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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2008

Public sitting

held on Tuesday 16 September 2008, at 10 a.m., at the Peace Palace,

Vice-President Al-Khasawneh, Acting President, presiding,

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

VERBATIM RECORD

ANNÉE 2008

Audience publique

tenue le mardi 16 septembre 2008, à 10 heures, au Palais de la Paix,

sous la présidence de M. Al-Khasawneh, vice-président, faisant fonction de président

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

COMPTE RENDU

Present:	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 : 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

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The VICE-PRESIDENT, Acting President: Please be seated. This morning, President Higgins will not be sitting. We are meeting to continue with the second round of pleadings by Romania, and I give the floor to Professor Vaughan Lowe. You have the floor.

Mr. LOWE: Thank you, Mr. Vice-President, Members of the Court.

VII. CONSTRUCTION OF THE EQUIDISTANCE LINE

1. We turn now to the explanation of the construction of the equidistance line. We have explained this in detail in the first round, and here I shall deal with it summarily, addressing in context the points which have been raised by our friends on the other side.

2. The Parties are agreed that the settled practice is now to adopt a three-stage approach: first, drawing the provisional, "strict", equidistance line; secondly, adjusting that line to take account of special circumstances; and third, checking the equitableness of the result.

Base points

3. Last Friday, Professor Quéneudec gave you a detailed analysis of the approach to the drawing of the equidistance line, at the end of which he concluded that you draw the line that is equidistant from the closest base points on the coasts of each of the two States. He said that the only question is that of the proximity of the relevant points. At times Ukraine seemed to contradict that by suggesting that base points can be used only once, in order to avoid "double counting": but that suggestion has no basis whatever in treaty or customary law or in principle. Professor Quéneudec's insistence on the use of the most proximate points, whatever they might be, is plainly correct; and we respectfully agree with him.

4. Where we disagree is in the identification of the relevant base points. Ukraine says that we pretend to be unaware of the fact that the equidistance line is to be established objectively and, in this first stage, without concern for special circumstances. Specifically, it says that we ignore Serpents' Island.

5. We do *not* ignore Serpents' Island. We considered it: and in our view it falls within paragraph 3 of Article 121; and we treat it accordingly.

Judge Oxman's question

6. It is convenient here to answer Judge Oxman's first question. He asked, in essence, if Article 121 applies to marine areas within 200 nautical miles of the mainland. The answer is, yes. Article 121 is entitled "Regime of islands". It constitutes the whole of Part VIII of the Convention, which is itself entitled "Regime of islands". Part VIII appears after the parts of the Convention dealing with the territorial sea, the contiguous zone, the EEZ, the continental shelf, and the high seas.

7. Article 121 purports to define the legal régime of islands. There is nothing in the Article which says that it applies only to islands on the high seas, or beyond the EEZ or continental shelf, or at a certain distance from the coast. Nothing in the Convention even hints at that possibility. Nor is there anything in the *travaux préparatoires* which indicates that any such limitation should be read into the words of the Article.

8. Given the fact that, with the exception of coral islands and mid-ocean ridges, islands naturally tend to occur relatively close to land masses rather than in mid-ocean, any such addition to the words of the Article would dramatically cut down the scope of its application. And that fact alone should caution against the implication into the Article of limitations that appear nowhere in the text.

9. Article 121 is a treaty text; and in our submission there is no proper approach to its interpretation, observing the basic disciplines of the law of treaties, which could lead one to suppose that it is limited in its application to areas more than 200 miles from mainland coasts.

10. In our view, the plain words of Article 121 mean what they say. Neither we nor Ukraine have in our pleadings argued that a geographical limitation should be read into its scope. The closest that Ukraine got was Ms Malintoppi's suggestion that the drafters of the Article had in mind features such as Rockall, far out at sea[1]. But even if her intuition is correct, and even if it represented the mental state of the 150 or so delegations which signed the Convention — and we can find no evidence on these matters — it is beside the point. When the Court has to interpret the Convention, the question is not what a paradigmatic case of a paragraph 3 island would be. The question is what, as a matter of law, are the limits of the category of island established by

[1]CR 2008/29, p. 17, para. 52.

paragraph 3, and whether Serpents' Island falls within them. And for that task the Court must rely on the wording of the treaty, and not rely on intuition to write into the text limitations that the drafters did not put there.

Serpents' Island is not a base point for an EEZ or continental shelf delimitation: Article 121

11. I turn to the question of base points. Ukraine raises several objections to our classification of Serpents' Island within paragraph 3 of Article 121. It says that it is not a rock but an island; and that it is not what the drafters of Article 121 had in mind in drafting paragraph 3, because it is too big and not far enough from the coast.

12. "Rock" is not a term of art defined in the Convention; and "rocks" and "islands" are not mutually exclusive categories. We have pointed out that all rocks are necessarily islands within the meaning of Article 121 (1). Rockall, a photograph of which Ms Malintoppi showed you on the screen, is a paragraph 1 island, and is also a paragraph 3 rock.

13. Ukraine also referred to the treatment of the Eddystone Rock in the *Western Approaches* arbitration 30 years ago, in 1977. But that decision was based, as Professor Quéneudec rightly pointed out, on the fact that France had already agreed that the rock should be treated as a base point for the 6- and 12-mile British fishing zones, which — under the 1964 European Fisheries Convention — were to be measured from the baseline of Britain's territorial sea, which was then three miles.

14. At the date of that award, the 1982 Convention was five years away from its final form, and 17 years away from its entry into force. The *Western Approaches* case was pleaded on the basis of the 1958 Continental Shelf Convention and, because of the effect of reservations to the 1958 Convention, on the basis of customary international law, which the tribunal found to be practically the same as the 1958 Convention. Article 121 was simply not applicable, not relevant, in that case. The pleadings are not public, but what we do know of them from the text of the award indicates that the parties focused on the question whether Eddystone was an island or a low-tide elevation. That case would no doubt be pleaded differently today. But, as I say, the decision was based on other grounds, and in a case to which Article 121 had no relevance.

15. Ukraine also referred to the configuration of Serpents' Island and its relationship with the coast. That is a pertinent point. The Convention deals with the generation of EEZs and continental shelves by offshore features such as Serpents' Island in two ways. If they are located in the immediate vicinity of the coast, they can perhaps be used as base points in a straight baseline system, under Article 7. If they are not within the immediate vicinity of the coast, they can generate no more than a territorial sea.

16. Serpents' Island is not in the vicinity of the coast, and Ukraine has not sought to use it in its straight baseline system. Ukraine's counsel stated last week that Serpents' Island "was not situated at the beginning or at the end of any straight baseline segment"[2] and that "there were no straight baselines . . . connecting the island with the mainland"[3]. It therefore cannot generate anything other than the 12-mile territorial sea — and that is stipulated in Article 121 of the Convention. Professor Pellet will make some further observations on the question of Serpents' Island's relationship with the coast shortly.

17. Article 121, paragraph 3, refers to "rocks". It does not define the term "rock"; but it is clear from the reference to "[r]ocks which cannot sustain human habitation or economic life of their own" that there must be *some* rocks that *can* sustain human habitation or economic life of their own. If that were not so, the reference to sustaining habitation or economic life would be superfluous. It necessarily follows that some features which are "rocks" are large enough to sustain human habitation or economic life of their own; and such rocks may well be as large as Serpents' Island, or even larger.

18. That is why we say that the crucial criterion under paragraph 3 is the one criterion that *is* explicitly spelled out: the application of that paragraph specifically to features that cannot sustain human habitation or economic life of their own. Romania is not arguing for some interpretation of the Convention or of its effect which is based upon implied terms and hidden meanings. Article 121, paragraph 3, is absolutely clear and explicit in stipulating that: "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or

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[2]CR 2008/26, p. 26, para. 27 (Bundy).

[3]CR 2008/26, p. 25, para. 23 (Bundy).

continental shelf." That rule binds Ukraine and Romania; and its application as a matter of law cannot be avoided.

19. Ms Malintoppi concentrated on establishing that Ukraine was doing nothing to increase the size of Serpents' Island[4]. We accept that, though we also think that making a small barren island into a slightly larger barren island would not affect its legal status.

20. Her analysis of the central question of human habitation and economic life was economical. She said, "It has water and it has vegetation."[5] No further explanation, no evidence was offered. The existence of the grass and the moss we concede. She did not say how many bottles of water the island has, or how soon they will run out.

21. She says that the dependency on the mainland for the basic resources is quite common, and that complete self-sufficiency cannot be expected[6]. We made the same point. But she did not respond to our further point, that an island that is *totally* dependent for food, water and every other human need is indistinguishable from a steel platform, and is, on any definition, an island incapable of sustaining human habitation.

22. The answer to the question of what life Serpents' Island itself can sustain, without airlifting supplies onto it, is easy to see. There is no suggestion that the island has sources of fresh water. Rainfall is very low: the figure of about 366 mm each year is given in the study in Annex 6 of our Memorial; and that is, on average, 1 mm of rain each day. The World Health Organization daily needs figure for water is 15-20 litres per capita per day[7]. We invite Ukraine to explain to the Court how they think that the island *can* sustain human habitation on that basis.

23. On the question of the island's capacity to support economic life, Ukraine claims no more than that it has the potential to do so[8]. It offers no evidence on that point. It does not try to explain how, or when, that might happen. We do not accept that there is any realistic prospect of Serpents' Island sustaining either human habitation or economic life of its own. If Ukraine thinks

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[4]CR 2008/29, p. 12, para. 35.

[5]CR 2008/29, p. 11, para. 30.

[6]CR 2008/29, p. 17, para. 51.

[7]World Health Organization, Technical Note No. 9 (Draft revised: 7.1.05), *Minimum water quantity needed for domestic use in emergencies*: http://www.searo.who.int/LinkFiles/List_of_Guidelines_for_Health_Emergency_Minimum_water_quantity.pdf

[8]CR 2008/29, p. 16, para. 50.

differently, again we invite it to explain to the Court exactly how and when it sees the island sustaining economic life of its own. It has simply not addressed our extensive factual arguments, which I will not repeat.

24. Ms Malintoppi also referred to the fact that Ukraine had agreed not to deploy offensive weapons on Serpents' Island, as an indication that Romania must have thought that the island was habitable[9]. The logic of this argument is elusive. There are also treaties forbidding the deployment of weapons on the sea-bed and on the moon; but it is hard to see that the existence of those treaties evidences the possibility of either location sustaining human habitation.

25. Serpents' Island can only generate an entitlement to an EEZ or a continental shelf if it is capable of sustaining either human habitation or economic life of its own. If it is not, it cannot generate either zone. And if it cannot generate either zone, it cannot be used as a base point in the first stage of constructing an equidistance line for the delimitation of either an EEZ or a continental shelf. That is our point, and it has not been answered.

26. The fallacy in Ukraine's argument is the suggestion that the rigid objectivity of the stage 1 construction of the equidistance line requires no legal analysis, that one simply runs a measure from each base point regardless of its character; but that is not what the law is.

27. The measurement for an EEZ equidistance line can only be made from base points that are *relevant* to the generation of an EEZ. The measurements for a continental shelf equidistance line can only be made from base points that are *relevant* to the generation of a continental shelf. The Convention to which Romania and Ukraine signed up, and which they ratified, and whose relevant provisions they chose to incorporate in the 1997 Agreement, establishes a distinct category of islands "which cannot sustain human habitation or economic life of their own" and stipulates that those islands do *not* generate an EEZ or continental shelf. We submit that Serpents' Island falls into that category, and that it is therefore necessarily irrelevant to the construction of an EEZ or continental shelf equidistance line.

28. Ukraine has also suggested[10] that the fact that Romania pursued its efforts at UNCLOS III to have an article included in the Convention expressly precluding "uninhabited"

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[9]CR 2008/29, p. 11, para. 30.

[10]CR 2008/29, pp. 17-16, paras. 53-60.

islands from influencing maritime delimitation because it did not consider that Serpents' Island was covered by Article 121, paragraph 3. Romania's purpose was, as Ukraine conceded, to secure the inclusion of a provision in the Convention dealing with the Serpents' Island situation. Romania made proposals early on; it remained active in negotiations; and near the end of the conference it tried unsuccessfully to have a provision with a wider scope than Article 121 inserted. But the fact that it sought the added protection of a wider provision, perhaps anticipating the ingenious attempts of Ukraine to extract itself from Article 121 (3), should be no surprise.

29. As the Court knows, that is only a part of our case on Serpents' Island. We submit that there is in existence a binding agreement between the Parties as to how the island will be dealt with: Professor Crawford has dealt with that.

30. We also submit that in any event, even if the island *were* in principle admissible as a base point, as a "paragraph 2" island in Article 121 terms, an island of that size and character in a geographical context such as exists here should, according to the established practice in maritime delimitation, be given no effect in a delimitation. Professor Pellet addressed this point in the first round: and I will not rehearse his arguments. I will simply emphasize five points:

— first, this argument has been examined only very briefly by the other side, and they have avoided commenting on the carefully prepared synoptic table that we attached to our first round pleadings and which is reproduced again in your folders as tab 1;

— second, by way of exception, Mr. Bundy[11] made, at some length, the argument that since every island has a baseline, so has Serpents' Island; and *hence* he alleges, "it is entirely appropriate to use base points situated on that baseline for purposes of constructing the provisional equidistance line"[12]. As we have said, this begs the question. We have no doubt that all islands, including Serpents' Island, have a baseline. But the real question is whether the baseline in question is to be taken into consideration for constructing the provisional equidistance line. And in our submission, the answer established by the practice of States and by the case law of this Court and of other international tribunals, is clearly, no;

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[11]CR 2008/26, pp. 23-26, paras. 15-29 ; see also CR 2008/24, p. 32, para. 54; CR 2008/28, p. 50, para. 70 (Bundy), and CR 2008/29, p. 28, para. 34 (Quéneudec).

