

CHAPTER 7

SURINAME'S RESPONSE TO GUYANA'S SUBMISSION 2

7.1. Guyana's Submission 2 is as follows:

Suriname is internationally responsible for violating its obligations under the 1982 United Nations Convention on the Law of the Sea, the Charter of the United Nations, and general international law to settle disputes by peaceful means because of its use of armed force against the territorial integrity of Guyana and/or against its nationals, agents, and others lawfully present in maritime areas within the sovereign territory of Guyana or other maritime areas over which Guyana exercises lawful jurisdiction; and that Suriname is under an obligation to provide reparation, in a form and in an amount to be determined, but in any event no less than U.S. \$33,851,776, for the injury caused by its internationally wrongful acts.⁴⁵³

That submission is based upon an erroneous premise. Guyana assumes that it has legal title over a disputed maritime area. That premise, however, has things backwards: Guyana cannot anticipate the Tribunal's decision on the maritime boundary issue and thus it cannot seek a judicial benefit that has not yet accrued to it.

7.2. Guyana's Submission 2 assumes that on 3 June 2000 Guyana was lawfully entitled to undertake a drilling operation in a continental shelf area that had long been in dispute with Suriname. Guyana had no such entitlement then or now. The area concerned was and is claimed by Suriname. If the Tribunal rejects Suriname's Preliminary Objections, it will then be for the Tribunal to decide, by determining the single maritime boundary, which Party has jurisdiction in which part of the maritime area in dispute. Lawful title will then be established and the Parties, respectively, will then be able to undertake all activities they deem necessary for the exploration and exploitation of the natural resources on that basis.

7.3. Moreover, when the facts associated with the 3 June 2000 CGX incident are examined in the light of the applicable international law, it becomes obvious that Guyana committed an internationally wrongful act and that Suriname did not. It is in light of those facts that Suriname maintains its position, expressed in its Preliminary Objections, that Guyana lacks clean hands with respect to its Submission 2.

I. The Relevant Facts

7.4. The facts that are relevant to consideration of Guyana's Submission 2 are set forth in Chapter 6 of Suriname's Preliminary Objections. In addition, Chapter 5 of this Counter-Memorial reviews the facts that pertain to the limits of the oil concessions, service contracts and licenses that have been offered by the Parties from independence up to the 3 June 2000 incident. Those facts demonstrate that the combined oil concession practice of the Parties has always reflected the existence of a maritime boundary dispute, even though both Parties from time to time have not included the entirety of the disputed area in their concessions, service

⁴⁵³ MG, p. 135. Guyana Submission 2.

contracts and licenses. Furthermore, it has always been clear that the respective maritime boundary positions of the Parties were independent of the limits of any particular concession.

7.5. It is not necessary to repeat all that was said about the oil concession practice of the Parties in Chapter 6 of Suriname's Preliminary Objections. However, a few points should be mentioned here.

7.6. First, as described in Chapter 5 of this Counter-Memorial, the oil concession, service contract and license practice of the Parties since before the independence of both countries has reflected the existence of a maritime boundary dispute resulting in an area of overlapping claims.⁴⁵⁴ Second, since 1980 Staatsolie, Suriname's national oil company, has held a right to obtain a concession for the entirety of Suriname's offshore area up to the 10° Line.⁴⁵⁵ For all but two years since 1980, Staatsolie has held concessions for significant portions of that area, including the disputed zone.⁴⁵⁶ Third, in 1989/1991 the Parties entered into a *modus vivendi* and MOU to benefit jointly from the area of overlapping claims defined as the area between the 10° Line and the 30° line.⁴⁵⁷ Fourth, from 1989 to 1997, there was a period of cooperation.⁴⁵⁸ Fifth, in 1997, without consultation with Suriname and in disregard of the 1989/1991 *modus vivendi* and MOU, Guyana issued a license to Maxus that pertained to the western side of the disputed area (but that did not extend all the way to the 34° line now claimed by Guyana).⁴⁵⁹

7.7. The Maxus concession, while undertaken unilaterally by Guyana without consultation with Suriname, was one of a long line of relationships that both Parties had entered into with companies that pertained in part to some portion of the disputed area. Those relationships without exception also related to areas that were not disputed and did not distinguish between disputed and undisputed areas. This was the *status quo* in the disputed maritime area.

7.8. In 1998 Guyana entered into its concessions with CGX. The concession areas awarded by Guyana to CGX are shown on Figure 35. The initial CGX/Corentyne concession is dated 24 June 1998.⁴⁶⁰ The Annex concession was awarded later that year.⁴⁶¹ Together, those concessions include area that is recognized by Suriname as belonging to Guyana (71 percent) as well as area that is claimed by Suriname (29 percent).⁴⁶² Notwithstanding its assertion that

⁴⁵⁴ See *supra* Chapter 5, Section I.

