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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2008

Public sitting

held on Friday 5 September 2008, at 10 a.m., at the Peace Palace,

President Higgins presiding,

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

VERBATIM RECORD

ANNÉE 2008

Audience publique

tenue le vendredi 5 septembre 2008, à 10 heures, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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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;

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as Counsel;

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

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

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

Mr. Octavian Buzatu, Lieutenant Commander (retired),

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

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

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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. We meet for the continuation of the first round presentations of Romania. Mr. Müller has the floor.

M. MÜLLER : Thank you, Madam President.

LE RÔLE DES EFFECTIVITÉS DANS LA DÉLIMITATION

1. Madame le président, Messieurs les juges, c'est un honneur immense de se présenter devant vous à cette barre. Pour commencer la présentation de la Roumanie ce matin, il me revient de montrer que les soi-disant «effectivités» qu'invoque la partie ukrainienne, même si elles étaient pertinentes — ce qui, en fait, n'est pas le cas comme mon collègue et ami Cosmin Dinescu va l'expliquer tout à l'heure —, les effectivités, disais-je, ne sont pas susceptibles de produire l'effet juridique que l'Ukraine veut leur attacher. Ces «effectivités» ou «activités étatiques»[1] ne peuvent pas, en droit, constituer «a relevant circumstance which operates in favour of the continental shelf/EEZ claim line proposed by Ukraine»[2].

2. Le choix du terme «effectivité» peut certes surprendre. Le mot n'apparaît pas une seule fois dans les écritures des deux Parties. Néanmoins, c'est bien d'effectivités qu'il s'agit quand l'Ukraine invoque, sous le couvert des circonstances pertinentes, «the Parties' conduct concern[ing] the exercise of sovereign activities (e.g. in respect of the licensing of hydrocarbon exploration and exploitation) as well as obligations assumed by the respective States, notably regarding activities of the State border guard in policing fishing areas»[3]. En d'autres termes, il s'agit, selon les dires de l'Ukraine, d'activités constituant des actes accomplis à titre de souverain (*Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, arrêt du 8 octobre 2007, par. 186 et 206 ; *Différend frontalier (Burkina Faso/République du Mali), arrêt, C.I.J. Recueil 1986*, p. 586, par. 63 ; *Statut juridique du Groënland oriental, arrêt, 1933, C.P.J.I. série A/B n° 53*, p. 45-46) dans la zone litigieuse.

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[1] Contre-mémoire de l'Ukraine (CMU), p. 212.

[2] CMU, p. 213, par. 8.41.

[3] CMU, p. 212, par. 8.40.

3. Bien que ceci déplaise à nos contradicteurs de l'autre côté de la barre[4], je vais limiter ma présentation à des arguments purement juridiques — parce que c'est bien d'une question de droit qu'il s'agit — pour démontrer que c'est à juste titre que ces «effectivités» «ne disent pas leur nom»[5]. Dans la délimitation maritime, elles ne peuvent être prises en compte que sous une forme toute particulière et dans des circonstances très strictes dont l'Ukraine fait une application pour le moins approximative (II). En principe cependant, les «effectivités» ne jouent en tant que telles aucun rôle dans l'exercice de la délimitation dont vous êtes saisis (I).

I. Le principe : l'absence d'influence des effectivités sur la délimitation maritime

4. Madame le président, Messieurs de la Cour, il ne fait aucun doute que, dans la délimitation territoriale, les «effectivités» ont un rôle bien déterminé et je vais vous épargner la lecture du *dictum* bien connu dans l'affaire du *Différend frontalier (Burkina Faso/Mali)* qui le confirme (*Différend frontalier (Burkina Faso/République du Mali), arrêt, C.I.J. Recueil 1986*, p. 586-587, par. 63. Voir aussi *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras ; Nicaragua (intervenant)), arrêt, C.I.J. Recueil 1992*, p. 398, par. 61 ; *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria ; Guinée équatoriale (intervenant)), arrêt, C.I.J. Recueil 2002*, p. 353, par. 68, p. 354, par. 70 ou p. 415, par. 223 ; *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 678, par. 126 ; *Différend frontalier (Bénin/Niger), arrêt*, *C.I.J. Recueil 2005*, p. 120-121, par. 47 ou p. 127, par. 77).

5. Bien que le principe soit clair en ce qui concerne la délimitation territoriale, sa transposition pure et simple à la délimitation maritime est fort douteuse. En effet, comme la Chambre l'a souligné dans ce même arrêt — *Burkina Faso/Mali* —, «le processus par lequel le juge détermine le tracé d'une frontière terrestre entre deux Etats se distingue nettement de celui par lequel il identifie les principes et règles applicables à la délimitation du plateau continental» *(Différend frontalier (Burkina Faso/République du Mali), arrêt, C.I.J. Recueil 1986*, p. 578,

[4] Duplique de l'Ukraine (DU), p. 120, par. 6.75.

[5] N. Ros, «Les effectivités» *in* Institut du droit économique de la mer, *Le processus de délimitation maritime*, Colloque international, Monaco, 27-29 mars 2003, Pedone, Paris, 2004, p. 211.

par. 47) en particulier, et à la délimitation maritime en général. Et c'est justement le rôle des «effectivités» qui change considérablement quand on passe de la terre à la mer et son sous-sol.

6. Cette différence s'explique d'abord par des considérations pratiques. Il est insensé d'exiger d'une façon ou d'une autre, une occupation effective de la mer ou du plateau continental. Il est également difficile d'imaginer comment un Etat peut accomplir des actes à titre de souverain dans sa zone économique exclusive ou sur son plateau continental avec la même constance et avec la même intensité que sur son territoire terrestre. Pour emprunter les mots de MM. Lucchini et Vœlckel, «le milieu marin, en raison de sa nature même, est impropre à une occupation effective ; il ne se prête aussi que difficilement à des actes attestant de l'administration d'un Etat»[6]. Certes, l'exigence de l'occupation effective n'est pas absolue, mais modulable en raison des caractéristiques particulières de l'espace concerné (*Statut juridique du Groënland oriental, arrêt, 1933, C.P.J.I. série A/B n° 53*, p. 46. Voir également *Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn), fond, arrêt, C.I.J. Recueil 2001*, p. 100, par. 197-198 ; *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 682, par. 134 ; *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, arrêt du 8 octobre 2007, par. 174.) Même «modulable», la transposition n'a pas eu lieu et le droit des espaces maritimes ne connaît pas l'exigence de l'exercice effectif des compétences de l'Etat dans ces espaces.

7. Tout au contraire, aussi bien la convention de Genève sur le plateau continental que la convention des Nations Unies sur le droit de la mer disposent que «[l]es droits de l'Etat [riverain][ou côtier] sur le plateau continental sont indépendants de l'occupation effective ou fictive»[7]. La Cour a endossé ce principe dans son arrêt sur le *Plateau continental de la mer du Nord* : «Pour reprendre le terme de la convention de Genève, [le droit inhérent à un plateau continental] est «exclusif» en ce sens que, si un Etat riverain choisit de ne pas explorer ou de ne pas exploiter les zones de plateau continental lui revenant, cela ne concerne que lui.» (*Plateau*

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[6] *Droit de la mer*, t. 2 — *Délimitation, navigation et pêche*, vol. 1 — *Délimitation*, Pedone, Paris, 1996, p. 28. Voir aussi N. Ros, *op. cit.* (note 5), p. 200.

[7] Art. 2, par. 3, de la convention de Genève sur le plateau continental (*RTNU*, vol. 499, p. 315) et art. 77, par. 3, de la convention des Nations Unies sur le droit de la mer (*RTNU*, vol. 1834, p. 36).

continental de la mer du Nord (République fédérale d'Allemagne/Danemark) (République fédérale d'Allemagne/Pays-Bas), arrêt, C.I.J. Recueil 1969, p. 22, par. 19.)

8. D'une façon comparable, si un Etat choisit de ne pas exploiter les eaux surjacentes de son plateau continental ou d'y exercer des droits souverains, cela ne regarde que lui et ne peut aucunement signifier que ses eaux sont «sans maître» et ouvertes à l'«occupation» d'un ou plusieurs autres Etats. Dès 1951, la Cour a exclu toute opposabilité de principe des actes pris à titre de souverain dans les espaces maritimes : «La délimitation des espaces maritime a toujours un aspect international ; elle ne saurait dépendre de la seule volonté de l'Etat riverain telle qu'elle s'exprime dans son droit interne.» (*Pêcheries (Royaume-Uni c. Norvège), arrêt, C.I.J. Recueil 1951*, p. 132 ; *Compétence en matière de pêcheries (Royaume-Uni c. Islande), fond, arrêt, C.I.J. Recueil 1974*, p. 22, par. 49 ; *Compétence en matière de pêcheries (République fédérale d'Allemagne c. Islande), fond, arrêt, C.I.J. Recueil 1974*, p. 191, par. 41. Voir également *Plateau continental (Tunisie/Jamahiriya arabe libyenne), arrêt, C.I.J. Recueil 1982*, p. 66-67, par. 87.) Que l'Etat riverain exprime sa volonté par des actes juridiques ou par des activités accomplies à titre de souverain ne change rien au principe : la délimitation maritime n'en dépend pas.

9. Madame le président, Messieurs de la Cour, ce n'est donc pas l'homme ou les activités qui importent ; c'est «la terre [qui] domine la mer» (*Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, arrêt du 8 octobre 2007, par. 113 ; *Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn), fond, arrêt, C.I.J. Recueil 2001*, p. 97, par. 185 ; *Plateau continental de la mer Egée (Grèce c. Turquie), arrêt, C.I.J. Recueil 1978*, p. 36, par. 86 ; *Plateau continental de la mer du Nord (République fédérale d'Allemagne/Danemark) (République fédérale d'Allemagne/Pays-Bas), arrêt, C.I.J. Recueil 1969*, p. 51, par. 96) comme votre Cour le rappelle constamment. Contrairement à ce qu'on a pu constater dans l'appropriation terrestre, il importe alors peu qu'un Etat procède à des actes à titre de souverain sur un espace maritime ou pas. Ce n'est pas le plus rapide ou le plus fort qui acquiert un titre plus valable sur cet espace. Ce ne sont pas l'homme et les activités concurrentes auxquelles il se livre qui constituent la base des

opérations d'attribution et de délimitation maritimes ; c'est la nature avec ses avantages et ses inconvénients qui gouverne. Dans la mer et sur son sous-sol, *ex facto ius non oritur*.

10. La jurisprudence de la Cour et des tribunaux arbitraux est d'ailleurs particulièrement constante sur cette question, notamment eu égard à la pratique pétrolière des Etats. Dans l'affaire relative à la *Frontière terrestre et maritime entre le Cameroun et le Nigéria* cette Cour a ainsi considéré que «les concessions pétrolières et les puits de pétrole ne sauraient en eux-mêmes être considérés comme des circonstances pertinentes justifiant l'ajustement ou le déplacement de la ligne de délimitation provisoire» (*Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria ; Guinée équatoriale (intervenant)), arrêt, C.I.J. Recueil 2002*, p. 447-448, par. 304). Sur cette base, la Cour n'a pas pris en compte la pratique pétrolière dans la région à délimiter entre le Cameroun et le Nigéria, qui était pourtant bien plus importante que dans le cas présent. Contrairement à ce que l'Ukraine veut faire croire dans sa duplique[8], cette jurisprudence est loin d'être isolée. Dans ce même arrêt (entre le Cameroun et le Nigéria), la Cour a fondé son raisonnement sur sa jurisprudence antérieure dans l'affaire du *Plateau continental* entre la Tunisie et la Libye et dans celle de la *Délimitation de la frontière maritime dans la région du golfe du Maine*. L'Ukraine tait le fait que, dans la première de ces deux affaires, la Cour n'a pas tenu compte pour l'ajustement de la ligne de l'équidistance provisoire, de «la ligne en direction du nord servant de limite aux zones pétrolières libyennes» (*Plateau continental (Tunisie/Jamahiriya arabe libyenne), arrêt, C.I.J. Recueil 1982*, p. 83, par. 117). Dans l'affaire du *Golfe du Maine*, la Chambre de la Cour a également considéré que la pratique pétrolière ne pouvait constituer un élément à prendre en compte (*Délimitation de la frontière maritime dans la région du golfe du Maine (Canada/Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 1984*, p. 310-311, par. 150-151).

11. Une telle position a été également adoptée par différents tribunaux arbitraux qui, sans exception, ont tous refusé de considérer la pratique pétrolière des Etats concernés comme des circonstances pertinentes. C'est le cas de la sentence arbitrale rendue il y a tout juste un an concernant la délimitation maritime entre le Guyana et le Suriname qui, se référant expressément à la jurisprudence de la Cour dans l'affaire *Cameroun c. Nigéria* — que je viens de citer —, est

[8] DU, p. 120, par. 6.77.

arrivée à la conclusion que «the oil practice of the Parties cannot be taken into account in the delimitation of the maritime boundary in this case»[9]. Cette solution est confirmée par les sentences arbitrales rendues dans l'affaire entre la *Guinée et la Guinée-Bissau*[10], dans celle entre la France et le Canada concernant *Saint-Pierre-et-Miquelon*[11] et dans celle entre la *Barbade et Trinité-et-Tobago*[12]. Dans cette dernière sentence — *Barbade et Trinité-et-Tobago* —, le tribunal arbitral a expressément précisé qu'il ne considérait pas que «the activities of either Party, or the responses of each Party to the activities of the other, themselves constitute a factor that must be taken into account in the drawing of an equitable delimitation line»[13].

12. Madame le président, le principe est donc bien clair. Il a été établi dans de nombreuses décisions de votre Cour et des tribunaux arbitraux : les «effectivités» ne constituent pas un élément à prendre en considération pour la délimitation maritime. C'est donc en vain que l'Ukraine prétend que «[w]hereas Ukraine has consistently carried out and/or licensed sovereign and economic activities in the relevant area, Romania has not»[14]. Même si cette allégation correspondait à la réalité, ce qui n'est pas le cas, ces activités ne pourraient pas constituer une circonstance pertinente ou changer la ligne d'équidistance.

II. L'exception : les effectivités en tant que preuve d'un accord

13. Pour échapper à ce principe de la non-prise en compte de ses soi-disant «nombreuses»[15] «effectivités» — dont le nombre est pourtant très relatif comme mon collègue Cosmin Dinescu va le montrer dans quelques instants —, l'Ukraine se fonde exclusivement sur l'arrêt de la Cour dans l'affaire du *Plateau continental* entre la Tunisie et la Libye dont j'ai parlé brièvement il y a un instant[16] et qui a été discuté dans la réplique roumaine[17]. A en croire la duplique, nos collègues de

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[9] *Guyana/Suriname*, *sentence arbitrale*, 17 septembre 2007, par. 390, en ligne : http://www.pca-cpa.org/

[10] *RSA*, vol. XIX, p. 174, par. 63.

