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International Court of Justice

THE HAGUE

Cour internationale de Justice

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YEAR 2008

Public sitting

held on Tuesday 9 September 2008, at 10 a.m., at the Peace Palace,

President Higgins presiding,

***in the case concerning* Maritime Delimitation in the Black Sea (Romania *v.* Ukraine)**

VERBATIM RECORD

ANNÉE 2008

Audience publique

tenue le mardi 9 septembre 2008, à 10 heures, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

***en l'affaire relative à la* Délimitation maritime en mer Noire (Roumanie c. Ukraine)**

COMPTE RENDU

Present:	President	Higgins
	Vice-President	Al-Khasawneh
	Judges	Shi
		Koroma
		Buergenthal
		Owada
		Tomka
		Abraham
		Keith
		Sepúlveda-Amor
		Bennouna
		Skotnikov
	Judges *ad hoc*	Cot
		Oxman
	Registrar	Couvreur

Présents : Mme Higgins, président
M. Al-Khasawneh, vice-président
MM. Shi
Koroma
Buergenthal
Owada
Tomka
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov, juges
MM. Cot
Oxman, juges *ad hoc*

M. Couvreur, greffier

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as Co-Agent, Counsel and Advocate;

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Mr. Mihai German, Deputy Director General, National Agency for Mineral Resources, member of the United Nations Commission on the Limits of the Continental Shelf,

Mr. Eugen Laurian, Counter-Admiral (retired),

Mr. Octavian Buzatu, Lieutenant Commander (retired),

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M. Octavian Buzatu, capitaine de corvette (en retraite),

M. Ovidiu Neghiu, capitaine, ministère roumain de la défense,

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comme conseillers techniques.

The PRESIDENT: Please be seated. The sitting is now open and the Court — I am about to tell you of a different case, which would have given great anxiety to the counsel concerned if I were to call upon him! But I am able to tell you that the Court meets this morning, of course, now to hear Ukraine in the case concerning *Maritime Delimitation in the Black Sea*. Judge Ranjeva, for reasons made known to the Court, is unable to sit this morning, and I can immediately turn to the Agent of Ukraine, His Excellency Mr. Vassylenko.

Mr. VASSYLENKO:

I. OPENING STATEMENT OF UKRAINE'S AGENT

Introduction

1. Madam President, Members of the Court, it is a great honour for me to appear before you as Agent of Ukraine in these important proceedings. This is the first time that Ukraine has appeared before the International Court of Justice. It is a measure of Ukraine's commitment to international law and to the peaceful settlement of disputes that we are here today.

2. Ukraine attaches the highest importance to the rule of law in international affairs. For us, support for international law, and strict compliance with the principles of international law set forth in the United Nations Charter, including the obligation to settle disputes through peaceful means, is a central tenet of our foreign policy. Ukraine strives to have good neighbourly relations with all of our neighbours, and to resolve the differences that may arise through negotiations and, if necessary, through other peaceful means. The present case sets a good example.

3. Ukraine's relations with Romania have been continuous and constructive and we are confident that they will remain so in the future. Of course, some issues inevitably arise where there is a long and important border with a complicated history. But the essential thing, on which both Parties firmly agree, is that such matters are to be resolved peacefully.

4. It will be clear that Ukraine has not been brought reluctantly before the Court in these proceedings. It was, in fact, at Ukraine's suggestion that the 1997 Exchange of Letters[1] provided

[1] CMU, Ann. 1.

for recourse to the Court, at the request of either Party, if negotiations did not succeed within a reasonable period. Formally speaking, it was Romania which commenced the present proceedings. But we are here by mutual consent. The Application of Romania was lodged in accordance with the agreement between the Parties. Ukraine did not raise any preliminary objections. Within the limits provided for in the Exchange of Letters, we have raised no objections to the jurisdiction of the Court.

Some general remarks concerning the case before the Court

5. Madam President, Members of the Court, before introducing Ukraine's counsel, it falls to me, as Agent of Ukraine, to say a few words of a general character related to the case. I would like to begin with some points regarding the nature of the dispute before the Court.

6. First, I would emphasize that the problem that the Parties have agreed to submit to the Court is one of delimitation of the continental shelf and exclusive economic zones. It does not concern territorial sovereignty over Serpents' Island or any other territory. There are no outstanding issues of territorial sovereignty between the Parties. Romania's attempts to bring within the scope of these legal proceedings issues relating to Ukraine's rights in respect of its sovereign territory are misplaced. I must categorically reject the assertion by Romania's Agent that the 1948 Protocol concerning USSR's sovereignty over Serpents' Island[2] was in any way illegitimate or unequal, or was in contradiction with the Paris Peace Treaty between the Allied and Associated Powers, Ukraine among them, and Romania[3]. On the contrary, the Protocol was a valid and binding instrument, the effect of which has moreover been confirmed by many subsequent agreements duly ratified by the Romanian Parliament — contrary to the impression given by the Agent of Romania last week[4].

7. I also note that Romania's Agent stated last week that Soviet troops occupied Romania in 1944 and installed a new government, which thereafter led to what he termed the illegal transfer of Serpents' Island to the Soviet Union[5]. It was striking, however, that no mention was made of

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[2] *Ibid.*, Ann. 24.

[3] *Ibid.*, Ann. 23.

[4] CR 2008/18, p. 23, para. 27 (Aurescu).

[5] *Ibid.*

Romania's role in the war prior to 1944 and the occupation of Ukrainian territory or to other aspects of history which relate to the territorial issues and place past events in perspective.

8. For my part, Madam President, I find it distasteful to rehearse historical arguments that have no relevance for the Court's present task[6]. Each Party will have their own vision of history, but these matters are quite irrelevant to these proceedings. I would simply note for the record that Ukraine has included a detailed assessment of Romania's position on historical events in Chapter 5 of our Counter-Memorial, to which I would respectfully refer the Court[7].

9. Second, it is important to emphasize that the 1997 Treaty on Relations of Good Neighbourliness and Co-operation[8] and the Exchange of Letters, along with other treaties, demonstrate clearly the Parties' understanding that there was a need to delimit the continental shelf and exclusive economic zones between the Parties. This reflects the fact that the Parties had never beforehand agreed on the delimitation of areas beyond the State border, which comprises the territorial sea.

10. The Agent of Romania asserted, in his opening remarks last week, that the 1997 Treaty represented a "legal compromise" or a "package deal" whereby Romania accepted Ukraine's sovereignty over Serpents' Island, while Ukraine accepted — in his words — the applicability in the delimitation of the continental shelf and exclusive economic zones of paragraph 3 of Article 121 of the Convention on the Law of the Sea as interpreted by Romania when signing and ratifying it[9].

11. Ukraine categorically denies the existence of any such "package deal". I headed the Ukrainian team at the final stage of negotiations leading to the 1997 Treaty and Exchange of Letters. No deals were "struck" beyond the formal framework of these instruments. Like any important treaties, the 1997 Treaty and Exchange of Letters did indeed embody a compromise. All the details of the compromise are in the 1997 Treaty and Exchange of Letters themselves. In the Exchange of Letters, for example, Ukraine undertook not to deploy offensive weapons on Serpents'

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[6]CMU, paras. 5.4-5.5

[7]*Ibid.*, paras. 5.7-5.30.

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

[9]CR 2008/18, pp. 26-29, paras. 37-45 (Aurescu).

Island. On the other hand, there is nothing at all about disregarding Serpents' Island for the purposes of delimitation.

12. Romania has produced no evidence whatsoever of any "package deal". Romania supports its assertion by reference to the text of the Exchange of Letters, with its mention of Article 121 (not, it should be noted, paragraph 3 of that Article), and to Romania's unilateral declaration upon signing and ratifying the Convention on the Law of the Sea. But neither the text of the Exchange of Letters nor the unilateral declaration establishes a "package deal", express or tacit, as asserted by Romania. This is hardly surprising since there was no such deal.

13. Romania also relies[10] upon a newspaper article, produced at the hearing, written in 2006 by Romania's former Minister for Foreign Affairs[11], that is to say long after the events in question and when this case was already before the Court. We would invite the Court to disregard this self-serving article, which in any event does not reflect Ukraine's view of the negotiations.

14. I now turn briefly to the negotiations that preceded the submission of this dispute to the Court. They were conducted in a friendly and co-operative manner. It was therefore surprising to hear the Agent of Romania suggest last week that Ukraine had put forward proposals that were not in accordance with international law or with prior agreements of the Parties[12]. We reject these allegations. Ukraine negotiated throughout in good faith. Both Ukraine, as successor State to the USSR, and Romania inherited a complicated problem. Despite 20 years of negotiations, the Soviet Union and Romania had not been able to reach agreement.

15. In these difficult circumstances, both Parties did their best to resolve the matter. Ukraine may have had a different approach in terms of the international law of the sea to that espoused by Romania, but it cannot be said to have negotiated in bad faith. It was Ukraine that introduced into the negotiations the idea of having recourse to the International Court of Justice, in order to ensure resolution of the issue which risked impeding good relations between the Parties in the future.

16. During the whole of these delimitation negotiations, there was never any suggestion that the Soviet Union and Romania had agreed to the northern limit of Romania's area of continental

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[10]CR 2008/18, pp. 25-26, paras. 32-36 (Aurescu).

[11]CMU, Ann. 22.

[12]CR 2008/18, pp. 18-22, paras. 11-22 (Aurescu).

shelf[13]. As we shall show, Romania's novel and creative arguments regarding the alleged effect of the agreements concluded in the late 1940s are impossible to reconcile with the actual political and diplomatic background to this case.

17. Romania now claims, before this Court, that there is a pre-existing agreement, in force between the Parties, providing for an all-purpose maritime boundary running along the 12-mile territorial sea arc around Serpents' Island. It is important to note at the outset that this appears to be an entirely new claim, made for the purpose of these proceedings. There is, of course, no such agreement. In the past, Romania was perfectly clear about this. They, too, were of the view that there was no agreement on the delimitation of the continental shelf or exclusive economic zones between the former USSR and Romania[14], and in particular that the bilateral agreements from 1994 and 1999 made no provision for any such delimitation. The Court will nowhere find in the diplomatic record any support for Romania's thesis that there was a pre-existing boundary around Serpents' Island.

18. Madam President, unlike the distinguished Agent of Romania, I have never had the courage to characterize cases before the Court as simple or very complex[15]. But I have always drawn the attention of my students to the very high quality of the Court's judgments, underlying that each judgment is a valuable contribution both to the maintenance of international peace and security, and to the strengthening of international law.

19. I always tell my students that it is not a sin to have one's own view of history, or even one's own understanding of international law. What is a sin, however, is to distort history by a selective approach, and to produce unsubstantiated allegations that are simply not backed up by the relevant agreements.

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[13]MR, Anns. 25, 26.

[14]CMU, Anns. 25, 26.

[15]CR 2008/18, p. 16, paras. 6, 7 (Aurescu).

Ukraine's case before the Court

[Slide: sketch-map of the north-western part of the Black Sea.]

20. After these general remarks, I will now turn briefly to Ukraine's case. You will see on the screen a map of the north-western part of the Black Sea[16]. This illustrates the coastline of the Parties, and covers the maritime area to be delimited by the Court.

21. There is one basic point that I would like to make at the outset, the importance of which cannot, in my opinion, be overstated. Ukraine's coast dominates this part of the Black Sea[17]. This is a geographical fact and is apparent from a glance at any map. This basic fact is, in Ukraine's view, one of the salient characteristics of this case.

22. Contrary to what Romania alleged last week[18], it is not Ukraine but Romania itself that has sought to depict the case as being a dispute about Serpents' Island. Yet Serpents' Island is just one element of the long coastline of Ukraine in the north-western part of the Black Sea. Romania's attempt to focus on this one island while ignoring large swathes of Ukrainian coastline that face the area to be delimited reflects Romania's discomfort with the fact of the great disparity between the coastal lengths of Ukraine and Romania. We for our part might just as well call this the "Sulina dyke" case, since that man-made structure certainly has a wholly disproportionate effect on the delimitation line that Romania espouses.

