast, whether due to accretion or erosion or other natural processes that change the configuration of the low-water line, can lead to very substantial changes in the provisional equidistance line, particularly in adjacent state situations.

2. *Other South American Boundaries*

a. Suriname-French Guiana

3.220. Suriname responded to Guyana's contentions about the Suriname-France maritime boundary relationship at paragraphs 2.19-2.23 of the Counter-Memorial. The Guyana Reply responds by stating:

> Suriname is notably defensive when it comes to the question of its agreement with France (French Guiana). It does not dispute that the agreement (which is not yet in force) reflects a straight equidistance line with a single constant azimuth of N30E in the territorial sea and continental shelf.[446]

3.221. In Suriname's view it is not "defensive" to note the facts and the law. There is no agreement between Suriname and France, and the law to be applied in this and every other case is clear: the law is to be applied in the geographic circumstances of the case before an international court or tribunal and the claims of a party in relation to other geographic situations are not relevant.

3.222. Guyana insists, nonetheless, that there is such an agreement, although it concedes that there is no agreement in force, and at times in its pleading it refers to it as an agreement in principle. Guyana argues:

> Given the similarities of the coastal situations, the burden is on Suriname to explain why an equidistance approach is equitable in one area but inequitable in another a little further up the coast,

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[445] Robert W. Smith, Independent Report on the Guyana-Suriname Coastal Geography and the Impact on Maritime Boundary Delimitation (March 2006), at RG, Vol. II, Annex R1, at para. 36.

[446] RG, para. 5.52, pp. 99-100.

> having regard to the fact that the two areas share many of the same essential coastal features.[447]

Suriname does not believe it bears any burden in this regard. If there is a burden, it is on Guyana to explain how the geographical circumstances are similar when they obviously are not and when it asks the Tribunal to find relevant a not-yet-agreed-upon maritime boundary situation between Suriname and France. There would seem to be two reasons why Guyana is focused on this matter. First, it wants to promote the idea that if equidistance is agreed between Suriname and France, Suriname should agree that equidistance should be used by Suriname and Guyana. Second, to advance and support its various proportionality arguments that must include the measurement of maritime areas, it wants to convince the Tribunal that Suriname's western boundary with France will run at 30°. In that regard, there is no doubt reference to 30° can be found in archival documents and secondary sources, but those are old and are largely irrelevant in today's world for the establishment of an EEZ boundary between Suriname and France by agreement, which is yet to come.

3.223. It is tedious for Suriname to repeat that in Suriname's bilateral relations with France there is no "agreement in principle" on this boundary. Suriname acknowledges that there are meetings at the technical level, and that France and Suriname do not have an active and obvious maritime boundary dispute is also true. It is also true that a simplified equidistance line between Suriname and France, based on the coastline as it now is, would approximate a straight line at a bearing of about 24-25°, not 30°, and corresponds to a perpendicular to the general direction of the coast throughout its length to the 200-nautical mile limit. Thus, in these circumstances, there is little difference between an equidistance line and a single segment perpendicular to the general direction of the coast line. Embracing such lines in those circumstances is quite unlike Guyana's "historical equidistance line," which claims for Guyana 12,000 square kilometers more than would result from the provisional equidistance line.

b. Others

3.224. Guyana calls attention to the South American maritime boundaries between France and Brazil, Brazil and Uruguay, and Uruguay and Argentina. It refers to them as equidistance lines and suggests that if such lines were agreeable to those states concerned, Suriname should agree to the "equidistance" line Guyana proposes. The equidistance line that Guyana proposes is, of course, not an equidistance line; nor is it a simplified equidistance line.

3.225. Guyana is correct when it notes that Judge Jimenez de Aréchega referred to these boundaries as equidistance lines in his summary of South American boundaries in Volume I of the American Society of International Law's International Maritime Boundaries series.[448] However, a review of that summary presentation reveals that the purpose of the reference to equidistance is to contrast the South American boundaries on the Pacific coast (parallels of latitude) with the general approach on the Atlantic coast, where the coastal relationship between the neighboring countries has been given greater weight in determining the maritime boundary line.

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[447] *Ibid.*

[448] *See id.* at para. 3.50, n.79, p. 53.

3.226. In the same Volume I which contains the summary presentation that Guyana refers to, Judge de Aréchega also authored the individual reports on the three referenced maritime boundaries with the accompanying maps.[449] The three relevant maps which appeared in that volume are included in Annex SR33. In keeping with the format of the maps in that series, the boundary line and the equidistance line are shown.

3.227. The map of the Brazil-France (French Guiana) boundary illustrates that the single segment boundary at 41° 30' established from an agreed starting point corresponds closely to the equidistance line throughout its entire length. As Judge de Aréchega noted in his Boundary Report 3-3:

> The boundary is perpendicular to the general direction of the coasts of Brazil and French Guiana. It coincides roughly with the line of equidistance because of the straight baseline and the absence of promontories or other special circumstances on the coasts of either party that would markedly affect an equidistant line.[450]

3.228. The Brazil-Uruguay boundary is also a single-segment boundary established from an agreed starting point, and as the map shows it closely corresponds to an equidistance line throughout its entire length. The beginning words of Judge de Aréchega's Boundary Report are: "This agreement establishes a lateral maritime boundary between the two adjacent countries by means of a single line running nearly perpendicular to the general line of the coast."[451]

3.229. The Argentina-Uruguay boundary, relative to the two boundaries just mentioned, departs more substantially from a true equidistance line as can be seen in the depiction of that boundary appearing in Annex SR33. While those parties choose to refer to the agreed line as an equidistance line, it obviously is not. In fact, Suriname estimates that there are approximately 5859 square kilometers between the equidistance line and the boundary line to Uruguay's advantage.

B. Bisectors

3.230. The bisector of the angle formed by two coastal fronts is a delimitation method that has been used to determine boundary segments in both the *Gulf of Maine* case and the *Tunisia-Libya* case. In geographical circumstances such as that between Guyana and Suriname, where the respective and relevant coasts of the Parties meet and form an angle, the angle bisector method, when properly applied, will result in a single segment boundary that approximates a simplified equidistance line, just as so happens when a perpendicular to the general direction of the coast is used. The bisector method and its variations were applied in two of the boundary segments in the *Gulf of Maine* case and were used to determine the bearing of the

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[449] 1 *International Maritime Boundaries*, 757-76, 777-83, 785-92 (J.I. Charney & L.M. Alexander, eds., Martinus Nijhoff Publishers 2002). The Brazil-France (French Guiana) boundary is Report Number 3-3; the Brazil-Uruguay boundary is Report Number 3-4; and the Argentina-Uraguay boundary is Report Number 3-2. These individual boundary reports are reproduced in Annex SR33 to this Rejoinder.

[450] *Id*. at p. 778.

[451] *Id.* at p. 785.

second segment of the boundary in the *Tunisia-Libya* case.[452] Thus, it is a method of delimitation that is useful and finds its place in certain geographic circumstances.

1. *Gulf of Maine (1)*

3.231. In its Counter-Memorial, Suriname noted that the most famous use of the angle bisector method was in the first sector of the boundary in the *Gulf of Maine* case.[453] Guyana criticizes Suriname and says that its "reliance on that case is misconceived and of no assistance to Suriname."[454] Guyana bases its criticism on the fact that the geographic circumstances are different—there are no isolated rocks and low-tide elevations—nor is there the *Machias Seal Island* problem. Those are, of course, factors noted by the Chamber, and they do not exist in this case.

3.232. However, that does not mean that the angle bisector method may not be appropriate in this case. This is a case where the respective relevant coasts of the Parties form an angle where they meet, just as the coastal fronts of Canada and the United States form an angle where they meet at their land boundary terminus. Thus, Suriname believes that it is worth noting exactly what the Chamber did to establish and apply the angle bisector in the first boundary segment in the *Gulf of Maine* case. This is shown at Figure 8.

3.233. The Chamber constructed coastal fronts running from Cape Elizabeth in the United States to the international boundary terminus and from Cape Sable in Canada to the international boundary terminus. The bisector of the angle created by these two lines was established, and a line of that bearing was then applied as the first segment of the maritime boundary running from Point A, agreed between Canada and the United States.[455]

2. *Gulf of Maine (2)*

3.234. It may also be recalled that the second sector of the *Gulf of Maine* boundary was based upon an angle bisector between two coastal fronts. At paragraph 216 of its Judgment, the Chamber noted the line linking Cape Ann and the elbow of Cape Cod in the United States and the line joining Brier Island and Cape Sable in Canada. These two lines are not parallel. To determine what the Chamber of the Court referred to as the median line between those two coastal front lines, it was necessary to determine the bisector of the angle formed by the converging lines of those two coastal fronts. Although the Chamber referred to that angle bisector line as a median line, it obviously was not a median line as would be created by applying the equidistance method. Rather, it was the median line or angle bisector line that split the angle formed by the bearings of two coastal front lines. It was that median line/angle bisector that was then adjusted to the northeast to take into account the longer United States coast that overall was deemed relevant to the delimitation.

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[452] Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Merits, Judgment, I.C.J. Reports 1984, p. 333, para 213; pp. 337-38, paras. 224-25; Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamatiriya), Merits, Judgment, I.C.J. Reports 1982, pp. 88-89, para. 128.

[453] SCM, para. 4.32, pp. 49-50.

[454] RG, para. 5.51, p. 99.

[455] *Gulf of Maine*, I.C.J. Reports 1984, p. 333, para. 213.

3.235. The Technical Report appended to the Chamber's decision explains the process of creating this angle bisector line at paragraphs 8-11.[456] The creation of the second segment of the Chamber's boundary is depicted at Figure 9. Among other things, this example from the case law demonstrates the basic geometrical proposition that it is always possible to bisect the angle of two lines of different bearing even if those lines are not shown as intersecting in the picture before the viewer.

3. *Tunisia-Libya*

3.236. The second segment of the boundary in the *Tunisia-Libya* case is another example of an angle bisector based on coastal fronts. It may be recalled, as shown at paragraphs 5.45-5.55 of the Counter-Memorial of Suriname, that the first segment of that boundary was a perpendicular to the general direction of the coast, supported by the law enforcement practices of the colonial powers, and the intentional alignment by Libya and Tunisia of their oil concessions for an eight-year period.

3.237. The first segment of the Tunisia-Libya boundary extended northward beyond 33° N latitude into the Mediterranean Sea at a 26° bearing, that is to say it extended at this bearing well beyond the limit of any aligned oil concessions. The Court stopped that line where other factors came into play; the most evident factor was the "radical change in the general direction of the Tunisian coastline marked by the Gulf of Gabes."[457]

3.238. To give effect to the eastward facing coastal front of Tunisia, the Court considered that the second segment of the boundary it was constructing should run generally parallel to that coast. To determine the bearing of a line parallel to this portion of the coast of Tunisia, the Court first considered a line at a 42° bearing which represented the Tunisian coastal front "from the most westerly point of the Gulf of Gabes . . . to Ras Kaboudia."[458] This would not, however, take into account Tunisia's Kerkennah Islands. The Court determined that a Tunisian coastal front from the most westerly point of the Gulf of Gabes to the Kerkennahs would run at 62°. The Court found a 62° bearing to be inappropriate because a second segment bearing line running at 62° would give "excessive weight to the Kerkennahs."[459] The Court, accordingly, determined to give half-effect to the Kerkennahs in the following way in the establishment of the second sector of boundary line:

> On this basis the delimitation line, seawards of the parallel of the most westerly point of the Gulf of Gabes, is to be parallel to a line drawn from that point *bisecting the angle* between the line of the Tunisian coast (42 degrees) and the line along the seaward coast of the Kerkennah Islands (62 degrees), that is to say at an angle of 52 degrees to the meridian.[460]

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[456] *Id.* at pp. 349-50.

[457] *Tunisia/Libyan Arab Jamahiriya*, I.C.J. Reports 1982, p. 86, para. 122.

[458] *Id.* at pp. 88-89, para. 128.

[459] *Ibid.*

[460] *Id.* at p. 89, para. 129 (emphasis added).

C. Conclusions

3.239. This review of the equidistance and bisector delimitation methods illustrates that on the one hand the equidistance method is controlled by individual basepoints along the natural coastlines of the neighboring countries. If there is agreement on the basepoints, construction of the provisional equidistance line is a relatively simple cartographic exercise. On the other hand, the bisector method requires an initial determination of simplified representations of the neighboring coasts. The bisector method splits the angle formed by those representations, and thus reflects the median line between the two adjacent neighboring coastal fronts.

3.240. Neither method is required. In the circumstances of the case, it is for the Tribunal to decide whether one of these methods, or perhaps some other, or some combination, is the more appropriate to the circumstances.

3.241. In Suriname's view, the angle bisector is more appropriate because it results in a straight line boundary extending from the coast (a common feature of the claims of both Parties), and it is constructed based upon the simplified representations of the neighboring relevant coasts of Suriname and Guyana that face the delimitation area. These coastal fronts do not refashion geography; they reflect the overall geographic relationship between the coasts of the Parties. An equitable solution can be achieved in this case by applying the angle bisector method to these coastal fronts.

V. The Guyana 34° Line

A. Guyana's Position Has Changed

3.242. Guyana's position concerning this maritime boundary continues to evolve. It began with British acceptance of the 10° Line in the territorial sea, a position maintained from 1936 through 1961. When the boundary discussions between the Netherlands and the United Kingdom took up the need to delimit the continental shelf, the British view was that the maritime boundary should use the 10° Line to delimit the territorial sea, and the equidistance line to delimit the continental shelf—first considered to be bounded by the 25-fathom depth contour, and later, to be bounded by the 100-fathom (200-meter) depth contour. Then, in 1965 the United Kingdom dropped the 10° Line in the territorial sea and took the position that the entirety of the maritime boundary should be the equidistance line—not a modified or simplified equidistance line—but the equidistance line. During this period, the British Government from time to time tended, however, to refer to the equidistance line as being composed of various linked straight line segments denoted as different lines of different bearings.

3.243. When Guyana became independent it took the position expressed in the Marlborough House meeting that the maritime boundary ought to be the equidistance line, and it referred to this line as one of "33 to 34 degrees."[461] The minutes of the Marlborough House meeting give no indication of how far the delegation of Guyana believed this line should extend or where it thought the outer limit of the continental shelf might be located. It may be that in 1966 the delegation of Guyana was of the firm position that the boundary should extend indefinitely at "33 to 34 degrees." The record is also subject to the interpretation that the position of that

[461] MG, para. 4.6, pp. 38-39 (quoting Report of the Discussions Held between Suriname and Guyana at Marlborough House, London England, on 23 June 1966, at MG, Vol. II, Annex 69, at p. 5).

delegation was that the boundary ought to follow the equidistance line, which in its view resulted in an initial segment at "33 to 34 degrees."

3.244. In 1977, Guyana enacted its Maritime Boundaries Act. That law, like many other laws being enacted around the world at the time, anticipated the conclusion of the Third United Nations Conference on the Law of the Sea. The 1977 Maritime Boundaries Act is a modern law of the sea statute that reflects the concepts then under negotiation at the Conference. Article 35 (1) provides for boundaries and it states:

> The maritime boundaries between Guyana and any State whose coast is adjacent to that of Guyana in regard to their respective territorial seas, continental shelves, exclusive economic zones, fishery and other maritime zones shall be determined by agreement between Guyana and such States and pending such agreement shall not extend beyond the line every point of which is equidistant from the nearest point on the baseline from which the breadth of the territorial sea of Guyana and such State is measured.[462]

3.245. As Guyana has admitted, in one part of its practice—its exclusive economic zone—it adheres to a line that approximates the equidistance line to the 200-nautical mile limit, consistent with the requirements of its law. Those responsible for promoting the 34° line to the 200-nautical mile limit, however, evidently do not feel constrained by the national law and promote a line that, in the case of Suriname, extends well to the east of any equidistance line imaginable.

