

The Marouini River Tract And Its Colonial Legacy in South America

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I. Introduction

In perhaps the most desolate and under-populated area in the South America lies one of the most lingering boundary conflicts of modern nations. Suriname and French Guiana (an overseas colony of France) dispute which of the upper tributaries of the Maroni River¹ was originally intended to form the southern extension of their border. The Maroni River exists as the northern boundary between the two bordering nations on the Caribbean coast, and was intended to serve as the boundary to the Brazilian border.² The disputed area, deemed the Marouini River Tract,³ is today administered by France under the Overseas Department. Most modern maps, except those produced by Suriname, indicate that the land is a possession of French Guiana. However, Suriname claims that it has always been the rightful owner of the region and that France should relinquish it to them.

The territory covers approximately 5,000 square miles of inland Amazon forest and apparently contains significant bauxite, gold, and diamond resources and potential hydroelectric production. The area has remained undeveloped and subject to dispute for over 300 years. It has received scant international attention. And today it remains one of many borders in the Guianas that has resisted solution.⁴ It is a continuous reminder of the troubled colonial legacy in Latin America and the Caribbean.

This paper will describe the historical roots of the dispute, the different claims over time, and the legal precedents to support such claims. The paper will indicate that French Guiana would be more likely to perfect title to the Marouini River Tract if the issue were ever referred to an international tribunal. Its

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¹ The Marouini River should not be confused with the Maroni River. The Marouini River is Suriname's claim for its southeastern boundary with French Guiana. The Maroni River is used to describe the northern boundary on the Caribbean coast, which is often labeled the "Marowijne River." Ivan Sanderson, *A Journey in Dutch Guiana*, GEOGRAPHICAL J., June 1939, at 472.

² *Id.*

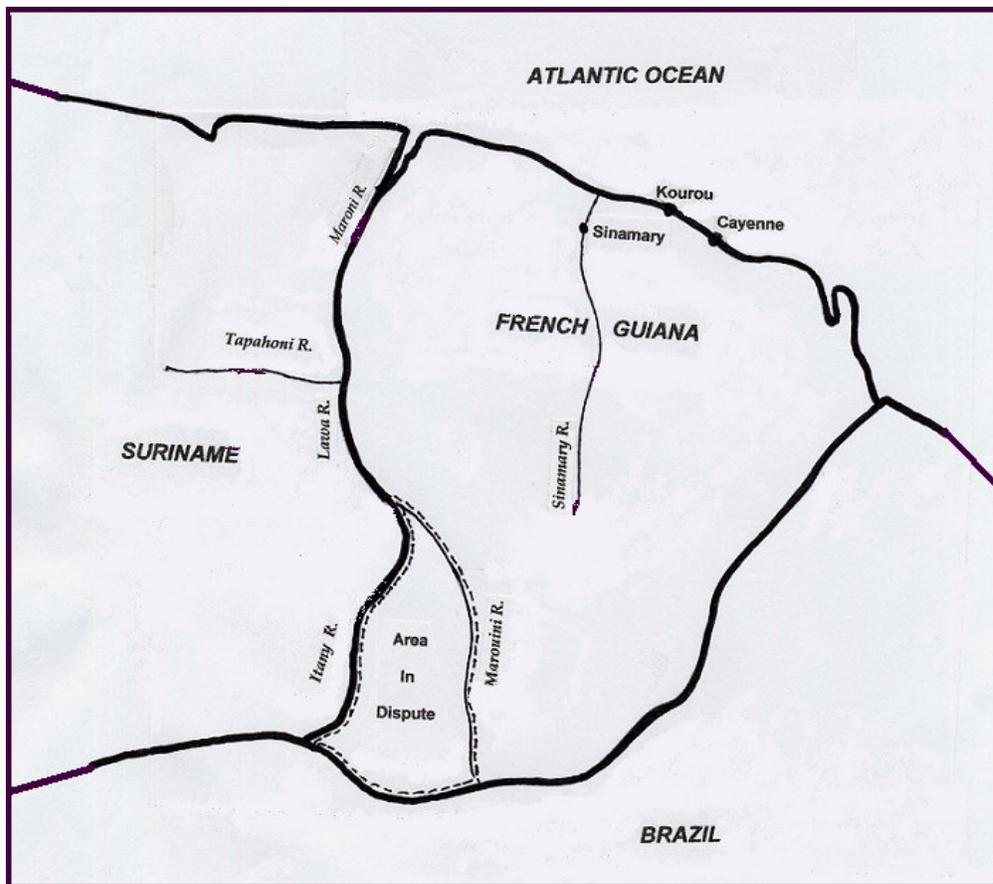
³ The Marouini River Tract has also been labeled the "Marouini River Triangle," or the "Itany-Marouini Triangle." For purposes of this paper, the Marouini River Tract is defined as the area between the Itany and Marouini Rivers, bordered on the South by Brazil.

⁴ For a more complete discussion of the other border disputes in the Guianas see Thomas W. Donovan, *Challenges to the Territorial Integrity of Guyana: A Legal Analysis*, GA. J. INT'L & COMP. L. (Spring 2004); Thomas W. Donovan, *Suriname-Guyana Maritime and Territorial Disputes: A Legal and Historical Analysis*, 13 FLA. ST. J. TRANSNAT'L L. & POL'Y 41, 41-98 (2003).

primary argument would be that it has maintained effective occupation that has been clear and consistent throughout the last two hundred years. French Guiana has controlled and policed the area for most of this time, and has even been effective in defending it from Dutch and later Surinamese incursions. Moreover, Suriname, as well as its previous colonial state of Dutch Guiana, effectively relied on the French occupation of Marouini River Tract to fortify its southeastern border and has acquiesced, as defined in international law, to French control of the area.

In order to persuade any international tribunal that Suriname has the right to this territory, it may utilize such legal mechanisms as possible prescription, colonial hinterland claims, and inherited colonial claims. It can claim that Dutch subjects were the original inhabitants of the area, and that their descendents have lived there continuously. Suriname can then assert that it inherited all the claims of their Dutch colonial predecessors and thus remains possessor of the territory under *uti possidetis juris*. However, none of these legal theories are able to defeat the clear and consistent showing of effective occupation by French Guiana.

II. Description of Disputed Territory



A. Geographical Considerations

The land in dispute is the territory between the Itany⁵ and Marouini Rivers.⁶ The area lies at the southwestern corner of French Guiana, or the southeast corner of Suriname. France claims its southwestern border is the Itany River, which flows northward from a watershed in Northern Brazil and empties into the Lawa River.⁷ Suriname, on the other hand, claims the Marouini River, which parallels the Northern flow of the Itany River, but lies nearly 100 miles eastwards. It is the area between these two river systems that forms the modern boundary question. The southern section of the disputed territory forms the northern border of Brazil, which is not disputed by any of the three countries.

The area consists of dense forests with few roads and little human inhabitation. No census has been undertaken by either country to determine its exact population. Most of the inhabitants work as seasonal miners and “banta bleeders” (people who extract the natural latex from the rubber tree). They move through the unfortified boundary area freely. There is also significant drug trafficking in the territory. The area is used for the cultivation of drug producing plants as well as for concealing and smuggling processed and unprocessed drugs.⁸

B. Economic Activity in Disputed Areas

Even though no systemic survey has ever been accomplished to determine the extent of its resources, the territory is believed to contain significant natural resources. Perhaps the most noted are the gold deposits which were discovered the mid Nineteenth Century by French prospectors. This led to the first “gold rush,” if it is to be labeled as such, in the area.⁹

There is also evidence of significant aluminum and bauxite deposits.¹⁰ In 1984, SURALCO, a subsidiary of the Aluminum Company of America (ALCOA), formed a joint venture with the Royal Dutch

⁵ The Itany River is sometimes labeled the “Litany River” on maps. A consistent spelling of “Itany River” is used to describe France’s claim for the southwest corner of French Guiana.

⁶ See Sanderson, *supra* note 1, at 1.

⁷ The Lawa River forms the boundary between Suriname and French Guiana in the middle area between the Caribbean headwaters and the southern extension which is the disputed Marouini – Itany River. Although some maps label this map various names, a consistent use of “The Lawa River” will be used to describe the boundary between the confluence of the Tapanhoni River and the confluence of the Itany – Marouini Rivers.

⁸ The CIA World Factbook. Available at <http://www.cia.gov/cia/publications/factbook/geos/ns.html> (last visited Jan. 15, 2004).

⁹ Engel Sluiter, *Dutch Guiana: A Problem in Boundaries*, HISP. AM. HISTORICAL REV, Feb. 1933, at 7.

¹⁰ Aluminum exports accounted for 70% of Suriname's estimated \$485 million export earnings in 2000. Szczesniak, *supra* note 8. See also Debra A. Klein, *A Cultural Mix in a Lush Landscape*, N.Y. TIMES, Oct. 26, 2003, at Section 5, page 10.

