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Mardi 2 septembre 2008 à 10 heures

Tuesday 2 September 2008 at 10 a.m.

10 Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte. La Cour se réunit aujourd'hui pour entendre les Parties en leurs plaidoiries dans l'affaire relative à la *Délimitation maritime en mer Noire (Roumanie c. Ukraine)*.

Je voudrais indiquer tout d'abord que le juge Simma s'est, en vertu du paragraphe 2 de l'article 17 du Statut, récusé en l'affaire.

Je voudrais également indiquer que le juge Parra-Aranguren, pour des raisons qu'il m'a fait connaître, n'est pas en mesure de siéger aujourd'hui.

La Cour ne comptant sur son siège aucun juge de la nationalité des Parties, chacune d'elles a usé de la faculté qui lui est conférée par le paragraphe 2 de l'article 31 du Statut de désigner un juge *ad hoc*. La Roumanie a désigné M. Jean-Pierre Cot et l'Ukraine a désigné M. Bernard H. Oxman.

L'article 20 du Statut dispose que «[t]out membre de la Cour doit, avant d'entrer en fonction, en séance publique, prendre l'engagement solennel d'exercer ses attributions en pleine impartialité et en toute conscience». En vertu du paragraphe 6 de l'article 31 du Statut, cette disposition s'applique également aux juges *ad hoc*.

Avant d'inviter chacun des juges *ad hoc* à faire leur déclaration solennelle, je dirai d'abord, selon l'usage, quelques mots de leur carrière et de leurs qualifications.

M. Jean-Pierre Cot, de nationalité française, est membre du Tribunal international pour le droit de la mer. Il est également professeur émérite à l'Université Paris-I (Panthéon-Sorbonne) et chercheur associé au Centre de droit international de l'Université libre de Bruxelles. Entre 1981 et 1982, il a exercé les fonctions de ministre chargé de la coopération et du développement au sein du Gouvernement français. Pendant plusieurs années, M. Cot a été membre du Parlement européen, au sein duquel il a exercé d'éminentes fonctions, notamment celle de président de la Commission des budgets et de vice-président du Parlement européen. M. Cot a plaidé devant la Cour en qualité de conseil et avocat dans un certain nombre d'affaires, notamment l'affaire du *Différend frontalier (Burkina Faso/République du Mali)*, l'affaire du *Différend territorial (Jamahiriya arabe libyenne/Tchad)*, l'affaire relative à l'*Ile de Kasikili/Sedudu (Botswana/Namibie)*, l'affaire relative à la *Frontière terrestre et maritime entre le Cameroun et le*

Nigéria (Cameroun c. Nigéria) et l'affaire relative à la *Souveraineté sur Pulau Ligitan et*
11 *Pulau Sipadan (Indonésie/Malaisie)*. M. Cot est l'auteur de nombreuses publications dans le domaine du droit international, du droit européen et des sciences politiques. Il est président de la Société française pour le droit international.

M. Bernard H. Oxman, de nationalité américaine, est professeur à la faculté de droit de l'Université de Miami et directeur du programme de droit de l'océan et des côtes. Il est également corédacteur en chef de l'*American Journal of International Law*. M. Oxman a occupé le poste de conseiller juridique adjoint pour les océans, l'environnement et les affaires scientifiques au bureau du conseiller juridique du département d'Etat des Etats-Unis. Il a été le représentant et le vice-président de la délégation des Etats-Unis à la troisième conférence des Nations Unies sur le droit de la mer. M. Oxman a été nommé juge *ad hoc* au Tribunal international pour le droit de la mer et membre du tribunal arbitral constitué conformément à l'annexe VII de la convention des Nations Unies sur le droit de la mer, aux fins d'examiner un différend opposant la Malaisie et Singapour. Il a également exercé la fonction d'expert juridique du Gouvernement des Etats-Unis d'Amérique devant la Cour en l'affaire relative à la *Délimitation de la frontière maritime dans la région du golfe du Maine*. M. Oxman est l'auteur de nombreux ouvrages dans divers domaines du droit international, en particulier le droit international de la mer.

Conformément à l'ordre de préséance défini au paragraphe 3 de l'article 7 du Règlement de la Cour, j'inviterai tout d'abord M. Cot à faire la déclaration solennelle prescrite par le Statut et je demanderai à toutes les personnes présentes à l'audience de bien vouloir se lever.

M. COT : Thank you, Madam President.

«I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.»

Le PRESIDENT : Je vous remercie. J'inviterai maintenant M. Oxman à faire la déclaration solennelle prescrite par le Statut.

M. OXMAN : Je vous remercie, Madame le président.

«Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.»

12 Le PRESIDENT : Je vous remercie. Veuillez vous asseoir. Je prends acte des déclarations solennelles faites par MM. Cot et Oxman et déclare ceux-ci dûment installés en qualité de juges *ad hoc* en l'affaire relative à la *Délimitation maritime en mer Noire (Roumanie c. Ukraine)*.

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Je rappellerai à présent les principales étapes de la procédure en l'espèce.

Le 16 septembre 2004, la Roumaine a déposé au Greffe de la Cour une requête introductive d'instance datée du 13 septembre 2004 contre l'Ukraine, au sujet de la délimitation du plateau continental et de leurs zones économiques exclusives respectives dans la mer Noire.

Dans sa requête, la Roumanie, a invoqué, pour fonder la compétence de la Cour, les dispositions de l'alinéa *h)* de l'article 4 de l'accord additionnel conclu par l'échange de lettres du 2 juin 1997 entre les ministres des affaires étrangères de la Roumanie et de l'Ukraine. Cet accord additionnel a été conclu par référence à l'article 2 du traité de bon voisinage et de coopération entre la Roumanie et l'Ukraine, signé le 2 juin 1997. Les deux instruments sont entrés en vigueur le 22 octobre 1997.

Conformément au paragraphe 2 de l'article 40 du Statut, le greffier a immédiatement communiqué au Gouvernement ukrainien une copie certifiée conforme de la requête ; en application du paragraphe 3 de ce même article, il en a également informé tous les Etats admis à ester devant la Cour.

Suivant les instructions données par la Cour en vertu de l'article 43 de son Règlement, le greffier a adressé les notifications prévues au paragraphe 1 de l'article 63 du Statut de la Cour aux Etats parties à la convention des Nations Unies sur le droit de la mer du 10 décembre 1982. Le greffier a en outre adressé la notification prévue au paragraphe 2 de l'article 43 du Règlement de la Cour, tel qu'adopté le 29 septembre 2005, à la Communauté européenne, qui est aussi partie à cette convention, en priant cette organisation de lui faire savoir si elle entendait présenter des observations écrites en vertu de la disposition précitée. En réponse, la Communauté européenne a informé le greffier qu'elle n'avait pas l'intention de présenter des observations en l'espèce.

13 Par ordonnance en date du 19 novembre 2004, la Cour a fixé au 19 août 2005 et au 19 mai 2006, respectivement, les dates d'expiration des délais pour le dépôt du mémoire de la Roumanie et du contre-mémoire de l'Ukraine ; ces pièces ont été dûment déposées dans le délai ainsi prescrit.

Par ordonnance en date du 30 juin 2006, la Cour a autorisé la présentation d'une réplique par la Roumanie et d'une duplique par l'Ukraine, et fixé au 22 décembre 2006 et 15 juillet 2007 les dates d'expiration des délais pour le dépôt de ces pièces. La réplique de la Roumanie a été déposée dans les délais ainsi prescrits. Par ordonnance en date du 8 juin 2007, la Cour, à la demande de l'Ukraine, a reporté au 6 juillet 2007 la date d'expiration du délai pour le dépôt de la duplique. L'Ukraine a dûment déposé sa duplique dans le délai ainsi prorogé.

Le 23 août 2007, l'agent de la Roumanie a fait part à la Cour du souhait de son gouvernement de produire un document nouveau conformément à l'article 56 du Règlement de la Cour et a fourni certaines explications à l'appui de sa demande. Dans sa réponse, l'agent de l'Ukraine a indiqué que son gouvernement s'opposait à la production de ce nouveau document, au motif que la Roumanie n'avait pas «agi conformément à l'instruction de procédure IX». Vu l'absence de consentement de l'Ukraine, le greffier, sur instruction de la Cour, a demandé au Gouvernement roumain, le 10 décembre 2007, de préciser les raisons pour lesquelles il estimait nécessaire de produire ce nouveau document. Le Gouvernement roumain a dûment présenté le 18 décembre 2007 le supplément d'explications requis. Le 23 janvier 2008, les Parties ont été informées que la Cour, en vertu du paragraphe 2 de l'article 56 de son Règlement, et après avoir examiné les vues des Parties, avait décidé d'autoriser le Gouvernement roumain à produire le nouveau document.

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Conformément au paragraphe 2 de l'article 53 de son Règlement, la Cour, après s'être renseignée auprès des Parties, a décidé de rendre accessibles au public, à l'ouverture de la

procédure orale, des exemplaires des pièces de procédure et documents annexés. En outre,
14 conformément à la pratique de la Cour, l'ensemble de ces documents, sans leurs annexes, sera placé dès aujourd'hui sur le site Internet de la Cour.

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Je constate la présence à l'audience des agents, conseils et avocats des deux Parties. Conformément aux dispositions relatives à l'organisation de la procédure arrêtées par la Cour, les audiences comprendront un premier et un second tours de plaidoiries. Conformément au paragraphe 1 de l'article 60 du Règlement de la Cour, les exposés oraux seront aussi succincts que possible.

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Le premier tour de plaidoiries débute aujourd'hui et se terminera le vendredi 12 septembre 2008. Le second tour de plaidoiries s'ouvrira le lundi 15 septembre 2008 et s'achèvera le vendredi 19 septembre 2008.

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La Roumanie, qui est l'Etat demandeur en l'affaire, sera entendue la première. Je donne à présent la parole à S. Exc. M. Bogdan Aurescu, agent de la Roumanie.

Mr. AURESCU:

I. Introduction

1. Madam President, Members of the Court, it is a great honour and a real privilege for me to represent my country before you as Agent of Romania.

2. First, because it gives me an opportunity to respectfully pay tribute to the International
15 Court of Justice, the prestigious principal judicial organ of the United Nations, and to all its judges, representing as they do the principal judicial systems of the world with professionalism and integrity.

3. Second, because — for Romania — strict respect for international law represents the very basis, the nub of our foreign policy. For a European country the size of Romania, international law is the most effective instrument for finding equitable solutions in international disputes. Meanwhile, this Court devotes itself to the effective and enlightened application of international law with a view to establishing international lawfulness and public order on a lasting basis.

4. This guiding principle of my country's foreign policy is rooted in Romania's contribution to the development of international law and international justice. Among others, the Romanian School of International Law has provided a judge to the Permanent Court of International Justice throughout its lifetime — Demetre Negulesco, who wrote with great scientific authority on advisory opinions, as well as one of the originators of the concept of international criminal law and of the International Criminal Court — Vespasien Pella, to mention only two. To these may be added the contribution of Nicolae Titulesco, former Minister for Foreign Affairs and twice President of the League of Nations Assembly, who was one of the authors of the definition of aggression in the 1933 London Conventions (the "Titulesco-Litvinov" Conventions), and the visionary instigator of the concept of the "spirituality of borders" (which heralded the Schengen principles) and of regional international organizations. As regards the law of the sea, the *travaux préparatoires* of the Montego Bay Convention of 1982 testify to the substantial contribution by Romania, the letter and spirit of its proposals having been broadly adopted by the text of the Convention, including in its Article 121 on the Régime of Islands, and above all in its paragraph 3[1].

5. I am particularly conscious of this privilege — also and thirdly — because it is the first time Romania has appeared before your distinguished Court in a contentious case. In September 2004, when Romania seised the Court of this case of maritime delimitation in the
16 Black Sea, my country placed its entire trust in your distinguished Court to settle this dispute justly and impartially, basing itself on all the wealth of its case law on the subject. For Romania, this case law represents an absolute guarantee of a solution which is equitable and fully complies with the law. Madam President, we are inspired by this same trust today.

[1]MR, pp. 85-90, paras. 8.8-8.16.

6. Members of the Court, in the opinion of Romania[2], this case is not a very complex one. This view is based on the fact that there are no territorial claims between the Parties and the geographical context is not excessively complicated by exceptional circumstances — the presence of Serpents' Island in the area for delimitation apart. At the same time, it must be borne in mind that the first part of the maritime boundary between Romania's continental shelf and exclusive economic zone, *on the one hand*, and the area having a radius of 12 nautical miles around Serpents' Island, *on the other hand*, has already been established by the agreements concluded between Romania and the Soviet Union. These agreements are still in force between the Parties before you. The 1997 bilateral agreements then established the delimitation principles applicable for drawing the remainder of the delimitation line — principles fully complying with the rules already implemented by this Court when it ruled on other maritime delimitation cases. It is on the basis of all these facts and the consolidated jurisprudence of this Court, as well as the substantial practice of States in this area, that Romania regards the maritime delimitation in the Black Sea as not a very complicated case.

7. But "not very complicated" does not mean "simple". As I always tell my students in the Faculty of Law in Bucharest, there are no simple cases before this Court. But comparing the Court's task in this case with other far more complicated cases — for example, *Cameroon* v. *Nigeria* or *Qatar* v. *Bahrain*, to quote just two examples — it is easy to see why Romania considers that *our* maritime delimitation case is not a very complicated one. Hence, I cannot share the position of our opponents who, in the Counter-Memorial, have asserted that the impossibility for

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the two Parties to reach a negotiated solution testifies to the complex nature of the present case[3]. Madam President, Members of the Court, if international law had been accepted and implemented by our opponents during the negotiations, this Court — there is no doubt — would never have been seised of this case. Romania has always based its positions and proposals throughout the long negotiation process on international maritime delimitation law and on the rules of delimitation — as developed and implemented above all by this Court in its now settled case law[4].

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[2]MR, p. 9, para. 1.10.

[3]CMU, p. 33, para. 4.1.

[4]MR, p. 47-48, para. 4.44; Ann., MR 25.

The bilateral negotiations and the positions of Romania and Ukraine. The originality of the delimitation "method" proposed by Ukraine during the negotiations and before the Court

8. Negotiations between Romania and the Soviet Union on the delimitation of the continental shelf and its exclusive economic zones in the Black Sea took place over a period of 20 years, in ten sessions, between 1967 and 1987. There was no concrete result, given the divergent positions of the two countries on the key elements of the delimitation process[5].

9. The negotiations between Romania and Ukraine on the problem of the delimitation of the continental shelf and its exclusive economic zones took place after the proclamation of independence by Ukraine, and also in the context of the negotiations for the conclusion of the Treaty on Relations of Co-operation and Good Neighbourliness (the "Treaty on Relations"), signed in Constanta on 2 June 1997[6]. An Additional Agreement was concluded at the same time as this Treaty, the same day, by an exchange of letters between the Ministers for Foreign Affairs of the two States[7]. Under the provisions of the Treaty on Relations and the Additional Agreement, following the entry into force of these two instruments, 24 negotiation sessions and ten sessions of experts were held between 1998 and 2004, before Romania brought this case before the Court[8].

18 10. Romania's position during these 34 negotiation sessions was based on the principles of maritime delimitation agreed by the two Parties in Article 4 of the Additional Agreement, which — I repeat — fully comply with the practice of States and international jurisprudence, in particular that of the Court. This is why Romania suggested that, as a starting-point, the delimitation should take an equidistance or median line between the relevant adjacent or opposite coasts of the two States, subsequently adjusting that line if need be, taking account of the relevant circumstances of the area for delimitation[9], including the presence of Serpents' Island in this area. The equitableness of the line was to be verified by the "proportionality" test, as practiced in international jurisprudence. This method has consistently been proposed by Romania during the negotiations, as

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[5]MR, p. 43, para. 4.27-4.28; MR, Chap. 5; MR, Anns. 28-31.

[6]*UNTS*, Vol. 2159, p. 26 (Ann. MR 1). See MR, p. 43, para. 4.29. See also CMU, Ann. 22.

[7]*Ibid.*, p. 48 (letter from Romania), p. 54 (corresponding letter from Ukraine) (Ann. MR 2).

[8]MR, p. 47, para. 4.41.

[9]*Ibid.*, pp. 47-48, para. 4.44.

illustrated by the diplomatic correspondence sent to Ukraine, and which is included in Annex 25 of the Memorial[10].

11. However, the official Ukrainian position during the negotiations was based on a somewhat original delimitation method, which is now being illustrated on the screen.

