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International Court of Justice

THE HAGUE

Cour internationale de Justice

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YEAR 2008

Public sitting

held on Thursday 18 September 2008, at 3 p.m., at the Peace Palace,

President Higgins presiding,

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

VERBATIM RECORD

ANNÉE 2008

Audience publique

tenue le jeudi 18 septembre 2008, à 15 heures, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

The Government of Romania is represented by:

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

as Agent, Counsel and Advocate;

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

as Co-Agent, Counsel and Advocate;

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

As Co-Agent;

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

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

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

a*s Senior Counsel and Advocates;*

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

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

as Counsel and Advocates;

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

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

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

Mr. Octavian Buzatu, Lieutenant Commander (retired),

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

as Technical and Cartographic Experts;

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

Le Gouvernement de la Roumanie est représenté par :

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

comme agent, conseil et avocat ;

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

comme coagent, conseil et avocat ;

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

comme coagent ;

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

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

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

comme conseils principaux et avocats ;

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

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

comme conseils et avocats ;

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

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

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

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

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

comme experts techniques et cartographes ;

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

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

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

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

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

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

as Advisers.

The Government of Ukraine is represented by:

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

as Agent;

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

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

as Co-Agents;

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

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

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

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

as Counsel and Advocates;

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

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

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

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

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

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

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

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

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

comme conseillers.

Le Gouvernement de l'Ukraine est représenté par :

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

comme agent ;

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

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

comme coagents ;

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

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

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

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

comme conseils et avocats ;

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

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

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

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

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

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

as Legal Advisers;

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

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

as Technical Advisers.

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

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

comme conseillers juridiques ;

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

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

comme conseillers techniques.

The PRESIDENT: Please be seated. The sitting is open and the Court is meeting today to hear the second round of oral argument of Ukraine. Ukraine will be heard this afternoon and again tomorrow afternoon and I now invite the Agent, His Excellency Mr. Vassylenko, to take the floor.

Mr. VASSYLENKO: Thank you.

I. STATEMENT OF UKRAINE'S AGENT

1. Madam President, Members of the Court, it falls to me as Agent of Ukraine to introduce the second round of Ukraine's pleadings.

2. We have carefully studied the additional arguments of Romania presented in its pleadings earlier this week. We found nothing radically new that could undermine the basics of Ukraine's position and cast doubts on the delimitation line proposed by Ukraine.

3. Last Monday, Romania's counsel said: "after more than ten hours of oral argument, their claim line was justified. The justification took three minutes."[1] Indeed, Ukraine spent a relatively short time for its final presentation of its delimitation line. But, in fact, we did not need more time for this quite straightforward exercise, as both the written and oral pleadings of Ukraine had already been devoted to the detailed justification of the line, which is constructive, equitable and supported by the jurisprudence of the Court. As Romania's counsel spent much effort to refashion the geographic context of the case, Ukraine spent much time on rebutting their mistaken approach.

4. Romania's team has sought to attack our legal arguments with jokes, historical anecdotes and innuendos of bad faith. These jokes and other elements of entertainment stuff were amusing, but they missed the point. We, for our part, have concentrated on the legal argument, as is appropriate for cases before this Court. On the other hand, Romania's counsel have failed to seriously address Ukraine's arguments with regard to the flawed nature of Romania's proposed delimitation line.

5. Madam President, Members of the Court, now I would like to rebut some of Romania's Agent's bold statements, and then briefly outline the general structure of Ukraine's response to the issues raised by the counsel for Romania in the second round.

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[1] CR 2008/30, p. 21, para. 5.

6. During the first round of oral hearings I was reluctant to respond in detail to Romania's Agent's distorted view of history. And I did not intend to do so during the second round of oral pleadings. But having heard his introductory speech on Monday, I must again categorically reject the allegations that the territorial status quo between Ukraine and Romania is the result of "past injustices" which "should not be further magnified"[2]. It was striking to listen to Romania's Agent, who went so far as to state: "It would also be unethical to expand the effects generated by manifest violations of international law."[3] By saying so, he implied that the post-war territorial settlement based upon the Paris Peace Treaty was unethical and illegal. Such line of thinking needs no further comments.

7. Indeed, past injustices should not be magnified. They should also not be based on a one-sided vision of history. Romania is evidently seeking sympathy and compensatory justice in this case — something that has no relevance for maritime delimitation. But Romania definitely should not be rewarded for having taken part in the war of aggression and committing grave war crimes on the occupied Ukrainian territory. Having said this, I would like to reiterate our strong belief that these past events are irrelevant to the present case. In this regard, may I recall the preamble to the 1997 Treaty on the Relations of Good Neighbourliness and Co-operation, according to which both Parties are convinced of the need for them to conduct an active future-oriented policy of mutual understanding and concord, good neighbourliness and partnership.

8. The Agent of Romania repeated that the 1948 Protocol was not submitted to ratification while omitting to mention that neither the Romanian Government nor the Romanian Parliament raised any objections against the Protocol and its provisions when, very soon, they were substantially repeated in the USSR-Romania 1949 Border Treaty and in the USSR-Romania 1961 Border Régime Treaty, both of which were ratified by the Romanian Parliament. In this regard I would again respectfully refer the Court to Chapter 5 of Ukraine's Counter-Memorial.

9. Ukraine's sovereignty over *all* its territory, including Serpents' Island, was confirmed by the 1997 Treaty and Additional Agreement and the 2003 Treaty, which were concluded between Ukraine and Romania and duly ratified by the parliaments of both countries. It is these instruments

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[2]CR 2008/30, p. 15, para. 15.

[3]*Ibid.*, p. 16, para. 16.

which constitute the basis for the delimitation of continental shelf and exclusive economic zones between the Parties.

10. Madam President, the Romanian Agent in his introductory speech on Monday reiterated his assertion with regard to a "bilateral legal compromise of 1997" when the Treaty and Additional Agreement were concluded. I would like to make clear that I personally participated in the process of negotiating, finalizing, and initialing the texts of the 1997 Treaty and Additional Agreement in Kyiv, as the head of the Ukrainian expert team and a member of the Ukrainian governmental delegation, headed by the Minister for Foreign Affairs of Ukraine, His Excellency Mr. Gennady Udovenko. This was together with my Romanian counterpart Mr. Dumitru Chaushu, who was the head of the Romanian expert team and a member of the Romanian governmental delegation, headed by the Minister for Foreign Affairs of Romania, His Excellency Mr. Adrian Severin. Both of them had initialed the text of the 1997 Treaty and the Additional Agreement. Later, as a member of the Ukrainian high-level official delegation, I participated in the ceremony of signing of these documents in Constanta on 2 June 1997 by the Presidents of both countries.

11. Neither in Kyiv, nor in Constanta, was there any agreement, express or tacit, on any kind of compromise beyond the framework of the signed documents. In fact, the compromise reached was fixed in the Additional Agreement itself. The essential elements of this compromise were as follows:

— unconditional confirmation of the existing State border between Ukraine and Romania in a separate Treaty on the Régime of the State Border, together with the possibility of either Party having recourse to the International Court of Justice should bilateral negotiations on the delimitation of continental shelf and EEZ not succeed;

— an important condition for recourse to the Court was that the Treaty on the State Border Régime had entered into force;

— Ukraine's obligation not to deploy offensive weapons on Serpents' Island;

— as there were differences between the Parties with regard to the principles to be applied during the delimitation negotiations, it was agreed that the principles proposed by each Party would be

listed in the Additional Agreement. The list of principles was simply to be a basis for the negotiations;

— as there was no agreement between the Parties concerning the effect of Serpents' Island, reference was made to Article 121 of the United Nations Convention on the Law of the Sea, without specifying which paragraphs of the Article were to be applied.

All these elements were reflected in the Additional Agreement. The Agent of Romania has failed to present any evidence whatsoever in support of his version of the compromise.

12. I also categorically reject the repeated allegations of Romania's Agent regarding Ukraine's activities on Serpents' Island. Ukraine is under no obligation to refrain from development of the island's infrastructure, with the sole exception that it is not to deploy offensive weapons on it. All the activities of the Ukrainian Government on the island that the Romanian delegation referred to in these pleadings are no more than the exercise of sovereign rights with regard to Ukraine's own territory. As counsel for Ukraine will again explain, there is no basis whatsoever for the suggestion of "admission against interest" by Ukraine.

13. Madam President, Members of the Court, I would like to reiterate that Romania's counsel also failed to prove the existence of the alleged pre-existing all-purpose 12-mile maritime boundary around Serpents' Island, dating from 1949, including the existence of the mysterious "point X". The documents of the Soviet-Romanian negotiations, and the diplomatic correspondence between Ukraine and Romania, as well as bilateral treaties, confirm that no such line was ever agreed.

14. Madam President, now it remains for me to introduce Ukraine's second round pleadings.

15. First, Sir Michael Wood will respond to Professor Crawford and Mr. Olleson as regards the assertion of a pre-existing agreement line dating from 1949.

16. Then Mr. Bundy will address the arguments advanced by Professors Crawford and Lowe regarding the relevant coasts of the Parties, and will say a few words on certain issues that have arisen as regards Sulina dyke.

17. Ms Malintoppi will address petroleum and coastguard activities, as well as Romania's argument on the enclosed or semi-enclosed nature of the Black Sea. She will also cover some issues relating to Serpents' Island. This will take us over to tomorrow.

18. Tomorrow Professor Quéneudec will respond to our opponents on the construction of the provisional equidistance line, and the relevant circumstances to be taken into account to establish an equitable line.

19. Following Professor Quéneudec, Mr. Bundy will address the equitableness of Ukraine's delimitation line, including a discussion of the relevant area, the application of the proportionality test, and the issues of non-encroachment.

20. Finally, Madam President, I shall read out Ukraine's final submissions.

Madam President, I should be grateful if you would invite Sir Michael Wood to address the Court. Thank you.

The PRESIDENT: Thank you, Your Excellency. I now call upon Sir Michael.

Sir Michael WOOD:

II. ABSENCE OF A PRE-EXISTING, ALL-PURPOSE MARITIME BOUNDARY AROUND SERPENTS' ISLAND

1. Madam President, Members of the Court, my task today is to address two issues in response to what Professor Crawford and Mr. Olleson said in the second round: first, the jurisdiction of the Court; and second, the absence of a pre-existing agreement establishing an all-purpose maritime boundary.

2. As you recalled at the end of the first round, Madam President, the purpose of this round is to enable each Party to reply to the arguments advanced orally by the other. It should not be a repetition of earlier statements[4]. I shall therefore limit myself to replying to arguments made by our opponents in the second round. For our full case, I refer the Court to Ukraine's written pleadings and first round oral argument.

[4]CR 2008/29, p. 52.

A. Jurisdiction of the Court

3. As far as concerns the jurisdictional question that Ukraine has raised, I can be very brief. Notwithstanding Professor Crawford's remarks in the second round, Ukraine maintains its position on the Court's jurisdiction, as set out in our written pleadings and in oral argument last week[5].

4. But Ukraine accepts, of course, the principle in Article 36, paragraph 6, of the Statute of the Court. It is for the Court, in the exercise of its *compétence de la compétence,* to decide (should it be necessary to do so) the scope of the jurisdiction conferred by paragraph 4 *(h)* of the 1997 Exchange of Letters.

5. In response to Professor Crawford, I would simply recall what I said last week: that, at the very least, the terms of the *compromis* suggest that the Parties did not anticipate that the Court would be called upon to delimit an all-purpose maritime boundary along the outer limit of Ukraine's territorial sea. Had they done so, they would surely have drafted the *compromis* differently[6].

B. Absence of a pre-existing all-purpose maritime boundary around Serpents' Island

6. Madam President, I now turn to what was said by the other side in response to our points concerning Romania's failure to establish the existence of an agreement, in force between Ukraine and Romania, establishing a pre-existing all-purpose maritime boundary around Serpents' Island. I shall address their main arguments in the order in which they were presented.

What counsel did not say

7. Madam President, I note at the outset that what counsel for Romania did not say was at least as interesting as what they did say. They responded to less than half of the ten points that I listed early in my speech last week[7]. In addition, there was no word about the need to interpret delimitation agreements in accordance with the law of the sea as it stood at the time of their conclusion — no reference to the *Guinea-Bissau* v. *Senegal* award[8]. There was no word about Romania's territorial sea and EEZ decrees, with their contrasting references to boundaries with

[5]CR 2008/26, pp. 48-49, paras. 20-22 (Wood).

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

[7]CR 2008/26, pp. 44-46, para. 9 (Wood).