[12]CR 2008/26, p. 26, para. 29.

— third, even though there is no legal obligation upon States to notify their "normal" baselines, it is telling that Ukraine has notified *all* of its baselines to the United Nations, except for the baseline on Serpents' Island;

— fourth, for his part, Professor Quéneudec has contended that Serpents' Island is a coastal island and that, as such, it must be a base point taken into consideration at the early stage of the establishment of the provisional equidistance line. But it is not a coastal island, as Professor Pellet will show in a moment; and

— fifth, it cannot reasonably be asserted, as Professor Quéneudec suggested last Friday, that Romania accepted Serpents' Island as a base point when it signed the 2003 Treaty[13]. Article 1 of this Treaty simply determines the "meeting point of the outer limits" of the respective "territorial seas of the Contracting Parties". As Professor Crawford said[14], the Parties agreed what they could, and they left the resolution of the rest of the dispute pending. That 2003 Treaty is not relevant to the question of the use of Serpents' Island as a base point for the delimitation of the continental shelf and EEZ.

31. Before leaving the question of Serpents' Island, I should recall that our friends opposite have not given any explanation as to why they remained silent in the face of Romania's declarations made on signature and on ratification of the Law of the Sea Convention (UNCLOS), and of why they agreed to the adoption of Article 121 in the famous Article 4 of the 1997 Agreement. We do not say that they were legally obliged to respond to Romania's declaration in the same way that they did respond to the Philippines UNCLOS declaration. There is a right to silence. But it is also possible to draw inferences from silence; and in Romania's view Ukraine did not object to Romania's declarations, or to the adoption of Article 121 in 1997, because it did not then find them objectionable.

32. Ms Malintoppi gave a correct but incomplete account of the work of the International Law Commission on this topic[15]. It is indeed right that the Special Rapporteur on reservations to treaties considered that, with regard to interpretative declarations, silence cannot *ipso facto*

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[13]CR 2008/29, p. 34, para. 46 (Quéneudec).

[14]CR 2008/30, p. 50, para. 25 (Crawford).

[15]CR2008/29, pp. 20-21, paras. 64-68.

constitute agreement, in contrast with the position concerning reservations under Article 20, paragraph 5, of the Vienna Convention on the Law of Treaties. But this is only half of the story.

33. In certain circumstances, as was highlighted by the ILC Special Rapporteur in his thirteenth report, "a State or an international organization may be considered as having acquiesced to an interpretative declaration by reason of its silence or its conduct, as the case may be"[16]. The present circumstances are among those which can trigger this legal effect of Ukraine's silence[17]. Romania's declaration could not concern any rock other than Serpents' Island and Ukraine was well aware of this, and it accepts that fact. In the circumstances, one would have expected Ukraine to react in order to preserve its rights; but it did not. And in our submission, it is now "stopped or precluded from challenging the validity and effect"[18] of Romania's declaration.

34. By way of conclusion, Mr. Vice-President, on this important aspect of the case, largely ignored by our colleagues, let me reiterate that Serpents' Island can play no role in the construction of the equidistance line and that this conclusion is independent of the fact that Serpents' Island must be characterized as a rock according to Article 121, paragraph 3, of the Convention. As the Agent of Romania said yesterday[19], this is not an argument "in the alternative". Each argument, based on the 1949 Agreement, on practice concerning small features in delimitation, and on Article 121, stands by itself; and the three arguments complement one another.

Sulina dyke

35. Let me now turn to Sulina dyke. Ukraine hinted at some sort of trade-off between the dyke and Serpents' Island: "Let us have the Serpents' Island base points and you can use the Sulina dyke." At first sight this looks like a mugger's offer: "Give me your wallet and you can keep your watch."

36. But Ukraine's position is, we are sure, by no means so crude. It is, as we understand it, aimed not at the construction of the provisional equidistance line but at the *stage two* exercise of

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[16]A/CN.4/600, para. 316. See also para. 313.

[17]CR 2008/20, pp. 53 *et seq.*, paras. 73 *et seq.*

[18]Decision regarding delimitation of the border between Eritrea and Ethiopia, 13 Apr. 2002, *RIAA*, Vol. XXV, p. 111, para. 3.9.

[19]CR 2008/30, p. 11, para. 5 (Aurescu).

considering Serpents' Island as a special circumstance; and it suggests that Sulina dyke, too, should be considered a special circumstance. Mr. Müller's presentation yesterday explained that the dyke is a long-standing, substantial structure connected to the coast, and within the general profile of the coastline to the north, to which it will no doubt shortly be joined by the effects of siltation. The new sandbar is clear evidence of that process. The dyke is also essential to maintain the navigability of the Danube, and access to the Black Sea port of Sulina and to the Danube river ports. No plausible case has been made for not giving it its full legal effect as a base point. But in case there should be thought to be a suggestion that Romania is not entitled to use Sulina dyke as a base point at all, I will address that point.

[Graphic: tab 2]

37. I do so because the point has been raised by our friends, and it involves a significant point of principle. I should, however, make clear that on Ukraine's view the dyke makes little difference to the equidistance line. The graphic on the screen, tab 2 in your folders, shows that effect. The green line is Ukraine's equidistance line, as it would be drawn giving effect to Serpents' Island, but giving no effect to Sulina dyke, and drawing the line instead from base points on Romania's natural coast. The red line shows Ukraine's equidistance line drawn using Serpents' Island and also using Sulina dyke. The difference, as you can see, is small, and limited to the first dozen miles of the line, before base points on the natural coastline of Romania take over. The dyke has, however, more effect on the mainland equidistance line drawn by Romania and it is, in our submission, therefore, a point of some importance. [End graphic]

38. Ukraine also appears to have miscalculated the effect of Sulina dyke on Romania's equidistance line. [Graphic: tab 3] Mr. Bundy showed you in his tab 9, what he said was the effect of the dyke[20]. He said that the red line represents the equidistance line without Sulina dyke and the blue line the equidistance line using Sulina dyke as a base point. In fact, the red line appears to have been calculated using a baseline some way inland from the natural coast of Sulina. If the coast is drawn from the furthest point of the natural coast, the true equidistance line is that

[20]CR 2008/24, pp. 32-33, para. 58 (Bundy).

shown in yellow on the chart, and it has significantly less effect on the equidistance line than Ukraine has claimed. [End graphic]

39. [Graphic: tab 4] While we are looking at this area let me also refer to Ukraine's drawing of the perpendicular from the coast at this point. Their perpendicular line is extraordinary. It cuts right across the Danube delta, lopping off the eastern part, an area of 990 sq km, including Sacalin. The line drawn in red, incidentally, is not Romania's perpendicular drawn from the adjacent coast: that is a line designed to illustrate the construction of point X, as Professor Crawford explained two weeks ago. [End graphic] But let me return to the point of principle.

40. Mr. Müller has shown you the facts concerning the dyke and its essential, integral role in the maintenance of Sulina and the Danube ports.

41. Mr. Bundy's suggestion that natural features such as Serpents' Island should be treated at least as favourably as artificial features such as Sulina dyke is one way in which one might have framed a treaty provision on the subject; but it is not the way in which the law has developed and now exists.

42. The International Law Commission's 1956 Commentary on what became Article 8 of the 1958 Territorial Sea Convention[21], and then Article 11 of the 1982 Convention, is instructive. It is short, and the relevant paragraphs — which are in your folders as tab 5 — read as follows:

> "(2) Permanent structures erected on the coast and jutting out to sea (such as jetties and coast protective works) are assimilated to harbour works.
>
> (3) Where such structures are of excessive length (for instance, a jetty extending several kilometres into the sea), it may be asked whether this article could still be applied or whether it would not be necessary, in such cases, to adopt the system of safety zones provided for in article 71 for installations on the continental shelf. As such cases are very rare, the Commission, while wishing to draw attention to the matter, did not deem it necessary to state an opinion."[22]

43. This Commentary makes it plain that the ILC considered that the text of Article 8, which is identical to the first sentence of Article 11 of the Law of the Sea Convention, applied to coast protective works — a category into which the dyke clearly falls. It also shows that the ILC asked whether long jetties extending several kilometres into the sea should fall within its proposed rule.

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[21] "For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast."

[22] *YILC*, *1956*, Vol. II, p. 270 (Commentary to Draft Article 8); http://untreaty.un.org/ilc/texts/instruments/english/commentaries/8_1_8_2_1956.pdf

Jetties are not the same as coastal protection works. A jetty is typically a structure rather like a pier, supported on legs made of wood or iron, although it may have a solid construction. But even in the case of jetties, despite the ILC having raised the question, the 1958 Conference did not exclude them from the "permanent harbour works" rule.

44. The 1982 Convention does add one qualification to the rule. It is the second sentence of Article 11, which reads "Off-shore installations and artificial islands shall not be considered as permanent harbour works". And, again, one sees that the question of the scope of the rule and its application to various kinds of structure was considered; and, again, a deliberate position was taken, this time by UNCLOS III. Sulina dyke is clearly not an "off-shore installation" — that is a term used in Article 56 of the Convention to refer to offshore oil platforms and the like. Nor is it an artificial island. It remains, with other coast protective works, within the category of permanent harbour works which States are entitled to use as base points. Mr. Bundy raises a good question, but there has been a clear and certain answer to it for the past half century: coast protection works of this kind do indeed qualify as base points.

45. We would also draw your attention to the fact that Sulina dyke was referred to by Ukraine in its own list of base points, while Serpents' Island was not. The first point of the Ukrainian baseline is described in the Ukrainian law as being

> "the point of intersection of the line of the State sea border between the Russian Federation and the Socialist Republic of Romania connecting the eastern tip of the north entrance of the pier of the Sulina canal with the east islet of Tsyganka island"[23].

46. So, the answer to the proposal for equivalence between Serpents' Island and Sulina dyke is to be found in the Convention itself. The Convention — the law — treats them differently and that is why they must be treated differently in the process of delimitation.

47. Once the question of those base points is settled, the task of constructing the provisional equidistance line is mechanical[24] and there is little room for disagreement — although there is, of course, disagreement over what was agreed in 1949. The line proceeds as we have shown it. It has

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[23]See MR, Ann. 27; and *List of Geographical Coordinates of Points Defining the Baselines for Measuring the Breadth of the Territorial Sea, Exclusive Economic Zone and the Continental Shelf in the Black Sea*, available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/UKR_1992_CoordinatesBlackSea.pdf.

[24]Cf. CR 2008/29, p. 23, para. 5 (Quéneudec).

two main sectors, one controlled by base points on adjacent coasts, one by base points on opposite coasts, and the course of that line is dictated by the geography and by those base points.

48. Having drawn the provisional equidistance line, the next task is to consider what, if any, adjustments are necessary to take account of special circumstances; and I would ask you now, Sir, to call now on Professor Pellet, who will address that question.

The VICE-PRESIDENT, Acting President: Thank you for your speech and, as you suggest, I call on Professor Alain Pellet.

M. PELLET :

VIII. LA DEUXIÈME PHASE DE LA DÉLIMITATION

LES CIRCONSTANCES PERTINENTES

1. Merci beaucoup Monsieur le président ; il faut que j'essaye de ne pas m'emmêler entre les «Madame la» et les «Monsieur le». Monsieur le président, Messieurs les juges, permettez-moi, je vous prie, de rappeler le raisonnement que nous avons suivi jusqu'à présent. Peut-être est-ce une réduction cartésienne de la complexité des choses — bien que j'ai noté que le professeur Lowe ait présenté les choses de la même manière — mais, décidément, lorsque l'on s'en tient aux grandes lignes, notre affaire me paraît raisonnablement simple. Si l'on suit le raisonnement en trois temps traditionnel :

— la ligne d'équidistance doit être tracée en fonction des points de base pertinents des deux Etats ; mais l'île des Serpents, n'est pas susceptible de constituer un tel point — contrairement à la digue de Sulina, alors que l'Ukraine assimile artificiellement l'une à l'autre, comme on vient de le rappeler ;

— une fois la ligne tracée, elle peut être ajustée si des circonstances pertinentes l'exigent afin d'arriver à un résultat équitable — c'est le stade auquel nous en sommes arrivés, et c'est ce qu'il m'incombe d'aborder ce matin ;

— ensuite peut intervenir, le cas échéant, le test de la proportionnalité ; le professeur Lowe reviendra à cette barre pour en traiter tout à l'heure.