[11] *RSA*, vol. XXI, p. 295-296, par. 89-9.

[12] *Sentence arbitrale*, 11 avril 2006, par. 364, en ligne : http://www.pca-cpa.org/

[13] *Ibid.*, par. 366.

[14] CMU, p. 212, par. 8.39.

[15] CMU, p. 253, par. 11.1 viii) ; DU, p. 153, par. 9.3 xii).

[16] Voir *supra*, par. 10.

[17] Réplique de la Roumanie (RR), p. 246-247, par. 7.3.

l'autre côté de la barre font une interprétation inexacte de ce précédent. Il est vrai que la Cour a marqué un certain intérêt pour la pratique pétrolière de la Tunisie et de la Libye à proximité de la côte et de la ligne *de facto* qui en résultait. Mais, selon ses propres mots, elle devait «tenir compte de tous les indices existants au sujet de la ligne ou des lignes que les Parties elles-mêmes ont pu considérer ou traiter en pratique comme équitables» (*Plateau continental (Tunisie/Jamahiriya arabe libyenne)*, *arrêt*, *C.I.J. Recueil 1982*, p. 84, par. 118). C'est à ce titre que l'accord tacite qui découlait de la pratique pétrolière ainsi que le *modus vivendi* instauré par la France et l'Italie dans les années 1930 et respecté depuis lors par la Tunisie et la Libye ont été pris en considération : il s'agissait d'évaluer le caractère équitable de la délimitation (*ibid.*, p. 70-71, par. 93-96 et p. 83-85, par. 117, 119-120. Voir aussi *Délimitation de la frontière maritime dans la région du golfe du Maine (Canada/Etats-Unis d'Amérique)*, *arrêt*, *C.I.J. Recueil 1984*, p. 310, par. 150.) Les «effectivités» pétrolières ne jouent donc plus le rôle des «effectivités» terrestres dont, faute de titre, il suffit de démontrer l'existence et la supériorité en qualité et en nombre pour établir une occupation effective ; les «effectivités» maritimes ne peuvent être prises en compte que si elles reflètent un accord sur lequel elles reposent et qui, lui — l'accord, donc —, pourrait constituer une circonstance pertinente pour la délimitation. L'Ukraine, qui attache bien trop d'importance à prouver la réalité de ses «effectivités», perd complètement de vue cet aspect des choses.

14. Pourtant, la jurisprudence postérieure confirme entièrement et très clairement ce rôle que les «effectivités» peuvent éventuellement jouer. Dans l'affaire *Cameroun c. Nigéria*, la Cour, en résumant sa jurisprudence, y compris celle de 1982 entre la Tunisie et la Lybie, et celle des tribunaux arbitraux, conclut :

> «si l'existence d'un accord exprès ou tacite entre les parties sur l'emplacement de leurs concessions pétrolières respectives peut indiquer un consensus sur les espaces maritimes auxquels elles ont droit, les concessions pétrolières et les puits de pétrole ne sauraient en eux-mêmes être considérés comme des circonstances pertinentes justifiant l'ajustement ou le déplacement de la ligne de délimitation provisoire. *Ils ne peuvent être pris en compte que s'ils reposent sur un accord exprès ou tacite entre les parties*.» (*Frontière terrestre et maritime entre la Cameroun et le Nigéria (Cameroun c. Nigéria ; Guinée équatoriale (intervenant))*, *fond*, *arrêt*, *C.I.J. Recueil 2002*, p. 447-448, par. 304 ; les italiques sont de nous.)[18]

[18] Voir aussi *La Barbade/Trinité-et-Tobago, sentence arbitrale*, 11 avril 2006, par. 364, en ligne : <http://www.pca-cpa.org/> ; *Guyana/Suriname*, *sentence arbitrale*, 17 septembre 2007, par. 390, en ligne : <http://www.pca-cpa.org/>.

C'est dans le but de trouver un tel accord tacite préexistant que vous avez récemment fait référence, pour les besoins de la délimitation maritime, à la pratique du Nicaragua et du Honduras, sans pour autant la trouver pertinente (*Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, arrêt du 8 octobre 2007, par. 254-256).

15. Il ne suffit donc pas de démontrer que des activités à titre de souverain ont été accomplies dans les zones revendiquées. Ceci reste sans importance. Seule l'existence d'un *accord* entre les parties, même tacite ou implicite, peut être prise en compte en tant que circonstance pertinente et c'est à ce titre que les «effectivités» peuvent intervenir : en tant que preuve de l'accord entre les parties sur lequel ils reposent. C'est cet accord et la ligne *de facto* en résultant qui seuls peuvent être pertinents aux fins de la délimitation.

16. Madame le président, Messieurs de la Cour, c'est loin d'être un détail. Tout au contraire, pour accomplir ce rôle particulier — c'est-à-dire démontrer l'accord sur lequel elles reposent —, les «effectivités» doivent nécessairement revêtir certaines caractéristiques.

17. En premier lieu — et sur ce point la délimitation maritime ne se distingue guère de son homologue terrestre — seules les activités étatiques antérieures à la date critique pourraient être pertinentes. La raison en est simple et vous l'avez très clairement exprimée dans votre arrêt d'octobre dernier entre le Nicaragua et le Honduras : les actes postérieurs à la date critique «ne sont généralement pas pertinents en tant qu'ils sont le fait d'un Etat qui, ayant déjà à faire valoir certaines revendications dans le cadre d'un différend juridique, pourrait avoir accompli les actes en question dans le seul but d'étayer celles-ci» (*ibid.*, par. 117). Sur cette base, vous n'avez alors pris en compte que des événements intervenus jusqu'en 1982 pour arriver à la conclusion qu'aucun accord tacite n'a été établi entre les parties quant à la délimitation maritime (*ibid.*, par. 258 ; voir aussi, *ibid.*, par. 124.) Nul doute alors que la date critique a la même importance et la même fonction dans les délimitations maritime et terrestre : il est immatériel qu'un Etat, une fois un différend sur la délimitation maritime cristallisé, multiplie ses activités dans la zone en litige afin de créer l'illusion qu'il existait un accord *de facto* concernant la frontière maritime entre les parties. La Cour

> «ne saurait prendre en considération des actes qui se sont produits après la date à laquelle le différend entre les Parties s'est cristallisé, à moins que ces activités ne constituent la continuation normale d'activités antérieures et pour autant qu'elles

> n'aient pas été entreprises en vue d'améliorer la position juridique des Parties qui les invoquent» (*Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)*, *arrêt*, *C.I.J. Recueil 2002*, p. 682, par. 135 ; *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, arrêt du 8 octobre 2007, par. 117. Voir également, *Souveraineté sur Pedra Branca/Pulau Batu Puteh, Middle Rocks et South Ledge (Malaisie/Singapour)*, arrêt du 23 mai 2008, par. 179-180.)

Mon collègue Cosmin Dinescu montrera tout à l'heure que ce principe tout simple disqualifie la totalité des soi-disant «effectivités» invoquées par l'Ukraine, toutes survenues après la date critique, après le moment où l'Ukraine ne pouvait pas ne pas être au courant de la position de la Roumanie[19].

18. Même si ces «effectivités» devaient être admissibles, Madame le président, elles ne sont pas, pour autant, aptes à démontrer un quelconque accord ou *modus vivendi* quant à la délimitation équitable entre les Parties devant la Cour. Permettez-moi d'emprunter encore une fois les termes de votre arrêt dans l'affaire entre le Nicaragua et le Honduras : «Les éléments de preuve attestant l'existence d'un accord tacite doivent être convaincants. L'établissement d'une frontière maritime permanente est une question de grande importance, et un accord ne doit pas être présumé facilement.» (*Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, arrêt du 8 octobre 2007, par. 253.) Dans l'arrêt concernant la délimitation du *Plateau continental* entre la Libye et Malte, la Cour a ainsi refusé de prendre en compte la pratique des parties étant donné qu'elle n'a pas pu

> «déceler d'un côté ou de l'autre *un type de comportement suffisamment net* [ou, en anglais, *any pattern of conduct*] pour constituer soit un acquiescement soit une indication utile des vues de l'une des Parties sur une solution équitable qui diffère sensiblement des thèses avancées par cette même Partie devant la Cour» (*Plateau continental (Jamahiriya arabe libyenne/Malte)*, *arrêt*, *C.I.J. Recueil 1985*, p. 29, par. 25).

La sentence arbitrale dans l'affaire entre Terre-Neuve-et-Labrador et la Nouvelle-Ecosse, affirme également que

> «pour décider qu'une limite (non réglée ou déterminée par accord) a été établie par suite d'une conduite, il faut montrer qu'il existait entre les deux parties concernées un type de comportement net [«an unequivocal pattern of conduct» dans la version

[19] CR 2008/20, p. 60, par. 14 (Aurescu).

anglaise de la sentence] par rapport à la zone et étayant la limite — ou l'aspect de la limite — objet de la contestation»[20].

19. Ainsi, ni une concession pétrolière unique[21], ni une pratique pétrolière s'inscrivant dans une période de temps relativement courte (sept ans par exemple dans l'affaire du *Golfe du Maine*) (*Délimitation de la frontière maritime dans la région du golfe du Maine (Canada/Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 1984*, p. 310-311, par. 151) ne peut produire un effet quelconque sur la délimitation maritime ou prouver l'existence d'un accord tacite ou un *modus vivendi*. Dans l'affaire *Libye/Tunisie* qui, de l'avis de l'Ukraine, constituerait un précédent pertinent, le *modus vivendi* s'était justement établi dans les années trente et a été respecté jusqu'au milieu des années soixante-dix — c'est-à-dire pendant une bonne quarantaine d'années (*Plateau continental (Tunisie/Jamahiriya arabe libyenne), fond, arrêt, C.I.J. Recueil 1982*, p. 93, par. 133 B) 4)). Même en cherchant bien, il est difficile de trouver une quelconque ressemblance entre ce *modus vivendi* et les «effectivités» ukrainiennes — pompeusement dénommées dans la duplique de l'Ukraine «historical pattern of State activities»[22] — qui, elles, ne s'étalent, avec beaucoup de bonne volonté, que sur une petite dizaine d'années avec des grandes interruptions. M. Dinescu va vous en dire plus dans quelques instants.

[Projection 1 : les «effectivités» dans la zone litigieuse présentées par l'Ukraine [DU, fig. 6-2].]

20. Madame le président, l'Ukraine semble également oublier que les «effectivités» et l'accord qu'elles sont censées faire apparaître, devraient concerner la zone en litige et d'une certaine façon une frontière *de facto*. Un regard, même rapide, sur le croquis actuellement projeté derrière moi montrant l'ensemble des «effectivités» présentées par l'Ukraine, ne peut cependant montrer qu'un seul fait : la zone de délimitation est disputée entre les deux Parties. On a du mal à y déceler un «prevailing understanding»[23] entre les Parties, comme l'Ukraine l'affirme. Les «effectivités» ukrainiennes prises isolément ne peuvent même pas raisonnablement confirmer la ligne de délimitation réclamée par l'Ukraine.

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[20] *Sentence arbitrale (deuxième phase)*, 26 mars 2002, p. 58, par. 3.5 et, pour la version anglaise, *ILR*, vol. 128, p. 544. Voir aussi la sentence arbitrale dans la première phase de la même affaire, 17 mai 2001, par. 6.8 (*ILR*, vol. 128, p. 488).

[21] Voir *Affaire de la délimitation de la frontière maritime, entre la Guinée et la Guinée-Bissau*, *sentence arbitrale*, 14 février 1985, *RSA*, vol. XIX, p. 149.

[22] DU, p. 138, par. 7.23.

[23] DU, p. 119, par. 6.74.

21. Pas de ligne *de facto*, pas de «pattern of conduct» prouvant d'une façon ou d'une autre un accord entre les deux Parties, ou un acquiescement de la part de la Roumanie concernant d'une manière quelconque la délimitation maritime. Ceci n'est d'ailleurs guère surprenant étant donné que la Roumanie a protesté à plusieurs reprises contre ces soi-disant «effectivités» ukrainiennes empêchant par là-même l'établissement d'un quelconque *modus vivendi*.

[Fin de la projection.]

22. Madame le président, l'absence d'accord sur lequel les prétendues «effectivités» auraient pu déboucher les rend donc non pertinentes pour les besoins de la délimitation maritime. Certes, chaque différend est unique et connaît ses propres particularités factuelles. Néanmoins, les précédents que je viens d'évoquer et qui constituent sans aucun doute une jurisprudence constante, sont un guide utile et suffisant permettant d'affirmer que les «effectivités» dont l'Ukraine se prévaut sans «dire leur nom» ne constituent certainement pas des «circonstances pertinentes» aux fins de l'ajustement de la ligne provisoire d'équidistance.

23. Madame le président, Messieurs de la Cour, ceci conclut ma présentation. Je vous remercie très vivement de votre attention et je vous prie, Madame le président, de bien vouloir donner la parole à M. Dinescu, qui va continuer la présentation de la Roumanie.

The PRESIDENT: Thank you, Mr. Müller. I now call Mr. Dinescu.

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

XI. UKRAINE'S ARGUMENT BASED ON *EFFECTIVITÉS*

1. Madam President, Members of the Court, you have heard my colleague Daniel Müller who explained the role of *effectivités* in maritime delimitation as a matter of legal principle. He showed that the situations in which *effectivités* may be taken into account in maritime delimitation are exceptional, the well-established rule being that, unlike in land border delimitation, *effectivités* are not relevant. Our case is no exception to this established rule.

2. Still, in its written pleadings, Ukraine submits that what it terms "State activities in the relevant area" — in fact, *effectivités* — "cannot be ignored and constitute a relevant circumstance

which operates in favour of the continental shelf/EEZ claim line proposed by Ukraine"[24]. In spite of Romania's arguments regarding the irrelevance of these "State activities" for the present dispute, Ukraine reiterates its position in its Rejoinder, trying to dismiss Romania's Reply as being restricted to "legal arguments and limited attempts to pick holes in the evidence filed by Ukraine"[25].

