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International Court of Justice

THE HAGUE

Cour internationale de Justice

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YEAR 2008

Public sitting

held on Friday 19 September 2008, at 3 p.m., at the Peace Palace,

President Higgins presiding,

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

VERBATIM RECORD

ANNÉE 2008

Audience publique

tenue le vendredi 19 septembre 2008, à 15 heures, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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

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Mr. Octavian Buzatu, Lieutenant Commander (retired),

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The PRESIDENT: Please be seated. We now meet for the second day of submissions of Ukraine. Professor Quéneudec, you have the floor

M. QUENEUDEC : Thank you, Madam President.

V. LIGNE D'ÉQUIDISTANCE PROVISOIRE ET CIRCONSTANCES PERTINENTES

Introduction

1. Madame le président, Messieurs les juges, durant le premier tour des plaidoiries, l'Ukraine, paraît-il, a fait preuve d'une remarquable réticence à exposer la ligne de délimitation qu'elle propose[1]. A les en croire, nos adversaires auraient même piaffé d'impatience dans l'attente d'une présentation détaillée de cette ligne, qu'ils n'auraient vu apparaître qu'une seule fois sur l'écran, lors de l'audience du 9 septembre[2].

2. Lorsque nous nous résolûmes enfin à justifier cette ligne, ce fut, nous a-t-on dit, entre 12 h 12 et 12 h 15 le vendredi 12 septembre[3]. Trois minutes seulement pour indiquer comment ajuster la ligne provisoire d'équidistance, selon une méthode que le professeur Crawford a aimablement appelée «the method of the dance floor, slipping and sliding»[4]. C'était vraiment trop bref, a-t-on laissé entendre de l'autre côte de la barre[5].

3. La brièveté du propos sur ce point s'explique aisément par deux raisons, l'une de forme ou de procédure, l'autre plus fondamentale.

4. D'un point de vue formel, on rappellera d'abord que la ligne de délimitation proposée par l'Ukraine avait fait l'objet de développements substantiels dans les pièces écrites. Dix pages du contre-mémoire et quatre pages de la duplique y étaient consacrées[6]. Il était donc non seulement inutile mais encore peu souhaitable de répéter, lors de la phase orale, les arguments qui étaient déjà invoqués dans ces pièces de procédure. D'autant plus que l'instruction de procédure VI de la Cour,

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[1] CR 2008/30, p. 20, par. 1 (Crawford).

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

[3] CR 2008/30, p. 21, par. 5 (Crawford).

[4] CR 2008/30, p. 22, par. 12 (Crawford).

[5] CR 2008/30, p. 17, par. 20 (Aurescu).

[6] Contre-mémoire de l'Ukraine (CMU), par. 9.1-9.29 ; duplique de l'Ukraine (DU), par. 7.19-7.28.

après avoir rappelé les termes de l'article 60 du Règlement, insiste sur «le plein respect ... du degré de brièveté requis». On ne saurait blâmer une partie de suivre cette instruction à la lettre.

5. Si l'on se place ensuite à un point de vue substantiel, la ligne proposée par l'Ukraine a, selon nous, le mérite de la simplicité, tant en ce qui concerne la description de son tracé qu'en ce qui concerne les motifs qui sont à la base dudit tracé. Elle se différencie fondamentalement en cela de la ligne revendiquée par la Roumanie. Celle-ci est une ligne si compliquée, notamment autour et au-delà de l'île des Serpents, que la Partie adverse a dû consacrer de longs discours pour en expliquer et tenter d'en justifier le tracé[7]. On comprend mieux, dès lors, l'insatisfaction qu'ont pu éprouver nos contradicteurs.

6. Madame le président, avant d'aller plus loin, je voudrais encore rassurer le professeur Crawford. Lundi dernier, estimant sans doute que l'équipe ukrainienne allait vaciller sous les assauts roumains, il a fait part de sa crainte de voir l'Ukraine saisir l'occasion du dernier mot qui lui revient dans le second tour de plaidoiries orales pour présenter, suggérer, ébaucher ou esquisser une autre ligne de délimitation[8]. Au risque de le décevoir, je dois dire que telle n'est pas notre intention. Comme l'a indiqué hier l'agent de l'Ukraine, rien de ce qui a été avancé au début de cette semaine de l'autre côté de la barre n'est de nature à amener un quelconque changement de la ligne de délimitation que nous avons proposée. [Projection : délimitation finale selon l'Ukraine.] C'est la ligne en bleu que l'on voit à l'écran et qui figure sous l'onglet 18 dans le dossier des juges.

7. Madame le président, dans le présent exposé, nous allons nous attacher essentiellement à réfuter ce qui nous paraît contestable dans ce que nous avons entendu en début de semaine concernant, d'une part, la construction de la ligne d'équidistance provisoire et, d'autre part, à propos des circonstances pertinentes. Seuls seront abordés quelques-uns des aspects les plus importants. Le fait de ne pas répondre à tout ce qui a été avancé par la Partie adverse n'implique évidemment aucun abandon des positions que nous avons défendues et des points de vue que nous avons soutenus tant dans les pièces de procédure écrite qu'au premier tour de plaidoiries orales.

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[7] CR 2008/21, p. 20, p. 35-52 (Crawford).

[8] CR 2008/30, p. 22, par. 10 (Crawford).