23. I should once again emphasize that the present case is about delimitation of the continental shelf and the exclusive economic zones. The other side may try to focus the case essentially on Serpents' Island, distracting attention from the many other aspects of the proceedings, not least of which is the predominant position of Ukraine's coastlines in the relevant area. But it is not a case exclusively, or even principally, about Serpents' Island.

24. I should also like to make clear Ukraine's position on recent activities on Serpents' Island to which the Romanian Agent also made reference last week[19]. Serpents' Island is part of Ukraine's sovereign territory. Ukraine has as much right to develop Serpents' Island as it has to

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[16]CMU, fig. 1-1.

[17]CMU, paras. 8.10-8.34 ; RU, paras. 6.49-6.56.

[18]CR 2008/20, p. 10, para. 1 (Pellet).

[19]CR 2008/20, pp. 54-66, paras. 1-33 (Aurescu).

develop any other part of its territory. That is precisely what is happening. Romania has made much of recent development activities, suggesting that they are being conducted with a view to strengthening Ukraine's case in the present proceedings. Yet these activities are no more than a continuation of ones that have been going on for years, of activities that were also conducted or envisaged during the period when the island was under Romanian control.

25. In his intervention last Thursday, the Agent of Romania drew heavily upon misleading press reports, and gave a distorted account of Ukrainian official documents[20]. He used colourful but irrelevant historical anecdotes. He went so far as to accuse Ukraine of "deceptive publicity" and raised the concept of abuse of rights[21]. These are serious allegations. They are completely without foundation. Ukraine's activities on Serpents' Island have been conducted throughout openly and in good faith, with a view to the further development of the island's infrastructure and to support economic activities on the island. These activities in no way are aimed at the transformation of the natural dimensions of the island as the Agent of Romania asserts. As counsel for Ukraine will explain, there is no basis whatsoever for these allegations.

26. I wish to place on record, before the Court, that the continuing development activities on Serpents' Island, conducted since well before the crystallization of the dispute and the commencement of the proceedings before the Court, have not in any sense altered the legal status of the island. Nor have they changed, nor were they ever intended to change, the natural characteristics of Serpents' Island. Romania's complaints are beside the point, and irrelevant to the case. The fact that the island can accommodate such activities, which have been conducted for many years to develop the island's infrastructure and which continue to be conducted legitimately today, undermines any suggestion that the island is a rock within the meaning of paragraph 3 of Article 121.

Ukraine's line

27. I shall now make a few brief comments on Ukraine's proposed delimitation line.

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[20] *Ibid.*

[21] *Ibid.*, p. 64, para. 27.

28. Ukraine has taken as the starting-point of the delimitation to be decided by this Court the endpoint of the border of the Parties' territorial seas fixed in the 2003 Treaty on the Ukrainian-Romanian State Border Régime[22]. The Parties are in agreement on this starting-point.

29. Ukraine's approach is grounded in international law which, as set out in Article 38 of the Court's Statute, is clearly the applicable law in this case. Ukraine has thus applied the "equitable principles/relevant circumstances" principle of delimitation to the facts of the case, which has been developed in the jurisprudence of this Court and which has been followed by tribunals in a number of important arbitrations.

30. Ukraine has therefore drawn a provisional equidistance line, measured from the nearest points on the baselines from which the breadth of the Parties' territorial seas is measured.

31. This equidistance line has subsequently been adjusted to reflect the most striking and most important circumstance that characterizes this dispute, namely the fact that it is the Ukrainian coast which dominates the area to be delimited by this Court. The geography of the north-western part of the Black Sea is a fact which is clearly relevant, and the substantial disparity of the Parties' coasts is also a fact which, in Ukraine's view, must necessarily be taken into account in order to ensure an equitable result.

[Map with claim line]

32. The adjusted line represents Ukraine's claim line[23], and, again following principles developed in the jurisprudence of this Court, Ukraine then applied the element of proportionality as a test, not as a method of delimitation in and of itself, and has compared the ratio between the areas of continental shelf and exclusive economic zones allocated to the Parties by Ukraine's claim line to the ratio of the lengths of the Parties' relevant coasts. As Ukraine has demonstrated, there is no disproportion in the result advocated by Ukraine[24]. This underscores the equitableness of Ukraine's delimitation line.

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[22]CMU, Ann. 3.

[23]CMU, p. 240, fig. 9-3.

[24]CMU, p. 247, fig. 10-2.

33. Contrary to the suggestion of counsel last Friday, Ukraine's delimitation line is not advanced as a kind of "bargaining position" in an open-air market[25]. It is a position that is grounded in principles of international law. Similarly, as my colleagues will show, Romania's claim is scarcely a "reasonable" one. Ultimately, of course, it is for the Court to decide on the merits of the positions the Parties put to you.

Introduction of team and order of first round speeches

34. Madam President, Members of the Court, in conclusion, I shall introduce Ukraine's legal team, and indicate how we propose to organize our first round of pleadings. I should first like to introduce my Co-Agents, His Excellency Mr. Oleksandr Kupchyshyn, Deputy-Foreign Minister of Ukraine, and Mr. Volodymyr Krokhmal, Director of the Legal and Treaty Department of the Ministry of Foreign Affairs of Ukraine.

35. Our counsel will address the Court in the following order. First, Mr. Rodman Bundy will give a brief overview of the case.

36. Next, Sir Michael Wood will set out the diplomatic background to the dispute, and in particular take you through the various agreements dating from the late 1940s to 2003.

37. Professor Quéneudec will then address the applicable law.

38. Then, tomorrow morning, Mr. Bundy will consider the all important geographical context, including the relevant coasts and relevant area.

39. Sir Michael will then take you through the arguments concerning Romania's novel and extraordinary claim that there is already an agreement on an all-purpose maritime boundary around Serpents' Island.

40. Ms Loretta Malintoppi will then describe a number of aspects in relation to the conduct of the Parties that have a bearing on the case.

41. Mr. Bundy will deal next with the flawed nature of Romania's claim line and the treatment of islands in maritime delimitation.

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[25]CR 2008/21, p. 66, para. 75.

42. Ms Malintoppi will then discuss certain "irrelevant" circumstances raised by Romania, the fact that the Black Sea is enclosed, and the existing delimitation agreements therein; and Romania's characterization of Serpents' Island.

43. Afterwards, Professor Quéneudec will deal with the construction of the provisional equidistance line, and the relevant circumstances which should lead to a modification of the line. He will describe the line which Ukraine proposes to the Court.

44. And, concluding the first round, we will demonstrate the equitable character of Ukraine's line, and the inequitable nature of Romania's line, applying among other things the proportionality test. We will also draw some brief conclusions from our first round pleadings.

45. That concludes my preliminary remarks. Madam President, Members of the Court, thank you for your attention. I would now ask you to call upon Mr. Rodman Bundy to continue Ukraine's presentation.

The PRESIDENT: Thank you, Mr. Vassylenko. I now call upon Mr. Bundy.

Mr. BUNDY: Thank you, Madam President, Members of the Court.

II. AN OVERVIEW OF UKRAINE'S CASE

1. Madam President, Members of the Court, once again, it is a great honour for me to appear before you and it is also a privilege to represent Ukraine in this important case.

Introduction

2. The distinguished Agent for Ukraine has highlighted the scope and the essential features of the case and my task this morning is to present an overview of Ukraine's case on delimitation and to contrast that case with the inherently flawed and, in many respects, contradictory approach of Romania.

3. In approaching this task, I intend to focus on four main issues on which the Parties continue to be divided.

First, the significance of the overall geographic setting in the case for purposes of achieving an equitable result;

Second, I will deal with the starting-point for the Court's task — in other words, the importance of the agreed starting-point for delimiting the continental shelf and exclusive economic zones of the Parties;

Third, I will then touch briefly on the manner in which Romania has misapplied the basic rule of maritime delimitation to the facts of the case — the equitable principles/relevant circumstances, equidistance/special circumstances rule — as contrasted with Ukraine's approach to delimitation which reflects the applicable law and respects the geographic facts; and

The fourth matter I will deal with is the ill-founded and, indeed, contradictory approach that Romania has adopted with respect to applying the proportionality test to the Parties' respective claims.

4. These points will obviously be developed further by my colleagues and myself in subsequent presentations. At this stage, it is appropriate to note that the principal issues which divide the Parties may be readily identified as a result of the Parties' written pleadings and the first round presentation of Romania last week. Bearing in mind Practice Direction VI, along with paragraph 1 of Article 60 of the Rules of Court, Ukraine will endeavour to focus on these issues.

1. The general geographic setting

[Slide: fig. 1-1 to Ukraine's Counter-Memorial without the shaded relevant area]

5. Let me start with the general geographic setting within which the delimitation is to be carried out, and the significance that the coastal geography has for arriving at an equitable delimitation.

6. The map on the screen, which is tab 1 in your folders, shows the Black Sea as a whole: and obviously we have shifted our attention to the western part of the Black Sea this morning. The Court will appreciate that, while there are a number of States which possess coasts that front the Black Sea, the area within which the present delimitation is to be effected is confined to the north-west corner of the Black Sea where only Ukraine and Romania have coasts which abut the area.

7. Now two important considerations flow from this basic geographic fact.

8. First, a glance at the map on the screen shows very clearly the geographical predominance of Ukraine's coast in this area: this is in tab 2 of your folders. Ukraine's coast faces and fronts on three sides of the area [on the slide, highlight in turn each segment of Ukraine's coast in green]: — on the west, from the terminal point of the land boundary with Romania to a point in the vicinity of Odessa; on the north, along the entire stretch of coast from Odessa to Cape Tarkhankut; and on the east, along the west-facing coast of Crimea down to Cape Sarych. In addition, of course, there is Serpents' Island belonging to Ukraine, which lies some 19 miles off the east-facing coast of Ukraine to the north of the terminal point on the land boundary and which forms also part of Ukraine's coastal geography.

9. Romania's coast, in contrast, is relatively short — even taking the entire coast from the land boundary with Ukraine down to the land boundary with Bulgaria into account [on slide, highlight Romania's coast in red].

10. This is the geographic reality of the case. Ukraine has a long coast bordering three sides of the area to be delimited and an island, while Romania has a short coast fronting just part of one side of that area. As the Court's pronouncement in the *North Sea Continental Shelf* cases that the "land dominates the sea" remains as true today as it did some 40 years ago, so also does its statement of principle that:

> "Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline." (*North Sea Continental Shelf, Federal Republic of Germany/Denmark*; *North Sea Continental Shelf, Federal Republic of Germany/Netherlands, Judgment, I.C.J. Reports 1969*, pp. 49-50, para. 91.)

11. The second point that I would like to note is that the coasts of the Parties which border the north-west corner of the Black Sea all lie less than 200 nautical miles from each other, and thus generate overlapping maritime entitlements projecting from those coasts which meet and overlap. It is this situation that gives rise to the need for continental shelf and exclusive economic zone delimitation in this area.

12. That brings me to a major flaw in Romania's case. Romania is well aware of the fact that *coastal* geography is paramount in maritime delimitation cases — particularly those involving

the delimitation of a single maritime boundary, as we have here — and it is also aware that the Court has *consistently held* that significant differences in coastal lengths constitute a relevant circumstance to be taken into account in arriving at an equitable solution. So how then does Romania confront this issue? Quite simply, by refashioning geography.

[Slide: fig. 3-3 to Ukraine's Counter-Memorial]

13. The manner in which this is done, as evidenced in Romania's written pleadings and again in oral argument last week, is quite striking in its audacity. Romania simply eliminates from consideration roughly half of Ukraine's coast extending all the way from a point arbitrarily labelled "point S" by Romania [arrow pointing to "point S" on fig. 3-3] over to Cape Tarkhankut [arrow on slide and depict in red the suppressed Ukrainian coast], while keeping, at the same time, its entire coast in play. This can be seen on the screen and in tab 3.