2. Pour être complet, je rappelle que, dans ses lignes générales, cette méthode s'applique tant à la délimitation de la mer territoriale qu'à celle de la zone économique exclusive ou du plateau continental. Toutefois, en l'espèce, une délimitation entre la mer territoriale de l'île des Serpents et les espaces maritimes roumains qui l'entourent, a été arrêtée par voie d'accord et il n'y a pas lieu d'y revenir. Si cependant vous considériez qu'il faudrait y procéder *de novo*, ce que nous ne pensons pas, il conviendrait alors d'appliquer globalement la même méthode à compter du point F, celui qui est fixé à l'article premier du traité de 2003. Je m'en tiendrai, pour l'instant, à notre position, que le professeur Crawford à expliquée à nouveau hier matin : elle consiste à considérer que les Parties se sont mises d'accord en 1949 pour doter l'île des Serpents d'un espace maritime de 12 milles marins, accord qui a été constamment confirmé depuis lors. Cependant, pour ne rien laisser au hasard, je reviendrai cependant brièvement sur ce point, ne fût-ce que pour montrer que la solution qui devrait être adoptée en l'absence de délimitation préexistante, serait nettement plus favorable à la Roumanie que celle résultant de l'accord de 1949.

3. Monsieur le président, pour déterminer l'incidence que pourraient avoir les circonstances pertinentes en la présente espèce, je m'interrogerai brièvement, dans un premier temps, sur leur définition et sur le rôle qu'elles sont appelées à jouer dans la délimitation maritime, en essayant de dégager les points d'accord entre les Parties et ceux, malheureusement encore nombreux, qui les divisent. Puis, sans essayer de suivre un beau plan équilibré «à la française» (tout cartésien que je suis), je m'interrogerai, sur les effets éventuels des circonstances pertinentes invoquées de part et d'autre.

1. Le rôle des circonstances pertinentes

4. A priori, Monsieur le président, les Parties semblent être maintenant d'accord sur la définition et le rôle (ils vont de pair) des circonstances pertinentes. Pour faire vite, elles admettent toutes deux :

— qu'il s'agit de considérations pouvant conduire à infléchir le tracé de la ligne d'équidistance tracée lors de la première phase de l'opération conduisant à la délimitation[25] ;

[25] Voir CR 2008/24, p. 28-29 (Bundy) ; CR 2008/26, p. 14, par. 59 (Quéneudec) ou CR 2008/29, p. 24, par. 7 (Quéneudec).

— que le but de cette deuxième phase est de parvenir à un résultat équitable — un point sur lequel, d'ailleurs, je trouve que nos amis de l'autre côté de la barre, qui sont pourtant, en général, fort «didactiques», ont été assez discrets ; sans s'y appesantir, ils conviennent néanmoins que tel est bien l'objectif : un résultat équitable[26] ;

— les Parties s'accordent également pour considérer qu'il n'y a pas lieu d'opérer de distinction entre les circonstances spéciales de l'article 15 de la convention sur le droit de la mer et qui trouvent application lorsqu'il s'agit de délimiter la mer territoriale, et les circonstances pertinentes, auxquelles on a recours pour la délimitation de la zone économique exclusive et du plateau continental[27] ;

— et nous convenons également, des deux côtés de la barre, qu'à l'occasion de cette étape «délicate»[28], en l'absence de règles précises — conventionnelles ou coutumières, la subjectivité du juge — que je ne m'aventurerai tout de même pas à comparer à un épicier…[29] — joue inévitablement un certain rôle, tant pour l'identification des circonstances pertinentes que pour ce qui est des conséquences à en tirer[30].

5. Mais Monsieur le président, il y a subjectivité et subjectivité et admettre que le juge dispose d'un certain pouvoir d'appréciation ne signifie pas qu'il peut faire «n'importe quoi». Il y a un monde entre ce que l'on appelle pouvoir «discrétionnaire» en droit administratif français (peut-être cette notion est-elle plus compréhensible hors du monde latin sous le nom de «marge d'appréciation» — *margin of appreciation*) et, de l'autre, l'exercice arbitraire de se pouvoir d'appréciation. Il s'en déduit notamment que l'équité à laquelle il s'agit de parvenir est un concept juridique, encadré par des règles de droit, et non une pure notion impressionniste[31] ; et aussi que la première des circonstances éventuellement pertinentes est constituée par les traités que les parties à l'exercice de délimitation auraient pu conclure entre elles ou par lesquels elles sont liées.

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[26] Voir cependant CR 2008/29, p. 42, par 102 (Quéneudec).

[27] Voir CR 2008/24, p. 28, par. 38 (Bundy) ou CR 2008/26, p. 10, par. 40-41 (Quéneudec).

[28] CR 2008/26, p. 16, par. 68 (Quéneudec).

[29] Voir CR 2008/29, p. 37, par. 77 (Quéneudec).

[30] Voir CR 2008/26, p. 16, par. 68 ou p. 19, par. 81-82 (Quéneudec) ou CR 2008/29, p. 41, par. 94 (Quéneudec).

[31] Voir sentence arbitrale du 26 mars 2002, *Arbitrage entre la province de Terre-Neuve et du Labrador et la province de la Nouvelle-Ecosse*, par. 5.18.

6. En l'espèce, cela veut dire qu'il faut tenir compte d'abord et avant tout de la délimitation conventionnelle de la mer territoriale autour de l'île des Serpents, à laquelle les Parties ont procédé en 1949 et qu'elles ont confirmée depuis lors : cet accord est «intouchable» en soi et doit recevoir son plein effet ; en revanche, s'il produit des effets inéquitables, la Cour peut tenir compte de ces distorsions pour procéder à la délimitation au-delà de la zone qu'il concerne ; c'est une circonstance pertinente. De manière plus générale, il vous appartient, Messieurs de la Cour, d'appliquer, prioritairement, tous les traités conclus entre les Parties en relation avec la délimitation à laquelle vous avez été priés de procéder — au premier rang desquels l'accord additionnel de 1997.

7. Une autre remarque s'impose. Nos contradicteurs se sont délectés de la fameuse formule de l'arrêt de 1969 selon laquelle «[i]l n'est jamais question de refaire la nature entièrement» [«There can never be any question of *completely* refashioning nature…»] (*Plateau continental de la mer du Nord (République fédérale d'Allemagne/Danemark) (République fédérale d'Allemagne/Pays-Bas), arrêt, C.I.J. Recueil 1969*, p. 49, par. 91), qu'ils ont ressassée avec une gourmandise satisfaite, en la répétant pas moins de neuf fois[32]. Cette affirmation fait partie de la vulgate du droit de la délimitation maritime et le moment n'est pas à une remise en cause «académique». Je voudrais seulement faire remarquer que le *dictum* de 1969 comporte un adverbe : «[i]l n'est jamais question de refaire la nature *entièrement*» — et, un peu plus loin dans le même paragraphe : «Il ne s'agit donc pas de refaire *totalement* la géographie.» [«It is therefore not a question of *totally* refashioning geography…»] (*Ibid.*, p. 50, par. 91 ; les italiques sont de nous.)

8. C'est que, comme l'a magistralement démontré le professeur Prosper Weil, c'est l'équidistance de la première phase qui reflète le plus fidèlement la nature ou la géographie ; les circonstances pertinentes interviennent comme un correctif afin «de remédier à une particularité non essentielle d'où pourrait résulter une injustifiable différence de traitement» [«a question … of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result»] *(ibid.)*. Ce faisant, inévitablement, elles «refont» quelque peu la nature ou la géographie : «la correction de la ligne d'équidistance a … pour objet véritable d'établir une

[32] Voir CR 2008/24, p. 21, par. 10, ou p. 22, par. 12, p. 36, par. 73 (Bundy) ; CR 2008/26, p. 30, par. 47, p. 41, par. 94 (Bundy) ; CR 2008/28, p. 43, par. 37 (Bundy), p. 59, par. 26 (Malintoppi) ; CR 2008/29, p. 26, par. 19, ou p. 41, par. 97 (Bundy).

délimitation correspondant à une géographie reconstituée, plus équitable aux yeux des juges que la géographie réelle»[33]. C'est vrai pour les circonstances dont la Partie ukrainienne voudrait vous faire croire qu'elles sont plus particulièrement pertinentes, comme pour celles qui le sont réellement.

[Projection n° 1 : délimitation finale selon l'Ukraine (dossier documentaire de l'Ukraine, onglet n° 83)]

9. Nos collègues de l'autre côté de la barre devraient sans doute convenir que le but des circonstances pertinentes est justement de remédier, dans des limites raisonnables, aux injustices flagrantes résultant de la géographie — et que cela est vrai de toute circonstance pertinente, y compris et d'abord de celles qu'ils invoquent — à cette nuance près qu'ils leur font produire des effets qui ne sont pas raisonnables (par exemple lorsqu'ils «font glisser» leur ligne d'équidistance, intenable en elle-même, pour, disent-ils, «parvenir à un tracé qui tienne pleinement compte de la très grande disproportion de [la] longueur des côtes»[34]). Le professeur James Crawford vous a entretenu hier de ce que nos amis ukrainiens appellent pudiquement un «glissement»[35].

[Fin de la projection n° 1.]

10. Pour en terminer avec ces considérations générales, Monsieur le président, je dirai trois choses :

1) c'est l'équidistance qui reflète la nature et la géographie existantes le plus fidèlement possible ;
2) comme, en effet, il ne saurait être question de refaire entièrement la nature ou la géographie, il convient de ne s'écarter de la ligne d'équidistance que si l'injustice en découlant est manifeste ; et,
3) cet exercice n'est pas une sorte de poker menteur favorisant celui qui a le plus de culot, c'est une opération juridique encadrée par plus de règles, dégagées par la pratique et la jurisprudence, que nos amis de l'autre côté de la barre le concèdent.

11. C'est à la lumière de ces remarques qu'il faut examiner tour à tour les diverses circonstances pertinentes qu'ont invoquées les Parties :

— la configuration générale des côtes de la mer Noire et divers facteurs qui lui sont liés ;

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[33] Prosper Weil, *Perspectives du droit de la délimitation maritime*, Paris, Pedone, 1988, p. 233.

[34] CR 2008/29, p. 43, par. 106 (Quéneudec).

[35] CR 2008/30, p. 21-22, par. 6-9 (Crawford).

— l'île des Serpents (en elle-même et par comparaison peut-être avec la digue de Sulina) ; et

— la disparité entre la longueur des côtes respectives de la Roumanie et de l'Ukraine.

2. La configuration générale des côtes

12. Monsieur le président, pour les besoins de la discussion, je suis prêt à admettre que la configuration générale des côtes peut constituer une circonstance pouvant peut-être être prise en considération en vue d'ajuster la ligne d'équidistance — donc, en ce sens, une «circonstance pertinente». Mais pour déterminer s'il doit en aller ainsi, c'est d'abord «le cadre géographique [global] dans lequel la délimitation devra s'opérer» [the general geographical context in which the delimitation will have to be effected] comme vous l'avez dit dans *Libye/Malte* (*Plateau continental (Jamahiriya arabe libyenne/Malte), arrêt, C.I.J. Recueil 1985*, p. 50, par. 69)[36], qu'il faut envisager.

13. L'Ukraine refuse de s'intéresser à ce cadre global et ne considère comme pertinentes à cet égard que deux circonstances : la disparité de la longueur de ses côtes par rapport à celles de la Roumanie (sur laquelle je reviendrai) et le fait qu'elle-même Ukraine borde la zone pertinente sur trois côtés, ce à quoi on peut peut-être ajouter les considérations de sécurité et de navigation qu'elle fait valoir — disons l'effet d'empiètement.

14. La Partie ukrainienne semble accorder une grande importance au fait que l'espace maritime concerné constituerait un golfe[37] bordé par des eaux en majorité ukrainiennes[38]. Il en résulterait une «prédominance» de l'Ukraine, qui devrait avoir une incidence en sa faveur sur le tracé de la ligne[39].

[Projection n° 2 : la part de la Roumanie I.]

15. Monsieur le président, il suffit de jeter un œil sur la carte qui se trouve dans le dossier des juges sous le n° VIII-1 et qui est projetée en ce moment, pour voir que la ligne proposée par la Roumanie — qui repose sur l'équidistance pure et simple, donne une image fidèle de la

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[36] Voir aussi, par exemple, la sentence arbitrale du 14 février 1985, *Délimitation de la frontière maritime entre la Guinée et la Guinée-Bissau*, *RSANU.*, vol. XIX, p. 189, par. 108-109.

[37] CR 2008/29, p. 38, par. 79 (Quéneudec).

[38] Cf. CR 2008/24, p. 21, par. 8 et 10 (Bundy) ; CR 2008/26, p. 37, par. 76 (Bundy) ou CR 2008/29, p. 26, par. 20-21, p. 27, par. 24, ou p. 38, par. 79 (Quéneudec).

[39] CR 2008/29, p. 38, par. 81, ou p. 42, par. 101 (Quéneudec) ; voir aussi CR 2008/24, p. 21, par. 8, ou p. 34, par. 63 (Bundy).

configuration générale des côtes, sans frustrer en quoi que ce soit l'Ukraine, qui se taille la part du lion dans la zone concernée.

[Fin de la projection n° 2. Projection n° 3 : la part de la Roumanie II.]

La carte que vous voyez maintenant, et qui porte le n° VIII-2 dans votre dossier, illustre elle, la méthode de délimitation ukrainienne ; vous pouvez y constater à quelle portion congrue la Roumanie serait réduite si l'on appliquait cette méthode au profit de l'Ukraine et aussi de la Bulgarie. Inévitablement, le triangle vert qui représente les espaces maritimes que la Partie ukrainienne concède généreusement à la Roumanie, fait penser à la situation de l'Allemagne [Fin de la projection n° 3. Projection n° 4 : *Plateau continental de la mer du Nord.*] dans les affaires du *Plateau continental de la mer du Nord*, dans laquelle l'effet d'enfermement résultait de la concavité générale de la côte des trois Etats en cause. Ici, il y a aussi une concavité — partielle mais assez prononcée — de la côte roumaine qu'il n'y a aucune raison de ne pas prendre en compte.

