



ORIGINAL RESEARCH ARTICLE

Legal Reflections on the Guyana-Venezuela Maritime Issue

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Abstract: *This paper contrasts the Guyana-Venezuela maritime incident that occurred on October 10th 2013 with the Guyana-Suriname maritime incident that occurred on June 3rd 2000. It examines several issues to determine whether the actions by the Venezuelan Government to detain the seismic research vessel RV Teknik Perdana which was in disputed waters at the time of the incident can be justified under public international law. First, the different factual backgrounds between the two events are discussed. Next, the legal implication of the different Maritime zones where the two incidents occur is examined. This is followed by a discussion on the use of force in the Guyana-Venezuela incident versus the threat of force in the Guyana-Suriname incident. The Applicability of UNCLOS and its Dispute settlement mechanism to the disputes is also analysed and finally, the applicability of customary international law principles of equidistance or equitable principles to resolve the dispute are discussed. Also, the possibility of Guyana and Venezuela entering into a joint unitisation agreement is examined.*

Keywords: Law of the Sea, Dispute Settlement, Maritime,
Customary International Law, Unitisation

In 1907, Lord Curzon stated that ‘frontiers are indeed the razor’s edge on which hang suspended the modern issues of war or peace, of life or death to nations.’¹ This statement still holds true and impacts the modern modes of dispute settlement, title to territory and delimitation of various maritime zones.

There are many issues which surround the Guyana-Venezuela dispute which give it the potential to become a landmark case in disputed waters. The potential for oil and gas royalties and the fact that the international maritime boundaries which are linked to international territorial boundaries are not clearly established are issues not just of purely academic interest but arise in political and economic context. Also, the fact that Venezuela is not a party to the United Nations Convention on the Law of the Sea (hereinafter UNCLOS)² and how this dispute will be resolved are also issues which are important and inextricably linked to the two country's current territorial identification. The same cannot be said for the Guyana-Suriname dispute which mainly concerned disputed maritime boundaries and the threat of the use of force. Guyana and Suriname did not have a dispute concerning title to any part of their territory. Also, both states are parties to UNCLOS and therefore their dispute was settled through one of the dispute settlement mechanism in place under the UNCLOS. The similarities between both the Guyana-Venezuela and Guyana-Suriname incidents are clear; Guyana is involved in both incidents and in both cases Guyana gave concessions to oil companies to explore for oil in maritime areas which turned out to be considered disputed waters, and in both cases, the other territories, Venezuela and Suriname raised disputes about whether Guyana has the sovereign right to exercise jurisdiction over the disputed waters.

The common features and areas of differences make this topic an interesting study to contrast the Guyana-Venezuela maritime incident which occurred on October 10th, 2013 with the Guyana-Suriname incident which occurred on June 3rd, 2000. This contribution will focus on the way forward and identify where legal solutions may lie in the Guyana-Venezuela dispute with respect to dispute settlement, title to Essequibo and the delimitation of the maritime zones under public international law.

DIFFERENT FACTUAL BACKGROUNDS

The Guyana-Venezuela Relationship

The suspected presence of hydrocarbon reservoirs in the north-eastern shoulder of South America since a discovery off nearby French Guiana in 2011 has caused oil companies to show an increasingly interest in exploring that area. Industry experts described the discovery as a game-changer for the region's energy

prospects and this discovery lead up to the events surrounding the Guyana-Venezuela maritime incident which occurred on October 10th, 2013.

It must be highlighted that the disputed waters have its roots in a historical arbitral award which occurred in 1899.³ Venezuela and Guyana have long disputed about the legal title to the Essequibo region, and over legal rights to the ocean resources that lie offshore. Venezuela calls the Essequibo region and the bordering sea a 'reclamation zone' or the disputed territory but in practice Guyana exercises effective control over the territory. Guyana's effective occupation in no way diminishes Venezuela's claim based on *uti possidetis*, as Venezuela continues to issues map which show Essequibo as part of their territory.

When Guyana and Venezuela were colonies of the Netherlands and Spain respectively, the Essequibo River marked the border between the two. The Essequibo River now currently marks the border between the zone in reclamation and Guyana. The Dutch territory was signed over to Britain in 1814. The treaty agreement merged the various colonies into one country in 1831. However, in 1819, Jose Revenga, following Simon Bolivar's instructions, noted the number of British settlers living on the other side of the river and asked that they either cross over into Guyana, or live according to Venezuelan law, but the British continued to promote colonization of the area.⁴

About 20 years later, in 1840, it is reported that Britain published Guyana's boundaries, including the 'Schomburgk Line', which went well beyond the original Dutch occupation, and gave the UK control of the mouth of the Orinoco River. In contrast, Venezuela claims all of the area originally belonging to the Spanish colony.⁵

Venezuela severed relations with Britain in 1887, and in 1895, following Venezuela's request, the U.S. intervened in the issue, and an international arbitration tribunal ruled largely in favour of the British in 1899.⁶ It accepted the Shomburgk Line, slightly modified, as the border. The modifications gave most of the territory and all of the gold mines to Britain and Venezuela only got control of the Orinoco River.

In 1949 information about fraudulent back room deals during the 1899 rulings was raised by Venezuela. Venezuela then claimed the arbitral award to be null and void and revived its claim to the disputed territory. From then to the current time Venezuela has raised the issue at various forums. At a meeting in Geneva in 1966

when Guyana became independent, Britain and Venezuela agreed to receive recommendations from a representative of the United Nations Secretary General on ways to settle the dispute peacefully. The parties signed a treaty which established steps to resolve the dispute, but as Guyana obtained independence a few weeks later, talks had been deadlocked, notwithstanding the fact that it accepted Venezuela's contention. Mediation over the issue has been going on for decades. In February 1990 Guyana and Venezuela had agreed to the appointment of a special United Nations representative to mediate in their dispute over the Essequibo region. Currently, Guyana and Venezuela utilises the Good Officer Process is dealing with Venezuela's resuscitated claim to the Essequibo. The Good Office process under the United Nations traditionally developed in the area of the settlement of international disputes and today is commonly used in UN peacekeeping Operations around the world to encourage mediation and conciliation among local actors. In April 2010 Professor Norman Girvan of Jamaica was appointed by the United Nations Secretary General Ban Ki-moon as his Personal Representative on the Border Controversy between Guyana and Venezuela. Mr. Girvan's is currently the UN Good Officer for the Guyana-Venezuela border dispute and his role is to assist the two countries in resolving the dispute through dialogue. His appointment was done after there was a request from the parties to resume the Secretary-General's good offices, which were suspended in 2007 following the death of the Secretary-General's last Personal Representative, Oliver Jackman.

