CHALLENGES TO THE TERRITORIAL INTEGRITY OF GUYANA: A LEGAL ANALYSIS

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2004] CHALLENGES TO THE TERRITORIAL INTEGRITY OF GUYANA

I. INTRODUCTION

On February 25, 2004 the Government of Guyana invoked arbitration under United Nations Convention on the Law of the Sea against its neighboring coastal state, Suriname, to settle the disputed maritime boundary.¹ The Republic of Guyana,² a small nation on the Caribbean coast of South America, is today confronted with other major territorial disputes with its neighbors. To its west, Venezuela³ claims the sparsely populated and heavily forested Essequibo region. To its east, Suriname⁴ claims a maritime border, a boundary river, and a huge tract of forested land in the southeast called the “New River Triangle.” If these disputes are settled against Guyana, the nation would be deprived of more than fifty percent of its currently occupied territory, a large amount of its territorial sea, outlying maritime areas, and significant natural resources. A major foreign policy objective of Guyana since its independence from Great Britain has been to reach comprehensive demarcations of its frontiers and ensure its territorial integrity.

These disputes began long before Venezuela, Guyana, and Suriname emerged from colonialism. After various European nations established colonies in South America, these developing nations became embroiled in their own wars and territorial claims. Although achieving independence, the states which emerged from colonialism have inherited territorial disputes and are often ill-equipped to handle the complexity such disputes entail. As conditions changed, resources are discovered, and populations shift, these problems can no longer be ignored.

² The formal name of Guyana is “The Republic of Guyana.” This Article will refer to “British Guiana” to describe the area that is now the Republic of Guyana until its independence in 1966. Likewise, this Article will use the term “Guyana” to refer to the Republic of Guyana after independence. See ATLAS A-Z 229 (Dorling Kindersley Publishing 2001).
³ The formal name of Venezuela is the “Republic of Venezuela.” This Article will refer to “Gran Colombia” to describe the area that is now the Republic of Venezuela and Colombia after their independence from Spain in 1811, but before Venezuela separated from this state in 1834. It will use the term “Venezuela” to describe the modern Republic of Venezuela since its independence. See GARY MACEOIN, COLOMBIA AND VENEZUELA AND THE GUIANAS 45 (1965).
⁴ The formal name for Suriname is, “Republiek van Suriname.” This Article will refer to “Dutch Guiana” to describe the area that is now the Republiek van Suriname after its independence from The Netherlands in 1975. Likewise, this Article will refer to Suriname to describe the country that occupied the area that Dutch Guiana administered after 1975. See 18 THE WORLD BOOK ENCYCLOPEDIA 807 (1985).
In the modern world, states seek secure and stable borders and are loathe to yield land or even compromise on issues that question their territorial integrity. Short of war, the disputing nations are thus compelled to seek resolution through arbitrators, usually in the form of respected and neutral international tribunals. Such tribunals evaluate the colonial histories, claims over time, and historical precedents to support such claims. Guyana and its disputing neighbors, however, have yet to reach this point. The countries involved have found it difficult to offer compromises or show willingness to allow international bodies to mediate. Political leaders who make such proposals risk losing their popularity. To avoid this, politicians are more often inclined to demand concessions from the opposing state, make threats, and assert their nation’s rights. Meanwhile, the disputed territories are gradually being developed and occupied by different citizens and business organizations that are becoming entrenched without the establishment of firm legal precedents.

The first step toward resolution will be the establishment of an orderly framework by which the disputes can be negotiated and settled legally. This Article provides such a framework. It will discuss the historical developments of the boundary conflicts, territorial claims all three nations have asserted over time, and the applicable legal principles that must support these claims. It reveals how Guyana will have more to gain in internationally sponsored arbitration than its neighbors. If all parties submit to communal jurisdiction of an international tribunal, it is unlikely that Venezuela will prevail in its claim for the Essequibo, and Suriname will likely be awarded the bordering Courantyne River and a beneficial territorial sea, leaving Guyana with control over the Essequibo, New River Triangle, and outlying maritime zones.

This Article demonstrates why most of Guyana’s claims would likely be sustained by international arbitrators, given existing legal precedents, historical incorporation of treaties, and the realities of constructive occupation. Under these considerations the Essequibo region between Venezuela and Guyana would most probably be awarded to Guyana based upon historical incorporation of treaties through state law succession mechanisms and recognition principles as seen under international law. The 1899 Paris Arbitration Award\(^5\) that originally deeded the Essequibo region to Guyana will be seen as binding and inherited by the Republic of Guyana from Great Britain. A claim by Venezuela that the award was procured by fraud and therefore invalid will be difficult to support. Guyana’s claims to the inland southeastern New River

Triangle will likely be sustained because these claims are supported by historical precedents from the previously conducted, yet un-ratified work of boundary commissions. The disputed Courantyne River will be awarded to Suriname based upon historic title being inherited by a former colonial state under the concept of *uti possedetis*. Because the entire river would be awarded to Suriname, it will affect the land boundary terminus, allowing Suriname control over its claimed immediate territorial sea. However, because international courts have consistently not awarded maritime boundary claims to encompass maritime zones not recognized by the parties at the time of agreement, Suriname may not assume control of these territories simply by reiterating its claim for the territorial sea. Therefore, the location of long-standing Guyanese concessions and prior claims to these outlying maritime areas may award them to Guyana based upon traditional methods of maritime delineation.

II. THREE DISPUTED TERRITORIES

Three distinct territories are in dispute between Guyana and its neighbors. Part II.A describes the Essequibo region of Western Guyana that is now in dispute with Venezuela. Part II.B describes the New River Triangle, a sparsely populated section in the southeast of Guyana that is in dispute with Suriname. Part II.C describes the offshore maritime area and the Courantyne River which forms a boundary between Suriname and Guyana.

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7 *Id.*
During the nineteenth century, Venezuela and British Guiana claimed territories whose borders overlapped. This area is known today as the Essequibo region (labeled "Venez. Claim" on map). The region consists of roughly 50,000 square miles. Other estimates place the area as large as 63,600 square miles. This region is roughly the size of New York State. The area is between the very large Orinoco and Essequibo Rivers.

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8 Alan J. Day, Border and Territorial Disputes 381 (1982).
region lies to the west of the Essequibo River and extends to the Guyana-Venezuela boundary dictated by the 1899 Paris Arbitration Award.11

The Essequibo is sparsely populated, with an estimated 100,000 people,12 although the numbers have not accurately been verified. The Essequibo area is heavily forested land13 and extends southwards in the Rupununi savannahs by the city of Lethem, and north to the Caribbean Sea. It includes the cities of Charity and Mabaruma, and encompasses the Kanaku and Pakaraima mountain ranges, where the highest peak extends over 9,000 feet.14 In the northeastern area of the disputed zone, at the mouth of the Orinoco River there are disputed islands around the area of Parika.15

Most of the inhabitants of the Essequibo interior are small scale gold and diamond miners and Amerindians who live in the Southern Rupununi savannahs.16 There are significant concentrations of gold, copper, iron ore, nickel, and mica.17 Diamonds and manganese have been found but not in quantities sufficient for commercial production.18 The Guyanese government, with the assistance of the Home Oil Company, explored for oil in the interior of the Essequibo. Wells were drilled in the interior Takutu basin in the Rupununi area.19 Oil has also been found in the disputed northern coastal and offshore areas, and in 1971 a Dutch-German-American consortium initially drilled two wells.20 In 1979, the Guyanese government signed an agreement with a U.S.-led consortium for a five-year joint concession.21

Guyana has also granted a concession of 100,000 acres to a Texas based firm, Beal Aerospace, to install a satellite launching base in the Essequibo

11 The 1899 Award line is the present demarcation of the Guyana-Venezuela boundary. It was awarded by an American-led tribunal in 1899 and is contested by Venezuela. This issue will be discussed infra. See DAY, supra note 8, at 381.
12 See BRAVEBOY-WAGNER, supra note 10, at 38; see also DAY, supra note 8, at 381; BRITANNICA ATLAS 246-47 (1989).
14 See BRAVEBOY-WAGNER, supra note 10, at 38.
15 See GUYANA AND BELIZE: COUNTRY STUDIES (AREA HANDBOOK SERIES) 125 (1993) [hereinafter AREA HANDBOOK SERIES].
16 See BRAVEBOY-WAGNER, supra note 10, at 80.
17 See id.; see also Szczesniak, supra note 13, at 1.
18 RAYMOND T. SMITH, BRITISH GUIANA 2 (1962).
19 See BRAVEBOY-WAGNER, supra note 10, at 81.
20 Trinidad Guardian, May 13, 1971, at 1; see also BRAVEBOY-WAGNER, supra note 10, at 81.
21 See BRAVEBOY-WAGNER, supra note 10, at 81.
The Venezuelan government objected to the grant, stating, "we have informed Guyana of our claim on the Essequibo territory, which was taken from Venezuela by the colonialists. The country and President Hugo Chavez's administration have not and will not relinquish that claim."23

B. New River Triangle

The area of the New River Triangle comprises over 6,000 square miles.24 It is located between the Courantyne River and the New River (labeled "Sur. Claim" on map). An agreement between the predecessor colonial administrations in 1799 provided that the delineation between the preceding colonial entities of British Guiana and Dutch Guiana would be the west bank of the Courantyne River.25 However, when this agreement was concluded, neither colonial administration was exactly aware of the source of the Courantyne River. Through its own expedition, Guyana claimed the Kutari River, a river feeding the Courantyne from a southeast direction as the boundary. However, based upon a later survey, Suriname claimed the New River, a river flowing from a southwest direction as its version of the boundary. The area bounded by these two rivers is called "The New River Triangle."26


24 GUYANA MINISTRY OF INFORMATION, GUYANA-SURINAME BOUNDARY, para 4. 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; Background to Our Border Row with Suriname, GUYANA GRAPHIC, Jan. 17, 1968.


26 Duke E. Pollard, The Guyana/Suriname Boundary Dispute in International Law, CARIBBEAN YEARBOOK OF INTERNATIONAL RELATIONS 219 (1976). The Maroon Indians are today the only people living in the New River Triangle. Their numbers are no more than 5,000, and of that number most are seasonal gold and diamond prospectors who move intermittently throughout the unfortified border region. Id.
Within the New River Triangle are significant timber and mineral resources. Guyana awarded a Malaysian corporation a 500,000 hectare logging concession in the New River Triangle. There is also evidence of significant aluminum and bauxite deposits. Within the New River Triangle, there is the possibility of commercially viable gold and diamond resources. The large rivers that are fed from the same Northern Amazon watershed have commercially viable hydroelectric capacity.

C. Maritime Zone

The disputed maritime area between Guyana and Suriname (labeled "Suriname Claim" and "Guyana Claim" on map) extends on the continental shelf out nearly 150 miles, before dropping into the Southern Caribbean trench. Commercial entities such as Exxon, AGIP, and Burlington have been successfully drilling for petroleum in this area since the colonial era.

In June 2000, the United States Geological Survey's World Petroleum Assessment 2000 estimated the resource potential for the Guyana Basin at 15.2 billion barrels of oil. If the potential is reached, it would become the twelfth most productive site in the world and the second most important unexplored region in the world. However, various corporations have expressed doubt

29 Aluminum exports accounted for seventy-seven percent of Suriname's estimated $453.3 million export earnings in 1996. See Szczesniak, supra note 13, at 4.
30 See Pollard, supra note 26, at 219.
34 Id. The United States Geological Study projected the Guyana Basin would have approximately twenty-four “Elephants” (deposits containing 100 million barrels of oil) and six
about the extent of resources. Shell Oil, for example, withdrew from its Abary Well license in 1974, presumably basing its decision upon the lack of viable petroleum.35

III. HISTORICAL ORIGIN OF DISPUTES

A. Venezuela-Guyana

1. Early History of Dispute

In 1640, Dutch trade concerns established several settlements on the northern coast of South America, which was referred to as “the Wild Coast” or “the Guianas.”36 The Dutch maintained settlements at the Essequibo River, and according to a treaty signed in 1648 between Holland and Spain, extended sovereignty as far west to the Orinoco River.37 Gradually, during the Dutch colonization of the Guianas, the Moruca River (125 miles east of the Orinoco River) was regarded as the boundary between their settlements in Guyana and the Spanish occupied areas of Venezuela.38

The Guyana sub-province was officially created in 1762, and by Royal Decree of The Netherlands in 1768, its boundaries were stated as “the Atlantic on the east to the Upper Orinoco, Casequlare, and Rio Negro on the west and the lower Orinoco on the north, and the Amazon River to the south.”39 By

“Giants” (deposits containing more than 500 million barrels). The Guyana basin is also estimated to contain 42 metric ton TcF of natural 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 license. Id.