⁴⁵⁵ See *supra* Chapter 5, Section I, Part C.

⁴⁵⁶ *Ibid.* At paragraph 4.15 of its Memorial, Guyana admits that "Suriname granted Staatsolie a licence covering the entire country (including maritime areas)." See also Suriname Decree No. E8 of 3 December 1980, relating to the grant of a license and concession to the State Oil Company, at MG, Vol. IV, Annex 170.

⁴⁵⁷ The 1989 *modus vivendi* and 1991 MOU are discussed at SPO, paras. 6.18-6.29, pp. 34-38; MG, paras. 4.32-4.37, pp. 53-55.

⁴⁵⁸ See *supra* Chapter 5, Section I, Part C.

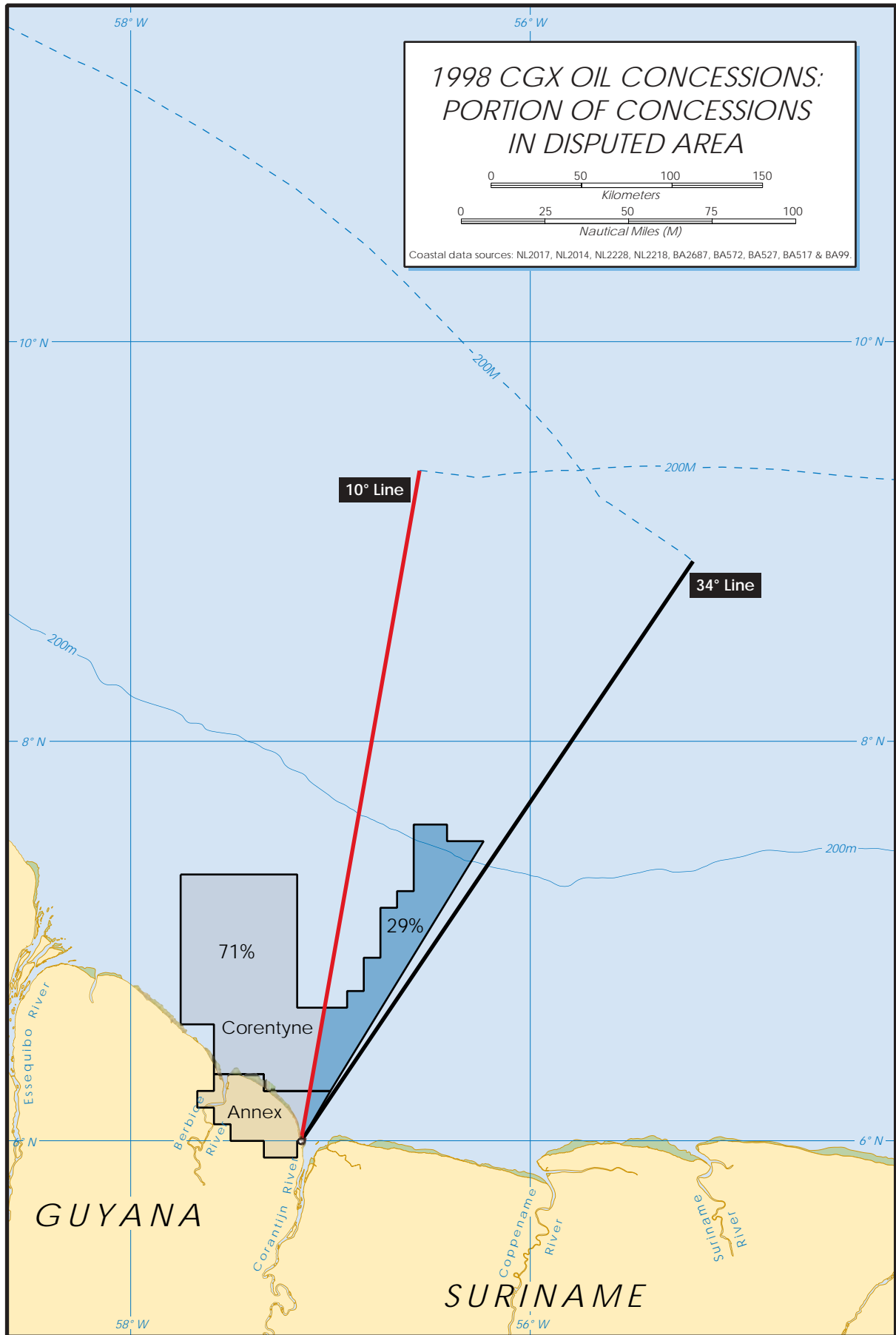
⁴⁵⁹ See *supra* Chapter 5, Section I, Part C; MG, Vol. III, Annex 155. The Maxus concession area is shown at Figure 24.

⁴⁶⁰ See MG, Vol. III, Annex 156.