The territory remains under Guyanese authority and effective control, which is an important factor in determining title to the territory.⁷ As a result, it is important to note that Guyana currently exercises sovereignty over the disputed land territory. Admittedly, Venezuela's intervention was in the marine area, but Guyana continues to exercise sovereign control and effectively administer the disputed land area. It must also be highlighted that the *uti possidetis* supports Venezuela's claim. *Uti possidetis* is an important legal principle which provides that states emerging from the dissolution of a larger entity inherit as their borders those administrative boundaries which were in place at the time of independence.⁸ There are two sides to the dispute. Guyana's claim to the territory means that Venezuela's action in the incident described below was a violation of international law. On the other hand, Venezuela might claim that Guyana is threatening

Venezuela's inviolability of its border by possession and sovereign control over Essequibo and granting concession to oil companies to explore within its sea areas where Venezuela alone should exercise sovereign control.

The RV Teknik Perdana Maritime Incident

According various reports⁹ on October 10th, 2013 an armed Venezuelan Navy vessel detained the seismic research vessel *RV Teknik Perdana* which was in disputed waters bordering Guyana and Venezuela.

The *Teknik Perdana* was contracted by Texas based Andarko Petroleum Inc. to search for oil off the Essequibo coast. Guyana awarded Anadarko Petroleum a deep-water, exploration license in June 2012 for a block named Roraima, but details of the concession have not been revealed. Anadarko has a petroleum prospecting licence to search for hydrocarbons in the Roraima block offshore Guyana. Anadarko Petroleum Inc. is the third-largest independent U.S. oil and natural gas producer.

The Ministry of Foreign Affairs in Guyana issued a statement which said that at approximately 16:00 hours on the day in question a Venezuelan armed naval vessel, the *Yekuana*, was trailing the seismic vessel, the *RV Teknik Perdana*.¹⁰ The crew of the *RV Teknik Perdana*, explained to the crew of the Venezuelan vessel that they were conducting a multi-beam survey of the seafloor in Guyana's exclusive economic zone. The Venezuelan crew however insisted that the vessel was doing such work in Venezuela's exclusive economic zone and instructed that the vessel switch off its engines and shut down its seismic equipment.

The vessel was instructed to sail to the island of Margarita in Venezuela where the ship's Ukrainian captain was subsequently charged with violating Venezuela's exclusive economic zone. The crew and vessel were subsequently released.¹¹ The 36 member crew included 5 Americans and a number of Russians and the vessel was Panamanian-flagged.

*The Guyana – Suriname maritime incident*¹²

The Guyana-Suriname incident occurred 13 years prior to the Guyana-Venezuela incident. On 3rd June 2000 Suriname patrol boats ordered the CGX oil rig and drill ship *C.E. Thornton* 'to leave the area within 12 hours or the consequences would be theirs.' *C. E.*

Thornton was operating under a concession to a Canadian company granted by Guyana in the continental shelf area, which is a maritime area disputed by the two states.

Prior to this incident, it must be appreciated that both Guyana and Suriname had attempted to arrive at provisional arrangements in the area. The efforts appear to have started in 1989. A Joint Communiqué dated 25 August 1989 between the President of Suriname and the President of Guyana stated that the two Presidents expressed concern over the potential for disputes ‘with respect to petroleum development within the area of the North Eastern and North Western Seaward boundaries of Guyana and Suriname respectively’.¹³ The parties agreed that pending settlement of the boundary question, representatives of the Agencies responsible for petroleum development within the two countries should agree on modalities which would ensure that the opportunities available within the disputed area could be jointly utilised. Further, the Presidents agreed that concessions already granted in the disputed area would not be disturbed.

The 1989 agreement led to the 1991 ‘Memorandum of Understanding – Modalities for Treatment of the Offshore Area of Overlap between Guyana and Suriname’ (the ‘MOU’).¹⁴ However, it was later claimed by the representatives negotiating the MOU that they lacked the authority to negotiate an agreement on the actual utilisation of resources in the disputed area. The MOU was therefore limited in scope: it applied only to one Guyanese oil concession from 1988, and provided that further discussions would have to occur if the concession holder made any discoveries. Also, the MOU provided that representatives of both governments would meet within thirty days to conclude discussions on modalities for joint utilisation of the disputed area awaiting a final boundary agreement. The parties, however, never met within the 30 days deadline. In 1994, Guyana submitted a new draft of proposed ‘Modalities for Treatment of the Offshore Area of Overlap between Guyana and Suriname.’ However, Suriname never responded to the proposal. Over the following years, the parties did not engage in any further discussions on the topic despite certain efforts by Guyana to start the discussion process. There were also indications that the already limited 1991 MOU was disavowed by Suriname during that time.¹⁵

For these reasons the *Guyana-Suriname Maritime Boundary Arbitration Award* (Arbitral Tribunal) held that the evidence demonstrates that both Guyana and Suriname had failed to fulfil

their obligation to make every effort to enter into provisional arrangements relating to exploratory activities in the disputed area.¹⁶ Further, the tribunal held that although this alone cannot form the basis of a finding that Suriname violated the Convention, Suriname's subsequent conduct, which was consistent with its pre-1998 conduct, did constitute a failure to meet its obligations under Articles 74(3) and 83(3) and constituted a violation of the UNCLOS.¹⁷

Article 73 of UNCLOS provides for the enforcement of laws and regulations of the coastal State and states:

1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.
2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.
3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.
4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

Also, article 83 of UNCLOS provides for the Delimitation of the continental shelf between States with opposite or adjacent coasts and states that:

1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation...