3. As to legal arguments, I wonder, Madam President, Members of the Court, what would be the content of the pleadings in a case before the Court if not "legal arguments"? As to "picking holes in the evidence", that again seems appropriate in a legal case, which is decided on the basis of relevant evidence. But I do have a quibble with "picking holes" — for Ukraine's case seems to us *mostly* made of holes, so much so that one has to pick the bits of fabric in its case against a background of irrelevance! Let me explain why.

4. Within the list of State activities which Ukraine considers relevant for the present dispute, it includes licences granted for sea-bed exploration and exploitation within the relevant area, and fishing practices in the same area; the latter refer, in fact, not to fishing as such but to naval patrols by Ukrainian vessels to enforce Ukrainian fishery laws in the area.

The PRESIDENT: Mr. Dinescu, could I ask you to speak a little more slowly for the interpreters?

Mr. DINESCU: Yes. Yes, of course.

The PRESIDENT: Thank you.

Mr. DINESCU: Notwithstanding the fact that, in any event, *effectivités* are irrelevant for our case, I will analyse these matters one by one. However, before doing so, I will refer briefly to two issues that must be considered when analysing any State activity in the delimitation area: *the critical date, on the one hand, and the relevance of the 1997 Additional Agreement, on the other.*

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[24]CMU, p. 213 , para. 8.41.

[25]RU, p. 120, para. 6.75.

(a) ***Critical date***

5. The issue of the critical date of the crystallization of the dispute which is now before the Court was only briefly referred to in the written pleadings of the two Parties[26]. The Agent of Romania expanded on it yesterday, when assessing the steps taken by Ukraine to artificially develop Serpents' Island. Further, my colleague Daniel Müller explained the significance of establishing critical dates in disputes, which consists — to use your own words in the *Nicaragua* v. *Honduras* case — in

> "distinguishing between those acts performed *à titre de souverain* which are in principle relevant for the purpose of assessing and validating *effectivités*, and those acts occurring after such critical date, which are in general meaningless for that purpose, having been carried out by a State which, already having claims to assert in a legal dispute, could have taken those actions strictly with the aim of buttressing those claims" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras),* Judgment of 8 October 2007, para. 117).

6. In his presentation, the Agent of Romania concluded that the critical date in our case is, *at the latest*, the date of the exchange of diplomatic correspondence between Romania and Ukraine in 1995[27]. He also mentioned that the difference of positions between the two Parties was well known earlier. In the following minutes I will analyse this question in more detail.

7. One particular aspect of our case is the fact that one Party — Ukraine — is the successor of another State — USSR — which, at the time of its disappearance in 1991, was *already* in dispute with Romania regarding maritime delimitation in the Black Sea. Through the dissolution of the USSR, the dispute regarding the maritime delimitation transformed itself from a "Romania-USSR" dispute into a "Romania-Ukraine" dispute. In fact, the dissolution of the Soviet Union and its legal disappearance occurred while the process of negotiations on delimitation was still ongoing[28]. Thus, at the moment of its independence, Ukraine was perfectly well aware that, among other succession issues, it had "inherited" a maritime dispute with its southern neighbour, Romania.

8. This is confirmed by the subsequent conduct of the two Parties. The 1995 exchange of correspondence, introduced into the pleadings, may I remind you, by Ukraine, is one relevant

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[26]See, for instance, the brief mention of the critical date in RR, p.165, para. 5.106.

[27]CMU, Anns. 25 and 26.

[28]See MR, Ann. 31.

example. This exchange consists of a Romanian Note Verbale sent to Ukraine on 28 July 1995[29] and of a Ukrainian response, dated 7 November 1995[30]. You may find these notes as tabs XI-1 and XI-2 in your folders. In its Note, Romania referred *inter alia* to the Romanian-Soviet negotiations for the delimitation of the maritime areas in the Black Sea, it defined by geographical co-ordinates the area which was in dispute, and it also underlined that there was no comprehensive agreement between those two States on the delimitation of their maritime areas in the Black Sea. From this Note it can be seen that Romania maintained its claim after the dissolution of the USSR and assumed that Ukraine, as the successor of the former Soviet Union, also maintained the Soviet claim.

9. In its response, dated 7 November 1995, Ukraine, among other issues, assumed — to use its own words — "succession" to what it called the Soviet "title" regarding the continental shelf. Yet, offering no explanations, Ukraine advanced a delimitation claim that was more than double the former Soviet claim.

10. It is thus clear from the 1995 exchange that, at that time — November — both Parties were aware of the existence and the scope of their maritime dispute in the Black Sea.

11. Having underlined these elements, I conclude these short considerations on the critical date of the dispute, a dispute the existence of which at the moment of Ukraine's independence was never contested by either of the Parties, and was in any case confirmed by the 1995 exchange of Notes.

(b) ***Relevance of the Additional Agreement***

12. Madam President, I turn now to the 1997 Additional Agreement. Romania referred to it in its Reply[31] in relation to the "State activities" in the relevant area, and concluded that "any practice occurring after the conclusion of the 1997 Agreement is irrelevant in the present proceedings". In its Rejoinder, Ukraine did not contest the substance of Romania's arguments[32].

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[29]CMU, Ann. 25.

[30]CMU, Ann. 26.

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

[32]RU, p. 121, para. 6.80.

Still, I would like to underline two points regarding the relevance of the Additional Agreement with respect to the State activities introduced into the pleadings by Ukraine.

13. First, by the Additional Agreement — whose paragraph 4 is included as tab XI-3 in your folders — the two Parties clearly recognized in writing the existence of a dispute regarding the maritime delimitation, and set the framework for future negotiations to conclude a delimitation agreement. However, since this was not the first instance when the dispute between the Parties regarding the maritime delimitation became apparent — as I have just demonstrated — the Agreement's provisions regarding the existence of the dispute were a mere confirmation of a factual situation that had already existed for a long time.

14. Second, the Additional Agreement established, through its paragraph 4 *(f)*, a particular régime for the activities of exploration and exploitation of the mineral resources in the disputed area. The language of the text is as follows:

> "Until reaching a solution concerning the delimitation of the continental shelf, the Contracting Parties shall refrain from exploitation of the mineral resources of the zone submitted to delimitation, the coordinates of which shall be established at the beginning of the negotiations on the basis of the above-mentioned principles."[33]

15. This text says nothing about the *exploration* of the mineral resources. Both during their bilateral negotiations and during the present proceedings, the Parties have been in agreement that this is to be interpreted as meaning that such activities, i.e. of exploration, are permitted to either of them. Co-ordinates of the area in dispute that was to be discussed were exchanged at the beginning of the negotiations, in 1998; this area coincides generally with the area in dispute as resulting from the different claim lines advanced by the Parties during the present proceedings.

16. Paragraph 4 *(f)* of the 1997 Agreement once again recognized expressly the existence of the maritime dispute. More importantly, the text also established the basis for the conduct of the two Parties from then on: they agreed to mutually tolerate each other's *exploration* activities in the delimitation area, without prejudice to the final delimitation.

17. Thus, even ignoring the fact that any exploration activities conducted after 1997 would in any case be after the critical date, they could not prejudge the result of the delimitation: they would

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[33]MR, Ann. RM 2; also CMU, Vol. 2, Ann. 1.

not be the expression of the exercise of sovereign rights by a party, but of tolerated conduct, mutually agreed upon.

18. As for the *exploitation* activities — they were simply and explicitly banned, so their eventual conduct *post*-1997 would amount to a breach of the Additional Agreement. As such, these activities could not be the basis for any right and could not prejudge the final outcome — *ex injuria non oritur jus*.

The PRESIDENT: I am going to have to ask you again. The French interpreter is having to follow you at a gallop and it is really in your interests that the francophone judges understand well what you are saying

Mr. DINESCU: I apologize, and I will try to do my best.

19. Madam President and Members of the Court, having clarified these aspects specific to our case, I turn now to the State activities in the delimitation area, as invoked by Ukraine.

Gas and oil licences

[Slide 1: The disputed area and the Ukrainian concessions]

20. In its pleadings Ukraine states that it "has *consistently* licensed the exploration of maritime areas within the areas of continental shelf/exclusive economic zone claimed by Ukraine"[34] — and I emphasize the word "consistently". It also states that these areas "*include* the *Olympiiska*, the *Gubkina* and the *Delphin* blocks"[35]. But, in fact, Ukraine invokes *only* these three instances in which it has licensed oil and gas activities in the delimitation area — an image of these three blocks can be seen now on the screen and is also included in your folders, as tab XI-4.

21. All three concessions were granted well after Ukraine's independence, at times when it was well aware of the existence of its dispute with Romania — the *Delphin* block on 1 October 1993[36], *Olympiiska* in 2001[37] and *Gubkina* in 2003[38]. Ukraine adduced no evidentiary

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[34]RU, p. 126, para. 6.96

[35]RU, p. 126, para. 6.96.

[36]CMU, p. 213, paras. 8.44-8.46; also Ann. 97, Ukrainian text.

[37]CMU, p. 214, para. 8.48

[38]CMU, p. 214, para. 8.51

support regarding activities prior to the dissolution of the USSR (1991) or in the first two years of its independence, between 1991 and 1993. In fact, no exploration, let alone exploitation, of the areas now in dispute was conducted by Ukraine before 1993.

22. Furthermore, the latter two examples invoked by Ukraine represent concessions granted *after* the entry into force of the Additional Agreement. As Ukraine admits, albeit in a contradictory manner, they refer to activities of exploration — exploitation being forbidden under the Additional Agreement)[39]; in other words, they were in line with the provisions of the Additional Agreement, which provided for the possibility of the Parties undertaking exploration activities and also specifically recognized the existence of the dispute. Thus these concessions can by no means be regarded as an expression of the exercise of Ukraine's sovereign rights in that area.

[End of slide 1]

[Slide 2: the disputed area, the Delphin block and the Romanian concessions as presented by Ukraine]

23. Regarding the other concession — the *Delphin* block, as can be seen now on the screen (also in your folders at tab XI-5), this block covers only a very limited part of the area in dispute. Its limits do not even remotely coincide with the Ukrainian claim line. Nor do these limits coincide with the maximum line of the Romanian concessions *as represented by Ukraine*. Granting a licence for this block was not an episode in a longer, continuous Ukrainian, or Soviet, practice. Consequently, the specific conditions required in order for the oil and gas licences to be taken into account in maritime delimitation are not met.

24. Furthermore, contrary to the repeated Ukrainian statements according to which no protest in relation to the grant of this concession was made by Romania[40] — Romania in fact did protest: its Note Verbale from 1995, which you may find at tab 1 in your folders, as well as the 1993 aide-memoire to which reference is made in that Note, were triggered by reports about Ukraine's intention to grant this concession[41].

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[39]CMU, footnote 47 at p. 214, RU p. 122, para. 6.81; but see also CMU, p.214, paras. 8.48 and 8.51, where it is mentioned that the permits in the two areas were granted for "exploration and exploitation".

[40]RU, pp. 120-121, para. 6.78; p. 122, para.6.83; pp.126-127, para.6.96.

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

25. In conclusion, the *Delphin* licence, like the other two, has no relevance for the present proceedings.

[End of slide 2]

[Replay of slide 1]

26. Madam President and Members of the Court, quite apart from any consideration of timing or of the particulars of the case, we maintain that the three examples relied on by Ukraine completely fail to comply with the conditions that might have rendered them "eligible" for consideration as relevant for delimitation:

— they do not represent a well-established, constant and uniform practice — since the first licence dates from 1993 and was followed by only two others, after some eight years;

— their location does not coincide, even in very rough terms, with the Ukrainian claimed area; and

— they are not based on, and do not lay the basis for, a tacit agreement with Romania. On the contrary, they were protested by Romania[42].

27. Regarding the Romanian protests in response to the grant of these licences, Ukraine criticizes the fact that Romania's diplomatic correspondence, dated after 1997, refers to the relevant provisions of the Additional Agreement regarding exploitation versus exploration of mineral resources[43]. But this is entirely understandable: in fact, it was the Additional Agreement that regulated the Parties' conduct regarding oil and gas activities after 1997.

[End of slide 1]

28. Before concluding this part of my intervention dedicated to the gas and oil activities, I would like to refer briefly to Romania's practice in this respect. In its written pleadings, Romania did not say that these activities were relevant for the delimitation. Still, even after our rebuttal of Ukraine's position, Ukraine insisted in its Rejoinder that account should be taken of the gas and oil activities in the maritime area. Under these circumstances, some Ukrainian statements regarding Romania's practice need to be corrected.

[Slide 3: Romania's activities in the delimitation area]

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

[43]See RU, p. 125, para. 6.91.

29. First, Ukraine considers that Romania's review of its own practice is "characterized by an absence of evidentiary support"[44]. This allegation is unfounded. We annexed to our Reply several examples of seismic profiles taken from different zones in the disputed area. These profiles resulted from intense Romanian exploration activities in the 1980s and 1990s. An illustration of the area covered by these activities is now on the screen and may be found in your folders at tab XI-6. We have superimposed on the area covered by the seismic profiles the blocks licensed by Romania after 1990. As you can see, these blocks represent only a part of Romania's gas and oil activities in the Black Sea. And, as you can also see, the area covered by Romania's activities coincides almost perfectly with the area now claimed by Romania.

30. Evidence regarding Romania's exploration activities in the Black Sea may be found in specialized publications. Studies published by the well-known *Marine Geology* magazine refer to the activities conducted from the 1970s by Romanian State-owned companies such as GeoEcoMar and Petrom[45]. These studies confirm that the area of interest for Romania's exploration covered practically all of the area presently claimed by Romania.

[End of slide 3]

31. Madam President and Members of the Court, I turn now to a different issue. Ukraine implies that the outer limits of the Romanian blocks, licensed in the early 1990s to foreign companies, somehow form a line beyond which "Romania lacked confidence that it possessed rights to the continental shelf or Exclusive Economic Zone" [46]. This might be very simply answered by quoting from Ukraine's Rejoinder: "There is no obligation for a State to issue licences in respect of all its maritime areas, and it would be premature and commercially unreasonable for a State to take any steps to license areas that have yet to be identified as prospective."[47]

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[44]RU, p. 125, para. 6.92; see also p. 125, para. 6.93.

[45]The Danube submarine canyon (Black Sea): morphology and sedimentary processes, *Marine Geology* 206 (2004) 249-265; Upper Quaternary water level history and sedimentation in the northwestern Black Sea, *Marine Geology* 167 (2000) 127-146, also available on http://www.geo.edu.ro/sgr/mod/downloads/PDF/Winguth-MarGeo-2000-167-127.pdf; Messinian event in the Black Sea: Evidence of a Messinian erosional surface, *Marine Geology* 244 (2007) 142-165, also available on http://www.elsevier.com/

[46]RU, pp. 125-126, para. 6.94; see also pp. 12-121, para. 6.78; p.122, para. 6.81.

