Non-Corrigé
Uncorrected

CR 2008/30

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2008

Public sitting

held on Monday 15 September 2008, at 10 a.m., at the Peace Palace,

President Higgins presiding,

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

VERBATIM RECORD

ANNÉE 2008

Audience publique

tenue le lundi 15 septembre 2008, à 10 heures, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

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

COMPTE RENDU

Present:	President	Higgins
	Vice-President	Al-Khasawneh
	Judges	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,

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

as Counsel and Advocates;

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,

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

comme conseils et avocats ;

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. The Court meets today for the second round of oral argument of Romania. Romania will address the Court today until 1 p.m. and tomorrow from 10 a.m. to 1 p.m. I now call the Agent of Romania, Dr. Aurescu.

Mr. AURESCU: Thank you, Madam President.

I. INTRODUCTORY SPEECH OF THE AGENT OF ROMANIA

Introductory remarks

1. Madam President and Members of the Court, it is an honour for me, as Agent of Romania, to open this second round of Romania's pleadings.

2. We have listened with great attention to the arguments displayed by Ukraine last week. In our view, they did not succeed in casting any legal light on the outstanding issues between the Parties. Today and tomorrow Romania will reply and show that the delimitation proposed by my country before the Court fully observes the international law on maritime delimitation and the method developed by this Court in its jurisprudence, thus being equitable for *both* Parties in these proceedings.

3. Madam President, the delimitation line proposed by Romania in its written pleadings and during the first round is constructed in an appropriate way and it is a perfectly reasonable one. It is supported both by detailed legal arguments and by the evidence.

Presentation of the line claimed by Romania and of the main arguments in its support

[Slide 1 — the line claimed by Romania]

4. The line claimed by Romania — it is now on the screen, and tab 1 in your folder — starts from the last point of the State border with Ukraine — point F — and follows the arc of circle of 12-nautical-mile territorial sea around Serpents' Island up to point X. It then follows the equidistance line between the relevant adjacent coasts of the two countries up to point T, from where it goes south along the median line between the relevant opposite coasts of Romania and Ukraine.

5. The proposed configuration of this line in the delimitation area in the vicinity of Serpents' Island is supported by *at least* three concurring arguments. These arguments are not in the alternative, as suggested by Sir Michael Wood[1] last week. Arguments in the alternative presume that other arguments used are incorrect: when the arguments are autonomous, they should all be — and we believe they *all* are — true. They are not arguments that we have devised for these proceedings. They are the unavoidable product of a proper legal analysis of the facts. All these arguments establish — taken separately and altogether — that the maritime formation called Serpents' Island should be disregarded in drawing the delimitation line between the maritime spaces of the Parties, with the exception of the 12-mile territorial sea it already has. Contrary to what Ukraine's counsel asserted[2], they do not show the weakness, but rather the strength of Romania's position.

6. These reasons why the final line should semi-enclave Serpents' Island in this manner are as follows:

First, there exists already a partial delimitation between Romania and the former Soviet Union, by way of an agreement in force between Romania and Ukraine, which is supported by a large amount of cartographic evidence, including maps and charts officially issued by Ukrainian State institutions.

Secondly, the secluded geographic position, its size and the character of Serpents' Island do not justify taking it into account as a relevant coast in drawing the provisional equidistance line and does not entitle it to any effect beyond the 12-mile territorial sea it already has.

Thirdly, Serpents' Island is nothing but a rock within the meaning of paragraph 3 of Article 121 of the United Nations Convention on the Law of the Sea (UNCLOS), not entitled continental shelf or exclusive economic zone of its own, because its natural features cannot sustain either human habitation, or economic life. The recent conduct of Ukraine to "improve" Serpents' Island, its purposes and intentions behind it show clearly the admission by Ukraine itself that the natural characteristics of this maritime feature are those of a rock within the meaning of Article 121 (3) of UNCLOS.

---

[1]CR 2008/26, p. 44, para. 8 (Wood).

[2]*Ibid.*

Furthermore, the necessary equitable character of the solution of maritime delimitation in this case implies taking also into account that the inequitable effects of the transfer of Serpents' Island in 1948 in the legally dubious conditions I have described in my opening statement two weeks ago, and the arbitrary manner of establishing the maritime border in 1949 should not be further magnified by granting Serpents' Island a supplementary effect to that already produced — the 12-mile maritime zone surrounding it. Also, the legal compromise agreed when the 1997 Treaty on Relations and its Additional Agreement were concluded — which includes Ukraine's acceptance that the only role Serpents' Island may play in the delimitation is the one prescribed by paragraph 3 of Article 121 of UNCLOS — has to be taken into consideration.

7. Madam President, I will briefly outline the structure of Romania's arguments just invoked and rebut some of Ukraine's arguments. My colleagues will complete this rebuttal in our subsequent interventions today and tomorrow.

8. The partial delimitation agreed between Romania and the former USSR in 1949 following the arc of circle of 12-mile radius around Serpents' Island was confirmed in subsequent documents of the same character in 1954, 1963, 1974 and is presently in force between Romania and the successor of the USSR, Ukraine. This delimitation was agreed by a treaty whose validity was never contested by Ukraine — including before this Court. These documents were not — contrary to what counsel of Ukraine tried to assert in his speech of 9 September 2008[3] — less formal treaties than the other treaties between the Parties, despite their rather technical character. A quick check on the annexes of both Parties' written pleadings where these documents were included shows the careful manner of drafting, in two originals, in both official languages of the Parties[4]. They were duly signed and approved, like any other treaty. Their object and purpose — which was land, river and maritime delimitation and demarcation — were extremely important, and it is no surprise that they were treated with such attention by the Parties. Their nature was not and it is not that of a tacit agreement, as wrongly asserted by Ukraine's counsel[5]. Their texts are clear, and despite the attempts by Ukraine to confuse the Court with various readings of the translations

[3]CR 2008/24, pp. 40-41, paras. 21-22 (Wood).

[4]See MR, Anns. 13, 14, 15, 17, 19, 20, 21.

[5]CR 2008/26, pp. 50-51, paras. 25-28 (Wood).

provided by the Parties or by the Registry, all these readings converge in the same sense: the agreed boundary between — on one side — the 12-mile zone of Serpents' Island and — on the other side — the maritime spaces of Romania goes on this arc of circle around or surrounding this maritime formation — and I quote the text of *all* these agreements — "leaving Serpents' Island on the side of USSR"[6], now Ukraine. Madam President, Ukraine cannot change the clear reading of these texts.

9. Irrespective of the existence of this partial delimitation — which cannot be legally denied — the large amount of State practice and international jurisprudence presented by Romania shows that maritime formations in a similar situation to that of Serpents' Island — insignificant in the context of the geography of the area, isolated from the mainland coast of Ukraine and not integrated with this coast — are not to be used in the first phase of constructing the delimitation line in order to generate base points and are eventually to be granted *but* a minimum effect upon the delimitation line — a 12-mile territorial sea *at the most*. Any different approach would generate a manifest distortion in the result of the delimitation process, thus creating an inequitable delimitation. Despite repeated statements by counsel of Ukraine last week, they were unable to demonstrate that Serpents' Island is integrated with the coast of Ukraine.

10. The geographic reality and the large amount of evidence — coming from a variety of sources, including from Ukraine's own annexes to its written pleadings — as I have shown on 3 September 2008, prove without any shadow of doubt that Serpents' Island is nothing but a small rocky protuberance, which cannot sustain human habitation or economic life. Thus, it falls in the category of islands described by Article 121 (3) of UNCLOS — that is, without any entitlement to continental shelf and EEZ.

11. Moreover, as I have demonstrated on 4 September, all activities undertaken by Ukraine in its *Potemkin village* in the Black Sea not only failed in transforming the factual and the legal characteristics of Serpents' Island, but also represent a powerful admission against interest by Ukraine that the natural features of Serpents' Island do not allow it to sustain human habitation or economic life. Indeed, all such acts took place *after* the critical date and they are not a continuation

[6]See MR, Anns. 13, 17, 19, 21, 22.

of prior acts, which were not taken before the first decision of 18 December 1995 — as it was confirmed by Ukraine's counsel on 12 September 2008[7]. They are undertaken for the sole purpose of attempting to improve the legal position of Ukraine in the dispute with Romania. These acts failed because the adverse natural conditions on Serpents' Island cannot support any such transformation and lack any legal effect. They cannot be taken into account when deciding upon the equitable solution of maritime delimitation in this case.

12. I would like to underline that Ukraine, in its presentation last week, failed to contest the validity of the numerous pieces of evidence displayed by Romania which prove that the factual reality of Serpents' Island is that of a rock that cannot sustain human habitation or economic life: the antique authors, the many Romanian sources dating from a period when the appurtenance or involvement of Serpents' Island in any maritime delimitation process was not in question, and not even the evidence in the same sense from the annexes Ukraine itself included in its written pleadings. Nor did it address Romania's rebuttal of the arguments in Ukraine's Rejoinder. Ukraine's counsel limited herself to repeating the same unsubstantiated ideas from the Rejoinder, without adding anything else.

13. Instead of addressing the large amount of evidence displayed, Ukraine relied upon inadmissible self-serving retranslation of its own annexes, which Ukraine now "discovered" that they are allegedly wrongly translated by Ukraine itself when they were filed as evidence, again by Ukraine, with the Court[8]. It misquoted Romania's Agent[9]. It dismissed as unreliable[10] the numerous concurring presentations of the Ukrainian press items which confirm these facts: that Serpents' Island is nothing but an uninhabitable rock, which cannot support economic life even at the most basic level.

14. In his speech last week, Ukraine's Agent asserted, first, that "Romania's attempts to bring within the scope of these legal proceedings issues relating to Ukraine's rights in respect of its sovereign territory are misplaced"[11] and, secondly, that the 1948 Protocol by which USSR illegally

---

[7]CR 2008/29, p. 12, para. 35 (Malintoppi).

[8]CR 2008/29, pp. 13-14, paras. 41-42 (Malintoppi).

[9]See CR 2008/29, p. 14, para. 43 (Malintoppi) *versus* CR 2008/20, p. 56, para. 6 (Aurescu).

[10]CR 2008/29, p. 14, para. 44 (Malintoppi).

[11]CR 2008/24, p. 11, para. 6 (Vassylenko).

seized Serpents' Island was not illegitimate or unequal, and does not contradict the 1947 Paris Peace Treaty. Ukraine's Agent added that the Protocol was a valid and binding instrument the effect of which was confirmed by many subsequent agreements duly ratified by the Romanian Parliament "contrary to the impression given by the Agent of Romania"[12].

15. As to the first point, as I clearly stated in the opening of Romania's first round of pleadings, there are no territorial claims between the Parties[13] and Romania does not seek now before the Court to annul the injustices of 1948 and 1949 despite their highly controversial nature[14]. What Romania considers of utmost importance is that the inequitable effects that these past injustices have already produced should not be further magnified by allowing Serpents' Island to generate maritime spaces beyond the 12-mile territorial sea it has now as a result of these illegal transactions. As to the second point, I will respectfully refer the Court to the arguments that I have shown on 2 September 2008[15]. The 1948 Protocol was deemed to specify the line of the State boundary, apparently in accordance with the Peace Treaty, but in reality it changed the boundary in breach of this document. Indeed, in manifest contradiction with Article 1 of the Peace Treaty, according to which it was obvious that Serpents' Island was under Romanian sovereignty, Article 1 *(b)* of the Protocol reads: "The Island of Zmiinyi (Serpilor) . . . *shall become* a part of USSR."[16] Also, under its Article 4, the Protocol was not submitted to ratification, which was extremely unusual for such kind of sensitive documents dealing with border issues, and — moreover — with territorial cessions.

16. Also in connection with the same issue, Ukraine's Agent described as "*distasteful* to rehearse historical arguments that have no relevance for the Court's present task"[17]. Madam President, the presentation of Romania of these historical facts does have relevance in the case, as they are intrinsically linked with the background of this dispute that you have to solve. Historic facts cannot be ignored as their understanding may contribute to shaping the best response of

---

[12] *Ibidem.*

[13] CR 2008/18, p. 16, para. 6 (Aurescu).

[14] CR 2008/18, p. 25, para. 30 (Aurescu).

[15] CR 2008/18, pp. 22-24, paras. 24-27 (Aurescu).

[16] Ukraine's judges' folder, tab 12; emphasis added.

[17] CR 2008/24, p. 12, para. 8 (Vassylenko); emphasis added.

international law to the problems it has to solve, especially when these facts represent violations of international law. It would be also unethical to expand the effects generated by manifest violations of international law. As set forth by UNCLOS and stated constantly in your jurisprudence, any solution of maritime delimitation has to be equitable. This solution cannot but take into account that it would be both unethical and inequitable to further amplify the already inequitable effects of the illegal conduct of the former USSR, out of which Ukraine, its successor, already drew benefits.

17. Ukraine's Agent also stated that there was no "package deal" in 1997:

> "I headed the Ukrainian team at the final stage of negotiations leading to the 1997 Treaty and Exchange of Letters. No deals were 'struck' beyond the formal framework of these instruments . . . neither the text of the Exchange of Letters nor the unilateral declaration establishes a 'package deal' . . ."[18]

18. Madam President, I have already shown in my speech on 2 September the context and the terms of the bilateral legal compromise of 1997. In fact, the mentioned compromise *was* reached, in 1997, when the Treaty on Relations and the Additional Agreement were concluded, and when the head of the Ukrainian delegation for negotiations — already since 1996 — was Mr. Anton Buteiko, the second Agent appointed by Ukraine in this case. As regards the second argument, those of us who have negotiated and concluded agreements know perfectly well that there is no practice of specifying expressly in the text of the agreement that a certain package was agreed: this results from the context and the conduct of the parties as corroborated by the text of the agreement.

19. This is precisely the case of the 1997 Agreement. The context results clearly from the intervention of the Romanian Minister for Foreign Affairs before the Romanian Senate of 4 December 1995, cited in my speech of 2 September[19], a piece of evidence included by Ukraine itself in the annexes of its Counter-Memorial, but which Ukraine's Agent overlooked in his intervention last week. The conduct of Ukraine is also clear: although its own diplomatic practice is to react quite promptly to the positions of Romania — for instance, in the case of the Romanian declaration issued when the Border Régime Treaty was signed in 2003, and entered into force, in 2004 — Ukraine did not object or react at all when Romania ratified UNCLOS in 1996, or when

---

[18]CR 2008/24, pp. 12-13, paras. 11-12 (Vassylenko).

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

the Treaty on Relations and the Additional Agreement were signed in June 1997, and entered into force in October 1997 or, in 1999, when Ukraine became a party to the United Nations Convention on the Law of the Sea. Last, but not least, the text of the 1997 Additional Agreement is consistent with the mentioned context and conduct. In its text Romania accepted the territorial status quo, while Ukraine agreed that the first principle of delimitation in paragraph 4 should be Article 121 of the UNCLOS, at a time when Ukraine was not party to the Law of the Sea Convention, but it was well aware of Romania's understanding of this Article. Indeed, Ukraine's counsel, in his speech of 9 September 2008[20], acknowledged that Romania's position that "the Island's entitlement to maritime space should be limited to the 12-mile territorial sea agreed in 1949" was well-known already during the Romanian-Soviet negotiations. He continued: "That was nothing new. That Romanian position explains . . . [Romania's] . . . efforts at the Third United Nations Conference on the Law of the Sea" regarding Article 121 (3)[21].

General assessment of Ukraine's arguments in support of its claim line

20. Madam President, Professor Crawford will discuss Ukraine's claim line in a couple of minutes, which is about all the time that Professor Quéneudec spent on it last week[22]. But, as to the arguments in support of that line, it is not too much to say that the only "rule" on which Ukraine's reasoning is based in the present case is "repetition", the golden canon of advertising. I have counted not less than 68 times when Ukraine's counsel mentioned "the marked disparity of coastal lengths" or a similar formula. That is almost once every ten minutes of their pleadings, which is, I think, a record in maritime delimitation proceedings. But besides Ukraine's inadequate arguments why its entire coast is to be considered as relevant — which do not stand the test of both law and geography in this case — Ukraine totally failed to explain exactly *how* its provisional "equidistance" line is shifted to reach the final position proposed by Ukraine as an equitable solution.