⁴⁶¹ In December 1998 Guyana entered into an additional arrangement with CGX that expanded the area of its license. See MG, para. 4.39, pp. 56-57. Annex 157 of Guyana's Memorial purports to give evidence of this new or expanded arrangement, but it does not. The document in Annex 157 is a duplicate of the document in Annex 156 of Guyana's Memorial.

⁴⁶² See Figure 35.

Figure 35



all relevant documents should be made available to the Tribunal, Guyana has not provided to the Tribunal or Suriname the Petroleum Agreement between CGX and the government or indeed any of the relevant correspondence. Presumably that agreement sets out the financial terms of the arrangement and such arrangements that would follow if the company were to discover a petroleum prospect. What Guyana has put forth at Annex 156 of its Memorial is the initial Petroleum Prospecting Licence granted by Guyana to CGX in June 1998, which identifies the limits of the concession area at that time and sets out a four-year work program.

7.9. For reasons unknown to Suriname, the work program disclosed and set out in that license was not followed. That work program was to be in two phases. The first phase for the first two years of the license (June 1998-June 2000) was to be devoted to seismic work; the first year of phase two (June 2000-June 2001) was also to be devoted to seismic work; the second year of phase two (June 2001-June 2002) was to be devoted to additional seismic studies “or commence drilling one(1) Exploration Well in accordance with Article 4.2 of the Petroleum Agreement.”⁴⁶³ This is a relatively normal program of work. Unfortunately, the Petroleum Prospecting License at MG Annex 156 does not give a thorough or accurate picture of Guyana’s relationship with CGX since the plan of work was clearly changed and drilling was accelerated.

7.10. Guyana has offered four categories of additional evidence: (1) a series of 16 CGX press releases found at MG Annex 158; (2) a cover page extract from CGX’s 1999 Annual Report at MG Annex 162; (3) CGX “Morning Reports” dated 3-4 June 2000 at MG Annex 164; and (4) a witness statement at MG Annex 178 of Mr. Newell Dennison of Guyana Geology and Mines Commission, dated 7 February 2005, which is the sole evidence that is offered to support the sum that Guyana seeks as reparations.

7.11. There are serious discrepancies among the petroleum license offered by Guyana at MG Annex 156, the witness statement at MG Annex 178 and the self-serving press releases at MG Annex 158 that will be discussed below. Obviously at some point along the way a decision was made to modify the CGX work program initially agreed upon, to accelerate the drilling of a well from year four into year two and to drill that well deliberately in the disputed area without notice to or consultation with Suriname. The decision made by Guyana’s officials and CGX to drill in a disputed area breached the 1989/1991 *modus vivendi* and MOU and upset the *status quo* in the disputed area. It was also in violation of Guyana’s legal duty under Articles 74(3) and 83(3) of the 1982 Law of the Sea Convention “not to jeopardize or hamper the reaching of the final agreement,” as Suriname will explain below (Chapter 7, Section V).

7.12. The decision to drill led to the events of 3 June 2000, which Guyana inaccurately and incompletely describes in Chapter 5 of its Memorial. From that description, it is clear that Guyana and CGX had been aware of the fact that Suriname would not tolerate an attempt to change the *status quo* in the disputed maritime area. However, notwithstanding repeated warnings, CGX proceeded with the deployment of the drill ship. This left Suriname no choice but to dispatch vessels employed for maritime law enforcement to the area. The commander of one of those vessels then, in accordance with his instructions and standard maritime practices, directed the captain of the drill ship to leave the area. In stark contrast to Guyana’s description, this all happened in a professional and non-threatening way. Four weeks after the incident, President Wijdenbosch of Suriname made an elaborate statement at the CARICOM

⁴⁶³ MG, Vol. III, Annex 156, at p. 3.

Conference of Heads of Government in Canouan, St. Vincent and the Grenadines (2-5 July 2000), explaining the events surrounding the 3 June incident as well as its background and its aftermath so far. In his statement, the actual operation is briefly summarized as follows:

In the case of the oil rig the following standard procedure was followed.

Before the rig reached Surinamese territory, and because the intentions could be inferred, it was asked through diplomatic and other channels, that it keep out of Surinamese territory.

When the rig has reached Surinamese territory, it was requested that it clear the area. The crew of the rig was willing to comply with the request, but asked time to prepare for clearing the area.

The Surinamese navy allowed the rig 12 hours to leave the area. Which is what happened.⁴⁶⁴

7.13. In contrast, Guyana greatly exaggerates the actual nature of the operation. Suriname acted with great restraint under the circumstances in order to preserve the *status quo* in the disputed area. It did nothing more than ask a drill rig to leave an area to which it had a claim.