14. Now this exercise in severely amputating Ukraine's relevant coast is artificial in the extreme and has no legal justification. I will return later, tomorrow, with a closer look at the relevant coasts of the Parties and their role in the delimitation process. But for present purposes, what is clear is that the entire south-facing coast of Ukraine — the part of the coast that Romania seeks to suppress — generates 200-nautical-mile maritime entitlements under international law throughout the area to be delimited and that those coasts should be given no less consideration than the other coasts of the Parties bordering the relevant area.

15. Last week, my good friend Professor Crawford introduced a novel proposition, which he termed the "principle of comparative proximity", and complained that Ukraine's south-facing coast is too far from the area being delimited to be considered as a relevant coast (CR 2008/18, p. 71, para. 27 (4)). Now let me display on the screen one of Professor Crawford's illustrations showing Romania's claim line which places the issue in perspective and disproves, I would respectfully suggest, my learned friend's thesis. [Place tab IV-3 map on screen.]

16. I would like to focus on Romania's coast and the part of that coast that lies south of the Sacalin peninsula — the part of the coast that is now being highlighted on the map on the screen. Despite the fact that this is by far the longest stretch of Romania's coast that Romania considers to be a relevant coast, our opponents have been reluctant to discuss it. The distinguished Co-Agent of Romania ignored this part of Romania's coast altogether in his geographical overview last week,

and Professor Crawford barely mentioned it in his own interventions. For his part, Professor Lowe bravely tried to resurrect its importance, but, with respect, the arguments for maintaining this part of Romania's coast as a relevant coast while suppressing half of Ukraine's coast were unpersuasive. As I shall show, there are good reasons for Romania to be sensitive about its southern coast.

17. If we take a point about half-way down Romania's "opposite coasts" claim line, and then draw one line directly from that point to Romania's coast south of the Sacalin peninsula, and then a second line between Romania's claim and the middle of Ukraine's south-facing coast, the Court will observe that the distance of each coast from this point on Romania's claim line is exactly the same. A similar line can be drawn to Ukraine's straight baseline lying further east, as is now being shown on the screen, as well as to a point north of what Romania artificially labels "point S". These are included in the graphic that you will find under tab 4 of your folders.

18. Now international law does not require such exactitude when it comes to identifying the relevant coasts of a party to a delimitation dispute. As I said, the rest of Ukraine's coast along the northern stretch of the Black Sea in this corner also generates maritime entitlements extending to a distance of 200 nautical miles. And yet Romania would discard Ukraine's entire south-facing coast as lying too far away while taking full account of its own coast south of the Sacalin peninsula based on Professor Crawford's "proximity" theory. Now that is a peculiar way of applying equitable principles and of comparing "like with like".

[Fig. 3-3 back on screen]

19. I would also point out that the part of Ukraine's coast which Romania tries to suppress is not relevant to any delimitation with a third State in the region because of the location of such States far to the south and east. In contrast, the south-facing Ukrainian coast *is* specifically relevant to the delimitation with Romania because it projects into the entire north-west corner of the Black Sea, which is the focus of the present dispute. This distinguishes the present case from examples such as *Tunisia/Libya*, *Libya/Malta*, and the *Jan Mayen* cases cited by counsel for Romania last week in which certain coasts in those cases were not considered to be relevant because they faced in a different direction, indeed towards third States in the area, not towards the

area involving delimitation with the opposing party in each case. It was because of the presence of third States in those other cases that coasts were limited.

20. The third aspect of the overall geographic context that deserves mention at this stage concerns a matter that I have just alluded to, and that is the presence of third States in the region. Romania contends that third State delimitation practice in the Black Sea should dictate the method of delimitation that is employed as between Ukraine and Romania because of the enclosed nature of the Black Sea. And indeed, Romania's Co-Agent last week went so far as to tell the Court that it is *necessary*, those were his words, *necessary* that there exist a consistency between the methods used elsewhere in the Black Sea and those used in this case lest an inequitable and incompatible result arise (CR 2008/18, pp. 58-59, para. 33). And with the greatest respect, that proposition is demonstrably unsound, and it has never been adopted by the Court in previous cases where it has dealt with maritime delimitation in enclosed or semi-enclosed seas.

[Replace map of Black Sea on screen]

21. It is evident, as you can see from the map on the screen that there are no third States which lie in the immediate vicinity of the area to be delimited between Ukraine and Romania. Both Bulgaria and Turkey, for example, lay far to the south of our area of concern and other States lay far to the east. None of those States has applied to intervene in the case and none of them, at least to Ukraine's knowledge, has sought to be provided with the written pleadings, at least prior to the opening of these hearings.

22. Turkey concluded a delimitation agreement with the Soviet Union in 1978 to which Ukraine has succeeded in part. And the course of that delimitation now appears on the screen. [Add the line from fig. 8-10 to Ukraine's Counter-Memorial on the map.] Turkey and Bulgaria also agreed their maritime boundary which you can see on the screen in 1997 and these are also at tab 5 of your folders. [Add the line on fig. 8-11 to Ukraine's Counter-Memorial to the Black Sea map.] And the Court will appreciate that these two delimitations fall to the south and east of the relevant area in this case. Romania has not protested or reserved its position with respect to either of these two agreements but obviously accepts them.

23. Now as Ms Malintoppi will develop in more detail, third State agreements are the product of bilateral negotiations and are *res inter alios acta* as far as the Parties to this case are

concerned. Whatever methods of delimitation those third States considered appropriate were a function of the particular circumstances with which they were confronted and had nothing to do with the north-west corner of the Black Sea relevant to the Ukraine-Romania delimitation with which the Court is presently concerned.

24. At most, the potential interests of third States only come into play at the very extremity of the maritime boundary to be delimited between Ukraine and Romania. And Ukraine's delimitation line respects these potential third State rights. To the extent the Court considers that it is necessary to take into account the interests of third States, Ukraine is confident that the Court will be able to draw upon its past experience in similar situations. Otherwise, however, the existence of third State delimitations in the Black Sea has nothing to do with the choice of the appropriate method — or appropriate methods — of delimitation applicable, as between Ukraine and Romania. As is always the case, delimitation in a particular case depends on the geographic and other circumstances characterizing the specific area to be delimited.

25. The final point deserving mention at this stage in connection with the geographic setting is that, because of the particular configuration of the north-west corner of the Black Sea, it is a relatively straightforward exercise to identify the "relevant area" in this case. [On slide, show Ukraine's relevant area with Turkey/USSR and Turkey Bulgaria delimitations] A glance at the map now being displayed on the screen shows the area where the maritime projections of the Parties' coasts meet and overlap, without trespassing on areas relevant to actual or potential delimitations with third States. That area stops in the south-west where the potential rights of Bulgaria come into play, and it also takes into account the fact that areas lying further east have already been delimited between Turkey and the former Soviet Union — now Ukraine — and have nothing to do with Romania.

26. It is, therefore, within the green shaded area you see on the map that the principles and rules of international law governing maritime delimitation — the equidistance/special circumstances rule — fall to be applied, and that the criterion of proportionality can be applied as an *ex post facto* test to the respective claims of the Parties. This is the approach that Ukraine has adopted in its written pleadings, and it is the approach which remains Ukraine's position today, notwithstanding Romania's first round oral presentation last week.

2. The starting-point for the delimitation

27. Madam President, Members of the Court, I now come to the second part of my remarks in which I would like to recall certain essential points relating to the starting-point for the delimitation — the starting-point of the Court's task, if you will.

28. As Ukraine's Agent has described, the 1997 Exchange of Letters, on which the Court's jurisdiction is based, provided that the Parties would conclude a separate treaty on the régime of the State border between the two countries — a border that included the territorial sea. They also agreed to settle the problem of delimitation of the continental shelf and exclusive economic zone by negotiations or, failing an agreement within a period of two years and, provided, in principle, that the State Border Régime Treaty had entered into force, by either State applying to this Court to decide the matter.

29. So, a two-step process was thus envisaged: first, the conclusion of a treaty on the State border régime; and, second, negotiations to delimit the continental shelf and exclusive economic zones of the Parties.

30. In 2003, the Parties did conclude a treaty on the State border and it entered into force in 2004. With respect to the maritime portion of that agreement, Article 1 of the 2003 Treaty provides that the State border extends seaward to a point, identified by specific co-ordinates, where the outer limit of Ukraine's 12-mile territorial sea measured from Serpents' Island intersects with the outer limit of Romania's own 12-mile territorial sea. You can see this on the screen. [Slide: map showing the maritime section of 2003 boundary]

31. The location of the endpoint of the territorial sea portion of the State border fixed by the 2003 Treaty can also be found at tab 6 of your folders. This endpoint is labelled "point F" by Romania. As for the significance of this point for the present case, there is one important matter on which the Parties are in agreement, and another, equally important, issue where their positions radically diverge and where Romania's arguments are fundamentally misplaced.

32. The point of agreement between the Parties is that both Parties — both Parties — acknowledge that the final point of the State border established by the 2003 Treaty constitutes the starting-point for the delimitation by the Court of the continental shelf and exclusive economic

zones seaward of that point. Romania stated this very clearly in its Memorial — and I would like to place the quote on the screen and read it. Romania stated:

[Place quote on slide]

> "The question of territorial sea delimitation is not before the Court. That being so, the principal importance of the 2003 Border Regime Treaty (other than in relation to the question of the jurisdiction of the Court) is that the final point of the boundary defined by the 2003 Treaty (Point F) constitutes the starting point of the delimitation line which the Court is called upon to establish." (MR, para. 7.19.)

33. The necessary implication of this statement — that point F is the starting-point of the delimitation that the Court is called upon to establish — is that the Parties have *not* previously delimited any maritime spaces beyond the endpoint fixed by the 2003 Treaty, beyond point F. In other words, while the Parties were successful in agreeing their territorial sea boundary out to a distance of 12 nautical miles from each Party's baselines, they were not able to agree on their continental shelf and exclusive economic zone boundary beyond that point. That latter delimitation is the subject-matter of the present case.

34. The fundamental point of disagreement between the Parties is that, notwithstanding Romania's acceptance of the fact that the final point fixed by the 2003 Treaty constitutes the starting-point for the Court's task in this case, notwithstanding that, Romania still asserts that there is a pre-existing, all-purpose maritime boundary extending beyond the last point defined by the 2003 Treaty. This so-called pre-existing boundary is said to extend along a 12-mile arc south and east of Serpents' Island all the way up to a point, labelled "point X" by Romania, lying east of Serpents' Island. [Add to map a dashed line around Serpents' Island to "point X"] Now, Romania has been unable to identify any delimitation agreement which actually identifies this mysterious "point X", or its co-ordinates, but it nonetheless maintains that a boundary up to "point X", and "point X" itself, have previously been agreed.

35. That proposition is clearly misguided and, amongst other reasons, makes no sense when considered in the light of the 2003 Treaty. Because, in 2003, the Parties essentially finalized the process of delimiting their State border — it is labelled a "State border" treaty — that had begun in 1949 — which was another "State border" labelled treaty. In 2003, the Parties finalized the process that had actually begun in 1949 and neither in 1949 nor at any time thereafter until the 2003 Treaty was concluded were the precise co-ordinates of the endpoint of the State border ever agreed. That

was achieved for the first, and for the only, time in the 2003 Treaty, in which the Parties were able to delimit the State border up to the point where the outer limits of their respective 12-mile territorial seas intersected. The first time you get the co-ordinates of that endpoint on the State border is in the 2003 Treaty and nothing beyond.