Indeed, in the build-up to the CGX incident of 3 June 2000, Suriname did not fulfil its obligation to make every effort to enter into provisional arrangements relating to the exploratory activities of Guyana's concession holder CGX. According to the reported facts, while CGX was conducting seismic testing in the disputed area, in 1999 it had publicly announced that it had received approval from Guyana for its drilling programme, and later the company announced a drilling schedule. Less than three weeks after the last announcement, which occurred on 10 April 2000, it appeared that 'the drilling plans had become known in Suriname via the 'grapevine'.' Suriname's first reaction was an attempt at diplomacy. This came in the form of a diplomatic note dated 10 May 2000, in which Suriname cautioned Guyana against its proposed course of conduct. Guyana responded on 17 May 2000, asserting that all activities were taking place within Guyanese territory. Suriname then issued a *note verbale* objecting to the planned drilling, insisting on termination of all activities in the disputed waters, and informing Guyana of its intention to 'protect its territorial integrity and national sovereignty'.¹⁸ On 2 June 2000, hours before the CGX incident occurred, Guyana invited Suriname to 'send a high level delegation to Georgetown within twenty-four hours to commence dialogue' on matters relating to the maritime boundary.¹⁹

According to reports, the CGX rig operators were sufficiently threatened by Suriname's actions that a return to the area was considered unsuitable and subsequent intimidation of the licensee Esso E & P Guyana similarly prevented its continued operations and caused it to terminate all exploration activities in its Guyanese concession area. It was also reported that Suriname threatened Maxus, the licensee from Guyana, with respect to operations in the disputed area and that this in turn caused Maxus not to carry out further exploration in the area of its concession.

The contrast between the two maritime events

It is important to highlight the different factual background between the two incidents since the historical relations that led up

to the two incidents give an understanding of the context in which the disputes arise. From the brief overview of Guyana's foreign relations with Venezuela and the historical claim to Essequibo, this paints an important picture of the build-up to the maritime incident. It must be pointed out that Venezuela's claim to Essequibo would affect their delimitation of the Exclusive Economic Zone (EEZ). The delimitation of the EEZ is directly related to the coastal state's title to territory and its baseline. The EEZ encompasses both the water column and the submarine up to a distance of 200 nautical miles measured from the baseline from which the territorial sea is measured. On the other hand, in the Guyana-Suriname incident wider maritime delimitation issues were resolved and the line adopted by the tribunal to delimit the parties' continental shelf and EEZ follows an unadjusted equidistance line. The equidistance line for delimitation will be discussed below.

Importantly, there was no attempt by Venezuela to resolve the dispute through diplomatic channels. The use of force to detain the vessel and arrest the captain was a strong signal that any action by Guyana which displays control over the area would not be tolerated. It also sent a message to other potential investors that the area is hotly disputed. In contrast, the Guyana-Suriname incident saw several attempts at negotiation. Prior to the threat to use force Suriname and Guyana had diplomatic exchanges to resolve the dispute. The relations between Guyana and Suriname appears to be more in accordance with international norms concerning the maintenance of peace and security in the South American region while the actions by Venezuela display a violation of several customary international law principles such as the prohibition on the use of force, the obligation to respect the sovereignty, integrity, and territorial inviolability of states, as well as the obligation to promote the peaceful settlement of disputes.

THE DIFFERENT MARITIME ZONES

International law parcels the sea into various zones in which States enjoy a variety of jurisdictional competences. Generally, the further from the coast you go the area of the jurisdiction or control of the coast state becomes more limited. In this regard, the law regulating the sea provides in a complex yet subtle manner an interesting contrast to the rather absolutist approach to sovereignty and jurisdiction which are common in other areas of international law.

Overview of UNCLOS

The legal implications of the different maritime zones where the incidents occur are important as United Nations Convention on the Law of the Seas (UNCLOS)²⁰ provides different freedoms and modes of regulatory controls by the coastal state based on the zone where the incident occurs. In the Guyana–Venezuela incident the EEZ was involved while the continental shelf was involved in the Guyana-Suriname incident. This has implications under the UNCLOS and customary international law because of the limitations on the jurisdiction that the coastal state can exercise in the various zones.

An understanding of the modern law in this area depends on an understanding of the history of it.²¹ After nine long years of negotiation UNCLOS was adopted in 1982 and entered into force on 16th November 1994.²² It is an international treaty that provides a comprehensive regulatory framework for the use of the world's seas and oceans, *inter alia*, to ensure the conservation and equitable usage of resources and the marine environment and to ensure the protection and preservation of the living resources of the sea. UNCLOS also addresses such other matters as sovereignty, rights of usage in maritime zones, and navigational rights. It replaces the four previous Geneva Conventions of 1958 that were believed to be inadequate.²³ Although the Geneva Conventions were a considerable achievement, they did not settle questions relating to the territorial sea, continental shelf and various fishing rights. The development of new techniques of underwater oil and other mineral exploitation also made it necessary to have a new convention regulating the sea. Importantly, most post-colonial states had had no say in the drafting of the Geneva Conventions of 1958 and this led to call for a United Nations Conference on the Law of the Sea.

