Non-Corrigé
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*CR 2008/28*

**International Court of Justice**

**THE HAGUE**

**Cour internationale de Justice**

**LA HAYE**

**YEAR 2008**

***Public sitting***

***held on Thursday 11 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)**

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**VERBATIM RECORD**

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**ANNÉE 2008**

***Audience publique***

***tenue le jeudi 11 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)**

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**COMPTE RENDU**

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| *Present:* | President | Higgins |
| | Vice-President | Al-Khasawneh |
| | Judges | Ranjeva |
| | | 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. Ranjeva
Shi
Koroma
Buergenthal
Owada
Tomka
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov, juges
MM. Cot
Oxman, juges *ad hoc*

M. Couvreur, greffier

***The Government of Romania is represented by:***

Mr. Bogdan Aurescu, Director General, Ministry of Foreign Affairs of Romania, Professor Lecturer, Faculty of Law, University of Bucharest, President of the Romanian Branch of the International Law Association, member of the Permanent Court of Arbitration, substitute member of the Venice Commission,

*as Agent, Counsel and Advocate;*

Mr. Cosmin Dinescu, Director General for Legal Affairs, Ministry of Foreign Affairs of Romania,

*as Co-Agent, Counsel and Advocate;*

H.E Mr. Călin Fabian, Ambassador of Romania to the Kingdom of the Netherlands,

*As Co-Agent;*

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the Institut de droit international, Barrister, Matrix Chambers,

Mr. Vaughan Lowe, Q.C., Chichele Professor of International Law, University of Oxford, member of the English Bar, associate member of the Institut de droit international,

Mr. Alain Pellet, Professor at the University Paris Ouest, Nanterre-La Défense, member and former Chairman of the International Law Commission, associate member of the Institut de droit international,

as *Senior Counsel and Advocates;*

Mr. Daniel Müller, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

*as Counsel and Advocate;*

Mr. Simon Olleson, member of the English Bar, 13 Old Square Chambers,

*as Counsel;*

Mr. Gicu Boroşi, Director General, National Agency for Mineral Resources,

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),

Mr. Ovidiu Neghiu, Captain, Ministry of Defence of Romania,

*as Technical and Cartographic Experts;*

Mr. Liviu Dumitru, Head of the Borders and Maritime Delimitation Unit, Ministry of Foreign Affairs of Romania,

***Le Gouvernement de la Roumanie est représenté par :***

M. Bogdan Aurescu, directeur général au ministère roumain des affaires étrangères, chargé de cours à la faculté de droit de l'Université de Bucarest, président de la section roumaine de l'Association de droit international, membre de la Cour permanente d'arbitrage, membre suppléant de la Commission de Venise,

*comme agent, conseil et avocat ;*

M. Cosmin Dinescu, directeur général des affaires juridiques du ministère roumain des affaires étrangères,

*comme coagent, conseil et avocat ;*

S. Exc. M. Călin Fabian, ambassadeur de Roumanie auprès du Royaume des Pays-Bas,

*comme coagent ;*

M. James Crawford, S.C., F.B.A., professeur de droit international à l'Université de Cambridge, titulaire de la chaire Whewell, membre de l'Institut de droit international, avocat, Matrix Chambers,

M. Vaughan Lowe, Q.C., professeur de droit international à l'Université d'Oxford, titulaire de la chaire Chichele, membre du barreau d'Angleterre, membre associé de l'Institut de droit international,

M. Alain Pellet, professeur à l'Université de Paris Ouest, Nanterre-La Défense, membre et ancien président de la Commission du droit international, membre associé de l'Institut de droit international,

*comme conseils principaux et avocats ;*

M. Daniel Müller, chercheur au Centre de droit international de Nanterre (CEDIN), Université de Paris Ouest, Nanterre-La Défense,

*comme conseil et avocat ;*

M. Simon Olleson, membre du barreau d'Angleterre, 13 Old Square Chambers,

*comme conseil ;*

M. Gicu Boroşi, directeur général de l'agence nationale des ressources minières,

M. Mihai German, directeur général adjoint de l'agence nationale des ressources minières, membre de la Commission des limites du plateau continental de l'ONU,

M. Eugen Laurian, contre-amiral (en retraite),

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

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

*comme experts techniques et cartographes ;*

M. Liviu Dumitru, chef de l'unité frontières et délimitation maritime du ministère roumain des affaires étrangères,

Ms Irina Niță, Second Secretary, Legal Adviser, Embassy of Romania in the Kingdom of the Netherlands,

Ms Catrinel Brumar, Third Secretary, Borders and Maritime Delimitation Unit, Ministry of Foreign Affairs of Romania,

Ms Mirela Pascaru, Third Secretary, Borders and Maritime Delimitation Unit, Ministry of Foreign Affairs of Romania,

Ms Ioana Preda, Third Secretary, Borders and Maritime Delimitation Unit, Ministry of Foreign Affairs of Romania,

Ms Olivia Horvath, Desk Officer, Public Diplomacy Department, Ministry of Foreign Affairs of Romania,

*as Advisers.*

***The Government of Ukraine is represented by:***

H.E. Mr. Volodymyr A. Vassylenko, Adviser to the Minister for Foreign Affairs of Ukraine, Ambassador Extraordinary and Plenipotentiary of Ukraine, Professor of International Law, National University of Kyiv Mohyla Academy,

*as Agent;*

H.E. Mr. Oleksandr M. Kupchyshyn, Deputy Foreign Minister of Ukraine,

Mr. Volodymyr G. Krokhmal, Director of the Legal and Treaty Department of the Ministry of Foreign Affairs of Ukraine,

*as Co-Agents;*

Mr. Rodman R. Bundy, *avocat à la Cour d'appel de Paris*, Member of the New York Bar, Eversheds LLP, Paris,

Mr. Jean-Pierre Quéneudec, Professor emeritus of International Law at the University of Paris I (Panthéon-Sorbonne),

Sir Michael Wood, K.C.M.G., Member of the English Bar, Member of the International Law Commission,

Ms Loretta Malintoppi, *avocat à la Cour d'appel de Paris*, Member of the Rome Bar, Eversheds LLP, Paris,

*as Counsel and Advocates;*

H.E. Mr. Vasyl G. Korzachenko, Ambassador Extraordinary and Plenipotentiary of Ukraine,

Ms Cheryl Dunn, Member of the State Bar of California, Eversheds LLP, Paris,

Mr. Nick Minogue, Solicitor of the Supreme Court of England and Wales,

Mr. Oleksii V. Ivaschenko, Acting Head of International Law Division, Legal and Treaty Department of the Ministry of Foreign Affairs of Ukraine,

Mme Irina Niță, deuxième secrétaire, conseiller juridique à l'ambassade de Roumanie au Royaume des Pays-Bas,

Mme Catrinel Brumar, troisième secrétaire, unité frontières et délimitation maritime du ministère roumain des affaires étrangères,

Mme Mirela Pascaru, troisième secrétaire, unité frontières et délimitation maritime du ministère roumain des affaires étrangères,

Mme Ioana Preda, troisième secrétaire, unité frontières et délimitation maritime du ministère roumain des affaires étrangères,

Mme Olivia Horvath, responsable du département des relations diplomatiques du ministère roumain des affaires étrangères,

*comme conseillers.*

***Le Gouvernement de l'Ukraine est représenté par :***

S. Exc. M. Volodymyr A. Vassylenko, conseiller du ministre des affaires étrangères de l'Ukraine, ambassadeur extraordinaire et plénipotentiaire d'Ukraine, professeur de droit international à l'Académie Mohyla (Université nationale de Kiev),

*comme agent ;*

S. Exc. M. Oleksandr M. Kupchyshyn, vice-ministre des affaires étrangères de l'Ukraine,

M. Volodymyr G. Krokhmal, directeur du département des affaires juridiques et des traités du ministère des affaires étrangères de l'Ukraine,

*comme coagents ;*

M. Rodman R. Bundy, avocat à la cour d'appel de Paris, membre du barreau de New York, cabinet Eversheds LLP, Paris,

M. Jean-Pierre Quéneudec, professeur émérite de droit international à l'Université de Paris I (Panthéon-Sorbonne),

sir Michael Wood, K.C.M.G., membre du barreau d'Angleterre, membre de la Commission du droit international,

Mme Loretta Malintoppi, avocat à la cour d'appel de Paris, membre du barreau de Rome, cabinet Eversheds LLP, Paris,

*comme conseils et avocats ;*

S. Exc. M. Vasyl G. Korzachenko, ambassadeur extraordinaire et plénipotentiaire d'Ukraine,

Mme Cheryl Dunn, membre du barreau de Californie, cabinet Eversheds LLP, Paris,

M. Nick Minogue, *Solicitor* à la Cour suprême d'Angleterre et du pays de Galles,

M. Oleksii V. Ivaschenko, directeur par intérim de la division du droit international, département des affaires juridiques et des traités du ministère des affaires étrangères de l'Ukraine,

Mr. Maxime O. Kononenko, First Secretary of the Embassy of Ukraine in the French Republic,

Ms Mariana O. Betsa, Second Secretary of the Embassy of Ukraine in the Kingdom of the Netherlands,

*as Legal Advisers;*

Mr. Robin Cleverly, M.A., D. Phil, C. Geol, F.G.S., Law of the Sea Consultant, Admiralty Consultancy Services,

Major General Borys D. Tregubov, Assistant to the Head of the State Border Protection Service of Ukraine,

*as Technical Advisers.*

M. Maxime O. Kononenko, premier secrétaire à l'ambassade d'Ukraine en France,

Mme Mariana O. Betsa, deuxième secrétaire à l'ambassade d'Ukraine au Royaume des Pays-Bas,

*comme conseillers juridiques ;*

M. Robin Cleverly, M.A., D. Phil., C. Geol., F.G.S., consultant en droit de la mer, Admiralty Consultancy Services,

M. Borys D. Tregubov, général de division, assistant du chef du service de protection des frontières d'Etat de l'Ukraine,

*comme conseillers techniques.*

The PRESIDENT: Please be seated. The sitting is now open for the continuation of the first round of pleadings of Ukraine and Sir Michael you are to continue your submissions.

Sir Michael WOOD: Thank you very much, Madam President.

## VI. ABSENCE OF A PRE-EXISTING ALL-PURPOSE MARITIME BOUNDARY AROUND SERPENTS' ISLAND (CONTINUED)

1. Madam President, Members of the Court, yesterday, I was explaining why Romania's thesis of a pre-existing agreement on an all-purpose maritime boundary around Serpents' Island is unconvincing. Romania has not discharged the burden upon it, if it is to substantiate its claim that, already in 1949, the Soviet Union and Romania had agreed on such a boundary.

2. I covered yesterday Romania's misreading of the text of the 1949 procès-verbaux, and also its unconvincing speculation about the intentions of the negotiators in 1949, which completely ignored the state of international law of the sea at that time.

3. Today, after some words about subsequent agreements, I will consider Romania's reliance upon "map evidence". Then, at the end, I shall list briefly the inconsistencies between its thesis and recent agreements entered into by the Parties and in particular those of 1997 and 2003, and with their activities or, rather, in the case of Romania, lack of activities in the relevant area.

### (iii) *Reference to sketches, charts and subsequent agreements*

#### *Instruments of 1954, 1961, 1963 and 1974*

4. Madam President, Romania originally relied upon certain subsequent agreements to "confirm" the agreement which it claims to find in the 1949 procès-verbaux; these are the agreements of 1954, 1961, 1963 and 1974. The Parties now seem to be in agreement that these change nothing[1].

5. The Act of 1954, and the procès-verbaux of 1963 and 1974, merely effected technical adjustments of certain border marks. The Treaty on the Border Régime of 1961, updated and

[1] CR 2008/19, p. 34, para. 39 (Crawford).

replaced the Treaty on the Border Régime of 1949. Article 1 simply confirmed the State border agreed in 1949.

6. This is perhaps the moment to mention Romania's argument, first raised in the Memorial[2], that the procès-verbaux — and also the 1997 Exchange of Letters — are "agreements in force between the States concerned", within the meaning of Article 74, paragraph 4, and Article 83, paragraph 4, of the Convention on the Law of the Sea, so that "questions relating to the delimitation of the continental shelf [or the EEZ] shall be determined in accordance with" their provisions. Last Tuesday, Professor Pellet confessed that he had difficulty seeing the interest in this debate[3] — "cette querelle". I respectfully agree.

7. The purpose of paragraph 4 of Articles 74 and 83 may not be immediately apparent. The paragraphs were, I think, intended to be saving provisions, having regard to Article 311 of the Convention, which concerns the relations of the Convention to other agreements. But, in any event, as regards the procès-verbaux of 1949, and subsequent agreements dealing with the State border, the argument in Romania's written pleadings falls at the first hurdle. These instruments simply do not deal with any question relating to the delimitation of the continental shelf or the EEZ. There is nothing upon which the provisions in question could bite[4]. As regards the 1997 Exchange of Letters, as Professor Quéneudec explained, once the negotiations had failed, all that the Exchange of Letters provides is that the question of delimitation of the continental shelf and the EEZs shall be referred to this Court.

***Sketches and maps: general consideration***

8. I turn now to the question of maps. Romania has sought to bolster its assertion of a pre-existing agreed boundary deriving from the 1949 agreements, by reference to a whole series of sketches and charts of varying dates, quality and origin.