3.246. Guyana would have the Tribunal believe, however, that Guyana has always understood that the equidistance line and the 34° line were synonymous. Guyana's Reply states:

> . . . for Guyana there was no distinction between equidistance and the 34° line.[463]

The Reply continues:

> To be sure, more recent maps reflect a variance between a strict equidistance line and the 34° historical equidistance line . . . .[464]

These rationalizations to equate the equidistance line and the 34° line to the 200-nautical mile limit are not credible, particularly in light of Guyana's fishery practice and its national law, as discussed above and in Suriname's Counter-Memorial.

3.247. Moreover, the legal justification that Guyana gives to support its 34° line has changed fundamentally between its Memorial and its Reply. In the Memorial one finds statements such as the following:

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462 Maritime Boundaries Act 1977, Act No. 10 of 1977, at MG, Vol. III, Annex 99.

463 RG, para. 4.43, p. 75.

464 *Ibid.*

- ". . . there are no islands, low-lying elevations or other equivalent features to be taken into account in identifying the relevant equidistance line or achieving an equitable solution."[465]

- ". . . the case law confirms that geographic and geological factors are of no material relevance for this case."[466]

- "The conduct of Guyana and Suriname shows that between 1966 and 2000 there existed a broad understanding—a *modus vivendi*—as to the location of the maritime boundary."[467]

- ". . . the actions of Guyana and Suriname . . . reinforced the understanding that there was a *modus vivendi* around a historical equidistance line of N34E."[468]

- "The Arbitral Tribunal should take as its starting point for the delimitation of the continental shelf (and the exclusive economic zone) the historical equidistance line . . . ."[469]

- "There are no grounds for shifting that line, which produces an 'equitable solution' within the meaning of Article 83 of the 1982 Convention."[470]

3.248. In the Reply one finds statements that are quite different. Two differences are particularly notable. First, there is no longer any reference to a "*modus vivendi*" along the 34° line. Second, the Reply posits that the provisional equidistance line is the starting point for consideration[471] and should be evaluated and, Guyana maintains, adjusted for geographical and historical reasons "toward" the 34° line.[472]

B. The 34° Line Is Not an Equidistance Line

3.249. The boundary line that Guyana claims in this case is not an equidistance line. The 34° line attributes to Guyana 12,000 square kilometers of maritime area more than an equidistance line would do. The 34° line is best understood as a line that represents a perpendicular to Guyana's coastal front.

3.250. Occasionally, Guyana acknowledges that there is a divergence between any representation of the equidistance line and the 34° line.[473] Guyana postulates that this

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[465] MG, para. 1.11, p. 4; *see also id.* at para. 2.2, p. 7.

[466] *Id.* at para. 7.35, p. 89.

[467] *Id.* at para. 4.1, p. 37.

[468] *Id.* at para. 4.5, p. 38; *see also id.* at para. 7.34, pp. 88-89.

[469] *Id.* at para, 9.29, p. 119.

[470] *Id.* at para 9.30, p. 119.

[471] RG, para. 1.15, pp. 6-7; para. 1.22, p. 9.

[472] *Id.* at para. 1.24, p. 9.

[473] MG, para. 9.28, p. 118; RG, para. 1.28, p. 11; para. 3.58, pp. 56-57.

divergence begins at about the 100 fathom (200-meter) depth contour.[474] In fact, the divergence begins within the 12-nautical-mile territorial sea, and becomes wider and wider as the lines extend seaward. Guyana's modern 34° claim line crosses its provisional equidistance line exactly one time—approximately 11 nautical miles from shore—and that is the last time the two meet. *See* Figure 1, following page 13. The effect of the divergence outside the territorial sea is shown at Figure 5.

3.251. In response to the Counter-Memorial, the Reply offers nothing new to explain the provenance of the 34° line. The Reply maintains that the 34° line represents the average bearing of the equidistance line the British proposed in 1961.[475] That proposal started with a 10° Line for six miles, a 33° line for 35 miles, a 38° line for 28 miles, and a 28° line to the edge of the continental shelf as defined by international law, by which the British probably meant in 1961 the 100-fathom depth contour. That was the best that Commander Kennedy could do to define the equidistance line in 1961—and it was the equidistance line, plus a 10° Line in the territorial sea, that he was trying to define. Notably, in the 1965 British proposal, the United Kingdom made no attempt to define an equidistance line.[476] At no point did the United Kingdom present a 34° line to the Netherlands.

3.252. Although it is said to derive from the equidistance line presented in 1961, Guyana's 34° line has no similarity to the line presented in 1961.[477] Guyana's position does not follow 10° for six miles; it computes the average of the numbers 33, 38 and 28 as 34 when the unweighted numerical average is 33, and instead of following the equidistance line to the 200-nautical mile limit as one can assume that both Commander Kennedy and the British Government would have done, it departs from the equidistance line in a real and substantial way without justification.[478]

3.253. The record is clear. The 34° line cannot be justified as an equidistance line, nor can it be justified as a fair representation of the work of Commander Kennedy leading to the 1961 British proposal.

C. Is the 34° Line Guyana's True Position?

3.254. In light of the evolving character of Guyana's position, the question must be asked whether the 34° line is Guyana's true position. As noted in Chapter 1, after expressing virtually no interest in the provisional equidistance line in the Memorial, Guyana refers to it 187 times in the Reply. In Suriname's view, this is no accident. Guyana's national law calls for an equidistance line. Furthermore, as shown in Section V, Part A of this Chapter 3, the equidistance line would appear to be Guyana's true position.

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474 RG, para. 6.22, pp. 97-98.

475 *See, e.g., id.* at para. 4.28, p. 69.

476 SCM, para. 3.54, pp. 34-35.

477 This is apparent from Plate 40 of the Guyana Memorial.

478 Unlike Commander Kennedy in the late 1950s and early 1960s, both Suriname and Guyana have constructed provisional equidistance lines that extend to the 200-nautical mile limit. The average bearing of those lines is not 34 degrees. Instead, the average bearing of Suriname's provisional equidistance line is 22.7 degrees (see Tables of Geographic Coordinates of Provisional Equidistance Line, at SCM, Vol. III, Annex 69 for coordinates of this line), and the average bearing of Guyana's provisional equidistance line is 21.6 degrees (see RG, Vol II., Annex R26 for coordinates of this line).

D. The 34° Line Does Not Produce an Equitable Solution in This Case

3.255. Guyana represents its 34° claim line at Plate R20 of its Reply. That Plate is reproduced here as Figure 10.[479] It is entitled "Guyana's Proposed Maritime Delimitation." One needs only to examine Guyana's own figure to understand that the 34° line is not an equitable solution. One does not need a computer, or even a ruler, to discern that the 34° line approximates a line perpendicular to Guyana's coastal front, and that it "cuts off" the northward extension of Suriname's coastal front.

VI. The Suriname Line and Its Equitable Characteristics

3.256. The broad question raised by this case is how delimitation is to be effected between adjacent states in circumstances where there are no offshore islands and the coastlines on either side of the land boundary terminus, although not completely regular throughout their course, do not contain features such as peninsulas, major bays, island fringes or other such configurations. In these circumstances, the issue is fundamentally one of the geographical projection and relationship of the coasts and the impact that these have on the choice of the delimitation method.

3.257. From the very beginning, at the Marlborough House talks in 1966, there has been a dispute between Guyana's particular vision of equidistance and Suriname's view that equidistance did not accord with the geographical relationship between the Parties. The minutes of the meeting of the Marlborough House talks prepared by Guyana—that were only produced by Guyana after a request from Suriname—record that Dr. Essed of the Suriname delegation observed:

> I would like to add that the equidistance line is not a general rule. There are exceptions. The general rule is the geographical and natural reality, and if nothing is evident of the geographical situation then we will use the equidistance line.[480]

A similar statement was made by Dr. Calor of the Suriname delegation:

> I wish to explain further the application of the 10° rule. In searching for the direction of the border line, as has been stated by Dr. Essed, the general rule applied is that a border line must be determined between two parts of the country in accordance with the geographical circumstances, which have to be taken into account.[481]

3.258. The emphasis these statements place on geography of course sounds familiar. The case law has always recognized the importance of geography, but these statements predate even the *North Sea Continental Shelf* cases.

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[479] Guyana's map shows its claim to the Upper Corantijn-Coeroeni triangle, which Suriname contests.

[480] Minutes of a Meeting Held at Marlborough House, Room 6, London, 23 June, 1966, Between Officials of the Governments of Guyana and Surinam To Discuss the Border Between the Two Countries, at RG, Vol. II, Annex R12, at p. 12.

[481] *Id.* at pp. 11-12.

3.259. The Suriname 10° Line began as an agreed boundary for the territorial sea. The extension of that line beyond the territorial sea corresponds to the extension of the land boundary of the Parties into the sea. Thus, the 10° Line has a geographical basis throughout its extension to the 200-nautical mile limit; it reflects geographical reality. Its extension to the 200-nautical mile limit also promotes the object and purpose of the 10° Line, which was to protect the interests of the Netherlands, and now of Suriname, in the regulation of navigation to and from the Corantijn River east of that line—in other words to protect the interests of Suriname in the areas in front of its coast. At the time of its adoption, such regulatory jurisdiction was generally limited to internal waters and the narrow territorial sea. That is no longer the case. The coastal state now has substantial regulatory power over navigation not only within the 12-nautical-mile limit of the territorial sea,[482] but well beyond it. In the contiguous zone, whose limit extends up to 24-nautical miles from the coast, the coastal state may enforce its customs, fiscal, immigration, and sanitary laws.[483] In the exclusive economic zone, whose limit extends up to 200-nautical miles from the coast, the coastal state may adopt and enforce regulations applicable to foreign ships with respect to the prevention of pollution.[484] In the exclusive economic zone and on the continental shelf, the coastal state may control the location of installations and structures, including oil rigs, and the safety zones around them, in order both to protect and to prevent interference with navigation and sea lanes.[485]

3.260. Just as the representatives of Suriname argued in 1966, Suriname's pleadings have demonstrated that the equidistance line is not equitable in the light of the relevant geographical circumstances. The 10° Line, however, does result in an equitable delimitation. Guyana argues that the 10° Line is not an equitable boundary, and the Reply ascribes motives to those who first established Suriname's maritime boundary claim. In doing so, the Reply misconstrues the historical record.[486] The Reply suggests that Suriname's 10° Line position only originated after a motion affirming the sovereignty over the Upper Corantijn-Coeroeni triangle was passed in the Parliament of Suriname on 7 October 1965. According to the Reply, the purpose of that Parliamentary action was to ensure no compromise on the land boundary issues, and for that reason Suriname needed a "maximalist" continental shelf boundary claim to start negotiations in the strongest possible negotiating position.[487] The Reply even argues that the 10° Line "was advanced precisely because it was *not* equitable."[488]

3.261. Aside from the unpersuasive reasoning, Guyana's arguments in this regard demonstrate three points. First, Guyana fails to accept that at least by 1962 Suriname's position for the continental shelf boundary was the 10° Line and that this was reflected in the 1962 treaty proposal of the Netherlands, and it forgets that by 1964 one expression of Suriname's position is found on the Colmar concession map which depicted the 10° Line as the boundary of

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[482] Articles 21-23, 25, 26 of the 1982 Law of the Sea Convention.

[483] *Id.* at Art. 33.

[484] *Id.* at Art 56 (1)(b)(iii), 58 (3), 210 (5), 211 (5)-(6), 216 (1)(a), 220 (3)-(8).

[485] *Id.* at Art. 60, 80.

[486] RG, paras. 4.16-4.17, pp. 63-64.

[487] *Id.* at para. 4.16, p. 63.

[488] *Id.* at para. 4.17, p. 64.

Suriname's continental shelf claim.[489] The second point is that Guyana's argument, while not correct in ascribing to Suriname motives for its 10° Line position, nonetheless emphasizes the interconnectedness of all of the boundary problems that Guyana and Suriname inherited and face today. The third point is that Guyana forgets its own history and the well-documented British determination to withhold agreement on the offshore boundary to get what it wanted on the territorial issues.[490]

3.262. It cannot be denied that the broad geographical relationship between the Parties is two adjacent states that face the Atlantic Ocean at different angles. Suriname faces north and Guyana faces somewhat east of north. Thus, a "maximalist" position for Suriname would be a boundary running due north at 0°. The 10° Line, however, does not run on such a bearing and thus does not leave to Suriname all of the maritime area in front of its coast. In contrast, the 34° line, introduced in 1966 after Guyana became independent with the understanding that the United Kingdom had not convinced the Netherlands/Suriname to concede the Upper Corantijn-Coeroeni triangle to Guyana, is a "maximalist" claim, as it would leave to Guyana all of the area in front of its coast. Thus, the 10° Line shares the area of overlapping coastal front projections, while the 34° line takes all the area of overlap and leaves nothing of that area to Suriname.

A. The 10° Line as the Boundary in the Territorial Sea

3.263. In Chapter 4, Section III of the Counter-Memorial, and in Chapter 2, Section I of this Rejoinder, Suriname sets out in detail the reasons why, if the Tribunal concludes that the 1936 Point is binding on the Parties, then the Tribunal should also conclude that the 10° Line is established as the boundary in the territorial sea.

3.264. Suriname maintains, however, that even if the territorial sea section of the single maritime boundary were to be established *de novo*, the 10° Line results in a maritime boundary that respects Suriname's full sovereignty over the Corantijn River and its rights and responsibilities in relation to the shipping in and approaches to the River.

3.265. Such navigational considerations are often found to be circumstances that require accommodation in the establishment of a territorial sea boundary. Even Guyana excerpts a quote from Commander Kennedy in its Memorial that recognizes a "navigable channel" as a special circumstance requiring adjustment of the equidistance line, even for the continental shelf.[491]

3.266. Thus, adjustment of the angle bisector line to the 10° Line appropriately accounts for and protects Suriname's interests in controlling shipping entering and leaving the Corantijn River.

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[489] The Memorial of Guyana contains a map prepared by Guyana that recognizes that the 10° Line stems from as early as 1962. That map depicts a 10° Line extending well beyond the 200-meter isobath and labels it "10° Dutch line 1962." MG, Vol. 5, Plate 15.

[490] SCM, para. 3.32, pp. 26-27.

[491] MG, para. 9.6, pp. 108-09 (quoting Care Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993, pp. 122-23).

B. The 10° Line Represents the Extension of the Land Boundary Into and Beyond the Territorial Sea

3.267. The Reply suggests that the only argument that Suriname has presented in support of the 10° Line is the existence of the "western thalweg" of the Corantijn.[492] Of course, that is not the case. The Counter-Memorial and this Rejoinder set out the principles and rules of maritime delimitation law, including the case law that supports the 10° Line throughout its length to the 200-nautical mile limit.[493]

3.268. It is established that maritime boundary delimitation takes place in the area of overlapping coastal front projections. The principle to be employed in dividing such areas was articulated by the Chamber in the *Gulf of Maine* case:

> [I]n principle, while having regard to the special circumstances of the case, one should aim at an equal division of areas where the maritime projections of the coasts of the States between which delimitation is to be effected converge and overlap.[494]

The Chamber continued:

> The multiplicity and diversity of geographical situations frequently call for this criterion to be adjusted or flexibly applied to make it genuinely equitable . . . .[495]

3.269. Thus, it is the overlapping coastal front projections of Suriname and Guyana that is the area that must be considered and delimited by the Tribunal.

