

# Guyana v. suriname analysis



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CASE BRIEF

*THE VOTE:* a unanimous vote by all five judges: H. E. Judge L. Dolliver M. Nelson President, Professor Thomas M. Franck, Dr. Kamal Hossain, Professor Ivan Shearer, and Professor Hans Smit.

*THE FACTS :* Guyana gained independence from Great Britain May 26, 1966, and ratify the 1982 United Nations Convention on the Law of the Sea (UNCLOS) November 16, 1993. Suriname gained independence November 25, 1975, from the Netherlands and ratify the UNCLOS on July 9, 1998.[1]

“ The Parties,” Guyana and Suriname are situated on the northeast coast of the South American continent with their coastlines adjacent and meeting at or near the mouth of the Corentyne River.[2]

In 1799 the land border between Suriname and Guyana was agreed to by colonial authorities to run along the west bank of the Corentyne River.[3] In 1936 a Mixed Boundary Commission fixed the northern end of the border at a particular point on the west bank of the Corentyne River, near the mouth, a point then referred to as “ Point 61” or the “ 1936 Point”- the British and Dutch commission concluded that the maritime boundary in the territorial sea should be fixed at an azimuth of  $N10^{\circ}\frac{1}{4}E$  from point 61 to the limit of the territorial sea.[4]

Guyana advocates using the equidistance method for maritime delimitation after obtaining independence, which resulted in a line following an azimuth of  $N34^{\circ}\frac{1}{4}E$ , whereas Suriname’s position was that the maritime boundary

was to follow the N10i<sup>13</sup>/<sub>4</sub>line. The area overlapping claims were about 31 600 km<sup>2</sup>.<sup>[5]</sup>

In 1989, then presidents of both parties agreed that modalities for joint utilization of the border area should be established pending settlement of the border.<sup>[6]</sup> Furthermore, a 1989 agreement led to a 1991 “ Memorandum of Understanding – Modalities for Treatment of the Offshore Area of Overlap between Guyana and Suriname” (the 1991 MOU), if representatives of both governments would meet within 30 days to conclude discussions on the modalities for joint utilization of the disputed area.<sup>[7]</sup> The 1991 MOU was never implemented by Suriname, and the negotiations on joint utilization did not progress any further.<sup>[8]</sup> During MOU period, Guyana issued several concessions for oil exploration in the disputed area.

In 1999, CGX Resources Incorporated (a Canadian oil and gas company that holds three licenses in the Guyana v. Suriname Basin) arranged for seismic testing to be performed over the entire concession area, involving exploratory drilling on the seabed, and the drilling plans became known to Suriname government.

On May 11 & 31 2000, Suriname government, through diplomatic channels requested Guyana to cease all oil exploration activities in disputed area. On June 3, 2000, two Surinamese navy patrol boats approached CGX’s oil rig and drill ships, the C. E. Thornton, and ordered the crew and ship to leave the area within 12 hours, otherwise, “ the consequences would be theirs.”<sup>[9]</sup>

*PROCEDURAL HISTORY*: On February 24, 2004, Guyana initiated arbitration proceedings by way of a Notification and Statement of Claim such;

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1.) concerning the delimitation of its maritime boundary with Suriname, alleging breaches of international law by Suriname in disputed maritime territory – Pursuant to Articles 286 and 287 of the 1982 United Nations Conventions on the Law of the Seas (the “ convention”) and in accordance with Annex VII to the convention.[10]

2.) Claiming that the Parties are deemed to have accepted arbitration in accordance with Annex VII of the Convention by operation of Article 287(3); since neither Party had made a declaration pursuant to Article 287(1) of the Convention regarding their choice of compulsory procedures, and that neither Party had made a declaration in accordance with Article 298 regarding optional exceptions to the applicability of the compulsory procedures provided for in Section 2. And,

3.) Further, appointed Professor Thomas Franck as a member of the Arbitral Tribunal in accordance with Article 3(b) of Annex VII.[11]

Hereinafter, on March 23, 2004 Suriname in its “ Notification under Annex VII, Article 3(c) of United Nations Convention on the Law of the Sea UNCLOS Regarding Appointment to the Arbitral Tribunal with Reservation”, appointed Professor Hans Smit in accordance with Article 3(c) of Annex VII, but reserved its right “ to present its views about jurisdiction and any other preliminary matters to the full Arbitral Tribunal when in is constituted.”[12]

On June 15, 2004, by joint letter to the Secretary-General of the Permanent Court of Arbitration (PCA) the Parties noted that they had agreed to the appointment of the remaining three members of the Tribunal in accordance with Article 3(b) of Annex VIII.[13]

*LEGAL ISSUES AT STATE* : there are two legal issues

1) whether claim of unlawful threat or use of force taken by Suriname is implicit in international laws, such actions not a law enforcement activity but a threat of use of force is in contravention of UNCLOS, the Charter of the United Nations and general international law; in international law force, may not be used in law enforcement activities provided such for is unavoidable, reasonable and necessary, reasonable and necessary.