21. Nor did Ukraine provide any explanation why its proposed delimitation line coincides perfectly with the line advocated by Ukraine during negotiations, which was the result of a

[20]CR 2008/24, p. 45, para. 40 (Wood).

[21]*Ibidem.*

[22]CR 2008/29, p. 43, paras. 105-109 (Quéneudec).

"method" manifestly in breach of the rules of delimitation agreed by the Parties in 1997, as I demonstrated in my first speech of Romania's first round[23]. The only explanation is that not only that line, but also the line supported by Ukraine before the Court, do not correspond to a correct application of the method of delimitation developed by this Court.

22. Madam President, Ukraine strives to shift the attention of the Court away from its lack of arguments as to the construction of its line, and on to the issue of coastal length, which is now the alpha and omega of its case, its mantra: in Ukraine's view, it plays an overwhelming role — both as an alleged relevant circumstance and as the main factor justifying, when performing the equity test, the line it proposes. Like its mysterious shifting of its wrongly constructed "equidistance" line, this shift of attention cannot succeed. Ukraine claims now that Serpents' Island is not central to its case, and that it is Romania that puts emphasis on it. But under Ukraine's own method, Serpents' Island plays the first and most important role: the first step of its method is to draw the provisional equidistance line between the Serpents' Island and the whole Romanian coast. This move makes 300 m of the coast of a minuscule rock, isolated and not integrated with the continental coast, a substitute for almost the entire mainland coast of Ukraine! The same coast that Ukraine would like to use in its entirety when it comes to the following stages of delimitation. But, as Romania will show today and tomorrow, this attempt has no basis in the applicable international law.

23. Another Ukrainian mantra was the Sulina dyke. Ukraine tried hard to put Serpents' Island on the same footing as the Sulina dyke, and at the same time to discard the legal importance of the latter. Again, repetition was the golden rule. On no less than 35 mentions — that is, on average, once every 20 minutes of pleadings — it said that the Sulina dyke is a man-made feature jutting well out from the coast. We will show in our presentation why this allegation is ungrounded.

24. Madam President, there is a famous sketch based on the writings of a classic Romanian author about a professor examining his student. It is known as the "cucumber" sketch. The story goes like this. The professor asks the student to give the lesson on tomatoes. And the student

[23]CR 2008/18, p. 22, para. 21 (Aurescu).

answers: "The tomato is a vegetable, as is the cucumber. The cucumber belongs to the plant family of *Cucurbitaceae* and has 90 per cent water." Then the professor asks the student what is a potato. And the student answers: "Well, the potato is a vegetable, as is the cucumber, which has 90 per cent water." Well, then the professor asks what the student can tell him about mathematics. And the student answers, mathematics is a science, exactly as biology which deals with vegetables, among them the cucumber, which has 90 per cent water. Whatever the professor asks the student, he refers only to the cucumber! And this is Ukraine's method here. Whatever Ukraine tries to argue in this case, it comes to the same cucumber — its alleged coastal predominance. But unlike the cucumber in the sketch, Ukraine's "cucumber" is not entitled to the water it claims.

The structure of Romania's pleadings in the second round

25. Madam President, I will briefly outline the structure of Romania's pleadings today and tomorrow. Professor Crawford, who with your permission will follow me, will show that Ukraine's claim line and its interpretation of the relevant coasts and the relevant area are unfounded. Then my colleague and friend Cosmin Dinescu, Co-Agent of Romania, will briefly address Ukraine's argument on *effectivités*. He will be followed again by Professor Crawford, who will discuss Ukraine's arguments against the pre-existing partial delimitation around Serpents' Island. Simon Olleson will complete this presentation by dealing with Ukraine's dismissal of the numerous maps and charts displayed by Romania. The last presentation today will address Ukraine's arguments against the use of the Sulina dyke in this delimitation and this will be the task of Daniel Müller.

26. Tomorrow, Professor Lowe will present the construction of Romania's equidistance line and Professor Pellet will address the issue of the relevant circumstances in this case. Then Professor Lowe will address the proportionality test of the line proposed by Romania, which shows its equitable character. I will close Romania's pleadings by presenting Romania's conclusions and submissions.

27. Madam President, that concludes my presentation. I thank the Court for its attention and I would respectfully ask you to call Professor Crawford to continue Romania's presentation.

The PRESIDENT: Thank you, Dr. Aurescu. We now call Professor Crawford.

Mr. CRAWFORD:

II. UKRAINE'S CLAIM LINE IN THE CONTEXT OF THE RELEVANT COASTS AND THE RELEVANT AREA

Introduction

1. Madam President, Members of the Court, a remarkable feature of Ukraine's presentation last week was its reticence as to its own claim line. By lunchtime on Thursday — after three days of presentations — there had been no defence whatever of the claim line. It had only once been displayed on the screen, by Mr. Bundy (tab 10)[24]. Ms Malintoppi, to be fair, showed it a few times, but she made no attempt to defend it.

2. By contrast, counsel lined up to deal with my argument about the 1949 Agreement. Mr. Bundy, Sir Michael Wood, Ms Malintoppi successively attacked it. Between them they spent three times as long in attacking the argument as I did in making it! Perhaps they are a bit concerned at the 31 maps showing a maritime boundary around the Island! But however that may be, they seemed as shy as a bongo about presenting their own line. Point X might have been mysterious to them — though it is shown in essentially the same place in 19 of our maps[25]. But how they arrived at their claim line remained much more mysterious. They seemed to be playing "pass the parcel" with the heart of their claim.

3. Thus it was on Friday we waited with bated breath for what was no doubt going to be a detailed presentation and defence of their final line. Professor Quéneudec was scheduled to speak for 80 minutes — at last they had set aside a decent amount of time.

4. But what did Professor Quéneudec do? He talked about Sulina dyke, the neglected promontory of Cape Tarkankhut, the three base points nestled within 300 m of each other on Serpents' Island; anything but the real point.

[Délimitation finale selon l'Ukraine — tab 83 of Ukraine's judges' folder]

---

[24]CR 2008/24 , p. 34, para. 67 (Bundy).

[25]MR, Ann. 16, Soviet map. No. 552 (1957) (Romania's first round judges' folder, tab V-17); MR, Ann. 18; MR, Ann. 19; MR, Ann. 20; MR, Ann. 21; MR, Ann. 23; MR, Ann. 25; MR, Ann. 26; MR, Ann. 27; MR, Ann. 31; MR, Ann. 32; MR, Ann. 33; MR, Ann. 35; MR, Ann. 36; MR, Ann. 38; MR, Ann. 39; MR, Ann. 41; *Lighthouses of Ukraine*, p. 50 (Romania's first round judges' folder, tab V-1).

5. So we waited still . . . Coffee came and went. Then at 12.12 p.m. on Friday, after more than ten hours of oral argument, their claim line was justified. The justification took three minutes[26]. The claim line was shown on the screen for 63 seconds (tab 83). You can see it on the screen now, in case you missed it.

6. And how did Professor Quéneudec justify the line? Let me quote him. Unusually for arguments made by counsel before the Court, it is more economical if I use his actual words — and his complete words. He said, and this will not take long :

> "L'un des moyens de prendre en compte, selon une formule souple et pratique, l'ensemble des circonstances pertinentes consiste à faire subir à la ligne d'équidistance provisoire un glissement *[un glissement]* vers l'ouest à partir du point B, afin de parvenir à un tracé qui tienne pleinement compte de la très grande disproportion de longueur des côtes.
>
> Dans ce mouvement de glissement de la ligne provisoire, il est suggéré d'éliminer le saillant constitué par le point C, de sorte qu'au-delà du point B la ligne de délimitation soit constituée par une ligne droite suivant l'azimuth de 156°.
>
> Ce glissement de la ligne d'équidistance en direction de la côte de la Roumanie ne correspond à aucun ratio mathématique. Il représente un ajustement d'une certaine importance, sans doute ; mais il n'est entouré d'aucun 'mystère' . . . En alignant ainsi la ligne provisoire d'équidistance sur une ligne droite, l'Ukraine a été mue par un souci de simplification, en même temps que par un désir de parvenir à un tracé présentant un intérêt pratique."[27]

That is it, you will be pleased to know!

7. In this passage Professor Quéneudec made the following points, that is the total justification:

— First, a way of adjusting the line is to move it to the west "selon une formule souple et pratique".

— Secondly, it should be moved "à partir du point B".

— Thirdly, the bend at point C should be removed.

— Fourthly, "ce glissement . . . ne correspond à aucun ratio mathématique".

— Fifthly, the line is a straight one, which is again practical.

8. Now some of these things are true: the line is an azimuth — but why *that* azimuth? The bend at point C is removed, but why should it be? If it had been kept, the correspondence to

---

[26]CR 2008/29, p. 43, paras. 106-108 (Quéneudec).

[27]CR 2008/29, p. 43, paras. 106-108 (Quéneudec).

mathematical proportionality of areas to coasts would have been closer. The line departs from point B — but why not from point F? The process is undoubtedly supple, "souple". Indeed it carries suppleness to the extreme. For each of these things could have been different, and there is no ground given for one line rather than another. It is true, as you know, that there is an irreducible element of judgment and discretion in maritime delimitation — but there must be *some* basis on which a line of this magnitude and effect is drawn.

9. Yet that is the full extent of Ukraine's justification of the location of its line after 12 hours. A *"glissement"!* And so saying, Professor Quéneudec slipped away.

10. Madam President, Members of the Court, there is an important forensic consequence of Ukraine's shamefaced presentation of its line. If, as we assume, Ukraine returns to these issues in the second round, proposing or implying another line than their claim line, Romania will not have been able to respond. If by good arguing the law is to be known, so also by refusal to expose one's case to critical argument a party deprives you of the assistance — from *both* sides — to which you are entitled.

11. Madam President, Members of the Court, the purpose of this presentation is twofold. First, I will analyse Ukraine's claim line, and will show that it entirely lacks justification in the law and practice of maritime delimitation. Secondly, I will revisit the issue of relevant coasts and relevant areas.

12. The two issues are connected. Ukraine's claim can be summarized as follows: it derives a case for adjustment of an equidistance line from the disproportion of relevant coasts, then it projects that disproportion through the focal lens of Serpents' Island like a magnifying glass — by way of a further adjustment of a provisional line for the drawing of which Serpents' Island is the overwhelming feature. An initial problem with Ukraine's case is that it has the wrong coasts and the wrong relevant areas. But even if it were right about both, its method of using them is fundamentally flawed. Indeed, as we heard it from Professor Quéneudec on Friday, it admits to no method at all, other than the method of the dance floor, slipping and sliding.

13. But these two issues are separate as well. The Ukrainian claim line cannot be defended by experienced counsel such as they possess; they do not seriously maintain it, and it will shortly be disposed to the dustbin of delimitation history. But the relevant coasts and areas do remain an

issue, as the Parties agree. And this case presents a novel question for the Court. How do you delimit a maritime boundary in a confined area when one party has longer coasts? Ukraine's answer depends — entirely — on the fortuitous presence of a tiny island which now happens to belong to it. But the disparity in coastal lengths — to which I will return in a moment — has nothing to do with Serpents' Island. Serpents' Island contributes nothing to these coastal lengths[28]. There could be a dozen Serpents' Islands around Odessa and no one would regard them as in the slightest degree relevant to a delimitation off the Danube delta. It is not an intelligible principle of delimitation that where a State has a tiny island in the general vicinity of the land border, this can be used to generate a massive deflection of the line just because the State happens to have longer coasts somewhere far away. There is no precedent in maritime delimitation for an island having such effect of magnifying coastlines to which it is as a matter of geography entirely unrelated.

14. In fact the normal outcome where an island lies just in front of the coastline of another State is that the island is ignored or at least heavily discounted. This has happened even to big, inhabited islands such as the Channel Islands. Similarly when small islands are located close to the mainland coast equidistance line, as with the Honduran cays. In an adjacent coast situation, it does not depend on the island being on the "wrong side" of the line; it is sufficient that the location of the island relative to the mainland coast line has a disproportionate effect. The Moscow Protocol of 4 February 1948 correctly described Serpents' Island as "located in the Black Sea eastward of the mouth of the Danube"[29]. The incidental possession of a tiny island by one or other of the coastal States in situations of this kind cannot be allowed to produce such vast differences in outcome as Ukraine's position dictates.

15. Thus the question becomes: how would the received method of maritime delimitation be applied in this geographical situation if Serpents' Island is disregarded? Once that question is answered it is possible to ask a second question: given the presence of Serpents' Island, the line so drawn may need to be modified. If Romania is right that the maritime zone attributed to the island is 12 miles and no more, the second question answers itself — you superimpose the 12-mile line. But the same answer would apply in order to achieve an equitable result in any event. No island of

---

[28]Cf. CR 2008/19, p. 12, para. 8 (Crawford); cf. CR 2008/29, p. 32, para. 50 (Quéneudec).

[29]CMU, Ann. 24.

this size could possibly have any additional effect on a delimitation that was otherwise equitable between the parties — unless it was thought that by getting 12 miles the State was getting too much!

16. Yet Ukraine never asks the first question, except by inference through its repeated references to the decision of the Chamber in the *Gulf of Maine* case, a case it never stops to analyse. I will return to *Gulf of Maine* shortly; but my present point is simple: Ukraine has offered no articulated justification of any kind for the location of its claim line, or of any other claim line. All it has done, following Professor Quéneudec's three-minute *glissade* on Friday, is effectively to throw itself on the mercy of the Court.

Ukraine's adjusted line

17. Madam President, Members of the Court, you may have noted that I did not comment on Professor Quéneudec's fourth point, where he said: "ce glissement . . . ne correspond à aucun ratio mathématique"[30]. Mr. Bundy for his part stoutly denied that Ukraine's claim reflected an arithmetical ratio: he admits that this would not be a proper procedure[31]. It is at some level entertaining to hear counsel vocally denying that they have a particular, prohibited reason for doing something — here, adjusting their provisional line in accordance with a mathematical ratio — especially when they can offer no other reason.

[Tab 2: construction of Ukraine's claim line]

18. But it is only half true that "ce glissement . . . ne correspond à aucun ratio mathématique". For Ukraine's claim line before you is exactly the same as the claim line put forward in the negotiations, and we do know how that was constructed. As you can see on the screen (tab 2 in your folders), it was done by splitting the difference between the provisional equidistance line giving full effect to Serpents' Island — that is the red-dashed line — and the coastal ratio line, which is the blue line proceeding practically due south from point F. Ukraine's position in the negotiations, was a line which split the difference between these two lines.

---

[30]CR 2008/29, p. 43, para. 108 (Quéneudec).

[31]CR 2008/28, p. 29, para. 42 (Bundy).

19. Now it is not unknown as maritime claims move from negotiation to adjudication that a party maintains the essential reasoning underlying its position, but modifies its position to some degree. Courts and tribunals are sensitive to over-claiming, since a compromise between claim lines tends to reward the State making the more extreme claim. It is less common for a litigant to do what Ukraine has done in coming before this Court — that is, to maintain its line but to abandon the reasons for doing so — reasons for the line. But the coincidence of the lines is telling, and it means that Ukraine's claim line gives half effect to its coastal ratio line, moving from a line giving full effect to Serpents' Island. In a phrase, one might describe that as the inequitable in pursuit of the inadmissible.