9. The Court's case law gives useful guidance on the weight, or lack of weight, to be attached to map evidence. We set out, in the Counter-Memorial, paragraphs 54 to 56 of the Chamber's Judgment in *Burkino Faso/Mali* (*Frontier Dispute (Burkina Faso/Republic of Mali)*,

[2]RM, paras. 7.5-7.6.

[3]CR 2008/18, p. 44, para. 29 (Pellet).

[4]CMU, paras. 5.98-5.102, and paras. 6.23-6.26.

*I.C.J. Reports 1986*, pp. 582-583 (cited at CMU, para. 5.129)). For convenience, we have reproduced the key paragraphs at tab 48.

10. The Chamber's decision in *Burkina Faso/Mali* is widely acknowledged to be a classic statement on the weight to be given to maps. You referred to it recently in *Nicaragua* v. *Honduras* (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, Judgment of 8 October 2007, paras. 209-219). In *Burkina Faso/Mali*, the Chamber referred to the "considerable degree of caution" with which maps have traditionally been treated in judicial decisions (*I.C.J. Reports 1986,* p. 583, para. 56). I shall quote just three sentences from paragraph 54 of the Judgment, in which the Chamber was confining itself to principle. It said, "Whether in frontier delimitations or in international territorial conflicts, maps merely constitute information which varies in accuracy from case to case." The Chamber then referred to maps which "fall into the category of physical expressions of the will of the State or States concerned", such as "when maps are annexed to an official text of which they form an integral part". It continued, in the last sentence of paragraph 54: "Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts." As the Chamber said at paragraph 56, "maps can . . . have no greater legal value than that of corroborative evidence endorsing a conclusion at which a court has arrived by other means unconnected with the maps" (*ibid.*, p. 583).

11. Madam President, this caution was equally apparent in *Nicaragua* v. *Honduras*. Here you were concerned with the evidential value of maps in confirming sovereignty over certain islands (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, Judgment of 8 October 2007, paras. 209-219). None of the maps was "part of a legal instrument in force nor more specifically part of a boundary treaty concluded between Nicaragua and Honduras" (*ibid.*, para. 218). You concluded that you could "derive little of legal significance from the official maps submitted and the maps of geographical institutions cited" (*ibid.*, para. 217).

12. In *Malaysia/Singapore*, you were referred to nearly 100 maps. This was, again, in the context of territorial sovereignty, not maritime boundaries — the two are very different, especially

as regards the accuracy to be expected of their depiction on maps. The parties in *Malaysia/Singapore* agreed "that none of the maps establish title in the way, for instance, that a map attached to a boundary delimitation agreement may" (*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment of 23 May 2008, para. 267). You nevertheless attached some significance to six of the maps, published between 1962 and 1975, which contained annotations that the Court held to be "clear" and to "support Singapore's position" (*ibid.*, para. 271). The Court thus regarded them as an indication that Singapore had sovereignty over Pedra Branca/Pulau Batu Puteh (*ibid.*, para. 275). Having said that, it would seem that the maps, relied upon in connection with territorial sovereignty, played only a secondary role[5].

13. For present purposes, I would suggest that two conclusions may be drawn from *Malaysia/Singapore.* First, the Court reaffirmed the all-important distinction between maps annexed to boundary agreements, and other maps. The latter may have only a confirmatory role; they may confirm a result reached upon the basis of other evidence. Second, the six maps which were considered of some significance, were considered significant because they contained annotations which the Court held to be "clear" as regards Singapore's sovereignty over Pedra Branca Pulau Batu Puteh. That is all far removed from the charts upon which Romania seeks to rely in the present case. They do not concern sovereignty over land territory. Most of them were not published officially by the Soviet Union or Ukraine. And those that were do not contain similarly "clear" annotations.

14. Madam President, I now turn to the various sketches, maps and charts relied upon by Romania. None, in our submission, gets near to establishing what is now asserted, that in 1949 Romania and the Soviet Union agreed on a maritime boundary extending beyond their respective (or in the case of Romania, prospective) 12-mile territorial seas, thus allocating maritime zones not then claimed or even under consideration for claim by the Parties.

15. In accordance with your case law, I shall first look at those maps or sketches which are in some way related to the 1949 Agreements. Here three sets of maps or sketches are at issue:

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[5]They are referred to, and briefly at that, in one of the separate and dissenting opinions, that of Judge *ad hoc* Dugard (*ibid.*, para. 24).

map 134 itself — which you have already seen —; the sketches included in the procès-verbaux of the individual border marks 1438 and 1439; and plates I and V.

***Map 134***

16. First, then, there is the map *(Karta)* referred to in the general procès-verbal and annexed thereto. That is map 134 [put map 134 on screen]. It is now on the screen and it was at tab 15 of your folders for Tuesday. Map 134, in so far as it was intended to indicate the State border beyond point 1439, shows the approximate point where that border would end when, as anticipated, Romania extended its territorial sea to 12 miles.

17. It will be seen that the border runs along the outer limit of Ukraine's territorial sea around Serpents' Island, which is depicted on map 134, and stops at a point whose co-ordinates are approximately 30° 02' 18" E, 45° 5' 25" N.

18. I think it is common ground between the Parties that map 134 is one of the maps referred to at point 1 in the list at the end of Volume III of the general procès-verbal. That list is headed "The following documents are attached to this Protocol", and point 1 reads: "Maps of the state border between the USSR and the RPR at a scale of 1:25,000".

19. While, unlike the other maps, including map 133, the scale of map 134 is in fact 1:150,000, this is explicable because it covers a maritime area and did not need to be on the same scale as the land maps. But it is not, as I have said, disputed that map 134 is among the maps referred to under the heading in the Protocol.

20. The main heading at the top of map 134, Russian to the left and Romanian to the right, reads "maps of the State Border [ — State Border — ] between the USSR and the People's Republic of Romania". That, I would suppose, appears on all the other maps as well. Between the Russian and the Romanian headings, there is another, smaller heading reading (in both languages): "Border Marks from No. 1438 to No. 1439". Professor Crawford rather conflated these two separate headings when he said, last week, that the map is entitled "map of the State Border between the Union of Soviet Socialist Republics and the People's Republic of Romania from border signs No. 1438 to No. 1439", and concluded from this that the purpose was only to depict

"the boundary between those two border signs and nothing else"[6]. The primary purpose of the map was to depict the location of the two border posts. But it also showed the State border.

21. As we have pointed out in the written pleadings, whereas the depiction of the mainland continues right to the lower edge of the map, the map depicts the State border at sea, the final point of which stops short of the bottom of the map. There is no indication that the State border was intended to continue any further along the outer limit of the territorial sea. There is no such indication, either in words, or by an arrow pointing in the desired direction, or in any other way. In short, map 134 depicts a border which ends only a short distance along the outer limit of the territorial sea around Serpents' Island.

22. Romania has suggested that, if significance had been attached to the final point depicted on map 134, the Parties would not have hesitated to describe with precision that one last point. The same applies, of course, to the failure of the Parties to describe with precision — or even to mention — anywhere in the documentation a final point such as Romania's "point X". But it is not difficult to see why the Parties did not, in 1949, specify precise co-ordinates of the final point foreshadowed in map 134. The Parties were seeking to establish the State border. The "State border" would only go as far out to sea as the point at which the outer limit of the Soviet Union's 12-mile territorial sea intersected with the outer limit of Romania's prospective 12-mile territorial sea, which happened shortly afterwards. Pending the establishment of Romania's 12-mile territorial sea, it was not possible to give precise co-ordinates for the point of intersection — although its approximate location could be — and was — indicated on the map.

23. I will not deal with all of Romania's attempts to explain away the fact that the agreed border line on map 134 ends a short distance round the outer limit of Ukraine's territorial sea around Serpents' Island. We have answered them point by point in the Counter-Memorial[7].

24. It is a fact that the border line does stop short of the edge of the map, whereas the relevant mainland coast continues to the edge of the map. The line stops where it does. Romania has pointed to nothing to suggest that it was nevertheless intended to continue further.

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[6]CR 2008/19, p. 30, para. 26.

[7]CMU, paras. 3.25-3.48.

25. Romania says that "in any case, such a conclusion [i.e., that the endpoint of the map's line was the final point of the agreed boundary] would be inconsistent with the clear terms of the instrument to which it was annexed". But there are no "clear terms" in the 1949 general procès-verbal which say anything about the final point of the State border being at "point X".

26. Next, Romania argues that, because map 134 does not depict all the mainland features in any detail, even though there was ample room to do so, no weight should attach to the gap between the end of the boundary line as depicted and the edge of the map[8]. This argument ignores the fact that the purpose of the map was to depict the location of the State border marks. It was a State border map. It showed the agreed State border, along with such other detail as was relevant.

27. A comparison of three depictions of the State border line along the outer limit of the territorial sea around Serpents' Island is very revealing [show on screen]. They are now on the screen — and they are also at tab 49. They are [point to them] first, the distance along the outer limit of the territorial sea depicted on map 134; second, the equivalent distance depicted on the chart submitted by Romania in 1997 when notifying its straight baselines to the United Nations, and third, the equivalent distance to point F. They are similar. The two later depictions are expressly related to the outer limit of Romania's territorial sea. It seems clear that, with due allowance being made for uncertainties surrounding the precise extent of Romania's 12-mile territorial sea in 1949, and the extension of the Sulina dyke, map 134 was intended to foreshadow the same point.

28. Professor Crawford addressed map 134 at some length last week[9]. He even suggested that "Ukraine bases its whole case in relation to this issue on the fact that the boundary depicted on the 12-mile arc around Serpents' Island on map 134, terminates short of the edge of the map, leaving a gap"[10]. This is not so, far from it, as I have already set out our main submission on the issue, that Romania has failed to meet the burden that rests upon it if it is to show the existence of an agreed all-purpose line.

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[8]RR, para. 4.57.

[9]CR 2008/19, pp. 30-31, paras. 26-30.

[10]*Ibid.*, p. 31, para. 29.

29. In response to our point that the border around the outer limit in map 134 ends approximately where point F now is, Professor Crawford pointed to the fact that the depiction on the same map of the State border to the west of point 1438 is not shown as going all the way to point 1437, notwithstanding that there is undoubtedly a border between points 1438 and 1437. He said that it would be absurd to suggest that the absence of the depiction of a border line there means that the border to the west only extends as far as is shown in map 134[11]. Indeed it would be absurd. The border between points 1437 and 1438 is shown on a different map. It is shown on map 133. It was obviously not necessary to show on our map the border all the way back to 1437.

[Remove from screen]

***Sketches in the PVs***

30. Next, I would invite the Members of the Court to look at the sketches included in the individual procès-verbaux for border marks Nos. 1438 and 1439 (these are at tab 50 in the folders). And I can deal with them very briefly. Professor Crawford drew attention to them last week, inviting you to conclude that "[w]hat map 134 and the sketches together show is an interstate boundary going around the 12-mile arc and not stopping at any defined or stipulated point"[12]. As we explained in the written pleadings, the sketches in the individual procès-verbaux, whose purpose was simply to describe the position of the border marks, are pretty unreliable for any other purpose. We certainly would not follow Professor Crawford's argument that the carefully constructed map 134 should, as he put it, "be treated as subordinate" to these sketches[13].

***Plates I and V***

31. Finally, as regards contemporaneous maps or sketches, Romania included in its Reply plates I and V. These can be found at tab 51 in the folders. They are described at "schematic sketches". They are on a far smaller scale than map 134 and the other maps showing the border marks. In fact, they are on a scale of 1:1,500,000 and 1:500,000 respectively. They are not among the maps referred to as "documents . . . attached to this Protocol" in the general procès-verbal.

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[11] *Ibid.*, p. 31, para. 30.

[12] *Ibid.*, p. 28, para. 19.3.

[13] *Ibid*.

Professor Crawford said that they were "included in the catalogue"[14]. It is not entirely clear what he meant by this. We were told in the Reply that they had been "discovered" since the completion of the Memorial[15]. In any event, they are not actually referred to in the text of the procès-verbaux.

32. These two plates are said by Romania to "depict the boundary around" Serpents' Island. Quite apart from their dubious status, they do not do so. Both of them, like map 134, only depict a line going a short way along the outer limit of the territorial sea around the Island. Romania further asserts that the two plates "clearly depict the boundary on the 12 nautical-mile arc around Serpents' Island, with areas appertaining to Romania on the other side of the line". That is simply not the case. The territorial sea around Serpents' Island is indeed identifiable on both plates, but neither includes any indication that the water column or the sea-bed to the south of the outer limit appertains to Romania.

33. Professor Crawford relied heavily on these two sketches, in so far as they depict a line extending somewhat further than that in map 134. We have set out in the Rejoinder a whole raft of reasons why little weight attaches to these sketches, and I shall not repeat them here[16]. I shall just mention one. Professor Crawford's response to all the points in the Rejoinder is simply that the sketches "form part of the catalogue, which itself forms part of the overall delimitation agreement"[17]. But their "inclusion" in a "catalogue" says nothing about their significance. For that, one has to look at their purpose, and what, if anything, the text of the agreement says about them. In fact, as we explained in the Rejoinder, neither sketch was prepared in order to depict the border. The purpose of plate I was to show which of the two States was responsible for the demarcation work in each of eight sectors. The purpose of plate V was merely to provide a key to the areas covered by the maps[18].