[8]CR 2008/26, p. 44, paras. 9 (iv) and 46-48 (Wood).

neighbouring States[9]. There was no word about the near-contemporaneous Soviet chart (or charts) of 1951[10]. There was no mention of the fact that Romania extended its territorial sea to 12 miles in 1951. Romania simply ignores inconvenient facts.

Not a new argument?

8. Madam President, Professor Crawford began by challenging our point that the invocation of a pre-existing agreement was a new argument, an argument devised by Romania for the purposes of these proceedings. He said "the argument is not new"[11]. In apparent justification for this assertion, Professor Crawford explained that "it is often the task of counsel to clarify and develop positions taken by diplomats and governments who are . . . not always models of consistency"[12]. I am not sure what we are to make of that. Nor am I sure what to make of his further statement: "the fact is that the 1949 Agreement argument" [I repeat, *"the 1949 Agreement argument"*] "was developed on the basis of the available materials"[13]. Further to establish that the argument was not new, he referred to two navigational charts, produced in 1994 and 2001[14]. But, with all due respect, navigational charts are there to assist mariners, not to act as advocates in legal proceedings.

9. Finally, on this point, Professor Crawford referred to a passage in Romania's own record of the final round of the delimitation negotiations with the Soviet Union, that took place in October 1987[15]. This passage, which had been cited by Mr. Dinescu, is quite interesting. I will start one sentence earlier than the Co-Agent did. The Romanian delegation leader in 1987, according to the Romanian records, said,

> "At the date of the conclusion of the procès-verbal the breadth of the Romanian territorial sea was of 6 miles, the agreed delimitation line on that sector separated both territorial waters of the two States and areas that, in the absence of any agreement, would have belonged to the high seas. That is why we are right to consider that, in 1949, our governments established a *sui generis* delimitation line, which . . . allocated

[9]CR 2008/26, pp. 45-46, para. 9 (viii)) (Wood).

[10]RU Ann. 3.

[11]CR 2008/30, p. 43, para. 2 (Crawford).

[12]*Ibid.*

[13]*Ibid.*

[14]*Ibid.*

[15]CR 2008/30, p. 43, para. 3 (Crawford).

> to [Serpents' Island], in part expressly and in part implicitly *[implicitly!]*, a semicircular maritime space, with a radius of 12 miles, whose exterior limit on the segment separating Romanian waters from Soviet waters received the characteristics of a State boundary."[16]

10. According to Professor Crawford, this statement "contains the key elements of Romania's argument in relation to the 1949 procès-verbaux". If it does so, the Romanian argument is even more obscure than I had thought. It is unclear what "segment" the statement was referring to. And it is far from clear what part of the establishment of the supposed line was "explicit" and what part was "implicit". An "implicit" agreed maritime boundary delimitation line is somewhat improbable, to put it mildly.

11. In any event, I would point out that the selected extracts before the Court from this unilateral Romanian record, to which Romania alone has access, do not indicate what response the Soviet negotiator made to the Romanian statement. I suggested last week and nothing Professor Crawford has said changes this assessment that no material assistance can be gained from these extracts[17].

12. But even if the record did show what Professor Crawford would have it show, which it does not, is it not remarkable that this is the best Romania can do? Romania's counsel have not even attempted to point to evidence, or I think even to claim, that Romania put forward what they now call "the 1949 Agreement argument" at any point before 1987, that is, 38 years after an agreement was said to have been concluded between the Soviet Union and Romania.

13. Next, Professor Crawford mentioned the map accompanying Romania's 1997 submission of its straight baselines to the United Nations. Professor Lowe also referred to it when answering Judge Oxman's second question, and he displayed a map on the screen[18]. Professor Crawford suggested that "it is another example to show that this was not a new argument"[19] — this time, I would note, an example from almost 50 years after the agreement was said to have been concluded. And Professor Lowe sought to link the map to the alleged

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[16]CR 2008/30, p. 40, para. 23 (Dinescu).

[17]CR 2008/24, p. 44, para. 38 (Wood).

[18]CR 2008/31, p. 42, para. 3.

[19]CR 2008/30, p. 44, para. 4 (Crawford).

1949 agreement, asserting that Ukraine had "never challenged that map, and it must be considered to have accepted the claim that it depicts".

14. Madam President, there are a number of points to make here. First, it is not clear what Professor Lowe meant by "the claim that [the map] depicts". Second, the map he showed on the screen may well have been the map deposited by Romania with the United Nations, but it was not the map published by the United Nations Division of Ocean Affairs and the Law of the Sea (DOALOS). The map that was published by DOALOS — which bears the reference MZN15-1997 — is at tab 1 in your folders. The depiction of Romania's contiguous zone, such as it is on this published map, is not the same as that on the map referred to by Professor Lowe. Third, the Romanian notification, which the map accompanied, was a notification to the United Nations Secretariat of Romania's straight baseline co-ordinates — a notification made in accordance with Article 16 of the Law of the Sea Convention. You will find at tab 2 in your folders, the United Nations Secretariat Note communicating to other States Romania's straight baselines submission. The Secretary-General's Note is clear. It is headed "Deposit by Romania of the list of geographical co-ordinates of points for the drawing of straight baselines and a chart showing its straight baselines and the outer limit of its territorial sea". In the body of the Note, the Secretary-General says that, on 19 June 1997, Romania transmitted for deposit with the Secretary-General, in accordance with the Convention, a list of geographical co-ordinates for the points for the drawing of straight baselines contained in the Romanian Act, and a chart "showing the straight baselines and the outer limit of the territorial sea". There is no mention here of the depiction of any contiguous zone. The contiguous zone was simply not relevant to the Article 16 notification. There was nothing published by the United Nations to which Ukraine should have reacted. This argument, it seems to me, is a very shaky ground upon which to construct a case for a 1949 agreement, in force between the Parties, on an all-purpose maritime boundary going round to "point X".

15. As I said earlier, Professor Crawford seemed to rely on this 1997 map chiefly as part of his efforts to show that the "1949 Agreement argument" was not new in 2005. But even if he could show that such an argument was put forward in 1997, which, in my submission, he has not done, that would scarcely help Romania's case. It would merely establish that the argument had been put

forward nearly 50 years after the supposed agreement was concluded. It really is no answer to say that the "1949 Agreement argument" was being "developed on the basis of the available materials"[20]. Either there was an agreement in 1949, or there was not. It was not something to be constructed on the basis of "available materials".

Note Verbale of 28 July 1995

16. Professor Crawford next came up with a new translation of the key sentence of the Note Verbale of 28 July 1995. But his new translation adds nothing. According to the new translation, Romania acknowledged that "no agreement was concluded between Romania and Ukraine on the delimitation of the maritime areas in the Black Sea". There is no material difference between this translation and the translation we considered last week. The new translation certainly does not justify Professor Crawford's conclusion that the phrase "clearly refers to the absence of an agreement concluded between the parties in relation to the delimitation of the continental shelf and exclusive economic zone as a whole"[21]. Moreover, as I said last week, this Romanian statement is by no means an isolated one[22]. Romania's position in the 1990s was clear, they said that the 1949 and 1961 Treaties on the Border Régime did not include provisions referring to the delimitation of the continental shelf

Burkina Faso/Mali

17. Madam President, Professor Crawford[23], and later Mr. Olleson[24], suggested that we had misunderstood the Chamber's analysis in *Burkina Faso/Mali*. According to them we had read the Judgment as saying that the maps which "fall into the category of physical expression of the will of the State or States concerned" were exclusively those which are "annexed to an official text of which they form an integral part". We did not in fact say this. In any event, with all due respect, it is Professor Crawford and Mr. Olleson who have misread the Judgment. They read into it a category of maps "where the map in question is produced by a State and depicts without

[20]CR 2008/30, p. 43, para. 2 (Crawford).

[21]CR 2008/30, p. 44, para. 5 (Crawford).

[22]CR 2008/24, p. 47, para. 51 (Wood).

[23]CR 2008/19, p. 38, paras. 52-53 (Crawford).

[24]CR 2008/30, p. 58, para. 11 (Olleson).

qualification a boundary between itself and another State"[25]. Nowhere, I think, does the Judgment mention any such category. What the key passage actually does is to single out as one example — as *the* example that it gives — "maps annexed to an official text". No other examples are given. You will find the passage in question, paragraph 54 of the Judgment, at tab 3. I do not need to read it again [but it will appear in the transcript]:

> "maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force. Of course, in some cases maps may acquire such legal force; but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts." (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 582, para. 54.)

Burden of proof

18. Professor Crawford next argues that the question of burden of proof simply does not arise. This is because, in his words, "clearly there was an agreement, indeed there were a number of agreements", and so the matter is one not of establishing an agreement, which he seems to accept would place the onus on Romania, but of interpreting an agreement already established. I would suggest, Madam President, that this is a rather nice distinction in this case. It begs the question to say "clearly there was an agreement". That begs the question. Of course there were agreements, but before 1997 none of them dealt with anything other than the State border. Whether one qualifies the matter as establishing the existence of an all-purpose maritime boundary agreement, or as a question of "interpreting" such an agreement into the 1949 Agreements, the fact is that Romania has to make out its case. This, we say, it has failed to do. "The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed." (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras*), Judgment of 8 October 2007, para. 253.) If Romania had been

[25] CR 2008/19, p. 38, para. 54 (Crawford).

going to show the existence of an all-purpose maritime delimitation agreement dating from 1949, it would have had to come up with far more persuasive evidence than it has mustered in this case.

6-mile territorial sea point

19. Next, Professor Crawford seeks to make a good deal of the fact that, in 1949, Romania only had a 6-mile territorial sea. Therefore, he says: "[t]he suggestion that the 1949 and subsequent agreements delimited solely a 'State border', separating areas under the respective sovereignty of both States, is demonstrably incorrect"[26]. Notwithstanding the emphasis with which this was made, this is a thoroughly unconvincing point. It is clear that what the Parties were doing was delimiting and demarcating the State border, and it was perfectly natural for them to delimit the State border as it would be when Romania extended its territorial sea to 12 miles.

20. In order to show that the Parties did not have Romania's prospective extension to 12 miles in mind, our colleagues on the other side have engaged in speculation themselves, despite the fact that they have access to the records of the negotiations. Ukraine, of course, does not have access to any records of the negotiations, to which it was not a party. But our opponents have produced nothing from the negotiating record to rebut the rather obvious inference that we have drawn from what the negotiating parties actually agreed upon. Instead, they have suggested that Romania only extended its territorial sea in 1956. That is simply not so. As Romania itself made clear in its Memorial[27], the extension to 12 miles took place in September 1951, just two years after signature of the 1949 procès-verbaux. At tab 4, Madam President, you will find Romania's Decree No. 176, which was published in the *Official Bulletin* in September 1951[28]. It is also at Annex 80 to Romania's Memorial. As you will see on the second page, at point 4, second paragraph, the Decree provides that: "Territorial sea means a 12 nautical mile (22,224 m) wide stripe, measured from the shore." I note in passing that there is nothing unusual or untoward in anticipating an extension of the territorial sea within the limits permitted by international law.

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[26]CR 2008/30, p. 46, para. 13 (Crawford).

[27]MR, para. 11.11 and Ann. 80.

[28]MR, Ann. 80.

What the Parties intended

21. It is noteworthy that Romania itself has produced no evidence to support its own speculation about what was in the minds of the negotiators in 1949. As I have said, Romania as a party to those negotiations must have its own records. Professor Crawford argued that "there is no indication whatsoever in the 1949 procès-verbaux or elsewhere that the parties had in mind a 'prospective' Romanian territorial sea". But that they would have had this in mind, we say, is evident from what they did. It is inconceivable that, as they agreed point 1439 on the outer limit of the Soviet Union's 12-mile territorial sea, they would not have had in mind Romania's own imminent extension to 12 miles. The fact that the point on the map — map 134 — does not correspond precisely to the exact point where in 1949 the 12-mile territorial seas would cease to overlap is beside the point. The 1949 procès-verbal did not specify the actual co-ordinates of the endpoint of the State border. That was only done in 2003. But the intention in 1949 was clear.

22. Next, we are told by our opponents that if the Parties, and again I quote, "were concerned with delimitation only to 12 miles . . ., one would have expected there to have been some indication of this in the text of the 1949 procès-verbaux. There is not."[29] But, Madam President, there is. The numerous references in the agreements of 1948 and 1949 to the "State border" are a clear indication of the intention of the Parties. What is striking, by its absence, is any indication — in the text of the agreements — of an intention to delimit a border going beyond the 12-mile territorial sea.