2) and whether the claim that action breached international laws constituted a countermeasure precluding wrongfulness not accepted, countermeasures may not involve the use of force.

*APPLICABLE INTERNATIONAL LAWS*: United Nations Convention on the Laws of the Seas (UNCLOS), adopted December 10, 1982, an international treaty to regulate the use of the world's ocean areas, and all uses of the seas and all its resources.[14]

1. 1. State Obligation under article 74(3) and 83(3) of the UNCLOS to make every effort to enter provisional arrangements; duty to negotiate in good faith; to “ make every effort” to reach such agreements. And,
2. 2. State Obligation under article 74(3) and 83(3) of UNCLOS to make every effort not to jeopardize or hamper the reaching of final agreement; unilateral activity that might affect the other party's rights in a permanent manner not permissible; distinction drawn between activities leading to a permanent physical change such as exploitation of oil and gas reserves, and those that do not, such as seismic exploration.[15]

*THE DECISION* : the tribunal awarded declaratory relief,

1) declares that violations of the Convention have taken place, in certain circumstances, “ reparation in the form of satisfaction may be provided by a judicial declaration that there has been a violation of a right” or an obligation. And,

2) declares that the parties violated their obligations under articles 74(3) and 83(3) of the Convention to make every effort to enter into provisional arrangements of a practical nature. Furthermore, the parties violated their obligations, also under articles 74(3) and 83(3) of the Convention, to make every effort not to jeopardize or hamper the reaching of a final delimitation agreement.[16]

In addition, 3) jurisdiction – holds it has competence to delimit, by the drawing of a single maritime boundary, the territorial sea, continental shelf, and exclusive economic zone appertaining to each of the parties in the waters where their claims to these maritime zones overlap; to consider and rule on Guyana’s allegation that Suriname has engaged in the unlawful use or threat of force contrary to the Convention, the UN Charter, and general international law; and to consider and rule on the parties’ respective claims under articles 74(3) and 83(3) of the Convention relating to the obligation to make every effort to enter into provisional arrangements of a practical nature and the obligation not to jeopardise or hamper the reaching of a final agreement.

*REASONING:* 1) The International Maritime Boundary between the parties is a series of geodetic lines joining the points in the order listed as set forth in the award;

2) the expulsion from the disputed area of the CGX oil rig and drill ship C. E. Thornton by Suriname on 3 June 2000 constituted a threat of the use of force in breach of the Convention, the UN Charter, and general international law; however, for a reason specified in the award, Guyana's request for an order precluding Suriname from making further threats of force and Guyana's claim for compensation are rejected;

3) both parties violated their obligation under articles 74(3), and 83(3) of the Convention to (first) make every effort to enter into provisional arrangements of a practical nature and to (second) do everything possible not to jeopardise or hamper the reaching of a final delimitation agreement; and claims inconsistent with award were rejected.[17]

## ANALYSIS

### 1. Introduction

For decades, neighboring countries have struggled to reach an amicable solution in resolving matters relating to the limitations of the High Seas, all parts of the sea that are not included in the territorial sea or in the internal waters of a state.[18] As well as the high seas freedoms such as navigation; overflight; fishing; to lay submarine cables and pipelines; to construct artificial islands, installations and structures; and scientific research.[19] Per Louis B. Sohn[20], et al., the first four freedoms are expressly mentioned in

Article 2 of the 1958 High Sea Convention;[21]whereas the last two were added in Article 87(1) of the LOS Convention.[22]Particularly, matters of potentially very high capital gain. Another thing to remember is that conflicts and/or disputes with respect to the two major wars WWI and WWII were a direct result of unresolved matters that could not be solved by diplomatic negotiations. Conflicts arising from the high seas are no different, especially with natural resources, not to mention resources such as oil, gas, and hydrocarbon. Factually, these commodities are in very high demand in relation to the economic stability of developed and even developing countries. Consequently, in the late 1960s the world was faced with a nightmare of conflicts over maritime rights.[23]Not only did different views arise between developed and developing countries, coastal and land-locked states, and large and small maritime powers, but also within those groups. [24]