34. In our submission, the plates are of no value in determining how far "along" the outer limit around Serpents' Island the State border agreed in 1949 was to extend. The primary map in

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[14] *Ibid.*, p. 31, para. 31.

[15] RR, para. 4.65.

[16] RU, paras. 3.35-3.37.

[17] CR 2008/19, p. 32, para. 34.

[18] RU, para. 3.36 *(e)*.

this context, as even Romania appears to accept, is the map — map 134 — referred to in the relevant part of the 1949 procès-verbal.

35. In short, Romania has produced no contemporaneous evidence that an agreed maritime boundary extended as far as its alleged "point X" or indeed any distance beyond point 1439. It is Romania which has access to and possession of the available material relating to the 1949 procès-verbal. It is significant that Romania has failed to point to any contemporaneous evidence that Romania and the Soviet Union agreed on an all-purpose maritime boundary extending along the outer limit of the territorial sea "point X". Even Romania admits that the 1949 procès-verbal depicted the maritime boundary as running, "around the 12-mile arc surrounding Serpents' Island to a point undefined, in the text, by geographical co-ordinates. Nor did the subsequent boundary agreements concluded between Romania and the Soviet Union identify this point by geographical coordinates."[19] The same is true of the individual procès-verbaux for the border marks, in respect of which Romania admits, "[i]t is true that the final point of the boundary following the arc of circle around Serpents' Island is not specified in any of the procès-verbaux and is not shown on any of the sketch maps"[20].

***Non-contemporaneous maps***

36. Madam President, I now turn to the second category of maps, the non-contemporaneous maps that Romania relies upon, to confirm the result it claims to have reached on its interpretation of the 1949 Agreements. None is referred to in the Agreements or even in diplomatic correspondence between the Parties. In our submission, these non-contemporaneous maps provide no evidence of what the 1949 general procès-verbal meant. Nor indeed do they establish any subsequent agreement between the Parties regarding its interpretation.

37. I shall not take you through the maps in Romania's map atlas one by one. With the exception of the late filed Soviet map, No. 552, we have set out detailed comments on each of them in the Counter-Memorial[21] and the Rejoinder[22].

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[19]MR, paras. 11.51-11.52.

[20]RR, para. 4.43.

[21]CMU, paras. 5.127-5.215.

[22]RU, paras. 3.52-3.103.

38. I shall, however, make some general points concerning the use of symbols on navigational charts ("symbology", as I understand cartographers call it). And then I shall say a word about one or two of the maps, in particular the newly introduced Soviet map from 1957.

39. It is a feature of some of the maps that they highlight the presence of Serpents' Island by what I shall call a "hook" (to use a non-technical term), shown as going varying distances around the outer limit of the island's 12-mile territorial sea to the south and east of the island. Romania appears to attach huge importance to these "hooks" (which are depicted with varying lengths and symbols), the "hooks" are depicted on some charts (the majority published by third parties or Romania itself), but not on others — not, for example, on the currently available British Admiralty Chart of the area[23] — Romania seeks to argue that the depiction of these "hooks", "confirms" that there already exists an agreed boundary between the Parties delimiting Ukraine's territorial sea, on the one hand, and maritime zones appertaining to Romania, on the other. In our submission, the depiction of a "hook" on some charts does nothing of the sort. Charts are the work of hydrographers and cartographers, not lawyers or diplomats. Not all hydrographers and cartographers are necessarily aware of the niceties of current legal disputes, or even of their existence.

40. The earliest charts that Romania has produced showing a "hook" are the two Soviet charts from 1957 — that is some eight years after the 1949 Agreements. There may have been many reasons, in 1957, for including on the charts a clear and visible depiction of the Soviet Union's 12-mile territorial sea around Serpents' Island. Among these reasons, not the least could have been Soviet security concerns. The charts are intended for navigation, by ships of all kinds. Serpents' Island is a prominent island in the Black Sea. It belonged to one of the two superpowers, the Soviet Union. The earliest charts showing a "hook" were produced by the Soviet Union at the height of the Cold War. Vessels heading north into the Black Sea would surely need to be alerted, unambiguously, to the fact that the Soviet Union had a 12-mile area of territorial sea around Serpents' Island, in which innocent passage, as understood at the time by the Soviet Union, not freedom of navigation, was the rule. The Black Sea was a sensitive area. Serpents' Island had a

[23]Black Sea Romania and Ukraine, Gura Sfîntu Gheorghe to Dnistrov'ski Lyman.

significant military presence. I would recall that in 1960, upon ratifying the Territorial Sea Convention, the Soviet Union declared that it considered "that the coastal State has the right to establish procedures for the authorization of the passage of foreign warships through its territorial waters"[24]. Romania made a similar declaration. These countries would be particularly sensitive to foreign State ships, including submarines, which of course are required to navigate on the surface and to show their flag in the territorial sea[25], coming near their territorial sea. I note that Romania's Territorial Sea Decree from 1956 — we looked at it yesterday — provides that "foreign submarine ships in immersion in the territorial waters of the People's Republic of Romania shall be followed and destroyed without warning"[26]. Clearly the States concerned did not want foreign vessels entering their territorial seas inadvertently.

41. The 1957 "hooks" reappear on some later charts. As is the way with maps and charts, they often simply copy earlier ones. Indeed, I understand that hydrographic offices routinely use data from other hydrographic offices under formal agreements. This "copycat effect" is only to be expected. Those who draw up charts do not start with a blank sheet of paper. They base themselves on existing charts and data.

42. Romania also draws attention to other symbols used on the various charts it has selected, issued by various technical services over a longish period. The most one can say about the proliferation of symbols is that the charts show a considerable degree of confusion and inconsistency. Moreover, the use of symbols on charts has varied over time, and it varies between the various issuing authorities, symbols are not always a reliable guide to the real position. The lack of consistency is compounded by what I have referred to as the "copycat effect". In my submission, nothing of significance can be read into the symbols for the purposes of this case. Certainly the far-reaching conclusions that Romania seeks to draw from them are unjustified.

43. Madam President, Romania relies *inter alia* upon a small number of Ukrainian charts and publications. They have even recently submitted to the Court a picture book entitled *Lighthouses of Ukraine*, which includes a graphic showing a "hook". They have tried to make much out of the

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[24]See Multilateral treaties deposited with the Secretary-General of the United Nations.

[25]UNCLOS, Art. 20.

[26]MR, Ann. 81, Art. 8.

symbols on one Ukrainian chart in particular, dating from 2001. As for that, I would merely note that it is a one-off chart. Its purpose, like all the other charts, is to aid navigation, not to show political borders. For all we know, the cartographer may have read too much into the "hooks" which he found on earlier charts. If so, he was in error. There is no later chart before the Court with similar markings. In any event, the 2001 chart predated the conclusion of the 2003 Border Treaty, in which the Parties finally agreed on the co-ordinates of point F; any relevance it might have has been overtaken.

44. Madam President, it involves a great leap to say that, because certain publications of technical Ukrainian bodies have, from time to time, included an ambiguous symbol, a "hook", Ukraine has made an "admission against interest". "Point X" simply played no part in the diplomatic relations of the Parties, and it could not suddenly become a reality because of symbols placed by cartographers on a few charts. It is important to remember that the essential purpose of the charts was an aid to navigation or, in some cases, they were sketches to accompany projects, or in one case even an illustration in what looks like a "coffee table book". They were not prepared for diplomatic purposes, or as an official depiction of State boundaries. In any event, in so far as some of Ukraine's charts and publications depict a "hook", they would all seem to go back to the Soviet charts of 1957, the likely significance of which I have already discussed. Depiction of a "hook" on certain sketches and charts can in no way be interpreted as an "admission" by Ukraine that there was an agreement in 1949 on a pre-existing all-purpose maritime boundary, as urged by Romania.

45. I said I would say a word about Soviet map No. 552, since this was admitted late and is not dealt with in our written pleadings. It dates from 1957. It is the second edition of a Soviet chart first published in 1951. It is one of the two charts from 1957 to depict the "hook", the first maps to do so that have been produced to the Court. Nineteen fifty-seven, as I have said, was some eight years after the 1949 agreements. Map 552 adds nothing significant to Romania's case. I would recall, however, that Romania has not submitted the original 1951 version of this map. In this connection, you will recall that the other map provided by Romania, from 1957, a Soviet map — map 500 — was also a second edition. Ukraine, however, subsequently located the first edition, the 1951 edition of that map, which contained no "hook". That first edition was obviously

more nearly contemporaneous with the 1949 agreements, and in our submission undermined any value that Romania might seek to attribute to the later 1957 edition. We have not, unfortunately, succeeded in locating the 1951 version of the late entry, Soviet map 552. But I would respectfully suggest that, like map 500, the value of that 1957 map 552 as an aid to interpreting the procès-verbal is zero.

**(iv)** ***Inconsistency of Romania's claim with the Parties' own actions and recent agreements***

46. Madam President, Members of the Court, I now turn to my last point, and this will be very brief: the inconsistency of Romania's assertion of a pre-existing maritime boundary with its own action, or inaction, and with recent agreements between the Parties.

47. In our submission Romania's own subsequent actions, or inactions, confirm that there was no pre-existing agreement between the Parties on the delimitation of the shelf or EEZ — and I shall just list them.

**(a)** ***Legislation***

48. First, as I mentioned at the outset, Romania's own legislation confirms that the 1949 agreements did no more than delimit the territorial sea. The Romanian Territorial Sea Decree of 1956 stated that "the territorial waters of Romania . . . are delimited in the Black Sea by a line determined by agreement between [Romania and the Soviet Union]". Romania's EEZ Decree of 1986, as you will recall, on the other hand makes no reference to any EEZ delimitation having been agreed.

**(b)** ***UNCLOS***

49. Second, during the Third United Nations Conference on the Law of the Sea in the 1970s and early 1980s, Romania made prolonged efforts to secure a provision that would have included Serpents' Island within the scope of Article 121, paragraph 3, of the Convention. These efforts will be described by my colleague, Ms Malintoppi. They would have been pointless if there had been a pre-existing agreement, and are thus incompatible with the position that Romania now adopts.

**(c)** ***Bilateral negotiations***

50. Third, during the negotiations leading to the Exchange of Letters of 1997, setting out the principles for the negotiation of a delimitation agreement, Romania made no mention of the idea of a pre-existing agreement between the Parties covering part of the line to be delimited. Indeed, as we have said, Romania took precisely the opposite position. There is, of course, no hint of any such pre-existing agreement in the text of the Exchange of Letters itself.

**(d)** ***Petroleum and coastguard activities***

51. Fourth, the significance of petroleum and coastguard activities in the relevant area will be dealt with next in a little more detail by Ms Malintoppi. It is significant that they give not the slightest indication that Romania thought there was a pre-existing continental shelf or EEZ boundary.

**Conclusion**

52. Madam President, Members of the Court, my conclusion is simple. Romania has not discharged the heavy burden that it bears if it is to establish that the Parties agreed, in 1949 or subsequently, on an all-purpose maritime boundary going around the outer limit of Ukraine's territorial sea around Serpents' Island to "point X" or "thereabouts". Romania has not provided any evidence, let alone compelling evidence, of any such agreement. They could not do so, because no such agreement exists.

Madam President, Members of the Court, that concludes my presentation. I thank you for your patience. I would request that you invite Ms Malintoppi to continue our case. Thank you.

The PRESIDENT: Thank you, Sir Michael. We now call Ms Malintoppi.

Ms MALINTOPPI: Thank you, Madam President.

## VII. PETROLEUM AND COASTGUARD ACTIVITIES

### I. Introduction

1. Madam President, Members of the Court, it is an honour and a great privilege to appear again before you and to represent Ukraine in this case. It falls to me this morning to address the Parties' arguments relating to their petroleum licensing activities and coastguard operations.

2. But before I discuss these activities, some introductory remarks are necessary in light of the oral arguments introduced by Romania last week.

3. It is important to emphasize that Ukraine does not point to this conduct of the Parties in order to show the existence of a line arising from a tacit agreement or a *modus vivendi*. For Ukraine, the significance of this aspect of the case is twofold: first and foremost, as Sir Michael has just mentioned, the Parties' conduct is fundamentally inconsistent with Romania's argument that there was a pre-existing maritime delimitation in the disputed area extending out to "point X"; and, second, the lack of any comparable operations by Romania in the disputed area at a minimum is incompatible with the claim that Romania advances in these proceedings.

4. In this context, it is no accident that the notion of *effectivités* was never mentioned before in this case by either Party, and at least until Romania's first round presentation last week. Ukraine is not relying on its petroleum and coastguard activities as acts *à titre de souverain* establishing a *de facto* line, but as considerations that, in its submission, should be taken into account in order to assess the claims of the Parties in relation to their actual conduct.

5. As to the notion of a critical date, another legal concept borrowed from territorial disputes, this has also been introduced in a novel way during Romania's first round presentation[27]. It is true that there had been a passing reference to a critical date in the Reply, but there Romania fixed the critical date at 1997, at the date of the 1997 Exchange of Letters[28]. The date has now been pushed back to November 1995, from the date of an exchange of correspondence between the Parties that took place at that time, but the reasons for this change of heart are not given.