20. One final observation about Ukraine's line. We heard a great deal last week about Romania's recessed coastline south-west of the Sacalin peninsula and down to the Bulgarian border. I will analyse it a little further in a moment, but it was said to face south-east, towards Bulgaria and Turkey, and to be hardly relevant to the delimitation[32]. The point I want to make is this: the two lines which Ukraine has used to construct its claim line are both insensitive — completely insensitive — to the configuration of Romania's south coast. Ukraine's provisional equidistance line does not depend on any base point south of the Sacalin peninsula. Its coastal ratio line does not depend on the configuration of the coast either: it would be the same or even more extreme if Romania's coastline proceeded due south from the Sacalin peninsula, since (on that hypothesis) Romania's coastline would be even shorter. Another of Ukraine's mantras is "coastal configuration, coastal configuration" — yet coastal configuration is ignored in constructing its line — except for the configuration of Serpents' Island, the starting-point for this utterly inadmissible procedure.

[End tab 2]

Relevant coasts and relevant areas

21. Madam President, Members of the Court, I pass to the second part of this presentation, the identification of relevant coasts and relevant areas.

[Tab 3: the Party's opposite coasts proceeding from point Z]

---

[32]CR 2008/28, p. 47, para. 52; p. 48, para. 57 (Bundy).

22. As I have said, last week Ukraine tended to focus on the northerly part of the delimitation, in particular segments 3 to 7 — despite the fact that no delimitation takes place between those segments. At the same time they were dismissive of our southern coast: you can recall Mr. Bundy's graphic which was tab 22 in their folder. For these reasons it is useful to start in the south, at the tripoint between Ukraine, Romania and Turkey. We have called it point Z. It is an agreed point in the sense that it is the final point on the provisional equidistance lines drawn by both Parties.

23. Now Mr. Bundy said that most of the southern cost of Romania pointed in the wrong direction: the arrows on the screen are his arrows. But the same exercise can be performed on the opposite Crimean coastline, segment 8, as you can see. Some bits of it point towards Turkey, some towards Bulgaria, some towards Romania. Yet as you can see, looking at these coastlines, three things are obvious. First, the opposite coasts identify themselves readily. Secondly, they are as coasts go, similar in outlook and configuration. Thirdly, they are of approximately equal length. If the delimitation was to take place solely between these coasts, that would clearly enough call for an equidistance line, and there would be no reason to adjust it.

24. I pause to note, however, that even here between more or less equal and opposite coastlines, Professor Quéneudec's *glissade* has a pronounced effect. Ukraine's claim line is miles to the west and heading even further north-west towards the delta. That between obviously opposite coasts.

25. As we move north along the equidistance line, however, we soon reach a point, below the latitude of Constanța, well below the latitude of Cape Sarych, where Ukraine's equidistance line based on Serpents' Island takes effect. It does so at a point where the dominant coasts are still the opposite coasts that I have identified. We are nowhere near a tripoint with any coasts to the north of the delta. Yet the opposite coasts which still dominate this part of the delimitation have ceased to be relevant to Ukraine's drawing of the line.

[End tab 3]

[Tab 4: Serpents' Island as displayed (1)]

26. Now on the scale of the western basin of the Black Sea, by the way, Serpents' Island is wholly insignificant. Despite the fact that it has this transmission effect of northern coasts. Our

friends opposite have taken to displaying Serpents' Island in various ways. The black dot surrounded by green was tab 5 in their bundle, it is 6.3 sq km in size and has a perimeter of 9 km. This compares with the real thing, which at 17 hectares is about 37 times smaller than that dot. On these scales you could not see it.

[End tab 4]

[Tab 5: Serpents' Island as displayed (2)]

27. Another device was to show Serpents' Island with concentric green circles, as in tab 4. The outer green circle has an area of 103 sq km, 620 times larger than the island. Realizing just how small it is on these scales brings home just how large an effect it has on the all-points equidistance line. The Court will remember what they say about real estate: location, location, location. And yet the all-points equidistance line is not their claim line, which is off to the west.

[End tab 5]

[Tab 6: the adjacent coast delimitation]

Relevant coasts

28. I turn to the subject of the relevant adjacent coasts, shown on the screen now. Although the distinction between adjacent and opposite coasts has been accepted by Ukraine in multilateral and bilateral treaties and in its own legislation, they reject it for the purposes of this delimitation: we murder their case if we dissect their coastline in any way. So you have heard Mr. Bundy say, in effect — "the coasts, the whole coasts and nothing but the coasts"[33]. Now it is true that the basic principle of maritime delimitation is the same for adjacent as for opposite coasts: it is stated as such in the 1982 Convention. It is also true that there are situations where coasts are obviously within a delimitation area but cannot readily be classified as adjacent or opposite: this is especially true for small islands. But there are still important practical differences between the two. For example coastal irregularities in an opposite coast situation are less intrusive than they are as between adjacent coasts: adjacent coasts magnify the differences, opposite coasts reduce them. Thus we adhere to our analysis of relevant coasts made last week, it is a reasonable estimate of relevant adjacent coasts in accordance with your case law. In particular, it is not enough to make

[33]CR 2008/28, pp. 51-53, paras. 73-82 (Bundy); see also CR 2008/26, pp. 21-25, paras. 8-24 (Bundy); CR 2008/26, pp. 21-22, paras. 5-14 (Bundy).

coasts relevant to observe that they are within 400 miles of each other and thus generate overlapping entitlements. That was true of coasts held irrelevant in both *Jan Mayen* and *Tunisia/Libya*[34].

[End tab 6]

29. Ukraine's approach to the relevant coasts issue comes down almost exclusively to the *Gulf of Maine* case, to which it clings as to a lifebelt in stormy seas. In effect it transposes *Gulf of Maine* to the western basin of the Black Sea. It asserts that the basin is dominated on all three sides by its coasts, leaving Romania cowering in the corner. Instead of the "Gulf of Maine" we have the "Gulf of Ukraine".

[Tab 7: the "Gulf of Ukraine": possible closing lines]

30. Now Ukraine's vision of the "Gulf of Ukraine" and Romania's subordinate role in it can be seen from the graphic on the screen, which is tab 7 in your folders. The other day Mr. Bundy drew a closing line across from Cape Sarych to Vama Veche, the border with Bulgaria[35]. But there is no basis for doing so. I would make the following points.

(a) As a matter of toponymy, the north-western basin of the Black Sea is not regarded as a distinct entity and it has no name of its own.

(b) This is despite the fact that geographers have not hesitated to give names to gulfs, bays and even seas within the Black Sea which are distinct entities — Karkinits'ka Gulf, for example, a gulf if ever there was one.

(c) Except in special markedly defined situations — the Gulf of Maine was one of them — it is rather arbitrary to draw closing lines across areas of water encompassing several hundreds of miles, especially when we have no conventional terminology to guide us. The line Mr. Bundy drew has no significance in the law of the sea whatever, in particular for maritime delimitation. But if one were to distinguish a geographical sub-area here, the closing line would not be the one drawn by Mr. Bundy, but a line we suggest drawn from Cape Khersones to the Sacalin peninsula. And the observation which immediately comes to mind when one does so, as is done on the screen, is that the bulk of Romania's coastline lies outside this line, looking across

---

[34]CR 2008/18, pp. 65-66, paras. 15 and 16; p. 69, paras. 23-25 (Crawford).

[35]CR 2008/29, p. 50, paras. 32-35 (Bundy).

the whole of the Black Sea at the southern tip of the Crimean peninsula and, much more distant, the coasts of Russia and Georgia.

(d) In short, Romania as a coastal State is at large in the Black Sea. It is not to be confined by Ukrainian closing lines, arbitrarily drawn, or by Ukrainian visions of local dominance.

[End tab 7]

[Tab 8: the Gulf of Maine]

31. Ukraine made much of the analogy with the *Gulf of Maine* case, but the following points should be made about the decision of the Chamber. I start with a few points about the coastal configuration which has to be understood to understand the case at all:

(a) The Gulf of Maine is an unusually well-defined entity. It is (except for the Bay of Fundy) essentially rectangular in shape.

(b) The entrance is much wider than it is deep.

(c) Outside the notional closing line of the Gulf, the open Atlantic coasts of Canada and the United States are aligned with the closing line: in other words they are at an orientation of 90° or so to their opposite coasts within the Gulf. They do not look into the Gulf at all and they are obviously irrelevant to the delimitation of waters, not merely within the Gulf, but also to the south-east of the closing line on which they do not encroach.

(d) What the delimitation position would have been if the opposite coasts of either the United States or Canada had continued out into the Atlantic one can only speculate. Yet that is Romania's position here, with its southern coastline.

32. As to the decision itself I would make five points:

(a) It is the decision of a chamber, not the whole Court.

(b) It is an outlier in delimitation decisions, the only occasion where the ratio of coastal lengths has generated a precise adjustment of a closing line.

(c) That operation, eccentric and even fussy as it now seems, was only possible because of the combination of two special facts: first, the regular geometry of the Gulf itself; secondly, the absence of any relevant coastal frontage of the parties outside the Gulf capable of affecting the allocation of open Atlantic EEZ areas beyond the notional closing line of the Gulf. In other words, the relevant EEZ areas in the Atlantic were, in this special situation, evidently

attributable to the coasts within the Gulf and therefore they could be divided in accordance with the ratio of those coasts. The ratio of those coasts could, in that special situation, create or generate a transfer to waters beyond.

(d) That situation is unique. It has never been replicated. It is certainly not the case here.

(e) Yet in fact the line actually drawn by the Chamber did not depart very much from an equidistance line. The line drawn, discounting a small Canadian island, slightly favoured Canada, the State with the shorter coastline in the Gulf.

33. As to relevant coasts, given the location of the land boundary, there was no coast within the Gulf that was evidently irrelevant (except for the interior coasts of the Bay of Fundy), just as there were no coasts outside the Gulf that were relevant to the delimitation. The issue of the Bay of Fundy nonetheless provoked disagreement if not dissent from Judge Schwebel (*I.C.J. Reports 1984*, pp. 354-357).

34. Mr. Bundy uses *Gulf of Maine* to assert the relevance in the present case of segment 7, the north-facing coast of the Karkinits'ka Gulf[36]. But the two situations are completely different. What Mr. Bundy calls the "back" of the Bay of Fundy, or the "back" of Nova Scotia, was only the "back" when looked at from the Atlantic. It fronted directly on to the land boundary. If the land boundary between the two States had been somewhere just to the north of Cape Cod, it is doubtful whether the coasts of the Bay of Fundy would have been relevant at all.

35. But however that may be, our situation is completely different and the opposite coasts of the Karkinits'ka Gulf, far distant from the land boundary and the scene of this delimitation, cannot possibly be relevant here. Nor can a closing line drawn across or anywhere within the Karkinits'ka Gulf be treated as a surrogate for its irrelevant coast.

[End tab 8]

[Tab 9: projections from Ukraine's south-facing coast]

36. I turn to the question of Ukraine's south-facing coast, the western part of segment 6. As I said in the first round, this does look out into the open waters of the western basin, though it is remote from the area of the delimitation. Thus it is on average — the western coastline of

[36]CR 2008/26, p. 35, para. 65; p. 36, para. 70 (Bundy); CR 2008/28, p. 47, para. 54 (Bundy).

segment 6 — 100 miles or so from Serpents' Island, and this in a region where the average distances to other parts of the Ukrainian coast are much less than 100 miles.

37. Now, it is of course true that Romania's east-facing coast on the delta and Ukraine's south-facing coast generate overlapping potential entitlements. Actually so does Ukraine's south-facing coast generate overlapping potential entitlements with the coasts of Bulgaria and Turkey: that does not make it relevant to either. If there were to be nonetheless hypothetically a delimitation between Romania's delta coast and Ukraine's south-facing coast, the delimitation line would be well to the north, quite irrelevant to the disputed area in the present case.

38. Last week Mr. Bundy showed you the graphic on the screen[37]: it shows projections from segment 6. It is odd that the delimitation waves — if I may coin a phrase — are powerful enough to flow over the Crimean peninsula, but not the more distant delta area. Apparently delimitation waves get weaker as they propagate with distance.

39. Just by itself, this graphic demonstrates the irrelevance to the delimitation of the northwards-facing coasts of the Karkinits'ka Gulf, against which the delimitation waves from segment 6 beat furiously.

[End tab 9]

[Tab 10: projections from all Ukraine's coasts]

40. And this is of course the point. Segment 6 is not unopposed; it competes with other and much closer Ukrainian coasts, as you can see displayed on the screen now. The delimitation waves meet and rebound; the result is . . . equidistance! It is most certainly not a focusing of the force of segment 6 through the magnifying lens of Serpents' Island, and that is Ukraine's theory of the case. The graphic is a striking one — and while you see it, it gives me an opportunity to pay tribute to Romania's technical team, playing in the cartographic World Cup against international opposition!

[End tab 10]

[Tab 11: comparison of the Parties' relevant areas]

[37] CR 2008/26, pp. 28-29, para. 42 (Bundy).

Relevant areas

41. Madam President, Members if the Court, I move finally to the question of relevant areas, usefully compared in Ukraine's graphic, which is tab 11 of your folder.

42. What I have said above about segments 3 to 7 determines the irrelevance of the areas in the north, in particular the waters around Odessa and within the Karkinits'ka Gulf. I will not repeat what I said on these in the first round[38].

43. As to the so-called "inconsequential area" in the south-west, Ukraine very kindly attributes to Romania areas south of the provisional equidistance line between Romania and Bulgaria. This has the effect, if Ukraine's delimitation method is followed, of increasing the areas notionally attributed to Romania at our expense; so, it is a Greek gift, one might call it — regionally appropriate. The relevant area, we say, is bounded either by actual delimitations with third States or, in the absence of delimitation, by a provisional equidistance line.

44. But by far the most important disagreement relates to the south-eastern triangle, which we *include* but Ukraine seeks to *exclude*. Ukraine argues that this area has been delimited with Turkey, and is not claimed by Romania[39]. But areas may be relevant to more than one delimitation — as in *Tunisia/Libya* and *Libya/Malta* — part of the area overlapped. And whether an area is claimed or not does not matter for the purpose of determining relevant areas; for example, areas very close to the coast of one State will not be claimed by the other but they are certainly part of the relevant area for delimitation purposes. Thus Ukraine rightly counts as relevant for the delimitation the areas of Constanța, despite the fact that it does not claim them.

[End tab 11]

[Tab 12: comparison of the Parties' relevant areas]

45. That the south-eastern triangle is, but for its tip, relevant here can be seen quite clearly from these two graphics. The first — tab 12 in your folders — is the 200-mile projection from the Romanian coasts north and south of the Sacalin peninsula: these coasts look directly on to the area in question, without any intervening or occluding coastal frontages.

[End tab 12]

---

[38]CR 2008/18, pp. 65-66 paras. 15 and 16; p, 69 paras. 23-25 (Crawford).

[39]CR 2008/24, p. 25, para. 25; p. 36, para. 73 (Bundy); CR 2008/26, p. 40, paras. 87-88 (Bundy); CR 2008/29, p. 47, paras. 17-19 (Bundy).

[Tab 13: comparison of the Parties' relevant areas]

46. The second graphic— tab 13 in your folders — is the eastwards projection of the southern coast of Romania above Vama Veche. This sector, as I have explained, lies entirely south of the latitude of Cape Sarych and looks directly eastwards. Unlike the previous graphic it does not entirely cover the area Ukraine claims to exclude, but it covers most of it. There is an obvious asymmetry in Ukraine's counting as relevant the equivalent triangle in the west but not in the east.

47. Madam President, Members of the Court, for these reasons the relevant coastal lengths and the relevant areas in this case are as specified by Romania. My colleagues tomorrow will explain what impact your conclusion on this point does — or does not — have on the delimitation.

[End tab 13]

Conclusions

48. Madam President, Members of the Court, the tale of maritime delimitation is a tale of modest adjustments even given large differences in coastal lengths: you can see this, for example, from the *Jan Mayen* case. You can see it also from the decision of the Tribunal in the *Barbados/Trinidad and Tobago* case, where a substantial difference in coastal lengths produced only a very modest adjustment in the eventual delimitation. That decision has been very well received — except, perhaps, than by losing counsel! *Gulf of Maine* stands alone as a case where a strict arithmetic proportion was used to achieve what was in the end a modest departure from equidistance; it does not depart from this tale of modest departures. For the reasons I have given, the Chamber's decision is of no relevance here.

