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## Suriname-Guyana Maritime and Territorial Disputes: A Legal and Historical Analysis

Thomas W. Donovan

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### Cover Page Footnote

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# SURINAME-GUYANA MARITIME AND TERRITORIAL DISPUTES: A LEGAL AND HISTORICAL ANALYSIS

THOMAS W. DONOVAN\*

## Table of Contents

I.	INTRODUCTION .....	42
II.	DESCRIPTION OF DISPUTED AREAS .....	43
	A. <i>Geography and Indigenous Inhabitants         of the New River Triangle</i> .....	44
	B. <i>Economic Activity</i> .....	46
	C. <i>Extent of Resources in Disputed Maritime Zone</i> .....	48
III.	HISTORICAL BACKGROUND .....	48
	A. <i>First European Exploration and         Occupation of Area</i> .....	49
	B. <i>Divergent Surveys of Courantyne: The Schomburgk         Expedition and Barrington Brown Survey</i> .....	53
	C. <i>The Brazilian – Guyana – Suriname         Tri-point Junction</i> .....	56
	D. <i>Sovereignty Over the Courantyne River         and the 1936 Mixed Commission</i> .....	57
	E. <i>Maritime Boundary and 1958-1962 Negotiations</i> ....	59
	F. <i>Independence of Suriname and         Guyana from Colonialism</i> .....	61
	G. <i>Recent Developments and Current State of         Bilateral Diplomatic Activities</i> .....	63
IV.	OPERATIVE LEGAL PRINCIPLES .....	65
	A. <i>The Law of Occupation to Determine Title         to the New River Triangle</i> .....	67
	B. <i>The Principle of Terra Nullius in the         New River Triangle</i> .....	70
	C. <i>The Principle of Uti Possidetis</i> .....	76
	D. <i>Prescription</i> .....	80
	E. <i>Recognition, Acquiescence, and Estoppel</i> .....	82
	F. <i>Relevant Law to Territorial Sea Delineation,         International Rivers, Exclusive Economic         Zone, and Submarine Continental Shelf</i> .....	85

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V.	ANALYSIS OF SURINAME AND GUYANA CLAIMS . . . . .	90
	A. <i>Sovereignty Over the Courantyne River</i> . . . . .	90
	B. <i>Maritime Extension of the Land Boundary</i>	
	<i>Terminus</i> . . . . .	92
	C. <i>Title to the New River Triangle – Summarized</i> . . . . .	94
VI.	CONCLUSION . . . . .	97

## I. INTRODUCTION

The maritime, land, and river boundary disputes between the adjacent South American nations of Suriname and Guyana existed long before the two nations gained independence from colonialism. Both countries claim sovereignty over three regions: the Courantyne River, which separates them; the New River Triangle, which lies at the southern edge of the adjacent countries; and part of the Caribbean Sea, which extends north from their coastlines. The issue was of relatively little importance until both countries discovered important natural resources in the contested regions; gold deposits were found in the New River Triangle area and offshore petroleum opportunities arose on the continental shelf. When both nations began to realize that timely resolution was economically crucial, their renewed efforts to achieve a comprehensive bilateral demarcation seemed promising. However, after years of negotiations, during which time both sides may have sponsored and encouraged unilateral development of the disputed regions, a mutually agreeable settlement has proved far more elusive than originally anticipated.<sup>1</sup>

As both nations continue to resist compromise, it becomes increasingly probable that an international tribunal will have to become involved. Such a tribunal would be called upon to review the histories of these nations and the region itself, from the pre-colonial era to the present, and to evaluate the boundary claims over time and the operative legal principles supporting these claims. What would the tribunal ultimately decide? What legal and historic precedents should the tribunal consider in arriving at its decision? This paper will address these questions and offer predictions about the likely outcomes. It will indicate that Guyana has the stronger claim to the New River Triangle, that Suriname will likely maintain title to the entire Courantyne River, and that Guyana has the stronger claim to the “triangle of overlap” in the offshore economic zone.

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1. For more information on the history of this dispute see generally, [http://www.guyana.org/features/guyanastory/guyana\\_story.html](http://www.guyana.org/features/guyanastory/guyana_story.html).

Guyana's claims to the New River Triangle are supported by fundamental laws of occupation. The twin elements of occupation (*animus occupandi* and *corpus*)<sup>2</sup> are fulfilled, detailing a clear intent and consistent occupation of the area. On the other hand, Suriname's claims to the New River Triangle are based primarily on possible prescription and colonial hinterland claims. In terms of the boundary river dispute, Suriname maintains a strong argument for sovereignty over the entire river based upon inheritance of historic title through *uti possedetis*. This title to the boundary river will affect the land boundary terminus and reward Suriname with a beneficial territorial sea immediately adjacent to the coast. However, this trajectory was not envisioned to apply to the outlying maritime Exclusive Economic Zone or continental shelf. These areas, therefore, would most probably use different precedents for the demarcation. Any international arbitration body following international jurisprudence would most likely award these offshore areas to Guyana given the existence of a *de facto* maritime line created by long-standing Guyanese concessions.

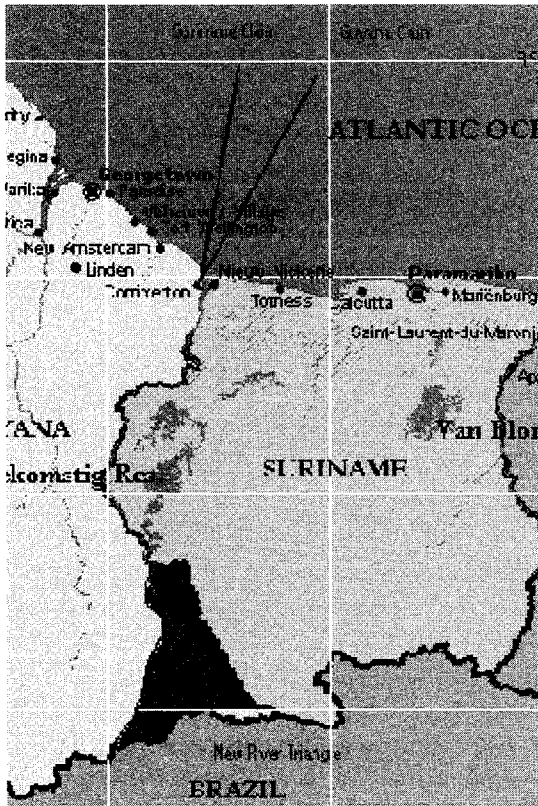
## II. DESCRIPTION OF DISPUTED AREAS

The area of the New River Triangle comprises over 6,000 square miles.<sup>3</sup> It is the northern extension of the Amazon River containing dense forests and snaking waterways. Large tracts of area have not been surveyed, nor has there been any long-term substantial inhabitation. The following section describes the geographical and maritime areas in dispute, estimated extent of natural resources contained, and current inhabitants.

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2. See generally, <http://www.seanhastings.com/havenco/sealand/opinion01.html> (last visited Oct. 23, 2003).

3. GUYANA – SURINAME BOUNDARY, THE GUYANA MINISTRY OF INFORMATION § 4 (1968). Other sources indicate that the New River Triangle is as large as 8,000 square miles. See Government of Suriname Homepage at <http://www.suriname.nu> (last visited Oct. 6, 2003).



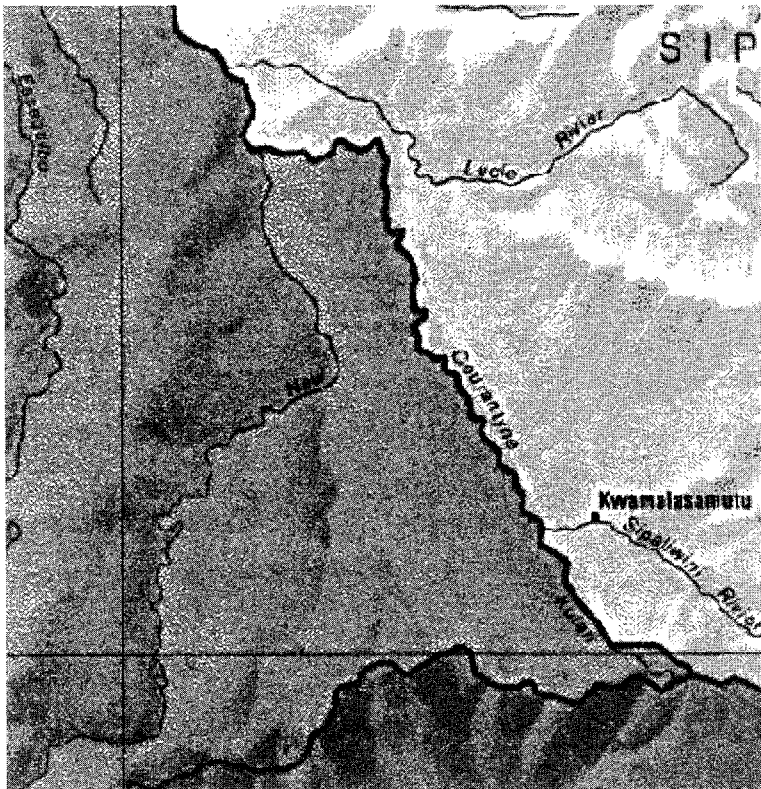
### A. Geography and Indigenous Inhabitants of the New River Triangle

The New River Triangle is located between the Courantyne<sup>4</sup> River to the east and the New River to the west. The southern border extends to a watershed that forms the northern border with Brazil. An agreement in 1799 established that the border between the predecessor states of British Guiana and Dutch Guiana would be the Courantyne River.<sup>5</sup> However, when this agreement was

4. For this paper a consistent spelling of Courantyne River is used. In parenthetical citations other spellings are used such as "Corentyne," "Corentin," "Corentyn," "Korentyn," "Corantine," or "Corentine" Rivers.

5. The 1799 Agreement will be discussed *infra* as it pertains to the relationships between separate colonies before the British and Dutch formalized their present colonies. For this paper, colonial Guyana is referred to as "British Guiana" during its colonial experience and "Guyana" since 1966. The formal name of Guyana is the Cooperative Republic of Guyana. The entire population of Guyana is 861,000. *ATLAS A-Z 229* (Sam Atkinson ed., 2001). Likewise, Suriname is referred to as "Dutch Guiana" during its colonial period. Since its independence in 1975, it has been referred to as the Republic of Suriname. The entire population is 417,000. *Id.* at 327.

ratified, neither the colonial government of British Guiana nor Dutch Guiana knew how far the Courantyne River extended into the northern Amazon. Different expeditions surveying the headwaters of the Courantyne reached incompatible conclusions. It is the differing opinions of these surveys that form the modern boundary dispute over the New River Triangle. Guyana claims the Kutari River,<sup>6</sup> a river breaking from the Courantyne and flowing from a southeast direction, as the true headwater of the Courantyne River, and therefore, the boundary. Suriname claims the New River, a river breaking from the Courantyne and flowing from a southwest direction, as the larger tributary, and therefore, the correct border. The area between these two rivers is called "The New River Triangle."



Today, the Maroon Indians are the only indigenous peoples living in the New River Triangle. Their numbers are no more than 5,000, and of that number, most are seasonal gold and diamond

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6. For this paper a consistent spelling of Kutari is used. In parenthetical citations other spellings are used, such as "Cutari," or "Cutari-Curuni," or "Curuni."

prospectors who move intermittently throughout the unfortified border region.<sup>7</sup> Most Maroons have descended from escaped slaves and Amerindians of Dutch and English colonial rule.<sup>8</sup> Although they have had a tenuous cultural and historical connection to Suriname, they have still asserted a right of self-determination in the past.<sup>9</sup>

### B. Economic Activity

Within the New River Triangle there are significant timber and mineral resources,<sup>10</sup> and both nations have been active in exploiting them. The Government of Guyana awarded a Malaysian corporation a 500,000 hectare logging concession in the New River Triangle.<sup>11</sup> There is also evidence of significant aluminum and bauxite deposits.<sup>12</sup> In 1984, SURALCO, a subsidiary of the Aluminum Company of America (ALCOA), formed a joint venture with the Royal Dutch Shell-owned Billiton Company to explore the interior of Suriname.<sup>13</sup> The survey did not refer to the New River Triangle directly, but did assert that there are commercial amounts of bauxite and aluminum throughout the interior.<sup>14</sup>

There is also the possibility of gold and diamond resources.<sup>15</sup> Both Suriname and Guyana have encouraged individual prospectors to venture into the disputed area to seek gold.<sup>16</sup> Guyana is a significant gold producer from the Omai Gold mine and other open pit mining sites.<sup>17</sup> Suriname's gold mining operations are still

7. Garry D. Peterson & Marieke Heemskerk, *Deforestation and Forest Regeneration Following Small-Scale Gold Mining in the Amazon: The Case of Suriname*, 28(2) ENVTL CONSERVATION 117, 117-126 (2001).

8. *Id.* at 118. Other minor Native American tribes inhabit the area, although they are also described as "Maroon." See Government of Suriname Homepage, *supra* note 1.

9. The largest established human presence in the area of the New River Triangle is the indigenous community of Kwamalasemutu. In 1995, the village of approximately 1,500 persons demanded that mining companies abandon the concessions and their rights to own and control those lands. See Press Release, Forest Peoples Programme, People Of Kwamalasemutu Want Golden Star Resources To Leave Their Land and Ask That Their Land Be Recognized By The Government (Feb. 4, 1997), at <http://nersp.nerdc.ufl.edu/~arm/FPP-Maroon.html> (last visited Oct. 6, 2003).

10. Philip Szczesniak, *The Mineral Industry of Suriname*, 16 U.S. GEOLOGICAL SURVEY MINERALS YEAR BOOK 1 (2000).

11. *Timber Concessions Freeze Feels the Heat: New Timbers Permits Imminent While Mining Moves South* (March 14, 1996) at <http://forests.org/recent/1996/guymelt.htm> (last visited Oct. 6, 2003).

12. Aluminum exports accounted for 70% of Suriname's estimated \$485 million export earnings in 2000. Szczesniak, *supra* note 10.

13. SURALCO is a dependant corporation of ALCOA but with state owned branches. *Id.*

14. *Id.*

15. See Peterson, *supra* note 7, at 117-119.

16. *Id.* at 119.

17. In 1998, Guyana produced 400,000 troy ounces of gold, amounting to 17% of the overall



restricted to small-scale operations. However, over the past few years, exploration efforts have intensified.<sup>18</sup> The Sella Kreek gold district is the country's largest producer with 50,000 troy ounces to date.<sup>19</sup> Suriname Wylap Development Corporation operates the Sella Kreek gold mine which produced 10,000 troy ounces in 2000.<sup>20</sup>

In 1997, the Government of Guyana secured World Bank financing to embark on a protectionist environmental policy in the area.<sup>21</sup> The grant refers to the New River Triangle as a possible site for a wildlife refuge.<sup>22</sup> It is not clear from the grant if the World Bank refers to the exact area in question or understands the ramifications of granting aid to a territory in dispute. In any case, the project is still in the implantation stage. It is expected to take six years and total project costs are estimated at approximately \$9 million.<sup>23</sup>

The large Courantyne, Kutari, and New Rivers have virtually unlimited hydroelectric capacity.<sup>24</sup> There is speculation that the Government of Guyana invited foreign bids to build a large hydroelectric plant on the New River, however, the plan was later abandoned due to the long-distance and topographical obstacles between the New River and the population centers located on the Caribbean Sea.<sup>25</sup>

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Gross Domestic Product (GDP). Diamond production was \$1.5 million in 2000. The Omai gold mine is located north of the New River Triangle but connected to the same geographical formations that created the gold and mineral deposits. See Marcus Colchester et al., *Mining and Amerindians in Guyana, Final Report of the APA/NSI project on Exploring Indigenous Perspective on Consultation and Engagement within the Mining Sector in Latin America and the Caribbean*, at [http://www.nsi-ins.ca/ensi/pdf/guyana/guyana\\_final\\_report.pdf](http://www.nsi-ins.ca/ensi/pdf/guyana/guyana_final_report.pdf) (last visited Oct. 15 2003).

18. See Peterson, *supra* note 7, at 121. The Sella Kreek Gold mine is located north of the New River Triangle claims asserted by Suriname, however, it is located on the same geographic plateau and adjacent to the known gold producing areas in Suriname. See *id.* at 118-19.

19. Heemskerck, Marieke. *Livelihood Decision-Making and Environmental Degradation: Small-Scale Gold Mining in the Suriname Amazon*, 15 *Society and Natural Resources* 327-344 (2002) available at <http://www.drs.wisc.edu/heemskerck/goldmine/> (last visited Oct. 24, 2003).

20. See <http://www.canarc.net/suriname-sarakreek.asp> (last visited Oct. 21, 2003). Production in 2001 was approximately 10,000 ounces of gold from the small, open pit placer mine and gravity recovery systems. A second high grade, open pit lode mine is also ready for development subject to financing. *Id.*

21. The World Bank-funded project is formally called the Guyana National Protected Areas System Global Project, available at <http://wbln0018.worldbank.org/essd/essd.nsf/28354584d9d97c29852567cc00780e2a/4e5833f2b0a3edde852567cc0077f970?OpenDocument> (last visited Oct. 6, 2003).

22. *Id.*

23. See *id.*

24. Szczesniak, *supra* note 10, at 1.

25. Alternative Sources of Energy Homepage, at <http://www.tda.gov/region/latin.html> (last visited Oct. 6, 2003).

### C. *Extent of Resources in Disputed Maritime Zone*

The disputed maritime area between Guyana and Suriname, called the Guyana Basin, is an under-explored area on the continental shelf of South America extending from present day Venezuela to Suriname.<sup>26</sup> The Guyana Basin is geographically next to Trinidad and Venezuela, both important oil producers on the Caribbean plateau and the Venezuelan extension, which are two large and productive oil fields. Throughout this area, large commercial petroleum consortiums such as Exxon, Agip, and Burlington have successfully drilled for petroleum.<sup>27</sup>

Limited exploration in the Guyana Basin has been carried out to date. However in June 2000, the United States Geological Survey's *World Petroleum Assessment 2000* estimated that the resource potential for the Guyana Basin is 15.2 billion barrels of oil. This estimate indicates that the Guyana Basin is the second most important unexplored region in the world in terms of oil potential. If the potential is reached, it would be the twelfth most productive site in the world.<sup>28</sup> CGX Resources, a Toronto based corporation, estimates the risk factor (the probability of striking commercially viable oil) on the Guyana Basin at 35%.<sup>29</sup>

### III. HISTORICAL BACKGROUND

The first inhabitants of the general area were the Carib Indian tribes.<sup>30</sup> The first European explorers were Spanish, although they

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26. CGX Resources Homepage, at [http://www.cgxresources.com/2001\\_page1.html](http://www.cgxresources.com/2001_page1.html) (last visited Oct. 6, 2003).