As of December 4th, 2013 UNCLOS has 166 parties, but Venezuela is not a party. On the other hand, both Guyana and Suriname are parties to UNCLOS: Guyana signed the UNCLOS on December 10th, 1982 and ratified it on November 16th, 1993²⁴ and Suriname signed the UNCLOS on December 10, 1982 and ratified it on July 9th, 1998.²⁵

Interesting, the United States of America is also not a party to UNCLOS. It has been stated that if the U.S. accedes to UNCLOS, it may be subjected to huge economic loss and that the convention's mandatory dispute mechanisms will result ultimately in

troublesome and costly lawsuits and adverse judgments if the United States is deemed to have 'violated' the convention—most likely when the United States has acted in its own best interests.²⁶ Maybe Venezuela is influenced by considerations of a similar nature to the US and hence it has opted not to become a party to UNCLOS.

Under the UNCLOS the sea has been divided up into sections or areas with a different legal status and consequently involving different rights and powers of States. Some of the provisions of UNCLOS are considered to reflect customary international law, while others are a mixture of emerging rules leading to the progressive development of customary international law. This means that states such as the USA and Venezuela will be bound by some of rules stipulated under UNCLOS because it merely codified existing customary law which existed before it or crystallised or settle the law which is now customary international law.²⁷

Territorial Sea

Article 3 of UNCLOS provides that States have the right to establish the breadth of their territorial sea up to a limit not exceeding 12 n.m. from the baselines. Within the territorial sea the coastal state enjoys sovereignty, subject to the right of innocent passage of foreign merchants' ships and warships. The provisions under UNCLOS reflect the dominant view and customary international law that the coastal state jurisdiction automatically extends to the territorial sea, with the logical corollary that the entire body of state law applies there.

Contiguous Zone

This zone goes beyond the territorial sea and can extend up to 24 n.m. from the baselines. In this zone the coastal state may 'prevent' and 'punish' infringements of its customs, fiscal, immigration, or sanitary regulations committed within its territory or its territorial sea.²⁸ The rights of the coastal state implies that it can both prevent ships from entering its territorial waters if they are suspected of engaging in prohibited activities, and arrest vessels that have already perpetrated offences in its territorial waters. The ability to 'punish' means that vessels that have committed offences outlined in the Convention within the territory of the State may be arrested even though they have left the territorial seas. The ability to

'prevent' means that a state might stop a vessel from entering its waters when it has reason to believe that an offence outlined in the Convention would be committed should that vessel enter. This provision is obviously open to abuse and there is the tendency for States to assert jurisdiction for a more ambitious range of matters than those mentioned in the convention provisions.

The Exclusive Economic Zone (EEZ)

This is an area beyond and adjacent to the territorial sea, that may extend up to 200 miles from the baselines from which the breadth of the territorial sea is measured. The EEZs were introduced to halt the increasingly heated clashes over fishing rights, although oil was also becoming important. Foreign nations have the freedom of navigation and over flight, subject to the regulation of the coastal states. In this zone, the coastal state may not prevent foreign states their right to lay pipelines and cables.

In this area the coastal state enjoys sovereign rights in some specific matters, namely only for the purpose of exploring, exploiting, conserving, and managing living and non-living natural resources.²⁹ In addition, it has jurisdiction over artificial islands, installations and infrastructure, marine scientific research, and the protection and preservation of the marine environment. The provisions regulating the EEZ are known to reflect customary international law. As a consequence of its rights over the zone, the coastal state has broad legislative powers relating to such zone, Under Article 62 (4) of the UNCLOS, a coastal state may issue laws and regulations which must however be consistent with the provisions of the zone contained in the Convention on a wide range of matters, such as (a) licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration, which, in the case of developing coastal States, may consist of adequate compensation in the field of financing, equipment and technology relating to the fishing industry.³⁰

The interpretation of the coastal states jurisdiction in the EEZ is not without difficulty. It is notable that in the *Franco-Canadian Fisheries Arbitration* (1986)³¹ that a ship engaged in fish processing in the EEZ was not subject to the jurisdiction of the coastal State for fish processing did not come within the purview of the matters over which that State had jurisdiction.

In another example, in 1977 Guinea arrested in its exclusive economic zone the *Saiga*, a vessel belonging to St Vincent and the

Grenadines, claiming that it has the right to do so because the ship had been supplying gas oil to other fishing vessels, thus avoiding paying customs duties. The International Tribunal for the Law of the Sea, in the *M/V Saiga (no. 2)*³² case held that in the area under consideration, the coastal state has jurisdiction to apply customs law and regulations in respect of artificial islands, installations and structures (Art 60 (2)). In the view of the Tribunal, the Convention does not empower a coastal state to apply its customs law in respect of any other parts of the EEZ.³³ It therefore held Guinea to be in breach of the Convention. The Tribunal also held that Guinea's use of force in stopping and arresting the Saiga was excessive. In the Tribunal's view:

Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of Art 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other area of international law.³⁴

Application of UNCLOS to the Guyana-Venezuela and Guyana-Suriname Incidents

In light of the foregoing, Guyana and Suriname are bound by the treaty provision of UNCLOS. However, while Venezuela is not bound by the provisions of UNCLOS, some of the provisions of UNCLOS reflect customary international law and Venezuela is bound by the customary international law principles. One such customary international law principles concern the prohibition on the use of force in the EEZ. Therefore, Venezuela's action on October 10th, 2013 was in excess of the powers provided under UNCLOS as well as customary international law. It is further submitted that Venezuela's act went beyond what is reasonable and necessary in the circumstances.