[Fin de la projection n° 4. Projection n° 5 : concavité virtuelle de la côte (dossier documentaire de la Roumanie, vol. II, onglet VII-2).]

Mais cet effet de concavité est aggravé dans des proportions considérables par l'inclusion totalement artificielle de l'île des Serpents dans ses lignes de base à laquelle procède l'Ukraine. «Une exagération d'une telle importance des conséquences d'un accident géographique naturel doit être réparée ou compensée dans la mesure du possible parce qu'elle est en soi créatrice d'inéquité» [So great an exaggeration of the consequences of a natural geographical feature must be remedied or compensated for as far as possible, being of itself creative of inequity] (*Plateau continental de la mer du Nord (République fédérale d'Allemagne/Danemark) (République fédérale d'Allemagne/Pays-Bas), arrêt, C.I.J. Recueil 1969*, p. 49, par. 89) comme vous l'avez dit dans l'arrêt de 1969.

[Fin de la projection n° 5. Projection n° 5 *bis* : retour à la projection n° 3.]

16. Quant à l'effet d'empiètement (cut-off effect) dont se plaint l'Ukraine[40], il me semble qu'il suffit de regarder à nouveau la carte n° VIII-1 pour constater qu'autant la Roumanie en serait

[40] Voir not. CR 2008/24, p. 35, par. 68 (Bundy) ; CR 2008/28, p. 45, par. 45 et 47 (Bundy) ; CR 2008/29, p. 49, par. 30 (Bundy).

fortement victime si vous veniez à adopter le tracé défendu par la Partie ukrainienne, autant on voit mal ce que celle-ci peut reprocher au tracé que nous proposons, puisqu'il n'y a aucun port significatif dans cette partie de la côte ukrainienne (Odessa se trouve à 160 kilomètres au nord de la frontière). Au contraire, la limite que l'Ukraine voudrait vous voir endosser complique singulièrement l'accès au port de Sulina et à la branche maritime du Danube par laquelle transite, bon an, mal an, 2 500 000 tonnes de marchandises[41]. Au surplus, le tracé ukrainien exclut, à terme, tout contact direct de la zone maritime roumaine avec la partie turque de la mer Noire et impose à la Roumanie un tête-à-tête avec ses deux voisins, alors qu'une délimitation équitable basé sur l'équidistance ne rend nullement cet enfermement inévitable.

[Fin de la projection n° 5 *bis*. Projection n° 6 : les frontières maritimes dans la mer Noire redessinées conformément à la méthode ukrainienne.]

17. Ceci attire également l'attention sur la nature semi-fermée de cette mer singulière, entièrement soumise aux droits souverains des Etats riverains. Des délimitations conventionnelles y existent entre la Turquie d'une part, la Bulgarie, l'Ukraine, la Russie et la Géorgie d'autre part ; elles suivent en fait des lignes d'équidistance — sous réserve de la limite de 12 milles marins autour de l'île des Serpents. Vous pouvez voir ceci à l'écran sous réserve donc de mes 12 milles marins. Ajoutons sur ce schéma, qui se trouve à l'onglet VIII-3 du dossier des juges, les lignes d'équidistance qui, selon nous, devraient constituer les futures frontières maritimes. Tout ceci paraît raisonnable, et reflète équitablement la géographie côtière générale de la mer Noire. Par contre, je me demande ce que penserait l'Ukraine si les frontières maritimes dans la mer Noire étaient révisées ou fixées en application de la méthode qu'elle voudrait voir appliquer à sa propre frontière avec la Roumanie… En fait, Monsieur le président, je ne me le demande pas : elle en penserait que ce n'est pas équitable — et elle aurait raison. Du même coup, ce n'est pas conforme aux principes juridiques qui doivent trouver application, qui incluent celui, rappelé avec une clarté particulière dans la sentence arbitrale de 1985, dans l'affaire *Guinée/Guinée-Bissau* : «Une délimitation visant à obtenir un résultat équitable ne peut ignorer les autres délimitations déjà

[41] 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.

effectuées ou à effectuer dans la région.»[42] Et j'ajoute que, si l'Ukraine a parfaitement raison de dire, par la voix de mon amie Loretta Malintoppi, que les traités conclus par des tiers sont *res inter alios acta* à l'égard des Etats qui n'y sont pas parties[43], elle ne peut pas être tenue pour un tiers par rapport au traité de 1978 conclu entre la Turquie et l'URSS[44], à laquelle elle a succédé. Elle bénéficie de ce traité qui la lie en tant que successeur de l'Union soviétique et il n'y a aucun inconvénient à le prendre en considération dans l'appréciation de ce que l'on pourrait appeler la «géographie maritime globale» de la mer Noire, cet accord rendant pleinement compte de la configuration générale des côtes. Cette circonstance confirme l'équité de notre ligne mais appellerait à corriger considérablement la ligne ukrainienne afin de l'aligner davantage sur le principe d'équidistance dont elle s'écarte dramatiquement.

[Fin de la projection n° 6.]

18. Voici, Monsieur le président, ce que j'avais à dire sur la configuration générale des côtes et les facteurs qui lui sont liés en tant que circonstances pertinentes. J'en viens maintenant à la principale circonstance pertinente, dont la prise en compte dès la première phase de l'élaboration de la ligne ukrainienne exerce une distorsion particulièrement marquée et totalement inacceptable sur celle-ci : il s'agit, bien sûr, de l'île des Serpents.

3. L'île des Serpents en tant que circonstance pertinente

19. Comme le professeur Lowe l'a montré tout à l'heure, l'île des Serpents ne peut pas avoir d'effet sur l'établissement de la ligne d'équidistance, qu'on la considère comme un rocher au sens du paragraphe 3 de l'article 121 de la convention des Nations Unies sur le droit de la mer, ou que, sans se préoccuper de sa qualification au regard de cette disposition, on lui applique les principes bien établis relatifs au rôle des îles de ce genre en matière de délimitation des frontières maritimes entre Etats dont les côtes sont adjacentes ou se font face. Mais, si notre île n'a aucun rôle à jouer dans la première phase de la délimitation, elle existe et, à ce titre, doit être réintroduite dans le jeu à titre de circonstance spéciale.

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[42] Sentence du 14 février 1985, *Délimitation de la frontière maritime entre la Guinée et la Guinée-Bissau*, *RSANU*, vol. XIX, p. 183, par. 93 ; voir aussi sentence arbitrale du 11 avril 2006, *Barbade et Trinité-et-Tobago*, par. 340.

[43] Voir CR 2008/28, p. 58, par. 20 et 22 (Malintoppi).

[44] *RTNU*, vol. 1247, p. 144 (n° 20344).

20. Lors de notre plaidoirie de premier tour, m'appuyant sur un tableau résumant la jurisprudence pertinente — que je me suis à nouveau permis d'inclure dans le dossier des juges, cette fois sous l'onglet VIII-4, j'avais montré que l'on pouvait déduire de la pratique juridictionnelle et arbitrale un certain nombre de principes généraux appliqués de manière constante. La réponse de M. Bundy ? «The important point, however — and this is a point which Romania's pleadings have conspicuously overlooked — is that each delimitation situation is unique and each case must be assessed in the light of its own particular geographic facts and circumstances.»[45] C'est, Monsieur le président, une fuite commode devant l'obstacle.

21. En fait, sur la base de la jurisprudence résumée dans le tableau de l'onglet VIII-4, on peut — quoi qu'en dise M[e] Bundy — dégager quelques principes généraux[46], que je me permets d'énoncer à nouveau puisque mon contradicteur et ami n'a jugé utile ni de les réfuter ni de les faire siens :

1) les petites formations insulaires, se trouvant au large des côtes et exclues, comme la nôtre doit l'être, de la phase de construction de la ligne d'équidistance, bénéficient au mieux d'un demi-effet — encore s'agit-il exclusivement de formations marines infiniment plus étendues et, en général, bien plus peuplées, que l'île des Serpents (en admettant que l'on pût parler de population serpentine en ce qui la concerne)[47] ;
2) dans d'autres cas, des îles, parfois bien plus considérables (y compris les îles anglo-normandes elles-mêmes dans l'arbitrage de la *mer d'Iroise*) se sont vu reconnaître, au grand maximum, une mer territoriale de 12 milles marins[48];
3) souvent, de très petites îles (d'une manière générale celles qui sont les plus comparables à la nôtre) n'ont été à l'origine d'aucune correction de la ligne d'équidistance initiale.

Et ceci indépendamment, je le répète, de leur définition au regard de l'article 121 de la convention sur le droit de la mer.

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[45] CR 2008/28, p. 50, par. 66 (Bundy).

[46] CR 2008/20, p. 36, par. 57 (Pellet).

[47] Voir CR 2008/20, p. 31-33, par. 52 (Pellet).

[48] *Ibid.*, p. 33-34, par. 53 (Pellet).

22. Il est d'ailleurs assez curieux que la Partie ukrainienne nous reproche de ne pas tenir compte des circonstances de chaque espèce alors que le tableau n° VIII-4 décrit, sous une forme certes résumée mais que je crois parfaitement honnête et objective, les circonstances mêmes que la Cour ou les tribunaux arbitraux ont eux-mêmes mentionnées à l'appui de leurs décisions de minimiser l'impact des îles en question sur la délimitation. Il est vrai que, lors de son intervention du 11 septembre, Rodman Bundy a déployé de grands efforts pour mettre en évidence ce qu'il présente comme des particularités propres à certaines des affaires que j'avais citées qui, selon lui, les distingueraient radicalement de la nôtre[49]. Cette approche appelle à nouveau trois remarques :

— en premier lieu, il est significatif que, dans tous ces cas, les circonstances que cite mon contradicteur n'aient, précisément, *pas* été citées par la Cour ou les tribunaux arbitraux à l'appui de leurs décisions de ne pas laisser les îles en question exercer un effet trop important sur le tracé final de la frontière maritime ;

— en deuxième lieu, et surtout, cédant aux démons qui obsèdent la Partie ukrainienne, M^e^ Bundy met en avant, dans sept cas sur les dix qu'il évoque, la question de la (dis)proportion de la longueur des côtes des Etats concernés[50] ! Mais, Monsieur le président, ceci est totalement irrationnel, pour dire le moins : si la proportionnalité peut, dans certains cas exceptionnels, être une circonstance pertinente, la présence d'une petite île exerçant une distorsion très excessive sur le tracé de la ligne en est une autre ! Il est tout aussi … absurde — je ne peux m'empêcher de lâcher le mot… — de vouloir expliquer l'impact de la circonstance pertinente que constitue une petite île par la configuration générale de la côte — ce que M. Bundy a fait à six reprises[51], alors que, comme je viens de le rappeler, il s'agit là encore d'une *autre* catégorie de circonstances pertinentes. Cela confirme, si besoin en est, que la Partie ukrainienne ne parle qu'un langage : celui de la proportionnalité — c'est son concombre[52], le concombre des

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[49] CR 2008/28, p. 51-53, par. 71-82 (Bundy).

[50] Dans les affaires de la *Mer d'Iroise* (*ibid.*, p. 51, par. 74), *Libye/Tunisie (*p. 51, par. 75), *Libye/Malte* (p. 52, par. 76), *Jan Mayen* (*ibid.*), *Barbade/ Trinité-et-Tobago* (*ibid.*), *Erythrée/ Yémen* (p. 52, par. 78), *Golfe du Maine* (p. 53, par. 81-82).

[51] Voir les affaires de la *Mer d'Iroise* (*ibid.*, p. 51, par. 74), *Libye/Tunisie* (p. 51, par. 75), *Doubaï/Sharjah* (p. 52, par. 77), *Erythrée/ Yémen* (p. 52, par. 78), *Nicaragua/Honduras* (*ibid.*), *Qatar/Bahreïn* (p. 52, par. 79).

[52] Voir CR 2008/30, p. 18-19, par. 24 (Aurescu).

mauvais élèves roumains ! Ceci ne saurait, décidément, constituer l'alpha et l'oméga de la délimitation maritime !

— j'ajoute en troisième lieu que la Cour et les tribunaux arbitraux ne se sont aventurés qu'avec beaucoup de prudence sur ce terrain de la disparité entre les côtes des Parties — qu'il s'agisse du «test de proportionnalité» dont parlera tout à l'heure le professeur Lowe ou, plus encore peut-être, d'en faire une circonstance pertinente, comme je le montrerai dans un instant.

23. Pour tenter de faire de l'île des Serpents (ou aux Serpents : je ne sais pas pourquoi mon éminent ami le professeur Quéneudec semble préférer cette appellation[53] ?...) une circonstance pertinente qui devrait exercer un effet correcteur majeur sur l'orientation de la ligne, nos collègues de l'autre côté de la barre s'emploient à l'affubler de caractéristiques qu'elle n'a pas. Selon eux, il s'agirait :

— d'une île «très en vue» (prominent) dans la mer Noire — *dixit* Mme Malintoppi[54] ; il est vrai qu'avec un sens plus aigu de la litote, M. Quéneudec remet les choses au point et concède qu'elle n'est «certes pas très grande» et que ses dimensions sont «relativement modestes»[55] ;

— et il s'agirait, selon les cas, d'un «élément de la longue côte ukrainienne» (an element of the long coastline of Ukraine[56]), d'une partie intégrante de la géographie côtière (part of the coastal geography[57]) ou de la «configuration côtière»[58], voire d'une «île côtière»[59] ou, encore plus imprudemment, d'une «avancée côtière»[60].