36 The Guianas consist of Venezuela, Guyana, Suriname and French Guiana. All were former colonial holdings of European powers, except French Guiana which still maintains its colonial overseas status of France. The Dutch holdings were originally assets of the Dutch West Indies Corporation, a quasi-national entity. See Colin Henfrey, Guyana, LATIN AMERICA AND THE CARIBBEAN 279 (Claudio Véliz ed., 1968).
37 LESLIE B. ROUT, WHICH WAY OUT? AN ANALYSIS OF THE VENEZUELAN-GUYANA BOUNDARY DISPUTE 2-3 (1971). See also BRAVEBOY-WAGNER, supra note 10, at 97; DAY, supra note 8, at 351.
38 BRAVEBOY-WAGNER, supra note 10, at 98.
39 Francisco Xavier Yanes, Compendio de la Historia desde el Descubrimiento y Conquista hasta que se Declaro Estado Independiente, 1940, in BRAVEBOY-WAGNER, supra note 10, at 97.
1704, the Dutch had an extensive trading network spreading down the Essequibo to the Rupununi in the south and to the Orinoco in the west.40

In the Napoleonic wars of 1814, the Dutch lost control of many overseas possessions and ceded the South American colonies to Great Britain, in an act known as the Treaty of London.41 Although intermittent skirmishes continued throughout the area, Great Britain maintained these settlements, collectively named British Guiana, under the Overseas Colonial Office until independence in 1966.42 The British saw their colony as the successor state to the original Dutch colonies, and likewise inherited all the territory claimed and inhabited by the Dutch. During the control over British Guiana, the British colonial government issued claims, which exceeded the exercised controlled area of the Essequibo, all the way to Moruca.43

Throughout this time, the Spanish Government ruled the territory of modern day Venezuela and Colombia. The Spanish Government initially came to the Caribbean Coast of South America before the British and Dutch formed settlements, yet the Spanish concentrated their trade and development on the Pacific side of the continent. With the development of trade routes between Cartagena, Panama, and Havana, the Spanish Government took a great interest in the Caribbean.44 In 1819, a new nation named Gran Colombia achieved independence from Spain and immediately made a claim to the Essequibo region directly to its east, labeling it the Guyana Essequiba.45 Gran Colombia’s ministers to England informed the British colonial government “that the Essequibo River was their nation’s frontier with British Guiana.”46 Britain ignored these claims.47

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40 Id. at 97-98.
41 Great Britain took control of the specific colonies of Demarara, and Essequibo, and Berbice. These colonies collectively form the rough boundaries of British Guiana. See Stephen Clissold & Alistar Hennessy, Territorial Disputes, in Veliz, supra note 36, at 406; see also Otto Schoenrich, The Venezuelan-British Guiana Boundary Dispute, 43 AM. J. INT’L L. 523, 523-24 (1949).
42 See DAY, supra note 8, at 380-81; see also AREA HANDBOOK SERIES, supra note 15, at 125.
43 See Schoenrich, supra note 41, at 524.
45 See ROUT, supra note 37, at 7-8.
46 Id. at 7.
47 Id. at 7-8.
In 1834, Venezuela formally separated itself from Gran Colombia. In the Treaty of Recognition, following secession, there was no reference to the eastern border of Venezuela. Because of this omission, the Royal British Geographical Society in 1834 commissioned a surveyor and naturalist, Robert Herman Schomburgk, to survey the boundaries. In 1839 Schomburgk produced a map and a memoir in which he described his findings and ideas regarding a convenient boundary between the new country of Venezuela and the English colony. The memoir was forwarded to the Overseas Office, and in 1840, the English commissioned Schomburgk to demarcate a westward boundary of British Guiana without Gran Colombia’s approval. This culminated in 1841 in the production of boundary pillars and a map indicating English control from the mouth of the Orinoco River to Point Barima. Venezuela protested the location of the boundary pillars, and Great Britain agreed to remove them. Venezuela insisted the markers were only a boundary claim, not a manifestation of effective occupation of British subjects.

When Venezuela ceded from Gran Colombia it concluded a recognition treaty between the former colonial government and colony. Because of the stalemates that plagued early boundary negotiations, both the British and Venezuelan governments made a “status quo” declaration, calling for “non-violation of the disputed zone by either party.” The agreement was short lived; in the late 1850s, the discovery of substantial gold deposits proved too economically compelling, and the dispute was reignited. British settlers moved into the region and the British Guiana Mining Company was formed to

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48 See MACEOIN, supra note 3, at 45.
49 See ROUT, supra note 37, at 8.
50 See SCHOENRICH, supra note 41, at 524; see also ROUT, supra note 37, at 8. Schomburgk was also commissioned to demarcate the Southern and Eastern borders of British Guiana bordering Dutch Guiana and Brazil. His demarcations during this era are the bases for several claim lines to be discussed infra. See DAY, supra note 8, at 380-81.
51 See ROUT, supra note 37, at 8.
52 See Schoenrich, supra note 41, at 524; see MINISTRY OF EXTERNAL AFFAIRS OF VENEZUELA, “The Report on the Boundary Question with British Guiana Submitted to the National Government by the Venezuelan Experts” (1967). The report quotes a report by the Minister of Gran Colombia, Jose Manuel Hurtado saying: “The Republic of Colombia is today composed of . . . a beautiful and rich country [which] extends by the Northern Sea, from the Essequibo River or the limits of the province of Guyana, up to the Culebras River in the boundary with Guatemala.” See Public Record Office of London F.O. 18/10, reprinted in BRAVEBOY-WAGNER, supra note 10, at 289.
53 See ROUT, supra note 37, at 10.
54 Id. at 11.
mine the deposits. Later, British Guiana citizens began inhabiting this area, during a time that Venezuela was unable to protest because of "civil strife" and revolution.

In 1877, an official map of British Guiana was published, dated 1875, showing the Schomburgk Line as the boundary. The map included a note asserting that this line "should not be taken as authoritative as it had not been adjusted by the respective governments." When gold deposits were discovered in the area, a new map was published in 1886 (still dated 1875) but showing a Schomburgk Line that had been moved far to the west. The map did not reference the fact that this area was in dispute or subject to adjustment by either the Venezuelan or British governments. Based upon these actions, Venezuela formally lodged a diplomatic protest and demanded the evacuation of the territory claimed by Great Britain from a point east of the Moruca River. Great Britain ignored the protest and suspended diplomatic relations with Venezuela.

2. 1899 Paris Arbitration Tribunal

Throughout the nineteenth century, Venezuela had made repeated proposals to arbitrate the Essequibo dispute. These efforts were ignored by Great Britain. Venezuela finally broke diplomatic relations with Britain in 1887 and appealed to the United States for help. Lord Salisbury refused Venezuela's requests for arbitration, and brushed aside the offers of mediation by the United States. The United States was at that time primarily concerned with the development of the trans-continental canal, and the extension of the Monroe Doctrine in Latin America. In 1894, William L. Scruggs, an attorney originally appointed by Grover Cleveland, was hired by the Venezuelan Government to negotiate on its behalf. Scruggs published a report entitled British Aggression in Venezuela, or the Monroe Doctrine on Trial. His

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56 See Schoenrich, supra note 41, at 524.
57 Id.
58 See ROUT, supra note 37, at 12.
59 Id.
60 HENRY JAMES, RICHARD OLNEY AND HIS PUBLIC SERVICE 124 (1923).
61 ALEXANDER DE CONDE, A HISTORY OF AMERICAN FOREIGN POLICY (1931) (asserting that the 1894 Corinto Island Affair, where Great Britain succeeded in establishing support in
theory was that the British policies in Latin America infringed upon United States concerns in the Panama Canal. He believed their refusal to arbitrate further indicated their commitment to continue aggression.

Responding to this scrutiny, President Cleveland delivered a message to a joint session of Congress, "recommending the appointment of a commission so that the United States might determine for its own purposes where the true divisional line lay." Mr. Scruggs then persuaded the United States Congress to pass a resolution urging Britain and Venezuela to arbitrate the dispute. The resolution passed both Houses of the U.S. Congress by a unanimous vote, and President Cleveland signed it into law on February 20, 1895. This resolution resulted in the U.S. Congress nominating members of the boundary commission. Throughout this time, Great Britain was the premier colonial power in the world, including in the Western Hemisphere. The arbitration between Venezuela and British Guiana served as a pre-textual way to assert American dominance over the Caribbean and Latin America, and establish the United States as an international power.

Honduras, exacerbated the tension between Great Britain and the United States. Conde further argues that it was this alleged weakness of the United States government in dealing with the British that strongly influenced Cleveland's decision to make a stand in 1895.

62 See BRAVEBOY-WAGNER, supra note 10, at 38 (noting that James argues that the decision of the United States to become involved in the conflict was part of a general concept to become involved throughout the Latin American area, and to strengthen the Monroe Doctrine); see also ROUT, supra note 37, at 8; JAMES, supra note 60, at 100 (quoting President Cleveland as saying "the appeals of Venezuela for help... were incessantly ringing in our ears").

63 See ROUT, supra note 37, at 17.

64 ODEEN ISHMAEL, THE TRAIL OF DIPLOMACY, ch. 9(B) (entitled "United States Support of Venezuela"), at http://www.guyana.org/features/trail_diplomacy.html (last visited Apr. 15, 2004); Message from the President to the U.S. Senate (1895) (statement of President Grover Cleveland).

65 The members of the 1896 Boundary Commission were David J. Brewer, Associate Justice of the Supreme Court; Richard L. Albe, Chief Justice of the Court of Appeals of the District of Columbia; F.R. Coudert, a Spanish scholar; Dr. D.C. Gillman, President of Johns Hopkins University; and Dr. D. White of Cornell University. Schoenrich, supra note 41, at 525.

66 During this time Great Britain maintained colonial holdings or members of the British Commonwealth in British Guiana, Belize (British Honduras), Jamaica, Trinidad and Tobago, the British Virgin Islands, Bermuda, and Canada. See AREA HANDBOOK SERIES, supra note 15, at 125.

67 DAVID W. DENT, THE LEGACY OF THE MONROE DOCTRINE: A REFERENCE GUIDE TO U.S. INVOLVEMENT IN LATIN AMERICA AND THE CARIBBEAN 365 (1999) (reasoning that the U.S. government intervened on behalf of the Venezuelan interest to counter English power in Latin America). Only a few years earlier, Great Britain established a sovereign king on the Moskitio coast, as a way to thwart American expansion in Panama, centered around completing work on
Great Britain (for British Guiana) signed a treaty of arbitration with the Republic of Venezuela signed in 1897. The Treaty of Arbitration laid the foundation and purpose of the tribunal, and bound each side to the outcome of the decision. The treaty also defined core concepts of law, to which the Arbitration Panel was to be bound. The relevant portions are the following:

Article IV

In deciding the matters submitted, the Arbitrators shall ascertain all facts which they deem necessary to a decision of the controversy, and shall be governed by the following Rules, which are agreed upon by the High Contracting Parties as Rules to be taken as applicable to the case, and by such principles of international law not inconsistent therewith as the Arbitrators shall determine to be applicable to the case:

Rules

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

(b) The Arbitrators may recognize and give effect to rights and claims resting on any other ground whatever valid according to international law.

(c) In determining the boundary line, if territory of one Party be found by the Tribunal to have been at the date of this Treaty in the occupation of the subjects or citizens of the other party, such effect shall be given to such occupation as reason, justice,

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the trans-continental Panama Canal. Dent also asserts that, just as the United States had emerged from colonialism, the foreign policy of the United States naturally identified with such movements worldwide. Id. In 1901, following arbitration of the boundary dispute, the United States again exerted pressure to sign a fifty-year old treaty renouncing sole rights to any trans-continental canal over the Central American isthmus. See Veliz, supra note 36, at 443.

68 See Schoenrich, supra note 41, at 525; see also ROUT, supra note 37, at 21 (citing Report of the Special Commission Appointed by President January 4, 1896 to Examine and Report upon the True Division Line Between the Republic of Venezuela and British Guiana, S. DOC. No. 55-91 (1898)).
the principles of international law, and the equities of the case shall, in the opinion of the Tribunal, require.\textsuperscript{69}

By Article XIII, the contracting parties agreed to consider the arbitral award as the "full, perfect and final settlement" of the questions referred to the arbitrators.\textsuperscript{70}

The Venezuelan argument was that when Great Britain acquired British Guiana in 1814, the Colony's boundary was the Essequibo River.\textsuperscript{71} This was the frontier shown on various maps printed in London, and in particular by Venezuelan maps depict this as the boundary line. The Venezuelan argument also asserts that the British constituents mislabeled the Essequibo line and the Schomburgk line, giving Britain credit for much more territory than was originally demarcated by Schomburgk in 1834. "Essequibo line was the original Schomburgk Line of 1835 as shown on the map that Schomburgk drew before he showed partiality for British interests."\textsuperscript{72} The British view was that they inherited the Dutch occupied areas, which were the Essequibo, Mazaruni, Cuyuni, Moruka, Pomeroon, Waini, Barima and Amakura Rivers. This would extend the overall British claim west of the Essequibo River and west of Point Barima.\textsuperscript{73}

On October 4, 1899 the Arbitration Panel published its decision in a unanimous award. The line chosen by the tribunal was to begin at Point Playa, forty-five miles east of Point Rivers and extended south along the Amacura River. The award granted Great Britain nearly ninety percent of the territory


\textsuperscript{70} \textit{See} \textit{ROUT, supra} note 37, at 19. The tribunal to decide the Venezuelan-Guyana boundary was convened in Paris in 1898. Five justices were appointed to hear the case. Lord Chief Justice Russell and Lord Justice Collins of Great Britain, Chief Justice Fuller and Justice Brewer of the U.S. Supreme Court, and the president of the panel was an academic named F. de Martens. There were no Venezuelan representatives on the panel, nor any judges from South America. The legal representatives from Great Britain were Sir Richard Webster, Attorney General of Great Britain, and Sir Robert Reid, ex-Attorney General of Great Britain. The Venezuelan legal counsel was conducted solely by lawyers from the United States, including ex-Secretary of War, General Benjamin Tracy, Severo Mallet-Prevost, James Russell Soley, and headed by former United States President Benjamin Harrison. \textit{BRAVEBOY-WAGNER, supra} note 10, at 180.