6. This discussion of the critical date is baffling, not only because the issue is introduced by Romania so late in the case, but also because the date chosen, 1995, is a date of no particular significance in the history of this dispute. It was not until 1997 that the Parties even agreed on the principles for the conduct of their negotiations. It is evident that the dispute had not crystallized in 1995, or even in 1997. Even assuming that there was a critical date at all, and that the critical date would have a role to play in maritime delimitation, it is the date of Romania's Application: 16 September 2004.

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[27]CR 2008/20, pp. 60-61, paras. 13-15.

[28]RR, p. 165, para. 5.106.

## II. Description of the relevant activities

7. With these caveats in mind, I shall now turn to the relevant factual background.

8. Ukraine has shown in its written pleadings that it has been Ukraine, not Romania, which has awarded licensing rights and conducted surveillance patrols on a regular basis in the area now disputed by Romania[29].

### (a) *Oil and gas activities*

9. First, the petroleum activities. In order to illustrate Ukraine's licensing of petroleum activities, notably in respect of the exploration of hydrocarbons, we are projecting on the screen a map, which is also under tab 52 of the folders, which depicts the limits of the oil and gas licences granted by Ukraine in relation to the boundary lines claimed in these proceedings.

10. The location of the Ukrainian licences — the *Delphin*, *Olympiiska* and the *Gubkina* blocks — is shown on the map. The licence area of the *Delphin* block is depicted as a rectangle straddling Romania's claim line, and extending into the area of the Parties' overlapping claims. Rights to this particular area were awarded in 1993 under a licence agreement between the Ukrainian State Committee on Geology and the Utilization of Mineral Resources and a joint venture between the Crimean State Property Fund and J. P. Kenny, a United Kingdom company[30].

11. The second concession, the *Olympiiska* block, covering about 120 sq km, was granted to the Ukrainian company Chornomornaftogaz by the Ministry of Ecology and Natural Resources of Ukraine in 2001 for the exploration of petroleum in an area lying closer to the western limit of Ukraine's continental shelf[31]. The licence area is depicted as a rectangular block falling entirely within the area in dispute on the map on the screen.

12. In 2003, the Ministry of Ecology and Natural Resources of Ukraine granted a further licence to the same Ukrainian company[32]. This licence concerned rights in respect of hydrocarbon resources in the *Gubkina* block, an area of 456 sq km lying in the northern part of the maritime area

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[29]CMU, Chap. 8, Sect. 2; and RU, Chap. 6, Sect. 4.

[30]The licence agreement is reproduced in CMU, Ann. 97.

[31]The licence is reproduced in CMU, Ann. 98.

[32]A copy of the licence is reproduced in CMU, Ann. 99.

now in dispute, straddling the southern limit of the territorial sea of Serpents' Island. It is depicted as a narrow rectangle partly straddling Romania's claim line.

13. The existence of these licences demonstrates that Ukraine, both before and after the 1997 Exchange of Letters, authorized activities relating to the exploration of oil and gas deposits in areas of the continental shelf to which Romania lays claim in these proceedings.

14. In sharp contrast to Ukraine's practice, Romania cannot point to any comparable conduct. This is striking in light of the argument advanced for the first time in this litigation that Romania and the Soviet Union had agreed in 1949 that the limit of Ukraine's sovereign rights over maritime areas should be restricted to a 12-mile arc surrounding Serpents' Island to "point X". Had such an agreement existed, surely it would have been reflected in Romania's subsequent practice in respect of petroleum operations. And yet, Romania's practice shows nothing of the sort.

15. In fact, Romania has not produced any licensing agreements or other documentation evidencing the terms of the concessions that it has granted in respect of offshore areas in the Black Sea. However, the firm Petroconsultants published a map in 1998 which shows that the location of the blocks apparently licensed to both Romanian and international oil companies has no relation to the line claimed by Romania in these proceedings.

16. We are now projecting on the screen a copy of the Petroconsultants map, which is also at tab 53 (CMU, fig. 8.8). The four blocks licensed by Romania are depicted and labelled, running from north to south: *Pelican*, or block XII, which is marked as having been licensed to the United Kingdom oil company Enterprise Oil; *Istria*, which was licensed to the Romanian State-owned company Petrom; *Midia*, or block XV, which was licensed to Enterprise Oil; and *Neptun*, the block lying to the south-east, which was licensed to Petrom.

17. If we now project on the screen the sketch-map depicting the limits of both Parties' oil and gas licences in the area of overlapping claims, which is also under tab 54[33], it is apparent that the line corresponding to the eastern limit of the blocks licensed by Romania up until 1998 bears no relation to its claim that Romania's continental shelf lies to the south and east of a 12-mile arc of territorial sea around Serpents' Island. In fact, as it is evident from this sketch, the outer limit of

[33]CMU, fig. 8.7.

the blocks stays well clear of an imaginary 12-mile arc and does not correspond to Romania's claim at all.

18. In its Reply, Romania has argued that the concessions depicted on this map "represent only a minor part of the activities performed by Romania in the delimitation area"[34]. Romania added that "Romanian activities in the area date since the 1960s . . ."[35] and that "[e]ver since extended seismic profiles have been carried out in an area whose outer limit coincides almost exactly with the maritime boundary claimed by Romania in the present proceedings"[36]. The Co-Agent of Romania maintained this position although now he appears to have placed the starting date of Romania's alleged exploration activities in the 1970s[37]. It is worth mentioning that, curiously, Romania relies on secondary sources for this information — the authority cited is a study published in 2000 by the magazine *Marine Geology* — rather than relying on its own records[38].

19. Romania's statements remain mere assertions as, remarkably, no documentary evidence of any probative significance has been filed to substantiate them. The map projected on the screen by Romania's Co-Agent last Friday, which had been filed by Romania as figure RR 26 of its Reply, provides a good example. We will show it again on the screen now. The sketch is not dated and the source is not provided. It is not a paragon of clarity, to say the least, as a number of lines have been superimposed onto the map, along with symbols representing exploratory wells. It is unclear when the claim lines and the "well" symbols were superimposed on this map. There is no indication whatsoever in the document filed by Romania when the alleged seismic profiles were carried out, by whom, on whose authority. The Co-Agent of Romania shed no further light in this respect last week. He simply stated that these profiles "resulted from intense exploration activities in the 1980s and 1990s"[39].

20. But to the extent that Romania's oil and gas activities can be ascertained in the disputed area on the basis of third party sources, the outer limits of its concession blocks appear to

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[34]RR, p. 255, para. 7.33.

[35]RR, p. 256, para. 7.34.

[36]RR, p. 256, para. 7.34.

[37]CR 2008/21, p. 28, para. 30.

[38]CR 2008/21, p. 28, para. 30.

[39]CR 2008/21, p. 28, para. 29.

correspond to what is depicted on the screen, in green, and at tab 54[40]. If it is true, as Romania contends, but does not prove, that "its conduct regarding oil and gas activities was performed during a reasonably extended period of time (more than 40 years) and is characterised by uniformity, continuity and constancy"[41], the location of Romania's concession blocks certainly gives no credence to Romania's theory that a maritime boundary had been settled in 1949, between the Soviet Union and Romania, out to "point X". Had there actually been such a pre-existing agreement, such a line — and the areas lying south of it — could have been expected to have been reflected in connection with the outer limit of the concessions. As can be seen from the map on the screen, that was not the case. This line bears no relation to the line claimed by Romania in these proceedings.

**(b)** ***Coastguard activities***

21. I shall now turn to a brief description of the activities of Ukraine's coastguard in the area of concern.

22. As discussed in Ukraine's written pleadings, on 7 November 1995, the Ukrainian Ministry of Foreign Affairs informed Romania through diplomatic channels that it was prepared to negotiate an agreement on the delimitation of the Parties' continental shelf and exclusive economic zone. The letter specified that, pending a final determination of the maritime boundary between the Parties, Ukraine's exclusive economic zone in the south-western part of the Black Sea was delimited by a provisional line passing through specific geographical co-ordinates[42]. It is clear from the terms of this letter that Ukraine considered that only areas lying to the south and west of the line defined by those co-ordinates could be in dispute.

23. As recalled in the Parties' pleadings[43], Romania replied to this letter and rejected the validity of this provisional line. However, Romania has not alleged that, in its response, it stated that Ukraine's line was invalid because of a previous existing maritime delimitation in the area. On the contrary, as recalled by Ukraine's Agent, Romania's view was that there was no agreement on

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[40]CMU, fig. 8-7.

[41]*Ibid.*, p. 256, para. 7.37.

[42]*Ibid*., Ann. 26.

[43]*Ibid.*, p. 217, para. 8.62 and RR, p. 260, para. 7.41.

the delimitation of the continental shelf or exclusive economic zones between the former Soviet Union and Romania.

24. The provisional line was also communicated to third States. For example, subsequent to several incidents in which Bulgarian fishermen were intercepted while fishing illegally in Ukraine's EEZ, the Bulgarian Embassy in Kyiv contacted the Ministry of Foreign Affairs of Ukraine, and Ukraine responded on 19 November 2002, confirming that, until an agreement with Romania was reached, the limit of Ukraine's EEZ in the south-western part of the Black Sea was provisionally being limited by the same line[44].

25. The record shows that negotiations with Romania continued subsequently. The record also shows that Romania neither demonstrated any interest in patrolling the area lying on the Ukrainian side of this line, nor did it ever object to the fact that the Ukrainian coastguard assumed the sole responsibility of intercepting illegal fishing vessels and, when possible, escorting them out of Ukraine's exclusive economic zone and taking any other appropriate measures.

26. In its written pleadings, Ukraine described several incidents in which the Ukrainian coastguard intercepted Turkish and Bulgarian fishing vessels caught illegally fishing in Ukraine's EEZ, now claimed by Romania in these proceedings. Documentary evidence of these incidents, notably diplomatic Notes to the respective Governments, was filed with Ukraine's Counter-Memorial[45]. Lest there be any doubt regarding the continuous and constant presence of the Ukrainian coastguard in this area, Ukraine also filed with its Rejoinder statements of several members of the Ukrainian coastguard[46], which confirm, beyond any doubt, that it has been Ukraine and not Romania, that has exercised sovereign rights in the exclusive economic zone contemplated by Article 73 of the Law of the Sea Convention.

27. The map now on the screen, and at tab 55, depicts the location of several of the incidents involving the Ukrainian coastguard and Turkish and Bulgarian fishing vessels. The number of incidents represented on this sketch illustrates the vigilance exercised by the Ukrainian coastguard

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[44]CMU, Ann. 103.

[45]*Ibid.*, Anns. 104-110.

[46]RU, Anns. 13-19.

in intercepting third-State vessels caught illegally fishing in these waters — activities that, incidentally, were carried out at considerable expense to Ukraine.

28. In contrast, Romania carried out no patrolling of any kind and no Romanian fishing vessels were detected by Ukraine in this area, not until 28 April 2006, when an airplane of the Ukrainian border service chased off Romanian fishing vessels, triggering a Romanian protest[47]. Again, this protest Note, it should be said, contains no hint of a pre-existing agreed boundary.

29. This sudden and recent interest by Romania in the area, which only arose well after this case commenced, does not detract from the fact that, prior to 2006, Romania's attitude was very different. Until April 2006, the Ukrainian coastguard had never encountered Romanian vessels in the course of their interceptions of illegal fishing and, until that date, the Romanian authorities had in no way opposed Ukraine's surveillance operations in maritime areas that Romania now claims belong to it.

30. The attitude adopted by Romania in 2006 comes too late to affect the Parties' legal positions as they stood when this case was initiated. Romania cannot improve its legal position by new conduct inconsistent with its earlier behaviour. If anything, this new Romanian conduct reveals a belated awareness by Romania of the weakness of this aspect of its case and a belated attempt to improve its position.

## III. Legal relevance of these activities

31. I shall now discuss the legal relevance of these activities.

32. The evidence on the record with respect to oil and gas activities — which, I would recall, has been submitted only by Ukraine — demonstrates that, whereas Ukraine, since the granting of the *Delphin* concession in 1993, has awarded rights in blocks situated in the area in dispute, this has not been the case with Romania. On the contrary, Romania, in its licensing practice, appears to have carefully respected the outer line that is now shown on the screen and that is also at tab 54[48].

33. Romania's rebuttal of Ukraine's arguments hinges primarily on an analysis of the legal relevance of oil and gas activities according to previous decisions of the Court and arbitral

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[47]RR, Ann. RR37; RU, p. 127, para. 6.100 and Ann. 12.

[48]RU, fig. 6.2.

tribunals, and on the fact that Ukraine's activities were protested by Romania[49]. Romania also contends that it refrained from pursuing exploration and exploitation activities in the area because it confined its licences to an area which was not in dispute[50].

34. As to the first part of Romania's arguments, Romania relies on the case law for the proposition that oil concessions can be taken into account in maritime delimitations only if they demonstrate a consistent behaviour displayed over a period of time and evidencing a tacit agreement between the parties[51]. However, in the present case, as I have just discussed, the relevance of the Parties' oil licensing practices — in particular, the outer limit of Romania's blocks — lies in the fact that it is scarcely consistent with Romania's claims. The pattern of these practices is also relevant when it is considered in conjunction with the activities and responsibilities assumed by the Ukrainian coastguard — in respect of which Romania did not protest until this case was initiated.