36. There was no agreement seaward of that point, whether to "point X" or to any other point; and it is inconceivable that, had a maritime boundary already existed seaward of the 2003 Treaty endpoint, it would not have been referred to in the 1997 Agreements, which did envisage future negotiations of the maritime boundary beyond the State border, or in the 2003 Treaty itself. Needless to say, there is no such reference and, as my colleague Sir Michael Wood will explain, Romania's attempt to construct a non-existent, all-purpose maritime boundary based on agreements entered into between Romania and the former Soviet Union in the late 1940s is entirely misconceived.

37. In short, the Parties agree that the Court's task is to delimit the continental shelf and exclusive economic zones appertaining to the Parties beyond the point — Romania's "point F" — having the co-ordinates specified in the 2003 Treaty. This necessarily implies that there is no agreed boundary beyond that point. The task of the Court, therefore, is to delimit a single continental shelf and EEZ boundary beyond that point F.

3. Application of the equitable principles/relevant circumstances rule to the facts of the case

38. That brings me to the third part of my presentation, in which I would like to address the main differences that have arisen between the Parties with respect to the relevant principles and rules of international law and the manner in which they are applied to the facts of the case, and Professor Quéneudec will be dealing with these matters in greater detail subsequently.

39. Ukraine's position has been clearly spelled out in its written pleadings. Based on the Court's jurisprudence, Ukraine considers that it is now well settled that the basic rule of maritime delimitation finds its expression in what is known as the "equitable principles/relevant circumstances" rule, which is equivalent to the "equidistance/special circumstances" rule.

40. As the Court has noted on several occasions, and as the tribunals in both the *Barbados/Trinidad and Tobago* arbitration and the *Guyana/Suriname* Annex VII arbitration have

also held, application of this rule involves essentially a two-step process. The first step is to construct a provisional equidistance line, and the second step is then to identify the relevant circumstances characterizing the area to be delimited and to assess whether, and to what extent, those circumstances call for the adjustment of the provisional equidistance line in order to achieve an equitable result.

41. The case law also confirms that, in certain situations, a third step can be applied. This involves testing the delimitation line that is arrived at as a product of the first two steps against the criterion of proportionality. In this manner, the Court can verify that the line does not produce a result that is overly disproportionate in terms of the maritime areas that appertain to the Parties in relation to the lengths of their respective coasts that border on the area to be delimited. Now this test — the proportionality test — is distinct from treating a significant difference in the lengths of the coasts of the Parties as a relevant circumstance — a factor which is assessed in the second stage — the relevant circumstances stage — of the process.

42. Obviously, Ukraine recognizes that proportionality in and of itself is not a method of delimitation, and that maritime delimitation is not an exercise in distributive justice. And Ukraine's line is not based on such a method. Moreover, in certain geographic situations — for example, where there are third States situated in the immediate area subject to delimitation or where the delimitation takes place in an open sea — it is not always practical to apply the proportionality test as an *ex post facto* test because it is not possible to identify the relevant area with sufficient precision. But, as I noted, because the present case is confined to a well-defined area in the north-west corner of the Black Sea, where only Ukraine and Romania possess coasts which abut that area, the proportionality test can be readily applied to the claim lines of the Parties as a third step in the delimitation process in this case, in order to test the equitableness of the result that those claim lines produce.

43. In its written pleadings, Romania purported to accept this basic approach to delimitation for the purposes of the present case. However, Romania misapplies the law at each step of the process, the result of which is a really quite seriously distorted approach to delimitation and a claim line that bears no relation to the actual geographic facts of the case or that satisfies the test of proportionality.

44. To give the Court a flavour of the different manner in which the Parties have reflected the applicable law, let me start with the first step in the process — the plotting of the provisional equidistance line.

45. In principle, this exercise should be straightforward. The coastal geography of the Parties is what it is — a product of both nature, in terms of the configuration of the coasts of the Parties and, of course, of political geography, in terms of the attribution of sovereignty over land areas and, in this case, the existence of an agreed State border comprising both a land segment and a territorial sea border out to the point F agreed in the 2003 Treaty.

46. Because the establishment of a provisional equidistance line should take the coastal geography as it is — that is, it should be "delimitation neutral", in a sense, without trying to prejudge any of the relevant circumstances, or the *potentially* relevant circumstances — the Court's jurisprudence, as reflected in the *Qatar* v. *Bahrain* case and the *Cameroon* v. *Nigeria* case, makes it clear that the provisional line is one which is equidistant from the baselines from which each State measures the breadth of its respective territorial sea. That is also clearly what is provided for in Article 15 of the Law of the Sea Convention, which is the basis for the "equidistance/special circumstances" rule.

47. Ukraine has adopted this methodology. [Slide: map showing the course of Ukraine's provisional equidistance line with control points indicated] On the Ukrainian side, Ukraine has used the relevant base points located on its own baselines, including on the baseline of Serpents' Island, from which the breadth of Ukraine's territorial sea is measured.

48. And on the Romanian side, Ukraine has done the same thing — you can see this in tab 7 and on the screen. It has plotted the equidistance line using the relevant base points on Romania's baselines, which control the measurement of the outer limit of Romania's own territorial sea. Now, one of those base points is located on a man-made feature, extending some 7.5 km out to sea — the famous Sulina dyke — which Romania claims, for purposes of establishing the outer limit of its territorial sea, as a permanent harbour work forming an integral part of the harbour system. The Sulina dyke is located just south of the land boundary between the two countries. [On slide, arrow pointing to the location of the Sulina dyke] Because the outer breadth of Romania's territorial sea is measured from Romania's baselines, which include the end of this dyke amongst those baselines,

Ukraine has used the seaward point on the dyke as a relevant base point — just as it has used Serpents' Island, which has a baseline as a base point. But, this is obviously without prejudice to the question whether, at the second stage of the exercise — the "relevant circumstances" stage — an artificial structure of this kind should have any effect at all on the course of an equitable delimitation line which, above all, should be based on the actual geographic facts characterizing the area. But that is Ukraine's method for constructing the provisional equidistance line.

49. Now, let me turn to Romania's position and here, we run into a host of problems.

50. The first major flaw in Romania's methodology is that the initial part of its claim line is not based at all on the methodology endorsed by the Court. Indeed, the first step in maritime delimitation is discarded in favour of Romania's assertion that there is a pre-existing boundary extending half-way around Serpents' Island to "point X". As I have already explained, that thesis is divorced from what the Parties agreed in their 2003 Treaty and has no basis in earlier agreements concluded between Romania and the former Soviet Union.

51. The second part of Romania's claim line fares no better and is also quite fundamentally flawed. South and east of Serpents' Island, Romania purports to adopt a provisional equidistance line. But that is misleading for the following reasons.

52. First, the provisional equidistance line that Romania posits is not a true equidistance line in any sense of the word. Reduced to its essentials, Romania totally ignores the base points located on the baseline of Serpents' Island for purposes of constructing the equidistance line. But at the same time, Romania has no hesitation using an artificial structure — the Sulina dyke — as a base point for plotting the line. In other words, our distinguished opponents rely on a protruding man-made structure in establishing the provisional equidistance line, but take no account of a natural feature possessing an actual coast — Serpents' Island — for the same purpose. The difference in the Parties' positions can be seen on the map on the screen — you have seen this before — and it is at tab 8 in your folders. [Place slide on map showing Romania's provisional equidistance line as compared with Ukraine's provisional equidistance line.]

53. Last Thursday, Professor Pellet acknowledged expressly — not once, twice — that the provisional equidistance line should be a line — and I am going to quote Professor Pellet, and the Court will excuse my French — "dont tous les points sont équidistants des points les plus proches

des lignes de base à partir desquels est mesurée la largeur de la mer territoriale de chacun des deux Etats" (CR 2008/20, p. 15, para. 12; and see CR 2008/20, p. 17, para. 18). So there is agreement between the Parties on this important point of principle.

54. Nonetheless, Professor Pellet went on to argue that Serpents' Island cannot be used as a base point for the construction of the provisional equidistance line because the island has no baseline — that was his thesis — Serpents' Island has no baseline and it is a proposition he sought to support by reference to Ukraine's notification of its straight baselines to the United Nations in 1992.

55. That argument, with the greatest respect, is truly astonishing, and finds no support in international law. I will have more to say on the matter in a later intervention, but the plain fact is that, under international law, all islands have baselines regardless of their size: all islands have baselines. Now, in some instances, those baselines will be part of a system of straight baselines enacted in conformity with Article 7 of the 1982 Convention. And in other instances, the baseline will be the low-water mark around the island, as is the case for Serpents' Island. The fact that every island, at a minimum, has a territorial sea necessarily implies that every island has a baseline as well. As the authors of one well-respected study entitled *The Law of the Sea*, have written:

> "With large islands, such as Great Britain, Greenland and Madagascar, there are obviously no problems. But it also means that every islet or rock, no matter how small in size, has a territorial sea, i.e., the islet or rock, or rather the low-water mark around it, will serve as part of the baseline." (A.V. Lowe, R.R. Churchill, *The Law of the Sea*, Third Edition, Juris Publishing, Manchester University Press, p. 49.)

The quote is obviously correct.

56. That being the case, and given that the provisional equidistance line should be drawn from the baselines of the Parties from which the breadth of their territorial seas is measured, it follows that because Serpents' Island has a baseline, that baseline, in turn, provides base points for establishing the provisional equidistance line.

57. As can be seen from the map on the screen, Romania's provisional equidistance line bears no relation to a line which is genuinely equidistant from the nearest base points on the baselines of the Parties from which the outer limits of their territorial seas are measured.

58. Moreover, the huge effect that Romania's use of the seaward tip of the Sulina dyke as a base point has on the course of the line can be seen on another graphic which is now being

displayed on the screen and which is at tab 9 of your folders. That shows the course of the provisional equidistance line if *both* Serpents' Island *and* the Sulina dyke are ignored as base points. Romania only ignores Serpents' Island but if you ignored both, *quod non*, this would be the difference. [Add the equidistance line ignoring Sulina dyke and Serpents' Island to the map.]

59. In short, Romania's version of the provisional equidistance line is plainly skewed in its favour. The notion that a protruding, man-made structure can be given a full effect for purposes of plotting the provisional equidistance line, while a natural feature — an island — can simply be ignored does not comport with a proper application of the law or with equitable principles. Yet Romania's claim line is based precisely on that premise and, as we shall see, a large part of that claim is controlled by the dyke. Last Thursday, my good friend Professor Pellet complained that a base point located on Serpents' Island controlled 137 km of Ukraine's provisional equidistance line (CR 2008/20, p. 11, para. 2). What he conspicuously failed to mention is that the tip of the Sulina dyke controls 160 km of Romania's provisional equidistance line.

60. The second shortcoming in Romania's provisional equidistance line is that, east of Serpents' Island, Romania actually claims more than that line. Here, Romania has been confronted with the fact that its self-generated "point X" does not lie on the provisional equidistance line even as improperly calculated by Romania. As a result, Romania is forced to try and marry up its "point X" with its wrongly plotted provisional equidistance line, and to argue that Romania is entitled to additional maritime spaces over and above its provisional line as a kind of distributive justice to compensate for areas that Romania says it "lost" when it was allegedly forced to agree a State border with the Soviet Union in 1949.

61. We will be focussing on this highly artificial aspect of Romania's claim in a later presentation. I merely want to flag it now and will come back to it. But for present purposes, the point I would respectfully like to recall is the fact that Romania has misapplied the first step in the delimitation process — the establishment of the provisional equidistance line.

62. If I now move to the second stage of the process — the identification and the weighting of the relevant circumstances which may call for an adjustment being made to the provisional line — we will see that Romania's position here, too, runs into a host of problems.

63. Now it can scarcely be disputed that the most important factor in maritime delimitation is the geography of the area to be delimited — particularly the configuration and the lengths of the parties' relevant coasts. Without entering into details at this stage — I will come back to the relevant coasts tomorrow — I would simply recall the point that I discussed at the outset of my presentation which is the fact that in terms of coastal geography, Ukraine has a predominant position.