[Projection n°7 : l'île des Serpents comme «avancée côtière» (onglet n° VII-6 du dossier documentaire de premier tour de la Roumanie).]

24. Certes, Monsieur le président, si l'Ukraine incluait l'île des Serpents dans ses lignes de base droites, on pourrait parler d'«avancée côtière» — mais elle ne le fait pas, et, comme je l'ai

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[53] Voir CR 2008/29, p. 25, par. 16, p. 28, par. 34, p. 30, par. 42, p. 31, par. 47, p. 32, par. 48, p. 41, par. 96 et 97, p. 43, par. 105 (Quéneudec).

[54] CR 2008/29, p. 10, par. 29 (Malintoppi).

[55] *Ibid.*, p. 41, par. 98, et p. 28, par. 35.

[56] CR 2008/24, p. 15, par. 22 (Vassylenko).

[57] *Ibid.*, p. 34, par. 64-65 (Bundy) ; CR 2008/28, p. 34, par. 64 (Bundy) ; voir aussi p. 39, par. 19, p. 45, par. 45, ou p. 48, par. 60 (Bundy).

[58] CR 2008/29, p. 26, par. 16 (Quéneudec).

[59] *Ibid.*, p. 30, par. 40-41 (Quéneudec).

[60] *Ibid.*, p. 42, par. 99 (Quéneudec).

montré lors du premier tour de nos plaidoiries[61], elle ne pourrait pas le faire. Et pour une raison très simple : l'île des Serpents *n'est pas* une île côtière ; elle n'est pas intégrée dans la géographie côtière de l'Ukraine, mais elle constitue une formation maritime isolée loin de la côte, avec laquelle elle n'entretient aucune relation particulière (même si je prie la Cour et la Partie ukrainienne de bien vouloir excuser l'erreur que j'ai commise il y a quinze jours en donnant pour distance, en réalité, celle qui sépare l'île des Serpents de Sulina[62] !).

[Fin de la projection n° 7.]

25. M. Quéneudec a donné, avec une robuste assurance, lors de sa dernière plaidoirie de la semaine dernière, une définition inédite de ce qu'il faut entendre par «île côtière». Selon lui, «[q]uand il y a chevauchement» entre la mer territoriale du continent et la mer territoriale engendrée par l'île, «on est en présence d'une île côtière»[63]. Cette définition a sûrement le grand mérite à ses yeux de correspondre à la situation de l'île des Serpents mais elle n'a pas celui d'être généralement admise. Et je me permets simplement de rappeler que, dans l'arbitrage entre les deux *Guinée*, le tribunal a défini des îles côtières, comme celles «qui ne sont séparées de la terre ferme que par des bras de mer ou cours d'eau de faible largeur et qui lui sont souvent reliées à marée basse, [et] doivent être considérées comme parties intégrantes du continent»[64] ?

[Projection n°8 : les îles côtières ukrainiennes.]

26. Monsieur le président, l'île des Serpents n'est pas une île côtière : éloignée de la côte, isolée dans la mer Noire, contrairement à de «vraies» îles côtières qui s'intègrent, elles, dans la «géographie côtière» ukrainienne, et que, d'ailleurs, l'Ukraine a notifiées comme points de base à la Division du droit de la mer des Nations Unies[65]. Tel est le cas, notamment des îles Tsyganka, Koubansky ou Djarylgatch qui se trouvent pour Tsyganka et Djarylgatch, respectivement à 700 mètres et 6,1 km de la côte, tandis que Koubansky est intégrée dans le delta du Danube. On

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[61] CR 2008/20, p. 19-20, par. 25 (Pellet).

[62] Voir CR 2008/20, p. 10, par. 2 (Pellet) ; voir aussi CR 2008/29, p. 29, par. 37-38 (Quéneudec).

[63] CR 2008/29, p. 30, par. 41 (Quéneudec).

[64] Sentence du 14 février 1985, *Délimitation de la frontière maritime entre la Guinée et la Guinée-Bissau*, *RSANU*, vol. XIX, p. 183-184, par. 95.

[65] Voir mémoire de la Roumanie (MR), annexe 27.

peut relever en outre que ces îles ont des superficies très considérables de, respectivement, 4,6 km², 25 km² et 62 km². Voilà de vraies îles côtières.

[Fin de la projection n° 8. Projection n° 9 : l'île des Serpents comme circonstance (non) pertinente.]

27. Que faire alors de cette petite formation insulaire isolée et inhospitalière ? Une circonstance pertinente sans doute, mais qui ne devrait guère avoir d'incidence sur le tracé de la frontière établie au départ sans la prendre en considération. De deux choses l'une, Monsieur le président :

— ou bien, comme nous le croyons, l'espace maritime lui revenant a été fixé en 1949 et il n'y a pas lieu d'y revenir : *pacta sunt servanda* ; dans ce cas, l'arc de 12 milles tracé autour de l'île des Serpents doit ensuite rejoindre la ligne d'équidistance comme le professeur Lowe l'a indiqué tout à l'heure ;

— ou bien l'Ukraine maintient — et la Cour accepte — que cette délimitation s'est arrêtée au point F (ou A dans la nomenclature ukrainienne) et, dans cette seconde hypothèse, pour reprendre la formule célèbre du Commander Kennedy lors de la première Conférence des Nations Unies sur le droit de la mer, il faut la traiter selon ses mérites[66] *(on its merits)*.

28. Malheureusement pour la Partie ukrainienne, les «mérites» de l'île des Serpents sont fort limités et il n'y a aucune raison d'infléchir de manière importante la ligne d'équidistance tracée initialement pour tenir compte de cet «élément parasite»[67] somme toute fort secondaire. Vous apercevez sur l'écran, Messieurs les juges, la ligne d'équidistance tracée, comme il se doit, *sans* l'île des Serpents. Si on doit traiter celle-ci «selon ses mérites», tout à fait indépendamment de la question de savoir s'il s'agit ou non d'un rocher, un arc de cercle de 12 milles autour de l'île paraît fort excessif et il serait sans doute plus logique et plus équitable de ne lui accorder vers le sud qu'une mer territoriale de six milles marins. Toutefois, puisque délimitation conventionnelle il y a eu, c'est bien une mer territoriale délimitée par un arc de cercle de 12 milles qu'il convient de lui reconnaître. C'est faire amplement justice à cette circonstance à peine pertinente que constitue l'île des Serpents.

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[66] Voir Nations Unies, *Documents officiels de l'Assemblée générale*, vol. VI, Quatrième Commission, 32e séance doc. A/CONF.13/42, p. 92, par. 3.

[67] Cf. L. Lucchini et M. Voelckel, *Droit de la mer*, tome 2, vol. 1, *Délimitation*, Pedone, Paris, 1996, p. 259.

[Fin de la projection n° 9.]

Mr. President, since I probably still have 15 minutes to go and since the second part of our presentation would be shorter than the remaining time, it might be the right time to have a break.

The VICE-PRESIDENT, Acting President: Thank you very much, Professor Pellet. I think this would be the right time to take a short break.

The Court adjourned from 11.20 to 11.35 a.m.

The VICE-PRESIDENT, Acting President: Please be seated. Professor Pellet, would you kindly continue with your speech.

M. PELLET : Thank you very much.

4. La disparité entre les longueurs des côtes des Parties

29. J'en viens maintenant, Monsieur le président, à l'antienne obsessionnelle de nos amis ukrainiens : la proportionnalité, qui semble constituer leur indépassable horizon.

30. Qu'elle ait un rôle à jouer en matière de délimitation maritime, nul n'en disconvient. Mais :

— elle ne saurait intervenir durant la première phase, celle de la construction de la ligne d'équidistance ;

— elle est une circonstance pertinente parmi d'autres (et, à vrai dire, elle n'entre en lice au second stade, celui dont je suis en train de parler, que tout à fait exceptionnellement) ; et

— d'une manière générale, ce n'est qu'à l'occasion de la troisième étape qu'elle intervient — parfois, pas toujours — pour tester le caractère équitable de la frontière une fois la ligne d'équidistance éventuellement ajustée en fonction des circonstances pertinentes de l'espèce.

Je ne m'intéresse pour l'instant qu'au premier de ces deux aspects : le cas où la disparité entre les côtes pertinentes des deux Etats est tellement manifeste qu'elle peut apparaître comme une circonstance conduisant à ajuster la ligne d'équidistance au stade II. Mon collègue et ami Vaughan Lowe traitera du test de proportionnalité dans un instant.

31. Une remarque préalable cependant — qui concerne non pas la deuxième, mais la première étape. Contrairement à ce qu'ils professent parfois du bout des lèvres[68], les avocats de l'Ukraine utilisent bel et bien la différence entre la longueur des côtes non seulement à la deuxième étape de leur raisonnement, puis à la troisième, mais aussi à la première, celle de la construction initiale de la ligne d'équidistance. Et lors de la phase écrite, ce n'est que sur la base de la proportionnalité que la ligne d'équidistance avait été construite. Lors de la phase orale, ceci est à nouveau apparu avec une netteté particulière dans la plaidoirie de M. Bundy du 11 septembre : alors qu'il était censé critiquer la ligne d'équidistance retenue par la Roumanie, il n'a eu de cesse d'introduire la disparité marquée qui existerait entre les longueurs des côtes des Parties[69]. Or, décidément, Monsieur le président, la proportionnalité ne saurait tenir lieu de méthode de délimitation : «l'utilisation de la proportionnalité comme véritable méthode ne trouve aucun appui dans la pratique des Etats ou leurs prises de position publiques … non plus que dans la jurisprudence» [«the use of proportionality as a method in its own right is wanting of support in the practice of States, in the public expression of their views …, or in the jurisprudence»] (*Plateau continental (Jamahiriya arabe libyenne/Malte), arrêt, C.I.J. Recueil 1985*, p. 45-46, par. 58 ; voir aussi, par exemple, *Délimitation de la frontière maritime dans la région du golfe du Maine (Canada/Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 1984*, p. 323, par. 185)[70], et ceci demeure vrai.

32. Quant au recours à la proportionnalité (ou «disproportionnalité») en tant que circonstance pertinente, il est sans doute exagéré d'affirmer, comme l'a fait le professeur Quéneudec, qu'«une inégalité flagrante ou même une simple disparité des longueurs côtières a été regardée à plusieurs reprises comme une circonstance appelant une modification plus ou moins importante de la ligne d'équidistance»[71]. L'exagération est double, Monsieur le président ; contrairement à cette surprenante allégation,

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[68] Voir par exemple CR 2008/24, p. 29, par. 42, ou p. 35, par. 67 (Bundy).

[69] CR 2008/28, p. 44, par. 45 ; p. 46, par. 49 ; p. 50, par. 67 (Bundy).

[70] Sentence arbitrale du 17 décembre 1999, *Sentence du Tribunal arbitral rendue au terme de la seconde étape de la procédure entre l'Erythrée et la République du Yémen (Délimitation maritime), RSANU* XXII, p. 372, par. 165 ; sentence arbitrale du 26 mars 2002, *Arbitrage entre la province de Terre-Neuve et du Labrador et la province de la Nouvelle-Ecosse*, par. 5.17.

[71] CR 2008/26, p. 18, par. 77 (Quéneudec).

1) ni la Cour, ni aucun tribunal arbitral n'a jamais procédé à un ajustement de la ligne d'équidistance dans l'hypothèse d'une «simple disparité» ; la jurisprudence sur ce point est constante et bien établie : pour constituer une circonstance pertinente, la disparité en question doit être «substantielle» (*Ibid.*, ; ou *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria; Guinée équatoriale (intervenant)), arrêt, C.I.J. Recueil 2002*, p. 446, par. 301), «forte» (*Plateau continental (Jamahiriya arabe libyenne/Malte), arrêt, C.I.J. Recueil 1985*, p. 50, par. 67), et seule une «très grande différence de longueurs des côtes pertinentes» (*ibid.*, p. 49, par. 66 ; voir aussi *Délimitation maritime dans la région située entre le Groenland et Jan Mayen (Danemark c. Norvège), arrêt, C.I.J. Recueil 1993*, p. 67, par. 65) peut justifier un ajustement de la ligne d'équidistance ; en conséquence,
2) il y est, à vrai dire, procédé très exceptionnellement.

33. M. Quéneudec en a trouvé trois exemples : les affaires du *Golfe de Maine*, *Libye/Malte* et de *Jan Mayen*[72] ; comme je suis un adversaire honnête et scrupuleux, je note qu'il a oublié le quatrième (et seul autre) exemple d'un ajustement effectué sur la base du principe de proportionnalité : la sentence arbitrale de 2006 dans l'affaire *Barbade/Trinité-et-Tobago*. Aucun de ces quatre *uniques* précédents — dont deux seulement nous intéressent directement pour l'instant — n'est comparable à notre affaire :

— Très clairement, dans deux au moins de ces quatre cas, la disparité entre la longueur des côtes des Parties a joué un rôle correcteur non pas au stade des circonstances pertinentes, mais à celui du test final (c'est le cas s'agissant de *Libye/Malte,* d'une part (*Plateau continental (Jamahiriya arabe libyenne/Malte), arrêt, C.I.J. Recueil 1985*, p. 45-46, par. 58-59), et de *Barbade et Trinité-et-Tobago*, d'autre part[73]).