Shell-owned Billiton Company to explore the interior of Suriname.¹¹ The survey did not reveal the exact locations of bauxite deposits, but noted the entire Suriname interior, including the disputed territory, appeared to have viable amounts of bauxite.¹² The large Marouini and Itany Rivers also have virtually unlimited hydroelectric capacity. Both nations would benefit economically and socially if these resources could be exploited.

III. Origins and Progression of the Dispute

The historical basis for the boundary dispute lies in the colonial history of the Guianas where European enterprises entrenched themselves with little regard to the exact location of boundaries of their colonies.¹³ This section will discuss the relevant indigenous inhabitation, colonial history of the dispute, and modern overtures towards demarcation.

A. Indigenous Inhabitants

The earliest inhabitants of the general area were the Carib Indians, whose range was the Amazon River valley and the Guiana lowlands to the islands of the Sea that bears their name.¹⁴ Most of the Carib died from disease and warfare with the Spanish in the 1500s, and have left few traces of their existence in the area. Largest of the other Amerindian groups were the Arawak Indians. More peaceful than the Caribs, their numbers were decimated by disease rather than war when the Spanish arrived. A third group, the Maroons, were the African slaves who escaped captivity after being brought to the area by Europeans. Many sought refuge in the forests of the southern Guianas where many of their descendents continue to live. Many Maroons and indigenous Indians have co-mingled and their offspring have created a separate and distinguishable culture.¹⁵ Today the number of Maroons and Amerindians living in the southern

¹¹ Donovan, *supra* note 4, at 46. SURALCO is a dependant corporation of ALCOA but with state owned branches. *Id.*

¹² *Id.*

¹³ Thomas W. Donovan, *Jurisdictional Relationships Between Nations and Their Former Colonies*. 1 ACROSS BORDERS INT'L L. J. 5 (2003), at <http://www.across-borders.com>. A colony was usually the legal extension of the home country. In the Guiana experience, however, many of the colonies were established, maintained, and funded by state run corporations such as the Dutch West Indies Corporation instead of a traditional state ministry. This will be discussed *infra*, as it pertains to the legal status of the trust territories of the Netherlands and France. *See id.*

¹⁴ The Organization of American States (OAS), Annual Report of the Inter-American Commission on Human Rights, available at <http://www.cidh.oas.org/annualrep/89.90eng/toc.htm> (May 17, 1990). Although the Maroons were the first inhabitants, the Government of Suriname has reportedly violated property and human rights of the small tribes that live in the New River Triangle. *Id.*

¹⁵ Garry D. Peterson & Marieke Heemskerk, *Deforestation and Forest Regeneration Following Small-Scale Gold Mining in the Amazon: The Case of Suriname*, ENVTL. CONSERVATION, June 2001, at 117-126.

French Guiana-Suriname area are estimated at about 5,000, and most of them enter the disputed area only seasonally for prospecting.¹⁶

B. Early Colonial History

The area that is today French Guiana was discovered in 1496 by the Spanish, who established a few settlements in 1503 and 1504.¹⁷ Long after the Spanish had abandoned these communities, the Dutch moved in and established settlements along the coast.¹⁸ They endured rampant disease, floods, and the disruptions brought about by the European wars between England, Holland, and France.¹⁹ Under the 1667 Treaty of Breda, the Dutch, were forced to relinquish their claim and plantations and were expelled.²⁰ The Dutch trade concerns returned in the early 1700s and established new farming and shipping settlements in what is now the modern day Suriname - French Guiana Caribbean boundary area.²¹

The first organized and viable settlement of the disputed Marouini River Tract began in the late 1700s. The King of France 'granted' a group of French colonists the land between the coastal city of Kouro and the Maroni River in 1,600 acre parceled grants.²² Records indicate that this colonial experiment did not last, and most of the chartered Europeans abandoned their attempts to settle the interior and returned to the larger cities of French Guiana, Cayenne and Kouro.²³ However, this record provides evidence of the French Government's intent to claim the area for France, and to occupy it with French colonialists.

¹⁶ *Id.* at 117-126. For a description of the indigenous people in the area, *see* <http://www.si.edu/maroon/foodways/guiana.htm> (last visited Jan. 15, 2004).

¹⁷ VERE T. DALY, *THE MAKING OF GUYANA* 35-37 (1974). Daly asserts that the first European inhabitants of the Guianas did not venture inland because of health concerns and poor transportation abilities. During this era the coast was cultivated to produce tobacco and sugar which were the most important commodities at the time. *Id.* at 35-37, 46.

¹⁸ The colonial experiences in the Guianas involved the English, Dutch and French. Sir Walter Raleigh. The Discoverie of the Large, Rich and Bewtiful Empyre of Guiana. (Neil L. Whitehead ed.) 1998. First printed in 1596. (University of Oklahoma Press).

¹⁹ CORNELIUS CH. GOSLINGA, *THE DUTCH IN THE CARIBBEAN AND ON THE WILD COAST 1580-1680*, 34, 430 (1971).

²⁰ The 1667 Treaty of Breda (also called Peace of Breda) ended the Second Anglo-Dutch war. "By this treaty the Dutch Republic's possession of islands in the West Indies and of Suriname was confirmed, while the Dutch gave up their possessions in what is now New York and New Jersey." Benjamin Hunnigher, *Breda*, in 4 *ENCYCLOPEDIA AMERICANA* 494 (1998).

²¹ Goslinga, *supra* note 19, at 35.

²² David Lowenthal, *Colonial Experiments in the Guiana*, *HISP. AM. HISTORICAL REV.*, Feb. 1952, at 28.

²³ *Id.* at 28-29.

Not until the latter half of the Seventeenth Century were the borders of the interior explored for the first time.²⁴ The Dutch argued that the Sinamary River,²⁵ which lies in the center of modern French Guiana, was their far Eastern border. Had this border been accepted by the French, modern day French Guiana would be denied nearly 50 percent of its territory. This ambitious claim was based on the fact that Dutch traders and slave drivers ventured periodically into the region either in search of escaped slaves or new markets for the Suriname's plantation products. Records of the Dutch West Indies Corporation indicate that it effectively administered the area to the west bank of the Maroni River, and dealt with its inhabitants through trade and commerce.²⁶

Existence of trade routes were not the only facts used by the Dutch to justify its claims on territory east of the Maroni River. Early documents also indicated Dutch hegemony over the area. The most persuasive example of this was the original English grant of land by King Charles II to Lord Willoughby which "expressly stated that the colony of Surinam (at the time in the English hands) had expanded to the right bank of the Marowijne (Maroni)."²⁷

The original grants and early claims, however, seemed to have been ignored. The realities of actual occupation took precedence over the views of European monarchs. Records indicate that over the course of the Seventeenth Century the Maroni River eventually came to be generally regarded as the eastern boundary of Dutch Guiana.²⁸ This occurred for the most part because the Dutch had tacitly permitted the French to build commercial structures and military outposts on the right bank of the river. The Dutch allowed this French encroachment as an additional means of preventing slaves from escaping.²⁹ The failure of the Dutch to object or contest the French occupation suggests that they did not themselves plan to occupy the territory east of the Maroni River at the time.³⁰

In 1836, the Dutch and French Governments agreed to settle their common border. They first determined that the Maroni River would divide their colonies from the Caribbean-Atlantic Ocean to its origin in the mountains at the Brazilian border.³¹ The question they had not yet answered when they made

²⁴ See generally Vincent T. Harlow (ed.) *Colonizing Expeditions to the West Indies and Guiana, 1623-1667*. Halkuyt Society Work Series. No. 2, Vol. 56. Kraus International Publications.

²⁵ Other spellings of the Sinamary River have been used in the past such as the "Sinnamarie River" or "Sinnamary River." Throughout this paper a consistent spelling of Sinamary will be used.

²⁶ <http://www.cia.gov/cia/publications/factbook/geos/ns.html> (last visited Jan. 15, 2004).

²⁷ *Id.*

²⁸ Sanderson, *supra* note 1, at 472.

²⁹ RICHARD PRICE, *THE GUIANA MAROONS: THE HISTORICAL AND BIBLIOGRAPHICAL INTRODUCTION* (1976).

³⁰ Sluiter, *supra* note 5, at 6.

³¹ Raye R. Platt, *Present Status of International Boundaries in South America*, *GEOGRAPHICAL REV.*, Oct. 1924, at 627.

this decision was, ‘where exactly does this river originate? Many rivers joined along this route and it was necessary to decide which of them was the main tributary of the Maroni. After lengthy debate, the commission disbanded when it remained unable to decide whether the Maroni came primarily from the Tapahoni in the west, or the Lawa River in the east.³²

A few years later gold was discovered in the Marouini River Tract. Both nations renewed their eagerness to demarcate the territory so they could begin development of the area.³³ The Dutch had more experience in the interior stemming from their frequent slave problems. Throughout the Eighteenth Century slave revolts and escapes compelled the Dutch to venture frequently into the territory to retrieve them. To facilitate this, the Dutch established military outposts deep in the interior and exercised acts of sovereignty in the disputed interior.