Scholars suggest that this, of course, bred its own problems and since the close of WWII and the end of European Empire, there have been a growing number of boundary disputes, particularly between states.[25]In other words, nothing can more epitomize this than the realm of upstream oil and gas developments, where particularly in recent times, glittering prices of \$100 a barrel await those who can maximize their hydrocarbon production. [26]As time change, disputes became more and more challenging. In the twentieth century, the international law codification movement addressed both international and new law of the sea issues.[27]The League of Nations in 1930 and then the United Nations, UN in its 1958 and 1960 First and Second UN conferences on the Law of the Sea (UNCLOS 1 and UNCLOS 2)



tried to solve the recurrent issue of the breadth of the territorial sea under the control of the coastal state, to no avail.[28]The only logical solution was the establishment of a new international legal regime, a code of international law of the oceans. Therefore, the states arranged for the Third United Nations Law of the Sea conference (UNCLOS III) and over a period of nine years 1973-1982, [...] the 1982 United Nations Convention on the Law of the Sea was birth and set out the rights and responsibilities of coastal states and other states.[29]

The following paper will examine the tribunal decision, between the Republic of Guyana and the Republic of Suriname (Guyana v. Suriname, 2007) arbitral case, after hearing awarded September 17, 2007. But before the following paper seeks to explore the courts' decision on Surinamese action which constituted a threat of the use of force, and the threat of the use of force was not justified on the first and second states obligations. It is important to point out from the outset that the decision is commendable and a progression, however, it did not provide clear guidance on its interpretations or what it meant by 'state practice.' To analysis the decision, this paper is divided into three sections to examine the issues first, historical events up to arbitration; secondly, the tribunal decision on state's first obligation and the reasoning in the international legal framework; and third, the court ruling on the second states obligation, logic and what it means for further disputes on international laws. For concision, the following paper will consolidate its conclusion with a focus on the tribunal decision in general international law with associated cases.

## 2. Historical events leading up arbitration

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Since the establishment of the UNCLOS, 1982, proponents of the law of the seas have noted that there are an increasing number of disputes being fuelled by the discovery of hydrocarbons on or near a claimed boundary line.

[30]Per Roughton, indeed the United Nations noted in 2001 that ‘ 100 maritime boundary delimitations throughout the world still await some form of a resolution by peaceful means and by 2006, that figure had increased to some 220 potential maritime boundary disputes, which must exclude boundary disputes on land.[31]At that time, the tribunal had already awarded in the case of Barbados and Trinidad & Tobago while at the International Court of Justice (ICJ), between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), 2007 and Nicaragua and Columbia (Nicaragua v. Columbia) in December of the same year, on territorial sea and maritime delimitation disputes.[32]

The evidence through documentation submitted to the tribunal for the dispute between Guyana v. Suriname, 2007, on the maritime boundary line proves that many factors are leading up to the dispute going back to colonization which has a direct link to the arbitration. But the most important factor is perhaps the economic factor. In this regard, the significance of oil and gas reserves should not be understated as in many disputed areas which often involve oil and natural gas resources.[33]Legal documentation pointed out the origin of the conflict between the parties stretch back to a 1799 border agreement and the inability, of the Dutch and British colonial authorities in the 1930s to define the boundaries between the parties with greater precision.[34]Following the independence of both states and the granting of offshore oil concessions in a disputed area of the sea, where the

Corentyne River flows into the Atlantic Ocean, matters came to a halt in June 2000, specifically for sovereignty over the territorial sea, Continental Shelf, and EEZ.[35]

This is an interesting point to note, that prior as well, colonial authorities for the parties had agreed for the border to run along the west bank of the Corentyne River to enable the Netherlands (for Suriname) to exercise supervision of all traffic in the river. Additionally, in 1936 a Mixed Border Commission (agreement) between the parties fixed the northern end of the border at a particular point on the west bank, near the mouth of the Corentyne River. Taken together, during this time, this area is considered a disputed area (title belong to neither of the parties) yet they worked together and jointly shared the area. Since, the traffic during this time on the seas was mainly for navigating, transporting citizens between both countries, and fishing. Hence, from the early times when sailors and fishermen first ventured into the sea, two principles traditionally governed the law of the sea: the right of the coastal state to control a narrow strip along the coast and the freedoms of navigation and fishing in the high seas beyond the coastal area.[36] This comment supports the overall argument in this section that the parties interest at the time was navigating and fisheries, so peaceful arrangements were possible. However, a different approach ensued with the drilling company for possibly discovering oil, gas, and hydrocarbon.