[Slide 1: the delimitation "method" proposed by Ukraine during the negotiations with Romania (on the basis of CMU, figure 9-1)]

12. In accordance with this method, communicated to Romania by diplomatic correspondence, included in the annexes to the Memorial[11], the delimitation line should have been calculated as the "average" of two other previously determined lines. These were a line equidistant between Romania's mainland and the coast of Serpents' Island, then a small segment of the coast of the Crimean peninsula — on the screen, you can see the "Ukrainian" equidistance line — and a line determined on the basis of the "proportionality" method. How should that line be drawn? This remains a mystery, not just a legal one but a mathematical and a geographical one too. As under tab I-1 in the judges' folder, you can now see on the screen the "average" final line proposed by Ukraine. This method suffered from a serious logical contradiction. To begin with, in drawing the

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equidistance line, Ukraine considered the coast of Serpents' Island and a fragment of the Crimean coast as relevant. However, later — when the "proportionality line" had to be drawn, Ukraine included the mainland Ukrainian coast as a whole, including the sectors situated north of Serpents' Island — despite the fact that, according to the approach first used, the mainland coast of Ukraine (with the exception of part of the coast of the Crimea) was not relevant to the purposes of the delimitation[12].

13. Madam President, intrinsically contradictory as it is, the Ukrainian method manifestly failed to respect the delimitation principles laid down by the Additional Agreement, and accepted as mandatory by the two States in 1997, despite Ukraine's efforts to present its position during the negotiations differently, "cosmetically", in the Counter-Memorial[13].

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[10]For example, the Note Verbale of 24 January 2002 from the Ministry of Foreign Affairs of Romania to the Ministry of Foreign Affairs of Ukraine, MR, Ann. 25.

[11]For example, the Note Verbale of 29 May 2002 from the Ministry of Foreign Affairs of Ukraine to the Embassy of Romania in Kiev, MR, Ann. 26.

[12]MR, p. 48, para. 4.45.

[13]See CMU, pp. 233-234, para. 9.10.

14. Hence, although the Additional Agreement refers, in its Article 4 *(a)*, to the principle stated in Article 121 of the United Nations Convention on the Law of the Sea "as applied in the practice of States and in international jurisprudence", Ukraine has insisted on Serpents' Island being treated on an equal footing with Romania's mainland territory, even if, according to the well-established practice of States, and laid down by a number of decisions of this Court and arbitral tribunals, this maritime feature should be disregarded, at least in the first stage of the delimitation process, in view of its geographical position and natural characteristics[14].

15. At the same time, the Ukrainian method was based on an erroneous application of the principle laid down by Article 4 *(b)* of the Additional Agreement, according to which the Parties were to use "the principle of the equidistance line in areas submitted to delimitation where the coasts are adjacent and the principle of the median line in areas where the coasts are opposite", for Ukraine's adjacent mainland coast was disregarded in drawing the delimitation line. At the same
20 time, the Ukrainian method did not envisage any median line between the opposite coasts of the two countries, thus ignoring the second part of the above-mentioned rule.

16. What is more, although, in its Article 4 *(c)*, the Additional Agreement lays down the application of the "principle of equity and the method of proportionality, as they are applied in the practice of States and in the decisions of international courts", the Ukrainian proposal meant granting proportionality an unprecedented role, by regarding it as an *independent* delimitation method[15].

17. The Ukrainian method also disregards Article 4 *(e)*, which lays down "the principle of taking into consideration the special circumstances of the zone submitted to delimitation", since — according to this method, Serpents' Island has been denied the character of a relevant circumstance which it does possess in the zone submitted to delimitation.

18. Furthermore, the line claimed by Ukraine was not consistent with the proces-verbaux concluded between Romania and the Soviet Union since 1949, which are recognized by Ukraine, (and by Romania) as agreements in force between the two States. These Agreements clearly fix the maritime boundary along the 12-nautical-mile arc drawn around Serpents' Island[16].

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[14]MR, p. 49, para. 4.47.

[15]*Ibid.*

[16]MR, p. 49, para. 4.48.

19. Only in 2006, in the Counter-Memorial, did Ukraine — perhaps conscious of just how unusual the method previously suggested was, decide to radically alter its view, by appearing to accept the method, well known in doctrine, State practice and international jurisprudence — "equidistance/median line — relevant or special circumstances". But this acceptance, Madam President, is only apparent. For Ukraine's "new" position is based on a distortion of the rules laid down in the maritime delimitation, in an attempt to justify the same delimitation line — the same profoundly inequitable result sought by Ukraine during the negotiations.

[Slide 2: the delimitation "method" proposed by Ukraine before the Court (on the basis of CMU, figure 9-3)]

21 20. In accordance with Ukraine's written pleadings, the delimitation "must" principally be made between a tiny part of the already minuscule coast of Serpents' Island and a reduced part of the Crimean coast, and the coast of Romania[17], disregarding the mainland Ukrainian coast adjacent to the Romanian coast. Ukraine actually proposes the drawing of a provisional equidistance line using 3 (three!) allegedly relevant points on the southern coast of Serpents' Island — a coast of some 310 m, the distances between these points being some 240 and 70 m[18] — and only one point on the Crimean coast[19]. The adjustment of the resulting provisional line "must", according to Ukraine, be effected by shifting it in order to take into consideration — here I am quoting Ukraine's Counter-Memorial — "the broad geographical framework of the area and in particular . . . the marked disparity of coastal lengths"[20]. You can now see on the screen as well as under tab I-2 in the judges' folder, the delimitation line proposed by Ukraine. Using what method, for what scientific reason does Ukraine propose this shifting of the provisional line? — this remains a mystery, for Ukraine barely explains it, just as it provided no justification of its positions during the previous negotiations with Romania. At the same time, Serpents' Island, although accorded an importance — which it does not have — and although artificially and contrary to all evidence incorporated into the Ukrainian coast, of which it does not form part geographically — Serpents' Island, as I was saying, is nevertheless denied the character of relevant circumstance in

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[17]See CMU, Chap. 7, pp. 235-239, paras. 9.15-9.29.

[18]See CMU, P. 22, fig. 3-6.

[19]See RU, p. 90, para. 5.4 and fig. 5-1.

[20]CMU, p. 238, para. 9.26.

the zone submitted to delimitation[21]. These are only a handful of examples among others of the erroneous argument put forward by Ukraine regarding the application of the "equidistance/median line — relevant or special circumstances". But this argument will be further taken apart in Romania's oral argument.

[Slide 3: comparison of the delimitation "methods" proposed by Ukraine during the negotiations with Romania and before the Court, and delimitation lines which coincide]

22 21. The coincidence between the delimitation line proposed by Ukraine during the negotiations — which is the result of a highly debatable "method" lacking any scientific basis — and the line claimed before this Court can easily be ascertained on the slide now being shown on the screen and which is under tab I-3 in your folders. This coincidence — which is no accident — very clearly establishes the erroneous nature of the line drawn and the application of the "method" proposed by Ukraine to the Court.

22. Members of the Court, bearing in mind Ukraine's conduct during the negotiations, allow me, if you will, to conclude here that it is not the sophisticated nature of this case, but rather Ukraine's failure to comply with the rules of maritime delimitation and the provisions of the agreements in force between Romania and Ukraine which resulted in the failure of the bilateral negotiations. If these relevant rules had been accepted, complied with and applied by our neighbours during the negotiations, they would have resulted in a viable and equitable negotiated solution to the delimitation problem.

The inequitable effects of the unlawful seizure of Serpents' Island by the USSR

23. Madam President, it is now time for me to present various important aspects of the context in which the former Soviet Union illicitly obtained Serpents' Island in 1948. When Romania gained its independence, the Berlin Treaty of 1878 confirmed Serpents' Island as sovereign Romanian territory — which it remained for 70 years until 1948. From that date, it was occupied by the Soviet Union for some 43 years (being transformed into a military outpost under the direct control of the central military authorities in Moscow)[22], until the independence of Ukraine.

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[21]See, for example, RU, pp. 95-96, paras. 5.25-5.27.

[22]MR, p. 24, para. 3.11.

24. The transfer of Serpents' Island to the Soviet Union in 1948 ran counter to the provisions of the 1947 Treaty of Peace between the Allied and Associated Powers and Romania[23], and also contrary to international law in force at the time. The Peace Treaty did not contemplate any transfer of Serpents' Island to the Soviet Union. Its Article 1 (1) ("Frontiers") laid down that "[t]he

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frontiers of Roumania . . . shall be those which existed on January 1, 1941 . . .", on which date Serpents' Island was without any doubt a sovereign Romanian territory. Article 1 (2) laid down that "[t]he Soviet-Roumanian frontier is thus fixed in accordance with the Soviet-Roumanian agreement of June 28, 1940 . . ."[24].

25. The so-called "Soviet-Roumanian Agreement" of 1940 was not a true agreement. As reputed historians have pointed out[25], this name in fact conceals a unilateral Soviet instrument requiring the evacuation of certain Romanian territories — an ultimatum which was never accepted by Romania[26].

26. But in any event, the text of the ultimatum did not include any reference whatever to Serpents' Island (or to various river islands in the Danube, which were also seized by the USSR). This means that Article 1 of the peace treaty did not lay down any transfer of Serpents' Island to the Soviet Union: under the peace treaty, that territory came under Romanian sovereignty[27].

27. In February 1948, Serpents' Island was unlawfully seized by the Soviet Union under an unfair treaty — the Protocol laying down the line of the national boundary between the Soviet Union and what was already the People's Republic of Romania[28], which was not ratified by the Romanian Parliament. When this document was signed, as a result of the geopolitical changes of the post-war period, Romania was unable to oppose this territorial cession[29]. For Soviet troops had already been occupying Romania since 8 August 1944 and a communist government had already been installed by Moscow since March 1945. The Protocol was also at variance with the Treaty of

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[23]*UNTS*, Vol. 42, p. 3.

[24]MR, PP. 28-29, paras. 3.26-3.27.

[25]MR, pp. 28-29, paras. 3.26-3.27.

[26]MR, pp. 27-38, paras. 3.20-3.22 and Anns. 7, 8, 9.

[27]MR, Ann. 9.

[28]MR, p. 29, para. 3.28 and Ann. 11. See also Ann. 12, including the Procès-Verbal of Delivery-Reception of Serpents' Island of 23 May 1948.

[29]RR, pp. 320-321, paras. A24-A26.

Friendship, Co-operation and Mutual Assistance, which was signed between the two countries and
24 entered into force the same day (4 February 1948), in Moscow, and whose Article 5 laid down "mutual respect of their . . . sovereignty" and, whose Article 2 (2) laid down that "[t]he application [of this] treaty will be in conformity with the principles of the United Nations Charter"[30].

[Slide 4: area lost by Romania following the arbitrary fixing of the maritime boundary in 1949 — sketch based on figure 8 "Maritime areas in front of the Romanian and Soviet coasts", included on page 52 of the Memorial (judges' folder, tab I-4)]

28. The seizure of Serpents' Island directly influenced the establishment of the maritime boundary between Romania and the USSR, which was fixed in a manner arbitrary and inequitable for Romania[31]. The unlawful transfer of this rock 0.17 km^2, together with the arbitrary delimitation of the last sector in the river boundary on the Danube — which disregarded Romania's legitimate interests — led to the loss by Romania of major maritime areas and the establishment of an unfair maritime boundary. They also resulted in the attribution of a Soviet maritime area of 12 nautical miles around Serpents' Island, but of a Romanian area limited to 9 nautical miles between the baseline and the 12-nautical-mile boundary around Serpents' Island. The arbitrary "method" used to fix the maritime boundary has of itself inflicted on Romania the loss of an area of some 70 km^2. This situation can easily be seen on figure 8 in the Memorial, now being projected on the screen and under tab I-4 of your folders, which illustrates how the illicit allocation to the Soviet Union of the river island of Limba, some 10 km^2, as well as Serpents' Island, have noticeably affected the position of the river and maritime boundary.

[Slide 5: area lost by Romania in violation of the rules of international law in 1948 and 1949 (judges' folder, tab I-5)]

29. You can now see on the screen (and under tab I-5 in your folders), purely for the sake of illustration and comparison, how the delimitation of the maritime boundary should have been effected if, in 1948, the peace treaty had been respected and if, in 1949, the river boundary had been drawn in compliance with the rule of the main navigable channel, whereas the maritime boundary would have been fixed according to the equidistance rule. The difference between the

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[30] *UNTS*, Vol. 48, p. 199.

[31] MR, p. 29, paras. 3.26-3.30 and pp. 51-53, paras. 5.2-5.4 (see also figure 8 "the maritime areas facing the Romanian and Soviet coasts", p. 52 of the MR); RR, pp. 313-314, para. A3.

situation imposed on Romania and the solution respecting the peace treaty and international law is an area of over 1,600 sq km.

25 30. Madam President, Members of the Court, Romania is not asking the Court, in these proceedings, to annul these earlier arrangements, despite the highly debatable circumstances of their adoption. On the contrary, the 1997 Treaty on Relations and the Additional Agreement clearly show how Romania views its role and responsibilities in the Europe of today. Romania is not seeking, as Ukraine suggests, "compensatory justice"[32]. However, Romania asserts that the arbitrary acts perpetrated in 1948 and 1949 — the unlawful seizure of Serpents' Island by the Soviet Union and its inequitable effects (the unjustified attribution to that territory of maritime areas larger than those attributed to Romania, without there being any justification for this in the particularities of this maritime feature) — cannot, in any event, constitute a basis for further prejudicing[33] Romania's territorial rights.

31. Madam President, an equitable and lasting solution in the present case would be incompatible with the increase and extension of these inequitable effects. Such a solution cannot disregard these historical and political circumstances. Nor can such a solution disregard the significance of the special agreement of 1997, when the Treaty on Relations was concluded.

The special agreement between Romania and Ukraine of 1997

32. Madam President, the context and significance of the conclusion of the Treaty on Relations, in 1997, is aptly shown by a document which Ukraine chose to include in Annex 22 of its Counter-Memorial. This document, published in Romania's *Moniteur Officiel*[34], is a record of a public hearing organized in the Romanian Senate on 4 December 1995, during which the Romanian Minister for Foreign Affairs replied to a question put by a senator on "solving the delicate problem of Serpents' Island".

33. In his reply (the relevant part of which is found in the judges' folder, tab I-6), the Minister set out the present state of the negotiations with a view to the conclusion of the

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[32]For example, CMU, p. 37, para. 4.16.

[33]See, for example, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 448, para. 307.

[34]*Moniteur Officiel* of Romania, No. 227, part 2 (parliamentary debates), 14 December 1995.

1997 Treaty on Relations. He begins by recalling the historical context in which the former Soviet

26 Union unlawfully seized Serpents' Island. He then states: "During the negotiations for the conclusion of the basic political treaty [the Treaty on Relations], Ukraine pointed out . . . that Ukraine — as legal successor of the former USSR — did not plan to discuss the status of the Island"[35]. By "the status" it was referring to appurtenance of Serpents' Island — and the Minister states the Ukrainian position "which is and should be considered Ukrainian soil and an integral part of the national territory of the Ukraine"[36]. He went on to explain:

> "In all the discussions we have had on this question — and let me say again that they are part of the file of our negotiations with Ukraine — we were [particularly] concerned with the fact that . . . although Serpents' Island has no economic value of itself — as you know, it is made up of hard rock which does not even support vegetation, [and] has no water, it can have extremely important economic consequences for Romania and Ukraine, in view of the impact it may have on the delimitation of the territorial sea, the [continental] shelf and the exclusive economic zone between Romania and Ukraine, in a geographical area where, according to recent surveys, there may be sizable oil and gas reserves."[37]

34. The Minister went on — and this also deserves to be quoted: "During the negotiations, we sought to *distinguish between the two questions which make up this problem: the former* being bound up with the determination of the legal status of Serpents' Island — as I was saying, we could debate this problem at length . . ."[38]

35. Referring to the legal status, the Minister again emphasized the question of the sovereignty of Serpents' Island. Focusing on the second aspect of the problem, he continued: "and *the second question*, is how far this island — notwithstanding the determination of its status — can and should influence the delimitations of the territorial sea, the exclusive economic zone and the continental shelf"[39].

36. And the Romanian Minister for Foreign Affairs concluded: "as you well know, this question represents one of the main obstacles to the finalization of the treaty [on relations]"[40].

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[35]Translation by the Registry.

[36]*Ibid.*

[37]*Ibid.*

[38]*Ibid*.; emphasis added.

[39]*Ibid*.; emphasis added.

[40]*Ibid*.