7.14. Guyana's Submission 2 also relates to communications with Maxus and Esso by Mr. Jharap, the Director of Staatsolie. Those communications did no more than remind those companies of something that they could not help but know, namely that the concessions they held from Guyana also overlapped in part with areas claimed by Suriname.⁴⁶⁵

7.15. Since Guyana portrays those communications as particularly threatening, the communications Guyana cites bear examination. First, concerning Esso, Guyana cites to an email from Mr. Jharap of Staatsolie to an official of Esso. That email is dated 8 June 2000 and is found at Annex 50 of Guyana's Memorial. It simply says that Staatsolie has information that Esso "is performing exploration activities in Suriname offshore territories without a permit" and that "the Suriname coast guard is patrolling in that area and in order to prevent problems we would appreciate your quick response in this matter." The other communication from Staatsolie to Esso is dated 18 August 2000 and is found at MG Annex 173. Neither it nor the 8 June 2000 email is menacing. They are simply informative reminders of Suriname's boundary position; indeed, they are notably diplomatic under the circumstances.

7.16. Guyana also suggests that "Staatsolie made yet another warning to Maxus not to conduct any further exploratory operations in the so-called 'Area of Overlap.'"⁴⁶⁶ The evidence for that statement is not a letter from Staatsolie but a letter from Mr. Robeson Benn, Commissioner, Guyana Geology and Mines Commission, to Maxus dated 24 November 2001. That letter is found at Annex 168 of Guyana's Memorial. It is dated almost 18 months after the CGX incident, and it is primarily a letter about the restructuring of the relationship between Guyana and Maxus. Interestingly, while the boundary matter is given as an excuse, the letter

⁴⁶⁴ Statement by the President of the Republic of Suriname, H.E. Jules Albert Wijdenbosch, at the Twenty First Meeting of the Conference of Heads of Government of the Caribbean Community, Canouan, St. Vincent and the Grenadines, July 2-5 2000, at SCM, Vol. II, Annex 5, at p. 5.

⁴⁶⁵ MG, paras. 10.20-10.21, pp. 130-131.

⁴⁶⁶ MG, para. 10.21, p. 131.

makes clear that political events and bureaucratic delays also affected the Guyana-Maxus relationship. In all events, that letter is not evidence of threats by Suriname to Maxus. Annex 53 of this Counter-Memorial contains the email sent by Staatsolie to Maxus (a subsidiary of Repsol) shortly following the CGX incident. One can see that it is virtually the same as the email sent to Esso, quoted above.

II. Guyana's Joining of the Boundary Dispute with Questions of State Responsibility Is Inconsistent with State Practice and the Practice of Courts and Tribunals

7.17. The essence of Guyana's Submission 2 is that Suriname's state responsibility is engaged because it expelled the CGX drill ship from a disputed area and because it informed two other companies that the concessions they held from Guyana intruded into areas claimed by Suriname.

7.18. The joining by Guyana of questions of state responsibility and territorial title is highly irregular and inappropriate. There have been many cases in which territorial disputes have resulted in adverse consequences for people and property and governmental interests, but Guyana has cited no case in which a territorial dispute has been decided in favor of one state and in which the losing state was then held to be responsible for its actions in a formerly disputed area. Indeed, in a recently published essay by Judge Rosalyn Higgins, she states: "The Court has *never yet made a finding* that a State's responsibility is engaged in a case whose main focus is territorial title."⁴⁶⁷

7.19. Guyana's presumption that the disputed maritime area belongs to it assumes that this case has already been decided and indeed that it had been decided on 3 June 2000. However, this case is far from being decided. It remains for the Tribunal to decide Suriname's Preliminary Objections, and only following a decision by the Tribunal that it has jurisdiction to proceed will the Tribunal decide the contending maritime boundary claims of the Parties.

7.20. The root of Guyana's complaint concerns the application of principles of international law to maritime space. Disagreement about the application of legal principles is not a basis for international responsibility. Suriname has consistently claimed the maritime space off its coast east to the 10° Line. That position was inherited from the Netherlands, it was well-known to the United Kingdom prior to Guyana's independence and it has been a fact of life in the bilateral relations between Suriname and Guyana throughout time. Disagreement about the application of legal principles relating to the course to be taken by a maritime boundary yet to be established is not the basis for international responsibility. Nor are acts taken to maintain the *status quo* in a disputed area in response to acts designed to change the *status quo* and create a *fait accompli*.

7.21. As the Tribunal knows, the maritime space that Guyana claims that lies east of the 10° Line is also claimed by Suriname. The exercise of authority by Suriname within an area to which it claims sovereign rights and jurisdiction solely to preserve the *status quo* until the dispute can be settled cannot constitute violations of international law as alleged by Guyana. Even if the Tribunal were to hold, contrary to Suriname's submissions, that the entire disputed

⁴⁶⁷ Rosalyn Higgins, *The International Court of Justice: Selected Issues of State Responsibility*, in *International Responsibility Today, Essays in Memory of Oscar Schachter* 271, 285 (Maurizio Ragazzi ed., 2005), at SCM, Vol. III, Annex 74.

maritime area belongs to Guyana, it does not follow that Suriname's actions in support of its position involve its international responsibility. Were it to be otherwise, every case involving a territorial or maritime boundary dispute would be transformed into a state responsibility case.