3. On the first obligation - was there every effort made by both sides?

Under UNCLOS with regards to the nature and the rights and obligations impose under international law for article 74(3) and 83(3) provides as

follows, in sum - pending agreement (of delimitation of the EEZ or Continental Shelf), the States involved, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and during this transitional period, not to jeopardise (risk, endanger, expose) or hamper (hinder) the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.[37]

All the same, the two duties of cooperation and mutual restraint imposed on states party to the UNCLOS in relation to disputed maritime delimitations, as per Roughton, for some time there was no clear view as to the form in which any such cooperation might be mandated beyond the anodyne statement, but that States are simply required to negotiate in 'good faith' provisional arrangements of a practical nature.[38] This was to change from the Guyana v. Suriname case by what the UNCLOS meant in article 74(3) and 83(3), from the threat of the use of force by the Suriname navy vessel against CGX resources undertaking exploratory work for Guyana which brought up the issue of sovereignty over the disputed area between the parties to be ruled on. The tribunal had to then consider the meaning and effects of article 74(3) and 83(3), so in its award/decision, it specified in its interpretation to that of both obligations simultaneously attempt to promote and limit activities in a disputed maritime area.[39] Which means in the first obligation is that pending a final delimitation, states parties are required to make 'every effort to enter provisional arrangements of a practical nature.' [40] That is, in turn to 'pave the way for provisional utilization of disputed areas pending delimitation.' Parallel through its expose of the first obligation the tribunal implied to encourage 'the equitable and efficient use of the resources of the

sea's natural resources claimed by more than one state, subject always to the objectives of the second obligation, ' such activities do not affect the reaching of a final agreement.[41]

Additionally, the tribunal appeared to have in mind the encouragement of ' arrangements for the joint exploration and exploitation of maritime resources' as between the parties. Hence, using the decision by the ICJ in the *North Sea Continental Shelf Cases* to interpret the extent of the obligation to cooperate with the pre-UNCLOS regime. In that regard, the tribunal referenced the (then) recent UK-Norwegian Continental Shelf Agreement, and found that where there are overlapping claims, joint exploitation agreements were ' particularly appropriate when it is a question of preserving the unity of deposit.[42]Noteworthy to mentioned, the parties have worked together without conflict up to 1990. By previous agreements as up to the attempt with the 1991 MOU which apparently if a representative of both governments would have met within the 30 days to conclude the discussion, but, Suriname never implemented, neither came forth to negotiate on joint utilization, which might have prevented this arbitration.

This supports the argument that the dispute was driven by the possibility of discovering and the production of oil, gas, and hydrocarbon in the disputed area. The tribunal decision did not provide a clear interpretation to ' the practice of States' in interpreting ' first obligation and offered guidance as to what extent it considered there to be a developing trend of customary law.

[43]For clarification, my understanding is perhaps within its language the tribunal was suggesting states to jointly share the exploitation and exploration of maritime boundaries if overlapping or in disputed areas. If so,

is there a regulation to rights, limits, and responsibilities for states not signed to the UNCLOS with other signed states and where neither state is signed? Likewise, the production, and revenue from the oil, gas, and hydrocarbon pending delimitation.

On the other hand, successful joint utilization as a memorandum of understanding between Cambodia and Thailand made on 18 June 2001 under which both parties ‘ consider that it is desirable to enter into a ‘ provisional arrangement of a practical nature’ in relation to their overlapping claims in the Gulf of Thailand: the allusion to Articles 74(3) and 83(3) could not be clearer – neither party is contracting state under UNCLOS.[44]But for this to be acceptable and recognized as customary international law both parties must consider two elements; state practice and *opinio juris* (not discussed in this paper) as was used and interpreted in the North Sea Continental Shelf case. However, per author Roughton joint development agreements have been concluded most famously between Malaysia and Thailand in 1990 and between Malaysia and Vietnam in 1992. As well as, the suite of an agreement entered by Australia with Indonesia and East Timor over the Timor Gap.[45]For the overall argument of this paper is that a joint utilization in an international legal framework to solve such an issue should be taken up on a case-by-case basis. The language suggested by the tribunal should not pose a blanket of one-size fits all to resolve a disputed area conflict.