27 37. It is quite clear, Madam President, as shown in no uncertain terms by this annex to the Ukrainian Counter-Memorial, that, during the wrangling over the Treaty on Relations, the two States had been negotiating a complex territorial problem *(lato sensu)*: the question of the delimitation of the continental shelf and the exclusive economic zone and, *in that context*, the meaning of the appurtenance of Serpents' Island to Ukraine, as a consequence of its unlawful transfer to the former Soviet Union in 1948 — intimately bound up with the problem of its possible influence in the delimitation process. The negotiation "package" regarding Serpents' Island thus consisted of the two interrelated sub-problems I have just mentioned.

38. Madam President, the text, of the 1997 Treaty on Relations, and particularly of its Additional Agreement precisely reflects this "package" and the agreement reached on the two intricately linked sub-problems of which it consisted. Thus, despite the highly debatable way in which the former Soviet Union acquired Serpents' Island in 1948, Romania — fully aware of its responsibilities in Europe and the need to preserve order and stability in the region — for the first time, formally confirmed in writing in these treaties that this maritime feature belonged to Ukraine[41]. At the same time, and in parallel, in the same Additional Agreement, Article 4 lays down the applicable principles in the maritime delimitation, agreed upon between the two Parties[42]. In practical terms, the fact that Romania formally confirmed that Serpents' Island belonged to Ukraine coincides with, and corresponds to, the insistence by Romania on an equitable outcome of the maritime delimitation, in view, firstly, of the provisions of Article 121 (on the Régime of Islands) of the 1982 Convention[43]. There is a close and direct link between, *on the one hand*, the express acceptance by Romania of the territorial status quo and, *on the other hand*, the delimitation principles laid down by the Additional Agreement for reaching an equitable solution[44].

28 39. It should also be pointed out that, when the Additional Agreement was signed and entered into force, Ukraine was fully aware of the declaration made by Romania on the occasion of the signature and ratification of the Montego Bay Convention[45].

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[41]MR, p. 40, para. 4.24 ; p. 44, para. 4.34; p. 59, paras. 5.16, 5.18.

[42]MR, pp. 44-45, para. 4.35..

[43]*Ibid.*

[44]MR, p. 59, para. 5.18.

[45]MR, pp. 91-94, paras. 8.20-8.30.

[Slide 6: paragraph 3 of the Declaration of Romania on the signature (10 December 1982) and ratification (17 December 1996) of the United Nations Convention on the Law of the Sea]

40. Let me recall the relevant passage in this declaration, now being shown on the screen and also included under tab I-7 in the judges' folder:

> "Romania states that, according to the requirements of equity as [resulting] from Articles 74 and 83 of the Convention on the Law of the Sea, the uninhabited islands without economic life can in no way affect the delimitation of the maritime spaces belonging to the mainland coasts of the coastal States."

This declaration reiterated five and a half months before the signature of the Treaty on Relations with Ukraine, during the negotiation process of that treaty, without a shadow of a doubt related to Serpents' Island.

41. Hence, Ukraine's agreement that the reference to Article 121 constitutes one of the principles applicable to the present delimitation — *the first* — clearly establishes that Ukraine accepted the applicability, to the present delimitation, of the *third paragraph* of Article 121, as interpreted by the declaration of Romania[46]. Ukraine made no negative comment or objection either in 1999, on the filing of its instrument of ratification of the Montego Bay Convention, or in 1997, on the signature or entry into force of the Additional Agreement, or in 1996, on the filing of the Romanian instrument of ratification of the Montego Bay Convention, nor prior to that.

42. The agreement on this "package" and on its scope and meaning were both confirmed by official Romanian public statements.

29

43. For example, in a press article[47] (the relevant paragraphs may be found in the judges' folder under tab I-8), the acting Romanian Minister for Foreign Affairs in 1997, who initialled the Treaty on Relations and signed the Additional Agreement, wrote the following:

> "In realizing that, for the young Ukrainian State now detached from the USSR, the territorial adjustments were inacceptable because they could trigger a domino effect, particularly as the Russian-Ukrainian boundary was still in dispute, Romania has disregarded the problem of the validity of Ukraine's rights over Serpents' Island. *The result has been the following agreement*: Romania has recognized the de facto situation in accepting that the island concerned belonged to Ukraine, but only as successor to the USSR (the question of the validity of the original title remaining open); Ukraine, in exchange for the freezing of the territorial dispute, has implicitly

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[46]MR, pp. 94-95, para. 8.34.

[47]"Romania's Friendship or the Population of the Serpents' Island", *Nine O'Clock*, No. 3724, 17 July 2006, http://www.nineoclock.ro/archive_index.php?page=detalii&categorie=politics&id=20060717-506115.

> agreed not to use the Island in the delimitation of the continental shelf and has undertaken not to place any offensive military equipment on the island either."

44. The Minister added:

> "The delimitation of the [continental] shelf has been entrusted to the International Court in The Hague, so that the Kiev authorities are able to assert that they have not ceded anything, but have simply complied with an impartial judgment. In the drafting of that judgment, there would appear to be no reason to take Serpents' Island into account, given that it is uninhabited and not open to economic exploitation."

45. In light of the foregoing, it is quite clear, Members of the Court, that, in 1997, by the Additional Agreement to the Treaty on Relations, Ukraine accepted that the only role Serpents' Island may play in the delimitation of the maritime spaces of Romania and Ukraine is that determined by Article 121 (3) of the Montego Bay Convention.

Conclusions

46. Madam President, allow me, if you will — before setting out the schedule of Romania's oral pleadings — to draw some conclusions which strike me as important.

(a) First — the delimitation method proposed by Ukraine in its written pleadings filed in this case in no way corresponds to a genuine, sincere acceptance of the method enshrined by you for the purpose of reaching an equitable result — "equidistance/median line — relevant or special
30 circumstances". In fact, its application, as conceived by Ukraine, would result in a distortion of this method in order, in a totally artificial way, to reach the same profoundly unjust result sought by Ukraine during the negotiations prior to this case being referred to the Court.

(b) Secondly, it is beyond any doubt that the transfer of Serpents' Island to the Soviet Union in 1948 was an unlawful act, which has already produced inequitable effects to the detriment of Romania and the benefit of the Soviet Union and, after it gained independence, to the benefit of Ukraine, its successor. These inequitable effects are quantifiable: over 1,600 sq km of maritime areas which should belong to Romania in accordance with the normal application of the rules and principles of international law.

(c) Thirdly, the Treaty on Relations and the Additional Agreement enshrine a legal agreement reached between Romania and Ukraine in 1997, this "package" including the acceptance by Ukraine of the applicability, in the delimitation of the continental shelf and excusive economic

zones, of Article 121 (3) of the Convention on the Law of the Sea, as interpreted by Romania when signing and ratifying it. This means that the two countries before you agreed in 1997 that Serpents' Island could receive no other effect, in addition to the effects — which I repeat were inequitable — already produced by it on the delimitation of the territorial sea between the two Parties.

(d) Hence, an equitable solution to the delimitation of the continental shelf and exclusive economic zones would be incompatible with the increase and extension of these inequitable effects and cannot disregard the content of the 1997 Agreement.

47. Madam President, Members of the Court, you will find a schedule of Romania's oral pleadings for today and the following days at the beginning of your folders.

48. With your permission, Madam President, Professor Pellet will follow me to analyse questions relating to the jurisdiction of the Court and the law applicable to the present case. My colleague, Cosmin Dinescu, co-Agent of Romania, will then go on to describe the geographical context of the dispute and also treaty practice in the maritime delimitations already effected between the other neighbouring countries in this half-enclosed sea, the Black Sea. Professor Crawford will then present the relevant coasts for the purposes of delimitation, the relations between them and the relevant zone for the delimitation.

31 49. Tomorrow morning and on Thursday, our presentations will focus on the delimitation of the maritime areas of the two States in the part of the zone submitted for delimitation adjoining Serpents' Island, and also on the role of this maritime feature in the delimitation process. Professor Crawford will show that in 1949, the Soviet Union and Romania agreed on a maritime boundary between these two States following the 12-nautical-mile arc around Serpents' Island — an agreement confirmed by a number of other bilateral agreements in force, by many maps included in treaties binding on the two Parties to the dispute and by a number of other maps. I will present the factual situation of Serpents' Island and my colleagues, Professors Pellet and Lowe, will show that this small rock, geographically isolated in the zone submitted for delimitation, must be semi-enclaved — in accordance with the general principle of delimitation, requiring that an equitable solution to the dispute be found, and also in accordance with the specific principle laid down by Article 121 (3) of the Convention of the Law of the Sea — each of these two reasons

being sufficient in itself to justify the solution. I shall then speak again in order to establish, in the guise of a postscript, that Ukraine's recent efforts to transform this rock are completely futile.

50. Two presentations will then be devoted, on Friday morning, to refuting Ukraine's argument on "effectivités" — oil and fishing activities. Mr. Daniel Müller will remind us of the law applicable to *effectivités* in maritime delimitations in cases of this type and Mr. Dinescu will apply these legal rules to the facts alleged by Ukraine.

51. Finally, in its last two oral pleadings, Romania will justify the delimitation line to be drawn, in accordance with our submissions to the Court (a task which will fall to Professor Crawford) and Professor Lowe will show the equitable nature of this line, in light of the circumstances of this case.

52. Madam President, Members of the Court, thank you for your attention. Madam President may I ask you to give the floor to Mr. Pellet.

Le PRESIDENT : Je remercie l'agent de la Roumanie pour sa présentation et je donne à présent la parole au professor Pellet.

32 Mr. PELLET:

II. Jurisdiction and applicable law

Madame la présidente (I say "*Madame la*" because you kindly informed me that you have no objection to the use of the feminine form of address in French[48]; and a *présidente* is, to my mind, every bit as good as a *président* . . .).

1. So *Madame la présidente*, Members of the Court, litigants who appear before you often begin by virtuously undertaking to comply strictly with the instruction contained in Article 60 of your Rules, which requires them to refrain from going over "the whole ground covered by the pleadings" — but they then proceed to recapitulate most of "the facts and arguments these contain". I must admit that I have also erred in this regard; but I shall not do so today. The exchanges of written pleadings have completed most of the groundwork, so to speak, on the two

[48]CR 2006/8, p. 30.

related but separate points on which I propose to comment this morning: the scope of your jurisdiction in the present case, on the one hand, and the applicable law, on the other.

2. The diminishing number of pages devoted to these two issues in the course of the proceedings reflects if not a convergence of views, at least some measure of clarification of the Parties' arguments concerning them:

— the Romanian Memorial[49] devoted 68 pages to the two issues;

— the Counter-Memorial[50], 27;

— the Reply[51] and the Rejoinder[52] a dozen pages each.

Such figures are admittedly somewhat misleading inasmuch as the problems that Romania addressed under those headings in its Memorial were "watered down" to some extent in other chapters during the course of the proceedings. And that is one reason why it is necessary to revert

33 to them in order to identify as clearly as possible the points of agreement and disagreement on, first, the jurisdiction of the Court and, second, the applicable law.

I. THE JURISDICTION OF THE COURT

3. Although Ukraine has never challenged the principle of the Court's jurisdiction, it has endeavoured to limit its scope. It states in both its Rejoinder and its Counter-Memorial that you derive your jurisdiction in the present case, Members of the Court, from Article 4 *(h)* of the Additional Agreement constituted by the exchange of letters of 2 June 1997,[53] and it recognizes that the two (or three) "conditions" or "preconditions" — it matters little which![54] — on which this provision makes the jurisdiction of the Court dependent have been fulfilled. It follows that the Court has jurisdiction.

4. Similarly, the points of disagreement between the Parties do not relate to the principle of your jurisdiction but to its scope. Ukraine describes them in somewhat esoteric terms in paragraph 2.1 of its Rejoinder; they are allegedly due to:

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[49]MR, pp. 5-9 and 73-128.

[50]CMU, pp. 7-13 and 147-168.

[51]RR, pp. 1-7 and 10-14.

[52]RU, pp. 5-17.

[53]CMU, pp. 7-8. paras. 2.1-2.8; RU, p. 5, para. 2.2.

[54]See CMU, p. 8, para. 2.5.

> "(i) Romania's adherence to its unjustified claim that there exists an agreed all-purpose maritime boundary extending around the south of Serpents' Island to a point approximately due east of that Island, and
>
> (ii) Romania's refusal to have regard to the actual terms in which the Parties agreed that their dispute should be referred to the Court."[55]

5. It is probably preferable to address the second of these two objections first — it is clearer than the first one and, unlike the latter, actually relates to jurisdiction. Moreover, the response to the second objection will influence the response to be made to the first; it will lead us to conclude (while adhering strictly for the time being to the question of the Court's jurisdiction) that there is nothing to prevent one from establishing a "mixed" boundary (i.e., one between a territorial sea, on the one hand, and a continental shelf and exclusive economic zone, on the other).

34 **A. The scope of Article 4 *(h)* of the Additional Agreement**

6. Article 4 *(h)* of the 1997 Additional Agreement reads as follows — in the English translation published in the *United Nations Treaty Series*:

> "If these negotiations shall not determine the conclusion of the above-mentioned agreement [for the maritime boundary] in a reasonable period of time, but not later than 2 years since their initiation, the Government of Romania and the Government of Ukraine have agreed that the problem of delimitation of the continental shelf and the exclusive economic zones shall be solved by the UN International Court of Justice, at the request of any of the parties, provided that the Treaty on the regime of the State border between Romania and Ukraine has entered into force. However, should the International Court of Justice consider that the delay of the entering into force of the Treaty on the regime of the State border is the result of the other Party's fault, it may examine the request concerning the delimitation of the continental shelf and the exclusive economic zones before the entry into force of this Treaty."[56]

Significantly, Ukraine refrains in both its Counter-Memorial and its Rejoinder from citing the text of the above clause. This was not an innocent oversight.

7. The Ukrainian Party's whole line of argument in this regard is based on a premise founded on an interpretation that is clearly unwarranted by the wording of the clause: "The line to be drawn by the Court shall be a line dividing exclusively areas of continental shelf and EEZ"[57] :

> "the boundary must be such that *on each side* of the boundary line there needs to be a continental shelf and an EEZ over which Ukraine, on its side of the boundary, and Romania on its side of the boundary, has its own sovereign rights; the boundary to be

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[55] RU, p. 5, para. 2.1.

[56] *UNTS*, Vol. 2159, p. 51 (I-37743); translation supplied by the Government of Romania.

[57] CMU, p. 11, para. 2.17; emphasis added.

> delimited by the Court is thus, by virtue of the language in which their consent to the Court's jurisdiction is expressed, a boundary running *between* the Parties' respective continental shelves and EEZs"[58].

But this is not what Article 4 *(h)* of the 1997 Additional Agreement says: the words or expressions "exclusively" or "between the Parties", which form the core of the Ukrainian argument, are not to be found in Article 4 *(h)*. The task that the Parties have entrusted to the Court consists in solving the problem of delimitation of their exclusive economic zones and their continental shelf — and that's it, full stop. This in no way implies that there must perforce be a continental shelf or an exclusive economic zone on *both* sides, on *each* side, of the line. The assertion that "[n]o mention is made of boundaries involving the territorial sea of either State, and such boundaries are *therefore* excluded from the Court's jurisdiction"[59] simply begs the question — self-serving is an apt description.

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8. Furthermore, this arbitrary and untenable interpretation of Article 4 *(h)* of the 1997 Additional Agreement proposed by the Ukrainian Party overlooks the context of the clause, which flows from Article 2, paragraph 2, of the Treaty on Relations of Co-operation and Good Neighbourliness (the "Treaty on Relations") between Romania and Ukraine signed the same day. Pursuant to the latter provision, the parties "shall settle *the* problem of the delimitation of their continental shelf and economic exclusive zones in the Black Sea"[60]. *The* problem. It is plainly a matter of finding a global solution to *the* "problem of the delimitation of their continental shelf and economic exclusive zones in the Black Sea"; and, as it happens, the solution involves a judgment by your distinguished Court, which should put an end to the dispute as a whole; in so doing, you should not and cannot refrain from adjudicating on the pretext that, in the process of adopting a position, you might have to take a stand, collaterally, on issues pertaining to other maritime (or indeed terrestrial) zones.

[Slide 1: figure RR1, the boundary of the continental shelf between France and the United Kingdom (RR, p. 4)]

9. Ukraine believes that it is justified in invoking the position of the Arbitral Tribunal in its 1977 judgment in the *Continental Shelf of the Mer d'Iroise* case in support of its argument.

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[58] RU, p. 10, para. 2.10; emphasis added, *"between"* in italics in the text.

[59] RU, p. 5, para. 2.2; emphasis added; see also RU, p. 10, para. 2.9.

[60] *UNTS*, Vol. 2159, p. 37 (I-37743); emphasis added.