The runaway slaves would invariably seek refuge and cover in the deep forests of the Northern Amazon. Throughout the early history of Dutch Guiana there are numerous accounts of military excursions into the area searching for escaped plantation slaves, now called Maroons.³⁴ The most notable escapee was the slave leader, Koffie, after whom the village of Koffiekamp, is named.³⁵ The slave escapes and their subsequent settlement in the area provide the most compelling argument for Suriname’s predecessor, Dutch Guiana, to have control over the Marouini River Tract. Besides arguing that it occupied the area, Dutch Guiana also asserted the only inhabitants of the territory in dispute were the Maroons, the descendants of escaped slaves belonging to Surinamese plantations. Since the implied right to exercise sovereignty over these people had never been relinquished by the Dutch Government, a claim to the interior which the Maroons inhabited could therefore be sustained.³⁶ Effective occupation, it was argued, was demonstrated by the Dutch military posts which dotted the interior. The Dutch further argued that it was not that important which rivers were the main tributaries of the Maroni. More important was the fact that the area was inhabited by the Maroons, who were subjects of the Dutch nation.³⁷

Despite the arguments from the Dutch homeland, Dutch Guianese settlers agreed with their French Guianese counterparts that a clear border had to be determined. So, in 1861 a group of colonists and local

³² *Id.*

³³ ALLEN MARK FLETCHER, *THE LAND AND PEOPLE OF THE GUIANAS* (Revised ed. 1972).

³⁴ Donovan, *supra* note 4, at 48. Escaped slaves and slave rebellions plagued economic development in the Dutch colonies during the seventeenth and eighteenth centuries.

³⁵ See <http://spac.cq-link.sr/SBN/SBN-news.htm> (last visited Jan. 15, 2004).

³⁶ WIM S. M. HOOGBERGEN, *THE BONI MAROON WARS IN SURINAME* (1997).

³⁷ In the Peace Treaty of Badajoz (June 6, 1801) and Peace Treaty of Madrid September 29 (1801), Portugal, militarily and diplomatically weak, is forced to sign these treaties, by which Brazil accepted French demands for the river Arawani to form Guiana's borders with Brazil. See <http://www.geocities.com/CapitolHill/2382/brevhisi.htm> (last visited Jan. 15, 2004).

government officials from both colonies attempted to establish which rivers were the major tributaries, and finally demarcate the boundary.³⁸ They explored the Maroni River upstream until they reached the confluence of two rivers almost identical in size and volume, the Tapanhoni and Lawa Rivers. After measuring the comparative width of the entering streams and taking varying depth measurements, the commission finally concluded it was the Lawa that was the greater tributary.

The colonists of the 1861 mixed commission presented their findings to their respective parent countries expecting that soon a final agreement would be reached. However, neither France nor Holland wanted to follow the colonists' recommendations, and work to establish a formal treaty was abandoned. It was understood that the intent of a government to gain title to a particular area must be through objective, state controlled interests, not private decisions. Since both territories were colonies of rival European powers, decisions had to come from the parent country rather than the colonists.³⁹ Since the colonies were not independent, it would not be correct to impute the intent of the colonialists onto the government.⁴⁰

In 1874 additional gold discoveries in the Marouini River Tract began a larger and more organized gold rush to the area.⁴¹ The Dutch felt that their rights were being infringed upon by the presence of the French, while the home government in Paris showed little interest in demarcating the border.⁴² Taking the initiative, the Dutch government suggested the dispute be arbitrated by a neutral judge whose decision was to be final. The arbitrator agreed upon was Czar Alexander III of Russia who accepted the responsibility to decide the case.⁴³ In May 1891, he returned a verdict in favor of the Dutch, stating:

³⁸ Sluiter, *supra* note 5, at 7.

³⁹ Because the colonial encampment was an extension of the home country, European methods of government and state control the intent of the country. The conduct of private individuals, although persuasive as to show the effective control at a certain time and relevant as to the socio-economic ties which might be evident, are irrelevant as to determine the intentions of a state during colonialism. *See* Sluiter, *supra* note 9, at 3-7.

⁴⁰ *Id.*

⁴¹ Sluiter, *supra* note 5, at 9.

⁴² Sluiter, *supra* note 5, at 10.

⁴³ It was customary among colonial countries to refer inter-European disputes to detached neutral arbitrators who could rule on the issue. It was also customary to refer to another country (as seen in the 1899 Venezuela - British Guiana instance where the American Government acted as panel to decide the Essequibo region of Western Guyana/Eastern Venezuela). *See* Donovan, *supra* note 4, at 35. Likewise other European sovereigns such as kings were used (as seen in the 1904 Dutch Guiana -Brazil arbitration over the Southern border of Dutch Guiana which was referred to King Vittore Emanuele, III of Italy for arbitration. *See* SURYA P. SHARMA, TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW (1997). "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." *Suriname, Regional Location and Boundaries*, at <http://home.student.uva.nl/selwijn.pengel/boundaries.html> (last visited Oct. 6, 2003).

That the Dutch government, according to well established facts not denied by the French Government, had already by the end of the previous [eighteenth] century established by military posts on the Lawa. That the French authorities in Guiana have often acknowledged that the negroes residing in the disputed area directly or indirectly were subject to the Dutch Government; and that the French authorities did not enter into treaty relationships with the inland tribes living there except by means of the mediation, and in their presence, of a representative of the Dutch Government.

That beyond contradiction it has been determined by both the interested powers that the (Maroni) River from its source must be taken as the boundary by their respective colonies.

That the mixed commission of 1861 had collected evidence in favor of recognizing the Lawa as the superior stream of the upper (Maroni) on these grounds:

- (1) We declare that the Lawa must be considered as the boundary between the two possessions.
- (2) As a result of this decision the territory above the confluence of the Lawa and the Tapanhoni must be considered henceforth to belong to the Dutch however without infringing on the bona fide rights previously obtained by the French nationals on the territory which was in dispute.⁴⁴

Alexander's declaration settled only part of the dispute. As he indicated, the Lawa River was to be the definitive boundary. Unfortunately, the merging of two tributaries of nearly equal size, the Itany, in the west, and the Marouini to the east forms the Lawa River upstream. The dispute remained unresolved over the question of which of these rivers is to be considered the main progenitor of the Lawa, and thus the upstream border. Although Alexander cited the findings of the 1861 mixed commission to establish that the Lawa was the superior tributary, he did not use their findings to settle the Itany-Marouini issue. Had he done so, there probably would not now be a dispute. Perhaps he did not do so because the work of the commission had a glaring deficiency. The commissioners measured the Itany to its source to determine if it deserved to become the border river.⁴⁵ However, they did not measure, or even explore, the Marouini.

The commissioners reported that the Itany is usually larger than the Marouini. Depending on the flow of each particular rainy season, they concluded, the Itany is wider and deeper than the Marouini, and on average feeds greater water volume into the Lawa.⁴⁶ This is a rebuttable presumption, for the mixed commission of 1861 did not actually ascend the Marouini River. They were therefore in no position to comment accurately about its strength or flow.

⁴⁴ Sluiter, *supra* note 5, at 9.

⁴⁵ Sluiter, *supra* note 9, at 9.

⁴⁶ See http://www.transboundarywaters.orst.edu/publications/register/tables/IRB_footnotes.html (last visited Jan. 15, 2004).

The Marouini River was not formally surveyed until 1888 when Henri Condreau, a noted French explorer in South America, published an account of his journey. He indicated nothing that could resolve the controversy of whether the Itany or Marouini River systems were larger. Following publication of this work, Dutch boundary commissioners reverted to their earlier argument that it didn't matter about the rivers as long as Dutch subjects (the runaway slaves) now were the only significant inhabitants of the area. They pointed out the fact, which Condreau acknowledged, that the colonies of Maroons, the 'Boninegers,'⁴⁷ had lived along the Marouini River as early as 1790.⁴⁸ Since the Czar in 1891 had agreed these peoples were Dutch subjects and their homes were on Dutch territory, by the same reasoning the Marouini River Tract, could be considered Dutch territory.⁴⁹

Another boundary issue that should have been addressed at the time, but was not, pertained to the ownership of the islands in the Maroni River. If the Maroni were to be the boundary, who was entitled to the islands on that River? Usually such issues are determined by establishing the *thalweg* (the deep water mark of the boundary river) and awarding the land on each side of that mark accordingly. However, the Maroni River has a tendency to change course, move soil around, build its own natural dams, and rise and fall with each season. It was practically impossible to establish a permanent line where the impermanent *thalweg* was located. Given this fact, there was no method recognized in international law whereby the exclusive ownership of these islands could be determined except by a treaty based on mutual compromise.