[47]*Ibid.*, p. 122, para. 6.82.

32. The reality was explained by Romania in its Reply. We conceived the limits of those blocks in such a way as not to overlap to what Romania thought, at the time, might be the maximum Ukrainian claim[48]. In order to avoid any possible problems, Romania wished to grant concessions only for those areas that were not claimed by other States — and it founded this decision on the state of play in the Romanian-Soviet negotiations, which it assumed would be "taken over" by USSR's successor State. It was a course of conduct of the Romanian authorities, in good faith, to which no other interpretation or meaning can be given.

33. Romania's 1995 Note Verbale, which is at tab XI-1 in your folders, further clarifies the issue:

> "The Ministry of Foreign Affairs [of Romania] reminds that, at the negotiations with the former USSR, the last round of which was held in 1987, the proposals were presented with regard to the delimitation, which defined a perimeter approximately of 7,700 sq. km. claimed by both parties . . . A gentlemen's agreement existed between the two Parties not to carry out activities for exploration and exploitation of the mineral wealth in the above-mentioned area as long as the agreement on the delimitation of the continental shelf is not concluded."[49]

34. The area in dispute defined in 1987 approximately corresponds, at its south-western limit, with the outer limit of the Romanian concessions. Only in 1995 did it become apparent that Ukraine claimed more than double the area that its predecessor had claimed. In fact, Romania gave effect to this gentlemen's agreement referred to in the 1995 Note, not to carry out exploration and exploitation activities in the disputed area, as known to Romania at that time, when it confined its licences to a perimeter in which it thought, bona fide, that its sovereign rights were not contested by any third party.

35. Such precautionary conduct is normal when States conduct themselves in good faith. It was also recognized by this Court. Thus, in your recent Judgment in the *Nicaragua* v. *Honduras* case (case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, Judgment of 8 October 2007, para. 254), you quoted your earlier finding from the *Indonesia/Malaysia* case:

> "These limits may have been simply the manifestation of the caution exercised by the Parties in granting their concessions. This caution was all the more natural in the present case because negotiations were to commence soon afterwards between

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[48]RR, p. 256, paras. 7.35, 7.36.

[49]CMU, Vol. 3, Ann. 25; English translation as provided by Ukraine.

> Indonesia and Malaysia with a view to delimiting the continental shelf." (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 664, para. 79.)

This finding is all the more relevant in our case, since negotiations on the delimitation of the maritime areas in the Black Sea had been ongoing for more then 30 years at the moment of the granting of the concessions by Romania.

36. In this context, it is surprising what double standards are applied by Ukraine in treating licences granted by the two Parties in the disputed area. On the one hand, the Ukrainian concessions, covering sparse and limited parts of the disputed area, of which only one was licensed before the conclusion of the 1997 Additional Agreement — but in any case at a date when Ukraine was well aware of the existence of the dispute — and all of which had been the object of protest by Romania, so the Ukrainian concessions, I say, should apparently count in the delimitation process. On the other hand, Romania's activities, covering the whole area in dispute, all of them dating from before the conclusion of the Additional Agreement and before the moment when Romania was aware of Ukraine's eventual claim, and none of them protested to by Ukraine, should not count!

37. Nevertheless, we do not claim that the gas and oil practice of the two States is relevant for this dispute. To quote the Court's dictum from the *Cameroon* v. *Nigeria* case, "oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. Only if they are based on express or tacit agreement between the parties may they be taken into account." (Case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002,* pp. 447-448, para. 304.) In the present case there is nothing even faintly approaching an express or tacit agreement capable to influence the delimitation. Accordingly, the conclusion is evident: the oil and gas practice of the two States cannot be considered as a relevant circumstance able to influence the delimitation line.

38. Still, just for the record — the Romanian gas and oil practice is more likely to meet the criteria for relevance than Ukraine's practice, which, beyond the special régime regulated by the Additional Agreement, is limited *geographically* — to a minor part of the area in dispute, *temporally* — it started two years after Ukraine's independence, and *materially* — it covers only exploration activities.

Naval patrols in the delimitation area

[Slide 4: fisheries surveillance activities in the disputed area, as presented by Ukraine]

39. The second State activity invoked by Ukraine in support of its claims over the disputed area is represented by the naval patrols of Ukrainian vessels enforcing Ukrainian fisheries laws. In its Counter-Memorial[50] and its Rejoinder[51], Ukraine refers to 14 incidents which supposedly occurred in the disputed area, during the course of which Ukrainian police vessels supposedly caught fishermen allegedly involved in illegal fishing. As evidence for these incidents, Ukraine quotes diplomatic correspondence between itself and Bulgaria and Turkey, one press release, as well as seven witness statements of members of the Ukrainian Coast Guard. These incidents are summarized in Annex 20 of Ukraine's Rejoinder and are schematically presented on figure 6-1 of the Ukrainian Rejoinder, which is now on the screen, and which you may find at tab XI-7 in your folders. All these facts, combined with the alleged Romanian inactivity in respect to fishing practices, should — in Ukraine's submission — be regarded as a relevant circumstance enforcing Ukraine's case[52].

40. However, Ukraine readily admits that these activities were indeed contested by Romania. It recognizes that "Romania responded through diplomatic channels that it did not accept the validity of the Ukrainian interim boundary line"[53] and that "Romania has not *formally* recognized the line communicated by Ukraine in 1995"[54]. That "line" mentioned by Ukraine is, Madam President and Members of the Court, the claim line communicated by Ukraine to Romania in November 1995. As you will remember, that Ukrainian Note was preceded by a Romanian Note dating from earlier that year, and by another document from 1993 by which Romania had communicated to Ukraine its claims in respect of the maritime areas.

41. In fact, not even one incident reported by Ukraine dates from before 1995. In other words, all incidents are subsequent to the moment that I identified earlier as being at the latest the critical date. Moreover, all but one of the incidents occurred also after 1997, when the Additional

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[50]CMU, pp. 216-219, paras. 8.58-8.65.

[51]RU, pp. 127-132, paras. 6.97-6.111.

[52]CMU, p. 219, para. 8.65 ; RU, p. 132, para. 6.111.

[53]CMU, p. 217, para. 8.62.

[54]RU, p. 128, para. 6.102.

Agreement was concluded. The affidavits annexed to Ukraine's Rejoinder refer to specific incidents that occurred after 1998. Only one statement mentions generally that "between 1991 and 2004, boarding guards ships of the Odessa Force detained approximately 20 Turkish poaching vessels and seven vessels of the Republic of Bulgaria for illegal fishing in these waters"[55]; however, the individual incidents which are then detailed in the same affidavit are all subsequent to 1997 (the first one is dated 2000). In these circumstances, it is clear that no Ukrainian naval patrol is relevant for our case, since all cases invoked are subsequent to the critical date and all but one are subsequent to the conclusion of the Additional Agreement. All the naval incidents introduced by Ukraine are thus irrelevant.

42. Even though this conclusion is straightforward, I will very briefly refer to certain elements put forward by Ukraine in its Rejoinder.

43. My first remark concerns the affidavits relied upon by Ukraine. On several occasions, the Court has analysed the evidentiary value of affidavits. For instance, in the recent *Nicaragua* v. *Honduras* case, you observed that

> "witness statements produced in the form of affidavits should be treated with caution. In assessing such affidavits the Court must take into account a number of factors. These would include whether they were made by State officials or by private persons not interested in the outcome of the proceedings and whether a particular affidavit attests to the existence of facts or represents only an opinion as regards certain events. The Court note[d] that in some cases evidence which is contemporaneous with the period concerned may be of special value. Affidavits sworn later by a State official for purposes of litigation as to earlier facts will carry less weight than affidavits sworn at the time when the relevant facts occurred. In other circumstances, where there would have been no reason for private persons to offer testimony earlier, affidavits prepared even for the purposes of litigation will be scrutinized by the Court both to see whether what has been testified to has been influenced by those taking the deposition and for the utility of what is said." (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras),* Judgment of 8 October 2007, para. 244.)

44. With these observations firmly in mind, I would simply stress that all statements introduced by Ukraine appear to have been produced for the specific purpose of being used in these proceedings; in fact they seem to follow a pre-drafted model, as if they were forms whose blanks were filled in by their signatories. All the signatories are serving within the Ukrainian navy — so they are State officials — and they do not refer to contemporary facts, but in all instances save one,

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[55]RU, Ann. 15.

to facts which occurred between three and nine years before the date of the affidavit. The probative force of this evidence should be assessed in the light of these factors.

45. Second, quite simply, the area covered by the incidents does not coincide with the Ukrainian claimed area; moreover, according to Ukraine itself, two incidents occurred *outside* the disputed area — as is visible from the figure which is now on the screen.

46. Third, Ukraine in its Rejoinder observed that "it is striking that this section of Ukraine's Counter-Memorial [dedicated to fishing practices] prompted the Romanian Embassy in Ankara on 16 November 2006 to send a diplomatic Note to the Turkish Ministry of Foreign Affairs seeking comfort that Turkey had not endorsed the delimitation line claimed by Ukraine"[56] and that "it is furthermore remarkable that, whereas Romania was quick to contact the Turkish Ministry of Foreign Affairs, Romania did not notify the relevant Ukrainian authorities to challenge Ukraine's authority to patrol areas in which these incidents occurred"[57]. But besides stating that it was struck by the Romanian démarche to Turkey and observing that the lack of any démarche to Ukraine itself was remarkable, Ukraine draws no conclusion from these facts.

47. I find it very hard to see any basis on which Ukraine could have been struck or amazed. It was entirely normal for Romania to approach Turkey in respect to the unsettled situation of the Romanian-Ukrainian delimitation, after Ukraine suggested in its Counter-Memorial that Turkey had recognized its claims in the disputed area[58].

48. As to the supposed absence of any Romanian protest against Ukraine's activities in question, this is likewise easy to understand. Ukraine states that press releases were issued by the Ukrainian Ministry of Foreign Affairs whenever such incidents occurred[59]. Still, only one such "press release" (from 1998) was enclosed by Ukraine, as Annex 106 of its Counter-Memorial. We did not find on the websites of the Ukrainian Ministry of Foreign Affairs or of any other Ukrainian institution any press release regarding the incidents mentioned in the pleadings or any other similar incident — even though press releases relating to various other issues from the same periods are

[56]RU, pp. 130-131, para. 6.107.

[57]RU, pp. 130-131, para. 6.107.

[58]See CMU, pp. 217-219, para. 8.64.

[59]RU, p.130-131, para. 6.107.

available on line. Beyond this lack of publicity regarding these alleged incidents, there was no real need to protest: Romania's position regarding the delimitation had been repeatedly and constantly affirmed during the negotiations that were ongoing at the times these incidents are supposed to have happened.

49. Finally, Ukraine concludes in its Reply that "the significance of Ukraine's fisheries surveillance activities is that Ukraine has carried out these activities within an area that Ukraine has consistently considered to fall within Ukraine's EEZ, and that Romania has tacitly respected by [the] legitimacy of Ukraine's activities"[60] — I end this quotation from the Ukrainian pleadings. Frankly, I fail to understand how Ukraine could have considered that that area fell within its EEZ and how Romania could have tacitly respected this, when all these activities happened *after the critical date* and all but one occurred *in parallel with the process of bilateral negotiations*, where the Parties had put forward their respective claim lines.

[End of slide 4]

Conclusion

50. To summarize, in relation to the State activities conducted in the delimitation area relied upon by Ukraine, our conclusion is short and simple: neither the oil and gas concessions, nor the fisheries practice are relevant for the present dispute. As such, they cannot influence in any way whatsoever the maritime delimitation between Romania and Ukraine in the Black Sea.

51. Madam President, Members of the Court, thank you for your attention. Madam President, I would ask you to call on my colleague, Professor James Crawford, to continue the presentation of Romania.

The PRESIDENT: Thank you very much, Mr. Dinescu. Professor Crawford, do you want to make this start now with a break, or would you rather have a clear run after a short pause?

Mr. CRAWFORD: I think it would be convenient to speak for about 15 minutes, and then we will have gotten the heat and burden of the day over before the break.

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[60]RU, p.131, para. 6.110.

The PRESIDENT: Yes.

Mr. CRAWFORD:

XII. ROMANIA'S DELIMITATION LINE

Introduction

1. Madam President, Members of the Court, I have now to explain and justify Romania's claim line in some further detail, and to respond to Ukraine's criticisms of it. This is largely an exercise of synthesis, pulling together the various strands of argument you have heard over the past few days. Taken together, these support Romania's position that the appropriate approach to the delimitation involves four steps:

— first, restricting Serpents' Island to a 12-mile maritime zone — in fact the "marine boundary zone" agreed in 1949;

— secondly, constructing a provisional equidistance line in the sector governed by the adjacent mainland coasts of the Parties and relating that line to the 12-mile line around Serpents' Island;

— third, constructing a provisional median line as between their opposite mainland coasts; and

— fourth, considering whether the provisional equidistance/median line so drawn requires adjustment in light of any relevant circumstances.

2. This approach is fully in accordance with the principles contained in Article 4 of the Additional Agreement, which, as the Court will recall, referred to:

— "the principle stated in Article 121 of the United Nations Convention on the Law of the Sea of 10 December 1982 . . ."[61];

— ["le principe énoncé à l'article 121 de la convention des Nations Unies sur le droit de la mer du 10 décembre 1982 . . ."];

— "the principle of the equidistance line in areas submitted to delimitation where the coasts are adjacent and the principle of the median line in areas where the coasts are opposite"[62];

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[61] Additional Agreement, para. 4 *(a)*.

[62] *Ibid.*, para. 4 *(b)*.

— ["le principe de la ligne d'équidistance dans les zones à délimiter lorsque les côtes sont adjacentes et le principe de la ligne médiane lorsque les côtes se font face"];

— "the principle of taking into consideration the special circumstances of the zone submitted to delimitation"[63];

— ["le principe selon lequel les circonstances spéciales de la zone à delimiter doivent être prises en compte"];

— "the principle of equity and the method of proportionality . . ."[64];

— ["le principe de l'équité et la méthode de la proportionnalité . . ."].

The issues are right, and the order is right.

3. In this presentation I will deal with the first four of those five points; Professor Lowe will deal with the fifth — the principle of equity and as it relates to equity, the method of proportionality. In this speech I will do four things.