Although it expatiates at length on this award, the argument serves no purpose because, to begin with, the clause in the Arbitration Agreement establishing the Tribunal's jurisdiction in the case was couched in very different terms from that establishing the Court's jurisdiction in our case. It read as follows:

> "The Court is requested to decide, in accordance with the rules of international law applicable in the matter as between the Parties, the following question:
>
> What is the course of the boundary (or boundaries) between the portions of the continental shelf appertaining to the United Kingdom and the Channel Islands and to the French Republic, respectively, westward of 30 minutes west of the Greenwich meridian as far as the 1,000 metre isobath?"[61]

36 10. This wording, Madam President, may be legitimately invoked in support of the interpretation that Ukraine is seeking to impose in the present instance: given that it involves a delimitation of the portions *of the continental shelf* appertaining *respectively to the two litigant States*, I readily admit that this may be interpreted as implying that the jurisdiction of the Tribunal dealing with the case was limited to the course of a boundary "running between the Parties' respective continental shelves"[62]. Again, however, our arbitration clause is not couched in those terms and Article 2, paragraph 2, of the Treaty on Relations shows clearly that its scope is broader. Moreover, the 1977 award emphasizes the very special geographical circumstances pertaining to "the narrow waters situated between the Channel Islands and the coasts of Normandy and Brittany"[63]. And it was "having regard to the geographical circumstances, the precise formulation of its competence in Article 2 (1) of the Arbitration Agreement and the replies of the Parties to the Court's questions regarding the problem of its competence in the Channel Islands region"[64] that the Arbitral Tribunal decided that it lacked jurisdiction in respect of that zone. Furthermore, it did not hesitate to determine the outer boundary of the territorial waters, while being perfectly well aware that this delimitation would constitute a mixed boundary (between the territorial sea of the islands, on the one hand, and the continental shelf of the French Republic, on the other)[65].

[End of slide 1]

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[61] Article 2 of the Arbitration Agreement signed at Paris on 10 July 1975, *RIAA*, Vol. XVIII, p. 132.

[62] RU, p. 10, para. 2.10

[63] *RIAA*, Vol. XVIII, pp. 152-153, para. 21.

[64] *Ibid.*

[65] See RR, pp. 2-3, para. 1.7, and RR, figure RR1, p. 4.

11. Admittedly, and the Parties agree on this point[66], the Court has not been assigned jurisdiction to establish a delimitation line between their respective territorial seas. That was done by the Romanian-Soviet procès-verbal of 27 September 1949[67] and confirmed by the Act of 26 December 1954[68], the Treaty on the Border Regime of 27 February 1961[69] and the

37 procès-verbaux relating to demarcation of 20 August 1963[70] and 4 September 1974[71]. In turn, Article 2, paragraph 2, of the Treaty of 2 June 1997 on Relations of Good Neighbourliness[72] and Article 1 of the Treaty of 17 June 2003 on the Border Regime[73] reaffirm the validity of these agreements and the resulting course of the boundary between the territorial seas of the two States.

12. As noted by the Permanent Court in its Opinion on the *Interpretation of the Treaty of Lausanne*, "the very nature of a frontier and of any convention designed to establish frontiers between two countries imports that a frontier must constitute a definite boundary throughout its length" and it is therefore "natural that any Article designed to fix a frontier should, if possible, be so interpreted that the result of the application of its provisions in their entirety should be the establishment of a precise, complete and definitive frontier" (*Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925*, *P.C.I.J., Series B, No. 12*, p. 20)[74]. And that is precisely the aim of Article 2, paragraph 2, of the 1997 Treaty on Relations of Good Neighbourliness, the terms of which I have cited[75]: to find a complete and definitive solution to the "problem of delimitation" of the continental shelf and the exclusive economic zones. This aim would not be achieved if the Court were to fall in with Ukraine's line of argument and decline

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[66]See MR, p. 131, para. 9.3; CMU, p. 9, para. 2.11, and p. 10, para. 2.15; RR, p. 62, para. 4.7, and RU, p. 5, para. 2.2, and p. 6, para. 2.4.

[67]MR, Vol. III, Ann. 13; see also the procès-verbal of border sign No. 1438 and the procès-verbal of border sign No. 1439, *ibid*., Anns. 14 and 15.

[68]*Ibid*., Ann. 17.

[69]*Ibid*., Ann. 18.

[70]*Ibid*., Anns. 19 and 20.

[71]*Ibid*., Anns. 21 and 22.

[72]*Ibid*., Ann. 2.

[73]*Ibid*., Ann. 3.

[74]See also *Temple of Preah Vihear (Cambodia* v. *Thailand*), *Merits*, *Judgment*, *I.C.J. Reports 1962*, p. 34; or the separate opinion of Judge Shahabuddeen, *Maritime Delimitation in the Area between Greenland and Jan Mayen* (*Denmark* v. *Norway*), *I.C.J. Reports 1993*, p. 209.

[75]See *supra*, para. 8.

jurisdiction to determine, if necessary, a "mixed" boundary in the area surrounding Serpents' Island.

13. As it is "the problem of delimitation of the continental shelf and the exclusive economic zones" that has to be solved, Article 4 *(h)* of the 1997 Additional Agreement, read in context, not only does not rule out, but actually implies that the Court should take the delimitation of the territorial sea into account should it prove necessary for the accomplishment of its task. The task in question is perfectly compatible with the possibility of a "mixed" boundary.

38 **B. The jurisdiction of the Court to establish a "mixed" boundary**

14. In addressing this problem, which the Parties have referred to you pursuant to an arbitration agreement, you will be required, Members of the Court, to rule on the existence — or otherwise: I refer here solely to jurisdiction — of a pre-existing maritime delimitation which could presumably have related, on the one hand, to a maritime zone around Serpents' Island claimed by the USSR, and, on the other, to a different type of marine area, as quite frequently occurs, a fact which the two Parties also recognize[76].

[Slide 2 : Figure illustrating the "problem" (territorial sea *v.* continental shelf/EEZ)]

15. In other words, the Court obviously cannot, in the present case, disregard the Parties' agreement on the delimitation of the territorial sea, if only because point F, fixed by the 2003 Border Régime Treaty, constitutes the endpoint of the boundary and hence the starting-point for the delimitation line that you have been requested to establish. Moreover, Romania and Ukraine agree in this regard[77]. In addition, however, and this is where the two Parties do not agree, you cannot, Members of the Court, go back on a pre-existing delimitation on the pretext that it appertains, on the one hand (on the Ukrainian side), to the territorial sea (of Serpents' Island) and, on the other (on the Romanian side), to the continental shelf and the exclusive economic zone. Once again, you are requested to solve "the problem of delimitation of the continental shelf and the exclusive economic zones", but as this delimitation concerns the Romanian continental shelf and exclusive economic zone between point F and point X, there is obviously a "problem of

[76]See RR, pp. 5-6, paras. 1.12-1.13; RU, p. 7, para. 2.5.

[77]See MR, p. 82, para. 7.19, and p. 131, para. 9.3; CMU, p. 252, para. 11.1 *(v)*, p. 257 (Submissions); RR, p. 62, para. 4.7, or p. 289, para. 8.40; RU, p. 149 (conclusions), para. 9.3 (ii) or p. 6, para. 2.4.

delimitation of the continental shelf" on which the Parties hold conflicting views and on which the Court not only can but must deliver a ruling pursuant to the arbitration clause of Article 4 *(h)* of the Additional Agreement.

16. Furthermore, Ukraine, not content with distorting the text of the clause (by asserting that it stated something which it did not, as becomes clear on first reading), also felt the need to play another trick, which involved claiming that the Parties could not "have fixed" the external limit of
39 the waters around Serpents' Island in 1949 because the Court is being asked to solve "the problem of delimitation of the continental shelf and the exclusive economic zones":

> "the Romanian thesis results in a boundary running between, on the one hand, Romania's continental shelf and EEC and, on the other hand, Ukraine's territorial sea, and not, as required by the Parties' agreement to the Court's jurisdiction between two sets of continental shelves and EEZs"[78].

But apart from the fact that the arbitration clause of Article 4 *(h)* says nothing of the kind, this reasoning is flawed by a manifest *non sequitur* and a reversal of the logical order.

[End of slide 2]

17. As summarized in the table in the judges' folder under tab II-3, Ukraine bases its position on the erroneous assumption, contradicted by the wording of Article 4 *(h)*, that the Court has jurisdiction (and has jurisdiction only) to delimit the respective continental shelves and exclusive economic zones of the Parties; *therefore* it cannot take into account an agreement delimiting the territorial sea and the continental shelf and any such agreement is null and void. This reasoning, if reasoning is the correct term, is based on a flawed premise with respect to the meaning of the clause conferring jurisdiction on the Court. It wrongly infers that the Court should not give effect to an agreement reached between the Parties because the agreement in question fails to settle the dispute laid before it!

[Slide 3: Maritime delimitation between Honduras and Nicaragua pursuant to the Court's Judgment of 8 October 2007]

18. It is relatively clear, Madam President, that the agreement reached between the Parties on the delimitation of what today undoubtedly constitutes the territorial sea of Serpents' Island does not fully settle the dispute between Romania and Ukraine — if it did, we would not be here! But

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[78] RU, p. 10, para. 2.11.

that does not warrant a ruling to the effect that the Parties were unable to agree in 1949 on what I have called a "mixed boundary" — a notion regarding which, it may be noted in passing, Ukraine has also contradicted itself, inasmuch as, having apparently conceded that there are precedents for maritime boundaries separating different categories of areas[79], it asserts, in reply to the Romanian argument, that

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> "such an argument would be inconsistent with Articles 55 and 76 of UNCLOS, both of which define those maritime zones as being *beyond* the territorial sea, and the shelf's outer boundary cannot therefore follow the same line as the boundary of the territorial sea"[80].

19. Notwithstanding the Ukrainian Party's curious convictions, this is in fact extremely common — as attested by the precedents described, by way of example, in our Reply[81]. Indeed it is inevitable when an island belonging to a State A is located on the continental shelf of a State B — and the application of Article 121 of the Montego Bay Convention furthermore renders such a result inevitable in such circumstances, regardless of whether the island falls under paragraph 1 or paragraph 3. An example may be found in the not so distant past: take, for instance, the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras*), a case in which the single line established by the Court is certainly "mixed" in some portions of its course (see the Judgment of 8 October 2007, paras. 299-305 and 320).

[End of slide 3]

20. Moreover, even if we concede — solely for the sake of discussion — that the Court lacks jurisdiction to rule on such a "mixed" boundary, the implication of such a lack of jurisdiction would obviously not be — contrary to Ukraine's claim — that such a boundary does not exist but that the Court could not issue a ruling on its course, which is completely different. In an attempt to evade this conclusion, despite its apparent inevitability, Ukraine has to resort to another artifice[82], which is illustrated in schematic form under tab II-5 of your files:

1. the Parties agree that the Court has jurisdiction to delimit the respective continental shelves and exclusive economic zones of the two States; and

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[79]See RU, p. 7, paras. 2.5-2.6.

[80]RU, p. 11, para. 2.1; emphasis in the original text.

[81]RR, pp. 5-6, para. 1.13.

[82]See RU, p. 10, para. 2.10, and p. 11, para. 2.12.

2. they agree that the delimitation should start from point F;

therefore, Ukraine continues, *therefore*,

41 3. the maritime zones situated beyond point F around Serpents' Island are necessarily the continental shelves and exclusive economic zones of the two States.

21. But the "therefore" is entirely unwarranted, Madam President. The delimitation line to be decided by the Court should indeed start from point F because the problem of delimitation of the continental shelf and the exclusive economic zones which has given rise to the dispute referred to your distinguished Court begins beyond that point. But there is no cause and effect relationship between the Parties' agreement on the starting-point for the delimitation and the necessarily non-territorial character of the waters located on either side of the future line. The Parties' agreement on point F means just one thing: that they request the Court to rule on any limit that might affect the continental shelf or the exclusive economic zone beyond that point; and that is all it means. But Ukraine again proceeds to beg the question by contending that the Parties' agreement "to confer jurisdiction on the Court . . . must be such that, starting from the agreed terminal point of their territorial sea boundary, each Party has some zones of continental shelf and EEZ immediately to the east and south of that agreed terminal point"[83]. Why "must" it be so? A mystery. Why is it not sufficient for the continental shelf or exclusive economic zone of just one of the Parties to be involved? Another mystery.

22. This robust Ukrainian contention is, in fact, contradicted both by the context in the light of which the arbitration clause of Article 4 (*h*) should be interpreted and by its drafting history and the negotiations conducted by the Parties on that basis before referring the matter to the Court.

23. With regard to the context, may I draw your attention, Madam President, to subparagraph *(d)* of the same Article, which states:

> "*(d)* The principle according to which neither of the Contracting Parties shall contest the sovereignty of the other Contracting Party over any part of its territory adjacent to the zone submitted to delimitation."

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[83] RU, p. 11, para. 2.12.

To my mind, this shows that the Parties were certainly not ruling out the possibility that the delimitation would affect the continental shelf or exclusive economic zone of one of the Parties adjacent to the other's territorial sea.

42 24. Similarly, the "subsequent practice in the application of the treaty"[84], especially the positions adopted during the negotiations conducted between 1998 and 2004, of which Mr. Aurescu has just spoken, make it clear that the Parties intended to proceed with the delimitation of the entire maritime zone located beyond point F, without ruling out the possibility that this could result in a boundary between the territorial sea of Serpents' Island, on the one hand, and Romania's continental shelf and the exclusive economic zone, on the other. In any case, as it is clearly the zone located beyond 12 nautical miles that the Court is called upon to delimit, the problem is certainly one of "delimitation of the continental shelf and the exclusive economic zones", in respect of which Article 2, paragraph 2, of the Treaty of 2 June 1997 and Article 4 (*h*) of the Additional Agreement of the same date clearly confer jurisdiction on the Court.

25. To sum up, Madam President:

— the Court has jurisdiction to rule on the whole of the Application from Romania;

— the line it is called upon to delimit must, as agreed by the Parties, begin at Point F, which marks the endpoint of the line separating the respective territorial seas of Romania and Ukraine;

— beyond that, there is nothing to prevent the single line to be determined by the Court from being mixed and thus possibly, for a certain distance, separating the territorial sea of Ukraine (around Serpents' Island) from the continental shelf and exclusive economic zone of Romania.

Madame la présidente, j'en aurai pour encore un peu plus de quinze minutes. Voulez-vous que je continue ou préféreriez-vous que nous nous arrêtions maintenant pour la «sacro-sainte» pause café ?

[84] See Article 31, para. 3 (*b*), of the 1969 Vienna Convention on the Law of Treaties.

Le PRESIDENT : Et bien, la pause café est «sacro-sainte» mais les délais ne le sont pas. Et puisque de toute façon nous serons un peu en retard, la Cour va se retirer brièvement.

L'audience est suspendue de 11 h 50.

Le PRESIDENT : Veuillez vous asseoir. Monsieur Pellet.

Mr. PELLET:

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II. THE APPLICABLE LAW

26. Madam President, as I said at the outset[85], one of the two arguments that Ukraine has invoked in support of its efforts to limit the Court's jurisdiction does not actually relate to your jurisdiction but to the applicable law, since the Ukrainian Party is seeking to prevent you from applying the agreement (or rather the agreements) whereby the Parties (and in the case of Ukraine its predecessor, the Soviet Union) established the boundary of their respective maritime zones beyond point F. I shall briefly examine this argument, while at the same time raising some more general queries about the nature of these instruments which, according to our opponents, are not delimitation agreements within the meaning of Articles 74 and 83 of the United Nations Convention on the Law of the Sea — although they acknowledge their status as treaties binding on the Parties. I shall then take up my next point, which is not the meaning and content of the principles set forth by the Parties in Article 4 of the 1997 Additional Agreement but the role that those principles should play in resolving this case.

A. The legal nature of the 1949-1974 agreements and of the 1997 Additional Agreement

27. I shall not dwell on the first point, Madam President, since my colleague and very dear friend James Crawford will address it at greater length tomorrow when he presents the part of our argument concerning the first sector of the maritime boundary between the two States. At this stage, suffice it to note:

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[85] See *supra*, para. 5.

1. that the Parties concur in the view that the Romanian-Soviet procès-verbaux of 1949, 1963 and 1974 that I mentioned earlier[86] and the Additional Agreement comprising the exchange of letters of 2 June 1997 are treaties which are legally binding on the Parties[87]; and
2. that Ukraine refuses to accord these instruments the status of agreements in force of the type referred to in paragraphs 4 of Article 74 and Article 83 respectively of the United Nations Convention on the Law of the Sea[88].