27. Interview with Dr. Edris K. Dokie, Director, CGX Resources, Inc., New York, NY (May 7, 2003).

28. *Id.* The United States Geological Survey (USGS) projected that the Guyana Basin would have more than thirty "elephants" (deposits containing 100 million barrels of oil), six of which could be "giants" (deposits containing more than 500 million barrels). The Guyana basin is also estimated to contain 42 trillion cubic feet of gas. *Id.* However, certain oil consortiums have not been convinced of the extent of resources. Shell Oil, for instance, ceased specific operations in the disputed area before June 2000 asserting lack of resources and relinquished its licenses. *Id.*

29. *Id.* The "risk factor" of striking commercially viable oil in the Guyana Basin is extremely high as compared to other areas of the world. The deposits also have a 75% seal rating (the ability of the deposit to remain sealed until drained by extrapolation). Due to the extent of petrochemicals on the continental shelf off Guyana and Suriname, this find could yield enormous financial benefits for any corporation or industry involved in its extraction. Near the area in dispute, Suriname has granted a concession to a joint venture between Burlington Resources, Totalfina, and The Korean National Oil Company to drill on the continental shelf. See *Consortium Zoekt Olie in Zee Suriname*, NRC Handelsblad, Aug. 24, 1999. Offshore concessions in Suriname are valid for 40 years. See *Petroleum Law of 1990*, reprinted in HYDROCARBON LEGAL FACTS OF SURINAME (February 2002).

30. The Organization of American States (OAS), *Annual Report of the Inter-American Commission on Human Rights*, available at <http://www.cidh.oas.org/annualrep/89.90eng>

never held a sustainable claim to the area. The Dutch and English came later, and supported long-term colonization procedures.

*A. First European Exploration and Occupation of Area*

In the beginning of the European colonialist experience in the Guianas, modern day Suriname was controlled by British interests and modern day Guyana was controlled by the Netherlands.<sup>31</sup> Dutch mercantile concerns were the first Europeans to settle the area; their primary focus was on trade with indigenous tribes and gold exploration.<sup>32</sup> In subsequent years, after deforestation and dike-building, tobacco and dye cultivation became an important economic justification for maintaining the colonies.

By the early 1600s, Dutch traders had established an important and sustained settlement on the mouth of the Essequibo (in modern-day Guyana).<sup>33</sup> Subsequent waves of Dutch colonization followed in Berbice (also in modern-day Guyana).<sup>34</sup> In 1604, English colonies were established near modern-day Paramaribo.<sup>35</sup> By 1663, the English settlers were granted full recognition and colonial status under the Governorship of Lord Willoughby by royal grant from King Charles II.<sup>36</sup>

/toc.htm (May 17, 1990). Although the Maroon Indians were the first inhabitants, the Government of Suriname has reportedly violated property and human rights of the small tribes that live in the New River Triangle. *Id.*

31. ISLANDS OF THE COMMONWEALTH CARIBBEAN: A REGIONAL STUDY 12-16 (Sandra W. Meditz & Dennis Hanratty eds., 1989).

32. VERE T. DALY, *THE MAKING OF GUYANA* 35-37 (1974). Daly asserts that the first European inhabitants of the Guianas did not venture inland because of health concerns and poor transportation abilities. During this era the coast was cultivated to produce tobacco and sugar which were the most important commodities at the time. *Id.* at 35-37, 46.

33. CORNELIUS CH. GOSLINGA, *THE DUTCH IN THE CARIBBEAN AND ON THE WILD COAST 1580-1680*, 430 (1971). The Courteen and Company was created by the fact that the largest company and colonizing entity in the Netherlands, the Dutch East Indian Company, did not want to do business in Guyana. In the absence of the large corporation, Courteen & Company established itself in the colony of Essequibo. See <http://www.guyana.org/features/guyanastory/chapter9.html> (last visited Oct. 21, 2003).

34. Berbice was settled in 1627 by a wealthy and well-known Dutch businessman, Abraham van Peere, acting on behalf of Courteen & Company. See *Conditions for Colonies, adopted by the West India Company on November 28, 1628, reprinted in U.S. COMMISSION ON BOUNDARY BETWEEN VENEZUELA AND BRITISH GUIANA VOL. II, EXTRACTS FROM NATIONAL ARCHIVES* at 57 (1897). In the original Dutch version, Guyana is referred to as the "Wild Coast." See MICHAEL SWAN, *BRITISH GUIANA THE LAND OF SIX PEOPLES* 3 (1957). The Dutch described the "Wild Coast" as "stretching...from the Amazon to the Wild or Caribbean Islands." GOSLINGA, *supra* note 33, at 431.

35. The land rush in the Guyanas coincided with the establishment of European colonies across North and South America, and in particular, the Caribbean. The main rival during this era was Spain, which later abandoned its position in the Guyanas. See DALY, *supra* note 32, at 14-20.

36. See [http://www.guyanaca.com/suriname/guyana\\_suriname\\_colonial.html](http://www.guyanaca.com/suriname/guyana_suriname_colonial.html) (last visited Oct. 21, 2003).

Disputes between the early English and Dutch settlers eventually grew into overt hostilities. An invasion by the English was eventually repelled and the Dutch regained control of the area in modern-day Guyana. This was formally acknowledged in the 1667 Treaty of Breda<sup>37</sup> in which the English ceded colonies in Guyana in exchange for Dutch relinquishment of New York.<sup>38</sup> In 1674, the English settlements in Suriname were conquered by Dutch forces operating out of Guyana. Following the annex of territories, the early leaders of Dutch and English settlements decided that their plantation land should be separated.<sup>39</sup> The relatively minor river called Devil's Creek (*Duivels Kreek*) was decided as the suitable boundary between the two adjacent colonies.<sup>40</sup> Devil's Creek lies roughly eighty miles west of the current border of the Courantyne River. The following map shows Devil's Creek (*Duivels Kreek*) as lying west of the Courantyne River. Devil's Creek is now located in present day Guyana, under the administrative region of Berbice.<sup>41</sup>

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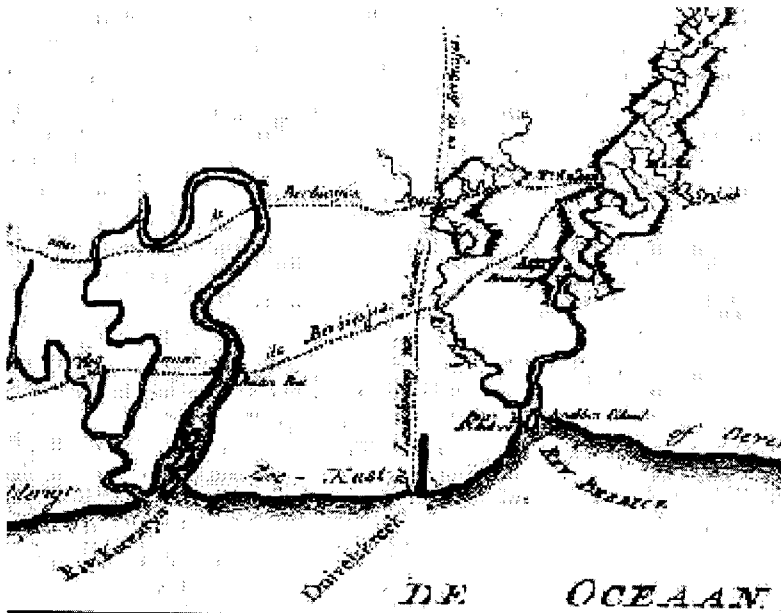
37. The 1667 Treaty of Breda (also called Peace of Breda) ended the Second Anglo-Dutch war. "By this treaty the Dutch republic's possession of islands in the West Indies and of Suriname was confirmed, while the Dutch gave up their possessions in what is now New York and New Jersey." Benjamin Hunnigher, *Breda*, in 4 *ENCYCLOPEDIA AMERICANA* 494 (1998).

38. ROBERT H. MANLEY, *GUYANA EMERGENT* 3 (1979).

39. During the colonial period Governors Van Peere of Berbice and Van Somelsdyk of Suriname agreed that their plantations should be separated by a River. The Devil's Creek River was chosen because it already was being used as a de facto boundary line between plantations. See HENRY BOLINGBROKE, *A VOYAGE TO THE DEMERARY, CONTAINING A STATISTICAL ACCOUNT OF THE SETTLEMENT THERE, AND OF THOSE ON THE ESSEQUIBO, THE BERBICE, AND OTHER CONTIGUOUS RIVERS OF GUYANA* 109-112 (1809).

40. *Id.* at 108-110.

41. See *ATLAS A-Z*, *supra* note 5, at 229.



Devil's Creek lasted for nearly one hundred years as the boundary between the colonies of Suriname and Berbice. In 1794, the Governor of Berbice challenged the legality of the Devil's Creek boundary line stating, "in keeping with the grant of Charles II to Lord Willoughby the western limit of Suriname could not be regarded as extending further than one English mile [past the Courantyne River]."<sup>42</sup>

In the Second Anglo-Dutch War, the Dutch colonies of Berbice and Suriname both returned to the control of Great Britain.<sup>43</sup> In 1799, the two Governors moved the Devil's Creek border east and concluded that Berbice (modern-day Guyana) should control all territory up to the west-bank of the Courantyne River.<sup>44</sup> This accord ("1799 Agreement") is the basis of the modern Surinamese claim that the boundary between Guyana and Suriname lies on the western bank of the Courantyne River, not in the middle of the river

42. See GUYANA-SURINAME BOUNDARY, *supra* note 3, at § 6. Governor Van Battenburg referred to the Devil's Creek boundary as "an illegal act from which it is not to be inferred that the true boundary limit between Berbice and Suriname could be at that place (i.e., at Devil's Creek)." *Id.*

43. See BOLINGBROKE, *supra* note 39, at 121-129. Berbice was taken in 1796 and Suriname in 1799 by British troops and conscripted farmers. *Id.*

44. *Id.* The area between Devil's Creek and the Courantyne River was put to immediate cultivation after the 1799 Agreement, although no navigation was commenced on the Courantyne River which was attributed to the colony of Dutch Guiana. Although under British control, the new British sovereign allowed Governors Van Battenburg and Van Peere to remain in control of the colonies for administrative reasons. See GUYANA – SURINAME BOUNDARY, *supra* note 3, at § 6.

which is customary in international law. It is also the basis of Suriname's argument that the islands located in the Courantyne River are under full Surinamese sovereignty.<sup>45</sup> The terms of the 1799 Agreement provide that "the west sea coast of the River Corentyne, up to the Devil's Creek, besides the west bank of the said River, hitherto considered belonging to the government of the colony of Surinam be declared and acknowledged henceforth to belong to the Government of the Colony of Berbice."<sup>46</sup>

Guyana has since claimed that, although the 1799 Agreement was bilaterally ratified, the proclamation did not constitute a formal boundary agreement.<sup>47</sup> Guyana asserts that the 1799 Agreement was intended to be only an interim agreement, lasting only until a final demarcation could be established. There is evidence to substantiate this claim; the foremost of which is the 1799 Agreement itself. As it states, "some arrangements by which all the Ends wished for might be obtained without precluding the final Regulations which, on determining the future fate of the Colonies, their Sovereign or Sovereigns in time being, might judge proper to establish with respect to the Boundary."<sup>48</sup> Suriname asserts that the 1799 Agreement was subsequently incorporated in later international treaties and relied on by both parties over time.<sup>49</sup>

In 1802, the Treaty of Amiens stipulated that both the principalities of Suriname and Berbice (then under British control) would be returned to the Netherlands.<sup>50</sup> However, the peace did not last and Berbice in 1803, and Suriname in 1804, were recaptured by the British. The Articles of Capitulation, ratified

45. The Suriname main claims of 1936, 1958-1962, and 2002 will be discussed *infra*. All are common in that they rely upon the 1799 Agreement as a basis for the establishment of sovereignty over the Courantyne River and the islands therein. ALAN J. DAY, *BORDER AND TERRITORIAL DISPUTES* 378 (1982). There are three major islands located in the Courantyne River which are firmly under the control of Suriname. These islands are not disputed in the current Courantyne River dispute.

46. 1 *LAWS OF BRITISH GUIANA* 5-6 (1870), reprinted in Duke E. Pollard, *The Guyana/Surinam Boundary Dispute in International Law*, *CARIBBEAN Y.B. OF INT'L REL.* 217, 219 (Leslie F. Manigat ed., 1976).

47. See DAY, *supra* note 45, at 378.

48. GUYANA - SURINAME BOUNDARY, *supra* note 3, at § 8.

49. The fact that an international peace treaty referenced and relied upon the 1799 Agreement, would add more strength to its credibility and perception with the European Colonial time. The 1815 Agreement references the border agreement and was submitted by Suriname as evidence of sovereignty over the Courantyne in the 1899 negotiations between Venezuela and British Guiana, and in the Draft Treaty of the 1936 Mixed Commission (both to be discussed *infra*). Peggy A. Hoyle, *The Guyana-Surinam Maritime Boundary Dispute and its Regional Context*, *IBRU BULLETIN* 99, 107 (2001).

50. *Treaty of Amiens*, RESEARCH SUBJECTS: GOVERNMENT AND POLITICS, available at [http://www.napoleon-series.org/research/government/diplomatic/c\\_amiens.html#III](http://www.napoleon-series.org/research/government/diplomatic/c_amiens.html#III) (last visited Oct. 6, 2003). Articles 3 and 18 of the Treaty of Amiens deal with the return of colonies between the Batavian Republic (the Netherlands) and Great Britain. *Id.*

between Britain and the Netherlands in September 1803, acknowledged and reaffirmed the 1799 Agreement as the boundary line. Article II of the Articles of Capitulation stated that “[t]he Grants of Lands on the West Coast and West Bank of the River Corentin made by Governor Frederici of Surinam which territory was formerly held to make part of and belonging to that Colony, but since December, 1799, has been placed and considered as belonging to the Government of Berbice, shall . . . be respected as conclusive.”<sup>51</sup>

“As part of the peace settlement of 1814, Britain and Holland signed an agreement known as the London Convention by which Britain undertook to pay \$14,000,000 in return for...Berbice” (captured by the Dutch in 1803).<sup>52</sup> The 1815 Peace of Paris returned the Suriname colony to the Netherlands.<sup>53</sup> This colony would remain under Dutch control until its independence in 1975. Likewise, Guyana incorporated Berbice under the later colonial trusteeship of British Guiana and controlled it until Guyana’s independence in 1966. Since 1799, Dutch Guiana, and later the Republic of Suriname, has consistently maintained control over the entire Courantyne River.<sup>54</sup>

### *B. Divergent Surveys of Courantyne: The Schomburgk Expedition and Barrington Brown Survey*

In 1840 the British Government commissioned Sir Robert Schomburgk to survey the interior boundaries of the newly formed colony of British Guiana.<sup>55</sup> Schomburgk explored the Courantyne River and claimed the Kutari River to be the principal source of the Courantyne.<sup>56</sup> Schomburgk mapped the boundary between British Guiana and Suriname designating the Kutari as the Southwest extension of the Courantyne, and therefore, forming the boundary.<sup>57</sup>

51. GUYANA-SURINAME BOUNDARY, *supra* note 3, at § 9.

52. DALY, *supra* note 32, at 130.

53. The boundary between Berbice and Suriname was not dealt with in the 1815 Agreement. See GUYANA – SURINAME BOUNDARY, *supra* note 3, at § 10.

54. Controlling an entire boundary river is somewhat contrary from international practice. Normally, when two nations are adjacent but divided by a river, the equidistant median line is used as the actual boundary demarcation. CLIVE H. SCHOFIELD, *WORLD BOUNDARIES*, 76 (Vol. 1, 1994).

55. See RICHARD SCHOMBURGK, *TRAVELS IN BRITISH GUIANA DURING THE YEARS 1840-1844*. The Governor of British Guiana suggested to the Governor of Dutch Guiana that he should send a commissioner to cooperate in the exploration of the river which was regarded as the boundary between the two colonies. However, the Government of Suriname declined to participate in the survey on the grounds that the Governor "having no instructions to that effect, was unable to appoint a commissioner and that as he was not aware of any difference of opinion as to the boundary and did not anticipate any, he saw no occasion for sending a representative." *Id.* See also Pollard, *supra* note 46, at 220.

56. See SCHOMBURGK, *supra* note 55, at map 10 (*From Watuticaba to the Corentyn*).

57. *Id.* Subsequent maps drawn by both Dutch and English cartographers reiterated

Thirty years later, in 1871, a British geologist named Barrington Brown conducted a geological survey of the interior. It was his opinion that another tributary was the larger extension of the Courantyne and therefore should be the border. The New River, as Brown labeled it, merges with the Courantyne from a southeast direction. Brown "regarded [the New River] as being only a branch," and viewed the border between Dutch and British Guyana as following the New River.<sup>58</sup> Brown did not map the New River as forming the boundary, however, and labeled the Kutari, the original river suggested by Schomburgk, as the border between Suriname and British Guiana.<sup>59</sup> Both the British and the Dutch continued to publish maps on this basis until 1899 when a land surveyor in Suriname drew a map which, for the first time, depicted the New River as the continuation of the Courantyne. The difference between these surveys and the maps that represented their findings originally created the debate over the New River Triangle.

1. *1899 Paris Arbitration Tribunal Regarding Boundary Demarcation Between the Colony of British Guiana and Venezuela*

The 1899 Arbitral Award established the borders between Eastern Venezuela and Western British Guiana.<sup>60</sup> The Commission referred to British Guiana's boundary with Suriname as continuing, "to the source of the Corentyne called the Kutari River."<sup>61</sup> The 1899 Arbitration was the first time the Netherlands Government formally objected to the use of the Kutari River as the extension of the Courantyne. The Netherlands insisted that, based on Barrington Brown's 1871 survey, the New River, not the Kutari, should be

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Schomburgk's findings. For example, in 1892 in Dornseiffen's *Atlas*, published at Amsterdam, Schomburgk's depiction was followed. This delineation remained unchanged until after the turn of the twentieth century. See generally, DAY, *supra* note 45, at 379.