A. La construction de la ligne d'équidistance provisoire

8. Madame le président, Messieurs les juges, j'aborde le premier point qui concerne donc la construction de la ligne d'équidistance provisoire. Mardi dernier, le professeur Lowe a fort justement remarqué que les deux Parties étaient d'accord sur la démarche à suivre. Il a noté en particulier que la ligne d'équidistance provisoire devait être une ligne de «stricte» équidistance, en ce sens que son tracé reposait nécessairement sur les points les plus proches des côtes de chacun des deux Etats, quels que puissent être ces points de base[9]. [Projection : établissement de la ligne d'équidistance provisoire.] La ligne de stricte équidistance établie par l'Ukraine apparaît maintenant à l'écran et est reproduite également dans l'onglet 19 du dossier des juges. On y voit les quatre points de base — deux sur chacune des deux côtes pertinentes — qui ont servi à son établissement.

9. Nous sommes également d'accord avec la Partie roumaine pour reconnaître que notre divergence porte sur l'identification des points de base et, plus particulièrement, sur la prise en compte de l'île des Serpents dans l'établissement de ces points de base.

10. Je ne reviendrai pas sur le problème posé par la digue de Sulina. En effet, mon collègue M[e] Bundy a dit hier ce qu'il y avait à dire de l'effet inéquitable produit par ce point de base sur la ligne d'équidistance présentée par la Roumanie. Je suivrai donc le précepte qu'énonçait l'abbé Siéyès : «A quoi bon, quand l'erreur est une fois démontrée, entasser objections sur objections, comme si l'on voulait finir par écraser ses adversaires.»[10]

11. Le professeur Lowe a voulu démontrer que l'île des Serpents ne pouvait pas servir de point de base parce qu'elle entrait dans la catégorie des rochers du paragraphe 3 de l'article 121 de la convention des Nations Unies sur le droit de la mer. Or, nous a-t-il dit, ne pouvant engendrer ni zone économique exclusive ni plateau continental, une telle formation insulaire ne peut servir de point de base dans une opération de délimitation concernant précisément ces deux types d'espaces maritimes[11].

12. Nous ferons ici quatre remarques qui nous paraissent de la plus grande importance.

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[9] CR 2008/31, p. 10, par. 3.

[10] Siéyès, «Lettres aux économistes sur leur système de politique et de morale».

[11] CR 2008/31, p. 15, par. 25.

13. Premièrement : l'article 121 de la convention de 1982, consacré au régime des îles, est une disposition relative au titre juridique que les îles engendrent à l'égard des espaces maritimes qui les entourent. C'est pourquoi, après la définition générale de l'île donnée au premier paragraphe, les paragraphes 2 et 3 précisent la manière dont sont déterminés les espaces maritimes d'une île. Cet article ne dit rien quant au rôle susceptible d'être joué par une île dans une opération de délimitation et il n'a pas été conçu comme une disposition consacrée à la délimitation maritime entre Etats.

14. Deuxièmement : il y a évidemment un lien entre le titre juridique sur les espaces maritimes et la délimitation de ces mêmes espaces. Et l'on pourrait sans doute invoquer l'article 121, paragraphe 3, dans une opération de délimitation qui mettrait directement en cause deux côtes dont l'une serait uniquement celle d'une île entrant dans la catégorie prévue par ce paragraphe. Dès lors, on voit mal le rôle que peut jouer cette disposition dans une délimitation mettant en cause des côtes continentales dans une situation comme celle concernant l'Ukraine et la Roumanie.

15. Troisièmement : dans toute opération de délimitation maritime, le tracé d'une ligne d'équidistance doit se faire en se fondant sur les lignes de base à partir desquelles est mesurée la largeur de la mer territoriale de chacun des deux Etats. Telle est la règle énoncée à l'article 15 de la convention de 1982 pour la mer territoriale. Telle était la règle de l'article 6 de la convention de 1958 sur le plateau continental. Telle est aussi la règle appliquée par la Cour lorsqu'elle a à se prononcer sur le tracé d'une ligne unique de délimitation maritime.

16. Quatrièmement : il importe peu, en définitive, que l'île des Serpents puisse être rangée dans l'une ou l'autre des catégories prévues aux paragraphes 2 et 3 de l'article 121. La ligne de base à partir de laquelle est mesurée la largeur des eaux territoriales entourant cette île est parfaitement apte à fournir un (ou des) point(s) de base pour le tracé de la ligne provisoire d'équidistance. Car, contrairement à ce qu'a affirmé le professeur Lowe, il n'y a pas de «base points that are *relevant* to the generation of an EEZ», pas plus qu'il n'y a de «base points that are *relevant* to the generation of a continental shelf»[12]. Ce ne sont certainement pas les points de base

[12] CR 2008/31, p. 15, par. 27 (Lowe).

qui génèrent ces zones, ce sont les côtes. Les points de base ne sont que des éléments de la technique de calcul du tracé d'une ligne.

17. En fin de compte, l'insistance qu'a mise la Roumanie à invoquer constamment l'article 121, paragraphe 3, de la convention ressemble fort à une incantation rituelle. Elle fait même songer au refrain de cette chanson qui fit naguère la gloire et la fortune d'un groupe de jeunes Anglais chevelus, chanson où revenait sans cesse un «Yellow Submarine».

18. Madame le président, lors du premier tour de plaidoiries, nous avions indiqué qu'il résultait des termes de l'article premier du traité du 17 juin 2003 que la Roumanie avait accepté que l'île des Serpents serve de point de base pour le tracé de la frontière entre les mers territoriales des deux Etats[13]. Le professeur Lowe a contesté ce point de vue et nous a dit que cette disposition déterminait simplement («simply») «le point de jonction» des limites extérieures des mers territoriales respectives des parties contractantes[14]. C'est pourquoi je rappellerai que l'article premier du traité de 2003 fait expressément mention des «mers territoriales des parties contractantes mesurées *à partir des lignes de base*». Comme il s'agit du point de jonction entre la limite extérieure de la mer territoriale de la Roumanie et «la limite extérieure de la mer territoriale de l'Ukraine autour de l'île aux Serpents», c'est donc qu'il y a bien eu reconnaissance par la Roumanie de la ligne de base et, à travers celle-ci, de l'existence de points de base sur la côte de l'île des Serpents.

