

INTERNATIONAL COURT OF JUSTICE

**CASE CONCERNING MARITIME
DELIMITATION IN THE BLACK SEA**

(ROMANIA v. UKRAINE)

MEMORIAL

SUBMITTED BY

ROMANIA

19 AUGUST 2005

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CHAPTER 1

INTRODUCTION

(1) The dispute submitted to the Court

- 1.1 This Memorial is filed in accordance with the Court's Order of 19 November 2004. In conformity with article 49, paragraph 1 of the Rules of the Court, it sets forth the grounds of fact and of law on which the claim contained in Romania's Application, filed in the Registry of the Court on 16 September 2004, is based.
- 1.2 The geographical configuration of the coasts of the two States facing the Black Sea is shown on **Figure 1** (page 8 of this Memorial). Also shown is Serpents' Island (in Romanian *Insula Șerpilor*, in Ukrainian *Острів Зміїний*), a small featureless rock some 20 nm off the Danube delta, which was detached from Romania in 1948 in circumstances described below and which now belongs to Ukraine.
- 1.3 The present dispute concerns the delimitation of the boundary of the exclusive economic zones and continental shelf appertaining to Romania and Ukraine respectively in the Black Sea.

(2) The Court's jurisdiction over the dispute

- 1.4 The Court's task in the present case is framed and determined by three treaties concluded between the two States in the period since 1997. They are:
 - the Treaty on the Relations of Good Neighbourliness and Co-operation between Romania and Ukraine, signed at Constanța, on 2 June 1997 (hereafter the "Treaty on Relations");¹

¹ Treaty on the Relations of Good Neighbourliness and Co-Operation between Romania and Ukraine, signed at Constanța, on 2 June 1997; 2159 *United Nations Treaty Series* 335 (**Annex RM 1**).

- the Agreement Additional to the Treaty on Relations, concluded by exchange of letters of the Ministers of Foreign Affairs of the two States, also dated 2 June 1997 (hereafter the “Additional Agreement”);²
- the Treaty between Romania and Ukraine on the Romanian-Ukrainian State Border Regime, Collaboration and Mutual Assistance on Border Matters, signed at Cernăuți, on 17 June 2003 (hereafter, the “2003 Border Regime Treaty”).³

The first two agreements entered into force simultaneously on 22 October 1997.

The 2003 Border Regime Treaty entered into force on 27 May 2004.⁴

1.5 Article 4(h) of the Additional Agreement provides that:

“If these negotiations shall not determine the conclusion of the above-mentioned agreement [for the maritime boundary] in a reasonable period of time, but not later than 2 years since their initiation, the Government of Romania and the Government of Ukraine have agreed that the problem of delimitation of the continental shelf and the exclusive economic zones shall be solved by the UN International Court of Justice, at the request of any of the parties, provided that the Treaty on the regime of the State border between Romania and Ukraine has entered into force. However, should the International Court of Justice consider that the delay of the entering into force of the Treaty on the regime of the State border is the result of the other Party’s fault, it may examine the request concerning the delimitation of the continental shelf and the exclusive economic zones before the entry into force of this Treaty.”

1.6 Accordingly, pursuant to Article 4(h), there were two preconditions which had to be fulfilled before the dispute could be referred to the Court. These were, first, that the negotiations had not resulted in an agreed delimitation of the maritime boundary between the two States within two years since their initiation, and, second, that the treaty relating to the border regime between the

² Agreement Additional to the Treaty on the Relations of Good Neighbourliness and Co-Operation between Romania and Ukraine, concluded by exchange of letters between the Ministers of Foreign Affairs of Romania and Ukraine, done on 2 June 1997; 2159 *United Nations Treaty Series* 357 (Romanian letter), 363 (Ukrainian counterpart) (**Annex RM 2**).

³ Treaty between Romania and Ukraine on the Romanian-Ukrainian State Border Regime, Collaboration and Mutual Assistance on Border Matters, signed at Cernăuți, on 17 June 2003 (**Annex RM 3**). The Treaty was registered with the Secretariat of the United Nations on 10 September 2004 by Romania, and was assigned registration no. 40547.

⁴ See the Protocol on the Exchange of Instruments of Ratification, signed in Mamaia, on 27 May 2004 (**Annex RM 4**).

two States had entered into force. In relation to the second condition, even if the treaty on the border regime had not entered into force, the dispute could have been referred to the Court by either Party if the delay of entry into force were due to the fault of the other.

- 1.7 As noted above, the 2003 Border Regime Treaty entered into force on 27 May 2004, the date of the exchange of the instruments of ratification. Accordingly, the second condition specified by the Additional Agreement was fulfilled.
- 1.8 Between 1998 and 2004, 24 rounds of negotiations were held between the Parties to the present proceedings on the subject of the establishment of the maritime boundary, as well as 10 rounds at expert level. As the negotiations did not result in an agreement on the delimitation of the maritime areas within 2 years from their commencement, the first condition set in the Additional Agreement was also fulfilled.
- 1.9 The two conditions specified in article 4(h) of the Additional Agreement being fulfilled, the Court has jurisdiction over the present dispute between Romania and Ukraine in accordance with article 36(1) of its Statute.



Figure 1
General View of the Black Sea

(3) Summary of Romania's Position

- 1.10 The delimitation upon which the Court is called to rule is to be effected in an area where - Serpents' Island apart - no major circumstance could pose problems as to the equitable solution to be achieved. There are no outstanding territorial claims. The geographical context of the delimitation is a simple one and the boundary between the maritime zones to which each of the Parties is entitled can be readily drawn. The agreements in force between Romania and Ukraine established clearly the first segment of the maritime boundary, as well as the principles of delimitation for the remainder of the boundary.
- 1.11 Taking into account the geographical background, the delimitation needs to be discussed and determined in two broad sectors. **Sector 1** is the sector from the outer limit of the territorial sea in an easterly direction, defined by a relation of adjacency between the mainland coasts of Romania and Ukraine. **Sector 2** is dominated by a situation of oppositeness between the mainland coasts of Romania and Ukraine (Crimean Peninsula) and any maritime boundary will have a southerly trajectory.
- 1.12 It should be emphasised that the boundary between the territorial seas of the Parties is not included in the Application presented to the Court, which only concerns the delimitation of the Parties' continental shelf and exclusive economic zones. The territorial sea boundary is the subject of an agreement between the Parties concluded in 2003: the agreed boundary runs from the last point of the land boundary between the Parties to the point where the 12 nm arc around Serpents' Island intersects the Romanian territorial sea. This part of the boundary had already been delimited by agreements between Romania and the USSR, to which Ukraine is bound according to the principles of State succession, and which had been expressly recognised as binding by Ukraine following its independence⁵.

⁵ See paras. 4.3-4.26 of Chapter 4 of this Memorial.

1.13 The primary issue as to **Sector 1** concerns the boundary around Serpents' Island beyond the territorial sea boundary confirmed in 2003, as well as the area immediately to the east of Serpents' Island. As explained in this Memorial, the Parties have already agreed that the maritime boundary here goes around Serpents' Island in an arc drawn 12 nm (nautical miles) from it. That arc is depicted on maps agreed between the Parties, as well as maps published by third States. The issue of the maritime boundary in Sector 1 is determined by the following considerations:

- the existing agreements in force between the Parties establishing the trace of the maritime boundary in the vicinity of Serpents' Island;
- the relevant elements agreed by the Parties in the Additional Agreement, including Article 121 of the 1982 United Nations Convention on the Law of the Sea⁶ (hereafter the "1982 UNCLOS"); the Additional Agreement was concluded at a time when Article 121, and specifically its paragraph (3), was not binding on the Parties as a matter of treaty law⁷;
- the character of Serpents' Island as a "rock" in terms of Article 121(3) of the 1982 UNCLOS;
- relevant geographical and other circumstances as set out in this Memorial.

1.14 Having regard to these considerations, the maritime boundary in the first sector takes the form of an equidistance line between the adjacent mainland coasts of the Parties, qualified by the 12 nm arc drawn around Serpents' Island. The boundary line departs from that arc at a point practically due east of Serpents' Island, at approximately 45°14'20"N, 30°29'12"E, then it joins the equidistance line between the mainland coasts of the Parties at a point at approximately 45°11'59"N, 30°49'16"E and follows this equidistance line until

⁶ United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, 1833 *United Nations Treaty Series* 3 (in force 16 November 1994).

⁷ At the moment of the entry into force of the Additional Agreement, Ukraine was not a party to the 1982 UNCLOS. See paras. 8.31-8.35 of this Memorial.

it reaches the median line drawn between the opposite coasts of the Parties at approximately 45°09'45"N., 31°08'40"E.

- 1.15 **Sector 2** concerns the maritime boundary to be drawn between the opposite coasts of the Parties (the Romanian coastline and the coastline of the Crimean Peninsula (Ukraine). This sector extends southwards until it reaches maritime areas attributable to Turkey and Bulgaria. The mainland coasts of the two Parties in this second sector are approximately parallel, approximately equal in length and present no special features. That being so, the maritime boundary is a median line drawn between the opposite coasts in the direction of areas potentially appertaining to third States.

(4) The structure of this Memorial

- 1.16 This Memorial consists of twelve chapters, grouped in three parts.
- 1.17 **Part I** consists of five chapters outlining the geographical, historical and diplomatic background to the dispute. *Chapter 2* describes the geographical situation. *Chapter 3* outlines the important historical background, noting the strategic significance accorded to Serpents' Island since at least the 19th century and detailing the circumstances surrounding its peremptory seizure by the Soviet Union in 1948. *Chapter 4* briefly outlines the maritime boundary negotiations held between Romania and the Soviet Union before 1990 and between Romania and Ukraine since then. *Chapter 5* introduces the consequences of the historical circumstances upon this case. *Chapter 6* sets out the existing maritime boundary delimitations in the Black Sea.
- 1.18 **Part II** consists of two chapters analysing the applicable law. *Chapter 7* describes the treaties which are binding on the Parties and which relate to the present delimitation. *Chapter 8* details the applicable law to which these treaties refer.
- 1.19 **Part III** sets out the maritime boundary which in Romania's view follows from the applicable law and which represents an equitable solution. *Chapter 9*

identifies the relevant coasts and the relevant areas. *Chapter 10* deals with the status of Serpents' Island as a "rock" within the meaning of Article 121(3) of the 1982 UNCLOS. *Chapter 11* deals in turn with the two sectors referred to above, detailing the appropriate course of the boundary in each, having regard to the applicable law. *Chapter 12* demonstrates the equitable character of the boundary so described.

- 1.20 Filed with this Memorial are 2 volumes of documentary annexes and a volume of maps (Map Atlas).

PART I

**GEOGRAPHICAL, HISTORICAL AND DIPLOMATIC
BACKGROUND**

CHAPTER 2

THE GEOGRAPHICAL SITUATION

(1) The general geographical setting

- 2.1 Romania and Ukraine border the Black Sea, an enclosed sea connected with the Mediterranean by the Bosphorus Straits via the Sea of Marmara and the Dardanelles (Çanakkale) Straits, and with the Azov Sea by the Kerch Straits. The Black Sea is situated between 40°55' and 46°37' N and 27°27' and 41°47' E, and has a surface area of some 420,325 km² (462,535 km² including the small Azov Sea in its north-eastern part).
- 2.2 There are no areas of high sea in the Black Sea. All points are within 200 nm off the coast at least one of the riparian States.
- 2.3 Six countries border the Black Sea: Romania, Bulgaria, Turkey, Georgia, Russia and Ukraine. **Figure 1** (page 8 of this Memorial) shows their respective coastlines. As can be seen from **Figure 1**, the Black Sea is roughly divided by the Crimean Peninsula, which now constitutes an autonomous republic within Ukraine. The maritime area within which the Court is requested to draw the maritime boundary is located in the northern part of the western basin of the Black Sea. The western basin of the Black Sea is shown in **Figure 2** (page 16 of this Memorial).
- 2.4 The Romanian coast in the delimitation area can be divided into two distinct sectors, also shown on **Figure 2**. These are in the north, a shorter, roughly straight segment, corresponding to the edge of the Danube delta, and in the south a longer, slightly curved sector. Due to the geographical situation of this basin, the coasts of Romania and Ukraine are in a relationship of adjacency in the northern sector whereas in the southern sector they are clearly opposite coasts. Even the coast itself has a differentiated aspect: between the Musura Gulf and the city of Constanța it is low with large beaches; towards the south it is higher, with cliffs reaching 40 meters in height.

- 2.5 The territory of Romania situated between the Danube and the Black Sea is commonly referred to as *Dobrogea*, and includes most of the Danube delta (approximately 80% of it). The northernmost part of the delta is situated on the Ukrainian territory.
- 2.6 The seabed in the relevant area represents geologically and geomorphologically a single mass. The continental shelf has a continuous character, descending gradually towards the south-east, more swiftly in the south, without major discontinuities.
- 2.7 On the continental shelf in the western basin of the Black Sea, several structures with potential gas and oil resources have been identified. They were extensively explored by the Romanian side during the 70s and 80s.
- 2.8 There are very few maritime formations in the Black Sea, apart from the tiny islets in the Bulgarian Gulf of Burgas and the Ukrainian Gulf of Berezan and Serpents' Island itself.



Figure 2
Western Basin of the Black Sea

(2) Brief introduction on Serpents' Island

- 2.9 Serpents' Island⁸ is a maritime feature bordering the adjacent Romanian and Ukrainian shores in the vicinity of the Danube delta, situated at 45°15'53"N, 30°14'41"E. As shown in **Figure 2**, it lays at approximately 21 miles from the nearest point on the Romanian coast.
- 2.10 Serpents' Island has an area of 0.17 km², with a circumference of 1,973 meters and an irregular shape. It is 662 m long (east-west) and 440 m wide (north-south). It has high and abrupt rocky shores which make it difficult to approach by sea. These characteristics can be observed in the photographs included in this Memorial – see **Figures 3 and 4** included in this Chapter (page 18 of this Memorial), as well as in Chapter 10 of this Memorial⁹. Possessing no natural water or harvestable resources and accordingly entirely dependent on external supplies, Serpents' Island has never had a settled population. Ukrainian officials, in particular the staff of the Ukrainian border police, are stationed there for periods of time.
- 2.11 From a geological perspective, Serpents' Island does not have a continental shelf of its own, being a mere local elevation of the seabed. Geologically, Serpents' Island and the Dobrogea landmass have the same origin. In the Würm period (ca. 75,000 – 9,800 BC), Serpents' Island was linked with Dobrogea by a continuous landmass. Further increases and decreases of the sea level led to complete submergence of the island, followed by its re-emergence, which marked the present geology of the island, without effacing its common origin with the landmass¹⁰.

⁸ "Serpents' Island" is the name under which this maritime feature became to be known. Using this name does not imply any acknowledgment by the Romanian side that this feature could be entitled to maritime areas other than a maximum 12 nm territorial sea.

⁹ See also **Annexes RM 87 to RM 91**.

¹⁰ Vasile Cucu, Gheorghe Vlăsceanu, *Insula Șerpilor (Serpents' Island)*, „Viața Românească” Publishing House, Bucharest, 1991 (**Annex RM 5**), pp. 11-13.

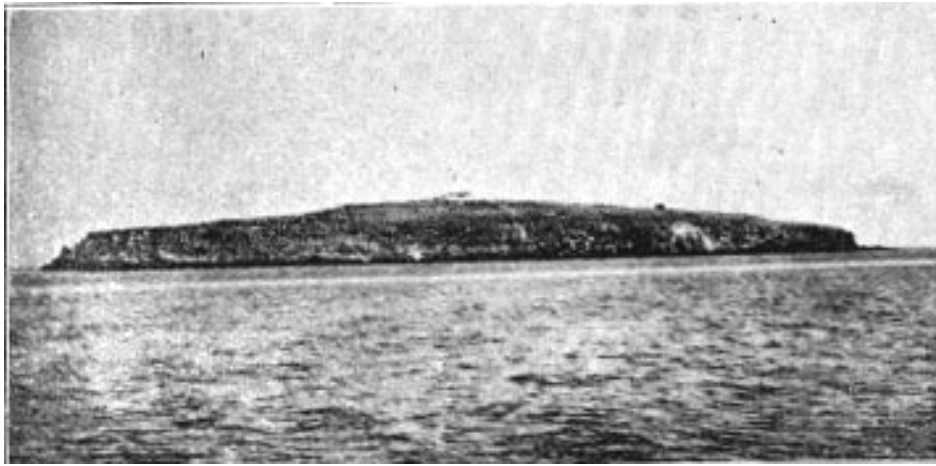


Figure 3

Image of Serpents' Island
- from the 1931 volume of R.I. Călinescu "Insula Șerpilor. Schiță monografică" – see Annex RM 6



Figure 4

Recent picture of Serpents' Island

2.12 The gritstone and quartz conglomerates on Serpents' Island confirm that the present insular territory belongs to the same kimmeric link as the mountains in northern Dobrogea. On the remnants of the littoral terrace identified in the peninsular area in the NE, it was found red lehm (*terra rossa*) dating from the Quaternary, proof that Serpents' Island was also once covered with terra rossa and loess – now almost completely washed or blown away.¹¹ This could also be seen in connection with the recent Ukrainian activities which consist in bringing soil on Serpents' Island.¹² The same factors that lead to the complete disappearance of its soil in past continue to apply, despite the Ukrainian demarches meant to change the natural conditions of Serpents' Island, which are climatically condemned to failure.

¹¹ Vasile Cucu, Gheorghe Vlăsceanu, *Insula Șerpilor (Serpents' Island)*, „Viața Românească” Publishing House, Bucharest, 1991 (**Annex RM 5**), p. 13.

¹² See paras. 10.101-10.132 of this Memorial.

CHAPTER 3

THE HISTORICAL BACKGROUND

(1) Earlier period¹³

- 3.1 Serpents' Island was first mentioned in historical writings relating to the Greek colonisation of the Black Sea shores in the 7th century BC¹⁴.
- 3.2 Its history is connected to the legend of the Greek hero Achilles, who is said to have been buried on the island. Remains of a sanctuary built on Serpents' Island honouring this divinity have been found.
- 3.3 During the earlier period, Serpents' Island is shown, under various names, on different maps of the Black Sea basin or of the mouths of the Danube. Enclosed to this memorial are six such maps, where Serpents' Island appears under the names of *Ilanada* (*Ilanda*, *Ilan adasy*, *Nanada*)¹⁵, *Fidonisi* (*Phidonisi*) or *Leuce*.¹⁶

(2) The period 1700-1939

- 3.4 Given the strategic importance of the region, the 18th and 19th centuries witnessed continuous rivalry between Russia and the Ottoman Empire over the mouths of the Danube and the water routes it provided, as well as the Black Sea straits. Dobrogea and the Danube delta were integral parts of the Ottoman Empire. Serpents' Island, situated immediately off the delta, was likewise part of the Ottoman Empire.

¹³ The historical evolution of the geo-political situation at the mouths of the Danube, including Serpents' Island, is relevant in order to understand the context of the delimitation of the maritime areas of Romania and Ukraine in the Black Sea.

¹⁴ Historical sources point to the existence of close links between harbours established by Greek settlers on the western coast of the Black Sea and the indigenous populations of the mainland, the Scythians and the Gets, forebears of the Romanian people.

¹⁵ Meaning "Serpents' Island" in Turkish.

¹⁶ See **Maps RM A1, RM A2, RM A3, RM A4, RM A5 and RM A6 in the Map Atlas.**

- 3.5 In 1812, by the Peace Treaty of Bucharest,¹⁷ Russia annexed the eastern part of Moldova (which was known as Bessarabia), thus becoming a riparian State on the Danube. The frontier between Russia (Bessarabia) and Turkey (Dobrogea) was established on the Kilia arm of the Danube, on either side of the Ochakov channel (in the north of the secondary delta of the Kilia arm).¹⁸ Serpents' Island was unaffected.
- 3.6 In 1829 when, by the Treaty of Adrianopole, concluded between the Ottoman Empire and the triumphant Russia on 2/14 September 1829,¹⁹ the two States established the frontier between them on the Saint George arm of the Danube (the southernmost arm in the Danube delta). Article III of the Treaty stated that Bessarabia and the whole Danube delta would become Russian territory. Although the Treaty did not contain any direct reference to Serpents' Island and did not provide for its inclusion within the Russian territory, Russia assumed control over Serpents' Island and in 1842 built a lighthouse on the island in order to assist navigation in the Black Sea.
- 3.7 Article XX of the General Treaty of Peace of 30 March 1856 (the Treaty of Paris) concluded after the Crimean War, provided for the Russian retrocession of part of Bessarabia and the Danube delta to the Ottoman Empire. Article XXI annexed the area thereby retroceded to the Principality of Moldova. By Articles XXII and XXIII the Romanian Principalities of Moldova and Walachia were guaranteed autonomy under the suzerainty of the Ottoman Empire.²⁰
- 3.8 The Treaty of Paris did not make express reference to the status of Serpents'

¹⁷ Treaty of Peace between Russia and Turkey, Bucharest, 16(28) May 1812, reproduced in *Consolidated Treaty Series*, vol. 62, p. 25.

¹⁸ *Ibid.*, Article 4.

¹⁹ Treaty of Peace between Russia and Turkey, Adrianopole, 2/14 September 1829, reproduced in *Consolidated Treaty Series*, vol. 80, p. 83; Martens, *Nouveau Recueil des Traités*, vol. VIII, p. 143; *British and Foreign State Papers*, vol. XVI, p. 647; E. Hertslet, *The Map of Europe by Treaty* (London, Butterworths/Harrison, 1875), vol. II (1828-1863), p. 813.

²⁰ General Treaty for the Re-Establishment of Peace between Austria, France, Great Britain, Prussia, Sardinia and Turkey, and Russia, Paris, 18/30 March 1856, reproduced in *Consolidated Treaty*

Island. The issue was regulated by the Protocol concluded on 6 January 1857 in Paris between the representatives of the European Powers parties to the Treaty of Paris.²¹ This was the first international agreement expressly to mention Serpents' Island. It stated as follows:

“Islands in Delta of the Danube to be replaced under Sovereignty of Turkey.

The Plenipotentiaries agree that the Islands included between the different branches of the Danube at its mouth, and forming the Delta of that River, as shown by the Plan No.2 hereunto annexed, and initialled, shall, instead of being annexed to the Principality of Moldavia, as stipulated by Article XXI of the Treaty of Paris, be replaced under the immediate Sovereignty of the Sublime Porte, of which they formerly held.

Isle of Serpents to be an Appendage of Delta of the Danube.

The Plenipotentiaries agree, moreover, that the Treaty of Paris having, like the Treaties previously concluded between Russia and Turkey, been silent with regard to the Isle of Serpents, that Island is to be considered as an appendage to the Delta of the Danube, and must, in consequence follow its destination.

Lighthouse to be maintained on Isle of Serpents.

In the general interest of maritime commerce, the Ottoman Government engages to maintain on that Island a Lighthouse destined to render secure the navigation of vessels proceeding to the Danube and to the Port of Odessa; the River Commission, established by Article XVII of the Treaty of Paris, for the purpose of maintaining the Mouths of that River, and the neighbouring parts of the Sea, in a navigable state, will see to the regular performance of the service of such Lighthouse.

Protocol to have the force of a Convention. Boundary Convention to be signed.