35. As regards Romania's attempt to minimize the relevance of Ukraine's activities[52], Romania relies in particular on paragraph 4 *(f)* of the 1997 Exchange of Letters. In this paragraph, the Parties agreed to, in terms, "refrain from *exploitation* of the mineral resources of the zone submitted to delimitation, the co-ordinates of which shall be established at the beginning of these negotiations . . .". However, the co-ordinates of such a delimitation zone were never established as anticipated in the Exchange of Letters; the provision excludes exploitation of petroleum resources and has no bearing on exploration; and in any event, a number of the licences which I discussed earlier (such as the Ukrainian *Delphin* block, and, according to Romania, the Romanian blocks) were awarded before 1997, therefore before the Exchange of Letters. And the relevance of this 1997 Exchange of Letters is accordingly minimal.

36. With regard to Romania's argument that it "consistently objected to Ukraine's hydrocarbon activity"[53], these contentions are overstated since Romania's objections were limited to just two instances. And in contrast, no objections were voiced by Romania in respect of the

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[49]CR 2008/21, pp. 11-15, paras. 4-12 and p. 26, para. 24.

[50]CR 2008/21, pp. 29-30, paras. 32-35.

[51]RR, p. 248, para. 7.7; CR 2008/21, pp. 16-19, paras. 14-19.

[52]RR, pp. 248-249, paras. 7.8-7.9.

[53]RR, pp. 252-255, paras. 7.21-7.31.

constant exercise of Ukraine's sovereign rights in the disputed zone by the Ukrainian coastguard until 2006.

37. Romania also asserts that it did not carry out any exploration and exploitation activities in the disputed area out of respect for the "gentlemen's agreement" referred to in Romania's 1995 Note Verbale[54].

38. But, Madam President, if this self-imposed abstention corresponds to reality, it seems to have gone too far because, not only did Romania's alleged activities not remotely correspond to its present claim, but they also did not respect the so-called "all-purpose boundary" which Romania asserts existed since 1949. It is true that caution in granting oil concessions is sometimes exercised where negotiations are ongoing in the delimitation of the continental shelf and exclusive economic zones. But, if an area is already delimited, as Romania contends, what is the need for this "precautionary conduct"[55]?

39. As to the patrolling operations, they have been undertaken exclusively by the Ukrainian coastguard. The burden of conducting the hazardous and expensive role of surveillance of illegal fishing in the maritime area now in dispute has rested solely on Ukraine since 1995. These activities have been consistent with Ukraine's rights and duties as a coastal State.

40. Romania argued during its first round presentation that the probative value of the affidavits of members of the Ukrainian coastguard filed with the Reply should be assessed in light of the fact that they were prepared for the purpose of these proceedings, that they were not contemporaneous with the facts to which they attest, and they were sworn by Ukrainian State officials[56].

41. However, these statements stand unrebutted by any similar evidence provided by Romania. They are relevant because they provide the first-hand views of the people actually involved in patrolling the area that the waters in question were frequented exclusively by Ukrainian vessels.

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[54]CR 2008/21, p. 29, para. 34.

[55]CR 2008/21, pp. 29-30, para. 35.

[56]CR 2008/21, pp. 32-33, paras. 43-44.

## IV. Conclusion

42. In Ukraine's submission, Madam President, Members of the Court, the oil and gas activities and Ukraine's coastguard operations — particularly if regarded cumulatively — are relevant for a number of reasons.

43. First, they constitute an important element of the conduct of the Parties subsequent to the 1949 agreement that fundamentally undermines Romania's argument that an all-purpose boundary had been agreed at the time.

44. If Romania's thesis regarding the import of the 1949 agreement is correct, then its licensing and coastguard inactivity in areas that it now contends it had allegedly long since acquired sovereign rights over is inexplicable. It is also inexplicable, if one is to believe Romania's theory, that none of Romania's diplomatic correspondence in the record refers to a pre-agreed delimitation line. For instance, the 1995 Note by Romania unequivocally stated that: "there is no Agreement between Romania and Ukraine on the delimitation of maritime spaces in the Black Sea"[57].

45. Second, these activities are consistent with Ukraine's delimitation line and deserve to be taken into account together with the other relevant circumstances — notably the physical geography — in order to achieve an equitable solution. In its Judgment in the *North Sea Continental Shelf* cases, the Court stated clearly that "there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures . . ." *(North Sea Continental Shelf*, *Judgment*, *I.C.J. Reports 1969*, p. 50, para. 93). In *Tunisia/Libya*, the Court underscored the importance of applying equitable principles "as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result" *(Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 59, para. 71).

46. Third, Romania has remained silent in the face of Ukraine's assumption of responsibilities in respect of surveillance of the disputed maritime area in order to prevent illegal fishing. Romania has given no convincing explanation for its failure to object to Ukraine's conduct, its failure to take any coastguard measures itself, or its failure even to offer to co-operate

[57] CMU, Ann. 25.

with Ukraine in patrolling the waters that it now considers appertain to it. As is evidenced by the diplomatic Notes filed with Ukraine's pleadings, Ukraine's activities were known to the other Black Sea States, and notably Bulgaria and Turkey.

47. As I said, it is particularly noteworthy that the conduct of the Parties, and notably that of Romania, confirms that there was no pre-existing agreement delimiting a maritime boundary in the disputed area as alleged by Romania. In other words, the conduct of the Parties is an additional aspect of this case which confirms that Romania's theory is nothing but a figment of its imagination.

Madam President, Members of the Court, this leads me to the end of this brief speech. Perhaps this may be a convenient time to take the coffee break, and then, if I may ask you to call on Mr. Bundy after the break. Thank you.

The PRESIDENT: Thank you, Ms Malintoppi. The Court will briefly rise now.

*The Court adjourned from 11.20 to 11.30 a.m.*

The PRESIDENT: Please be seated. Yes, Mr. Bundy.

Mr. BUNDY: Thank you.

## VIII. THE FLAWED NATURE OF ROMANIA'S CLAIM LINE

### Introduction

1. Madam President, Members of the Court: yesterday morning and again this morning Sir Michael has explained why Romania's contention that there is a pre-existing boundary seaward of "point F" at this fictional point X is without merit, and Ms Malintoppi, just before the break, demonstrated how Romania's claim is inconsistent with the conduct of the Parties. My task this morning is to address the remainder of Romania's claim.

2. Now that claim falls into two segments, labelled sector 1 and sector 2 by Romania. The first sector is what Romania terms the lateral boundary between the coasts of the Parties that Romania views as adjacent to each other. This claim line proceeds seaward from "point F" around Serpents' Island, leaving a 12-mile arc to the island corresponding to a territorial sea, and then

extends further eastward of the island and eastward of point X. The second sector of Romania's claim assumes a broadly north-south configuration and is described by Romania as an equidistance line falling between what Romania considers to be the opposite coasts of the Parties in the case.

3. With respect to the first sector of Romania's claim line, Romania has asserted that the "equitable character" of its historical claim to a maritime boundary around Serpents' Island "is confirmed by the fact that, even if no account were taken of the series of agreements said to be binding on Romania and Ukraine, the solution adopted pursuant to Articles 74 and 83 of the United Nations Convention on the Law of the Sea would be the same" (MR, para. 11.45).

4. Now that argument is pure wishful thinking. It is self-evident that the equitable character of an alleged historical boundary cannot be confirmed when there is no such historical boundary in the first place, as Sir Michael has shown.

5. Moreover, as I shall show, Romania's argument that the application of principles and rules of international law relating to maritime delimitation produces, *mirable dictu*, virtually the exact same line, is advanced at the expense of distorting the geographic facts and misapplying the law to the circumstances of this case.

6. The same holds true for the second sector of Romania's claim line — its so-called "opposite coasts" claim line. That claim also is based on a disregard for the relevant circumstances characterizing the area to be delimited, particularly the marked disparity that exists between the lengths of the relevant coasts of the respective Parties.

7. I shall address the deficiencies underlying each of the sectors of Romania's claim in turn, starting first with what Romania terms the lateral boundary in the north, and then I will proceed to Romania's version of the "opposite" coasts boundary further south.

## 1. The first sector of Romania's claim

8. If we turn to the first sector of Romania's claim, the most practical way of exposing the defects in this part of Romania's case is to use Romania's own illustrations. The first graphic I shall be referring to was produced as figure 29 to Romania's Memorial: it now appears on the screen and is tab 56 in your folders.

[Place fig. 29 of Romania's Memorial on screen]

9. The illustration on the screen shows a convoluted series of lines and alphabetically labelled points. I shall try to do my best to unravel this tangled web of constructs and to show why each element of Romania's claim in this area is flawed.

10. Starting out in the west off the mainland coasts of the Parties, the only part of this maritime boundary that has been delimited by the Parties is the State border, including the territorial sea, from the land boundary and internal waters out to point F, the co-ordinates of which are specifically identified in the 2003 Treaty.

**A. Romania's provisional equidistance line**

11. At the same time, the Court will observe that Romania has drawn a straight, dashed line from its own mainland coast in an easterly direction: that is being highlighted on the screen now (tab 56) [point to line with arrow on map]. That line passes about 3 miles south of Serpents' Island and then connects up with a series of points labelled Y1, Y, D and T. Romania refers to this as an "equidistance line between Romanian and Ukrainian adjacent coasts", and equates it with Romania's version of the "provisional equidistance line".

12. The line as such bears no relation to the course that a properly constructed provisional equidistance line should follow. Romania's equidistance line gives full effect to the Sulina dyke while at the same time giving no effect to Serpents' Island which, as I have demonstrated yesterday, has a baseline. Base points for constructing an equidistance line are for Romania apparently like beauty — they rest in the eyes of the beholder. This is not a question of "trading off" Sulina dyke for Serpents' Island, as Professor Crawford suggested last week (CR 2008/21, p. 43, para. 23). It is a question of assessing whether it is equitable to give full effect to an artificial structure while giving no effect to a natural island for purposes of plotting the provisional equidistance line.

13. Professor Crawford argued that the fact that the dyke is man-made "is neither here nor there; its use as a base point is in accordance with Article 11 of the Law of the Sea Convention" dealing with permanent harbour works (CR 2008/21, p. 45, para. 30). Be that as it may, the use of the baseline on Serpents' Island to provide base points is also justified under international law in

accordance with Article 5 of the 1982 Convention, the provision dealing with normal baselines of coasts.

14. Professor Crawford also referred to the *Sharjah/Dubai* Award in support of his proposition that harbour works can be used as base points for constructing an equidistance line (CR 2008/21, p. 45, para. 31). But the facts in that case, *Sharjah/Dubai,* were very different from what we have here.

15. In *Sharjah/Dubai*, *both parties* had harbour works which the Court of Arbitration took into account. Each party's harbour works were 3 km in length — horizontally in length — as opposed to the Sulina dyke, which I showed yesterday, is only 150 m across. Dubai's harbour works extended 1.5 miles, or about 2.4 km, out to sea while Sharjah's harbour works extended about 0.5 miles, or just under 1 km, seaward (91 *ILR* 545, p. 662). The Sulina dyke, in contrast, extends 7.5 km out to sea.

16. Given the existence of harbour works along the coasts of *both* Dubai and Sharjah, their effect on the equidistance line in that case was insignificant — you can see that from the map in the Court of Arbitration's Award. Closer to the shore, Sharjah's harbour works caused the line to deviate *very slightly* towards Dubai. And further seaward, Dubai's harbour works caused a similar, small deflection of the line towards Sharjah. And as the Court of Arbitration noted: "the deflection of the line from the 'true' or 'strict' equidistance line by reason of the effect given to the harbour works of both Parties is slight and the resulting line is in all respects equitable as between the two territorial seas" (*ibid*., p. 663).

17. In contrast, the Court may recall the graphic that I presented on Tuesday, which was also in tab 9 earlier in the folder, showing the dramatic effect that use of the Sulina dyke has on Romania's equidistance line, even without taking into account Serpents' Island.

[Place comparison slide on screen]

**B. Romania's line to the south and east of Serpents' Island**

18. To the south of Serpents' Island, Romania does not rely on its own, or indeed on any other, version of equidistance. Instead, Romania contends that:

> "Given the close proximity of Serpents' Island to the adjacent coasts of Romania and Ukraine, as well its status of a rock falling under the provisions of

> Article 121 (3), [of the Convention] it is appropriate to give Serpents' Island no weight at all in delimiting the continental shelf and exclusive economic zones of Romania and Ukraine. This means that the only effect for Serpents' Island is restricted to a 12 nautical mile semi-enclave." (MR, para. 11.49.)

19. I shall come back to Romania's argument that Serpents' Island is entitled to no more than a 12-mile territorial sea at the end of my presentation this morning. Ms Malintoppi will also be responding to Romania's assertion that Serpents' Island is no more than an Article 121 (3) rock. For present purposes, I would simply note that Romania treats Serpents' Island as if it exists in a vacuum divorced from the overall geographic setting characterizing this part of the Black Sea.

20. To the east of Serpents' Island, Romania's claim line becomes even more confused.

21. The Court will note from the map on the screen that Romania's provisional equidistance line intersects with the 12-mile territorial sea of Serpents' Island at a point Romania labels Y1 [arrow on screen pointing to this point]. That point bears no relation, as I have said, to a true equidistance line. It is based on giving the Sulina dyke a full effect and Serpents' Island no effect at all.