58. GUYANA - SURINAME BOUNDARY, *supra* note 3, at § 13.

59. *Id.*

60. *Id.* See also COMMISSION ON BOUNDARY BETWEEN VENEZUELA AND BRITISH GUIANA: REPORT AND ACCOMPANYING PAPERS VOL. III (1897). The British claimed westward to "the Schomburgk line," while the Venezuelan interest claimed as far East as the Moruca River. The final decision of the 1899 arbitration directly splits these two claimed boundary lines. However, the Venezuela - Guyana boundary has not been permanently settled, as Venezuela still claims eastward until the Essequibo River. If this claim would be acquiesced, the total land mass of Guyana would be cut into approximately half. More notably, Guyana and Venezuela also have a maritime dispute in the Caribbean Sea which is affected by bilateral agreements on both sides with neighboring Trinidad and Tobago over the continental shelf. These claims are not dealt with in this paper, but for a general discussion see DAY, *supra* note 45, at 381.

61. See COMMISSION ON BOUNDARY BETWEEN VENEZUELA AND BRITISH GUIANA, *supra* note 60. See also GERALD G. EGGERT, RICHARD OLNEY: EVOLUTION OF A STATESMAN 201 (1974).



considered as the boundary between the two colonies.<sup>62</sup> Lord Salisbury, the British Secretary of State, reacted to the Dutch assertion in 1900 stating that it was “now too late to reopen this particular issue as the Kutari had long been accepted on both sides as the boundary.”<sup>63</sup> Lord Salisbury further reacted to the Dutch protest against the 1899 Arbitration Tribunal to the Venezuela British Guiana boundary, stating that, “a definite and easily ascertainable boundary which had been accepted in good faith [by both parties] for over fifty-six years and in no way challenged during that time, should not be upset by geographical discoveries made long after the original adoption of the boundary....”<sup>64</sup>

## 2. *Contradictory Dutch Statements Regarding the Courantyne River*

Ten Years after the 1899 Venezuela–British Guiana Arbitration, surveys of the Courantyne River continued. In 1909, Lieutenant Kayser<sup>65</sup> of the Dutch Navy surveyed the area showing inconclusive results.<sup>66</sup> The differences between the Brown, Kayser, and Schomburgk expeditions did not resolve but contributed to ongoing debates. Dr. Yzerman, one of the leading Dutch authorities on the Guyanas, discussed the issue before the Dutch Royal Geographical Society in the late 1920s.<sup>67</sup> He asserted that the Kutari Basin was considerably more extensive than that of the New River, a fact that diminished Dutch claims that the New River was the principal source of the Courantyne.<sup>68</sup> Other officials also seemed to argue against the Dutch claim that the New River formed the upper reaches of the Courantyne, and consequently, the border

62. GUYANA – SURINAME BOUNDARY, *supra* note 3, at § 14.

63. *Id.*

64. Pollard, *supra* note 46, at 222. Lindley added in 1900 that it was “now too late to reopen this particular issue as the Kutari had long been accepted on both sides as the boundary.” *Id.*

65. GUYANA – SURINAME BOUNDARY, *supra* note 3, at § 15.

66. *Id.* at § 16. Lt. Kayser discovered another large tributary of the Courantyne River which converged with the Courantyne roughly twenty miles below the New River, and this he called the Lucie River. The Lucie River runs in an eastward direction. Both the colonial government of Dutch Guiana and Suriname asserted that the Lucie is not a true tributary of the Courantyne and is instead “drainage.” If this was to be seen as the true Courantyne tributary, then the territory of Suriname would be cut in approximately half. See <http://www.guyana.org/features/guyanastory/chapter88.html> (last visited on Oct. 21, 2003). There were other minor surveys of the area including the Farabee-Ogilvie party which further explored the upper Courantyne estuaries. Contrary to Barrington Brown’s survey, however, the Farabee-Ogilvie expedition believed the Kutari to be a larger tributary than the New River. See *id.*

67. See Pollard, *supra* note 46, at 222.

68. *Id.* See also DAY, *supra* note 45, at 379.

between the two colonies.<sup>69</sup> On April 28, 1925, the Netherlands Minister of the Colonies declared to the Dutch Parliament, "[w]hat Dr. Yzerman set forth before the Royal (Dutch) Geographical Society ...I doubt somewhat whether the pronouncement that the New River, and not the Curuni really forms the upper reaches of the Corentyne River."<sup>70</sup>

On June 23, 1925, the Netherlands Minister for Foreign Affairs further argued before the Dutch Parliament that, "the territory on the other side of these rivers" [i.e., the Curuni-Kutari] is not within the authority of the Netherlands.<sup>71</sup> However, other Dutch statements seem to assert that the Government viewed the New River as the correct extension of the Courantyne. In 1925, a Dutch Minister stated, "[t]he desire may be cherished that at a future date it may transpire that the New River will be regarded on both sides as the right boundary, but to base political claims to it, on the existing data, seems to me to be precluded for the present."<sup>72</sup> The debates coincided with Brazilian efforts to formalize its Northern border with French, Dutch, and British Guianas in the 1920s.

### C. *The Brazilian – Guyana – Suriname Tri-point Junction*

In 1926, the British Foreign Office and Government of Brazil ratified a treaty providing for the demarcation of the Southern Boundary of British Guiana bordering Brazil.<sup>73</sup> The treaty concluded that, "[t]he British Guiana/Brazil frontier shall lie along the watershed between the Amazon basin and the basins of the Essequibo and Corentyne Rivers as far as the point of junction or convergence of the frontier of the two countries with Dutch Guiana."<sup>74</sup> Because Brazil had ratified its northern border demarcation with Dutch Guiana twenty years earlier, it now became necessary to establish and clarify the tri-point junction between the three countries. The Netherlands made its recommendations in the *Note Verbale* of February 27, 1933, stating that the point should be

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69. In a later statement to the Parliament on June 23, 1925, the Dutch Minister added, "[t]he river with the largest basin that is the main affluent; and, as Dr. Yzerman has shown...this would...not be the New River but the Curuni." GUYANA – SURINAME BOUNDARY, *supra* note 3, at § 16. See also Pollard, *supra* note 46, at 225.

70. GUYANA – SURINAME BOUNDARY, *supra* note 3, at § 16. See also Pollard, *supra* note 46, at 224.

71. Pollard, *supra* note 46, at 225.

72. *Id.*

73. See DAY, *supra* note 45, at 379.

74. *Id.* (quoting Treaty and Convention between His Majesty and the President of the Brazilian Republic for the Settlement of the Boundary between Guiana and Brazil, April 22, 1926, Britain-Braz.).

located at the "Trombetas-Cutari [Kutari] from its extremity on the Cutari...till its point of contact with the Brazilian frontier."<sup>75</sup> The Dutch representative, Admiral Kayser, signed the map that described the tri-junction point as the upper branch of the Courantyne River, placing it at the Kutari. In 1936, all parties agreed that this point would constitute the border between the three countries.

*D. Sovereignty Over the Courantyne River and the 1936 Mixed Commission*

In the period between 1920 and World War II, Dutch Guiana and British Guiana moved closer to achieving an agreeable boundary demarcation. The Petrochemical Age ushered in a new urgency to define exact borders and coincided with a trend in Dutch colonial governance to establish firm boundaries in the international arena.<sup>76</sup> During this period, the Dutch Government was amenable to concluding a final treaty ceding the Kutari as the upper reaches of the Courantyne in exchange for complete sovereignty over the Courantyne River.<sup>77</sup>

Accordingly, on August 4, 1930, the Netherlands Government informed the British Foreign Office that they were willing to ratify a treaty which proposed that, "[t]he frontier between Surinam and British Guiana is formed by the left bank of the Corentyne and the Cutari up to its source, which rivers are Netherland territory."<sup>78</sup>

In the reply to the Dutch proposal on February 6, 1932, the British Government stated, "His Majesty's Government are gratified to learn that the Netherlands Government are prepared to recognise the left banks of the Courantyne and Kutari Rivers as forming the boundary, provided that His Majesty's Government recognize the rivers themselves as belonging to the Netherlands Government."<sup>79</sup>

The foundation of the argument asserting Dutch control of the entire Courantyne River is the original 1799 agreement. This

75. GUYANA – SURINAME BOUNDARY, *supra* note 3, at § 19. For discussions of the boundary commission at work, *See generally* EVELYN WAUGH, NINETY-TWO DAYS: THE ACCOUNT OF A TROPICAL JOURNEY THROUGH BRITISH GUIANA AND PART OF BRAZIL (1936).

76. *See* Hoyle, *supra* note 49, at 100. The Netherlands and the United States arbitrated the *Isle of Las Palmas* case before the Permanent Court of International Justice dealing with a sparsely inhabited island in the Pacific during this time. *Id.*

77. Secondary British sources refer to the Courantyne as the complete sovereign possession of Dutch Guiana. As Michael Swan stated in 1956, "[b]y some strange boundary agreement, the Courantyne is Dutch territory up to the high water mark on the British side and the Dutch are insistent on their rights...not to let the British fish." This "strange agreement" was, of course, the 1799 Agreement. SWAN, *supra* note 34, at 116.

78. GUYANA – SURINAME BOUNDARY, *supra* note 3, at § 21.

79. *Id.* at § 22.

agreement for the separation of Berbice and Suriname colonies, "specifically provided not only that the territory west of the Corentyne River be regarded as British territory but also that the islands in the river should be regarded as belonging to Suriname."<sup>80</sup> This firm Dutch claim to the whole width of the Courantyne is contrasted to the delimitation based upon the deep point of the river ("*thalweg*"),<sup>o</sup> which normally forms the boundary in international rivers.<sup>81</sup> Customary international law states that generally, if a river is navigable, the boundary will be in the middle of the navigable channel.<sup>82</sup> However, the 1930 Dutch overtures to control the entire river were approved and in 1936 culminated in a comprehensive draft treaty (1936 Mixed Commission), agreeing in principal on final borders. The Mixed Commission defined the extent of the New River Triangle and erected boundary pillars on the mouth of the Courantyne River to determine the maritime extension of the land boundary terminus. It is the consensus of commentators that the 1936 Mixed Commission stipulated that, for the abandonment of Dutch claims in the New River Triangle, Dutch Guiana would be granted sovereignty of the entire Courantyne River. This Treaty was not signed because of the Second World War, although the agreement had, in principle, been reached. Its precedence would be reflected in ensuing discussions as well as modern boundary discussions.<sup>83</sup>

The 1936 Mixed Commission, based on the 1799 agreement, assumes the full width of the Courantyne River to be Dutch Guiana territory. Therefore, the two sides agreed to a point on the west bank of the Courantyne River (the so called Kayzer-Phipps point, or Point No. 61) which would be the land boundary terminus for the maritime extension. Commentators agree that the 1936 Mixed Commission asserted a 10<sup>o</sup> prolongation of the territorial sea from Point No. 61.<sup>84</sup> The modern notions of Exclusive Economic Zone and

80. *Id.* at § 23.

81. See, e.g., STEPHEN B. JONES, BOUNDARY MAKING: A HANDBOOK FOR STATESMEN, TREATY EDITORS AND BOUNDARY COMMISSIONERS 116-17 (1945); S.W. BOGGS, INTERNATIONAL BOUNDARIES (1940). The term for midpoint of the river, or deepest part of the river is *thalweg*, which is used consistently through the different treaty negotiations. *Id.* at 117.

82. R. Lauterpacht, *River Boundaries: Legal Aspects of the Shatt-Al-Arab-Frontier*, 9 INT'L & COMP. L. Q. 208, 216 (1960). The deepest point of the river principle has been applied in: *Arkansas v. Tennessee*, 246 U.S. 158 (1918); *New Jersey v. Delaware*, 291 U.S. 361 (1934); *Louisiana v. Mississippi*, 282 U.S. 458 (1940). The *thalweg* principle has also been applied to dry river beds, known as *wadis*. See MENDELSON AND HUTTON, IRAQ-KUWAIT BOUNDARY 160 (1995).

83. Letter by Ambassador Ismael on the New River Triangle available at [http://www.guyana.org/guysur/new\\_river.html](http://www.guyana.org/guysur/new_river.html).

84. A 28<sup>o</sup> prolongation from Point No. 61 was originally asserted, but a 10<sup>o</sup> trajectory was finally settled upon. This trajectory was intended to only cover a three mile territorial sea. See Hoyle, *supra* note 49, at 103. See also GUYANA - SURINAME BOUNDARY, *supra* note 3, § 18.

continental shelf were not envisioned in the original 1936 negotiation process but were discussed in the ensuing 1958-1962 discussions.<sup>85</sup>

### *E. Maritime Boundary and 1958-1962 Negotiations*

Boundary negotiations between Suriname and Guyana were re-commenced in the late 1950s, coinciding with the first draft of the United Nations Law of the Sea. During the recess, the territorial seas of a particular country were expanded from the three-mile sea, as probably envisioned by the 1936 Mixed Commission, to twelve miles as codified by the Law of the Sea. Distinctions were also drawn between territorial seas (a twelve-mile extension of state sovereignty) and the Exclusive Economic Zone (an area where a state could have the exclusive ability to extract resources, but other nations could transport or ship).

In making these distinctions, there was much international debate as to whether offshore exclusive economic zones and continental shelves should be based on *equidistance* (the geographic median of two adjacent land masses projected outward) or on *equity* (taking into consideration agreements or common usage of the ocean).<sup>86</sup> Thus in 1954, Britain claimed the continental shelf for British Guiana, and in 1958 granted a concession to the California Oil Company (later Exxon) which operated partly in the far eastern area of overlap.<sup>87</sup> This grant and claim, if it is to be reaffirmed in

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Two names are used to describe the boundary pillars established by the 1936 Mixed Commission. The Kayzer-Phipps Point (named after the Dutch Boundary Commissioner, Lt. Kayser, and the English Boundary Commissioner, Phipps) and Point No. 61. Throughout this paper Point No. 61 is used to describe the boundary pillars. The exact location of the boundary pillars is 5°59', 53.8"N, 57°08' 51.5"W. See Hoyle, *supra* note 49, at 100. The 1936 Commission refers to the 10° extension as one country being responsible for the buoys marking the navigable river channel. *Id.*

85. See Hoyle, *supra* note 49, at 103.

86. David A. Colson, *The Delimitation of The Outer Continental Shelf Between Neighboring States*. 97 A.J.I.L. (2003). In international law, it is customary to take treaties into account when determining the extent of a Continental Shelf. See D.W. GREIG, *INTERNATIONAL LAW*, at 184-188 (2d ed. 1976).

87. Alteration of Boundaries. Order in Council of 1954. Statutory Instruments, 1954, No. 1372, Colonies, Protectorates, and Trust Territories, see U.N. Doc. ST/LEG/SER.B/6 at 48 (1954), cited in KARIN HJERTONSSON, *THE NEW LAW OF THE SEA* 65 (1973). The 1954 British claim to the Continental Shelf was intended to be used against Venezuela, but can be applied to the Suriname - Guyana instance. During the 1950s, the British Government divided the continental shelf between British Guiana and Venezuela in a treaty dated Feb. 26, 1942. JURAJ ANDRASSY, *INTERNATIONAL LAW AND THE RESOURCES OF THE SEA* 49 (1970). It was customary in this era to claim continental shelf areas, even if there was no international statute allowing countries to claim these areas. The United States claimed its Continental Shelf in the Caribbean in 1945 under President Truman. The Truman Proclamation (White House Press Release of Sept. 28, 1945, 13 Dep't St. Bull. 484-486 (July-Dec. 1945)), cited in Andrassy at 49-50. The Truman Proclamation "expressed that the submarine and subsoil was

modern boundary discussions, would extend the Guyanese Exclusive Economic Zone past the 10°-agreed line in the 1936 Mixed Commission. The reason for this apparent incongruity is that nothing more than a three-mile territorial sea was envisaged by the 1936 Mixed Commission during its debates. Suriname did not object to these concessions, although it was probably aware of their existence. Later drilling operations re-affirm this position. Shell drilled at one site in 1974 on its concession in the area now disputed by Suriname. Shell relinquished its concession, but Guyana reissued concessions in the same area to other parties. These concessions still exist and operate today.<sup>88</sup>

The final opportunity for the colonial powers to demarcate the maritime boundary before independence came in 1961-1962. In this round of negotiations, British Guiana asserted the following: "1) Dutch sovereignty over the Corentyne River; 2) a 10°E line dividing the territorial sea; and 3) British control over the New River Triangle...."<sup>89</sup> In June 1962, the Dutch rejected this British proposal and responded with new claims to the New River Triangle<sup>90</sup> and to locating the boundary in the Courantyne in the deep water mark *thalweg* rather than on the left bank, as in the first draft.<sup>91</sup> This Dutch response was contrary to the earlier positions and has not been reiterated by the Suriname government since independence. This 1962 Dutch response is the basis of Guyana claims that the Courantyne River was unsettled at independence. This response can be understood by the "Land Boundary Component," whereby neither Dutch Guiana nor British Guiana has ever indicated a willingness to concede their claimed maritime sea if they were to forego the New River Triangle.<sup>92</sup>

During the 1961-1962 negotiations, the British Colonial Government did not continue to grant concessions. The original concession on the Continental Shelf to the California Oil Company lapsed in 1960. After this lapse, the British Government took constructive steps to ratify the borders before the ensuing independence of Guyana; yet in 1965, when final demarcation did

the exclusive jurisdiction of the United States." Andrassy at 50. The ability to claim a continental shelf was not codified until 1958 with the Geneva Convention on the continental shelf, but many nations believed it was customary to do so. ZDENEK J. SLOUKA, *INTERNATIONAL CUSTOM AND THE CONTINENTAL SHELF* 89 (1968).

88. CGX Resources Homepage, *supra* note 26.

89. Hoyle, *supra* note 49, at 104.

90. *Id.*

91. The British were prepared to concede the 10-degree line (to a distance of six miles) so far as the territorial sea was concerned because it was not considered to represent the median line. *Id.*

92. *Id.*

not materialize, Britain granted a concession to Shell Oil in the same area extending the 33<sup>rd</sup> boundary into the outlying exclusive economic zone. There is no record of Dutch Guiana objecting to the 1965 concession to Shell Oil.