It must be noted that the Guyana-Suriname incident concerned the Continental shelf. This area is defined as the natural prolongation of the land territory to the continental margin's outer edge, or 200 nautical miles from the coastal state's baseline, whichever is greater. A state's continental shelf may exceed 200 nautical miles until the natural prolongation ends. However, it may never exceed 350 nautical miles from the baseline; or it may never

exceed 100 nautical beyond the 2,500 meter isobath (the line connecting the depth of 2,500 meters).³⁵

The Coastal states have sovereign rights limited to certain specific activities: to explore and exploit the natural resources in the continental shelf- essentially, oil and fishing resources. The *North Sea Continental Shelf cases* recognized the right of coastal states to exploit their natural resources in the continental shelf as a part of customary international law.³⁶

USE OF FORCE

In the Guyana-Suriname incident the Arbitral Tribunal viewed the statement by Suriname patrol boats 'to leave the area within 12 hours or the consequences would be theirs' as a threat of the use of force in breach of Art 2(4) of the UN Charter and presumably as being inconsistent with the purposes of the United Nations which include the settlement of disputes by peaceful means. Recall that Suriname officials had ordered the CGX oil rig and drill ship *C.E. Thornton* operating under a concession to a Canadian company granted by Guyana in a continental shelf area disputed by the two states to leave the area. The Tribunal stated that the expulsion from the disputed area of the CGX oil rig and drill ship *C.E. Thornton* by Suriname on 3rd June 2000 constituted a threat of the use of force in breach of the Convention, the UN Charter, and general international law.³⁷

Use of force in the Guyana-Venezuela incident

In the Guyana-Venezuela incident there was more than a threat of the use of force but actual arrest and detention. Recall that the ship's Ukrainian captain was charged with violating Venezuela's exclusive economic zone and the vessel was detained, even though they were subsequently released. One might argue that while Venezuela has an existing claim to Essequibo the use of force in this incident was excessive since no attempt was made resolve the differences through diplomacy and dialogue.

On the other hand, in the Guyana-Suriname incident at first there was an attempted to resolve the conflict through diplomatic channels and then Suriname threatened the CGX oil rig and drill ship *C.E. Thornton* to use force. This leaves an impression that relations between Guyana and Venezuela are hostile as there was

no attempt at diplomatic resolution or to use force or acts of aggression as a last resort in the Guyana-Venezuela incident.

What is more interesting is that both Guyana and Venezuela are members of the Organisation of American States (OAS) and the Union of South American Nations (UNASUR), and both of these organisations declare in their constitutive treaties and various declarations and resolutions that they were established to promote the peaceful settlement of disputes. Among the objectives of these two regional organisations includes the maintenance of peace and security in the region, unlimited respect for sovereignty, integrity and territorial inviolability of states, promotion of the peaceful settlement of disputes and to safeguard the full force of international law in conformity with the principles and standards of the UN Charter.

Thus, the actions by Venezuela including the use of force and demonstration of some form of military aggression or threats to the territorial stability, sovereignty and integrity of Guyana might be frowned upon by members of the OAS and UNASUR. Not only is the use of force or the threat of the use of force prohibited by treaties, by this is recognised as a principle of customary international law.

APPLICABILITY OF UNCLOS AND ITS DISPUTE SETTLEMENT PROVISIONS

Guyana-Suriname Dispute Settlement

Both Guyana and Suriname are parties to UNCLOS. Therefore in the Guyana-Suriname incident, this dispute was resolved through an Arbitral Tribunal constituted pursuant to Article 287, and in accordance with Annex 7 of the UNCLOS.

UNCLOS provides under Part XV various rules for the peaceful resolution of disputes between State Parties arising out of the interpretation or application of UNCLOS. Under Article 287(1) of UNCLOS, when signing, ratifying, or acceding to UNCLOS, a State party may make a declaration choosing one or more of the following means for settling disputes including the International Tribunal for the Law of the Sea (ITLOS) in Hamburg, Germany; the International Court of Justice in The Hague, The Netherlands; *ad hoc* arbitration (in accordance with Annex VII of UNCLOS); or a 'special arbitral tribunal' constituted for certain categories of disputes (established under Annex VII of UNCLOS).

The Permanent Court of Arbitration (PCA) has administered most of the UNCLOS Annex VII arbitrations to date. The PCA administered the dispute between Guyana and Suriname, which was instituted in February 2004 and decided by a final award rendered on September 17th, 2007. According to Article 287(3) of UNCLOS, arbitration under Annex VII is the default means of dispute settlement if a State has not expressed any preference with respect to the means of dispute resolution available under Article 287(1) of UNCLOS (and has not expressed any reservation or optional exceptions pursuant to Article 298 of UNCLOS). Also, pursuant to Article 287(5) of UNCLOS, if the parties have not accepted the same procedure for the settlement of the dispute, arbitration under Annex VII is the default means of dispute settlement (again subject to same exceptions or reservations pursuant to Article 298). Since the 1982 Convention came into force in 1994, nine cases have been arbitrated under Annex VII of UNCLOS. The Permanent Court of Arbitration (PCA) is acting, or has acted, as registry in eight of those cases.³⁸

Options for resolving the Guyana-Venezuela dispute

Even though Venezuela is not a party to UNCLOS this does not mean that there are no options available to resolve the dispute between Guyana and Venezuela. The fact that Venezuela is not a party to UNCLOS means that Venezuela is not subject to the compulsory dispute settlement mechanisms under that convention. Failing that, several other options are available to resolving the maritime dispute such Good Offices, mediation, conciliation, or a tribunal, such as the International Court Justice or Arbitration Tribunal.

According to reports,³⁹ the incident between Guyana and Venezuela is not a matter that can be settled at a bilateral level through diplomatic negotiations given that both countries are holding to their positions. Further, the current Good Officer Process between Guyana and Venezuela is dealing with the resuscitated claim to the Essequibo by Venezuela. The Good Officer Process is an option that can be utilised, but to utilize this process to resolve this maritime dispute would require a renewed mandate different terms of reference different to the one that was established in 1966.

While the Essequibo claim is one that had been settled before, the maritime delimitation was never formally addressed. According

to Guyana's Minister of Foreign Affairs, Rodrigues-Birkett, one good thing that has come out of the recent incident involving the seizure of the vessel is the fact that the maritime delimitation will formally be settled.⁴⁰ Indeed, the maritime delimitation between Guyana and Venezuela needs to be formally settled.