19. En conséquence, avions-nous dit, la Roumanie peut être réputée avoir accepté que l'île des Serpents serve de point de base dans l'opération de délimitation, de la même manière que la France s'était vu opposer son acceptation de la fixation d'un point de base sur Eddystone Rock lorsqu'il s'était agi de la délimitation du plateau continental avec le Royaume-Uni. Le professeur Lowe a également contesté la pertinence de ce précédent au motif que l'article 121 n'existait pas encore en tant que disposition conventionnelle et qu'il n'aurait pu, en tout état de cause, être applicable dans l'arbitrage franco-britannique[15]. Tout cela est sans doute rigoureusement exact mais n'enlève rien au fait qu'il y a une incontestable analogie entre la

[13] CR 2008/29, p. 34, par. 46.

[14] CR 2008/31, p. 17, par. 30 (Lowe).

[15] CR 2008/31, p. 12, par. 13-14 (Lowe).

situation de la France à l'égard d'Eddystone Rock et la situation de la Roumanie à l'égard de l'île des Serpents, parce que dans l'un et l'autre cas il y a eu reconnaissance de l'existence de points de base, même si cela s'est fait par des moyens et dans des cadres différents.

20. Finalement, le professeur Lowe a soutenu que, même si l'île des Serpents pouvait être retenue comme point de base, on ne devrait cependant pas lui faire produire un effet sur la ligne de délimitation[16]. Je dois avouer que la logique de ce raisonnement m'échappe. Si l'on admet que l'île puisse être utilisée comme point de base, on doit admettre qu'elle a nécessairement un effet sur le tracé de la ligne d'équidistance provisoire. Ce n'est que dans la deuxième étape du processus de délimitation, lorsque l'on examine les circonstances de nature à corriger ce tracé provisoire, qu'on peut éventuellement se poser la question de savoir si l'île doit produire un plein effet ou n'avoir qu'un effet réduit sur le tracé de la ligne définitive de délimitation. La même question se pose d'ailleurs pour la digue de Sulina.

21. Madame le président, Messieurs les juges, cette remarque nous conduit au deuxième point de notre exposé, qui concerne la question des circonstances pertinentes.

B. Les circonstances pertinentes

22. La Cour voudra bien me permettre d'attirer son attention sur le fait que la Partie adverse semble avoir des circonstances pertinentes une vision quelque peu déformée, comme on en a eu l'illustration mardi dernier.

23. Dans un exposé où j'avoue ne pas avoir retrouvé la clarté et la rigueur qui caractérisent habituellement ses plaidoiries, le professeur Pellet a envisagé successivement la configuration générale des côtes, l'île des Serpents en tant que circonstance pertinente ou spéciale et la disparité des longueurs côtières.

24. En ce qui concerne la configuration générale des côtes, il s'est déclaré «prêt à admettre», «pour les besoins de la discussion», a-t-il précisé, qu'elle «peut constituer une circonstance pouvant peut-être être prise en considération», mais à condition que l'on envisage «le cadre géographique global»[17]. Il n'a toutefois pas expliqué en quoi ce cadre géographique global constituait une

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[16] CR 2008/31, p. 16, par. 30 (Lowe).

[17] CR 2008/31, p. 27, par. 12 (Pellet).

considération qui conduirait à modifier (ou à ne pas modifier) une ligne provisoire d'équidistance. Envisageant à cette occasion la question du non-empiètement, il a par ailleurs estimé que la ligne proposée par l'Ukraine compliquerait l'accès au port de Sulina, sans toutefois là encore expliquer pourquoi[18]. De surcroît, on ne voit pas bien le lien existant entre la configuration côtière et ce dernier élément.

25. Quant à l'île des Serpents, le professeur Pellet a contesté son caractère d'île côtière et critiqué le critère que nous avions cru pouvoir trouver dans le chevauchement des eaux territoriales continentales et insulaires afin de mieux cerner cette notion[19]. Reprenant l'exemple de la sentence arbitrale de 1985 entre la Guinée et la Guinée-Bissau, il n'a voulu y voir que la première catégorie d'îles côtières qui y étaient mentionnées et qui étaient celles «considérées comme partie intégrante du continent». Or, dans cet arbitrage, les trois juges de la Cour qui composaient le tribunal avaient pris soin de préciser qu'ils tenaient aussi pour côtières les îles Bijagos dont les eaux territoriales étaient liées entre elles et à celles du continent[20]. Ce qui est aussi la situation de l'île des Serpents.

26. S'agissant, enfin, de la disparité entre les longueurs des côtes des Parties, notre valeureux contradicteur a estimé que c'était de façon très exceptionnelle[21] que cette disparité conduisait à ajuster la ligne provisoire et que, dans deux des quatre cas recensés, cette disparité «a joué un rôle correcteur non pas au stade des circonstances pertinentes, mais à celui du test final»[22]. On reste confondu devant ces contrevérités.

27. Cela nous donne l'occasion de revenir sur l'affaire de la *Délimitation maritime dans la région située entre le Groenland et Jan Mayen*, affaire dans laquelle la Norvège estimait qu'une comparaison des longueurs des côtes était dépourvue de pertinence. On sait que la Cour en a fait une circonstance déterminante qui a conduit à déplacer la ligne médiane. La Cour a toutefois pris soin d'indiquer que «la prise en compte de la disparité des longueurs des côtes ne signifie pas une application directe et mathématique du rapport entre les longueurs des façades côtières» (*Délimitation maritime dans la région située entre le Groenland et Jan Mayen (Danemark*

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[18] CR 2008/31, p. 28, par. 16 (Pellet).

