

COMMENTARY

The *Guyana/Suriname* Arbitration: A Commentary

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1. INTRODUCTION

Guyana and Suriname are situated on the northeast coast of the South American continent, and the coastlines of these States are adjacent. Guyana gained independence from the United Kingdom in 1966, while Suriname achieved independence from the Netherlands in 1975. Both Guyana and Suriname are parties to the 1982 UN Convention on the Law of the Sea (hereafter the Convention).

By its Notification dated 24 February 2004, Guyana instituted arbitration proceedings concerning the delimitation of its maritime boundary with Suriname, and concerning alleged breaches of international law by Suriname in disputed maritime territory pursuant to Articles 286 and 287 of the Convention and in accordance with Annex VII of the Convention. The Arbitral Tribunal (hereafter the Tribunal) was composed of five members: Dolliver M. Nelson (President), Kamal Hossain, Thomas M. Franck, Ivan Shearer and Hans Smit. The Permanent Court of Arbitration served as Registry for the proceedings.

On 20 May 2005, Suriname filed Preliminary Objections on jurisdiction and admissibility. In this respect, the Tribunal ruled that the objections by Suriname were not of an exclusively preliminary character; and that the Tribunal should rule on the Preliminary Objections to jurisdiction and admissibility in its final award.¹ In its award, the Tribunal held that it had jurisdiction to delimit the maritime boundary in dispute between the Parties.² Thus the Tribunal addressed the delimitation of the territorial seas and the single maritime boundary dividing the continental shelves and exclusive economic zones (EEZs) of the Parties.

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¹ Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea in the Matter of an Arbitration between Guyana and Suriname (hereafter 2007 Award), p. 8, para. 48.

² *Ibid.*, p. 85, para. 280.

2. DELIMITATION OF THE TERRITORIAL SEAS

Suriname argued that the delimitation of the territorial sea should proceed along an azimuth of N10°E from the 1936 Point/Point 61. This claim was based mainly on the existence of *de facto* agreement between the Netherlands and the United Kingdom, acquiescence or estoppel and consideration of navigation.³ However, Guyana contended that the delimitation line should follow an ‘historical equidistance line’ along an azimuth of N34°E from Point 61 for a distance of 12 nautical miles (nm) to a point at the outer limit of the territorial sea.⁴ In relation to this, Guyana argued that there was no justification admissible under Article 15 of the Convention for departing from the provisional equidistance line in Suriname’s favour.⁵

With respect to the law applicable to the delimitation of the territorial seas, the Tribunal ruled that Article 15 of the Convention places primacy on the median line as the delimitation line between the territorial seas between opposite or adjacent States.⁶ The Tribunal, then, examined special circumstances which might require the adjustment of the equidistance line. In this respect, the Tribunal ruled that special circumstances of navigation may justify deviation from the median (equidistance) line.

In the delimitation process, the Tribunal held that the 10° Line claimed by Suriname was established between the Parties from the starting point to the 3 nm limit.⁷ Thus the next issue was whether the 10° Line should be automatically extended from the previously accepted limit of 3 nm to the current limit of 12 nm. According to the Tribunal, an automatic extension of the line would “rapidly cease to have relevance to the special circumstances of navigation and control that brought it about”.⁸ It was also necessary to find a principled method by which the 10° Line could be connected to the single maritime boundary line to delimit the continental shelves and EEZ of the Parties. Taking these elements into account, the Tribunal concluded that the delimitation line of the territorial sea must be drawn from the point at which the N10°E line intersects the 3 nm limit to the point at which the equidistance line drawn by the Tribunal in Chapter VI of this Award intersects the 12 nm limit.⁹

³ *Ibid.*, p. 87, paras. 281-282.

⁴ *Ibid.*, p. 90, para. 288.

⁵ *Ibid.*, p. 92, para. 294.

⁶ *Ibid.*, p. 93, para. 296. It appears that this view is supported by the *Qatar/Bahrain* judgment of 2001, p. 94, para. 176. Available at <http://www.icj-cij.org/docket/files/87/7027.pdf>.

⁷ 2007 Award, p. 97, para. 307.

⁸ *Ibid.*, p. 100, para. 314.

⁹ *Ibid.*, p. 103, para. 325. The verbal description of this line is as follows: ‘The delimitation line commences at Point 1, being the intersection of the low water line of the west bank of the Corentyne River and the geodetic line of N10°E which passes through Marker “B” established in 1936. Marker “B” has a WGS-84 position of 5°59’46.21”N, 57°08’50.48”W.’ *Ibid.*, p. 104, para. 327.