— On ne peut pas tenir compte de ces deux affaires à ce stade car, malgré l'amalgame que semblent vouloir faire nos adversaires, les paramètres à prendre en considération sont différents :

> «L'étude de la comparabilité ou non-comparabilité des longueurs de côte est un élément du processus par lequel une limite équitable est obtenue en partant d'une ligne médiane initiale ; le critère d'une proportionnalité raisonnable de ces longueurs est en

[72] CR 2008/26, p. 18, par. 77 (Quéneudec).

[73] Sentence arbitrale du 11 avril 2006, *Barbade et Trinité-et-Tobago*, par. 376.

> revanche un moyen qui peut être utilisé pour s'assurer de l'équité d'une ligne quelconque, indépendamment de la méthode utilisée pour aboutir à cette ligne.» (*Plateau continental (Jamahiriya arabe libyenne/Malte), arrêt, C.I.J. Recueil 1985*, p. 49, par. 66.)

Au stade qui nous intéresse, c'est la longueur respective des *côtes* des Parties qui importe.

[Projection n° 10 : golfe du Maine.]

— Dans *Golfe du Maine*, la Chambre a pris en compte une différence de 1,38 à 1 dans la longueur des côtes des Parties pour procéder à un ajustement arrivant à un *ratio* de 1 à 1 — ce qui est une exception totalement isolée, tous les arrêts et toutes les sentences arbitrales se plaisant au contraire à souligner (qu'il s'agisse de la phase deux ou de la phase trois) que

> «quand une forte disparité est à retenir comme circonstance pertinente, une définition rigoureuse n'est pas indispensable et elle n'est d'ailleurs pas appropriée. Si la disparité n'apparaît qu'après définition et comparaison minutieuses des côtes, il est par hypothèse improbable qu'elle soit d'une ampleur telle qu'on puisse lui attribuer un poids quelconque comme circonstance pertinente.» (*Ibid.*, p. 49, par. 67.)

Ce qui peut se lire comme un désaveu de la méthode retenue dans *Golfe du Maine*. Au surplus, comme le montre la projection en cours, la translation de la ligne effectuée par la Chambre — qui ne concerne qu'un secteur limité de la frontière maritime qu'elle devait établir, a été assez réduite, comme le montre le croquis ; il en irait très différemment dans notre affaire si la Cour donnait une suite favorable aux prétentions de la Partie ukrainienne. Monsieur le président, je ne suis pas sûr que l'arrêt de 1985 mérite toutes les critiques dont mon collègue James Crawford l'a accablé hier, mais ce qui est sûr, et il l'a fort bien montré, est que la situation du «golfe d'Ukraine» — si golfe il y a — n'a strictement rien à voir avec celle du golfe du Maine — et les avocats de l'Ukraine, qui se déclarent si attachés au caractère spécifique, propre à chaque situation devraient, je pense, être sensibles à ces différences qui sautent aux yeux…

[Fin de la projection n° 10.]

— S'agissant de *Jan Mayen*, la disproportion était de 1 à 9,1 ou 9,2, selon les calculs (*Délimitation maritime dans la région située entre le Groenland et Jan Mayen (Danemark c. Norvège), arrêt, C.I.J. Recueil 1993*, p. 65, par. 61) ; étant donné son importance, la Cour a estimé être en présence de l'une de ces situations

> «dans lesquelles le rapport existant entre la longueur des côtes pertinentes et les surfaces maritimes qu'elles génèrent par application de la méthode de l'équidistance

est si disproportionné qu'il a été jugé nécessaire de tenir compte de cette circonstance pour parvenir à une solution équitable» (*ibid.*, p. 67, par. 65).

Mais cet ajustement, dicté par une disparité vraiment très considérable entre les côtes des Parties (et sans commune mesure avec celle existant dans notre espèce, quels que soient les côtes de référence et le mode de calcul retenu), c'est cette énorme disparité qui a conduit la Cour à effectuer une translation de la ligne d'équidistance qui est très loin de refléter le rapport entre les côtes du Groenland, d'une part, de Jan Mayen, d'autre part : la surface maritime allouée à Jan Mayen demeure hors de toute proportion avec l'énorme différence qui existe entre les côtes des deux territoires.

— Par contraste, dans l'affaire du *Plateau continental* entre la Tunisie et la Libye, la Cour a considéré que le «résultat, qui [tenait] compte de toutes les circonstances pertinentes, paraît satisfaire au critère de proportionnalité en tant qu'aspect de l'équité», bien qu'il traduisît un rapport des zones maritimes revenant aux Parties de 1 à 1,5 pour un rapport des côtes de 1 à 2,23[74] ; de même dans l'affaire entre *la province de Terre-Neuve et du Labrador et la province de la Nouvelle-Ecosse*, le Tribunal arbitral a estimé que des rapports de côtes de 52 et 48 % rapportés à des rapports de zones de 39 et 61 % ou de 33 et 67 % pour les côtes comparés à 38 et 62 % pour les zones n'étaient pas «révélateurs d'une disproportionnalité stupéfiante»[75].

34. Monsieur le président, malgré l'enthousiasme manifesté par nos contradicteurs pour la proportionnalité, il n'y a pas grand-chose à tirer de tout ceci. Comme le disent à la fois Shakespeare et … Daniel Müller[76], tout cela fait «beaucoup de bruit pour rien»!

— il est extrêmement rare que la disparité des côtes des Parties intervienne à titre de «circonstance pertinente» en matière de délimitation maritime;

— lorsque c'est le cas, la Cour et les tribunaux arbitraux ont toujours considéré que des marges considérables étaient parfaitement tolérables à cet égard (à l'exception de la Chambre de la Cour dans l'affaire du *Golfe du Maine* ; mais il s'agit d'un précédent un peu «limite» et qui, pour le reste, ne présente, de toutes façons aucune similitude avec notre affaire) ; et,

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[74] Arrêt du 24 février 1982, *Rec.* 1982, p. 91, par. 131.

[75] S.A., 26 mars 2002, *Arbitrage entre la province de Terre-Neuve et du Labrador et la province de la Nouvelle-Ecosse*, par. 5.18.

[76] CR 2008/30, 15 septembre 2008, p. 66, par. 2 (Müller).

— en la présente espèce, aucune disparité manifeste et extrême de la longueur des côtes respectives Parties n'existe, et ceci quel que soit le mode de calcul retenu — le professeur Vaughan Lowe sera plus spécifique à cet égard lorsqu'il va présenter, dans un instant, le fameux «test de proportionnalité»; il ne nous a pas paru nécessaire de répéter deux fois l'énoncé de ces précisions.

[Projection n° 10 *bis* : la part de la Roumanie I (reprise de la projection n° 2).]

35. Mais, surtout, le plus important est ailleurs, Monsieur le président : la proportionnalité n'est, en tout état de cause, que l'une des circonstances pertinentes qui pourraient éventuellement, si les conditions étaient réunies — *quod non*, être prises en considération pour infléchir, le cas échéant, et en les prenant toutes en compte, la ligne d'équidistance tracée par la Roumanie conformément au droit international, afin de parvenir à un résultat équitable. Or toutes les circonstances de l'espèce concourent à la même conclusion : cette ligne n'appelle aucune correction ; le résultat auquel elle conduit *est* équitable comme le montre la carte qui est, à nouveau projetée à l'écran.

[Projection n° 10 *ter* : la part de la Roumanie II (reprise de la projection n° 3).]

36. La ligne ukrainienne qui repose sur une ligne d'équidistance construite sur des bases arbitraires et qui a été retouchée au nom de circonstances non pertinentes, conduit, elle, à un résultat inéquitable.

37. Je ne doute pas, Monsieur le président, que la démonstration à laquelle va procéder mon excellent collègue, le professeur Vaughan Lowe, au sujet du test de proportionnalité «de troisième phase» confirmera pleinement cette conclusion. Et je vous prie de bien vouloir lui donner à nouveau la parole. Merci infiniment, Messieurs de la Cour, pour l'attention que vous m'avez prêtée.

[Fin de la projection.]

The VICE-PRESIDENT, Acting President: Thank you, Professor Pellet, for your speech. I now call on Professor Vaughan Lowe.

Mr. LOWE:

IX. CHECKING EQUITABLENESS; CONCLUSION

1. Thank you, Mr. President, Members of the Court: the end is in sight! I shall respond to Ukraine's submissions concerning the equitableness of our respective proposals and briefly summarize our position and the key points that still divide the Parties.

Judge Oxman's second question

2. Before I do so it is convenient to respond to Judge Oxman's second question, which related to the relevance of Articles 33 and 303 on the contiguous zone, and of Article 8 of the 2001 Convention on the Protection of the Underwater Cultural Heritage: and this question was put only to Romania.

3. Romania introduced a contiguous zone law in 1990, and it notified its extent in 1997 by a map that was introduced into the pleadings by Ukraine[77]. [Graphic: tab 1] That map, now on the screen, is the map which we wished to show you yesterday. 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. Further out, the contiguous zone is shaded in green: and at the top of the 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 the arc around Serpents' Island, and that the lateral limit of the shading indicating the contiguous zone also follows an arc around the island. This is in full conformity with the 1949 procès-verbaux. Ukraine has never challenged that map, and it must be considered to have accepted the claim that it depicts — which is, of course, quite irreconcilable with the claim line that Ukraine advances here. [End graphic]

4. Neither Party has put forward a case which refers to a contiguous zone claim extending beyond the limits of the EEZ claim that it makes. Indeed, the exclusive nature of the competences established by Article 303 of the Law of the Sea Convention, and by Article 8 of the 2001 Convention on the Protection of the Underwater Cultural Heritage, makes it difficult to see

[77] CMU, Ann. 41.

how it would be possible for one State's contiguous zone to overlap with the contiguous zone or EEZ of another State.

5. Romania's contiguous zone will therefore consist of the waters lying between 12 and 24 miles from its baseline, on the Romanian side of the boundary that the Court will draw.

6. We recognize that Article 121, paragraph 3, precludes only claims to an EEZ or continental shelf off the islands to which it applies. It does not preclude a claim to a contiguous zone. But that causes no difficulties in the present case, because neither Party has suggested that the limits of its contiguous zone should be any different from the limits of the first 12 miles of its EEZ, either now or in the future: and Ukraine has, at present, no legislation on the EEZ.

7. Moreover, as the Court is by now well aware, Romania considers that an all-purpose maritime boundary was fixed in 1949. And that boundary would apply equally to the contiguous zone. Romania has also submitted that under contemporary delimitation practice Serpents' Island would in any event certainly get no more than a 12-mile territorial sea, and would probably get much less.

Equitableness of the line

8. Let me turn now to the question of the check on the equitableness of the line. Throughout its oral pleadings Ukraine insisted that this is not a case about Serpents' Island[78], and that Romania was attempting to impose an artificial focus on the case so as to divert attention from what are truly the key features of the case.

9. My first point is that the attention that Romania has paid to Serpents' Island is no more than a reflection of its significance in this case. [Graphic] We have shown you what the equidistance line drawn without Serpents' Island looks like. It is a fact that Romania believes that the provisional equidistance line must be drawn *without using* Serpents' Island as a base point, and that Ukraine thinks it should be drawn *using* Serpents' Island as a base point: and it is this difference between the Parties which produces the greatest difference in their respective provisional equidistance lines.

[78]See e.g. CR 2008/24, p. 15, paras 22 and 23 (Vassylenko); CR 2008/28, p. 48, para. 60 (Bundy)

10. Romania has given Serpents' Island so much attention because so much hangs on the question of its legal status and effect. We think that Ukraine in fact shares this view, and that this is the explanation for its attempts to create and artificially sustain a small settlement on the island. [End graphic]

11. Ukraine may say that this view is misconceived, because it focuses upon the stage one drawing of the provisional equidistance line, when the overwhelmingly significant task is the stage two adjustment to take account of what it calls the predominant characteristics in the general area of the delimitation. Those characteristics, it says, are the fact that the area, first, is like a gulf, three sides of which are Ukrainian coast, and second, that Ukraine's coast is much longer that Romania's coast.

12. Similarly, Ukraine stresses that you should take account of these characteristics at stage two, and not leave them until stage three where they would perform the different role of a check upon the equitableness of the adjusted delimitation line.

The importance of a stage-by-stage approach

13. Romania attaches much importance to the proper application of the stage-by-stage approach. It might be thought that if one is to draw a provisional equidistance line, and then check it against coastal lengths and coastal areas for its equitableness, the order in which one applies the various tests does not matter much — that it all amounts to the same thing in the end. In Romania's submission, that is not so. The correct application of the successive stages of delimitation is more than pedantry, and more even than the matter of following the established practice and discipline in this field. It can actually affect the outcome.

14. Let me explain briefly. The choice of the provisional equidistance line is of great significance. The Parties are agreed that the stage three equitableness test is *not* a matter of correcting the provisional equidistance line so as to deliver to each Party a share of the relevant area that is mathematically proportionate to its share of the combined relevant coast. The requirement is not to achieve proportionality, but rather to avoid gross disproportionality.