22. It is at this juncture that Romania runs into another embarrassing problem. Romania's principal argument is that there is an historical delimitation extending around Serpents' Island up to "point X" — this is a proposition to which Sir Michael has responded. In its Memorial, Romania is forced to concede that "point X" is actually a "point undefined, in the text [of the 1949 procès-verbaux], by geographic coordinates" (MR, para. 11.51). Romania also admits that, "Nor did the subsequent boundary agreements concluded between Romania and the Soviet Union identify this point by geographical coordinates." (MR, para. 11.52.) Nonetheless, that does not deter Romania from arguing that the maritime boundary must pass through "point X", even though Professor Crawford stated the other day, "whether or not point X is located precisely where we propose, it must be located thereabouts" (CR 2008/21, p. 40, para. 13).

23. A glance at Romania's map, which I have had placed on the screen, shows that its "point Y1" — the point arrived at on the basis of Romania's equidistance line — does not coincide with "point X": it lies to the south of it. This discrepancy in and of itself undermines Romania's contention that its provisional equidistance line somehow "confirms" the course of the alleged historic boundary line.

24. Romania is thus faced with the problem of how to overcome this inconvenient fact — in other words, how to link up its "point X" with its version of the equidistance line. And, in trying to deal with this problem, Romania has embarked on a series of artifices, each of which is more tendentious than its predecessor. With the Court's indulgence, I will review the rather convoluted process that Romania has adopted in arriving at its line to show why the approach as a whole is fundamentally misguided.

25. In its written pleadings, Romania referred to passages from the Court's Judgment in the *Cameroon* v. *Nigeria* case to justify its approach and Professor Crawford also made a similar reference last Friday (CR 2008/21, p. 40, para. 12). To facilitate an understanding of Romania's argument, you can see on the screen now the relevant map from the Court's Judgment.

[Sketch-map No. 12 at p. 449 of *I.C.J. Reports 2002* in *Cameroon* v. *Nigeria*]

26. Romania's argues that in *Cameroon* v. *Nigeria* the Court had to connect up the delimitation resulting from an historical boundary agreement — the 1975 Maroua Declaration, which ended at point G on the map — with the starting-point of the equidistance line running to seaward that was decided by the Court — point X. This the Court did by connecting points G and X with a line running due west along an azimuth of 270°. Romania then argues that the Court should do more or less the same thing here in linking up Romania's own "point X" with its version of the equidistance line. Romania contends that "under normal circumstances" this could be done by drawing a perpendicular between "point X" and point Y1, but then curiously Romania does not actually follow that method.

27. I will return to Romania's line in a minute, but first it is important to point out why the situation confronted by the Court in *Cameroon* v. *Nigeria* is not at all comparable to the situation we have here.

28. Unlike the present case, point G in *Cameroon* v. *Nigeria* was a point that had been identified and specifically agreed by the parties in an international delimitation instrument which the Court ruled was binding. The agreement in question — the 1975 Maroua Declaration — provided that:

> "The Two Heads of State of Cameroon and Nigeria agree to extend the delimitation of the maritime boundary between the two countries from point 12 to point G on the Admiralty Chart No. 3433 annexed to this Declaration."

29. Thus, not only did the 1975 Maroua agreement expressly provide that it related to the delimitation of the maritime boundary out to point G, the co-ordinates of point G itself were specified and referred to as such in the agreement. They were also identified and referred to as such in Court's *dispositif* in the case (*I.C.J. Reports 2002*, p. 456, para. 325 IV. (B)).

30. As Sir Michael has demonstrated, nothing of the kind exists in this case with respect to Romania's "point X" in our case. There is no delimitation agreement either between Romania and the Soviet Union or between Romania and Ukraine beyond point F. "Point X" is nowhere mentioned in any instrument and, as Romania itself has conceded, its co-ordinates are nowhere defined. There is simply no pre-existing boundary out to "point X" and no "point X" at all. It follows that the methodology adopted by the Court in the *Cameroon* v. *Nigeria* case for linking up points G and X in that case has no role to play in this case.

31. It is also striking that, having set out *Cameroon* v. *Nigeria* as the relevant precedent, Romania then discards the method used by the Court in *Cameroon* v. *Nigeria* in favour of yet another line that it has conjured up out of thin air. For, if we return to Romania's illustration of its position [place Romania Memorial fig. 29 back on screen], the Court will observe that Romania's claim line does not actually proceed south from "point X" to point Y1; instead it extends in an east-south-easterly direction to connect up with yet another artificially constructed point labelled "point Y" [point to point Y on map].

32. In other words, having first wrongly plotted the provisional equidistance line which gives full effect to the Sulina dyke and no effect to Serpents' Island, Romania then claims more than this equidistance line — a claim that includes the triangular-shaped area that is now being highlighted in red on the map on the screen [arrow pointing to hatched area].

33. The justification Romania uses for this methodology and for its choice of arriving at point Y is eccentric in the extreme. In Romania's words:

[Place quote on screen]

> "The solution would lead to the allocation to Romania of a maritime area of about 68 km². This roughly equals the area lost by Romania because of the unjustified departure from equidistance when delimiting the territorial seas between Romania and the USSR, a factor which should be kept in mind when considering the overall equity of the solution adopted." (MR, para. 11.72.)

34. In other words, Romania is claiming an additional slice of continental shelf and exclusive economic zone to the east of Serpents' Island, in order to compensate it for areas that Romania perceives it "lost" when it delimited its territorial sea boundary with the former Soviet Union in 1949. The so-called "lost" area in question is now the area in blue being highlighted on the screen; it is also at tab 57 [arrow pointing]. This area is labelled by Romania on its own map as "Maritime area lost by Romania as a consequence of the establishment of the 1949 boundary". And Romania apparently feels that it is now entitled to some form of compensation for past agreements it entered into. This was made very clear by Romania's Agent last week in his opening presentation, when he discussed at considerable length the so-called "injustices" that Romania claims it suffered at the hands of the Soviet Union (CR 2008/18, pp. 22-25, paras. 23-31).

35. Quite apart from the fact that Romania "lost" no maritime areas in 1949, the 1949 Agreement was determined by a valid treaty entered into by two States. Romania has not invoked any of the grounds of invalidity set out in Part V of the Vienna Convention on the Law of Treaties. And the 1949 Treaty has been reaffirmed on many occasions — most recently in 2003. Romania's current manner of justifying its claim is really no more than an ill-disguised attempt to make out a plea for a kind of politically inspired "distributive justice". Ukraine pointed this out in its Counter-Memorial (paras. 4.15-4.19). And as Ukraine also noted, in the *Tunisia/Libya* case, the Court firmly rejected the proposition that maritime delimitation should be based on distributive justice. As the Court stated with respect to its task — and I am citing from paragraph 71 of the Judgment:

[Place quote on screen]

> "It [the Court] is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result. While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice." (*I.C.J. Reports 1982*, p. 60, para. 71.)

36. Following the submission of Ukraine's Counter-Memorial, Romania came up with yet another construct to justify its line. Having previously admitted that "point X" was never defined in any agreement between the Parties, Romania advanced a brand new argument in its Reply, which Professor Crawford also ran with last Friday. Pursuant to this new argument, Romania

contends that "point X actually represents the intersection of the 12 nm arc around Serpents' Island with a line drawn from the last point of the Romanian/Soviet land-river boundary on a perpendicular to the segment closing the Musura Bay" (RR, para. 4.97). This new construct is illustrated in Romania's Reply at fig. RR21 — it is now being reproduced on the screen [fig. RR21 on screen]. Professor Crawford asserted that the point where this new construct crosses the 12-mile arc around Serpents' Island corresponds to "point X" (CR 2008/21, p. 39, para. 10).

37. Madam President, Members of the Court, once again, our opponents are engaging not simply in a refashioning of history but also a refashioning of geography.

38. On the historical plane, there is *no evidence* that the Soviet Union or Romania paid any attention, or ever referred, to Romania's perpendicular line when they agreed their State border in 1949, or that Ukraine and Romania had in mind any such perpendicular when they entered into the 1997 and 2003 Agreements. Romania's perpendicular theory is no more than an *ex post facto* attempt to justify something that is otherwise completely unsubstantiated — the location of "point X". Let me repeat once more, "point X" has no basis in fact or law, and it certainly was not the practical result of constructing any perpendicular line, whether in 1949 or thereafter.

39. Geographically, Romania's version of the general direction of the coast on the basis of which its red perpendicular line has been constructed is the product of myopic vision. The red line you see on the map does not even begin to represent the general direction of the Parties' coasts in this area. It lops off part of Ukraine's coast, it treats the seaward end of the Sulina dyke as if it alone represents the general direction of Romania's coast, and it does not begin to reflect the overall general direction of both Parties' coasts.

40. If lines drawn perpendicular to the general direction of the coast were to have any relevance in this case, such lines would have to be drawn in a way to represent faithfully the actual geographic orientation of the Parties' coasts. A properly constructed line, representing the general direction of the Parties' coasts in this area, would adopt the course that is now being shown on the map and which you can also see at tab 58 [superpose a new "coastal front" on Romania's fig. RR21]. As can be seen, a line drawn perpendicular to the coastal façade of both Parties, even ignoring for the moment the presence of Serpents' Island, would pass to the south of Romania's

12-mile arc drawn around Serpents' Island and it would come nowhere near to any of Romania's other points, whether labelled "point X", "Y", "Y1", "D" or "T".

[Place MR fig. 29 back on screen]

41. It is abundantly clear that "point X" and "point Y" are both a product of Romania's imagination and no justification is given by Romania for the location of point Y, other than to assert that it lies "approximately in the middle" of its equidistance line lying between points Y1 and T.

42. This brings me back to Romania's version of equidistance, since points Y, D and T on its line, are all said to be situated on the provisional equidistance line.

[Place MR fig. 28 on screen]

43. The map that now appears on the screen is figure 28 to Romania's Memorial. It is labelled "The equidistant line between the adjacent relevant Romanian and Ukrainian coasts", and it depicts the base points that control the course of Romania's equidistance line — it is also at tab 59.

44. As the Court will observe, the entire course of this line is controlled by a single base point situated on Sulina dyke. The distance between the land boundary separating the two Parties and Sulina dyke is very short — it is no more than about 5 nautical miles. Yet this very limited stretch of coast — and in fact, just one point not even located on the coast but rather at the tip of a man-made structure — dictates the entire course of Romania's claim line in the first sector out to sea. In his presentation last Tuesday, Professor Crawford displayed a map (tab IV-3) which labelled this line as the "Mainland coasts equidistance line". And I would suggest that it probably should have been more accurately called the "Sulina dyke equidistance line", since Romania's only base point for constructing the line is situated at the end of the dyke.

45. Several important points stand out from this analysis of the actual coastal geography.

— First, the length of Ukraine's relevant coast in this area — the area which Romania posits as relevant to its lateral boundary — is significantly longer than the corresponding length of Romania's coast even if Romania's coast is taken as extending from the land boundary with Ukraine down to the Sacalin peninsula.

— Second, a line drawn perpendicular to the general direction of the Parties' coasts projects in a south-east direction as can be seen on the illustration on the screen, not in an easterly direction as Romania would have the Court believe [add perpendicular line to the coastal front line].

— Third, Romania's versions of equidistance produces a marked cut-off effect of the projection of Ukraine's coastal front north of the land boundary. While Romania's methodology accords the very, very short stretch of Romania's coast around the Sulina dyke a projection due eastwards, the projection of Ukraine's much longer coast is amputated despite its greater length.

— Fourth, the cut-off effect produced by Romania's line is even more pronounced when Serpents' Island is included in the equation, as it should be. Romania obviously ignores Serpents' Island for the course of its equidistance line. But Serpents' Island forms part of Ukraine's coastal geography and it is surely entitled to greater weight than a man-made structure having the characteristics of Sulina dyke.

46. All of these elements undermine the legitimacy of the first part of Romania's claim line. However, there is still a further important point, and an important defect in that line which merits attention. For not only does Romania's line encroach upon the extension or projection of Ukraine's south-east-facing coast — the coast just above the land boundary — it also produces a cut-off effect on the projection of Ukraine's south-facing coast lying beyond Odessa.

47. This is the long stretch of coast that Romania has been at pains to suppress throughout these proceedings. As Ukraine has shown, its south-facing coast generates maritime entitlements throughout the relevant area on a basis that is no less deserving than the entitlements generated by the other coasts of the Parties. I have previously observed that the 200-nautical-mile entitlements that this south-facing stretch of Ukraine's coast gives rise to extend well south of Romania's claim line connecting up points X, Y, D and T. Yet that portion of Romania's claim line connecting those points runs parallel to the south-facing Ukrainian coast and hence cuts in front of its natural prolongation, to borrow Professor Lowe's words.

48. Romania's failure to take this part of Ukraine's coast into account once again is telling. On the one hand, Romania proceeds on the basis that its very short east-facing coast, and the Sulina dyke, are entitled to a maritime projection extending due east and east of Serpents' Island. On the

other hand, Romania denies the same treatment to Ukraine's much longer east-facing coast, as well as to its south-facing coast and Serpents' Island.

49. Any balanced application of equitable principles must respect the actual geography of the area being delimited and must give appropriate weight to the relevant coasts of the Parties on an equitable basis. Romania's claim line fails to do this. It not only fails to take into account the long stretch of Ukraine's coast lying between Odessa and Cape Tarkhankut, but it also fails to reflect the substantial difference in the overall lengths of the Parties' coasts abutting the area to be delimited. When it is recalled that Romania's provisional equidistance line is improperly calculated in the first place, the failure thereafter of Romania to take any account of the marked differences in the lengths of the Parties' relevant coasts and the configuration of those coasts exacerbates the inequitable nature of Romania's claim line.