[19] CR 2008/31, p. 34, par. 25 (Pellet).

[20] RSA, vol. XIX, p. 149, paragraphe 95 de la sentence (p. 183-184).

[21] CR 2008/31, p. 38, par. 32 (Pellet).

[22] CR 2008/31, p. 38, par. 33 (Pellet).

c. Norvège), *arrêt*, C.*I.J. Recueil 1993*, p. 69, par. 69), mais qu'il s'agit uniquement «de tirer les conclusions appropriées, dans l'application des principes équitables, du fait que les longueurs des côtes présentent une disparité marquée» (*ibid*., p. 79 et 81, par. 92). Ce que précisément l'Ukraine a proposé de faire dans la présente espèce.

28. On notera d'ailleurs que, dans cette affaire *Jan Mayen* [projection : croquis n° 1 de l'arrêt de la Cour, p. 45], la petite île de Bontekoe, [flèche indiquant cette île sur le croquis] située à un peu plus de 22 kilomètres de la côte principale du Groenland, a été utilisée comme point de base et paraît même avoir exercé une influence non négligeable sur le tracé de la ligne médiane et, par voie de conséquence, sur la ligne de délimitation qui a finalement été retenue. [Projection : croquis n° 2, arrêt Jan Mayen, p. 80.] Ce que l'on peut voir sur les deux croquis projetés et qui sont reproduits sous l'onglet 20 du dossier des juges.

Conclusion

29. Madame le président, dans la présente affaire, nous persistons à penser que le tracé de la ligne provisoire d'équidistance stricte doit être établie de façon objective, c'est-à-dire en prenant appui sur les points de base dont la pertinence est déterminée automatiquement par le principe de proximité. L'île des Serpents doit donc être prise en compte à ce titre. Nous estimons, d'autre part, que l'examen et la mise en balance des circonstances pertinentes, telles qu'elles ont été identifiées et évaluées dans les plaidoiries précédentes de l'Ukraine, conduisent à ajuster la ligne provisoire dans le sens que nous avons indiqué de manière à satisfaire à l'exigence du résultat équitable. [Projection : délimitation finale selon l'Ukraine.] Le «glissement» suggéré ne vise nullement à introduire, à côté de ce qu'on nomme la «translation», une nouvelle catégorie d'ajustement dans la modification d'une ligne d'équidistance provisoire. C'est tout simplement un terme commode pour désigner le type d'ajustement proposé.

30. Madame le président, Messieurs les juges, parvenu au terme des quelques remarques que je souhaitais présenter dans ce qui sera ma dernière plaidoirie devant votre Cour, je tiens à vous remercier pour votre attention et votre écoute durant ces trois longues semaines de plaidoiries.

31. Madame le président, il conviendrait d'appeler à la barre M^e^ Bundy qui va poursuivre la présentation de l'argumentation de l'Ukraine. Thank you, Madam.

The PRESIDENT: Thank you, Professor Quéneudec. We do now call Mr. Bundy.

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

VI. THE EQUITABLE NATURE OF UKRAINE'S LINE: THE RELEVANT AREA, PROPORTIONALITY TEST, AND NON-ENCROACHMENT

1. In this presentation, which will slightly prolong these three weeks but I hope not too long, I shall show that the Ukraine's delimitation line achieves an equitable result in the light of the facts of the case.

2. In responding to Romania's arguments on this matter, I shall take up three related issues on which the Parties remain divided: first, the question of the relevant area; second, the application of the proportionality test; and third, the issue of non-encroachment. I shall also provide Ukraine's answer to Judge Oxman's question that was posed to both Parties.

A. The relevant area

[Map of different relevant areas: tab 35 of Ukraine's folder]

3. With respect to the relevant area, it is helpful once again to refer to the map on the screen, which illustrates the differences between the Parties. And as can be readily seen, the two main differences concern an area in the north, which Romania seeks to exclude, and the triangle in the east, which Romania seeks to include.

4. The inclusion of the northern area is a function of whether Ukraine's coast fronting this area is considered to be a relevant coast. That is an issue that I discussed fully yesterday.

5. I would only note at this stage that there is no more reason to exclude the northern area in this case than there was to exclude the Gulf of Gabes in the *Tunisia/Libya* case. In *Tunisia/Libya*, the Gulf of Gabes was considered to form part of the relevant area notwithstanding the fact that Tunisia had enacted a straight, bay-closing line across the Gulf closing off its waters as internal waters. So, also, does the northern area in this case — which has not been similarly closed off except for a short portion of the Karkanits'ka Gulf — form part of the relevant area.

6. That brings me to the eastern triangle. Romania claims that this triangle — or virtually all of it — should be included in the relevant area. Ukraine says it should not because it constitutes an

area that is subject to delimitation with a third State, Turkey — indeed, that has already been delimited — and an area over which Romania has never expressed any interest previously.

7. On Monday, Professor Crawford argued that the eastern triangle is relevant because it lies within a 200-nautical-mile arc extending from Romania's coast. He displayed two graphics on the screen to illustrate the point (CR 2008/30, pp. 12-13, paras. 45-46), and I will put one of them up on the screen — in a sense, Romania's "best" one, the one that illustrates Romania's more extensive 200-mile potential entitlement referred to by Professor Crawford — in order to show why Romania's arguments are misplaced.

[Tab II-12 of Romania's 15 September presentation]

8. Professor Crawford's contention was that, because the projection of Romania's coast out to 200 miles covers most of the triangle, it must necessarily form part of the relevant area.

9. But that line of reasoning runs counter to the approach that the Court adopted in the only other case where it identified the relevant area with the same degree of specificity for purposes of applying the proportionality test as can be done here — and that was the *Tunisia/Libya* case.