44 28. Here again the Ukrainian Party does not base its argument on the text of the provisions in question — which it does not cite, it has a penchant for not citing — but on its own "free interpretation". Yet contrary to what our opponents write (and they write it "within quotes"), these two paragraphs do not refer (nor do the three preceding paragraphs of Articles 74 and 83) to the agreements "delimiting *the continental shelf/EEZ*")[89] but to the agreements in force concerning "questions relating to the delimitation of the exclusive economic zone" (or "the continental shelf"); these questions must therefore be settled "in accordance with the provisions of that agreement". And if the provisions clearly relate to delimitation agreements, in the prescribed form, it follows from the very text of the two paragraphs that I have just cited that they refer not only to agreements entailing a full delimitation but to any agreement that has an impact on questions relating to the delimitation of such marine areas. This is obviously the case for all the instruments concerning which Ukraine is seeking a quarrel for quarrelling's sake.

29. Incidentally — and to repeat myself yet again — I confess that I have some difficulty in seeing the point of this quarrel — even from the standpoint of our opponents. The question as to whether or not the agreements — which are recognized by the Ukrainian Party as having the status of legally binding treaties for both itself and Romania — fall into the category of those referred to in Article 74, paragraph 4, and Article 83, paragraph 4, of the Montego Bay Convention is of no consequence; they are binding on the Parties, and it is for this Court to ensure their application.

[Slide 4: the 1949 delimitation]

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[86] See *supra*, para. 11.

[87] See MR, p. 78, para. 7.10, and pp. 80-81, paras. 7.15-7.16; CMU, p. 154, para. 6.23; RR, p. 11, para. 2.4; and RU, p. 13, para. 2.17, or p. 149, para. 6.11.

[88] See CMU, pp. 154-155, paras. 6.24-6.26; and RU, p. 13, paras. 2.18-2.19.

[89] RU, p. 13, para. 2.18; emphasis added.

30. I should add that, whatever the other Party may have written on the subject, it seems somewhat unreasonable to deny these instruments the status of delimitation agreements. It is clear in any case that they delimited, at least, the Parties' respective territorial seas. But I wish to draw your attention, Madam President, to an enigma — one to which we shall revert in due course: why on earth did the Parties feel the need to extend the limit of their maritime territories beyond the endpoint of Romania's territorial sea — which was, at the time, 6 nautical miles? Beyond point A, which you may now view on the screen, we are obviously no longer talking about a delimitation between the territorial seas of two States, and it is very hard to see what legal title Romania might have invoked in support of the determination of point 1439 or the extension of the line around Serpents' Island — or even what it stood to gain through these operations unless it was to obtain assurances from the Soviet Union that it had no claim beyond that limit. Indeed I may note in passing that this is how the transaction was understood by Romania, as very clearly shown by the statements by successive Romanian heads of delegation during the bilateral delimitation negotiations with the Soviet Union, which are reproduced in our Memorial[90]. To cite just one of these statements, the last one, dating from 1987:

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> "according to its features, Serpents' Island cannot have its [continental] shelf and [exclusive economic] zone. But we do not ignore it . . . [t]he delimitation proposal respects the bilateral Romanian-Soviet understandings regarding Serpents' Island. It will continue to have maritime boundary waters of 12 miles, together with the accompanying soil and subsoil."[91]

31. I shall say nothing further on this point for the time being, but it confirms, if confirmation were needed, that the Court certainly cannot disregard these agreements, whose impact on the delimitation that it is called upon to establish is self-evident — whether or not they should be regarded as "agreements under Article 74.4 or Article 83.4", a point which is of no importance whatsoever beyond the gates of academia.

[End of slide 5]

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[90]MR, pp. 55-59, paras. 5.12-5.17.

[91]Minutes of the 1987 Romanian-Soviet negotiations, MR, Ann. 31.

B. The role of the principles agreed upon in Article 4 of the 1997 Additional Agreement

32. Madam President, the Ukrainian Party's argument regarding the role to be played in the present case by the principles agreed upon in Article 4 of the 1997 Additional Agreement is no less baffling and raises, to some extent, similar problems.

33. Ukraine plainly cannot deny that these five principles are laid down in the 1997 exchange of letters, but it denies their relevance and asserts, Members of the Court, that you cannot apply them "as such"[92]. The alleged reason for this ostracism is that the "chapeau" to Article 4 of the 1997 Additional Agreement reads as follows:

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> "The Government of Ukraine and the Government of Romania shall conduct negotiations on the Agreement on Delimitation of the Continental Shelf and the Exclusive Economic Zones of both States in the Black Sea on the basis of the following principles and procedures:"

It follows, according to Ukraine, that:

> "the five principles [listed in Article 4] which were then set out were agreed as 'the basis' on which the Parties 'shall conduct negotiations'.
>
> The Parties did not agree that those principles should apply also as part of the *compromise* for the reference of their dispute to the Court in the event that the negotiations were not successful."[93]

34. What a curious rhetorical posture, Madam President! In *a single clause*, two States agree, on the one hand, on five principles to be applied in their negotiations with a view to reaching agreement on the delimitation of their respective continental shelf and exclusive economic zones and, on the other, on the conditions governing referral of their dispute to the Court — it is worth repeating: all of this is set out *in the same Article* of the Additional Agreement. And these principles are supposed to be applicable only to the diplomatic negotiations between the two States and may not be invoked for the purpose of settlement of the dispute by your distinguished Court? This can't be serious! If the Parties had intended to impose such limits on the relevance of the "principles and procedures" set out in Article 4, they would undoubtedly have said so clearly; and they would have included a specific clause to that effect in their Agreement. But it contains no such clause.

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[92]RU, p. 16, para. 2.29; see also CMU, p. 153, para. 6.20.

[93]RU, p. 14, paras. 2.23-2.24.

35. While the judicial settlement of disputes is admittedly a different form of settlement from negotiations[94], it is nonetheless an extension of the former, its "continuation by other means". And this is even more patently true in the case before us inasmuch as Article 4 *(h)* states it explicitly and

47 in no uncertain terms. As Ambassador Rosenne has written, "[l]itigation is a phase in the unfolding of a political drama"[95]. Whatever our opponents may think, and as stated by the Permanent Court which you cite in your Judgments on the *Continental Shelf* and the *Gulf of Maine*

> "[a]s the Permanent Court of International Justice said in its Order of 19 August 1929 in the case of the *Free Zones of Upper Savoy and the District of Gex*, the judicial settlement of international disputes 'is simply an alternative to the direct and friendly settlement of such disputes between the parties' (*P.C.I.J. Series A, No. 22,* at p. 13)" (*North Sea Continental Shelf (Federal Republic of Germany/Denmark) (Federal Republic of Germany/Netherlands), Judgment*, *I.C.J. Reports 1969*, p. 47, para. 87; see also *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America*), *Judgment*, *I.C.J. Reports 1984*, p. 266, para. 22),

it being understood that the word *succédané* used in the original French version of the Permanent Court's decision is perhaps more apposite than its English translation "alternative". In everyday usage and according to the *Dictionnaire de l'Académie française*, the term *succédané* is used to refer to "[a]ny product which is derived from another one and may, if need be, replace it"[96].

36. In executing its task, the Court cannot but apply "as such" the principles that the Parties decided, on the basis of an agreement, to apply for the purpose of negotiating the delimitation agreement, to which your judgment will be the *succédané*, the "alternative". With all the ensuing consequences for their interpretation — which should comply with the "general rule of interpretation" of treaty law and the order of priority that the Parties have assigned to them.

37. Incidentally, this is not the first time that Parties have specified the principles and rules that they would like to have applied in the arbitration clause providing for referral to the Court. They did so, to mention only a few examples, in a number of boundary delimitation cases resulting from decolonization, in which the arbitration agreements explicitly provided for application of the *uti possidetis* principle (*Frontier Dispute (Benin/Niger)*, *Judgment*, *I.C.J. Reports 2005*, p. 96, para. 2, and p. 108, para. 23); in the case concerning *Kasikili/Sedudu Island*, for example, the

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[94]See RU, p. 15, para. 2.27.

[95]Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005*, Vol. I: *The Court and the United Nations*, Martinus Nijhoff Publishers, Leiden/Boston, 2006, p. 3.

[96]Eighth edition, digital version, internet site: http://atilf.atilf.fr/academie.htm.

Court was requested to rule, in particular, on the basis of a treaty explicitly mentioned in the arbitration agreement (*Kasikili/Sedudu Island (Botswana/Namibia)*, *Judgment*, *I.C.J. Reports 1999 (II)*, p. 1053, para. 11; see also p. 1102, para. 93; see also *Land, Island and Maritime*
48 *Frontier Dispute (El Salvador/Honduras; Nicaragua (intervening))*, *Judgment*, *I.C.J. Reports 1992*, pp. 357-358, para. 3, and p. 386, para. 40). This is in no way inappropriate and, as emphasized by the Court in the *Continental Shelf (Tunisia/Libya)* case, "[w]hile the Court is, of course, bound to have regard to all the legal sources specified in Article 38, paragraph 1, of the Statute of the Court in determining the relevant principles and rules applicable to the delimitation, it is also bound, in accordance with paragraph 1 (*a*) of the Article, to apply the provisions of the Special Agreement" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *Judgment*, *I.C.J. Reports 1982*, p. 37, para. 23).

38. These provisions, which constitute special norms in relation to those of the United Nations Convention on the Law of the Sea or to the general principles of maritime delimitation law, must be applied as a matter of priority. But it certainly does not follow that particular clauses are irrelevant in the present case when it comes to interpreting or supplementing the application of the principles set forth in Article 4 *(h)* of the 1997 Additional Agreement. This becomes even more obvious when one considers that, as Ukraine grudgingly concedes (at least on paper), these principles largely (though not literally) reflect those which are applicable — in other words those of the 1997 Agreement — pursuant to general international law.

39. Before closing, Madam President, I should like to point out once again that when Ukraine refers solely to the delimitation principles laid down in the Additional Agreement, it deliberately overlooks the fact that this instrument is not the only bilateral treaty of relevance for the purpose of settling the delimitation issue. The Ukrainian Party again "forgets" the Treaty of Good Neighbourliness (or the "Treaty on Relations"), of which I propose to cite again Article 2, paragraph 2. Once again, this stipulates that the parties "shall settle the problem of the delimitation of their continental shelf and of economic exclusive zones in the Black Sea *on the basis of the principles and procedures agreed upon by an exchange of letters . . .*"[97]. No distinction is made

[97] *UNTS*, Vol. 2159, p. 37 (I-37743); emphasis added.

anywhere between, on the one hand, the negotiations and, on the other hand, the other procedures
49 to which the Parties might have recourse to solve the problem of delimitation; there is no reference anywhere, either explicit or implicit, to any form of limitation of the applicability of these principles to the context of diplomatic negotiations. On the contrary, it seems quite clear that the principles in question must constitute the basis for the solution to the delimitation problem to be worked out either by the Parties themselves or by the Court — as stipulated in the Additional Agreement.

40. Members of the Court, I thank you for your attention and I would request you, Madam President, to give the floor to Mr. Cosmin Dinescu, who will present the geographical context of the case and review existing delimitation agreements in the Black Sea. Thank you very much.

Le PRESIDENT : Merci, Monsieur Pellet. J'appelle le coagent de la Roumanie, M. Dinescu.

Mr. DINESCU:

III. THE GEOGRAPHICAL CONTEXT

Thank you very much, Madam President.

1. Madam President, Members of the Court, it is a great honour for me to appear before you as representative of my country, Romania, in the case concerning *Maritime Delimitation in the Black Sea*. The honour is all the greater as this, Madam President, is my first appearance before the Court.

2. My task today is to describe to you the general geographical context of the dispute between Romania and Ukraine which has been referred to you — that is to say to describe the *geographical setting* of the dispute and, in this context, the *existing delimitation agreements* in the region. Given that these are factual aspects, my task might appear a rather easy, if not somewhat dry, one; however, the two Parties' differing interpretations of these aspects make this both a necessary and a more interesting exercise.

The geographical description of the region

[Slide 1: the geographical context of the dispute: the Black Sea (judges' folder, tab III-1)]

50 3. Madam President, Members of the Court, Romania and Ukraine are among the six States bordering the Black Sea, a semi-enclosed sea in south-eastern Europe. The Black Sea communicates with the Mediterranean Sea through the Bosporus and Dardanelles Straits. With a surface area of some 420,300 sq km (462,500 sq km counting the Sea of Azov to the north-east)[98], it is a small sea.

4. The two Parties concur on these points. They also concur that there are no areas of high seas in the Black Sea[99]; thus, ultimately, all its waters lie entirely within the jurisdiction of the six littoral States.

5. A depiction of the Black Sea appears on the screen and can also be found in your folders under tab III-1; the coastlines of Romania and Ukraine can clearly be seen bordering the western basin of the Black Sea; the maritime area which the Court is being asked to delimit lies in the northern part of this basin.

6. The boundary between the two countries in the area bordering the Black Sea runs generally east-west and lies along the northernmost main branch of the Danube delta: the Chilia. As a riverine boundary, it follows the twists and turns of the river and ends in the sea in the small Musura channel.

7. Taken as a whole, the coastlines of the two countries from the endpoint of the boundary between Romania and Bulgaria (Vama Veche) to the southernmost point of the Crimean peninsula (Cape Sarych) delimit a maritime area representing roughly half of the western basin of the Black Sea. The extremities of this basin are represented, as I just said, by the endpoint of the Bulgaria-Romania boundary (Vama Veche) and Cape Sarych, which also marks the point of transition to the eastern basin of the Black Sea.

[End of slide 1]

[Slide 2: the western basin of the Black Sea with the main geographical elements and the relevant and non-relevant coasts (tab III-2)]

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[98]MR, p. 14, para. 2.1; CMU, p. 13, para. 3.2.

[99]MR, p. 14, para. 2.2; CMU, p. 13, para. 3.3.

8. The coasts of the two countries do not form a straight line: there are numerous inflection
51 points, where the direction of the coast changes significantly. In their written pleadings the two Parties have expressed conflicting views on the number of segments best reflecting the coastal geography[100] for purposes of determining the relevant coasts and, accordingly, the relevant area for the delimitation.

9. One look at the map of the Black Sea's western basin is enough to identify the salient geographical features: the Sacalin peninsula, the Sulina dyke, the northernmost point of the Danube delta, the Dniestr and Dniepr estuaries, Yarholyt and Karkinit bays, and Capes Tarkhankut, Khersones and Sarych. I shall describe the most important of these features.

[End of slide 2]

[Slide 3: satellite photo of the Sacalin peninsula]

10. The Sacalin peninsula lies in the south-eastern part of the Danube delta. As you can now observe on the screen, and at tab III-3 of your folders, this is a sand spit extending south-westward for some 12 km from the mouth of the Saint George branch. The present peninsula was initially made up of two sandy islands, Big Sacalin and Little Sacalin, which, in a natural evolutionary process lasting some 100 years and characterized by permanent sedimentary deposits, came to form a single islet which ultimately attached itself to the shore, resulting in the existence of a peninsula with a surface area of 3.5 sq km. Sacalin is one of the relevant points for Romania's baselines, and has been notified as such to the United Nations Secretariat[101].

[End of slide 3]

[Slide 4: satellite photo of the Sulina dyke]

11. The second noteworthy point in the Danube delta is the Sulina dyke (tab III-4, judges' folder). The dyke is located north of Sacalin, at the mouth of the Sulina branch; construction of it
52 started in 1856, with a view to protecting the mouth of the navigable branch from the risk of silting up from alluvial deposits and to ensuring the smooth operation of the port of Sulina. Increasing quantities of alluvium required enlargement of the dyke on several occasions, the most recent such

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[100]CMU, pp. 16-17, paras. 3.16-3.19, p. 25, para. 3.49; RR, pp. 16-19, paras. 3.6-3.12; RU, p. 68, para. 4.11, pp. 79-81, paras. 4.51-4.56.

[101]RR, Ann. RR 3; see also http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ROM_1990_Act.pdf

work having been carried out in 1980. As can now be seen on the screen, there are in fact two parallel dykes, which create a navigable channel providing access to the port and the Sulina branch. A lighthouse is located towards the eastern end, on a small sandy islet with a surface area of 3.3 hectares, a small islet adjacent to the dyke. In front of the dyke, two buoys mark the entrance to the Sulina channel. Thus, this is a system of permanent harbour works, extending seaward for 7.5 km. Immediately to the north of the dyke lies a sandy island, of 60 hectares, formed about ten years ago and continuing to grow. The Romania-Ukraine maritime boundary established in 1949 crosses this island and has therefore become a land boundary in the sector containing this new island feature. The eastern end of this island is situated on nearly the same meridian as the most seaward point of the Sulina dyke, which is also one of the points notified by Romania to the United Nations Secretariat as relevant points in defining the baselines for the Romanian coast[102].