3. DELIMITATION OF THE CONTINENTAL SHELF AND EEZS

The delimitation of the continental shelf and the EEZ in the present case were governed by Articles 74 and 83 of the Convention. After highlighting the importance of the existing case law in the field of maritime delimitations, the Tribunal ruled that:

In the course of the last two decades international courts and tribunals dealing with disputes concerning the delimitation of the continental shelf and the exclusive economic zone have come to embrace a clear role for equidistance.¹⁰

The Tribunal further stated that in addition to maritime delimitation between opposite coasts, the presumption in favour of equidistance applied in maritime delimitations between States with adjacent coasts.¹¹ Thus the Tribunal held that:

The case law of the International Court of Justice and arbitral jurisprudence as well as State practice are at one in holding that the delimitation process should, in appropriate cases, begin by positing a provisional equidistance line which may be adjusted in the light of relevant circumstances in order to achieve an equitable solution. The Tribunal will follow this method in the present case.¹²

In so stating, the Tribunal took the “corrective-equity” approach. According to this approach, a provisional equidistance line is drawn at the first stage of delimitation, and, if necessary, adjusted by taking relevant circumstances into account.

In order to draw a provisional equidistance line, there is a need to identify relevant coasts. The Tribunal ruled that the relevant coast of Guyana extends from Devonshire Castle Flats to a point just seaward of Marker ‘B’, and that the relevant coast for Suriname extends from Bluff Point, the point on the east bank of the Corentyne River used in 1936 as the mouth of the river, to a point on Vissers Bank.¹³ The next issue was whether there were relevant circumstances which might justify the departure from the provisional equidistance line. In this respect, the Tribunal held that the relevant coastlines did not present any marked concavity or convexity; and that the relevant coastlines did not represent a circumstance that would justify any adjustment of the provisional equidistance line.¹⁴ The Tribunal also ruled that the oil practice of the Parties could not be taken into account in this case.¹⁵ Further to this, after applying the proportionality test, the Tribunal ruled that there were no distortions caused by coastal geography.¹⁶ It follows that there were no relevant circumstances which would render the equidistance line

¹⁰ *Ibid.*, p. 108, para. 335.

¹¹ *Ibid.*, p. 109, para. 338.

¹² *Ibid.*, p. 110, para. 342.

¹³ *Ibid.*, p. 113, para. 352.

¹⁴ *Ibid.*, pp. 121-122, para. 377.

¹⁵ *Ibid.*, pp. 125-126, para. 390.

¹⁶ According to the Tribunal, the ratio of relevant areas is Guyana 51%: Suriname 49%, while the ratio of coastal frontages is Guyana 54%: Suriname 46%. *Ibid.*, p. 127, para. 392.

inequitable. The Tribunal therefore concluded that the equidistance line, which commences at Point 3, should be the delimitation line of the continental shelf and the EEZ between the Parties.¹⁷

4. THE THREAT AND USE OF FORCE

In addition to maritime delimitations, Guyana sought reparations for Suriname's threat to use force. According to Guyana, Suriname resorted to the use of force on 3 June 2000 to expel Guyana's licensee, the Canadian oil exploration company CGX resources Inc. After confirming its jurisdiction to deal with this issue, the Tribunal held that the action mounted by Suriname seemed more akin to a threat of military action rather than a mere law enforcement activity. The Tribunal concluded that Suriname's action constituted a threat of the use of force in violation of the Convention, the UN Charter and general international law.¹⁸ On the other hand, the Tribunal discarded Guyana's claim for compensation since the damages were not proved to the satisfaction of the Tribunal.¹⁹

5. THE BREACH OF THE OBLIGATIONS UNDER ARTICLES 74 (3) AND 83 (3)

The final issue addressed in the Award was whether the Parties breached the obligations provided for by Articles 74 (3) and 83 (3) of the Convention. These provisions require the States concerned to make, pending agreement as provided for in paragraph 1, every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper efforts to reach a final agreement. The Tribunal ruled that Suriname's conduct *did* constitute a failure to meet its obligations under Articles 74 (3) and 83 (3).²⁰ Equally the Tribunal held that Guyana also violated its obligation in these provisions by leading up to the above-mentioned CGX incident.²¹ Furthermore, the Tribunal ruled that both Guyana and Suriname violated their obligations to make every effort not to jeopardize or hamper reaching a final delimitation agreement.²² Every decision in this Award was unanimously rendered.

6. SOME REMARKS ON THE ARBITRAL AWARD

The *Guyana/Suriname* arbitration is the thirteenth international judgment in the field of maritime delimitation. A remarkable feature of this Award is that

¹⁷ *Ibid.*, p. 127, para. 392.

¹⁸ *Ibid.*, p. 147, para. 445.

¹⁹ *Ibid.*, p. 150, para. 452.

²⁰ *Ibid.*, p. 158, para. 474.

²¹ *Ibid.*, p. 159, para. 477.