[Map of *Tunisia/Libya* with relevant area]

10. Now appearing on the screen is a map depicting the relevant area identified by the Court in *Tunisia/Libya*. (See, *I.C.J. Reports 1982*, p. 91, para. 130, for the identification of the relevant area.) If we adopt Professor Crawford's 200-mile projection theory to Tunisia's east-facing coasts, it will be seen that 200-nautical-mile projections from Tunisia's coast along the island of Djerba, and from Tunisia's coast between the Gulf of Gabes and Ras Kaboudia, both extend much further eastwards than the limit of the relevant area identified by the Court.

11. In *Tunisia/Libya*, the Court was clearly sensitive to the rights and interests of third States in the region. It did not consider the Tunisian coast north of Ras Kaboudia — a coast that faced an area that had already delimited between Tunisia and Italy — to be relevant. Nor did it consider the Libyan coast east of Ras Tajura, which faced Malta, to be relevant either. The relevant area was therefore limited by a parallel of latitude extending east from Ras Kaboudia and a meridian of longitude extending north from Ras Tajura.

12. In other words, the Court implicitly rejected the proposition that the relevant area should encompass areas extending all the way out to a distance of 200 nautical miles from the coast of a

party, in this case Tunisia, when such an extension would cross over into areas that are relevant to delimitations with third States: rejected the approach that Professor Crawford is suggesting.

13. The same considerations apply here. Professor Lowe maintained that the projection eastward from Romania's coast does not "fizzle out" somewhere to the west of Cape Sarych (CR 2008/31, p. 51, para. 44). But this misses the point. The eastward projection from Tunisia's coast did not "fizzle out" west of Ras Tajoura either. Nonetheless, the relevant area, in that case, was limited by a line drawn north from Ras Tajura because of the presence of third-State interests beyond that limit.

[Map of Black Sea delimitations: tab 5 of Ukraine's first round folders without the relevant area shaded green]

14. In this case, there is a pre-existing delimitation agreement concluded between Turkey and the former Soviet Union, and subsequently, between Turkey and Ukraine, and it is depicted on the screen.

15. Romania has indicated that this boundary is based on equidistance (Romanian Memorial, paras. 6.10-6.11). The points on the coasts of Ukraine and Turkey, which control the western end of the delimitation line, are now being added to the map [add to map]. Ms Malintoppi showed you this in a different context yesterday. These would be the control points for the equidistance boundary.

16. On the Ukrainian side, it is clear that Cape Sarych provided the last base point for constructing the delimitation line. The relevant Turkish base point can also be seen. The area lying between those control points thus circumscribed the area that was being delimited between Turkey and Ukraine, and between Turkey and the Soviet Union earlier.

17. That area so delimited between Ukraine and Turkey *includes* the entire triangle that Romania now urges the Court to accept as part of the relevant area in this case. But such an area should not be included. It is an area that was relevant only to the delimitation between Ukraine and Turkey as to which Romania never expressed the slightest interest prior to these proceedings. Permit me to recall the fact that Romania never protested this agreement — indeed it accepts the agreement — and Romania never once intimated that Ukraine, or the Soviet Union, together with

Turkey, were delimiting an area that Romania considered was relevant to its delimitation with Ukraine.

18. And it is for these reasons that Ukraine maintains its position that the eastern triangle cannot properly be deemed to form part of the relevant area in this case.

B. Answer to Judge Oxman's question

19. Having addressed the question of the relevant area, it is appropriate for me to respond to Judge Oxman's question put to the Parties on Friday. The question also relates, in a way, to a situation that exists within the relevant area in this case.

20. Judge Oxman's question was:

> "Does paragraph 3 of Article 121 of the United Nations Convention on the Law of the Sea apply to marine areas that are in any event within the limits of the EEZ and continental shelf of the same State, such as marine areas within 200 nautical miles of the mainland of that State?" (CR 2008/29, p. 51.)

21. Before giving Ukraine's response to that question, I need to say a few words about Romania's answer provided by Professor Lowe on Tuesday.

22. What was surprising about Professor Lowe's answer is that it did not actually address the question that was asked. Professor Lowe prefaced his remarks by saying that Judge Oxman "asked, in essence, if Article 121 applies to marine areas within 200 nautical miles of the mainland" (CR 2008/31, p. 11, para. 6). And he then offered an extended analysis of Article 121 as a whole without actually focusing on paragraph 3, to which the question was specifically related.

23. Professor Lowe's answer was "yes. Article 121 is entitled 'Regime of islands'." He went on to argue that Article 121 purports to define the legal régime of islands, that "there is nothing in the Article which says it applies only to islands on the high seas", that "Article 121 is a treaty text" as to which, under the law of treaties, there is no proper approach to its interpretation that "could lead one to suppose that it is limited in its application to areas more than 200 miles from mainland coasts", and that the "plain words of Article 121 mean what they say" (CR 2008/31, p. 11, paras. 7-9).

24. But all of this is beside the point. The scope of Article 121 as a whole was not — at least, as far as Ukraine understood it — what the question asked. The question related to paragraph 3 of Article 121.

25. In Ukraine's submission, paragraph 3 of Article 121 has no practical application to situations, such as we have in this case, where all of the marine areas at issue lie within 200 nautical miles of the mainland coasts of both Parties.

26. Article 121 (3) is an "entitlement" provision. It is not concerned with questions of delimitation. It deals with the maritime entitlements of rocks which cannot sustain human habitation or economic life of their own. Such rocks have no EEZ or continental shelf.