#### *F. Independence of Suriname and Guyana from Colonialism*

As the date for Guyana's independence from Great Britain grew near, the Dutch Government abandoned its position on the possibility of exchanging the New River Triangle for maritime claims (embodied in the 1936 and 1958-1962 claims).<sup>93</sup> Instead, the Dutch Government asserted a claim for the entire New River Triangle and for the original claim of the 10<sup>th</sup> north maritime boundary.<sup>94</sup> A Suriname representative stated in April 1966 that "in view of the forthcoming independence of British Guiana the Suriname Government wishes the British to make it clear when sovereignty was transferred that the frontier is disputed."<sup>95</sup>

When Guyana became independent on May 26, 1966,<sup>96</sup> the new nation asserted its claim to the New River Triangle. Meanwhile, Dutch Guiana commenced various activities to demonstrate its actual control over the region. In December of 1967, Guyana expelled Surinamese surveyors thought to be conducting preliminary sightings for a hydroelectric dam.<sup>97</sup> In mid-August 1969, the Guyana Defense Force patrol expelled a group

93. DAY, *supra* note 45, at 380.

94. *Id.* at 380-381. During this time, British negotiators, conscious of the doctrine of state succession, re-submitted a draft treaty to the Netherlands. In 1965, the British Government, after consultation with the British Guiana Government, proposed a new draft restating the 1961 British draft and suggesting a maritime delineation following the median line from the left bank along the line where the two markers intersect the low waterline and following the equidistance principle. This proposal elicited no response from the Dutch. *Id.*

95. See MANLEY, *supra* note 38, at 43. Dr. Walston, a boundary negotiator for the British, asserted that "on the New River Triangle Her Majesty's Government maintain very firmly their sovereignty over the territory of British Guiana as defined by its present frontier." One month later Guyana became independent having as its boundaries the boundaries of British Guiana and as its sovereignty that which Britain had exercised undisturbed for over a century. GUYANA – SURINAME BOUNDARY, *supra* note 3, § 17.

96. Guyana gained independence on Sept. 20, 1966 and joined the United Nations the same year. Guyana at a Glance, available at <http://www.un.org/cgi-bin/pubs/infonatn/dquery.pl?lang=e&guy=on> (last visited Oct. 6, 2003). Guyana is also a member of CARICOM, The Law of the Sea, the World Trade Organization (WTO), and the World Bank Group. All international agencies have methods of international dispute resolution. At independence, Guyana laid claim again to the New River Triangle in Article I of the new constitution, "The territory of the State comprises the areas that immediately before the commencement of this Constitution were comprised in the area of Guyana together with such other areas as may be declared by Act of Parliament to form part of the territory of the State." GUY. CONST. chap. 1, art. 2, reprinted in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert Blaustein & Gisbert Flanz eds., vol. 8, 2003). See also Pollard, *supra* note 46, at 217.

97. DAY, *supra* note 45, at 380.

attempting to finish a Surinamese airstrip west of the Courantyne River.<sup>98</sup> On August 19, 1969, skirmishes were reported west of the Courantyne River between the Guyana Defense Forces and Surinamese individuals. On August 21, 1969, Prime Minister Burnham informed the Guyana National Assembly that the Guyana Defense Forces would stay in the New River Triangle.<sup>99</sup> He stated that "there can be no doubt that the New River Triangle is part of the territory of Guyana and has been in our possession from time immemorial. This Government is pledged to maintain traditional friendly relations with Suriname, and at the same time, our country's territorial integrity."<sup>100</sup>

This statement was later rescinded in a 1971 Joint Statement in Trinidad, which asserted that both Suriname and Guyana would withdraw military forces from the New River Triangle. This has not occurred, and Guyanese forces remain in the area. On November 4, 1975, Suriname gained independence from the Netherlands and reiterated its claim for the New River Triangle.<sup>101</sup> Incidents continued to occur between the two countries. For example, in 1977 the Guyanese authorities confiscated four fishing trawlers, one of which was owned by the Surinamese Government, alleging that they were trespassing in the 200-mile exclusive economic zone.<sup>102</sup> Even though the presidents of both Suriname and Guyana held urgent bilateral talks, no demarcation of the maritime or territorial areas took place.<sup>103</sup>

In terms of determining the outlying Exclusive Economic Zone and the Continental Shelf, the newly founded Republic of Guyana retreated to the original policy of equidistance demarcation of the territorial sea rather than equity. In doing so, the Republic of Guyana wished to nullify the original 1799 Agreement by co-sponsoring a United Nations bill that asserted that the equidistance principle would be the only means of maritime demarcation. It

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98. DAY, *supra* note 45, at 380. See *Guyana – Suriname Boundary*, *supra* note 3, at § 17.

99. See DAY, *supra* note 45, at 380. Shortly after, the Guyana Defense Forces (GDF) established a permanent military post called Camp Jaguar. This coincides with other Amazon-based developmental schemes to populate border regions in dispute. Venezuela, Colombia, and Brazil have all taken similar actions. JACQUELINE ANNE BRAVEBOY-WAGNER, *THE VENEZUELA-GUYANA BORDER DISPUTE: BRITAIN'S COLONIAL LEGACY IN LATIN AMERICA* 192 (1984).

100. [http://www.guyana.org/suriname/guysuri\\_boundary.html](http://www.guyana.org/suriname/guysuri_boundary.html).

101. DAY, *supra* note 45, at 380.

102. *Id.* at 380-381.

103. The President of Suriname during the 1979 negotiations was Henck Arron, while Linden Forbes Sampson Burnham represented Guyana. Less than one year later, a military coup took place displacing Arron's government in place of a military commander, Desi Delano Bourtesse. Despite the militaristic regime, the Bourtesse Government ensured that they would honor all international agreements of the previous Governments. See DAY, *supra* note 45, at 381.



states "the delimitation of the Exclusive Economic Zone/Continental Shelf between adjacent or opposite states shall be effected by agreement employing, as a general principle, the median or equidistance line."<sup>104</sup>

Accordingly, the Government of Suriname, conscious of how the 1799 Agreement might affect any maritime delimitation, sponsored a bill asserting the equitable delimitation of maritime claims which states that, "the delimitation of the exclusive economic zone (or continental shelf) between adjacent or/and opposite states shall be affected by all relevant circumstances and employing any methods, where appropriate to lead to an equitable solution."<sup>105</sup> Relying on these precedents and concessions awarded by Guyana, in 1974 Shell Oil drilled an oil well (Abary #1) about ten miles within the "area of overlap" (and roughly ten miles west of CGX's intended drill site in July 2000). Between 1972 and 1975, Oxoco and Major Crude carried out petroleum exploration in some portions of the maritime "area of overlap." In 1975, all concessions lapsed. In 1981, Guyana awarded a concession to Seagull Petroleum extending as far as 33°. Seagull Petroleum entered into a joint venture agreement with Denison; the joint ventures conducted seismic surveys to the 33° boundary. These concessions have also since lapsed.

#### *G. Recent Developments and Current State of Bilateral Diplomatic Activities*

In 1988, Guyana awarded the lapsed petroleum licenses within the maritime "area of overlap" to Lasmo. Lasmo carried out a seismic program in 1989. That same year, the President of Suriname, Ramsaywak Shankar, and his Guyanese counterpart, Desmond Hoyte, agreed to joint petroleum development in the maritime area pending a final resolution of the border.<sup>106</sup> This was codified in the 1991 Memorandum of Understanding which provided for joint exploitation pending a resolution of the final border and respect of concession rights.<sup>107</sup> Negotiations proceeded through the 1990s until Guyana independently granted new petroleum concessions in the "area of overlap" to Maxus, CGX, and Exxon for

104. OCEAN BOUNDARY MAKING: REGIONAL ISSUES AND DEVELOPMENTS 161 (Douglas Johnston & Phillip Saunders eds., 1988) (quoting NC7/10/Rev. 2 co-sponsored by Venezuela, Nicaragua and Suriname).

105. *Id.* at NG7/10/Rev.2, co-sponsored by Venezuela and Nicaragua.

106. GUYANA – SURINAME BOUNDARY, *supra* note 3, at § 18. The "area of overlap" is highly prospective for petroleum exploration, having the concentration of petroleum. See CGX Energy Homepage, *supra* note 26.

107. Hoyle, *supra* note 49, at 99.

1997-1999 without informing Suriname.<sup>108</sup> Maxus entered into a joint venture with AGIP. In 1999, CGX and the Maxus-AGIP joint venture carried out a seismic survey to the 33<sup>rd</sup> boundary and obtained permission from Suriname to enter Surinamese waters for research. In 2000, CGX commenced drilling, and on May 6, 2000, Suriname navy gunboats evicted CGX's oil rig from the "area of overlap."<sup>109</sup> The Suriname government claimed that the oil platform was in Surinamese territorial waters and in violation of the 1989 Memorandum of Understanding.<sup>110</sup>

A few weeks prior to the expulsion, Suriname sent a *Note Verbale* to the Guyana Government asserting that the proposed CGX drilling would be in its territorial waters.<sup>111</sup> Suriname reiterated that the boundary in the Exclusive Economic Zone and Continental Shelf was a straight-line extension of the 1936 line of 10<sup>th</sup> east of true north from Point No. 61.<sup>112</sup> Guyana responded by asserting that any CGX exploration activities were in Guyana territory and valid under the Hoyte/Shankar Agreement.<sup>113</sup>

The Hoyte/Shankar Memorandum and the expulsion of CGX dictate modern Suriname-Guyana relations. A Joint Communiqué was issued on January 29, 2002, asserting that the presidents of Suriname and Guyana establish border commissions and report on alternatives to assist the governments in managing the joint maritime exploration. Despite a positive tone in January 2002, no agreement has materialized. Suriname continues to claim a boundary of 10<sup>th</sup>, based on the precedent of the 1936 Mixed Commission, which supports Suriname's claim for the entire Courantyne River and a territorial sea of 10<sup>th</sup>. In an April 2003 statement, Suriname asserted that it does not wish to divide the issues of the New River Triangle and the offshore area of overlap, believing that a more beneficial solution is available under a full demarcation.

Guyana believes the New River Triangle should be decided under the constructive law of occupation and the Courantyne River must be demarcated with the traditional norms of *thalweg*

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108. CGX was granted the original license in 1998 by Guyana to "carry out its oil drilling operation in an area of some 15,464 square kilometers and said to have deposits of more than 800 million barrels of oil." The concession is in good standing until the end of 2003. *Resolving Old Controversies*, TRINIDAD GUARDIAN, Jan. 14, 2002.

109. Army Belfor, *Suriname and Guyana Sign Cooperation Agreement, Will Negotiate Territorial Dispute*, SOUTH FLORIDA SUN-SENTINEL, Jan. 16, 2002.

110. *World Watch*, WALL ST. J., Jan. 21, 2002, at A9.

111. *Id.*

112. *Id.* The 10<sup>th</sup> extension is based upon the 1936 Mixed Commission. These negotiations were never ratified but laid the framework for the 1958-1962 Negotiations. See GUYANA - SURINAME BOUNDARY, *supra* note 3, at § 19. See also Hoyle, *supra* note 49, at 100.

113. *Id.*

delineation accepted by international law.<sup>114</sup> Additionally, Guyana relies on the 1936 Mixed Boundary Commission to substantiate its claim for the New River Triangle. It also maintains that maritime borders were never formalized during colonial rule, evidenced by the 1962 Dutch counterproposals. However, Guyana has made overtures to separate the issues of the New River Triangle from the offshore maritime zones and to decide them independently of one another.<sup>115</sup>

Due to this diplomatic impasse, the Guyanese Foreign Minister stated on December 22, 2002, that a possible international tribunal would be a "last resort" if diplomacy fails.<sup>116</sup> However, given the length of this dispute, it appears that arbitration will likely be the only option for a final demarcation.

The Caribbean Community, known as CARICOM, attempted to mediate the offshore dispute in July 2000 (both Guyana and Suriname are members of the international agency). All attempts by CARICOM to settle this dispute have failed thus far. CARICOM did issue a statement urging the two sides to:

return to the spirit of the [1991].... Memorandum of Understanding which together created the environment and the prospects not only for a peaceful resolution to a potential area for problems but also for the joint utilization of the resources in the area of dispute...[and] designate the disputed maritime area as a Special Zone for Sustainable Development to be jointly managed....<sup>117</sup>

The efforts of CARICOM were unsuccessful, but they highlight the regional importance of the offshore boundary issue, and display one international tribunal that might be called upon to facilitate the resolution.

#### IV. OPERATIVE LEGAL PRINCIPLES

The various arguments put forward by Suriname and Guyana provide different versions of who should be allocated title to the New River Triangle and where the offshore maritime boundary should

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114. See *World Watch*, *supra* note 110.

115. Patrick Denny, *Guyana / Suriname Talks: Joint Explanation Independent of New River Triangle Issue*, Starbroek News.

116. *Id.*

117. THE GUYANA-SURINAME BOUNDARY: A HISTORICAL REVIEW, MINISTRY OF EXTERNAL AFFAIRS OF GUYANA (2000), available at [http://www.guyana.org/suriname/guysuri\\_boundary.html](http://www.guyana.org/suriname/guysuri_boundary.html) (last visited Oct. 6, 2003).

lie. This section describes the operative legal principles that must justify each party's claim. Guyana will likely argue that British Guiana demonstrated clear and consistent effective occupation of the New River Triangle, and thus the Republic of Guyana inherited these claims with independence. Guyana can argue that the entire Courantyne River could not be in Suriname control, because this is not in general acceptance of international law. Thus, the maritime extension should be demarcated at the *equidistant* median of the Courantyne River, which the Dutch Government offered in 1962. Further, Guyana can argue the 10<sup>o</sup> prolongation of the land boundary terminus applied only to the three-mile limit of the territorial sea, not to the outlying Exclusive Economic Zone, which was not contemplated at time of drafting. Therefore, *de facto* methods of delineation must be incorporated.

Suriname, on the other hand, will likely assert that since the entire boundary issue was unsettled at the end of colonialism, the new republics inherited unsettled borders under varying theories of *uti possedetis*. Any maritime claim should not ignore the work of the 1936 Mixed Commission which established a 10<sup>o</sup> extension. The claim should take into account the different agreements over time. That would put the 1799 Agreement (as incorporated in the Mixed Commission of 1936 and 1958-1962 negotiations) on center stage to be the deciding factor in determining a more westward extension of its territorial sea and the entire Courantyne River.

Evaluating such claims requires an understanding of the law governing the acquisition of land and marine territory. Section A describes the relevant principles of international law with respect to the ability of gaining title to land. That section will focus on the requirements of demonstrating effective control and intent to control a territory as embodied by the classical legal tenants of *animus occupandi and corpus*. Section B describes the legal concept of *terra nullius* and subsequent abandonment and hinterland theories. Section C describes *uti possedetis*, a doctrine by which colonies inherit the boundaries of the former colonial power at independence. Section D describes the legal theory of prescription, which is analogous to the common law property term of adverse possession. Section E describes the theories of recognition, acquiescence, and estoppel from a legal perspective, which prevents states from asserting claims if they have effectively relied on *de facto* border demarcations without protest. Section F describes relevant portions of the United Nations Law of the Sea Convention and case law from international tribunals relevant to maritime demarcation.

A. *The Law of Occupation to Determine Title to the New River Triangle*

The legal basis for acquiring large amounts of territory through occupation and control was formulated during the European colonial era.<sup>118</sup> Gaining territory through occupation was seen as “a valid — in fact, desirable — means of acquiring territory....”<sup>119</sup> This occupation was subject to following a prescribed set of international legal norms for the occupation. However, there was substantial disagreement on the extent and scope of these occupation conditions.<sup>120</sup>

This section discusses the international legal tenets govern the occupation of conquered territory. It traces the basic requirements under customary international law and the continuous and simultaneous display of both the intention and the ability to effectively occupy a territory. As applied to the New River Triangle, it can be seen that Guyana has consistently displayed the twin elements of *animus occupandi* and *corpus*, and Suriname, although displaying the intent intermittently through its colonial and nationalist experiences, does not demonstrate the actual physical occupation of the area as compared to Guyana.

Throughout international law there have been two requirements for control over a territory, *animus occupandi* (intent to control a territory) and *animus corpus* (actual control of a territory). These twin requirements were first seen in the arbitral award between Brazil and Dutch Guyana in 1904.<sup>121</sup> It held that in

118. See Matthew M. Ricciardi, *Title to the Aouzou Strip: A Legal and Historical Analysis*, 17 *Yale J. Int'l L.* 301, 385 (1992). The ability to control territory over colonial possessions increased European power vis-à-vis other colonial powers, as well as, increased the amount of raw materials that could be extrapolated from the area. See Thomas W. Donovan, *Jurisdictional Relationships Between Nations and Their Former Colonies*, 1 *Across Borders Int'l L. J.* 5, Section A (2003), available at <http://www.across-borders.com>.

119. *Id.* at 385. Ricciardi asserts that the overwhelming majority in colonial Europe supported the taking and development of colonies. The need for a prescribed set of rules to define their conquest came after the intense drive to acquire territory. *Id.* at 385-91.

120. The 1885 Act of Berlin “fixed two important rules for the occupation of territory. First, the occupation had to be effective, and second, the occupying state had to notify other powers of the occupation.” *Id.* at 391.

121. This dispute was referred to King Vittorio Emanuele III of Italy for arbitration. The colonies of Portugal and Spain were gaining independence throughout South America and there were no uninvolved arbitrators to refer disputes. Once Brazil emerged from colonialism, it attempted to ratify its borders, which included its northern border with Dutch Guiana. See SURYA P. SHARMA, *TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW* 70 (1997). “The international agreement of May 5, 1906 (signed in Rio de Janeiro, approved by the law of July 11, 1908, and ratified on Sept. 15, 1908, in The Hague), established the boundary between Suriname and the Federal Republic of Brazil.” *Suriname, Regional Location and Boundaries*, at <http://home.student.uva.nl/selwijn.pengel/boundaries.html> (last visited Oct. 6, 2003).

order to acquire sovereignty over territory not under the control of any state, a state must intend to control the territory, and this intent must be accompanied by effective, uninterrupted, and permanent possession of the territory.<sup>122</sup>

The concept of effective control gained greater recognition in the 1933 *Eastern Greenland* case before the Permanent Court of International Justice. According to the Court, "a claim to sovereignty based...upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign and some actual exercise or display of such authority."<sup>123</sup> Intent and constructive occupation within a given territory are the two elements that constitute the basic criteria any international tribunal will use to measure occupation.<sup>124</sup>

The majority of scholars assert that in order to state a claim of intent (*animus occupandi*), it is necessary to look toward objective factors performed by the State.<sup>125</sup> The court in *Eastern Greenland* stated that intent did not need to be a comprehensive inhabitation of a disputed land. In areas that were uninhabited, intent could be as perfunctory as raising a flag or reading a proclamation signifying a government's control over an area.<sup>126</sup> However, it was an act that a State organ needed to perform. State organs could be military officers (as in *Clipperton Island*), large state run corporations, such as the Dutch East Indies Corporation (as in *Island of Palmas*), or informal Ministry proclamations (as in *Eastern Greenland*).<sup>127</sup> In general terms, any act demonstrating a State's willingness to claim the territory, as simple as publicly stating so, satisfied the *animus occupandi* intent criteria.<sup>128</sup>

The necessary second element of *corpus* to create title by occupation is considered to be more stringent and has received large amounts of judicial review by arbitral panels.<sup>129</sup> It was first elucidated in the *Island of Palmas* case over a sparsely populated island in the Pacific. In that case, the United States asserted title

122. *Id.* at 71.

123. Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 45-46 [hereinafter *Eastern Greenland*].

124. MALCOLM N. SHAW, *INTERNATIONAL LAW*, 342 (4th ed., 1997).

125. Some writers assert that subjective criteria may also be incorporated in determining intent (*animus occupandi*). Other commentators have labeled the state's subjective intent an "empty phantom." *Id.* at 343-345.

126. *Eastern Greenland*, *supra* note 123, at 48.

127. If a non-state organ was to assert a claim for the title it would have no legal effect and would not be taken into consideration by any international body. See SHAW, *supra* note 124, at 349.

128. *Eastern Greenland*, *supra* note 123, at 48.

129. The second element of *corpus* is dealt with in *Island of Palmas* (U.S. vs. Neth.), 2 R.I.A.A. 829, 839 (Perm. Ct. Arb. 1928) [hereinafter *Island of Palmas*].

based on continuity of title, supported by the 1648 Treaty of Munster. The United States argued that good title continued until the conclusion of the 1898 Treaty of Peace by which Spain ceded the Philippines to the United States. Due to this transfer of title by cession, the United States argued it was unnecessary to establish facts seeking to prove actual displays of sovereignty. On the other hand, the Netherlands asserted that its predecessor, the Dutch East Indies Company, had possessed and exercised examples of occupation as early as 1677.<sup>130</sup>

In the *Island of Palmas* award, Judge Max Huber stressed that occupation is seen as the "actual display of State activities, such as belongs only to the territorial sovereign."<sup>131</sup> Elements such as tax rolls, jurisdictional legal courts, administration, civil servants, etc., are signs of a government's effective occupation and control. The Court stated that, "[t]he Netherlands title of sovereignty, [was] acquired by continuous and peaceful display of State Authority during a long period of time...."<sup>132</sup>

However, in cases of uninhabited and distant territories, it is clear that an award tribunal will hold a less stringent standard in determining effective occupation. As Judge Huber stated in the *Island of Palmas* award, "manifestations of sovereignty over a small island and distant island, inhabited only by natives, cannot be expected to be frequent."<sup>133</sup> In these instances, international tribunals have consistently required a lesser showing of effective occupation of *corpus*, and instead look toward more symbolic, rather than effective, instances of occupation.<sup>134</sup> Various international tribunals have asserted specific aspects of State sovereignty acts which demonstrate elements of *corpus* in unpopulated territories, including, having a police force in *The Southern Boundary of the*

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130. *Id.* at 830.

131. *Id.*

132. SHARMA, *supra* note 121, at 72, citing *Island of Palmas*, *supra* note 129.

133. *Island of Palmas*, *supra* note 129, at 830-839. This is the classical notion of effective occupation. In the exercise of territorial sovereignty there are necessarily gaps, intermittence in time, and discontinuity in space. This phenomenon will be particularly noticeable in the case of colonial territories, partly uninhabited. The fact that a State cannot prove or display sovereignty with regard to such a portion of territory cannot forthwith be interpreted as showing sovereignty is nonexistent. Each case must be appreciated in accordance with the particular circumstances. *Id.* at 833-839.

134. See Ricciardi, *supra* note 118, at 389. This less stringent and more symbolic test was seen in various countries' control over territories on the continent of Antarctica. The Antarctic Treaty is the most widely known and cited instance. The race to acquire land in the uninhabited Antarctic areas has been called "the land rush of the century." See Sir ARTHUR WATTS, *INTERNATIONAL LAW AND THE ANTARCTIC TRADING SYSTEM* 9 (Grotius Pub. Ltd. 1992). See also *Antarctica Case (U. K. v. Arg.)*, 1956 I.C.J. 12-14 (March 16); and *Antarctica Case (U. K. v. Chile)*, 1956 I.C.J. 15-17 (March 16).

*Territory of Walfisch Bay*,<sup>135</sup> the granting of hunting concessions in *The Legal Status of Eastern Greenland*,<sup>136</sup> and sporadic fishing and pearl diving in the *Hanish Islands*.<sup>137</sup> The holding of *Eastern Greenland* was later confirmed in the *Case of Clipperton Island* (Mexico vs. Spain) where it elucidated the second element of occupation in terms of an occupied and populated territory.<sup>138</sup> The Permanent Court of International Justice stated that "the actual, and not the nominal, taking of possession is a necessary condition of occupation."<sup>139</sup>

Because both Suriname and Guyana intended to control the New River Triangle, any international tribunal will hinge upon an examination of actual control extended over the area. In doing such, it is clear that Guyana has demonstrated a consistent presence in the area both in military and economic terms. It has established bases for the Guyana Defense Forces, granted concessions, taxed logging operations, and is today planning on constructing a road to access the secluded areas. The nominal subsistence gold mining, as encouraged by Suriname, will not be enough to satisfy any international tribunal of clear and consistent presence.

This standard is relevant in the New River Triangle where Guyana granted concessions to logging and gold mines. Guyana further established World Bank funding for conservation projects in the New River Triangle, incorporating the area into the national identity of Guyana. The economic activities of lumber and road construction allow for economic development within this territory at a pace faster than that of Suriname. If the tribunal considers the constructive measures, productivity, and development already established by Guyana, as compared to Suriname, the Guyanese claim to sovereignty would have the most weight.

### *B. The Principle of Terra Nullius in the New River Triangle*

Due to the undeveloped area that compromises the New River Triangle, a crucial issue is whether it was possible to occupy the

135. Southern Boundary of the Territory of Walfisch Bay (Gr. Brit. v. F.R.G.), 104 Brit. & Foreign St. Pap. 50, 100 (May 23, 1911).

136. See Eastern Greenland, *supra* note 123.

137. See Island of Palmas, *supra* note 129.

138. Clipperton Island Award (Fr. v. Mex.), 26 A. J. INT'L L. 390 (1932). Clipperton concerned a dispute between France and Mexico over an uninhabited island. The arbitrator emphasized the nominal acts which translated toward possession over the actual occupying and ruling the island. In the case, title was ultimately determined by the nominal act of a French Naval Officer proclaiming the island to be French and publishing an article in a Honolulu newspaper. This was deemed sufficient in creating valid title in this specific circumstance. See SHAW, *supra* note 124, at 348.

139. Clipperton Island Award, *supra* note 138, at 390.



territory throughout the colonial era. Either party may argue that the former colonial governments of Great Britain or the Netherlands did not effectively occupy the New River Triangle because it was inhabited by indigenous sovereign people. In the absence of these tribes, the territory would have been *terra nullius* (the property of no one) and thus able to be controlled by either Suriname, Guyana, or Brazil, as determined by the elements of intent (*animus occupandi*) and actual control (*corpus*). This section will define the concept of *terra nullius*, its historical roots, and legal applications.

### 1. *Terra Nullius as Defined and Applied*

Throughout the colonial era, European scholars agreed that “any land that was *terra nullius* was open to occupation.”<sup>140</sup> This was seen in the colonization of North and South America, Australia, and, in some instances, Africa.<sup>141</sup> In the colonial era, *terra nullius* was seen as any part of the Earth’s surface which was not yet occupied by a central developed government.<sup>142</sup> However, determining the governing presence and signs of a central government posed certain problems. The majority of scholars agreed that non-European, but still cohesive governments, such as China, Japan, and Turkey had claim to their inhabited lands not qualifying as *terra nullius*.<sup>143</sup> It was argued that these non-Western cultures may not have achieved the developmental level of European powers but were still central and organized enough to maintain title over their inhabited territory.<sup>144</sup> There was consternation, however, as to what developmental level an indigenous tribe needed to be at before they were accorded the same consideration. The question of whether a land was *terra nullius*,

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140. Ricciardi, *supra* note 118, at 395.

141. *Minquiers and Ecrehos (France v. U.K.)*, 1953 I.C.J. 47 (November).

142. See Shaw, *supra* note 124, at 335. The Australian case of *Mabo v. State of Queensland* dealt with *terra nullius* in Australia when dealing with an indigenous population that was not organized, coherent, or central. “Whatever differences of opinion there may have been among jurists, the [s]tate practice of the [colonisation] period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terra nullius*.” *Mabo v. State of Queensland*, 107 A.L.R. 1, 40.

143. A minority of scholars asserted that if any substantive population inhabited an area that land could not be *terra nullius* and is therefore unable to be occupied. See M.F. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW* 11-20 (1926); J. WESTLAKE, *CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW* 141-42 (1894).

144. In the *Lotus* instance, France brought suit against the Turkish government asserting that it had violated its jurisdiction by a collision in the Mediterranean. It is assumed that, since France brought suit against Turkey, the colonial power of France assumed Turkey to be a cohesive political unit. See *SS Lotus (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10.

therefore, depended not on the land, but on the European view of the developmental level achieved by the inhabitants.<sup>145</sup>

In the instance of the New River Triangle, neither Guyana nor Suriname in the early colonial era was aware of the interior of their countries.<sup>146</sup> Historical records give inconsistent accounts of the area and the inhabitants. Early records indicate that Dutch traders went inland up to two hundred miles yet were confined to the waterways and tributaries of major rivers.<sup>147</sup> No scientific expeditions were convened until 1840, and, even then, there were discrepancies in their findings.<sup>148</sup>

Because of the lack of records discussing the New River Triangle, abandonment issues arise. If a state subsequently abandons a territory after acquiring it, that territory reverts back to *terra nullius*.<sup>149</sup> International law, however, is unsettled as to what objective acts determine abandonment.<sup>150</sup> This question is crucial in the New River Triangle because it could potentially be argued by either Suriname or Guyana that the occupied positions in the New River Triangle were occupied and subsequently abandoned.

The majority of scholars assert that to find a territory effectively abandoned, both physical abandonment and the desertion of *animus occupandi* must occur.<sup>151</sup> Jurists have allowed exceptions where it was seen that if an uprising occurs that drives government forces from a particular area, this is not seen as abandonment.<sup>152</sup> However, if a general withdrawal from an area occurs, even with an express intent to return, abandonment would be seen if the government does not return for a sufficient length of time.<sup>153</sup>

In the New River Triangle, the inhabitants of the area did not meet the European standards of a developed and cohesive state. The Arawak and Carib tribes were migrant, had no written language, and moved intermittently throughout the Northern

145. *Terra nullius* was dealt with recently by the International Court of Justice in *The Indo-Pakistan Western Boundary Case Tribunal*. 1968 I.C.J. (Feb. 19). Both India and Pakistan submitted evidence of partial claims to a border area that was primarily wasteland, yet neither submitted evidence that they claimed the entire area. In deciding this case, the justices asserted that since both countries understood that the land was there, yet could not, and did not exert influence over the territory, the areas do not qualify as *terra nullius*. Conversely, it can be inferred that *terra nullius* is the land which, although may be inhabited, must be not claimed by any power, European or otherwise. *Id.*

146. See Odeen Ishmael, *THE TRAIL OF DIPLOMACY*, Part 1 (c)(4).

147. *Id.*

148. *Id.* at Part 1 (c)(10).

149. See Ricciardi, *supra* note 118, at 415.

150. *Id.* at 416.

151. *Id.*

152. See Lindley, *supra* note 143, at 48-51.

153. *Id.*

Amazon watershed.<sup>154</sup> Even by the modern standards, as asserted by the United Nations in *Reparations for Injuries Suffered in the Service of the United Nations*,<sup>155</sup> the Carib and Arawak Indians did not comprise a state. Therefore, in the absence of any codified politic entity, the twin requirements of *animus occupandi* and *corpus* indicated that the area was open for inhabitation.

## 2. *The Scope of Occupied Territory under Terra Nullius: Hinterland Territories*

In dealing with the concept of *terra nullius*, it is important to note the extent of the unoccupied land. According to the traditional view, a state could claim no more territory than it effectively occupied. Another view asserts that a country was entitled to control not only the land that it effectively administered but also a hinterland.<sup>156</sup> Hinterland theory asserts that attaching hinterlands to colonial possessions is crucial based upon basic considerations of "geographical proximity, natural features, or ... strategic need."<sup>157</sup> Hinterland theories were asserted in the Guianas during the 1899 Paris Arbitration regarding the maritime and territorial boundaries between British Guiana and Venezuela.<sup>158</sup>

Some states asserted claims based upon the first theory of geographical contiguity to justify claims to an unoccupied territory that was adjacent to the previously inhabited and structurally occupied area. Jurists generally denied that proximity alone, without effective occupation, could support valid title. "They argued that if proximity conferred upon a state superior faculties for occupying a territory, that the state should exercise those faculties."<sup>159</sup> In the *Island of Palmas* award, Judge Huber addressed the contiguity theory and concluded that it had "no foundation in international law."<sup>160</sup> Huber wrote that this is "by its very nature...uncertain,"<sup>161</sup> and that it conflicted with the clear requirement in international law of effective occupation. Huber

154. *Id.* at Part 1 (b) 1-4.

155. *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 174-178 (Apr. 11).

156. See Ricciardi, *supra* note 118, at 405. Hinterland as used in this context applies to territory which, while known to the colonial or administering power, is not effectively controlled under western notions of territorial sovereignty. *Id.*

157. *Id.* at 406.

158. See Ishmael, *supra* note 146, at Part Chapter 13 (f)(4).

159. *Id.*

160. See Ricciardi *supra* note 118, at 405-406.

161. *Id.*

thus concluded that even isolated displays of occupation would defeat claims based on a hinterland theory.<sup>162</sup>

Under the second natural boundaries theory, states could invoke claims based on geographical contiguity extending to a geographic natural boundary. Prominent natural boundaries such as oceans, mountains, and rivers created natural boundaries that allowed for easy demarcation and division.<sup>163</sup> Britain asserted the natural boundary theory in the *1899 British Guiana – Venezuela Arbitration*.<sup>164</sup> Britain wanted natural boundaries to be the boundary between Guyana and Venezuela because they are “both easy to distinguish and hard to cross.”<sup>165</sup> Huber asserted that where the claimed additional feature had a geographical relation to the effectively occupied area, the state could assert a hinterland theory. Yet, even in cases where there existed linguistic, ethnic, and geographical consistency with the hinterland, international law has always stated that the claiming state must effectively occupy the territory within a reasonable time.<sup>166</sup>

Geographical boundaries were seen in the maritime context in the case between Yemen and Eritrea. Yemen argued that the group of disputed islands in the Red Sea should be viewed as one geographical entity, based upon “the principle of natural or geophysical unity.”<sup>167</sup> In the final award, the International Court of Justice stated that the principle of boundaries based upon natural geographical principles is “not an absolute principle.”<sup>168</sup>

The third justification for hinterland extensions is that the area is needed for the safety and security of the state. During the negotiations in the 1885 Conference of Berlin, the British government instructed its delegate to assert “as a general principle...if a nation has made a settlement it has a right to assume sovereignty over all adjacent vacant territory which is necessary to the integrity of the settlement.”<sup>169</sup> This theory has gained little respect from international panels in deciding hinterland arguments. “At a time when colonizing states had ample knowledge of the geography of the region, claims based on strategic

162. *Id.*

163. See Ricciardi, *supra* note 118, at 406.

164. Clifton J. Child, *The Venezuela-British Guiana Boundary Arbitration*, 44 AM. J. INT'L L. 682 (1951). See also William Cullen Dennis, Editorial Comment, *The Venezuela-British Guiana Boundary Arbitration of 1899*, 44 AM. J. INT'L L. 720 (1951).

165. See Ishmael, *supra* note 146, at Part 3 Chapter 13 (f)(4).

166. See Ricciardi *supra* note 118, at 406.

167. Eritrea-Yemen Award. Phase II: Maritime Delimitation. Chapter X, § 459. Available at <http://www.nic.gov.ye/>.

168. *Id.* at para 461.

169. See Ricciardi, *supra* note 118, at 406.

importance made after the occupation rang hollow, because the state could have occupied all the necessary land from the beginning."<sup>170</sup>

If no other state asserts claim to a hinterland, it is clear from the *Eastern Greenland* case that an international tribunal will grant title as long as there is a showing of occupation.<sup>171</sup> In *Eastern Greenland*, no other state challenged Danish control over a hinterland claim, and therefore, solely on the basis of Danish domestic legislation decreeing control over the territory, the area was Danish. There was no evidence of the actual display of sovereignty. In framing this decision, the Court noted the need to take into account "the extent to which the sovereignty is also claimed by some other [p]ower."<sup>172</sup> The Court laid particular emphasis on the fact that until 1931, no other state had either disputed Denmark's claim to the area, nor had any other power asserted a claim until 1931.<sup>173</sup> Given the lack of any claim to sovereignty by another state and the inaccessibility of the area, even Denmark's scant occupation was deemed enough to be granted title to the territory.<sup>174</sup>

*Eastern Greenland* is therefore considered the first international arbitral award to sanction hinterland possession in the absence of conflicting claims.<sup>175</sup> In these rare instances, it is possible to claim large tracts of hinterland territories with small acts of occupation. However, the later *Island of Palmas* award states that those directing hinterland territory claims could not defeat an opposing claim based on "continuous and peaceful" possession of the same territory.<sup>176</sup>

During the early colonial era, claims to hinterland territories were unclear. Neither the British nor the Dutch entities seemed to be concerned about control over the hinterland, when it was the opportunity to trade with the seafaring inhabitants and cultivate sugar and tobacco which mattered.<sup>177</sup> Throughout the existence of early Dutch interests, sporadic settlements dot the interior of

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170. *Id.*

171. See *Eastern Greenland*, *supra* note 123, at 46.

172. *Id.* at 46-48.

173. *Id.*

174. Ricciardi, *supra*, note 118, at 409.

175. This case is confirmed and contrasted by the *Island of Palmas* case, where it states explicitly that hinterland theories of state sovereignty are not valid when they compete with another nation's claim to the same territory. It is possible to reconcile the two countries by noting the extreme isolation experienced by Danish claims in Denmark as contrasted to the *Island of Palmas*, which contained various population centers that were intermittently inhabited. See *Isle of Palmas*, *supra* note 129.