\textsuperscript{71} \textit{ISHMAEL, supra} note 64, ch. 3(D).

\textsuperscript{72} \textit{Id.} ch. 3(D), para. 5.

\textsuperscript{73} \textit{Id.} ch. 3(E), para. 1.
in dispute. Venezuela was awarded only the mouth of the Orinoco River and a 5,000 square mile extension around Point Barima. In total, Great Britain received 45,000 of the 53,000 square miles disputed. Little reference was given to the constructive occupational realities in the award. The award described the boundary line in vague terms and did not elucidate the constructive occupation realities which supposedly were the spirit of the award and the 1897 Treaty to Arbitrate. As a Venezuelan legal analyst said at the time, “it was exceedingly short, gave no reasons whatsoever for the decision and merely described the boundary line approved by the Tribunal.”

After the decision, Britain and Venezuela sent commissioners to survey the area of the boundary in accordance with the award, and in 1905, both sides accepted the Commission’s report. The boundary was ratified by a map, seen below, that was produced and signed by representatives from British Guiana and Venezuela.

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74 See Schoenrich, supra note 41, at 526.
75 See Arbitration Treaty & Award, supra note 69.
76 Id.
77 See Schoenrich, supra note 41, at 526.
78 Abraham Tirado and Elias Toro signed the map on Venezuela’s behalf and H.I. Perkins and C. Wilgress Anderson on Britain’s behalf. The agreement of the commissioners was recorded in a separate document signed a few days after the map was published. BRAVEBOY-WAGNER, supra note 10, at 107.
3. Modern Venezuela-Guyana Relations

The dispute was believed to be settled until the posthumous publication in 1949 of a memorandum by Mallet Prevost, one of the American jurists on the 1899 Paris Tribunal. In this declaration Prevost stated the result of the tribunal was due to a secret deal between the British attorneys and American judges. Prevost claimed that Venezuela had been unable to defend her rights because British Guiana was still a British colony and Venezuela was too weak as compared to Great Britain. The members of the tribunal feared that the economic development of the area would also be hindered from growing into one economic unit if an adverse decision was handed to Great Britain. After the 1949 Prevost memo was published, the Venezuelan Government re-asserted its claim for the Essequibo, citing the 1899 Award as a nullity under international law.

Anticipating independence of Guyana from English rule, on February 17, 1966, representatives of Britain, Guyana, and Venezuela signed an agreement in Geneva that established a border commission. The Commission, consisting of two Guyanese and two Venezuelans, failed to reach an agreement. However, both countries agreed to resolve their dispute by peaceful means as stipulated in Article 33 of the United Nations Charter. On October 12, 1966, Guyana discovered that Venezuelan military and civilian personnel had occupied the Guyanese half of Ankoko Island in the Cuyuni River. The Venezuelans had begun developing an airfield and mining facilities on the island. The Venezuelans hoped to seize this crucial island and utilize its territorial sea before Guyana could discover its presence. Guyanese Prime Minister Burnham protested the occupation and demanded Venezuela’s complete withdrawal and the removal of the facilities. Dismissing the protest, Venezuela countercharged that Ankoko Island had always been Venezuelan territory. With Guyana unable to force a Venezuelan withdrawal, Ankoko Island remained occupied, and sporadic gunfire was exchanged between Guyanese and Venezuelan military outposts.

79 See Clissold & Hennessy, supra note 41, at 407.
81 See id.
82 Ankoko Island is located at the confluence of the Cuyuni and Venamo Rivers, roughly 100 miles south from the northern coast of South America. GEORGES A. FAURIOL, FOREIGN POLICY BEHAVIOR OF CARIBBEAN STATES 143 (1984).
In 1968, Venezuela claimed a twelve mile territorial sea beyond the disputed territory, a straight base line drawn across the delta of the Orinoco River. Since the Essequibo region is disputed (the area now under Guyanese control), this decree was meant to establish the baselines for Venezuela's territorial sea in a sector enclosed between the dividing line of the Essequibo River and Punta Araguapich, the northern tip of the delta.

The border commission could not resolve the dispute by the time its four year term expired in 1970. Nonetheless, on June 18, 1970, the governments of Venezuela, Britain, and Guyana signed an agreement to place a twelve year moratorium on the border dispute. This protocol, known as the Port-of-Spain Protocol provided for continued discussions, a suspension of territorial claims, and automatic renewal of the protocol if it remained uncontested after the twelve years. In 1981, Venezuela announced that it would not renew the protocol. Thus, for the past two decades no substantive progress has been made in resolving this aspect of the dispute.

B. Guyana-Suriname

1. Early Colonial Dispute

The disputes over the maritime area, New River Triangle, and Courantyne River began during the colonial era, when Guyana was controlled by Great Britain and Suriname was controlled by The Netherlands. These colonial
governments exercised direct control over their colonies and viewed the territories as extensions of their states. Possession of these colonies changed through successive wars and raiding, and in the second Anglo-Dutch War, the Dutch colonies of Berbice (in present day eastern Guyana) and Suriname came under the firm control of England. In 1799, the governors of the neighboring provinces concluded that Berbice should control all territory up to the west bank of the Courantyne River. 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 the middle of the river which is customary in international law.

2. 1936 Mixed Commission

In 1936, officials from Great Britain and The Netherlands (referred to as the Mixed Commission) addressed the problem of the river, maritime, and inland boundary issues. A contention was the Dutch (and later Surinamese) claim to the entire width of the Courantyne River was at odds with customary international law. Generally, in international law, river boundaries between

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90 See Thomas W. Donovan, Jurisdictional Relationships Between Nations and Their Former Colonies, 1 ACROSS BORDERS INT'L L.J. 5 (2003). The fact that these colonies were seen as extensions of the colonial state allowed the colonial power to be in charge of the domestic and international commitments of the area, and to speak on its behalf. See PASQUAL FIORE, INTERNATIONAL LAW 431 (1929). Fiore asserts that "a protectorate may be deemed a legitimate mode of acquiring territory inhabited by uncivilized tribes only when established in accordance with the principles of international law." Id.


92 Id. at 121; The Guyana-Suriname Boundary Dispute, STABROEK NEWS, Oct. 17, 2002; see GUYANA-SURINAME BOUNDARY, supra note 24, para. 6.

93 Guyana has since claimed that, although the 1799 Agreement was bilaterally ratified, the proclamation did not constitute a formal boundary agreement. It asserts that the 1799 Agreement was intended to be an interim agreement, lasting only until a final demarcation could be established. There is evidence to substantiate this claim. The 1799 Agreement 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." Ishmael, supra note 5.
nations are set in the middle of the navigable channel. However, in 1936, the Mixed Commission established boundary pillars not at mid-river, but on the western bank of the Courantyne River following the 1799 Agreement.

Because the 1936 Mixed Commission assumed the full width of the Courantyne River to be Dutch Guiana territory, Guyana and Suriname agreed to a point on the west bank (the so-called Kayzer-Phipps point or Point No. 61) which would be the land boundary terminus. It is the consensus of many commentators that the 1936 Mixed Commission asserted a 10° prolongation of the territorial sea from Point No. 61. The modern notions of exclusive economic zone and continental shelf were not envisioned in the original 1936 negotiation process but were addressed in the ensuing discussions. 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 (which saw the German Government occupy The Netherlands).

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95 See *Hoyle*, supra note 6, at 100.

96 See *Hoyle*, supra note 6, at 103.
After World War II, boundary negotiations between Suriname and Guyana were recommenced in the late 1950s. During this time, the territorial seas of a particular country were expanded from the three mile sea to twelve miles, as stipulated by the United Nations Law of the Sea Treaty. Distinctions between territorial seas (a twelve mile extension of state sovereignty) and the exclusive economic zone (an area where a state had the exclusive ability to extract resources, but other nations could transport or ship) were drawn and codified under international law.

In 1954, Britain claimed the continental shelf for British Guiana, and in 1958 granted a concession to the Standard Oil of California Corporation (later Exxon) to operate in the far eastern “area of overlap.” This grant and claim, if it is to be re-affirmed in modern boundary discussions, would extend the Guyanese exclusive economic zone past the 10th line agreed to in the 1936 Mixed Commission. The reason for this apparent incongruity is that nothing more than the three mile territorial sea was envisaged by the 1936 Mixed Commission during its debates.

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101 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. See Hjertónsson, supra note 80, at 65. The 1954 British claim to the continental shelf was intended to be used against Venezuela, but can be applied to the Suriname-Guyana instance as well. During the 1950s, the British Government divided the continental shelf between British Guiana and Venezuela in a treaty dated February 26, 1942. Juraj Andrassy, International Law and the Resources of the Sea 49 (1973). 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 Sept. 29, 1945, 13 DEPT. ST. BULL. 485-486 (July-Dec. 1945), cited in Ian Brownlie, Principles of Public International Law 165 (3d ed. 1979). The Truman Proclamation "expressed that the submarine and subsoil was the exclusive jurisdiction of the United States." Id. 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: A Study in the Dynamics of Customary Rules of International Law x (1968).
102 Suriname did not object to these concessions, although 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
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 offered: (1) Dutch sovereignty over the entire Courantyne River, (2) a 10° E line dividing the territorial sea, and (3) British Guianese control over the New River Triangle. In June, 1962 the Dutch rejected the British proposal and responded anew with claims to the New River Triangle. The Dutch located the boundary in the Courantyne River in the deep water mark (thalweg) rather than on the left bank as in the first draft. Its 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 Guyanese 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.

4. Independence of Suriname and Guyana from Colonialism

When Guyana became independent in 1966, 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.\textsuperscript{109} For example, in 1967, Guyana expelled Dutch surveyors thought to be conducting preliminary sightings for a hydroelectric dam.\textsuperscript{110} In mid-August 1969, the Guyana Defense Force patrol expelled a group attempting to finish a Surinamese airstrip west of the Courantyne River.\textsuperscript{111} 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 stated that the Guyana Defense Forces would stay in the New River Triangle.\textsuperscript{112}

5. Modern Guyana-Suriname Relations

In 1988, 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.\textsuperscript{113} This was codified in the 1991 Memorandum of Understanding, providing for joint exploitation pending a resolution of the final border and agreeing to respect concession rights.\textsuperscript{114} Negotiations proceeded through the 1990s, until Guyana unilaterally granted new petroleum concessions in the area of overlap to Maxus, CGX, and

\textsuperscript{109} Dr. Walston, a boundary negotiator for the British, stated 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 24, para. 17.

\textsuperscript{110} See DAY, supra note 8, at 380.

\textsuperscript{111} See Hoyle, supra note 6, at 98; see also GUYANA-SURINAME BOUNDARY, supra note 24, para. 17; DAY, supra note 8, at 380; Rickey Singh, Suriname Sets Up a New River Outpost, GUYANA GRAPHIC, Aug. 9, 1969; GDF, Dutch Troops in Bloodless Clash, GUYANA GRAPHIC, Aug. 20, 1969; Surinamers' 'Outpost' was Really a Military Camp..., GUYANA GRAPHIC, Aug. 29, 1969.

\textsuperscript{112} See DAY, supra note 8, at 380; PM: Friendship with Suriname is Our Desire, GUYANA GRAPHIC, Aug. 22, 1969. Shortly after the Prime Minister's declaration, 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. See BRAVEBOY-WAGNER, supra note 10, at 192.

\textsuperscript{113} See GUYANA-SURINAME BOUNDARY, supra note 24, para. 18. The 'area of overlap' is highly prospective for petroleum exploration, having the most concentration of petroleum. See CGX Energy Homepage, supra note 35.