27. But, when such features already lie within a maritime area that is, in any event, within the 200-nautical-mile limits of the EEZ and continental shelf of a mainland coast, Article 121 (3) has no relevance to that area. It is only in situations where an Article 121 (3) rock is being used to extend the outer limit of a coastal State's EEZ or continental shelf beyond the 200-mile limit generated by other coasts of a State, as was the case with Rockall, that Article 121 (3) might have a role to play.

28. Obviously, that is not the situation we have in this case. As we have shown, Serpents' Island is not an Article 121 (3) rock in any event. But even if it were, *quod non*, the entire marine area at issue in this case — in other words, all of the relevant area — lies within 200 nautical miles of Ukraine's mainland coast. Article 121 (3) does not change that fact. That is why we say that Article 121 (3) has no practical application, and no real relevance at all in such situations.

C. Application of the test of proportionality

29. I now turn to the application of the proportionality test as an *ex post facto* test at the third, and final, stage of the delimitation process.

30. Professor Lowe prefaced his remarks on this issue by emphasizing that it was important already, before the proportionality test is applied, to get the first stage of the exercise right — the choice of the provisional equidistance line (CR 2008/31, p. 44, para. 14, and p. 45, para. 19).

31. Ukraine agrees that establishing the provisional equidistance line is an important step in the process. And we have heard Professor Quéneudec on that. But I must say that my colleagues and I were baffled by the graphic that Professor Lowe placed on the screen to illustrate his point. [Tab IX-3 to Lowe's 16 September presentation]

32. Now, perhaps it is due to my own shortcomings, or maybe it is due to the fact that the slide was produced very late at night — I suspect it is more my own shortcomings — but I cannot see how this graphic lends the slightest support to Professor Lowe's argument about the importance of getting the provisional equidistance line right.

33. According to my colleague, the slide shows "two adjusted provisional equidistance lines" hypothetically adopted by a tribunal — that is two lines which are not the provisional equidistance line itself, but rather adjusted lines that have already taken into account differences in coastal lengths and other special circumstances. These are the red line on the left, and the blue line on the right. In one case this hypothetical tribunal has fixed the adjusted equidistance line 40 miles off the coast of State A — i.e., the red line — and in the other hypothetical case, the tribunal has adjusted the line 70 miles off the coast — the blue line.

34. In between, Professor Lowe drew a white line which, under his hypothetical, represented a division of the area — presumably the maritime area — in strict proportion to the lengths of the two States' coasts. Professor Lowe then speculated that, in either case — the red or the blue case — a tribunal might view the adjusted line as producing a result within the bounds of equitable proportionality (CR 2008/31, p. 45, paras. 16-18).

35. That may or may not be so. Presumably, the tribunals would have had good reasons for drawing the adjusted equidistance line where they did in each of the two examples to reflect the particular facts of the case.

36. But why these scenarios have anything to do with counsel's argument that it is important to get the first step in the process right — the plotting of the provisional equidistance line — is anything but clear. No provisional equidistance lines even appear on the graphic.

37. As Professor Quéneudec has explained, the Court clearly has a margin of appreciation when it comes to weighting the effect that a marked difference in coastal lengths has for adjusting the provisional equidistance line in order to achieve an equitable result. Both Parties agree that delimitation does not entail a division of the relevant area in a strict mathematical ratio corresponding exactly to the ratio between the lengths of their coasts. It is the role of the proportionality test to check whether the result of the line produced by the first two steps in the exercise — the plotting of the provisional line and its adjustment to take into account relevant

circumstances — produces a result that is not overly disproportionate. I showed last week that Ukraine's line meets that test while Romania's line does not.

38. Professor Lowe then took aim at what he termed Ukraine's "three-sided argument" — the fact that Ukraine has a much longer coast fronting on three sides of the delimitation area while Romania has a shorter coast fronting just one side of the area (CR 2008/31, p. 46, para. 25).

39. My colleague's reaction to this was "so what?" And he produced another graphic to illustrate the point.

[Tab IX-6 to Lowe on screen]

40. Even using this schematic, as Professor Lowe pointed out, the coastal ratios stand in a ratio of 5:1 while the maritime areas are in a ratio of 3:1. He then asked on what other grounds than coastal length might one object? (CR 2008/31, p. 47, para. 26.)

41. The answer is that it is precisely in such situations — as demonstrated by the *Gulf of Maine*, by the *Barbados/Trinidad and Tobago* case, by other cases where coastal lengths have been relevant, that an adjustment would be made to the provisional equidistance line to reflect the relevant geographic circumstances.

42. But there is a danger in relying on these kinds of overly simplified schematics — what Professor Lowe termed a "table-top exercise in delimitation" (CR 2008/31, p. 50, para. 39). For instance, if Professor Lowe's graphic had been drawn to reflect perhaps more faithfully the situation we have in this case, it would have looked like this — as you see on the screen.

[Place revised sketch on screen]

43. Now the situation looks different and the dashed line begins to lose its appeal.

44. Madam President, Members of the Court, Ukraine believes that it is preferable to look at the *actual* geographic situation that exists in the north-west basin of the Black Sea rather than relying on table-top schematics.

[North-west corner with Parties' relevant coasts]

45. Ukraine believes that it has shown that the *actual* geographic relationship between the lengths of the Parties' coasts stands in a ratio in the order of 3.7 to 1, and that the provisional equidistance line should be adjusted to reflect that fact.

46. Professor Lowe complains that this is using proportionality as an independent principle of delimitation — something it is not supposed to do (CR 2008/31, p. 46, para. 21). Indeed, my good friend introduced a scare tactic in his closing speech on Tuesday. In his words:

> "If relative coastal lengths were to be regarded as a factor requiring the adjustment of the provisional equidistance line in cases such as this now before the Court, that would elevate the proportionality issue into the dominant principle for maritime delimitation . . . and it would contradict 50 years of international jurisprudence." (CR 2008/31, p. 48, para. 30.)