[End of slide 4]

[Repeat slide 2]

12. Let us move northwards and take a look at the Ukrainian coast. It first runs from south to north, then turns towards the northeast and gradually ceases to be in a relationship of adjacency with the Romanian coast. The "turning point" is the Dniestr estuary, which resembles a bay with an area of 373.6 sq km. and an average width of 7 km. The endpoint of the southern bank of the estuary, which Romania has called "point S", marks a north-eastward shift in the direction of the coast, a shift which will become even more pronounced at a point to the north of Odessa. After that point the coast turns eastward before finally beginning to descend towards the southeast, where the coast line is broken up by bays such as the Dniepr estuary, Yarholyt and Karkinit. The last of these, for example, has a mouth of 32.3 nautical miles and a surface area of 3,300 sq km.

53 13. The southern extremity of the bay of Karkinit is Cape Tarkhankut, on the Crimean peninsula. This bay — the bay of Karkinit — separates the Crimea from the rest of the mainland in the north-western basin of the Black Sea. The west coast of the Crimea generally runs north-west/south-east, and has the noteworthy feature of Cape Tarkhankut, which projects into the sea for a distance of 27.6 km and thus significantly distorts the general direction of the coast.

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[102] RR, Ann. RR 3; see also http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ROM_1990_Act.pdf

14. This coast of the Crimea stands in an opposite relationship to the Romanian coast. This relationship ceases at the southernmost point of the peninsula, Cape Sarych, which also marks the limit of the western basin of the Black Sea.

15. This description of the coasts shows that the three sectors of the Ukrainian coast identified by our opponents in their written pleadings[103] are nothing but an over-simplification and an unacceptable refashioning of the regional geography. These points will be addressed in detail by Mr. James Crawford following my statement.

16. For the time being, it is sufficient to point out that the various segments of the two countries' coasts bear various relationships with one another:

— firstly, some coastal segments are continuations of each other: you see these in red on the screen;

— secondly, some segments are opposite each other — in blue on the illustration;

— finally, there are Ukrainian segments which bear no relation to the area to be delimited — they appear in mauve on the screen.

The consequence of this is wholly obvious: there are coasts which are relevant for the delimitation in this case and there are others which are not; further, the relationships between the relevant coasts — that is to say adjacent to each other in some cases and opposite each other in others — require a sectorial approach to the delimitation. Here again, James Crawford will go into detail in the next statement.

[End of slide 2]

[Slide 5: the Black Sea and its western basin]

54 17. In the north-western basin of the Black Sea, we discern an isolated, microscopic point: this is Serpents' Island, a maritime feature close to the adjacent coasts of Romania and Ukraine, lying some 20 nautical miles from those coasts and having an area of 0.17 sq km. Why have I said, "we discern"? Because the island is so tiny as to be invisible at the scale used in the sketch maps which have just been shown. As now shown on the screen, in order to be able to see the island — let us say — normally, the scale must be increased by a factor of more than 400. If the same scale

[103] CMU, pp. 16-17, paras. 3.16-3.19; RU, sketch-map 4-4.

is used for both Serpents' Island and the maritime basin surrounding it, the island is no longer visible, it disappears. This rock, lending itself to neither human habitation nor real economic life, has been one of the main protagonists in the two countries' written pleadings[104] and, for better or worse, will no doubt continue to play such a role in the coming days. I shall not go into a detailed description of it, but shall however once again stress the obvious fact shown by the image on the screen: a tiny, isolated feature opposite the adjacent mainland coasts of the two countries.

[End of slide 5]

[Slide 6: Geomorphological characteristics of the Black Sea — excerpt from the study *Catastrophic Flooding of the Black Sea, Annual Review of Earth and Planetary Sciences,* Vol. 31, 2003, pp. 525-554, also available at http ://www.geo.edu.ro/sgr/mod/downloads/ PDF/Ryan-AnRevEPS-2003.pdf]

18. From the geological and geomorphological standpoint, the bed of the Black Sea represents a single mass[105], the continental shelf being continuous in nature. In the north-western basin, the continental shelf extends further in the west, off the adjacent Romanian and Ukrainian coasts, and the north, where the "descent" towards the continental slope is gradual, while in the east, off the Crimean coast, the continental slope is much more abrupt. This is now shown on the screen; the image also appears in your files under tab III-5. The line indicating the beginning of the continental slope is clearly visible; up to this line there is the single geological continental shelf, which is the natural extension of both Romanian territory and mainland Ukrainian territory. Thus,

55 geological factors are not relevant in our case. The two Parties concur on this: neither has invoked these factors in its written pleadings.

[End of slide 6]

Delimitation practice in the Black Sea

[Slide 7: existing delimitation agreements in the Black Sea]

19. The waters of the Black Sea have not been fully delimited among the littoral States. However, a true delimitation practice has developed and manifests itself in agreements presently in force between Bulgaria and Turkey, Ukraine and Turkey, Russia and Turkey and Georgia and

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[104]See, e.g., MR, Chap. 10; CMU, Chap. 3, sect. 2 A (ii), Chap. 7, sect. 3, Chap. 9, sect. 2 B; RR, Chap. 5; RU, Chap. 4, sect. 2 C.

[105]MR, p. 15, para. 2.6.

Turkey[106]. The delimitation lines established by these agreements are shown on the figure now appearing on the screen.

20. It will be noted that, in the western basin of the Black Sea, which the present case concerns, the southern half has been delimited, while the maritime areas in the north between Romania and its neighbours — that is Ukraine, Turkey and Bulgaria — are yet to be delimited.

[End of slide 7]

[Slide 8: existing delimitation agreements in the western basin of the Black Sea]

21. A depiction of the existing delimitations in the western basin of the Black Sea now appears on the screen, as well as in your files under tab III-6. These are the delimitations agreed between Ukraine (the USSR at the time) and Turkey in 1978 and between Bulgaria and Turkey in 1997. It will be noted that the agreement concluded in 1978 between the USSR and Turkey only covered the continental shelf, but, further to Turkey's proclamation of an exclusive economic zone, the two countries agreed that the delimitation line of the continental shelf would also serve as the line of delimitation between their exclusive economic zones.

56 22. In their written pleadings, the two Parties have exhaustively described the consequences of these agreements[107]. The descriptions generally accord with each other, and I shall not go over them; I am however going to point out those nuances between the two positions which appear to have the greatest relevance for our case.

23. The lines defined by these two agreements to delimit the exclusive economic zones and the continental shelf are based on simplified equidistance; although Ukraine's position is not very clear on this point[108], it does not openly dispute it; moreover, this conclusion, which clearly

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[106]Agreement between the Republic of Bulgaria and the Republic of Turkey on Determination of the Boundary in the Mouth Area of the Rezovska/Mutludere River and Delimitation of the Maritime Areas between the two States in the Black Sea, 4 December1997, *UNTS*, Vol. 2087, pp. 6-9 (I-36204); Protocol between the Government of the Union of Soviet Socialist Republics and the Government of the Republic of Turkey concerning the Establishment of the Maritime Boundary between Soviet and Turkish Territorial Waters in the Black Sea, 17 April 1973, *UNTS*, Vol. 990, p. 206 (I-14475); Agreement between the Government of the Republic of Turkey and the Government of the Union of Soviet Socialist Republics concerning the Delimitation of the Continental Shelf between the Republic of Turkey and the Union of Soviet Socialist Republics in the Black Sea, 23 June 1978, *UNTS*, Vol. 1247, p. 142 (I-20344); Exchange of Notes constituting an Agreement between the Government of the Republic of Turkey and the Government of the Union of Soviet Socialist Republics on the Delimitation of the Exclusive Economic Zone of the Two Countries in the Black Sea, 23 December 1986 and 6 February 1987, *UNTS*, Vol. 1460, p. 136 (I-24690); see also CMU, Vol. 5, Ann. 111 (in English).

[107]MR, pp. 63-67, paras. 6.6-6.20; CMU, pp. 224-228, paras. 8.82-8.94.

[108]CMU, p. 224, para. 8.82.

follows from the maps themselves, is confirmed by expert analysts — such as Charney and Alexander in their reports on the two agreements in question[109].

24. The lines of delimitation established by the two agreements end with provisionally defined segments, the definitive course of which is to depend on subsequent discussions. Article 1 of the USSR-Turkey agreement provides that the line delimiting the continental shelf between the two countries has been defined as far as a point which Romania has called "point K"; the agreement further provides that the line of delimitation may be extended beyond point K as far as another point, which Romania has called "point L". The agreement also provides in respect of the delimitation in the sector between the two points mentioned: "The Parties have agreed that [this] question . . . shall be settled later, in the course of subsequent negotiations, to be held at a convenient time"[110].

25. A similar provision is found in Article 4 of the agreement between Bulgaria and Turkey, which defines the line of delimitation as far as a point identified as point P10 and provides in respect of the course of the final segment of that line (between point P10 and the preceding point, P9) that "the Parties have agreed that such a drawing will be finalized later at subsequent negotiations which will be held at a suitable time"[111].

57 26. The two provisional segments are clearly visible on the screen: segment K-L from the USSR-Turkey agreement and segment P9-P10 from the Bulgaria-Turkey agreement.

27. Points 10 and L are virtually the same[112]; they represent the tri-point equidistant from Ukraine (the USSR at the time), Turkey and Romania, a point lying 111 miles from their coasts[113]. Even though Ukraine would appear to disagree with this conclusion[114], the reason is obvious why the Soviet Union and Turkey decided that a segment ending at a point lying equidistant from the

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[109] *International Maritime Boundaries*, Vol. II, edited by Jonathan I. Charney and Lewis M. Alexander, Martinus Nijhoff publishers, 1996, p. 1695; *ibid.*, Vol. IV, 2002, p. 2874.

[110] *UNTS*, Vol. 1247, p. 143.

[111] *UNTS*, Vol. 2087, p. 8.

[112] MR, p. 66, para. 6.16.

[113] *International Maritime Boundaries*, Vol. II, edited by Jonathan I. Charney and Lewis M. Alexander, Martinus Nijhoff publishers, 1996, p. 1694.

[114] CMU, p. 226, para. 8.87.

two countries and Romania would be provisional: the two parties thought that Romania might have valid claims in the area in question and they did not wish to prejudice its interests.

28. The Bulgaria-Turkey example is analogous: Point 9 under the agreement between the two countries coincides with the tri-point equidistant from Bulgaria, Turkey and Romania — that point lies at a distance of approximately 110 miles from the three coasts. It should be noted that the closest point on the Ukrainian coast is 125 miles away. Thus, it is obvious that the two contracting parties wished to avoid prejudicing the interests of third parties and that they had Romania in mind; incidentally, this conclusion is supported by the analysts, such as Charney and Smith, who state in the report on the Bulgaria-Turkey agreement: "The seaward limit of this maritime boundary would end at a tripoint between Bulgaria, Turkey and Romania. Until such time as the three reach agreement on this point, the Bulgaria-Turkey terminal point will remain undefined."[115*]

29. Aside from the aspects I have just addressed, the two Parties are in agreement that the other delimitation agreements already concluded in the Black Sea have a certain impact on the present case. The main point of agreement is that, as shown by these agreements themselves, and by the settled practice of the Court, the delimitation between Romania and Ukraine must not affect the rights of third States.

30. But, beyond this point, there are still differences on other questions.

[End of slide 8]

58 [Repeat slide 7]

31. First, there is disagreement on a factual matter: Ukraine disputes Romania's conclusion that "[n]o major consideration was given to other factors related to the relevant coasts of the parties (such as their geographical configuration or eventual disproportion between them)"[116] when the delimitation lines were drawn on the basis of the equidistance principle. Ukraine's disagreement is already announced in the Counter-Memorial[117] and expressed more "vociferously" in the

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[115] *International Maritime Boundaries*, Vol. IV, Martinus Nijhoff publishers, 2002, p. 2875.

*[« Cette frontière maritime se prolongerait vers le large jusqu'à un point triple entre la Bulgarie, la Turquie et la Roumanie. Tant que ces trois parties ne seront pas parvenues à un accord sur celui-ci, le point terminal de la frontière entre la Bulgarie et la Turquie restera indéterminé».] *[Traduction par le Greffe.]*

[116] MR, pp. 69-70, para. 6.24.

[117] CMU, p. 43, para. 4.34.

Rejoinder[118], where our opponents call Romania's position "dubious"[119] and see it as "another attempt by Romania to develop an argument that the Court should ignore the geography of the relevant area"[120].

32. Ukraine's vehement insistence is difficult to understand in the light of one simple fact: the truth is that the Turkish coast is, for example, 3.9 times longer than the Bulgarian, and, while the Turkish and Soviet coasts were comparable in length at the time, the Turkish coast is now 3.3 and 3.63 times the length of, respectively, the Russian and Georgian coasts. This is therefore simply the geographical reality.

33. But the main points of discord relate to the consequences of the existing geographical situation: the Black Sea's nature as a semi-enclosed sea and its rather small size, together with the agreed solutions established in the delimitation agreements in force, constitute a relevant circumstance which must be taken into account in the delimitation process for Romania's and Ukraine's maritime areas[121]. This relevant circumstance results from a two-fold limitation:

— to ensure that delimitation solutions are not inequitable, there must be *consistency* among the delimitation methods used — the use in new delimitations of methods greatly at variance with those already used is very likely to lead to inequitable results incompatible with existing delimitations;

59

and

— Ukraine's proposed method of delimitation refashions the geography of the area to be delimited, resulting in a proposed line of delimitation which is profoundly inequitable for Romania[122].

34. Ukraine takes issue with these Romanian arguments and denies that any relevant circumstance results from the combination of *the Black Sea's characteristic as a small, semi-enclosed sea and the delimitation agreements in force in the Black Sea*[123]. We shall return to this in the next few days when we discuss the other aspects of relevance for the delimitation.

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[118]RU, pp. 101-102, paras. 6.17, 6.18.

[119]RU, pp. 101-102, para. 6.18.

[120]RU, p. 101, para. 6.17.

[121]MR, pp. 69-72, paras. 6.21-6.34; RR, pp. 202-205, paras. 6.42-6.50.

[122]MR, pp. 69-72, paras. 6.21-6.34; RR, pp. 202-205, paras. 6.42-6.50.

[123]CMU, pp. 43-47, paras. 4.33-4.50; RU, pp. 98-107, paras. 6.4-6.34.

35. Madam President, Members of the Court, I shall bring my statement to a close now, not however without setting out my conclusion: subject to the presence of the rocky feature called "Serpents' Island", the geographic area to be delimited, like the Black Sea in its entirety incidentally, raises no specific problems complicating your task. The straightforward solutions established in the delimitation agreements previously concluded — and straightforward solutions are the most enduring — are the proof of this.

[End of slide 7]

36. I thank you for your attention and ask you, Madam President, to give the floor to Mr. James Crawford, who will deal with the relevant coasts and the relevant area for the delimitation.

Le PRESIDENT : Merci, Monsieur Dinescu. J'appelle maintenant à la barre M. Crawford.

M. CRAWFORD

IV. LES CÔTES ET LA ZONE PERTINENTES

Introduction

1. Madame le président, Messieurs de la Cour, on peut faire confiance à M. Pellet lorsqu'il affirme qu'une plaidoirie sera longue. Aujourd'hui, toutefois, la mienne sera relativement brève.

60 Ma première tâche, dans le cadre de ce premier tour de plaidoiries, sera d'analyser les côtes et la zone pertinentes aux fins de cette délimitation, en répondant tout particulièrement à l'argumentation développée au chapitre 4 de la duplique de l'Ukraine. Je voudrais remercier Simon Olleson pour l'assistance qu'il m'a prêtée en vue de la préparation, entre autres, du présent exposé.

[Projection n° 1: délimitations existantes dans la mer Noire.]

2. Mon collègue Cosmin Dinescu a mentionné les accords de délimitation existants qui impliquent des Etats tiers. Vous constaterez que, hormis quelques variations mineures, il s'agit à chaque fois de frontières fondées sur le principe de l'équidistance par rapport aux côtes continentales. Les négociations entre la Roumanie et la Bulgarie concernant la délimitation de leurs zones maritimes en mer Noire se poursuivent, mais je sais que les deux parties sont

convenues, en principe, d'utiliser la méthode fondée sur l'équidistance/les circonstances pertinentes, et ont déjà tracé une ligne d'équidistance provisoire. Un coup d'œil à la carte, qui figure sous l'onglet IV-1 du dossier de plaidoiries, permet de constater qu'aucune circonstance majeure n'impose de s'écarter radicalement de la méthode de l'équidistance aux fins d'obtenir une délimitation équitable entre les Parties en présence.

[Fin de la projection n° 1.]

[Projection n° 2 : le bassin nord-ouest de la mer Noire.]