15. We have referred to cases such as *Eritrea/Yemen* in which the Tribunal found that the coastal lengths were in a ratio of 1.31:1, and the marine spaces in a ratio of 1.09:1, and that this was

not disproportionate[79]. There one State received about one fifth less of the area than it might have expected under strict proportionality. But consider how this works in practice.

[Graphic]

16. Assume that the relevant area is 150 miles across, and that a provisional equidistance line, adjusted to take account of coastal lengths and other special circumstances — one might think of a configuration similar to *Jan Mayen* — is set along a line 40 miles off State A, and 110 miles off State B. The proportionality test is applied, and it shows that a strict proportionality of coastal lengths and coastal areas would place the line 50 miles off State A. The tribunal sees that State A has been given around one fifth less of the area than it might have expected under strict proportionality. It follows *Eritrea/Yemen* and says that this is not grossly disproportionate, and it upholds the provisional adjusted equidistance line.

17. But if the adjusted provisional equidistance line had first been placed not 40, but 70 miles off State A, so that State B got 80 miles, it could be said that State B has been given around one fifth less of the area — 80 rather than 100 miles — that it might have expected under strict proportionality. Here, too, the tribunal could follow *Eritrea/Yemen* and say that this is not grossly disproportionate and upholds the adjusted provisional equidistance line.

18. The proportionality test can consecrate very different lines, regarding each of them as producing a result within the bounds of equitable proportionality. But the results are obviously not the same: here, one line gives State A 40 miles, the other 70 miles — 75 per cent more than the first. That is why we say that it is essential to get the provisional equidistance line right in the first place. The order of the stages is critical. And it is also a useful reminder of the perils of relying too heavily upon proportionality as an indication of fairness. [End graphic]

19. It is for these reasons that Romania has paid close attention to the proper construction of the provisional equidistance line, and to the three-stage approach to the delimitation process.

Ukraine's argument on the disparity in coastal lengths

20. Ukraine's strategy of placing relative coastal lengths in centre stage is perfectly understandable. Each Party is putting its strongest case to the Court: that is how litigation works.

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[79] *Eritrea/Yemen* arbitration, Second Stage: Maritime Delimitation, award dated 17 Dec. 1999, para. 168.

But there is a risk that the insistence on relative coastal lengths may distract attention from the need to follow the correct procedure to prepare the ground for the proper application of the proportionality test.

21. There is a risk, which Ukraine has perhaps not entirely avoided, that proportionality of coastal lengths and sea areas will slide into the role of an independent method of adjusting the provisional equidistance line, and of establishing the final delimitation line. And that is precisely what it is *not* supposed to do: "the principle of proportionality . . . is not an independent mode or principle of delimitation, but rather a test of the equitableness of a delimitation arrived at by some other means"[80].

22. Ukraine seems to suggest that because it has a long coast the provisional equidistance line should be adjusted to give it a greater sea area. But why should that be so? [Graphic] The graphic on the screen shows a reasonably straight coastline with States of different coastal lengths. And a glance at it is enough to see that there is no basis here for an argument that the provisional equidistance lines should be adjusted so as to reflect the very different coastal lengths of the States. In the case of adjacent States, it is hard to see what reason there could be for regarding relative coastal lengths as a special circumstance. [End graphic]

23. Ukraine's response seems to be that we are ignoring two overwhelmingly important factors: the uniqueness of the coastal configuration[81], and the fact that Ukraine surrounds the delimitation area on three sides[82].

24. The uniqueness we concede: it is as indisputable as it is unhelpful. There is a lapel badge which says: "Remember. You're unique; just like everybody else." Each delimitation is different: but the point of having legal principles is to inject an element of consistency and reasoned justice into the approach to this important task.

[Graphic]

25. As for the three-sided argument: first, it is not really true. As we have shown you, Romania's coast south of Sacalin projects onto an area that is *not* bounded by the Ukrainian coast,

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[80] *Eritrea/Yemen* arbitration, Second Stage: Maritime Delimitation, award dated 17 Dec. 1999, para. 165.

[81] CR 2008/28, p. 50, para. 66 (Bundy).

[82] CR 2008/28, p. 52, para. 77 (Bundy); CR 2008/29, p. 38, para. 79 (Quéneudec).

although Ukraine has an interest in it by virtue of the southerly projection from its coast around Cape Sarych. [End graphic]

26. And second, there is a point which is smothered by the confidence and vigour with which my colleague and friend Mr. Bundy trumpets the three-side argument. So what? To take a paradigmatic case, if State A has half of one side — [Have you lost the —] With your indulgence, Mr. President, all the linguistic finesse that I could muster would not be an adequate substitute for this graphic.

The VICE-PRESIDENT, Acting President: Take your time.

Mr. LOWE: [Graphic] To take a paradigmatic case, if State A has half of one side of a gulf, and State B has two-and-a-half sides, what Mr. Bundy would call three sides, the equidistance line would give State B three quarters, and State A one quarter, of the area of the gulf. What is wrong with that? Ukraine would no doubt say that it is wrong because the areas are in a ratio of 3:1, but the coastal lengths are in a ratio of 5:1. And that is precisely my point. If one thinks that the disparity in ratios is excessive, on what other ground than coastal length might one object? The "three sides" argument is a repetition of the coastal lengths argument — a cucumber, as my Agent would call it. [End graphic]

27. The Court has made the clear distinction between the stage two application and the stage three application of a reference to the disparity in coastal lengths. Professor Quéneudec cites the Court's 1985 *Libya/Malta* decision[83]. As he points out, the Court said there that a disparity in coastal lengths can indeed be relevant both at stage two, as a reason for adjusting the provisional equidistance line, and in stage three in the context of the proportionality test.

28. It is in the paragraph which follows that which Professor Quéneudec quoted to the Court that the Court explained this point, in a manner that bears directly upon this case. It said:

> "The question as to which coasts of the two States concerned should be taken into account is clearly one which has eventually to be answered with some degree of precision in the context of the test of proportionality as a verification of the equity of the result. Such a test would be meaningless in the absence of a precise definition of the 'relevant coasts' and the 'relevant area', of the kind which the Court carried out in the *Tunisia/Libya* case. Where a marked disparity requires to be taken into account as

[83]CR 2008/29, p. 40, para. 89 (Quéneudec), citing *I.C.J. Reports 1985*, p. 49, para. 66.

> a relevant circumstance, however, this rigorous definition is not essential and indeed not appropriate. If the disparity in question only emerges after scrupulous definition and comparison of coasts, it is *ex hypothesi* unlikely to be of such extent as to carry weight as a relevant circumstance." (*I.C.J. Reports 1985*, p. 49, para. 67.)

29. In *Libya/Malta* the coastal ratio was 8:1. In this case the coastal ratio is 1.4:1 in favour of Ukraine, and the relevant coastal area is divided in a ratio of 1.7:1 in favour of Ukraine. The figures are in paragraph 12.6 of our Memorial. The disparity in coastal lengths only becomes clear when one measures the ratios down to one decimal place.

30. Ukraine's attempt to cast Romania in the role of Malta, and itself in the role of Libya is, we submit, unsustainable. If relative coastal lengths were to be regarded as a factor requiring the adjustment of the provisional equidistance line in cases such as this now before the Court, that would elevate the proportionality issue into the dominant principle for maritime delimitation — into the dominant *method* of maritime delimitation — and it would contradict 50 years of international jurisprudence.

31. Plainly, the disparity in coastal lengths in this case is a matter, not for the stage two adjustment of the provisional equidistance line but for the stage three proportionality test.

32. Ukraine says that we take this view because we ignore its northern coast. Professor Crawford touched yesterday on the question of relevant coasts, but it is central to the question of proportionality, and there is a little more that needs to be said about it.

33. Once we venture beyond the mantra of the land dominating the sea, the Parties have fundamentally different conceptions of the relationship between the coast and the sea. [Graphic] Ukraine's view — and I hope that I characterize it both fairly and accurately — is that any portion of coastal land generates an entitlement to an EEZ within 200 miles of any part of that portion of land[84]. Professor Crawford showed you Mr. Bundy's graphic showing the northern coast generating maritime entitlements for Ukraine like an X-ray, passing through solid land masses in the Tarkhankut peninsula to generate maritime zones on the other side of that land mass. It is a formidable feat [85].

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[84]See, e.g., CR 2008/24, p. 23, para. 18 (Bundy).

[85]CR 2008/30, p. 31, paras. 38-39 (Crawford).

34. Professor Crawford also showed you what is wrong with that approach[86]. [Add one wave, then a second wave, etc. — slowly] You can follow the development. If there were only a 6- or 12-mile zone there would be little overlap. Only at the land boundary would delimitation be necessary. It is only when the coasts generate wider zones that an acute problem of delimitation arises. It is a truism, but worth seeing played out on the screen: a delimitation problem only arises when the available space does not permit each segment of coast to generate its own entitlement to a maritime zone without overlapping with an area generated by another coast.

35. And the point that is crucial in this case is that Ukraine's northern coast is not squeezed out by Romania's coasts. Its maritime zones do not overlap with Romania's maritime zones. They overlap with *Ukraine's* maritime zones, and it is *Ukraine's* western and eastern coasts which squeeze out, or eclipse, the effect of Ukraine's northern coast. [End graphic]

36. The point can be made in a different way. Take the position illustrated on the screen. [Graphic] On this basis, waters lying immediately adjacent to the low-water mark of State A and within State A's territorial sea, 198 miles west of the land boundary between State A and State B — point 1 on the graphic — can be said, according to Ukraine, to be "generated by" the coast of State B. Of course, they can also be said to be generated by the coast of State A; and there is therefore a need to delimit the maritime zones of States A and B.

37. We are, no doubt, agreed that in this paradigmatic case the proper delimitation line is a perpendicular, an equidistance line, drawn at the land boundary between A and B. But though we may agree on the result, Romania certainly does not accept the oversimplified rationalization proposed by Ukraine.

38. The difference between us is evident if one looks at the graphic and asks, *which* coast generates point 1? Ukraine would say, both the coasts of State A and the coast of State B — or, perhaps, more precisely, the coasts of State A and of State B in so far as each lies within 200 miles of point 1. But in our view, that response is unhelpful.

39. Naturally, we accept that if State A did not exist, State B's coast would generate the maritime zone at point 1; and that if State B did not exist, State A's coast would do so. We can

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[86]CR 2008/30, p. 31, para. 40 (Crawford).

see, too, that as a table-top exercise in delimitation, it can make geometrical sense to draw the radii and semicircles as they are drawn in the graphic in order to construct the line on the map. But the cartographical construction of the line and the legal analysis which precedes it are tasks of a very different character.

40. The legal analysis must be consistent with rules of international law, and reflect the principles and concepts underlying the law in this area. The cartographer, on the other hand, can properly take a geometrical approach; and that essential difference in focus is why Ukraine's approach — perfectly proper as a tool for the cartographer — is not much help for the lawyer, as a step in the legal analysis prior to the geometrical construction of the line. And this is where we differ. [End graphic]

41. Let me recall those fundamental legal principles. In the first round we referred to the passage from the Judgment in the *North Sea Continental Shelf* cases in which the Court spoke of the necessity for "applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field . . ." (*I. C.J. Reports 1969*, p. 47, para. 85).

42. That reference was no mere adornment to our pleading. The need to approach the task of delimitation, "in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf", and now of the EEZ, is of primordial importance. The central underlying idea is that of "prolongation": the idea that each segment of coast must be allowed, as far as possible, to generate its own maritime zones; the idea that maritime zones are prolongations, extensions, projections, of the adjacent land territory. In our submission, Ukraine has lost sight of those fundamental principles in the presentation of its case on relevant coasts.

43. In Romania's view, one must ask, not what segments of coasts *could* generate an entitlement to a maritime zone at any given point in the waters adjacent to the two States, but rather, what segments of coast *do* generate the entitlement at any given point. [Graphic] As we have shown you, it is not the northern coast that generates Ukraine's entitlement to waters that overlap with waters to which Romania has an entitlement. It is segments 1, 2 and 8 of Ukraine's coast that generate that entitlement. That was why we excluded the northern coast, and how we

arrived at the ratio for coasts of 1:1.4 in favour of Ukraine, and for maritime areas of 1:1.7 in favour of Ukraine. [End graphic]

44. [Graphic] That is also why we object to the exclusion by Ukraine of the "eastern triangle", south of Cape Sarych. Romania's claim there is obviously generated by its coast south of Sacalin[87]. Far from fizzling out somewhere to the west of Cape Sarych, the claim extends across the Black Sea. Romania looks, at this point, straight across to Russia and Georgia. Ukraine wishes to see itself as omnipresent in the region; but there are areas where it is not the only, or even the predominant, presence. It has an interest in these waters between Romania and Russia; and so, of course, does Romania. Beyond Romania's 200-mile limit the area remains an area of overlapping entitlements, even where it is not an area of overlapping claims. It is a part of the relevant area which you are asked to delimit. [End graphic]

45. [Graphic] Even if the northern coast of Ukraine *were* to be taken into account, with the exception — as is shown on this graphic — of the Karkanitska gulf, which cannot possibly be said to generate areas overlapping with Romania's maritime entitlement, the ratio of coastal lengths would still only be 1:2.31, and the ratio of maritime areas, using Romania's maritime delimitation line, would be 1:2.01, both in favour of Ukraine. Following Ukraine's model, these ratios are calculated taking into account the lengths of the coasts, not of their baselines as we did in the written Pleadings, and this explains the slight difference in areas. This, we submit, is well within the range of "not disproportionate" results; and it confirms that the Romanian delimitation line achieves an equitable result. [End graphic]

46. [Graphic] Ukraine says that our line cuts off its coast; as Professor Pellet said, we do not accept that. We say that Ukraine's line cuts off Romania's coast. There is no accepted mathematical index of cut-off or occlusion; and I think that I can best assist the Court on this point by setting out side-by-side maps showing the alleged "cut-offs" of each side's delimitation line, and leaving it to the Court to decide whether either of the claims does result in a cut-off. [End graphic]

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[87] CR 2008/30, p. 32, para. 45 (Crawford).