176. *Id.*

177. See Ishmael, *supra* note 146, at Part 1 (c) (4).

Guyana and Suriname.<sup>178</sup> The trading between native Indians and Dutch/English settlers seems to have been limited to less than six hundred miles inland.<sup>179</sup>

However, during the later and more developed colonial rule in the Guyanas, the surveys that were enacted seem to cut against any possible hinterland theory claim. This is because a claim for title based solely upon a hinterland theory will be defeated upon showing clear and consistent occupation of the disputed land. In the Guyana — Suriname instance, Guyana demonstrated a consistent constructive occupation in the New River Triangle, developed the area, policed the area, and defended the area from incursions. Therefore, Suriname may not state a hinterland claim to the area based upon the colonial view of the interior by the predecessor state Dutch Guiana.

### C. *The Principle of Uti Possidetis*

The doctrine of *uti possidetis* is the most essential operative legal principle involved in the Suriname—Guyana border dispute. The concept was first applied during the break-up of the Spanish colonial holdings on Latin and South America in 1820.<sup>180</sup> It asserts that a country gaining independence from colonial rule inherits the original borders of the previous state.<sup>181</sup> However, if the former colonial powers maintained unresolved borders before independence, then the new republics inherit the unresolved claim at issue. The doctrine originated in South America as many former colonies of Spain and Portugal gained independence.<sup>182</sup> It has been applied in the Northeastern section of South America in cases of Venezuela from Spain, Cuba from Spain, and Brazil from Portugal.<sup>183</sup>

This section will discuss the doctrine of *uti possidetis*, its historical development, recent application, and applicable case law. This section asserts that, since the border in the New River Triangle

178. *Id.*

179. See GOSLINGA, *supra* note 33, at 428.

180. SHAW, *supra*, note 124 at 356. Frontier Dispute (Burkina Faso v. Mali) 1986 I.C.J. 545, §§ 19-26; EC Arbitration Commission on Yugoslavia (1993) 92 I. L. R. 162, 162-66. See also Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras), 97 I.L.R. 266, 351, 514, 598 (1994) [hereinafter *El Salvador v. Honduras*].

181. *Id.* See also Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 Am. J. Int'l. L. 590, 590 (1996); Michael Reisman, *The Government of the State of Eritrea and the Government of the Republic of Yemen; Award of the Arbitral Tribunal in the First Stage of the Proceedings, (Territorial Sovereignty and Scope of the Dispute)* 93 Am. J. Int'l L. 668, 668 (1999).

182. See SHAW, *supra* note 124, at 356-57.

183. *Id.*

was not resolved during the colonial rule, neither Suriname nor Guyana can claim title to the area incorporating solely a claim of *uti possidetis*. However, *uti possidetis* does not preclude inheriting the original *animus occupandi* and *corpus* exhibited by its colonial predecessor in the New River Triangle. In terms of the Courantyne River, the successor state of Suriname inherited the historic title of the 1799 Agreement, and therefore, may extend complete sovereignty over the river, contained islands, and re-affirm Point No. 61 as the land boundary terminus. This would suggest a 10° extension into the territorial sea, as envisaged in the 1936 Mixed Commission, and as claimed by Suriname. However, Guyana could likewise inherit the 1954 British claim to the continental shelf, the ability to grant concessions in the far eastern “area of overlap” as seen in the 1958 Shell and Exxon concessions, and the original *animus occupandi* and *corpus* that was noted by the 1936 Mixed Boundary Commission in the New River Triangle.

The doctrine of *uti possidetis*<sup>184</sup> is closely related to the doctrine of state succession,<sup>185</sup> whereby one state displaces another in an area by means of a treaty.<sup>186</sup> In succession mechanisms, the new state inherits all the rights and obligations of the former sovereign.<sup>187</sup> Thus, under the independence agreements between Guyana and Great Britain and Suriname and the Netherlands, the two countries inherited rights and obligations entailed with statehood.<sup>188</sup> It is distinct, however, because state succession does not directly apply to international boundaries of the successor state.<sup>189</sup> The doctrine of *uti possidetis*, in these instances, refers directly to the inheritance of boundaries at state succession.<sup>190</sup>

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184. *Uti possidetis* translates to “as you possess, so you may possess.” See RATNER, *supra* note 181, at 593.

185. State succession may be briefly defined as “the replacement of one state by another in the responsibility for the international relations of territory.” See SHAW, *supra* note 124, at 676. State succession is dealt with in Article 2 of both the Vienna Conventions of 1978 and 1983, and Opinion No. 1 of the EC Arbitration Commission on Yugoslavia 92 I.L.R. 165 (1993). The foremost International Court of Justice decision is Guinea-Bissau v. Senegal, 83 I.L.R. 1, 22 (1990) and El Salvador v. Honduras, *supra* note 180.

186. SHAW, *supra* note 124, at 674.

187. Badinter Commission in *Opinion No. 3 in 1992 delineating the boundaries between Serbia and Yugoslavia*. See Peter Radan *Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission*, 24 MELB. U. L. Rev. 50 (2000).

188. See independence discussion in *Id.* at 59.

189. See Shaw, *supra* note 124, at 676. It is seen where a former state disappears in whole or in part and is succeeded by another state occupying roughly the same territory of the original sovereign. See D.P. O’CONNELL, *STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW* (Cambridge) (1967). See also IAN BROWNLIE *PRINCIPLE OF PUBLIC INTERNATIONAL LAW*. (4th ed. 1990) at Chapter 28.

190. *Id.*

In the Case Concerning the Frontier Dispute (Burkina Faso v. Mali), the International Court of Justice discussed *uti possidetis*.<sup>191</sup> The Court dealt with a boundary award regarding the "principle of the intangibility of frontiers inherited from colonization."<sup>192</sup> In its holding, the International Court of Justice stated that *uti possidetis* was "a firmly established principle of international law where decolonization is concerned."<sup>193</sup> The court further stated that "[u]ti possidetis, as a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers, is therefore a principle of a general kind which is logically connected with this form of decolonization wherever it occurs."<sup>194</sup>

The majority of scholars agree that there are two distinct versions of *uti possidetis*.<sup>195</sup> Through the first mechanism of *uti possidetis juris*, boundaries "are defined according to legal rights of possession based upon the legal documents of the former colonial power at the time of independence."<sup>196</sup> *Uti possidetis juris* was seen in the *Colombia-Venezuela* Arbitration in 1922. In this award, the court held, "[t]he principle of [*uti possidetis*] asserted that the boundaries of the newly established republics would be the frontiers of Spanish provinces which they were succeeding.... These territories, although not occupied in fact...were by common agreement as considered as being occupied in law."<sup>197</sup> Therefore, in an *uti possidetis juris* setting, a state could lay claim to an area, although not exactly administering within the territorial notions of the former Spanish administrative division.

The second concept of *uti possidetis de facto* was seen in the later case of *El Salvador v. Honduras*, where the court held that borders may be demarcated by territory which was "actually possessed and administered by the former colonial unit at the time of independence, irrespective of the legal definition of former colonial borders."<sup>198</sup> In this case, the court dealt with a boundary award between three states that had ratified international treaties determining the applicable law. The International Court of Justice held that the ruling in the Burkina Faso-Mali instance does not apply "if parties to any dispute...specifically agree to the contrary

191. See *Frontier Dispute (Burkina Faso v. Mali)*, *supra* note 180, at 554.

192. *Id.* at 565.

193. *Id.*

194. *Id.* at 566.

195. See Radan, *supra* note 187, at 59.

196. *Id.*

197. *Colombia-Venezuela Arbitration*, 1 U.N.R.I.A.A. 223, 288 (1922).

198. See Radan, *supra* note 187, at 59.



that the principle of *uti possidetis* should not be applied.”<sup>199</sup> Therefore, in a *uti possidetis de facto* setting, a state could only claim to an area that the former colonial division administered and controlled.

The principle of *uti possidetis* applies to territorial as well as maritime zones.<sup>200</sup> The principle can be applied to the Suriname-Guyana context by inheritance of the 1799 Agreement for the Courantyne River. *Uti possidetis* asserts that, where there is a relevant applicable treaty, an international frontier achieves a status of permanence so that even if the treaty itself were to cease to be in force, the continuance of the boundary would be unaffected and may only be changed with the consent of the states directly concerned.<sup>201</sup>

This inheritance of the entire Courantyne would, therefore, reaffirm the land boundary terminus of Point No. 61 on the west bank of the Courantyne. If the 1936 Mixed Commission or the 1958-1962 negotiations had ratified the treaty, a 10° extension into the territorial sea (to the three-mile limit) would have been inherited by the new republics. As this is not the case, the question arises of who actually controlled the territorial waters during the late colonialism era. This *corpus*, or actual control of the area, could be inherited through *uti possidetis juris* to the successor states. As the record marginally indicates, since Suriname maintained trawling and fishing rights to the mouth of the Courantyne, Suriname is not prevented from asserting an *uti possidetis juris* argument that Dutch Guiana's occupation of the mouth of the Courantyne re-affirms the 10° extension in the territorial sea as seen in the un-ratified 1936 Mixed Commission.

If *uti possidetis juris* is applied to the outlying Exclusive Economic Zone and Continental Shelf areas, Guyana inherits a *de facto* maritime delineation that incorporates a 1954 British claim of the Continental Shelf. Moreover, British Guiana granted California Oil and Shell two specific concessions which were not objected to by Suriname before independence, and Guyana has subsequently

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199. Ratner, *supra* note 181 at 594. See also, <http://www.lawschool.cornell.edu/library/cijwww/icjwww/igeneralinformation/ibook/Bbook8-1.56.htm>. The territorial concepts and boundaries of the former colonial power are often accompanied with other forms of governance that are implanted in the colonial country. See Thomas W. Donovan, *Jurisdictional Relationships Between Nations and Their Former Colonies*, 1 *Across Borders Int'l L. J.* 5, (para. 1-5) (2003) available at <http://www.across-borders.com>.

200. The International Court of Justice has emphasized that the *uti possidetis* principle applies to territorial as well as boundary problems. See *El Salvador v. Honduras*, *supra* note 180, at 387.

201. *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 23 (Feb. 24) (citing the Special Agreement between Tunisia and Libya, Art. 1).

awarded numerous concessions as enumerated above, again without timely objection by Suriname.<sup>202</sup> Reconciling a 10° Suriname territorial sea with a 33° Guyanese Exclusive Economic Zone will be a difficult task for any international tribunal. One solution asserts a maritime delineation which, although possibly projecting at 10° immediately from the shore, would move towards the Guyanese position of 33° past the territorial sea and respect the concession rights given by each country.<sup>203</sup> Another solution is to impose an equidistant median line through the area, a common practice in offshore boundaries. In practice, such a median line is a set of line segments. The outlying continental shelf and Exclusive Economic Zone are located past the territorial sea. At this distance, the location of the median line is completely unaffected by the demarcation of the boundary in the territorial sea which could be demarcated upon separate principles.<sup>204</sup>

In terms of the New River Triangle, Guyana can state a strong claim to title based upon *uti possidetis juris*, which asserts that, even though Guyana did not effectively administer the territory in dispute during the colonial period, it still may inherit the lands which it effectively occupied. This effective occupation will be determined by the twin criteria of *animus occupandi* and *corpus*, which dictate how a colonial state may lay claim to title in lands that are *terra nullius*. In doing such, the *animus occupandi* and *corpus* will be judged against a similar Suriname claim that Dutch Guiana also exhibited these objective notions. Any tribunal will, however, overlook the intermittence of Dutch outlying settlements and concentrate on the clear, consistent, and objective showings of state sovereignty exhibited on behalf of British Guiana and, by the principle of *uti possidetis juris*, the Republic of Guyana.

#### D. Prescription

The twin elements of occupation (*animus occupandi* and *corpus*) “permitted a state to acquire territory only when no other state had perfected title to it.”<sup>205</sup> When the land was under the power of one state, international law provided other means for acquiring title to the disputed land. One such mechanism relevant to the New River Triangle dispute is the gaining of title through prescription. Prescription, analogous to the common-law property doctrine of adverse possession, generally requires the same

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202. Provided by CGX Petroleum, Oct. 17, 2003, on file with author [hereinafter Historic Operators].

203. See Hoyle, *supra* note 49, at 100-104.

204. *Id.* at 102.

205. Riccardi *supra*, note 118, at 413.

conditions. The adverse possession has to be open, conspicuous, notorious, and uninterrupted for a reasonable period of time.<sup>206</sup> This possession must not be contested or challenged by the original possessor.<sup>207</sup>

Prescription is defined as "legitimation of a doubtful title by the passage of time and the presumed acquiescence of the former sovereign...."<sup>208</sup> The doctrine of prescription was dealt with most recently in the *Case Concerning Kasikili / Sedudu Island (Botswana v. Namibia)*.<sup>209</sup> In prescription, if the state, which initially maintained control of an area that was adversely possessed, actually did not maintain actual control over the area, scholars suggest that this land was not territory of the original sovereign but rather *terra nullius*, and open for occupation based upon showing *animus occupandi* and *corpus* or other constructive occupation realities.<sup>210</sup> To gain title by prescription, the intruding elements need to be part of a nation-state. In the *Botswana/Namibia* instance, it was seen that title can not be perfected by non-state actors (private citizens) encroaching upon sovereign territory. In both instances of prescription and *terra nullius*, the outcome is similar: the state constructively occupying the territory maintains sovereignty.

The requirement for a "reasonable amount of time" is imprecise and has gained little judicial review.<sup>211</sup> It is not possible to define any precise amount of time and determining a proper time frame will depend on the circumstances involved in deciding the title to the area, competing claims, and the nature of the dispute. The one international case that dealt with the time element of prescription was the *Minquiers and Ecrehos* case.<sup>212</sup> In *Minquier*, France and England were disputing a group of islets in the English Channel where titles could be traced back before 1066. The court

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206. Prescription is dealt with in three major international awards. See *Clipperton Island Arbitration (France v. Mexico)*, 26 Am. J. Int'l. L. 390, (1932); *Western Sahara*, 1975 I.C.J. 12, 43 § 92; and *Minquiers and Ecrehos (France v. United Kingdom)*, 1953 I. C. J. 47, 65-66 [hereinafter *Western Sahara*]. The doctrines of adverse possession and prescription are similar in that they reward a party in equity reflecting the actual occupier of the land. See *id.*

207. The reasonable amount of time and the objection of the state are dealt with in two major awards: *Eastern Greenland (Denmark v. Norway)* 1933 P.C.I.J. (ser. A/B) No. 53, at 45-46 (June 14); *Western Sahara*, *supra* note 206, at 42 § 91. The type of encroachment needed to manifest sovereignty is analogous to the *terra nullius* requirements of *animus occupandi* and *corpus*. See *Minquiers and Ecrehos (France v. United Kingdom)*, 1953 I.C.J. 47; *Anglo-Norwegian Fisheries (United Kingdom v. Norway)* 1951 I.C.J. 116, 184 (Dec. 18).

208. SHAW, *supra* note 124, at 343-344.

209. 39 I.L.M. 310 (2000).

210. *Id.* at 344.

211. *Id.* at 345.

212. See *Minquiers and Ecrehos*, *supra* note 141, at 47.

did not concentrate on the historic titles offered, but concentrated its decision on the recent acts of prescription that occurred throughout the last century.<sup>213</sup> In the 1899 arbitration between Guyana and Venezuela, prescription was agreed to be a constructive occupation of an area for 50 years.<sup>214</sup> As the 1897 agreement to arbitrate the dispute states:

- (a) Adverse Holding or prescription during a period of fifty years shall make good title. The Arbitrators may deem exclusive control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription.<sup>215</sup>

Under a prescription theory, Suriname or Guyana could argue that although one side effectively demonstrated *animus corpus* and *occupandi* throughout the colonial era, the fact that each entity has ignored a conspicuous encroachment onto the territory would preclude title. Each side would cite encroachment by elements of their military as prescription, because encroachment needs to be performed by a state organ. A prescription argument would be especially beneficial for Suriname, which otherwise lacks objective manifestations of intent and control of the New River Triangle. Through a prescription argument, Suriname could effectively gain title to the New River Triangle simultaneously with Guyana demonstrating intent to occupy the land. The issue would center on whether Guyana objected to Suriname's encroachment.

### *E. Recognition, Acquiescence, and Estoppel*

Recognition, acquiescence, and estoppel are concepts that revolve around the common term of state consent.<sup>216</sup> They reflect the presumed will of a State, either expressly or implicitly, concerning an encroachment on the State's borders.<sup>217</sup> This section will discuss the theories of recognition, acquiescence, and estoppel in international law. It asserts that Guyana may be prevented from raising legal arguments related to Suriname's control of the Courantyne River because it *acquiesced* to Surinamese control. Conversely, it will be even more difficult for Suriname to assert a

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213. See SHAW, *supra* note 124, at 349-350.

214. [http://www.guyanaca.com/features/trail\\_diplomacy.html](http://www.guyanaca.com/features/trail_diplomacy.html) (last visited Oct. 24, 2003).

215. *Id.*

216. *Id.* Consent is important because it denotes cession of territory to the other state, reflecting the will of one State not to occupy and administer a specific area of territory. *Id.*

217. *Id.* at 350.

claim of title for the New River Triangle because Dutch Guiana recognized British Guiana control of the territory, and recognized the Kutari as the Southern extension of the Courantyne River, forming the boundary between the two states. In terms of the maritime area of overlap, Suriname has *acquiesced* to the long-standing Guyanese concessions stemming from 1958 and granted its own concessions respecting their existence. Recognition and acquiescence are inherited by *uti possedetis juris* mechanisms, and therefore, both states may be *estopped* from raising these claims in an arbitration award, based upon the conduct of their former colonial powers.<sup>218</sup>

Recognition is defined as a positive act by a state which accepts a particular situation.<sup>219</sup> This was seen poignantly in the case of *Eastern Greenland*, where Norway accepted Danish control over an area of Greenland by agreeing to treaties with third parties that recognized and relied on the Danish control.<sup>220</sup> Although it does not expressly bind a state to the boundary that they have recognized, "it is nevertheless an affirmation of the existence of a specific factual state of affairs."<sup>221</sup>

In the colonial histories of the Guyanas, Dutch Guiana made frequent positive statements labeling the Kutari as the southern extension of the Courantyne, and therefore, the border. The most notable is the Tri-point junction where the Dutch Representative, Lt. Kayser, signed the Brazilian and British junction point allowing the Kutari to be seen as the border. The debates in Parliament, where many Dutch officials and the geographical society stated that they believed the Kutari to be the border, assert that the Netherlands recognized that British Guiana controlled the area in dispute.