Such a treaty was finally concluded at Paris September 30, 1915 between the Dutch Minister De Steurs, and the French Foreign Minister Déclassé. The treaty was limited to the islands in the Maroni River between the northern point of Stoelman's Island (Dutch) and the Southern extremity of Portal Island (French). It provided that (1) a line in the middle of the river (at normal flow) should mark the boundary (*thalweg*); (2) islands entirely or largely to the west of this line should be Dutch while those entirely or largely to the East of this line should be French; (3) navigation on the river should be free to both nations; and (4) gold dredging permits were to be granted by mutual consent.⁵⁰ Once again, this treaty did not address or define whether the Itany or the Marouini River were to be considered the southern extension of the border to Brazil.

In 1902, the Dutch colonial Government undertook the construction of a railroad to the Lawa District. It took five years to complete 120 kilometers and another five to connect the district with the capitol. That same year, L.A. Bakhuis, a Dutch geographer, called attention to the publication of a French

⁴⁷ Boninegers is a Dutch term used to describe the inhabitants of the interior. *See* <http://www.suriname.nu/distrikt/sipa.html> (last visited Jan. 15, 2004).

⁴⁸ Sluiter, *supra* note 5, at 9-10.

⁴⁹ Donovan, *supra* note 4, at 48. The later part of the nineteenth century saw a pressing drive to solidify borders in the Guianas. This is highlighted by the 1899 Arbitration between British Guiana and Venezuela where the United States acted as arbitrator. However, the colonial legacy and the difficult geography make boundary demarcations in the Guianas difficult. *Id.*

⁵⁰ Sluiter, *supra* note 9, at 9-10.

map by the firm of Erhard Freres at Paris, on which the cartographer, Maurice Goffroy, depicted the Itany, rather than the Marouini, as French Guiana's southwestern boundary. This was contrary to Suriname's land surveyor, W.L. Loth, who indicated on Dutch maps the Marouini as Dutch Guiana's southeastern boundary.

In 1911, the matter drew attention in the second chamber of the Dutch Parliament. A member (Van Doorn) urged that all of Dutch Guiana's boundary disputes be resolved. The Dutch colonial minister answered that diplomatic negotiations with France on this subject were in progress. But after two years, the Dutch Foreign Minister reported that his offer to make a treaty with France was getting nowhere.⁵¹ Both nations failed to settle, or even to give settlement negotiations priority. Eventually, as it became apparent that gold production in the area was decreasing, so too was the amount of attention paid to the boundary issue.

The boundary issue has not been dealt with since. Only a few overtures to resume discussions have been offered by both Suriname (after independence in 1975 from The Netherlands) and the French Government. But no substantive talks have been authorized. Throughout the Twentieth Century nearly all sources indicate that French Guiana is administering the disputed area.⁵² Today, the world community and most of its mapmakers depict the Marouini River Tract as French sovereign territory.⁵³

IV. Legal Principles Applied to the Marouini Dispute

The following section describes the operative legal principles that Suriname and French Guiana could use to justify their respective claims for the Marouini River Tract. French Guiana will likely argue that they have consistently and effectively occupied the area, creating title through either occupation or prescription (adverse possession). Suriname, on the other hand, will likely counter these arguments by pointing out that the inhabitants of the area were of Dutch Guiana descent and therefore Dutch Guiana created acts of occupation in the area. And, even though French Guiana might have administered the area in recent years, Suriname could have gained title to the territory. It could have done so through either adverse possession or a colonial hinterland claim which would be inherited by the successor state of Dutch Guiana or Suriname through *uti possidetis juris*.

A. Determining Title Through The Law of Occupation

⁵¹ Throughout the Twentieth Century most maps of the area depict the French-Dutch boundary along the Itany, the western branch of the Lawa, and not along the Marouini River. *Id.*

⁵² See The Central Intelligence Agency World Factbook 2003 Edition. <http://www.cia.gov/cia/publications/factbook/print/fg.html> (last visited on Jan. 14, 2004).

⁵³ EDWARD M. DEW, THE TROUBLE IN SURINAME 1975-1993 (1975).

Gaining title to the Marouini River tract will hinge largely upon each disputant's demonstration of its effective control of the area during the colonial era. 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).⁵⁴ These elements were originally delineated in the Arbitral Award between Brazil and Dutch Guiana in 1904.⁵⁵ 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."⁵⁶

The intent element could be established by the colonial entity, as the colonial protectorates were viewed as extensions of the state during this 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 is has undertaken a protectorate over the country named; but, aside from such notification, the protectorate must become effective."⁵⁷

Sustaining an intent claim requires a strict review of overt actions conducted by the ruling governmental authority.⁵⁸ The seminal case on this point is *Eastern Greenland*. The Permanent Court of International Justice held that in sparsely populated and desolate areas, intent could be as simple as reiterating in public a basic intent to control the territory.⁵⁹ The court further noted that consistent inhabitation and comprehensive creation of public services were not needed to sustain the intent element. However, for the claim to have weight, any public services rendered, even sporadically, would have to be those that only a state entity could perform. The existence of a state entity could be established through such things as a military occupation or outpost (as seen in *Clipperton Island*),⁶⁰ state owned and operated commercial businesses (such as the Dutch East Indies

⁵⁴ *Animus domini* is also referred to as *animus occupandi*. Consistent throughout this paper intent will be used to describe this element. MALCOLM N. SHAW, INTERNATIONAL LAW (4th ed. 1997).

⁵⁵ This dispute was referred to King Vittore Emanuele III of Italy for arbitration. The colonies of Portugal and Spain were gaining independence throughout South America and there were no uninvolved arbitrators to refer disputes. Once Brazil emerged from colonialism, it attempted to ratify its borders, which included its northern border with Dutch Guiana. 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.

⁵⁶ Sharma, *supra* note 43, at 71.

⁵⁷ Article 34 of the Treaty of Berlin, cited in PASQUAL FIORE, INTERNATIONAL LAW 431 (1929). Jurists in the colonial era were consistent in asserting that a properly established colony or protectorate could acquire territory for the colonial sovereign. Theodore Woolsey 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).

⁵⁸ For a general discussion *see* Shaw, *supra* note 54.

⁵⁹ *See Eastern Greenland Case (Denmark v Norway)* 1933 P.C.I.J. (ser. A/B) No. 53, at 48.

⁶⁰ *Clipperton Island Award*. 26 A. J. INT'L L. 390 (1932). Clipperton concerned a dispute between France and Mexico over an uninhabited island. The arbitrator emphasized the nominal acts which translated

Corporation (as in *Island of Palmas*)), or in public proclamations through a ruling government-affiliated ministry (as in *Eastern Greenland*).⁶¹

The second element, known as *animus corpus*, is necessary to complete a claim of title over a given territory. Arbitral panels have reviewed *animus corpus* much more extensively than the intent element.⁶² The controlling and fundamental law came through the *Island of Palmas* award in which control of a sparsely populated island in the Pacific was disputed between the United States and The Netherlands. The United States based its claim on continuity of title (citing the U.S. rule over the Philippines). Because of this continuous transfer of title, the United States claimed, it was unnecessary to prove any further displays of sovereignty. Conversely, The Netherlands asserted that its predecessor in interest, the Dutch East Indian Company, maintained continuous occupation since 1677. This gave The Netherlands a more justifiable claim to the island, they asserted.⁶³

“Occupation” was defined by the Swiss Judge Max Huber in granting the Award to the Netherlands, as the actual display of state activities that can only be performed by a territorial sovereign.⁶⁴ Judge Huber added that there was a different test of *corpus* in the instances of distant, uninhabited territories.⁶⁵ As he stated, “manifestations of sovereignty over a small island and distant island, inhabited only by natives, cannot be expected to be frequent.”⁶⁶ International tribunals have followed this reasoning since Huber’s decision. They have not required a showing of effective occupation of *corpus* but rather a more symbolic occupation.⁶⁷

toward possession over the actual occupying and ruling the island. In the case, title was ultimately determined by the nominal act of a French Naval Officer proclaiming the island to be French and publishing an article in a Honolulu newspaper. This was deemed sufficient in creating valid title in this specific circumstance. See Shaw, *supra* note 54, at 348.

⁶¹ *Id.* 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.

⁶² The second element of *corpus* is dealt with in the *Island of Palmas Case (United States vs. Netherlands)*, 2 RIAA 829, 839 (Huber, Arb., April, 1928).

⁶³ *Id.* at 830.

⁶⁴ *Id.* at 830. The court states that elements such as tax rolls, jurisdictional legal courts, administration, civil servants, etc. are signs of a government’s effective occupation and control.