47. With great respect, that alarmist reaction scarcely reflects either how the jurisprudence has treated situations where there is a marked difference in coastal lengths or how Ukraine has arrived at its delimitation line.

48. Because once again, our opponents mix up the role that differences in coastal lengths have as a relevant circumstance justifying an adjustment or shifting of the provisional equidistance line, with the role that the proportionality test plays *after* such an adjustment has, or has not, been made. The Court had made it perfectly clear what the difference in these two steps involves at paragraph 66 of its Judgment in the *Libya/Malta* case; Professor Quéneudec cited that last week — I will not read it again (CR 2008/29, p. 40, para. 89).

49. Professor Lowe's contention that "[p]lainly, the disparity in coastal lengths in this case is a matter, not for the stage two adjustment of the provisional equidistance line but for the stage three proportionality test" is simply not correct (CR 2008/31, p. 48, para. 31). It runs counter to the way the Court and arbitral tribunals have consistently treated the issue.

50. In the present case, the Parties reach the following position after the first two steps in the delimitation process have been carried out, and before they apply the test of proportionality.

— On Ukraine's side, Ukraine has plotted the provisional equidistance line from the nearest base points on the baselines of the Parties from which the breadth of their territorial sea is measured, and has then adjusted that line to reflect the relevant geographic circumstances.

— Romania has plotted a different provisional equidistance line, and then makes no adjustment to that line except for postulating a 12-mile arc around Serpents' Island and claiming an additional area in the north to compensate it for areas that it alleges it "lost" when it entered into agreements in 1949 with the Soviet Union.

51. This takes us through the first two steps of how the Parties have got there, and the purpose of the proportionality test at the third stage is to test the equitableness of the lines that the Parties have arrived at as a result of these first two steps.

52. Last Friday, I showed that Ukraine's delimitation fully satisfies the test of proportionality. I do not intend to repeat the demonstration again other than to simply recall that Ukraine's line produced a division of the maritime areas in a ratio of 3.1 to 1, whereas the ratio between the lengths of the relevant coasts of the Parties is in the order of 3.7 to 1. That is not a disproportionate result (CR 2008/29, p. 47, para. 21).

53. I also explained why Romania's line failed the test because it produced a division of maritime areas only in the order of 1.4 to 1, which Ukraine submits is grossly disproportionate when compared to the Parties' coasts that actually generate such areas (CR 2008/29, p. 48, para. 24).

54. Professor Lowe did not come back to these calculations. Instead, he presented yet another graphic, which I will put on the screen [map – tab IX-11 to Lowe]. This one was designed to show that Romania's line meets the proportionality test if now you only exclude the Karkanits'ka Gulf from the equation while still keeping the eastern triangle included.

55. There are two basic problems with this new effort by my colleague to squeeze Romania's claim into satisfactory proportionality calculations. The first is that there is no reason to exclude the Karkanits'ka Gulf. I addressed that matter yesterday, citing both the Gulf of Gabes and the Bay of Fundy examples which contradict Professor Lowe's approach. The second problem is that Romania continues to include the eastern triangle, which has the effect of adding substantial areas — over 13,000 sq km of sea area — to Ukraine's side of the equation while, conveniently, adding no more Ukrainian coast. I have shown in my presentation earlier this afternoon why that manoeuvre is misguided.

56. In contrast, Professor Lowe had nothing to say about a further demonstration Ukraine made last week, which had also appeared in our Rejoinder, that confirmed the equitable nature of Ukraine's line. I refer to the fact that — as we showed on the screen last week — even if one were to include, for sake of argument, both the eastern triangle and the northern area as part of the

relevant area, Ukraine's line would still readily satisfy the proportionality test (CR 2008/29, p. 48, para. 23). There was no answer to that on Tuesday.

57. Nor has Romania responded to a third way in which Ukraine has shown that its line respects and satisfies the proportionality test.

[Fig. 8-2 to Ukraine's Rejoinder]

58. The map that now appears on the screen was figure 8-2 to Ukraine's Rejoinder. It shows the result that would be produced if one were to eliminate the northern area from the proportionality calculation while treating Romania's closing line between "point S" and Cape Tarkhankut as a notional coastal front instead.

59. This is similar to a situation that the Court of Arbitration faced in the *Canada-France* arbitration involving St. Pierre and Miquelon.

60. In that case, France argued that significant segments of the southern coast of Newfoundland should be excluded, and that a closing line across what was called the Cabot Strait in that area lying in front of that coast that France wanted to exclude, should not be considered as a "coast", the closing line should not be considered as a notional coast.

61. The Court of Arbitration disagreed. It stated, and I quote from its award:

> "But the coastlines that France wants to exclude form the concavity of the Gulf approaches and all of them face the area where the delimitation is required, generating projections that meet and overlap, either laterally or in opposition. The closing line across the Cabot Strait represents coastlines inside the Gulf which are in direct opposition to Saint Pierre and Miquelon and are less than 400 nautical miles away." (*RIAA*, Vol. XXI, pp. 280-281, para. 29.)

62. So, even taking Romania's closing line as a notional coast, the figure on the screen still shows that Ukraine's delimitation fully satisfies the proportionality test. And as I said, we addressed this in our Rejoinder: it is another matter which Romania has failed to grapple with.

D. Non-encroachment

63. The last issue I intend to address is the question of non-encroachment. Here, I can be very brief since counsel for Romania had virtually nothing additional to say on the matter in his second round presentation.