Series, vol. 114, p. 409; Martens, *Nouveau Recueil Général*, vol. XV, p. 770; *British and Foreign State Papers*, vol. XLVI, p. 8; Hertslet, *The Map of Europe by Treaty*, vol. II (1828-1863), p. 1250.

²¹ Protocol of Conference fixing the Boundaries of Russia, the Principalities and Turkey, between Austria, France, Great Britain, Prussia, Russia, Sardinia and Turkey, Paris, 6 January 1857, reproduced in *Consolidated Treaty Series*, vol. 116, p. 155, Martens, *Nouveau Recueil Général*, vol. XV, p. 793; *British and Foreign State Papers*, vol. XLVII, p. 92; Hertslet, *The Map of Europe by Treaty*, vol. II (1828-1863), p. 1298.

The present Protocol shall have the same force and validity as if it had assumed the form of a Convention; but it is understood that, when the Boundary Commission shall have concluded its labours a Convention shall be signed by the High Contracting Parties recording the Frontier such as it shall have been established by the Commissioners, and the resolutions taken on the subject of the Isle of Serpents and the Delta of the Danube.”

- 3.9 Annex 2 to the Protocol was a map showing the delta of the Danube stretching from the Kilia Channel in the north to the St George’s Channel in the south, with Serpents’ Island shown off-shore as appurtenant to the delta.²²
- 3.10 As expressly envisaged in the Protocol, these provisions were embodied in a further Treaty relative to the Frontier in Bessarabia, the Isle of Serpents, and the Delta of the Danube, signed at Paris on 19 June 1857.²³ This provided relevantly as follows:

“Islands at Mouths of the Danube to be under Sovereignty of Sultan of Turkey.

ART.II. The Contracting Powers agree that the Islands included between the different branches of the Danube at its mouth, and forming the Delta of that river, as shown by the Plan annexed to the Protocol of the 6th of January, 1857, shall, instead of being annexed to the Principality of Moldavia, as implied in the stipulations of Article XXI of the Treaty of Paris, be replaced under the immediate Sovereignty of the Sublime Porte, of which they formerly held.

Turkish sovereignty over Island of Serpents.

ART.III. The Treaty of the 30th March, 1856, having, like the Treaties previously concluded between Russia and Turkey,

²² *Parliamentary Papers, 1857, Sess. 1*, vol. XVII, p. 145. The map is also reproduced in Hertslet, *The Map of Europe by Treaty*, vol. II (1828-1863), following p. 1301 (**Map RM A 8 in the Map Atlas**).

²³ Treaty between Austria, France, Great Britain, Prussia, Russia, Sardinia and Turkey relative to the Frontier in Bessarabia, the Isle of Serpents and the Danube Delta, Paris, 19 June 1857; reproduced in *Consolidated Treaty Series*, vol. 117, p. 59, Martens, *Nouveau Recueil Général*, vol. XVI(2), p. 11; *British and Foreign State Papers*, vol. XLVII, p. 60; Hertslet, *The Map of Europe by Treaty*, vol. II (1828-1863), p. 1320. See also the *Definitive Act of the Commissioners [...] relative to the Bessarabian Frontier*, Kichineff, 30 March/11 April 1857, *Consolidated Treaty Series*, vol. 116, p. 455, Martens, *Nouveau Recueil Général*, vol. XX, p. 4; *British and Foreign State Papers*, vol. L, p. 1020; and Hertslet, *The Map of Europe by Treaty*, vol. II (1828-1863), p. 1313, with accompanying maps (**Map RM A 7 in the Map Atlas**).

been silent with regard to the Isle of Serpents, and the High Contracting Parties having agreed that it was proper to consider that Island as a dependency of the Delta of the Danube, its destination is fixed according to the arrangement of the preceding Article.

Maintenance by Turkey of Lighthouse on Island of Serpents.

ART. IV. In the general interest of maritime commerce, the Sublime Porte engages to maintain on the Isle of Serpents a Lighthouse destined to afford security to the navigation of vessels proceeding to the Danube and to the port of Odessa. The River Commission established by Article XVII of the Treaty of the 30th of March, 1856, for the purpose of maintaining the mouths of that river and the neighbouring parts of the sea in a navigable state, will see to the regular performance of the service of such Lighthouse.”

- 3.11 The next development of note²⁴ was the Treaty of Berlin of 13 July 1878.²⁵ By Article 43 the parties recognised the independence of Romania, subject to certain conditions. Articles 45 and 46 provided as follows:

“Art. XLV. The Principality of Roumania restores to His Majesty the Emperor of Russia that portion of the Bessarabian territory detached from Russia by the Treaty of Paris of 1856, bounded on the west by the mid-channel of the Pruth, and on the south by the mid-channel of the Kilia Branch and the Stary-Stamboul mouth.

Art. XLVI. The islands forming the Delta of the Danube, as well as the Isle of Serpents are added to Roumania. The Principality receives in addition the territory situated to the

²⁴ In the meantime, following the double election of Alexandru Ioan Cuza as prince of Moldova (5 January 1859) and Walachia (24 January 1859), the two Romanian principalities merged to form a unitary State, officially named *Romania*.

²⁵ Treaty between Austria-Hungary, France, Germany, Great Britain, Italy, Russia and Turkey for the Settlement of Affairs in the East, Berlin, 13 July 1978, reproduced in *Consolidated Treaty Series*, vol. 153, p. 171; Martens, *Nouveau Recueil Général des Traités* (2nd Series), vol. III, p. 449; *British and Foreign State Papers*, vol. LXIX, p. 749; Hertslet, *The Map of Europe by Treaty* (HMSO/Harrison, 1891), vol. IV (1875-1891), p. 2759.

By Art. XIX of the Preliminary Treaty of Peace between Russia and Turkey, San Stefano, 19 February/3 March 1878, (*Consolidated Treaty Series*, vol. 152, p. 395; *British and Foreign State Papers*, vol. LXIX, p. 732; *Martens Nouveau Recueil Général des Traités* (2nd Series), vol. III, p. 246; Hertslet, *The Map of Europe by Treaty*, vol. IV (1875-1891), p. 2672), Russia, although consenting to accept cession of certain territories (including Serpents' Island) as a substitute for the payment of war reparations, declared that it did not wish to annex the delta, the delta islands and Serpents' Island, and “se reserve la faculté de les échanger contra la partie de la Bessarabie détachée par le Traité de 1856” [“reserves the right of exchanging them for the part of Bessarabia detached by the Treaty of 1856” (i.e. the Treaty of Paris)].

south of the Dobroutcha as far as a line starting from the east of Silistria and terminating on the Black Sea, south of Mangalia.

The frontier line shall be determined on the spot by the European Commission appointed for the delimitation of Bulgaria.”

- 3.12 No map was attached to the Treaty of Berlin, but the situation of Serpents’ Island was perfectly clear from the text. The reproduction of the English language translation of the Treaty of Berlin in Hertslet’s *The Map of Europe by Treaty*²⁶ appends maps which show the boundary so drawn, with Serpents’ Island appertaining to Romania.
- 3.13 It is significant that, although the Treaty retroceded to Russia “that portion of the Bessarabian territory detached from Russia by the Treaty of Paris of 1856”, this territory did not include the delta islands or Serpents’ Island.
- 3.14 Following the Treaty of Berlin, a bilateral Commission reached partial agreement on the demarcation of the boundary in the delta region, and the demarcation was recorded in a Procès Verbal of 5/17 December 1878.²⁷ Although some of the places and islands mentioned in the Procès Verbal can be located with certainty on modern maps, others cannot, the coastline here having changed substantially since 1878 due to the accretion of the delta. But like the Treaty of Berlin itself, the Procès Verbal of 17 December 1878 did not affect Serpents’ Island.
- 3.15 Due to its importance for security in this area, during the First World War, Serpents’ Island was scene of several war episodes, such as the bombing of the lighthouse by German forces, its occupation by Russian soldiers and the

²⁶ Hertslet, *The Map of Europe by Treaty*, vol. IV (1875-1891), maps following pp. 2790 and 2798 (**Map RM A 9 in the Map Atlas**)

²⁷ Procès-Verbal of the Commission (Roumania and Russia) for the Delimitation of the Territory retroceded to Russia by Art. XLV of the Treaty of Berlin, Bucharest, 5/17 December 1878, reproduced in *Consolidated Treaty Series*, vol. 153, p. 495; *British and Foreign State Papers*, vol. LXX, p. 693; Hertslet, *The Map of Europe by Treaty*, vol. IV (1875-1891), p. 2842.

sinking of a Russian torpedo-carrier by German mines²⁸.

- 3.16 Bessarabia again became part of Romania following a decision taken on 9 April 1918 by the Bessarabian State Assembly (*Sfatul Țării*). Russia did not formally accept the re-union of Bessarabia with Romania. This controversy does not, however, affect Serpents' Island.
- 3.17 To summarise, since the 1878 Berlin Peace Treaty, that formally consecrated Romania's independence, until the outbreak of World War II, Serpents' Island was under Romanian sovereignty. It was not treated as part of Bessarabia, but was acknowledged to be appurtenant to the Danube delta (the area from St George's Mouth in the south to the Kilia Mouth in the north). As mentioned above, there was multilateral recognition in the Protocol of 1857 and the subsequent treaty on the frontier that Serpents' Island was appurtenant to the delta.
- 3.18 It may be noted that the European Danube Commission (headquartered in Galatz (Galați), Romania) undertook some works on Serpents' Island as part of its mandate to maintain the conditions for navigation on the Danube. In particular it rebuilt the beacon on Serpents' Island which served for navigational purposes before the Second World War.²⁹
- 3.19 The attention given by the European powers to the mouths of the Danube (the Danube delta) and to Serpents' Island, shown by the conclusion of these instruments, is a proof of the geo-strategic importance of these regions at that time.

²⁸ See R.I. Calinescu, *Insula Șerpilor. Schiță monografică (Serpents' Island. Monographic Study)*, published in the *Analele Dobrogei* magazine, "Glasul Bucovinei" Publishing House, Cernăuți, 1931 (**Annex RM 6**), pp. 50-51.

²⁹ *Ibid.*, p. 50.

(3) Serpents' Island in and after World War II

3.20 After the outbreak of the Second World War, the Soviet Union took the opportunity to reassert its claim over Bessarabia, adding to it a new claim to part of Bukovina. Following the conclusion of the Ribbentrop-Molotov Pact and its secret additional protocol³⁰, a Soviet ultimatum was sent to the Romanian Government of 26 June 1940. It stated as follows:

“The Soviet Government considers that the issue of the return of Bessarabia is organically linked with the issue of the handing over to the USSR of that part of Bukovina where the population is linked in its great majority with the Soviet Ukraine by the common historical destiny as well as by the language community and national composition. Such an act would be justified since the handing over of the northern part of Bukovina to the USSR could represent, even though to a small degree, a means of compensation of that great loss caused to the USSR and Bessarabian population by the 22 years of Romanian domination of Bessarabia.

The USSR Government proposes to the Royal Government of Romania:

1. to return Bessarabia to the Soviet Union;
2. to hand over to the Soviet Union the northern part of Bukovina with the borders in accordance with the enclosed map.

The Soviet Government hopes that the Romanian Government will accept the present proposals of the USSR and this will give an opportunity to peacefully solve the long-lasting conflict between USSR and Romania.”³¹

The Soviet ultimatum did not include any demand in relation to Serpents' Island.

³⁰ The Pact and its additional protocol established the *sphères d'influence* of Germany and the USSR in Europe. Its conclusion and arbitrary character were condemned both by the Soviet/ Russian authorities (e.g. the Decision of the Congress of the People's Deputies regarding the legal and political aspects of the 1939 Russo-German Non-Aggression Pact, adopted on 24 December 1989) and in the bilateral Romanian-Russian framework (e.g., in the Joint Declaration of the ministries of foreign affairs of Romania and the Russian Federation, signed at Moscow on 4 July 2003) and internationally (e.g., the recent statements made with the occasion of the 50th anniversary of the conclusion of World War II).

³¹ Note of 27 June 1940 to the Romanian Mission in Moscow (**Annex RM 7**).

- 3.21 In response Romania proposed a meeting to discuss the situation. In a Soviet note of 28 June 1940 the Soviet Government rejected the reply as “unclear” because it had failed to accept the Soviet proposition, and it set down a timetable for Romanian withdrawal.³²
- 3.22 Romania had no choice but to accept this timetable, and, in the response to the note of 28 June 1940, accepted the withdrawal of the Romanian administration from Bessarabia and Northern Bukovina.³³ Serpents’ Island was not included in the said territory.
- 3.23 In August 1940, the Moldavian Soviet Socialist Republic was founded on part of the territory ceded to the USSR by Romania. The southern part of Bessarabia was not included in the territory of the newly-established Soviet Socialist Republic but was incorporated into the territory of the Ukrainian Soviet Socialist Republic.
- 3.24 Work began on delimitation of the resulting boundary but was stopped in November 1940 when Soviet troops occupied certain islands in the Danube delta (but not Serpents’ Island). In 1941 the Romanian army evicted the Soviet army from those positions.
- 3.25 During World War II, Serpents’ Island had a strategic role. On 22 June 1941 it entered under the rule of the Commandment of the German forces in the Black Sea and was occupied by German troops. The areas of Serpents’ Island and of the mouths of the Danube were theatre of naval operations between 1941 and 1944³⁴.
- 3.26 After the end of World War II, the Treaty of Peace between the Allied and

³² See the Note of 28 June 1940 to the Romanian Mission in Moscow (**Annex RM 8**).

³³ See the Note of 28 June 1940 of the Romanian Mission in Moscow (**Annex RM 9**).

³⁴ See major (retired) Silviu Ștefănescu, *Din amintirile veteranilor (War Veterans’ Memories)*, published in *Revista de istorie militară (Military History Magazine)*, issue no. 3(31)/1995, p. 48 (**Annex RM 10**).

Associated Powers and Romania was signed at Paris on 10 February 1947.³⁵

Part I provided as follows:

“FRONTIERS

Article 1

The frontiers of Roumania, shown on the map annexed to the present Treaty (Annex I) shall be those which existed on January 1, 1941, with the exception of the Roumanian-Hungarian frontier, which is defined in Article 2 of the present Treaty.

The Soviet Roumanian frontier is thus fixed in accordance with the Soviet Roumanian Agreement of June 28, 1940, and the Soviet-Czechoslovak Agreement of June 29, 1945.”

- 3.27 The annexed map, on a scale of 1:1,500,000, which formed an integral part of the Peace Treaty, shows the boundary proceeding down the Danube to the sea. The text of the Treaty has no express provision relating to Serpents’ Island, which accordingly remained under the sovereignty of Romania. The map annexed to the Peace Treaty showed Serpents’ Island as forming part of Romania.³⁶

(4) The Events of 1948

- 3.28 In order to precisely describe the trace of the Romanian-Soviet boundary, on 4 February 1948, a Protocol to Specify the Line of the State Boundary between the People’s Republic of Romania and the Union of Soviet Socialist Republics was concluded.³⁷ Despite the provisions of the Paris Peace Treaty, Article 1 described the boundary, in relevant part, in the following terms:

“b/ In accordance with Annex II:

along the River Danube, from Pardina to the Black Sea, leaving the islands of Tătaru Mic, Daleru Mic and Mare, Maican and

³⁵ 42 *United Nations Treaty Series* 3.

³⁶ See **Map RM A 10 in the Map Atlas**.

³⁷ Protocol to Specify the Line of the State Boundary between the People’s Republic of Romania and the Union of Soviet Socialist Republics, signed at Moscow, on 4 February 1948 (**Annex RM 11**).

Limba on the side of the Union of the SSR, and the islands Tătaru Mare, Cernovca and Babina - on the Romanian side;

Serpents' Island, situated in the Black Sea, eastwards from the Danube mouth, is incorporated into the Union of the SSR." (emphasis added).

- 3.29 On 23 May 1948, a procès verbal was signed by the Deputy Foreign Minister of Romania and the First Secretary of the Soviet Embassy. Actually signed on Serpents' Island, it provided in relevant part as follows:

“Acknowledging that today, at 12 hours (local time), Serpent's Island or Zmeinyj [...], has been returned to the Soviet Union by the People's Republic of Romania and integrated within the territory of the Union of the Soviet Socialist Republics, by signing this procès verbal the legal formalities of the handing over of the island have been fulfilled.”³⁸

- 3.30 It should be stressed that the term “returned” used by the language of the procès verbal was not appropriate, as Serpents' Island had never belonged to the USSR.
- 3.31 After being incorporated into the Soviet territory, against the provisions of the 1947 Paris Peace Treaty, Serpents' Island was transformed into a military post, under the direct control of the central military authorities in Moscow. This underlines the geo-strategic reasons for which the USSR decided to occupy Serpents' Island, which represented an *avant-poste* in the Black Sea, situated at the mouths of the Danube.
- 3.32 The legal status of Serpents' Island as a Soviet territory is unclear, as there is no public document providing for its inclusion within the territory of any Soviet republic. It was only after the dissolution of the USSR that Serpents' Island became formally part of the territory of the newly-independent Ukraine.

³⁸ See the Procès verbal of Delivery-Reception, signed on Serpents' Island, on 23 May 1948 (Annex RM 12).

CHAPTER 4

MARITIME BOUNDARY NEGOTIATIONS AFTER 1948

(1) Introduction

- 4.1. Since 1948, Romania has conducted negotiations on the issue of the delimitation of the maritime areas in the Black Sea successively with the Soviet Union and, after its independence in 1991, with Ukraine. As these negotiations did not produce agreement (in particular in the area to the east and south-east of Serpents' Island), they are essentially of historical relevance. On the other hand, successive agreements were concluded with the Soviet Union (by which Ukraine is bound as successor) concerning the area between the land boundary and Serpents' Island and as to the extent of the maritime boundary going around Serpents' Island. Moreover, although no progress of any kind was made in the post-1997 negotiations with Ukraine on the location of the exclusive economic zones and continental shelf boundary, the two Parties did agree in 1997 on the criteria to be applied in those negotiations.
- 4.2. Romania does not rely on unperfected negotiations as a basis for the maritime boundary it claims. On the other hand it does rely on the agreements reached with the Soviet Union as to the maritime boundary around Serpents' Island in the first sector, and with Ukraine as to the criteria to be applied in delimiting the remainder of the maritime boundary. For these purposes the course of the negotiations leading to these agreements is relevant and is described in this Chapter. The legal consequences of the agreements reached are analysed in later chapters.

(2) Negotiations and agreements concluded with the Soviet Union

(a) The land border and the maritime boundary around Serpents' Island

- 4.3. The land border and a significant part of the maritime boundary was demarcated in 1948-1949 and the demarcation incorporated in a single document, the Procès Verbal of the Description of the State Border Line between the People's Republic of Romania and the Union of the Soviet

Socialist Republics, signed by the Joint Soviet-Romanian Demarcation Commission on 27 September 1949 (hereafter, the “September 1949 Procès Verbal”).

4.4. According to the September 1949 Procès Verbal, the land and river border is continued at sea by a maritime boundary, joining the final point of the river border (Point 1437) with two successive signs (a buoy and a beacon) representing the final border signs established by that Procès Verbal. Specifically these were Point 1438 - buoy at 45°11'34.97"N, 29°41'28.56"E, and Point 1439 - beacon at 45°08'59.21"N, 29°57'39.42"E, the latter being situated on the 12-nm arc surrounding Serpents' Island.

4.5. Thus, the September 1949 Procès Verbal provides in relevant part:

“From the border sign no. 1437 the boundary goes through the middle of the Musuna (Musura) channel, in a south-south-east direction, until the mouth of the Musuna (Musura) channel, on the alignment no. 1, leaving Limba Island on the USSR side, and the island no. 3 on the P.R.R. [Peoples' Republic of Romania] side, going to the border sign no. 1438 (buoy).

The border sign no. 1438 (buoy) is fixed (anchored) in water, in the point of the change of the direction of the boundary line in the Black Sea.

...

The border sign no. 1439 (beacon), is fixed in water, in the point where the State boundary line going through the Black Sea changes its direction, at the intersection of the straight line going from the border sign no. 1438 (buoy) on the azimuth of 102°30',0, with the outer exterior margin of the Soviet marine boundary zone, of 12 miles, surrounding Serpents' Island.”³⁹

The coordinates of border sign 1439 were then set out. After specifying the distance between Points 1438 and 1439, the description continued:

“The State boundary line, from the border sign no. 1439 (beacon), *goes on the exterior margin of the marine boundary zone, of 12 miles, leaving Serpents' Island on the side of the USSR.*”⁴⁰ (emphasis added)

³⁹ Procès Verbal of the Description of the State Border Line between the People's Republic of Romania and the Union of the Soviet Socialist Republics, demarcated in 1948-1949, signed at Bucharest, on 27 September 1949, volume III (**Annex RM 13**), pp. 900-901.

⁴⁰ *Ibid.*, p. 902

4.6. The map annexed to the September 1949 Procès Verbal⁴¹ depicts the boundary so drawn, although only a small segment of the circle around Serpents' Island is shown.

4.7. Similarly, the individual Procès Verbal of Description of Border Sign 1438 (buoy) dated 27 September 1949 establishes that

“the boundary line, from the border sign no. 1437, passes on the middle of watershed of the Musuna (Musura) channel, towards south-south-east, till the mouth of the Musuna (Musura) channel, then on the alignment no.1, leaving the island of Limba on the USSR side and the island no.3 on the Romanian PR side, to the border sign no.1438 (buoy), and from the border sign no.1438 (buoy), the State boundary in the Black Sea passes in a straight line, on the azimuth of 102°30',0', till it reaches the exterior margin of the Soviet marine boundary zone, of 12 miles, surrounding Serpents' Island, to the border sign no. 1439 (beacon).”⁴²

4.8. The individual Procès Verbal of Description of Border Sign 1439 (beacon) dated 27 September 1949 stipulates that:

“the boundary line, from the border sign no. 1438 (buoy) passes in the Black Sea, in a straight line, on the azimuth of 102°30',0', till it reaches the exterior margin of the Soviet marine boundary zone, of 12 miles, surrounding Serpents' Island, to the border sign no. 1439 (beacon) and from the border sign no. 1439 (beacon), *the boundary passes on the exterior margin of the Soviet marine boundary zone, of 12 miles*, leaving Serpents' Island on the USSR side.”⁴³ (emphasis added).

4.9. The words in italics in the official languages of the September 1949 Procès Verbal of Description of Border Sign 1439 (beacon) read as follows:

in Romanian, “*frontiera trece pe marginea exterioară a zonei sovietice de frontieră marină, de 12 mile*”;

in Russian, “*граница проходит по внешней линии 12-мильной морской пограничной полосы*”.

⁴¹ **Map RM A 11 in the Map Atlas.**

⁴² Procès Verbal of Border Sign no. 1438 (buoy), signed at Bucharest, on 27 September 1949 (**Annex RM 14**).

⁴³ Procès Verbal of Border Sign no. 1439 (beacon), signed at Bucharest, on 27 September 1949 (**Annex RM 15**).

The meaning is clear and the different language versions are to the same effect. There is a 12 mile Soviet marine zone going around Serpents' Island, and the 12 mile arc constitutes the "exterior margin" ("*marginea exterioară*"; "*внешней линии*") of this zone.