23. Once again, we are told that Ukraine's argument "is based wholly on its hypothesis as to the extent of the boundary shown on map 134". This is not so! Our position is based on our understanding of the whole series of transactions from 1947 to 1949, leading to the conclusion of the 1949 State Border Treaty. Their purpose was to determine the State border. The transactions led to a clear result. Map 134 is one element, an important element — but one element — in the overall consistent picture.

[29]CR 2008/30, p. 46, para. 14 (Crawford).

Plates I and V

24. I now turn to plates I and V. Our opponents have gone on at length about the status of plates I and V. These, you will recall, are two sketches said to be included in some way in the album of maps (referred to also as "the catalogue"), which contains the 134 maps attached to the 1949 general procès-verbal. Professor Crawford continues to mischaracterize these sketches. Yes, they appear at the front of the album of maps as submitted by Romania to the Registry in the middle of 2007. But it is not clear from the material supplied at tab IV-5 of their folders — the folders handed to the judges for the hearing on 15 September — what is, and what is not, included in the album. [Place front cover on screen.] As you can see on the screen, the front cover of the album supplied by Romania appears to indicate (in manuscript at the bottom, in Romanian) that there are 149 sheets (134 + 13 + 2). Immediately following the front cover in the judges' folders version, from earlier this week, but not, so far as I could see, in the copy held by the Registry, there follows what appears to be a list of contents [place list of contents on screen] — I'm afraid this is probably too small to see, but it is in the tabs that were submitted by Romania — or perhaps part of a list of contents, this lists only 145 sheets: 1 + 4 + 134 + 6. The album of maps held by the Registry does not appear to contain either this list of contents or the last six sheets referred to in the list of contents, which are said to show the "characteristics and drawings of the State border signs" [remove from screen]. If one adds to this uncertain picture the fact that Romania "discovered" plates I and V only after the submission of its Memorial[30], the mystery deepens. In any event, the album of maps (whatever its composition) was not itself listed in the 1949 procès-verbal under the heading "The following documents are attached to this Protocol", and is not otherwise mentioned in the procès-verbal. The only maps listed under the heading were the "Maps of the state border between the USSR and the RPR at a scale of 1:25 000", in other words the maps numbered 1 to 134[31].

25. Our opponents have once again offered no reply to any of our points distinguishing these two sketches — plates I and V — from the maps attached to the 1949 general procès-verbal. They

[30]RR, para. 4.65.

[31]CR 2008/24, p. 43, para. 31 (Wood).

have in particular offered no reply to the point I repeated last week concerning the function of plates I and V, which most certainly was *not* to depict the State border.

26. I turn now to another point. Quite apart from the uncertainties concerning their symbology, the maps referred to in this case either show no line at all, or show a line going to various distances along the outer limit of Ukraine's territorial sea. As Romania itself points out, the lengths of the lines on plates I and V, and on the sketches included in the individual procès-verbaux, and on the other charts and sketches, vary. The lines do not uniformly go to Romania's "point X" or to any other point. The only constant in our case is point F, determined by the 2003 Treaty.

27. In this connection, it is worth recalling what you said about inconsistent maps in *Indonesia/Malaysia*. You will find the relevant extract at tab 5. As you know, Madam President, Members of the Court, and you will find this at paragraph 90, Indonesia had submitted

> "a certain number of maps . . . showing a line continuing out to sea off the eastern coast of Sebatik Island . . . The Court notes that the manner in which these maps represent the continuation out to sea of the line . . . varies from one map to another. Moreover, the length of the line . . . varies considerably: on some maps it continues for several miles . . ., whilst on others it extends almost to the boundary between the Philippines and Malaysia." (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, pp. 667-668, para. 90.)

The Court concluded that "In sum, . . . the cartographic material submitted by the Parties is inconclusive in respect of the interpretation of Article IV of the 1891 Convention." (*Ibid.*, p. 668, para. 91.)

The international law of the sea in 1949

28. Madam President, Professor Crawford came up with no less than six points in response to my argument concerning the applicable international law of the sea in 1949. All six points seem to be aimed at showing that the concept of the continental shelf was known, and known to the Soviet Union in 1949. Most of his points hardly call for comment, such as those on the work of the ILC in 1950 and 1951. The reference to the continental shelf in the Tsar's Siberian islands declaration of 1916 is I think generally regarded as a curiosity, not as foreshadowing the modern doctrine[32]. The declaration concerned islands, not the shelf. The famous Gulf of Paria Treaty of

[32]W.E. Butler, *The Soviet Union and the Law of the Sea* (1971), p. 139.

1942[33], between Great Britain and Venezuela, was carefully drafted to avoid implying exclusive rights. It is at tab 6. As the preamble makes clear, the purpose of the two Governments was "to define as between themselves their respective interests in the submarine areas of the Gulf of Paria". Article 2 of the Treaty also makes clear the essentially bilateral nature of this transaction. In any event, as Professor Crawford suggests, the real question is "whether informed governments could have understood a 1949 agreement about a maritime boundary zone . . . as a delimitation not limited to the territorial sea"[34]. Of course they could. But the question is not whether the Soviet Union and Romania *could* do so; it is whether they *did* do so. As I explained last week, and I shall not repeat the arguments here, given the state of the law and given the attitudes of the parties to the notion of the continental shelf at that time, it is inconceivable that they did so. There is nothing in the text of the agreements to suggest that they did. The contrast with the Gulf of Paria Treaty could not be more stark.

Non-contemporaneous map evidence

29. Madam President, Members of the Court, that concludes my response to Professor Crawford. I now turn to what Mr. Olleson had to say about non-contemporaneous maps. These, you will recall, are prayed in aid by Romania "as confirming and corroborating its arguments as to the effects of the 1949 procès-verbaux"[35].

30. Mr. Olleson began by making a number of rather exaggerated claims. That the map evidence was "all one way"[36]. That "a large proportion of the maps in question were produced by Ukraine and, previously, the Soviet Union"[37]. That "the earliest charts that either side has located are the charts produced by the Soviet Union in 1957"[38]. That the 1957 charts were "produced . . . not long after conclusion of the 1949 agreements"[39]. That the 1957 Soviet chart was produced

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[33]205 *LNTS* 121.

[34]CR 2008/30, p. 53, para. 32 (Crawford).

[35]CR 2008/30, p. 56, para. 1 (Olleson).

[36]*Ibid.*, p. 57, para. 4.

[37]*Ibid.*, p. 57, para. 4.

[38]*Ibid.*, p. 57, para. 6.

[39]*Ibid.*, p. 57, para. 6.

"just a year after Romania extended its territorial sea from 6 to 12 miles"[40]. That "all the maps produced by the Soviet Union and Ukraine show the agreed boundary"[41]. None of these statements is correct.

31. Mr. Olleson next addressed the case law on maps. We were told that the annotations on the maps produced by Romania were "clear and consistent" like the six maps in *Malaysia/Singapore*. I would just recall, unnecessarily no doubt, what the annotations were in *Malaysia/Singapore*. They are described at paragraph 269 of your recent Judgment. The relevant extract is at tab 7. The maps were published by the Malayan and Malaysian Surveyor General and Director of National Mapping between 1962 and 1975. As you said in your Judgment,

> "Those maps include Pedra Branca/Pulau Batu Puteh with four lines of information under it:
>
> 'Lighthouse 28,
>
> P. Batu Puteh,
>
> (Horsburgh),
>
> (SINGAPORE) or (SINGAPURA)'."

You went on to note that "[e]xactly the same designation '(SINGAPORE)' or '(SINGAPURA)' appears on the maps under the name of another island which unquestionably is under Singapore's sovereignty". And even though it appeared to the Court "that the annotations are clear", your conclusion was a prudent one. You said: "The Court concludes that those maps [the six maps] tend to confirm that Malaysia considered that Pedra Branca/Pulau Batu Puteh fell under the sovereignty of Singapore." (*Ibid.*, para. 272.) Madam President, there is no comparison between the markings in *Malaysia/Singapore* and the markings on the maps produced by Romania in this case. The only map that might be thought to have anything approaching a "clear" annotation is the 1991 map produced by the *Bundesamt für Seeschiffahrt und Hidrologie* of the Federal Republic of Germany[42]. That map obviously has no legal standing whatsoever for the Parties to the present proceedings.

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[40] *Ibid.*, p. 57, para. 6.

[41] *Ibid.*, p. 58, para. 11.

[42] Map RM A 41 and 42.

32. Mr. Olleson then claims that 31 non-contemporaneous maps relied upon by Romania are "entirely consistent in depicting the agreed boundary [as he calls it] as extending beyond point F, and around Serpents' Island"[43]. (I am not sure how the number 31 was arrived at, despite our opponents' obvious abilities when it comes to counting. It seems to have been 23 in the Reply. But no matter.) Mr. Olleson showed you once again a number of maps depicting one or other variation of the Romanian "'hook". The maps relied upon by Romania are indeed "all consistent with showing the boundaries as extending beyond point F"[44]. There is no surprise there! If they had not shown such extensions, at least of some length, Romania would obviously not have relied upon them. But what Romania fails to acknowledge is that there are other maps, many of them, that do not contain the annotation, the "hook", that "hook" that bears such a great part of the weight of Romania's case. [Place 1951 chart on screen.] Romania studiously ignores, for example, the 1951 Soviet chart, which is now on the screen: it is also at tab 8, and it was annexed to our Rejoinder[45]. This is the Soviet chart from 1951, and as you will see, there is no "hook"! This, it will be recalled, is the first and near-contemporaneous edition of one of the 1957 charts relied upon by Romania. It was found and submitted to the Court by Ukraine. Romania likewise ignores the recent United Kingdom Admiralty Chart, which Ukraine annexed to its Counter-Memorial[46]. [Place UK chart on screen.] This is now on the screen, and it is at tab 9 in the folders. Again, we can enlarge the section [enlargement on screen] showing the land border and Serpents' Island, and you will see there is no "hook". Incidentally, the legend on this British chart, which is now itself being enlarged [enlarge legend], is interesting. It reads, "Sources: Romanian and Russian Government charts of 1980 to 1994 with later corrections." Such an annotation often appears on charts, it is an example of cartographers using existing data from earlier maps. Professor Crawford sought to dismiss maps such as the Soviet map of 1951 and this British map of 2004 as "silent witnesses". But with all due respect, and perhaps the thought does not come easily to members of the bar, silence can also be eloquent. [Remove chart from screen.]

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[43]CR 2008/30, p. 60, para. 21.

[44]CR 2008/30, p.61, para 23.

[45]RU, Ann. 3.

[46]CMU, Ann. 44: British Admiralty Chart No. 2232 *Black Sea — Romania and Ukraine: Constanța to Yalta*, published in 1995, reissued in 2004.

33. Mr. Olleson next attacked my "speculation" that the cartographers of the Soviet Union in 1957 were concerned with security issues. He did not in fact suggest that this was an unlikely explanation. He contented himself with the thought that, if this had been the purpose, the line would have gone all round the Island. But that, with respect, is scarcely a convincing argument. A "hook" was a perfectly clear way of indicating the presence of Serpents' Island and its 12-mile territorial sea. Most foreign ships would have been approaching from the south, anyway, not from the Soviet Union's own ports.

34. Mr. Olleson also said that "[n]o evidence was provided on this point"[47]. That accusation comes ill from those who speculate, with no evidence whatsoever, that a Soviet cartographer in 1957 decided to depict, on a new edition of a 1951 chart, an all-purpose maritime boundary that he took to have been agreed back in 1949 by the Soviet Union and Romania. By contrast, my inference is based on the solid fact of Soviet military activity on Serpents' Island. While Ukraine does not have access to Soviet documentation concerning Soviet military activities on Serpents' Island, it is clear that they were important and, being on an external border of the Warsaw Pact, they were obviously sensitive. As we said in the Counter-Memorial, servicemen consisting of air defence troops of the USSR were permanently stationed on Serpents' Island from 1946 until Ukraine's independence[48]. Some indication of the scale of the activities may be deduced from Annex 90 to our Counter-Memorial, the 2002 Plan for the withdrawal of Ukrainian armed forces from the Island. The large amount of equipment that was being removed was essentially what the Soviet Union had left behind. There is reference, among other things, to a radar complex and radar stations, to radio stations, to 240 containers of technical property, to a number of AK-74 submachine guns. It is clear that the military activities on Serpents' Island were not insubstantial.