Madam President, this concludes this part of my presentation. I would ask you to call upon Mr. Dinescu to continue.

The PRESIDENT: Thank you, Professor Crawford. The Court now calls Mr. Dinescu.

Mr. DINESCU: Thank you very much, Madam President.

III. IRRELEVANCE OF "STATE ACTIVITIES" IN THE DELIMITATION AREA

I. Introduction and general considerations

1. Madam President, Members of the Court, in its written pleadings Ukraine asserted that the so-called "State activities in the relevant area"[40] represent a relevant circumstance that supports the delimitation line it put forward[41]. These activities were treated under the sections dedicated to its relevant circumstances both in the Counter-Memorial[42] and the Rejoinder[43]. And the final summaries of both the Counter-Memorial and the Rejoinder included these activities among the relevant circumstances as well[44].

2. In an apparent shift from the original position, in the oral pleadings Ukraine changed tack. To quote counsel for Ukraine, Ms Malintoppi, the oil and gas activities and Ukraine's coastguard operations "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"[45]. The idea appeared for several times throughout Ukraine's pleadings of last week, while the "old" idea that the States' activities might be considered as a relevant circumstance for the delimitation was touched upon only once[46].

3. The new assertion that Ukraine introduced into the case is as unsustainable as the previous one.

4. In the following minutes I will answer this new Ukrainian allegation and I will also briefly refer to other aspects which, following Ukraine's presentation of last Friday, must be clarified. Before doing so, it is necessary to make two remarks.

---

[40]CMU, Chap. 8, Sec. 2, pp. 212-219.

[41]See CMU, p. 213, para. 8.41; also RU, p. 119, para. 6.74.

[42]CMU, Chap. 8, Sec. 2, pp. 212-219.

[43]RU, Chap. 6, Sec. 4, pp. 119-132.

[44]See CMU, p. 253, para. 11.1 (viii); also RU, p. 153, para. 9.3 (xii).

[45]CR 2008/28, p. 34, para. 43.

[46]See CR 2008/28, p. 34, para. 45.

5. The first concerns the consequences of the provisions of the 1997 Additional Agreement on the issue of the State activities. Last Friday counsel for Ukraine tried to minimize the relevance of the Additional Agreement for our case, but none of the legal arguments presented by Romania was contested. In turn, Ms Malintoppi made two inexact statements as to the facts, namely that "a number" of the Ukrainian licences were awarded before the Additional Agreement was concluded[47] and that anyway the co-ordinates of the area in dispute where petroleum activities of the two Parties were covered by the special legal régime of the Additional Agreement were never established[48].

6. The "number" of the licences awarded by Ukraine before 1997 is, in fact, one — the *Delphin* block. Of course, in terms of percentage, this number is indeed important — since Ukraine's petroleum activity is limited to only three concessions!

7. As far as the definition of the area in dispute is concerned, Ms Malintoppi was again wrong: that area was indeed defined on the basis of the claim lines of the Parties at the very beginning of the process of negotiations, and was reconfirmed several times during this process. In fact, the claim lines of the Parties were well known even earlier — as proved by the exchange of diplomatic correspondence of 1995, by which the two States communicated to each other their maritime claims. I referred at length to this 1995 diplomatic exchange during the first round of Romania's pleadings and I will not repeat what I said then[49].

8. My second remark concerns the critical date. Rather surprisingly, Ukraine concluded that "[e]ven 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"[50].

9. Madam President, Members of the Court, whenever there is a dispute, there must be a point in time when that dispute emerged — when it crystallized. So, whenever a dispute exists, a critical date also exists. This applies to all kinds of disputes, and maritime delimitation is no

---

[47]See CR 2008/28, p. 32, para. 35.

[48]*Ibid.*

[49]See CR 2008/21, pp. 22-23, paras. 8-10.

[50]See CR 2008/28, p. 25, para. 6.

exception. My colleague Daniel Müller explained in the first round that, as concerns the relevance of the critical date, maritime delimitation is no different from its land counterpart[51].

10. That the critical date has a role to play in maritime disputes is confirmed by the *Nicaragua* v. *Honduras* case. In the Judgment of October last year you said that "[i]n the context of a maritime delimitation dispute or of a dispute related to sovereignty over land, the significance of a critical date lies . . ." *(Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras),* Judgment of 8 October 2007, para. 117) and I will not go further, since this paragraph from the 2007 Judgment was already quoted and analysed in our presentations two weeks ago[52].

11. Of course, to determine the critical date may not always be simple. An example is represented by the divergent views advanced by the parties in *Nicaragua* v. *Honduras*. But our case is not like that. In our case it would be quite amazing to hold that the dispute emerged in 2004, when Romania seised the Court. Nor can it be sustained that the dispute crystallized in 1997, when the Additional Agreement was signed; this is obvious from the language of the Additional Agreement itself. Incidentally I would like to correct another erroneous Ukrainian statement — in our Reply we did not fix the critical date in 1997; in fact we said that the time of the Additional Agreement was "at the latest" the critical date[53]. The 1995 exchange of diplomatic correspondence did not reveal the dispute for the first time either, this exchange merely confirmed its existence and scope. In fact the reality was very eloquently presented by the Agent of Ukraine in his opening remarks last Tuesday, when he referred to the past negotiations on the delimitation: "Both Ukraine, as successor State to the USSR, and Romania inherited a complicated problem."[54]

12. In conclusion, the dispute predates Ukraine's independence. Still, for the purposes of our case, in view of the late activities invoked by Ukraine — and I refer here both to the "State activities" in the disputed area and the activities on Serpents' Island — it suffices to say that the critical date of the dispute is situated in any case *at the latest* in 1995.

---

[51]See CR 2008/21, pp. 17-18, para. 17.

[52]See CR 2008/21, pp. 117-118 (Müller); p. 22, para. 17 (Dinescu).

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

[54]CR 2008/24, p. 13, para. 14.

II. Ukraine's allegation that the State activities in the disputed area prove the inexistence of a previous agreement in the area of Serpents' Island

13. Madam President, Members of the Court, I turn now to the new interpretation given by Ukraine to the "State activities" in the disputed area — i.e., that they constitute an element which "fundamentally undermines Romania's argument that an all-purpose boundary had been agreed"[55] in 1949. Unlike the previous contention (according to which the State activities are a relevant circumstance), where the focus was on the Ukrainian activities, in this new play the main actor is represented by the Romanian activities — or rather, as Ukraine wants you and us to believe, their non-existence.

14. This is based on a false assumption, just like other arguments through which our opponents contest the validity and the meaning of the 1949 procès-verbaux.

15. This false assumption is that the concessions awarded by Romania after 1990 represent the *only* State activities undertaken by Romania in the disputed area.

[Slide 1: Romania's activities in the delimitation area]

16. The slide which is now on the screen and that you may find at tab III-1 in your folders is an accurate illustration of Romania's activities in the delimitation area. Last week Ukraine criticized that map saying that it was not dated, that its source was not provided and that it was "not a paragon of clarity"[56]. In fact this map was produced by Romania in its pleadings with the purpose of presenting the location of all activities in the delimitation area, along a period of more than 40 years, on the basis of information provided by the Romanian competent institutions. As for the clarity — the map includes a legend in which the meaning of the lines and dots is very clearly explained: they represent seismic profiles carried out by Romania at different points in time and exploration wells drilled by Romania.

17. On the other hand, if in its written pleadings Ukraine accused us of making "contentions [which] are difficult to reconcile with the publicly available data compiled by Petroconsultants, an authoritative and independent petroleum consultancy"[57], now Ukraine is equally dissatisfied with data provided by Romania from specialized publications, which are as authoritative and

[55]CR 2008/28, p. 34, para. 43.

[56]CR 2008/28, p. 28, para. 19.

[57]RU, p. 125, para. 6.93.

independent as Petroconsultants: last Thursday Ms Malintoppi found it "worth mentioning that . . . Romania relie[d] on secondary sources for information" by invoking studies published in the *Marine Geology* magazine[58]. In fact these independent studies bear witness to Romania's activities in the disputed area.

[End of slide 1]

[Slide 2: location of Romanian industrial seismic profiles (thick lines) taken in 1970-1971 and 1981-1988, of high-resolution seismic profiles of the research cruises in 1992, 1993 and 1994 (thin lines) and of the two drill holes 1 Ovidiu and 13 Heraclea (extract from *Upper Quaternary water level history and sedimentation in the northwestern Black Sea, Marine Geology* 167 (2000), pp. 127-146, also available on http://www.geo.edu.ro/sgr/mod/downloads/PDF/Winguth-MarGeo-2000-167-127.pdf, p. 129)]

18. Thus, the authors of one study published in 2000 based their documentation, according to the study itself, on the "analysis and interpretation of ca 3,300 km of industrial multichannel reflection seismic profiles obtained in 1970–71, 1981–88 and 1994, made available by the Romanian exploration companies PETROMAR and PROSPECTIUNI"[59]. The slide which is now on the screen (and which is also at tab III-2 in your folders) illustrates the area covered by these Romanian exploration activities.

[End of slide 2]

[Slide 3: area explored by the Romanian companies Petrom and GeoEcoMar and by the joint Romanian-French BlaSON expedition (extract from "The Danube submarine canyon (Black Sea): morphology and sedimentary processes", *Marine Geology* 206 (2004) 249-265, p. 251)]

19. Another study[60], published in the same specialized publication in 2004, shows another area explored by Romania, alone and in co-operation with a French company, at different points in time. The Romanian profiles made available by the Romanian companies result from the early Romanian exploration activities, while the joint Romanian-French exploration dates from 1998[61]. The area covered by these exploration activities is now on the screen and at tab III-3 in your folders.

---

[58]CR 2008/28, p. 28, para. 18.

[59]"Upper Quaternary water level history and sedimentation in the northwestern Black Sea", *Marine Geology* 167 (2000), pp. 127-146, also available on http://www.geo.edu.ro/sgr/mod/downloads/PDF/Winguth-MarGeo-2000-167-127.pdf, p. 128.

[60]"The Danube submarine canyon (Black Sea): morphology and sedimentary processes", *Marine Geology* 206 (2004), pp. 249-265.

[61]See "Messinian event in the Black Sea: Evidence of a Messinian erosional surface", *Marine Geology* 244 (2007), p. 150

[End of slide 3]

[Slide 4: area covered by the Romanian exploration activities as presented by the studies "Upper Quaternary water level history and sedimentation in the northwestern Black Sea", *Marine Geology* 167 (2000), pp. 127-146 and "The Danube submarine canyon (Black Sea): morphology and sedimentary processes", *Marine Geology* 206 (2004), pp. 249-265 and the disputed area]

20. Madam President and Members of the Court, you can see now on the screen the areas of the Romanian exploration activities presented in these two studies overlapped on which we also overlapped the area now in dispute. It is clear that the area covered by Romania's activities coincides practically with all the maritime area claimed by Romania, including those maritime spaces immediately south of the maritime boundary established on the 12-nautical-mile arc around Serpents' Island. This shows that Ukraine's assertion regarding the inconsistency of Romania's activities in the area with the established maritime boundary on the 12-nautical-mile arc around Serpents' Island is erroneous.

[End of slide 4]

[Replay of slide 1]

21. As for the location of the Romanian concessions awarded after 1990, on which much reliance is put by Ukraine, we explained that this was the expression of Romania's cautious approach in granting concessions in the context of the ongoing maritime delimitation negotiations[62].

22. In response, Ms Malintoppi rhetorically asks "if an area is already delimited, as Romania contends, what is the need for this 'precautionary conduct'?"[63] and quotes Romania's 1995 Note Verbale, according to which no agreement on delimitation between Romania and Ukraine was concluded[64].

23. Madam President, two weeks ago, I briefly touched on the history of negotiations on the delimitation between Romania and the former USSR, then Ukraine after its independence, and I explained the reasons for which Romania exercised caution in granting concessions for petroleum or gas activities. As it results from the records of the Romanian-Soviet negotiations, included by

---

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

[63]CR 2008/28, p. 33, para. 38.

[64]See CR 2008/28, p. 34, para. 44.

Romania in its annexes to the Memorial[65], from the end of the 1970s, the Soviet Union started to contest the validity and the meaning of the 1949 procès-verbaux, which made the Romanian chief negotiator in 1987 to clearly reaffirm Romania's position that,

> "in 1949, our governments established a *sui generis* delimitation line, which confirmed the pass-over of Serpents' Island to the USSR and allocated to it, in part explicitly and in part implicitly, a semicircular maritime space, with a radius of 12 miles, whose exterior limit on the segment separating Romanian waters of Soviet waters received the characteristics of a State boundary"[66].

24. This contestation of the 1949 Agreements lead to the inclusion of the areas south of the maritime boundary on the 12-nautical-mile arc around Serpents' Island within the area in dispute between Romania and the USSR and, consequently, within the area where Romania refrained, after 1990, from awarding concessions — although Romania continued its exploration activities in that area, as I have just shown. But the fact that from a certain moment one party — the USSR — contested the validity of the 1949 Agreements does not mean that the agreements do not exist or that they do not mean what they say. Professor Crawford will deal with this point shortly.

[End of slide 1]

Madam President, I still have two pages to go; may I continue?

The PRESIDENT: Please continue.

Mr. DINESCU: Thank you very much.

III. Ukraine's petroleum and coastguard activities in the disputed area

25. I will turn now to Ukraine's invoked activities. This will not take long, since Ukraine brought no new element into the picture.

[Slide 5: the disputed area and the Ukrainian concessions]

26. Regarding Ukraine's gas and oil activities — an illustration of which you can see now on the screen — Ukraine adduced no further data than what it produced in its written pleadings. Our opponents continue to argue that "these activities are consistent with Ukraine's delimitation line"[67],

---

[65]See MR, Anns. MR 28-MR 31.

[66]MR, Ann. MR 31.

[67]CR 2008/28, p. 34, para. 45.

but a simple glance at the map, at their location, is enough to prove the contrary. Counsel for Ukraine also affirmed that the Ukrainian hydrocarbon activity was protested by Romania in "just two instances"[68]. But in Romania's Rejoinder, evidence is produced regarding the diplomatic correspondence of Romania addressed to Ukraine between 2001 and 2006[69]. To this we must add the 1995 Romanian Note Verbale[70], as well as the earlier Romanian document referred to in this Note — the aide-memoire addressed by Romania to Ukraine in 1993, after Romania became aware of Ukraine's plan to grant the Delphin concession.

27. Ms Malintoppi did not contest our conclusions regarding the relevance of the Additional Agreement on the Parties' oil and gas activities either, but for those two small issues that I touched upon at the beginning of my intervention; thus our conclusions remain valid.

[End of slide 5]

28. Turning to the naval patrols — or, as called now by Ukraine, the "coastguard activities" — these were all conducted after the critical date and all but one after the entry into force of the 1997 Additional Agreement. So our conclusions remain unrebutted.

29. Ukraine resurrects from the written pleadings its argument regarding the existence of a so-called "provisional line"[71] of delimitation between Romania and Ukraine, corresponding to its claim and communicated to Romania and third States. But Ukraine readily admits that this "provisional line" was never accepted by Romania[72].

30. And the fact that this line was communicated to other States has no relevance for our case. No State has ever recognized the Ukrainian "provisional line"[73].

31. Counsel for Ukraine also referred to a 2006 incident involving an airplane of the Ukrainian border police and Romanian fishing vessels. As Ukraine admits, Romania reacted to this incident through a Note Verbale, which may be found as Annex 37 of our Reply. This incident —

---

[68]CR 2008/28, p. 32, para. 36.

[69]See RR, pp. 252-255, paras. 7.21-7.30.

[70]CMU, Vol. 3, Ann. 25.