Acquiescence, as defined in international law, "occurs in circumstances where a protest is called for and does not happen."<sup>222</sup>

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218. [http://www.guyanaca.com/suriname/guyana\\_suriname\\_colonial.html](http://www.guyanaca.com/suriname/guyana_suriname_colonial.html) (last visited Oct. 26, 2003).

219. See BROWNIE, *supra* note, 189 at 163. See also CHARLES S. RHYNE, INTERNATIONAL LAW: THE SUBSTANCE, PROCESSES, PROCEDURES AND INSTITUTIONS FOR WORLD PEACE WITH JUSTICE 77 (1971).

220. See *Eastern Greenland*, *supra* note 123, at 47. See BROWNIE, *supra* note 189, at 164-65. Brownlie asserts that recognition, estoppel, and acquiescence have played a large role in determining boundary awards. Brownlie makes a distinction between recognition and acquiescence by asserting that "acquiescence has the same effect as recognition, but arises from conduct, the absence of protest when this might reasonably be expected." *Id.* at 164.

221. See SHAW, *supra* note 124, at 350. See also Brownlie, *supra* note 189, at 165 (defining express recognition as "recognition in the treaty of the existence of title in the *other party* to a dispute (as opposed to recognition by third states) [which] creates an effect equivalent to that of estoppel").

222. SHAW, *supra* note 124, at 350. See also BROWNIE, *supra* note 189, at 164. Brownlie asserts that recognition, estoppel, and acquiescence are not essential to gaining title over a

These are instances where the available time for asserting a protest acknowledging a State's disagreement over a circumstance has lapsed. If a lapse of time occurs, the state that did not object is tacitly understood to accept the event that transpired. This instance was seen in the *Libya v. Chad* case where the International Court of Justice noted that "[i]f a serious dispute had indeed existed regarding frontiers, eleven years after the conclusion of the 1955 Treaty, one would expect it to have been reflected in the 1966 Treaty."<sup>223</sup>

In terms of the Courantyne River, Guyana has 'acquiesced' to Surinamese control over the entire river. That is, Guyana has allowed Point No. 61 to be considered for the land boundary terminus in two draft treaties and did not protest the established Dutch control over navigation rights in the Courantyne. If Guyana was to protest the incorporation of Point No. 61 in the 1936 Mixed Commission, it could have done so before the 1958-1962 negotiations, which also used Point No. 61 as the land boundary terminus. These actions indicate that the Government of Guyana considers, either tacitly or expressly, the entire width of the Courantyne River to be in Surinamese control.<sup>224</sup> The significant lapse in time between the 1799 Agreement, granting Dutch control over the River, and its independence, could have allowed the English foreign office to raise an objection that the boundaries of British Guiana were being infringed upon. Yet, since there was no protest noted, modern day Guyana inherited the acquiescence to Surinamese control over the Courantyne River through the concepts of *uti possedetis juris*.

In terms of the maritime boundary, a court may hold that Suriname *acquiesced* to a 33<sup>rd</sup> extension to the Exclusive Economic Zone and the Continental Shelf because they did not object to the 1954 British claim to the Continental Shelf or to the concessions granted to California Oil and Shell in 1958. Subsequent drilling occurred in the same area and did not elicit a protest from Dutch Guiana. Additionally, while Suriname has awarded offshore concessions (including 1965 concessions to Shell), its concessions have more or less gone only as far as the 33<sup>rd</sup> line claimed by Guyana. Suriname has never awarded a concession in the "area of overlap."<sup>225</sup>

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disputed territory, but are of great significance to any international tribunal. Brownlie further distinguished acquiescence from estoppel by saying that recognition is a more persuasive element than acquiescence. *Id.*

223. Territorial Dispute (*Libya v. Chad*), 1994 I.C.J. 6, 35 at § 66 (Feb. 3).

224. See Hoyle, *supra* note 49 at 100-104.

225. For more information on where Guyana is drilling see [http://www.businessweek.com/2000/00\\_41/c3702238.htm](http://www.businessweek.com/2000/00_41/c3702238.htm) (last visited Oct. 26, 2003) and <http://www.cgxresources.com/>

The notion of estoppel asserts that if one party has acquiesced or recognized a particular situation, it is prevented from arguing otherwise during an arbitral panel. The leading case on estoppel is *The Temple of Preah Vihear*<sup>226</sup> between Cambodia and Thailand. In *Preah Vihear*, boundary commissioners negotiated a final demarcation between Thailand and the former colonial government of France. During the boundary negotiations, the Thai prince visited a temple that was in disputed territory and saw a French flag clearly flying over the temple. The prince did not object at that time, and in future negotiations was prevented from raising an argument based upon his conduct. In sum, any tribunal which might hear the Suriname-Guyana case could prevent Guyana from raising claims to the Courantyne due to an acquiescence principle; it also could prevent Suriname from claiming the New River Triangle on a recognition concept, or the Continental Shelf on acquiescence.

*F. Relevant Law to Territorial Sea Delineation, International Rivers, Exclusive Economic Zone, and Submarine Continental Shelf*

The delineation of an outlying maritime zone is usually dependent upon choosing a land boundary terminus and extending the land boundary terminus in a mutually agreed direction.<sup>227</sup> The Suriname-Guyana dispute over the maritime zone seems to be complicated by the fact that the two states are divided by a

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press/other/020204\_toronto\_business\_journal.htm (last visited Oct. 26, 2003). For information as to where Suriname is drilling see <http://www.olade.org.ec/idiomas/ingles/EnergiaEnLosPaises/sr/carsec-contenido.htm> (last visited Oct. 26, 2003).

226. *The Temple of Preah Vihear (Cambodia v. Thailand)*, 1962 I.C.J. 6 (June 15) (Spender, J., dissenting) (asserting there must be a higher degree of acquiescence and recognition for a party to be estopped from raising protests). See also D. H. Johnson, *The Case Concerning the Temple of Preah Vihear*, 11 INT'L & COMP. L.Q. 1183 (1962); *The Temple of Preah Vihear* opinion on recognition in international law was later confirmed by Queen Elizabeth II in her ruling between Argentina and Chile. See *Award of Her Majesty Queen Elizabeth II for the Arbitration of a Controversy between the Argentine Republic and the Republic of Chile*. (1966). *Argentina-Chile Frontier*, R.I.A.A. Vol. 16 (1969) 109-182.

227. See U.N. CONVENTION ON THE LAW OF THE SEA part II, art. 15, available at <http://www.un.org/Depts/los> [hereinafter UNCLOS]. Suriname and Guyana, both parties to the Law of the Sea Convention, have committed themselves to a system of dispute resolution dictated by treaty. Article 188 expressly states that parties must submit "to a special Chamber of the Law of the Sea Tribunal or an ad hoc Chamber of Sea-Bed Disputes or to binding arbitration." See *id.* part XI, § 5, art. 188. BARRY E. CARTER AND PHILLIP R. TRIMBLE, INTERNATIONAL LAW 989 (2d ed. 1985). The Territorial Sea is the twelve mile extension immediately adjacent to the land territory of a state. See, A.O. ADEDE, THE SYSTEM FOR SETTLEMENT OF DISPUTES UNDER THE CONVENTION ON THE LAW OF THE SEA 270 (1987) (asserting that jurisdiction under the Law of the Sea extends to the seabed and continental shelf areas.

boundary river with the boundary in dispute. However, the impact of the precise land boundary terminus is only relevant to the immediate territorial sea, as the outlying Exclusive Economic Zone and continental shelf do not have to be demarcated using a straight line extension from a land boundary terminus.<sup>228</sup>

Normally the land boundary terminus would have been placed in the midpoint (*thalweg*) of the Courantyne River if no other special arrangements existed. The 1799 Agreement, however, gave complete sovereignty of the Courantyne to Suriname;<sup>229</sup> therefore, in this unusual and atypical case, the land boundary terminus is located on the Guyana side (west bank) of the Courantyne River.<sup>230</sup> This agreement was inherited through *uti possidetis* and state succession mechanisms and applies today as the applicable boundary between Suriname and Guyana.

Determining a boundary at a river bank instead of a river *thalweg* is not without international precedent.<sup>231</sup> The *Shatt al-Arab* is an example where a river bank is used to determine the border between Iraq and Iran. In the *Shatt al-Arab*, the Ottoman Empire, and its successor state, Iraq, exercised jurisdiction over the entire river despite Iranian protests.<sup>232</sup> A river bank boundary is therefore a special circumstance, which although valid, is uncommon. Article 15 of the Law of the Sea allows for unconventional demarcation in maritime areas, stating that:

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant.... The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.<sup>233</sup>

The exception of "historic title" applies to the 1799 Agreement which has existed as the boundary for over two hundred years. The issue therefore becomes how the 1799 Agreement affects the

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228. See Hoyle, *supra* note 49 at 104.

229. [http://www.guyanaca.com/suriname/guyana\\_suriname\\_colonial.html](http://www.guyanaca.com/suriname/guyana_suriname_colonial.html) (last visited Oct. 26, 2003).

230. <http://nationmaster.com/country/ns/Transportation> (last visited Oct. 26, 2003).

231. See Jones, *supra* note 81, at 118.

232. *Id.* at 119.

233. UNCLOS at part II, art 15.



immediate twelve-mile territorial sea.<sup>234</sup> If Point No. 61 is to be assumed as the land boundary terminus, then any offshore delineation towards the original 10<sup>o</sup> can be asserted by Suriname relying on the precedent in 1958-1962 and 1936 Mixed Commission. Because Guyana has *acquiesced* to this terminus in practice, it appears as though Guyana has consented to Point No. 61 as the land boundary terminus.<sup>235</sup> Implied or express consent is of great relevance to boundary delineation. As seen in *British Guiana vs. Venezuela Boundary Arbitration*, it is possible to alter boundaries where circumstances indicate consent.<sup>236</sup>

In dealing with a continental shelf or outlying marine areas, Article 6 of the Continental Shelf Convention is the applicable law. This convention is concerned with cases where the same continental shelf extends between two adjacent states.<sup>237</sup> The convention asserts that the boundary between two adjacent states shall be determined by agreement, but in the absence of any agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by a median line based upon the principle of equidistance.<sup>238</sup> Therefore, a respected international tribunal will look first to ascertain whether an equidistance line is possible, taking into consideration the relationship of the maritime zone to the land mass, and then see if any equitable reasons

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234. Coastal states are entitled to claim, absent any bilateral or multilateral treaties obliging otherwise, a twelve-mile territorial sea that is the exclusive jurisdiction of the coastal state. The outlying zone of the Exclusive Economic Zone and the Continental Shelf are not the territorial extension of the sovereign coastal state, but may be used solely by the state for economic purposes such as fishing or extrapolation of resources. See BROWNIE, *supra* note 189, at 228.

235. Acquiescence, as defined in international law, occurs "in instances where a protest is called for and does not happen." See Shaw, *supra* note 124, at 340-344. Brownlie asserts that recognition, estoppel, and acquiescence are not essential to gaining title over a disputed territory, but are of great significance to any international tribunal. Brownlie further distinguished acquiescence from estoppel by saying that recognition is a more persuasive element than acquiescence. See Brownlie, *supra* note 189, at 228. British Guiana and the predecessor state of Guyana did not specifically protest the incorporation of the 1799 Agreement at the independence of Suriname from the Netherlands, and its presence was acknowledged in the 1936 Mixed Boundary Commission. See Hoyle, *supra* note 49, at 104.

236. Express consent is seen in *British Guiana v. Venezuela Boundary Arbitration* (1899-1900) 92 B.F.S.P. 160. This case is the most relevant to the Guyana - Surinam instance. The notion of implied consent and the court's reliance on this principle is also seen in *Chamizal Arbitration* (United States v. Mexico), 5 Am. J. Int'l. L. 782 (1911); *Frontier Land* (Belgium v. Netherlands), 1959 I.C.J. 209, 227 (Jun 20); and more recently in *Land, Island and Maritime Frontier Dispute* (El Salvador v. Honduras), 1992 I.C.J. 351, 401 (Sept. 11).

237. For definition of "adjacent," see *North Sea Continental Shelf*, 1969 I.C.J. 3, at 27-28 (Feb. 20). The *North Sea Continental Shelf Case* was between the Federal Republic of Germany and Denmark, and the Federal Republic of Germany and the Netherlands. See also W. Michael Reisman, *International Decision: Eritrea-Yemen Arbitration (Phase II: Maritime Delineation)*, 93 AM. J. INT'L L. 731, 734 (1999).

238. Colson, *supra* note 86.

prohibit its use.<sup>239</sup> As Judge Guillaume states: "Such a result may be achieved by first identifying the equidistance line, then correcting that line to take into account special circumstances or relevant factors, which are both essentially geographical in nature."<sup>240</sup>

This principle has been applied in many international boundary delineations.<sup>241</sup> However, in the 1969 *North Sea Continental Shelfcases*,<sup>242</sup> the International Court of Justice decided that Article 6 of the Continental Shelf Convention was not declaratory of existing rules of law and consequently the equidistance median was not binding on the parties.<sup>243</sup> Therefore, since delineation based upon equidistance was not an applicable measure, it was necessary to decide the *North Sea Continental Shelf* case based upon equitable principles. Economic concessions and usage of the continental shelf were examples of equitable principles that create a dividing line between adjacent states on the Continental Shelf.<sup>244</sup>

Equity was seen in *Tunisia v. Libya*, where the International Court of Justice treated economic concessions as creating a tacit boundary line.<sup>245</sup> The Court stated, the fact that a "line of adjoining concessions, which was tacitly respected for a number of years, and which approximately corresponds...to the line perpendicular to the coast at the frontier point which had in the past been observed as a

239. *Id.* at 91.

240. Gilbert Guillaume, Speech to the Sixth Committee of the General Assembly of the United Nations (Oct. 31, 2001), available at <http://www.icj-cij.org/icjwww/ipresscom/iprstats.htm> (last visited Oct. 26, 2003).

241. See, e.g., *Italy v. Yugoslavia* (1968), 7 I.L.M. 547 (1968); *USSR-Finland*, 6 I.L.M. 727 (1967).

242. *North Sea Continental Shelf*, 1969 I.C.J. 3, at § 34 (Feb. 20).

243. *Id.* The International Court of Justice has confirmed this holding in later cases. The ability to decide outlying maritime areas upon principles of equity can be seen in *Delimitation of the Maritime Boundary in the Gulf of Maine (Denmark v. Norway)*, 1993 I.C.J. 38 (June 14); *Gulf of Maine (Canada v. United States)*, 1984 I.C.J. 246 (Oct. 12) [hereinafter *Gulf of Maine*]; *Continental Shelf (Libyan Arab Jamhariya v. Malta)*, 1984 I.C.J. 1 (March 4). See also CARTER AND TRIMBLE, *supra* note 227, at 1041.

244. The limits set by the Exclusive Economic Zone are two hundred miles. In these areas, the sovereign states enjoy exclusive economic rights to the exploitation of natural resources, but may also allow passage through the zone by other states. This should be distinguished from a "territorial sea" which is an extension of a state's territory. See BARBARA KWIATKOWSKA, *THE 200 MILE EXCLUSIVE ECONOMIC ZONE IN THE NEW LAW OF THE SEA* (1989). Most of the Caribbean countries have asserted claims ranging from three to twelve miles for their territorial sea depending upon the proximity of neighboring and opposite states which affect a clear twelve mile territorial sea claim. This was seen in the Treaty of Santo Domingo, where it states, "Every State has ... the right to fix the breadth of its territorial sea up to the limit of twelve nautical miles." RENE-JEAN DUPUY, *THE LAW OF THE SEA: CURRENT PROBLEMS* 195 (1974) (quoting U.N. Doc A/AC.138/80, June 7, 1972).

245. See *Continental Shelf (Tunis. v. Libya)*, 1982 I.C.J. 18, 37-38 at § 70 (Feb. 24).

*de facto* maritime limit."<sup>246</sup> The Court also noted "the appearance on the map of a *de facto* line dividing concession areas which were the subject of active claims, in the sense that exploration activities were authorized by one Party, without interference...by the other."<sup>247</sup>

The importance of *de facto* lines in *Tunisi v. Libya* may be contrasted with the Gulf of Maine.<sup>248</sup> In the *Gulf of Maine*, concessions that were "too brief to have produced a legal effect of this kind, even supposing that the facts are as claimed"<sup>249</sup> did not produce maritime claims. In the opinion of the International Court of Justice, the occurrence of overlapping permits or coincidental offshore grants are not sufficient in ignoring the median line determined by concessions as the preferred method of delineation.<sup>250</sup>

The existence of a *de facto* maritime boundary line is of relevance to the Suriname-Guyana dispute. Since at least 1958, Guyana gave concessions outside of the territorial sea claimed by Suriname on a 33<sup>rd</sup> maritime extension. Suriname never objected to these concessions nor did they object to the movement enjoyed by Guyana fishermen and support personnel for the oil expeditions. This *de facto* line, if it is considered one, would be deemed relevant as seen in *Tunisia v. Libya*, where the concessions were given in good faith and not in an attempt to create a *de facto* line by its own independent volition.

The borders of the territorial waters were not formalized during colonial rule. If any state had formalized a territorial sea agreement, then the doctrine of *uti possidetis* would have passed these claims to the successor state at independence from colonialism. The British 1954 claim to the continental shelf,<sup>251</sup> and consequential economic concessions add to maritime delineation of the continental shelf and Exclusive Economic Zone that will most probably be based upon equity. While Guyana maintained these outlying claims, Suriname asserted claims for the territorial sea based upon having sovereignty over the Courantyne River and a 10<sup>th</sup> extension from Point No. 61.<sup>252</sup> Suriname did not grant concessions in the Exclusive Economic Zone or Continental Shelf claimed by

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246. *Id.* at § 96.

247. *Id.* at § 117.

248. *Gulf of Maine (United States v. Canada)*, 1984 I.C.J. 246, 311 § 151 (Oct. 12).

249. *Id.* at 311 § 151.

250. *See id.* at §151-152.

251. *Alteration of Boundaries. Order in Council of 1954. Statutory Instruments, 1954, No. 1372, Colonies, Protectorates, and Trust Territories.* See U.N. Doc ST/LEG/SER.B/6 at 48. Cited in Hjertonsson, *supra* note 87, at 165.

252. *Id.* at 64.