\textsuperscript{114} See Hoyle, supra note 6, at 100.
Exxon in 1997-1999 without informing Suriname.\textsuperscript{115} After CGX commenced drilling, on June 3, 2000, two Suriname navy gunboats evicted them.\textsuperscript{116} The Suriname government claimed that the oil platform was in Surinamese territorial waters and in violation of the 1989 Memorandum of Understanding.\textsuperscript{117}

A few weeks prior to the expulsion, Suriname sent a \textit{Note Verbale} to the Guyana Government, asserting that the proposed CGX drilling would be in its territorial waters.\textsuperscript{118} The Suriname position reiterated that the boundary in the exclusive economic zone and continental shelf was a straight line extension of the 1936 line of 10° east of true north from Point No. 61.\textsuperscript{119} Guyana responded by stating that any exploration activities carried out by CGX were in Guyana territory and valid under the Hoyte/Shankar Agreement.\textsuperscript{120}

\textbf{IV. APPLICABLE LEGAL PRINCIPLES}

The following section describes the applicable legal principles involved in Guyana's border disputes with Venezuela and Suriname. Part A describes how a nation gains title to specific territory. Part B describes state succession mechanisms whereby an emerging state inherits treaties and international commitments of the previous government. Part C describes how an international arbitration award may be declared a nullity and therefore not controlling. Part D details notions of recognition, acquiescence, and estoppel in customary international law. Part E describes prescription, the modern international law equivalent of adverse possession. Part F details modern jurisprudence as to maritime delineation, which is relevant to the offshore dispute between Suriname and Guyana.

\begin{footnotesize}
\begin{enumerate}
\item 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. \textit{See TRINIDAD GUARDIAN}, Jan. 14, 2002.
\item \textit{Suriname Evicts Oil Rig}, IBRU BOUNDARY & SECURITY BULL., Summer 2000; \textit{SOUTH FLORIDA SUN-SENTINEL}, Jan. 16, 2002.
\item \textit{WALL STREET JOURNAL}, Jan. 21, 2002.
\item \textit{Id.}
\item \textit{Id.} The 10° extension is based upon the 1936 Mixed Commission. These negotiations were never ratified but laid the framework for the 1958-1962 negotiations. \textit{See GUYANA-SURINAME BOUNDARY, supra note 24, para. 19; see also Hoyle, supra note 6, at 100.}
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
A. Sovereignty Over Territory During Colonialism

Gaining title to the Essequibo or the New River Triangle will hinge upon showing that during the colonial era the colonial power effectively controlled the area. Towards this end Section 1 will discuss the principles of *animus domini* and *corpus*, the twin elements of intent and actual control that must be shown to demonstrate occupation during colonialism. Section 2 will discuss the legal concept of *terra nullius*, its definition, application, and scope.

1. The Principles of Animus Domini and Corpus: Intent and Actual Control of a Territory

International law sets forth two requirements for creating sovereignty and control over sections of unoccupied land, *animus domini* (intent to control a territory) and *animus corpus* (actual control of a territory). These elements were originally delineated in the arbitral award between Brazil and Dutch Guiana in 1904.\(^1\) The arbitration award stated "that in order to acquire sovereignty over territory which is 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."\(^2\)

The *animus domini* element could be established upon behalf of the colonial protectorate, as the colonial protectorates were viewed as extensions of the state during the colonial era. According to Article 34 of the 1885 Treaty of Berlin, "the state intending to assume a protectorate is obliged to notify the other powers signatory to the act that it has undertaken a protectorate over the country named; but, aside from such notification, the protectorate must become effective."\(^3\)

\(^1\) The subsequent dispute was referred to King Vittore Emanuelle 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. The international agreement of May 5, 1906 (signed in Rio de Janeiro, approved by the law of July 11, 1908, and ratified on September 15, 1908, in The Hague) established the boundary between Suriname and the Federal Republic of Brazil. *Id.*

\(^2\) *Id.* at 71.

\(^3\) Article 34 of the Treaty of Berlin, *in Fiore, supra* note 90, at 431. Jurists in the colonial era consistently asserted that a properly established colony or protectorate could acquire territory for the colonial sovereign. Theodore Woolsey in *International Law*, writes that "title is derived by immemorial occupation of land which was before vacant and by occupation of colonies is then occupied." *THEODORE DWIGHT WOOLSEY, INTERNATIONAL LAW* 78 (1981).
Sustaining an intent claim (*animus domini*) requires a strict review of overt actions conducted by the ruling governmental authority. The ruling in *Eastern Greenland* held that intent did not need to be a consistent inhabitation and comprehensive creation of public services, but it did need to be an act that a State entity needed to perform. In sparsely populated and desolate areas, *animus domini* could be as simplistic as reiterating in public a basic intent to control the territory. A State entity could be branches of the military (as seen in *Clipperton Island*), state run commercial entities (such as the Dutch East Indies Corporation in *Island of Palmas*), or public proclamations from a ruling government-affiliated ministry (as in *Eastern Greenland*).

The second element, known as *animus corpus*, is also necessary to complete a claim of title over a given territory. Unlike the *animus domini* element, which has not been reviewed extensively by arbitral panels, the *animus corpus* element has received significant amount of review. The controlling and fundamental case where *animus corpus* was first detailed was the *Island of Palmas* case in which control of a sparsely populated island in the Pacific was disputed with the Netherlands. The United States asserted title based on continuity of title (citing U.S. rule over the Philippines). Because of this continuous transfer of title, the United States claimed, it was unnecessary to prove displays of sovereignty. Conversely, the Netherlands asserted that its predecessor in interest, the Dutch East Indian Company, maintained continuous occupation since 1677, therefore the Netherlands had a first-in-time claim to the island.

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124 See SHAW, supra note 96, at 343.
126 Id. at 45-46.
127 *Clipperton Island Award*, 26 AM. 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 of 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 96, at 348.
128 SHAW, supra note 96, at 348. If a non-state organ were to assert a claim for the title it would have no legal effect and would not be taken into consideration by any international body. *Id.* at 349.
129 The second element of *corpus* is dealt with in the Island of Palmas Case (U.S. v. Neth.), 2 R.I.A.A. 829, 839 (Huber, Arb., Apr., 1928).
130 *Id.* at 830.
In the Award, Judge Max Huber emphasized that occupation is defined as the "actual display of state activities, such as belongs only to the territorial sovereign." Judge Huber pointed out that there was, however, a different test of *corpus* in the instances of "uninhabited and distant territories." As he stated, "manifestations of sovereignty over a small island and distant island, inhabited only by natives, cannot be expected to be frequent." In instances since this award, 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. Examples of such functions are having a viable police force, granting of hunting concessions in a disputed area, and regulating fishing in claimed maritime areas.

Because both Guyana and Venezuela claimed the disputed Essequibo region (Guyana through the colonial auspices of Great Britain and Venezuela through *Gran Colombia's* claim to the eastern section of Venezuela), it is necessary to look towards the constructive realities of occupation that existed during the colonial era. One indicator of constructive occupation was the existence of Spanish Missions in the area. There is considerable evidence that such missions had been established near the tributary of the Yuruari River, well within the disputed territory.

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131 *Id.* The court stated that elements such as tax rolls, jurisdictional legal courts, administration, civil servants, etc., are signs of a government's effective occupation and control. *Id.*

132 *Id.*

133 *Id.* at 830-39. 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 that are only partly uninhabited. The fact that a state cannot prove or display sovereignty over an uninhabited 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 833-39.


135 Southern Boundary of the Territory of Walfisch Bay (Great Britain v. Germany), 104 BRIT. & FOREIGN ST. PAP. 50, 100 (May 23, 1911).


138 See *ISHMAEL,* supra note 64. Ambassador Ishmael suggests that the number of Spanish missions was a leading indicator in ascertaining the extent of *corpus*, or constructive occupation realities that existed during the colonial era. The use of missions and missionaries to prove constructive occupation is seen in other boundary disputes in South America such as Colombia/Peru and Colombia/Panama. It has also been seen in the Libya/Chad example. *Id.*
1748, a Spanish mission was depicted on a tributary on the left bank of the Cuyuni. The site of an intended Mission at the mouth of the same creek was also indicated.\textsuperscript{139}

Even so, the evidence of effective occupation demonstrated by the Netherlands was more compelling. In 1757, the Commandant of Orinoco complained to the Dutch authorities "of the evil conduct in Barima of traders from Essequibo and Suriname."\textsuperscript{140} The Director-General of the Netherlands immediately implemented measures with the Suriname Government to deal with this evil. It has been seen in the case of \textit{Eastern Greenland}, that policing an area is a valid demonstration of \textit{animus corpus}, demonstrating not only the intent but actual control of the area. There are also records of Dutch traders in Point Barima as early as 1766.\textsuperscript{141} In 1769, the Prefect of the Spanish Missions reported that a Dutchman had been living since 1761 on the Aguirre River, and that Dutch families had been living at the mouth of the Curumo.\textsuperscript{142}

In 1796, the Dutch settlements transferred to the English. The colonies had been seized in 1781 by the British from whom they were later in the same year taken by the French who subsequently abandoned them in 1784. The Dutch resumed possession until the invasion by the British in 1796. In 1801, the British Commandant was ordered to report on the extent of the colony (of Essequibo). His report was illustrated by a chart which showed the boundary commencing at Barima, and included the territories claimed by the Dutch in their protests to the Spanish Government in 1759 and 1769.\textsuperscript{143}

In terms of Guyana’s boundary dispute with Suriname, because Suriname and Guyana both intended to control the New River Triangle (thus satisfying the \textit{animus domini} element), any international tribunal’s decision will hinge upon an examination of \textit{actual} control over the area. Because the New River Triangle is much more isolated than the Essequibo, effective demonstration of occupation occurred much later. In the twentieth century, it is clear that Guyana has consistently demonstrated actual presence. It has maintained a consistent presence of defense and military personnel, has granted concessions, taxed such concessions, built a road into the area, and was originally awarded the area by the unratified 1936 Commission.

\begin{itemize}
  \item \textsuperscript{139} Id.
  \item \textsuperscript{140} Id.
  \item \textsuperscript{141} Id.
  \item \textsuperscript{142} Id.
  \item \textsuperscript{143} Id. ch. 6(B).
\end{itemize}
2. Terra Nullius

A critical issue in determining sovereignty over an area during the colonial experience is establishing whether the land was *terra nullius*, defined as "territory which belongs to no one." This means that such land must be open for occupation because no one else is occupying it and fulfilling the fundamental laws of occupation. Venezuela, Suriname, or Guyana may argue the former colonial governments did not effectively occupy the disputed areas because it was either inhabited by another European power or by a cohesive indigenous society. In the absence of these tribes or other acts of European *animus domini* or *corpus*, the territory would therefore have been *terra nullius*. Thus, it could have been controlled by a colonial entity determined by the twin elements of fundamental occupation.

In the *Western Sahara* case (1975), the International Court of Justice held that territories inhabited by tribes or peoples having social and political organization were not regarded as *terra nullius*. In such cases, sovereignty was not acquired unilaterally through occupation. Rather, sovereignty could be acquired through agreements with local rulers. Such agreements were regarded as derivative roots of title, and not original titles obtained by occupation of *terra nullius*.

*a. Terra Nullius as Defined and Applied*

Throughout the colonial era European scholars agreed that "any land that was *terra nullius* was open to occupation." This was the justification for the colonization of North and South America, Australia, and in some instances, Africa. 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.

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144 SHAW, supra note 96, at 342.
146 See id. at 43; Minquier and Ecrehos (Fr. v. U.K.), 1953 I.C.J. 47, at 65-66. 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 Western Sahara, para. 92.
147 See Ricciardi, supra note 134, at 395.
149 See SHAW, supra note 96, at 355. The Australian case of *Mabo v. Queensland* dealt with *terra nullius* in Australia when dealing with an indigenous population that was not organized, coherent nor central. "Whatever differences of opinion there may have been among jurists, the state 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*." 66 A.L.J.R. 408
However, to define “governing presence” and “central government” poses 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. These non-western cultures may not, it was argued, have achieved the developmental level of European powers, but were still central and organized enough to maintain title over their inhabited territory.

There was debate, however, as to how much an indigenous people had to be “developed” before they were accorded the same consideration. Whether a land was considered terra nullius depended not on the land, but on the European view of the developmental level achieved by the inhabitants. The early twentieth century Italian jurist, Pasquale Fiore, presented that title to territory could be established if the area was inhabited by “savage tribes” yet required a treaty of cession from the tribes, no matter how slight, that these tribes recognized colonial rule. This “disguised form of conquest” required the European settlers to negotiate a cession of title which could include direct and indirect means for inducing the indigenous inhabitants to yield territory to European colonialists.

In New River Triangle, neither the Dutch nor the English colonists systematically explored the interior of their lands. Historical records contradict accounts of the area and the inhabitants. Early records indicate that

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150 A minority of scholars believed that if any substantive population inhabited an area that land could not be terra nullius. 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 (1926).

151 In the Lotus instance, France brought suit against the Turkish Government claiming 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 conceded Turkey to be a cohesive political unit. See S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. 131.

152 Terra nullius was dealt with recently by the International Court of Justice in The Indo-Pakistan Western Boundary Case Tribunal (1968) 50 I.L.R. 2. 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 does not qualify the areas as terra nullius. Conversely, it can be inferred that terra nullius is the land, which although it may be inhabited, must be not claimed by any power, European or otherwise.

153 See Fiore, supra note 90, at 423.

154 Id.

155 Id.
Dutch traders went inland up to two hundred miles, yet were confined to the waterways and tributaries of major rivers. No scientific expeditions were convened until 1840, and even then, there were discrepancies in their findings. However, in terms of the Essequibo, it is clear the early Dutch forces and later British forces maintained a consistent occupation in the area, thus satisfying the *animus corpus* element of occupation. The Dutch and then British forces maintained and policed territory extending toward Point Barima.