3.270. As articulated in the Counter-Memorial, the provisional equidistance line is not an appropriate method of delimiting the maritime boundary between the Parties because it responds to incidental coastal features and cuts off the extension of Suriname's coastal front into the sea.[496] Suriname reaffirms that the appropriate method of delimitation of the area of overlapping coastal front projections is the bisector of the angle formed by the adjacent coastal fronts of Suriname and Guyana, which extends from the coast at 17°. A line of that bearing reflects the principle of equal division of the area of overlap articulated by the Chamber in the *Gulf of Maine* case.[497]

3.271. As noted above, the *Gulf of Maine* Chamber also stated that geographic circumstances frequently call for the criterion of equal division to be adjusted so that the delimitation is "genuinely equitable." Suriname maintains that the relevant geographic circumstances in this case call for an adjustment of the 17° angle bisector line west to the 10° Line in order to achieve an equitable solution as called for by the 1982 Convention. An adjustment of the

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[492] RG, para. 4.15, pp. 62-63.

[493] *See* SCM, paras. 6.37-6.60, pp. 101-106; *infra* Chapter 3, Section VI, Part C.

[494] Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Merits, Judgment, I.C.J. Reports 1984, p. 327, para. 195.

[495] *Id.* at p. 327, para. 196.

[496] SCM, paras. 6.24-6.36, pp. 98-101.

[497] *Gulf of Maine*, I.C.J. Reports 1984, p. 299, para. 115.

angle bisector line to the 10° Line is called for in these circumstances because the 10° Line represents the extension of the land boundary of the Parties into the sea. The Corantijn River runs north as it approaches the sea.[498] It is therefore the northward course of the Corantijn River that expresses the geographical reality between Suriname and Guyana. This northward course of the western bank of the Corantijn River—the extension of the land frontier—calls for an adjustment of the coastal front angle bisector that validates the 10° Line.[499] Such an adjustment will also confirm the object and purpose of the 10° Line agreement in the territorial sea.

3.272. As in its Counter-Memorial, Suriname notes here the *Tunisia-Libya* case where the Court articulated the importance of the extension of the land frontier when it corresponded with a line based upon relevant coastal fronts:

> [T]he factor of perpendicularity to the coast and the concept of prolongation of the general direction of the land boundary are, in the view of the Court, relevant criteria to be taken into account in selecting a line of delimitation calculated to ensure an equitable solution.[500]

3.273. Thus, a maritime boundary that extends from the coast as a single straight line segment reflecting the "geographical reality" of the relationship of two countries, and in particular the trend of that relationship as it is demonstrated by the land boundary as it approaches the sea, is a circumstance to be taken into account to achieve an equitable solution.

C. An Adjustment of the 17º Line to the 10 º Line Is Supported by the Disparity Between the Lengths of the Relevant Coasts That Abut Upon the Area To Be Delimited

3.274. The length of the relevant coast of Suriname that abuts upon the area to be delimited stands in a ratio of 1.56:1.00 in relation to the relevant coast of Guyana. Suriname appreciates that this difference in the length of the relevant coasts is not in and of itself "significant" as that term was used by the Arbitral Tribunal in the *Barbados-Trinidad and Tobago* case.[501] However, that tribunal did not rule out that less notable differences in relevant coastal length could constitute a relevant geographic circumstance to be considered. In Suriname's view, when this factor is combined with the other relevant circumstances, in particular the extension of the land boundary into and beyond the territorial sea, it supports an adjustment of the 17º angle bisector line to the 10º Line.

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[498] *See* MG, para. 2.3, p. 7. However, Guyana is incorrect when it states that the two states are separated by the Corantijn River. *Ibid.* The River is entirely within the territory of Suriname, which includes the western bank of the Corantijn River.

[499] Guyana criticizes Suriname's past reliance on the direction of the Corantijn River as a geological circumstance that could not justify the 10º Line. *See* RG, para. 1.17, p. 7; para. 6.32, pp. 114-115. However, Suriname has not made such an argument. The direction of the Corantijn River is a geographical fact.

[500] Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Merits, Judgment, I.C.J. Reports 1982, p. 85, para. 120.

[501] In the Matter of an Arbitration Between Barbados and the Republic of Trinidad and Tobago (Barbados/Trinidad and Tobago), Award (11 April 2006), p. 72, para. 237, available at http://www.pca-cpa.org/ENGLISH/RPC/BATRI/AWARD%20final%20110406.pdf.

3.275. The 10° Line is an equitable maritime boundary between Suriname and Guyana because in this case of adjacent states the coastal front projections of the Parties converge and overlap. There is thus no question here of altogether avoiding the cut-off effect. In these geographical circumstances it must be shared. The 17° angle bisector line would share the cut-off equally between Suriname and Guyana. Suriname holds that an adjustment of the 17° line to the 10° Line is justified by the relevant geographic circumstances.

3.276. Suriname maintains that an equitable delimitation line should exhibit the following properties:

- it should be constructed on the basis of the broad patterns of the geography;
- it should therefore be based on a method that employs coastal fronts rather than selected and isolated basepoints;
- the line should not be pushed out by the protruding incidental features that do not represent the direction of Guyana's coast or drawn in toward Suriname by the recessed incidental features of Suriname's coast; and
- it should not veer toward the coast of either Party as it proceeds toward the 200-mile limit, so as to divide equitably between the Parties both the inshore and offshore area of overlapping coastal front projections.

The 10º Line proposed by Suriname meets these criteria; the provisional equidistance line does not and, manifestly, the 34º claim line of Guyana does not.[502]

3.277. The question then is whether the 10° Line satisfies the proportionality test. As the Arbitral Tribunal in the *Barbados-Trinidad and Tobago* case said:

> [P]roportionality is not a mathematical exercise that results in the attribution of maritime areas as a function of the length of the coasts of the Parties or other such ratio calculations, an approach that instead of leading to an equitable result could itself produce inequity. Proportionality is a broader concept, it is a sense of proportionality, against which the Tribunal can test the position resulting from the provisional application of the line that it has drawn, so as to avoid gross disproportion in the outcome of the delimitation.[503]

3.278. The 10° Line reflects a line of delimitation that is in proportion to the geographical relationship between the neighboring coasts, the extension of those coastal fronts into the sea, and the division of the area of the overlap of those coastal front extensions. It shares out the cut-off between the Parties. It meets the proportionality test.

3.279. Figure 11 shows the area of overlapping coastal front projections, the claim lines of the Parties, the provisional equidistance line and the 17° angle bisector line.

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[502] SCM, para. 6.60, pp. 105-06.

[503] *Barbados/Trinidad and Tobago*, p. 111, para. 376.

CHAPTER 4

GUYANA BREACHED ITS DUTY UNDER ARTICLES 74(3) AND 83(3) OF THE 1982 CONVENTION ON THE LAW OF THE SEA BY AUTHORIZING DRILLING IN A DISPUTED AREA OF THE CONTINENTAL SHELF, WHEREAS SURINAME'S CONDUCT IN JUNE 2000 WAS LAWFUL

4.1. In further response to Submission 3 of Guyana's Reply,[504] and in the event that the Tribunal finds Submission 3 admissible, this Chapter sets forth Suriname's position that Submission 3 lacks merit. Further, this Chapter supports Suriname's contention that it is Guyana who violated Articles 74(3) and 83(3) of the 1982 Convention. Suriname submits that Guyana's Submission 3 has no place in this proceeding. Guyana's tactic of joining a state responsibility claim concerning conduct in the disputed area with its request for delimitation of that area is without precedent in international law and practice and should be rejected by this Tribunal. Moreover, Guyana's claim concerning police action does not concern any issue as to the interpretation or application of the 1982 Convention, so that this Tribunal lacks jurisdiction over it (Section I). Suriname then demonstrates that, under Articles 74(3) and 83(3) of the 1982 Convention, it is not lawful for a party to authorize exploratory drilling in a disputed area. Suriname shows that the attempt to drill that Guyana authorized did, in fact, take place in the disputed area and was carried out without Suriname's agreement (Section II). The Chapter then discusses the measures taken by Suriname in response to Guyana's conduct. Suriname shows, first, that those measures were in the nature of law enforcement. Because Guyana has chosen to misrepresent the events of 3 June 2000, Suriname has provided a detailed account of those events, based on sworn statements from persons who were involved, confirming the law enforcement nature of Suriname's activity. Suriname also shows that its activity did not constitute a "use of force" within the meaning of international law, and that if, contrary to reason and judicial precedent, it did, such force was not used against Guyana. Suriname also shows that its actions were lawful countermeasures (Section III). Lastly, Suriname shows that in any case Guyana has not suffered, let alone proven, any injury (Section IV).

I. The Tribunal Should Summarily Reject Guyana's Submission 3, Which Has No Place in This Proceeding

A. Guyana's Submission 3 Is Inconsistent with International Law and Practice, as It Would Turn Every International Boundary Dispute into a Matter of State Responsibility

4.2. Suriname maintains its position, as reflected in the Counter-Memorial[505] and in Chapter 2, Section II above, that Guyana's joining of the maritime boundary dispute with questions of state responsibility is inconsistent with international law and practice, and therefore should be rejected. Guyana's claim as formulated in its Submission 3 is based on the assumption that the disputed area belongs to it: Guyana asserts that the 3 June 2000 incident occurred in "maritime areas within the sovereign territory of Guyana or other maritime areas over which Guyana exercises lawful jurisdiction."[506] Yet throughout the period in question, it

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[504] Submission 2 of Guyana's Memorial became Submission 3 in its Reply. *See* MG, p. 135; RG, para 101(3), p. 153.

[505] SCM, paras. 7.17-7.25, pp. 111-13.

[506] RG, p. 153, Guyana Submission 3.

is clear that this area of the continental shelf was claimed by both Suriname and Guyana.[507] Even if this Tribunal ultimately were to award to Guyana jurisdiction over the location of the 3 June 2000 incident, it is wholly inconsistent with international law and practice to regard as wrongful Suriname's actions prior to the Tribunal's decision, when those actions were reasonably designed to preserve Suriname's maritime claim.

4.3. For example, in the *Cameroon v. Nigeria* case before the International Court of Justice, Cameroon alleged that Nigeria used force, in violation of U.N. Charter Article 2(4) and customary international law, by militarily occupying parcels of Cameroonian territory in the area of Lake Chad and the peninsula of Bakassi. Even though the Court ultimately awarded to Cameroon certain areas along the border that were occupied by Nigerian military forces, the Court decided that its delimitation judgment (along with the anticipated evacuation of the Cameroonian territory by Nigeria) sufficiently addressed the injury allegedly suffered by Cameroon. Consequently, the Court did not further determine whether and to what extent Nigeria's responsibility to Cameroon had been engaged as a result of the occupation.[508] On similar reasoning, even if the Tribunal in this case concludes that the incident occurred in waters that are now determined to be under Guyana's jurisdiction, the Tribunal should decline to pass upon Guyana's claim for alleged unlawful activities by Suriname.

4.4. Indeed, as Suriname has noted elsewhere,[509] International Court of Justice President Judge Rosalyn Higgins recognized just last year that "[t]he Court has *never yet made a finding* that a State's responsibility is engaged in a case whose main focus is territorial title." That quote encapsulates not only the jurisprudence of the International Court of Justice, but also conveys the message that this practice reflects judicial wisdom. It would be wrong to attach state responsibility consequences to acts performed by states in the genuine belief that they had title to a particular area of land or a particular maritime area even if that area is later awarded to another state. The International Court of Justice and other international tribunals have not done so, and Suriname submits that this Tribunal should follow that consistent approach.

B. Guyana Has Not Shown That Its Submission 3 Concerns Any Issue Under the 1982 Convention

4.5. Guyana accuses Suriname of breaching its obligation to settle disputes by "peaceful means" and illegally employing the "use of armed force" in violation of the UN Charter, the 1982 United Nations Convention on the Law of the Sea and general international law. Accusing another state of violating the central norm of the UN Charter is a very serious allegation, one that no state or tribunal should take lightly. Obviously, under the Rules of Procedure of this Tribunal (Article 11), Guyana bears the burden of sustaining this claim, a burden that it has failed to discharge. Guyana's Submission 3 must also fail because it does not concern any dispute about the interpretation or application of the 1982 Convention and so falls outside the jurisdiction of this Tribunal.

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[507] *See infra* para. 4.18, p. 136.

[508] *See* Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening), Merits, Judgment, I.C.J. Reports 2002, pp. 143-46.

[509] SCM, para. 7.18, p. 111 (quoting Rosalyn Higgins, *The International Court of Justice: Selected Issues of State Responsibility in International Responsibility Today, in* Essays in Memory of Oscar Schachter 271, 285 (Maurizio Ragazzi ed., 2005), at SCM, Vol. III, Annex 74.

4.6. Suriname acknowledges that under the UN Charter and customary international law, the use of force is prohibited except in self-defence or as authorized by the Security Council of the United Nations,[510] and Parties are required to "settle their international disputes by peaceful means."[511] Suriname also acknowledges that the 1982 Convention imposes an obligation for Parties (1) to resolve "dispute[s] . . . concerning the interpretation or application of th[e] Convention by peaceful means in accordance with Article 2, paragraph 3 of the Charter of the United Nations"[512] and (2) to "refrain from any threat or use of force against the territorial integrity or political independence of any State" when "exercising their rights and performing their duties under th[e] Convention."[513] However, Guyana has not shown the existence of any connection between Suriname's police action and the 1982 Convention, a necessary precondition for this Tribunal to have jurisdiction over Submission 3. That is, Guyana never shows that the action complained of was an attempt to resolve a "dispute[] . . . concerning the interpretation or application of th[e] Convention" (which would invoke Article 279) or an instance of Suriname "exercising [its] rights and performing [its] duties under th[e] Convention" (which would invoke Article 301). Thus, this Tribunal lacks jurisdiction over Guyana's claim, and it should on that ground be dismissed.

4.7. Under Articles 286 and 288(1) of the 1982 Convention, this Tribunal is empowered to decide disputes concerning "the interpretation or application" of the 1982 Convention. That is the full extent of its mandate. The Tribunal has no jurisdiction to adjudicate alleged violations of the UN Charter and general international law. Indeed, to the extent that the Tribunal is allowed to consider the UN Charter and customary international law, it is *only* as they relate to disputes concerning "the interpretation or application" of the 1982 Convention. They can be secondary points of reference, but not the primary basis for bringing a claim. Indeed, where a tribunal's jurisdiction is predicated on the interpretation or application of a particular instrument, the tribunal must reject efforts by a party to rely upon other instruments or general international law that do not, by their own terms, confer jurisdiction upon the tribunal.[514]

4.8. Although Guyana and Suriname have had a long-running dispute concerning their maritime boundary, the existence of that dispute does not confer upon this Tribunal the power to impose international responsibility based upon its evaluation of any and all conduct relating to that dispute, much less to review that conduct under the provisions of the UN Charter. Guyana has not provided any evidence to this Tribunal that the CGX incident involved a dispute between the Parties concerning the 1982 Convention as of June 2000. Indeed, the diplomatic notes exchanged between Suriname and Guyana prior to June 2000 do not reveal any argument over the interpretation or application of any provision of the 1982

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[510] Article 2(4) of the Charter of the United Nations.