64. Whether the coasts of the Parties are measured in accordance with their general direction or by taking into account their sinuosities, Ukraine's coast fronting the relevant area is some four times longer than Romania's coast. In addition, Serpents' Island also forms part of Ukraine's coastal geography and must be taken into account in any equitable delimitation of the continental shelf and EEZ.

65. There is clearly ample jurisprudence which supports the principle that significant differences in the length of the Parties' relevant coasts constitute a relevant circumstance justifying the shifting of the provisional equidistance line in favour of the State with the longer coast in order to achieve an equitable delimitation.

66. There is also State practice which reflects the same proposition. The France/Spain agreement being a key example. The present case fits comfortably within these precedents. Ukraine's coast borders three sides of the relevant area, and is much longer than the relevant coast of Romania facing the same area. In these circumstances, there are sound legal grounds, Ukraine submits, for adjusting the provisional equidistance line to take into account these facts.

67. As will be explained by my colleague, Professor Quéneudec, Ukraine's delimitation line respects this crucial geographic fact. Ukraine has started, as the Agent showed, by calculating on a provisional basis, a strict equidistance line. And then Ukraine has then adjusted that line in order to reflect the effect that marked differences in the lengths of the Parties' relevant coasts has as a relevant circumstance. The course of that line, including the weight given to this substantial disparity in coastal lengths, is shown on the map and in tab 10 of your folders. [Slide: Ukraine's provisional equidistance line and the shifting of that line to arrive at Ukraine's claim line] Despite Romania's confusion on this point — a confusion that I have to say was carried over into the oral

pleadings last week — this is not using proportionality as a method of delimitation. Rather, an adjustment to the provisional line is necessary to reflect the relevant geographic circumstances.

68. In contrast, Romania's claim line is grounded on the false premise that there is a pre-existing boundary extending south and east of Serpents' Island and on a wrongly plotted provisional equidistance line. And it thereafter fails to take any account of the large disparity in the lengths of the coasts of the Parties bordering the area to be delimited as a relevant circumstance. As a result, Romania's method produces a "cut-off" effect on both Ukraine's south-facing and its east-facing coasts. Given the faulty premises on which Romania's claim is constructed, it is not surprising that, when it comes to the final step in the delimitation process — applying the proportionality test to the claims of the Parties — Romania's line fails that test.

4. Application of the proportionality test to the Parties' claims

69. That is the last issue, Madam President, perhaps before the coffee break, that I would like to comment briefly on in my overview of the case. As I noted earlier, proportionality can be readily applied in the present case to test the equitableness of the Parties' claims. Indeed, if the Parties have correctly applied the first two steps of the process — the establishment of the provisional equidistance line and then the adjustment of that line in order to take into account the relevant geographic circumstances — the result should in principle be a line that satisfies the test of proportionality.

70. Ukraine has demonstrated in its written pleadings that its delimitation line fully satisfies the proportionality test, and we will be showing this again later at the end of our presentation. Clearly what is important is that there be no gross disproportion in the result, not that there be a strict mathematical correlation between coastal lengths and maritime areas. That is what Ukraine's line achieves.

71. Romania, on the other hand, has exhibited a somewhat inconsistent attitude towards proportionality — perhaps understandably, in the light of the geographic characteristics of the area to be delimited.

72. In its Memorial, Romania fully embraced the application of the proportionality test in the present case, although it confused the role that a marked difference in coastal lengths has as a

relevant circumstance with the role of proportionality as an *ex post facto* test of the equitableness of the result. Those are two quite distinct matters.

73. In its Reply, however, Romania exhibited considerably less enthusiasm for proportionality. And it may have belatedly realized that the only way it can argue that its claim line satisfies the proportionality test is by refashioning geography. This, as I have explained, Romania has done in two ways, first by disregarding half of Ukraine's relevant coast line while, at the same time, taking into account its entire coast down to Bulgaria, and second by adding to the equation — the proportionality equation — a large area lying between Ukraine and Turkey that has nothing to do with the delimitation between Ukraine and Romania.

74. As I indicated, we will address the element of proportionality at the end of our first round presentation and we will show how Ukraine's claim satisfies the proportionality test while Romania's does not.

75. Madam President, that concludes my overview of Ukraine's case. I would be grateful perhaps, after the coffee break if you could call on Sir Michael Wood to continue Ukraine's presentation and I thank the Court for its attention. Thank you.

The PRESIDENT: Thank you, Mr. Bundy. The Court will now shortly rise.

The Court adjourned from 11.25 a.m. to 11.45 a.m.

The PRESIDENT: Please be seated. Sir Michael, you have the floor.

Sir Michael WOOD:

III. THE DIPLOMATIC BACKGROUND TO THE DISPUTE

A. Introduction

1. Madam President, Members of the Court, it is an honour for me to appear before the Court on behalf of Ukraine, and I am very grateful to the Ukrainian authorities for giving me this opportunity. At the same time, it is a great sadness that Sir Arthur Watts is not with us today. He was a key member of the Ukrainian legal team, and he contributed fully to Ukraine's written pleadings.

2. Madam President, this morning I shall take the Court though the principal international instruments at issue in this case. Then, tomorrow, I shall return to these agreements, to show that Romania has not begun to discharge the heavy burden it bears if it is to establish its thesis: its thesis that there is a pre-existing agreement, dating from 1949, on an all-purpose maritime boundary going around Serpents' Island, to what it calls "point X".

3. In this connection, I should recall what you said in your recent Judgment in *Nicaragua* v. *Honduras*: "The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed." (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, Judgment of 8 October 2007, para. 253.)

4. This morning I will describe the diplomatic background to the dispute, in so far as it may be of legal significance. In particular, I shall draw the Court's attention to the key documents. Professor Crawford already took you through these documents last week[26]. But what he did not bring out, and what we say is of primordial importance, is that, throughout the period from the late 1940s to 2003, what the Parties were doing was to delimit and demarcate their common State border, that is, the border between areas under their respective sovereignty. The State border runs between the two countries' land territory, internal waters and territorial seas, but not of course between maritime zones seaward of the territorial sea. This strand of negotiations was eventually completed with the conclusion of the 2003 Border Treaty, in which, as Mr. Bundy has already explained, the Parties finally agreed the co-ordinates of the last point of their State border — following Romania, we will call this point F. The documents in question refer throughout to the "State border", and there is no hint that the Parties were concerned in any way to delimit maritime areas beyond the State border.

5. There was, of course, a quite separate strand of negotiations, also stretching over a long period, concerning delimitation of the continental shelf and exclusive economic zones. The only agreements to emerge from these negotiations were those of 1997.

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[26]CR 2008/19, pp. 21-37 (Crawford).

6. If this important distinction, between the negotiations on the State border, and the negotiations on the continental shelf and EEZs, is borne in mind, the "procession of agreements", as Professor Crawford called them, is really quite easy to follow.

7. I do not propose to enter into the more distant historical background, which Romania dealt with at some length in its written pleadings. Ukraine's sovereignty over Serpents' Island is undisputed. So, too, is the endpoint of the State border agreed in the 2003 Treaty. No one, now, questions the validity of the agreements of the late 1940s. The delimitation before the Court takes as its basis, as it must, the territorial position that exists today, which is not disputed by either side, and as its starting-point the final point agreed in 2003, point F.

B. The key dates

8. Madam President, three key dates to bear in mind are 1949, 1997, and 2003.

9. In 1949, the Soviet Union and Romania agreed on their State border, from the tripoint where the Soviet Union, Hungary and Romania meet, to the furthest point of the border between their territorial seas, actual and prospective, on the outer limit of the 12-mile territorial sea around Serpents' Island — the endpoint of the State border. They did not identify that endpoint by co-ordinates, presumably because Romania had not yet extended its territorial sea to 12 miles. But they knew very well approximately where it was. Indeed by our calculation, the endpoint shown on map 134 of 1949 — to which I shall return — lies some 245 m away from point F agreed in 2003. It is indeed, as Professor Crawford said last Friday[27], "some distance to the north-west", but not a very great distance!

10. Then, in 1997, Ukraine and Romania agreed on negotiations to delimit their continental shelf and exclusive economic zones, and they provided for reference of that matter to this Court under certain circumstances.

11. And, finally, in their 2003 Treaty, Ukraine and Romania reconfirmed the territorial sea delimitation that had been agreed in 1949 and already confirmed in 1961. And they agreed for the first time the precise co-ordinates of the final point, point F, where the State border between their

[27]CR 2008/21, p. 41, para. 15 (Crawford).

respective territorial seas terminates. The 2003 Treaty concluded the negotiations on the State border that had begun in 1948.

12. I propose to deal tomorrow with Romania's assertion that the 1949 Agreements also determined questions relating to the continental shelf and EEZs, at a time when the doctrine of the continental shelf had yet to be accepted as part of international law, and when the concept of the EEZ was simply unknown. I shall focus today in particular on the Agreements of 1997 and 2003. In our submission, *these* are the key documents relevant to this case. The 1997 Exchange of Letters establishes the jurisdiction of the Court. The 2003 Treaty establishes the precise co-ordinates of the starting-point for the delimitation that the Court has been requested to undertake.

13. The earlier agreements, those before 1997, are *not*, in our submission, especially material to the disposition of the case. I shall nevertheless have to take the Court through them since they have been much relied upon by Romania.

14. The written pleadings make reference to a whole series of international agreements and instruments concluded between 1947 and 2003, a period of some 55 years. It was a period of rapid development in international law. It was the period which saw the development of the modern law of the sea, with the three United Nations conferences[28], the adoption of the Law of the Sea Conventions and other treaties, including many maritime delimitation agreements, and the making of national claims and laws, including by the Parties before you today. It was also a period which saw great political change, not least in the former Soviet Union and Eastern Europe.

15. The various instruments that I shall describe need to be seen against this changing legal and political background. For the convenience of the Court, we have included a list of these instruments at tab 11 of your folders. This is largely chronological, it gives the full title of the instrument, its date, where it can be found in the written pleadings, as well as a suggested informal short title.

[28]Conferences of 1958, 1960 and 1973-1982.

C. Some general observations on the instruments

16. I shall now offer three general observations on the agreements with which we are concerned.

17. First, the principal distinction between the various instruments is the one I have already mentioned, between those that deal with the State border, and those that concern delimitation of the continental shelf and EEZs.

18. Most of the agreements deal with the location and demarcation of the State border between Ukraine (before 1991, the Soviet Union) and Romania, and with the régime applicable to the border. The agreements of 1997, but *only* those agreements, also refer to the continental shelf and the EEZs. Certain agreements also deal with wider political matters: the Peace Treaty of 1947 and the1997 Treaty on Relations.

19. A second general comment. Except for the 1947 Peace Treaty, all the instruments involve just two States: the Soviet Union (from 1991, Ukraine) and Romania. They are concluded in two authentic texts, Russian (or Ukrainian) and Romanian. The English translations supplied by the Parties, and the French translations (made by the Registry), are not of course authentic texts. Unfortunately, you sometimes have before you different English translations. This is untidy, but the differences generally do not seem to be material. An obvious example of a non-material difference is the use, in English, of the terms "protocol" and "procès-verbal". However, when we come to the key sentences, for example, in the 1949 procès-verbaux, some care may be needed when approaching the various translations.

20. A third comment is that the instruments involved are of two kinds. There are treaties in standard form, international agreements of the kind that are familiar to foreign ministries and often drafted by them, sometimes even with the involvement of legal departments. The 1997 agreement and the successive treaties on the Border Régime (of 1949, 1961, and 2003) are examples.

21. And then there is the series of instruments drawn up and signed by technical experts within the Joint Soviet-Romanian Commission for the Demarcation of the State Border, these are usually called procès-verbaux. They are also formal documents. But they are formal documents of a rather different kind. They record very detailed agreements reached at the technical level. They are concerned to establish, and describe as precisely as possible, border points, border marks, and

border lines. They may be "absolutely meticulous" and a "model of precision", as Professor Crawford suggested[29], but I would suggest that that is only on the technical level. They do not seem to me to have been drafted with an eye to legal niceties or consistency of language. Their purpose is the technical one of describing precisely facts on the ground. It is not their purpose to record political agreements.