**b. Abandonment of Claims Reverting Back to Terra Nullius**

The lack of records about the New River Triangle raises abandonment issues. If a state abandons a territory after acquiring it, that territory reverts back to *terra nullius*. International law, however, is unsettled as to what objective acts determine abandonment. The 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 area were occupied and subsequently abandoned. Abandonment principles do not apply to the Essequibo territory, as there has been continuous *animus domini* on both the Venezuelan and Guyana side, and effective control had also consistently been enforced by England.

The majority of scholars state that to find a territory effectively abandoned, both physical abandonment and the desertion of *animus domini* must occur.\(^\text{156}\) Jurists have, however, allowed exceptions. For example, when an uprising occurs that drives government forces from a particular area, it is considered abandonment if the government fails to return in sufficient time even when conditions otherwise permit the return.\(^\text{157}\) If, on the other hand, general withdrawal from an area occurs without force, abandonment would be seen if the government does not return after a sufficient length of time, even if it expresses the intention to return at some future date.\(^\text{158}\)

**c. The Range of Occupied Territory under Terra Nullius**

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. An alternative view

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\(^{156}\) See Ricciardi, *supra* note 134, at 407.  
\(^{157}\) See LINDLEY, *supra* note 150, at 428.  
\(^{158}\) Id.
suggests that a country is entitled to control not only the land that it effectively has title to, but also a hinterland. This theory claims that non-occupied hinterlands may be attached to occupied colonial possessions when one of three factors occur. These are "geographical proximity, natural features, or strategic need." Hinterland theories have been asserted in the Guianas during the 1899 Paris Arbitration regarding the maritime and territorial boundaries between British Guiana and Venezuela.

In the first consideration used in hinterland theory, geographical continuity is used to justify a claim to 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. In the Island of Palmas award, Judge Huber addressed the contiguity theory and concluded that it had "no foundation in international law." Huber wrote that this principle is "by its very nature... uncertain," and that it conflicted with the clear requirement in international law of effective occupation. Huber thus concludes that even isolated displays of occupation would defeat claims based on a hinterland theory.

In the second justification to include a hinterland, natural features allow states to 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. Britain claimed the natural boundary theory in the 1899 British Venezuela-Guiana Arbitration. Britain wanted to use the natural boundaries to divide Guyana and Venezuela because they are "both

159 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. See Ricciardi, supra note 134, at 404.

160 Id.


162 Id.

163 Id. Fiore argues that the extent of occupied land must extend to "areas which the occupying state has granted the use, under private title to individuals." See Fiore, supra note 90, at 426. Fiore argues implicitly that hinterland claims will be defeated by the showing of effective control and that a European colonial power in extending title to territory must indeed assert the intent to occupy the territory and the actual occupation of that territory. Id. at 426-27.

easy to distinguish and hard to cross." Britain asserted hinterland theories based on ethnic and racial divisions. Yet, Fiore declared that 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.

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 delegate was ordered to assert "as a 'general principle ... if a nation has made a settlement it has a right to assume sovereignty over all the adjacent vacant territory which is necessary to the integrity of the settlement." However, this theory has gained little respect from international panels. According to Fiore, acquisitive prescription "may find application in connection with possessions acquired by conquest, colonial protectorate, or by means of spheres of influence (hinterland) although these measures do not constitute a legitimate mode of acquisition."

If no other state claims a hinterland, an international tribunal will most likely grant title as long as there is some show of occupation. In Eastern Greenland, for example, 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 power." The Court laid particular emphasis on the fact that until 1921 no other state had either disputed

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166 See Fiore, supra note 90.

167 Ricciardi, supra note 134, at 407-09 (citing Telegram from Lord Granville to Sir Edward Malet (Jan. 14, 1885)).

168 Fiore, supra note 90, at 430.


170 Id. at 46-48.

171 Id.

172 Id. at 46.
Denmark's claim to the area or asserted a claim themselves. Given the "absence of any claim to sovereignty by another power, and the Arctic and inaccessible character" of the area, Denmark's scant acts of occupation were deemed enough to be granted title to the territory.

B. State Succession and Inheritance of International Commitments

State succession is defined as "the replacement of one state by another in the responsibility for the international relations of territory." This can occur through dissolution, revolution, merging, conquering, surrendering, or federation. It occurred when Venezuela succeeded from Spanish rule, Suriname succeeded from rule by the Netherlands, and the Republic of Guyana emerged from British colonial rule in 1966. State succession always leads to several questions that must be resolved. Should the emerging government be liable for the debts of the former government? What happens to state owned land? Are treaty obligations of the former state to be honored by the new one?

The 1897 Treaty to Arbitrate signed by Venezuela and Great Britain acknowledges the state succession mechanisms. The Treaty said the role of the Tribunal is to "investigate and ascertain the extent of territories belonging to, or that might lawfully be claimed by The Netherlands or by the Kingdom of Spain respectively at the time of acquisition by Great Britain of the colony of British Guiana and the United States of Venezuela."

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173 Id.
174 Id. at 50-51. This case is confirmed and contrasted by the Island of Palmas, 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. See Island of Palmas Case (U.S. vs. Neth.), 2 R.I.A.A. at 839-40. It is possible to reconcile the two cases by noting the extreme isolation of Greenland experienced by in Denmark as contrasted to the Island of Palmas, which contained various population centers that were intermittently inhabited. Eastern Greenland is then considered the first international arbitral award to sanction hinterland possession in the absence of conflicting claims. In these rare instances, it is therefore possible to claim large tracts of hinterland territories with small acts of occupation. Id.
175 See Shaw, supra note 96, 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 (1967); see also Ian Brownlie, Principles of Public International Law, ch. 28 (4th ed. 1990).
177 Arbitration Treaty & Award, supra note 69, para. 6.
In the following discussion about state succession, Part 1 describes state succession mechanisms when an international treaty specifically deals with a boundary in question. Part 2 discusses state succession mechanisms when a state is gained through conquest. Part 3 describes the legal concept of uti posseditis whereby a former colonial government inherits its borders at independence.

1. State Succession Regarding International Treaties Dealing with Boundaries

The extent to which the new state will be bound to all external obligations varies. However, it is clear that customary international law views boundary treaties as having a special permanence, binding subsequent states to the original terms.\(^{178}\) The objective of this rigid stance in international law is that in the field of state succession, there must be a "minimum disruption and instability" to the world order.\(^{179}\) That is, in most instances international law will bind the successor states to the obligations of the former states, particularly when a boundary is at issue. In most non-violent cases of state succession, there are multilateral treaties dealing with territorial dispositions that allow a smooth transition between state successors. Bi-lateral treaties between the former colonial power and the former state also have considerable precedent in international law.\(^{180}\) For example, in the northern South American context, Spain, the Netherlands, and Great Britain all ratified bilateral treaties with the emerging states. These colonial treaties provided in general that "all rights and benefits, obligations and responsibilities devolving upon the colonial power in respect of the territory in question, arising from valid international instruments, would therefore devolve upon the new state."\(^{181}\)

Viewing a boundary with a stricter sense of permanence than most treaties often has foundations in many fundamental international treaties. It is seen in Article 62(2) of the Vienna Convention on the Law of Treaties, which stipulates that a fundamental change in circumstances may not be invoked as a ground for terminating or withdrawing from a treaty which establishes a

\(^{178}\) See SHAW, supra note 96, at 674.

\(^{179}\) See id.

\(^{180}\) See id.

\(^{181}\) Id. at 675. Shaw cites the 1975 U.K.-Burma Agreement of 1947 as evidence of concluding through treaty that the new state would have all rights, and consequently duties and obligations of the former colonial government in respect to the territory of the successor state.
boundary. In addition, Article 11 of the Vienna Convention on Succession from Treaties, asserts that "a succession of states does not as such affect (a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary."  

In terms of case law, the International Court of Justice dealt with succession to boundary treaties generally in the Libya-Chad case, where it asserted that "[o]nce agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court." Directly referring to concluding a boundary by international treaty or arbitration, the Court held that a boundary established by a treaty thus achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary. . . . when a boundary has been the subject of an agreement, the continued existence of that boundary is not dependent upon the continuing life of the treaty under which the boundary is agreed.

2. State Succession Through Conquest

Modern international law defines conquest as "the act of defeating an opponent and occupying all or part of its territory." Simple conquest over another sovereign, however, does not automatically create title to territory under international law. Title is retained by the displaced sovereign. Gaining title through conquest over land raises the critical question as to what extent may an illegal act (aggression) "give birth to complete title to land." International law, according to Shaw, must "modify its reactions to the consequences of successful violations of its rules to take into account the

182 Id. at 684; see also Article 5 of the Minsk Agreement (establishing the Commonwealth of Independent States on December 8, 1991, Alma Ata Doctrine which re-affirmed the territorial boundaries of the state succession states which evolved from the former administrative boundaries of the USSR), available at http://www.rulg.com/documents/Presentation_legal_Status_caspian_IEA_Apr_15_03.doc (last visited Jan. 28, 2004).
183 See SHAW, supra note 96, at 684-85.
184 Concerning the Territorial Dispute (Libya v. Chad), 1994 I.C.J. 6 (Feb. 3).
185 Id.
186 See SHAW, supra note 96, at 340.
According to most jurists gaining title to this displaced land would require either widespread international recognition of the new sovereign, or a treaty of succession between the displaced sovereign and the conquering sovereign. Pasquale Fiore defined annexation as "when an autonomous state [is] incorporated into another voluntarily or by force, [and] all of its territory becomes an integral part of the state to which it is annexed." This territory must be considered as in the legal possession of the state to which it is annexed.

Because conquest was often used as a means of territory acquisition in South American colonial times, it is useful to consider the way a colonial nations viewed conquest as a legal act. Early colonial nations distinguished between the "necessary law of nations" (the law which results from applying the natural law of nations) and the "voluntary law of nations" which is the positive element of international law whose rules are devoted to the welfare and advancement of the universal society. The former applies to the sovereign's legal ability to settle disputes through warfare. As Vattel asserted, "[t]he method of settling disputes by force is a sad and unfortunate expedient to be used against those who despise justice and refuse to listen to reason, but after all, it is a method which must be adopted when all others fail." Therefore, European nations viewed conquest as a legal, although regrettable, means of settling disputes and consequently gaining title to territory.

The "necessary law of nations" is also considered one of the key elements in creating a balance of power within the European continent and preventing aggressive wars among the various States. Since public law of Europe after 1648 was still developing and the states were not yet ready to abandon their

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187 Id. An international treaty acknowledging defeat and the intent suffices as to when conquest in modern international law creates title to subjugated land. See also M.J. Peterson, Recognition of Governments: Legal Doctrine and State Practice 1815-1995, 185 (1997). Peterson asserts that a state may also perform an act of recognition, short of an international treaty which may suffice as intent to abandon the subjugated territory. Id.


189 See Fiore, supra note 90, at 422.

190 Id. at 423. Fiore cites the examples of the independent state of Texas annexed by the United States in 1845 and Hanover being incorporated into Prussia in 1866. Id.

right to war, there were few if any means of preventing war between the sovereign powers of Europe. One way was to attain a state of equilibrium between them. In the absence of a rule of law prohibiting aggressive war, the system of balance of power, given the alternative, was simply based upon "dividing Europe into States almost equal in order that their forces being in balance, they will fear to offend one another, and hesitate to plan too great designs." This would mean that states, while in theory retaining their moral, if not legal, right to war were effectively constrained from doing so. It has been rightly stated that "the States were so bounded and organized that aggression could not succeed unless it was so moderated and so directed that the prevailing opinion of the Powers approved it."

This did not occur until there were imbalances of power, such as when England established military superiority over the Dutch and acquired their holdings in Berbice, Essequibo, and Pomeroon in 1796. This early conquest, and the successive Dutch-English wars that followed it, gave title to the English, as codified in the Treaty of London and the Treaty of Amiens. The Dutch colonies of Pomeroon, Berbice, and Essequibo, thus became firmly in English hands when it ruled Guyana through British Guiana. The recognition treaty that Great Britain and the Republic of Guyana ratified upon its independence in 1966 transferred this territory.

3. *Uti Possidetis*

The doctrine of *uti possidetis* is the most essential operative legal principle in Guyana’s border disputes. The concept originated in South America when former colonies of Spain and Portugal were emerging into independence.

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192 *Id.*


194 See ISHMAEL, supra note 64, ch. 6(B). Although the areas changed hands back to The Netherlands and were subsequently re-conquered by the English, a state succession mechanism applies in each instance. Noting the state succession elements as seen in the Libya/Chad instance, although there might be successive inheritors to the same area, state succession is still applied to each actor, and succession of title is inherited by all when dealing with boundary disputes.

It states that a country gaining independence from colonial rule inherits the original borders of the previous state. However, if the former colonial powers maintained unresolved borders before independence, then the new republics inherit the unresolved claim at issue. It has been applied in the northeastern section of South America in cases of Venezuela from Spain, Cuba from Spain, and Brazil from Portugal.