3. Ainsi, de manière générale, la zone pertinente en l'espèce est le bassin nord-ouest de la mer Noire, représentée ici à l'écran et sous l'onglet IV-2, du cap Sarych vers l'ouest. En suivant la côte vers l'ouest et le nord, on voit que celle-ci fait saillie au niveau du cap Chersonèse, en face de Sébastopol, puis longe le golfe de Kalamitska, jusqu'au cap de Tarkhankut, point le plus à l'ouest de la péninsule de Crimée. Elle s'infléchit ensuite très brutalement sur une trajectoire nord-est vers l'intérieur du golfe de Karkinitska, d'une profondeur d'environ 110 kilomètres. Elle s'infléchit de nouveau brusquement vers l'ouest, direction qu'elle suit sur près de 145 kilomètres jusqu'au golfe de Yahorlytska, s'orientant ensuite vers le nord jusqu'au bras de mer du Dniepr, puis légèrement vers le sud-ouest jusqu'à la ville d'Odessa. A quelque 40 kilomètres au sud-ouest de celle-ci se trouve le bras de mer du Dniestr ; de là, le littoral suit une direction d'orientation générale sud-ouest jusqu'au delta du Danube où, immédiatement au nord de l'embouchure de Sulina, passe la frontière entre les deux Etats. Au sud de la frontière terrestre, il s'oriente plus ou moins plein sud jusqu'à l'embouchure de Saint-George et à la péninsule de Sacalin, où il prend une trajectoire sud-ouest, puis sud, qu'il suit, au-delà de la ville de Constanța, jusqu'à la frontière bulgare, au sud de Vama Veche.

4. Je voudrais faire une dernière remarque d'ordre géographique, en ce qui concerne la mer Noire et son caractère de mer semi-fermée. Si, d'est en ouest, la mer Noire atteint plus de 640 milles — et par «milles», j'entends «milles marins» — de large, elle est pour l'essentiel bien
61 plus étroite du nord vers le sud. Seuls 143 milles séparent le cap Sarych de la côte turque immédiatement au sud, soit une distance bien moindre de celle — 174 milles — qui sépare l'extrémité du canal roumain de Sulina du fond du golfe de Karkinitska, du côté de la péninsule de Crimée. En conséquence, chaque partie de la mer Noire, sans exception, se trouve à moins de

200 milles d'au moins deux, généralement trois, et jusqu'à quatre Etats côtiers. Ainsi Sébastopol — cette ville illustre — se trouve-t-elle à environ 230 milles de la Roumanie comme de la Bulgarie, et moins loin encore de la Turquie. En conséquence, les zones associées à chaque paire de côtes se faisant face se chevauchent. Ce qui, dans un contexte de côtes sans vis-à-vis et de haute mer s'étendant sans limite, pourrait être considéré comme un droit reconnu à certains espaces maritimes ne s'applique, en réalité, à aucun des Etats de la mer Noire.

[Fin de la projection n° 2.]

I. Définition des côtes et zones pertinentes : observations liminaires

5. Madame le président, Messieurs de la Cour, il m'incombe à présent de définir les côtes et les zones pertinentes — tâche non plus simplement géographique, mais juridique. Permettez-moi à cet égard de formuler quatre observations liminaires.

6. Ma première observation est que la méthode de délimitation la plus courante consiste à partir de la ligne d'équidistance calculée à partir de points répondant aux critères voulus situés sur les côtes des parties et à se demander ensuite si cette ligne provisoire doit être ajustée. La valeur de cette approche a été expressément reconnue par les Parties dans l'accord additionnel de 1997, qui pose, à l'alinéa *b)* de son paragraphe 4, «le principe de la ligne d'équidistance dans les zones à délimiter lorsque les côtes sont adjacentes et le principe de la ligne médiane lorsque les côtes se font face» [«[t]he principle of the equidistance line in areas submitted to delimitation where the coasts are adjacent and the principle of the median line in areas where the coasts are opposite»].

7. Certes, dans le dernier arrêt rendu par la Cour dans une affaire relative à la délimitation, l'affaire *Nicaragua c. Honduras*, vous avez retenu non pas une ligne d'équidistance provisoire, mais une bissectrice. C'est ainsi que vous avez pu prendre en compte, aux fins de la délimitation, les côtes continentales dans les circonstances particulières de cette affaire. Vous avez expressément indiqué que vous n'entendiez pas revenir sur la manière de faire habituelle (*Nicaragua c. Honduras*, arrêt du 8 octobre 2007, par. 281). En outre, comme vous l'avez rappelé, ni l'une ni l'autre des Parties n'avait à titre principal argué en faveur de la construction d'une ligne d'équidistance provisoire (*ibid*., arrêt du 8 octobre 2007, par. 275, 281).

62 [Projection n° 3 : lignes de délimitation et lignes d'équidistance revendiquées par les Parties.]

8. Vous voyez maintenant apparaître à l'écran, ainsi que sous l'onglet IV-3, une vue d'ensemble de la zone à délimiter, représentant les lignes revendiquées par les Parties. Je ferai maintenant apparaître deux lignes d'équidistance provisoires. La première est la ligne d'équidistance/médiane établie sur la base de tous les points retenus par l'Ukraine. La seconde est la ligne d'équidistance/médiane tracée par rapport aux côtes continentales, qui fait abstraction de l'île des Serpents — bien que j'aie évidemment laissé la marge extérieure de la zone des 12 milles marins convenue par les Parties en 1949, un sujet sur lequel je reviendrai demain matin. La seconde est calculée à partir de points de base situés sur les côtes adjacentes des Parties ; elle se prolonge jusqu'à ce que nous avons appelé le point T, qui est le tripoint entre les points de base situés sur les côtes adjacentes des Parties et celui se trouvant sur la côte ukrainienne faisant face à la Roumanie, au niveau du cap Tarkhankut. Au tripoint, ou point T, la ligne d'équidistance tracée à partir des côtes adjacentes s'infléchit et devient une ligne médiane calculée à partir de points situés sur les côtes de la Roumanie et de l'Ukraine (péninsule de Crimée) qui se font face, jusqu'à l'endroit où elle rejoint les espaces maritimes relevant d'un Etat tiers — la Turquie —, au sud. J'ai mentionné le point T ; pour que la Cour ne nous croie pas atteints d'une crise d'exubérance alphabétique, j'ai fait figurer sous l'onglet IV-4 du dossier de plaidoiries une carte représentant les divers points auxquels, à des fins de commodité, nous avons associé une lettre de l'alphabet.

9. En la présente espèce, l'utilisation qu'il convient de faire de l'île des Serpents est éminemment controversée. Mais il y a souvent lieu de ne pas tenir compte des très petites îles et des rochers lorsqu'on trace la ligne médiane ou la ligne d'équidistance provisoire ; comme mon collègue M. Pellet le montrera cette semaine, l'emplacement et les caractéristiques de l'île des Serpents sont tels qu'il convient de ne pas tenir compte de cette formation aux fins de l'élaboration de la ligne d'équidistance/médiane provisoire. Indépendamment de cela, ainsi que je le démontrerai demain, l'effet qu'il convient d'accorder à l'île des Serpents est régi par les procès-verbaux de 1949 et des accords ultérieurs, qui le circonscrivent à une zone de 12 milles marins. Et, tout à fait indépendamment de l'un et l'autre de ces points, l'île des Serpents, ainsi que le démontreront MM. Aurescu et Lowe, est en tout état de cause un rocher au sens du paragraphe 3 de l'article 121 de la convention de 1982, ne générant aucun droit à un plateau continental ou à une

zone économique exclusive. Ainsi la ligne d'équidistance/médiane provisoire d'où il convient de partir — une ligne d'équidistance/médiane tracée par rapport aux côtes continentales — apparaît à présent à l'écran. Je motiverai le choix des points de base retenus aux fins de la construction de cette ligne dans les jours qui suivront.

[Fin de la projection n° 3.]

63 10. La troisième observation liminaire que je voudrais faire est que, si les points de base d'où sera tracée la ligne d'équidistance médiane provisoire sont situés sur les côtes pertinentes, ces points ne déterminent pas pour autant la *longueur* de ces dernières. Dans certaines parties de ses écritures, l'Ukraine semble partir du principe inverse, mais elle fait fausse route. [Projection n° 4 : représentation schématique de côtes de même longueur se faisant face] Selon la configuration des côtes, les points de base utilisés aux fins de construire la ligne peuvent être très rapprochés ou relativement éloignés ; pour autant, les côtes pertinentes ne changent pas, ainsi qu'il ressort du schéma projeté maintenant à l'écran. Ici, j'ai représenté les points de base, sur des côtes de même longueur se faisant face, qui détermineront le tracé de la ligne médiane provisoire. Les points de base de la côte de l'Etat R sont relativement rapprochés ; dans le cas de la configuration côtière, différente, de l'Etat U, ces points sont plus distants l'un de l'autre. Et néanmoins, nul ne prétendra que les côtes pertinentes n'ont pas la même longueur ou que, en ce qui concerne l'Etat R, la côte pertinente se limite au segment compris entre les points R1 et R2.

[Fin de la projection n° 4.]

11. De fait, pour tracer la ligne provisoire d'équidistance établie sur la base de tous les points qu'elle a retenus, l'Ukraine, dans ses écritures, n'a utilisé qu'un point de base sur la côte criméenne faisant face à la Roumanie, à savoir le point situé sur le cap Chersonèse (contre-mémoire de l'Ukraine (CMU), par. 7.90-7.91 ; voir également les figures CMU 7-1 et CMU 9-1 ; duplique de l'Ukraine (DU), par. 5.4 et figure DU 5-1). Elle n'en a pas moins considéré comme pertinente la totalité de la côte faisant face à la Roumanie, ce qui, au moins en ce qui concerne la côte située entre le cap Sarych et cap Tarkhankut, est relativement raisonnable.

12. La quatrième observation liminaire est que, pour définir la côte et la zone pertinentes, il faut faire preuve de perspicacité et de jugement. Comme l'a dit la Cour, dans l'affaire *Nicaragua c. Honduras*, «[l]a détermination de la géographie côtière *pertinente* nécessite une appréciation

réfléchie de la géographie côtière *réelle*» (*Nicaragua c. Honduras*, arrêt du 8 octobre 1997, par. 289 ; les italiques sont de nous) [«[i]dentifying the *relevant* coastal geography calls for the exercise of judgment in assessing the *actual* coastal geography»]. Le caractère approximatif de l'exercice est inévitable ; il est du reste acceptable si l'on prend en compte les fins auxquelles il est légitime, ou non, d'utiliser les longueurs côtières. D'un côté, une nette disproportion entre les longueurs des côtes pertinentes peut militer en faveur de l'ajustement de la ligne d'équidistance ou de la ligne médiane provisoire. De l'autre, les longueurs des côtes pertinentes ne doivent pas être

64 prises en compte aux fins d'établir une formule ou un rapport déterminant la répartition entre les Parties les espaces pertinents. Comme l'a dit la Cour dans l'affaire *Jan Mayen,* «la prise en compte de la disparité de longueurs des côtes ne signifie pas une application directe et mathématique du rapport entre les longueurs des façades côtières du Groenland oriental et de Jan Mayen» (*Délimitation maritime dans la région située entre le Groenland et Jan Mayen (Danemark c. Norvège), arrêt, C.I.J. Recueil 1993*, p. 69, par. 39) [«taking account of the disparity of coastal lengths does not mean a direct and mathematical application of the relationship between the length of the coastal front of eastern Greenland and that of Jan Mayen»].

13. De la même façon, il n'est pas légitime de présenter la zone pertinente comme un ensemble non attribué qu'il conviendrait de répartir entre les Parties sur la base de telle ou telle formule. De fait, les cours et tribunaux font parfois l'économie de la question de la zone pertinente dès lors que, la délimitation permettant d'aboutir à un résultat globalement équitable, il ne leur reste rien à ajouter.

II. La pratique des cours et des tribunaux

14. Madame le président, Messieurs de la Cour, je vais maintenant analyser la jurisprudence consacrée à la question. Ce faisant, je considèrerai essentiellement les décisions de la Cour elle-même, qui constituent une référence pour les tribunaux *ad hoc*.

[Projection n° 5 : les côtes pertinentes ou dénuées de pertinence dans l'affaire *Tunisie/Libye*]

15. Dans l'affaire *Tunisie/Libye*, la Cour a fait état de la nécessité d'identifier les côtes des Etats voisins qui étaient «limitrophes ou [faisaient] face» à celles des Etats parties — je cite :

> «Les seules zones qui puissent intervenir dans la décision sur les prétentions de la Libye et de la Tunisie au plateau continental bordant leurs côtes respectives sont

> celles qui peuvent être considérées comme étant au large, soit de la côte tunisienne, soit de la côte libyenne. Prises ensemble elles représentent la région à prendre en compte pour la décision. La zone litigieuse où les prétentions s'entrecroisent est la partie de cette région globale qui peut être considérée comme étant à la fois au large de la côte libyenne et au large de la côte tunisienne.» (*Plateau continental (Tunisie/Jamahiriya arabe libyenne), arrêt, C.I.J. Recueil 1982*, p. 61, par. 74.)
>
> [«The only areas which can be relevant for the determination of the claims of Libya and Tunisia to the continental shelf in front of their respective coasts are those which can be considered as lying either off the Tunisian or off the Libyan coast. These areas form together the area which is relevant to the decision of the dispute. The area in dispute, where one claim encroaches on the other, is that part of this whole area which can be considered as lying both off the Libyan coast and off the Tunisian coast.»]

65 Cependant, certaines côtes, bien qu'elles puissent donner droit à des fonds marins, ne seront pas considérées comme pertinentes aux fins de la délimitation, comme la Cour l'a ensuite précisé :

> «Néanmoins, pour délimiter le plateau entre les Parties il n'y a pas à tenir compte de la totalité des côtes de chacune d'elles ; tout segment du littoral d'une Partie dont, en raison de sa situation géographique, le prolongement ne pourrait rencontrer celui du littoral de l'autre Partie est à écarter de la suite du présent examen. Les cartes mettent en évidence, sur la côte de chacune des deux Parties, l'existence d'un point au-delà duquel ladite côte ne peut plus avoir de lien avec les côtes de l'autre Partie aux fins de la délimitation des fonds marins. Au-delà de ce point, les fonds marins au large de la côte ne peuvent donc pas constituer une zone de chevauchement des extensions du territoire des deux Parties et, de ce fait, n'ont aucun rôle à jouer dans la délimitation.» (*Ibid.*, p. 61-62, par. 75.)
>
> [«Nevertheless, for the purpose of shelf delimitation between the Parties, it is not the whole of the coast of each Party which can be taken into account; the submarine extension of any part of the coast of one Party which, because of its geographic situation, cannot overlap with the extension of the coast of the other, is to be excluded from further consideration by the Court. It is clear from the map that there comes a point on the coast of each of the two Parties beyond which the coast in question no longer has a relationship with the coast of the other Party relevant for submarine delimitation.»]

Compte tenu des faits qui étaient alors en jeu, dans cette affaire *Tunisie/Libye*, la Cour avait statué que les points pertinents étaient Ras Kaboudia, sur la côte tunisienne, et Ras Tajoura sur la côte libyenne (*ibid.*, p. 62, par. 75). Comme vous pouvez le constater sur la carte figurant sous l'onglet IV-6, ces deux points ne marquaient aucune inflexion majeure de la côte : le choix de Ras Kaboudia et de Rad Tajoura ne coulait pas vraiment de source du point de vue géographique. Mais au-delà de ces points, a ajouté la Cour, le littoral de l'une des Parties «ne p[ouvait] plus avoir de lien avec les côtes de l'autre Partie aux fins de la délimitation des fonds marins» [«no longer has a relationship with the coast of the other Party relevant for submarine delimitation»], ce en dépit du fait que les points situés au-delà des points choisis se trouvaient à bien moins de 200 milles du

point terminal de la frontière terrestre sur la côte. Vous pouvez le voir sur la carte à l'écran, sur laquelle nous avons tracé des arcs à 200 milles de Misratah et du cap Bon : les arcs s'entrecroisent, mais ces points de base et les côtes d'en face n'ont pas été jugés pertinents.