- 4.10. Both individual Procès Verbaux of Description of Border Signs 1438 and 1439 include bilingual (Romanian and Russian) sketches (see **Figures 5 and 6** – pages 36, 37 of this Memorial) which form integral parts of them, and these clearly show the boundary and the position of the two border signs.
- 4.11. It should be emphasised that the September 1949 Procès Verbal and the individual Procès Verbal of Description of Border Sign 1439 (beacon) do not refer to a 12-mile territorial sea, but to a "marine boundary zone" of 12 miles of the USSR. There is no suggestion that beyond this 12 nm arc there is a further maritime zone appertaining to Serpents' Island and cutting across the front of the Romanian coast.
- 4.12. The next event of relevance occurred on 25 November 1949 in Moscow when a Treaty was concluded between the Government of the People's Republic of Romania and the Government of the USSR on the Regime of the Romanian-Soviet State Border (hereafter, the "1949 Border Regime Treaty").⁴⁴ Chapter I dealt with the border line, border signs and border maintenance. Article 1 provided:

"The State border line between the People's Republic of Romania and the Union of the Soviet Socialist Republics, fixed in accordance with Article 1 of the Peace Treaty with Romania, entered into force on 15 September 1947, and with the Protocol [of 4 February 1948] passes in the field as it is determined in the demarcation documents signed on 27 September 1949, at Bucharest, by the Joint Soviet-Romanian Commission for the Demarcation of the State Border between the People's Republic of Romania and the Union of the Soviet Socialist Republics."

- 4.13. The delimitation set out in the September 1949 Procès Verbal was thereby embodied in the 1949 Border Regime Treaty.

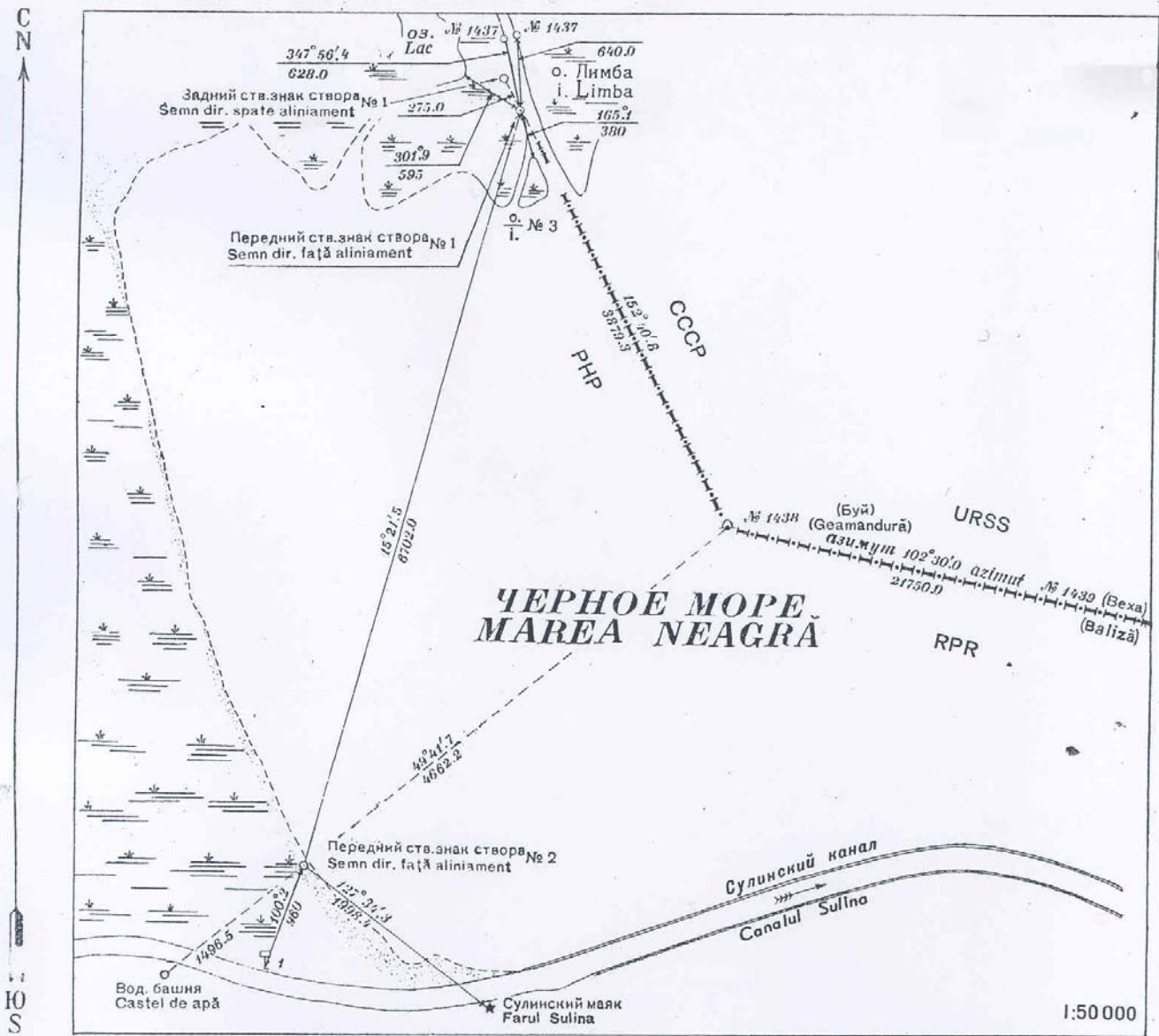
⁴⁴ Treaty between the Government of the People's Republic of Romania and the Government of the USSR on the Regime of the Romanian-Soviet State Border, signed at Moscow on 25 November 1949, pp. 1-2 (**Annex RM 16**).

- 4.14. In the period subsequent to 1949, several further bilateral Romanian-Soviet instruments were concluded, under which the maritime boundary between what is now Ukraine and Romania was affirmed. No agreement suggested any possible change to the position of the boundary located on the 12 mile arc around Serpents' Island.
- 4.15. Thus, between 1952 and 1954, as a result of the re-location of certain border posts and the calculation of new technical data, several bilateral documents were signed by the border authorized officers of the two countries. Such a new document, entitled "Act" ("Act" in Romanian, "Акм" in Russian), was also concluded for the border sign 1439, as the beacon located there had disappeared. The Act, signed in Ismail on 26 December 1954, uses practically the same language as the 1949 individual Procès Verbal of Border Sign 1439. It reads, in relevant part, as follows:

"the boundary line [,] from the border sign no.1438 (buoy), passes in the Black Sea, in a straight line, on the azimuth of 102°30',0, till it reaches the exterior margin of the marine boundary zone of 12 miles of the Union of the Soviet Socialist Republics surrounding Serpents' Island, to the border sign no.1439 (beacon) and from the border sign no. 1439 (beacon), *the boundary passes on the exterior margin of the Soviet marine boundary zone of 12 miles*, leaving Serpents' Island on the USSR side."⁴⁵ (emphasis added).

⁴⁵ Act signed by the Border Authorized Officer of the People's Republic of Romania for the Tulcea sector and the Border Authorized Officer of the Union of the Soviet Socialist Republics for the Ismail sector in Ismail on 26 December 1954 (**Annex RM 17**).

Locul semnului de frontieră este arătat pe schița de mai jos.



Prezentul proces verbal s'a încheiat în patru exemplare, două în limba rusă, două în limba română, ambele texte având putere egală.

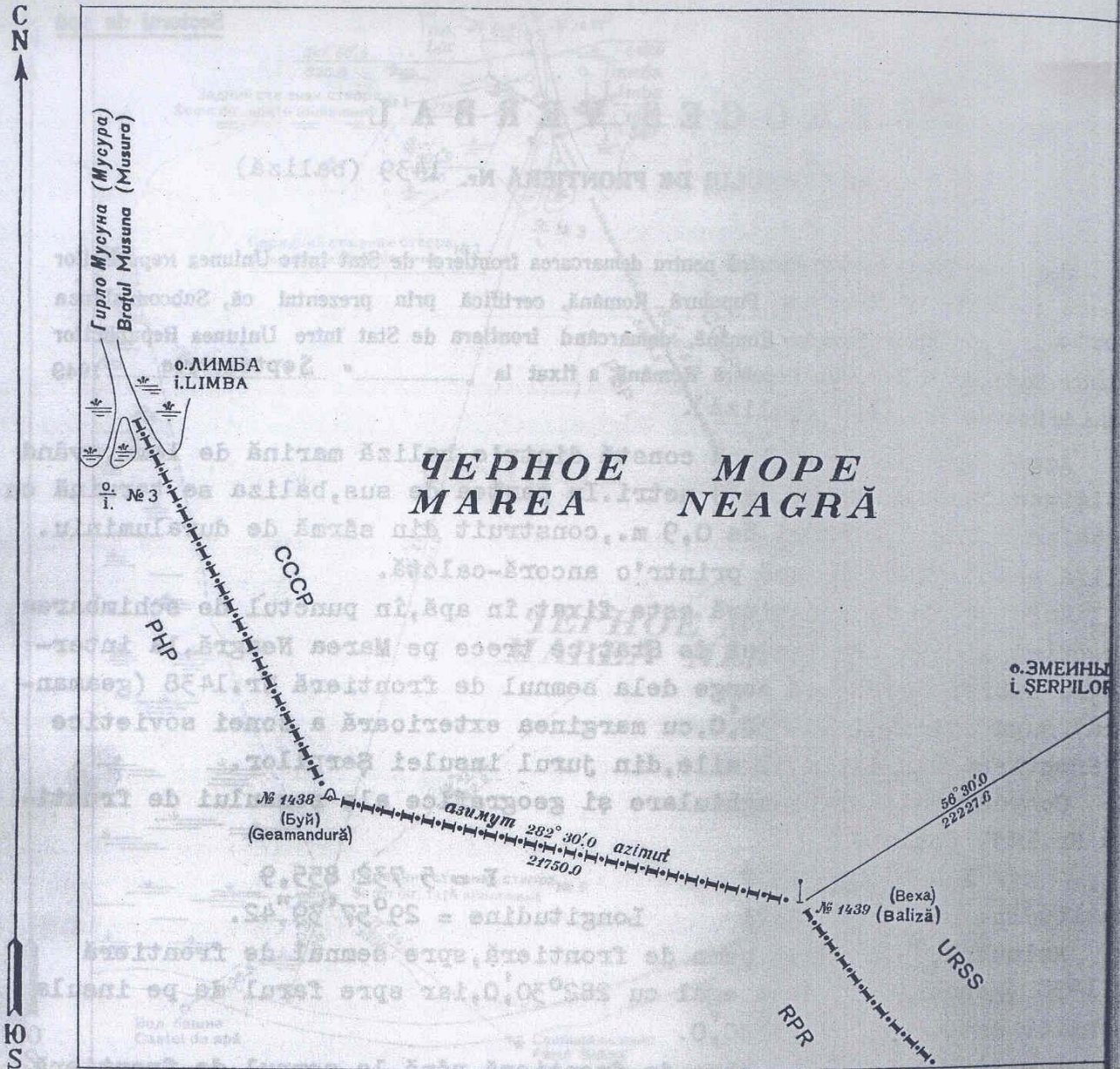
Составитель: Бураевский

1949

Figure 5

Sketch included in the Procès Verbal of Border Point no. 1438, signed at Bucharest, on 27 September 1949

Locul semnului de frontieră este arătat pe schița de mai jos.



Prezentul proces verbal s'a încheiat în patru exemplare, două în limba rusă, două în limba română, ambele texte având putere egală.

Figure 6

Sketch included in the Procès Verbal of Border Point no. 1439, signed at Bucharest, on 27 September 1949

4.16. On 27 February 1961, a Treaty was concluded between the governments of Romania and the USSR on the regime of the Romanian-Soviet State Border (hereafter, the “1961 Border Regime Treaty”) ⁴⁶; it was expressed to be a replacement for the 1949 Border Regime Treaty. No modification occurred with regard to the border between the two Parties. Thus, Chapter I, dealing with the border line, border signs and border maintenance, specified:

“The State border line between the People’s Republic of Romania and the Union of the Soviet Socialist Republics, settled according to Article 1 of the Peace Treaty with Romania, entered into force on 15 September 1947 and to the Protocol [of 4 February 1948] passes in the field as described in:

- (a) ...
- (b) the demarcation documents signed on 27 September 1949 in Bucharest by the Joint Romanian-Soviet Border Commission for the Demarcation of the State Border line between the People’ Republic of Romania and the Union of the Soviet Socialist Republics;
- (c) the annexes and the additions to the documents with respect to the demarcation of the Romanian-Soviet State border line, which may be concluded during the period of validity of this Treaty.”

4.17. Accordingly, the delimitation recorded in the 1949 Procès Verbal (and confirmed by the 1954 Act) was expressly incorporated by reference.

4.18. A demarcation process was carried out between 1961 and 1962 as envisaged by the 1961 Border Regime Treaty. The final document (hereafter the “1963 Procès Verbal”), was accompanied by individual procès verbaux describing the position of each of the defined points, including sketches and enclosed maps. As for the border sign no. 1439, no modification occurred and no new Procès Verbal was concluded for this sign.

4.19. However, the general description of the boundary reads, in its relevant parts, the following:

⁴⁶ Treaty between the Government of the People's Republic of Romania and the Government of the Union of Soviet Socialist Republics on the Romanian-Soviet State Border Regime, Collaboration and Mutual Assistance on Border Matters (with Procès Verbal), signed at Bucharest on 27 February 1961 (**Annex RM 18**). The treaty was registered with the Secretariat of the United Nations on 10 September 2004 by Romania, and was assigned registration no. 40546.

“From the border sign no. 1438 (buoy), the State boundary passes in the Black Sea in a straight line on the azimuth of 102°30',0, to the border sign no. 1439 (beacon).

The border sign no. 1439 (beacon) is fixed in water, in the point where the State boundary line going through the Black Sea changes its direction, at the intersection of the straight line going from the border sign no. 1438 (buoy) on the azimuth of 102°30,'0 with the exterior margin of the Soviet territorial sea of 12 miles, around Serpents' Island.

...

From the border sign no.1439 (beacon), the State boundary passes on the exterior margin of the 12-mile territorial sea of the USSR, leaving Serpents' Island on the USSR side”⁴⁷.

- 4.20. The individual Procès Verbal of Border Sign 1438 uses generally the same language as the one concluded in 1949. The only change of language consists in provisions concerning the attribution of some newly formed Danubian islets⁴⁸, while the 1949 individual Procès Verbal of Border Sign 1439 remained in force, as no factual change occurred since its conclusion.
- 4.21. The 1963 Procès Verbal was the first time that the “Soviet marine zone” of 12 miles around Serpents' Island is referred to as a “territorial sea”. But there is no suggestion in the documents of the period that this change in terminology produced any change of substance or that it had the effect of an implicit claim by the Soviet Union to maritime areas to the south of the 12 nm line.
- 4.22. The next demarcation process was carried out in the 1970s, on different sectors of the Romanian-Soviet border. The work carried out between 1972 and 1973 covered the southern sector of the common border and resulted in further Procès Verbaux for each boundary point, as well as a subsequent Procès Verbal which summarised them all. In the general description, this Procès Verbal kept the language of the 1963 Procès Verbal, reading that

⁴⁷ Procès Verbal of Description of the State Border Line between the People's Republic of Romania and the Union of the Soviet Socialist Republics on Rivers Tur, Tisa, Prut and Danube, drafted on the Basis of the Verification Effected in 1961-1962 in Sectors where Modifications as Compared to the 1948-1949 Demarcation Documents Occurred, signed at Iași, on 20 August 1963 (**Annex RM 19**), p. 110.

⁴⁸ See the Procès Verbal of Border Sign no. 1438 (buoy), signed at Iași, on 20 August 1963 (**Annex RM 20**).

“From the border sign no.1439 (beacon), the State boundary passes on the exterior margin of the 12-mile territorial sea of the USSR, leaving Serpents’ Island on the USSR side”⁴⁹.

4.23. The individual Procès Verbal relating to Point 1439 was concluded on 4 September 1974. As with the individual Procès Verbal relating to Point 1439 from 1949, it referred to the “Soviet marine boundary zone”. It provided:

“This border sign is fixed in water, in the point where the State boundary line going through the Black Sea changes its direction, at the intersection of the straight line going from the border sign no. 1438 (buoy) on the azimuth of 102°30',0 with the exterior margin of the Soviet marine boundary zone of 12 miles surrounding Serpents’ Island.”⁵⁰

It went on to add:

“The boundary line, from the border sign no. 1438 (buoy) goes through the Black Sea in a straight line, on the azimuth of 102° 30',0 until it reaches the exterior margin of the USSR marine boundary zone of 12 miles around Serpents' Island, to the border sign no. 1439 (beacon) and *from the border sign no. 1439 (beacon), the boundary passes on the exterior margin of the USSR marine boundary zone of 12 miles, leaving Serpents’ Island on the USSR side.*”⁵¹ (emphasis added).

Again, the phrase “the exterior margin of the USSR marine boundary zone of 12 miles” is the same as in the general and individual Procès Verbaux of 1949.

4.24. A sketch is included, which clearly shows the boundary line running south-eastwards of Point 1439 as a curved line, i.e. as a sector of a circle with a radius of 12 miles drawn from Serpents’ Island. The map attributes territory within the 12 nm circle to the USSR (the indication on the map reads *C.C.C.P./U.R.S.S.*, in Russian and Romanian), and territory beyond it to Romania (*R.S.R/C.P.P.*, in Romanian and Russian). The sketch is shown as **Figure 7** (page 42 of this Memorial).

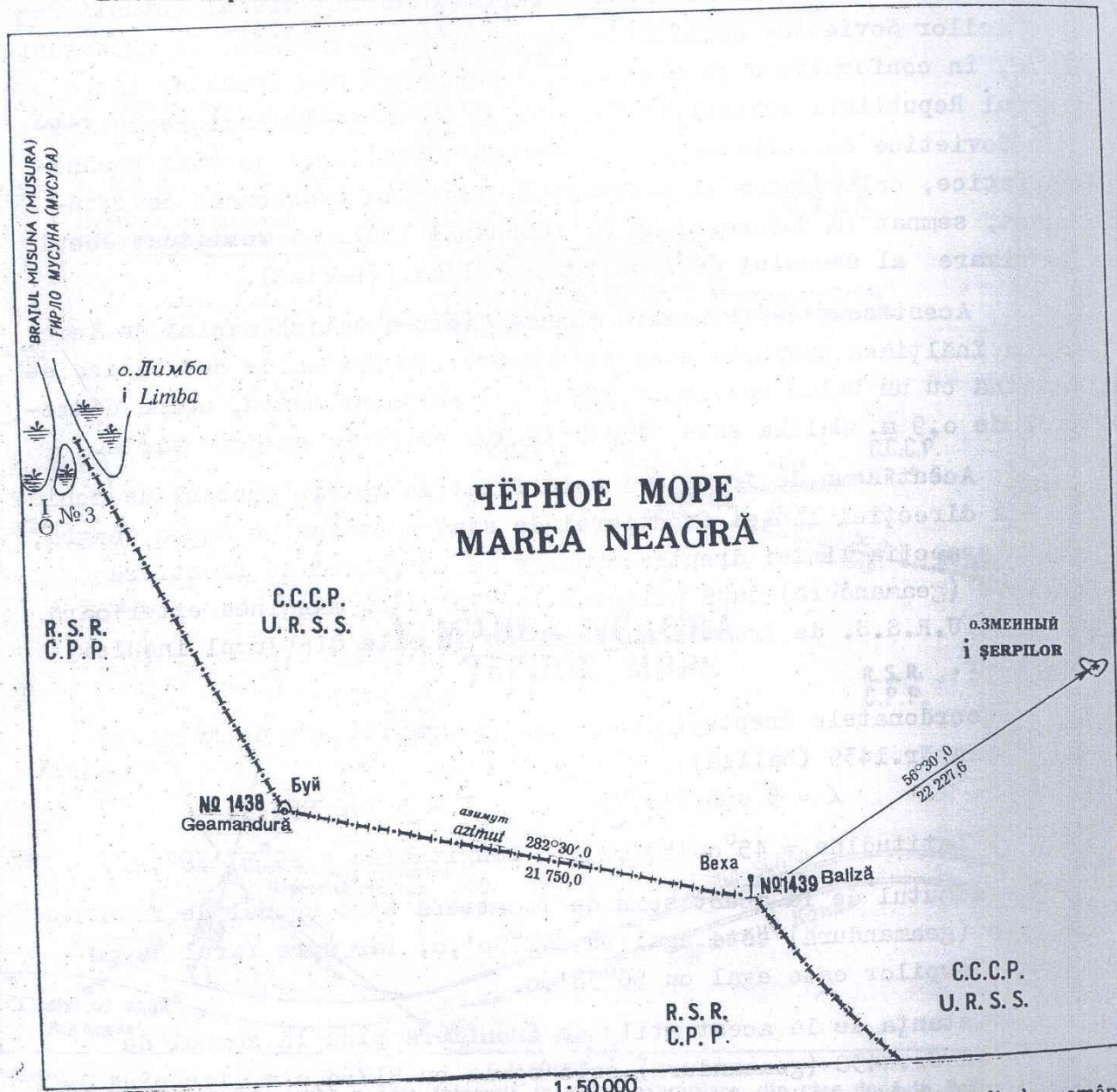
⁴⁹ Procès Verbal of Description of the State Border Line between the Socialist Republic of Romania and the Union of the Soviet Socialist Republics from Border Sign no. 1335 to Border Sign no. 1439, Drafted on the Basis of the Verifications Effected in 1972-1973, the Tulcea sector, signed in Ismail, on 4 September 1974 (**Annex RM 21**), p. 21.

⁵⁰ Procès Verbal of Border Sign no. 1439 (beacon), signed in Ismail, on 4 September 1974 (**Annex RM 22**).

⁵¹ Ibid.

- 4.25. The difference between the 1974 individual Procès Verbal's description of border sign 1439 and the 1963 and 1974 general Procès Verbaux's in use of the phrase "territorial sea of the Soviet Union", rather than the phrase "Soviet Union marine boundary zone of 12 miles", cannot have been intended to mean that beyond the 12 nm arc there was an unexpressed and undetermined area of Soviet maritime area, consisting of continental shelf and exclusive economic zones. This is particularly so as the established term "Soviet Union marine boundary zone of 12 miles" ("*zonei sovietice de frontieră marină de 12 mile*" / "*12-мильной морской пограничной полосы*") was used in the specific Procès Verbaux of the individual signs, of which the 1963 and 1974 general Procès Verbaux were but summaries. Further, if the change of language in the 1963 Procès Verbal had been intended to record an eventual change of legal regime, the 1974 individual Protocol of description would not have continued to use the language of "marine boundary" rather than referring to "territorial sea".
- 4.26. The relevance of the provisions of the various Procès Verbaux concluded between Romania and the USSR after 1948 will be further detailed in Chapter 11 of this Memorial.

Locul de dispunere al semnului de frontieră este arătat în schița crochiu de mai jos :



Prezentul proces-verbal a fost întocmit în patru exemplare, din care două în limba română și două în limba rusă, ambele texte având putere egală.