35. I am next told that my reference to the "copycat effect" is also speculative. Mr. Olleson mentions that "[t]he charts submitted by Romania are on a wide variety of scales, and show a variety of different areas of the Black Sea"[49]. But that, with respect, does not mean that the data they contain is not taken from previous maps. I should have thought that it was self-evident that

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[47]CR 2008/30, p. 64, para. 36.

[48]CMU, para. 7.68.

[49]CR 2008/30, p. 64, para. 38.

"hooks" appearing on subsequent charts could be traced back to the "hooks" on the 1957 charts. It would have been a strange coincidence indeed if cartographers in various countries almost simultaneously, but independently, decided to place a "hook" on their charts of the north-west Black Sea.

36. The "copycat" effect is a well recognized phenomenon in mapping and charting. It has even received judicial recognition. Could I invite you, please, to turn to tab 10 in the folders? The Eritrea/Ethiopia Boundary Commission said in its Decision at paragraph 3.17:

> "The Commission has also been presented with an abundance of maps . . . As is often the case in circumstances such as those facing the Commission, many maps are in effect copies of earlier maps. While adding to the apparent number of different maps, they do not in substance do so — except as possibly showing a consistent course of conduct by a Party. The number of what may be regarded as original maps is thus more limited than the long list of maps presented by the Parties would suggest."[50]

37. The next point, Madam President: Mr. Olleson ended by relying on a sentence from the Judgment of this Court in the *Minquiers and Ecrehos* case of 1953[51]. Professor Crawford cited the same phrase in the first round[52]. Both Professor Crawford and Mr. Olleson said that the case was authoritative for the proposition that, and I quote from Mr. Olleson, "a chart published by a State showing a boundary, without any qualification must be taken as" — and here comes the brief quotation from the Judgment — "evidence of the [State's] official view at that time". In fact, if you read the passage as a whole, it is authority for a quite *different* proposition. The relevant extract from this Judgment is at tab 11 in the folders. As you will see from the passage we have sidelined, the Court was referring to diplomatic exchanges between Britain and France in 1820. It did *not*, as Professor Crawford and Mr. Olleson implied, say that "where the map in question is produced by a State and depicts without qualification a boundary between itself and another State", the map must be considered as "evidence of the [State's] official view at that time"[53]. What the Court actually said is this: you will see it in the middle of the page.

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[50]Eritrea/Ethiopia Boundary Commission, Decision Regarding Delimitation of the Border between The State of Eritrea and The Federal Democratic Republic of Ethiopia.

[51]CR 2008/30, p. 65, para. 40 (Olleson).

[52]CR 2008/19, p. 38, para. 54 (Crawford).

[53]*Ibid.*

> "By his Note of June 12th, 1820, to the Foreign Office, — the French Ambassador in London transmitted a letter from the French Minister of Marine — to the French Foreign Minister, in which the Minquiers were stated to be '*possédés par l'Angleterre*', and in one of the charts enclosed the Minquiers group was indicated as being British. It is argued by the French Government that this admission cannot be invoked against it, as it was made in the course of negotiations which did not result in agreement. But it was not a proposal or a concession made during negotiations, but a statement of facts transmitted to the Foreign Office by the French Ambassador, who did not express any reservation in respect thereof. [And here comes the phrase relied upon by Professor Crawford.] This statement must therefore be considered as evidence of the French official view at that time." (*Minquiers and Ecrehos (France/United Kingdom), Judgment, I.C.J. Reports 1953*, p. 71.)

As you will see, far from saying that the map as such must be considered as evidence of the French official view, it was the fact of the official transmission by the French Ambassador to the Foreign Office of the text of a letter saying that the Minquiers were possessed by England and of a map indicating the group as being British. It was that that was evidence of the official French view.

C. Conclusion

38. Madam President, Members of the Court, by way of conclusion, I shall make just three points.

39. First, in constructing what Professor Crawford referred to as "the 1949 Agreement argument"[54], Romania has placed enormous weight on the agreements from the late 1940s, and has correspondingly sought to downplay the agreements of 1997 and 2003. Yet it is the 1997 and 2003 Agreements that are central to relations between the Parties in these proceedings. The jurisdiction of the Court derives from the 1997 Exchange of Letters, which also makes clear that the entry into force of the 2003 State Border Treaty was a precondition for the reference to the Court of the question of delimitation of the shelf and exclusive economic zones. The State Border Treaty of 17 June 2003, especially, is central. The significance of the 2003 Treaty extends beyond the fact, important though that is, that in it Ukraine and Romania finally reached agreement on point F, the endpoint that the Soviet Union and Romania had left unspecified in 1949. The 2003 Treaty is the governing treaty between the Parties on the State border. It replaced the 1961 Treaty, which itself had replaced the 1949 Treaty. As a matter of law, the 1961 and 1949 Treaties are superseded. They are relevant *only* to the extent that they are referred to in the

[54]CR 2008/30, p. 43, para. 2 (Crawford).

2003 Treaty. They are relevant only in so far as they describe the line of the State border, which — as agreed in the 2003 Treaty — terminates at point F.

40. It should be recalled, Madam President and Members of the Court, that for a period in the 1990s after Ukraine regained its independence, Romania had questioned the binding force and validity of these earlier agreements, particularly those from 1948 and 1949, and Romania had sought to reopen the post-War territorial settlement and the State border agreed in 1949. In the 2003 Treaty, the Parties reaffirmed the post-War territorial settlement and they reaffirmed the State border agreed in 1949. Upon its entry into force in 2004, the 2003 Treaty finally and definitively settled the question of the State border, which was a precondition for the reference of the continental shelf and EEZ delimitation question to this Court.

41. My second point is that, it is as clear as it could be that point F, agreed by co-ordinates in 2003, was the endpoint of the line of the State border, the line that was agreed in 1949, and reaffirmed on many occasions. It is also clear, and I think it is indeed common ground between the Parties, that point F in the 2003 Treaty constitutes the starting-point for the delimitation in these proceedings.

42. My third point in conclusion is this. Notwithstanding Professor Crawford's admonition, it remains the case that the onus of showing the existence of an agreement from 1949 rests upon Romania. They most certainly do bear a heavy burden, and in our submission they have comprehensively failed to discharge it.

43. Madam President, Members of the Court, that concludes my presentation, and I would request that you invite Mr. Bundy to address you next in continuation of Ukraine's case, either before or after the tea break. Thank you.

The PRESIDENT: Thank you, Sir Michael. I would rather like to know if Mr. Bundy would like a clear run for the entirety or would like to make a beginning?

Mr. BUNDY: I would be happy to make a beginning, Madam President.

The PRESIDENT: Yes, please then come forward; we call Mr. Bundy to make a start.

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

III. THE RELEVANT COASTS

1. In this presentation, I intend to take up the important question of the relevant coast of the Parties. It is a matter that Professor Crawford addressed on Monday and, to a lesser extent, Professor Lowe on Tuesday: and my remarks will be directed primarily to the presentations of those two counsel.

2. I will also, in a second, and briefer part of my presentation, offer a few observations on Mr. Müller's intervention, which focused on the Sulina dyke, — a matter which Professor Lowe dealt with as well — since this aspect of the case figures prominently in Romania's view of the relevant geography, and the Sulina dyke controls a large part of Romania's claim line.

3. As for the relevant area, another matter addressed by Professors Crawford and Lowe, I will come back to that subject tomorrow when I address the equitableness of Ukraine's delimitation line and the test of proportionality.

4. So with that brief introduction, let me turn directly to the issue of the relevant coasts of the Parties in this case.

A. The relevant coasts of the Parties

1. The southern coasts

5. On Monday, Professor Crawford elected to address the relevant coasts in reverse order, starting in the south. He adopted this tact as a result of his view that Ukraine had been "dismissive" of Romania's southern coast, and he understandably felt that that southern coast needed to be resurrected (CR 2008/30, p. 26, para. 22).

6. Let me clarify one matter right at the outset. It is not Ukraine that has been "dismissive" of any parts of the Parties' coasts in this case. It is Romania. Ukraine's position is very clear. Ukraine considers that it is the whole of both Parties' coasts that abut the north-west corner of the Black Sea should be considered to be relevant coasts in this case for delimitation purposes. That applies to Romania's coast — including its southern coast — as much as it applies to Ukraine's coast — including its northern coast.

7. The only "dismissing" of coasts being undertaken in this case has been done by Romania, because it is Romania that at all costs seeks to eliminate 630 km of Ukraine's coast — that is, two thirds of Ukraine's coast fronting this part of the sea — from consideration while keeping its entire coast all the way down to Bulgaria in play as a relevant coast.

8. To the extent that Ukraine has focused on Romania's southern coast, it is simply to point up the double standards that Romania applies when discussing the coastal geography.

9. Romania says parts of Ukraine's coast point in the wrong direction because 90° angles drawn from certain, arbitrarily selected segments along the coast do not point out into the middle of the sea. Ukraine has shown that, if such perpendicular criteria are applied — and they should not be applied — but if they are, then Romania's southern coast is vulnerable to the same criticism. Under Romania's thesis as we have shown, much of that coast, divided into appropriate segments, also points in the wrong direction.

10. Romania also asserts that Ukraine's south-facing coast is too far away and that it is therefore somehow "eclipsed" by closer parts of Ukraine's own coast. Yet, Ukraine has shown that this part of its coast, its south-facing coast, is no further away from the area of concern than is Romania's southern coast. [Place Ukraine tab 4 from first round on screen]. The Court may recall the graphic that now appears on the screen that was from our first-round presentation illustrating the point. Romania offered no response to this demonstration earlier this week.

11. Nor has Romania responded to another element that Ukraine mentioned last week. That was the fact — I will not illustrate it again, but you can find it under tab 26 of the first week's folders — that was the fact that all of Ukraine's coast, all of it — including the south-facing coast — lies closer to the base points that Romania has used for the construction and plotting of its equidistance line than the southernmost parts of Romania's own coast.

12. These demonstrations put to rest, I would submit, Professor Crawford's rather novel theory, advanced in the first round, which he called the "principle of comparative proximity". It was telling that my colleague did not revert to this ambitious concept in his second round pleadings. Indeed, the "principle of comparative proximity" was mentioned by Romania this week exactly the same number of times it has been mentioned in the Court's jurisprudence — not once.

13. But let me return to Professor Crawford's discussion of the coasts of the Parties starting in the south. He posited Romania's what he termed "point Z" as the starting-point because, in his words: "It is an agreed point in the sense that it is the final point on the provisional equidistance lines drawn by both Parties." (CR 2008/30, p. 26, para. 22.)

14. "Point Z" may lie at the end of both Parties' provisional equidistance line, but it does not in any way lie on both Parties' claim lines. It is a purely Romanian point on Romania's claim line — a claim line that takes no account whatsoever of the marked disparity that exists between the lengths of the Parties' coasts as a relevant circumstance.

15. Having clarified that point, let me now turn to Professor Crawford's main argument which was that, in the south, the "opposite coasts" of the Parties readily identify themselves. He said that they are similar in outlook and orientation, and are of approximately equal length. According to Professor Crawford, if the delimitation was to take place solely between these coasts, that would call for an equidistance line (CR 2008/30, p. 26, para. 23).

16. But once again, our opponents put their blinders on when they attempt to parse the delimitation area into discrete sectors. The delimitation requested of the Court is not limited to this area. As Ukraine pointed out in its first round, Professor Crawford's tendency to focus on only parts of the coasts at one time — in this case, the coasts that he deems are the "opposite" coasts — without taking into account the overall geographic context, is divorced from how the case law has treated the issue of the relevant coasts.

[Tab 31 to Ukraine's first round on screen]

17. Take the *Gulf of Maine* case. I assure the Court that I do not intend to repeat what I said in the first round other than to point out that Professor Crawford had no answer to the fact that the Chamber in *Gulf of Maine* most decidedly did *not* consider the equivalent "opposite" coasts on the United States and Canadian sides should be delimited on the basis of strict equidistance. To the contrary, the Chamber adjusted the equidistance line between these coasts to take into account the *overall geographic relationship* between the Parties' coasts fronting the entire Gulf of Maine.

18. So how did Professor Crawford deal with this precedent? First, by attacking Ukraine for relying on it; and second, by attacking the Judgment of the Court itself in terms that even appeared to catch Professor Pellet somewhat off guard.

19. On Monday, Professor Crawford asserted that "Ukraine's approach to the relevant coasts issue comes down almost exclusively to the *Gulf of Maine* case, to which it clings as to a lifeboat in stormy seas" (CR 2008/30, p. 28, para. 29): it is a nice image.