[511] *Id.* at Article 2(3).

[512] Article 279 of the 1982 Law of the Sea Convention.

[513] *Id.* at Article 301.

[514] *See, e.g.*, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.) (Serbia & Montenegro), Further Requests for the Indication of Provisional Measures, Order, I.C.J. Reports 1993, p. 326, para. 2; p. 342, para. 36 (rejecting the effort by Bosnia to rely upon customary and conventional laws of war where the Court's jurisdiction was predicated solely on an instrument—the Genocide Convention—that did not, by its terms, confer jurisdiction upon the Court over those other matters).

Convention.[515] Thus, the action that Suriname took on June 3 cannot be regarded as an effort to "settle" a dispute concerning the 1982 Convention, peaceably or not. Indeed, the International Court of Justice has found that for a cognizable "dispute" to have arisen between two states, there must be at least a certain degree of specificity and contestation about a particular legal norm.[516] Such specificity does not exist in this case. While obviously there was a disagreement between the two states about their maritime boundary, Guyana has not established that the CGX incident constituted a dispute regarding the "interpretation or application" of the 1982 Convention.[517]

4.9. Further, Article 279 should not be read in isolation from the other articles contained within Part XV of the 1982 Convention, including Article 283, entitled "Obligation to exchange views." This Article provides in its first paragraph: "When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means." This Article imposes an affirmative obligation on state parties. With respect to Guyana, it means that if Guyana considered that a dispute had arisen regarding the interpretation or application of the 1982 Convention, Guyana was obligated expeditiously to seek settlement of that dispute, first by providing its views to Suriname regarding the provisions of the 1982 Convention that were at issue. That is a substantial obligation. In the *Southern Bluefin Tuna* case, the Tribunal viewed the Article 283 obligation as having been met only because during the negotiations the applicant states had invoked the 1982 Convention (even though Japan responded by denying its relevance).[518] Guyana, however, has failed to demonstrate that prior to June 2000 it informed Suriname in any way that it believed the two nations were at odds over the "interpretation or application" of the 1982 Convention. That is to say, Guyana does not assert that prior to June 2000, it believed that a dispute existed. Consequently, Guyana has not asserted any violation of Article 279.

4.10. Likewise, Guyana has not asserted a violation of Article 301. Guyana never addresses whether, in taking the actions complained of, Suriname was "exercising [its] rights and performing [its] duties under th[e] Convention."[519] Yet Guyana's position must be either that Suriname *was not* exercising a right or performing a duty under the 1982 Convention when it took action against the CGX drilling rig (in which case the dispute cannot be one arising under Article 301), or that Suriname's action *was* taken in the course of exercising Suriname's rights

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[515] *See, e.g.*, *Note Verbale* No. 2651 from the Republic of Suriname to the Cooperative Republic of Guyana (11 May 2000), at MG, Vol. II, Annex 76; *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; Letter of Karshanjee Arjun, Ambassador, 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.

[516] *See, e.g.*, Electricity Company of Sofia and Bulgaria (Belgium/Bulgaria), 1939, P.C.I.J., Series A/B, No. 77, p. 21; The Mavrommatis Palestine Concessions (Greece v. Britain), 1924, P.C.I.J., Series A, No. 2, pp. 10-11.

[517] Had Guyana informed Suriname prior to June 2000 that Articles 74 and 83 of the 1982 Convention required Suriname to enter into an agreement regarding the delimitation of the EEZ and continental shelf, and had Suriname responded that no such obligation exists, then a dispute clearly would have arisen regarding the interpretation or application of the 1982 Convention. But Guyana and Suriname never took such positions.

[518] *See* Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), UNCLOS Award, 39 I.L.M. 1359, 1389 (2000).

[519] Article 301 of the 1982 Law of the Sea Convention.

or performing its duties under the 1982 Convention, in which case (as discussed below) Suriname's action constituted standard coastal law enforcement, not a use of force. To the extent that Guyana's position is the former, this matter falls outside the scope of the Tribunal's jurisdiction.

4.11. In its Submission 3, therefore, Guyana is taking the radical step of asking the Tribunal to exercise jurisdiction over claims that relate only to violations of the UN Charter and general international law. The Tribunal lacks jurisdiction to do so. Accordingly, the Tribunal should summarily reject Guyana's Submission 3.

II. Guyana Breached Its Duty Not To Jeopardize or Hamper the Reaching of the Final Agreement When It Authorized Drilling in the Disputed Area

4.12. In this Section, Suriname will demonstrate that: (a) exploratory drilling in disputed maritime areas without agreement is unlawful under the 1982 Convention; (b) Guyana authorized its licensee to drill in June 2000 in a disputed area of the EEZ and continental shelf; (c) the attempt to drill was carried out without agreement from Suriname; and, consequently, (d) Guyana's conduct constituted a breach of its international obligations.

A. Unilateral Exploratory Drilling in Disputed Maritime Areas Is Unlawful

4.13. As discussed in Chapter 5, the provisions of the first clause of Articles 74(3) and 83(3) do not require parties to the 1982 Convention to follow any specific course of action in their negotiations concerning interim arrangements and do not obligate them to reach a final agreement.[520] With respect to the second clause of those Articles, however, both Guyana and Suriname agree that there are circumstances where a state's conduct may quite clearly breach the duty of coastal states involved in a dispute concerning the boundary of their EEZ or continental shelf not to engage in actions that could "jeopardize or hamper the reaching of" a final delimitation agreement.[521]

4.14. Unlike the obligation to employ reasonable efforts to reach a provisional arrangement of a practical nature or a final agreement, where questions of discretion and national interest abound and a tribunal lacks the ability to substitute its judgment for that of the Parties, the obligation to refrain from conduct that will jeopardize or hamper the reaching of a final agreement creates a standard that a tribunal may apply and enforce. This duty requires that the Parties refrain from any activities that radically affect the ability to reach a final agreement. As Suriname has shown in its Memorandum on Preliminary Objections and its Counter-Memorial, this duty under the second clause of Articles 74(3) and 83(3) is to be understood as prohibiting exploratory drilling in the disputed area by one party without prior agreement from the other Party to the dispute.[522] Guyana does not explicitly contest this, but relies on alleged

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[520] *See infra* Chapter 5, para 5.8, p. 148.

[521] *See* MG, para. 10.6, pp. 126-27; SCM, para. 5.73, p. 88; para. 7.44, p. 118.

[522] SPO, paras. 7.3-7.4, pp. 45-46; SCM, para. 7.44, p. 118.

acquiescence or consent by Suriname, consent which did not in fact exist; see paras 4.18-4.26 below.[523]

4.15. The International Court's decision in the *Aegean Sea Continental Shelf Case* is particularly instructive in supporting the proposition that exploratory drilling in a disputed area is prohibited. There, the Court declined to grant interim measures of protection to Greece because Turkey's granting of concessions, and its seismic and aeromagnetic surveying, were regarded as involving no risk of physical damage, as transitory in nature, and as not involving any establishment of installations on the seabed of the continental shelf, nor actual appropriation of natural resources.[524] The clear implication of the *Aegean Sea* case is that less transitory measures, involving the establishment of installations on the seabed and potential extraction of resources, would have warranted a different result.

4.16. Exploratory drilling involves a significantly more invasive and potentially permanent exercise of sovereign rights over the natural resources of the continental shelf than the comparatively benign activities of granting concessions or engaging in seismic and aeromagnetic surveying. No state can stand idly by while another state authorizes drilling in an area claimed by the first state. Aside from the potential legal and political consequences of doing so, exploratory drilling (a) can cause extensive environmental damage to the seabed and the living resources of the sea if done improperly—damage that often cannot be remedied without adequate insurance; (b) entails the establishment of an installation on the seabed; (c) is not transitory in character, since the entire objective is to establish a permanent installation on a specific site; (d) can lead to proof of the existence of exploitable oil or gas deposits, information that can be of crucial economic and financial importance for both the coastal state and the company involved, including in respect of the conditions for future exploitation arrangements; (e) can result in the coastal state being bound to respect the long-term rights of the concession holder with respect to the area; and (f) can lead to the actual appropriation of natural resources. For all these reasons, exploratory drilling can significantly jeopardize the ability of the two coastal states to agree upon a settlement of the dispute or on provisional measures of a practical nature, and can even significantly aggravate the dispute. To avoid this consequence is the very object and purpose of the obligation of restraint that is imposed by paragraph 3 of Articles 74 and 83 of the 1982 Convention. Eminent commentators such as Churchill and Lowe believe that Article 83(3) "suggests that neither party should take any action in the area subject to delimitation, *such as engaging in exploratory drilling for oil or gas*, which might be regarded as prejudicial by the other party."[525]

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[523] In its Reply brief, Guyana only deals indirectly with this matter under the heading of its so-called "necessity" test (from the law of state responsibility) with respect to Suriname's 3 June 2000 measures. Guyana implies that Suriname's measures were in principle unlawful but that their wrongfulness could be precluded if the test's criteria were met. It then contends that its own action (authorizing the attempt to drill) was not of sufficient gravity for Suriname to have acted as it did. *See* RG, para 8.14, p. 143. Guyana, however, does not assert that its own action was lawful.

[524] *See* Aegean Sea Continental Shelf Case (Greece v. Turkey), Request for the Indication of Interim Measures of Protection, Order, I.C.J. Reports 1976, p. 10, para. 30.

[525] R.R. Churchill & A.V. Lowe, *The Law of the Sea* 192 (3d ed., Manchester University Press 1999) (emphasis added), at SPO Annex 38.

B. Guyana's Attempt To Drill Was Within Disputed Waters

4.17. Guyana has admitted that the location where the C.E. Thornton jack-up drilling rig was found present on 3 June 2000 in a fixed position preparing to drill was within the disputed area.[526] As Guyana states in its Reply, "Suriname formally maintained a claim to the 10° line."[527] Suriname was aware that Guyana maintained a claim extending eastward of that line. The drilling location ("Eagle") was in the area of overlapping claims that had been the subject of prolonged negotiations in the past. Figure 2 of Suriname's Counter-Memorial, reproduced here as Figure 12, shows that the Eagle location was located in the disputed area. And, as Suriname has pointed out, CGX was well aware that this part of its concession was within disputed waters.[528]

C. The Attempt To Drill Was Carried Out Without Suriname's Agreement

4.18. Contrary to what Guyana implies in its Reply, Suriname had not acquiesced in Guyana carrying out exploratory drilling in this area. It is not necessary to repeat here all that has been said about the oil concession practice of the Parties previously in this Rejoinder (Chapter 3), as well as in Suriname's Memorandum on Preliminary Objections (Chapter 6) and Counter-Memorial (Chapter 7). Suriname fully maintains its position as expounded there.

4.19. Guyana asserts that "[p]rior to June 2000, Guyana thus had a well-grounded expectation that exploratory activity could continue without intervention by Suriname."[529] That assertion is unfounded if the term "exploratory activity" is meant to include drilling. As Suriname has explained, the practice of both Parties with respect to exploratory seismic and aeromagnetic surveying often allowed such transitory activities to be undertaken unilaterally,[530] but drilling was definitely not part of any such practice.

4.20. In fact, prior to June 2000, only one well had been drilled in the disputed area—the Abary-I in 1974—just prior to Suriname's independence. Guyana states that this well was drilled by Shell exclusively under licence from Guyana.[531] Suriname has shown that Shell at the time held concessions from both countries with respect to this part of the disputed area.[532]

4.21. For Suriname, it was always abundantly clear that neither of the two Parties would accept any unilateral drilling activities in the disputed area. In particular, the 1989 *modus vivendi* and subsequent arrangements implied that unilateral drilling would not be carried out.[533] Suriname has always acted in accordance with that understanding and has never

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[526] This is admitted in the affidavits of Mr. Edward Netterville and Mr. Graham Barber. Affidavit of Edward Netterville, former Rig Supervisor on the C.E. Thornton, at MG, Vol. IV, Annex 175, at para. 8; Affidavit of Graham Barber, former Reading & Bates Area Manager, at MG, Vol. IV, Annex 176, at para. 7.

[527] RG, para. 8.5, pp. 139-40.

[528] SCM, para. 5.69, pp. 86-87; para. 7.27, p. 113.

[529] RG, para. 8.5, pp. 139-40.

[530] SCM, Chapter 5, Section I.

[531] RG, para. 8.5 & n.8, pp. 139-40.

[532] SCM, para. 5.23, p. 71.

[533] SPO, paras. 6.18-6.29, pp. 34-39.

engaged in or authorized unilateral exploratory drilling activities in the disputed area. Consequently, as Suriname has pointed out, Guyana's action clearly constituted an attempt to change the status quo by a *fait accompli*.[534]

4.22. Consequently, the attempt to drill was unlawful both under Guyana's general obligations as a party to the 1982 Convention and under its particular obligations toward Suriname under the *modus vivendi*.

4.23. Guyana further asserts that Suriname was well aware of the intentions of CGX to undertake the drilling activities because of the publicity that company had given to its plans on 10 April 2000 (when it announced that it had contracted the C.E. Thornton). Guyana even states: "Suriname's claim that it did not have notice is similarly baseless."[535] Although CGX's intentions as stated in its press releases did eventually come to the attention of the Government of Suriname,[536] it is not credible for Guyana to maintain that press releases by a foreign concession holder can replace and serve the same function as official notifications by the government of a state. Such a casual attitude does not conform with such good neighbourliness as Suriname was entitled to expect from Guyana under the circumstances. Press releases by a foreign concessionaire certainly do not constitute a formal notification and invitation to discuss a problem let alone to agree upon its solution.

4.24. Guyana's assertion that Suriname had prior notice seems to suggest that Guyana regards such notice as a potential basis for assuming implied consent by Suriname to the drilling. That is the contention that is "baseless."

4.25. When the Government of Suriname became aware of the plans through publications in the press, it requested clarification from Guyana through a *Note Verbale* dated 11 May 2000.[537] Guyana responded on 17 May 2000, but completely dodged the issue by asserting that whatever activity might be in progress was occurring in Guyana's territory.[538] In the meantime, the CGX operation moved forward. On 31 May 2000, Suriname again communicated with Guyana and made it clear that "[t]he Government of the Republic of Suriname is determined to protect its territorial integrity and national sovereignty utilising all avenues offered by international law and international practice on these matters."[539] Thus, it left no doubt that Guyana could expect Suriname to take appropriate lawful measures if the operations continued. In the same *Note Verbale*, Suriname took the initiative of inviting Guyana for deliberations on the matter.[540] In addition, on 31 May 2000, Suriname

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534 SCM, para. 7.27, p. 113.

535 RG, para. 8.6, p. 140.

536 *See infra* para. 4.37, p. 133.

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

538 *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.

539 Letter of Karshanjee Arjun, Ambassador, 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.

540 *Ibid.*

appropriately warned CGX directly that it should cease any activities in the disputed area.[541] By these means, Suriname made every effort to prevent this new dispute from escalating. On 2 June 2000, the very day that the drilling rig had arrived at the drilling location and was being readied for drilling, Guyana responded by inviting Suriname "to engage in dialogue."[542] However, it did not cease, or even suspend, the operation.

4.26. Thus, Guyana's assertion that "[a]s of June 2000, Guyana could not reasonably have expected that Suriname would respond as it did"[543] lacks merit. On the contrary, Guyana was duly informed of Suriname's position and was expressly warned about the consequences of its course of action.