Semnat în ORAȘUL ISMAIL la 4 Septembrie 1974

Figure 7

Sketch included in the Procès Verbal of Border Point no. 1439, signed in Ismail, on 4 September 1974

(b) Subsequent continental shelf and exclusive economic zone negotiations with the Soviet Union

- 4.27. In 1967 Romania and the Soviet Union commenced negotiations concerning the delimitation of the continental shelf and the exclusive economic zones of the two States in the Black Sea. Ten rounds of negotiations were conducted between 1967 and 1987 (3 rounds of consultations at expert level and 7 rounds of negotiations at diplomatic level).
- 4.28. No concrete results could be reached, as the positions of the two countries diverged on key elements of the delimitation process. Further considerations on the approach promoted during these negotiations by Romania are presented in Chapter 5 of this Memorial⁵².

(3) Negotiations with Ukraine following its independence

(a) The 1997 treaties

- 4.29. Following the independence of Ukraine, new negotiations were held between Romania and Ukraine relating to a variety of questions, including issues relating to the land border between the two States and the delimitation of the continental shelf and exclusive economic zones between the two States.
- 4.30. One important product of these negotiations was the conclusion of the Treaty on Relations and the Additional Agreement in 1997. Despite the highly questionable manner in which the USSR obtained Serpents' Island, Romania nevertheless accepted by these treaties that Serpents' Island belongs to Ukraine.
- 4.31. Article 1(2) of the Treaty on Relations provides:

“The Contracting Parties shall observe, in their mutual relations as well as in the relations with other states, the principles of the Charter of the United Nations and of the Helsinki Final Act: sovereign equality, refraining from the threat or use of force,

⁵² See paras. 5.11-5.17 of this Memorial.

inviolability of frontiers, territorial integrity of states, peaceful settlement of disputes ...”⁵³

4.32. Article 2(1) provides:

“The Contracting Parties, in accordance with the principles and norms of the international law and with the principles of the Helsinki Final Act, reaffirm that the existing border between them is inviolable and therefore, they shall refrain, now and in the future, from any attempt against this border, as well as from any demand for, or act of, seizure and usurpation of part or all the territory of the other Contracting Party.”⁵⁴

4.33. It was expressly on this basis that negotiations relating to the 2003 Border Regime Treaty and the delimitation of the boundaries between the States’ respective continental shelves and exclusive economic zones were foreseen in Article 2(2) of the Treaty on Relations. This is evident from the Additional Agreement, which provides in its paragraph 1 that:

“The Government of Ukraine and the Government of Romania shall conclude, not later than two years from the date of the entering into force of the Treaty on the Relations of Good Neighbourliness and Cooperation between Romania and Ukraine, a Treaty on the regime of the state border between the two states, on the basis of the principle of succession of states regarding borders, according to which the proclamation of the independence of Ukraine does not affect the existing state-border between Romania and Ukraine, as it was defined and described in the Treaty of 1961 on the regime of the Romanian-Soviet state border and in the appropriate demarcation documents, valid on 16 July 1990 - the date of the adoption of the Declaration on the state sovereignty of Ukraine.”⁵⁵

4.34. Similarly, paragraph 3 expressly recognises that Serpents’ Island “belongs to Ukraine, according to the above-mentioned paragraph 1”.

4.35. But at the same time, in the very same document, in paragraph 4, the Parties agreed on the principles to be applied in delimiting the maritime boundary. These principles, and their implications for the present case, will be analysed

⁵³ Treaty on the Relations of Good Neighbourliness and Co-Operation between Romania and Ukraine, signed at Constanța, on 2 June 1997; 2159 *United Nations Treaty Series* 335 (**Annex RM 1**).

⁵⁴ Ibid.

⁵⁵ Agreement Additional to the Treaty on the Relations of Good Neighbourliness and Co-Operation between Romania and Ukraine, concluded by exchange of letters between the Ministers of Foreign Affairs of Romania and Ukraine, done on 2 June 1997; 2159 *United Nations Treaty Series* 357 (Romanian letter), 363 (Ukrainian counterpart) (**Annex RM 2**).

in detail in later chapters. What must be emphasised here is that the resolution between the Parties of outstanding territorial issues coincided with Romanian insistence on an equitable outcome to the resulting maritime delimitation, in particular having regard to the provisions of Article 121 of the 1982 UNCLOS.

(b) The 2003 Border Regime Treaty

4.36. The 2003 Border Regime Treaty was concluded by the two States in accordance with the 1997 Treaty on Relations. Article 1 of the 2003 Border Regime Treaty expressly adopts the boundary contained in the 1961 Border Regime Treaty:

“The State border between Romania and Ukraine passes on the ground as defined and described in the Treaty between the Government of the People’s Republic of Romania and the Government of the Union of Soviet Socialists [*sic*] Republics on the Romanian-Soviet State Border Regime, Collaboration and Mutual Assistance on Border Matters, signed at Bucharest, on the 27th of February 1961, as well as in all the corresponding demarcation documents, the maps of the State border between the former People’s Republic of Romania and Union of the Soviet Socialists [*sic*] Republics, the protocols of the border signs with their draft sketches, the corresponding annexes and their additions, as well as the documents of verifications of the State border line concluded between the former People’s Republic of Romania/Socialist Republic of Romania and the former Union of the Soviet Socialist Republics in force on the 16th of July, 1990 – the date of the adoption of the Declaration on the State Sovereignty of Ukraine, as well as in the annexes and additions to the above mentioned documents which may be concluded between the Contracting Parties during the period of validity of this Treaty,

with the exception of the sector of the State border line above-defined, that passes from the Northern meeting point of the State borders of Romania, Ukraine and the Republic of Moldova to the Southern meeting point of the State borders of those countries,

and continues, from the border sign 1439 (buoy) on the outer limit of Ukraine’s territorial waters around the Serpents’ Island, up to the point of 45°05’21” north latitude and 30°02’27” east longitude, which is the meeting point with the Romanian State border passing on the outer limit of its territorial sea. The territorial seas of the Contracting Parties measured from the baselines shall permanently have, at the meeting point of their outer limits, the width of 12 maritime miles.

[...]»⁵⁶.

- 4.37. At the moment of signing the 2003 Border Regime Treaty, Romania made a declaration (transmitted to the Ukrainian side by Note verbale no. C26/3118/17 June 2003⁵⁷), by which expressed its hope that the signature of the Treaty was to give an impetus to the bilateral negotiations for the delimitation of the continental shelf and the exclusive economic zones of Romania and Ukraine in the Black Sea, in order to allow for the conclusion of the bilateral agreement on the delimitation of these maritime areas in the shortest delay, and reiterated its position according to which mentioning the geographical coordinates of the last point of the Romanian-Ukrainian boundary separating the territorial seas of the two States would not affect this process of delimitation. This declaration was confirmed by Romania at the moment of the entry into force of the 2003 Border Regime Treaty.⁵⁸
- 4.38. The declaration was triggered by Ukraine's approach during the negotiations on the issue of the delimitation of the continental shelf and the exclusive economic zones of the two States in the Black Sea, which had been unfolding in parallel with the negotiations on the 2003 Border Regime Treaty. According to this approach, the establishment of the final point of the boundary between the territorial seas of the two countries would have necessarily lead to a solution for the delimitation of the outer maritime areas in accordance with the Ukrainian position.
- 4.39. This point, fixed in the Border Regime Treaty as the "outer limit of Ukraine's territorial waters" "which is the meeting point with the Romanian State border passing on the outer limit of its territorial sea" at 45°05'21"N and 30°02'27"E, will be referred to by Romania as "Point F"⁵⁹.

⁵⁶ Treaty between Romania and Ukraine on the Romanian-Ukrainian State Border Regime, Collaboration and Mutual Assistance on Border Matters, signed at Cernăuți, on 17 June 2003 (**Annex RM 3**). The Treaty was registered with the Secretariat of the United Nations on 10 September 2004 by Romania, and was assigned registration no. 40547

⁵⁷ See Note verbale no. C26/3118 dated 17 June 2003 of the Ministry of Foreign Affairs of Romania to the Embassy of Ukraine in Bucharest (**Annex RM 23**)

⁵⁸ See Note verbale no. E VI-1/3559 dated 27 May 2004 of the Ministry of Foreign Affairs of Romania to the Embassy of Ukraine in Bucharest (**Annex RM 24**)

⁵⁹ It is worth mentioning that the Treaty provided for the conclusion of new documents on the position of Point F, if needed in order to preserve the 12-mile breadth of the Romanian territorial sea.

4.40. Point F corresponds to a point on the 12 nm arc drawn around Serpents' Island under the September 1949 Procès Verbal, as adopted by the 1961 Border Regime Treaty, and as described in the individual Procès Verbaux for Point 1439 from 1949 and 1974, and in the 1963 and 1974 Procès Verbaux on the general description of the Romanian-Soviet border. It lays roughly south-south-west of Serpents' Island.

(c) Negotiations in relation to the continental shelf and the exclusive economic zones

4.41. The Romanian–Ukrainian negotiations on the delimitation of the continental shelf and exclusive economic zones opened in 1998, in accordance with the provisions of the Additional Agreement. Before Romania seized this Court with the present case, there were 24 rounds of negotiations, as well as 10 rounds at expert level⁶⁰.

4.42. These negotiations ended into a stalemate, as the two Parties diverged, *inter alia*, on the definition of the relevant coasts, on the method to be applied and on the interpretation and application of the relevant principles agreed in paragraph 4 of the Additional Agreement.

4.43. The positions put forward by the two Parties during the negotiation process were officially explained by both sides in diplomatic correspondence during the negotiation process.

4.44. Romania favoured an approach based on the principles of the Additional Agreement, in conformity with State practice and international jurisprudence, mainly the case-law of this Court. Thus, Romania proposed that the delimitation line be constructed by provisionally drawing an

⁶⁰ These rounds took place as following: 14-16 January 1998 (Kiev), 12-15 October 1998 (Bucharest), 18-22 January 1999 (Kiev), 16-19 March 1999 (Bucharest), 14-16 June 1999 (Kiev), 2-3 December 1999 (Bucharest), 17-19 January 2000 (Kiev), 29-31 March 2000 (Bucharest), 10-11 July 2001 (Kiev), 1-3 October 2001 (Bucharest), 23-24 January 2002 (Kiev), 28 February 2002 (Bucharest), 30-31 May and 11-12 November 2002 (Kiev), 2-3 December 2002 (Bucharest), 21-22 January 2003 (Kiev), 18-19 February 2003 (Bucharest), 9-10 April 2003 (Kiev), 15-16 May 2003 (Bucharest), 13 June 2003 (Kiev), 26-27 September 2003 (Constanța), 13 February 2004 (Odessa), 14 April 2004 (Brăila), 10 July 2004 (Yalta) and 8-9 September 2004 (Bucharest). The rounds at expert level were organized on 11-12 February 2002 (Bucharest), 18-19 February 2002 (Kiev), 5-7 February 2003 (Bucharest), 6-9 May 2003 (Bucharest), 22-23 May 2003 (Kiev), 10-11 July 2003 (Constanța), 4-5 September 2003 (Odessa), 23-24 October 2003 (Suceava), 29-30 April 2004 (Iași) and 6-7 August 2004 (Kiev).

equidistant/median line between the relevant adjacent/opposite coasts of the two States, followed by an eventual adjustment of this line as to take account of the relevant/special circumstances of the delimitation area⁶¹. The presence of Serpents' Island was identified as a most important such circumstance. The equitableness of the line was to be tested by the so-called "proportionality test", as done in international case-law.

4.45. By contrast, according to the Ukrainian proposed method, the delimitation line would have been calculated as an average of two previously determined lines. These were an equidistant/median line between the Romanian mainland coast and the coasts of Serpents' Island and then the Crimean Peninsula, and a line determined in accordance with the so-called "method of proportionality"⁶². This method was undermined by a logical contradiction. Thus, in its first stage, while drawing the equidistant/median line, the Ukrainian side considered as relevant the coast of Serpents' Island and a fragment of the coast of Crimea. By contrast, in its second stage (drawing the "proportionality" line) Ukraine took into account the whole coast of the Ukrainian mainland (including all sectors north to Serpents' Island) – despite that, in accordance with the approach in the first stage, the Ukrainian mainland coast was irrelevant for delimitation purposes.

4.46. In this context, it is worth mentioning that Ukraine, while notifying to the United Nations Secretariat, in accordance to Article 16 (2) of the 1982 UNCLOS, the geographical coordinates of the points defining the baselines for measuring the breadth of its territorial sea, exclusive economic zone and continental shelf in the Black Sea has, did not include Serpents' Island among the relevant points.⁶³ Thus, the Ukrainian approach to consider this maritime feature as relevant for delimiting the continental shelf and the exclusive economic zone of Ukraine is not opposable to Romania or to any other States.

⁶¹ See Note verbale no. C23/491 dated 24 January 2002 of the Ministry of Foreign Affairs of Romania to the Ministry of Foreign Affairs of Ukraine (**Annex RM 25**).

⁶² See Note verbale no. 72/16-446-119 dated 29 May 2002 of the Ministry of Foreign Affairs of Ukraine to the Embassy of Romania in Kiev (**Annex RM 26**).

⁶³ Ukraine. List of the geographical coordinates of the points defining the position of the baselines for measuring the width of the territorial waters, economic zone and continental shelf of the Black Sea, *Law of the Sea Bulletin no.36/1998*, pp. 49-50 (**Annex RM 27**). Also available on www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/UKR.htm

- 4.47. Besides being self-contradictory, the Ukrainian method clearly failed to comply with the principles set out in the Additional Agreement, binding on both Parties. Thus, although the Additional Agreement called for an application of the “principle of equity and method of proportionality as applied in State practice and in decisions of the international courts”, the Ukrainian proposal supposed a totally unprecedented role for proportionality, seen as an independent method of delimitation. Moreover, even if the Additional Agreement provided for the application of the “article 121 of the United Nations Conventions on the Law of the Sea ... as applied in State practice and in international case law” the Ukrainian side insisted that Serpents’ Island should be treated on an equal footing with the opposing Romanian mainland, despite the fact that, in accordance with a consistent body of State practice as well as several decisions of this Court and arbitral tribunals, this maritime formation, due to its geographical position and natural characteristics should be ignored for delimitation purposes.
- 4.48. Furthermore, the resulting Ukrainian claimed-line was not in conformity with the Procès Verbaux concluded between Romania and the USSR starting in 1949, which clearly provided for the maritime boundary passing on the 12 nm arc around Serpents’ Island.
- 4.49. Failure of the Ukrainian side to comply with the provisions of the agreements in force between Romania and Ukraine led to failure of the bilateral negotiations.

(4) Conclusions

- 4.50. The legal implications of these negotiations will be analysed in further detail in later chapters. What needs to be stressed here are four basic facts:
- first, the maritime zone around Serpents’ Island was established in 1949, in terms not limited to a territorial sea;
 - second, that boundary was subsequently affirmed on repeated occasions, without any suggestion that there were further areas appertaining to the USSR beyond the 12 nm line;

- third, Romania's recognition that Serpents' Island belonged to Ukraine in 1997 was bound up with the Additional Agreement and its list of principles applicable in the delimitation in order to achieve an equitable solution;
- fourth, this clear and comprehensive list of principles, if applied correctly during negotiations, with due account given to international State practice and jurisprudence, could have lead to a sustainable and equitable solution for the delimitation issue.

CHAPTER 5

THE INFLUENCE OF HISTORY

- 5.1. It is worth underscoring the fact that neither the 1948 Protocol, nor the procès verbal of delivery-reception signed on Serpents' Island on 23 May 1948 was authorised or ratified by the Romanian Parliament. The two documents by which Serpents' Island was incorporated within the territory of the USSR were not the results of free negotiations between Romania and the Soviet Union and were contrary to the provisions of the Peace Treaty of Paris of 1947.
- 5.2. It is also necessary to mention that the incorporation of Serpents' Island in the Soviet Union was not the only arbitrary act taking place in 1948-1949 with regard to the Romanian territory. Thus, the above mentioned September 1949 Procès Verbal established the river border line on the Kilia arm (the northern arm of the Danube, representing the Romanian-Soviet border) in such a way as to allocate to the USSR several Danubian islets situated on the Romanian side of the navigable channel, in spite of the general principle established by the same Procès Verbal that the border was to follow the middle of the main navigable channel and that the islets were to be allocated accordingly.
- 5.3. Of particular importance for the course of the maritime boundary was the allocation of the river islet of Limba (with an area of 10 km²), part of the Romanian territory situated at the mouth of Kilia, to the USSR. As a result, the river border ceased to follow the navigable channel of Kilia and was shifted to the south, along a minor channel (the Musura). This affected the position of the last point of the land/river border and, consequently, the course of the maritime boundary delimiting the territorial seas of the two States (see **Figure 8** – page 52 of this Memorial).

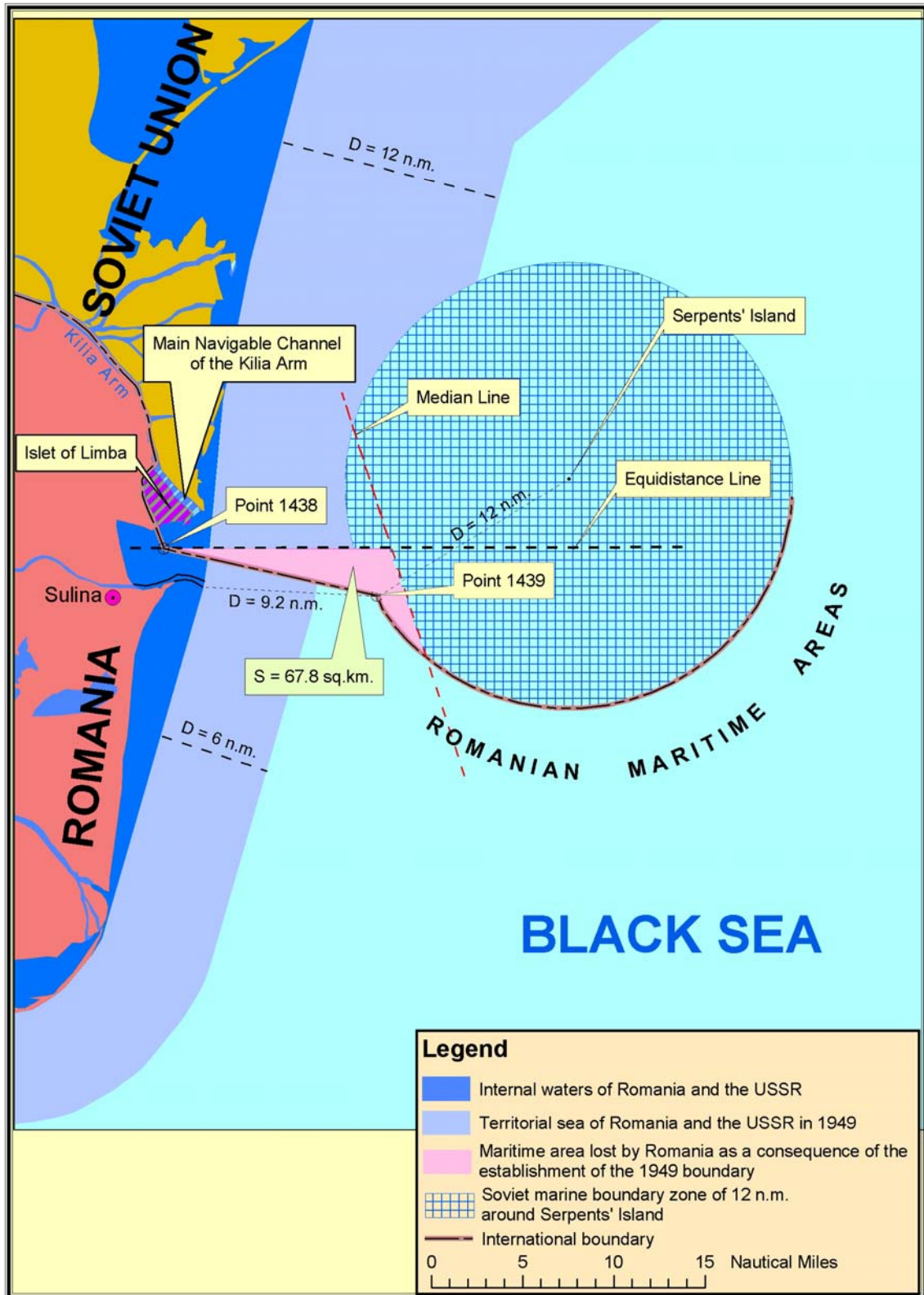


Figure 8

The maritime areas in front of the Romanian and Soviet coasts
 As it can be seen from the sketch, the inclusion of the islet of Limba in the Soviet territory dramatically affected the position of the Romanian-Soviet river border, as well as of the maritime boundary separating the territorial seas of the two States; furthermore, the boundary separating the territorial seas of Romania and the USSR is neither equidistant between the Romanian and Soviet adjacent coasts, nor median between the Romanian and Soviet (Serpents' Island) opposite coasts

5.4. The maritime boundary established by the same September 1949 Procès Verbal and described in detail by the individual Procès Verbaux of Border Signs no. 1437 (the last point of the river border), 1438 (buoy) and 1439 (beacon) is, as well, inequitable towards Romania: it corresponds neither to the line of equidistance between the Romanian and then-Soviet adjacent coasts, nor to the median line between the Romanian coast and Serpents' Island and, moreover, Serpents' Island is given more weight than the Romanian mainland coast⁶⁴. This is more striking as there is no special circumstance in that area that could justify such a solution. As a result of this establishment of the boundary, Romania lost a maritime area of approximately 70 km². The situation is also presented in **Figure 8** (page 52 of this Memorial).

5.5. The above mentioned situation can be explained only by the historical circumstances of that period. After 23 August 1944, Romania was occupied by Soviet troops, which, on 6 March 1945 imposed a government under the leadership of dr. Petru Groza, made up mostly of members of the Communist party, which did not represent the Romanian people⁶⁵. As Keith Hitchins wrote in his well-known volume *Rumania 1866-1947*,

“The Government headed by Petru Groza was a minority government. Imposed by the Soviet Union, it did not represent the will of the majority of Rumanians, who were anti-Russian and anti-Communist”⁶⁶.

5.6. The elections organised by the Groza government on 19 November 1946 were fraudulent and the resulting government was not a genuine reflection of the will of the people. As Hitchins observed,

“Various independent sources suggest that the National Peasants [the main anti-Communist party] were on their way to a landslide victory with about 70 per cent of the vote, an expression of faith in the most democratic of all Rumanian political parties and, no less, a manifestation of strong

⁶⁴ The equidistance line would have followed a more northern tract; the Soviet marine area of Serpents' Island has a breadth of 12 miles, while in that zone the Romanian area was limited to about 9 miles, according to the factual situation of 1949 (8 miles in present).

⁶⁵ See Keith Hitchins, *Rumania 1866-1947*, Clarendon Press Oxford, 1994, pp. 514-515.

⁶⁶ *Ibid.*, p. 516.

national feeling. It appears that when Communist leaders realized the extent of their impending defeat they had the reporting of returns suspended [...] and sent instructions to all prefects to 'revise' the figures in order to show a victory for the Bloc [the Communist-dominated alliance]. Ana Pauker and other Communists appear to have consulted Moscow and to have received the go-ahead to falsify the election results⁶⁷.