47. There are, in Romania's view, no special circumstances of a kind which would warrant any principled adjustment of the provisional equidistance line. Mr. Bundy made a rather half-hearted attempt to say that it is Ukraine which polices these areas, and that this gives it a particular interest. But if the waters were acknowledged to be Romanian, it is Romania that would be policing them, to the extent that activity in that area of the sea requires policing.

48. There is a further point. Romania submits that equitableness is also to be appraised by reference to the way in which the delimitation solution gives effect to, and does not undermine, pre-existent agreements between the Parties. I am not referring to the 1949 procès-verbaux — which have been discussed at length and whose effects are crystal clear. But last week counsel for Ukraine embarked upon a complicated interpretation of a provision of the 2003 Border Régime Treaty[88], to which Professor Crawford referred briefly yesterday[89]. The provision in question, Article 1 of the 2003 Treaty, reads as follows: "The territorial seas of the Contracting Parties measured from the baselines shall permanently have, at the meeting point of their outer limits, the width of 12 maritime miles."

49. [Graphic] Under this provision, the Parties envisaged that, should it be necessary for the position of the final point to be moved because of the extension of Sulina dyke, new procès-verbaux would be concluded. Thus, the two Parties agreed that in future it might be necessary that the final point be moved to preserve the breadth of Romania's territorial sea.

50. But the only possible way in which this could be done — given that the final point would also have to be 12 miles from Serpents' Island — would be to move it around the 12-nautical-mile arc which surrounds Serpents' Island.

51. This would be perfectly possible if the maritime boundary follows the 12-nautical-mile arc around Serpents' Island, as Romania submits. But it would be impossible if Ukraine's delimitation line were adopted. With Ukraine's proposed line, an extension to the Romanian territorial sea of the kind provided for in the 2003 Treaty would overlap with the Ukrainian EEZ or continental shelf. [End graphic]

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[88]CR 2008/29, p. 34, para. 46 (Quéneudec).

[89]CR 2008/30, p. 50, paras. 25-26 (Crawford).

52. So we submit that the desirability of upholding, rather than undermining, the 2003 agreement is a further factor reinforcing the equitable result achieved by Romania's proposed line.

53. And for these reasons, Romania submits that its delimitation line is in full conformity with international law.

Romania's proposed delimitation line

[Graphic]

54. Let me conclude by summarizing Romania's proposed delimitation line.

55. In the sector of adjacent coasts, let me start in the east, at point T, where the further course of the line southwards becomes controlled by base points on the opposite coasts and the line ceases to be an adjacent coast delimitation line and becomes an opposite coast delimitation line.

56. Moving west from point T, Romania has used a provisional equidistance line drawn from the mainland coasts. In fact, the provisional equidistance line that we have used in this case is drawn not from the tip of Sulina dyke but from the lighthouse on the naturally-formed island that is almost at the end of the dyke. The difference, which came to light only recently when Romania obtained computerized cartographic software, means that the mainland equidistance line that we have used is slightly south of the true equidistance line, to Ukraine's slight advantage.

57. Serpents' Island is not used as a base point because its maritime entitlement was fixed by agreement in 1949, and it would in any event not generate a larger zone under established delimitation principles and, furthermore, Article 121 (3) of the Law of the Sea Convention limits it to a 12-nautical-mile zone.

58. In the west, the provisional equidistance line encounters the 12-mile zone drawn by agreement around Serpents' Island in 1949. Romania maintains that it was agreed that the maritime boundary between Romania and then the USSR was fixed right round to a point at the east of the 12-mile zone, leaving Serpents' Island on the Soviet side of the boundary. That point is labelled point X. The shortest line between point X and the provisional equidistance line would follow a course practically impossible to police. It would involve a sliver from point X down to the equidistance line, and Romania has therefore suggested a pragmatic adjustment — not in order to

give one State more or less maritime area, but simply to make the implementation of the line workable.

59. If there had been no delimitation in 1949, Romania would have proposed the equidistance line drawn from the mainland as the maritime boundary. Romania concedes that a 12-mile maritime zone exists around Serpents' Island, and that this zone would necessitate a departure from the provisional equidistance line in favour of Ukraine.

60. And, finally, from point T, the boundary tracks south along the equidistance line, until it reaches the median line between the Romanian and Turkish coasts. [End graphic]

61. Mr. President, Members of the Court, I must thank you for your patient attention over these last days. That concludes my presentation on behalf of Romania and I would ask you now to call upon the Agent for Romania to make Romania's closing submissions. Thank you, Sir.

The VICE-PRESIDENT, Acting President: Thank you very much, Professor Lowe, for your speech. I now call on the Agent of Romania, Dr. Aurescu, to make conclusions and final submissions for Romania. You have the floor, Sir.

Mr. AURESCU:

X. CONCLUSIONS AND FINAL SUBMISSIONS BY THE AGENT OF ROMANIA

1. Mr. President and Members of the Court, it is my task now, in my capacity as Agent of Romania, to present, at the end of this second and final round of pleadings, our concluding remarks as well as Romania's submissions in this case. In doing this today, 16 September 2008, it is exactly four years since the filing with this Court, on behalf of Romania, of the Application instituting proceedings in this case, on 16 September 2004.

2. Mr. President and Members of the Court, you have already heard our detailed legal arguments and it is not necessary to review them again here. With your permission, I will only outline very briefly the salient elements of our case.

(a) An initial part of the maritime boundary between Romania and Ukraine was settled by way of agreement — namely the Romanian-Soviet Agreement of 1949, confirmed by subsequent

understandings of the same nature; these treaties are binding on Ukraine, as a successor to the former Soviet Union.

(b) The plain text of these agreements and the cartographic materials annexed to them show that the intention of the Parties was to establish a maritime boundary following the 12-nautical-mile arc surrounding Serpents' Island, up to a point due east of this maritime feature. The official cartographers and map makers of Romania, of the USSR and later Ukraine, as well as of other countries, consistently depicted this boundary on various maps and charts of the concerned area of the Black Sea, using the appropriate symbols — and indeed, it appears that the competent hydrographic service of Ukraine has never ceased to do so, even after the start of these proceedings before the Court.

(c) The remainder of the boundary is to be determined by employing the method regularly used by this Court and by the arbitral tribunals, namely the "equidistance/median line-relevant circumstances" rule.

(d) In the current case, the application of this method involves, in a first stage, the plotting of an equidistance line between the relevant adjacent coasts and of a median line between the relevant opposite coasts of the two countries. No account is to be taken when drawing the provisional equidistance/median line of the tiny rocky feature of Serpents' Island, which would unreasonably deflect this line.

(e) Romania is entitled to use for purposes of plotting the provisional equidistance/median line the most advanced points of its coastline, namely the Sulina dyke and the Sacalin peninsula, which are, indisputably, an integral part of the system of straight baselines duly notified by Romania to the United Nations.

(f) No relevant circumstance warrants the adjustment of the provisional equidistance/median line.

(g) Even if there were no pre-existing conventional delimitation, State practice and the jurisprudence of international courts demonstrate that Serpents' Island should play no role in the adjustment of the provisional line, given its natural characteristics and location, of course, with the minor exception of the 12-mile zone it already has. I make here a very slightly technical correction to a statement by Professor Lowe when he answered Judge Oxman's question: in fact, he meant to say that Ukraine has presently no legislation on contiguous zone.

(h) In any case this feature is a rock within the meaning of Article 121 (3) of the United Nations Convention on the Law of the Sea and it is not entitled to a continental shelf and an exclusive economic zone.

(i) The frantic attempts of Ukraine at artificially altering the natural characteristics of Serpents' Island — undertaken precisely for the purposes of this case — are devoid of legal significance, except as an implicit admission against interest by Ukraine of the status of Serpents' Island as a rock under the United Nations Convention on the Law of the Sea.

(j) The circumstances invoked by Ukraine are of no significance for the maritime delimitation to be achieved; the alleged geographical predominance of Ukraine is merely the result of an attempt to include in the coasts relevant for the purposes of delimitation between Romania and Ukraine stretches of the Ukrainian coastline that have nothing to do with it.

(k) There is no marked disparity between the relevant coasts of the Parties and consequently no need to adjust the provisional equidistance/median line in order to take account of such a factor.

(l) The limited Ukrainian oil and gas activities or the so-called incidents involving fishing boats, which allegedly occurred in the delimitation zone, are totally irrelevant for determining the delimitation line. And, finally:

(m) The proportionality test confirms the equitable character of the boundary advocated by Romania.

3. Mr. President, our case is straightforward: the boundary we claim is the equidistance/median line plus the already agreed boundary around or surrounding Serpents' Island. The line put forward by Romania is based on the actual geography of the area and, in particular, on the spatial relations between the coasts of the two States. It is consistent with the pattern of maritime delimitations that prevails in the small, semi-enclosed Black Sea and does not affect the rights or interests of third States. It is also apparent from a look at the map — as well as confirmed by conducting the proportionality test — that Romania's proposal leads to a balanced delimitation between the two countries. Romania's line is decent, fair and reasonable and does not encroach on Ukraine's entitlements, leaving to Ukraine all the maritime areas lying off its coasts.

4. Mr. President, we end where we began: with international law. International law is the prominent sovereign that all actors and actions of the international community should follow and

respect. The inspired words of Nicolae Titulescu, whose distinguished effigy can be seen not far from this Great Hall of Justice, close to the Peace Palace, come to my mind: he used to define the State sovereignty *"comme étant grevée d'une 'servitude internationale en faveur de la Paix' et du droit international"*.

5. It was in accordance with international law that Romania has tried to solve the issue of the delimitation of its maritime spaces in the north-western basin of the Black Sea by negotiations with the Soviet Union and, after its dissolution, with Ukraine — even if the claims put forward by the Ukrainian side were much more ambitious than the Soviet ones. It was only after it became obvious that these talks were sterile and that prolonging them would be pointless that we decided to seise the Court with this matter.

6. Mr. President and Members of the Court, we respectfully maintain that the boundary proposed by Romania during the current proceedings is drawn in full accordance with the relevant norms of international law and that it will achieve an equitable delimitation of the continental shelf and of the exclusive economic zones for both our countries.

7. Mr. President, before reading Romania's submission, I would like to respectfully thank you, the distinguished Members of this Court, for the attention, patience and courtesy shown during these three weeks of pleadings. I would also like to thank the Registry for the courteous, helpful assistance awarded to us in all matters related to this case during all these four years of proceedings, including for the smooth running of these hearings and for looking after all the other administrative details. I would also like to extend our gratitude as well to the excellent interpreters, who have done a wonderful job at keeping up with the sometimes galloping pace of our speeches. Last but not least, I would also like to thank Madame Laurence Blairon, the Head of the Information Department, and her staff, who have been very helpful to our team and to the representatives of our media. Special words of gratitude go to all my team — which is young but very efficient — and the term "young" also includes, of course, Professors Pellet, Crawford and Lowe. Without each and every one of its members, all this effort to promote the legal interests of my country before the World Court would have been impossible.

8. Mr. President, Members of the Court, having regard to the legal considerations and to the evidence put forward in the written and oral pleadings, Romania respectfully requests the Court to

draw a single maritime boundary dividing the maritime areas of Romania and Ukraine in the Black Sea, having the following description:

(a) from point F, at 45° 05' 21" N, 30° 02' 27" E, on the 12-nautical-mile arc surrounding Serpents' Island, to point X, at 45° 14' 20" N, 30° 29' 12" E;

(b) from point X in a straight segment to point Y, at 45° 11' 59" N, 30° 49' 16" E;

(c) then on the line equidistant between the relevant Romanian and Ukrainian adjacent coasts, from point Y, passing through point D, at 45° 12' 10" N, 30° 59' 46" E, to point T, at 45° 09' 45" N, 31° 08' 40" E;

(d) and then on the line median between the relevant Romanian and Ukrainian opposite coasts, from point T — passing through the points of 44° 35' 00" N, 31° 13' 43" E and of 44° 04' 05" N, 31° 24' 40" E, to point Z, at 43° 26' 50" N, 31° 20' 10" E.

9. Mr. President and Members of the Court, that brings to a close my presentation and the pleadings of Romania in this case. Let me express, once again, on behalf of my country, our deep trust in the International Court of Justice as well as in the noble virtues of international law. I would like to thank you very much for your patient and kind attention.

The VICE-PRESIDENT, Acting President: I thank you very much, Dr. Aurescu. The Court takes note of your final submissions which you have now read on behalf of Romania.

Ukraine will present their oral reply on Thursday, 18 September 2008, from 3 p.m. to 6 p.m. and also on Friday, 19 September 2008, from 3 p.m. to 6 p.m. Thank you all.

The sitting is adjourned.

The Court rose at 12.45 p.m.