III. The International Law of State Responsibility

7.22. Before a state is internationally responsible under the principles of state responsibility, it must have engaged in a breach of an international obligation. The International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts⁴⁶⁸ is a much heralded effort, but those articles are in the nature of drafts, and they do not purport to constitute a complete statement of the law in this area, reflecting customary international law.⁴⁶⁹ The Draft Articles themselves do not define which acts constitute internationally wrongful acts, but leave that to be covered by the primary rules of international law.⁴⁷⁰

7.23. Guyana claims that Suriname has violated the principle of non-use of force by directing the CGX rig to leave the disputed area and by communicating with two companies. In Guyana's view, Suriname's acts to preserve the *status quo* in the disputed maritime area pending agreement between the Parties or judicial resolution constitutes an internationally wrongful act. Suriname disagrees. Suriname exercised its lawful authority to prevent drilling without its permission in an area it claims. That was a law enforcement measure.⁴⁷¹ The general international law rule is that no more force may be used than is strictly necessary to achieve the legitimate objective and is proportionate to the circumstances. Suriname fully complied with that standard and did not act wrongfully. It merely directed a drilling rig to leave Suriname's claimed waters and allowed the crew adequate time to do so. There were no personal injuries or property damage, and the rig shortly resumed operations in undisputed waters. Thus, Suriname engaged in no wrongful act.

7.24. The general practice of States is not to link disputes as to territorial title with claims of international responsibility on the part of whichever state loses its claim. It is to be noted, for instance, that in the *Temple of Preah Vihear* case, the Court did not adjudge any responsibility against the party in possession and limited itself to specific matters such as the return of property and withdrawal of official personnel.⁴⁷² Similarly, in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court declined to ascertain

⁴⁶⁸ See 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., Supp. No. 10, U.N. Doc. A/56/10 (2001).

⁴⁶⁹ See G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (12 December 2001); G.A. Res. 59/35, U.N. Doc. A/RES/59/35 (2 December 2004).

⁴⁷⁰ See Draft Articles at Art. 3.

⁴⁷¹ In Guyana's memorial, paras 10.8-10.9, there is a reference to supposed conditions for the arrest of ships in the high seas. Since no arrest was involved in the 3 June 2000 incident Suriname will not here go into the (erroneous) argument by Guyana.

⁴⁷² See Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962, *dispositif*, pp. 36-37.

whether and to what extent Nigeria's responsibility to Cameroon had been engaged as a result of Nigeria's occupation of territory determined by the Court to belong to Cameroon.⁴⁷³

7.25. Given that Suriname believed that the disputed maritime area belongs to it under applicable international law, Suriname's action to preserve its position by taking proportionate law enforcement measures against an incursion by Guyana's drilling rig that was intended to change the *status quo* and create a *fait accompli* is not an unlawful act. It was not an armed attack, and it was not in any way directed against the territorial integrity of Guyana; it was rather the means by which Suriname protected itself from Guyana's unlawful conduct. Consequently, Suriname did not by its actions breach its obligations under the U.N. Charter or other applicable international law.⁴⁷⁴

IV. Guyana Has Suffered No Loss and Alone Bears the Consequences of Offering Contracts Concerning Areas for Which It Does Not Have Secure Title

7.26. Guyana is not entitled to reparations. Suriname acted in complete accord with its international obligations and engaged in no wrongful act giving rise to its international responsibility. In particular, Suriname did not engage in unlawful conduct when it directed the CGX rig to leave Suriname's claimed waters and when it brought the simple and incontestable fact of Suriname's claim to the attention of two other companies. This conclusion is fully supported and confirmed by a close review of Guyana's specific demand for reparations. Such a review discloses the overall weakness of Guyana's evidence and Guyana's misleading use of it.

7.27. As noted above in Chapter 5, CGX was fully aware that it was about to drill in a disputed maritime area. As early as 1998, CGX described its concession as including an "Area of Overlap" and CGX told its shareholders on 1 October 1998 that "Title to a significant portion of the Company's oil and gas concessions may be disputed by Suriname, which asserts that the boundary between Guyana and Surinam is further west than claimed by Guyana."⁴⁷⁵ Guyana too was on notice of Suriname's objections to CGX's plans even before the drilling rig entered the area. In fact, Guyana concedes that in a diplomatic note dated 11 May 2000, Suriname advised Guyana that it had seen newspaper reports that Guyana, in cooperation with one or more private oil companies, was conducting exploration activities in Suriname's territory and Suriname demanded that such activities be terminated immediately.⁴⁷⁶ Guyana describes that note as "unexpected and hostile," but it was neither. It was merely an attempt to preserve the *status quo* as reflected in the 1989 *modus vivendi* and the 1991 MOU. It is therefore impossible to avoid the conclusion that CGX's attempt to drill in an area of overlapping claims was deliberately provocative and designed to create a *fait accompli*.