64. In particular, we heard no response to the demonstration that Ukraine made last week — and I refer back, for the record, to tab 87 in our first round folders — that Romania's claim line cuts off the projection of Ukraine's much longer coast situated between the land boundary up to "point S" — cuts it even excepting point S, it cuts it off even more if you take the coast beyond point S. There was also no response to the fact that Romania's claim line cuts off and runs parallel to Ukraine's south-facing coast while, at the same time, according to Romania's own east coast a full projection eastwards. It was a clear imbalance. There is a cut-off effect, we showed it last week and there has been nothing from the other side in response.

65. There was only one new argument presented this week, not by Professor Lowe, but by Professor Pellet, on Tuesday.

66. He complained that Ukraine's delimitation line, when coupled with the presence of Bulgaria further south, places Romania in a concave situation (CR 2008/31, p. 28, para. 15).

67. Now that argument, Professor Pellet's argument, was really the same argument that Cameroon unsuccessfully made in the *Cameroon* v. *Nigeria* case. There, Cameroon contended that the concavity of the Gulf of Guinea and the concavity of its own coastline created a virtual enclavement of Cameroon which constituted a special circumstance that should be taken into account.

68. The Court disagreed. It noted that the particular sectors of Cameroon's coastline relevant to the delimitation with Nigeria — in other words, not taking into account parts of the coast that faced third States in the region — exhibited no particular concavity (*I.C.J. Reports 2002*, p. 445, para. 297).

69. The same applies here.

70. And so I come back full circle to the point at which I began in my opening presentation last week, when I cited the Court's passage from *Cameroon* v. *Nigeria* in which the Court stated:

> "The geographical configuration of the maritime areas that the Court is called upon to delimit is a given. It is not an element open to modification by the Court but a fact on the basis of which the Court must effect the delimitation." (*I.C.J. Reports 2002*, pp. 443-445, para. 295.)

We subscribe to that wholeheartedly.

Conclusions

71. Madam President, Members of the Court, I am coming to the end. There have been suggestions during these hearings from the other side of the Bar that it is Romania alone which respects international law and has presented a reasonable approach. The distinguished Agent of Romania intimated that if recognized norms had been accepted by Ukraine during negotiations, we would not be here today (CR 2008/18, p. 22, para. 22). Need I recall that Romania was also unable to reach agreement with the Soviet Union despite years of negotiations.

72. No one State has a monopoly on international law.

73. During these proceedings, the position of Romania has been put to you with vigour and with skill. Ukraine has endeavoured to do the same.

74. Ukraine believes that it has met all of the arguments raised by our colleagues on the other side. We have treated "like with like", whether with respect to the relevant coasts of the Parties, or with respect to the role of Serpents' Island and the Sulina dyke, or in connection with applying the proportionality test. We believe that we have shown that Ukraine's delimitation line is based on a proper and a legally sound application of the principles and rules of maritime delimitation to the facts of this case.

75. Madam President, Members of the Court, that concludes my presentation. I thank the Court very much for its attention, and I would ask you, Madam President, if you would now call on Ukraine's Agent to present Ukraine's final submissions. Thank you.

The PRESIDENT: Thank you, Mr. Bundy. We now call the Agent of Ukraine, Mr. Vassylenko. Your Excellency.

Mr. VASSYLENKO:

VII. FINAL SUBMISSIONS OF UKRAINE

Madam President, Members of the Court, Ukraine greatly appreciates the work of the International Court of Justice, the principal judicial organ of the United Nations. It is because of this that we were happy to entrust this matter to the Court. This case, the first case before the Court to which Ukraine is a Party, is of great importance to my country. We are confident that your judgment will be a significant contribution to good relations between Ukraine and Romania.

I shall now read Ukraine's final submissions:

"For the reasons given in Ukraine's written and oral pleadings, Ukraine requests the Court to adjudge and declare that the line delimiting the continental shelf and exclusive economic zones between Ukraine and Romania is as follows:

(a) from the point (point 1) identified in Article 1 of the 2003 Treaty between Ukraine and Romania on the Regime of the Ukrainian-Romanian State Border, having the co-ordinates of 45° 05' 21" N; 30° 02' 27" E, the line runs along a straight line to point 2, having the co-ordinates of 44° 54' 00" N; 30° 06' 00" E; then

(b) from point 2, the line runs along an azimuth of 156° to point 3, having the co-ordinates of 43° 20' 37" N; 31° 05' 39" E; and then continues along the same azimuth until it reaches a point where the interests of third States potentially come into play.

The co-ordinates are referenced to the Pulkovo datum i.e., using the Krasovsky ellipsoid, and all lines are loxodromes."

Madam President, Members of the Court, my colleagues and I would like to thank you for your attention, patience and courtesy.

I would also like to express thanks, on behalf of the entire Ukrainian delegation, to the Registrar and all his staff for ensuring the smooth running of these oral proceedings and the efficient administration of the entire case.

I would especially like to thank the interpreters for their outstanding efforts.

And, finally, I wish to express our appreciation to the members of the Romanian delegation for their co-operation throughout the proceedings.

I thank you, Madam President.

The PRESIDENT: Thank you, Your Excellency. The Court takes note of the final submissions which you have read on behalf of Ukraine, as it took note on Tuesday 16 September 2008 of the final submissions read on behalf of Romania.

This brings us to the end of these three weeks of hearings devoted to the oral argument on the case.

And we wish the very best to Professor Quéneudec, who has said that this is his swansong, and who has assisted this Court over the years.

I should like to thank the Agents, counsel and advocates for their statements.

In accordance with the usual practice, I shall request both Agents to remain at the Court's disposal to provide any additional information it may require. And with this proviso, I now declare closed the oral proceedings in the case concerning *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)*.

The Court will now retire for deliberation. The Agents of the Parties will be advised in due course of the date on which the Court will deliver its judgment. Having no other business before it today, the Court now rises.

The Court rose at 4.15 p.m.

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