[71]See CR 2008/28, pp. 29-30, paras. 22, 24.

[72]See CR 2008/28, pp. 29, paras. 23.

[73]See RR, pp. 260-263, paras. 7.43-7.48.

which by the way took place long after the critical date — has no relevance on the present proceedings.

IV. Conclusion

32. Madam President, Members of the Court, from all the elements regarding the "State activities" in the disputed area, only one clear-cut conclusion can be drawn: Ukraine failed to demonstrate that these State activities comply, in fact or in law, with the necessary criteria that might transform them into a relevant circumstance able to have an impact on our delimitation.

Ukraine also completely failed to build its new case, that these activities might constitute an element undermining Romania's argument regarding the 1949 procès-verbaux.

To paraphrase the distinguished counsel for Ukraine, all Ukrainian allegations on the State activities in the relevant area are nothing but "a figment of Ukraine's imagination"[74].

Madam President, Members of the Court, thank you for your patient attention. Madam President, I think it may be an appropriate time for the break. With your permission, Romania's presentation will be continued thereafter by Professor Crawford.

The PRESIDENT: Thank you, Mr. Dinescu. The Court now rises.

The Court adjourned from 11.30 a.m. to 11.45 a.m.

The PRESIDENT: Please be seated. Yes, Professor Crawford.

Mr. CRAWFORD:

IV. THE DELIMITED BOUNDARY AROUND SERPENTS' ISLAND

1. Madam President, Members of the Court, I turn to deal with the delimited boundary around Serpents' Island, responding to the large number of arguments made on this by Sir Michael Wood in his distinguished debut.

[Slide: Ukrainian map from 2001 (RM A 23)]

[74]See CR 2008/28, p. 35, para. 47.

No new argument

2. One of Sir Michael's points was that this was a *new* argument, invented by counsel for the purpose of the case[75]. One sensed he was particularly satisfied to be able to cry "new argument, new argument" — like the ancient Spaniard proclaiming "Let no new thing arise!" Unfortunately for Sir Michael — I am tempted to call him Don Miguel — the argument is not new. It is often the task of counsel to clarify and develop positions taken by diplomats and governments who are, sometimes, no doubt, to the despair of their legal advisers, not always models of consistency. But there are nonetheless transactions to which the Court will give effect unless the relevant rights have been waived or abandoned. And the fact is that the 1949 Agreement argument was developed on the basis of the available materials. The Court will be relieved to hear that we did not forge the maps! I never met the Ukrainian State cartographer who produced the 2001 map on your screens (it is tab IV-1 in your folders)[76], nor the German cartographer who independently showed the same agreed border in 1991[77]. What they showed was clear and it was not new. My colleague, Mr. Olleson, will, with your permission, Madam President, follow me and deal with Sir Michael's speculations relating to the maps — as to which even Sir Michael had some new ideas.

[End slide]

3. But it is not only the maps which show that this is not a new argument. Sir Michael referred to the record of negotiations with the Soviet Union in October 1987: my colleague, Mr. Dinescu, has read the relevant passage and I will not repeat it. It makes it quite clear that all the essentials of the Romanian argument had been elaborated by that time. What is dreamt up in all of this is Ukraine's argument relating to Romania's "prospective" territorial sea, which made its first appearance in the Counter-Memorial.

4. I would also draw your attention to the map forming part of Romania's 1997 notification to the United Nations Secretariat of base points from which its territorial sea is drawn. Ukraine seems to have had some difficulty, in its pleadings[78], in reproducing this map in the appropriate colours, though its pleadings are otherwise full of colour. An accurate reproduction of the map as

---

[75]CR 2008/26, p. 46, para. 9 (x) (Wood).

[76]CMU, Ann. RM A 23.

[77]CMU, Ann. RM A 41.

[78]CMU, Figs. 5-13 and 5-14.

submitted to the Secretariat is now on the screen[79]. You can see the line indicating the outer limit of the territorial sea, the first of the lines parallel to the coast, the territorial sea is shaded in pink. Sorry, it is not on my screen, that is because it is not on yours. I apologize. This document is the Romanian Reply, figure 23, and I am sorry there has been a glitch in our arrangements. Weekends of work do not always work out. But, I refer you to Romania's Reply, figure 23, and you will see that there is a line indicating the outer limit of the territorial sea shaded in pink. Further on, the contiguous zone is shaded in green. At the top of that chart, in the region of Serpents' Island, you can see clearly that the northernmost point of the outer limit of the territorial sea, is located on an arc around Serpents' Island. That chart was submitted in 1997; no objection was ever made to it by Ukraine. It is another example to show that this was not a new argument.

Romania's alleged renunciations

5. Then it is said that Romania renounced its rights under the 1949 Agreement — or, at least, recognized it had none. In this context I should refer to the Note Verbale of 28 July 1995, referred to both by Sir Michael[80], and by Ms Malintoppi[81]. They suggested that Romania had explicitly recognized that there existed no agreed delimitation. The phrase quoted by Ukraine reads "there is no agreement between Romania and Ukraine on the delimitation of maritime spaces in the Black Sea". We have provided an alternative translation of the Note Verbale which is tab IV-4 of your folders, I hope. Properly translated, the passage should read: "Since no agreement was concluded between Romania and Ukraine on the delimitation of the maritime areas in the Black Sea, the Romanian party . . ." And it goes on. That phrase clearly refers to the absence of an agreement concluded between the parties in relation to the delimitation of the continental shelf and exclusive zone as a whole. It does not mean that Romania accepted that the 1949 Agreements, concluded with the Soviet Union, not with Ukraine, had not delimited a part of the boundary.

---

[79]RR. Fig. 23.

[80]CR 2008/24, p. 58, para. 51 (Wood); CR 2008/26, p. 43, para. 4 (Wood).

[81]CR 2008/28, p. 34, para. 44 (Malintoppi).

6. Then Ukraine repeatedly invokes the 1997 Agreement, and the fact that it made no reference to the fact of an agreed boundary around Serpents' Island[82]. I notice in other respects it ignores the 1997 Agreement. I will deal with this point when we come to the question of jurisdiction, at the end of this presentation.

7. It is true, as Mr. Dinescu explained, that negotiations were held with the Soviet Union and with Ukraine in which other solutions were envisaged than a semi-enclave around Serpents' Island. But in negotiations, offers of settlement may be made which depart from the legal position of the offering State. This is done on a without prejudice basis, and nothing is to be implied from such conduct as to the strength of the underlying legal position.

Burden of proof

8. I turn to the burden of proof. On eight occasions last week, Sir Michael stressed that Romania had "the burden" or even, "the heavy burden" of showing that there existed an agreed boundary[83]. In his words: "Romania, the Party asserting the existence of an agreement, has the burden of establishing it."[84]

9. In this context, Sir Michael repeatedly referred to your decision in *Nicaragua* v. *Honduras* where you said that: "The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed." (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, Judgment of 8 October 2007, para. 253.)[85] Of course, that was a case in which you were asked to conclude that there existed a tacit agreement between the parties as to the delimitation. There have been similar cases where an agreement was sought to be inferred from practice — the oil practice line in *Cameroon* v. *Nigeria*, for example (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002,* p. 447, paras. 302-304).

---

[82]CR 2008/24, p. 12, para. 9 (Vassylenko); p. 28, para. 36 (Bundy); pp. 47, para. 50 and 49, para. 60; CR 2008/26, p. 44, para. 9 (i) (Wood); CR 2008/28, p. 24, para. 50 (Wood).

[83]CR 2008/24, p. 37, para. 2 (Wood); CR 2008/26, p. 43, paras. 5 and 6; p. 44, paras. 7 and 9 (Wood); CR 2008/28, pp. 10, para. 1; 16, para. 28; 24, para. 52 (Wood).

[84]CR 2008/26, p. 43 (para. 5) (Wood) .

[85]See CR 2008/24, p. 37, para. 3 (Wood); CR 2008/26, p. 43, paras. 5 and 6; and p. 51, paras. 27-28 (Wood).

10. But the present case is different. Listening to Sir Michael, with his constant references to "burdens" and "cases to answer", one might think that the issue was one of proof of the existence of an agreement — that Romania had conjured up a non-existent agreement relating to the maritime boundary around Serpent's Island of which there was no trace in the record.

11. But clearly there *was* an agreement; indeed there are a number of agreements — you are already familiar with them. Given that these exist and are binding on the parties, the question is no longer one of evidence. It is not a question of proof, or of burdens, or of inferring the existence of an agreement. It is a question of *interpretation* of the agreements which are binding on the parties. What did the 1949 procès-verbaux and subsequent agreements, properly interpreted, establish?

12. As a question of interpretation, there is no presumption one way or another as to what the parties agreed: that would amount to a special principle of restrictive interpretation of delimitation agreements, for which there is neither authority nor justification. The question is simply "What was agreed?"

The "State border"

13. In this regard the first question to be answered is "Was there a boundary agreed beyond the 6 mile territorial sea of Romania as it existed at the time of conclusion of the 1949 procès-verbaux?" The answer to that question is indisputably "Yes" — the boundary was agreed to extend beyond the territorial sea, as I showed you in the first round. On the sketches annexed to the 1949 individual procès-verbaux, the boundary is depicted using the same symbol along its entire length, and there are clearly visible, at locations lying well outside the territorial sea of Romania, indicators of appurtenance on either side of the line to Romania as well as the Soviet Union. This is true, *inter alia*, of map 134. Undoubtedly, there was an agreed boundary beyond areas then under the sovereignty of Romania. The suggestion that the 1949 and subsequent agreements delimited solely a "State border", separating areas under the sovereignty of both States is demonstrably incorrect.

14. Sir Michael attempted to avoid this obvious point by suggesting on a number of occasions that the Parties must have had in mind Romania's "prospective" territorial sea, or the future extension of the territorial sea to 12 miles. He even went so far as to say that the endpoint of

the supposed agreed boundary shown on map 134 was not identified by co-ordinates "presumably because Romania had not yet extended its territorial sea to 12 miles"[86]. "Presumably"! Apparently, "presumably" works for Ukraine.

15. Having guessed at the motivations of the Parties, Sir Michael proceeded to suggest that the point marking the extent of the arc around Serpent's Island, on map 134, was the same (or nearly the same[87]) as the location of point F, the point agreed in 2003; this was the point he suggested which Romania and the USSR must have had in mind. But as I have explained during Romania's first round, this cannot be right[88]. I will simply make four points:

— first, there is no indication whatever in the 1949 procès-verbaux or elsewhere that the parties had in mind a "prospective" Romanian territorial sea;

— secondly, if they were concerned with delimitation only to 12 miles from the mainland, one would have expected there to be some indication of this in the text of the 1949 procès-verbaux. There is not;

— thirdly, the attributions of maritime areas on both the maps and the sketches are inconsistent with this suggestion. They are bisected by the outer limit of a 12-mile "prospective" territorial sea based on the coastal geography, as it existed in 1949;

— fourthly, the suggestion that the final point of map 134 was intended to reflect Romania's "prospective" territorial sea does not fit with that coastal geography. I have already explained the process of extension of the Sulina dyke in the years since 1949[89]. Romania's "prospective" 12-mile territorial sea, even if that had been in the minds of Romania and the USSR at the time, would have intersected the 12-mile arc more than a mile to the north-west of the innominate point on map 134. But 12 miles from the end of the Sulina dyke was no mystery at the time: the parties knew the coastal geography, and they had the technical expertise to make the measurements. If they had intended to draw that point one may expect that they would have got it right.

---

[86]CR 2008/24, p. 38, para. 9; and p. 41, para. 24 (Wood); CR 2008/26, p. 44, para. 9 (ii) (Wood); CR 2008/28, p. 13, para. 84 (Wood); see also CR 2008/26, p. 48, para. 17 (Wood).

[87]CR 2008/24, p. 38, para. 9 (Wood).

[88]CR 2008/19, pp. 48-49, paras. 97-109 (Crawford).

[89]CR 2008/19, p. 49, para. 106 (Crawford).

16. Thus on Ukraine's own case, Romania and the USSR agreed a substantial portion of boundary beyond even the "prospective" 12-mile territorial sea. Sir Michael's suggestion that in the 2003 Treaty, Ukraine and Romania did nothing more than "reconfirm[] the territorial sea . . . *that had been agreed in 1949* and already confirmed in 1961"[90], is untenable. It is just not true that the boundary as far as point F was agreed in 1949 as a territorial sea boundary. In 1949, point F could not have been contemplated.

17. This undermines Sir Michael's carefully constructed argument that a distinction is to be drawn between those instruments relating to the State border and those relating to the delimitation of the exclusive economic zone and the continental shelf.

18. I note in passing that Ukraine's original argument, which was that the Parties beyond the 6-mile territorial sea delimited the outer limit of the Soviet 12-mile zone, on the other side of which was high seas[91], has disappeared without trace.

The effect of the 1949 Agreements

19. What then, as a matter of interpretation, was the effect of the 1949 Agreement? I have shown that the USSR and Romania agreed at the very least a sector of border beyond the territorial sea as it was at that time. That much is clear from the text of the Agreements.

20. Sir Michael attempts to muddy the waters by referring to differences in the translations provided[92]. But issues as to the precise translation of the term "marine border zone" or "maritime border strip" (or "maritime borderland") have no impact upon the question of the *extent* of the border; whatever translation is preferred, it is clear that a 12-mile zone was established, and that from a Soviet point of view it constituted a State border with Romania on the other side. The central questions remaining are whether this was an all-purpose boundary and how far it extended. Let me take the latter question first; I will refer to the former question shortly.

21. Ukraine accepts that the agreed border goes some way past border sign 1439. Sir Michael, although maintaining Ukraine's argument that the first of the two sentences in the 1949 general procès-verbal relates entirely to the location of border sign 1439, expressly accepted

---

[90]CR 2008/24, p. 38, para. 11 (Wood).

[91]CMU, para. 5.66; RU, paras. 3.76-3.84.

[92]CR 2008/26, p. 52, para. 33; pp. 53-54, para. 40 (Wood).

that the second sentence "does appear to address the continuation of the State border around the territorial sea outer limit, in that it says that it goes on or along the limit"[93]. And that is correct. The language of the procès-verbal is clear — the boundary runs along the exterior margin of the 12-mile zone.

22. The next question is how far did that agreed boundary go. In our view it went all the way around the island. That is what a 12-mile zone around a tiny island must inevitably do. Romania agreed that there was such a zone. That meant it was delimited; there is no mystery in the word "delimited".

23. Despite Sir Michael's protestations[94], and apart from forensic arguments based on the burden of proof, Ukraine's argument is wholly based on its hypothesis as to the extent of the boundary shown on map 134, and its speculation that the intention was only to delimit a boundary arising from a "prospective" Romanian territorial sea from the mainland coast. I have already dealt with that speculation.

24. I briefly address some subsidiary arguments made by Ukraine on map 134:

— First, reference is made to what is said to be the object and purpose of the procès-verbal and map 134[95]; this was solely "demarcation". But the USSR and Romania clearly also agreed a *delimited* boundary beyond the last *demarcated* border sign — that is evident on the face of the document. Therefore the procès-verbal was not only concerned with demarcation.

— Secondly, Sir Michael complained that I had misrepresented the title of map 134 by suggesting that the headings should be understood as meaning that the purpose of the map was to depict the boundary between those border signs and nothing else[96]. I do not think that that was a misrepresentation — the title is clear. In any case, Sir Michael accepted that the "primary purpose of the map was to depict the location of the two border posts". He added somewhat half-heartedly that "it also showed the State border"; he did not suggest that the object and purpose of map 134 was to depict the State border beyond border sign 1439. The fact remains

[93]CR 2008/26, p. 53, para. 39 (Wood).

[94]CR 2008/28, p. 16, para. 28 (Wood).

[95]CR 2008/26, p. 53, para. 39 (Wood).