16. En fait, la Tunisie — par la voix de sir Robert Jennings — avait demandé à la Cour de tenir compte de l'intégralité de sa côte orientale, en remontant jusqu'au cap Bon[124]. Toutefois, n'en déplaise à sir Robert Jennings, la Cour n'a attaché de pertinence qu'au segment de la côte
66 tunisienne situé au sud de Ras Kaboudia. Deux observations peuvent être formulées ici : la première est que, certes, le secteur de la côte situé au nord de Ras Kaboudia, dont la Cour a écarté la pertinence, donnait sur la zone à délimiter et sa projection chevauchait au moins en partie celle de la côte libyenne pertinente, mais il était distant de la zone en cause. D'autres portions de la côte tunisienne, qui se projetaient également dans la zone à délimiter, étaient bien plus proches et produisaient beaucoup plus d'effet. La seconde observation est que, à la différence de la côte orientale tunisienne du golfe de Gabès remontant jusqu'à Ras Kaboudia — qui fut jugée pertinente en dépit du changement radical de direction observable au sud du golfe —, la côte ukrainienne qui nous intéresse ici, après Odessa, est fort éloignée de la zone à délimiter et la ligne d'équidistance ne chevauche sa projection nulle part. Pour résumer, il s'agit non pas d'amputer le littoral[125], mais de déterminer quelles côtes et quelles zones sont pertinentes pour procéder concrètement à la délimitation.

17. Dans sa duplique, l'Ukraine argue que la Cour «a considéré *la totalité* de la côte tunisienne bordant le golfe de Gabès comme pertinente pour la délimitation, sans se demander si cette côte pouvait être considérée comme strictement opposée ou adjacente à la côte libyenne»[126]. Il est vrai que la Cour a estimé que ce segment de la côte tunisienne était pertinent. Toutefois, elle a déclaré que la côte du golfe de Gabès, jusqu'à Ras Kaboudia au nord, demeurait dans son ensemble adjacente à la côte libyenne. Pour citer la Cour : «Ce changement de direction peut être

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[124] Voir, par exemple, *Plateau continental (Tunisie/Jamahiriya arabe libyenne),* mémoire de la Tunisie, 27 mai 1980, par. 8.29 (*C.I.J. Mémoires, Plateau continental (Tunisie/Jamahiriya arabe libyenne)*, vol. I, p. 182-183) et figures 9.10, 9.12 et 9.13 (*ibid.*, p. 194 et 196). Voir également les plaidoiries de sir Jennings pour la Tunisie du 16 septembre 1981, suivant le sous-titre «Les côtes» (*C.I.J. Mémoires, Plateau continental (Tunisie/Jamahiriya arabe libyenne)*, vol. IV, p. 411-415).

[125] Voir DU, par. 4.8-4.20, et le titre du chapitre 4, sect. 2.A.

[126] Voir DU, par. 4.23.

considéré comme modifiant la situation de contiguïté des deux Etats, même s'il ne va pas, de toute évidence, jusqu'à en faire, en droit, des Etats se faisant face.» [«The change in direction may be said to modify the situation of lateral adjacency of the two States, even though it clearly does not go so far as to place them in a position of legally opposite States.»] (*C.I.J. Recueil 1982*, p. 63, par. 78.) Les Etats concernés conservaient ainsi une relation générale d'adjacence. La zone pertinente aux fins de la délimitation correspond donc à celle où se chevauchent les extensions ou prolongements sous la mer des côtes de chaque Partie — soit de Ras Kaboudia à Ras Tajoura dans l'affaire *Tunisie/Libye*. Si la Cour a statué en ce sens, c'est, contrairement à ce qu'indique l'Ukraine[127], *non pas* parce que la côte tunisienne située au nord de Ras Kaboudia et la côte
67 libyenne à l'est de Ras Tajoura faisaient face à des Etats tiers, mais parce que, au-delà de ces points, le littoral de l'une des Parties «ne p[ouvait] plus avoir de lien avec les côtes de l'autre Partie aux fins de la délimitation des fonds marins» (*Tunisie/Jamahiriya arabe libyenne*, p. 61-62, par. 75).
[Fin de la projection n° 5.]

[Projection n° 6 : les côtes pertinentes ou dénuées de pertinence dans l'affaire *Libye/Malte*]

18. J'en viens à l'affaire du *Plateau continental (Jamahiriya arabe libyenne/Malte)*. Il s'agissait dans cette affaire-là de côtes qui se faisaient face, mais une approche similaire a été adoptée (*C.I.J. Recueil 1985*, p. 49-50, par. 67). La Cour a déclaré que :

> «Du côte libyen, Ras Ajdir, point d'aboutissement de la frontière terrestre avec la Tunisie, doit à l'évidence constituer le point de départ ; le méridien 15°°10' E qui, selon la Cour, définit les limites de la zone dans laquelle l'arrêt peut s'appliquer, coupe la côte libyenne non loin de Ras Zarrouk…» *(Ibid.*, p. 50, par. 68.)
>
> [«On the Libyan side, Ras Ajdir, the terminus of the frontier with Tunisia, must clearly be the starting point; the meridian 15°10' E which has been found by the Court to define the limits of the area in which the Judgment can operate crosses the coast of Libya not far from Ras Zarruq . . .»]

La Cour a donc conclu que la côte libyenne pertinente correspondait au segment compris entre Ras Ajdir et Ras Zarrouk, excluant tout segment situé à l'est de ce dernier point (la carte projetée a été versée au dossier de plaidoiries sous l'onglet IV-7). En ce qui concerne Malte, la Cour a jugé pertinente la côte qui apparaît à l'écran, en excluant l'île de Filfla *(ibid.)*. Vous pouvez voir un agrandissement des côtes pertinentes, sans la ligne droite reliant Gozo et Malte. La Cour a mis

[127] DU, par. 4.24.

particulièrement l'accent sur la configuration de la Méditerranée, une mer semi-fermée, et sur l'incidence de ce facteur sur les relations côtières (*ibid.*, p. 40, par. 47 ; p. 42, par. 53).

19. Dans sa duplique, l'Ukraine n'est revenue ni sur notre analyse de l'affaire *Libye/Malte*, ni sur les arguments avancés dans notre réplique[128].

[Fin de la projection n° 6.]

[Projection n° 7 : les côtes pertinentes ou dénuées de pertinence dans l'affaire du *Golfe du Maine*.]

20. A l'inverse, l'affaire du *Golfe du Maine* est longuement examinée dans les écritures[129]. L'intérêt de ce précédent tient non pas à la distinction opérée par les Etats-Unis entre côtes «principales» et côtes «secondaires», mais à la manière dont la Chambre a traité la côte canadienne bordant la baie de Fundy (*Délimitation de la frontière maritime dans la région du golfe du Maine (Canada/Etats-Unis d'Amérique)*, *C.I.J. Recueil 1984*, p. 335-336, par. 221). Les points de la côte de la baie de Fundy qui n'ont pas été jugés pertinents pour la délimitation sont illustrés à l'écran, et sous l'onglet IV-8 du dossier de plaidoiries. Vous verrez aisément que les deux portions de la côte de la baie de Fundy que la Chambre a déclarées pertinentes ont manifestement une double relation d'adjacence et d'opposition, la côte des Etats-Unis passant dans le voisinage de la frontière terrestre entre le Maine et le Nouveau-Brunswick, qui apparaît en vert à l'écran.

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21. La situation géographique en l'espèce est très différente. Les deux segments pertinents des côtes canadiennes ne sont pas simplement en relation d'adjacence et en relation d'opposition avec la côte des Etat-Unis mais elles sont aussi en étroite proximité avec celle-ci. La solution consistant à ne pas tenir compte de ces deux segments serait revenue à refaçonner de façon inacceptable la géographie de la région[130]. En revanche, en l'espèce, les portions de la côte ukrainienne situées au nord du point S et du cap Tarkhankut se trouvent bien plus éloignées de la zone pertinente. En outre, ces portions n'ont aucun rapport avec la côte roumaine, elles n'y sont pas adjacentes et n'y font pas face. Pour ces raisons, elles ne peuvent être considérées comme faisant partie de la côte pertinente aux fins de la présente délimitation[131].

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[128] RR, par. 3.60.

[129] Voir RR, par. 3.55-3.58.

[130] RR, par. 3.58.

[131] RR, par. 3.59.

22. Dans sa duplique[132], l'Ukraine présente à nouveau l'argument selon lequel nous cherchons à établir une hiérarchie entre les différentes côtes. Dans l'affaire du *Golfe du Maine*, les Etats-Unis ont effectivement cherché à introduire une telle hiérarchie, en différenciant les côtes suivant la longueur sur laquelle elles suivaient la direction générale de l'ensemble de la côte (*C.I.J. Recueil 1984*, p. 298 et 318, par. 108 et 170) ; cette tentative a été à juste titre rejetée par la Chambre (*ibid*., p. 298, par. 109). La Roumanie a une position différente, consistant simplement à dire que, compte tenu de la configuration géographique de la zone, les segments de la côte de l'Ukraine ne sont pas tous pertinents. Et cela ne tient pas à un quelconque classement des côtes selon qu'elles sont primaires ou secondaires mais aux principes que la Cour a pris en considération pour parvenir à une délimitation équitable, en particulier la relation d'adjacence ou d'opposition entre les côtes des Parties[133] et ce que j'appellerai la proximité relative des côtes en question par rapport à la zone à délimiter.

69 [Fin de la projection n° 7.]

Madame le président, il est treize heures. Il me faudrait à peu près sept minutes.

Le PRESIDENT : Poursuivez s'il vous plaît.

M. CRAWFORD : Je vous remercie. Ma plaidoirie de demain sera ainsi plus courte.

[Projection n° 8 : côtes pertinentes/non pertinentes dans l'affaire *Jan Mayen*.]

23. L'affaire suivante est celle de *Jan Mayen* : on peut en voir la configuration côtière sous l'onglet IV-9 du dossier de plaidoiries. Il s'agissait d'une délimitation entre des côtes se faisant face qui présentaient des longueurs très différentes. La Cour a défini comme pertinentes les côtes situées entre les points E et F sur Jan Mayen et entre les points G et H au Groenland (*C.I.J. Recueil 1993*, p. 68, par. 67). Aux points H et G, la côte du Groenland change de direction, même si, en particulier au point G, ce changement n'est pas très prononcé. Les espaces maritimes situés au sud et au nord de ces points n'étaient pas considérés comme pertinents. Les espaces situés au large de ces points n'étaient pas considérés comme pertinents.

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[132] Voir DU, par. 4.25-4.27.

[133] Voir RR, par. 3.31-3.46.

24. L'Ukraine fait valoir dans sa duplique que le raisonnement suivi par la Cour dans l'affaire *Jan Mayen* vient étayer la proposition selon laquelle toute la côte de l'Ukraine orientée au sud est pertinente en l'espèce[134]. Comment parvient-elle précisément à cela, l'Ukraine ne le dit pas : *Jan Mayen* était une affaire simple et évidente où les côtes se faisaient face, sans rien présenter qui ressemblât à la configuration complexe des côtes ukrainiennes situées au nord de la zone à délimiter.

25. En outre, si l'on utilise la technique de l'Ukraine consistant à tracer des arcs de 200 milles marins, la longueur de la côte située immédiatement au sud du point G au Groenland se projetterait sur une partie au moins de la zone pertinente située entre le Groenland et Jan Mayen ; néanmoins, la Cour a jugé que seule la côte située au nord du point G était pertinente. Manifestement, l'importance des côtes se trouvant au sud du point G était éclipsée par le segment de côte au nord de ce point, lequel segment était bien plus proche de la zone à délimiter.

[Fin de la projection n° 8.]

[Projection n° 9 : côtes pertinentes/non pertinentes dans l'affaire *Nicaragua c. Honduras*.]

26. Considérons ensuite la décision la plus récente de la Cour en matière de délimitation, dans l'affaire *Nicaragua c. Honduras*. Dans cette affaire, les circonstances étaient telles que la Cour à choisir la méthode de la bissectrice. Comme vous pouvez le voir sous l'onglet IV-10 du

70 dossier de plaidoiries, la frontière terrestre représentée par le fleuve — comme vous vous en souviendrez bien évidemment — avance dans la mer au-delà de la côte et les directions générales des deux côtes s'infléchissent très nettement de part et d'autre à l'ouest. Les façades côtières devaient être suffisamment longues pour former la base d'une bissectrice, sans représenter de manière erronée la géographie côtière au voisinage immédiat : selon les propres termes de la Cour, il était nécessaire de déterminer «une façade côtière suffisamment longue pour rendre compte correctement de la configuration côtière de la zone en litige» (*Nicaragua c. Honduras*, arrêt du 8 octobre 2007, par. 298). L'important, pour la présente instance, est que vous avez rejeté l'argument du Nicaragua selon lequel il fallait utiliser la totalité de la façade côtière des parties. Vous l'avez formulé ainsi :

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[134] Voir DU, par. 4.31-4.32.

> «La première proposition du Nicaragua, consistant à considérer la façade côtière … amputerait le Honduras d'une portion importante de territoire au nord de cette ligne et accorderait ainsi un poids considérable à une partie du territoire hondurien *très éloignée de la zone à délimiter*.» (*Nicaragua c. Honduras*, arrêt du 8 octobre 2007, par. 295 ; les italiques sont de nous.)
>
> [«Nicaragua's primary proposal for the coastal fronts . . . would cut off a significant portion of Honduran territory falling north of [the] line and thus would give significant weight to Honduran territory that is *far removed from the area to be delimited*.»]

A cet égard, vous avez accordé la préférence à la configuration côtière locale par rapport à la configuration côtière régionale et donné davantage de poids aux portions de la côte qui étaient plus proches de la zone à délimiter qu'à celles qui en étaient plus éloignées.

[Fin de la projection n° 9.]

III. Conclusions à tirer de la jurisprudence

27. Compte tenu de ce qui précède, je proposerais quelques conclusions au sujet des côtes et des zones pertinentes. Elles sont au nombre de cinq :

1) Premièrement, une question de délimitation ne peut se poser que dans le cas où les côtes sont adjacentes ou se font face. Cette conclusion découle de ce que la Cour a indiqué dans l'affaire du *Plateau continental (Tunisie/Jamahiriya arabe libyenne)* : «il n'y a pas à tenir compte de la totalité des côtes de chacune d'elles ; tout segment du littoral d'une Partie dont, en raison de sa situation géographique, le prolongement ne pourrait rencontrer celui du littoral de l'autre Partie est à écarter de la suite du présent examen» (*C.I.J. Recueil 1982*, p. 61, par. 75) [«it is not the whole of the coast of each Party which can be taken into account; the submarine extension of any part of the coast of one Party which, because of its geographic situation, cannot overlap with the extension of the coast of the other, is to be excluded from further consideration by the Court»].

72 2) Deuxièmement, on ne saurait déterminer les longueurs côtières de manière mécanique, en considérant des points qui, s'ils étaient les seuls au monde, pourraient générer des titres opposés. Il faut examiner la situation côtière réelle en tenant compte de la véritable étendue de la zone à délimiter. Les côtes qui sont, selon vos propres termes, «très éloignée[s] de la zone à délimiter» (*Nicaragua c. Honduras*, arrêt du 8 octobre 2007, par. 295) [«far removed from the

area to be delimited»] ne sauraient être pertinentes dans une telle affaire, et cela est particulièrement vrai dans le cas d'une mer semi-fermée.

3) Troisièmement, une côte est donc pertinente aux fins d'une délimitation *a)* s'il s'agit d'une côte opposée ou adjacente à la côte adverse de l'autre Etat et *b)* si, dans les circonstances réelles de l'affaire, elle peut générer un titre se chevauchant avec celui que génèrerait la côte de l'autre Etat. Ces côtes comprennent les points de base qui produisent la ligne d'équidistance provisoire mais ne se réduisent pas aux côtes intermédiaires entre les points de base.
4) Quatrièmement, une côte, même si elle pouvait, en théorie, générer un titre maritime se chevauchant avec celui que produit la côte de l'autre Etat, ne sera pas jugée pertinente si d'autres portions de côte incontestablement pertinentes sont situées relativement plus près de telle manière qu'elles constituent la principale source de titre. C'est ce que j'ai appelé le principe de proximité.
5) Cinquièmement, des zones seront pertinentes si elles constituent des projections des côtes pertinentes dans la région où doit être effectuée la délimitation et s'il est tenu compte des espaces maritimes dans lesquels la délimitation doit avoir lieu ; peu importe à cet égard qu'elles relèvent ou non de la zone où se chevauchent les prétentions des parties.

Madame le président, ces cinq principes maintenant exposés, je pense que le moment est venu de lever la séance. Avec votre permission, je reviendrai demain matin pour appliquer ces conclusions aux côtes et aux zones du secteur ouest de la mer Noire.

Je vous remercie, Madame le président, Messieurs de la Cour.

Le PRESIDENT : Merci, Monsieur Crawford. Ceci met un terme à notre première matinée de plaidoiries au nom de la Roumanie et la Cour se réunira de nouveau à dix heures demain matin. L'audience est levée.

L'audience est levée à 13 h 5.