- 5.7. Likewise, the proclamation of the "People's Republic" on 30 December 1947 is also generally considered today as an act of a minority. In his book *Romania under Communist Rule*, Dennis Deletant writes:

"In Romania the Communist Party took the initiatives designed to reduce Romania to subservience to the Soviet Union. It did so through the political system, the trade unions, and the educational system.[...]The final action was the forced abdication of King Michael, under the threat of civil war, on 30 December 1947. The same day, the Romanian People's republic was declared. It did not stem from a popular will, freely expressed, but from dictates of a political group who were the puppets of a foreign master. Even the legality of the law establishing the Republic was suspect [...]"⁶⁸

- 5.8. Hence, the events connected to the Romanian-Soviet "understandings" of 1948 and 1949 did not take place between equal partners, but between an occupied State and the occupying power. It is to mention that the Romanian delegation had had a similar behaviour with the occasion of the negotiations of the 1947 Paris Peace Treaty:

"[...] the Rumanian delegation did not contest any issues of vital concern to the Soviet Union. For example, although the pre-1940 frontier between Rumania and Hungary was restored on the grounds that it had been altered under threat of force, Tătărescu [the head of the Romanian delegation at the peace negotiations in Paris] and company did not object to the Soviet annexation of Bessarabia and northern Bukovina. Nor did they bring up the Treaty of Craiova of 1940 with its loss of southern Dobrudja to Bulgaria, now a close Soviet ally. Romanian diplomats who had taken refuge in the West [...] tried to represent the national interests of Greater Rumania and repeatedly showed Western diplomats how the behaviour of the official delegation was dictated by the Soviet Union

⁶⁷ Hitchens, *Romania 1866-1947*, Clarendon Press Oxford, 1994, p. 533. For the general context of the organization of the elections, see p. 529-533.

⁶⁸ Dennis Deletant, *Romania under Communist Rule*, The Center for Romanian Studies, Iași-Oxford-Portland, 1999, p. 56-57

[...].”⁶⁹

5.9. This factual status was maintained to a certain extent, even after the withdrawal of the Soviet troops in July 1958. In this respect, Deletant notes that

“On 25 July 1958, the last of the 35, 000 Soviet troops left Romania. The most significant impact of the Soviet withdrawal upon Romanian leadership was psychological. Romania was still tied firmly within the Soviet bloc. Soviet air and naval bases remained on Romanian territory, and Soviet divisions in southern Ukraine and across the Prut in the Moldavian Republic could descend at once in an emergency”.⁷⁰

5.10. In conclusion, the process of the incorporation of Serpents’ Island in the Soviet Union, as well as the 1949 establishment of the maritime boundary between border signs 1437, 1438, 1439 and beyond did not reflect the free will of the Romanian State.

5.11. The arbitrariness of this situation was underscored by Romania during the 20 years of negotiations between Romania and the USSR on the delimitation of the maritime spaces in the Black Sea. It was emphasised that the unfair way in which Serpents’ Island was transferred, as well as the unfair allocation to it of a maritime area with a breadth of 12 miles (while the breadth of the Romanian territorial sea facing Serpents’ Island was reduced) should not produce more negative effects than those which Romania had been compelled to accept in 1948 and 1949. At the same time, Romania always accepted that the provisions of the 1949 Procès Verbal and its subsequent Romanian-Soviet understandings established – albeit in an inequitable manner – the maritime boundary in the area surrounding Serpents’ Island.

5.12. For instance, with the occasion of the Romanian-Soviet bilateral talks on 2-4 February 1976, the Romanian negotiators referred to the Soviet-advocated delimitation solution as

⁶⁹ See Keith Hitchins, *Romania 1866-1947*, Clarendon Press Oxford, 1994, p. 534.

⁷⁰ See Dennis Deletant, *Romania under Communist Rule*, The Center for Romanian Studies, Iași-Oxford-Portland, 1999, pp 96-97

“[being] based on a factual situation established in 1948, the delimitation of the territorial sea of 1948, which was made in Romania’s disadvantage, based on unknown criteria.”⁷¹

They went on to state that

“in 1949 Serpents’ Island left Romania’s territory against the [provisions of] the peace treaty [...] which established the border between the two States. We do not contest the 1947 [peace] treaty, but we cannot agree with the abnormal situation created in this sector [...] Nobody can use a situation, nobody can prevail of it against another State. This is the situation from 1948: we do not want this situation to perpetrate its negative effects on the delimitation of the continental shelf”.⁷²

5.13. On 17 November 1978, the head of the Romanian delegation conveyed to his Soviet counterpart the following:

“We have listened carefully to the declaration of the Soviet delegation and I would like to make clear that the Romanian delegation does not raise the issue of the maritime boundary between [the territorial seas of] our countries. We have underlined, though, the historical facts that cannot be ignored by either party and that must be taken into account in the delimitation.

In its statement of 15 November, the Romanian delegation stated, among others, the following:

‘Serpents’ Island cannot produce any unfavourable effects for Romania not only because it is a special circumstance in itself, but also because of the way it was detached from the territory of Romania in 1948 contrary to the provisions of the Peace Treaty of Paris of 1947, a situation that can by no means be ignored by the Soviet party’.

This statement is based on the following elements:

1. The Peace Treaty of 15 September 1947 provides in art.1: ‘The frontiers of Romania, shown on the map annexed to the present Treaty (Annex I) shall be those which existed on January 1 1941’. Thus, the provision in the Treaty confirms an undisputable legal situation, *id est* that Serpents’ Island was an integral part of the territory of Romania. The map attached to the Peace Treaty also reflects this situation.

2. The protocol of 4 February 1948, titled “Protocol to Specify the Line of the State Boundary between the People’s Republic of Romania and the Union of Soviet Socialist Republics” concerned only the materialization of the trace of

⁷¹ Extract from the minutes of the 1976 Romanian-Soviet negotiations (**Annex RM 28**).
⁷² Ibid.

the border line established by the Peace Treaty. In the Protocol it is stipulated in the first paragraph that this materialization of the state border is done in accordance with art.1 of the 1947 Peace Treaty. The obligation of the Parties was, accordingly, to fix the trace of the border between the two States as it was at 1 January 1941. Nevertheless, despite the provisions of the Peace Treaty, in this Protocol, the purpose of which was only to define the trace of the state border of Romania existing at 1 January 1941, it is provided that Serpents' Island is incorporated into the USSR. So, by a Protocol having the said purpose, this island was detached from the territory of Romania, contrary to the provisions of the Peace Treaty.

This is the meaning of the contradiction to which we referred in our intervention of 15 November.

We want to remind, also, that even in 1948, when this island was detached from the Romanian territory, there existed a treaty of friendship that stipulated clearly the inviolability of borders, similarly to the 1970 Treaty. Nonetheless, the border was modified by detaching the island from the Romanian territory.

In conclusion, we have made this statement, as during other rounds of our negotiations, going from the necessity that political and legal circumstances linked to Serpents' Island, constituting in itself special circumstances, shall be taken into consideration in order to achieve a truly equitable agreement in respect to the delimitation of the continental shelf in the Black Sea between our countries.”⁷³

5.14. Further, on 15 May 1980, the head of the Romanian delegation said that:

“In relation to Serpents' Island, the Romanian delegation has expressed its position, and not only once. Once more, we underline that we cannot agree with your opinion, that the delimitation of the continental shelf should start from the point of confluence of the territorial seas of Romania with the ones established for Serpents' Island [...] By no means can the territorial waters established by the Soviet party for this minuscule island constitute a starting point for the delimitation. [...].

We see that Serpents' Island is considered by the Soviet delegation the decisive factor in the delimitation of continental shelf between our countries. We want to underline that the island cannot produce any effects, unfavourable for Romania, not only because it is a special circumstance in itself, but also because of the way it was detached from the territory of Romania in 1948 contrary to the provisions of the Peace Treaty of Paris of 1947, a situation that can by no means be ignored by the Soviet party.”⁷⁴

5.15. Again, with the occasion of the last round of the Romanian-Soviet

⁷³ Extract from the minutes of the 1978 Romanian-Soviet negotiations (**Annex RM 29**).

negotiations (1-2 October 1987), the Romanian head of delegation said that

“By establishing, in 1948, an area of water boundary of 12 miles around this island [Serpents’ Island], the maritime area which Romania could have south to Serpents’ Island was diminished [...]. In these conditions this island was not ignored, as it was already allocated its own maritime area, which represents an important effect [...], an effect which must not be exaggerated, given its characteristics.”⁷⁵

Describing the Romanian-proposed delimitation line, the Romanian negotiator added that

“As already shown, we think that, according to its features, Serpents’ Island cannot have its [continental] shelf and [exclusive economic] zone. But we do not ignore it. [...] The delimitation proposal respects the bilateral Romanian-Soviet understandings regarding Serpents’ Island. It will continue to have maritime boundary waters of 12 miles, together with their accompanying soil and subsoil.”⁷⁶

In conclusion, the Romanian delegation pointed out that

“Regarding Serpents’ Island, without mentioning the conditions in which, by the 1948 Procès Verbal, the question of this island was dealt with and notwithstanding the fact that it has very reduced dimensions, we do not ignore it as far as the maritime spaces are concerned. We did not ignore it when the 27 September 1949 Procès Verbal was concluded and established that ‘from the border sign 1439 (beacon), the boundary passes on the exterior margin of the Soviet marine boundary zone of 12 miles, leaving Serpents’ Island on the USSR side’. As at the date of the conclusion of this Procès Verbal the breadth of the Romanian territorial seas was of 6 miles, the agreed delimitation line on that sector separated both territorial waters of the two States and areas that, in the absence of any agreement, would have belonged to the high seas. That is why we are right to consider that, in 1949, our governments established a *sui generis* delimitation line, which confirmed the pass-over of Serpents’ Island to the USSR and allocated to it, in part explicitly and in part implicitly, a semicircular maritime space, with a radius of 12 miles, whose exterior limit on the segment separating Romanian waters from Soviet waters received the characteristics of a State boundary. What was

⁷⁴ Extract from the minutes of the 1980 Romanian-Soviet negotiations (**Annex RM 30**).

⁷⁵ Extract from the minutes of the 1987 Romanian-Soviet negotiations (**Annex RM 31**).

⁷⁶ Extract from the minutes of the 1987 Romanian-Soviet negotiations (**Annex RM 31**).

agreed then is the maximum effect that can be given to this island. We cannot go any further beyond.”⁷⁷

- 5.16. As clearly seen, Romania did not then, in bilateral talks with the USSR or subsequently in its discussions with Ukraine, seek to reverse the coerced transfer of 1948 or the unjust provisions of the 1949 Procès Verbal. Romania put more value on the need for order and stability of the international community than on its own historical frustrations. Thus, by the provisions of the already mentioned bilateral Romanian-Soviet documents concluded in 1961, 1963, 1974, as well as of the Romanian-Ukrainian agreements concluded in 1997, it recognised Serpents’ Island and its 12 mile zone as belonging to the USSR and later Ukraine, as a State successor of the former Soviet Union.
- 5.17. Romania, did, however, always insist that the flawed transaction of 1948 should not be prolonged and extended in space, beyond the actual language of the 1949 delimitation agreements, to the manifest disadvantage of Romania.
- 5.18. This was also the basis for Romania’s insistence in 1997 — when for the first time it formally accepted that Serpents’ Island belonged to Ukraine — that principles of maritime delimitation be adopted which would not cause it such further prejudice, in particular by treating Serpents’ Island as a rock for the purposes of Article 121 of the 1982 UNCLOS. The history of the matter explains the vital link between Romania’s acceptance of the territorial *status quo* and the principles of delimitation specified in the Additional Agreement of 1997.
- 5.19. Likewise before this Court Romania does not ask for the reversal of prior transactions, whatever their merits or auspices. But it does say that the arbitrary acts perpetrated in the 1948 and 1949 – the illegal take-over of Serpents’ Island by the Soviet Union, as well as the unjust allocation of maritime areas to it larger than the maritime areas of Romania and not justified by the very characteristics of this maritime feature - can in no way constitute a basis for further injustice. Hence, the territorial rights of

⁷⁷

Extract from the minutes of the 1987 Romanian-Soviet negotiations (**Annex RM 31**).

Romania cannot be affected more than they have already been, while an equitable solution should take into account any historical or political prejudice previously inflicted.

CHAPTER 6

EXISTING DELIMITATIONS IN THE BLACK SEA

(1) Introduction

- 6.1 The general context of the maritime delimitations already established in the Black Sea should be seen together with its geographical character as an enclosed sea. As further explained in this Chapter, the Romanian-Ukrainian maritime delimitation cannot ignore the delimitation practice existing in the Black Sea, as well as the solutions identified by this practice.
- 6.2 In addition to Romania and Ukraine, both Turkey and Bulgaria have continental shelf and exclusive economic zone entitlements in the western basin of the Black Sea. Considering the geographical configuration of the area, there are five delimitation situations between the riparian States in this western basin.
- 6.3 A number of these delimitations have already been settled by agreement. There are single maritime boundaries for both the continental shelf and the exclusive economic zones between Turkey and Ukraine and between Turkey and Bulgaria.
- 6.4 The boundaries between Romania and Bulgaria and Romania and Turkey have yet to be agreed.
- 6.5 A presentation of the existing delimitations in the western basin of the Black Sea is shown in **Figure 9** (page 62 of this Memorial).



Figure 9
Maritime delimitations in the western basin of the Black Sea

(2) Delimitation Agreements with and between third States

(a) *Turkey/USSR (Ukraine, Georgia, Russian Federation)*

- 6.6 Turkey and the USSR concluded the Agreement concerning the delimitation of the continental shelf between the Republic of Turkey and the Union of Soviet Socialist Republics in the Black Sea (hereafter the “Turkey/USSR Continental Shelf Agreement”) at Moscow on 23 June 1978.⁷⁸ Ukraine and Georgia are successors to this Agreement, and to the boundary it creates, by way of succession following the break-up of the former USSR. The Russian Federation, continuing the personality of the former USSR, is likewise bound by the Agreement as concerns its remaining territory.
- 6.7 Article 1 of the Turkey/USSR Continental Shelf Agreement delimits the continental shelf between the former USSR and Turkey running from the outer limit of the territorial sea between what is now Georgia and Turkey,⁷⁹ diagonally north-west across the central section of the Black Sea south of the Crimean peninsula up to a point situated to the south-west of Sevastopol in the Crimea (43°20'43"N, 32°00'00"E).
- 6.8 Article 1, having set out the coordinates of the turning points of the agreed line, continues:

“The Contracting Parties agree that with the conclusion of this Agreement the line delimiting the continental shelf between the Republic of Turkey and the Union of Soviet Socialist Republics has been defined as far as the point with co-ordinates 43°20'43" north latitude and 32°00'00" east longitude. The Parties have agreed that the question of extending the line delimiting the continental shelf further to the West between the points with co-ordinates 43°20'43"N north latitude and 32°00'00" east longitude

⁷⁸ Agreement between the Government of the Republic of Turkey and the Government of the Union of Soviet Socialist Republics concerning the delimitation of the continental shelf between the Republic of Turkey and the Union of Soviet Socialist Republics in the Black Sea, Moscow, 23 June 1978; 1247 *United Nations Treaty Series* 141 (in force 15 May 1981).

⁷⁹ For delimitation of the territorial sea, see the Protocol between the Government of the Republic of Turkey and the government of the Union of Soviet Socialist Republics concerning the establishment of the maritime boundary between Turkish and Soviet territorial waters in the Black Sea, Ankara, 17 April 1973; 990 *United Nations Treaty Series* 201 (in force 27 March 1975).

and the co-ordinates 43°26'59" north latitude and 31°20'48" east longitude, shall be settled later, in the course of subsequent negotiations, to be held at a convenient time.”

- 6.9 The Agreement therefore envisaged that, in principle, the end-point of the delimitation between the USSR and Turkey would be at or about the point 43°26'59"N and 31°20'48"E. Romania will refer to this point as "Point L". The situation can be seen on **Figure 9** (page 62 of this Memorial).
- 6.10 This point corresponds almost exactly to the equidistance tri-point between the Soviet Union (to which Ukraine is the successor), Turkey and Romania. Accordingly, it is clear that the Soviet Union (and Turkey) envisaged in 1978 that Romania can validly assert a claim to maritime zones out to at least this point, and that, in the absence of a delimitation between the Soviet Union and Romania, agreement of the boundary any further west would be likely to impinge on areas claimed by Romania.
- 6.11 The delimitation boundary established in the Agreement is based on simplified equidistance⁸⁰. It is worth mentioning that, unlike the boundary delimiting the continental shelf between the two countries, the boundary separating their territorial sea had been previously established as a non-equidistant line, on the prolongation of the last course of the land boundary⁸¹.
- 6.12 Following the proclamation of an exclusive economic zone by Turkey on 17 December 1986, Turkey and the USSR agreed by an exchange of notes dated 23 December 1986 and 6 February 1987 (hereafter “Turkey/USSR EEZ Agreement”), that the continental shelf boundary agreed in the Turkey/USSR Continental Shelf Agreement would also constitute the boundary between their exclusive economic zones.

⁸⁰ See *International Maritime Boundaries, vol II*, edited by Jonathan I. Charney and Lewis M. Alexander, Martinus Nijhoff Publishers, 1996, p. 1695.

⁸¹ *Ibid.*, p. 1683.

(b) Turkey/Bulgaria

6.13 On 4 December 1997, Turkey and Bulgaria concluded an Agreement on determination of the boundary in the mouth area of the Rezovska/Mutludere river and delimitation of the maritime areas between the two States in the Black Sea.⁸² The Turkey/Bulgaria Delimitation Treaty delimited the territorial sea (Article 3), and continental shelf and exclusive economic zones (Article 4) of the two States in the south-western portion of the western basin of the Black Sea.

6.14 The maritime boundary thereby drawn between Turkey and Bulgaria runs, with minor variations, roughly east-north-east from the outer limit of the boundary between the territorial seas of the two States “through geodetic lines joining the turning points” defined in Article 4(1). The two final points described by the Agreement are Point 9, located at 43°19'54"N, 31°06'33"E, and Point 10, located at 43°26'49"N, 31°20'43"E. However, Article 4, paragraph 1 of the Agreement continues:

“As for the drawing of the delimitation line of the continental shelf and the Exclusive Economic Zone further to the North-East direction between geographic point 43°19'54" N and 31°06'33" E and geographic point 43°26'49" N and 31°20'43" E, the Parties have agreed that such a drawing will be finalized later at subsequent negotiations which will be held at a suitable time.”

Turkey and Bulgaria accordingly reserved the possibility of further variation between Point 9 and Point 10.

6.15 Point 9 corresponds to the equidistance tri-point between Bulgaria, Turkey and Romania. Accordingly, it is clear that, similarly to the previous approach of the Soviet Union and Turkey, Bulgaria and Turkey envisaged that Romania can validly assert a claim beyond Point 9.

⁸² Agreement between the Republic of Turkey and the Republic of Bulgaria on determination of the boundary in the mouth area of the Rezovska/Mutludere river and delimitation of the maritime areas between the two States in the Black Sea, Sofia, 4 December 1997 (in force 4 November 1998); 2087 *United Nations Treaty Series*. The agreement was registered with the United Nations Secretariat on 1 November 1999 by Bulgaria, and was assigned registration no. 36204.

- 6.16 Point 10 of the Turkey/Bulgaria Delimitation Treaty, located at 43°26'49"N, 31°20'43"E, and the final point defined in the Turkey/USSR Continental Shelf Agreement (Point L) located at 43°26'59"N and 31°20'48"E (which also serves as the final point defined in relation to the exclusive economic zone boundary under the Turkey/USSR EEZ Agreement) are virtually identical, varying only by 10 seconds latitude north and 5 seconds longitude east. This difference may be accounted for by the different projections used in calculating these points.
- 6.17 As already presented above, this point is the equidistance tri-point between Ukraine, Turkey and Romania, while Point 9 from the Bulgaria/Turkey agreements coincides with the equidistance tri-point between Bulgaria, Romania and Ukraine.
- 6.18 The graphic representation of the Bulgarian-Turkish delimitation can be seen on **Figure 9** (page 62 of this Memorial).
- 6.19 As already explained, the 1997 Agreement established the maritime boundary delimiting the Bulgarian and Turkish territorial seas, exclusive economic zones and continental shelf. Due to historical circumstances, the boundary separating the territorial seas of the two States was established on the geographical parallel passing through the terminal land border point; thus, it does not comply with equidistance, even though, taking into account the characteristics of the delimitation area (the coastlines of the two States are relatively even and there are no islands or islets and no major protrusions on either coastline), an equidistance line could be presumed to produce equitable results. However, the situation is different regarding the continental shelf and the exclusive economic zones: the boundary separating these maritime areas is based on a simplified equidistant line, considered by the parties as just and equitable⁸³.

⁸³ See *International Maritime Boundaries, vol IV*, edited by Jonathan I. Charney and Robert W. Smith, Martinus Nijhoff Publishers, 2002, p. 2874.

6.20 As, by agreeing to a maritime boundary separating the territorial seas non-complying with the equidistance principle, Turkey seems to have suffered a territorial loss, it appears that this was compensated by the establishment of the first segment of the boundary delimiting the continental shelf and the exclusive economic zones - in the area lying between the co-ordinates of 42°14'28"N, 29°20'45"E; 42°26'24"N, 29°34'20"E and 42°29'24"N, 29°49'36"E, where the delimitation boundary deviates to the north of the equidistant line, thus allocating to Turkey maritime areas to compensate for the “loss” connected to the delimitation of the territorial seas⁸⁴. This situation is depicted in **Figure 10** (page 68 of this Memorial).

⁸⁴ See *International Maritime Boundaries, vol IV*, edited by Jonathan I. Charney and Robert W. Smith, Martinus Nijhoff Publishers, 2002, p. 2875.