7.28. Guyana has suffered no loss. Its call for reparations is unfounded in fact. It offered its concessionaires areas to which it did not have a confirmed legal title. Indeed, the agreements

⁴⁷³ 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. 145, para. 319.

⁴⁷⁴ Suriname reserves its position with respect to the Tribunal's competence to adjudicate claimed breaches of the U.N. Charter, but does not believe that it is necessary to address that issue at this time.

⁴⁷⁵ See *supra* Chapter 5, Section III, Part A.

⁴⁷⁶ See MG, paras. 10.12, 10.14, pp. 128-29; MG, Vol. II, Annex 76.

with those concessionaires contained *force majeure* provisions that anticipated boundary problems.

7.29. The sole basis for Guyana's claim of US\$33,851,776 against Suriname is a witness statement dated 7 February 2005, almost a year after Guyana filed its Application. That witness statement is made by Mr. Dennison, an official of the Guyana Geology and Mines Commission. It is found at Annex 178 of Guyana's Memorial. It alleges damages in connection with the three oil concessions granted by Guyana and held in the year 2000 by CGX, Esso and Maxus that intruded into the disputed area.

7.30. For the most part, the damages alleged relate to certain categories of exploration work that Mr. Dennison asserts were not done by those companies because of Suriname's actions, or what he deems to be lost re-licensing revenue when those companies relinquished areas of their concessions and those areas were not re-licensed. Thus, Guyana's claim for reparations is based on tortured logic: Guyana entered into contracts, some of the area covered by the contracts concerned a disputed area, the contracts anticipated boundary problems in their *force majeure* provisions because of those problems, and the companies invoked *force majeure* termination provisions. Guyana apparently believes it can demand reparations from Suriname notwithstanding that it created the very condition — authorizing drilling in a disputed area — that precipitated the exercise of the *force majeure* clauses in the first place. If Guyana caused those companies to believe there was no maritime boundary dispute with Suriname, it misled them. If it thought it could unilaterally appropriate the disputed area by using those companies as its surrogates, it was also wrong.

7.31. Concerning CGX, the Tribunal will recall that in addition to the disputed area, Guyana's CGX concession covered areas offshore Guyana that Suriname does not claim.⁴⁷⁷ Indeed, most of the CGX concession area is not claimed by Suriname. Mr. Dennison's statement, at paragraph 5, states that "CGX contracted to drill an exploratory well at a location know as 'Eagle.'"⁴⁷⁸ This assertion is inaccurate, at least as far as one can tell from the CGX Petroleum Prospecting License set forth at MG, Vol. III, Annex 156 and the sixteen CGX press releases at MG, Vol. III, Annex 158. The Petroleum Prospecting License reveals that CGX's obligation was only to drill one well somewhere in its concession area in the fourth year of its license *or* to undertake further seismic work that year.⁴⁷⁹ Furthermore, CGX's press releases reveal that it had four potential drilling targets and that its initial target was "Horseshoe West," a location not in the disputed area.⁴⁸⁰ CGX does not appear to have been "contractually required" to drill the well at Eagle as Mr. Dennison asserts. The accuracy of the rest of his statement is, as a result, called into question.

7.32. Next, Mr. Dennison lists the damages claimed that pertain to work he asserts CGX did not perform because of Suriname's actions. That includes the amount of US\$1,200,000 for 2D seismic work, the amount of US\$4,000,000 for 3D seismic work, and the amount of US\$8,000,000 for an exploratory well. Those amounts totaling US\$13,200,000 are based on

⁴⁷⁷ See Figure 25.

⁴⁷⁸ See MG, Vol IV, Annex 178.

⁴⁷⁹ From the CGX press releases, it appears that at sometime in 1999 CGX undertook to drill a second well but Guyana has not supplied any underlying documentation.

⁴⁸⁰ See MG, Vol. III, Annex 158, at CGX Press Release dated 13 September 1999; CGX Press Release dated 16 September 1999.

“information provided to me by CGX.”⁴⁸¹ Those amounts do not represent losses, but rather what the work *would have cost* had it been performed.