— First I will summarize the reasons why Serpents' Island is to be restricted to a 12-mile maritime zone and why it does not provide any base point for the construction of the EEZ continental shelf line.

— Secondly, I will address the points raised by Ukraine as to the use of the Sulina dyke and Sacalin peninsula as base points.

— Thirdly, I will discuss point X, and its location: point X is, as you will recall, the point on the agreed boundary located on the 12-mile arc around Serpents Island, it is the point of departure for the rest of the maritime boundary.

— Fourthly, I will describe the base points governing the construction of the provisional equidistance line based on the adjacent coasts of the Parties, and show you the construction of that line, with its turning points, before doing the same in relation to the points governing the median line located on the Romanian and Ukrainian opposite coasts.

— Finally, I will ask whether the boundary so determined requires adjustment in light of any relevant circumstances.

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[63] *Ibid.*, para. 4 *(e)*.

[64] *Ibid.*, para. 4 *(c)*.

A. The boundary around Serpents' Island: a reprise

4. Turning then to the boundary around Serpents' Island, Romania's position, you will not be surprised to hear, is that Serpents' Island is entitled to no more than a 12-mile territorial sea, and that it may not be used as a base point for the construction of the line beyond 12 miles. This is based on a number of considerations, all leading to the same conclusion:

(a) first, there was an agreed boundary around Serpents' Island, resulting from the 1949 general and specific procès-verbaux, and confirmed by subsequent agreements. It was thereby agreed that the State boundary would go around the 12-mile arc formed by the exterior margin of the "maritime boundary zone" ("la zone frontière maritime") "around" or "surrounding" ("qui entoure") Serpents' Island. As a result of those agreements, the areas to the south of that boundary appertain to Romania, there is no hint in the 1949 Agreements or subsequently that the area to the south is high seas. That understanding of the parties was confirmed by the maps produced by Romania and the Soviet Union in the years following, as well as by more recent maps produced by Ukraine itself;

[Slide 1: the effect of Ukraine's and Romania's provisional equidistance lines]

(b) secondly, as demonstrated by Professor Pellet, quite apart from the existence of the agreed boundary around the island, your jurisprudence and that of other international tribunals shows that it is appropriate to disregard small insular features disconnected from the mainland in constructing a provisional equidistance/median line. This is especially so where the feature would have a disproportionate effect on the provisional equidistance line. That Serpents' Island would have such a disproportionate effect can be seen from the comparison shown on the screen (which is tab XII-1 in your folders): an isolated feature of 0.17 sq km produces a difference of 7,000 sq km in the maritime zones — or to put it another way, every eroding square metre of the rock generates 40 sq km of maritime zone. In accordance with prevailing international practice it is appropriate that Serpents' Island be restricted, *at best*, to a 12-mile enclave. Indeed, but for the 1949 Agreement there would have been a good case for giving it less than that;

[End slide 1]

(c) thirdly, as demonstrated by Dr. Aurescu and Professor Lowe, Serpents' Island generates no entitlement to a continental shelf or exclusive economic zone since it constitutes a "rock" within the meaning of Article 121, paragraph 3, of the 1982 Convention. Ukraine's frantic attempts to modify the character of the island — all of which occurred after the critical date — demonstrate that Serpents' Island is incapable of sustaining human habitation or economic life of its own. If it could do so, there was no need to force it to do so.

Madam President, that would be a convenient moment. I'm about to start on point X, and the argument on point X is — if I may say so — inseverable, like point X itself.

The PRESIDENT: Yes. The Court will then briefly rise.

The Court adjourned from 11.10 to 11.25 a.m.

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

Mr. CRAWFORD:

B. Point X

5. Madam President, Members of the Court, I turn to my second point, the character and location of point X.

[Slide 2: detail of the chart entitled "Western Part of the Black Sea From Odessa to the Sulina Mouth", produced by the Ukrainian State Hydrographic Institution Branch "Ukrmorcartographia" (2001)]

6. You can see on the screen the all-purpose boundary "surrounding" Serpents' Island on the 2001 chart produced by Ukraine, which I showed you on Wednesday and which is at tab XII-2 in your folders for this speech. As you can see, the boundary goes around the exterior margin of the 12-mile zone to a point located in the east. But even after that point, the arc is depicted as continuing all the way around, until it meets the outer limit of Ukraine's territorial sea generated by its mainland coast.

7. The compiler of the 2001 Ukraine chart understood the effect of the 1949 and subsequent agreements. It is for this reason that the sector of the boundary along the 12-mile arc to the north of the point at which the boundary changes character is marked using the international symbol for

the outer limit of the territorial sea, since to the other side are waters which form indisputably part of Ukraine's EEZ.

[End slide 2]

8. Ukraine, of course, makes much of the fact that the terminal point — the point where the boundary changes character on the 12-mile arc was not defined in the agreements[65]. But the various charts all depict the boundary running around the "margin" ("la limite extérieure") and, where there is room on the chart, they depict it running to a point located to the east of Serpents' Island, and they do so consistently[66]. This is the point we have referred to as point X.

[Slide 3: the construction of point X]

9. In its Reply, Romania demonstrated that point X, as shown on these series of maps, coincided with the point at which a line drawn from the last agreed point on the Romanian/Soviet land/river boundary and drawn on a bearing perpendicular to the closing line across relevant points on the other side of Musura bay as they were in 1949, i.e., the small Soviet islet and the outer end of the Sulina dyke[67]. This was depicted on figure RR21 in the Reply, and you can see the process of construction on the screen now, using an enlargement of the 1957 Soviet chart entitled "Western Part of the Black Sea"[68] — it is at tab XII-3 in your folders.

10. First, a closing line is drawn across the relevant points located at either side of the Musura mouth, points being as they were at the time. Then from the last point on the land/river boundary agreed in 1949, border sign 1437, a line is constructed which is perpendicular to the closing line across the Musura mouth. The point at which that perpendicular line crosses the 12-mile arc constituted by the exterior margin of the "marine boundary zone" corresponds to the final point of the boundary depicted on the various charts, point X. The co-ordinates of point X as depicted on those charts can be calculated (45° 14' 20" N, 30° 29' 12" E). Here and in the remaining part of the speech, I will not speak the co-ordinates but I am grateful to the Registry for including them.

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[65]RU, para 3.12.

[66]MR, para 11.54.

[67]RR, para 4.97.

[68]MR, Ann. 16 and MR, Ann. 17.

[End slide 3]

11. It may be noted that point X is located some distance to the north of the current mainland coast equidistance line. This is the result of two factors; first, the extension of the Sulina dyke in the intervening years, and, second, the fact that the relevant point for construction of the mainland coasts equidistance line is not the small insular formation located on the Ukrainian coast, but a point located somewhat further north of the Ukrainian coast located on Cape Kubansky.

12. As a result, it is necessary for the Court to arrive at a solution which joins point X to the mainland provisional equidistance line. I will return to this shortly. It is in principle a similar problem to that which the Court faced in the *Cameroon* v. *Nigeria* case, in a part of the maritime boundary there.

13. But even if there were no subsequent practice of the Parties, even if the charts and maps relied upon by Romania had never been produced, it remains the case that there had to be a point X. As soon as you accept that the Parties agreed a 12-mile marine boundary around Serpents' Island; as soon as you accept that that zone did not stop after a short space around point F — then, as a matter of logic, there must be a point from which the boundary running along the exterior margin of the marine boundary zone would depart from this "exterior margin" and join the mainland coasts provisional equidistance line. The same thing is true if you accept the alternative submissions that Serpents' Island should be semi-enclaved as a matter of equity or that it is a rock, under Article 121 (3). On any of those three hypotheses, there must be a point X. Whether or not point X is located precisely where we propose, it must be located thereabouts.

14. The reason is that the provisional mainland-coast equidistance line intersects with the 12-mile arc around Serpents' Island at a point very close to where the boundary is shown as terminating, or as changing its character, on the various maps and charts.

[Slide 4: the mainland coasts equidistance line and its intersection with the 12-nautical-mile arc around Serpents' Island in the region of point X]

15. You can see this from the graphic now on the screen and at tab XII-4 in your folders. This shows the provisional equidistance line drawn from points on the Parties' adjacent mainland coasts, as they are now. Ukraine accepts that up to the point where Romania's 12-mile territorial sea intersects with the 12-mile marine boundary zone around the island — point F on the

graphic — the marine boundary is settled by agreement. This boundary delimits first internal waters, then territorial seas, of the two States. Point F marks the agreed starting-point of your delimitation. Ukraine asserts that it is the same as the innominate and undefined endpoint shown on map 134, but as I have shown you, that is not true. That point is located some distance to the north-west along the 12-mile arc.

16. Now, setting to one side the practice demonstrating the understanding of the Parties as to the extent of the agreed boundary line under the 1949 and subsequent agreements, it is obvious that a mainland coast equidistance line passes through the marine boundary zone around Serpents' Island, emerging to the east, where it then plays the role of the provisional delimitation line between the exclusive economic zones and continental shelves of the Parties in the remaining sector governed by their adjacent coasts.

[End slide 4]

[Slide 5: Ukraine's north-west facing coast looking on to Karkinits'ka Gulf]

17. Let me contrast this with Ukraine's case. The graphic you can see on the screen is at tab XII-5 in your folders. Ignoring the clear effect of the 1949 and subsequent agreements, as well as the applicable rules of international law relating to maritime delimitation and the express provision of Article 121 (3), Ukraine argues that base points on Serpents' Island should be used for the construction of a provisional equidistance line. As a consequence, on Ukraine's approach, Serpents' Island, as it were, concentrates within itself all the potentialities of Ukraine's distant but still allegedly relevant coastline. And this is so even in relation to portions of the coast that do not even face onto the area of the delimitation. For example, the north-west-facing coast looking on to Karkinits'ka Gulf — which we have called segment 7, which is shown as a relevant coast in this graphic — that has effect through a projection from Serpents' Island. That north-west-facing coast somehow manages to do a sharp U-turn, to leap westwards more than 100 miles, and to empower Serpents' Island — this tiny spot — to project itself much further to the south, occluding much of Romania's coastal frontage. But in this semi-enclosed sea, Serpents' Island is in no relevant coastal relationship to that or most of the rest of Ukraine's allegedly relevant coast. Serpents' Island acts as a focus for coasts which do not face it, which do not relate to it and which are a long

distance away. That is an inadmissible procedure. But Ukraine has provided no other basis on which its line can be constructed than the basis of this focal point of Serpents' Island.

[End slide 5]

[Slide 6: the maritime boundary in the region of point X]

18. By contrast Romania's position is in line with normal procedures of delimitation. As shown in tab XII-6 in your folders, in this sector of adjacent coasts you draw a provisional equidistance line from relevant base points. Since there is only one island here and — for the reasons we have given — it should be discounted. The provisional equidistance line is drawn from points on the mainland coast.

19. Given the clear language of the 1949 and subsequent agreements, the delimitation beyond the agreed boundary commences from point X, wherever precisely you decide to locate it. Accordingly, it is necessary for the Court to identify an appropriate solution joining point X to the mainland coasts provisional equidistance line. We have put forward our case as to how to do that: this involves the construction of a line joining point X to a point on the mainland provisional equidistance line, located approximately half of the distance between point X and where the opposite coast of Crimea comes into play, that is, point T. This intermediate point we have referred to as point Y, and you can see it on the screen.

20. If there had been no practice of the Parties demonstrating that the all-purpose boundary extended as far as point X — due east — the process might have been simpler, but it would not have been very different in the result. All the Court would have needed to do was to start the delimitation beyond the agreed boundary, from the point at which the provisional mainland equidistance line intersected with the 12-mile arc around Serpents' Island and then to follow the equidistance line.

[End slide 6]

C. Ukraine's criticism of Romania's base points

21. Madam President, Members of the Court, I come to my third point: Ukraine's criticism of the construction of the provisional equidistance line.

22. In its Counter-Memorial, Ukraine criticized the fact that Romania used "a man-made feature"[69] for the construction of its provisional equidistance line, and that it used "artificial base points on Romania's side represented by the seawardmost extension of an artificial structure, the Sulina Dyke"[70]. It then proceeded to show what the equidistance line would have been if both Serpents' Island and the Sulina dyke were ignored[71].

23. But as a matter of international law, the two issues are completely distinct; they cannot be traded off in this way. You cannot trade off coastal base points and offshore islands as if they were *eiusdem generis*. And, in fact, Ukraine did use the base point located on the Sulina dyke in order to construct its "strict" provisional equidistance line which uses Serpents' Island[72].

24. The same approach was continued in Ukraine's Rejoinder. There, Ukraine states that:

> "Even though Sulina Dyke is an artificial structure that does not actually form part of Romania's coast, Ukraine has accepted that it provides one set of base points for the plotting of the provisional equidistance line because the Dyke forms part of Romania's baselines from which the breadth of its territorial sea is measured."[73]

It adopts a similar approach to this in relation to the Sacalin peninsula[74].

[Slide 7: Ukraine's provisional equidistance line compared with Ukraine's claim line]

25. But these grudging concessions cost Ukraine very little. As you can see from the projection now on the screen — which is at tab XII-7 in your folders — having constructed its all-points provisional equidistance line, Ukraine's approach is that that provisional line should be "rotated" further to the south in order to obtain an "equitable" result by reference to a "coastal ratio", determined on the basis of the proportion of the area allocated to each of the Parties compared to the proportion of what Ukraine claims to be the lengths of their relevant coasts.

26. I leave to one side for the moment Ukraine's mistaken approaches to identifying the relevant coasts, which I dealt with the other day. I would only point out — and you will search in vain for any explanation of this point in Ukraine's written pleadings — that as you can see, its

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[69]CMU, para. 4.13.

[70]CMU, para. 4.14.

[71]CMU, fig. 4-2.

[72]See, e.g., CMU, fig. 9-2; cf. CMU, paras. 7.90, 9.23.

[73]RU, para. 5.15; see also para. 4.68.

[74]RU, para. 5.16.

claimed boundary is not an exact rotation of its all-points equidistance line. Rather, except for the kink in the initial section, the turning point of which seems to have been arbitrarily chosen, it essentially follows an azimuth and bears little relation to the "strict" all-points provisional equidistance line. On this approach, the provisional equidistance line, whatever points are used to construct it, plays little role.

[End slide 7]

27. But, however this may be, the Court has to delimit the maritime boundary in accordance with international law, not a devised system of arithmetical proportions, not a geometrical exercise performed on a cartographer's desk, and I will show you that Romania is indeed justified under international law in using its coastal base points.