22. That is not to suggest that the technical instruments are not binding. But I do suggest that their nature and purpose need to be borne in mind when it comes to interpreting them. We should not expect to find the same degree of legal precision in the language of such technical agreements as we do in more formal treaties.

D. Outline of the negotiations

23. Madam President, Members of the Court, I shall now outline the negotiations and instruments referred to by the Parties. It is seemingly complex, in the sense that there is a long series of agreed documents, stretching over some 55 years. Some appear, at first sight, to be rather obscure, at least to a tidy-minded lawyer. But at the same time, what happened — relevant to this case — is actually quite straightforward.

24. First, the Parties (or rather the Soviet Union and Romania) agreed in 1949, as part of their agreement on the State border, on the delimitation between their respective areas of territorial sea (including, in the case of Romania, prospective territorial sea). This agreement has been confirmed on various occasions, notably in 1961 and most recently in the 2003 Treaty, when the endpoint was finally specified by co-ordinates. In addition, steps have been taken from time to time to ensure the proper demarcation, through boundary marks — border posts, buoys and beacons — of the agreed line of delimitation. A number of the documents referred to in the pleadings relate to this essentially technical matter, and hardly need concern us.

25. Second, in 1997, the Parties agreed to resume negotiations to delimit their respective areas of shelf and EEZs. They further agreed that, if the negotiations failed, the matter would be submitted to this Court.

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[29]CR 2008/19, p. 23, paras. 7-8 (Crawford).

26. I shall first look briefly at the principal instruments from the Soviet era, the 1949 State border delimitation and demarcation as well as the Soviet-Romanian border agreements after 1949. I shall then turn to the all-important Ukraine-Romania agreements of 1997 and 2003. There is a full description of all the instruments in our Counter-Memorial.

(i) ***Soviet period instruments on the State border***

27. The State border between the Soviet Union and Romania was fixed in the Treaty of Peace between the Allied and Associated Powers and Romania of 10 February 1947, as clarified by the Protocol concerning Adjustment of the Traversal of the State Border Line which was done at Moscow on 4 February 1948. The Peace Treaty provided that the frontiers of Romania "shall be those which existed on January 1, 1941, with the exception of the Romanian-Hungarian frontier" (which was to be that of 1 January 1938).

28. A copy of the 1948 Protocol is at tab 12 in the folders. You will see that the preambular paragraph reads: "According to Article 1 of the Treaty of Peace with Romania . . ., [the two Governments] have settled as follows:" Paragraph 1 then begins: "The State border between the USSR and Romania . . . shall pass as follows." And at the end of paragraph 1 *(b)*, we read that "The island of Zmiinyi/Şerpilor/ [that is, Serpents' Island] located in the Black Sea shall become a part of the USSR." Paragraph 3 is important because it provides that a mixed Soviet-Romanian Border Commission should be established "for the demarcation of the border according to Item 1 of this Protocol", that is, for the demarcation of the State border between the USSR and Romania.

29. Pursuant to the 1948 Protocol, the Mixed Border Commission duly proceeded to demarcate the State border and prepared the documents that were signed on 27 September 1949. This was clearly an enormous technical task. The resulting documentation is extensive. The procès-verbal describing the line of the State border demarcated in 1948-1949 is contained in three volumes. This is referred to in the pleadings as the general procès-verbal of 1949. An English translation is at tab 13. This is of the opening pages of Volume 1 of the general procès-verbal. As you will see, as both the name of the Commission and the title of this general procès-verbal make clear and as is recorded in the opening paragraph, the task of the Commission, and the purpose of the procès-verbal, was to demarcate the State border. The opening paragraph reads in part:

> "the Mixed Soviet-Romanian Commission on the Demarcation of the State Border between the Union of [Soviet] Socialist Republics and the Romanian People's Republic during the period since 11 September 1948 to 20 September 1949 made demarcation of the state border from the junction of the state borders of the Union of Soviet Socialist Republics, the Romanian People's Republic and the Hungarian Republic (border mark 'Tur') to the Black Sea (border mark No. 1439)".

In the list that immediately follows, in the next paragraph, you will see point 10 refers to border mark No. 1439 as the final border mark. And if you turn to the third page, at paragraph 8, we again read: "The serial numbers are conferred to all the other basic border marks . . . in ascending order to the final point of the demarcated border line, located in the Black Sea starting from the No. 1 to No. 1439 . . ."[30]

30. However, the most relevant passage from the general procès-verbal, the passage to which Professor Crawford made lengthy reference, comes towards the end of Volume III. You will find the relevant part at tab 14 in the folders. Only the last few pages need concern us. They describe the last two border marks of the State border. I shall come back to them in a little more detail tomorrow.

31. But you will see at the end of the document at tab 14, there is a heading which reads: "The following documents are attached to this Protocol." Underneath the heading we see listed, first: "1. Maps of the state border between the USSR and RPR [that is, the Romanian People's Republic] . . ." The annexed map relevant to our case is, of course, map 134.

[Slide: map 134.]

That is now being shown on the screen and is also at tab 15. You will now see on the screen an enlargement of the relevant part of the map. [Enlargement on screen] It is a map showing the location of border point 1439. [Point to it] It also shows a line going some 22 degrees around the outer limit of the 12-mile territorial sea around Serpents' Island, and terminating there. [Point to it] I will return to map 134 tomorrow.

[Slide off screen]

32. If I could ask you to go back to the last few pages, in tab 14, of the general procès-verbal we next see, under the heading "The following documents are attached to this Protocol" — at point 3 — "Protocol for border marks". This refers to the procès-verbaux of the individual border

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[30] RU, Ann. 1.

marks. There are six volumes containing these individual procès-verbaux. We are chiefly concerned with the one relating to border mark 1439. I shall also return to this tomorrow.

33. Later in 1949, the Soviet Union and Romania concluded a Treaty on the Régime of the Soviet-Romanian State Boundary. Article 1 of this Treaty provided that the line of the State border established pursuant to the 1947 Peace Treaty and the Protocol of 1948 "shall run . . . as defined in the demarcation documents" of 27 September 1949, a reference to the general and individual procès-verbaux which I have just mentioned.

34. The next instrument chronologically is an Act of 1954 relating to mark 1439. This was a purely technical document, signed by Boundary Commissioners, which certified that they had "rebuilt the lost boundary mark". It need not detain us further.

35. Then, in February 1961, the Soviet Union and Romania concluded a new Treaty on the Régime of the Soviet-Romanian State Boundary, replacing that of 1949[31]. Article 1 of this Treaty essentially repeated the terms of Article 1 of the 1949 Treaty, once again referring back to the "demarcation documents signed on 27 September 1949".

36. Next, in August 1963, there was an extensive technical updating of the general and individual procès-verbaux[32]. But no change was made that is material to the case before the Court. The same exercise was carried out again in 1974[33]. Again there was no material change.

37. That concludes my brief review of the documents from the Soviet period. It is clear from their terms that they all deal with the State border, that is, so far as concerns maritime areas, with internal waters and the territorial sea, not the continental shelf or exclusive economic zones.

(ii) ***Soviet-Romanian negotiations on the delimitation of the continental shelf and EEZs***

38. A quite separate strand of negotiations on the delimitation of the continental shelf and EEZs did, however, start during the Soviet period. Ten rounds of negotiations took place between 1967 and 1987, without any agreement being reached. Romania has its own records. It has supplied the Court with extracts. We do not believe that any material assistance can be gained from these extracts.

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[31]CMU, Ann. 33.

[32]MR, Ann. 9; MR, Ann. 10.

[33]MR, Ann. 21.

39. The extracts supplied by Romania include a statement, apparently made by the Romanian delegation at the final round of the talks in October 1987, which is cited in translation in the Memorial[34]. The statement concludes with the words: "What was agreed then [in 1949] is the maximum effect that can be given to this island [Serpents' Island]."

40. In our submission, no significance attaches to this statement. Only in the most exceptional circumstances could a unilateral statement made during negotiations have legal effect. In any event, even on its terms as recorded in the Romanian records, which Ukraine has no way of verifying, the actual words supposedly used by the Romanian delegation do not bear the meaning placed upon them. They do not say that there was agreement in 1949 that the maximum effect that could be given to Serpents' Island was a 12-mile territorial sea. The statement indicates no more than that Romania's negotiating position, in 1987, was that the island's entitlement to maritime space should be limited to the 12-mile territorial sea agreed in 1949. That was nothing new. That Romanian position explains, for example, its protracted, and unsuccessful, efforts, at the Third United Nations Conference on the Law of the Sea, to modify the scope of the draft of Article 121, paragraph 3, so that the exception for "rocks" would be expanded to include Serpents' Island. My colleague, Ms Malintoppi, will refer to these events later.

(iii) ***The 1997 agreements between Ukraine and Romania***

41. I now turn to the important agreements concluded between Ukraine and Romania after 1991. Ukraine regained its independence, and became the successor State to the Soviet Union as regards the treaties that I have just described. Thereafter, negotiations took place on a range of matters, including both the régime of the State border between the two States, and the delimitation of the shelf and EEZs in the Black Sea — continuing the two strands of negotiations that had commenced in the Soviet period.

42. Agreement was reached on the two bilateral treaties of 2 June 1997: the Treaty on Relations of Good Neighbourliness and Co-operation[35], and the Exchange of Letters (which can also be referred to as the Additional Agreement)[36]. The Exchange of Letters is of course the basis

[34]MR, para.5.15 and MR, Ann. 331.

[35]CMU, Ann. 2.

[36]CMU, Ann. 1.

for the Court's jurisdiction in this case. These two are the only bilateral agreements applicable between the Parties that touch on the continental shelf and EEZs. As I have already pointed out, all the other agreements and instruments relate exclusively to the State border.

43. The Treaty on Relations is an important political treaty dealing with a wide range of issues concerning Ukrainian-Romanian relations. For present purposes, the key provision is Article 2 — and you will find it at tab 16 in your folders. In paragraph 1, the Parties reaffirmed "the existing border" between them — they reaffirmed that the existing boarder between them was inviolable. They thus confirmed the existing border, no more, no less.

44. Paragraph 2 then goes on to deal with the two separate matters to which I have alluded — the State border, and delimitation of the shelf and EEZs. It reads as follows:

> "2. The Contracting Parties shall conclude a separate Treaty on the regime of the boundary between the two states and 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 exchange of letters between the ministers of foreign affairs [that is a reference to the Exchange of Letters or the Additional Agreement] . . ."

45. This Article acknowledged that there was still a problem over continental shelf and EEZ delimitation, these matters were still open. It contains nothing whatsoever to suggest, as Romania now seeks to argue, that there was already an agreement on a partial all-purpose maritime boundary.

46. You will find the Exchange of Letters of the same date at tab 17 in the folders. Paragraph 1 committed the Parties to conclude the new Treaty on their State Border Régime,

> "on the basis of the principle of succession of states with regard to borders, according to which, declaration of independence of Ukraine shall not affect the existing border between Ukraine and Romania as determined and described in the 1961 Treaty . . . and relevant demarcation documents effective as of 19 July 1990 . . .".

47. Thus the existing agreement on the line of the State border, in the Treaty of 1961, and going back to 1949, was again reaffirmed, and again reaffirmed without change.

48. Paragraphs 2 and 3 of the Exchange of Letters concern details of the border régime, and are not material.

49. The Exchange of Letters then deals in a separate paragraph, paragraph 4, with the delimitation of the shelf and EEZs. The Parties accepted that the land and territorial sea State

border had been settled, and that it was time to move on to the delimitation of their continental shelf and EEZs. The Parties based themselves on the clear distinction — entirely in line with the modern international law of the sea — between the State border, dividing areas under their sovereignty, including the territorial sea, and other areas of sovereign rights and jurisdiction, in particular the continental shelf and EEZs. Paragraph 4 committed the two States to "negotiate an Agreement on the delimitation of the continental shelf and the exclusive economic zones in the Black Sea, on the basis of certain principles and procedures".