20. Ukraine considers that the *Gulf of Maine* case is an important precedent, and it is an important precedent all the more so because it presents a number of similarities to the present case. But Ukraine has also referred to other examples of the Court's jurisprudence to support its position. It was striking, for example, that, in his discussion of the relevant coasts, my distinguished colleague made no reference to what we had to say about the *Tunisia/Libya* case. The Court will recall Ukraine's first round presentation where both Professor Quéneudec and I dealt with that case and the Court's treatment of the relevant coasts in that case at some length.

21. We pointed out that the Court made no distinction between "opposite" and "adjacent" coasts in considering the Tunisian coast that was relevant to the delimitation. Nor did the Court exclude the Gulf of Gabes as a relevant coast, or as forming part of the relevant area for proportionality purposes, because it lay too far away from the delimitation area or pointed in the wrong direction. The back of the Gulf of Gabes in *Tunisia/Libya* lay over 100 nautical miles away from the delimitation line, considerably further away from that line than the Tunisian coasts to the north and the south of the Gulf, but nonetheless, the Gulf was still treated as a relevant coast and as part of the relevant area.

22. There has been no reply this week by the other side to that demonstration. Nor was there any reply to our analysis of the relevant coasts in the *Libya/Malta* case, or in the *Nicaragua* v. *Honduras* case, or to what we said about the Court of Arbitration's treatment of coasts in the *Anglo-French* Arbitration in response to Romania's first round argument that there is no third category of coastal relationships other than "opposite" or "adjacent" coasts.

23. Even Professor Crawford now seems to accept that point that we demonstrated, for on Monday, he stated: "It is also true that there are situations where coasts are obviously within a delimitation area but cannot really be classified as adjacent or opposite." (CR 2008/30, p. 27, para. 281.) That was precisely the point we were making in our first round. Professor Crawford maintained that that is especially true for small islands, but he offered no demonstration to back up that assertion, and it is one that is not consistent with the Court's treatment of mainland coasts that

were an issue in cases such as *Tunisia/Libya* or *Nicaragua* v. *Honduras*, or, indeed, with the Chamber's treatment of the mainland coasts of the parties in *Gulf of Maine*. Professor Crawford then went on to try and distinguish *Gulf of Maine* on a number of different grounds. I would like to take up those observations and comments of counsel for Romania in their rebuttal round but since that really leads me into a discrete section of my pleading, Madam President, perhaps, if convenient for the Court, we could break now.

The PRESIDENT: Yes, thank you, Mr. Bundy. The Court now briefly rises.

The Court adjourned from 4.25 to 4.35 p.m.

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

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

24. Now, on Monday, Professor Crawford chastised Ukraine for referring to the *Gulf of Maine* case — or perhaps for referring to it too much. That did not prevent my learned friend from embarking on quite a long discourse on the case, which I shall respond to. Professor Crawford also forgets that it was Romania which relied on the case in its Memorial, and again, in its Reply, for its discussion of which coasts should be considered relevant coasts in the present case (MR, para. 9.4 and footnote 223; RR, paras. 3.55-3.58). Moreover, it was Romania's Memorial which cited the passage from the Chamber's Judgment in which it noted that "it is equally certain that a substantial disproportion to the lengths of those coasts that resulted from a delimitation effected on a different basis would constitute a circumstance calling for an appropriate correction" (MR, para. 8.61, citing *I.C.J. Reports 1984*, p. 323, para. 185).

25. Earlier this week, Professor Crawford tried to distinguish *Gulf of Maine* from the present case on a number of different grounds, and I would submit that none of these is persuasive.

26. Counsel first suggested that, unlike the Gulf of Maine, the north-western basin of the Black Sea is not regarded as a distinct entity and has no name of its own (CR 2008/30, p. 28, para. 30 *(a)*).

27. But questions of toponymy are irrelevant. It was not because the Gulf of Maine was called the "Gulf of Maine" that the Chamber arrived at its particular delimitation line. That line was the product of the geographical characteristics of the area being delimited.

28. For his part, Professor Pellet asserted that the north-west corner of the Black Sea has nothing to do with the Gulf of Maine, and he maintained that Ukraine's counsel should be sensitive to the differences that exist between the two situations, which he claimed were self-evident (CR 2008/31, p. 39, para. 33).

29. But is it really so self-evident that the geographical situations in the two cases are so different? Obviously, while no two cases are exactly alike, it is quite clear that the coastal geography at issue in *Gulf of Maine* bears a much closer resemblance to the situation we have here than the geography of any of the other cases that have been cited by our opponents. Let me recall certain essential facts.

30. The Gulf of Maine is surrounded on three sides by the coasts of the parties to that case. So, too, is the area of concern in this case surrounded on three sides by the coasts of the Parties. Professor Crawford said that the Gulf of Maine is an "unusually well-defined entity" (CR 2008/30, p. 29, para. 31 *(a)*), but the north-west corner of the Black Sea is an equally well-defined area, and represents a discrete maritime area.

31. A number of Romania's own maps specifically label this area as the "North-west part of the Black Sea", and circumscribe the coasts abutting the area as extending from the Romania-Bulgaria land boundary all the way around to Cape Sarych. That can be seen, for example, on maps 26 and 38 to Romania's own map atlas. It can also be seen on Professor Crawford's map that he showed in the first round, which was labelled "The North-western Basin of the Black Sea". That map is now on the screen — it was tab IV-2 from Romania's first round folders. The coasts of the "North-western Basin" shown on the map, as well as on the other maps that I mentioned, are precisely the same coasts that Ukraine has shown to be the "relevant coasts" in this case.

32. Professor Crawford suggested that the present case presents a novel question for the Court. "How do you delimit a maritime boundary in a confined area when one party has longer coasts?" (CR 2008/30, p. 23, para. 13.) But that situation is hardly novel. It is similar to the

situation that the Chamber confronted in the *Gulf of Maine* case where the delimitation also took place in a confined area where one party had longer coasts.

33. My learned friend then argued that, outside the notional closing line of the Gulf of Maine, the Atlantic coasts of the United States and Canada did not look into the Gulf. But so, too, in this case, does the coast of Ukraine beyond to the east of Cape Sarych not look into the north-west corner of the Black Sea and is not relevant; nor does the coast of Bulgaria, beyond the Romanian coast, or even the very southernmost parts of Romania's coast itself, face on to the north-west corner of the Black Sea. I fail to see the difference.

34. A further point raised by counsel was that the entrance to the Gulf of Maine was much wider than it is deep (CR 2008/30, p. 29, para. 31 *(b)*). Why that makes any difference was left unexplained by my colleague (tab IV-14 to Romania's first round). Nonetheless, if a line is drawn between the Romania-Bulgaria land boundary and Cape Sarych, which actually does represent the natural limit to the north-west corner of the Black Sea, then that line, as you can see from the map currently on the screen, is longer or the area closed wider than is the depth stretching up to Ukraine's south-facing coast, just as was the situation in the Gulf of Maine — it is at tab 12.

35. Professor Crawford did not approve of this closing line. But it is the same line that Romania itself displayed at tab IV-14 of its first round folders to illustrate the relevant coasts. You can see that the width of the area closed is 224 nautical miles while the maximum depth to Ukraine's south-facing coast is about 150 nautical miles — another similarity to *Gulf of Maine*. Unlike *Gulf of Maine*, however, as I pointed out last week, Romania's delimitation line crosses this closing line at a point which is over 40 km closer to Ukraine's coast than to Romania's coast despite the fact that Romania has a much shorter coast.

36. Counsel then offered some comments on the decision in *Gulf of Maine* itself (CR 2008/30, pp. 29-30, para. 32).

37. His first point was that: "It is the decision of a chamber, not the whole Court." (*Ibid*., para. 32 *(a)*.)

38. Was my colleague seriously contending that this Judgment rendered by a Chamber carried less weight than delimitation judgments rendered by the full Court? If so, he apparently forgot to co-ordinate with Mr. Olleson who, shortly after Professor Crawford spoke, relied on the

Chamber's decision in the *Frontier Dispute* for the probative value of maps (CR 2008/30, p. 59, para. 17). Obviously, it is well known that Article 27 of the Statute of the Court provides that: "A judgment given by any of the chambers provided for in Articles 26 and 29 shall be considered as rendered by the Court."

39. Professor Crawford then suggested that the Judgment in *Gulf of Maine* was "an outlier in delimitation decisions"; it was the only occasion where a ratio of coastal lengths generated a precise adjustment of a closing line — an operation which he characterized as "eccentric and even fussy" (CR 2008/30, p. 29, para. 32 *(b)* and *(c)*).

40. What is eccentric, I would respectfully suggest, is to characterize a judgment of the Court as "eccentric and fussy". Was the Court's recent decision in *Nicaragua* v. *Honduras* "eccentric" because it used a bisector method instead of equidistance? Were the decisions in the *Libya/Malta* and *Jan Mayen* cases "eccentric" or "fussy" because they used different methodologies for taking into account a significant difference in coastal lengths? Why was the *Gulf of Maine* case "eccentric"? Each case responds to its own facts and circumstances.

41. Indeed, the continued relevance of the *Gulf of Maine* case as an important precedent for the proposition that material differences in coastal lengths justify a shifting of the provisional equidistance line is underscored by the fact that it has been cited with approval in both the *Jan Mayen* Judgment and in the award in the *Barbados/Trinidad and Tobago* case. (See *I.C.J. Reports 1993*, pp. 67-68, paras. 66 and 68; and the award in the matter of an *Arbitration Between Barbados and the Republic of Trinidad and Tobago*, Award of 11 April 2006, para. 377.)

42. What was peculiar, on the other hand, was Professor Pellet's comment on the decision in *Gulf of Maine*. While he correctly stated that the Chamber took into account a difference of 1.38 to 1 in the lengths of the respective parties' coasts to adjust the equidistance line, he then went on to assert that this adjustment was done to arrive at a ratio of 1 to 1 (CR 2008/31, p. 39, para. 33).

43. Now, where my distinguished friend came up with this account of the Chamber's reasoning is a mystery. No citation to the Judgment appears in the transcript, probably for the reason that none exists. Nowhere in the Judgment will any reference to an adjusted 1 to 1 ratio be found.

2. The northern coasts

44. Madam President, Members of the Court, following Professor Crawford's south to north tour of the relevant coasts, I now move to the northern coasts of the Parties. Let me start with the coasts of the Parties lying in the vicinity of the land boundary that Romania regards as the "adjacent coasts" of the Parties.

[Tab II-6 to Romania's 15 September folder]

45. The map on the screen is another figure that Romania has produced and it depicts what Romania considers to be the relevant coasts to the north and south of the land boundary. I would suggest that two points stand out.

46. First, even under Romania's thesis, Ukraine's coast up to "point S" is some three times longer than Romania's coast from the land boundary to the Sacalin peninsula. Yet that marked difference in coastal lengths is given no effect by Romania. Nor is the fact that Ukraine's coastal front in this area faces in a south-east direction — nor is that taken into account. The projection of that coast is cut off by Romania's claim.

47. Secondly, north of "point S", Ukraine's coast maintains virtually the same orientation or general direction as it has south of "point S". Yet that does not prevent Romania from positing an arbitrarily-named "point S" as the start of a new segment of Ukraine's coast that Romania considers to be irrelevant. There are no grounds for excluding Ukraine's coast north of "point S" or for treating "point S" as having any relevance at all. It is another member of Romania's collection of alphabet points that has no underlying rationale.

48. Professor Crawford seemed to think that the *Jan Mayen* case provides support for Romania's elimination of Ukraine's coast beyond "point S". And he referred once again to *Jan Mayen* on Monday (CR 2008/30, p. 28, para. 28).

49. Now, Ukraine's Rejoinder had contained a really quite thorough analysis of the Court's treatment of the relevant coasts in the *Jan Mayen* case and why that treatment was wholly inconsistent with Romania's attempts to suppress Ukraine's coast beyond "point S". And I would refer the Court respectfully to paragraphs 4.28 to 4.32 of the Rejoinder. We have been correctly reminded not to repeat arguments that appear in the written pleadings, so I will not do so and I will not rehearse the arguments made there, particularly since they have been totally ignored in

Romania's pleadings. Romania continues to cite the case in its support but it fails to take into account the fact that in the south, in the *Jan Mayen* case, Greenland's relevant coast was limited to that part of the coast that did not face a third State — Iceland — or the areas encompassed by Iceland's 200-nautical-mile claims. In the north, the relevant coast of Greenland stopped at a point where its 200-mile extension intersected with Jan Mayen's 200-mile projection and with an unadjusted median line. And that reasoning, as articulated in the Court's Judgment, in no way supports Romania's effort to suppress long stretches of Ukraine's coast in this case.