[Slide 8: satellite photo of the Sulina dyke]

28. On the screen and at tab XII-8, you can see a satellite photograph of the Sulina dyke as it was in 2006. It is a permanent harbour work of some respectable antiquity. Construction commenced in 1856, at the outset of the work of the European Commission of the Danube — the Court will be pleased to see something related to the European Commission back. It has been progressively extended since to deal with the progressive deposition of silt from the Danube. The dyke is part of the harbour works of Sulina, which you can see on the screen; it provides *the* main navigational channel from the Black Sea to that harbour and to the Danube[75]. It is fully integrated with the mainland coast of Romania.

29. In fact, it is becoming more integrated. You will notice on the screen the sand island to the north of the Sulina dyke, just a few hundred metres back from the eastern extremity of the dyke. That feature was not there in 1949 or in 1974; it is new and as yet has no name — perhaps after this case it will be called "insula haga" (?) or "ostrov haga" (?) depending on which side of the boundary it is on! It is cut by the agreed territorial sea boundary, which we have added to the satellite photograph. Even if the Sulina dyke was not there, there would be a Romanian base point on that sand island. But you can see in the aggradation of the coastline and the development of

[75]RR, para. 3.69.

such features the reason for the progressive extension of the Sulina dyke protecting the navigable channel.

30. The fact that the dyke is "man-made" is neither here nor there; its use as a base point is in accordance with Article 11 of the Law of the Sea Convention, which provides:

> "[f]or the purposes of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast"
>
> ["[a]ux fins de la délimitation de la mer territoriale, les installations permanentes faisant partie intégrante d'un système portuaire qui s'avancent le plus vers le large sont considérées comme faisant partie de la côte"].

Of course, both the continental shelf and the exclusive economic zone are measured from the baselines from which the breadth of the territorial sea is measured.

[End slide 8]

31. That full effect may be given to harbour works as base points was confirmed in the *Dubai* v. *Sharjah* Award. There, the Tribunal referred to Article 8 of the 1958 Convention on the Territorial Sea, and to the 1980 draft of what would become Article 11 of the 1982 Convention, and stated that:

> "there is a body of practice, and of conventional law, in which full effect has been given to harbour works in the construction of frontal maritime boundaries as between opposing States. The same principles apply to the construction of lateral maritime boundaries as between adjacent States as to the construction of frontal maritime boundaries between opposing States."[76]

Dubai v. *Sharjah* was, of course, a lateral or adjacent coast situation.

32. In 1997, Romania deposited a list of the co-ordinates of the baselines from which its territorial sea is measured with the Secretary-General in accordance with Article 16 of the 1982 Convention[77]. That list included a base point located on the outer end of the Sulina dyke, as well as specifying a point located on the Sacalin peninsula. No State raised any question or objection to that list.

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[76] *Boundary Dispute between Dubai and Sharjah (Emirate of Dubai* v. *Emirate of Sharjah)*, Award of 19 October 1981, 91 *ILR* 543, at 662-663.

[77] RR, Ann. 3.

33. Finally, I note that Ukraine accepted the use of Sulina dyke as a base point, for the purposes of the 2003 Treaty, which established the position of the final point of the maritime boundary separating the Parties' territorial seas[78].

[Slide 9: satellite photos of the Sacalin peninsula and Serpents' Island seen from the same altitude]

34. I turn to Ukraine's criticism of the use of Sacalin peninsula as a base point. It mentions that the peninsula "is a sand spit (which was previously a small island) with no human habitation or economic activity of its own"[79]. But, as you can see from the satellite image on the slide, which is at tab XII-9 in your folders, the Sacalin peninsula constitutes an integral part of Romania's mainland territory[80]. And in the end, Ukraine expressly accepts that it is a valid base point[81].

35. Incidentally, in the quotation which I have just read to you from the Rejoinder, Ukraine refers to a small island "with no human habitation or economic activity of its own". That is a helpful quotation in its own way; it is a good description of Serpents' Island, omitting its rocky character. By contrast, the Sacalin peninsula, to which Ukraine applies that description, is 12 km in length, and 3.5 sq km in area — about 20 times the size of Serpents' Island — and, of course, it is part of the coast. You can see we have superimposed Serpents' Island on the satellite photo as it would appear at the same altitude. We do not think that the analogy applies, but in the circumstances, we are grateful for Ukraine's reference to a small island with no human habitation and economic life of its own.

[End slide 9]

D. The construction of the provisional equidistance/median line

36. Madam President, Members of the Court, I come to the construction of the provisional equidistance/median line.

[Slide 10: the construction of the equidistance line in the sector of adjacent coasts]

37. On the screen, you can now see the general area relevant to this portion of the delimitation. This is tab XII-10 in your folders. The territorial sea boundary out to point F and the

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[78]RR, para. 53.

[79]RU, para. 5.16.

[80]RR, para. 3.68

[81]RU, para. 5.16.

agreed boundary along the 12-mile arc is shown. I recall the relevant coasts for this segment of the boundary are, on the Romanian side, the coast down to the Sacalin peninsula, and on the Ukrainian side, the coast up to point S.

38. As for the construction of the equidistance line in this sector, the relevant points are

— on the Romanian side, the end of the Sulina dyke [45° 08' 42" N, 29° 46' 20" E];

— on the Ukrainian side, Cape Kubansky [45° 19' 31" N, 29°45' 58" E], which governs the equidistance line in the initial portion, and Cape Burnas [45° 50' 40" N, 30° 12' 00" E], which governs the equidistance line from the point which Romania has referred to as point D[82].

39. You can now see the construction of the equidistance line based on the mainland adjacent coasts on the screen. For the sake of clarity, and given that no effect is to be given to Serpents' Island for this purpose, Serpents' Island is temporarily removed.

40. The equidistance line is shown as running all the way out from the coast. Initially it is governed by the point on the end of the Sulina dyke and Cape Kubansky on the Ukrainian side. From the turning point, point D[83] [45° 12' 10" N, 30°59' 46" E], the controlling point is Cape Burnas and the line then proceeds until it reaches the tripoint, point T [45° 09' 45"N, 31°08' 40" E]. The tripoint is equidistant from the Sulina dyke, Cape Burnas, and the point located on the opposite Ukrainian coast at the westernmost tip of Cape Tarkhankut. From this point, the line becomes a median line between opposite coasts.[84]

[End slide 10]

[Slide 11: The maritime boundary in the area of Serpents' Island]

41. Madam President, Members of the Court, I explained earlier the location of point X, that is slightly to the north of the mainland coast equidistance line. The slide now on the screen demonstrates how it is to be joined to the provisional equidistance line. This and subsequent slides are at tab XII-11. First let us focus on the immediate vicinity of Serpents' Island, and restore Serpents' Island as well as the 12-mile arc around to point X. As I mentioned earlier, obviously, the 12-mile arc must intersect with the mainland coasts equidistance line at some point. The

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[82]MR, paras 11.65-11.66; cf. MR, Ann. 27, point 2.

[83]MR, para 11.74.

[84]MR, para 11.74.

existence of point X in this vicinity is a necessary consequence of the location of Serpents' Island close to the mainland coasts equidistance line; its *position*, if it had not already been agreed, would be a function of the construction of the equidistance line, and its intersection with the 12-mile arc.

42. In its pleadings, Romania argued that joining point X with the provisional equidistance line by the shortest possible course, a line perpendicular to the equidistance line, would not lead to an equitable solution, as it would create a tiny sliver of Romanian maritime area surrounded by, except on its south side, areas appertaining to Ukraine[85]. In these circumstances, the appropriate course is to draw a line to another point, point Y.

43. Point Y [45° 11' 59" N, 30° 49' 16" N] is located on the mainland coast provisional equidistance line, practically equidistant between the point at which the equidistance line intersects the agreed boundary on the 12-mile arc and point T[86].

44. As noted in the Memorial, the area enclosed in this triangle is approximately 68 sq km[87].

45. That area equates to the maritime area which was lost to Romania by agreeing in 1949 that, rather than proceeding on the basis of equidistance, Serpents' Island would be accorded the full 12-mile maritime boundary zone[88].

46. Ukraine in its Counter-Memorial objected that the location of point Y was "mysterious", and further that it amounted to "compensation" and an attempt to obtain "distributive justice"[89]. As to the first point, the location of point Y is anything but mysterious — it is a response to the need to take account of the understanding of the Parties as to the effect of the previous agreement, and the location of point X, as well as the principle that, in the absence of relevant circumstances, further departure from the equidistance line is not justified[90]. As for the allegation that Romania is seeking to obtain some form of "distributive justice", Romania merely noted the correlation of the areas in question as a fact to be borne in mind when considering the overall equity of the situation[91].

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[85]MR, para 11.68-11.71; RR, paras 8.33.

[86]MR, para 11.71.

[87]MR, para 11.72.

[88]MR, para 11.72.

[89]CMU, paras 4.16-4.18.

[90]RR, para 8.34.

[91]RR, para 8.36

[End slide 11]

[Slide 12: Romania's claim line in the sector of adjacent coasts]

47. Madam President, Members of the Court, the slide now on the screen — this is tab XII-12 — shows the entirety of Romania's claim line in the sector based on adjacent coasts out to the tripoint.

[Slide 13: The construction of the median line in the sector of opposite coasts]

48. Madam President, Members of the Court, I turn to the sector where the Parties' coasts lie in a relation of oppositeness. As I explained on Tuesday, and as shown in tab XII-13, the relevant coasts are the whole of Romania's coast, all of which projects onto the delimitation area, and the Ukrainian coast south of Cape Tarkhankut down to Cape Sarych.

49. The relevant points governing the provisional equidistance line between the opposite coasts are:

— on the Romanian side, the eastern end of the Sulina dyke [45° 08' 42" N, 29° 46' 20" E], and

— the south-eastern point of the Sacalin peninsula [44° 47' 21" N, 29°32' 55" E][92];

— and on the Ukrainian side, the westernmost tips of Cape Tarkhankut [45° 20' 50" N, 32° 29' 43" E], and

— Cape Khersones [44° 35' 04" N, 33° 22' 48" E][93].

They identify themselves readily.

50. Using these points, the median line commences at point T, and proceeds in a general southerly direction to a turning point [44° 35' 00" N, 31° 13' 43" E] at which point it ceases to be governed by the end of the Sulina dyke, and is governed by the Sacalin peninsula on the Romanian side. From there it continues broadly southwards to the turning point [44° 04' 05" N, 31° 24' 40" E] at which the median line governing point on the Ukrainian side changes to Cape Khersones. From that point it continues again, in a broadly southwards direction until it reaches a point we have described as point Z [43° 26' 50" N, 31° 20' 10" E], the last point in our alphabet[94].

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[92]MR, para. 11.78.

[93]MR, para. 11.79; and Ann. MR 27, points 14 and 19.

[94]MR, para. 11.80.

51. Point Z is located at a point approximately equidistant from the Romanian, Ukrainian and Turkish coasts: it is located slightly farther from the Bulgarian coastline. It approximately coincides with point L, which was agreed as the final point in the Soviet/Turkish Agreement, and point 10, which was similarly agreed in the Bulgarian/Turkish Agreement[95], both of which my colleague Mr. Dinescu has already described. Drawing the line as far as point Z will therefore not affect the rights of other Black Sea States. Although the Court can always use its customary arrow to avoid difficulties in that regard.

[End slide 13]

[Slide 14: the maritime boundary between Romania and Ukraine]

52. On the screen you can now see both the provisional median line and the provisional equidistance line using the relevant coasts — this slide is at tab XII-14.

E. The absence of any relevant circumstances necessitating adjustment of the provisional equidistance/median line

53. Madam President, Members of the Court, finally I must address the question whether there exist any relevant circumstances which call for an adjustment in the provisional equidistance line that I have just described.

54. On this issue I can be succinct — for once, you may say! First of all, my colleagues have already dealt with the subject in some detail in the preceding days. Secondly, the fact is that there are no relevant circumstances which *require* an adjustment of the provisional equidistance line, but for the presence of Serpents' Island, whose consequences we have already analysed in detail. Other factors which might be considered to constitute relevant circumstances support maintaining the provisional equidistance line unchanged.

55. Ukraine relies on four circumstances as being "relevant" in this regard. The first, the "coastal geography" and Ukraine's geographic predominance in the relevant area, is, as Professor Pellet has explained, an attempt to double count the geography which is already taken into account in the construction of the line itself.

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[95] MR, para. 11.81.

56. The next two "relevant circumstances" — the *"effectivités"* that are invoked by Ukraine — the *"effectivités"* supposedly constituted by the gas and oil activities and their supposed action in relation to illegal fishing, are, as demonstrated by my colleagues this morning, irrelevant. Even if proved to their full extent, which they have not been, they would not entail or even imply a tacit agreement as to the course of the boundary. In fact, almost all of them occurred after the critical date.

57. The fourth "relevant circumstance" relied on by Ukraine is, of course, the comparative distance in the relevant coastal lengths of the Parties. This issue will be taken up by Professor Lowe in a moment. But I would limit myself to making two brief observations:

(a) First, Ukraine's approach in purporting to rely on the entirety of its coasts as relevant for this purpose is simply *wrong*. Portions of Ukraine's coast which lie in no relation of oppositeness or adjacency to Romania's coast, which do not project onto the relevant area or are located at a considerable distance from it, should not be taken into account. I demonstrated this on Wednesday.

(b) Secondly, and quite apart from the mistaken basis on which Ukraine embarks on its exercise of comparing the relevant coasts of the Parties, the use it attempts to make of that comparison is fundamentally flawed. It also contradicts the jurisprudence of the Court. Ukraine wants to use the comparative length of its relevant coasts as dictating the adjustment of its all-points provisional equidistance line, so that it comports better with the ratio between the relevant coasts. This is to apply a quasi-arithmetical process of apportionment, based on a correlation between the ratio of coastal lengths and the division of the relevant area, an exercise you have repeatedly condemned. Comparing relevant coastal lengths operates as a check that the delimitation produced by the earlier process — the well-established process — is not as a whole disproportionate, and this is part of an assessment of the overall equity of the situation. In other words, comparison of the relevant coasts of the Parties and the division of the relevant area is a check for the purpose of disproportion, it is not a criterion imposing an arithmetically proportioned outcome. And, as I have said already, Ukraine proposes no alternative to this arithmetical exercise based on the advance guard of Serpents' Island.