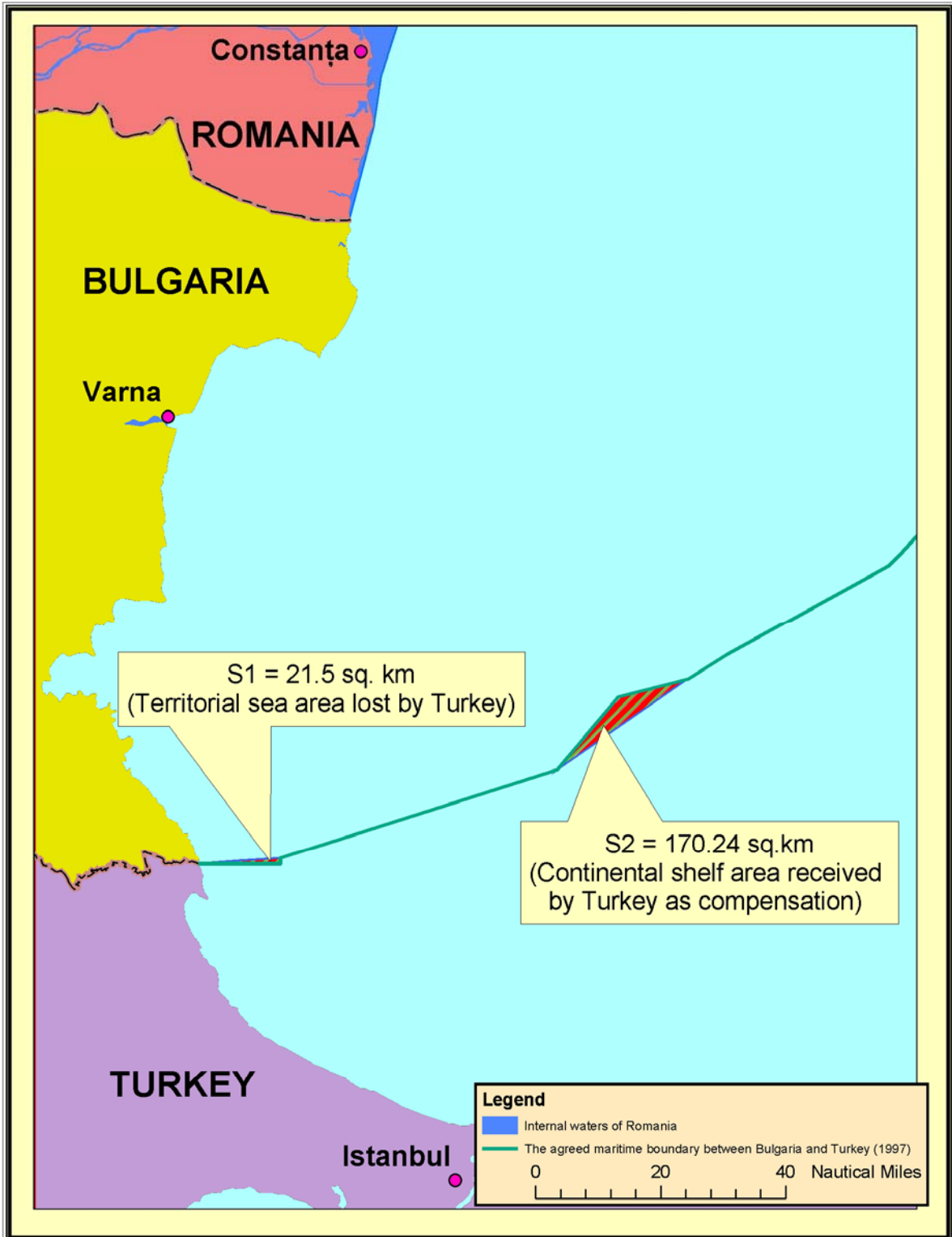


Figure 10

The Bulgarian-Turkish maritime boundary
The area of territorial sea lost by Turkey was compensated by an area of EEZ and continental shelf situated north to the equidistance line

(3) Relevance of other delimitations to the Court's task

- 6.21 In accordance with Article 59 of the Statute of the Court, the judgments of the Court are only binding on the parties, and only in respect of that particular case. There can be no question of prejudging the eventual delimitation of boundaries of either Ukraine or Romania with the other riparian States, or of the other States *inter se*. As the Court noted in the *Qatar/Bahrain* case and again in *Cameroon/Nigeria*, all it can do in such situations is to effect a bilateral delimitation between the two Parties before it, running in a certain direction towards but stopping short of the tri-point.⁸⁵
- 6.22 But the Court is entitled to be informed of the maritime boundary agreements or claims of third parties; the solutions established by the existing delimitation agreements, together with the geographical characteristics of the area in which these delimitations were concluded deserve being analysed in detail.
- 6.23 The Black Sea is a continental sea, having an area of 462,535 km² (including the small Azov Sea, situated in its northern part). Its only link with other seas – the Mediterranean Sea and, through it, the planetary ocean – is represented by the straits of Bosphorus and Çanakkale and the Sea of Marmara, situated in its South-Western part. Thus, the Black Sea is, in the terms of Article 122 of the 1982 UNCLOS, an “enclosed sea”.
- 6.24 As clearly presented, all the delimitation agreements concluded in the Black Sea used *equidistance* as the method for the delimitation of the continental shelf and the exclusive economic zones. Thus, the Bulgarian-Turkish delimitation line is *equidistant* to the Bulgarian and Turkish adjacent coasts, while the Soviet/Ukrainian-Turkish delimitation line is *median* between the respective relevant coasts. No major consideration was given to other factors related to the

⁸⁵ *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment, ICJ Reports 2001, p. 116 (para. 250); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, ICJ Reports 2002, judgment of 10 October 2002, para. 307. The same approach was taken by the Arbitration Tribunal in

relevant coasts of the parties (such as their geographical configuration or eventual disproportion between them) when the delimitation lines were drawn. Moreover, equidistance was chosen as the solution for the maritime boundary delimiting the exclusive economic zones and the continental shelf of the respective countries irrespective of the fact that the boundary delimiting their territorial seas was not the equidistance line.

6.25 Due to the nature of the Black Sea as an enclosed sea and to its limited area – and the even more limited area of its western part, where the Romanian-Ukrainian delimitation occurs – there is a clear need for consistency among all cases of delimitation in the Black Sea. Thus, using equidistance in all concluded agreements (which was considered equitable by all parties involved) leads to a situation in which using different methods in the other delimitation processes would tend to bring about inequitable results.

6.26 The analysis of international case-law leads to the conclusion that, in cases of enclosed seas, the actual or prospective delimitation agreements in the relevant area constitute a relevant circumstance for delimitation purposes.

6.27 Thus, in the *North Sea Continental Shelf cases*, the Court found that one of the relevant circumstances in the area of delimitation is

“the element of reasonable degree of proportionality, which delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal States and the length of the relevant part of its coast”, underlining that in the evaluation of this circumstance due account is to be taken of the “effects, actual and prospective, of any other continental shelf delimitation between States in the same region”.⁸⁶

6.28 A similar statement was made by the Court in the *Tunisia/Libya case*.⁸⁷

Eritrea-Yemen (Second Stage: Maritime Delimitation), Award of 17 December 1999, *International Legal Materials*, vol. 40, p. 1006 (para. 136).

⁸⁶ *North Sea Continental Shelf Cases, Judgment, ICJ Reports 1969*, p. 4 54 (para. 101 D (3)).

⁸⁷ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, ICJ Reports 1982*, p. 93 (para. 133 B (5)).

6.29 In the Case of the delimitation of the maritime boundary between Guinea and Guinea-Bissau, the Arbitral Tribunal stated that

“[a] delimitation designed to obtain an equitable result cannot ignore the other delimitations already made or still to be made in the region”⁸⁸.

6.30 The factual geographical situation of the Black Sea, as well as the homogenous practice regarding delimitations of maritime areas, makes a similar treatment essential.

6.31 For instance, in the western part of the Black Sea, the Bulgarian-Turkish and Ukrainian-Turkish delimitations of the continental shelf and the exclusive economic zones were realised on the basis of equidistance between the relevant adjacent/opposite coasts. The equidistant/median line was generally not corrected to reflect other factors (such as an eventual disproportion between the lengths of the relevant coasts)⁸⁹ – a solution which seems to have disadvantaged Turkey, which has a coast longer than both the Ukrainian and Bulgarian relevant coasts.

6.32 Using different approaches in the Romanian-Ukrainian process of delimitation would lead to an inequitable result in favour of one party, which could benefit from a correction of the delimitation line in its advantage and, on the other hand, would benefit from no correction having been done in its disadvantage in relation with a third State. To avoid such a situation, the equitable approach is to apply the method of equidistance in the case of delimitation between Romania and Ukraine too – as it is also set forth in paragraph 4 b) of the Additional Agreement.

6.33 Moreover, one cannot but notice the similarity between the situation in the cases of delimitation of Romania and Ukraine, on the one hand, and the delimitation

⁸⁸ *ILR vol. 77*, p. 677 (para.93); also *RIIA, vol. XIX*, part IV (1985), p. 183 (para. 93)

⁸⁹ In the case of the Turkey/Bulgaria Delimitation Treaty the boundary between the EEZ and continental shelf of the two States was corrected so as to compensate for the position of the boundary in the territorial sea - see para.6.20 of this Memorial.

effected between Bulgaria and Turkey, on the other hand. The ratio of proportionality between the relevant coast of Romania and Ukraine and respectively Bulgaria and Turkey is roughly the same, and the geographical relationship between these relevant coasts is also similar. The situation in the southern part of the western basin of the Black Sea resembles the situation in its northern part, except for the presence of Serpents' Island. For considerations of logic and equity, the same method – *i.e.*, equidistance – should be applied in the case of delimitation between Romania and Ukraine, subject always to the special situation of Serpents' Island, already substantially covered by agreement, as has been shown⁹⁰.

- 6.34 Considering the elements mentioned above, the general situation of the Black Sea – from the point of view of its geographical characteristics which give it the characteristic of an enclosed sea – seen in conjunction with the delimitation solutions consecrated in the delimitation agreements already concluded leads to a situation in which an eventual dramatic change of the method used for the delimitation of the economic areas of Romania and Ukraine, as against the method used in all other delimitations completed in the Black Sea, will lead to inequitable results. Thus, it seems certain that, in view of the already established practice of delimitation in the Black Sea, which is a geographically limited, enclosed sea, the only method of delimitation prone to bring about equitable results is equidistance – the same method used in the other agreements already in force – certainly, qualified by any pre-existing agreements or relevant circumstances.

⁹⁰ The situation of the maritime boundaries separating the territorial seas of Romania and Ukraine, on the one hand, and Bulgaria and Turkey, on the other hand, is also similar: in both cases these boundaries were established by agreement and depart from equidistance.

PART II

**THE APPLICABLE LAW AS AGREED BY THE
PARTIES**

CHAPTER 7

APPLICABLE BILATERAL TREATIES

(1) Paramountcy of agreement in maritime delimitation

7.1 Romania and Ukraine are now parties to the 1982 UNCLOS. Romania deposited its instrument of ratification on 17 December 1996 and Ukraine did so on 26 July 1999. The Convention entered into force as between them on 25 August 1999, in accordance with Article 308(2) of the 1982 UNCLOS.⁹¹

7.2 Articles 74 and 83 of the 1982 UNCLOS deal with delimitation of the exclusive economic zone and continental shelf, respectively. Article 74 provides:

*“Delimitation of the exclusive economic zone
between States with opposite or adjacent coasts*

1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.
3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.
4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.”

⁹¹ Both States were previously parties to the Convention on the Continental Shelf, Geneva, 29 April 1958 (in force 10 June 1964), 499 *United Nations Treaty Series* 312. Ukraine ratified the Convention on 12 January 1961; Romania acceded to it on 12 December 1961.

Similarly, Article 83 provides:

*“Delimitation of the continental shelf between
States with opposite or adjacent coasts*

1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.
3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.
4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.”

7.3. As recognised in Articles 74 and 83, in maritime delimitation the fundamental norm is that the parties shall effect the delimitation “by agreement on the basis of international law... in order to achieve an equitable solution”. This is equally the position under general (customary) international law, as recognized by the Court in the *North Sea Continental Shelf* cases and on many subsequent occasions. In the *North Sea Continental Shelf* cases,⁹² the Court observed that, starting with the Truman Proclamation “the two concepts, of delimitation by mutual agreement and delimitation in accordance with equitable principles, have underlain all the subsequent history of the subject”.⁹³ Later the Court observed that there existed certain basic legal notions reflecting

⁹² *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, ICJ Reports 1969*, p. 4.

⁹³ *Ibid.*, pp. 35-36 (para. 55).

“the *opinio juris* in the matter of delimitation; those principles being that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles.”⁹⁴

As a consequence, the Court ruled that, as a matter of customary international law:

“delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances...”⁹⁵

- 7.4. For the purposes of Articles 76(4) and 83(4), evidently it does not matter whether the agreement in question was concluded before or after the entry into force of the 1982 UNCLOS for the States concerned. Whenever it may have been concluded, an agreement in force relating to the delimitation of the exclusive economic zones and/or continental shelf remains binding, and the delimitation “shall be determined in accordance with the provisions of that agreement.” Moreover this language clearly applies to partial as well as complete delimitations. For example a treaty which partly delimits maritime zones is binding even though the parties may have still to complete the task of delimiting their outer maritime areas.
- 7.5. Articles 74(4) and 83(4) of the 1982 UNCLOS are formulated in broad terms. They cover not only agreements on the precise location of a delimitation, but agreements on “questions relating to the delimitation of the exclusive economic zones or the continental shelf”. Thus, for example, an agreement between the parties that a particular feature should not be considered as a base-point for the purposes of delimitation would be an agreement “relating to the delimitation of the continental shelf”.
- 7.6. Thus, the various Procès Verbaux concluded between Romania and USSR in 1949, 1963 and 1974, establishing the direction of the maritime boundary on the

⁹⁴ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, ICJ Reports 1969*, pp. 46-47 (para. 85)

⁹⁵ *Ibid.*, p. 53 (para. 101(C)(1))

12 mile arc around Serpents' Island clearly constitute "agreements in force relating to the delimitation". To the extent that it determines the principles to be applied in effecting the delimitation of this particular area, paragraph 4(a) to (e) of the Additional Agreement constitutes as well "an agreement in force ... relating to the delimitation" of the exclusive economic zone and continental shelf within the meaning of UNCLOS Articles 74(4) and 83(4), and is to be applied by the Court as such.

7.7. Furthermore, having regard to the principle of primacy of agreement in maritime delimitation (1982 UNCLOS Articles 74(1) and 83(1)), an agreement between two Parties that certain principles are to be applicable in the negotiations for a delimitation between them must be considered as equivalent to an agreement that those same principles should be applied by the Court. By agreeing to resort to judicial delimitation the parties ask the Court to determine on their behalf the equitable solution having regard to the relevant circumstances, in case the parties are unable to agree on such a solution themselves. In effect the Court is doing for the parties what they have been unable to achieve for themselves.⁹⁶ There would be no point in agreement on the relevant factors in a delimitation if—the parties having failed to agree on how they are to be applied—the Court were free to ignore those factors in delimiting the boundary.

7.8. On that view, a State which had agreed, for example, that a particular feature was to be considered a "rock" for the purposes of Article 121(3), could simply frustrate the negotiations by one means or another, in the expectation that its agreement would be considered irrelevant by a Court. This cannot be correct or consistent with the principle of good faith, which is underlined by Article 300 of the 1982 UNCLOS. If a factor is agreed by the parties to be relevant or binding for the delimitation, it must be equally relevant or binding for the Court in carrying out the delimitation on their behalf. In short, for two States to say that,

⁹⁶ Cf. the observation of the Court in *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, ICJ Reports 1969, p. 47 (para. 87) "the judicial settlement of international disputes 'is simply an alternative to the direct and friendly settlement of such disputes between the parties'", citing the Order of the Permanent Court in *Free Zones of Upper Savoy and the District of Gex (First Phase)*, P.C.I.J., 1929, Series A, No. 22, p. 13.

in their negotiations, aimed at reaching an agreement on a delimitation, certain principles are applicable is to say that those same principles should also direct the Court in its assessment of what is an equitable solution.

(2) Relevant agreements between Romania and Ukraine

7.9. Several agreements have been concluded between Romania and the USSR and, respectively, Ukraine that pertain to their common border. Apart of the Romanian-Soviet Procès Verbaux, the provisions of which were presented in detail in paragraphs 4.3 – 4.26 above, there are three agreements concluded between Romania and Ukraine relevant for the common border, as specified in paragraph 1.4 above. Their substantive provisions, and the relationship between them, must now be described.

(a) The Romanian-Soviet Procès Verbaux concluded in 1949, 1963 and 1974

7.10. The Romanian-Soviet Procès Verbaux concluded in 1949, 1963 and 1974 (both the general detailed descriptions of the Romanian-Soviet border and the individual Procès Verbaux drafted for particular border signs, particularly for border signs no.1438 (buoy) and 1439 (beacon)), as well as the 1954 Act referring to the border sign no. 1439 established the trace of the land and the river border between Romania and the USSR and also the maritime boundary from the final point of the river border until the area in the vicinity of Serpents' Island (on the 12 mile exterior arc surrounding Serpents' Island).

7.11. The provisions of the said Procès Verbaux have already been presented in detail. Their significance and consequences upon the present case will be presented further in Chapter 11 of this Memorial. For the moment it is sufficient to emphasise that these documents represent agreements in force between Romania and Ukraine, establishing the initial segment of the maritime boundary between them, from Point F (the final point of the boundary delimiting the territorial seas of the two States) on the 12-mile arc around Serpents' Island.

(b) The Treaty on Relations

7.12. As noted above, the Treaty on Relations foresaw the conclusion of a separate treaty on the border regime between the two States and the settlement of the problem of the delimitation of their continental shelf and exclusive economic zones.

7.13. Article 2 of the Treaty on Relations provides:

“1. The Contracting Parties, in accordance with the principles and norms of international law and with the principles of the Helsinki Final Act, reaffirm that the existing border between them is inviolable and therefore, that they shall refrain, now and in the future, from any attempt against this border, as well as from any demand for, or act of, seizure and usurpation of part or all the territory of the other Contracting Party.

2. The Contracting Parties shall conclude a separate Treaty on the regime of the border between the two states and shall settle the problem of the delimitation of their continental shelf and exclusive economic zones in the Black Sea on the basis of the principles and procedures agreed upon by exchange of letters between the Ministers of Foreign Affairs, which shall take place simultaneously with the signature of the Treaty. The understandings included in this exchange of letters shall enter into force simultaneously with the entry into force of this Treaty.”⁹⁷

7.14. Of particular significance here is the stipulation contained in the last sentence. This refers specifically to “[t]he understandings included in this exchange of letters”, prominent among them the agreement on the principles applicable in the delimitation. The Treaty on Relations and the Additional Agreement were evidently considered as a “package” reflecting significant concessions made on both sides.

⁹⁷ Treaty on the Relations of Good Neighbourliness and Co-Operation between Romania and Ukraine, signed at Constanța, on 2 June 1997; 2159 *United Nations Treaty Series* 335 (**Annex RM 1**).

(c) The Additional Agreement

7.15. In addition to the 1982 UNCLOS, the principles recognised by the Parties in the 1997 Additional Agreement should be taken into account by the Court in delimiting the continental shelf and the exclusive economic zone beyond the 12 nm arc around Serpents' Island. They have the status of agreed principles. It is significant that they acquired that status at a time when Ukraine was not a party to the 1982 UNCLOS. This Convention was not applicable at that time in relation to the delimitation, and (absent later Ukrainian ratification) might never have become applicable.

7.16. The Additional Agreement took the form of an exchange of letters between the Ministers of Foreign Affairs of Romania and Ukraine, as envisaged by the Treaty on Relations. In its paragraph 4, the Additional Agreement foresaw the conclusion of a negotiated agreement on the delimitation of the continental shelf and the exclusive economic zones between the two States in the Black Sea and proscribed the following principles as applicable to the negotiations:

“a) The principle stated in article 121 of the United Nations' Convention on the Law of the Sea of December 10, 1982, as applied in the practice of state and in international jurisprudence;

b) 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;

c) The principle of equity and the method of proportionality, as they are applied in the practice of state and the decisions of international courts regarding the delimitation of continental shelf and exclusive economic zones;

d) The principle according to which neither of the Contracting Parties shall contest the sovereignty of the other Contracting Party over any part of its territory adjacent to the zone submitted to delimitation;

e) The principle of taking into consideration the special circumstances of the zone submitted to delimitation.”⁹⁸

Paragraph (f) contains an undertaking by both States to refrain from exploitation of the resources of the continental shelf and the exclusive economic zones from the delimitation area, pending a solution of the problem, unless by agreement via joint exploitation. Paragraph (g) provides that the negotiations were to begin as soon as possible and in any case within three months from the entry into force of the Treaty on Relations. Paragraph (h) records the agreement between the two Parties that the problem of the delimitation of the continental shelf and exclusive economic zones might be submitted to this Court, subject to the fulfilment of certain conditions, as described in Chapter 1.

(d) The 2003 Border Regime Treaty

7.17. As set out above in Chapter 4 of this Memorial, the 2003 Border Regime Treaty was concluded as foreseen by the 1997 agreements, and delimited the land and sea boundary between the two States out to the point where the outer limit of Romania’s territorial sea meets the 12 nm arc drawn around Serpents’ Island at Point F.

7.18. As also set above, the agreed maritime boundary adopts the boundary as in force between Romania and the USSR upon the independence of Ukraine in 1991. This boundary is that under the September 1949 Procès Verbal (as incorporated in the 1949 and, subsequently, the 1961 Border Regime Treaty) and the subsequent Procès Verbaux, in particular, the 1963 Procès Verbal and the 1974 Procès Verbal together with the accompanying individual descriptions of the border points.

⁹⁸ Agreement Additional to the Treaty on the Relations of Good Neighbourliness and Co-Operation between Romania and Ukraine, concluded by exchange of letters between the Ministers of Foreign Affairs of Romania and Ukraine, done on 2 June 1997; 2159 *United Nations Treaty Series* 357 (Romanian letter), 363 (Ukrainian counterpart) (**Annex RM 2**).

7.19. The question of territorial sea delimitation is not before the Court. That being so, the principal importance of the 2003 Border Regime Treaty (other than in relation to the question of the jurisdiction of the Court) is that the final point of the boundary defined by the 2003 Treaty (Point F) constitutes the starting point of the delimitation line which the Court is called upon to establish. The 2003 Treaty stops at Point F because it relates exclusively to the land, river and maritime boundary up to the outer limit of the territorial sea. Agreement on the territorial sea boundary is entirely without prejudice to earlier agreements on the character of the 12 nm boundary around Serpents' Island, and the criteria to be applied in completing the maritime delimitation.

(3) Conclusions

7.20. In accordance with the primacy of agreement in delimitation, to the extent that agreements have been concluded between Romania and Ukraine (or between Romania and the USSR, which bind Ukraine by way of succession) delimiting the maritime zones between them outside the territorial sea, those agreements are controlling as to the respective entitlements of the Parties.

7.21. Further, the principles recognised by the Parties in the 1997 Additional Agreement fall to be applied by the Court in delimiting the continental shelf and the exclusive economic zones and govern the delimitation where the boundary has not already been so agreed.

CHAPTER 8
THE PRINCIPLES IDENTIFIED IN THE ADDITIONAL
AGREEMENT

(1) Introduction

- 8.1 The principles identified in paragraph 4 of the Additional Agreement are evidently not disjoined from the general international law of maritime delimitation as applied by this Court and by arbitral tribunals. Two of these principles specifically refer to State practice and international case-law (principles a) and c)), and the application of the three others cannot ignore these elements as well. Nonetheless the items selected for specific mention in paragraph 4 are significant, as is the order in which they are listed. They reflect an appreciation by the Parties, with knowledge of the dispute, as to the most relevant factors.
- 8.2 This Chapter will analyse each of these principles, having regard to the language of paragraph 4 and any considerations arising from State practice or the jurisprudence which may be relevant to the present dispute. The detailed application of the principles to the geographical situation before the Court will be discussed in Part III of this Memorial.
- 8.3 The application of the principles provided for by the Additional Agreement leads to a method of delimitation in full conformity with the jurisprudence of various international courts, mainly with the recent case-law of this Court. This method consists in first drawing a provisional equidistant/median line between the relevant coasts of the two States, and then analysing the relevant circumstances of the delimitation area and eventually shifting the position of the equidistant/median line to accommodate them in order to achieve an equitable result.