50. I now come to Ukraine's south-facing coast between Odessa and Cape Tarkhankut.

51. The gist of both Professor Crawford's and Professor Lowe's arguments for not considering this stretch of Ukraine's coast is that it is "eclipsed" by other parts of Ukraine's coast. Professor Crawford said, "it competes with other and much closer Ukrainian coasts" (CR/2008/30, p. 31, para. 40). Professor Lowe put it this way:

> "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." (CR 2008/31, p. 49, para. 35.)

52. Both Professor Crawford and Professor Lowe projected the same graphic to illustrate their argument. It is now being placed on the screen [tab IX-7 to Professor Lowe's 16 September speech]. This graphic was designed to show the so-called "squeezing effect" that Ukraine's south-facing coast is said to suffer at the hands of its south-east and west-facing neighbours.

53. The first comment I would make is that our opponents have been unable to cite a single authority for the proposition that, when part of a party's coast is allegedly "eclipsed" or "squeezed" by another part of its own coast, that part of the coast is no longer to be considered as a relevant coast. There is *no* support for such a theory.

54. In contrast, there *is* legal authority rejecting that approach. And, in particular, I refer to the *Tunisia/Libya* and *Gulf of Maine* cases.

[Map of Tunisia-Libya]

55. Here is Libya: and here is Tunisia-Libya. Under Romania's reasoning, the "eclipsed" or "squeezing" theory, in *Tunisia/Libya* the entire Gulf of Gabes should have been "eclipsed" or "squeezed" by the Tunisian coasts lying much closer to the area where the delimitation line fell —

namely, the Tunisian coast along the island of Djerba in the south, and the mainland coast of Tunisia north of Ras Yonga, including the Kerkannah Islands, in the north.

56. Using Romania's "wave theory", the waves created within the coasts within the Gulf of Gabes should have been cut off by corresponding waves projecting from Djerba and from the coast from Ras Yonga northwards. But the Court, in that case, in no way endorsed such an approach. As Ukraine has pointed out — and it is a point that Romania *never* addressed — either its first or second round of pleadings — the Court treated the entire Gulf of Gabes coast as a relevant coast and the whole area within the Gulf as part of the relevant area. It was not "eclipsed" or "squeezed" off.

[Map of Gulf of Maine]

57. The same approach was adopted by the Chamber in the *Gulf of Maine* case with respect to the Bay of Fundy. Its coasts were not "eclipsed" or "squeezed" out of the delimitation equation by other parts of the Canadian coast facing onto the Gulf of Maine. To the contrary, much of the coast of the Bay of Fundy was considered by the Chamber to form part of the Gulf of Maine proper, and was taken into account as a relevant coast when adjusting the equidistance line further out to sea.

58. It is not that the projection of Ukraine's south-facing coast gets eclipsed by other parts of Ukraine's coast. Rather, the projection from Ukraine's coast on all three sides of the relevant area *all* proceed seawards. They add to and complement each other.

[Wave map on screen)

59. This can be seen from the map that is now going to be displayed on the screen: it is — the cumulative effect of it is in tab 13 — but I will take you though it in stages. First, we have the projection from Ukraine's south-facing coast. [Add to map] Next, we have the projection from Ukraine's south-east facing coast. [Add] And third, we have the projection from Ukraine's coast along the Crimea. [Add]

60. Each of these projections does not magically stop when it meets the projection from another coast, any more than Ukraine's overall maritime entitlements stop when they meet those of Romania. To use words that have often been employed by the Court, these entitlements meet and overlap.

61. That is what happens to the projection from Ukraine's south-facing coast. It meets and it overlaps with neighbouring projections thus reinforcing the overall effect. And it is this phenomenon which led Professor Quéneudec to observe last week that Ukraine has the predominant, or the more intense, coastal geographic position along this part of the Black Sea.

62. Professor Lowe stated on Tuesday that, 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" (CR 2008/31, p. 50, para. 43).

63. That was certainly not the way the Court analysed the relevant coasts in *Tunisia/Libya* or the way the Chamber took into account the coastal geography in *Gulf of Maine*. As I have said, in both cases, the coasts of the Gulf of Gabes and the Bay of Fundy respectively could, *and did*, generate maritime entitlements, and they were thus taken into account. And the same applies to Ukraine's south-facing coast. It faces an area solely relevant to delimitation with Romania, not to third States which lay far to the south, unlike, for example, the parts of Libya's coast that faced Malta, or of Tunisia's coast that faced Italy, and which were therefore not considered relevant in that case.

64. The same considerations also undermine Romania's attempt to do away with the Karkinits'ka Gulf for delimitation purposes. And, once again, both the *Tunisia/Libya* and *Gulf of Maine* cases run counter to Romania's arguments. As the Chamber emphasized in the *Gulf of Maine*, and I quote from the Judgment:

> "In this respect, the Chamber wishes to emphasize that the fact that the two coasts opposite each other on the Bay of Fundy are both Canadian is not a reason to disregard the fact that the Bay is part of the Gulf of Maine, nor a reason to take only one of these coasts into account for the purpose of calculating the length of the Canadian coasts in the delimitation area."

And the Chamber continued, specifically citing the Gulf of Gabes example from *Tunisia/Libya*:

> "There is no justification for the idea that if a fairly substantial bay opening on to a broader gulf is to be regarded as part of it, its shores must not all belong to the same State." (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 336, para. 221.)

65. The same considerations apply to the Karkinits'ka Gulf. It forms part of the north-west basin of the Black Sea and it, too, constitutes part of Ukraine's relevant coast.

66. Madam President, Members of the Court, that concludes what I wish to say about the relevant coasts of the Parties. Ukraine believes that it has shown in a convincing, and legally supported, manner why *all* of its coasts fronting this part of the Black Sea should be considered to constitute relevant coasts for the present delimitation.

B. The Sulina dyke

67. I would now like to turn very briefly to a few issues concerning the Sulina dyke on which so much of Romania's case depends. Professor Quéneudec will have more to say about the dyke tomorrow, but for my part, I need to rectify a number of errors that counsel for Romania made in their second round pleading relating to the dyke and to its role in the delimitation process.

68. Let me start with Mr. Müller's presentation. In an effort to buttress Romania's reliance on the Sulina dyke as a base point for the majority of its equidistance line, Mr. Müller made references to examples where harbour works have been given effect for maritime delimitation purposes.

69. First, Mr. Müller referred to the *Sharjah/Dubai* arbitration for the proposition that there is a body of practice in which full effect has been given to harbour works (CR 2008/30, p. 70, para. 15). The Court will recall that I discussed the role that harbour works played in *Sharjah/Dubai* at some length during my intervention last Thursday (CR 2008/28, p. 30, paras. 14-16).

70. I recalled that what was at issue in that case were the harbour works of *both* parties. Those installations were much wider than the Sulina dyke (3,000 m versus 150 m), and projected much less far out to sea than the dyke. As was noted in the Award itself, use of *both* parties' — both Sharjah and Dubai's harbour works — had only a very slight effect on the equidistance line, in contrast to the situation we have here regarding the huge effect that the Sulina dyke has on Romania's equidistance line.

71. My colleagues on the other side of the Bar had no reply to this description of the actual situation in *Sharjah/Dubai*.

72. Instead, Mr. Müller cited two examples of State practice which I can only assume he believes support Romania's case.

73. The first involved the harbour installations down the coast at Zeebrugge in Belgium, which Mr. Müller asserted had a noticeable influence on the delimitation line agreed between Belgium and the Netherlands. He quoted from Article 2 of the 1996 Netherlands-Belgium delimitation treaty to support his point (CR 2008/30, p. 71, para. 16).

74. The part of Article 2 which Mr. Müller cited now appears on the screen in the English translation that was helpfully included in the transcript. This is the part that Mr. Müller cited:

[Place quote on screen]

> "The boundary, consisting of the points listed in article 1, is based on the principle of equidistance from a maximum base line, namely the low water mark along the shoreline. Account has been taken of the seaward extension of the port of Zeebrugge in Belgium . . ." (CR 2008/30, p. 71, para. 16).

75. Regrettably, my colleague elected not to read the remainder of Article 2 of the Treaty, and the phrase he omitted is now being added to the quote on the screen [add in red]. As the Court will observe, the second sentence of Article 2 actually reads in its entirety: "Account has been taken of the seaward extension of the port of Zeebrugge in Belgium *and the "Rassen" shallows off the coast of the Netherlands.*"

76. That is an important omission [project map of delimitation]. As you can see from the map appearing on the screen — it is a map of the delimitation area (tab 14) — "Rassen" is a low-tide elevation lying about the same distance off the coast of the Netherlands as the port installations at Zeebrugge extend into the sea off the coast of Belgium. *Both* features were taken into account in the delimitation and obviously had a kind of "balancing effect". Mr. Müller overlooked this key point.

77. My colleague also gave a truncated analysis of the use of the Zeebrugge harbour works for the delimitation agreement between Belgium and the United Kingdom [project map on screen] (tab 14). Once again, here is a map of that agreement. Counsel failed to point out that, on the United Kingdom side of the boundary, a low-tide elevation called Long Sand Head — which was located about 11.7 nautical miles out to sea — was also given an effect for purposes of establishing the delimitation line. So, in both examples cited by Mr. Müller, it was not the harbour works standing alone that were given weight for delimitation purposes; low-tide elevations on the other side were too. In these circumstances, one wonders why a full-fledged island — such as Serpents'

Island — should not have any effect for continental shelf and EEZ delimitation purposes, as Romania contends.

78. The other matter I need to deal with concerns the effect that the Sulina dyke has on Romania's provisional equidistance line. As we pointed out last week, use of a base point at the end of the dyke controls some 160 km of Romania's equidistance line, and we also showed that use of the dyke has a huge effect on Romania's line.

79. It was suggested by Professor Lowe on Tuesday that Romania did not actually draw its equidistance line from the tip of the dyke but from the lighthouse that is almost at the end of the dyke (CR 2008/31, p. 53, para. 56). That is not what Romania's written pleadings say, and it has not been demonstrated by the other side during these oral proceedings. At two places in its Memorial, Romania expressly states that "on the Romania coast only one point is relevant to construct the equidistance line: the outer (external) end of the Sulina dyke". That comes from Romania's Memorial at paragraph 11.65; a similar statement is made in its Reply (RR, para. 8.31).

80. More importantly, however, Professor Lowe accused Ukraine of having miscalculated the effect that the Sulina dyke has on Romania's equidistance line (CR 2008/31, p. 19, para. 38). [Place Romania's "corrected" map on screen.]

81. Professor Lowe displayed — I think it was on Tuesday — the map you now see on the screen. He said that Ukraine's red line — representing the effect of the dyke — "appears to have been calculated using a baseline some way inland from the natural coast of Sulina" *(ibid.)*. He then claimed that if the furthest point on the natural coast — that is the natural coast of Romania — is used, the "true equidistance line", which is what he termed it, is that shown in yellow on this chart, and "it has significantly less effect on the equidistance line than Ukraine has claimed" (CR 2008/31, pp. 19-20, para. 38). That was Professor Lowe's contention.

82. My response is as follows.

83. First, Professor Lowe made no demonstration at all to back up his argument that Ukraine had not used the natural coast of Romania as a base point, but rather that Ukraine had used a baseline some way inland. He simply asserted it — there was no showing of this — and he did not show the control points for Romania's new yellow line.

84. Nonetheless, after Professor Lowe's intervention, we were concerned, so we went back and we checked this point very carefully on Tuesday evening. The results of that checking show that Professor Lowe is mistaken, and that Romania's yellow line is wrong.

[Photo of base points)

85. Now being displayed on the screen are the base points on the Parties' natural coasts that should be used if the Sulina dyke is ignored (tab 15). The Court will see that we have used the very seawardmost point on Romania's natural coast that juts into the sea — not some point back, as Professor Lowe intimated. This is the point where the land ends. This also shows Ukraine's corresponding base point. A close-up photo of these points can now be seen on the screen; each of the respective base points. [Close-up photo]

86. Using these base points, Ukraine's experts then plotted the equidistance line between them. That line adopts an azimuth of 116°, as you can see on the screen [slide] (also at tab 15).

87. If that azimuth is then projected out to sea, as shown by the green line now on the map [new map], it can be seen that, if anything, Ukraine slightly *underestimated* the effect of the dyke on Romania's equidistance line. The green line falls slightly south of the red line.