D. Guyana's Authorization of an Attempt To Drill Constituted a Breach of Its International Obligations

4.27. In sum, the record shows that Suriname tried to avoid a confrontation, so as not to aggravate the dispute. It attempted to settle the dispute by peaceful means, but Guyana maintained an assertive posture. While belatedly professing that it only wanted to "engage in dialogue," Guyana still went ahead with the drilling. In so doing, Guyana breached its obligation, under Articles 74(3) and 83(3), "not to jeopardize or hamper" the reaching of a final agreement.

4.28. Suriname was left with no choice but to act as it did.[544] Guyana's suggestion that Suriname should have used the dispute settlement system under the 1982 Convention by requesting the ITLOS to prescribe provisional measures under Article 290(5) of the 1982 Convention[545] is not realistic. Moreover, Guyana itself could have initiated proceedings before the ITLOS requesting provisional relief, and it had ample time to do so, but nowhere explains why it did not.

4.29. It is remarkable that Guyana now says that Suriname should have settled the matter by peaceful means. It is not a good faith position to expect another state to accept an assertive act like the drilling of a well in a disputed maritime area while at the same time accusing that state of not being willing to settle the dispute by peaceful means, especially when the other state took the initiative to discuss the matter as soon as it became aware of it. In this connection, it is telling that the Guyanese authorities are reported to have offered to CGX an armed escort during the drilling operation within the disputed waters; CGX apparently prudently declined,

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[541] Letter of 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.

[542] *Note Verbale* No. 400/2000 from the Cooperative Republic of Guyana to the Republic of Suriname (2 June 2000), at MG, Vol. II, Annex 79.

[543] RG, para. 8.5, pp. 139-40.

[544] It is worth noting in this context that Guyana, in its diplomatic notes reacting to Suriname's concerns, found it necessary to stress that the Corantijn River "is a border river and as such attracts all the characteristics and features which such rivers bear in international law," MG, Vol. II, Annex 79**,** thus signaling that Guyana also wished to dispute the long-standing agreement that the entire river belonged to Suriname. Such an effort to create another dispute was not conducive to resolving the urgent matter of the CGX drilling operation in a constructive fashion.

[545] MG, para 10.22, p. 131.

so that its rig did not become a platform from which force could be used against Suriname's law enforcement agencies.[546]

4.30. A final observation should be made here concerning Guyana's argument that there was no necessity for Suriname's action on 3 June 2000. There was no need for Guyana to pursue its attempt to drill at this particular location in the disputed area. It could easily have decided in May 2000 to postpone drilling at that site, and it could have directed the drilling rig to first operate in the undisputed area of Guyana, as it subsequently did after the measures taken by Suriname. Thus, it was entirely unnecessary for Guyana to have escalated the situation in early June 2000.

4.31. In conclusion, Suriname submits that the attempt by Guyana to drill in the disputed area was unlawful both under Guyana's obligations as a Party to the 1982 Convention, in particular under the second clause of Articles 74(3) and 83(3), as well as under its particular obligations toward Suriname under the *modus vivendi*.

III. Suriname's Measures Were Reasonable and Proportionate Law Enforcement Measures and Were Not a "Use of Force" Within the Meaning of International Law

4.32. In this Section, Suriname will demonstrate its position that: (a) Suriname's measures taken on 3 June 2000 were of the nature of reasonable and proportionate law enforcement measures to preclude unauthorized drilling in a disputed area of the continental shelf; (b) Guyana has failed to prove that the measures constituted a "use of force" within the meaning of international law; (c) even if those measures did amount to a use of force, Guyana has failed to prove that those measures were directed against Guyana; and (d) should the Tribunal regard such measures as contrary to international obligations owed by Suriname to Guyana, the measures were nevertheless lawful countermeasures since they were taken in response to an internationally wrongful act by Guyana in order to achieve cessation of that act.

A. Suriname's Measures Taken on 3 June 2000 Were of the Nature of Law Enforcement Measures to Preclude Unauthorized Drilling in a Disputed Area of the Continental Shelf

4.33. The 3 June 2000 measures were in the nature of law enforcement since they constituted an exercise of coastal state jurisdiction.[547] It is quite normal for coastal states to undertake law

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[546] *Crucial Oil Rig Talks on Today Alibux, Snijders Due*, Stabroek News, June 13, 2000, at SR, Vol. II, Annex SR37.

[547] Acts by a state that seek to enforce rights under maritime jurisdictional zones generally are not regarded as "uses of force" within the meaning of Article 2(4) of the U.N. Charter. The distinction between the two concepts was clearly recognized by the International Court of Justice in the *Fisheries Jurisdiction (Spain v. Canada)* case, discussed *infra* at Section III, Part B, where the Court treated the Canadian patrol boat's actions against a Spanish fishing vessel on the high seas as enforcement of conservation and management measures, not as a "use of force" within the meaning of the U.N. Charter. Such law enforcement action by all coastal states, commensurate with the size of their maritime zones, occurs worldwide. For example, the U.S. Coast Guard conducts tens of thousands of law enforcement boardings each year with respect to vessels plying United States waters and the high seas. *See* www.uscg.mil. To regard such conduct *per se* as constituting a "use of force" within the meaning of the U.N. Charter—rather than as coastal law enforcement—would be an extraordinary and inappropriate expansion of the concept.

enforcement activities in disputed areas (usually in relation to fisheries), and also to do so against vessels under foreign flags, including the flag of the other party to the dispute, unless specific arrangements exist. Suriname's practice in respect of fisheries enforcement in the disputed area[548] is evidence of this.

4.34. It is useful to point out that the 3 June 2000 measures also served to enforce Suriname's legislation on exploration and exploitation of mineral resources. Article 2, paragraph 6 of the Mining Decree[549] prohibits the undertaking of mining activities without a licence. Article 1(h) of the Decree defines "mining activities" as including exploration. Article 71 of the Decree provides that he who undertakes mining activities without a licence can be punished by imprisonment for a maximum of two years and/or a fine of a maximum of 100,000 Suriname guilders. That the Suriname authorities regarded the 3 June 2000 action as a law enforcement measure is also shown by the fact that the Attorney General (the Chief Prosecutor) was consulted before the action.[550]

4.35. Guyana extensively speculates on Suriname's presumed "political" motives for the 3 June 2000 measures.[551] Apart from the fact that Guyana's rendition is inaccurate,[552] any motives are irrelevant for these proceedings. What matters here is whether Suriname's actions were in accordance with its international obligations. They were.

4.36. In its Memorial and Reply Guyana relies heavily on several witness statements for proof of its version of the events of 3 June 2000. In order to show the inaccuracies of those statements, and to support Suriname's earlier account of the events, Suriname has submitted statements of the members of its Diplomatic Service and its Armed Forces who were involved in the events leading up to, or who actually carried out, the operations on 3 June 2000.

4.37. As those statements confirm, Guyana did not employ any diplomatic channels to inform Suriname that it had given CGX permission to drill in the disputed area; Guyana admits that Suriname had to learn of those intentions from CGX's press releases and press reports,[553] and that is in fact how Suriname learned of CGX's intentions.[554] Even when faced with direct inquiries from Suriname as to whether CGX intended to drill in an area claimed by Suriname,

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Indeed, the 1982 Convention, in various contexts, recognizes the right of a coastal state to board, inspect, arrest, and even subject a foreign vessel to national judicial proceedings, all as a means of enforcing rights in maritime jurisdiction zones, including areas outside territorial waters. *See, e.g.*, Article 73(l) of the 1982 Law of the Sea Convention.

548 SCM, paras. 5.80-5.89, pp. 90-92.

549 Decree of 8 May 1986, containing general rules concerning the exploration for and exploitation of minerals (Mining Decree); SCM, Vol. III, Annex 54. A translation of Articles 1(h) and 2(6) and Article 71 of the Mining Decree is provided in Annex SR31 to this Rejoinder.

550 Statement H.A. Alimahomed, at SR, Vol. II, Annex SR15, at para. 9.

551 MG, paras. 5.3-5.5, pp. 63-65; RG, paras. 8.7-8.9, p. 141.

552 Indeed, if the fact that the CGX incident had become an election issue in Suriname had any impact on Suriname's reaction to Guyana's unlawful drilling actions, it was to *slow*, rather than to escalate, Suriname's response. *See* Statement Colonel G.H. Sedney, at SR, Vol. II, Annex SR21, at para. 5.

553 RG, para. 8.6, pp. 140-41.

554 Statement Lieutenant-colonel E.G.J. de Mees, at SR, Vol. II, Annex SR17, at para. 3; Statement Colonel G.H. Sedney, at SR, Vol. II, Annex SR21, at para. 2; Statement Major J.P. Jones, at SR, Vol. II, Annex SR20, at para. 2.

Guyana denied it. When Guyana's Ambassador to Suriname was questioned about those reports, he "acknowledged the existence of said contract between Guyana and CGX but he indicated that, as far as his Government was concerned, it was of no concern since the relevant exploratory drillings were going to be conducted in Guyanese waters."[555] When the Surinamese Ambassador made a similar inquiry of the Minister of Foreign Affairs in Georgetown, Guyana, "he reported essentially the same."[556] In effect, Guyana simply chose to ignore Suriname's claim to the disputed area.

4.38. Due not to any communication from Guyana, but instead from communications between the Surinamese and Canadian Ambassadors to Guyana and communications with CGX representatives, Suriname confirmed that "the drillings were to take place in the 'area of overlap'."[557] Based on that information, Suriname sent a diplomatic *Note Verbale* to Guyana on 11 May 2000, protesting against Guyana-sanctioned drilling in Surinamese territory.[558] As noted in Chapter 2 above, Guyana responded to Suriname on 17 May 2000 with its own *Note Verbale*, which claimed that no Guyana-sanctioned activity was occurring in Surinamese territory.[559] On 31 May 2000, Suriname delivered another *Note Verbale* to Guyana to reiterate Suriname's position.[560] Guyana did not respond to that *Note Verbale* before the CGX rig had positioned itself in the disputed area.

4.39. News of the intention to drill in the disputed area led to consultations with the Ministry of Foreign Affairs and with Staatsolie, and with the President of the Republic.[561] The President instructed Col. Sedney, then the Commander in Chief of the Suriname Armed Forces, to have the armed forces prepared to affirm Suriname's rights if necessary with respect to the offshore area.

4.40. Suriname's military reviewed the situation and analyzed whether the CGX rig's impending activities posed an imminent threat to Suriname's sovereignty.[562] After considering the evidence, the military determined that Suriname's sovereignty was indeed threatened by the CGX activities.[563]

4.41. Under the circumstances, Suriname acted to protect its sovereignty with the utmost restraint. Between 31 May 2000 and 2 June 2000, it dispatched surveillance airplanes to monitor the disputed area and determine if and when the CGX rig entered that area and if and

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555 Statement H.A. Alimahomed, at SR, Vol. II, Annex SR15, at para. 6.

556 *Ibid*.

557 *Ibid*.

558 *Ibid*. *See supra* Chapter 2, para. 2.113, p. 47; *Note Verbale* No. 2651 from the Republic of Suriname to the Cooperative Republic of Guyana (11 May 2000), at MG, Vol. II, Annex 76.

559 *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.

560 Letter of Karshanjee Arjun, Ambassador, 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.

561 Statement Lieutenant-colonel E.G.J. de Mees, at SR, Vol. II, Annex SR17, at para. 6; Statement Colonel G.H. Sedney, at SR, Vol. II, Annex SR21, at para. 8.

562 Statement Lieutenant-colonel E.G.J. de Mees, at SR, Vol. II, Annex SR17, at para. 5; Statement Colonel G.H. Sedney, at SR, Vol. II, Annex SR21, at para. 5.

563 Statement Lieutenant-colonel E.G.J. de Mees, at SR, Vol. II, Annex SR17, at para. 5.

when it began to drill.[564] Suriname decided that if the ship simply moved through the disputed area, or was an "innocent trespasser," then Suriname would take no action against it.[565] Only if the platform began to drill would Suriname order it to leave the area.[566] At the same time, Suriname solicited help from others. It requested that the Canadian Ambassador to Guyana intervene to prevent CGX, a Canadian firm, from drilling in the disputed area.[567] It also sent a letter directly to CGX, and asked it not to drill in the disputed area.[568]

4.42. On Friday morning, 2 June 2000, Suriname determined that the rig was in disputed waters and had begun drilling activities.[569] The President was immediately informed.[570]

4.43. During the morning of 2 June 2000, President Jagdeo and President Wijdenbosch spoke via telephone.[571] President Wijdenbosch explicitly asked President Jagdeo to instruct the platform not to conduct exploratory drilling in the area of overlap.[572] President Wijdenbosch also told President Jagdeo that if Guyana did not respond as requested, Suriname would be forced to take action to protect its territory.[573] As far as Suriname knows, President Jagdeo ignored President Wijdenbosch's request.[574]

4.44. Later that morning, the President informed Col. Sedney that diplomatic efforts had been unsuccessful, and he gave instructions that the Navy should order the drilling rig to leave Surinamese waters.[575] The leaders of Suriname's military then met to discuss how Suriname should proceed.[576] They decided to dispatch two patrol vessels, the PO2 and the PO3, that would order the rig to move to undisputed Guyanese waters.[577] Lt. Col. de Mees designated Capt. Jones as mission commander and gave him the instructions for the mission. The instruction was to notify the drilling rig that it was conducting economic activities in Suriname waters without permission from the Suriname authorities and should leave Surinamese waters within 12 hours. The patrol vessels were told that if the rig complied, their task was

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564 Statement H.A. Alimahomed, at SR, Vol. II, Annex SR15, at para. 7; Statement Lieutenant-colonel E.G.J. de Mees, at SR, Vol. II, Annex SR17, at para. 9; Statement Colonel G.H. Sedney, at SR, Vol. II, Annex SR21, at para. 6.

565 Statement Colonel Lieutenant-colonel E.G.J. de Mees, at SR, Vol. II, Annex SR17, at para. 9.

566 *Ibid*.; *see* Statement Captain R.S. Bhola, at SR, Vol. II, Annex SR16, at para. 3.

567 Statement H.A. Alimahomed, at SR, Vol. II, Annex SR15, at para. 7.

568 *Ibid*.; Letter of 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.

569 Statement Colonel Lieutenant-colonel E.G.J. de Mees, at SR, Vol. II, Annex SR17, at para. 10.

570 Statement Colonel G.H. Sedney, at SR, Vol. II, Annex SR21, at para. 9.

571 Statement H.A. Alimahomed, at SR, Vol. II, Annex SR15, at para. 8.

572 *Ibid*.

573 *Ibid*.

574 Statement Colonel G.H. Sedney, at SR, Vol. II, Annex SR21, at para. 8 ("[T]he Suriname Government had vigorously protested [against the CGX rig's activities in the disputed area] with the Guyanese Government [], but . . . it looked like the Government of Guyana apparently thought it was no concern of theirs.").

575 *Id.* at para. 11.

576 Statement Lieutenant-colonel E.G.J. de Mees, at SR, Vol. II, Annex SR17, at para. 11.

577 *Id.* at paras. 11-13; Statement Major J.P. Jones, at SR, Vol. II, Annex SR20, at para. 3.

completed.[578] If the rig chose not to comply, the vessels were to obtain further instructions from the command post.[579] The vessels were not to use force or to threaten force, except in self-defense.[580]

4.45. In fact, the PO2 and PO3 could not have used force to expel the rig.[581] Those two small fiberglass patrol boats, of the Spanish-built Rodman 101-class, did not display any armament and in fact had none. The crews (of ten men each) only had personal weapons, and each boat carried one automatic rifle.[582] The vessel crews were told explicitly not to enter the CGX rig or to fire their weapons.[583]

4.46. At around 7 pm on 2 June, the patrol boats PO2 (Capt. Bhola) and PO3 (Capt. Galong) set to sea from the base at Paramaribo. The mission commander, Capt. Jones, was present on board the PO3.[584] Those aboard the Surinamese patrol vessels were legitimately concerned that there could be a Guyanese military presence on or near the rig.[585] In contrast to the PO2 and PO3, the CGX rig was huge—to the Captain of the PO3, "[i]t looked like a town."[586] That the Suriname vessels were incapable of forcing the large CGX oil rig to do anything should have been obvious to anyone who looked at the vessels from the rig.