It is posited that Venezuela has a legal duty as well as a legal obligation to promote the settlement of disputes by peaceful means. As outline above, the obligation to settle disputes by peaceful means and to refrain from the use of force or threat of force, as well as the duty to respect the sovereignty, integrity and inviolability of states is reflected not only in the United Nations Charter, but in several UN Declarations and resolutions as well as regional treaties. These principles reflect customary international law and means that Venezuela has to promote the peaceful settlement of the dispute between it and Guyana. Further, Venezuela must not act in a manner which is contrary to its legal obligations.

APPLICABILITY OF CUSTOMARY INTERNATIONAL LAW PRINCIPLES AFFECTING DELIMITATION

It is now important to turn to the applicability of the customary international law principles of equidistance/ special circumstances or equitable principles to resolve the dispute between Guyana and Venezuela, as well as and other factors affecting delimitation.

Equitable or Equidistance Principle?

The question of delimitation of the continental shelf between opposite or adjacent States have given rise to many disputes. Under article 6 of the 1958 Geneva Convention on the Continental Shelf, in the absence of agreement between the States concerned, the boundary must be determined 'by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.' It must be highlighted that unlike the 1958 Geneva Convention, UNCLOS is totally silent on any particular method of delimitation and subsequent jurisprudence has sought to clarify this anomaly under customary international law principles. Rather, UNCLOS focuses on an equitable result under the provisions of articles 74 and 83 quoted above.

It must be highlighted that the principle of equidistance could lead to inequitable solutions, as became evident in the *North Sea Continental Shelf cases*⁴¹ between the Federal Republic of Germany on the one side and the Netherlands and Denmark on the other) brought before the International Court of Justice (ICJ). The Court held that the principle at issue was not enshrined in customary international law; in its view the relevant general rule prescribed that the delimitation was to be effected 'by agreement in accordance with equitable principles.' This view was repeated by the same court in *Tunisia v Libya Continental Shelf*⁴² ICJ Reports 1982 in *Gulf of Maine (Canada v US)*⁴³ ICJ Reports 1984 in *Libya v Malta Continental Shelf*⁴⁴ ICJ 1985 and in *Maritime Delimitation in the area between Greenland and Jan Mayen (Denmark v Norway)*⁴⁵ ICJ 1993.

However, after 35 years of hesitation, the ICJ finally accepted what it had rejected in the *North Sea cases*, that the equidistance/special circumstances approach reflects customary international law. In the *Guyana/Suriname Award* of 17th September 2007 the Permanent Court of Arbitration confirmed that this is the case both for the delimitation of the territorial sea and for the delimitation of the continental shelf, EEZ, or when drawing a single delimitation line. In subsequent cases the ICJ has also confirmed this principle.⁴⁶

Therefore, the method to delimit the EEZ in the current Guyana-Venezuela dispute will be the equidistance/special circumstances method which involves first drawing an equidistance line, then considering whether there are other factors calling for the adjustment or shifting of that line in order to achieve an 'equitable result.'

OPPORTUNITY FOR A JOINT UNITISATION AGREEMENT BETWEEN GUYANA AND VENEZUELA

International unitization agreements for the joint exploration and production of oil and gas reservoirs have been the subject of extensive literature in the last few years.⁴⁷ This paper does not intend to address the broad and far-reaching subject of unitization agreements generally but, rather, to highlight that there is the opportunity that if the territorial dispute and maritime delimitation should prove to be a lengthy and complex process that Guyana and Venezuela, the two states can enter into a Joint Unitisation Development Agreement or treaty to allow economic

development in the area to go ahead, even while the boundary dispute remains unresolved. Unitisation treaties or framework unitisation agreements may be entered in by countries that share common maritime boundaries for the development and exploitation of transboundary or cross-border hydrocarbon reservoirs. These agreements seek to establish the regulatory framework for the development of hydrocarbon reservoirs that extend across their common delimitation borders. The primary bilateral treaties aim to provide for the exploitation of transboundary reservoirs as single units. By exploiting a reservoir as a single unit, both countries can ensure each country's fair participation share of such reservoir, efficiency in exploitation, the prevention of waste and revenue maximization.

In Latin America, two framework unitization agreements have already been executed: the 2007 Trinidad-Venezuela Framework Agreement⁴⁸ and the 2012 U.S.-Mexico Framework Agreement.⁴⁹ However, in contrast to the Guyana-Venezuela situation, there was no territorial dispute to the maritime areas under those two framework agreements.

Unitisation agreements are can be used in situations where the maritime border between the countries is still disputed. For example, the Japan-South Korea Joint Development Agreement relating to part of the continental shelf extending southward into the northern part of the East China Sea was done because the countries involved desired to establish a mechanism to share jointly in agreed proportions of the hydrocarbons found in the disputed area while preserving their respective rights in connection with the border dispute.⁵⁰ Another example of a unitisation agreement where there was territorial and border disputes occurred in 1995 with the *UK-Argentina Joint Declaration on Hydrocarbons Cooperation*. This agreement provided for cooperation in the joint exploitation of offshore hydrocarbons in the Falkland Islands/Islas Malvinas.⁵¹ Under the joint declaration, the two countries agreed to cooperate in encouraging offshore activities in the Falkland Islands/Islas Malvinas. The joint declaration created a Joint Commission composed of representatives of both parties, which was given the task of submitting recommendations and coordinating activities for the exploration and exploitation of hydrocarbons in an area of special cooperation. The joint declaration provided for cooperation in the granting of licenses and the establishment of the applicable commercial terms, including overall levels of fees, royalties,

charges and taxes, the delimitation of the blocks, sharing of geological data and establishment of safety standards for offshore activities.

It is there possible for the governments of Venezuela and Guyana to enter into a joint unitisation development agreement before any exploration occurs in order to establish a cooperative environment for future licensees to conduct exploration activities. The Unitisation agreements can establish a single body with authority to develop its own petroleum regulations and fiscal terms and to manage the jointly shared jurisdiction. The agreement can also provide that the benefits and burdens arising from future discoveries are to be shared between the two countries and their respective licensees on a predefined basis.