(2) Article 121 of the 1982 UNCLOS

8.4 Paragraph 4 a) of the Additional Agreement refers to:

“The principle stated in article 121 of the United Nations’ Convention on the Law of the Sea of December 10, 1982, as applied in the practice of states and in international jurisprudence”.

8.5 Article 121 of the 1982 UNCLOS lays down the regime of islands and in particular the ability of islands to generate maritime zones for the coastal State. It provides:

“Regime of islands

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”

(a) The origins of Article 121

(i) The *travaux préparatoires* of the 1982 UNCLOS

8.6 The origins of the present Article 121 of the 1982 UNCLOS are to be found in the different approaches on the role of islands in maritime delimitations that were promoted by various States in the process of drafting and adoption of the text. The *travaux préparatoires* show the intention of some States to clarify the rules applicable to the entitlement of islands to maritime areas. Thus, the 1958 Convention on the Territorial Sea and Contiguous Zone and the 1958 Convention on the Continental Shelf retained a “non-discriminatory” regime for

all islands⁹⁹, in spite of proposals to define islands as being “capable of effective occupation and control”¹⁰⁰.

8.7 During the Third United Nations Conference on the Law of the Sea, delegations showed concern for limiting the possibility of small features like rocks, islets and small islands to generate important areas of continental shelf and exclusive economic zones. Thus, the Ambassador of Malta strongly criticized the

“possibility of States sovereign over isles like Clipperton, Guam, Açores, Saint Helen and Easter Island to extend their jurisdiction over millions of square kilometres [...]”¹⁰¹

8.8. Romania assumed a leading role among the States that argued for a limited effect of small features to generate maritime spaces. Romania’s approach on the capacity of islands to generate maritime spaces and on the role that maritime features have to be given in maritime delimitations was consistent, public and influential in the adoption of Article 121¹⁰². Romania’s determination in this respect was openly driven by its preoccupation that the new instrument governing the law of the sea should reflect its position as to Serpents’ Island not having any effect on the delimitation of the exclusive economic zones and the continental shelf in the Black Sea.

⁹⁹ Article 10 of the 1958 Convention on the Territorial Sea and Contiguous Zone granted territorial sea to any permanent above-water elevation. Article 1 of the 1958 Convention on the Continental Shelf made no distinction between the continental shelf of continental coasts and that of islands.

¹⁰⁰ Proposal of Sir Hersch Lauterpacht during the International Law Commission debates, 1954, *Yearbook of the International Law Commission*, 1954, I, p. 92. The proposal was submitted also by the United Kingdom, Australia, New Zealand, India and South Africa during the 1930 Codification Conference – *Base de Discussion, Conférence pour la codification du droit international de la Société des Nations, Vol. II (Eaux territoriales), Doc. C 74 M 39, 1929 V*, Geneva, 1929.

¹⁰¹ Official Documents, United Nations, General Assembly, First Commission, 22nd Session, p. 10, para. 67.

¹⁰² See Robert Kolb, "L'interprétation de l'article 121, paragraphe 3, de la Convention de Montego Bay sur le droit de la mer: Les rochers qui ne se prêtent pas à l'habitation humaine ou à une vie économique propre...", *Annuaire Français de Droit International XL*, 1994, Editions de CNRS, Paris, p. 891: "It's from the junction of the Romanian-Turkish and African proposals that Article 121 paragraph 3 was born" (« C'est de la jonction des propositions roumano - turques et africaines que naîtra l'article 121 paragraphe 3. »).

8.9 Thus, at the 1973 session of the Sea-Bed Committee of the Conference on the Law of the Sea, Romania proposed the introduction of a new article, addressing the maritime areas surrounding islets and small islands, which read as follows:

“1. Islets and small islands, uninhabited and without economic life, which are situated on the continental shelf of the coast, do not possess any of the shelf or other marine space of the same nature.

2. Such islands may have waters – of their own or forming part of the territorial sea of the coast – the extent of which shall be determined by agreement, taking into account all the circumstances affecting the maritime area concerned and all relevant geographical, geological and other features. The waters thus determined shall not, in any event, affect marine spaces which belong to the State or to neighboring States.”¹⁰³

8.10. The 1973 Romanian proposal was the first document of the Conference to propose the criterion of economic life for a feature to be entitled to maritime areas¹⁰⁴.

8.11. At the second session in 1974, Romania suggested that only islands, and not low-tide elevations, islets or small uninhabited islands without economic life and situated outside the territorial sea, were to be taken into consideration in delimiting ocean space between neighbouring States¹⁰⁵.

8.12. Further, Romania proposed a definition for “islets” and “islands similar to an islet”, on the basis of size (less, or greater, than 1 km²)¹⁰⁶. Islands similar to islets were restricted to any island “which is not or cannot be inhabited

¹⁰³ Document A/AC.138/SC.II/L.53, reproduced in III Sea-Bed Committee Report, 28 General Assembly Official Records (1973), Supp. No 21, 106 (Romania), see also *United Nations Convention on the Law of the Sea 1982 – A Commentary*, Martinus Nijhoff Publishers, 2002, vol III, 324-39.

¹⁰⁴ Syméon Karagiannis, "Les rochers que ne se prêtent pas à l'habitation humaine ou à une vie économique propre et le droit de la mer", *Revue Belge de Droit International*, 1996/2, Éditions Bruylant, Bruxelles, p. 574.

¹⁰⁵ Document A/CONF.62/C.2/L.18 (1974), article 2, paragraphs 2-5, III Official Records 195 (Romania).

¹⁰⁶ Document A/CONF. 62/C.2/L.53 (1974) articles 1 and 2, III Official Records 228 (Romania).

(permanently) or which does not or cannot have its own economic life”.¹⁰⁷ The proposal stated that:

“1. In principle, a State may not invoke the existence, in one of its maritime zones, of islets or islands similar to islets, as defined in article 1, for the purpose of extending the marine spaces which belong to its coasts.

2. Where such elevations of land are situated along the coast of the same State, in immediate proximity thereto, they shall be taken into consideration, in accordance with the provisions of this Convention, for the purpose of establishing the baseline from which the breadth of the territorial sea is measured.

3. Where an islet or island similar to an islet is situated in the territorial sea of the same State but very close to its outer limit, the State in question may reasonably extend its territorial waters seaward or establish an additional maritime zone for the protection of lighthouses or other installations on such islet or island. The additional zones thus established shall in no way affect the marine spaces belonging to the coasts of the neighboring State or States.

4. Islets or islands similar to islets which are situated beyond the territorial sea, on the continental shelf or in the economic zone of the same State, may have around them or around some of their sectors security areas or even territorial waters in so far this is without prejudice to the marine spaces which belong to the coasts of the neighboring State or States.”

8.13. At the eleventh session (1982), Romania proposed the addition of a new paragraph (4) to article 121, reading:

“4. Uninhabited islets should not have any effects on the maritime spaces belonging to the main coasts of the States concerned”¹⁰⁸.

The representative of Romania explained that the proposal was intended to “prevent any State from encroaching on the maritime zones of another State by invoking the existence of uninhabited islands in the delimitation area”¹⁰⁹.

¹⁰⁷ Document A/CONF. 62/C.2/L.53 (1974) articles 1 and 2, III Official Records 228 (Romania).

¹⁰⁸ Document A/CONF.62/L.118 (1982), article 121, paragraph 4, XVI Official Records 225 (Romania).

8.14. Proposals of other delegations also supported this position. Thus:

- a) Malta proposed the definition of an “islet” as a “naturally formed area of land, less than one square kilometre in area, surrounded by water, which is above water at high tide”. According to Malta’s proposal, States could not claim jurisdiction over maritime spaces by virtue of sovereignty or control over islets¹¹⁰.
- b) A group of 14 African States submitted a proposal that limited the right of all islands (not only rocks or islets) to maritime spaces:

“Maritime spaces of islands shall be determined according to equitable principles, taking into account all relevant factors and circumstances, including, *inter alia*:

- the size of the islands;
- the population or the absence thereof;
- their contiguity to the principal territory;
- whether or not they are situated on the continental shelf of another territory;
- their geological and geomorphological structure and configuration”¹¹¹.

The proposal was re-iterated by another group of five States¹¹².

- c) Turkey proposed that paragraph (3) of what become article 121 would be drafted “Rocks shall have no marine space of their own”. The Turkish proposal only allowed islands with a surface of at least one tenth of the State

¹⁰⁹ 169th Plenary Meeting (1982), para 53, XVI Official Records, 97.

¹¹⁰ Document A/AC.138/SC.II/L.28, articles 1 and 9, reproduced in III Sea-Bed Committee Report, 28 General Assembly Official Records (1973), Supp. No 21, at 35, 37 and 40 (Malta).

¹¹¹ Document A/AC.138/SC.II/L.40 and Corr. 1-3, article XII, reproduced in III Sea-Bed Committee Report, 28 General Assembly Official Records (1973), Supp. No 21, at 87, 89 (Algeria, Cameroon, Ghana, Ivory Coast, Kenya, Liberia, Madagascar, Mauritius, Senegal, Sierra Leone, Somalia, Sudan, Tunisia, Tanzania).

¹¹² Document A/AC.138/SC.II/L.43 reproduced in n III Sea-Bed Committee Report, 28 General Assembly Official Records (1973), Supp. No 21, at 98 (Cameroon, Kenya, Madagascar, Tunisia, Turkey).

to which they belonged to have a continental shelf and exclusive economic zone¹¹³.

- d) The text adopted on 28 April 1975 by the informal group on islands stated expressly that in order to be entitled to continental shelf and exclusive economic zone, an island should be able to sustain population on a *permanent basis*¹¹⁴. The group recalled the position of the Turkish delegation, stating that “military or police installations are not sufficient for generating exclusive economic zones”.
- e) Ireland submitted a draft article on delimiting the continental shelf between neighbouring States, together with an explanatory note, stating that:

“It is generally agreed that offshore islands should not be used as the base-point for measuring an equidistance boundary line in all circumstances”.

8.15. These initiatives show the broad support of the Third United Nations Conference on the Law of the Sea for the approach put forward by Romania and the like-minded States. Moreover, the proposals submitted during the Conference show that the intention of the parties was not to limit the effect of Article 121 (3) to what it can be strictly understood by “rocks”.

8.16. The text of article 121 (3) appeared for the first time in the present form in the *Texte unique de negotiation (officiels)*, elaborated by the Presidents of the Conference in 1975¹¹⁵. The article remained unchanged in the revised negotiating texts of 1976, 1977, 1979 and the 1980 Draft Convention¹¹⁶. Even though the text of the present Article 121 does not contain the precise language

¹¹³ Document A/CONF.62/C.2/L.55, Official Records, vol. III, p. 266.

¹¹⁴ Platzöder, *Third United Nations Conference on the Law of the Sea Documents*, Oceana Publications, Dobbs Ferry, New York, vol. IV, p. 222.

¹¹⁵ Article 132 corresponded to the present article 121. Document A/CONF. 62/WP.8.

¹¹⁶ Documents A/CONF. 62/WP.8 Rev.1, A/CONF. 62/WP.10, A/CONF. 62/WP.10 Rev.1, A/CONF. 62/WP.10 Rev.3.

of the Romanian proposals as submitted during the Conference (which is normal in the context of a multilateral negotiation of this kind), the *travaux préparatoires* demonstrate that this text should be read as covering not only rocks *stricto sensu*, but also any minor maritime feature unable to sustain human habitation or economic life of its own.

8.17. It is important to note the position of the USSR concerning article 121. During the 11th Session (1982), when various proposals to amend the existing text were made (among them a British proposal to suppress paragraph 3), the USSR joined other delegations in opposition¹¹⁷.

8.18. It is also important to note that the USSR and the Ukrainian Soviet Socialist Republic gave their agreement on the text, based also on the Russian official version of article 121(3), whose reading is even clearer than the English, French and Spanish ones. Thus, the words “cannot sustain [...] economic life of their own” read in Russian “не пригодны для [...] самостоятельной хозяйственной деятельности”, which may be literally translated as “self-sustaining economic activity” (emphasis added). This reinforces the interpretation that the “economic life” - criterion should be interpreted strictly¹¹⁸.

8.19. In conclusion, the *travaux préparatoires* show that the intention of the parties was to embrace the new approach towards entitlements of islands to maritime spaces, which aimed at more clearly regulating these entitlements. Moreover, the *travaux préparatoires* show that States intended to extend the application of the present article 121 (3) to a larger range of features situated above waters at high tide. Romania’s position to this effect was consistent and public.

¹¹⁷ Official Records, Vol. XVI, 169th Session, paragraph 32 s, p. 105; Official Records, Vol. XVI, 170th Session, para. 27, p. 111.

¹¹⁸ Thus, in an article published in 1999, J. Charney notes that native Russian speakers consulted seem to disagree as to whether this text would permit the purchase of necessities from outside sources – see Jonathan I. Charney, “Rocks That Cannot Sustain Human Habitation”, 93 *AJIL* 863, October 1999.

(ii) Romania's Declaration concerning Article 121

8.20. Upon signature of the 1982 UNCLOS, Romania made the following declaration:

“1. As a geographically disadvantaged country bordering a sea poor in living resources, the Socialist Republic of Romania reaffirms the necessity to develop international cooperation for the exploitation of the living resources of the economic zones, on the basis of just and equitable agreements that should ensure the access of the countries from this category to the fishing resources in the economic zones of other regions or subregions.

2. The Socialist Republic of Romania reaffirms the right of coastal States to adopt measures to safeguard their security interests, including the right to adopt national laws and regulations relating to the passage of foreign warships through their territorial sea.

The right to adopt such measures is in full conformity with articles 19 and 25 of the Convention, as it is also specified in the Statement by the President of the United Nations Conference on the Law of the Sea in the plenary meeting of the Conference on 26 April 1982.

3. The Socialist Republic of Romania states that according to the requirements of equity – as it results from articles 74 and 83 of the Convention on the Law of the Sea – the uninhabited islands without economic life can in no way affect the delimitation of the maritime spaces belonging to the mainland coasts of the coastal States.”

8.21. When depositing its instrument of ratification on 17 December 1996, Romania re-iterated this declaration.

8.22. Neither the USSR nor Ukraine made any comment or objection to the Romanian declaration. Nor did any other State.

8.23. Article 309 of the 1982 Convention prohibits States making reservations to the Convention. Nevertheless, declarations allow States to make clear their position on the interpretation or application of the text. In this sense, Romania's declaration reinforces the interpretation of article 121 (3) that results from the *travaux préparatoires*, that the term “rocks” should be interpreted in an extensive

way, as covering any and all minor maritime features incapable of sustaining human habitation or economic life of their own.

8.24. Romania's declaration does not alter, modify or supersede any provision of the 1982 UNCLOS. It does not represent a reservation in the sense of articles 2-(1)-(d) and 19-21 of the Vienna Convention on the Law of Treaties.

8.25. According to the definition in Article 2-(1)-(d) of the Vienna Convention on the Law of Treaties,

“‘Reservation’ means a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it *purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State*” (emphasis added).

In the present case, Romania did not have the intention to exclude or to modify the effect of any provision of the 1982 UNCLOS. Nevertheless, its declaration is not without legal effect both for Romania and the other contracting parties.

8.26. International law recognises the possibility of such interpretative declarations, which correspond in all respects to the definition recently adopted by the International Law Commission in its Guide to Practice on Reservation to Treaties:

“‘Interpretative declaration’ means a unilateral declaration, however phrased or named, made by a State or by an international organization, whereby that State or that organization purports to clarify the meaning or scope attributed by the declarant to the treaty or to certain of its provisions”.

This is precisely the legal effect of the Romanian declaration, which constitutes, therefore, an interpretative declaration and not a reservation.

8.27. As explained by the International Law Commission, the controlling effect is the “legal effect [that the unilateral statement] purports to produce” and

“[w]hen a treaty prohibits reservation to all [as does Article 399 of the 1982 UNCLOS] or certain of its provisions, a unilateral statement formulated in respect thereof by a State [...] shall be presumed not to constitute a reservation, except where it purports to exclude or modify the legal effects of certain provisions of the treaty or of the treaty as a whole, with respect to certain specific aspects in their application to its author”.

8.28. Furthermore, the conformity of the Romanian Declaration with the object and the purpose of the 1982 UNCLOS has been acknowledged in the literature. Thus, in an article on the declarations made by the States signatories of the 1982 UNCLOS written in 1983, Daniel Vignes underlines that

“Concerning the Romanian declaration, as far as it refers to uninhabited *islands*...and not to rocks (like Article 121.3), it seems to maintain a certain logic regarding the jurisprudence on delimitations, since, such islands being assimilated to the rocks of paragraph 3, which have neither exclusive economic zone, nor shelf, it seems normal that they not be taken into account in a delimitation of exclusive economic zones or continental shelf.”¹¹⁹

8.29. Articles 74, 83 and 121 (3) became binding as between Romania and Ukraine by virtue of the 1997 Additional Agreement. Ukraine had notice of Romania’s declaration, made in 1982 and re-iterated in 1996. Ukraine did not react to this declaration. Therefore, the law represented by article 74, 83 and 121 of the 1982 UNCLOS should be applied in light of the interpretation stated in Romania’s declaration.

8.30. Moreover, when ratifying the 1982 UNCLOS in 1999, Ukraine made no declaration or objection to Romania’s declaration. The 1982 UNCLOS, in force between Romania and Ukraine since 25 August 1999, must be applied and

¹¹⁹ « Pour ce qui concerne la déclaration roumaine, à ceci près qu’elle vise les îles inhabitées...et pas les rochers (comme l’article 121.3), elle semble conserver une certaine logique à l’égard de la jurisprudence sur la délimitation puisque, de telles îles étant assimilées aux rochers du paragraphe 3, qui n’ont ni zone économique exclusive ni plateau, il semble normal qu’elles ne soient pas prises en compte dans une délimitation de zone économique exclusive ou de plateau continental ».- Daniel Vignes, "Les déclarations faites par les Etats signataires de la Convention des Nations Unies sur le droit de la mer, sur la base de l’article 310 de cette Convention", *A.F.D.I.* 1983, p. 733.

interpreted by the Court on the basis of the only interpretation accepted by Romania, as stated in the above quoted declaration.

(b) Significance of the applicability of Article 121

- 8.31. The choice of Article 121 “as applied in State practice and in international case-law” as the first principle of delimitation to be applied by the Parties shows the great importance they attached to it in the context of the present case. This significance is even greater as certain factors are further analysed.
- 8.32. At the time the 1997 Additional Agreement was concluded, the 1982 UNCLOS was not in force between Romania and Ukraine, the latter not yet having ratified it. Instead, the law applicable between the two Parties was represented by the first and fourth of the 1958 Geneva Conventions. The definition of “island”, as well as the entitlement of islands to maritime areas, had been clearly established by the 1958 Conventions. On these aspects, the first two paragraphs of Article 121 of the 1982 UNCLOS brought nothing new.
- 8.33. By contrast, the third paragraph of Article 121 represented something new in the relations between Romania and Ukraine, as its provisions had no similar precedent in the applicable law between the Parties and, in 1997, its status under customary international law was not beyond doubt or argument. The specific reference in the Additional Agreement to Article 121 has the significance of putting beyond question the direct relevance of its third paragraph, referring to rocks which cannot sustain human habitation or economic life of their own. The only feature of the delimitation area to which this paragraph could refer is Serpents’ Island.
- 8.34. At the time when the Additional Agreement was signed and entered into force, Ukraine was well aware of the declaration made by Romania upon its signature

of the 1982 UNCLOS, and confirmed upon ratification¹²⁰. Under these circumstances, Ukraine's acceptance of the reference to Article 121 as one of the principles to be applied in delimitation, clearly indicate that Ukraine accepted the applicability of the third paragraph of Article 121, as interpreted by the Romanian declaration, to the present situation.

8.35. In 1997 Ukraine made no suggestion that Serpents' Island was entitled to larger areas of exclusive economic zone and continental shelf lying to the south and south-east beyond the 12 nm limit previously agreed. If Ukraine had wished to keep such a claim alive – knowing, as it must have done, that the Soviet Union had maintained it in earlier negotiations, and knowing, at the same time, the content of the Romanian declaration made upon signature, and confirmed upon ratification, of the 1982 UNCLOS – the onus was on it to do so.

(c) Article 121 in the jurisprudence of this Court and other tribunals

8.36. Paragraph 4 a) of the Additional Agreement refers to Article 121 of the UNCLOS *as applied by State practice and international case-law* (emphasis added). Consequently, the relevant international jurisprudence needs to be analysed.

8.37. In the case concerning *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, the Court stated that that the “legal definition of an island” was that contained in Article 121(1) of the 1982 UNCLOS and Article 10(1) of the 1958 Convention as a matter of general international law.¹²¹ In the circumstances of the case, there was no reason for the Court to make any reference to Article 121(3), and it did not do so.

¹²⁰ See paras. 8.20-8.30 of this Chapter.

¹²¹ *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain), Judgment, ICJ Reports 2001*, p. 99 (para. 195). Neither Qatar nor Bahrain was party to the 1958 Convention; and only Bahrain was party to the 1982 UNCLOS (see *ibid.*, p. 91 (para. 167)), although both agreed that most provisions of the 1982 UNCLOS relevant to the dispute represented custom (*ibid.*)

- 8.38. It may also be noted that the Denmark/Iceland Jan Mayen Conciliation Commission expressed the view that Article 121 in its entirety “reflect[ed] the present status of international law”, and this even before the adoption of the final text of the 1982 UNCLOS.¹²²
- 8.39. By contrast this Court has yet to pronounce on the application of Article 121(3) directly, although reference was made to the provision in passing in the *Jan Mayen* case.¹²³ Jan Mayen itself was of course much too large a feature to qualify as a “rock” for the purposes of Article 121(3).
- 8.40. It may also be noted in this context that in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, the Court, having early in the judgment described the small island of Filfla as an “uninhabited rock”,¹²⁴ then held as follows:

“An immediate qualification of the median line which the Court considers must be made concerns the basepoints from which it is to be constructed. The line put forward by Malta was constructed from the low-water mark of the Libyan coast, but with regard to the Maltese coast from straight baselines (inter alia) connecting the island of Malta to the uninhabited islet of Filfla. The Court does not express any opinion on whether the inclusion of Filfla in the Maltese baselines was legally justified; but in any event the baselines as determined by coastal States are not per se identical with the points chosen on a coast to make it possible to calculate the area of continental shelf appertaining to that State. In this case, the equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect of certain ‘islets, rocks and minor coastal projections’, to use the language of the Court in its 1969 Judgment [...]. The Court thus finds it equitable not to take

¹²² Conciliation Commission on the Continental Shelf Area Between Iceland and Jan Mayen: Report and Recommendations to the Governments of Iceland and Norway, (1981) *International Legal Materials*, vol. 20, p. 797, at pp. 803-804.

¹²³ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, *ICJ Reports 1993*, pp. 64-65 (para. 60) and pp. 73-74, (para. 80). Cf. the declaration of Judge Evensen who regarded Art. 121(3) as representing custom. The reference to Art. 121(3) was made in the context of argument by Denmark not that Jan Mayen was not capable of generating a continental shelf or EEZ, but that, by analogy with Art. 121(3), Jan Mayen should be given reduced weight in delimiting the respective maritime zones appertaining to Greenland and Jan Mayen in the light of the fact that it could not “sustain and has not sustained human habitation or economic life of its own” (*ICJ Reports 1993*, pp. 73-74 (para. 60)).