4.47. The boats arrived at the location of the drilling rig and its accompanying vessel (a tug boat) around 1:30 am on 3 June 2000. At first, Capt. Jones tried, unsuccessfully, to contact the drilling rig by radio. He then contacted the tug Terry Tide, which alerted the C.E. Thornton to get in touch with the patrol boat.[587] Capt. Jones then spoke with the person in charge of the rig. He recalls having used the following words: "This is the Suriname Navy. You are in Suriname waters without authority of the Suriname Government to conduct economic activities here. I order you to stop immediately with these activities and leave the Suriname waters."[588] The person on the drilling rig responded: "We are unaware of being in Suriname

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578 Statement Lieutenant-colonel E.G.J. de Mees, at SR, Vol. II, Annex SR17, at paras. 12-14; Statement Colonel G.H. Sedney, at SR, Vol. II, Annex SR21, at paras. 10-11; Statement Major J.P. Jones, at SR, Vol. II, Annex SR20, at paras. 2-4.

579 Statement Lieutenant-colonel E.G.J. de Mees, at SR, Vol. II, Annex SR17, at para. 14; Statement Major J.P. Jones, at SR, Vol. II, Annex SR20, at para. 4; Statement Colonel G.H. Sedney, at SR, Vol. II, Annex SR21, at para. 10.

580 Statement Lieutenant-colonel E.G.J. de Mees, at SR, Vol. II, Annex SR17, at para. 13; Statement Major J.P. Jones, at SR, Vol. II, Annex SR20, at para. 4; Statement Colonel G.H. Sedney, at SR, Vol. II, Annex SR21, at para. 10.

581 Statement Major J.P. Jones, at SR, Vol. II, Annex SR20, at para. 4; Statement Captain R.S. Bhola, at SR, Vol. II, Annex SR16, at para. 2; Statement Captain M. Galong, at SR, Vol. II, Annex SR19, at para. 2.

582 Statement Major J.P. Jones, at SR, Vol. II, Annex SR20, at para. 4; Statement Captain M. Galong, at SR, Vol. II, Annex SR19, at para. 2; Statement Captain R.S. Bhola, at SR, Vol. II, Annex SR16, at para. 2.

583 Statement Lieutenant-colonel E.G.J. de Mees, at SR, Vol. II, Annex SR17, at para. 13; Statement Colonel G.H. Sedney, at SR, Vol. II, Annex SR21, at para. 10.

584 Statement Major J.P. Jones, SR, Vol. II, Annex SR20, at para. 5.

585 Statement Lieutenant-colonel E.G.J. de Mees, at SR, Vol. II, Annex SR17, at para. 13.

586 Statement Captain M. Galong at SR, Vol. II, Annex SR19, at para. 6.

587 Statement Major J.P. Jones at SR, Vol. II, Annex SR20, at para. 6.

588 *Id.* at para. 7.

waters."[589] Capt. Jones repeated that the rig was in Suriname waters and that it had to leave. If they did not leave, he said "the consequences will be yours."[590] The rig then asked where they should go. Capt. Jones told them to go to Guyanese waters. Capt. Jones initially gave them 12 hours to depart the area.[591] When those aboard the rig requested that the time for its departure be extended from 12 to 24 hours, Capt. Jones immediately granted the request.[592]

4.48. Lt. Galong, the commander of PO3, communicated with the rig shortly thereafter. He repeated the message from Capt. Jones, and added that there was no intention to harm the rig.[593] The rig asked which direction it should sail. Lt. Galong advised it to sail 273 west over a distance of 13-14 M.[594]

4.49. The two patrol boats remained in the area for approximately one hour. Then, after they had ordered the rig to leave the area and the rig had voiced its intention to comply, the vessels headed south toward Nickerie.[595] Capt. Bhola, who was aboard the PO2, has been involved in many missions to order Guyanese fisherman fishing in the disputed area to leave that area, and he has stated that "the removal of the drilling platform [from Surinamese waters did] not differ essentially from the course taken during other patrols."[596]

4.50. In the afternoon of 3 June 2000, the boats again set sail to the drilling location in order to check if the rig had left. Upon arrival at the scene, those aboard the vessels observed that the rig had been readied for leaving and was being towed by two tugs towards Guyanese waters. By radio, the rig was informed that the patrol boats had returned to check its departure and that this would later also be checked by aircraft. After a short while, the two patrol boats returned to Nickerie.[597]

4.51. Guyana lays much stress on the supposedly threatening posture of the Surinamese patrol boats during the night of 2-3 June 2000. As Suriname has pointed out in its Counter-Memorial, that is an exaggerated perception of the event. The entire encounter at the Eagle location lasted little more than an hour, and the mission by the small Suriname Navy boats was executed in a professional manner. In particular, the meaning of the warning given to the master of the drilling rig that "the consequences will be yours" is exaggerated by Guyana. Contrary to what Guyana wants the Tribunal to believe, this warning did not constitute a threat to use force.

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589 *Ibid*.

590 *Ibid*.

591 *Ibid*.

592 *Ibid*.

593 Statement Captain M. Galong, at SR, Vol. II, Annex SR19, at para. 8.

594 *Ibid*.

595 Statement Lieutenant-colonel E.G.J. de Mees, at SR, Vol. II, Annex SR17, at para. 15; Statement Major J.P. Jones, at SR, Vol. II, Annex SR20, at para. 7; Statement Captain R.S. Bhola, at SR, Vol. II, Annex SR16, at para. 7; Statement Captain M. Galong, at SR, Vol. II, Annex SR19, at para. 9; Statement Colonel G.H. Sedney, at SR, Vol. II, Annex SR21, at para. 12.

596 Statement Captain R.S. Bhola, at SR, Vol. II, Annex SR16, at para. 8.

597 Statement Major J.P. Jones, at SR, Vol. II, Annex SR20, at para. 8; Statement Captain M. Galong, at SR, Vol. II, Annex SR19, at para. 9; Statement Captain R.S. Bhola, at SR, Vol. II, Annex SR16, at para. 7.

4.52. In fact, the Surinamese patrol boats used for the operation did not even have the ability to use force. As noted above, they did not display, or even carry, any armament; their crew carried only light personal weapons for use only in self-defence; and they had no authority to use force except in self-defence.

4.53. The "consequences" alluded to by Capt. Jones could have been of various natures, *e.g.*, a further diplomatic protest note, including invocation of state responsibility. No such further action actually happened. Minimal persuasion by Capt. Jones was sufficient to achieve the desired effect.

4.54. In his statement, Col. Sedney mentions that prior to the 3 June 2000 action, he had several contacts with the U.S. Ambassador in Paramaribo and gave him assurances that no harm would be done to the crew of the drilling ship, many of whom, the Ambassador had informed him, had U.S. nationality.[598]

4.55. The affidavits from Mr. Edward Netterville and Mr. Graham Barber concerning the 3 June 2000 events supplied by Guyana should be read with much caution. They both seem to have had difficulty in remembering precisely the events, starting even with the date (both refer to 4 June 2000 instead of 3 June 2000). They do not mention that the initial time period of 12 hours was extended to 24 hours as soon as it was made clear that 12 hours might not be enough time to comply, and they state incorrectly that the patrol boats stayed with the rig during the entire episode.

4.56. In conclusion, the measures Suriname took on 3 June 2000 were reasonable and proportionate law enforcement measures, to prevent unauthorized drilling on an area of continental shelf it claimed but recognised as being disputed by Guyana.

B. Guyana Has Failed To Prove That Suriname's Measures Constituted a "Use of Force" Within the Meaning of International Law

4.57. Even if one assumes that there was a dispute between Suriname and Guyana "concerning the interpretation or application of" the 1982 Convention, Guyana has not established that the measures undertaken by Suriname constitute a "use of force" within the meaning of international law. The fact that the means employed by Suriname in June 2000 were naval patrol boats does not mean that it was an "armed action" or "military response" as argued by Guyana,[599] let alone a "use of force." It is quite normal for states to use their naval assets for maritime law enforcement, in particular when the police lack such a separate coast guard force, as is the case for Suriname.

4.58. International tribunals do not regard the exercise of coastal state jurisdiction as a "use of force" within the meaning of international law. In the *Fisheries Jurisdiction* (*Spain v. Canada*) case, Spain alleged that Canada's arrest and seizure of a Spanish vessel on the high seas constituted a violation of the "principle of general international law which prohibits the threat or use of armed force in international relations, codified by the United Nations Charter,

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[598] Statement Colonel G.H. Sedney, at SR, Vol. II, Annex SR21, at para. 13.

[599] RG, paras. 8.11-8.18, pp. 139-44.

Article 2, paragraph 4."[600] Even though the action taken by Canada[601] was far more "forceful" than that allegedly taken by Suriname, the International Court of Justice viewed Canada's action as falling within the scope of what would be deemed "enforcement" of "conservation and management measures." The immediate issue in the case was whether Canada's action could be said to fall within the scope of one of Canada's reservations to the Court's compulsory jurisdiction, specifically one that stated that there would be no jurisdiction over:

> "*(d)* disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures."[602]

4.59. The Court noted in its judgment that:

> Spain contends that an exercise of jurisdiction by Canada over a Spanish vessel on the high seas entailing the use of force falls outside of Canada's reservation to the Court's jurisdiction. Spain advances several related arguments in support of this thesis. First, Spain says that the use of force by one State against a fishing vessel of another State on the high seas is necessarily contrary to international law; and as Canada's reservation must be interpreted consistently with legality, it may not be interpreted to subsume such use of force within the phrase "the enforcement of such measures". Spain further asserts that the particular use of force directed against the *Estai* was in any event unlawful and amounted to a violation of Article 2, paragraph 4,

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600 Fisheries Jurisdiction (Spain v. Canada), Application by Spain, para. 2(A)(h), I.C.J. Reports 1998.

601 Spain recounted the events of the incident as follows:

> [On] 9 March 1995, at 4.52 p.m. (Ottawa time), the boat *Estai*, flying the Spanish flag and with a Spanish crew, was stopped and inspected on the *high seas*, in the area of the Great Banks, at co-ordinates 48 ° 03' N, 46 ° 26' W, some 245 miles off the coast, by the Canadian patrol boat *Cape Roger*, assisted by the patrol boat *Leonard J. Crowley* and the coastguard vessel *Sir Wilfred Grenfell*, also Canadian, after successive attempts at boarding by gunboats manned by individuals armed with automatic weapons, and at intimidation with warning shots fired from a 50-mm gun by the patrol boat *Leonard J. Crowley*, after, according to the Canadian Note of 10 March 1995, "the necessary authorizations" had been obtained.
>
> The boat and its crew, whose security and integrity had been seriously endangered as a result of the coercive action by the Canadian flotilla, were forcibly escorted away and held incommunicado, in the Canadian port of St. John's, Newfoundland, where the captain of the boat was imprisoned and subjected to criminal proceedings for having engaged in fishing activity on the high seas outside the Canadian exclusive economic zone, and for resisting authority; the boat's papers and part of the catch on board were confiscated.
>
> *Id.* at para. 1(B).

602 Fisheries Jurisdiction (Spain v. Canada), Judgment, I.C.J. Reports 1998, p. 438, para. 14.

> of the Charter, giving rise to a separate cause of action not caught by the reservation.[603]

4.60. In rejecting Spain's argument, the Court stated that the

> Court finds that the use of force authorized by the Canadian legislation and regulation falls within the ambit of what is commonly understood as enforcement of conservation and management measures and thus falls under the provisions of paragraph 2 *(d)* of Canada's declaration. This is so notwithstanding that the reservation does not in terms mention the use of force. *Boarding, inspection, arrest and minimum use of force for those purposes are all contained within the concept of enforcement of conservation and management measures according to a "natural and reasonable" interpretation of the concept.*[604]

4.61. The Court's reasoning squarely supports Suriname's position that a coastal state's instruction to an oil rig that it not conduct drilling on the continental shelf claimed by the coastal state, and that the oil rig depart the area, is an exercise of the law enforcement jurisdiction of the coastal state, not a violation of the prohibition on the international use of force. This position is consistent with the approach taken by the ITLOS when considering whether unlawful force has been used when a vessel is being arrested. The ITLOS does not appear to regard the stopping and communicating with a vessel as constituting a use of force (or threat to use force). For example, in the *M/V Saiga* case, the ITLOS described actions of that type as ones that might precede a resort to force, but that themselves do not constitute a use of force:

> The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. *It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force.* Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered (*S.S. "I'm Alone"* case (*Canada/United States, 1935), U.N.R.I.A.A., Vol. III, p 1609; The Red Crusader case (Commission of Enquiry, Denmark-United Kingdom, 1962), I.L.R., Vol., 35,* p. 485).[605]

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603 *Id.* at p. 465, para. 78.

604 *Id.* at p. 466, para. 84, (emphasis added).

605 The M/V "Saiga" (No. 2) (St. Vincent v. Guinea), ITLOS 1999, 120 I.L.R. 143, para. 156 (emphasis added). In that case, the ITLOS found that a use of force occurred, but the facts were far more compelling than those at issue in this case. First, the Guineas patrol boat fired at *M/V Saiga* with live ammunition without issuing any of the signals and warnings required by international law and practice. Further, the Guinean patrol boat used excessive force once on board the *M/V Saiga*. Although the boarding occurred without resistance, and although there was no evidence of the use or threat of force from the *M/V Saiga* crew, the Guinean officers

4.62. By warning off an oil rig that was about to engage in unauthorized drilling in a disputed area of the continental shelf, Suriname's vessels did not engage in a "use of force" within the meaning of international law. By instructing the oil rig to depart the area, Suriname's vessels also did not engage in such a "use of force." To regard such actions as constituting a "use of force" proscribed by international law would unduly expand the scope of a fundamental prohibition of international law, one that has achieved the status of *jus cogens*. No tribunal has ever embraced such an interpretation.

4.63. Guyana's attempt to invoke the holdings of the Eritrea Ethiopia Claims Commission in support of its position[606] is misplaced. Suriname's ordering of an oil rig to refrain from drilling in an unauthorized area of the continental shelf is hardly comparable to what the Commission found to have been Eritrea's May 1998 large-scale invasion of Ethiopian-administered territory with soldiers, tanks and artillery, and Eritrea's subsequent occupation of that territory for nearly two years. Indeed, regarding Suriname's conduct as of the same nature as Eritrea's conduct demonstrates the extremity of Guyana's claim, for it seeks to expand the scope of the *jus ad bellum* to a point of absurdity. Further, the Eritrea Ethiopia Claims Commission found that Ethiopia either was sovereign or was peacefully administering the relevant area at the time of Eritrea's use of force.[607] By contrast, Guyana has not established (and cannot establish) that Guyana effectively and peacefully administered the disputed maritime area at issue in this proceeding. As Suriname has shown, both Parties had conducted extensive activities in that area for decades.[608]

C. Guyana Has Failed To Prove That Suriname's Measures Were Directed Against Guyana

4.64. Even if (contrary to what is said above), Suriname's actions constituted a "use of force" against Guyana, to succeed in its claim Guyana must establish that the measures in question were taken against Guyana. But it is common ground that the rig was not flying the Guyana flag, was not owned by a Guyanese company and was crewed almost entirely by non-Guyanese nationals. Indeed, the best Guyana can do in advancing its claim is to accuse Suriname of an "unlawful use of force" against its "licensees,"[609] not against Guyana's territory or its nationals.