[96]CR 2008/28, pp. 14-15, para. 20 (Wood).

that the express purpose of map 134 was limited to depicting the relevant border signs, and the boundary between them. There is no indication, anywhere, that map 134 was dispositive of the extent of the boundary around the 12-mile arc.

— Thirdly, Sir Michael was faced with the fact that the boundary shown on map 134 does not extend all the way back to border sign 1437, in the west. His explanation was that the section of the border was shown on a different map[97]. But in construing map 134, what it shows at the other end of the depicted line — another gap — explains what happened in the east.

25. As for the argument that Romania and Ukraine by entering into the 2003 Border Treaty, thereby agreed that there was no delimitation beyond that point[98], the 2003 Treaty says nothing of the sort. The dispute between the Parties, beyond 12 miles, was by 2003 of long standing. In 2003 the Parties sensibly agreed what they could, without prejudice to their respective legal positions beyond point F, at least agree on a territorial sea — that was not an exclusive agreement.

26. Incidentally, I would observe that it is not quite true to say that the Parties in 2003 fixed point F indefinitely. On Friday Professor Quéneudec helpfully slipped in a reference to the paragraph in Article 1 of the 2003 Treaty which stipulates that the territorial seas of the Parties "shall be permanently 12 miles wide at the point of their junction". It goes on to provide that point F may be recalculated by the Mixed Border Commission if the base points change "due to natural phenomena"[99]. Evidently the Parties envisaged that in certain circumstances point F would be relocated seawards along the 12-mile arc. Now that is inconsistent with point F being a fixed point of departure for a Ukrainian EEZ boundary to the south.

Plates I and V

27. I turn to plates I and V. You will recall these plates, they support the conclusion that the Parties did not intend map 134 to limit the extent of the boundary beyond border sign 1439. Sir Michael suggested that these plates are "not among the maps referred to as 'documents . . . attached to the Protocol' in the general procès-verbal", and he was not clear what was meant by the

---

[97]CR 2008/28, p. 17, para. 29 (Wood).

[98]CR 2008/24, pp. 27-28, paras. 27-37 (Bundy); pp. 49-50, para. 60 (Wood).

[99]CMU, Ann. 3, cited CR 2008/29, p. 34, para. 46 (Quéneudec).

fact that they were "included in the catalogue"[100]. He suggested that they were "of dubious status"[101].

28. Now we have put in your folders, at tab IV-5, a reproduction of the initial pages of the catalogue, which was submitted by Romania: a translation of the title page and table of contents follows. As you will see from the title page, the pages are taken from an album of maps — this is the "catalogue" which was annexed to the 1949 general procès-verbal. The next page is the contents page — you will see from the translation that the first entry is for plate I, the scheme of the trace of the State boundary line between the two States. The second entry corresponds to plates II to V, indicating four maps showing which of the maps cover the border signs; plate V was the last of these plates and it covered the border to the east in the vicinity of the coasts of the Parties. There then follows an entry for 134 maps, depicting the location of border signs, of which map 134 is the last one. If you continue, you will see plates I to V, as contained in the catalogue, and then the commencement of the series of maps. The status of plates I to V is in no way dubious; they were included in the catalogue of maps which was annexed to the procès-verbal. We are not suggesting that they are delimitation maps, we are suggesting that they are relevant to the question what the Parties intended by map 134.

The terminology used in the 1949 procès-verbaux

29. Sir Michael drew a link between the terminology used in the Russian text of the 1949 procès-verbal for the term translated by Romania as "maritime border zone" and the fact that, according to Professor Butler, this is one of the terms used by Soviet legislators "for waters washing Soviet shores"[102].

30. What Sir Michael did not discuss was the point I made in the first round, referring to an article by Professor Butler. A similar point is made at the outset of the extract to which Sir Michael referred you, and the whole chapter in Butler's work repays careful reading as to the varying doctrinal currents both in pre-Revolutionary Russia and, subsequently, in the Soviet Union. In 1949, there was no *general* Soviet claim to a territorial sea as that concept is contained in the

[100]CR 2008/28, p. 17-18, para. 31 (Wood).

[101]CR 2008/28, p. 18, para. 32 (Wood).

[102]CR 2008/26, pp. 54-55, para. 44 (Wood).

1958 Geneva Convention. That only happened in 1960 — yet in later agreements, up to 1974, the more general innominate term continued to be used for the Serpents' Island zone.

The 1949 Agreement in relation to the applicable international law

31. I turn to consider a further argument of Sir Michael's, the 1949 Agreement in relation to the applicable international law. Citing Lord Asquith in the *Abu Dhabi* arbitration, Sir Michael said that the parties in 1949 could have made no commitment as to claims beyond 12 miles[103]. As to this, the following points may be made — there are six of them:

(1) The Truman Proclamation was issued on 29 September 1945[104]. It had been well prepared and was well received. The Soviet Union was consulted in advance and said it had no difficulty in principle with the proclamation.

(2) In fact, in 1916, the Czar had declared that Russia's sovereignty extended to uninhabited islands in the Arctic Sea, a claim made expressly on the basis that the islands formed "the continuation of the continental shelf"; that claim was reaffirmed by the Soviet Government in 1924[105].

(3) The first bilateral treaty dealing with submarine resources was the Gulf of Paria Treaty of 1942[106]. It apportioned exclusive control over the "submarine areas" of the Gulf, defined as "the sea bed and sub-soil outside the territorial waters of the High Contracting Parties". And it led to the subsequent annexation of those sea-bed areas by Her Majesty's Government.

(4) The Persian Gulf States made various proclamations of continental shelf areas in 1949[107].

(5) In 1950, in the International Law Commission, Professor Brierly — not a law-making radical — concluded "the continental shelf belonged *ipso jure* to the littoral State", a view shared by some other members of the Commission, strongly opposed by none and reflected in the Commission's report for that year: 1950[108].

---

[103]CR 2008/26, p. 56, para. 49 (Wood).

[104]Proclamation with respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, (1946) 40 *AJIL* Supp 45.

[105]V. L. Lakhtine, *Rights over the Arctic* (1928) 43-5, cited in Young, (1948) 849-50.

[106]205 *LNTS* 121.

[107]For details see R. Young, "Further Claims to the areas beneath the High Seas", (1949) 43 *AJIL* 790.

[108]See *Yearbook of the International Law Commission (YILC)* 1951/1, 227-9, paras. 8 *(a)* (Brierly), 37 (Hudson), 40 (Amado). See also *YILC* 1950/II, 384-5.

(6) In 1951, the Commission adopted draft Articles 1-3 on the continental shelf; these were eventually embodied in the 1958 Convention without material change[109].

32. Whether or not the continental shelf doctrine had assumed in 1949 — and I quote Lord Asquith — "the hard lineaments or the definitive status of an established rule of international law"[110] is not the point. The Court is used to finding international law without always hard lineaments. Incidentally, that question was also completely irrelevant to the issue that Lord Asquith had to decide, which related to the interpretation of a grant of 1939. His much cited comments are *obiter dicta*. The point is different; it is whether informed governments could have understood a 1949 agreement about a marine boundary zone around a tiny island as a delimitation not limited to the territorial sea. The answer is that they certainly could have done. It is worth noting that the Ruler of Abu Dhabi's grant of 1949 to a rival oil company was, in effect, upheld in the *Abu Dhabi* award — that was, as is commonly the case, a dispute between competing oil companies.

33. So we come back to the question of interpretation. The Soviet Union in 1949 agreed a 12-mile marine boundary zone around Serpents' Island without any reservation of further claims to the south. We freely accept that the Soviet Union regarded itself as having sovereignty over that marine boundary zone. But the point is that maritime areas were, on the other side of that line, attributed to Romania in treaty maps, which went beyond the then existing, or even prospective, territorial sea of Romania. Subsequent official maps show the State boundary line as delimiting a Soviet from a Romanian domain, even to the south-east of the island. The position was reaffirmed in subsequent treaties, again without reservation of further claims to the south. In the circumstances, Romania could understand, and did understand, that an all-purpose delimitation had been agreed.

Point X

34. Madam President, Members of the Court, I turn to point X. This is the point where the maritime boundary to be delimited between the Parties departs from the 12-mile marine boundary

---

[109] *YILC* 1951/II, 141-2.

[110] *Abu Dhabi Arbitration* (1951) 18 *ILR* 144, 155.

zone around Serpents' Island. As I said earlier this morning — I finish as I start — you have to face two questions in this case, and they are *different* questions. Ukraine's whole strategy in this case is aimed at avoiding analysis, for which they substitute the mantra: "long coasts, long coasts". But coherent maritime boundary delimitation requires analysis, not lumping different things together. Of destructive analysis last week we had quite a lot; of constructive analysis virtually nothing.

35. I repeat, you face two questions. First, what effect would you give to this coastal configuration independently of Serpents' Island? Ukraine is silent on this. Second, what effect would you give to the island as such. Ukraine says nothing on that. We answer the two questions as follows. As to the first question, a mainland coast equidistance line is the starting-point. Since we say it is equitable in the circumstances, it is also the finishing point. As to the second question, there is — I am tempted to say, obviously — a 12-mile marine boundary zone around Serpents' Island. Point X is the point where the two lines meet. The boundary on the 12-mile zone around Serpents' Island as featured on all maps — there are 19 of them that go that far — stops at a certain point; this is point X, east of the island. From there, the boundary moves to meet the mainland equidistance line.

36. Let me put this another way, we do not suggest that Romania and the Soviet Union in 1949 reached an agreement as to the entitlement of mainland coasts to marine areas beyond 12 miles. Their concern in the relevant part of the general and special procès-verbaux was exclusively with the island. As shown by the maps, the boundary on the 12-mile arc stops due east of Serpents' Island, in the location we have proposed. But where it stops is a point of detail for you to decide. That the equidistance line does intersect the 12-mile arc agreed around Serpents' Island is a geometric requirement of the situation, as certain as anything can be in the uncertain world of maritime delimitation.

Jurisdiction

37. This brings me, finally, to the jurisdiction argument. I will not spend much time on it because Sir Michael was extremely brief. Although formally maintaining Ukraine's position, he was reduced to protesting, in the face of Professor Pellet's onslaught in the first week, that

Ukraine's was a good faith interpretation of paragraph 4 *(h)* of the Additional Agreement. He accepted that the *compromis* in the *Anglo-French* arbitration was different. His reliance on that decision (so unfavourable to Ukraine in other respects) is now limited: it constituted "a useful example of a court, in a matter of delimitation, taking care to stay within the bounds of the jurisdiction conferred upon it"[111]. Finally, he downplayed the importance of the issue on the basis that, on Ukraine's case, the line simply proceeds south-east from point F: that of course is a matter of merits, not jurisdiction[112].

38. Madam President, Members of the Court, with all due respect to this fading argument, you clearly have jurisdiction under paragraph 4 *(h)* to give no effect to Serpents' Island beyond 12 miles — and this is true whatever the reasons for zero effect might be. A *compromis* providing for submission of "*the problem* of delimitation of the continental shelf and exclusive economic zones" covers any delimitation in accordance with international law, whether by reason of the 1949 Agreement, Article 121 (3) of the 1982 Convention or the general law of delimitation. The idea that Romania in 1997 tacitly abandoned its long-standing position that Serpents' Island had no effect beyond 12 miles is frankly fanciful — and even more so when the 1997 Additional Agreement makes specific reference to Article 121. At a more general level, the view that you have jurisdiction to semi-enclave the Island at 12-and-a-half miles and not at 12 miles has no attraction whatever. Enclaving or semi-enclaving tiny islands is a well-established technique in delimitation: it is not excluded by a general mandate to delimit the exclusive economic zone and continental shelf.

39. This also disposes of Ukraine's point as to Articles 74 (4) and 83 (4) of the 1982 Convention[113]. An agreement between two States which delimited a 12-mile territorial sea around a tiny island within the EEZ or continental shelf of another State would be an agreement to which Articles 74 (4) and 83 (4) applied, and that would be true even if that was all that the agreement did.

---

[111]CR 2008/26, p. 49, para. 21 (Wood).

[112]CR 2008/26, p. 49, para. 22 (Wood).

[113]CR 2008/28, p. 11, paras. 6-7 (Wood).

Conclusions

40. Madam President, Members of the Court, to summarize:

(1) The 1949 Agreement delimited — which is to say, defined — a 12-mile maritime boundary zone around Serpents' Island. Such a zone was opposable to Romania from that date, and it was repeatedly reaffirmed.

(2) You cannot have a 12-mile zone without a boundary, and the boundary of the zone was repeatedly shown on maps, including treaty maps, as going beyond point 1439 and beyond the innominate endpoint shown on map 134; in short, it delimited the domain of the Island vis-à-vis Romania.

(3) That zone, and the boundary around it, goes round the Island and connects with the delimitation line drawn from the adjacent mainland coasts of the Parties wherever you draw it.

(4) You have jurisdiction to declare that the boundary runs as we have described.

41. Madam President, with your permission, my colleague, Mr. Simon Olleson, will now deal with the points made on the subsequent maps by Sir Michael. Madam President, Members of the Court, thank you for your attention.

The PRESIDENT: Thank you, Professor Crawford. I now call Mr. Olleson.

Mr. OLLESON:

V. THE MARITIME BOUNDARY AROUND SERPENTS' ISLAND AS SHOWN BY THE MAP EVIDENCE

1. Madam President, Members of the Court, it is an honour to appear before the Court; it is also an honour to have been entrusted with this part of Romania's presentation relating to the map evidence. Professor Crawford has already dealt with the arguments in relation to those maps depicting the agreed boundary which formed part of the 1949 procès-verbaux. I shall deal with the maps relied upon by Romania as confirming and corroborating its arguments as to the effects of the 1949 procès-verbaux.

2. As in its Counter-Memorial and Rejoinder, Ukraine clearly remains embarrassed by the map evidence. Sir Michael Wood advanced various reasons why the Court should be slow to place any reliance on the various maps, and their clear depictions of the agreed maritime boundary.

3. But he was slow to show you any of the depictions of the agreed maritime boundary — not one of the maps relied upon by Romania as showing the agreed boundary, whether in whole or in part, was shown to you. What is more, he was unable to show you a single subsequent map contradicting Romania's case as to the extent of the agreed boundary.

4. The map evidence is all one way. Moreover a large proportion of the maps in question were produced by Ukraine and, previously, the Soviet Union.

5. Sir Michael did not attempt to challenge this fact directly. Rather he mounted a collateral attack on the map evidence on various fronts; broadly he suggested that the maps relied upon by Romania are examples of "copy-cats" from earlier charts[114], in particular the Soviet charts from 1957, or, failing that, that they were examples of the cartographers in question going off on frolics of their own. This was particularly the case in relation to the official maps which are inconvenient for Ukraine's case and produced by its own State agencies.

6. As to the first point, the earliest charts which either side has located are the charts produced by the Soviet Union in 1957, not long after conclusion of the 1949 agreements. The very fact that the Soviet Union produced a chart showing the boundary extending all the way around Serpents' Island in 1957, just a year after Romania extended its territorial sea from 6 to 12 miles, is significant. It is a further indication, if any were needed, that Ukraine's argument as to the "prospective" territorial sea cannot be correct.

7. Further, the fact that the geographic data may be shared between States does not mean that a State's hydrographic services do not critically evaluate that data, or do their own work and research prior to producing their own charts. Further, the suggestion that all the other maps were all in some manner based on the 1957 Soviet maps has not been supported by any evidence. Those maps, although consistent on our point, are far from being identical.

8. As to Sir Michael's second point, the very fact that Ukraine attempts to distance itself from charts produced by the Soviet Union, and even more from the charts produced by its own cartographers, demonstrates its discomfort. The fact is that each of the maps, showing the agreed border, produced by the Soviet Union (and this over a period ranging from 1957 to 1985), and

---

[114]CR 2008/28, p. 21, para. 41.

those produced by Ukraine (from 2000 to 2007), was produced by their relevant State bodies. These are not private sector maps.