7.33. As far as Suriname knows, CGX retains its concessions in Guyana. It proceeded to drill the Horseshoe West prospect outside the disputed area shortly after the 3 June 2000 incident.⁴⁸² There is no reason why it could not proceed with other seismic studies or even the drilling of other wells, in undisputed Guyana territory or water. Indeed, Suriname understands that CGX has recently drilled two wells onshore in its concession area.⁴⁸³

7.34. It has been noted previously that Guyana has not made the Guyana-CGX Petroleum Agreement available to either the Tribunal or to Suriname. Suriname assumes, and believes the Tribunal can assume, that such Agreement, like other such agreements between petroleum companies and governments, includes a *force majeure* provision that allows a company to release itself from work commitments in certain circumstances. Such circumstances normally include territorial disputes. Indeed, the CGX Petroleum Prospecting License at paragraph 3 makes reference to *force majeure* and refers to Article 24 of the Petroleum Agreement which, as shown below, in at least the case of Esso contains a definition of *force majeure* that includes boundary disputes.⁴⁸⁴

7.35. Concerning Esso, Mr. Dennison’s statement sets out a variety of amounts totaling US\$12,642,000. Like the CGX concession, the Esso concession lies both inside and outside of areas claimed by Suriname.⁴⁸⁵ The majority of the claim (US\$11,600,000) pertains to work that Mr. Dennison claims Esso allegedly did not perform because of Suriname’s actions, including the amount of US\$1,700,000 for a 2150 km 2D seismic, the amount of US\$2,400,000 for a 3,000km 2D seismic survey, the amount of US\$7,000,000 for a 1,250km² 3D seismic survey or drilling an exploratory well to 3,600 meters and the amount of US\$500,000 for conducting geochemical sampling and other exploratory activities. Again, these amounts do not represent losses, but rather what the work *would have cost* had it been performed.

7.36. Mr. Dennison claims that Esso’s failure to perform work is attributable to Suriname’s action. Three basic points should be noted. First, the block held by Esso not only infringed upon areas claimed by Suriname but also areas claimed by Venezuela.⁴⁸⁶ Second, Esso did declare *force majeure* under its Petroleum Agreement with Guyana. Neither the Tribunal nor Suriname has seen that agreement, but Mr. Dennison states that “Esso declared *force majeure*.”⁴⁸⁷ Guyana provides at Annex 166 of its Memorial the letter from Esso to the Guyana Petroleum Ministry in which Esso declared *force majeure*. The reason that Esso gave for its declaration of *force majeure* pertains not only to the boundary problem with Suriname

⁴⁸¹ MG, Vol. IV, Annex 178, at p. 2.

⁴⁸² See SPO Annex 33.

⁴⁸³ See CGX Press Release dated 26 May 2005, available at http://cgxenergy.ca/PR_May26-05.html, at SCM Annex Vol. III, 62; CGX Press Release date 30 June 2005, available at http://cgxenergy.ca/PR_June30-05.html, at SCM, Vol. III, Annex 63.

⁴⁸⁴ MG, Vol. III, Annex 156, at para. 3, p. 5.

⁴⁸⁵ See, e.g., Figure 26.

⁴⁸⁶ See *supra* Chapter 5, Section I, Part C.

⁴⁸⁷ MG, Vol. IV, Annex 178, at para. 8, p. 2.

but also the boundary problem with Venezuela. Third, that letter discloses the definition of *force majeure* that is found in Article 24.2 of the Esso-Guyana Petroleum Agreement. That definition includes “international disputes affecting the extent of the contract area.” One may assume that Article 24 of Guyana’s other Petroleum Agreements includes a similar reference.

7.37. The remaining US\$1,042,000 set out in Mr. Denison’s statement pertains to what Mr. Dennison claims to be lost fees that Esso did not pay after declaring *force majeure* and lost fees caused by Guyana’s inability to relicense the relinquished acreage as a result of Suriname’s actions.⁴⁸⁸ The fact that Esso exercised its option to declare *force majeure* under its agreement with Guyana to release itself from its obligation, and that other companies chose not to undertake activities in an area of disputed sovereignty does not create liability for Suriname.

7.38. Third, concerning Maxus, Mr. Dennison alleges damages totaling US\$8,009,776. Mr. Dennison claims that US\$8,000,000 represents what would have been the cost of certain work had it been performed, including the amount of US\$7,000,000 for the drilling of an initial exploratory well and US\$1,000,000 for further seismic exploration. The remaining amounts totaling US\$9,776 represent alleged lost rental fees and training.⁴⁸⁹ Like the CGX concession, the Maxus concession lies mostly in areas that are not claimed by Suriname.⁴⁹⁰ Also, like the CGX Petroleum License at MG Annex 156, the Maxus Petroleum Prospecting License at MG Annex 155 contains a *force majeure* clause and makes reference to Article 24 of the Petroleum Agreement. Mr. Dennison does not indicate whether Maxus declared *force majeure* or not. In all events, as is now clear, Maxus had the contractual right to invoke *force majeure* because of “international disputes affecting the extent of the contract area” and it also had the opportunity in the undisputed portion of its concession block to undertake exploration activity. It should also be noted, as referenced above, Maxus has had other problems with Guyana beyond the boundary issue, as revealed in Mr. Robeson Benn’s letter to Maxus at Annex 168 of Guyana’s Memorial.⁴⁹¹

7.39. Setting aside for a moment the basic proposition that Suriname has not engaged in an internationally wrongful act, Suriname is not responsible for the fact that Guyana’s concessionaires chose not to undertake certain work programs pursuant to contractors rights that Guyana gave them. They had the right to suspend work programs because of an “international dispute affecting the extent of the contract area.” Those contracts had thus anticipated that problems could arise.