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fired indiscriminately while on the deck and used gunfire to stop the engine of the ship. The ITLOS found that:

> In using firearms in this way, the Guinean officers appeared to have attached little or no importance to the safety of the ship and the persons on board. In the process, considerable damage was done to the ship and to vital equipment in the engine and radio rooms. And, more seriously, the indiscriminate use of gunfire caused severe injuries to two of the persons on board.

Id. at para. 158. By contrast, Suriname's action consisted solely of communicating with the oil rig, a communication that allowed the rig considerable time to depart from the area. Suriname's action entailed no firing of shots and no injury or threat of injury to any individuals.

606 RG, para. 8.11, pp. 141-42.

607 *See* Eritrea Ethiopia Claims Commission, Partial Award on the *Jus ad Bellum* (Ethiopia's Claims 1-8), para. 16 (Dec. 19, 2005). Awards of the Eritrea Ethiopia Claims Commission are available at http://www.pca-cpa.org/English/RPC/#Eritrea-Ethiopia%20Claims%20commission.

608 SPO, paras. 6.11-6.38, pp. 31-42; SCM, paras. 5.1-5.44, pp. 63-81.

609 RG, paras. 8.1-8.2, p. 139.

4.65. A state cannot maintain an inter-state claim on behalf of a national of another state.[610] The 1982 Convention reinforces this principle by making clear that a ship has the nationality of the state whose flag it flies, that the flag state exercises jurisdiction and control over ships flying its flag, and that such jurisdiction entails cooperation among the relevant flag states where two vessels are involved in serious incidents on the high seas.[611] The fact that there might be other national interests at stake (such as crew members of different nationality or cargo owned by nationals of other states) is not relevant. As was stated in the *M/V Saiga* case,

> the Convention considers a ship as a unit, as regards the obligations of the flag State with respect to the ship *and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under Article 292 of the Convention*. Thus the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State.[612]

4.66. In the context of the "use of force" claim, Suriname's action was taken against an oil rig and drill ship, the C.E. Thornton. The C.E. Thornton is a cantilever Jackup that is flagged to the Marshall Islands. CGX Energy Inc. (CGX), a Canadian-based oil and gas company leased the C.E. Thornton from a U.S. drilling contractor (Reading & Bates of Texas), which owned the vessel. Thus, Suriname's alleged "use of force" was directed against a vessel that was not flagged to Guyana and not owned or leased by Guyana or its nationals. Yet only the flag state of the vessel is entitled to complain of alleged violations of international law against them by Suriname. Suriname has never received complaints from any other states with respect to its 3 June 2000 police action.

4.67. Guyana appears to base its "use of force" claim not only on the measures taken by Suriname on 3 June 2000, but also on communications sent to three oil companies (CGX, Maxus Guyana Limited and Esso Exploration and Production (Guyana) Limited (EEPGL)).[613] Suriname's communications with these oil companies cannot seriously be regarded as "threats of force" within the meaning of international law. Guyana does not cite any case or instrument, such as the UN Definition of Aggression, in support of such wide-ranging interpretation of what constitutes a "use of force." Yet even here, Guyana's claim fails since it relies on an alleged use of force against entities that are neither Guyana nor its nationals.

4.68. The dependency of Guyana's "use of force" claim upon injury to non-Guyana nationals is readily apparent from the type of damages sought by Guyana. As discussed below in Part D, the damages claimed by Guyana for Submission 3 principally relate to foregone costs that would have been incurred by three oil companies: CGX, EEPGL and Maxus. Leaving aside

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610 *See* Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, p. 168, para. 15 (Separate Opinion of Jessup, J.) (finding that Belgium could not advance a claim of damage on behalf of Belgian shareholders for injury to a Canadian corporation; Canada must bring the claim).

611 *See* Articles 91-92, 94(7) of the 1982 Law of the Sea Convention.

612 The M/V "Saiga" (No. 2) (St. Vincent v. Guinea), ITLOS 1999, 120 I.L.R. 143, para. 106 (emphasis added).

613 Letter of 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 of Robeson Benn, Commissioner, Guyana Geology and Mines Commission, to Maxus Guyana Ltd. (24 November 2001), at MG, Vol. III, Annex 168; Email of S. Jharap of Staatsolie to J.A. Ortega Dias-Ambrona and R. Bassols of Maxus (8 June 2000), at SCM, Vol. III, Annex 55.

for the moment that these foregone costs cannot constitute "damages," any such "damages" were incurred by companies incorporated in countries other than Guyana. CGX refers to either a Canadian company or its Bahamas affiliate. EEPGL is an affiliate of a U.S. corporation, Exxon Mobil Corporation, and is based in Texas. Maxus Guyana Limited is a company incorporated in the Grand Cayman Islands, though it is registered to do business in Guyana. Moreover, Guyana's efforts to advance a claim for "damages" allegedly sustained by these non-Guyana companies is also problematic because these companies failed to exhaust local remedies in Suriname prior to the filing of the international claim.[614]

D. Suriname's Actions Were Lawful Countermeasures Because They Were Taken in Response to an Internationally Wrongful Act by Guyana in Order To Achieve Cessation

4.69. In the alternative, Suriname submits that should the Tribunal find that Suriname's actions were contrary to international obligations owed to Guyana, those actions were lawful countermeasures in response to Guyana's prior unlawful act of attempting to authorize unilaterally exploratory drilling in a disputed area of the continental shelf.[615] The measures Suriname took on 3 June 2000 were fully in accordance with the requirements under general international law for the taking of countermeasures.[616]

4.70. Suriname had appropriately warned Guyana that, were it to continue with the unlawful act of drilling, Suriname would "utilis[e] all avenues offered by international law and international practice."[617] In this context, international practice includes the ordering of a

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[614] *See* Article 295 of the 1982 Law of the Sea Convention ("Any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law.") Under the local remedies rule, before a state may espouse a claim on behalf of its national, it must show that the national has exhausted all available legal remedies in the courts and administrative agencies of the state against which the claim is brought. *See, e.g.*, Interhandel (Switz. v. U.S.), 1959 I.C.J. 6 (Mar. 21); Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15 (July 20).

[615] A "countermeasure" is an act that would normally be contrary to the international obligations of a state, but that is deemed permissible when taken in response to the wrongful act of another state and in order to induce cessation of that act. *See, e.g.*, Air Service Agreement of 27 March 1946 (U.S. v. Fr.), 18 R.I.A.A. 417, p. 444, para. 83 (1978); Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the ILC on the Work of its Fifty-Third Session, 56th Sess., Arts. 49-54, U.N. Doc. A/56/10 (2001). The International Court of Justice has stated:

> In order to be justifiable, a countermeasure must meet certain conditions . . . . In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State . . . . Secondly, the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it . . . . In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question . . . [and] its purpose must be to induce the wrongdoing State to comply with its obligations under international law, and . . . the measure must therefore be reversible.

Gabčikovo-Nagymaros Project, 1997 I.C.J. 7, pp. 55-57, paras. 83-87.

[616] *See* Draft Articles on Responsibilities of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of Its Fifty-Third Session, U.N. GAOR, 56th Sess., Art. 22, Supp. No. 10, U.N. Doc. A/56/10 (2001).

[617] Letter of Karshanjee Arjun, Ambassador, 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.

drilling rig to leave the disputed area. Moreover, Suriname had called on Guyana to cease the operation, and offered to discuss the matter.[618] Under the circumstances, Suriname's measures had to be taken urgently in order to preserve its rights, making it impossible to use any potentially applicable alternative dispute settlement procedure.

4.71. The measures were clearly taken in order to induce Guyana to comply with its international obligation of not drilling unilaterally in a disputed maritime area. The measures were proportional, in that they involved using only the minimally necessary encouragement to the persons in command of the drilling rig to leave the area and thereby preventing any further escalation of the problem. The measures did not affect any of Suriname's other obligations towards Guyana.

4.72. Consequently, Suriname submits that, even if the Tribunal were to find that Suriname's actions on 3 June 2000 were contrary to international obligations owed to Guyana, such actions do not engage Suriname's state responsibility because they were lawful countermeasures.

4.73. In sum, this Tribunal only has jurisdiction to determine whether Suriname has violated the 1982 Convention. Guyana has failed to sustain its burden of proving that Suriname engaged in a threat or use of force as a means of settling a dispute between Guyana and Suriname concerning the interpretation or application of the 1982 Convention. Suriname's actions in June 2000 were reasonable and proportionate law enforcement measures; they were not actions of the kind that international tribunals regard as constituting a "use of force." Moreover, Guyana has failed to establish that these actions constituted a use of force against Guyana; the entire context of Guyana's claim and its request for damages is embedded in actions that were directed against entities other than Guyana. Finally, even if one were to regard Suriname's conduct as otherwise unlawful, it constituted a lawful countermeasure in response to Guyana's prior unlawful act. Accordingly, Guyana's claim must fail on more than one ground.

IV. Guyana Has Not Established That It Is Entitled to Any Remedy for Its Submission 3

4.74. Guyana's claim under Submission 3 fails on grounds of jurisdiction, admissibility, and the merits. Nevertheless, if the Tribunal were to find that Guyana should prevail on the merits, there is no basis for awarding any damages to Guyana for this claim.

4.75. Guyana has not made a serious attempt to respond to Suriname's detailed views on the damages for this claim in the Counter-Memorial.[619] Rather than repeating those views, they will just be briefly summarized here. Guyana's claims for compensation can be divided into two categories: compensation for "lost foreign investment" and compensation for lost licensing fees and other related sources of income.

4.76. The claim for compensation for so-called "lost foreign investment" concerns investment that would allegedly have been made in Guyana by three companies: CGX, EEPGL and Maxus Guyana Limited. Guyana asserts that these companies were committed to

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[618] *Ibid.*

[619] *See* SCM, paras. 7.26-7.39, pp. 113-16.

the expenditure of amounts totaling US$32.8 million. The sole underlying evidence for this compensation claim (the Affidavit by Mr. Newell Dennison; GM Annex 178) recounts a series of "costs" that the three companies (CGX, EEPGL and Maxus) would have incurred, totaling some US$32.8 million, had they been able to go forward with their concessions.[620] While both the Memorial and Annex 178 then portray the avoidance of these costs as though it constitutes a lost payment to Guyana, the reality is that, even if Suriname's action was unlawful, it simply saved the companies the costs of conducting surveys, drilling, and other activities. Those amounts are not "losses" to Guyana.

4.77. Suriname therefore maintains its position expressed in the Counter-Memorial[621] that the amounts being claimed by Guyana do not represent losses, but rather what the work would have cost had it been performed. Guyana cannot recover for costs avoided by the three companies.

4.78. The claim for compensation for lost licensing fees and other related sources of income, totaling about US$1 million, concerns amounts that allegedly would have been paid to Guyana by two of the companies (EEPGL and Maxus Guyana Limited) had their oil exploration projects gone forward.[622] Several items in this are very speculative, such as Guyana's alleged inability to receive payment for an application for a license renewal, where there is no evidence that EEPGL would have sought renewal. Moreover, the minimal evidence in support of such compensation is extremely weak. The only evidence are the bald statements by Mr. Newell Dennison, with little foundation as to his knowledge of the items at issue, no information as to his expertise in assessing damages, and no underlying documentation in support of the assertions he makes.[623]

4.79. In sum, Suriname submits that Guyana's claims for compensation in its Submission 3 should be rejected in their entirety as being without any basis.

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620 Affidavit of Newell M. Dennison, Head of Petroleum Unit, Guyana Geology and Mines Commission, at MG, Vol. IV, Annex 178, paras. 8 & 12.

621 SCM, para. 7.32, pp. 114-15.

622 MG, paras. 10.30-10.31, p. 133.

623 Moreover, some of these alleged losses appear not to take account of costs that would have been incurred by Guyana had the oil exploration gone forward. For example, to the extent that EEPGL did not pay "rental fees" or "training fees" to Guyana, presumably Guyana also did not incur any costs in providing whatever property was being rented or in providing the planned training. In other words, the only plausible damages would be any lost *profits* to Guyana from providing such goods and services, not the entire amount that would have been paid to Guyana. Yet Guyana provides absolutely no evidence as to the quantification of any such lost profits.

CHAPTER 5

GUYANA'S SUBMISSION 4 LACKS MERIT AND SHOULD BE REJECTED

5.1. Submission 4 of Guyana's Reply[624] maintains that Suriname violated Articles 74(3) and 83(3) of the 1982 Convention by failing "to make every effort to enter into provisional arrangements of a practical nature pending agreement on the delimitation of the continental shelf and exclusive economic zones in Guyana and Suriname, and by jeopardising or hampering the reaching of the final agreement" on delimitation.[625]

5.2. In further response to Guyana's Submission 4, this Chapter sets forth Suriname's position that, in the event the Tribunal finds that submission to be admissible, the Tribunal should find with respect to the merits of the submission that:

(i) In considering the alleged violation of Articles 74(3) and 83(3), only conduct of the Parties post-dating 8 August 1998 is relevant (Section I);

(ii) Although Articles 74(3) and 83(3) prohibit the unilateral authorization of drilling in a disputed area, those provisions do not dictate the content of either a provisional arrangement or a final agreement and do not permit the Tribunal to substitute its judgment for that of the Parties concerning the acceptability of particular outcomes in those regards (Section II);

(iii) If Articles 74(3) and 83(3) are regarded as imposing enforceable obligations with respect to concluding provisional arrangements or a final agreement, Guyana violated those Articles by its systematic refusal to engage in any negotiations on terms other than permitting its licensee to drill in the disputed area (Section III);

(iv) If Articles 74(3) and 83(3) are regarded as imposing enforceable obligations with respect to concluding provisional arrangements or a final agreement, Guyana has not proven that Suriname violated those Articles (Section IV); and

(v) If Suriname is regarded as having breached a duty under Articles 74(3) and 83(3), Guyana has not established that it is entitled to any remedy (Section V).

I. In Considering the Alleged Violation of Articles 74(3) and 83(3), Only Conduct of the Parties Post-Dating 8 August 1998 Is Relevant

5.3. The Tribunal's jurisdiction in respect of Guyana's Submission 4, should it be found admissible, is limited to events that have occurred after 8 August 1998. That is the date upon

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624 Submission 3 of Guyana's Memorial became Submission 4 in its Reply. *See* MG, p. 135; RG, para 101(4), p. 153.

625 RG, para 10.1(4), p. 153.

which the 1982 Convention entered into force as between Suriname and Guyana.[626] The 1982 Convention does not, by its terms, have any retroactive effect, nor are treaties generally regarded as having retroactive effect.[627] Accordingly, acts committed by Suriname or Guyana prior to that date cannot be said to constitute violations of the Convention, and thus fall outside the scope of the Tribunal's jurisdiction.[628]

5.4. In its Reply, Guyana refers to a whole series of events which have occurred from the 1980s up until 1996 in support of its arguments that Suriname did not engage in best efforts to achieve interim arrangements and to not hamper the reaching of a final delimitation agreement.[629] All of those events are irrelevant when deciding whether Guyana's Submission 4 should be upheld.