⁶⁵ The Award, available at <http://www.gwu.edu/~jaysmith/Island.html> (last visited February 27, 2004).

⁶⁶ *Island of Palmas*, 2 RIAA at 830-839. This is the classical notion of effective occupation. In the exercise of territorial sovereignty there are necessarily gaps, intermittence in time and discontinuity in space. This phenomenon will be particularly noticeable in the case of colonial territories 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 833-839.

⁶⁷ Matthew M. Ricciardi, *Title to the Aouzou Strip: A Legal and Historical Analysis*, 17 Yale J. Int’l L. 301, 385 (1992).

Examples of symbolic, rather than effective, occupation include such functions as having a viable police force,⁶⁸ granting of hunting concessions in a disputed area,⁶⁹ and regulating fishing in claimed maritime areas.⁷⁰

Because the Marouini River tract was claimed by both Suriname and French Guiana (both satisfying the intent element),⁷¹ an analysis to determine title will hinge upon the extent to which actual control, or *corpus*, could be demonstrated. The Dutch argument, that the *corpus* element was fulfilled through the escaped slaves who inhabited the area while they were subjects of The Netherlands, has questionable appeal. Relevant case law determines occupation to be acts which a state traditionally performs, not acts that subjects of the area might perform to escape from the government itself. As the escaped slaves received no benefit of protection, paid no taxes, and sought no governance from the Dutch Guiana authorities, this argument cannot be substantiated by the applicable case law.

The *corpus* element must elucidate a consistent and effective occupation of the area, so that the intent of the occupier is to incorporate the area into the national identity and structure of the society. Adhering to this definition French Guiana has a more persuasive argument based upon their present and actual control over the area. Throughout the later decades of the Dutch colonial enterprise in the disputed land, and since its independence, there has been no evidence that Suriname has entered the area.

B. The *Terra Nullius* Principle in the Marouini River Tract

A critical issue in determining sovereignty over an area during the colonial experience is establishing whether the land was “*terra nullius*,” defined as “the land of no one.”⁷² This means that such land could only be open for occupation if no one else was occupying it. Suriname or France may attempt to counter an argument by the opposing state, asserting that either former colonial government did not effectively occupy the disputed areas because it was not open for occupation. That is, the Marouini River Tract was either inhabited by another European power or by a cohesive indigenous society. Thus, it could not have been controlled by a colonial entity determined by the elements of fundamental occupation.

⁶⁸ *Southern Boundary of the Territory of Walfisch Bay (Great Britain v Germany)*, 104 Brit & Foreign St. Pap. 50, 100 (May 23, 1911).

⁶⁹ *See Eastern Greenland*, *supra* note 59 at 45-46.

⁷⁰ *See Island of Palmas*, 2 RIAA at 17.

⁷¹ Both France and Suriname can argue that they have claimed the area through either the original grants given by the European sovereigns to the area or by their own actions of incorporating the area into maps, professing intent to occupy the area, granting gold concessions, or encouraging development of the Marouini River Tract. Although these acts are relevant to establish the *animus domini* aspect of gaining title, they do not, by themselves, create title. Both requirements of intent and *corpus* must be established. For a general discussion see Fiore, generally, *supra* note 52.

⁷² *See Shaw supra* note 54 at 354.

Throughout the colonial era European scholars agreed that “any land that was *terra nullius* was open to occupation.”⁷³ This was the justification for the colonization of North and South America, Australia, and in some instances, Africa.⁷⁴ In the colonial era, *terra nullius* was seen as any part of the Earth’s surface that was not yet occupied by a central, developed government.⁷⁵ 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*.⁷⁶ 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.⁷⁷

There was debate, however, as to how much an indigenous people had to be “developed” before they also could be considered the inhabitants of the territory. Whether a land was considered *terra nullius* depended on the European view of whether the inhabitants had achieved a sufficient level of development.⁷⁸ The early Twentieth Century Italian jurist, Pasquale Fiore, stated 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.⁷⁹ This “disguised form of conquest”⁸⁰ required the European settlers to negotiate

⁷³ See Ricciardi, *supra* note 579 at 395.

⁷⁴ *Minquier and Ecrehos Case (France v U.K.)* 1953 ICJ 47, 65-66 (Special Agreement of Nov. 17)

⁷⁵ See Shaw, *supra* note 54 at 355. The Australian case of *Mabo v. State of Queensland* dealt with *terra nullius* in Australia when dealing with an indigenous population that was not organized, coherent nor central. “(w)hatever 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*.” See *Mabo v State of Queensland* (1992) 66 ALJR 408.

⁷⁶ 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* pp 11-20 (1926), J. WESTLAKE *CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW* pp 141-142 (1926).

⁷⁷ In the *Lotus* instance, France brought suit against the Turkish Government claiming that it had violated its jurisdiction by adjudicating a collision in the Mediterranean. It is assumed that because France brought suit against Turkey, the colonial power of France assumed Turkey to be a cohesive political unit. See *France v. Turkey, Case of the SS Lotus*, PCIJ (1927), 131.

⁷⁸ *Terra nullius* was dealt with recently by the International Court of Justice in *The Indo-Pakistan Western Boundary Case Tribunal*. February 19, 1968. 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 may be inhabited, must be unclaimed by any power, European or otherwise.

⁷⁹ See Fiore, *supra* note 57 at 423.

⁸⁰ *Id.*

a cession of title which could include direct and indirect means for inducing the indigenous inhabitants to yield territory to European colonialism.⁸¹

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 could not be acquired solely by occupying the territory. It was necessary in such cases to reach agreements with local rulers. Such agreements were regarded as derivative roots of title, and not original titles obtained by occupation of *terra nullius*.⁸²

Neither the Dutch nor the French colonists had systematically explored the interior of the Marouini River Tract. Historical documents which describe the area and its inhabitants are contradictory. No scientific expeditions were convened until 1840, and even then, there were discrepancies in their findings. Those that seem consistent are, at best, incomplete. Early records indicate that Dutch traders went inland up to two hundred miles, yet were confined to the waterways and tributaries of major rivers.

a. Abandonment of Claims Reverting to *Terra Nullius*.

The paucity of records accurately describing the Marouini River Tract 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 because it could potentially be argued by either Suriname or French Guyana that the other party had occupied the area and subsequently abandoned it.

The majority of scholars state that to find a territory effectively abandoned, both physical abandonment and the desertion of intent to occupy must occur.⁸³ Jurists have, however, allowed exceptions. For example, when an uprising occurs that drives government forces from a particular area, it is considered abandonment only if the government fails to return in sufficient time even when conditions otherwise permit the return.⁸⁴ 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.⁸⁵

Abandonment is relevant because there is no question that the original French colonialists who were granted the area in question, subsequently left it. The colonialists attempted to inhabit the area of the Marouini River

⁸¹ *Id.*

⁸² See *Western Sahara Case* 1975 ICJ 12, 43 para. 92 (Advisory Opinion of October 16), and *Minquier and Ecrehos Case (France v UK)* 1953 ICJ 47, 65-66 (Special Agreement of November 17). 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 specifically the *Western Sahara*, para. 92.

⁸³ See Ricciardi, *supra* note 67 at 407.

⁸⁴ See M.F. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW* pp 11-20 (1926).

⁸⁵ *Id.*

Tract and after living in it for under a year, returned to the coastal cities of Kouro and Cayenne. Because the state did not attempt to re-enter the land for a significant amount of time, a reversion to *terra nullius* was created. This meant Suriname would have been free to occupy the area. Once *terra nullius* has been reestablished, either state would have been able to enter the area, upon demonstrating the applicable twin elements of fundamental occupation (intent and *corpus*).

b. Terra Nullius and the Extent of Occupied Territory

When a nation occupies a territory that is either uninhabited or inhabited by people supposedly not developed enough for self-governance, one other consideration becomes a factor under the principle of *terra nullius*. At issue is the question of how much of the land would be eligible for occupation. One might argue that the occupying state would be limited to only that territory which it effectively occupied. An alternative view is that a country is entitled to control not only the land to which it has effective title, but also some adjacent territory, a hinterland.⁸⁶ This theory claims that non-occupied hinterlands may be attached to occupied colonial possessions when one of three factors occurs. These are geographical proximity, natural features, or strategic need.⁸⁷ The argument is that adjacent lands are necessary to make the title viable.