This section will discuss the doctrine of *uti possidetis*, its historical development, recent application, and related case law. This section asserts that since the border in the New River Triangle 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 domini* and *animus 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 and contained islands, and also reaffirm 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 claimed by Suriname, is appropriate. 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 domini* and *animus corpus* that was noted by the 1936 Mixed Boundary Commission in the New River Triangle. In terms of the Essequibo, Guyana would inherit the Dutch/English settlements as inferences of constructive occupation in the administrative territories of former succession in title states.

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198 See Simmler, supra note 195, at 47. The *uti possidetis* principle was recognized in the Vienna Convention on the Succession of States in Respect of Treaties 1978, which provides that treaties establishing boundaries are an exception to the general rule that successor States start with a clean slate in respect of treaties entered into by their predecessors. *Id.*
The doctrine of *uti possidetis* is closely related to the doctrine of state succession, whereby one state displaces another in an area by means of a treaty. It is distinct, however, because state succession does not directly apply to international boundaries of the successor state. The doctrine of *uti possidetis*, in these instances, refers directly to the inheritance of boundaries at state succession from colonialism.

The International Court of Justice dealt with *uti possidetis* in the *Case Concerning the Frontier Dispute* (Burkina Faso v. Republic of Mali). Here, the court held that *uti possidetis* was "a firmly established principle of international law where decolonization is concerned." The court further stated that

*[uti 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.*

Most scholars agree that there are two distinct versions of *uti possidetis*. 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." *Uti possedetis juris* was seen in the Colombia-Venezuela Arbitration in 1922. In this award, the

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199 *Uti possidetis* translates to "as you possess, so you may possess." See Shaw, supra note 96, at 676.


202 Id. at 10.


204 Id. at 565.

205 Id. at 566.

206 See Radam, supra note 201, at 59.

207 Id.

208 Honduras Borders (Guatemala v. Hond.), 2 R.I.A.A. 1307, 1322 (1933). Examples of
court held, "[t]he principle of [uti possidetis] laid down the rule 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."\textsuperscript{209} Therefore in an uti possidetis juris setting, a state could lay claim to an area, which, although it is not exactly administering it, was within the territorial notions of the former Spanish administrative division.

A second version of uti posse**detis de facto** was seen in the later case of El Salvador-Honduras, where that court held that borders may be demarcated by territory that was "actually possessed and administered by the former colonial unit at the time of independence, irrespective of the legal definition of former colonial borders."\textsuperscript{210} 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 that the principle of uti possidetis should not be applied."\textsuperscript{211} Therefore, in an uti possidetis de facto setting, a state could only claim an area that the former colonial division administered and controlled.


\textsuperscript{209} Colombia-Venezuela Arbitration, 1922 U.N.R.I.A.A. 223, 288. The court upheld the concept of uti possidetis juris in the later case of El Salvador-Honduras, by stating that "uti possidetis juris is essentially a retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes." Case Concerning the Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.), 97 I.L.R. at 388. El Salvador-Honduras applied uti possidetis principles to maritime as well as territorial title to land.

\textsuperscript{210} Id.

\textsuperscript{211} See Day, supra note 8, at 380. The application of uti possidetis goes beyond simple colonialism. It has been seen in the fragmentation of the USSR. See Roman Yakemtchouk, Les Conflits de Territoires and de Frontieres dans les Etats de l'Ex-URSS AFDI (1993). Uti possidetis has also been seen in the dissolution of Czechoslovakia and Yugoslavia. See Jiri Malenovsky, Problemes Juridiques Lies a la Partition de la Tchecoslovaquie, AFDI 328 (1993). 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.
The principle of *uti possidetis* applies to territorial as well as maritime zones.\(^{212}\) 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.\(^{213}\) Therefore, the 1799 Agreement, even though not in force, defines the boundary between Suriname and Guyana, because neither government has proactively recognized a dividing line following the middle part of the river since the Agreement.

Inheritance of the entire Courantyne River 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 as to who actually controlled the territorial waters during the late colonial 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 may assert 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 unratified 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 two specific concessions which were not objected to by Suriname before independence, and Guyana has subsequently awarded numerous concessions without timely objection by Suriname. Reconciling a 10° Suriname territorial sea with a 33° Guyanese exclusive economic zone will be a difficult task for any international tribunal. One solution is a maritime delineation which, although possibly projecting at 10° immediately from the

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\(^{212}\) The International Court of Justice has emphasized that the *uti possidetis* principle applies to territorial as well as boundary problems. See Case Concerning the Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.), 97 I.L.R. at 387.

\(^{213}\) Continental Shelf (Libyan Arab Jamahirya v. Malta), 1982 I.C.J. 18, 23 (citing Special Agreement between Tunisia and Libya, art. 1).
shore, would move towards the Guyanese position of 33° past the territorial sea. This solution would respect the concession rights given by each country. 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, whose line of demarcation would be bound on separate points.

In terms of the New River Triangle, Guyana could make 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 dual criteria of *animus domini* and *animus corpus*, which dictate how a colonial state may lay claim to title in lands that are *terra nullius*. In doing so, the *animus domini* and *animus 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.

In terms of the Essequibo, *uti possidetis juris* would award clear title to Guyana. The Dutch territories that were conquered by the British and inherited by the Republic of Guyana are clear indications of constructive occupation within the former territorial administrative regions of a former colonial power. This would be a direct application of *uti possidetis*, which as seen through case law, is directly applicable to South America and the former colonial holdings of European nations. The existence of Spanish missions in the Essequibo would be unlikely to be as persuasive evidence of construction occupation as compared to the extent that Guyana has developed the area. It was seen in the *Island of Palmas* case where, clear showings of effective control and constructive occupation defeat a title solely predicated upon the intent or *animus domini* aspect of title. Therefore the Essequibo, as gained by the Dutch and later British forces, will be inherited by the Republic of Guyana under *uti possidetis juris* mechanisms.
C. The Binding Nature of Arbitration Awards

In twentieth century boundary disputes, most nations accept and adhere to the final decisions of arbitration panels. Each party binds itself to the decision of the arbitration panel, regardless of a beneficial or adverse outcome, and empowers the arbitrator with binding international decision-making capability. The states submitting to the jurisdiction of the arbitrator panel must be prepared for an adverse decision, or they would not have submitted at all.

Nevertheless, there are numerous examples of countries objecting to the final decision of the arbitration panel. They tend to seek other means to avoid or circumvent the decisions they had previously agreed to follow. In the British Guiana-Venezuela context, Venezuela asserts that the 1899 Arbitral Award is a nullity and void. Article 35 of the Model Rules on Arbitral Procedure drafted by the International Law Commission indicate three instances in which an arbitral award may be declared a nullity and therefore invalid: (1) excess of power, (2) corruption of a tribunal member, and (3) departure from fundamental rules of procedure.214

1. Excess of Power of the Tribunal

Jurists are consistent in stating that excessive power of a tribunal is grounds for the nullity of the consequential award.215 Before arbitrating an issue, a compromis (also called compromiso) is created detailing the limits and extent of applicable power given to the tribunal. If the decision of the tribunal exceeds this compromis, then the decision may be a nullity based upon the legal doctrine of exces de pouvoir (excess of power).216 The compromis, as seen in the Venezuela-Guyana instance is the 1897 Treaty to Arbitrate which established the applicable law, defined key terms, and outlined the extent of power by the tribunal.217

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214 Oscar Schachter, Enforcement of International Judicial and Arbitral Decisions, 54 AM. J. INT'L L. 1 (1960); see also SHAW, supra note 96, at 741.
216 KENNETH CARLSTON, THE PROCESS OF INTERNATIONAL ARBITRATION 87 (1946) (arguing that in determining whether a tribunal has exceeded its mandate as dictated by the compromise, it is necessary to compare the final decision with the proscribed duties of the tribunal).
217 See ROUT, supra note 37, at 45; see also Arbitration Treaty & Award, supra note 69, para. 5.
W. Michael Reisman in his work, *Nullity and Revision*, writes that "claims of nullity rely, either specifically or generally on assertion of *exces de pouvoir*."\(^{218}\) The core concept is that a tribunal is only allocated the powers that were expressly granted it in the statutory document which authorized the tribunal or powers that are derived from the general practice of international tribunals.\(^{219}\) However, since not all possible scenarios that a tribunal may encounter can be envisioned and incorporated into the arbitration treaty, an arbitration panel must use "derivations of power perforce [which] turn on the construction of normative statements."\(^{220}\) These derivations of power must be sustainable and conform generally to the principles of customary international law.\(^{221}\)

The first major case dealing with an excessive use of power by an arbitrator was the *Northeastern Frontier Dispute* between Great Britain and the United States in 1831. The king of the Netherlands served as arbitrator, and was given the mandate to decide between two disputed maritime borders between the United States and Canada (then ruled by England).\(^{222}\) If the Dutch king did not find either of these two lines sufficient he was authorized only to establish further surveys in the disputed area. Instead of choosing a particular line or ordering more surveys, the king chose a third unrelated line.\(^{223}\) The United States refused to accept this line, on the grounds of excess of power. The award was not followed and was eventually settled in an 1842 Treaty.\(^{224}\)

\(^{218}\) W. Michael Reisman, *Nullity and Revision* 246 (1971).

\(^{219}\) Schachter, supra note 214, at 4 n.9.

\(^{220}\) Id. at 247.

\(^{221}\) Id.

\(^{222}\) Jackson Ralston, *International Arbitration From Athens to Locarno* 194 (1929). Ralston asserts that international arbitration began with the Jay Treaty between the United States and England. Following the American-English War of 1814, neutral European powers were looked to adjudicate boundary issues between other sovereigns on the North and South American continents. Id. at 194. In the *Northeastern Boundary Dispute* case, the king of the Netherlands was asked to determine the boundary between the United States and Great Britain (Canada) "from the source of River St. Croix to the St. Lawrence River." Id. The Dutch Award deviated from the given power to the tribunal, and the United States rejected it, while the English accepted it. This issue was eventually settled in the Webster-Ashburton Treaty of 1842. *Id.; see also* Carlston, supra note 216, at 88.

\(^{223}\) Carlston, supra note 216, at 88. Carlston argues that since the *Northeastern Frontier Dispute* case was not a binding arbitration, but instead only an advisory ruling, the excess of power argument is "academic." *Id. at 89. However, the Northeastern Frontier Dispute* case was a valid arbitration with a negotiated *compromis* between two nations with an intended final result. *Id.*

\(^{224}\) Id. at 88.
Another example of excessive use of power was seen in the later case of the Chamizal Arbitration (United States vs. Mexico, 1911). In Chamizal, the Treaty of Guadalupe Hidalgo in 1848 and the Gadsden Treaty of 1853 served as the compromis to demarcate the Mexico-United States boundary along the Rio Grande River. In 1884, another agreement was added to the compromis dealing with subsequent changes caused by erosion. A question of title arose when a large tract of land, named the Chamizal Tract, had been south of the river in 1852, but with the river subsequently changed course in 1910 it was on the north side. Failing to reach a diplomatic settlement, the boundary commission was created to deal "solely and exclusively as to whether the international title to the Chamizal tract is in the United States of America or Mexico."

The final award divided the disputed tract between Mexico and the United States. This was based upon a view that the 1848 and 1853 Treaties established a fluid border between the two countries along the Rio Grande, and was therefore not a fixed and invariable boundary. As a result, the tract was divided based upon the results of a flood that eroded the area in 1864. The American contingent ardently attacked the award, insisting that "it clearly departed from the terms of reference in deciding a question not submitted by the parties." The compromis gave strict guidelines as to not interpret the language of the overall boundary, but only to decide which country was to have title to a specific Chamizal tract of land.

In terms of the Guyana-Venezuela boundary, the original 1897 Treaty to Arbitrate established the mandate to decide the finality of the entire disputed Essequibo region and demarcate a final boundary. The treaty itself established a broad scope of potential power to the American-led tribunal, to "ascertain all facts which they may deem necessary to a decision of the controversy." Because the scope of the tribunal was exceedingly broad, it is difficult to sustain a Venezuelan claim that the Award exceeded the power

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226 Id.
227 Id.
228 Chamizal Arbitration, reprinted in CARLSTON, supra note 216, at 152.
229 Id.
230 Id. at 153.
231 Id.
232 Arbitration Treaty & Award, supra note 69, para. 5.
233 Id.
that was proscribed in the *compris*. Moreover, in *Chamizal* and the *Northeastern Frontier Dispute*, the arbitrator was given only limited capacity to decide between two delineated courses of action. When the arbitrators did not decide based on these alternatives, they deviated from the proscribed context. This is distinguishable from the 1899 Award because, due to the broad scope of the 1897 *compris*, virtually any decision would have been within the scope of the *compris*.