58. As for the other relevant circumstances which have been discussed by the Parties, Ukraine denies that the semi-enclosed nature of the Black Sea and the presence of other riparian States and their maritime boundaries constitute relevant circumstances[96]. These two circumstances, however, are interconnected: pre-existing delimitations are relevant precisely because of the semi-enclosed nature of the sea. We do not therefore have to get into the argument whether they would be relevant in the open coast situation, an issue which arose in the *Trinidad and Tobago/Barbados* case, where the coast could not have been more open. The semi-enclosed nature of the sea is undoubtedly highly relevant to the present delimitation, because it magnifies — just as Serpents' Island magnifies — the disproportion which Ukraine's method entails and the cut-off effect which it has. Far from requiring any adjustment of the provisional line, however, these factors — the semi-enclosed sea and the general practice of equidistance in this semi-enclosed sea — militate against any adjustment. They support the conclusion that equidistance should be adhered to as much as possible.

[End slide 14]

Conclusion

59. Madam President, Members of the Court, I have shown you the relevant points for the construction of the provisional equidistance line. I have introduced Serpents' Island into this equation. I have explained that there exist no other relevant circumstances requiring an adjustment of the provisional equidistance line, and indeed that the relevant circumstances that do exist militate the other way. The last stage in this process is to ask whether the delimitation that we have proposed is appropriate: is on the whole equitable as between the Parties. With your permission, Madam President, Professor Lowe will now address that question.

Madam President, Members of the Court, thank you for your patient attention.

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

[96]CMU, paras. 4.33-4.50, 8.66-8.99; RU, paras. 6.4-6.34.

Mr. LOWE: Thank you.

XIII. CHECKING THE EQUITABLE CHARACTER OF THE DELIMITATION

Introduction

1. Madam President, Members of the Court, you have heard the justification for each element of Romania's claimed delimitation line from Professor Crawford. It is common ground between the Parties that as a matter of law the ultimate test is whether the delimitation line achieves an equitable solution; and my submissions address the question whether Romania's line does indeed produce an equitable solution.

2. The Parties are divided on the question of the precise content of the relevant legal principles and their application to the facts of this case.

3. It is common ground that it is necessary to decide whether the provisional equidistance line, after its adjustment to take account of relevant circumstances, has — or has not — produced an unacceptable disproportionality between the resulting sea areas attaching to each of the Parties[97].

4. There is a consistent line of jurisprudence, cited in the written pleadings, which indicates the necessity for this final check on the adjusted equidistance or median line. The necessity derives from the fact that the analysis prior to this stage has had a close focus on particular geographical features and factors. Adjustments to the provisional equidistance line may have been made; and while each adjustment might appear reasonable if viewed in isolation, the cumulative effect of the adjustments — or lack of adjustments — may be to produce an overall delimitation that does not satisfy the imperative rule that the end result must be equitable.

5. It is also common ground that any disproportionality used to be something to be assessed by reference to the lengths of the relevant coasts and to the maritime areas ascribed to each Party as a result of the delimitation[98].

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[97]MR, Chap. 12; CMU, para. 7.3.

[98]MR, Chap. 12; CMU, Chap. 10; RR, Chap. 9; RU, Chap. 8.

6. That necessarily entails a determination of what the relevant *coastline* is. It would, for example, plainly be absurd to take account of the lengths of Russia's Arctic and Baltic coastlines in the context of a delimitation in the Black Sea. The exercise also plainly entails a determination of what the overall delimitation *area* is: otherwise it is impossible to determine how much is ascribed to each Party.

7. The Parties are agreed that the proper approach to proportionality is a comparison between the ratio of the lengths of the Parties' relevant coasts and the ratio of the areas within the relevant delimitation area which are ascribed to each Party as a result of the provisional delimitation line, as adjusted by taking account of the relevant circumstances.

8. There is, however, *no* agreement between the Parties on the question of what the relevant coasts and the relevant delimitation area are in this case. Each side has put forward its own view; and the two views are incompatible.

9. What does one do now? Well, plainly, the Court cannot arbitrarily choose one or other view, or arbitrarily choose a third view, on the question of relevant coastal lengths and sea areas. The decision must be principled and reasoned.

10. The necessity for a principled and reasoned approach flows from the nature of the task before the Court. It is worth recalling the words of the Court in the *Libya/Malta* case (*Judgment, I.C.J. Reports1985*, p. 39, para. 45):

> "the 'Application of equitable principles is to be distinguished from a decision *ex aequo et bono* and as the Court put it in its 1969 Judgment:
>
> > 'it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field' (*I. C.J. Reports 1969,* p. 47, para. 85)."

11. Let me deal first with the question of the relevant coasts, and then with the question of the delimitation area.

12. Professor Crawford has already addressed you on these points, and I shall not repeat his detailed submissions. I shall highlight some matters, and otherwise focus on the question of checking the equitable character of the line.

The relevant coasts

[Slide: the median line between the relevant Romanian and Ukrainian opposite coasts]

13. I should say that all slides which are going to be on the screen are also in your folders, and this is tab 1. As you can see, Romania has included the whole of its coastline between its boundaries with Ukraine and Bulgaria as its relevant coast. Ukraine appears to object to this[99] on the ground that the "[s]egment of this coast, south of the Sacalin peninsula, has absolutely no effect on the construction of Romania's claim line".

14. As you will see from the map on the screen, which is taken from figure 32 in Romania's Memorial, that is indeed true. The base point at Sacalin is closer to the equidistance line than is any point on the baseline south of Sacalin. The coastline south of Sacalin does not control the location of the equidistance line.

[End slide]

[Slide: the maritime zones generated by the Romanian coast]

15. But the coastline south of Sacalin certainly *generates* the maritime zones. One might think of the maritime zones being generated by the coast rather like waves rolling out from — instead of towards — the shore. Each part of the overall maritime zone is generated by the section of coast where the waves roll out, as it were; so that each part of the zone is generated by the nearest part of the coastline.

16. You will see that the northern area of Romania's maritime zone is generated by the Romanian coastline north of Sacalin, and the southern area of Romania's maritime zone is generated by the Romanian coastline between Constanta and the Romania-Bulgaria border. And obviously, the area of Romania's maritime zone between the northern and southern parts is generated by the Romanian coastline between those northern and southern parts of its coast.

17. You may recall the reference in the *North Sea Continental Shelf* Judgment to "the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea" (*I.C.J. Reports 1969*, p. 22, para. 19). It is plainly the case that the southern part of Romania's continental shelf is *generated by* the southern part of

[99] CMU, para. 10.12.

Romania's coast. It would be absurd to argue that the southern part is "generated by" the final base point at Sacalin.

[End slide]

18. The absurdity becomes even clearer if one considers what a base point actually *is*.

[Slide: the equidistance line between the Romanian and Ukrainian coasts]

You can see that the equidistance line between Romania and Ukraine is created by reference to two points on the Romanian coast: one on the Sulina dyke, and one on the Sacalin peninsula. These are the points on the Romanian coastline that happen to be closest to the nearest points on Ukraine's coastline. And they are *points*. In mathematical terms, they are infinitely small points. But points *cannot* be compared in the assessment of proportionality. It makes no sense at all to compare ratios of points with ratios of sea areas. It would be a mathematical nonsense.

[End slide]

[Slide: maritime zones are not generated by base points]

19. Indeed, it would be illogical even to try to compare base points, because it is not the *points* that generate the maritime zones, somehow radiating out into waters lying in front, to each side, and even behind, the point, as the figure on the screen now shows. It is the *coastline* that generates the maritime zones, as the passage from the *North Sea Continental Shelf* Judgment, which is substantially repeated in Article 76 (1) of the Law of the Sea Convention, makes perfectly clear.

[End slide]

[Slide: the maritime zones generated by the Romanian coast]

As this Court put it in *Tunisia/Libya* case, the continental shelf — and the point applies equally to the EEZ — lies "in front of their respective coasts" (*I.C.J. Reports 1982*, p. 61, para. 74). The maritime zone does not radiate out from a single point on the coast: it lies "in front of" *(ibid.)* the whole length of the coast. A maritime zone is generated by the coastline along which — adjacent to which, in front of which — it lies.

20. Base points are, quite simply, not relevant at all to the generation of the entitlement. Base points are relevant only to the geometrical task of drawing the provisional equidistance line.

21. And that is why it is plainly correct to include the whole of Romania's coastline as the relevant coast. It is the whole of the Romanian coastline that generates Romania's entitlement to maritime zones.

[End slide]

Indeed, Ukraine seems to accept this point, as you will see from figure 4.9, at page 80 of its Rejoinder. That figure shows Ukraine's view of Romania's coastal projections; and it shows the zones projecting outwards from the entire length of Romania's coastline, from the border with Ukraine in the north to the border with Bulgaria in the south. It is obvious that it is the projection, the natural prolongation, of the southern part of the coast which is the basis of Romania's entitlement to the southern part of its continental shelf and EEZ. To deny this part of the Romanian coast the capacity to generate an entitlement in this area would overthrow the fundamental principles of the jurisprudence that this Court has developed over the last 40 years.

22. Let me turn to Ukraine's coast.

[Slide: the part of the Ukrainian coast irrelevant for the delimitation with Romania]

Ukraine objects to the exclusion from the relevant coast of that part of its coastline that lies between point S and Cape Tarkhankut. Why did Romania exclude that part of Ukraine's coast?

23. The answer is obvious. It is a straightforward application, in the context of Ukraine's coast, of the principle to which I have already referred. The relevant coast is the coast that generates the entitlement to maritime zones: that is, the coast whose projection, whose natural prolongation, extends over the area in question so as to give the coastal State the entitlement to maritime zones.

[End slide]

24. Those projections are illustrated on figure RR5, the fold-out page 36 of Romania's Reply, on which the next few slides are based.

[Slide: the projection of the Ukrainian coast]

That map shows the projection of every segment of Ukraine's coast, from the border with Romania in the west to Cape Sarych on the Crimean peninsula in the east.

25. The segments have been drawn by simplifying the coast. It is necessary to simplify the coast in order to arrive at a practical figure for the length of the coastline. As is well known, there

is no true answer to the question, how long is a coastline? It all depends on the scale at which one follows all the sinuosities and indentations in the coast. Does one lay the measuring tape around each headland, or around each rock, or around each grain of sand? All measurements of coastal length are simplifications designed to match the practicalities of the task at hand.

26. The drawing of straight lines to represent the coast in this case is an exercise similar to the drawing of straight baselines around the coast in accordance with Article 7 of the 1982 Convention. Article 7, paragraph 3, stipulates that straight baselines "must not depart to any appreciable extent from the general direction of the coast", and the same discipline has been observed by Romania in drawing the segments. Each segment lies between points at which the general direction of the coast changes.

27. It is, we submit, important that there be a coherence of approach in all areas of maritime delimitation, and that situations are avoided in which what is regarded as "the coast" for the purpose of one kind of delimitation exercise, the kind now before the Court, follows a significantly different course from the coast whose low-water mark or straight baseline system, properly drawn, would generate a State's maritime zones.

28. Well, Romania believes that the segments which it has drawn in figure RR5 faithfully apply those principles, and that their lengths are the relevant lengths for the purpose of the "equity check".

29. As Professor Crawford showed you, Ukraine's segments 1 and 2 in the west project outwards, and extend over the area that is claimed by Romania. Those segments of coast therefore generate an entitlement to an area of maritime zones which overlaps with the area generated by Romania's coast and which therefore needs to be delimited. Those segments of coast should, accordingly, be taken into consideration as part of the relevant coast.

30. So, too, should segment 8, on the Crimean peninsula between Cape Tarkhankut and Cape Sarych. It generates a seaward projection which overlaps with Romania's coastal projection; and it is accordingly a part of Ukraine's relevant coast.

31. In theory, if a segment were very long, one might ask if the whole segment should be counted as "relevant coast", or only part of the segment. In the present case, however, that question does not arise, because the whole of segments 1 and 2 and of segment 8, generate

maritime zones which overlap with the maritime zones generated by Romania's relevant coast. But to anticipate my next points, no other segments do.

32. Segment 3, which proceeds north-eastwards from point S to Odessa, projects in a more northerly direction than segment 2 and its projection does not overlap with the area generated by Romania's coast. There is, therefore, no need to delimit the maritime zones generated by segment 3. Romania has no entitlement to any part of them, and it makes no claim to any part of them. This segment of Ukraine's coast should *not*, therefore, be taken into consideration as part of the relevant coast for the purposes of the "equitable result" check.

33. The case of segment 4 is a little more complex. The seaward projection of segment 4, eventually overlaps with areas generated by the Romanian coast, if it is extended far enough, as this map makes clear. But the important point is that wherever these extended projections *do* overlap, the points within the area of overlap would be closer to Ukraine's segments 1 and 2 than they would be to Ukraine's segment 4. And it is therefore more rational to say, that such areas are the projections, the natural prolongations, of Ukraine's segments 1 and 2 than that they are the projections of Ukraine's segment 4. Segments 1 and 2 eclipse the effect of segment 4. That is what we have called the principle of comparative proximity. That is why Romania has included segments 1 and 2 but excluded segment 4.

34. The same point can be made in respect of segment 6. By the stage that the projection of segment 6 comes anywhere near Romania's projection, the areas in question are closer to Ukraine's segments 1, and 2, and 8, all of which Romania accepts are part of the relevant coast, than to segment 6. Segments 1, 2 and 8 *eclipse* segment 6. And that is why segment 6 is not a part of the relevant coast.

35. Both segment 5, which I skipped over, and segment 7, project seaward in directions which make it evident that they can have no relevance whatever for the delimitation. Any overlap of their projections is solely with other Ukrainian waters, not with zones generated by Romania's coastline or claimed by Romania. Ukraine's segments 5 and 7 are therefore not part of its relevant coast for the purposes of this delimitation.

36. And as we have said, segment 8, on the Crimean peninsula generates a projection overlapping with Romania's coastal projection, and is clearly part of the relevant coast.

[End slide]

37. So, Romania applies the principle that the relevant coast is the coast that generates the entitlement to maritime zones: that is, the coast whose projection — whose natural prolongation — extends over the area in question, which is the area of overlap between the zones generated by the coasts of the two States, so as to give the coastal State the basis for its claim to the area in question.

38. This analysis yields actual coastal lengths of 269.67 km for Romania and 388.14 km for Ukraine — a ratio between the Romanian and Ukrainian coasts of 1:1.439. If the simplified "segment" lines are used, Romania's coastal length is 204.90 km, and Ukraine's 292.63 — a ratio of 1:1.428.

39. I should make three points about Ukraine's position on the relevant coasts, to emphasize the points made earlier by Professor Crawford. Ukraine's position is illustrated in its Rejoinder.