88. Romania's yellow line has no basis whatsoever. Where it came from is a matter of complete speculation, given that Professor Lowe provided no details as to how it was constructed.

89. What is clear — Ukraine said this before and will say it again — is the effect that this long, thin man-made structure has on Romania's equidistance line is very, very large and grossly disproportionate when the dyke is compared to Serpents' Island, which Romania persists in ignoring.

90. At the end of the day, and despite Romania's attempt to build up the importance of the Sulina dyke, our opponents have still not been able to explain why it is equitable to accord a man-made structure consisting of two low, thin stone embankments, about 150 m apart, jutting 7.5 km long, a full effect for the delimitation of the continental shelf and exclusive economic zone, while a much larger natural island should receive no equivalent treatment.

91. Madam President, Members of the Court, that concludes what I wish to say at this stage with respect to the coastal geography and I would be grateful if the floor could now be given to Ms Malintoppi. Thank you very much.

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

Ms MALINTOPPI: Thank you, Madam President, Members of the Court.

IV. PETROLEUM AND COASTGUARD ACTIVITIES, ROMANIA'S ENCLOSED SEA/REGIONAL PRACTICE ARGUMENTS AND THE NATURE AND CHARACTERISTICS OF SERPENTS' ISLAND

Introduction

1. Madam President, Members of the Court, this afternoon I shall respond to three aspects of Romania's second round oral arguments: first, Romania's contentions relating to the Parties' oil and gas activities and Ukraine's coastguard operations; second, Romania's remarks on the effect for this delimitation of the enclosed or semi-enclosed nature of the Black Sea and the limited regional delimitation practice in that sea; and, third, Romania's position on the nature and characteristics of Serpents' Island.

A. Romania's contentions with respect to petroleum and coastguard activities

2. First, I will deal with the contentions made by Romania with respect to petroleum and coastguard activities.

3. The first general observation that can be made with respect to the Co-Agent's presentation on Monday is that he glossed over a number of points that I raised in my speech on this subject during Ukraine's first round presentation, or simply repeated allegations already made by Romania in the first round.

4. A good example concerns Ukraine's arguments that Romania's conduct in the disputed area was totally inconsistent with the claim it now advances before the Court. In this respect, the Co-Agent limited himself to presenting a variation of the arguments already made in his first round speech. In response to Ukraine's statements that Romania's activities in the area tend to confirm the absence of any pre-existing delimitation agreement around Serpents' Island, or extending to "point X", Romania's Co-Agent contended that the concessions awarded by Romania after 1990 are not the only State activities carried out by Romania in the disputed area[55]. He stated that there

[55]CR 2008/30, p. 37, paras. 13-15.

are areas of Romanian "exploration activities" which overlap the area in dispute and are consistent with Romania's claims[56]. These arguments were based on the sketch showing seismic profiles that had been filed as figure RR 26 of Romania's Reply, and on independent studies produced for the first time during these oral hearings.

5. We have already discussed figure RR 26 and therefore I will not revert to it again. As to the studies, Romania's Co-Agent affirmed that they are as "authoritative and independent" as the Petroconsultants map produced by Ukraine[57]. However, this is not the point. First of all, Petroconsultants — which is now called HIS Energy after a corporate restructuring — is one of the leading companies providing data on oil and gas exploration activities and production. *Marine Geology*, the journal that published the studies produced by Romania, is an academic journal, which — however reputable — is a scientific publication dealing with the fields of marine geology, geochemistry and geophysics. Clearly, Petroconsultants is a more reliable source of information when it comes to the hydrocarbon industry and oil exploration and exploitation activities.

6. Moreover, Romania continues to rely on secondary sources and not on its own records, which ought to be Romania's primary source of information and which thus should have been produced before the Court. It is equally telling that not a word was said by our distinguished opponents in trying to explain this silence or to disprove that Romania did award the *Pelican*, *Istria*, *Midia* and *Neptun* blocks in the form depicted in the Petroconsultants map.

7. But let us look at the studies on which Romania bases its allegations. As I said, they were published in the journal *Marine Geology* in 2000, 2004 and 2007. Incidentally, the studies have not been produced by Romania in their entirety and the last two are only accessible by subscription.

8. The first study, published in 2000, is the result of a joint effort by Romanian, German and Russian institutes of marine geology and geophysics. It concerns the Upper Quaternary water level history and sedimentation in the north-western Black Sea[58].

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[56]CR 2008/30, p. 39, para. 20.

[57]CR 2008/30, pp. 37-38, para. 17.

[58]CR 2008/30, p. 38, para. 18.

9. The seismic profiles were apparently carried out by research cruises conducted in 1992, 1993 and 1994. The study mentions that data of industrial seismic profiles concerning surveys conducted in 1970-1971, 1981-1988 and 1994, were made available by two Romanian companies. It also refers to two drill holes, *Ovidiu* and *Heraclea*. However, there are no details regarding the industrial seismic profiles allegedly conducted by Romanian companies and, particularly for those conducted prior to Ukraine's independence, there is no way of knowing anything about the circumstances in which they were carried out, or, for instance, whether they were jointly carried out by Soviet and Romanian companies. As to the drill holes, they do not appear to have been drilled for oil exploration activities since the depths of the wells cited in the study only descend as far as 300-600 m, and are thus insufficient for oil exploration or exploitation[59].

10. The next two studies were only mentioned by Romania earlier this week. The second study, published in 2004 by a Franco-Romanian group of scientists and university professors, concerns, as the title indicates, the Danube submarine canyon: morphology and sedimentary processes[60]. The study, the nature of which again is purely academic, mentions that the Romanian company Petrom provided ten industrial seismic lines, but this is the same data from 1994 referred to in the previous study from 2000.

11. Romania's Co-Agent, in fairness, only tangentially mentioned the third study, published in 2007, although he appears to have referred to it as a joint Franco-Romanian effort, while it was apparently conducted by French scientific institutions only[61]. It is a study of the Messinian erosional surface in the Black Sea. A fascinating topic, no doubt, but the study does not indicate that the research was conducted for oil exploration purposes or that oil companies were in any way involved.

12. Consequently, these studies do not even come close to showing any oil exploration activities by Romania that have any relevance to its claim line.

13. Romania's Co-Agent reproached me for having allegedly made two factual mistakes: the first because I stated that "a number" of the *Ukrainian* licences were awarded before the

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[59]The holes are represented at fig. 8, p. 139.

[60]CR 2008/31, p. 38, para. 19.

[61]*Ibid*.

Exchange of Letters was concluded, when only one, the *Delphin* block, was, and the second because I said that the co-ordinates of the area in dispute were never established following the 1997 Exchange of Letters[62].

14. Romania's Co-Agent must have misread the transcript, because what I stated, in the first respect, was that "a number of the licences which I discussed earlier (*such as the Ukrainian* Delphin *block, and, according to Romania, the Romanian blocks*)" were awarded before the 1997 Exchange of Letters[63]. Clearly, I was not limiting my statement just to the Ukrainian blocks, but I was referring to both Ukraine's and Romania's licences. In the second respect, as to the second factual error I would have made, once again, I appear to have been misunderstood because, while the claims of the Parties, as they stood at the time, may have been known, the *co-ordinates* of the delimitation zone were never agreed by the Parties as anticipated in the Exchange of Letters.

15. Romania's Co-Agent also objected to my counting only two Romanian protests to Ukraine's oil and gas activities when — he stated — there was correspondence addressed by Romania to Ukraine from 2001 to 2006[64]. But in that 2001-2006 correspondence, Romania only objected to Ukraine's presumed *exploitation* activities that it argued were in violation of the 1997 Exchange of Letters, not its exploration activities. Ukraine responded to these letters, as documented in our written pleadings[65], and clearly stated that these operations did not come within the definition of "exploitation of mineral resources" under paragraph 4 *(f)* of the Exchange of Letters. It is telling that Romania's letters did not object to Ukraine's activities because they were being carried out in maritime areas that had been previously delimited by the 1949 Soviet-Romanian Agreement. It is also noteworthy that apparently Romania for a moment lost sight of the critical date that it itself set at 1997 — well before the first of these letters was sent.

16. But the critical date resurfaced again when Romania's Co-Agent turned to Ukraine's coastguard activities. In fact, little attention was paid to this subject, apart from a three-line comment that Ukraine's surveillance operations in the disputed area should be disregarded because

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[62]CR 2008/31, p. 35, para. 5.

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

[64]CR 2008/30, pp. 40-41, para. 26.

[65]RU, pp. 123-125, paras. 6.86-6.91.

they were conducted after the critical date[66]. Otherwise, Romania's Co-Agent made no attempt to respond to our arguments that Romania's inactivity, and its silence in the face of Ukraine's assumption of responsibility in respect of coastguard operations in the disputed area, fundamentally undermine its allegation that there was already an agreed delimitation in this area.

17. What *was* said by our distinguished opponents in this respect was actually more in tune with Ukraine's position than Romania's. It did not come from the Co-Agent, but from Professor Lowe. He made an extraordinary admission during his speech on the equitableness of the Parties' proposals, when he sought to rebut Mr. Bundy's statement that only Ukraine policed the disputed waters. Professor Lowe stated: "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."[67] In other words, Madam President, even counsel for Romania admits that Romania's theory of a pre-existing maritime delimitation agreement is pure fiction. If the waters were acknowledged by Romania to be Romanian by virtue of a pre-existing boundary dating from 1949, why was Romania not then policing the area? Professor Lowe offered no explanation.

18. With respect to the critical date, Romania's Co-Agent wished to clarify an incorrect statement that I apparently made, namely, that Romania set the critical date at 1997. He said that Romania's Reply actually stated that the 1997 Additional Agreement was "at the latest" the critical date in relation to this case, and not — as I noted — *the* critical date for Romania[68]. Actually, for the record, the Reply *did* state that 1997 was *the* critical date, and it did so precisely in relation to the discussion of the Ukrainian licensing practice. The relevant passage reads as follows: "the Ukrainian licensing practice has developed only recently, well after the critical date — *1997*"[69].

19. To be precise, Ukraine's first licence — the *Delphin* block — dates back to 1993[70]. But, in any event, Romania's treatment of the critical date in this case reveals its concern to do away with Ukraine's activities that pose a threat to Romania's case: the petroleum activities and

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[66]CR 2008/30, p. 41, para. 28.

[67]CR 2008/31, p. 52, para. 47.

[68]CR 2008/30, p. 36, para. 11.

[69]RR, p. 250, para. 7.13.

[70]CR 2008/28, p. 26 para. 10.

coastguard operations, and Ukraine's administrative acts regarding Serpents' Island. The self-serving nature of this exercise is apparent.

20. When our opponents deal with the critical date, they put the emphasis on the word *dispute* and appear to forget that the critical date is the date at which the dispute can be said to have *crystallized,* or, to use the words of the Chamber in the *Frontier Dispute*, when the clock stops (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment I.C.J. Reports 1986*, p. 568, para. 30). In other words, the critical date is the date upon which the Parties' positions have been expressed with sufficient precision so that it can be said that a dispute has crystallized. When, like in the present case, the Court is called upon to delimit a maritime boundary line, it can be more difficult to identify a critical date than territorial disputes. This is all the more problematic in a situation, such as the present one, where different positions may have been advanced by the parties in the course of prolonged negotiations, and introduced even as late as in the proceedings in this case. Moreover, whenever the critical date may be in this case, Ukraine's recent conduct cannot be interpreted as an attempt to improve its legal position because it represents the continuation of previous State activities.

21. In the circumstances, it would be incorrect, in our submission, to fix the critical date at 1995, or even 1997, because — as I already stated in the first round[71] — until 1997 the Parties had not even agreed *on the principles for the conduct of the negotiations*, let alone defined their respective claims and positions.

22. That is why Ukraine suggested that it would be more appropriate to fix the critical date — assuming that the Court decides that it can play a role for delimitation purposes — at 2004, a year which is doubly significant for this case. Because, it is both the date on which Romania introduced the dispute before the Court, and the date of the entry into force of the 2003 Treaty fixing the State border between the Parties and the starting-point of the maritime delimitation which the Court is called upon to establish.

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

B. Romania's arguments on delimitation agreements in the Black Sea

23. I will deal next with Professor Pellet's arguments on other delimitation agreements in the Black Sea.

24. On Tuesday, Professor Pellet referred to delimitation practice elsewhere in the Black Sea in an effort to show that these agreements "confirm" the equity of Romania's claim line[72].