5.5. Accordingly, in this Chapter, Suriname will deal solely with events that occurred after 8 August 1998. At the same time, Suriname rejects Guyana's characterization of the pre-1998 events and reiterates that its pre-1998 conduct in respect of the maritime boundary was always fully in conformity with its obligations under general international law. As shown in its Memorandum on Preliminary Objections and Counter-Memorial, at no time did Suriname avoid engaging in a dialogue with Guyana regarding resolution of the maritime boundary issue; at all times Suriname remained open to reasonable and appropriate means for concluding either provisional arrangements or a final delimitation agreement.[630]

II. Although Articles 74(3) and 83(3) Prohibit the Unilateral Authorization of Drilling in a Disputed Area, Those Provisions Do Not Dictate the Content of Either a Provisional Arrangement or a Final Agreement and Do Not Permit the Tribunal To Substitute Its Judgment for That of the Parties Concerning the Acceptability of Particular Outcomes in Those Regards

5.6. The relevant language in paragraph 3 of Articles 74 and 83 of the Convention states:

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626 Guyana ratified the Convention on 16 November 1993. Suriname ratified the Convention on 9 July 1998. In accordance with Article 308(2), the Convention entered into force as between Suriname and Guyana on the thirtieth day following Suriname's ratification, which was 8 August 1998.

627 Article 28 of the Vienna Convention on the Law of Treaties, *adopted* 22 May 1969, 1155 U.N.T.S. 331. *See also* Article 13 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of Its Fifty-Third Session, U.N. GAOR, 56th Sess., U.N. Doc. A/56/10 (2001) ("An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."); Special Rapporteur, International Law Commission, *Second Report on State Responsibility*, U.N. Doc. A/CN.4/498, at pp. 17-18, paras. 37-40 (1999) (describing this principle as "uncontroversial" and reviewing the supporting authorities); Commentary to Article 13 of the Draft Articles on Responsibility of States for International Wrongful Acts, *in* The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries 131, 134 (James Crawford ed., 2002), at SR, Vol. II, Annex SR38 (describing how international tribunals have applied the principle in many cases and concluding that the "basic principle stated in article 13 is thus well-established.").

628 Whether these norms operated as a part of customary international law prior to 1998 is not relevant to this proceeding, since the Tribunal's jurisdiction is limited to the interpretation or application of the 1982 Convention.

629 RG, paras. 9.2-9.9, pp. 147-50.

630 SPO, paras. 6.39-6.44, pp. 42-44; SCM, paras. 8.2-8.10, pp. 119-22.

> Pending [a final delimitation] agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement.

5.7. In Chapter 4, Section II, Suriname demonstrated that the conduct of a state in unilaterally authorizing exploratory drilling in a disputed maritime area would constitute a violation of its obligations under the second clause of Articles 74(3) and 84(3) "not to jeopardize or hamper the reaching of the final agreement." Such unilateral activity in a disputed area necessarily constitutes the rejection of a "spirit of understanding and cooperation" and radically prejudices the ability to conclude a final agreement through negotiation. Indeed, such unilateral action makes it inherently unlikely that any arrangement, let alone a final agreement, can be concluded between two states, since the state engaging in such unilateral activities is already achieving its objective without any such cooperation. Guyana is well aware of these necessary implications of the second clause of Articles 74(3) and 83(3), and that is why it has sought to excuse its improper unilateral conduct by claiming, with remarkable temerity, that Suriname no longer claimed the disputed area.

5.8. In contrast, paragraph 3 does not impose any concrete obligation with respect to the actual conclusion of a specific provisional arrangement or final agreement; it simply provides that parties should generally try to cooperate and engage in best efforts to enter into provisional arrangements of a practical nature. While the language is important in trying to promote a "spirit of understanding and cooperation" during the period prior to the conclusion of a binding final agreement, paragraph 3 does not require parties to the 1982 Convention to follow any specific course of action. Rather, terms such as "spirit of understanding," "every effort" and "practical nature" are appropriately indeterminate and open-textured. Even the reference to "arrangements" signals an intention that, at the provisional stage, legally binding agreements are not necessarily contemplated. Similarly, although the second clause forbids conduct that would hamper the reaching of a final delimitation agreement, it does not actually require parties to enter into a final delimitation agreement.

5.9. Such "agreements to agree" are inherently difficult for any tribunal to enforce and are regarded under the contract law of most jurisdictions as akin to a letter of intent. In treaty relations, provisions of this type are often referred to as a type of "soft law." As International Court of Justice Judge Richard Baxter once wrote:

> [T]here are norms of various degrees of cogency, persuasiveness, and consensus which are incorporated in agreements between States but do not create enforceable rights and duties. They may be described as "soft" law, as distinguished from the "hard" law consisting of treaty rules which States expect will be carried out and complied with.[631]

5.10. Under the language of Articles 74(3) and 83(3), states are left with considerable discretion in reaching agreement on what temporary measures should be taken and are under

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[631] R.R. Baxter, *International Law in "Her Infinite Variety,"* 29 Int'l & Comp. L.Q. 549, 549 (1980), at SR, Vol. II, Annex SR30.

no obligation to make interim arrangements, and they are also fully within their rights if they decline to conclude a final agreement that they deem unacceptable. There is no basis for a tribunal to conclude that a party was "hampering" a final agreement simply because that party maintained a firm negotiating position and rejected the preferred outcome of the other party. As states and scholarly commentators fully recognize, "[t]he law of maritime delimitation may require the parties to negotiate in good faith. But it places few if any limitations on the location of an agreed boundary or related arrangements."[632] Those Articles "do not require that delimitation negotiations should be successful; like all similar obligations to negotiate in international law, the negotiations have to be conducted in good faith."[633]

5.11. In short, paragraph 3 of Articles 74 and 83 does not set forth an obligation of result for the Parties with respect to their negotiations. Rather it is no more (and no less) than an exhortation to both Parties to cooperate as best as possible in the period prior to the conclusion of a final delimitation agreement. While such language is important in helping to foster a spirit of understanding between the Parties, it does not permit the Tribunal to substitute its judgment for that of the Parties concerning whether particular provisional arrangements should be adopted or whether a final agreement can be reached. At most, the Tribunal can make a judgment as to whether the Parties have made efforts to resolve their differences through negotiation.[634] Here, Guyana's own submission shows that the Parties have engaged in extensive (albeit fruitless) negotiations during the years when the 1982 Convention applied between them,[635] and also for decades before. For that reason, Guyana's Submission 4 should be rejected.

III. If Articles 74(3) and 83(3) Are Regarded as Imposing Enforceable Obligations with Respect to Concluding Provisional Arrangements or a Final Agreement, Guyana Violated Those Articles by Its Systematic Refusal To Engage in Any Negotiations on Terms Other Than Permitting Its Licensee To Drill in the Disputed Area

5.12. If the Tribunal believes that Articles 74(3) and 83(3) do permit it to evaluate the sufficiency or the result of the Parties' negotiations, then the relevant facts are those arising after 8 August 1998. Those facts point to one inescapable conclusion: it was Guyana that, by its unilateral efforts to drill and its associated stance in the negotiations, breached its obligations under those Articles.

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632 Bernard H. Oxman, *Political Strategic, and Historical Considerations*, *in* 1 International Maritime Boundaries 3, 11 (J.I. Charney & L. M. Alexander eds., Martinus Nijhoff Publishers 1993), at SR, Vol. II, Annex SR34.

633 Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening), Merits, Judgment, I.C.J Reports 2002, p. 424, para. 2.44.

634 *See* The MOX Plant Case (Ireland v. United Kingdom), ITLOS Order (3 December 2001), paras. 54-60, available at http://www.itlos.org/case_documents/2001/document_en_197.doc; Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), ITLOS Order (27 August 1999), paras. 56-60, available at http://www.itlos.org/case_documents/2001/document_en_116.doc.

635 MG, paras. 4.32-4.37, pp. 53-55; RG, paras. 9.2-9.9, pp. 147-50. *See also* SPO, paras. 6.18-6.29, pp. 34-39; SCM, paras. 5.36-5.38, pp. 77-78.

5.13. After the 3 June 2000 incident, as recounted in Suriname's pleadings,[636] Guyana systematically avoided engaging in meaningful efforts to conclude any provisional arrangement or final agreement on maritime boundary delimitation. Instead, Guyana's sole focus was on securing Suriname's agreement to the resumption of exploratory drilling by Guyana's licensee in the disputed area, as well as "respect" for concessions issued by Guyana for virtually the entire disputed area. Guyana's conduct in these discussions was well outside the bounds of any possible construction of best efforts to enter into provisional arrangements and not to hamper the conclusion of a final agreement.[637] It was, instead, conduct of precisely the type that 74(3) and Article 83(3) of the 1982 Convention seek to avoid.

5.14. In light of Guyana's conduct, Suriname is entitled to a declaration from this Tribunal that Guyana breached its legal obligations to Suriname under Articles 74(3) and 83(3).

IV. If Articles 74(3) and 83(3) Are Regarded as Imposing Enforceable Obligations with Respect to Concluding Provisional Arrangements or a Final Agreement, Guyana Has Not Proven That Suriname Violated Those Articles

5.15. By contrast, Suriname's conduct since 1998 cannot possibly be construed as a violation of Articles 74(3) and 83(3). Guyana has the burden of proving its allegation in this regard, and it has not met that burden at all.

5.16. From 1998 to 2000, there is no evidence in the record of any kind that Suriname sought to frustrate the conclusion of provisional arrangements or a final delimitation agreement. After Guyana's precipitous attempt in June 2000 to engage in unilateral exploratory drilling, the evidence before the Tribunal clearly shows that Suriname was readily available and willing to enter into discussions that could lead to either a provisional arrangement or final agreement.[638]

5.17. Suriname has recounted in its Counter-Memorial[639] that immediately after the CGX incident, Suriname sought to engage in discussions with Guyana about delimitation of the maritime boundary. Such discussions occurred at the presidential and ministerial level, and under the auspices of the Joint Technical Committee and Joint Border Commission. Throughout those discussions, Suriname played an active and reasonable role in trying to

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636 *See* SCM, paras 8.2-8.10, pp. 119-22. Suriname's account in its Counter-Memorial of the events immediately after the 3 June 2000 incident is further supported by the affidavit of Mr. H.A. Alimahomed, at that the time the highest-ranking official in the Ministry of Foreign Affairs of Suriname, who was intimately involved in the talks between Guyana and Suriname in 2000. Statement H.A. Alimahomed, at SR, Vol. II, Annex SR15, at paras. 5-6.

637 In its Counter-Memorial, Suriname demonstrated Guyana's unwillingness during the negotiations to share with Suriname essential information on its contracts and arrangements with its licencees, making it impossible for Suriname to negotiate on equal terms with Guyana. SCM, para. 8.4, pp. 119-20. In its Reply, Guyana tries to make much of the fact that at the Fifth Joint Meeting of the Guyana/Suriname Border Commissions, on 10 March 2003, "Guyana gave Suriname considerable amounts of information concerning its licencees, including CGX." RG, para 9.11, n. 27, pp. 150-51. That it was only at the Fifth Meeting that Guyana gave such information in fact proves that Guyana was dragging its feet in these negotiations. Moreover, in the same paragraph, Guyana explicitly admits that it refused to disclose all the terms and conditions of the agreement with CGX, and as Suriname has shown, the amount of information provided by Guyana was negligible. *See supra* Chapter 2, para. 2.119, pp. 48-49.

638 Statement H.A. Alimahomed, at SR, Vol. II, Annex SR15, at paras. 10-27.

639 SCM, paras 8.2-8.10, pp.119-22. *See also* Statement H.A. Alimahomed, at SR, Vol. II, Annex SR15, at paras. 5-6, 10-27.

negotiate with Guyana. Although Suriname did not accept wholesale Guyana's position, Articles 74(3) and 83(3) cannot possibly be construed as requiring Suriname to do so.

5.18. Finally, Suriname submits that, even if the Tribunal would find Suriname in breach of its obligations under Articles 74(3) and 83(3), Guyana has forfeited its right to invoke Suriname's responsibility since it itself has equally been in breach of the same obligations: *inadimpleti non est adimplendum*.[640] As Suriname has amply shown in its Preliminary Objections,[641] its Counter-Memorial[642] and above,[643] Guyana violated its obligations under Articles 74(3) and 83(3) through its persistent demands that Suriname permit CGX to resume drilling activities in the disputed area and that Suriname accept Guyana's concessions which covered virtually the entire disputed area. As Judge Hudson famously stated: "where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party."[644]

5.19. For these reasons, Guyana's Submission 4 should be rejected.

V. If Suriname Is Regarded as Having Breached a Duty Under Articles 74(3) and 83(3), Guyana Has Not Established That It Is Entitled to Any Remedy

5.20. If the Tribunal were to find that Suriname violated Articles 74(3) and 83(3) of the 1982 Convention, Suriname submits that the Tribunal should still dismiss this claim altogether since Guyana has not established that it is entitled to any remedy.

5.21. Guyana asserts in Submission 4 that "Suriname is under an obligation to provide reparation, in a form and in an amount to be determined, for the injury caused by its internationally wrongful acts."[645] Yet Guyana has not established that it suffered any injury from Suriname's alleged violation of Articles 74(3) and 83(3). Indeed, Guyana has made no effort whatsoever to specify its loss or to quantify its damages. Such a claim cannot be taken seriously and should be dismissed summarily.

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640 Case Concerning Diversion of Water from the River Meuse (Netherlands v. Belgium), 1937, P.C.I.J., Series A/B, No. 70, pp. 48-49 (Dissenting Opinion of Judge Anzilotti).

641 SPO, paras. 7.1-7.9, pp. 45-48.

642 SCM, paras. 7.40-7.45, pp. 116-18; paras. 8.17-8.19, pp. 123-24.

643 *See supra* Chapter 2, Section II, Part D.

644 *Netherlands v. Belgium*, 1937, P.C.I.J., Series A/B, No. 70, p. 77 (Separate Opinion of Judge Hudson).

645 RG, para 10.1(4), p. 153.

CHAPTER 6

SUBMISSIONS

Suriname respectfully requests the Tribunal

1. To uphold Suriname's Preliminary Objections, filed 23 May 2005, as reaffirmed in its Counter-Memorial, filed 1 November 2005, in accordance with the Rules of Procedure.

Alternatively, Suriname respectfully requests the Tribunal

2. A. To reject Guyana's three submissions set forth at page 135 of its Memorial and Guyana's four submissions set forth at page 153 of its Reply.

2. B. To determine that the single maritime boundary between Suriname and Guyana extends from the 1936 Point as a line of 10° east of true north to its intersection with the 200-nautical mile limit measured from the baseline from which the breadth of Suriname's territorial sea is measured.

2. C. To find and declare that Guyana breached its legal obligations to Suriname under Articles 74(3) and 83(3) of the 1982 Law of the Sea Convention, by authorizing its concession holder to drill an exploratory well in a known disputed maritime area thereby jeopardizing and hampering the reaching of a maritime boundary agreement.

2. D. To find and declare that Guyana breached its legal obligations to Suriname under Articles 74(3) and 83(3) of the 1982 Law of the Sea Convention, by not making every effort to enter into a provisional arrangement of a practical nature.

Lygia L.I. Kraag-Keteldijk
Minister for Foreign Affairs
Republic of Suriname
Agent
1 September 2006

LIST OF DOCUMENTS ANNEXED TO THIS REJOINDER

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