2. *Corruption*

The second generally accepted method for deciding an international arbitration award is a nullity is to prove the final award was procured through corruption or made impartiality. Oppenheim deals with corruption of a tribunal, stating that,

> [i]t is obvious that an arbitral award is only binding provided that the arbitrators have in every way fulfilled their duties as umpires, and have been able to arrive at their award in perfect independence. Should they have been bribed, or not have followed their instructions, [or] should their award have been given under the influence of coercion of any kind, or should one of the parties have intentionally or maliciously led the arbitrators into an essential material error, the award would have no binding force.\(^{234}\)

The Venezuela allegation, that the 1899 Paris Tribunal was "corrupted" and therefore a nullity must be substantiated if it is to be legally substantiated. Venezuela insists that a fraudulent map was offered as evidence and that the members of the tribunal were also corrupted.\(^{235}\) As Odeen Ishmael states in his work, *The Trail of Diplomacy*, "

Great Britain led the arbitrators into error by submitting to them the so-called "Physical Map" of Schomburgk of 36 square feet without border lines, as if it were the map of 90 square feet with

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\(^{235}\) *See Ishmael, supra* note 64, ch. 4(D), para. 16.
border lines which the explorer presented in 1844 to the Colonial Office.\textsuperscript{236}

The evidence that has been offered to date is of questionable legal value.\textsuperscript{237} Fraud may consist of corruption or of deceit in the presentation of offered evidence to the tribunal. In each instance, the burden of proof is on the proponent (Venezuela) to prove that the fraud did occur, and that the result of such fraud led to an adverse decision.\textsuperscript{238} This would entail detailing how closely the distortion of the maps was related to the final decision of the tribunal. As there is no ascertainable way to determine this more than one hundred years after the final decision, it would be difficult to achieve a positive decision on the grounds of corruption.

3. Departure from Fundamental Rules of Procedure

The earliest case that declared an arbitral award a nullity because a panel departed from a prescribed rule of procedure came about in the 1909 Arbitral Decision demarcating the line between Bolivia and Peru.\textsuperscript{239} The government of Argentina, acting as the arbitrator, was instructed to demarcate the given territory on the legal principle of \textit{uti possidetis} (maintaining the former colonial power's administrative divisions as the modern boundaries) as it existed in 1810. If the available Spanish documents were not conclusive, the matter was to be settled equitably.\textsuperscript{240} The \textit{compromis} believed equity could be defined as "whenever the royal acts and dispositions do not define the dominion of a territory in clear terms, the arbitrator shall decide the question according to equity, keeping as near as possible the meaning of those documents and to the spirit which inspired them."\textsuperscript{241}

Bolivia refused to comply with this final judgment claiming that the decision was not an equitable solution that deprived Bolivia of a fair share of the territory.\textsuperscript{242} Moreover, the doctrine of \textit{uti possidetis} was not followed and equity, which was supposedly defined as "near as possible to the documents

\begin{footnotes}
\textsuperscript{236} \textit{Id.},
\textsuperscript{237} See ROUT, \textit{supra} note 37, at 45.
\textsuperscript{238} See BRAVEBOY-WAGNER, \textit{supra} note 9, at 124.
\textsuperscript{239} Schachter, \textit{supra} note 214, at 4 n.9.
\textsuperscript{241} See Treaty of La Paz, Dec. 30, 1902, Bol.-Peru, \textit{reprinted in STUYT, id.} (referring to the Bolivia-Peru boundary question to the president of Argentina for decision).
\textsuperscript{242} See Schachter, \textit{supra} note 214, at 4 n.9.
\end{footnotes}
that inspired them" was abandoned. The border instead was demarcated based upon geographical features rather than *uti possidetis*. The Bolivia-Peru treaty was seen as a nullity by the Bolivian government and not followed.

The 1899 Award appears to be a diplomatic compromise between the two disputing parties. The extent of Great Britain's claims far exceeded its actual controlled and administered area. Venezuela's claim for the entire Essequibo because of scattered Spanish and Gran Colombia settlements, is also difficult to support. The 1899 Arbitration was also aware how crucial the balance of power was in this area of South America, and how a relatively even balance of power creates international security. The fact that Guyana was awarded nearly all of the territory within the Schomburgk Line, and Venezuela was given the strategic Point Barima, suggests that the tribunal made a diplomatic compromise. The scope of the 1897 *compromis* was not to diplomatically compromise, but to decide neutrally the history and claims of the Essequibo. Because of this incongruity, the Venezuelans claim that an established rule of procedure was disregarded. They also cite the posthumous letter of Mallet-Prevost as proof. Point Barima was claimed by the British as part of the former Dutch territory; however, Venezuela considered it the main point of control over the Essequibo and the Orinoco River, whose interior was never disputed and remained firmly in Venezuelan control. The fact that Point Barima was awarded to Venezuela as a gesture, is seen as an example of the compromise.

One way Venezuela could argue that the tribunal deviated from its proscribed rule of procedure is to point out that the tribunal failed to give a "reasoned decision" as required in the 1897 Arbitration Treaty. As the 1899 Arbitration did not provide legal arguments to support its decision, it may be argued, it deviated from the rule of procedure. As Odeen Ishmael assets, according to the prevailing opinion in the legal doctrine, the failure to give reasons, except through an agreement to the contrary between the parties, vitiates of nullity the verdict.

Even though there is evidence that the Essequibo was awarded based upon a diplomatic compromise, most of it is based on the Mallet-Prevost memoran-

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243 See BRAVEBOY-WAGNER, supra note 10, at 124.
244 British Guiana-Venezuela Bounty.
245 BRAVEBOY-WAGNER, supra note 10, at 125 (discussing the issue of the original Mallet-Prevost memorandum as being untrue and citing factual inconsistencies within the memorandum).
246 See ISHMAEL, supra note 64, ch. 4(D) para. 17.
247 Id.
dum. Although this may be very revealing about the intentions of the panel members, it does not (as compared to the Bolivia-Peru example) prove that the boundary demarcation award may be a nullity based upon departure from a rule of procedure. Moreover, because the original 1897 treaty is so broad in its scope and has so few aspects of applicable procedural law, it is very difficult to substantiate a Venezuelan claim that the 1899 award is a nullity despite its unique nature.

D. Recognition, Acquiescence, and Estoppel in International Law

Recognition and acquiescence reflect the presumed will of a State through its actions, either expressly or implicitly. Section 1 will discuss and apply the theory of recognition as seen in international law. Section 2 will define acquiescence, and Section 3 will discuss estoppel as seen through international legal precedent. Section 3 asserts that Venezuela may not declare that the 1899 arbitration agreement is void because of the actions Venezuela has taken that demonstrate otherwise.

1. Recognition

The majority of scholars define recognition as a public acknowledgment by a state of the existence of another state, law, or situation. This was first seen 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. Although it does not expressly bind a state to the action, it is nevertheless an affirmation of the presumed will of a state.

Within the Venezuela-Guyana context, if Venezuela ever recognized the validity of the 1899 Award, it cannot argue that the Award is later null and

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248 Id.
249 See BROWNLE, supra note 101, at 165; see also CHARLES S. RHYNE, INTERNATIONAL LAW: THE SUBSTANCE, PROCESSES, PROCEDURES AND INSTITUTIONS FOR WORLD PEACE WITH JUSTICE 46 (1971).
251 See SHAW, supra note 96, at 350. Brownlie defines another concept which is labeled 'express recognition.' In express recognition, the treaty of the existence of title in the other party to a dispute (as opposed to recognition by third states) creates an effect equivalent to that of estoppel. See BROWNLE, supra note 101, at 165; see also United Kingdom recognition of Norwegian control over the Sverdrup Islands, 27 A.J. 92, 93 (Supp. 1933).
void. It may be argued that the validity of the Award is already implicit in Article XIII of the Arbitration Treaty which spells out the provisions by which the parties would be bound to the outcome of the tribunal. Notwithstanding Article XIII, Venezuela appears to have recognized the Award when it sent commissioners to demarcate the boundary in 1905 and produced the final map of its joint work with Great Britain. However, Venezuela held that it did so unwillingly and felt compelled by the force of other nations. Many historians present reasons as to why Venezuela recognized the validity of the 1899 award. As George B. Young argues, [the Venezuelan Chancellery reached the conclusion that the Arbitral decision contained such vices that she had the right to invoke its nullity. It decided not to denounce it outright as it could not face the formidable power of its adversary without the support of the United States. Nonetheless, Venezuela did recognize the 1899 Award line, when it assigned its own boundary commissioners and ratified the work of the boundary commission. Two press releases by the Venezuelan government elucidate the formal policy dealing with the recognition of the 1899 Award. In the Reclamacion de la Guyana Esequiba: Documentos 1962-1970 and Mensajes Presidenciales y Discursos de Cancilleres: Reclamacion de la Guyana Esequiba, the Venezuelan Government asserts that Venezuela was a poorer and developing country when the 1899 award was established, and as such could not have voiced dissent to the award in fear of Great Britain.

In the colonial histories of the Guyanas, Dutch Guiana made frequent positive statements labeling the Kutari River 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 declared as the border. There were also debates in Dutch Parliament and by the Netherlands Geographical Society where many Dutch officials and the geographical society stated that

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253 See BRAVEBOY-WAGNER, supra note 10, at 113.

254 The Venezuelan foreign ministry asserted that “[Venezuela] wished to delay the demarcation of the frontier [in 1905]. In July 1900, the British minister notified the Venezuelan government that if it did not dispatch the demarcation commission before October 3, the British government would begin the demarcation alone.” See id. at 114.

255 ROUT, supra note 37, at 44 (quoting George B. Young).

256 See id. at 45.
they believed the Kutari to be the border, asserting that the Netherlands recognized that British Guiana controlled the area in dispute.\textsuperscript{257}

2. Acquiescence

Acquiescence, as defined in international law, occurs "in instances where a protest is called for and does not happen."\textsuperscript{258} 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."\textsuperscript{259} 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-Chad case where the International Court of Justice noted that "if 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."\textsuperscript{260}

As applied to Guyana-Venezuela, Venezuela appears to have acquiesced to the Award because it failed to denounce the award openly and immediately following the ruling.\textsuperscript{261} Some scholars indicate that Venezuela was too destitute and poor to organize a large scale diplomatic protest. However, Venezuela also did not object for the next fifty years, long after they were viable enough to organize a formal protest. Moreover, the prescription clause indicates a fifty year threshold of adverse possession. Failure to protest for over fifty years indicates, in legal terms, acquiescence.

In terms of the Courantyne River, Guyana has acquiesced to Surinamese control over the entire river. 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.

\textsuperscript{257} See Donovan, \textit{supra} note 90, para. 45.

\textsuperscript{258} \textit{Id.} 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. \textit{Browlilie, supra} note 101, at 645-47.

\textsuperscript{259} \textit{Browlilie, supra} note 101, at 645-47.

\textsuperscript{260} Concerning the Territorial Dispute (Libya v. Chad), 1994 I.C.J. 21-22 (Feb. 3).

\textsuperscript{261} See \textit{Braveboy-Wagner, supra} note 10, at 113.
If Guyana were to protest the incorporation of Point No. 61 in the 1936 Mixed Commission, it should have done so before the 1958-1962 negotiations, which also used Point No. 61 as the land boundary terminus. 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. Yet, since there was no protest noted, modern day Guyana inherited Britain’s acquiescence to Surinamese control over the Courantyne River.

In terms of the maritime boundary, a court may hold that Suriname acquiesced to a $33^\circ$ 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 Standard 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 drilling rights (including a 1965 permit to Shell), its concessions have more or less gone only as far as the $33^\circ$ line claimed by Guyana. Suriname has never awarded a concession in the ‘area of overlap.’

3. Estoppel

The notion of estoppel states if one party has already acquiesced or recognized a particular situation it is prevented from arguing otherwise during an arbitral panel. The leading relevant case on estoppel is the *Temple of Preah Vihear* between Cambodia and Thailand. In *Preah Vihear*, boundary commissioners negotiated a final demarcation between the former colonial government of France and Thailand. 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.

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262 *Temple of Preah Vihear*, 1962 I.C.J. 6; see also D.H. Johnson, *The Case Concerning the Temple of Preah Vihear*, 11 INT’L & COMP. L.Q. 1183 (1962). The dissent by Judge Spender in *Temple of Preah Vihear* asserts that there must be a higher degree of acquiescence and recognition for a party to be estopped from raising protests. *Temple of Preah Vihear*, *supra*, at 142-46. *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 Case, 16 R.I.A.A. 109 (1969); see also R.Y. Jennings, *The Argentine-Chile Boundary Dispute: A Case Study*, in *INTERNATIONAL DISPUTES THE LEGAL ASPECTS* 315 (Francis Vallit ed., 1972).
In the same way, Venezuela's actions of recognizing the 1899 Award by dispatching boundary commissioners to demarcate the boundary demonstrate the willingness to accept the Award. As a result, it may be estopped from asserting the nullity of the 1899 Award in front of any tribunal. Moreover, because Venezuela did not object immediately after the Paris arbitration, it is further estopped from claiming that it did not rely on the ruling of the tribunal.

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.

E. Prescription

The elements of occupation (animus domini and animus corpus) permitted a state to acquire territory only when no other state had perfected title to it. When the land was under the power of one state, international law provides other means for acquiring title to the disputed land. One such mechanism relevant to the New River Triangle dispute is by gaining title through prescription. Prescription is analogous to the common law property term "adverse possession" and generally requires the same conditions. The adverse possession has to be open, conspicuous, notorious, and uninterrupted for a "reasonable period of time." This possession must not be contested or challenged by the original possessor.