In the first consideration in hinterland theory, geographical continuity is used in the claim to unoccupied adjacent territory. However, jurists stated that proximity alone could not support valid title unless the adjacent land is effectively occupied. They argued that if proximity conferred upon a state superior faculties for occupying a territory, that the state should exercise those faculties. When Judge Max Huber made the *Island of Palmas* award, he concluded that contiguity alone to claim title had “no foundation in international law.”⁸⁸ Huber wrote that this principle is “by its very nature...uncertain.”⁸⁹ It conflicted with the clear requirement in international law of effective occupation, Huber stated. If the Hinterland theory is the basis of the claim, he concluded, any displays of occupation by a disputing party, even in rare or isolated instances, would defeat a claim that the land has contiguity with the occupied territory.⁹⁰

⁸⁶ Hinterland as used in this context applies to territory that, while known to the colonial or administering power, is not effectively controlled under western notions of territorial sovereignty. See Ricciardi, *supra* note 67 at 404.

⁸⁷ *Id.*

⁸⁸ *Island of Palmas*, 2 RIAA at 829.

⁸⁹ *Id.*

⁹⁰ *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 57 at 426. Fiore argues implicitly that the showing of effective control will defeat hinterland claims 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 426-427.

The second basis for claiming unoccupied adjacent land in the Hinterland theory pertains to natural geographic features. Claims could be invoked, according to this reasoning, based on geographical contiguity extending to a natural boundary. Prominent natural features such as oceans, mountains and rivers create natural boundaries that allow for clear demarcation and division of borders. The 1899 Paris Arbitration, reaffirmed this view when it dealt with border disputes between British Guiana and Venezuela.⁹¹ Britain wanted to claim title to adjacent lands and to use the natural boundaries to divide Guyana and Venezuela because they are “both easy to distinguish and hard to cross.”⁹² Britain also asserted hinterland theories based on ethnic and racial divisions. Yet, Pasquale Fiore, the Italian jurist 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.⁹³

A third basis upon which to claim title to lands adjacent to occupied territories under the hinterland theory is to show that the area is needed for the safety and security of the state. Great Britain claimed at the 1885 Conference of Berlin that when settlements are reached in territorial disputes it has the right also to assume sovereignty over any adjacent uninhabited territory which is needed to maintain the settlement’s integrity and viability.⁹⁴ The British claim did not gain much support from within the international community, however, and international tribunals and panels did not use the hinterland theory in subsequent rulings. According to Pasquale Fiore, “hinterlands may find application in connection with possessions acquired by conquest, colonial protectorate, or by means of spheres of influence, but [hinterlands] does not constitute a legitimate mode of acquisition.”⁹⁵

International tribunals would most likely grant title to the unoccupied adjacent lands if no other state is also claiming the same land as its hinterland. In this case the title would be awarded only when one of the claimants demonstrates actual occupation.⁹⁶ For example, Denmark had settled some coastal ports and then claimed additional, uninhabited, lands in Eastern Greenland under the hinterland claim. No other nation challenged this

⁹¹ Clifton J. Child. *The Venezuela-British Guiana Boundary Arbitration*, 44 Am. J. Int’l L. 682 (1951); see also William Cullen Dennis, Editorial Comment, *The Venezuela-British Guiana Boundary Arbitration of 1899*, 44 Am. J. Int’l L. 720 (1951).

⁹² See Ricciardi, *supra* note 67 at 407. The natural boundary theory was discussed in the Hanish Island Award between Yemen and Eritrea in dealing with a group of Islands in the Red Sea. The Yemeni pleadings describe the islands as being contained within the same “principle of natural or geophysical unity.” The International Arbitral Panel asserted that this natural boundary theory is “not an absolute principle.” See *Hanish Island Arbitration Phase I: Territorial Sovereignty and Scope of Dispute*. Chapter X Conclusions Paragraph 461

⁹³ See Fiore, *supra* note 57,

⁹⁴ Telegram from Lord Granville to Sir Edward Malet (Jan. 14, 1885). Discussed in Ricciardi, *supra* note 62 at 407-409.

⁹⁵ See Fiore, *supra* note 57 at 430.

⁹⁶ See *Eastern Greenland*, *supra* note 59 at para. 46

claim or sought to occupy the territory. As a result the area became recognized internationally as Danish. It occurred solely on the basis of Danish domestic legislation decreeing control over the territory, with no other evidence of the actual display of sovereignty.

In framing the *Eastern Greenland* decision, the Court considered whether some other power was claiming sovereignty over the territory in question.⁹⁷ An important factor in the decision reached by the Court was that no other state had made any claim to the Eastern Greenland territory before 1931; nor had any other state even disputed the Danish claim to the territory.⁹⁸ Thus, even though Denmark had made only scant acts of occupation, these acts were deemed sufficient to be granted title because this Arctic territory was so remote and virtually inaccessible and because there were no competing claims⁹⁹

In one respect the hinterland may be seen as the extension of the plantation system. The plantations obtained many of their needed commodities from the hinterland areas and some of the military assistance needed to maintain them. However, even though there was always a close relationship between the plantation and the hinterland, the hinterland also produced goods for export to Europe.¹⁰⁰ France and The Netherlands received many of these products and might have argued that this commercial relationship helps sustain a claim of territorial sovereignty over these lands.

A hinterland claim would be equally beneficial for Suriname or French Guiana because it could, if it is to be acknowledged by any deciding tribunal, 'attach' the Marouini River Tract to the colonial entities. France could argue that the area is part of the same "geographic contiguity" of its colony, and likewise, Suriname could argue that the Marouini River Tract was necessary to protect against escaped slaves from escaping to French Guiana. However, the likelihood that a hinterland theory could play a significant role in deciding the Marouini River Tract dispute is small. The debate will most likely hinge upon the showing of modern elements of effective occupation.

c. Acquisition of Title Through Prescription

The acquisition of title to a territory through the intent element and the *corpus* element forms of occupation was possible only when no other state had previously perfected title to it. Several other means of obtaining the

⁹⁷ *Id.* at 46-48.

⁹⁸ *Id.*

⁹⁹ 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. It is possible to reconcile the two countries 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. See *Isle of Palmas* at 129. *Eastern Greenland* is then considered the first international al 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.*

¹⁰⁰ ALVIN THOMPSON, COLONIALISM AND UNDERDEVELOPMENT IN GUYANA 1580-1803. 175 (1987).

territory exists when that land is controlled by one state. One such mechanism, that is relevant to the Marouini River Tract dispute, is by gaining title through prescription. Prescription is defined as “legitimization of a doubtful title by the passage of time and the presumed acquiescence of the former sovereign.”¹⁰¹ Analogous to the common law property term of “adverse possession,” prescription typically requires the same conditions. The adverse possession has to be accomplished and disclosed publicly and conspicuously. It must also be notorious and continuous (without interruption) for a “reasonable period of time.”¹⁰² This possession must not be contested or challenged by the original possessor.¹⁰³ And finally, to gain title by prescription, the intruding elements must be part of a nation-state.

Jurists have 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,” creates good title to the occupied land.¹⁰⁴ 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, other than the “considerable number of years” specification. Determining a proper time frame will depend, in each case, on the competing claims, the nature of the dispute, and the circumstances involved in deciding the title to the area. In any case, the requirement has gained little judicial review.¹⁰⁵ One of the few international cases that considered this element of prescription was the *Minquier and Ecrehos* case.¹⁰⁶ The case was a dispute between France and England over several small islands in the English Channel. The court concentrated primarily on those acts of prescription that took place within the past 100 years, even though titles to these lands could be traced back to medieval times¹⁰⁷

¹⁰¹ See Shaw, *supra* note 54 at 343-344.

¹⁰² Prescription is dealt with in three major international awards. The *Clipperton Island Arbitration (France v Mexico)* (1932) 26 AJIL 390; *Western Sahara*, 1975 ICJ at 43 para. 92; and *Minquier and Ecrehos*, 1953 ICJ at para. 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 specifically the *Western Sahara*, 1975 ICJ at 43 para. 92.

¹⁰³ The reasonable amount of time and the objection of the state are considered in two major awards. See *Eastern Greenland Case supra* note 54 at 45-46; *Western Sahara* 1975 ICJ at 42-43 para. 91. The type of encroachment needed to manifest sovereignty is analogous to the *terra nullius* requirements of *animus domini* and *corpus*. See *Minquiers and Ecrehos* 1953 ICJ at 47; and *Anglo-Norwegian Fisheries Case (United Kingdom v Norway)* 1951 ICJ 116, 184 (Judgment of December 18).

¹⁰⁴ See Fiore, *supra* note 57 at 428.

¹⁰⁵ *Id.* at 345.

¹⁰⁶ See *Minquiers and Ecrehos* 1953 ICJ at 47.

¹⁰⁷ *Id.*

Both Suriname and French Guiana could offer arguments in their territorial dispute under the prescription theory. French Guiana could argue that it had effectively occupied the territory and thus demonstrated *animus corpus* and intent to occupy for decades, certainly meeting the “reasonable amount of time” criteria, no matter what the Dutch had claimed earlier. On the other hand, Suriname could maintain that even though French Guiana effectively demonstrated *animus corpus* and intent element throughout the colonial era, the colonial government in France ignored a conspicuous encroachment onto the disputed territory.