[Slide: the relevant Ukrainian coast and its projection, according to Ukraine]

You can see on the screen Ukraine's figures 4-1, depicting its relevant coast, and 4-4, depicting the projection of its coastal front.

40. First, to focus on the right-hand chart, you will notice that the coastal fronts which generate Ukraine's claimed maritime zones depart markedly from the general direction of the coast. The 160 km line between Odessa and Karkinits'ka Gulf, for example, lies around 35 km — about 19 nautical miles — from the coast in its western part. These straight coastal frontages do not simplify the coast: they positively distort it.

41. Second, the projections from these coasts become relevant by overlapping with Romania's coastal projections; but Ukraine can achieve this only by having projections which radiate out from the ends of the lines marking the coastal front. The areas projected from those lines do not, to use the Court's term, "lie in front" of the coastal frontage: they spill out sideways, southwards, making angles of up to 140°.

42. Third, even on Ukraine's account as presented in its figure 4-4, the coastline in Karkinits'ka Gulf, immediately north of the Crimean peninsula, has no relevant projection whatever. Yet, Ukraine's figure 4-1, on the left, shows that the whole of that coast is counted by Ukraine as relevant coast.

43. It is for these reasons that Romania submits that Ukraine's account of its relevant coasts lacks a rational and principled basis.

[End slide]

44. I turn now to the question of the relevant area.

The relevant area

45. The relevant area is the area of overlapping entitlements of the Parties[100]. And it is important to appreciate that it is the overlapping *entitlements,* and not the overlapping *claims*, that defines the area: and a moment's thought will show why.

46. First, the area of overlapping *claims* has no objective existence. It is purely subjective. It is subjective because a State can make whatever claim it chooses, no matter how implausible others might consider that claim to be.

[Slide: graphic representing States with opposite coastlines of the same length]

47. The point can be illustrated simply. If we take two States, A and B, with coastlines of equal length facing each other and, say, 200 miles apart: State A claims the waters out to a point a few miles on the far side of the median line. State B claims *all of the waters* extending 80 per cent of the way across to State A, far across the median line. The Court follows the established procedure and first draws a provisional median line, and then, there being no special circumstances that call for any adjustment of the median line, applies the proportionality test to check that the result is equitable.

48. If the Court compares the ratio of their coastal lengths with the ratio of the waters that are ascribed to each State within the area of overlapping *claims*, it will find a coastal length ratio of 1:1. But it will find that, say, 90 per cent of the area of overlap between the two *claims* has been given to State A. That appears at first sight to be wholly disproportionate.

49. But it is not at all disproportionate. The equidistance line quite obviously produces a perfectly equitable, proportionate delimitation. It is a paradigmatic case. It may give 90 per cent of the area of *overlapping claims* to State A; but it gives 50 per cent of the *waters* between the two

[100] Reply, para. 3.85.

States to each State. Why should the Court shift the provisional equidistance line because there is a disproportionate division of the area of overlapping *claims*?

50. If State B *claimed* a greater or lesser extent of the waters, the ratio of areas produced by the provisional equidistance line within the area of overlapping *claims* would obviously change. But would that mean that the equitableness of the result changes, even though the provisional equidistance line remains the same throughout?

51. The fallacy is clear. In looking at the area of overlapping *claims*, one is looking at the wrong thing.

[End slide]

52. The correct approach — and the only rational approach — is evident if one recalls the fundamental principle — that each segment of the relevant coastline must be permitted to generate its own maritime zones. Those zones will extend up to the proper delimitation line: they cannot go further without encroaching upon the areas that properly belong to the other State. But the coast generates *all* of the waters up to that delimitation line, not only the waters that happen to fall within the limits of an arbitrary overlapping claim made by another State.

53. That is the approach that this Court has adopted, for example in the *Tunisia/Libya* case, where it defined the area in which the Parties sought the delimitation of "the continental shelf in front of their respective coasts" (*Judgment, I.C.J. Reports 1982*, p. 61, para. 74) in terms of the area of overlap between areas "which can be considered as lying off the Tunisian or off the Libyan coast" *(ibid.)*.

54. So, one looks at the whole of the zones generated by the coast. The relevant area is the area that is to be delimited. That must, obviously, in general terms include the area where the zones projected from the two coasts overlap.

55. But because the *aim* of delimitation must, in Romania's submission, be that each segment of the relevant coast is permitted to generate its own maritime zones, up to the proper delimitation line.

56. Because in principle, each State generates an entitlement that reaches all the way from the coast, right up to the coastline of the neighbouring State. It follows that what must be counted is the full extent of those waters that each segment of the coast generates. That includes *both* the

waters that lie *within* the area of overlapping claims, and *also* the areas, typically closer to shore, which each State believes indisputably belong to the other State, and to which it makes no claim.

57. So in short,

(a) the relevant coasts are derived from the simplified lines representing the coastlines, divided into segments to mark major changes in the direction in which the coast faces;

(b) all segments of the coast that generate waters which wholly or partly overlap with waters generated by the coasts of the other Party are *relevant coasts*; and

(c) the *relevant area* is the area of waters generated by the relevant coasts. More precisely, the relevant area means *all* of the waters generated by projections from the relevant coasts, whether or not claimed by the other State.

58. That is the approach that Romania has adopted.

[Slide: the relevant coasts and the relevant area]

Professor Crawford explained the boundaries of the relevant area to you. It includes the areas generated by the relevant Ukrainian segments, 1, 2, and 8. It excludes, in the north, the areas generated by the other segments, which do not produce overlapping entitlements. In the south, it runs along the hypothetical equidistance line between Romania and Bulgaria, then along the median line between Romania and Turkey, and finally follows the Ukrainian-Turkish boundary as far as the meridian passing through Cape Sarych, which is the final point on Ukraine's relevant coast at the southern end of segment 8. And it excludes the tiny triangle in the extreme south-east corner which lies more than 200 miles from Romania

59. Romania submits that the relevant delimitation area is, accordingly, that now illustrated on the screen. And it has an area of 86,050.3 sq km.

[End slide]

Proportionality

60. That brings me to my final point: the proportionality check itself. That is a convenient name for it, although, as the Tribunal in the *Anglo-French Continental Shelf* case put it, "it is

disproportion rather than any general principle of proportionality which is the relevant criterion or factor"[101].

61. Though that point is common ground between the Parties, it is worth emphasizing it. As a consistent line of jurisprudence makes clear, it is certainly *not* the case that a Court should design a delimitation so as to give to each of the Parties a share of the waters in question that is proportionate to their relative coastal lengths, so that if State A has a relevant coastline 40 miles long and the relevant coast of State B is 60 miles long, State A should have about 40 per cent and State B about 60 per cent of the waters. That is *not* the role of what is called the "proportionality check" or "proportionality test".

62. The proper approach is clear. As the Tribunal said in the *Eritrea/Yemen* case, "the principle of proportionality . . . is not an independent mode or principle of delimitation, but rather a test of the equitableness of a delimitation arrived at by some other means"[102]. The Tribunal draws a provisional equidistance line; it adjusts it to take account of any relevant circumstances; and then it checks to see whether the adjusted line produces an equitable result. If one State's share of the area is grossly disproportionate to its share of the combined lengths of the relevant coasts of the two States, the result might be thought inequitable and to call for further correction (see *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, pp. 67-69, paras. 66-69).

[Slide: The division of the relevant area between Romania and Ukraine by Romania's claim line]

63. In this case, the lengths of the relevant coasts of the two States, determined as I have described, are in a ratio of approximately 1:1.4 — i.e., the relevant Ukrainian coast is 1.4 times as long as the relevant Romanian coast, and the figures are set out in paragraphs 12.6 and 12.7 of our Memorial.

64. We have described how the relevant area was determined; and we have described how the maritime boundary should be determined, on the basis of the existing agreements between Romania and Ukraine and of the application of established principles of international law concerning maritime delimitation.

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[101] RR, para. 9.5.

[102] *Eritrea/Yemen Arbitration*, Second Stage: Maritime Delimitation, award dated 17 December 1999, para. 165.

65. The boundary line so determined divides the relevant area between Romania and Ukraine in the ratio of 1:1.7 — that is, Ukraine gets 1.7 times as much of the relevant area as does Romania. One might say that this favours Ukraine, given that the coastal length ratio is not 1.7:1 but 1.4:1. But Romania accepts that this result is within the range of "not disproportionate" results.

66. Romania accordingly submits that the boundary line quite clearly satisfies the proportionality check. For example, in the *Eritrea/Yemen* case, the Tribunal found that the coastal lengths were in a ratio of 1.31:1, and the maritime spaces in a ratio of 1.09:1, and that this was not disproportionate[103]. The "disproportion" in *Eritrea/Yemen* was about one fifth — the area ascribed to Eritrea was about four fifths of what might have been expected if the respective maritime spaces were strictly proportionate to the respective lengths of the relevant coastline.

67. In the *Tunisia/Libya* case, this Court ascribed about 60 per cent of the area to Tunisia and 40 per cent to Libya, whereas their coastal lengths were in the proportions of about 69 per cent to 31 per cent (*I.C.J. Reports 1982*, p. 91, para. 131).

68. But the ratios in the present case are even closer to strict proportionality. Ukraine, on the approach that I have described, would gain something like 105 per cent — one twentieth more — than it might expect if the maritime spaces were strictly proportionate to the relevant coastal lengths. This is well within the limits of what has been regarded as "not disproportionate" by international tribunals; and the line needs no correction in order to achieve an equitable result.

[End slide]

No cut-off

69. There are two other matters that I must deal with briefly: the principle of non-encroachment or no-cut-off, and the question of security.

[Slide: graphic illustrating the cut-off effect]

70. Some tribunals have emphasized the need to ensure that one State's maritime zones do not cut off, or encroach upon, those of another. This diagram shows the situation which must be

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[103] *Eritrea-Yemen Arbitration*, Second Stage: Maritime Delimitation, award dated 17 December 1999, para. 168.

avoided. Equidistance lines drawn at State B's boundaries with States A and C, result in State B's entitlement being cut off. It is similar to the *North Sea Continental Shelf* situation.

[End slide]

[Slide: the lack of cut-off effect as a result of Romania's claim line]

71. In the present case, as the Court will see from the displayed map, it is very clear that Romania's claim does *not* cut off the natural prolongation of Ukraine's territory. Romania's line is essentially an equidistance line constructed from their respective coasts, with the addition for Ukraine of the "Serpents' Island semi-circle" resulting from the 1949 Agreement. There is no encroachment or cut-off.

Economic and security interests

72. Some earlier delimitation judgments have referred also to the need to ensure that the delimitation, which the Court has in mind, does not imperil a State's security interests or threaten catastrophic consequences for the livelihood and economic well-being of the population of the countries concerned.

73. But there is no evidence at all to suggest that the delimitation advanced here would adversely affect Ukraine's security or lead to any such catastrophic consequences; and Ukraine has not suggested otherwise.

Closing

74. Madam President, Members of the Court, there is one final point that I should make.

75. As in most human activities, there are different styles in negotiation and in litigation. In the context of maritime delimitation, some adopt what one might call the "marketplace approach", making an initial claim that is so expansive that it does not express even a genuine aspiration, but simply signals the start of serious bargaining, like merchants at the start of the haggling down of an unrealistic asking price for goods. My wife bought a silver bracelet in Marrakesh market for one third of its initial asking price, and everyone seemed happy — though the local businessman was probably the happier of the two. Then there are those who do not take the marketplace approach, but who go straight in with a realistic proposition and then expect to engage in some serious argument to discover what, if anything, is wrong with it, and how it might need to be adjusted.

76. In this case, Romania has very deliberately chosen to put forward a reasonable, realistic claim. We do not say that other approaches to litigation are wrong. We do, however, submit that a State should not be penalized for taking a realistic approach and making a modest, but decent, objective and justified claim.

77. Ukraine might appear to have adopted the other approach.

[End slide]

[Slide: the cut-off effect produced by the Ukrainian claim line]

Its proposed line seems to treat Romania even worse than Germany would have been treated in the *North Sea Continental Shelf* cases by a strict application of the equidistance line.

78. The Ukrainian proposal is a good example of a cut-off. It encroaches upon Romania's entitlement, and the inequity of the result is immediately obvious from the map displayed[104].

79. And more than that, it has no basis in principle. It treats the 12-nautical-mile circle around Serpents' Island, agreed by the Parties, as if it did not exist, apart from a small arc of the circle that borders Romania's territorial sea. It then constructs a line between the coast of Romania and what is, for the most part, the coast of Serpents' Island, and drives it down, southwards, right across the front of the Romanian coast. It is the kind of line that one sees drawn between opposite States; but this is no median line. Here it is drawn so that the line is at one point 153 nautical miles from Ukraine's eastern coast but only 17 nautical miles from the Romanian coast which faces it.

80. At first sight, the Ukraine line is utterly lacking in credibility. But, Ukraine says, that is because Serpents' Island may be invisible to the naked eye on a map on this scale, but it has an immensely magnified effect upon the limit of the maritime boundary.

81. But that is not so. As we have shown, this approach contradicts the delimitation already agreed by the Parties in the procès-verbaux of 1949, 1963 and 1974. Under the consistent jurisprudence on maritime delimitation, Serpents' Island would not have this effect. Article 121, paragraph 3, of the Law of the Sea Convention stipulates that Serpents' Island does not have this effect. And it was accepted by the Parties in the 1997 Additional Agreement as a principle

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[104]RR, fig. 32.

applicable to this delimitation, that Serpents' Island would not have this effect. There is no basis upon which Ukraine can even start to build its case.

[End slide]

[Slide: the division of the relevant area between Romania and Ukraine by Romania's claim line]

82. Romania has been reasonable and realistic in presenting its claim, first in negotiations, now in the Court. It is confident that the Court will reflect on the inherent merits of the cases advanced by the Parties and will not be tempted to split the difference in the misplaced belief that this would produce a just result and keep both Parties happy.

[End slide]

83. Unless we can be of further assistance, Madam President, that concludes my presentation and, at the same time, this round of Romania's pleadings and I thank you and the Court for your patience and attention over this past week.

The PRESIDENT: Thank you, Professor Lowe. This does indeed mark the end of today's sitting and brings to an end the first round of the oral argument by Romania. The Court will meet again starting on Tuesday, 9 September from 10 a.m. to 1 p.m., in order to hear the first round of the oral argument of Ukraine. Ukraine will then conclude its first round of oral argument on Friday 12 September, having until 1 p.m. available to it that morning. The Court now rises.

The Court rose at12.50 p.m.

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