²² *Ibid.*, p. 163, para. 486.

the Tribunal applied the equidistance method to establish the single maritime boundary under Articles 74 (1) and 83 (1) of the Convention. It is common knowledge that these provisions omit any reference to a method of delimitation because of the need for a compromise. According to the Tribunal's interpretation, however, a specific (equidistance) method should be incorporated in Articles 74 (1) and 83 (1). This interpretation echoes the ICJ in the *Cameroon/Nigeria* case, which stated that:

They [rules of delimitation of a single maritime boundary] are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in the delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an "equitable result".²³

The Arbitral Tribunal, in the *Barbados/Trinidad and Tobago* case, is also supportive of this interpretation.²⁴

The equidistance method is the only method of ensuring predictability of results in the sense that, once the base-points are fixed, the delimitation line is mathematically determined.²⁵ Accordingly, the application of the equidistance method under Articles 74 (1) and 83 (1) of the Convention would enhance the predictability of the law of maritime delimitation. On the basis of the above interpretation, the Tribunal in the *Guyana/Suriname* arbitration adopted the corrective-equity approach. This approach has been adopted in a series of international decisions, such as the *Greenland/Jan Mayen* (1993), *Eritrea/Yemen* (1999), *Qatar/Bahrain* (2001), *Cameroon/Nigeria* (2002) and *Barbados/Trinidad and Tobago* (2006). It may be said that the Tribunal in the *Guyana/Suriname* arbitration reconfirmed the legal validity of the corrective-equity approach in maritime delimitations.

In relation to this, it is important to note that the Tribunal clearly discarded the 'angle bisector methodology' claimed by Suriname. In the words of the Tribunal:

[T]he general configuration of the maritime area to be delimited does not present the type of geographical peculiarities which could lead the Tribunal to adopt a methodology at variance with that which has been practised by international courts and tribunals during the last two decades. Such peculiarities may, however, be taken into account as relevant circumstances, for the purpose, if necessary, of adjusting or shifting the provisional delimitation line.²⁶

The Tribunal's view conforms to the legal orthodoxy in the field of maritime delimitation, and contrasts the recent decision of the ICJ concerning the maritime delimitation between Nicaragua and Honduras.²⁷

²³ In the *Cameroon/Nigeria* case 2002, the ICJ adopted the corrective-equity approach under Articles 74 and 83 of the Convention, p. 142, para. 288. Available at: <http://www.icj-cij.org/docket/files/94/7453.pdf>.

²⁴ The *Barbados/Trinidad and Tobago* arbitration, p. 73, para. 242.

²⁵ HWA Thirlway, 'The Law and Procedure of the International Court of Justice Part Five' (1994) 64 *British Yearbook of International Law*, p. 41.

²⁶ 2007 Award, p. 120, para. 372.

²⁷ In the *Nicaragua/Honduras* case of 2007, the ICJ accepted the bisector method since any base

Furthermore, the Tribunal echoed the neutral criteria of a geographical character, which was originally indicated in the *Gulf of Maine* case of 1984.²⁸ In addition to this, the Tribunal did not accept the relevance of the conduct of the Parties in the delimitation of single maritime boundary. This view is supported by the judicial precedents, in particular, the *Cameroon/Nigeria* case.²⁹ Thus it can be observed that the *Guyana/Suriname* award followed the recent trend of case law, giving much weight to geographical factors. Overall it appears that the *Guyana/Suriname* arbitration ensures the continuity of case law in the field of maritime delimitation.

At the same time, the *Guyana/Suriname* arbitration sheds some light on several issues which have not been adequately addressed by international courts and tribunals in this field. For instance, it is worth noting that the Tribunal explicitly regarded navigation as a special circumstance in the delimitation of the territorial seas.³⁰ It is also notable that the Tribunal addressed the question of whether and how, in the absence of an agreement to do so, a delimitation should be extended from the previous limit of territorial sea (3 nm) to a newly established limit (12 nm). On this issue, the Tribunal did not support the view that there should be automatic extension of the territorial sea from the previously accepted limit of 3 nm to the current limit of 12 nm.³¹ It is also of particular interest that the Tribunal addressed the threat of the use of force in the disputed maritime area. While the reasoning of the Tribunal in this matter appears to be succinct, this Award will be, together with the *M/V Saiga* case (1999), an important judicial precedent on this subject. Further to this, the Tribunal dealt with the obligation provided for by Articles 74 (3) and 83 (3) of the Convention. By examining these issues, it may be said that the *Guyana/Suriname* Award further enriches the existing case law relating to maritime delimitation.

points that could be determined by the Court are inherently unstable and, in such a situation, the equidistance method cannot be applied. See, p. 78, para. 287. It would appear that the ICJ's view is not free from controversy. In any case, in another part of the judgment, the Court cautiously stated that: 'equidistance remains the general rule'. *Ibid.*, p. 77, para. 281. Available at: <http://www.icj-cij.org/docket/files/120/14075.pdf>.

²⁸ Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. USA) 1984, p. 327, para. 194. Available at: <http://www.icj-cij.org/docket/files/67/6369.pdf>. The neutral criteria were also adopted in the Arbitral Tribunal in the *St. Pierre and Miquelon* arbitration. See (1992) 31 *ILM*, p. 1173, para. 83.

²⁹ On this issue, see Y Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Oxford, Hart Publishing, 2006) pp. 288-299.

³⁰ With respect to the consideration of navigation in maritime delimitation, *ibid.*, pp. 314-319; B Kwiatkowska, 'Economic and Environmental Considerations in Maritime Delimitations,' in JI Charney and LM Alexander (eds.), *International Maritime Boundaries* (Dordrecht et al, Nijhoff, 1993) pp. 96-100.

³¹ 2007 Award, p. 99, para. 311.