CONCLUSION

It is submitted that the Guyana-Suriname incident can be used as a precedent of persuasive authority to determine the way forward in the Guyana-Venezuela dispute. The first case demonstrated the customary international law principle concerning the prohibition on the use of force would be applicable to the Guyana-Venezuela border dispute. While it may be argued that Venezuela acted contrary to international law norms when it detained the *RV Teknik Perdana*, Venezuela might see this as an act of protecting its territorial claim to the disputed area through application of the *uti possidetis* principle. The first case involving Guyana and Suriname also helps us to identify applicable legal principles, such as the equidistance or special circumstances principle with respect to the delimitation of the maritime zones under customary international law, even though not expressed under UNCLOS. Additionally, even though Venezuela is not party to UNCLOS, the provisions of UNCLOS concerning the Guyana-Venezuela incident reflect customary international law and therefore are relevant to resolve the dispute between Guyana and Venezuela. Venezuela may not be subject to the dispute mechanisms under UNCLOS, but as a state it has rights and duties under international law, and one such duty is the obligation to promote the peaceful settlement of disputes.

Going forward, both Venezuela and Guyana have a duty to resolve their dispute concerning title to Essequibo and delimitation of maritime zones in conformity with the principles and standards of international law, both under the United Nations Charter as well as under several regional international treaties. It is submitted as a

first step in the process both parties ought to utilise the current Good Office process currently in place and simply expand the mandate to incorporate the October 2013 incident. Further, there is also the possibility that if the delimitation should prove to be a lengthy and complex process that the two states can enter into a Joint Unitisation Development Agreement or treaty to allow economic development in the area to go ahead, even while the boundary dispute remains unresolved. Cooperation between Guyana and Venezuela is of utmost importance, considering that, under international law, countries under no obligation to enter into unitisation agreements to cooperate for the joint development of transboundary hydrocarbon reservoirs. International law cannot compel a state to accept the idea of unitization with regard to exploitation of common petroleum deposits if the state is not willing to do so. Nevertheless, even though customary international law has not developed a principle compelling there seems to be a global trend with regard to exploitation of cross-border deposits in favor of cooperative development.

As a result of the October 2013 incident the hunt for oil by Guyana in the now disputed waters is at a standstill until the delimitation is settled. This unfortunate incident most likely signalled a negative factor in the diplomatic relations between Guyana and Venezuela. For, Guyana it will most likely have a negative financial effect as potential investors who intended to explore in the disputed area may change their minds, as there is no assurance that another vessel attempting to conduct a survey in that location will not meet the same fate. However, the good news is that the Guyana-Venezuela incident provides an opportunity for these two South American States to finally settle their territorial and maritime delimitation in a formal and legally binding nature.

NOTES ON CONTRIBUTOR

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NOTES

- ¹ Text of the 1907 Romanes Lecture on the subject of Frontiers by *Lord Curzon of Kedleston*, Viceroy of India (1898-1905) and British Foreign Secretary (1919-24) <http://www-ibru.dur.ac.uk/resources/docs/curzon1.html>, accessed November 11, 2013.
- ² *United Nations Convention on the Law of the Seas* (UNCLOS) UN Doc. A/CONF. 62/122; 21 ILM 1261.
- ³ *United Kingdom v Venezuela (British Guiana v. Venezuela Boundary Arbitration)* (1899) 92 BFSP 160.
- ⁴ 'Guyana-Venezuela Border Dispute,' as reported in *Keesing's Record of World Events Online* (1960-Present) Vol. 45 (October 1999) VENEZUELA, <http://www.keesings.com>, accessed November 11, 2013.
- ⁵ P.K. Menon 'The Guyana-Venezuela Boundary Dispute' *Encyclopaedia of Public International Law* 6 (1972): 212.
- ⁶ *British Guiana v. Venezuela Boundary Arbitration*, 92.
- ⁷ See *Minquiers and Ecrehos*, ICJ Reports 1953 p 47, 55-7, where the Court stated that the issue of possession and effective occupation was equated with sovereignty.
- ⁸ *Burkina Faso/Mali*, ICJ Reports 1986 p 544, 566; see also *El Salvador/Honduras*, ICJ Reports 1992 p 351, 386-8.
- ⁹ 'Guyana, Venezuela Maritime Boundary issue...Technical team to meet within four months,' *Kaieteur Newspaper*, October 18, 2013, accessed November 11, 2013, <http://www.kaieteurnews.com/2013/10/18/guyana-venezuela-maritime-boundary-issuetechical-team-to-address-matter-within-four-months/>; and 'Oil Search in disputed Guyana/Venezuela waters halted' , *Kaieteur Newspaper*, October 20, 2013, accessed November 11, 2013, <http://www.kaieteurnews.com/2013/10/20/guyanas-oil-search-halts-until-venezuelan-dispute-is-resolved/>.
- ¹⁰ 'Oil Search in disputed Guyana/Venezuela waters halted', *Kaieteur Newspaper*, October 20, 2013,
- ¹¹ *Ibid.*
- ¹² PCA Arbitral Tribunal constituted pursuant to Art. 287, and in accordance with Annex VII of the UNCLOS; *Guyana-Suriname Maritime Boundary Arbitration*, as available through: http://www.pca-cpa.org/showpage.asp?pag_id=1147, accessed November 11, 2013.
- ¹³ Joint Communiqué Signed at the Conclusion of the State Visit to Suriname by Hugh Desmond Hoyte, President of the Cooperative Republic of Guyana and Ramsewak Shankar, President of the Republic of Suriname (25 December 1989); See also, *Guyana-Suriname Maritime Boundary Arbitration Award*, 157.
- ¹⁴ *Ibid.*
- ¹⁵ *Guyana-Suriname Maritime Boundary Arbitration*, 157.
- ¹⁶ *Ibid.*, 158.
- ¹⁷ *Ibid.*
- ¹⁸ *Ibid.*, 156.
- ¹⁹ *Ibid.*, 157.
- ²⁰ *United Nations Convention on the Law of the Seas* (UNCLOS) UN Doc. A/CONF. 62/122; 21 ILM 1261.
- ²¹ James Crawford, *Browlie's Principles of Public International Law*, 8th edn. (Oxford: Oxford University Press, 2012) 256.
- ²² Article 308(1), UNCLOS.
- ²³ *Geneva Convention on the Territorial Sea and the Contiguous Zone*, 516 U.N.T.S. 205; (1958) A.J.I.L. 834; *Geneva Convention on the High Seas*, 450 U.N.T.S. 82;