Prescription is defined as "legitimisation of a doubtful title by the passage of time and the presumed acquiescence of the former sovereign." The doctrine of prescription was dealt with most recently in Case Concerning Kasikili/Sedudu Island. In prescription, if the state which initially maintained control of an area that was adversely possessed did not maintain

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263 Prescription is dealt with in three major international awards. Clipperton Island Arbitration (Fr. v. Mex.), 26 AM. J. INT'L L. 390 (1932); Western Sahara Case, 12 I.C.J. 43, 43, para. 92; Minquier and Ecrehos Case, 1953 I.C.J. 47.

264 The reasonable amount of time and the objection of the state are considered in two major awards. See Legal Status of Eastern Greenland (Den. v. Nor.) (1933) P.C.I.J. (ser. A/B) No. 53, at 45-46; Western Sahara Case, 12 I.C.J. 42-43, para. 92. The type of encroachment needed to manifest sovereignty is analogous to the terra nullius requirements of animus domini and corpus. See Minquier and Ecrehos Case, 1953 I.C.J. 47; and Anglo-Norwegian Fisheries Case (U.K. v. Nor.) 1951 I.C.J. 116, 184.

265 See Staw, supra note 96, at 343-44.

actual control over the area, most legal analysts suggest that this land was not the territory of the original sovereign but rather terra nullius. To gain title by prescription, the intruding elements need to be part of a nation-state. Jurists have also described prescription as de facto possession of a territory. Under this theory, if possession was known to be illegitimate from the beginning, but if established and maintained for a “considerable number of years,” it creates good title to the occupied land. For example, in the Botswana-Namibia dispute, title cannot 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. 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. One international case that considered prescription was the Minquier and Ecrehos. 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 did not concentrate on the historic titles offered, but instead concentrated on the recent acts of prescription that occurred throughout the last century.

Under a prescription theory, Suriname or Guyana could argue that although one side effectively demonstrated animus corpus and animus domini throughout the colonial era, the fact that each entity ignored a conspicuous encroachment onto the disputed territory would preclude title. Each side would cite prescription as encroachment by elements of their military, 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.

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267 See FIORE, supra note 90, at 428.
268 Id. at 345.
269 See Minquier and Ecrehos (Fr. v. U.K.) 1953 I.C.J. 47.
270 Id.
F. Relevant Law as to Maritime Delineation

The maritime dispute between Guyana and Suriname has received the most attention since Guyana's invocation of Annex VII dispute resolution under the United Nations Convention for the Law of the Sea in February 2004. The maritime areas are also potentially the most lucrative, with ascertainable amounts of commercially extractable petroleum on the continental shelf. This section will discuss the three legal issues apparent in the maritime dispute between Suriname and Guyana. Part IV.F.1 details the use of equity or equidistance in delineating the outlying maritime areas. Part IV.F.2 discusses the legal precedent by which tribunals refuse to grant outlying maritime areas that were not recognized at the time of treaty, and Part IV.F.3 discusses demarcating a boundary river between two adjacent states.

1. Equidistance or Equity?

The delineation of outlying maritime zones is an increasingly evolving area of the law. In the early stages of its development, maritime law was dependent upon choosing a land boundary terminus and extending the land boundary terminus in a mutually agreed direction. This "equidistance" point dividing the area equally between two separate countries came under attack for its strict application of delineation, when the use of the maritime area might indicate otherwise. For the greater extent of the twentieth century, the equity

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272 Both Suriname and Guyana are parties to the Law of the Sea Conventions. Therefore, they have committed themselves to a settlement dispute system that is dictated by the treaty. This is expressly stated in Article 188 of the treaty whereby both parties must submit "to a special Chamber of the Law of the Sea Tribunal, an ad hoc Chamber of Sea-Bed Disputes Chamber, or to binding arbitration." United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1245, 1833 U.N.T.S. 3, available at http://www.un.org/LOS. The Territorial Sea is the twelve mile extension immediately adjacent to the land territory of a state. Within this twelve mile extension, a country "may consider part of the territory of the state, and it is generally recognized that a state can exercise the same sovereignty over these waters as over its land area." See BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 989 (2d ed. 1995).


273 David A. Colson, *The Delimitation of the Outer Continental Shelf Between Neighboring*
principle was used. Equity refers to the use by a particular sovereign of the outlying maritime areas, and how this use demonstrates possession. For example, if a country has historically used a strait for navigation or traditional fishing regimes, it would be deprived of its access through the exercise of judicial decision. However, jurists and legal analysts have recently argued that maritime delineation has returned to an equidistance principle, although with exceptions. That is, a respected international tribunal will look first to ascertain whether an equidistance line is possible. The tribunal will consider the relationship of the maritime zone to the land mass, and then see if any equitable reasons prohibits its use. 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."

The applicable law for dealing with a continental shelf or outlying marine areas is Article 6 of the Continental Shelf Convention. The convention is concerned with cases where the same continental shelf extends between two adjacent states. The convention asserts that the boundary between two adjacent states shall be determined by agreement; however, 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. This principle has been applied in many international boundary delineations. However, in 1969 in the North Sea States, the International Court of Justice has at its disposal the resources and cartographic capabilities to adjust the line sufficient for modern standards of mapping. See NAGENDRA SINGH, THE ROLE AND RECORD OF THE INTERNATIONAL COURT OF JUSTICE 417 (1989).
Continental Shelf Cases, the International Court of Justice decided that Article 6 of the Continental Shelf Convention was not binding on the parties. The Third Law of the Sea Conference did not establish a precise legislative standard for delineating the continental shelf. In this absence, the delineation of the sea floor has been taken on by international judicial responsibility. Therefore, since delineation based upon equidistance was not an applicable measure, it was necessary to decide the North Sea Continental Shelf Cases based upon principles of equity. 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.

The equity principle is relevant to the Suriname-Guyana maritime dispute because since 1958, Guyana has been active in the outlying economic zone and has awarded concessions in the 'triangle of overlap.' Suriname never objected to these concessions nor did they object to the movement enjoyed by Guyana fishermen and support personnel to the oil expeditions. This de facto line, if it is to be considered as one, would be deemed relevant to determine the equitable result of the outlying maritime areas.

Since the borders of the outlying areas were never formalized during colonial rule, if any state had a claim to the outlying area or activity on the area, it would have been inherited by the successor states under the doctrine of uti possidetis juris. The continental shelf was claimed by British Guyana in 1954, and consequential concessions were granted. These concessions, along with modern concessions to Maxus, Exxon, and CGX add up to an equitable maritime delineation of the continental shelf and exclusive economic zone. While Guyana maintained these outlying claims, Suriname asserted claims for the territorial sea based upon having sovereignty over the Courantyne River and a 10° extension from Point No. 61. No contiguous zone was claimed outside the three mile limit envisaged by the 1936 Mixed

278 North Sea Continental Shelf Cases, 1969 I.C.J. 3 (Feb. 20).
279 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 Maritime Delineation in the Area Between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38; Delimitation of the Maritime Boundary in the Gulf of Main Area (Can. v. U.S.) 1984 I.C.J. 246 (Oct. 12); The Continental Shelf Case (Libyan Arab Jamhariya v. Malta), 1984 I.C.J. 1.
281 Id. at 64.
Therefore, Guyana has a strong claim that it should be awarded title to the outlying areas because of activity in these areas.

2. Contemporary Conceptions of Maritime Areas Relevant to Demarcation

Although Guyana's plausible claim to the outlying exclusive economic zone and continental shelf are strong, this claim does not include the immediate territorial sea. A territorial sea is the exclusive maritime jurisdiction of a state immediately bordering the land mass. The 1936 Mixed Commission offered the 10° extension to delineate the territorial sea which both states agreed to in practice. Even though they did not ratify this agreement, their consent and acquiescence has created a de facto boundary in the territorial sea. Extending only three miles from the coast in 1936, modern territorial seas are proscribed at 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.

International tribunals have consistently not awarded outlying maritime areas that were not conceived of during the time of treaty. In the 1952 case of *In the Matter of an Arbitration Between Petroleum Development (Trucial Coast) Ltd.* the court was asked whether the territorial sea extension should be applied to the outlying maritime areas. The court held that "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." Therefore, an outlying maritime area must be decided based upon contemporary applicable international precedent or through treaty between the bordering states.

In the Suriname-Guyana dispute, the Suriname's claim of 10° extension throughout the territorial sea, continental shelf, and exclusive economic zone, is difficult to substantiate because these outlying areas did not exist at the time of ratification. After the 1936 Mixed Commission, Guyana claimed the continental shelf, and parceled concessions to interested companies. This intent and occupation, substantiated by international legal precedent, indicates

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282 *See William E. Masterson, Jurisdiction in Marginal Seas* 387 (1929) (explaining that the Netherlands government, however, stated that it considers "the regulation of the question of territorial waters ... impossible or difficult, because of the divergent views ... of the various States").

283 *In the matter of an Arbitration between Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi*, 1 Int’l & Comp. L.Q. 247 (1952).
a justifiable argument for Guyana that the territorial sea and outlying maritime areas should be demarcated upon different principles.

3. River Demarcation and the Thalweg Principle

The Suriname-Guyana dispute over the maritime zone is complicated by the fact that the two states are divided by a boundary river, which is also in dispute. However, the impact of the precise land boundary terminus is only relevant to the immediate territorial sea, because the outlying exclusive economic zone and continental shelf do not have to be demarcated using a straight line extension from a land boundary terminus. The offshore dispute is also simplified by the fact there are no disputed offshore islands, which could affect a line of demarcation.

Normally, the land boundary terminus would have been placed in the midpoint, thalweg, of the Courantyne River if no other special arrangements had existed. The 1799 Agreement, in an unusual and atypical case, located the land boundary terminus at the west bank (Guyana side) of the Courantyne River. Determining a boundary at a river bank, instead of a river thalweg is not without international precedent. 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. 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

[w]here 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

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284 See JONES, supra note 95, at 118.
285 Id. at 119.
delimit the territorial seas of the two States in a way which is at variance therewith. 287

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 immediate twelve mile territorial sea. 288 If Point No. 61 is to be assumed as the land boundary terminus, then any offshore delineation towards the original 10° can be asserted by Suriname relying on the precedent in the 1936 Mixed Commission and 1958-1962 negotiations. 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 and has recognized Suriname’s complete control over the Courantyne River. 289

V. CONCLUSION

The findings of this Article strongly suggest that Guyana should continue to advocate for international arbitration of its disputes in a respected forum. The elements of constructive occupation, fundamental realities of governance in the disputed territories, and colonial histories indicate that if Guyana would submit all of its territorial disputes with Venezuela and Suriname to a tribunal it may likely gain undisputed title to the New River Triangle and the Essequibo. Even though Suriname’s claim to the entire Courantyne River and islands contained therein would probably be reaffirmed, the record and


288 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 101, at 228.

available international jurisprudence clearly suggest that Guyana would be
granted a beneficial outlying continental shelf and exclusive economic zone.

Because of its small size compared to its neighbor Venezuela, Guyana has
chartered a course of foreign policy that emphasizes international law and
peaceful arbitration of international disputes. This is a stark contrast from its
early colonial history of conquest. Although it has defended "incursions" into
its claimed territory through military force, it has done so reluctantly. In the
modern world, Guyana is very adept at emphasizing its point through the
internet and publications. Its Ministry of Foreign Affairs is proficient in
producing scholarly literature and making available documents from the
colonial to the present eras that support its claim for the disputed territories.

A nation's territorial integrity is a fundamental priority and in no other
nation is it as poignant as Guyana. The disputed section of Guyana comprises
nearly sixty percent of the small nation's territory and a large segment of its
population. It is a major issue in the daily periodicals and galvanizes the
polity. In the early years, Guyana's foreign policy was to conclude diplomatic
agreements with the regional powerhouses of Cuba and Brazil, attempting to
align itself with nations large enough to protect it from its contentious
neighbors. A balance of power through diplomacy has now created the
platform enabling all these nations to address their grievances through
international law. Today, Guyana should proceed more assertively to advocate
international adjudication of its claims.

The strongest overall argument for Guyana is the fact that Venezuela has
concurred in the use of the Schomburgk line as its de facto border with Guyana
and relied on the present border for over one hundred years. Although
possibly procured through a process that could qualify it as a nullity, the 1897
Arbitration Agreement says itself that fifty years of continuous conduct shall
create good title. This clause in the compromise was never objected to by
Venezuela, and therefore creates acquiescence between the two parties.
Because Venezuela has demarcated the area, it is a clear example of recogni-
tion, and of a de facto line which has been relied on by the international
community. Few maps label the area between Venezuela and Guyana as
disputed, and the ones that do also represent the present day border, re-
affirming the current Guyana line.

This Article has suggested that, when there is a balance of power between
competing nations, countries may submit themselves to a respected interna-
tional tribunal for arbitration. In the developing world, until this balance of
power is created, nations will continue to be governed by survival and national
interest politics. Assuaging boundary disputes with threats toward armed
conflict only creates hemorrhages in the international community, fueling further instability in an area which needs to adhere to fundamental rules of international law and developmental progression. Developing nations must become more inter-connected, not further apart through armed conflict. Guyana is one such country; it understands this concept and has thus structured its foreign policy around the development of international law, treaties, and the inter-connection between other developing countries in the Caribbean.