**2. The second sector of Romania's claim**

50. Madam President, Members of the Court, I now turn to the second sector of Romania's claim — I have dealt with the lateral portion and I will deal with the second sector, the part of Romania's claim that it characterizes as an "opposite coasts" delimitation. That is the line, as I have mentioned, that extends south from Romania's point T and is said to be equidistant between the opposite coasts of the Parties. And as with Romania's first sector, this element of its claim also suffers from numerous shortcomings.

[Place MR fig. 30 on screen]

51. The map on the screen is taken, once again, from Romania's Memorial and shows how Romania has plotted the initial part of the second sector of its claim south of point T. I would suggest that what is interesting about this figure is the fact that, while the base points on Ukraine's coast which control this part of Romania's line now lie on the other side of the Black Sea — at Cape Tarkhankut in Crimea — on the Romanian side, the line is still controlled by a single base point situated at the seaward end of the Sulina dyke. Moreover, the presence of Serpents' Island continues to be ignored by Romania for equidistance purposes.

52. It is only further south — as can be seen on the graphic on the screen [fig. 32 to MR on screen] which is also at tab 60 — that the Sulina dyke ceases to provide the relevant base points for

Romania, and is replaced by a second base point located on the Sacalin peninsula where the Romanian coast then recedes back sharply to the west. The part of Romania's claim line controlled by the single point — the Sulina dyke — is highlighted in red on the map that you have in your folders. South of the Sacalin peninsula, the Romanian coast does not provide any base points for Romania's delimitation line. In fact, most of that part of Romania's coast actually faces south and south-east. Yet that does not prevent Romania from considering this entire stretch of coast as a relevant coast.

53. On the Ukrainian side, Romania identifies the relevant base points as located at Cape Tarkhankut and Cape Khersones. Of course, Professor Lowe rightly observes that base points do not generate maritime zones, the coastline does (CR 2008/21, p. 56, para. 19). And as he also noted, "each segment of the relevant coastline must be permitted to generate its own maritime zones" (CR 2008/21, p. 62, para. 52).

54. The problem is that Romania's blinkered approach to geography denies to long stretches of Ukraine's coast precisely such zones. As I pointed out yesterday, just as the United States coast at the back of the Gulf of Maine was deemed by the Chamber to be relevant to the determination of an equitable delimitation throughout the Gulf and well into the Atlantic, so also should the entirety of Ukraine's coast be taken into account in this case with respect to the whole course of the delimitation line.

55. When it comes to the "opposite coasts" sector of its claim, Romania counts its coast between the land boundary with Ukraine and the Sacalin peninsula as a relevant coast for a second time. It has already used it for its adjacent coast, but for the opposite coast it also counts this part of the coast for a second time. But then it adds to this stretch of coast the remainder of Romania's coast all the way down to the land boundary with Bulgaria. Ukraine, on the other hand, is limited to its west-facing coast along the Crimea between Cape Tarkhankut and Cape Khersones, and is once again not allowed to take into account its own south-facing coast — parts of which are just as close to Romania's claim line as the Romanian coast south of the Sacalin peninsula, as I showed with a slide in my opening presentation on Tuesday.

56. In Ukraine's submission, such a self-serving approach to the geographic realities of the case is at odds with a delimitation based on the application of equitable principles. The proper way

of proceeding, both for purposes of plotting the provisional equidistance line and for considering whether there are any relevant circumstances justifying the shifting of that line, is to compare "like with like".

57. If Romania wishes to use the Sulina dyke for equidistance purposes, then at the very least it should be prepared to accord Serpents' Island the same, if not more favourable, treatment. If Romania wishes to consider its entire coast stretching from Ukraine down to Bulgaria as a relevant coast for delimitation purposes because, so it claims, that coast generally abuts the area to be delimited, then it should also be prepared to accept that all of Ukraine's coast fronting the same general area should be similarly treated as a relevant coast. On the other hand, if Romania wishes to eliminate all of Ukraine's south-facing coast from consideration because it is allegedly too far away or points in the wrong direction, it should also be prepared to eliminate its own coast south of the Sacalin peninsula. That coast points in a different direction too and I have shown that it is far away from the claim line as well. And if Romania wishes to rely on its short stretch of coast between the land boundary with Ukraine and the Sacalin peninsula twice — once for its lateral boundary and a second time for its opposite boundary — then it should be prepared to accept that there is a fundamental difference in the overall length of the Parties' coast justifying a shift of the provisional equidistance line.

58. Once a balanced approach is adopted, and even leaving to one side for the moment the conduct of the Parties to which Ms Malintoppi has referred earlier, two key factors stand out that Ukraine considers constitute circumstances which should be given their appropriate weight in arriving at an equitable solution.

59. The first is the marked disparity that exists between the lengths of the relevant coasts of the Parties that front the area to be delimited. That is a geographic fact, and it exists even without taking into account Serpents' Island. Yet neither sector of Romania's claim line takes this important circumstance into account.

60. The second is the presence of Serpents' Island. While this case is not about Serpents' Island in isolation, as Romania appears to believe is the case, Serpents' Island is a geographic fact that forms part of Ukraine's coastal geography. And it would seem evident that a natural feature

such as Serpents' Island should not be given less effect than an artificial structure such as the Sulina dyke, or a sand spit such as the Sacalin peninsula.

### 3. The legal entitlement of islands

61. Madam President, Members of the Court, this leads me to the final part of my presentation in which I would like to address Romania's argument that because Serpents' Island is a small island, it should be entitled to no more than a 12-nautical-mile territorial sea, but no continental shelf or exclusive economic zone.

62. In support of this argument, Romania has referred both in its written pleadings and in oral argument last week to a number of judicial precedents and examples of State practice where small islands have been accorded a reduced effect for maritime delimitation purposes. In some cases small islands have been accorded what is commonly known as a "half-effect". This is what happened, for example, with respect to the Scilly Isles in the *Anglo-French* Arbitration, the Kerkennahs, albeit it was a different kind of half-effect, in the *Tunisia/Libya* case, and Seal Island, which was still another version of the half-effect, in the *Gulf of Maine* case.

63. In other examples cited by Romania, such as the Channel Islands in the *Anglo-French* Arbitration, and the island of Abu Musa in the *Sharjah/Dubai* arbitration, islands received partial enclaves.

64. In still other cases, such as in the *Libya/Malta* with respect to the rock of Filfla which lay just off the southern coast of Malta, or a very small sand bar named Qitat al-Jaradah that was at issue in the *Qatar* v. *Bahrain* case, very small features have had no effect on the delimitation line.

65. Ukraine is obviously well aware of these precedents. It is also well aware of the examples of State practice cited in Romania's written pleadings where small islands have sometimes been accorded less than full equidistance treatment. Ukraine addressed all of these examples cited in Romania's written pleadings in its Counter-Memorial. And in addition, Ukraine presented other examples of State practice, of which there are many, where small islands have received full or substantially full effect; I would respectfully refer the Court to pages 48 to 64 of Ukraine's Counter-Memorial where there is a full discussion of these examples.

66. The important point, however, — and this is a point which Romania's pleadings have conspicuously overlooked — is that each delimitation situation is unique and each case must be assessed in the light of its own particular geographic facts and circumstances. To recall what the Court said in the *Tunisia/Libya* case: "There can be no doubt that it is virtually impossible to achieve an equitable solution in any delimitation without taking into account the particular relevant circumstances of the area." (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 60, para. 72.)

[Map of north-west corner of Black Sea]

67. Much as Romania would like the Court to believe the contrary, the present case is not primarily about Serpents' Island. It concerns delimitation in the entire north-west corner of the Black Sea. Here, as a glance at any map of the area shows, the factor that really stands out is the predominant geographical position that Ukraine's mainland coast possesses. No matter how those coasts are measured, along their sinuosities, according to their coastal fronts, using the system of straight baselines both Parties have enacted, Ukraine's coast is significantly longer than that of Romania.

68. Obviously, Serpents' Island is located within the area surrounded by these coasts. But it is only one element of the overall coastal relationship between the Parties.

69. When it comes to plotting the provisional equidistance line, Professor Pellet has acknowledged that such a line should be a line, "every point of which is equidistant from the nearest points on the baseline from which the breadth of the territorial seas of each of the two States is measured" (CR 2008/20, p. 15, para. 12). That formula is taken verbatim from Article 15 of the Law of the Sea Convention and it is the same formula that the Court referred to in the *Qatar* v. *Bahrain* and *Cameroon* v. *Nigeria* cases.

70. Madam President, Members of the Court, there are not many areas of agreement between the Parties in this case. But this is certainly one of them — and it is an important one. Once it is accepted that Serpents' Island has a baseline — as I hope I demonstrated yesterday — then under the formula agreed by both Parties, that baseline must provide relevant base points for constructing the provisional equidistance line.

71. That being the case, it is not necessary to rehearse past examples where small islands have been used for the plotting of a provisional equidistance line, as was the case, for example, with the Scilly Isles in the *Anglo-French* arbitration, or where small islands have not been used for that purpose, as in some of the examples cited by Professor Pellet last week. The Parties agree that the provisional equidistance line should be drawn from the nearest points on the baselines from which their respective territorial seas are measured.

72. Therefore, the important question is how to assess all of the relevant circumstances characterizing the area to be delimited for purposes of determining whether they justify a shifting of the provisional equidistance line. These circumstances include not only Serpents' Island, but more importantly, the overall relationship between the Parties' mainland coasts.

73. Last Thursday, Professor Pellet discussed a number of cases where islands have been accorded a reduced effect for delimitation purposes. But, the key point, I would suggest, is that — perhaps with the exception of the *Gulf of Maine* case — none of the examples cited by Professor Pellet involved an overall geographic situation that is remotely comparable to the present case.

74. The first case cited by my eminent colleague was *Anglo-French* (CR 2008/20, p. 24, para. 36). But the geographic position of the Channel Islands in that case bears no resemblance to the location of Serpents' Island in the present case. The Channel Islands fell on the "wrong side" so to speak, of a median line that was otherwise between opposite coasts of the same approximate length. Here, Serpents' Island does not fall on the "wrong side" of any median line, and Ukraine's mainland coast — unlike the situation in *Anglo-French* — is some four times longer than the mainland coast of Romania.

75. The *Libya/Tunisia* case, in which the Kerkannah Islands were accorded a kind of "half-effect", also did not involve a geographic situation where the relevant area was circumscribed by the coasts of parties the length of which were markedly different. There, the Court had no need to make any adjustment to the line — in fact, equidistance did not figure in the line at all. It is listed in our opponent's folders as an example where islands have not been used for a provisional equidistance line. There was no provisional equidistance line in *Libya/Tunisia*. The Court never addressed the point. Moreover, in that case, the Court had no need to make any adjustment to the

line to take into account a disparity between the lengths of the Parties' coasts. Here the situation is very different.

76. In *Libya/Malta*, Professor Pellet notes that Filfla was given no effect (CR 2008/20, p. 25, para. 36). That is obviously correct. But Filfla was unquestionably a rock, and disregarding it for delimitation purposes had a negligible effect on the Court's adjusted median line. What was important in that case — and what justified an adjustment being made to the median line in the first place — was the marked difference in the lengths of the parties' overall relevant coasts. That is what we have here, a marked difference in the length of the Parties' relevant coasts. The same considerations applied in the *Jan Mayen* case, where the median line was once again adjusted in favour of the State with the longer coast, and in the *Barbados/Trinidad and Tobago* arbitration, where an adjustment was made for the same reason.

77. The *Sharjah/Dubai* case cited by Professor Pellet (CR 2008/20, p. 25, para. 36) involved primarily a delimitation between States with adjacent coasts, on a very smooth coastline. Neither party in that case had a coast which surrounded the delimitation area on three sides. It too is not comparable to the geographic facts that are presented in this case.

78. *Eritrea/Yemen* involved coasts of roughly equivalent length which did not require an adjustment being made to what was otherwise a mainland-to-mainland equidistance line which did give full effect to islands on both sides lying close to the mainland. It did not involve a case where one's coast surrounded three sides of the area and was markedly longer than the other party's coast. And the *Nicaragua* v. *Honduras* case also involved a geographic situation which is much different from the present case, as I hope I illustrated yesterday when I put the no-man's zone slide on the map.

79. Counsel then referred to *Qatar* v. *Bahrain* where the very small island — and it was really just a sand bar — of Qit'at Jaradah was given no effect for equidistance purposes (CR 2008/20, p. 25, para. 36). Once again, the geographical context of that case bears no relation to the present case where we have the coast of one Party surrounding three sides of the area to be delimited.

80. There is another point about *Qatar* v. *Bahrain* that I would like to highlight. The delimitation line in *Qatar* v. *Bahrain* actually fell between Qit'at Jaradah and a low-tide elevation

called the Fasht ad Dibal. The Court noted there that the low-water line of a low-tide elevation falling within the territorial sea of the mainland or an island may be used as a baseline for measuring the breadth of the territorial sea. Fasht ad Dibal met this requirement and thus had a baseline, despite the fact that it was a low-tide elevation. As I said, the delimitation line decided by the Court in that case actually fell between Qit'at Jaradah on the one hand and the Fasht ad Dibal on the other. That is, again, the kind of situation which we do not have in this case.