9. You were shown in the first round an illustration, contained in the *Lighthouses of Ukraine* volume published in 2007, which clearly showed a maritime boundary, undifferentiated along its length, extending around Serpents' Island to a point to the east; Sir Michael was reduced to deriding that map as being taken from what appeared to be a "picture book"[115] or a "coffee-table book"[116]. True, it is beautifully prepared — but there is nothing wrong with well-adorned coffee tables. However, the material point is that the book was prepared by the State Hydrographic Service of Ukraine, a part of the Ministry of Transport and Communications of Ukraine.

[Slide: chart entitled "Western Part of the Black Sea From Odessa to the Sulina Mouth", produced by the Ukrainian State Hydrographic Institution Branch "*Ukrmorcartographia*" (2001) [RMA 23]]

10. Similarly, the various other maps produced by the Soviet Union and by Ukraine were all produced by State bodies; I will take but one example, the map entitled "Western Part of the Black Sea from Odessa to the Sulina Mouth", dating from 2001[117], which you have previously been shown, and which Sir Michael suggested was a "one-off chart"[118]. It was tab V-20 in the first round, and is at tab V-1 of your folders today. The chart was produced by the Ukrainian State Hydrographical Institution, Branch *"Ukrmorcartographia"*. Further, as you can see on the enlargement, it was printed by the Kyiv'ska Military Cartographical Factory. Similar indications of provenance are shown on the other, non-identical Ukrainian map published in 2003[119].

[End slide]

11. All of the maps produced by the Soviet Union and Ukraine show the agreed boundary — depicted using the same symbol along its entire length — as extending further than the last point shown on map 134. In most cases, the boundary is shown as extending round Serpent's Island to the point located to the east of the island. The same is true of the 11 Romanian maps, which date from 1958 through to 2003.

---

[115]CR 2008/28, p. 21, para. 43.

[116]CR 2008/28, p. 22. para. 44.

[117]MR, Ann. MR A 23.

[118]CR 2008/28, p. 22, para. 43.

[119]MR, Ann. MR A 25.

12. In the end one felt that Sir Michael could never be satisfied. He complained when the maps were different and also when they were the same. Not content with leaping on inconsistency, he leapt on consistency as well!

13. Madam President, Members of the Court, in the first part of this presentation, I will deal briefly with the correct approach to the map evidence.

14. In the second part, I will demonstrate that the maps relied upon by Romania, which show both Sir Michael's "hook" and the islet, are consistent and mutually reinforcing.

15. Finally, I shall deal in more detail with Sir Michael's various collateral attacks on the map evidence.

I. The correct approach to the map evidence

16. Turning first to the correct approach in relation to the map evidence, it is common ground that only the sketches, plates and maps forming part of the various procès-verbaux can be considered treaty maps.

17. Sir Michael referred you to the dictum of the Chamber in the *Frontier Dispute (Burkina Faso/Mali)* case, but limited himself to quoting only parts of the relevant passages[120]. In particular, he smoothly glided over the fact that the Chamber referred to maps annexed to boundary agreements as constituting only one example of maps which "fall into the category of physical expressions of the will of the State" (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 582 (para. 54); emphasis added).

18. He also sought to distinguish your recent decision in *Malaysia/Singapore*, on the ground that the six maps, which you held to be significant, contained clear annotations as to Singapore's sovereignty over Pedra Branca[121]. But the maps in the present case *are* clear, and consistent, as I will show in the second part of my presentation.

19. As you made clear in the *Malaysia/Singapore* case, maps falling into the category of "physical expressions of the will of the State" may be of relevance not only when they constitute part of a boundary agreement, of which they form an integral part, but also, for instance, in so far

[120]CR 2008/28, pp. 11-12, paras. 9-10 (Wood).

[121]CR 2008/28, pp. 12-13, paras. 12 (Wood).

as they constitute a clear admission against interest of the State producing them. As you also made clear, for this purpose, it is not necessary that the admission against interest should appear in a treaty or take place in inter-State negotiations (*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore),* Judgment of 23 May 2008, para. 271; *Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 119, para. 44). Sir Michael likewise glossed over the question of admissions against interest, but it was on this basis that you attributed significance to the clear annotations on the six maps in *Malaysia/Singapore*.

20. Further, as the Eritrea/Ethiopia Boundary Commission observed in a passage which you quoted with approval in your Judgment in *Malaysia/Singapore*:

> "'The map still stands as a statement of geographical fact, especially when the State adversely affected has itself produced and disseminated it, even against its own interest'." (*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore),* Judgment of 23 May 2008, para. 271, quoting Decision regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia, 13 April 2002, para. 3.28.)

Counsel before Ukraine sought to distinguish cases involving territorial sovereignty from maritime delimitation: this was the point of Sir Michael's mantra concerning the "State border", which you heard at length last Tuesday and at numerous other points[122]. But a map produced by a State clearly depicting its view of the course of a maritime border may just as well be considered relevant and corroborative as a map indicating its views as to sovereignty over territory.

II. The consistency of the map evidence in depicting the agreed boundary around Serpents' Island

21. Madam President, Members of the Court, I turn then to the second part of my presentation, in which I will briefly demonstrate that the various maps relied upon by Romania are entirely consistent in depicting the agreed boundary as extending beyond point F, and around Serpents' Island.

22. The 31 maps submitted by Romania *are* consistent in depicting the agreed boundary running around Serpents' Island. Although Sir Michael was reluctant to show you any of those maps, as I have said, his description of the agreed boundary as following the course of a "hook"

---

[122]CR 2008/24, pp. 36-50, paras. 1-61, *passim* (Wood); and see, e.g., CR 2008/26, pp. 42, para. 1; 43, para. 5; 44, para. 9 (ii); 48, para. 17; p. 52, para. 32; 53, para. 39 (Wood); CR 2008/28, pp. 11, para. 5; 14, paras. 20 and 22 (Wood); see also, e.g., CR 2008/24, pp. 12, para. 9; 26, paras. 28 and 29; 27-28, para. 35; 29, para. 38 (Bundy).

was entertaining. However, it was also not entirely accurate. Some of the maps show hooks, others show circles all the way around the island; here, the relevant piratical analogy is the noose.

23. Even where the maps in question do not depict the entire extent of the boundary because the depiction is curtailed by the edge of the chart, they remain consistent with Romania's case. In particular, and irrespective of which State produced them, they are all consistent in showing the boundaries as extending beyond point F.

[Slide: details of Soviet maps]

24. To demonstrate this, I start with a few of the Soviet maps — they are at tab V-2 of your folders. You can now see on the screen a detail of one of the large-scale maps produced by the Black Sea navy of the Soviet Union in 1957[123], which shows the full extent of the 12 mile arc — Sir Michael's "hook" — around Serpent's Island. Now becoming visible, as it fades into view, is the other 1957 map, which was at tab V-17 in the folders in the first round. Although drawn to different scales, and covering different areas of the Black Sea, the depiction of the "hook" is very similar, although on the second map, its full extent is curtailed to the east.

25. Now appearing, is a detail of a further Soviet map, this time dating from 1982[124]; this was not among the maps which you were shown by Professor Crawford in the first round. What is notable, is that although the southern part of the boundary is cut off by the lower edge of the map, it is clear that the Soviet Union nevertheless understood the boundary to extend all the way round to the south of Serpent's Island — as you can see, the arc — the point of Sir Michael's hook — reappears at the appropriate place to the east, heading northwards.

26. The last of the Soviet maps I will show you, dating from 1983[125], is this time curtailed to the west. Despite the fact that it does not show the mainland or any part of the territorial sea boundary, it nevertheless also depicts the agreed boundary running along the 12-mile arc up to a point to the east of Serpents' Island.

[End slide]

[Slide — details of Romanian maps]

---

[123]CM, Ann. RMA 16.

[124]CM, Ann. RMA 18.

[125]CM, Ann. RMA 20.

27. Turning to a few of the Romanian maps — this is tab V-3 in your folders — you can now see a detail of the earliest Romanian map, which the Parties have placed before you, dating from 1958[126]; it shows the entirety of Sir Michael's "hook".

Romania also produced maps on which the boundary was curtailed. You can now see a detail of another of the Romanian maps, dating from 1970[127]. The depiction of the agreed boundary is curtailed to the east; nevertheless, it clearly demonstrates that Romania understood that the agreed boundary extended well beyond the point depicted on map 134. On this further Romanian map, dating from 1982[128], the boundary depicted is similarly interrupted by the edge of the chart although, in this case, this is so a little further to the west.

28. However, to the east, the boundary did extend all the way round. This is confirmed from other larger-scale Romanian maps which depicted the agreed boundary in its entirety; to take one later example, you can now see a detail of a Romanian map dating from 1995, which shows the entirety of the hook[129].

[End slide]

[Slide: Ukrainian maps]

29. Finally, I turn to the Ukrainian maps. These are clear, none of them is curtailed, and they are all consistent in showing the entirety of the agreed boundary as extending from the last point of the land/river boundary, through points 1438 and 1439, and then along the exterior margin of the 12-mile zone around Serpents' Island, to a point well beyond point F and, in fact, all the way to the tip of Sir Michael's hook.

The first Ukrainian map, dating from 2000[130], shows the 12-mile arc around to a point to the east of Serpents' Island; the same is true of a chart dating from 2003[131].

30. The final chart I will show you, dating from 2001[132], is the map which depicts the 12-mile arc to the north of Serpents' Island using the international symbol for the outer limit of the

---

[126]CM, Ann. RMA 26.

[127]CM, Ann. RMA 28.

[128]CM, Ann. RMA 29.

[129]CM, Ann. RMA 32.

[130]CM, Ann. RMA 21.

[131]CM, Ann. RMA 25.

territorial sea. You will recall that the boundary from the land/river boundary along the course of the "hook" to the point to the east of the island where the line terminates on the other maps, is depicted using the symbol for an international maritime boundary.

31. And this brings me on to the third part of my presentation, Madam President, Members of the Court, and Sir Michael's various criticisms of the map evidence.

32. In his comments on the "symbology" used on the charts, Sir Michael suggested that the supposed "proliferation of symbols" shows a degree of "confusion and inconsistency"[133].

33. Sir Michael's complaints in this regard are without any foundation. True, there is some variation of the symbols used to depict the border as between the individual charts; this results at least in part from evolving cartographical conventions during the period of 50 or so years over which the charts were produced. But there is neither confusion, nor inconsistency. Each of the maps, without exception, uses a single symbol to depict the course of the maritime boundary constituted by the "hook", and they consistently do so either along its entire length, up to a point to the east of the island, or, where the depiction is curtailed by the edge of the chart, in a manner which is consistent with the boundary extending that far.

34. The only map in which a different symbol is used along the course of the 12-mile arc around Serpent's Island is the 2001 Ukrainian chart — this is the map Ukraine has effectively tried to disown as having been produced by a cartographer going off on a frolic all of his own. On this map, although there *is* a difference in symbols, the reason for that difference is clear. As with the other charts, there is a single symbol used along the entire course of the "hook", all the way to the point to the east of Serpents' Island; from there, to the north, another symbol — different — is used for the continuation of the 12-mile arc, around the outer limit of the territorial sea.

35. Sir Michael suggested a number of reasons why the Soviet Union might have produced charts showing the "hook" in 1957; he talked of submarines, innocent passage, and "significant military presence" stationed on Serpents' Island[134].

---

[132]CM, Ann. RMA 23.

[133]CR 2008/28, p. 21, para. 42 (Wood).

[134]CR 2008/28, pp. 20-21, para. 40 (Wood).

36. No evidence was provided in this regard — again, as with other aspects of Ukraine's case, it was pure speculation. And his suggestion is inconsistent with the use of a single symbol along the course of the entire boundary depicted. I recall that in 1956, prior to the production of the 1957 maps, Romania had extended its territorial sea from 6 to 12 miles. The point of intersection of that 12-mile territorial sea, as Professor Crawford stated earlier, with the zone around Serpent's Island would not have been difficult to calculate; one would have simply measured 12 miles from the relevant base point on the Romanian coast. Nevertheless, the Soviet cartographers used a single symbol along the entire course of the agreed boundary.

37. In any case, any speculation that the naval cartographers of the Soviet Union in 1957 were concerned with some sort of security zone around the island is also belied by the fact that they did not go far enough! If security or military considerations had indeed been the motivation for the depiction of the hook beyond Romania's new 12-mile territorial sea, the boundary should have been depicted as running all the way around the island, so as to indicate the outer limit of this "security" zone in the north as well. A 12-mile circle would have been enough. The Soviet security forces would have been just as concerned with submarines proceeding *from* Odessa as towards it! Further, on Sir Michael's hypothesis, one would have expected a similar indication of a security zone along the Soviet mainland coasts. But there is none on the 1957 charts.

38. Sir Michael's other suggestion, that the depiction of the hook on subsequent charts all goes back to the Soviet charts, that all other States simply "copied" the 1957 Soviet charts, is also speculation[135]. The charts submitted by Romania are on a wide variety of scales, and show a variety of different areas of the Black Sea. They are not mere copies.

39. Further, in seeking to distance itself from the charts produced by the Soviet Union and by itself, Ukraine suggests that the charts should not be relied upon because they are produced not by lawyers or diplomats but by hydrographers and cartographers[136] — "lesser breeds without the law", so it is implied. But these are navigational charts which give every indication of being carefully prepared. As, for example, is the case with the 2001 Ukrainian map. And maritime boundaries are not only relevant to the arcane world of legal advisers — sailors need accurate information too.

---

[135]CR 2008/28, pp. 21, para. 41 (Wood).

[136]CR 2008/28, p. 20, para. 39 (Wood).

40. In the end, Ukraine is reduced to saying in effect: "Although our official cartographic agencies produced and published these official charts showing a boundary on various occasions, we did not really mean it." But a chart published by a State showing a boundary without any qualification must be taken as "evidence of the [State's] official view at that time", as you said in relation to the official French charts at issue in *Minquiers and Ecrehos* (*Minquiers and Ecrehos (France/United Kingdom), I.C.J. Reports 1953*, p. 71). There is no qualification in that statement to the effect that it is necessary to verify that the State in question really meant what the map it produced depicted.

Conclusion

41. Madam President, Members of the Court, in conclusion, the various charts submitted by Romania to the Court confirm Romania's position as to the effect of the 1949 Agreements, and the understanding of both Romania and the Soviet Union, and subsequently Ukraine, in that regard:

— they consistently depict the boundary agreed by the 1949 procès-verbaux;

— they consistently show that boundary as having the same character along its entire length, including beyond the Romanian territorial sea;

— and they consistently show the boundary as proceeding to a point located to the east of Serpent's Island, far beyond the extent shown on map 134.

42. Further, the maps produced by the Soviet Union, and subsequently Ukraine, constitute a clear series of admissions against interest, extending over a prolonged period of time.

Madam President, Members of the Court, thank you for your attention. Madam President, I would ask you now to call on Mr. Daniel Müller.

The PRESIDENT: Thank you, Mr. Olleson. We now call Mr. Müller.

M. MÜLLER :

VI. LA DIGUE DE SULINA

1. Madame le président, Messieurs les juges, il n'est guère étonnant que la Partie ukrainienne ait essayé, de nouveau, de discréditer l'utilisation de la digue de Sulina comme point de base pour la construction de la ligne d'équidistance comme elle s'y était déjà employée lors de la phase

écrite[137]. M. Bundy a voulu vous faire croire que la Roumanie fait de l'«affaire de l'île des Serpents» — ce qu'elle n'est pas et ce qu'elle ne devrait pas être à nos yeux — l'affaire de la digue de Sulina[138] — ce qu'elle n'est certainement pas non plus, comme elle ne constitue pas davantage celle de la presqu'île de Sacalin ou celle du cap Khersones.