4. Second state obligation: not to jeopardize or hamper the reaching of a final agreement

The findings of the tribunal that both Guyana and Suriname violated their obligations under Articles 74(3) and 83(3) of UNCLOS, in its reasoning on the second obligation: state parties must during that period of ‘ make every effort’ .... not to jeopardize or hamper the reaching of final agreement, it was not intended to freeze all exploratory activities in a disputed maritime area in the absence of a provisional arrangement. In this regard, it made a distinction between activities of the kind that lead to a permanent physical change in the marine environment and those that do not, such as seismic exploration: while the former class of activities could be undertaken only jointly or by agreement between the parties, because such actions could be perceived to, or may genuinely, prejudice the position of the other party in the delimitation dispute, thereby both hampering and jeopardizing the reaching of a final agreement; the latter class of activities in disputed waters would be permissible.[46]

Based upon these theoretical analyses, the tribunal found that Suriname failed in its duty under Articles 74(3) and 83(3) noting that Suriname did not send a representative to conclude discussions on modalities for joint utilization of the disputed area, as contemplated by the 1991 MOU; Suriname failed to respond to the draft of proposed “ Modalities for Treatment of the Offshore Area of Overlap between Guyana and Suriname” submitted by Guyana in 1994.[47] Particularly, placing emphasis in the build-up to the CGX incident, “ In order to satisfy its obligation to make every effort to reach provisional arrangements, Suriname would have actively had to attempt to bring Guyana to the negotiating table, or, at a minimum, have accepted Guyana’s last minute 2 June 2000 invitation and negotiated in good faith.

[48]It notably could have insisted on the immediate cessation of CGX's exploratory drilling as a condition to participating in further talks.[49]In light of this, Suriname believed that Guyana's authorization of its concession holder to undertake exploratory drilling in disputed waters constituted a violation of its obligation, and if bilateral negotiations failed to resolve the issue, Suriname should resort to the remedy provided for "in the options for peaceful settlement envisaged by Part XV and Annex VII of the Convention", instead of opting for resorting to self-help in threatening CGX Resources.[50]

On the other hand, the Tribunal ruled that Guyana also violated its obligation to make every effort to enter provisional arrangements by its conduct leading up to the CGX incident, in that in a spirit of cooperation, informed Suriname directly of its plans, and the notification in the press by way of CGX's public announcements was not sufficient for Guyana to meet its obligation. Besides, Guyana should have sought to engage Suriname in discussions concerning the drilling at a much earlier stage.[51]Its 2 June 2000 invitation to Suriname to discuss the modalities of any drilling operations, although an attempt to defuse a tense situation, was also not sufficient to discharge Guyana's obligation under the LOS Convention.

[52]Being a tense situation already stemming from Suriname's lack of participation to implementation of the MOU agreement, the assumption is that the last minute efforts made matters worse. In this regard, the explanation by the tribunal in this section supports the overall argument of this paper. It points out clearly that the focus or driving force behind the arbitration is the development of the potential equity, that is the discovery by CGX Resources undertakings for Guyana in the disputed drilling for



possibly oil, gas and hydrocarbon. Both parties failed in the spirit of cooperation and restrained in relation to articles 74(3) and 83(3) states obligations.

## 5. Conclusion

The evidence listed above has supported the argument of this paper by proving that the dispute between Guyana v. Suriname was driven by factors of economic interest. Both parties failed in its obligations as Suriname contended in its defense that the measures it undertook on 3 June 2000 were of the nature of reasonable and proportionate law enforcement measures to preclude unauthorized drilling in a disputed area. While Guyana failed its for authorizing CGX Resources to drill in disputed area and not providing Suriname with sufficient notice of drilling activities.

Although in international law, force may be used in law enforcement activities, it is only if such force is unavoidable, reasonable and necessary. But, the action mounted by Suriname deemed more akin to a threat of military action rather than a mere law enforcement activity, therefore, constituted a threat of the use of force in contravention of the UNCLOS, the UN Charter, and general international law. Moreover, the tribunal emphasized that peaceful means of addressing Guyana's alleged breach of international law with respect to exploratory drilling were available to Suriname under the UNCLOS.[53] That is, a State faced with a such a dispute should resort to the compulsory procedures provided for in Section 2 of Part XV of the Convention, which provide, inter alia, where the urgency of the situation so requires, a State may request that ITLOS on prescribing provisional measures.[54]

Above all, the tribunal provided clarification of the obligations to make every effort to enter provisional arrangements and not to jeopardize or hamper the reaching of a final delimitation agreement, and exert a significant influence on the mode of behavior of those states facing maritime delimitation disputes.[55] However, it did not provide guidance when referred to 'the practice of States' in interpreting 'first obligation' neither offered guidance as to what extent (if any) it considered there be a developing trend of customary international law.[56] For such as, if a boundary is fixed, but a reservoir straddling it exist, unitization is the pa