25. As part of his demonstration, my friend Professor Pellet displayed the graphic that you now see on the screen and which is also at tab 16[73]. Not only did Professor Pellet speculate as to the location of future maritime boundaries on this map — they are depicted by blue lines between Russia and Ukraine, Romania and Bulgaria, and Romania and Ukraine — but he also superimposed red lines which he characterized as the delimitation lines that would have resulted if Ukraine's methodology in this case were to be applied to other boundaries.

26. Once again, our colleagues on the other side persist in arbitrarily drawing lines on maps without the slightest justification or explanation as to how they were constructed.

27. Nevertheless, Professor Pellet's map is helpful in one respect. For it shows very clearly the difference between the geographic characteristics of the north-west corner of the Black Sea and the rest of the sea.

28. Let me take the situation between Ukraine and Turkey where Professor Pellet has drawn a red line north of the actual boundary agreement line. Although he offered no explanation as to the basis on which this red line was constructed, it must be supposed that my friend was assuming that the relevant Turkish coast was longer than the corresponding Ukrainian coast.

29. Any such notion is clearly wrong. On the east, and using the coastal control points governing the endpoint on Professor Pellet's blue line representing his imaginary delimitation between Ukraine and Russia, it can be seen that the coast of Turkey relevant to the delimitation with Russia is approximately the same length as the corresponding Russian coast. [Add black line from Turkish coast to Russia/Turkey/Ukraine tripoints.]

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[72]CR 2008/31, pp. 29-30, para. 17.

[73]Tab VIII-3 to Romania's second round folders.

30. On the west, the relevant Turkish coast for purposes of delimitation with Bulgaria can also be identified and is similar in length to Bulgaria's coast. [Add further black line to Bulgaria/Turkey/Ukraine/Romania point.]

31. That leaves the middle — the stretch of Turkey's coast between the two black lines — in other words, the relevant Turkish coast facing Ukraine. Here, it can be seen that the relevant coasts of Ukraine and Turkey are virtually the same in length. Hence, a median line delimitation.

32. In contrast, Madam President, the north-west corner of the Black Sea is entirely different. Here, we have an area surrounded on three sides by the coast of one State — Ukraine. We also have a substantial difference in the lengths of the coasts of the Parties militating against the application of strict equidistance. And we have an island — Serpents' Island. These factors are simply not present elsewhere in the Black Sea.

C. The nature and characteristics of Serpents' Island

33. I shall now reply to Romania's remarks with respect to the nature and the characteristics of Serpents' Island.

34. First, I note that our distinguished opponents have shown remarkable restraint — to use an understatement — in dealing with Romania's proposals at the Law of the Sea Conference. Very little was said in this regard by counsel for Romania, except for a few words by Professor Lowe who recalled that Romania made various proposals, remained active in negotiations and sought unsuccessfully to include a provision in the Convention dealing "with Serpents' Island's situation"[74]. He added that it should not be surprising that Romania sought the addition of a "wider provision, perhaps anticipating the ingenious attempts of Ukraine to extract itself from Article 121 (3)"[75].

35. However, not a word was spent in order to rebut Ukraine's argument that Romania's position at the Conference is fundamentally inconsistent with its present position that — to quote Professor Lowe — "there is a binding agreement between the Parties as to how [Serpents'] Island will be dealt with"[76].

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[74]CR 2008/31, p. 16, para. 28.

[75]*Ibid*.

[76]CR 2008/31, p. 16, para. 29.

36. Accordingly, Ukraine's argument that Romania's conduct at the Conference confirms that there was no binding agreement between the Parties delimiting a 12-nautical-mile arc around Serpents' Island stands unanswered. If the question of "how the Island will be dealt with" had already been settled by a "binding agreement", as Romania has asserted with great confidence, why was Romania so set on trying to carve out a special régime for islets and islands similar to islets at the Conference? Why was it necessary to anticipate Ukraine's "ingenious attempts to extract itself from Article 121 (3)" if a régime for Serpents' Island had already been established with a "binding agreement"? These key questions remain unanswered by Romania.

37. As to the declaration made by Romania at the time of signature and ratification of the Law of the Sea Convention, we have heard nothing new from our Romanian colleagues in response to Ukraine's first round presentation.

38. Romania insists that Ukraine should have objected to Romania's declaration and largely ignores Ukraine's arguments. Professor Lowe repeated that inferences could be drawn from Ukraine's failure to object to Romania's declaration. But, Madam President, what could such inferences be and why should they be drawn? As Romania acknowledges, there was no legal obligation for Ukraine to react, and Romania's declaration could not have any effect for Ukraine. The declaration was all that was left after Romania had failed to win support for its various proposals regarding the effect of small islands. It was a unilateral interpretative declaration and, under the express terms of Article 310, it "could not purport to exclude or to modify the legal provisions of the Convention".

39. With respect to Serpents' Island's physical characteristics and its capacity to sustain human habitation or economic life of its own, in the first round Ukraine chose — unlike our opponents — not to inflict upon the Court a long litany of excerpts from historical or literary works on the Island. Instead, we preferred to refer back to the documentary evidence submitted with our written pleadings. However, in order to respond to Romania's Agent's allegation that Ukraine failed to address "the large amount of evidence displayed"[77], it is now appropriate to recall briefly some of the more salient facts that emerge from the record, the references to which will appear in

[77]CR 2008/30, p. 14, para. 13.

the transcript, and which attest to Serpents' Island's capacity to sustain human habitation or economic life of its own.

— Under the name of Leuke, Serpents' Island was reported by ancient accounts since the seventh century B.C. to have hosted a temple devoted to the cult of Achilles.[78] Serpents' Island was well known to seafarers coming to worship at the temple; some ancient authors, such as Arrian, state that an oracle resided on the island.[79] It also appears that the priest who tended to the cult of Achilles lived on the island, and was accompanied, at intervals of time, by attendants.[80] Antique coins from a number of different countries were found on the island, testifying to its widespread reputation, and that people of various nationalities, even in antiquity, visited the island.[81]

— In Roman times, Serpents' Island was an outpost of the Roman Empire in the Black Sea region. Ceramic artifacts and coins testify to the Roman presence.[82]

— With the collapse of the Roman Empire, the temple on Serpents' Island lost its religious significance and, although ships continued to visit the island, there is not much mention of it until the Middle Ages when it also was consistently depicted as a prominent island on maps and geographic guides[83].

— In 1837, Russia began building a lighthouse, the construction of which was completed six years later, in 1843 — I have shown pictures of the lighthouse, last week[84]. It was — and still is — manned[85].

— Also in the nineteenth century, the island hosted Russian quarantine commissions who also conducted archaeological surveys on the island during their stay, which lasted for ten years,

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[78]CMU, Anns. 48, 52, 56, 57.

[79]CMU, Ann. 52.

[80]*Ibid.*

[81]CMU, Ann. 57.

[82]CMU, Ann. 52.

[83]*Ibid*. See also, Romania's map atlas, maps RM A1-RM A6.

[84]CMU, Ann. 57.

[85]See, for instance, CMU, Ann. 10.

from 1841 to 1851, when the quarantine post was closed[86]. After Russia's defeat at the end of the Crimean War, the island was transferred to the Ottoman Empire[87].

— During the First World War, Russian soldiers were posted on Serpents' Island[88].

— When the island was under Romanian rule, in the period between the two World Wars, Romania harboured various plans to erect installations and to develop further Serpents' Island, thus showing that Romania itself believed in its capacity to sustain human habitation and an economic life of its own[89].

— Soviet troops were permanently stationed on the island from 1946 until Ukraine regained its independence in 1991[90].

— Shortly after 1991, Ukraine continued to foster the economic development of Serpents' Island. Ukraine has recalled in both its written and oral pleadings the various administrative measures that have been enacted for these purposes since 1995[91]. Incidentally, on the subject of Ukraine's administrative measures, contrary to what Romania's Agent stated on Monday[92], I did not misquote him when I referred to Ukraine's resolution No. 713 of 2002[93]. With all due respect, it was his mischaracterization of the resolution as a "'Comprehensive Programme' for transforming the island"[94] that made it necessary to provide the exact title in order to dissipate the wrong impression that might have been conveyed by the distinguished Agent's words.

— As to the existence of water on the island, a number of accounts refer to the existence of wells and reservoirs, which are also depicted on topographic maps[95]. One such map, perhaps the earliest, was drawn by a Russian officer in 1801. It is on the screen and at tab 17. Another topographic map, drawn by a Russian hydrographer in 1823, is also under the same tab and is

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[86]CMU, Ann. 57.

[87]*Ibid*.

[88]CMU, Ann. 58.

[89]MR, Ann. RM 6 and CMU, Ann. 61.

[90]CMU, para. 7.67, p. 191.

[91]CMU, paras. 7.72-7.88; CR 2008/29, p. 14, para. 43.

[92]CR 2008/30, p. 14, para. 13.

[93]CR 2008/29, p. 14, para. 43.

[94]CR 2008/20, p. 56, para. 6.

[95]CMU, Ann. 57.

now projected on the screen. As you can see from the images reproduced on the screen, both maps show wells and ruins[96]. This is also the case of a map produced by Romania, map RM A6 of its atlas[97]. Unfortunately, it appears that upon the withdrawal of Soviet troops from the island, the water reserves became polluted with chemical and other toxic waste. However, Ukraine has undertaken a project of water purification[98]. According to the conclusions of the Information Report filed as Annex 9 to Ukraine's Counter-Memorial, the purification system is "efficient, reliable and simple in operation". One of the wells is operational since 2004 and was being used "for drinking water supply (after additional treatment) and for household water supply"[99].

40. On the basis of this information, it can be concluded that Serpents' Island can sustain, and indeed has long sustained, human habitation and have an economic life of its own. Even Romania agreed with this analysis when it had sovereignty over the island. At the time, Romania thought that it was worth investing national resources in order to foster Serpents' Island's development, just as Ukraine has done and continues to do since it regained its independence. In these circumstances, it cannot be credibly maintained that Serpents' Island is a remote barren "rock" lying at a great distance from Ukraine's coast.

41. In fact, Serpents' Island's characteristics are just as, if not more, capable of human habitation and economic life than those of Jan Mayen. It is true that this island is larger than Serpents' Island, but it is nevertheless much less accessible; it is a volcanic island, which has no stable population and is inhabited only seasonally by technical staff. And yet, the Conciliation Commission established by Norway and Iceland to decide the maritime delimitation in the Jan Mayen area, concluded that this island is in terms "in principle entitled to its own territorial sea, contiguous zone, exclusive economic zone and continental shelf"[100]. For its part, the Court, in the case concerning maritime delimitation in the area between Greenland and Jan Mayen, recognized that the coast of Jan Mayen generated potential maritime entitlements up to a limit of 200 miles

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[96]*Ibid*.

[97]Romania's Map Atlas, Map RM A6.

[98]CMU, Ann. 9; RR, paras. 5.50-5.56 and CR 2008/19, p. 64, para. 35.

[99]CMU, Ann. 9.

[100]In 20 *ILM* (1981), pp. 797, 803-804.

from its baselines (*Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, p. 69, para. 70).

Conclusion

42. Madam President, Members of the Court, in Ukraine's submission, Serpents' Island cannot be deprived of its status of an Article 121 (2) island. As such, its effect on the delimitation cannot be ignored. Serpents' Island is clearly an element that must be taken into account in reaching an equitable result.

43. One of the most noticeable aspects of the overall presentation made by our colleagues on the other side of the Bar during these proceedings, is their inability to show any consistency between Romania's conduct — *before and after* the critical date that Romania itself has fixed — and the existence of an alleged conventional maritime delimitation around Serpents' Island.

44. In particular, neither Romania's alleged petroleum activities — nor even the scientific research undertaken by academic institutions of Romania and other countries — nor the proposals formulated by Romania during the Law of the Sea Conference, contain the slightest hint of the existence of such a pre-agreed boundary.

45. The absence of any reference to such a delimitation in the *compromis* between the Parties represents further confirmation — if any is needed — of the same conclusion: the delimitation of an "all-purpose" boundary around Serpents' Island is an after-the-fact construct, which only exists in the imagination of our opponents.

Madam President, Members of the Court, I see we are a bit earlier than we planned, but I would still like to thank you for your kind attention and I would ask you to call on Professor Quéneudec tomorrow to continue with Ukraine's presentation.

The PRESIDENT: Thank you, Ms Malintoppi. The Court will resume these hearings tomorrow morning at 10 a.m. This session for today is now concluded and the Court rises. I have unfortunately made an error, please do not be alarmed. It is tomorrow afternoon at 3 o'clock that we shall resume.

The Court rose at 5.50 p.m.