- (1958) 52 A.J.I.L. 842; *Geneva Convention on the Continental Shelf*, 499 U.N.T.S. 311; (1958) 52 A.J.I.L. 858; and *Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas*, 599 U.N.T.S. 285; (1958) 52 A.J.I.L. 851
- ²⁴ United Nations Treaty Section,
http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en accessed November 11, 2013.
- ²⁵ *Ibid.*
- ²⁶ <http://www.heritage.org/research/testimony/2012/06/the-law-of-the-sea-convention-treaty-doc-103-39>
- ²⁷ David Harris, *Case and Materials on International Law*, 7th edn. (London: Sweet and Maxwell, 2010) 321; *See also Nicaragua Case, North Sea Continental Shelf Cases, (Federal Republic of Germany v Denmark and the Netherlands)* ICJ Report 1969, 3.
- ²⁸ Article 33, UNCLOS.
- ²⁹ Article 57, UNCLOS.
- ³⁰ Article 64, UNCLOS.
- ³¹ *Franco-Canadian Fisheries Arbitration* (1986) Golfe du Saint-Laurent (Filetage), French-Canadian Arbitral Tribunal, 17 July 1986 in *RGDIP* (1986) 713-86.
- ³² *M/V Saiga No. 2 (St. Vincent and the Grenadines v Guinea)* Case No 2 Judgment of 1 July 1999, paras 56-59.
- ³³ *Ibid.*, 137.
- ³⁴ *Ibid.*, 155.
- ³⁵ Article 77, UNCLOS.
- ³⁶ *North Sea Continental Shelf*, ICJ Reports 1969, 3 paras 19, 39, and 43.
- ³⁷ *Ibid.*, at para. 16 of the judgment.
- ³⁸ The other cases arbitrated under the auspices of the PCA includes: *Philippines v. China*, which was instituted in January 2013 and is still pending; *Argentina v. Ghana*, (the 'ARA Libertad Arbitration'), which was instituted in October 2012 and is still pending; *Mauritius v. United Kingdom*, which was instituted in December 2010 and is still pending; *Bangladesh v. India*, which was instituted in October 2009 and is still pending; *Barbados v. Trinidad and Tobago*, which was instituted in February 2004 and decided by a final award rendered on April 11, 2006; *Malaysia v. Singapore*, which was instituted in July 2003 and terminated by an award on agreed terms rendered on September 1, 2005; and *Ireland v. United Kingdom ('MOX Plant Case')*, which was instituted in November 2001 and terminated through a tribunal order issued on June 6, 2008.
- ³⁹ 'Guyana, Venezuela Maritime Boundary issue...Technical team to meet within four months,' *Kaieteur Newspaper*, October 18, 2013.
- ⁴⁰ *Ibid.*
- ⁴¹ *North Sea Continental Shelf*, ICJ Reports 1969, 3.
- ⁴² *Tunisia v Libya Continental Shelf*, ICJ Reports 1982, 18.
- ⁴³ *Gulf of Maine (Canada v US)* ICJ Reports 1984, 246
- ⁴⁴ *Libya v Malta Continental Shelf*, ICJ 1985, 13.
- ⁴⁵ *Maritime Delimitation in the area between Greenland and Jan Mayen (Denmark v Norway)*, ICJ 1993, 37.
- ⁴⁶ *See, Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* Judgment of Oct 2007.
- ⁴⁷ *See*, Jacqueline Lang Weaver and David F. Asmus, 'Unitizing Oil and Gas Fields Around the World; A Comparative Analysis of National Laws and Private Contracts' 28 *Hous. J. of Int'l L.* 4 (2006); Ana E. Bastida et al., *Cross-Border Unitization and Joint Development Agreements: An International Law Perspective*, 29 *Hous. J. of Int'l L.* 2 (2007); and Pablo Ferrante, et al 'Framework Agreements

for the Unitization of Transboundary Hydrocarbon Reservoirs: The Experience In Latin America' *Rocky Mountain Mineral Law Foundation International Mining and Oil & Gas Law, Development, and Investment* (April 22-24, 2013) Oil & Gas Section, Paper 22.

⁴⁸ *Framework Treaty Relating to the Unitisation of Hydrocarbon Reservoirs that Extend Across the Delimitation Line Between the Republic of Trinidad and Tobago and the Bolivarian Republic of Venezuela* (2007).

⁴⁹ *Agreement between the United Mexican States and the United States of America Concerning Transboundary Hydrocarbon Reservoirs in the Gulf of Mexico* (2012)

⁵⁰ See Jacqueline Lang Weaver et al., International Unitization of Oil and Gas Fields: The Legal Framework of International Law, National Laws, and Private Contracts, *5Oil and Gas Energy L. Intelligence* 2, 116 (2007).

⁵¹ See, the *Joint Declaration for Cooperation Over Offshore Activities in the South West Atlantic* (1995). The joint declaration was signed under the framework agreement on the *Joint Statement Re-Establishing Consular Relations Between Britain and Argentina, and Agreeing a Framework on Sovereignty Which Would Allow Further Talks*, that was signed in Madrid in October 19th, 1989