The issue would then center on whether the French government in Paris objected to Suriname’s apparent encroachment. France might argue that no objection was needed because the encroachment from Dutch Guianese and later Surinamese people were as individuals rather than as an official activity of state. Suriname’s counter argument could state that, while it encouraged private individuals to enter the disputed area, it also maintained military troops and outposts in the area. Suriname thus fulfills the requirement for an official function of state, not by its people but its military in the area. Through a prescription argument, Suriname could in theory gain title to the Marouini River Tract simultaneously with French Guiana demonstrating intent to occupy the land.

d. Suriname’s Claims under Acquiescence and Estoppel

Suriname’s claims to the disputed territory might also be thwarted by the doctrines of *acquiescence* and *estoppel*. When the French began to occupy the territory, presumably with the full knowledge of the Dutch and Surinamese, there was no official protestation. In international law, *acquiescence* occurs where a protest is called for and does not happen.”¹⁰⁸ According to Brownlie, a state’s acquiescence to the encroachment of territory by another state has the same effect as recognition. The only significant difference is that recognition is an overt, positive act by the state to show that it accepts a given situation, whereas acquiescence occurs from the absence of protest when it might reasonably be expected.

An intervening variable in the concept of *acquiescence* is the duration of time between the disputable actions of one state and the official protest by the other. If there is a considerable lapse of time before an objection is lodged, it is understood that acceptance of the event has taken place. An example of this was in the *Libya/Chad* case. A 1955 Treaty established some boundaries between those adjoining nations. Another Treaty in 1966 further extended those boundaries but did not alter the ones established previously. The International Court of Justice reviewed later boundary disputes between Chad and Libya. The Court noted, “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.”¹⁰⁹ Inasmuch as neither nation had officially protested the

¹⁰⁸ *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.

¹⁰⁹ *See Territorial Dispute (Libya/Chad)* 1994 ICJ REP. 6, 21-22, para. 6.

agreement for eleven years, the Court ruled that the nations had acquiesced to the conditions that had existed in 1966.

Once a state has acquiesced to the encroachment by another party onto the territory it had claimed, the opportunity to revert to the previous condition is prevented by *estoppel*. The notion of *estoppel* states if one party has already acquiesced to the actions of the other party, then there can be no further dispute about it during subsequent arbitration hearings. An example in which *estoppel* precluded the wishes of one party to revisit an issue that had been previously settled through acquiescence occurred in a dispute between Cambodia and Thailand. In the *Temple of Preah Vihear*¹¹⁰ case it was revealed that boundary commissioners had negotiated an agreement between Thailand and Cambodia's colonial ruler, France, and issued a demarcation of their boundary. However, during these negotiations, the Thai prince visited a temple that was in disputed territory. A French flag was hanging very visibly over the temple and the prince made no objection or declaration that a flag of Thailand should be flying there instead or in addition to the French flag. Based on his conduct, which may have been due to simple politeness or an unwillingness to cause a scene on a holy site, it was no longer possible to dispute the possession of this territory.

In the same way, Suriname's acquiescence to the French control of the area precludes subsequent argument about French sovereignty over that territory. Whatever intentions they might have had, Suriname allowed and even relied on French Guiana to administer the disputed lands. Had Suriname planned to assert effective control over the area when it was within their means to do, their intention was negated when the French Guianese moved in without Suriname's timely protest. Suriname's intention to inhabit the area would thereafter be in conflict with the actual French occupation. Actual control by the French, from the colonial era to the Twenty-First Century, indicates that any arbitration panel would likely support maintenance of the status quo.

e. Suriname's Claims Under The *Uti Possidetis* Doctrine

The foundation of any claim by Suriname to the Marouini River Tract rests on the doctrine of *uti possidetis*. This doctrine states that when a country achieves its independence from a colonial ruler it acquires all the land and original borders that had comprised the former colony.¹¹¹ Moreover, says this doctrine, if the colony and its

¹¹⁰ *The Temple of Preah Vihear*. ICJ Reports 1962, p. 6, 33 ILR, p. 48. See also D. H. Johnson, *The Case Concerning the Temple of Preah Vihear* 11 ILCQ, 1962, p. 1183. The dissent by Judge Spender in the *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. *Id.* pp. 142-146. *The Temple of Preah Vihear* opinion on recognition in international law was later confirmed by Queen Elizabeth II in her ruling between Argentina and Chile. See *Award of Her Majesty Queen Elizabeth II for the Arbitration of a Controversy between the Argentine Republic and the Republic of Chile*. (1966). *Argentina-Chile Frontier Case*, RIAA, Vol. 16 (1969) 109-182. See also R.Y. Jennings *The Argentine-Chile Boundary Dispute: A Case Study*, printed in SIR FRANCIS VALLIT, *INTERNATIONAL DISPUTES THE LEGAL ASPECTS* 315 (1972).

¹¹¹ Steven R. Ratner *Drawing a Better Line: Uti Possidetis and the Borders of New States* 90 AJIL 590 (1996). See also Michael Reisman, *International Decision: The Government of the State of Eritrea and the*

ruler nation were involved in an unresolved border dispute with a neighbor of that colony, the newly independent nation inherits the dispute.¹¹² The territory that is claimed by both nations remains unresolved; the only change is that the former colonial ruler no longer has any involvement in the issue.

For example, the International Court of Justice dealt with *uti possidetis* in the *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali)*.¹¹³ Here, the court held that *uti possidetis* was firmly established in international law whenever aspects of decolonization are at issue.¹¹⁴ The administrative delimitations that were established during colonial times were applied to international frontiers whenever decolonization occurs.¹¹⁵

In South America the doctrine of *uti possidetis* was applied when many of the former colonies of Spain and Portugal were gaining independence.¹¹⁶ Most prominently the doctrine helped fix some borders of Brazil when it gained its independence from Portugal, and in Venezuela when it became autonomous from Spain.¹¹⁷

Any arbitration authority that adheres to a strict interpretation of this doctrine would not likely conclude that the dispute is resolved under *uti possidetis*. That is, neither Suriname nor French Guiana could bolster their respective claim to the Marouini River Tract using this doctrine. Because the border dispute was not resolved during the colonial rule, the subsequent independence of Suriname from The Netherlands does not bolster its claim against France or its colony in French Guyana.

*Uti possidetis*¹¹⁸ should not be confused with a similar principle, usually known as the doctrine of state succession.¹¹⁹ State succession occurs when a bi-lateral agreement is reached and a treaty is signed authorizing

Government of the Republic of Yemen. Award of the Arbitral Tribunal in the First Stage of the Proceedings, (Territorial Sovereignty and Scope of the Dispute) 93 AJIL 688 July 1999.

¹¹² Catharine A Hartzenbusch *Recent Development: International Litigation: Land, Island, and Maritime Frontier Dispute (El Salvador/Honduras)* Gen No. 75, 1992 I.C.J. (Judgment of Sept. 11) (Nicaragua Intervening, 34 Harv. Int'l L.J. 21 (1993).

¹¹³ See *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali)* at 557.

¹¹⁴ *Id.* at 570.

¹¹⁵ *Id.* at 565.

¹¹⁶ CHRISTIANE SIMMLER DAS UTI POSSIDETIS PRINZIP: ZUR GRENZZIEHUNG ZWISCHEN NEU ENTSTANDENEN STAATEN. 276 (1999). See also the *Frontier Dispute Case (Burkina Faso v Mali)* [1986] ICJ 545, paras. 19-26. *EC Arbitration Commission on Yugoslavia* (1993) 92 ILR 162. Also seen in the *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)*, 1992, pp. 351, 598; 97 ILR, pp. 266, 514.

¹¹⁷ See Simmler, *supra* note 96 at 47. *uti possidetis*- principle was recognized *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.*

¹¹⁸ *Uti possidetis* translates to “as you possess, so you may possess.” See Shaw, *supra* note 54 at 676.

¹¹⁹ See Shaw, *supra* note 54 at 676. State succession is dealt with in Article 2 of both the Vienna Conventions of 1978 and 1983 and Opinion No. 1 of the Yugoslav Arbitration Commission, 92 ILR, pp.

one state to displace another in the designated territory.¹²⁰ State succession differs from *uti possidetis* in that 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.¹²¹

f. Two Types of *Uti Possidetis*.

When a new nation is created by the relinquishment of a colonial power its borders remain the same under *uti possidetis*, but there are two distinct mechanisms to make this possible. One mechanism is known as *uti possidetis juris*, and the other is *uti possidetis de facto*.¹²² In the *juris* version the boundaries of the new nation are defined according to the legal documents of the former colonial power at the time of independence.¹²³ In the *de facto* version the borders may be demarcated when territory was actually occupied and governed by the colonial power at the time of independence, even if it was not consistent with the colony's legally defined border. An arbitration authority must consider which of these versions of *uti possidetis* predominates in determining the Marouini River Tract dispute.