50. There then follow a number of principles which were to be applied in the negotiations. As Professor Quéneudec will explain, in terms those "principles" were to apply to the negotiations between the Parties, not to any eventual proceedings before this Court. It is significant that neither the "principles" nor any other provision of the 1997 agreements includes *any* mention of *any* earlier continental shelf or EEZ delimitation agreement, which Romania now seeks to argue had already been concluded. Indeed, Romania has produced *nothing* to indicate that at any point during the negotiations leading to the 1997 agreements did Romania raise the argument that it now makes, namely that the agreements of 1949 and following established an all-purpose maritime boundary between the two States following the outer limit of the 12-mile territorial sea around Serpents' Island to what they like to call "point X"[37].

51. Romania has produced no evidence, because it did not raise any such argument. On the contrary, as the Agent of Ukraine said this morning, in the past, Romania was clearly "of the view that there was no agreement on the delimitation of the continental shelf or exclusive economic zones between the former USSR and Romania". This can be seen, Madam President, *inter alia*, in the Romanian Note Verbale that you will find at tab 18 of your folders: this is the Note Verbale of 28 July 1995 to which Romania itself drew your attention last week. As you will see — and you will find this at the beginning of the fourth paragraph on the first page — the Foreign Ministry of Romania said, in terms, "there is no Agreement between Romania and Ukraine on the delimitation of maritime spaces in the Black Sea". That is by no means an isolated statement. That was

[37]MR, para 11.5.

Romania's position in the 1990s. It surely lacks credibility when it now seeks to claim the opposite before this Court.

(iv) ***The 2003 State Border Treaty***

52. Madam President, in accordance with the 1997 Treaty and Exchange of Letters, Ukraine and Romania concluded the Border Régime Treaty on 17 June 2003[38]. This entered into force in 2004 — you will find an extract from the Treaty of 2003 at tab 19. For present purposes, I merely note that Article 1 again confirmed the existing State border. The effect of this provision is now being shown on the screen [graphic on screen]. The existing State border is described as continuing:

> "from border mark No. 1439 (spar buoy) along the external border of the territorial sea of Ukraine around Zmiinyi island [that is, Serpents' Island] to the point with co-ordinates of 45° 05' 21" N, 30° 02' 27" E, which is the junction point with the state border of Romania that passes along the external border of its territorial sea. The territorial seas of the Contracting Parties measured from baselines [I note in passing, that on the Ukrainian side, that means the baseline on Serpents' Island] shall be permanently 12 miles wide at the point of their junction."

53. As I have said, in our submission, this is a key provision for the present case. It established, for the first time, the precise co-ordinates of the point at which the outer limit of Ukraine's 12-mile territorial sea around Serpents' Island intersects with the outer limit of Romania's 12-mile territorial sea.

54. The final sentence of Article 1 then states that "Conclusion of new border-related documents shall not be a revision of the existing border between Ukraine and Romania." The description of the point of intersection thus marks no change to, but only a precision of, the existing State border — that is, that border was *already*, under previous agreements, a territorial sea border going only as far as the point of intersection of the outer limits of the two States' territorial seas.

55. Madam President, there is no hint in Article 1 of this 2003 Treaty that there was already an agreed boundary delimiting the two States' continental shelf and EEZs beyond point F.

[Remove graphic from screen]

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[38] CMU, Ann. 3.

56. Romania has tried to make something of a "declaration" that it made upon signature of the 2003 Treaty and repeated, in slightly different terms, upon entry into force of the Treaty[39]. On both occasions, Ukraine responded vigorously[40]. In our submission, no legal significance attaches to these exchanges. The Romanian "declaration" was vague and was not, in any event, an agreed term of the Treaty. It did not bind Ukraine. It could, at most, be regarded as a simple unilateral interpretative declaration, to which Ukraine responded in so far as this might have been thought necessary or desirable. The Parties agree that the 2003 Treaty fixes the final point of the State border at sea, point F. And they agree that point F constitutes the starting-point for the delimitation exercise now before the Court. Romania's declaration changed nothing.

E. Conclusion

57. Madam President, that concludes my introduction to the principal agreements relevant to the case.

58. One thing that emerges clearly is that, throughout the period of 50 years from 1947 to 1997, all the border agreements and other documents agreed between the Parties were concerned exclusively with the "State border". They concerned the delimitation of the border between the land and maritime areas under the sovereignty of the two States, that is, their respective land territory, internal waters, and territorial seas. There were no agreements touching on the continental shelf or EEZs.

59. That changed in 1997, with the Border Régime Treaty and the Exchange of Letters. These agreements explicitly envisaged negotiations "to settle the problem of the delimitation of the continental shelf and exclusive economic zones".

60. Throughout all this period, the Parties made no reference to existing agreements concerning the continental shelf and the EEZs. The 2003 Border Treaty finally fixed the precise co-ordinates of the endpoint of the State border, at a point virtually identical to that foreshadowed, 55 years earlier, on map 134. There is not the slightest hint, in any of the agreed documents of 1997 or 2003, or in the negotiations, of a pre-existing agreement on the subject of delimitation of

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[39]CMU, Anns. 37 and 39.

[40]CMU, Anns. 38 and 40.

the shelf or EEZs. On the contrary, both Parties were clear that there was no such agreement. The picture that emerges from the two strands of negotiation — on the State border, and on the shelf and EZZs — is, in our submission, wholly consistent throughout the 55-year period.

61. Madam President, Members of the Court, that concludes my presentation. I thank you for your attention. I would now request that you invite Professor Quéneudec to address you on the applicable law.

The PRESIDENT: Thank you, Sir Michael. We now call Professor Quéneudec.

M. QUENEUDEC :

IV. LE DROIT APPLICABLE

Madame le président, Messieurs les juges, c'est toujours un honneur de venir devant la Cour et je tiens à remercier le Gouvernement ukrainien pour la confiance qu'il a bien voulu me témoigner en me priant de participer à la présentation de ses thèses dans le différend qui l'oppose à la Roumanie. Je dois dire aussi ma tristesse et mon chagrin de ne plus voir à nos côtés l'aimable compagnon qu'était Sir Arthur Watts.

Introduction

1. Madame le président, il me revient de plaider devant vous la question du droit applicable. C'est une tâche délicate, car il peut paraître à la fois présomptueux et inutile de prétendre exposer à la Cour ce qu'est le droit applicable dans une affaire de délimitation maritime.

2. Toutefois, dans la présente affaire, la question du droit applicable se présente sous un jour particulier, qui justifie que l'on prenne le risque de fournir à la Cour quelques explications et éclaircissements à ce sujet.

3. Le caractère particulier de la question du droit applicable tient ici à ce que, depuis le début de la présente instance, la Partie adverse considère que les principes et règles applicables par la Cour pour résoudre le problème de délimitation maritime qui lui est soumis sont avant tout, et par priorité, ceux que les deux Parties avaient énumérés dans l'échange de lettres accompagnant le traité de 1997. Selon la Roumanie, cet accord, qu'elle appelle «accord additionnel», comporterait l'énoncé d'une sorte de *lex specialis*, en application de laquelle la Cour devrait se prononcer.

4. Dans la requête, il était ainsi affirmé : «L'accord additionnel constitue donc une *lex specialis* entre les deux Etats, et la délimitation demandée à la Cour doit être effectuée conformément aux cinq principes énoncés à l'article 4 de cet accord.»[41]

5. Ce point de vue a été réaffirmé par la suite, notamment dans la réplique, lorsque la Partie roumaine a fait une comparaison pour le moins audacieuse entre l'énumération contenue dans cette disposition et les termes du compromis dans l'affaire du *Plateau continental Tunisie/Libye*, où la Cour, nous dit-on, avait «expressément accepté que les Etats parties peuvent, dans les affaires de délimitation, stipuler une *lex specialis* contraignante»[42] («it expressly accepted that States parties in delimitation cases may stipulate a binding *lex specialis*»).

6. Cette question a déjà fait l'objet de plusieurs observations dans les pièces écrites présentées par l'Ukraine[43]. Mais il est cependant nécessaire d'y revenir quelques instants à ce stade de la procédure, en raison de la présentation que la Partie roumaine en a faite durant le premier tour de ses plaidoiries orales.

7. Dans le présent exposé, je m'attacherai donc en premier lieu à rappeler la position de l'Ukraine quant à la place et au rôle que les principes énoncés dans l'accord de 1997 peuvent tenir dans l'instance en cours ; car un évident désaccord persiste à ce sujet entre les deux Etats. Aussi, une mise au point s'impose-t-elle. J'espère seulement, Madame le président, que cette mise au point aura notamment pour effet bénéfique de dissiper l'impression «déroutante» -- pour reprendre ses mots -- que mon ami le professeur Pellet dit avoir retirée de l'argumentation présentée par l'Ukraine à ce sujet dans ses pièces écrites[44].

8. La seconde partie de mon exposé sera ensuite consacrée à la présentation des règles de droit international qui sont effectivement applicables au tracé de la ligne unique de délimitation que la Cour a été invitée à établir en l'espèce. En effet, ici aussi, derrière une apparente concordance de vues quant à l'énoncé des règles applicables, il subsiste en réalité de sérieuses divergences dans la manière dont chacune des deux Parties conçoit la mise en œuvre des principes et règles de la

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[41] Requête introductive d'instance, p. 7, par. 9.

[42] Réplique de la Roumanie (RR), par. 2.8 ; traduction du Greffe.

[43] Contre-mémoire de l'Ukraine (CMU), par. 6.10 à 6.22 ; duplique de l'Ukraine (DU), par. 2.22 à 2.30.

[44] CR 2008/18, p. 45, par. 32 (Pellet).

délimitation maritime. Et, il ne semble donc pas inutile d'apporter quelques éclaircissements quant à la position de l'Ukraine à ce sujet.

A. Mise au point concernant l'accord de 1997

9. L'accord par échange de lettres du 2 juin 1997 fut signé et entra en vigueur en même temps que le traité sur les relations de bon voisinage et la coopération entre l'Ukraine et la Roumanie, conformément d'ailleurs à l'article 2 dudit traité. C'est cet accord par échange de lettres qui a établi la compétence de la Cour et qui a servi de base à sa saisine dans la présente affaire.

10. On se bornera ici à rappeler deux aspects essentiels de cet accord au regard du problème du droit applicable. L'un de ces aspects est relatif à la structure et au contenu du paragraphe 4 de l'accord de 1997. L'autre aspect sur lequel je voudrais attirer l'attention porte plus particulièrement sur l'alinéa *h)* de ce paragraphe. Et on verra, à partir de là, que la portée réelle de ce paragraphe n'a rien à voir avec la portée que la Roumanie prétend lui conférer.

a) *Premier aspect essentiel de l'accord de 1997*

11. Le paragraphe 4 de cet accord (paragraphe que la Roumanie a préféré appeler «article 4») énonçait plusieurs principes, qui avaient été adoptés par les deux Etats en vue de servir de base à la négociation d'un accord de délimitation. Il s'agissait de principes directeurs dans la conduite de ces négociations. C'est ce qui ressort on ne peut plus clairement des termes mêmes dudit paragraphe, qui avait pour objet de fixer le cadre des négociations à venir.

12. Rappelons tout d'abord que ce paragraphe comportait un «chapeau» introductif, qui était ainsi rédigé :

> «Le Gouvernement de l'Ukraine et le Gouvernement de la Roumanie négocieront un accord relatif à la délimitation du plateau continental et des zones économiques exclusives des deux Etats en mer Noire, sur la base des principes et procédures suivants.»