Guyana.<sup>253</sup> Likewise, Guyana did not police or maintain the Courantyne River and granted no economic concessions in Suriname's maritime claim to the 10<sup>o</sup> prolongation of the territorial sea that was envisaged by the 1936 Mixed Commission.<sup>254</sup>

## V. ANALYSIS OF SURINAME AND GUYANA CLAIMS

Both Suriname and Guyana have committed themselves to a peaceful resolution of their current territorial disputes through the Law of the Sea and the Hoyte/Shankar Memorandum of Understanding. The 1989 Memorandum of Understanding calls for a joint exploration of the continental shelf pending a bi-lateral demarcation.<sup>255</sup> However, the heightened state of agitation between the parties suggests that an arbitration award could be a possibility if a bilateral situation fails. Given the recent dearth of meaningful diplomatic activity, this appears increasingly likely. This section will evaluate the separate Guyana and Suriname claims to determine which legal theory of boundary delineation is the most persuasive and applicable.

### A. *Sovereignty Over the Courantyne River*

Suriname will likely maintain title over the entire Courantyne River. Any international arbitration award would immediately note Suriname's claim over the entire Courantyne River based upon historical incorporation of the 1799 Agreement and the 1936 Mixed Boundary Commission. Although international law usually views bordering waterways as divided by the middle point of the river as determined by its deepest source (*thalweg*), Suriname has maintained a clear and consistent claim to the entire river. Suriname has provided security for the area, developed the area, and fully integrated the islands into the country of Suriname. Although rare, river bank delineation, instead of a *thalweg* delineation, has historical precedent. Likewise, Guyana relies on Suriname's control and has not undertaken any pro-active objections to challenge these notions. The 1799 Agreement has established the boundary between the two countries for over two hundred years and gained significant international recognition with the Treaty of Paris and Treaty of Amiens. Because Guyana has

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253. CGX Resources working document "*Historic Operators.*" Oct. 17, 2003

254. WILLIAM E. MASTERTON, JURISDICTION IN MARGINAL SEAS 387 (Kennikat Press 1929). As Masterton states, the Netherlands government, stated that it considers "the regulation of the question of territorial waters...impossible or difficult, because of the divergent views...of the various States."

255. Hoyle, *supra* note 49, at 100.

*acquiesced* to the 1799 Agreement, they are estopped from raising such protests.

Guyana could assert that the Courantyne River was never formalized before the countries emerged from colonialism because Suriname offered a *thalweg* delineation as late as 1962.<sup>256</sup> This overture may have some intuitive appeal, but when seen as politically linked to a possible territorial recognition of a Surinamese claim to the New River Triangle, it would likely be viewed as political, and not legal. Guyana would, therefore, have more success with incorporating arguments that encompass the overall concept of remedying border conflicts in the former colonial context of the Guianas.

One such argument that Guyana could assert to void Suriname title over the entire Courantyne River was that the early colonial protectorates that concluded the 1799 Agreement did not have proper legal status to conclude such a treaty.<sup>257</sup> The early colonial protectorates of Berbice and Essequibo, therefore, could not have concluded such a treaty because they were not authorized to do so. Their protection and existence depended upon the ruling power of Great Britain at the time, which was silent on the issue.<sup>258</sup> Although this is a relevant argument, the later colonial entity of British Guiana relied on the 1799 Agreement for over two hundred years. This acquiescence will estop Guyana from raising the argument, as seen in *The Temple of Preah Vihear*, while giving more credibility to Suriname claiming the 1799 Agreement as a "historic title."<sup>259</sup>

Modern jurisprudence towards historic title is clear;<sup>260</sup> historic title can confirm a nation's sovereignty over an area through continuity of cession and title. The 1936 Mixed Commission Treaty, which was never signed before World War II, also asserts that Suriname has consistently established intent and international reliance on its claim for the entire Courantyne.<sup>261</sup> Consequently, the modern land boundary terminus extends from Point No. 61, which is located on the high water mark on the Guyana side of the

256. See Hoyle, *supra* note 49, at 100-104.

257. See Ricciardi, *supra* note 118, at 412 n. 665. Ricciardi asserts that a colonial protectorate could be "just a disguised mode of occupation that permits, by simple diplomatic notification, [a state] to acquire territories and absorb by a progressive attraction the protected populations".

258. See *Guyana – Suriname Boundary*, *supra* note 3, at § 19.

259. *The Temple of Preah Vihear (Cambodia v. Thailand)*, 1962 I.C.J. 6 (June 15) (Spender, J., dissenting).

260. See *Hanish Islands Award Phase I: Territorial Sovereignty and Scope of Dispute* Chapter X.

261. See Hoyle *supra* note 49, at 100-104.

Courantyne River. This point confirms the Courantyne River to be Surinamese, but obfuscates a clear and concise trajectory for a maritime delineation.

Ironically, Suriname and Guyana adopt different elements from the same 1936 Mixed Commission. Suriname points to the Mixed Commission in supporting its claim of complete sovereignties over the Courantyne River and the 10° territorial sea which Guyana rejects. Guyana, likewise, finds support for its claim to the New River Triangle from the Commission which Suriname rejects. In determining sovereignty over the Courantyne River, an arbitration body would likely award Suriname clear and uncontested title.

### *B. Maritime Extension of the Land Boundary Terminus*

Guyana's plausible claim to the outlying Exclusive Economic Zone and Continental Shelf are strong due to parceling concessions and maintaining and policing the area. However, this claim does not include the immediate territorial sea. The 1936 Mixed Commission offered the 10° extension to delineate the territorial sea, and both states agreed to it in practice. Extending only three miles from the coast in 1936, modern territorial seas are now a proscribed twelve nautical miles. In delineating the Guyana – Suriname issue, it is probable that due to the precedent and acquiescence caused by the 1936 Mixed Commission, any tribunal will likely delineate the territorial sea and outlying maritime zones based upon different precedents. Therefore, it is likely that a Surinamese claim of 10° will be applied to the territorial sea and the outlying areas will be delineated based upon equity.

Suriname's claim to the outlying areas is difficult to support because international tribunals have consistently not awarded outlying maritime areas that were not conceived of during the time of treaty. In 1936, neither the Exclusive Economic Zone nor the Continental Shelf were envisioned. In the 1952 case of *In the Matter of an Arbitration between Petroleum Development (Trucial Coast) Ltd.*, the court was asked whether the angle of the territorial sea should be applied to the outlying maritime areas which came into existence after an initial 1939 agreement was made to delineate the territorial sea. The court held that the "continental shelf had no accepted meaning either at the time of the drafting of the contract in 1939 nor at the time of the rendering of the award."<sup>262</sup> Based upon this holding, outlying maritime areas must be decided based upon contemporary applicable international precedent or through

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262. *In the Matter of an Arbitration between Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi*, ICLQ, Vol. 1 (1952) 247-261.

treaty between the bordering states. Therefore, Surinam's claim that the 10<sup>o</sup> territorial sea prolongation should extend to the outlying areas will be difficult to substantiate. Guyana has asserted that a 10<sup>o</sup> territorial sea is an unconscionable solution to the current state of affairs between Guyana and Suriname. If a 10<sup>o</sup> claim is awarded to the territorial sea and the Exclusive Economic Zone, it would greatly interfere with the ability of Guyana to enjoy its territorial sea and, given the proximity of Trinidad and Tobago and Venezuela, would prevent any wide access to the territorial sea as compared to its Caribbean neighbors. Moreover, given the long-standing concessions that Guyana has granted since 1958, a 10<sup>o</sup> Suriname extension would not be a just solution. Instead, a maritime border based upon equity will most likely be utilized, taking into consideration the concessions granted during colonial rule. The court in *Tunisia v. Libya* incorporated a boundary line determined by equity, citing long-standing offshore petroleum concessions and continuous reliance by both parties.<sup>263</sup>

In terms of the Guyana-Suriname instance, it appears as though Guyana will be estopped from claiming a 33<sup>o</sup> territorial sea because of the acceptance of the 1936 boundary commission and the country's acquiescence to Dutch control over the mouth of the Courantyne. Any presence in the territorial sea would be deemed too brief to create a median line. This presence will therefore be analogous to the *Gulf of Maine* instance where concessions were too brief to substantiate a claim based upon equity.

In terms of the Exclusive Economic Zone and continental shelf, the concessions awarded in 1958 by British Guiana strongly suggest constructive occupation of the outlying maritime areas. Throughout this time, British Guiana granted numerous concessions with an eastern boundary of 33<sup>o</sup>. A well was drilled by Shell in 1974 about 10 kilometers west of the attempted CGX well under a Guyanese license and is also within the Exclusive Economic Zone claimed by Suriname.<sup>264</sup> Dutch Guiana did not object to these concessions. These earlier wells were not in the territorial sea of Suriname because they were granted on the Continental Shelf before Suriname believed it was entitled to an Exclusive Economic Zone. Therefore, their presence is analogous to the *Tunis/Libya* case, where the International Court of Justice concluded that long-standing concessions could create a maritime claim based upon equity. Moreover, Suriname did not grant any concessions in the

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263. Continental Shelf (*Tunisia v. Libyan Arab Jamahiriya*), 1982 I.C.J. 18, 23 (Feb. 24) (citing the Special Agreement between Tunisia and Libya, Art. 1).

264. See *Historic Operators*, *supra* note 202.

same area, but did grant concessions adjacent to the boundary asserted by Suriname.

The trajectory from Point No. 61 will, therefore, not be a straight line. The territorial sea, Exclusive Economic Zones and continental shelf areas will most likely be decided upon separate principles. The territorial sea immediately bordering the two countries may be demarcated by a 10° extension (as seen in the 1936 Mixed Commission). Arguments could be made that this territorial sea only extends three miles offshore, as was the original intent of the 1936 Mixed Commission. This will likely not be entertained by an international tribunal, due to the Law of the Sea, which entitles every State to a twelve mile extension unless States opposite each other force otherwise. Since Guyana and Suriname are adjacent to one another, the 10° extension will likely be seen as extending to the twelve mile limit. This 10° was inherited by the new republics under the principle of *uti possidetis juris*. In terms of the Exclusive Economic Zone and continental shelf, a delineation based upon equity will be used which would take into account the 1958 concessions granted by Guyana, thus inherited by the successor state under *uti possidetis de facto* mechanisms.

### C. Title to the New River Triangle – Summarized

Regarding the New River Triangle, any international tribunal would likely find Guyana's intent (*animus occupandi*) to the New River Triangle as consistent. The record is clear that Guyana reiterated its claim for the area during the colonial, as well as, the modern republic eras. In terms of actual occupation (the second element defined as *corpus*), the available information strongly asserts Guyana has maintained a high degree of actual control. It has maintained military bases that have been used to expel Surinamese forces, and have included the area in maps, tax rolls, and civil governance.

British Guiana was able to colonize the area of the New River Triangle because that land was *terra nullius*.<sup>265</sup> The Arawak and Carib tribes that inhabited the area did not satisfy the elements of contemporary colonial governments to award them with sovereign rights over the area. Therefore, the area was *terra nullius* and able to be occupied by showing the twin objective elements of *animus occupandi* and *corpus*.

Because a successor state inherits the obligations, commitments, and rights of the previous government, the intent and

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265. Literally, "the land of no one," this term refers to territory that does not belong to a particular country. BLACK'S LAW DICTIONARY 1483 (7th ed. 1999).



actual control of occupying a land that is *terra nullius* would therefore pass to the Republic of Guyana at independence from Great Britain under *uti possidetis juris*. This concept states that, upon independence, the republic inherits from its colonial predecessor lands that "are defined according to legal rights of possession based upon the legal documents of the former colonial power at the time of independence."<sup>266</sup> Inheriting unclear borders would not preclude the inheriting of the original *animus occupandi* and *corpus* displayed by British Guiana in the uninhabited areas.

Suriname would be able to counter a claim of Guyanese *animus occupandi* and *corpus* by asserting Guyana occupied the territory during the colonial period but later abandoned the area. What exactly constitutes abandonment is not as certain as other elements of international practice. However, the intermittent presence of Guyana forces during the colonial experience does allow Suriname to make certain, although likely not tenable, claims. The claims of abandonment have not received much judicial review and will probably fail when weighed against the inherited *animus occupandi* and *corpus* that were inherited through the doctrine of *uti possidetis juris* and have been repeatedly confirmed within the South American territorial and maritime context.

Suriname would also be able to assert a claim of prescription in the New River Triangle. Under prescription, Suriname would have adversely possessed the entire area in an open and conspicuous manner that did not warrant an objection by Guyana. Although this may be an applicable argument for certain areas of the border disputes, such as the sovereignty issue over the Courantyne River and the reliance on Point No. 61, it does not by itself warrant a claim for the entire New River Triangle. Guyana did object and has forcibly ejected Suriname based contingents from the area. Although "*reasonable time*" does not explicitly state when Guyana must have objected to Surinamese incursions, Guyana did make a timely objection every time it was aware of an illegal entry into what it viewed as its territory. Therefore, Suriname is precluded from acquiring title to portions of the New River Triangle claim based solely on prescription.

Prescription, however, has not been subject to judicial review since the early twentieth century, and it is unclear whether any international tribunal would uphold its validity. Although it has been used in arbitral awards before to reflect the *equity of the current situation*, prescription cannot be relied upon to counter clear *animus occupandi* and *corpus* claims to title. Moreover, the

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266. See Radam, *supra* note 187, at 59.

frequency of Guyanese objections makes it even less likely that any arbiter will seriously entertain a claim to the New River Triangle based upon prescription.

Suriname could lay possible claim to the New River Triangle on a hinterland theory. A hinterland claim would attach the New River Triangle onto the area that was Dutch Guiana based upon a contiguous geographical claim, natural boundary theory, or the security of the state. The contiguous geography claim seems applicable to both the English as well as Dutch colonial protectorates, because the forested areas are part of the same overall Northern Amazon watershed.<sup>267</sup> The availability of easily identifiable geographical boundaries and security arrangements also seem to be equally applicable to the English and Dutch colonial protectorates. That is, the area that is in dispute is not geographically linked to either Guyana or Suriname. Likewise, the area that is the New River Triangle is not necessary for the security of the either state due to the limited amount of inhabitants. Therefore, it would be difficult, although possible, to substantiate a claim to the New River Triangle for either country based upon a hinterland theory.

Hinterland theories will most likely fail to persuade any tribunal because they have been countered by claims based upon clear Guyanese *animus occupandi* and *corpus* for a territory that was clearly *terra nullius*. As seen in the Isle of Palmas award, hinterland theories of the sort that Judge Huber asserted in the *Isle of Palmas* are easily defeated when countered with intent and actual control of a territory; and even their legal foundation is suspect.

Finally, the Dutch acquiescence of the Schomburgk expedition and the debates in the Netherlands cut against any clear intent and control over the New River Triangle, and, if anything, show a propensity to deal the New River Triangle to Guyana in return for the 10° offshore extension in the territorial sea. The case is strong that Suriname never formally intended to control the area and saw any occupation of the New River Triangle as political. Moreover, Suriname may be estopped from raising a claim for the New River title because they have *recognized*, as defined by international law, the Kutari as the Southern extension of the Courantyne and thereby formed the boundary. The instance of the tri-point junction, contradictory statements regarding the New River, debates in the Dutch Geographical society, and even parliamentary statements

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267. See GUYANA - SURINAME BOUNDARY, *Supra* note 3 at 5-10.

undercut an argument for intent to control a territory where no actual showing of occupation was ever noted.

## VI. CONCLUSION

It would be most beneficial for the Suriname-Guyana border disputes to be adjudged through an international arbitration at an established forum. The International Court of Justice would be able to provide a comprehensive demarcation based upon accepted jurisprudence. Regional institutions, such as CARICOM, do not have enough experience or precedent to award a respected demarcation. Both Guyana and Suriname are signatories of the Law of the Sea Convention, which provides that a specialized arbitration tribunal shall be constituted and make a binding ruling once one party commences proceedings. This forum would be possible, but has not born out in practice.

Any arbitral award will likely give title of the New River Triangle to Guyana, while noting the scant Surinamised constructive occupation within the area as compared to the extent it is displayed continuously by Guyana. The work of the 1936 Mixed Boundary Commission will be re-affirmed. The Surinamese claims for the New River Triangle will be viewed as political in nature with the intent never being to occupy the territory, but instead to deal it away for recognition over the entire Courantyne and a beneficial territorial sea. Geographical and topographical arguments aside, the Kutari River will likely be the Southern extension of the Courantyne.

The New River Triangle was *terra nullius* when the British colonial government occupied the area. The Maroon Indians did not qualify as a coherent society according to European standards and, consequently, possessed no political identity. Therefore, the area was able to be occupied by British Guiana showing *animus occupandi* and *corpus*. These notions would pass to the Republic of Guyana at independence through the principle of *uti possidetis juris*. Assuming no abandonment or prescription principles are recognized by the arbitration body, Guyana will be awarded title the New River Triangle.

In terms of the Courantyne River, the precedents set forth by the 1936 and 1958-1962 Boundary Commissions will likely reward sovereignty to Suriname. Guyana acquiesced to Suriname's historic title to the River. This control of the river was inherited by Suriname at independence through *uti possidetis de facto*. The resulting territorial sea will be affected by Suriname's control of the entire Courantyne and its use of the previous land boundary terminus of Point No. 61. The degree of extension into the

territorial sea may indeed be the Suriname claim of 10° for a distance of twelve miles, given the reliance on the previous work done by the 1936 Mixed Boundary Commission. However, given international law's reluctance to reward extensions into maritime areas not envisioned at the time of ratification, the existing maritime separation established by the 1958 Guyana concessions will likely alter the projection of the maritime boundary more in line with 33° extension for the continental shelf and Exclusive Economic Zone.

The inter-linkage between the land and maritime disputes is unique to this region of South America. The colonial protectorates that were entrenched in this area left a heritage of unresolved frontiers which were not a pressing priority to settle. The new republics must now face that challenge. However, just as the colonial governments before them, Suriname and Guyana are competing for resources, for power, and for regional importance. It is difficult to define the exact motives of States in this international competition. With so much potential revenue and regional importance at stake in this boundary dispute, both sides are performing boundary negotiations with rigid stances and skeptical attitudes. It is these uncompromising positions and these clearly defined state interests that have made the boundary river, maritime and territorial boundary so difficult to resolve. Likewise, modern international law has created mechanisms and institutions for settling boundary disputes. These institutions rely on international law that depends on principle and precedent. These principles and precedents are such that the outcome of these disputes seems quite probable — even though the bilateral discussions may be inconclusive.