**V. Guyana Breached Its Duty Under Articles 74(3) and 83(3)
of the 1982 Law of the Sea Convention When It Authorized
Drilling in a Disputed Area**

7.40. Articles 74(3) and 83(3) of the 1982 Law of the Sea Convention each provide:

Pending agreement . . . , the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional

⁴⁸⁸ *Id.* at para. 8, p. 3.

⁴⁸⁹ *Id.* at para. 12, p. 4.

⁴⁹⁰ See Figure 25.

⁴⁹¹ See *supra* para. 7.16.

arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

This provision establishes two different obligations. One obligation is to “make every effort to enter into provisional arrangements of a practical nature.” The other is “not to jeopardize or hamper the reaching of the final agreement.” The first obligation is relevant to Guyana’s Submission 3 and Suriname’s response relating thereto, which is covered in Chapter 8. The second obligation is relevant to this Chapter.

7.41. Paragraph 3 of Articles 74 and 83 of the 1982 Law of the Sea Convention was part of the undercurrent of the debate between the opposing camps supporting equitable principles or equidistance that characterized the delimitation negotiations at the Third U.N. Conference on the Law of the Sea. For a time, both of those camps tried to integrate into paragraph 3 the essence of their substantive positions on delimitation law otherwise centered in paragraph 1 of both articles. When this back-door effort failed, the positions of the two camps with regard to paragraph 3 evolved toward two different points of view that are now reflected as two different obligations in paragraph 3: a duty to negotiate to reach provisional arrangements and a duty to exercise restraint so as not to hamper the reaching of a final settlement.⁴⁹² Unlike the compromise between the camps that is reflected in paragraph 1, paragraph 3 records both duties as separate obligations.

7.42. The acts or omissions to which the duty to exercise restraint relates are unilateral acts associated with the exercise of coastal state sovereign rights and jurisdiction that would violate or prejudice the rights of another state claiming the same rights in a maritime area. Since as a practical matter it is not realistic to assume that all disputed areas could be turned into no-activity zones, a distinction can be made between transitory or tolerated occasional actions, which characterize the unique *status quo* of each boundary situation and those acts that represent irreparable prejudice by changing the *status quo* to the advantage of one disputing state and to the disadvantage of the other.

7.43. In the *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, the Court distinguished seismic exploration activities of a transitory character from those that risked irreparable prejudice to the position of the other party.⁴⁹³ Lagoni in his article on this subject concluded:

One can thus infer that any activity which represents an irreparable prejudice to the final delimitation agreement, namely the “establishment of installations on or above the sea-bed” or the “actual appropriation or other use of the natural resources,” would doubtless be prohibited under paragraph 3 of Articles 74/83, since these activities could be terminated by an injunction if the dispute were submitted to a court or international tribunal.⁴⁹⁴

⁴⁹² Rainer Lagoni, *Interim Measures Pending Maritime Delimitation Agreements*, 78 Am. J. Int’l L. 345, 349-53, at SPO Annex 41.

⁴⁹³ See Order on Request for the Indication of Interim Measures of Protection, I.C.J. Reports 1976, paras. 30-31, pp. 10-11.

⁴⁹⁴ Lagoni, *supra* note 492, at 366.

7.44. Guyana's conduct in early 2000 in authorizing exploratory drilling breached its duty under Articles 74(3) and 83(3) "not to jeopardize or hamper the reaching of the final agreement." Transitory acts, such as seismic work, do not create rights and have never been regarded as a prejudicial exercise of state conduct in international maritime boundary cases. The drilling of a well is something entirely different. It is intended to create a fact that is permanent and to establish a right that is permanent. It is therefore to be regarded as prejudicial to the reaching of a settlement. Thus, it is Guyana that engaged in an internationally wrongful act when it breached the 1989/1991 *modus vivendi* and MOU by authorizing drilling in the disputed area, seeking to change the *status quo* in the disputed area and to prejudice the outcome of a final settlement. The 1989/1991 *modus vivendi* and MOU were means chosen by the parties to implement their obligations under international law and they should have been respected.

7.45. If the Tribunal does not uphold Suriname's Preliminary Objections, Guyana's Submission 2 should be dismissed; moreover, the Tribunal should find that it was Guyana that engaged in an unlawful act in this regard by authorizing drilling in a known disputed maritime area.