81. Professor Pellet then referred to the *Gulf of Maine* case and the Chamber's treatment of Seal Island which was accorded a kind of "half-effect" (CR 2008/20, p. 32, para. 53). However, the reduced effect given to Seal Island in that case was only for the purpose of constructing the closing line across the Gulf, and shifting the location of the point where the delimitation line intersected that closing line from a ratio of 1.38 to 1 in the United States favour, to a ratio of 1.32 to 1 (*I.C.J. Reports 1984*, p. 337, para. 222). As the Chamber noted, the practical effect of this small displacement was, to use the Chamber's words, "limited" *(ibid.)*.

82. What was much more important in the *Gulf of Maine* case, as I pointed out yesterday, was the fact that the Chamber viewed the whole of the coasts along the Gulf of Maine, and even significant parts of the Bay of Fundy, as relevant coasts, and considered a difference in coastal lengths in the magnitude of 1.38 to 1 — which was much less than our 4 to 1 magnitude in this case — that difference justified and warranted an important adjustment to be made to the equidistance line.

## 4. Conclusions

83. Madam President, Members of the Court, tomorrow Professor Quéneudec will be discussing the relevance and the weighting to be given to these kinds of factors when he addresses Ukraine's delimitation line tomorrow.

84. For my part, this morning I hope that I have showed the manner in which both "sectors" of Romania's claim line are based on artificial constructs and a selective approach to the geographic facts. "Point X" is a fictitious point, and Romania's after-the-fact attempt to justify it on geometrical grounds is misguided. The rest of Romania's alphabet soup fares no better. Romania's equidistance line is improperly plotted, and its failure to take into account the marked

difference that exists between the lengths of the relevant coasts of the Parties, both for the lateral part of the boundary and for the boundary as a whole, according to Romania, is contrary to the case precedents.

85. I wish to thank the Court very much for its attention, and I would now be grateful, Madam President, if the floor could be given back to Ms Malintoppi. Thank you.

The PRESIDENT: Thank you, Mr. Bundy. Now we call Ms Malintoppi.

Ms MALINTOPPI: Thank you, Madam President.

## IX. ROMANIA'S IRRELEVANT CIRCUMSTANCES: THE BLACK SEA AS AN ENCLOSED OR SEMI-ENCLOSED SEA, DELIMITATION AGREEMENTS THEREIN AND THE SIGNIFICANCEOF SERPENTS' ISLAND

### A. Introduction

1. Madam President, Members of the Court, Romania's written and oral pleadings emphasize certain aspects of the maritime delimitation with Ukraine that are said to represent the only "special" circumstances to be taken into account in this case[58].

2. In its Memorial, Romania relied on the enclosed nature of the Black Sea and maritime delimitation agreements concluded therein so far as the only elements which constitute "relevant", or "special", circumstances[59].

3. In its Reply, and in its first round presentation last week, Romania added Serpents' Island to its list of relevant circumstances, and argued that this island should be accorded no more than a 12-mile band of territorial sea[60].

4. Within this context, I shall address first, Romania's arguments concerning the enclosed or semi-enclosed nature of the Black Sea; second, the relevance of other delimitation agreements concluded by Black Sea States for this case; and, third, the significance of Serpents' Island, including the fact that it is not a "rock" under the definition provided in Article 121 (3) of the Law of the Sea Convention.

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[58]MR, pp. 108-129 and RR, pp. 188-245.

[59]MR, pp. 128-129, para. 8.126 *(h)*.

[60]RR, pp. 188-189, paras. 6.1-6.5; CR 2008/20, pp. 38-39, para. 66 and pp. 39-40, paras. 3-4.

**B. Romania's arguments concerning the enclosed or semi-enclosed nature of the Black Sea**

5. As for the first point, Romania puts great store on the characterization of the Black Sea as an enclosed or semi-enclosed sea and the importance of maritime delimitation agreements previously concluded between certain States bordering the Black Sea as providing the applicable methodology for delimitation in this present case: unadjusted equidistance, save for a 12-mile arc around Serpents' Island.

6. Romania's arguments find no support in law or in the factual context.

7. Legally, there is no special régime governing delimitations taking place in an enclosed or semi-enclosed sea simply because of its "enclosed" or "semi-enclosed" nature. Part IX of the Law of the Sea Convention dealing with enclosed or semi-enclosed seas does not provide for a specific delimitation methodology to be applied with respect to such seas. Article 122 — which has been reproduced for ease of reference in your folders under tab 61 — contains the following definition:

> "For the purposes of this Convention, 'enclosed or semi-enclosed sea' means a gulf, basin or sea surrounded by two or more States and connected to another sea or ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States."

8. In addition to this general definition, Article 123 of the Convention — the only other provision of Part IX — invites States bordering on an enclosed or semi-enclosed sea to co-operate with each other in the management and conservation of living resources and the marine environment. Aside from these provisions, there are no particular rules under the Law of the Sea Convention governing enclosed and semi-enclosed seas, and there are no specific rules applying to maritime delimitations taking place in such seas. As a result, delimitations in enclosed, or semi-enclosed, seas, as far as continental shelf and exclusive economic zones are concerned, remain governed by Articles 74 and 83 of the Convention — and as we know, these Articles make no exception for enclosed or semi-enclosed seas.

9. Romania relies on the *Tunisia/Libya* and *Libya/Malta* cases as supporting its contention that enclosed seas are to be considered "special circumstances" in the context of maritime delimitation[61]. However, these cases are of no assistance to Romania, because the semi-enclosed

[61] MR, p. 70, paras. 6.26-6.28; RR, p. 204, para. 6.48.

nature of the Mediterranean Sea — or, for that matter, pre-existing maritime delimitations in that area — played no role in the delimitation methodology adopted by the Court in each of these cases.

10. In *Tunisia/Libya*, the Court emphasized that the starting-point of any maritime delimitation is the particular geographical situation — and notably in terms "the extent and features of the area found to be relevant in the delimitation" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982,* p. 82, para. 114). No mention was made in the Judgment that the semi-enclosed nature of the Mediterranean, or — for that matter — the existence of other delimitation agreements in that sea, were relevant circumstances dictating the method of delimitation to be employed as between Tunisia and Libya in order to achieve an equitable result.

11. The Court's decision was in fact based on a combination of geographical and historical considerations specific to that case, and including the parties' own conduct. To the extent that the Court's Judgment mentioned third States' interests at all, it was for quite a different purpose — namely, in order to limit the area affected by the delimitation in the light of the existing or potential claims of third States (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, pp. 91-94, paras. 130, 131 and 133 B.(5) and C.(3)).

12. With respect to *Libya/Malta*, Romania asserts that, in that case, the semi-enclosed character of the Mediterranean Sea was "a factor to be taken into account in order to achieve an equitable result, influencing the scope of the adjustment of the boundary northwards"[62]. This is incorrect, and Romania misconstrues that aspect of the Court's Judgment on two accounts.

13. First, the focus of the Court's decision was not on the semi-enclosed nature of the Mediterranean as such, nor on the existence of a delimitation methodology purportedly adopted by other States in their bilateral agreements, but, rather, on the fact that Malta had a short coast facing the much longer coast of Libya. This was an important relevant circumstance which weighed heavily on the Court's decision to adjust the median line northwards towards the State with the shorter coast — a fact which Romania omits to mention. This is also a crucial aspect of the present delimitation that should similarly play a key role for purposes of achieving an equitable result.

[62]RR, p. 204, para. 6.48.

**C. The role of existing delimitation agreements in the Black Sea for purposes of this delimitation**

14. I will now move on to discuss the role of existing delimitation agreements in the Black Sea for purposes of this delimitation.

15. Professor Pellet stated last week that Romania's arguments regarding the semi-enclosed nature of the Black Sea and the delimitation agreements concluded so far in this area are fundamentally linked. His argument was that it is due to the semi-enclosed nature of the Black Sea that delimitation agreements between other States bordering that sea are important and must be taken into account[63]. Romania's written pleadings, and Romania's Co-Agent in his first speech, had, in fact, taken this reasoning much further.

16. In its Reply, Romania argued that the enclosed nature of the Black Sea is such a decisive factor that a new maritime delimitation — such as the present — cannot depart from the methods already used in existing delimitation agreements[64]. In other words, Romania treated the existing maritime delimitation agreements in the Black Sea not only as falling into the category of relevant circumstances, but also as imposing a particular methodology on the Court. Romania also argued that, since existing agreements in the Black Sea are allegedly "based on the assumption that the equidistance line leads to an equitable result" despite disparities in coastal lengths, "a dramatic shift from equidistance" would bring about inequitable results in our case[65].

17. Last Tuesday, the Co-Agent of Romania went as far as stating that:

> "il est *nécessaire* qu'il existe une consistence entre les méthodes de délimitation utilisées – en ce sens que l'utilisation dans les nouvelles délimitations de méthodes largement différentes de celles déjà utilisées a toutes les chances d'aboutir à des résultats inéquitables et incompatibles avec les délimitations existantes"[66].

18. In other words, Romania insists that — in order to reach an equitable result in the present case — the Court is *bound* to apply the methodology employed in the two pre-existing maritime delimitations in the Black Sea, which are promoted to the rank of a "véritable pratique de délimitation"[67]. We were also told that this "practice" might be growing to three agreements,

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[63]CR 2008/20, p. 30, para. 47.

[64]RR, pp. 200-201, para. 6.37.

[65]RR, p. 205, para. 6.50.

[66]CR 2008/18, p. 58, para. 33.

[67]CR 2008/18, p. 55, para. 19.

according to Professor Crawford's announcement last week that the on-going negotiations between Romania and Bulgaria may lead to an agreement adopting a similar method[68]. However, that agreement is not yet concluded, we are not privy to the contents of what is being negotiated, and only the future will tell if an agreement will indeed be concluded, and on what basis.

19. Ukraine disagrees with Romania's contentions as a matter of law. As Ukraine has already dealt with these arguments in detail in the written pleadings[69], I shall limit myself only to a few remarks.

20. In general terms, bilateral agreements cannot affect the rights of third parties and, as such, the existing maritime delimitation agreements in the Black Sea cannot influence the present dispute. Moreover, it would be inappropriate to use the methods employed by third States in their maritime delimitation agreements as precedents automatically applying to the present delimitation since there is no information as to the factors that lead to the final result in those cases and we are not appraised of the political, economic, or other considerations — or *quid pro quos* — that led to those specific delimitations.

21. The starting-point of any delimitation is based on the particular facts characterizing that case, especially the coasts abutting the relevant area. Each delimitation agreement has its own peculiarities, and a particular delimitation technique may be warranted in an individual instance in order to meet different considerations, which could be dictated by the geographical, political and economic context at hand. Consequently, it is misguided to attribute to the maritime delimitations previously concluded between third States in the Black Sea any privileged status for the present delimitation.

22. The existing Black Sea maritime delimitation agreements are now on the screen. This is a map that was shown by Mr. Bundy in his overview of the case. It is also reproduced at tab 5. The coasts of third States bordering the Black Sea are extraneous to the delimitation between Ukraine and Romania and thus have no bearing on the method — or methods — of delimitation appropriate as between Ukraine and Romania. The presence of third States may be relevant only to the extent that the Court may have to take precautions in identifying a precise endpoint of the

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[68]CR 2008/18, p. 60, para. 2.

[69]CMU, pp. 43-64, paras. 4.33-4.68; RR, pp. 98-106, paras. 6.4-6.33.

delimitation line so as to avoid potential prejudice to States situated on the periphery of the delimitation area. Beyond that, the pre-existing maritime delimitations in the Black Sea have no role to play in these proceedings.

23. The conclusion that delimitation agreements cannot by themselves create general rules of international law rendering any particular method obligatory is supported by the case law involving States bordering enclosed or semi-enclosed seas. Already in the 1969 *North Sea Continental Shelf* cases, the Court set high standards for State practice in delimitation agreements to acquire legal relevance. The Court stated as follows:

> "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough." (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 44, para. 77.)

24. Romania ignores this consideration — i.e., the fact that resort to a particular method of delimitation may have been motivated by factors that are only known to the relevant Contracting Parties which may be wholly extraneous to the present delimitation.

25. In the *Libya/Malta* case, the parties discussed at length the relevance of State practice in maritime delimitation, particularly with regard to the status of equidistance in international law at the time. While the Court recognized that State practice could be important in showing "normal standards of equity", nevertheless, it rejected the proposition that State practice in general could impose any method as compulsory. As the Court observed: "Yet that practice, however interpreted, falls short of proving the existence of a rule prescribing the use of equidistance, or indeed of any method, as obligatory." (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985,* p. 38*,* para. 44.)

26. The Court instead stressed that "there can be no question of 'completely refashioning nature'; the method chosen and its results must be faithful to the actual geographical situation" (*Ibid.*, p. 45, para. 57).

Madam President, with your permission that takes me to a convenient place where I could stop for today and resume tomorrow with the rest of this speech.

The PRESIDENT: Well, Ms Malintoppi, you are in the best position to know what lies ahead tomorrow and if that is your thought on these matters, the Court will indeed now rise and resume tomorrow morning for the continuation of Ukraine's first round.

The Court now rises.

*The Court rose at 12.50 p.m.*