13. Les alinéas *a)*, *b)*, *c)*, *d)* et *e)* de ce paragraphe 4 énuméraient ces principes. On notera incidemment que le principe énoncé à l'alinéa *d)* était d'une nature sensiblement différente des quatre autres, puisqu'il ne se rapportait pas à la délimitation maritime proprement dite. Il comportait en fait l'engagement de chaque Etat de ne pas contester la souveraineté de l'autre sur

toute portion territoriale adjacente à la zone à délimiter, c'est-à-dire un engagement qui, en lui-même, était étranger à l'opération de délimitation maritime elle-même.

14. L'alinéa *f)* prévoyait ensuite que, sur la base de ces principes, les parties devaient définir, au début des négociations, la zone à délimiter et s'abstenir d'y exploiter les ressources minérales tant qu'une solution n'aurait pas été trouvée pour la délimitation du plateau continental, sauf à prévoir une exploitation en commun de certaines parties de la zone.

15. L'alinéa *g)* précisait en outre que les négociations devaient s'ouvrir dans les trois mois suivant l'entrée en vigueur du traité de 1997.

16. Et enfin, l'alinéa *h)* fixait un délai de deux ans dans lequel les négociations devaient aboutir, faute de quoi la Cour serait saisie (je vais revenir dans un instant sur cet alinéa *h)*).

17. Mais, toute la structure et le contenu du texte de ce paragraphe 4 étaient conçus comme établissant non seulement les conditions dans lesquelles devaient s'ouvrir et être menées les négociations sur la délimitation, mais aussi la conduite à tenir par les parties pendant le déroulement de ces négociations.

18. C'est pourquoi il nous paraît difficile aujourd'hui de vouloir détacher et isoler de l'ensemble du paragraphe les alinéas qui comportaient l'énoncé de principes devant servir de guides dans la négociation, et il me semble donc difficile de venir prétendre que ces principes s'imposent à la Cour en vertu de l'accord de 1997.

19. A cette première raison, tirée des termes mêmes de l'échange de lettres, s'ajoute une autre considération d'ordre plus général. Lorsqu'il s'agit de procéder à une délimitation maritime, la voie de la négociation et la voie du règlement judiciaire sont des voies totalement différentes. Les paramètres susceptibles d'être pris en compte par des négociateurs et ceux qui peuvent être retenus par un juge international ne sont pas les mêmes.

20. Alors que, dans une négociation, des considérations d'ordre politique, économique ou autre peuvent être prises en compte pour arrêter un tracé particulier de la ligne de délimitation, le juge, quant à lui, ne peut que se fonder sur le droit. Il n'y a donc pas substantiellement de continuité entre ces deux voies, même si, conformément au célèbre *dictum* de la Cour permanente

dans l'affaire des *Zones Franches* qui a été cité l'autre jour de l'autre côté de la barre, le règlement judiciaire des litiges est un «succédané» au règlement amiable[45].

21. C'est d'ailleurs la raison pour laquelle le juge international a toujours hésité à se fonder en ce domaine sur la pratique des accords bilatéraux de délimitation, c'est-à-dire sur la «State practice». En effet, comme il est difficile, voire impossible, de connaître les raisons qui, dans une négociation, ont réellement motivé l'établissement de la ligne de délimitation maritime réalisée par voie d'accord. et comme il est difficile aussi d'y discerner la trace d'une *opinio juris*, le juge international s'est jusqu'ici bien gardé d'ériger les accords bilatéraux de délimitation en une pratique génératrice de règles coutumières.

22. J'en viens maintenant au deuxième aspect essentiel de l'accord de 1997.

b) ***Deuxième aspect essentiel de l'accord de 1997***

23. Ce deuxième aspect, Madame le président, a trait à l'alinéa *h)* du paragraphe 4 de l'échange de lettres de 1997. Cet alinéa *h)* prévoyait que, faute de parvenir à la conclusion d'un accord de délimitation dans un certain délai, l'un des deux Etats pourrait soumettre le problème de délimitation à la Cour par voie de requête unilatérale, après l'entrée en vigueur du traité séparé sur la frontière dont la conclusion était également prévue par le traité de bon voisinage de 1997. Mais cet alinéa *h)* ne précisait pas que les formules contenues dans les alinéas *a)* à *e)* du paragraphe constituaient l'énoncé de règles particulières que les deux parties entendaient voir la Cour appliquer pour le règlement du litige.

24. A l'audience du 2 septembre, le professeur Alain Pellet nous a dit en substance ceci : si, en 1997, l'Ukraine et la Roumanie avaient voulu limiter l'applicabilité des principes à la phase des négociations, elles n'auraient pas manqué d'introduire dans l'accord une disposition spécifique à cet effet[46]. Fort bien. Mais ne vaut-il pas mieux dire, au contraire, que si les Parties avaient voulu que la Cour, une fois saisie, statue sur la base desdits principes, elles l'auraient précisé sans ambiguïté dans le texte du compromis lui-même ?

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[45] CR 2008/18, p. 47, par. 35 (Pellet).

[46] CR 2008/18, p. 46, par. 34 (Pellet).

25. Dès lors, il semble bien que le consentement de l'Ukraine et de la Roumanie de soumettre leur différend à la Cour n'était accompagné d'aucune détermination des règles que la Cour devrait appliquer, à la différence d'autres affaires concernant la délimitation maritime portées devant la Cour par compromis. Ce qui signifie que les deux Etats étaient convenus de s'en remettre éventuellement à la Cour pour qu'elle tranche leur différend conformément à l'article 38 de son Statut, c'est-à-dire en faisant application des règles du droit international relatives aux délimitations maritimes entre Etats voisins, quelle que soit l'origine — conventionnelle ou coutumière, voire oserais-je dire jurisprudentielle — de ces règles. Les conséquences qui peuvent en être tirées sont importantes quant à la portée du paragraphe 4 de l'accord de 1997. C'est le troisième aspect de ma mise au point.

c) ***Portée réelle du paragraphe 4 de l'accord***

26. La Roumanie ne peut pas venir prétendre aujourd'hui que le paragraphe 4 de l'accord de 1997 comportait un énoncé du droit qui serait applicable par la Cour lorsqu'elle serait saisie du différend. D'autant plus que le paragraphe 4 de cet échange de lettres a désormais produit la totalité de ces effets.

27. Que prévoyait exactement ce paragraphe 4 ? Il prévoyait, d'une part, que des négociations seraient menées, sur la base de quelques principes directeurs, en vue de conclure un accord de délimitation. Or il est établi et reconnu que ces négociations ont échoué ; et l'on voit mal, dès lors, par quel miracle les principes qui devaient guider ces négociations auraient pu survivre à l'échec de celles-ci. Le paragraphe 4 envisageait précisément cette éventualité, puisqu'il prévoyait, d'autre part, qu'en cas d'échec des négociations le problème de délimitation serait porté devant la Cour. Or, que je sache, la Cour a bien été saisie du problème, comme l'atteste le déroulement de l'instance en l'affaire.

28. L'objet même de cette disposition a donc été entièrement réalisé. Tant et si bien qu'on peut sans doute affirmer que le paragraphe 4 de l'accord de 1997 est désormais dépourvu de toute pertinence dans les rapports entre l'Ukraine et la Roumanie en tant que Parties à la présente affaire devant la Cour.

29. Cela dit, et afin que la position de l'Ukraine soit clairement perçue, il convient d'ajouter une précision importante.

30. Il n'est pas douteux que la plupart des formules énoncées aux alinéas *a), b), c)* et *e)* du paragraphe 4 de l'accord de 1997 correspondent, pour l'essentiel, à des principes ou des règles de droit international applicables à la délimitation maritime que la Cour doit établir.

31. Toutefois, il convient de faire ici une distinction importante. Une chose est de dire que ces formules, ou certaines d'entre elles, sont susceptibles d'être appliquées, totalement ou partiellement, en tant qu'elles coïncident plus ou moins avec les règles du droit international que la Cour doit en tout état de cause appliquer. Autre chose est de considérer que les énoncés du paragraphe 4 de l'accord de 1997 sont directement applicables *en tant que tels* dans la présente instance devant la Cour et en suivant l'ordre dans lequel ils ont été formulés. Ce sont là deux démarches fondamentalement différentes.

32. Ce que l'Ukraine a entendu contester et ce qu'elle persiste à refuser, c'est donc l'application de ces énoncés *au titre du paragraphe 4 de l'accord de 1997*, puisque, répétons-le, les principes directeurs qui y étaient formulés ne valaient que pour la conduite des négociations. Il est cependant évident qu'on ne saurait refuser leur application éventuelle, en totalité ou en partie, en tant qu'ils peuvent apparaître comme un reflet ou une expression du droit international contemporain de la délimitation maritime.

33. Il convient précisément de se tourner à présent vers les règles de droit international qui sont effectivement applicables en l'espèce, ce qui m'amène à aborder l'examen de la deuxième partie de mon exposé.

B. Quelques éclaircissements concernant les règles de droit international effectivement applicables en l'espèce

34. Apparemment, la situation est ici relativement simple. En effet, la Cour est appelée à tracer une ligne unique de délimitation servant de frontière maritime entre les zones économiques exclusives et les zones de plateau continental relevant respectivement de chacun des deux Etats. Or, ces deux Etats sont tous deux parties à la convention des Nations Unies sur le droit de la mer de 1982, qui est en vigueur entre eux. Le droit applicable est dès lors constitué par les dispositions de la convention relatives à la délimitation de la zone économique et du plateau continental entre

Etats dont les côtes sont adjacentes ou se font face, c'est-à-dire les articles 74 et 83, et plus particulièrement le premier paragraphe de chacun d'eux.

35. Le contenu identique de ces deux dispositions est bien connu. Qu'il s'agisse de la zone économique exclusive ou du plateau continental, la délimitation doit à chaque fois être «effectuée par voie d'accord conformément au droit international tel qu'il est visé à l'article 38 du Statut de la Cour internationale de Justice, afin d'aboutir à [un résultat] équitable».

36. Si la règle ainsi énoncée prescrit la voie de l'accord négocié entre les Etats concernés, la disposition conventionnelle en cause pose aussi une norme fondamentale de portée générale. Cette norme fondamentale est celle de la solution équitable.

37. La Cour avait noté à ce sujet dans son arrêt du 3 juin 1985 : «La convention fixe le but à atteindre, mais elle est muette sur la méthode à suivre pour y parvenir. Elle se borne à énoncer une norme et laisse aux Etats ou au juge le soin de lui donner un contenu précis.» (*Plateau continental (Jamahiriya arabe libyenne/Malte), arrêt, C.I.J. Recueil 1985*, p. 30, par. 28.)

38. Plus d'un quart de siècle s'est écoulé depuis l'adoption de cette norme fondamentale par la troisième conférence des Nations Unies sur le droit de la mer. Depuis lors, le droit de la délimitation maritime est sorti de la sphère d'incertitude et d'imprévisibilité qui l'entourait. Il s'est affirmé et il s'est affermi au fur et à mesure du développement de la jurisprudence de la Cour en la matière. A tel point qu'il est possible de dire que ce domaine du droit international est aujourd'hui parvenu à un certain degré de stabilité et de prévisibilité. Il prescrit de suivre un processus comportant normalement deux étapes successives.

39. Il conviendra sans doute de rappeler rapidement en quoi consiste ce processus avant d'envisager chacune des deux étapes qu'il comporte.

Madame le président, sans chercher à introduire une quelconque forme de suspens dans la présentation de mon exposé, puis-je suggérer à la Cour de renvoyer à demain la suite de cet exposé ?

The PRESIDENT: We have heard that proposal and that shall be done. Thank you for your presentation thus far, Professor Quéneudec.

M. QUENEUDEC: Thank you.

The PRESIDENT: That brings to an end the presentation for this morning by Ukraine in the case concerning *Maritime Delimitation in the Black Sea*. The Court will resume at 10 a.m. tomorrow for the continuation beginning with the remaining part of Professor Quéneudec's address to us. The Court now rises.

The Court rose at 12.55 p.m.