In settling boundary disputes arising from the transfer of a colonial power to a new independent South American nation, courts have based their decisions on one or the other version of *uti possidetis*. An example in which *uti possidetis juris* was used took place in 1922 with a border dispute between the two former Spanish colonies that became Colombia and Venezuela.¹²⁴ The disputed land was virtually uninhabited and required little governance. Inasmuch as Spain had controlled all the territory in question, there had been relatively little need for resolution of boundaries before the nations became autonomous. The court held that *uti possidetis juris*

162, 165. The foremost International Court of Justice decision is *Guinea-Bissau v. Senegal*, 83 ILR, pp. 1, 22 and the *El Salvador/Honduras* case.

¹²⁰ *Badinter Commission* in Opinion No 3 in 1992 delineating the boundaries between Serbia and Yugoslavia. See Peter Radam *Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Commission*. 24 Melbourne U. L.R. 50, April 2000.

¹²¹ *Id.* at 10.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Honduras Borders (Guatemala v Honduras)* (1933) 2 RIAA 1307, 1322. Examples of treaties stipulating the application of *uti possidetis* include: *Treaty of Friendship, Commerce and Navigation*, 30 August 1855, Argentine Confederation-Chile, 113 333, art 39; *Treaty between Columbia and Venezuela for the Arbitration of the Boundary*, 14 September 1881, 159 87, art 1; *Bonilla-Gomez Treaty: Border Demarcation Convention*, 7 October 1894, Honduras-Nicaragua, 180 347, art 2(4); *Treaty of Arbitration*, 30 December 1902, Bolivia-Peru, 192 289, arts 1 and 5; *Treaty of Arbitration*, 16 July 1930, Guatemala-Honduras, 132 BFSP 823, art 5. In some of these cases the treaty did not specify which of the two versions of *uti possidetis* applied.

was the deciding principle. The Court stated that, under this principle, the Colombia-Venezuela boundaries would be the same as those of the Spanish provinces they were succeeding. The Court also noted that even though the territories were not occupied in fact, they were considered, by common agreement, “as being occupied in law.”¹²⁵

An example in which the other version, *uti possidetis de facto*, influenced a court finding occurred in a dispute between the neighboring Central American nations of Honduras and El Salvador. Both countries had been small provinces of Spain before gaining independence. Unlike the situation in the Colombia-Venezuela boundary resolution, the land in dispute between El Salvador and Honduras had been highly populated. Even though this territory had fallen within the borders of one province the rulers of the other province had long governed the people within. The Court used the *uti possidetis de facto* version in its ruling. It held that new borders might be demarcated by territory that was actually occupied and governed by the former colonial ruler when it became independent, “irrespective of the legal definition of former colonial borders.”¹²⁶

An important factor for the International Court of Justice in reaching its decision was that El Salvador, Honduras, and Spain, were all signatories to the international treaties that determined the applicable law. As such, the International Court of Justice would support any agreements made between them. Therefore, the Court held that the borders could be changed despite *uti possidetis juris* if both parties were in agreement.¹²⁷ In other words, a state could claim only territory that it already occupied and governed (*uti possidetis de facto*) if both disputants agreed that the former colonial borders were no longer binding on the newly independent countries. The decision about the Marouini River Tract dispute would first need to decide which type of *uti possidetis* predominates. Suriname’s case would be bolstered if *uti possidetis juris* version prevails. French Guiana would have a stronger case under *possidetis de facto*.

Thus, Suriname might argue that the boundary line should be set at the western side of the contested territory, at the Itany River. Its claim is based on *uti possidetis juris*, because the Itany River was the recognized border during its colonial times and when Suriname gained independence from the Netherlands it inherited this border. Through this mechanism, a state successor of colonialism is entitled to inherit the original *corpus* and

¹²⁵ *Colombia-Venezuela Arbitration* UNRIAA 223, at p. 288 (1922). 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.” See *El Salvador/Honduras* at 388. *El Salvador/Honduras* applied *uti possidetis* principles to maritime as well as territorial title to land.

¹²⁶ *Id.*

¹²⁷ See Day, *supra* note

¹²⁷ Alan J. Day, *Border and Territorial Disputes* 378 - 382 (1982). The application of *uti possidetis* goes beyond simple colonialism. It has been seen in the fragmentation of the USSR. See R. 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 J. 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.

intent of its colonial predecessor. This would allow Suriname to argue that the activities of Dutch Guiana in the area established intent through the colonial period. Inasmuch as Dutch Guiana established some military outposts in the area to help them intimidate and apprehending their escaped slaves, and because some of those slaves lived in the Tract while subjects of the colony, Dutch Guiana showed intent to occupy this territory. Suriname could argue that the Dutch and Dutch Guiana government thereby established intent at least during the early to mid colonial era. Suriname could conclude its argument stating that this early intent of possession precluded French Guiana from perfecting title to the area by its possession throughout the Twentieth Century.

Conversely, France and French Guiana might argue that the boundary line at the eastern side of the disputed territory on the Marouini River should be uncontested. Its claim would be based on *uti possidetis de facto*, because of the reality that French Guiana has occupied and governed the area for at least the past century. The French argument of *uti possidetis de facto* is based on the fact that it actually possesses and governs this territory. As such, French Guiana is entitled to offer its evidentiary claim of consistent and effective control over the area. It can also argue, even more persuasively, that this effective control is modern and current. French Guiana could further argue that Dutch activity in the area, even during the slave-holding era, is not persuasive evidence of constructive occupation. The slaves were not settling the area of their own volition as Dutch citizens and the outposts were not established to help settle the area but only to keep more slaves from living in the area. The French argument might also refer to the *Island of Palmas* case in which a clear demonstration of effective control and constructive occupation defeats a title solely predicated upon the element of intent, either actual or inherited through *uti possidetis juris*, aspect of title.

VI. Conclusion

Given the dearth of meaningful diplomatic activity, the Marouini River Tract dispute seems destined to remain unresolved for the foreseeable future. Resolution will certainly not be achieved through the current regimes of President Runaldo Ronaldo Venetiaan of Suriname and Jacques Chirac of France. Even though French Guiana strongly supports the Chirac administration, President Chirac has not been involved in the issues of French Guiana. The people of France show little interest or concern and the French media has given the issue virtually no attention in recent years. French Guiana wants to maintain its relationship with France and to remain part of the Overseas Department of France.¹²⁸ While the Marouini River Tract remains within their effective control France and French Guiana have little motivation to seek changes.

On the other hand, Suriname would have more incentive for bringing the issue to arbitration, if it ever hopes to regain effective control over the area. However, Suriname has its hands full, on the opposite side of the country, in boundary disputes with its western neighbor, Guyana (formerly British Guiana). Nearly the entire border between Guyana and Suriname, from Brazil to the Caribbean, is under dispute. If all of Guyana's claims to Suriname lands were sustained, Suriname would lose one-third of its entire nation to Guyana, including the

¹²⁸ <http://www.abacci.com/atlas/politics.asp?countryID=198> (Last visited on Jan. 15, 2004).

continental shelf.¹²⁹ Moreover, the territory that those two nations are disputing has the potential of vast natural resources, including huge oil deposits. In February 2004, both Suriname and Guyana have decided to place their dispute before the United Nations Conventions on the Law of the Sea (UNCLOS).¹³⁰ The effort to litigate this territorial dispute, with so much at stake, leaves Suriname with little time or resource to do anything about The Marouini River Tract.

The actual economic value of the Marouini River Tract has not been thoroughly determined, and what has been explored thus far has not excited anyone. Several large corporations seeking oil, lumber, and mineral deposits have ceased or limited their activities. They have indicated concern about the difficult terrain and long distances between the area and population and shipping centers, which suggested unpromising profit margins.

It is within this framework that a conclusive demarcation can and should be made. It is exceedingly difficult, costly, and disruptive to establish new borderlines when the area in dispute is well populated, developed, and economically valuable. The time to make final demarcations is before population, development and wealth become part of the area. Therefore, the most propitious time for settling the Marouini River Tract is the present. Suriname and French Guiana should consider the present time, when the stakes and costs are relatively low, as the most opportune movement to seek a settlement. If bi-lateral solutions fail, then either government should forward the issue to a respected international tribunal that would follow existing rules of procedure and substantive law.

¹²⁹ See Donovan, *supra* note 4.

¹³⁰ Rickey Singh. Guyana Takes Suriname to Court. The Jamaica Observer. February 26, 2004. Available at http://www.jamaicaobserver.com/news/html/20040225T210000-0500_56272_OBS_GUYANA_TAKES_SURINAME_TO_COURT_.asp (Last visited February 27, 2004).