2. Et pourtant, vous avez dû entendre les messages subliminaux envoyés de l'autre côté de la barre tout au long de la présentation ukrainienne de la semaine dernière : l'Ukraine, tout en utilisant la digue de Sulina pour la construction de sa ligne représentant, selon elle, l'équidistance entre les côtes des Parties, s'emploie à jeter un doute sur la pertinence de la digue dans la délimitation, en raison de son caractère «artificiel»[139] ou parce que cette digue est le fait de l'homme, «man-made»[140]. A plusieurs reprises, M[e] Bundy a suggéré qu'il s'agit, peut-être, d'une circonstance spéciale[141] sans pour autant en tirer des conséquences concrètes quant à la construction de la ligne soi-disant «équitable» de l'Ukraine. Beaucoup de bruit pour rien !

3. Afin de dissiper les doutes créés par la Partie ukrainienne sur cette partie de la côte roumaine, il suffit de reprendre, assez rapidement, quatre points.

La digue de Sulina constitue une installation portuaire au sens de l'article 11 de la convention de Montego Bay

[Projection n[o] 1 : photo satellite de la digue de Sulina.]

4. Sur ce point, le professeur Quéneudec semble être d'accord. Mais il n'a pas pu s'empêcher de laisser planer un certain doute[142]. Et pourtant, rien ne semble être plus clair : la digue de Sulina est une installation permanente faisant partie intégrante d'un système portuaire [celui du port de Sulina] qui s'avance le plus vers le large, pour emprunter les termes de l'article 11 de la convention.

---

[137] Contre-mémoire de l'Ukraine (CMU), p. 26, par. 3.53 ; p. 37, par. 4.13-4.14. Voir aussi réplique de la Roumanie (RR), p. 50-53, par. 3.66-3.73.

[138] CR 2008/24, p. 15, par. 22 (Bundy).

[139] CR 2008/24, p. 31, par. 48, p. 31, par. 52 (Bundy) ; CR 2008/26, p. 27, par. 34, p. 41-42, par. 94 (Bundy) ; CR 2008/28, p. 37, par. 12, p. 49, par. 60 (Bundy) ; CR 2008/29, p. 34, par. 60 (Quéneudec).

[140] CR 2008/24, p. 15, par. 22 (Vassylenko), p. 30, par. 48, p. 31, par. 52, p. 33, par. 59 (Bundy) ; CR 2008/28, p. 44, par. 44, p. 45, par. 45 (Bundy) ; CR 2008/29, p. 31, par. 11 (Malintoppi).

[141] CR 2008/24, p. 31, par. 48, p. 33, par. 59 (Bundy) ; CR 2008/26, p. 27, par. 34 (Bundy) ; CR 2008/28, p. 37, par. 12 (Bundy).

[142] CR 2008/29, p. 35, par. 61-62 (Quéneudec).

5. Comme vous pouvez le constater sur la projection actuellement sur l'écran — montrant la digue depuis la mer —, la double digue constitue le point d'entrée dans le port de Sulina qui établit le lien entre le trafic dans la mer Noire et celui du Danube. Sans la digue, le port de Sulina ne serait plus utilisable depuis la mer et le port, qui n'est toujours pas connecté au système routier de la Roumanie, ne constituerait rien d'autre qu'une impasse sans beaucoup d'intérêt. Pourtant, le port n'a pas perdu son intérêt, mais constitue toujours la plaque tournante du bras maritime du Danube tel que défini par la convention de Belgrade, par laquelle transite environ 2 500 000 tonnes de marchandises chaque année[143]. Et bien que la digue ait pu paraître très petite sur la photo que MM. Bundy et Quéneudec ont bien voulu vous montrer la semaine dernière, elle a une largeur de 150 mètres permettant à de très grands navires d'entrer dans le port.

6. La définition du terme «installation portuaire» donné par le Bureau des affaires maritimes et du droit de la mer des Nations Unies inclut d'ailleurs expressément des digues (ou en anglais *sea walls*)[144] protégeant le port ou ses installations. En outre, la digue de Sulina ne se trouve pas «au large des côtes», mais elle est connectée avec celles-ci ; elle ne constitue pas non plus une île artificielle, ce qui rend inopérantes les clauses d'exclusion de l'article 11 de la convention de Montego Bay à son égard.

7. On ne peut contester la qualification de la digue de Sulina et son statut par rapport à la convention. Elle constitue, avec son phare et les bouées marquant son entrée, une installation permanente faisant partie intégrante du système portuaire du port de Sulina. Par ailleurs, le procès-verbal de 1948 en a expressément fait état en se référant à la «digue du port de Sulina»[145]. En raison de cette qualification, et ceci est mon deuxième point, Madame le président, la digue de Sulina fait, *de jure* et *de facto*, partie intégrante de la côte roumaine.

---

[143] Administration fluviale du bas Danube (Galați, Roumanie), statistiques concernant le trafic de navires sur le Danube maritime, online: http://www.afdj.ro/statistics_en.html.

[144] Nations Unies, Bureau des affaires maritimes et du droit de la mer, *Le droit de la mer : lignes de base : examen des dispositions relatives aux lignes de base dans la convention des Nations Unies sur le droit de la mer*, New York, 1989, Glossaire (n° 38).

[145] Voir RR, annexe RR2.

La digue de Sulina fait, *de jure* et *de facto*, partie intégrante de la côte roumaine

8. *De jure*, d'abord, parce que la convention de 1982, le dit très clairement : «les installations permanentes faisant partie intégrante d'un système portuaire qui s'avancent le plus vers le large sont considérées comme faisant partie de la côte» (article 11 de la convention). En tant que partie de la côte roumaine, la digue, ou plus précisément son point «le plus vers le large», est intégrée dans le système de lignes de base normales, droites ou mixtes.

9. *De facto*, ou plutôt *de naturae*, ensuite, parce que, comme vous pouvez de nouveau le constater sur l'image satellite projetée sur l'écran, la digue s'intègre dans la configuration générale de la côte qui, vers le nord, continue le long de l'île sablonneuse. Cette continuité peut être observée d'une façon particulièrement manifeste lorsqu'on prend en compte les lignes de base (droites) de l'Ukraine de l'autre côté de la petite baie au nord de Sulina. Cette ligne, qui est maintenant à l'écran, ne se traduit par aucun changement brusque ou remarquable.

10. Mais il y a un autre point, Madame et Messieurs les juges, sur lequel je voudrais attirer votre attention. Bien que la digue de Sulina soit un ouvrage artificiel construit par l'homme, sa nécessité est dictée par la nature et les circonstances naturelles particulières dans le delta du Danube. Comme vous l'avez constaté l'année dernière au sujet du fleuve Coco dans l'affaire *Nicaragua c. Honduras*, «[t]ous les deltas sont par définition des accidents géographiques de caractère instable dont la taille et la forme évoluent sur des périodes relativement courtes» (*Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, arrêt du 8 octobre 2007, par. 32 [«All deltas are by definition geographical accidents of an unstable nature and suffer changes in size and form in relatively short periods of time»]). Le problème du dépôt des alluvions par le Danube dans le delta est important et a été justement à l'origine de la construction de la double digue à partir de 1856 pour assurer l'entrée dans le port et dans le bras de Sulina. L'avancée constante de la terre a rendu nécessaire les extensions successives qui se sont terminées en 1980 — soit, permettez-moi de dire ceci en passant, bien avant la date critique, qu'on la fixe à 1995[146] ou — ce qui est extraordinaire — à 2004[147]. L'extrémité de la digue de Sulina n'est donc aucunement fixée arbitrairement ; elle ne

[146] CR 2008/20, p. 60, par. 14 (Aurescu) ; CR 2008/21, p. 22-23, par. 5-10 (Dinescu).

[147] CR 2008/28, p. 25, par. 6 (Malintoppi).

fait qu'anticiper la configuration de la côte telle qu'elle va se présenter dans quelques années. Vous avez déjà vu l'île sablonneuse qui s'est formée et qui continue à se développer au nord de la digue. Vous pouvez également constater sur cette autre photo satellite, montrant la digue depuis la mer, que, de part et d'autre de la digue, l'eau est déjà très peu profonde, pour le plus grand plaisir des pélicans. Il y a même deux îles, formées naturellement par le phénomène du delta, le long de la partie sud de la digue sur lesquelles ont été construits un phare et une station météorologique respectivement. [Projection n° 2 : carte MR A 37 — puis détail sur la digue de Sulina.] Sur la carte marine publiée par la direction générale de la navigation et de l'océanographie du ministère de la défense de la Fédération de Russie en 1994, on ne peut que relever que les profondeurs marquées autour de la digue ne dépassent pas les trois mètres. Sur la même carte on voit également que l'entrée de la digue était, en 1994, d'ores et déjà cernée de nouveaux sédiments.

[Fin de la projection n° 2.]

11. Madame le président, il ne s'agit donc aucunement d'une installation créée de toutes pièces pour étayer ou améliorer la position de la Roumanie devant la Cour ou pour le processus de délimitation en général. Les cinq kilomètres de la digue de Sulina qui pénètrent dans la mer — et il s'agit de cinq kilomètres seulement bien que la digue ait une longueur totale de 7,5 km — ces cinq kilomètres donc ont été dictés par la nature et ne font qu'anticiper la configuration future de la côte roumaine dont la digue forme une partie intégrante.

12. En tant que partie de la côte, la digue de Sulina est, dès lors, tout à fait apte à générer des espaces maritimes et à être utilisée comme point de base, contrairement à l'île des Serpents qui, bien qu'elle soit naturelle — ce qui est dans ce cas synonyme d'«hostile» —, ne fait pas partie de la côte ukrainienne. Et, pour en venir au troisième point de ma démonstration, le point de base sur l'extrémité de la digue a été dûment notifié et a été expressément reconnu par la Partie ukrainienne contrairement aux trois points de base choisis par l'Ukraine sur le littoral de l'île des Serpents.

Le point de base sur l'extrémité de la digue a été dûment notifié et a été expressément reconnu par la Partie ukrainienne

13. En s'acquittant de l'obligation qui lui incombe en vertu de l'article 16 de la convention de Montego Bay, la Roumanie a dûment communiqué et notifié son système de ligne de base résultant de la loi concernant le régime juridique des eaux maritimes intérieures, de la mer

territoriale et de la zone contiguë du 7 août 1990. Ce texte ne précise pas seulement dans son article premier que la ligne de base inclut «les lignes droites reliant les points les plus avancés de la côte, y compris … des autres installations portuaires permanentes»[148], il définit également, par ses coordonnées géographiques, le point 2 situé à l'extrémité de la digue de Sulina[149]. Ni l'Ukraine, ni aucun autre Etat n'a protesté contre cette notification. Du reste, l'Ukraine, pour sa part, a également notifié des installations portuaires comme constituant des points de base pour la construction de sa ligne de base dans la mer d'Azov[150]. L'Ukraine tait également qu'elle a, elle-même, utilisé le point extrême de la digue de Sulina -- notre point 2 -- pour la construction de son premier point de base dans la notification de sa ligne de base de 1992[151].

14. De plus, Madame le président, l'Ukraine a reconnu le point 2. Ses conseils ont expliqué la semaine dernière qu'aussi bien la construction du point de départ de la délimitation dont vous êtes saisis[152] — nommé par la Roumanie point F et expressément convenu par le traité sur les relations de 2003 — que la soi-disant ligne d'équidistance proposée par l'Ukraine[153] s'appuie sur le point 2, c'est-à-dire le point le plus au large de la digue, comme point de base. Et ceci ne constitue pas une surprise, car la détermination du point 2 comme point de base n'est pas seulement légitime, mais — et c'est mon quatrième et dernier point -- l'utilisation de la digue de Sulina pour la délimitation est également corroborée par la jurisprudence et la pratique étatique.

L'utilisation de la digue de Sulina pour la délimitation est également corroborée par la jurisprudence et la pratique étatique

15. Dans sa réplique, la Roumanie avait cité à ce sujet la sentence arbitrale dans l'affaire de la *Délimitation entre Doubaï et Sharjah* qui confirme très clairement que «there is a body of practice, and of conventional law, in which full effect has been given to harbour works in the

---

[148] RR, annexe 3 [«the straight lines which join the most advanced points of the coast, including … other permanent harbour installations»]. Pour la traduction française, voir *Bulletin de droit de la mer*, n° 19, 1991, p. 11.

[149] *Ibid.* (annexe). Pour la traduction française, voir *Bulletin de droit de la mer*, n° 19, 1991, p. 23.

[150] *Bulletin de droit de la mer*, n° 36, 1998, p. 54 (point 11).

[151] *Ibid.*, p. 52 (point 1). Voir aussi http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/UKR_1992_CoordinatesBlackSea.pdf.

[152] CR 2008/26, p. 47, par. 12 (Wood).

[153] CR 2008/29, p. 35, par. 62 (Quéneudec).

construction of frontal maritime boundaries as between opposing States»[154] et que ce principe s'applique également pour la délimitation entre Etats dont les côtes sont adjacentes[155]. Appliquant ces mêmes principes au cas d'espèce, le tribunal a inclus les installations portuaires de Doubaï et de Sharjah dans le calcul de la ligne d'équidistance.

[Projection n° 3 : photo satellite du port de Zeebrugge, Belgique.]

16. Ce n'est certainement ni le lieu ni le moment d'examiner extensivement la pratique étatique concernant les installations portuaires. Néanmoins, je voudrais vous montrer un exemple qui ne se trouve pas très loin d'ici. Le port de Zeebrugge à quelques kilomètres de Bruges en Belgique. Comme vous pouvez constater sur l'écran, les installations portuaires s'avancent à environ trois kilomètres dans la mer sur une côte qui, en dehors de ces installations, est tout simplement droite. Il est évident que la prise en compte de ce point de base a, nécessairement, une influence sensible sur toute délimitation. Et pourtant, l'accord de délimitation de la mer territoriale entre la Belgique et les Pays-Bas signé en 1996 précise sans équivoque dans son article 2 :

> «La limite, constituée par les points énoncés à l'article premier [,qui lui énonce la ligne des délimitations], est basée sur le principe de l'équidistance à partir d'une ligne de base maximale, à savoir la laisse de basse mer le long de la côte. Il a été tenu compte de l'extension vers la mer du port de Zeebrugge en Belgique…»[156]

Cette petite protubérance qui, contrairement à la digue de Sulina s'écarte nettement de la direction générale de la côte n'a pourtant pas seulement été utilisée pour la délimitation des côtes adjacentes du royaume voisin, mais également, avec les installations portuaires d'Ostende, pour la délimitation avec la côte britannique qui lui fait face[157].

[Fin de la projection n° 3.]

17. Madame le président, Messieurs de la Cour, la présente affaire n'est certainement pas l'affaire de la digue de Sulina. Toutefois, la digue y trouve sa place. Elle constitue une installation permanente du port de Sulina et une partie intégrante de la côte roumaine. La Roumanie est donc

---

[154] Sentence du 19 octobre 1981, *ILR.*, vol. 91, p. 662 [traduction du Greffe : «dans la pratique comme dans les règles du droit conventionnel, il a été donné plein effet à des installations portuaires dans l'établissement des frontières maritimes entre Etats se faisant face»].

[155] *Ibid.*

[156] *RTNU*, vol. 2051, p. 190 (I-35449) [«The boundary, consisting of the points indicated in article 1, is based on the principle of equidistance from a maximum base line, namely the low water mark along the shoreline. Account has been taken of the seaward extension of the port of Zeebrugge in Belgium…»].

[157] D. H. Anderson, «Recent Boundary Agreements in the Southern North Sea», *Int'l & Comp LQ*, vol. 41, 1992, p. 418.

en droit d'invoquer ce point de base pour les besoins de la délimitation et de lui donner tous ses effets, malgré les insinuations de la Partie ukrainienne.

18. Madame et Messieurs les juges, ceci conclut ma présentation et je vous remercie de votre bienveillante attention.

The PRESIDENT: Thank you, Mr. Müller. This brings to an end to the proceedings for this morning which will be resumed at 10 a.m. tomorrow morning. The Court now rises.

The Court rose at 1 p.m.