¹²⁴ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, *ICJ Reports 1985*, p. 20 (para. 15).

account of Filfla in the calculation of the provisional median line between Malta and Libya...”¹²⁵

In the *Libya/Malta* case, the 1982 UNCLOS was not applicable, given that neither party had ratified it and that in any case it had not at that time acquired the requisite number of signatures in order to enter into force.¹²⁶ The case was accordingly not argued in terms of whether Filfla was a “rock” within the meaning of Article 121(3) of the 1982 UNCLOS¹²⁷. Nevertheless, the solution adopted by the Court arrived at the same result.

¹²⁵ *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, ICJ Reports 1985*, p. 48 (para. 64), quoting *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, ICJ Reports 1969*, p. 36 (para. 57).

¹²⁶ *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, ICJ Reports 1985*, p. 29 (para. 26).

¹²⁷ There are striking similarities existing between Serpents’ Island (see Chapter 9 of this Memorial) and Filfla, which is a rocky formation, with little or no soil, having as the main geographic feature a sort of plateau, covering an area of 2.5 hectares. A description of Filfla can be found at the internet address <http://www.geocities.com/diomedea.geo/Filfla.HTML>.

The description posted at the mentioned internet address reads as follows:

“Filfla is barren, there are no trees, but a variety of shrubs and plants managed to take root (...) Insect life also abounds and one can find: ants, flies and moths. Spiders and scorpions are also present. Due to isolation, Filfla produced an interesting variety of animal species. In the Maltese Islands we find one species of Wall Lizard (Podarcis filfolensis), Filfla hosts the nominate race which is larger than the others found on the other islands. It is black in colour with various blue and green spots. A top snail Helicella spratti var. despotti is endemic to Filfla. A cricket and a beetle found also on Filfla, both have a limited distribution on the Maltese Islands.

The most important animal group found on Filfla belongs to the avian family, particularly the seabirds. No less than four species have been found breeding on Filfla. The largest is the Yellow-Legged Gull Larus cachinnans, nesting mainly on the top of the island. Some 150 pairs nest on Filfla. The birds start arriving in December and breeding starts in March, where two to three eggs are laid in a shallow nest on the ground. The members of the Procellariidae have been found breeding on Filfla; Cory's Shearwater Calonectris diomedea, Levantine Shearwater and the Storm Petrel Hydrobates pelagicus. These are all pelagic birds, coming ashore only to breed, and they do this in complete darkness. The characteristic feature of these birds is the two tubular nostrils at the base of the bill. About 50 pairs of Cory's Shearwater lay their single egg beneath boulders. They arrive in February and the young leave the colony by the second week of October. The smaller Levantine Shearwater possibly breeds in very small numbers. But, the most important bird on Filfla is the Storm Petrel (Kangu ta' Filfla in Maltese). In the not so distant past it was believed that it was to be found only on Filfla in the Maltese archipelago”.

Thus, far from being a mere piece of stone protruding from the waters, Filfla has a fairly significant fauna and flora.

Also, on Filfla a small chapel dedicated to the Assumption of Our Lady was built inside a cave in 1343, where, every Sunday, mass was held for the fishermen fishing around this maritime formation.

Another resemblance with the Serpents’ Island is also noticeable: the erosion process (in accordance with the commentary on the above mentioned website, “winter storms are washing away the underlying clay, and the coralline limestone topping it, breaks and falls into the waters”) or the dangers for navigation (the same source notes that “berthing a boat is extremely dangerous, due to loose rocks and boulders”).

8.41. As to State practice and the international case-law regarding the role of islands, islets and other minor maritime features in maritime delimitations more generally, this will be analysed in detail in paras. 8.86-8.123 of this Chapter, dealing with maritime features as relevant/special circumstances in the context of principle 4 e) of the Additional Agreement.

(3) The principle of equidistance: adjacent and opposite coasts

8.42. Paragraph 4 b) of the Additional Agreement refers to:

“b) 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”.

8.43. Paragraph 4 b) addresses the general situation of adjacent and opposite coasts. Having regard to the fact that only a single maritime feature impinges on the delimitation area, and that this situation has already been addressed in paragraph 4 a), it is evident that the focus of paragraph 4 b) is the situation of mainland coasts, whether opposite or adjacent. In relation to such coasts, the dominant principle is that of equidistance, unless there are special circumstances dictating some other solution. In paragraph 4 b) the Parties specifically recognised this.

8.44. This Court in the *Jan Mayen* case concluded that “both for the continental shelf and for the fishery zones in this case, it is proper to begin the process of delimitation by a median line provisionally drawn”,¹²⁸ and then went on to consider the factors which might require an adjustment to that provisional line.¹²⁹

¹²⁸ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, ICJ Reports 1993*, p. 62 (para. 53). For the Court’s discussion of the appropriateness of use of starting from a provisional median line, see *ICJ Reports 1993*, pp. 59-62, (paras. 49-53), referring to the approach adopted by the Court in the *Libya/Malta (Continental Shelf (Libyan Arab Jamahiriya/Malta), ICJ Reports 1984*, p. 13) and *Gulf of Maine (Delimitation of the Maritime Boundary in the Gulf of Maine Area, ICJ Reports 1984*, p. 246).

¹²⁹ *ICJ Reports 1993*, pp. 62-63 (paras. 54-56).

8.45. Similarly, in the *Qatar/Bahrain* case, having referred to the approach adopted in the *Jan Mayen* case, the Court followed the same course, ruling that:

“For the delimitation of the maritime zones beyond the 12-mile zone it will first provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line.”¹³⁰

8.46. In the *Boundary Dispute between Dubai and Sharjah*, the Arbitral Tribunal applied the method of equidistance, which had been previously agreed upon by the two parties. It stated that:

“this Court [wa]s satisfied that use of the equidistance method [wa]s generally appropriate to, and required in, the present case and that the delimitation of the maritime boundary between the Parties beyond their respective territorial seas should properly be based upon this method where that boundary [wa]s unaffected by the presence of the island of Abu Musa which [wa]s the only “special circumstance” of which account must be taken in the area concerned”.¹³¹

8.47. As the Court said in *Cameroon/Nigeria*:

“The Court has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdictions is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an equitable result.”¹³²

8.48. In the context of delimitations between *opposite* coasts, the equidistance principle has a particular significance. Thus, the 1977 *Anglo-French Court of Arbitration* observed that

¹³⁰ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment, ICJ Reports 2001, p. 111 (para. 230).

¹³¹ *Dubai-Sharjah Border Arbitration* (1981) I.L.R., vol. 91, p. 542 (paras. 672-673).

¹³² *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, ICJ Reports 2002, judgment of 10 October 2002, para. 288.

“it seems ...to be in accord not only with the legal rules governing the continental shelf but also with State practice to seek the solution in a method modifying or varying the equidistance method rather than to have recourse to a wholly different criterion of delimitation.”¹³³

8.49. In the *Jan Mayen* case, where the 1958 Geneva Convention was applicable, the Court, having referred to the 1977 decision of the Anglo-French Court of Arbitration, observed that:

“If the equidistance-special circumstances rule of the 1958 Convention is, in the light of this 1977 Decision, to be regarded as expressing a general norm based on equitable principles, it must be difficult to find any material difference—at any rate in regard to delimitation between opposite coasts—between the effect of Article 6 and the effect of the customary rule which also requires a delimitation based on equitable principles.”¹³⁴

The Court went on to observe that:

“*Prima facie*, a median line delimitation between opposite coasts results in general in an equitable solution, particularly if the coasts in question are nearly parallel. When, as in the present case, delimitation is required between opposite coasts which are insufficiently far apart for both to enjoy the full 200-mile extension of continental shelf and other rights over maritime spaces recognized by international law, the median line will be equidistant also from the two 200-mile limits, and may *prima facie* be regarded as effecting an equitable division of the overlapping area.”¹³⁵

8.50. In the *Libya/Malta* case, the Court stated that:

“It is clear that, in these circumstances, the tracing of a median line between those coasts, by way of a provisional step in processes to be continued by other operations, is the most judicious manner of proceeding with a view to the eventual achievement of an equitable result.”¹³⁶

¹³³ *RIAA vol. XVIII (1977)*, p. 116 (para. 249).

¹³⁴ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, *Judgment*, *ICJ Reports 1993*, p. 58 (para. 46).

¹³⁵ *ICJ Reports 1993*, p. 66 (para. 64).

¹³⁶ *ICJ Reports 1985*, p. 47 (para. 62).

8.51. Similarly, in the second phase of the arbitration between Eritrea and Yemen, the Arbitral Tribunal took “as its fundamental point of departure, that, as between opposite coasts, a median line obtains”.¹³⁷ The Tribunal continued:

“It is a generally accepted view, as is evidenced in both the writings of commentators and in the jurisprudence, that between coasts that are opposite to each other the median or equidistance line normally provides an equitable boundary in accordance with the requirements of the Convention, and in particular those of its Articles 74 and 83 which respectively provide for the equitable delimitation of the EEZ and of the continental shelf between States with opposite or adjacent coasts [...]

The Tribunal has decided, after careful consideration of all the cogent and skilful arguments put before them by both Parties, that the international boundary shall be a single all-purpose boundary which is a median line and that it should, as far as practicable, be a median line between the opposite mainland coastlines. This solution is not only in accord with practice and precedent in the like situations but is also one that is already familiar to both Parties...”¹³⁸

8.52. In the *Award in the Case Concerning the Delimitation of Portions of the Offshore Areas between the Province of Nova Scotia and the Province of Newfoundland and Labrador*, the Tribunal¹³⁹ noted that

“[i]t has become normal to begin by considering the equidistance line and possible adjustments, and to adopt some other method of delimitation only if the circumstances justify it”.¹⁴⁰

8.53. From this analysis of the international jurisprudence, it is clear that the approach can now be taken in terms of a presumption of equidistance, although the presumption can be displaced in a given situation on grounds of equity by reference to the special circumstances of the case.

¹³⁷ *Eritrea-Yemen, Second Stage: Maritime Delimitation*, Award of 17 December 1999, *International Legal Materials*, vol. 40, p. 983 at p. 998 (para. 83).

¹³⁸ *International Legal Materials*, vol. 40, p. 1005 (paras 131-132).

¹³⁹ In this case the Tribunal was required to apply the principles of international law governing maritime boundary delimitation with such modification as the circumstances require, as if the parties were States subject to the same rights and obligations as the Government of Canada at all relevant times.

¹⁴⁰ *Newfoundland and Labrador v. Nova Scotia*, Award of the Tribunal in the Second Phase, Ottawa, 26 March 2002 (available at <http://www.boundary-dispute.ca>), para. 2.28.

8.54. The same international case-law establishes that equidistance (both in the resulting form of an equidistant line between adjacent coast and a median line between opposite coasts) is normally calculated between the mainland coasts of the respective parties; minor islands or other maritime formations are treated only as relevant circumstances that might shift the equidistant/median line.

(4) The principle of equity and the method of proportionality

8.55. Paragraph c) of the Additional Agreement refers to:

“c) The principle of equity and the method of proportionality, as they are applied in the practice of states and in the decisions of international courts regarding the delimitation of continental shelf and exclusive economic zones”.

This recognises that the principle underlying Articles 73 and 84 of the 1982 UNCLOS is that any delimitation must be equitable (i.e. it must “achieve an equitable solution”), having regard to the circumstances of the case.

8.56. This proposition may be traced back to the Truman Proclamation,¹⁴¹ which spoke in terms of delimitation in accordance with “equitable principles”. This approach was in turn endorsed, together with the primacy of agreement, by this Court in the *North Sea Continental Shelf* cases as the two principles underlying maritime delimitation.¹⁴² As the Court said in 1969:

“delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances...”.¹⁴³

8.57. The *North Sea Continental Shelf* cases were concerned only with the continental shelf, but the same approach was subsequently taken in relation to the emergent concept of the exclusive economic zones. Accordingly, referring to the term

¹⁴¹ (1946) 40 *AJIL Supp* 45.

¹⁴² *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, ICJ Reports 1969*, p. 47 (para. 85) (“delimitation must be the object of agreement between the States concerned; and... such agreement must be arrived at in accordance with equitable principles”).

¹⁴³ *ICJ Reports 1969*, p. 53 (para. 101(C)(1)).

“equitable solution” contained in Articles 74(1) and 83(1) of the 1982 UNCLOS, the Court observed in the *Jan Mayen* case that:

“[t]hat statement of an ‘equitable solution’ as the aim of any delimitation process reflects the requirements of customary law as regards the delimitation both of continental shelf and of exclusive economic zone”¹⁴⁴

and similarly, that,

“[t]he aim in each and every situation must be to achieve ‘an equitable result’”.¹⁴⁵

8.58. Further, Paragraph 4(c) of the Additional Agreement refers to the “method of proportionality”, as applied in State practice and international jurisprudence.

8.59. As the Court affirmed in the *North Sea Continental Shelf* cases, a final factor to be taken into account in assessing the equitable nature of a delimitation

“is the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines.”¹⁴⁶

8.60. The Anglo-French Court of Arbitration in 1977 referred to

“an alleged principle of proportionality by reference to lengths of coastlines” as “a factor to be taken into account when appreciating the effects of geographical features on the equitable or inequitable character of delimitation” and that “it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor”.¹⁴⁷

8.61. In the *Gulf of Maine* case, the Chamber of the Court observed that

¹⁴⁴ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, ICJ Reports 1993*, p. 59 (para. 48).

¹⁴⁵ *ICJ Reports 1993*, p. 62 (para. 54).

¹⁴⁶ *ICJ Reports 1969*, p. 52 (para. 98).

¹⁴⁷ *RIAA vol. XVIII (1977)*, p.3, at p. 115 (para. 246), p. 57 (para. 99), p. 58 (para.101).

“a maritime delimitation can ...not be established by a direct division of the area in dispute proportional to the respective lengths of the coast belonging to the parties in the relevant area, but it is equally certain that a substantial disproportion to the lengths of those coasts that resulted from a delimitation effected on a different basis would constitute a circumstance calling for an appropriate correction”.¹⁴⁸

8.62. In the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, the Court also examined the proportionality of the relevant coasts and, in the specific case, found that

“the disparity in length of the coastal fronts of the Parties cannot be considered such as to necessitate an adjustment of the equidistance line”.¹⁴⁹

8.63. The Court drew the same conclusion in the *Cameroon v. Nigeria* case, when it

”acknowledge[d] ... that a substantial difference in the lengths of the parties’ respective coastlines may be a factor to be taken into consideration in order to adjust or shift the provisional delimitation line. The Court note[d] that in the present case, which ever coastline of Nigeria is regarded as relevant, the relevant coastline of Cameroon, ..., is not longer that that of Nigeria. There [was] therefore no reason to shift the equidistance line in favor of Cameroon on this ground.”¹⁵⁰

8.64. In the *Case concerning the Maritime Boundary between Guinea and Guinea Bissau*, as well, the Arbitral Tribunal took into consideration proportionality, as a circumstance that needed to be examined in order for an equitable result to be reached. In this context, the international tribunal underscored the fact that proportionality is not a mathematics equality, but rather a juridical equality. In its award, the Tribunal added that

“[...] this circumstance must not be exaggerated. The delimitation [...] cannot be effected by simply dividing the

¹⁴⁸ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/ United States of America)*, Judgment, ICJ Reports 1984, p. 323 (para. 185).

¹⁴⁹ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment, ICJ Reports 2001, p. 114 (para. 243).

¹⁵⁰ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, ICJ Reports 2002, judgment of 10 October 2002, para. 301.

maritime zones equally between the two States in proportion to the lengths of their coastlines. A delimitation is a legal operation. In order to effect a delimitation, it is certainly necessary to refer to circumstances which may have physical characteristics, but these circumstances must nevertheless be based on considerations of law. Furthermore, the rule of proportionality is not a mechanical rule based only on figures reflecting the length of the coastline. It must be used in a reasonable way, with due account being given to other circumstances in the case [...]. More precisely, in the present case, the fact of taking the islands into account results in the coastlines of the two States being considered by the Tribunal as having the same length.”¹⁵¹

- 8.65. Although in situations where the relevant coastlines are disproportionate this has sometimes been taken as a relevant factor requiring adjustment of a provisional equidistance line,¹⁵² in the practice of international courts and tribunals proportionality has principally been used as a means of confirming the equitableness of a line arrived at by other means by comparing the ratio of the areas provisionally allocated to the ratio of the length of the relevant coastlines. It is thus used principally as a means to conduct a final check on the equitable nature of a delimitation after giving effect to the other relevant circumstances.
- 8.66. In this situation, the test appears to be whether the line adopted by other means is not “disproportionate”, rather than applying any strict requirement that the areas allocated to each State stand in the ratio of their respective relevant coast lines. As the Court of Arbitration said in its award in the maritime delimitation phase of the *Yemen/Eritrea* 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. So, as the Award stated in the *Anglo-French Channel* case, ‘it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor’.”¹⁵³

¹⁵¹ *ILR vol. 77*, p. 988 (para. 120); also *RIAA vol. XIX*, (1985), part. IV, p. 193 (para. 120).

¹⁵² See e.g. *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, *ICJ Reports 1993*, pp. 68-69 (paras. 68-69), p. 77 (para. 87) and pp. 79-81 (paras. 90-93).

¹⁵³ *RIAA, Vol. XXII* (2001), Part IV, p. 335, at p. 372 (para. 165).

8.67. This application of the principle of proportionality is reflected in the practice of this Court. In the *Tunisia/Libya Continental Shelf* case, the Court applied proportionality to compare the ratio of length of the coast lines of the two States to the maritime areas allocated as a test of the equitableness of the delimitation line.¹⁵⁴

8.68. The difference between the two potential uses of the length of coastlines was underlined in the *Libya/Malta Continental Shelf* case where the Court warned:

“In connection with lengths of coasts, attention should be drawn to an important distinction ... between the relevance of coastal lengths as a pertinent circumstance for a delimitation, and use of those lengths in assessing ratios of proportionality. The Court has already examined the role of proportionality in a delimitation process, and has also referred to the operation, employed in the *Tunisia/Libya* case, of assessing the ratios between lengths of coasts and areas of continental shelf attributed on the basis of those coasts. It has been emphasized that this latter operation is to be employed solely as a verification of the equitableness of the result arrived at by other means. It is however one thing to employ proportionality calculations to check a result; it is another thing to take note, in the course of the delimitation process, of the existence of a very marked difference in coastal lengths, and to attribute the appropriate significance to that coastal relationship, without seeking to define it in quantitative terms which are only suited to the *ex post* assessment of relationships of coast to area. The two operations are neither mutually exclusive, nor so closely identified with each other that the one would necessarily render the other supererogatory. Consideration of the comparability or otherwise of the coastal lengths is a part of the process of determining an equitable boundary on the basis of an initial median line; the test of a reasonable degree of proportionality, on the other hand, is one which can be applied to check the equitableness of any line, whatever the method used to arrive at that line.¹⁵⁵

8.69. Further, the Court commented on the role of proportionality in the following terms:

¹⁵⁴ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, ICJ Reports 1982, p. 91 (para.

131).

¹⁵⁵ *Continental Shelf (Libyan Arab Jamahiriya/ Malta)*, Judgment, ICJ Reports 1985, p. 49 (para. 66).

“to use the ratio of coastal lengths as of itself determinative of the seaward reach and area of continental shelf proper to each Party, is to go far beyond the use of proportionality as a test for equity and as a corrective of the unjustifiable difference of treatment resulting from some method of drawing the boundary line. If such a use of proportionality were right, it is difficult indeed to see what room would be left for any other consideration; for it would be at once the principle of entitlement to continental shelf rights and also the method of putting that principle into operation. Its weakness as a basis of argument, however, is that the use of proportionality as a method in its own right is wanting of support in the practice of States, in the public expression of their views at (in particular) the Third United Nations Conference on the Law of The Sea, or in the jurisprudence”¹⁵⁶.

8.70. From international case-law, it is accordingly possible to extract the following principles:

- (1) proportionality or disproportion is in any case assessed on the basis of the ratio between the coasts relevant to delimitation, taking into consideration their general direction and ignoring, for considerations of equity, their sinuosities;
- (2) proportionality has never been used as an independent mode or method of delimitation, but as a relevant circumstance in delimitation, justifying adjustment of a provisional equidistance line; it may also be used as a test of the equitableness of the result.
- (3) when utilising proportionality between the ratio of the lengths of the relevant coasts compared to the ratio of the area allocated to each party of the area to be delimited in order to assess the equitableness of a given line, the question is whether the relationship is one of *disproportion* between the two ratios, not whether they are in any given arithmetical proportion to one another.

¹⁵⁶ *Continental Shelf (Libyan Arab Jamahiriya/ Malta), Judgment, ICJ Reports 1985*, p. 45 (para. 58).

(5) The principle of non-contestation of territory

8.71. Paragraph 4 d) of the Additional Agreement refers to:

“d) The principle according to which neither of the Contracting Parties shall contest the sovereignty of the other Contracting Party over any part of its territory adjacent to the zone submitted to delimitation”.

8.72. This principle does not apply to the maritime delimitation as such; however, it forms an essential part of the context and background against which the other principles were agreed by the Parties in 1997.

8.73. In particular, its presence demonstrates that the criteria laid down in the Additional Agreement were specifically tailored to the situation of Serpents’ Island, and that they are not a mere general recital of a declaratory character.

8.74. As already observed, Romania does not contest that Serpents’ Island belongs to Ukraine, despite the circumstances in which that came to be so. Nor does Romania contest the sovereignty of Ukraine over any other parts of its territory, including its territorial sea.

(6) The principle of taking into account special circumstances

8.75. Paragraph 4 e) of the Additional Agreement refers to:

“e) The principle of taking into consideration the special circumstances of the zone submitted to delimitation.”

8.76. As already indicated, the recent practice of the Court shows that the normal approach to any delimitation is to take an equidistance or median line as the starting point and then to adjust it so as to take account of relevant or special circumstances, whether the delimitation is conducted under general international law, the 1958 Geneva Continental Shelf Convention, or under the 1982 UNCLOS. A similar approach is recognised through the combination Paragraphs

4 b) (equidistance/median line) and 4 e) (special circumstances) of the Additional Agreement.

8.77. As emphasised by the Court in the *Jan Mayen* case, the difference between the “equitable principles/relevant circumstances” method under customary international law (as reflected in Articles 74 and 83 UNCLOS), and the situation under the 1958 Convention, based on the “equidistance/special circumstances” approach is slight or non-existent:

“54. ... The aim in each and every situation must be to achieve ‘an equitable result’. From this standpoint, the 1958 Convention requires the investigation of any ‘special circumstances’; the customary law based upon equitable principles on the other hand requires the investigation of ‘relevant circumstances’.

55. The concept of ‘special circumstances’ was discussed at length at the First United Nations Conference on the Law of the Sea, held in 1958. It was included both in the Geneva Convention of 29 April 1958 on the Territorial Sea and the Contiguous Zone (Art. 12) and in the Geneva Convention of 29 April 1958 on the Continental Shelf (Art. 6, paras. 1 and 2). It was and remains linked to the equidistance method there contemplated, so much so indeed that in 1977 the Court of Arbitration in the case concerning the delimitation of the continental shelf (United Kingdom/France) was able to refer to the existence of a rule combining ‘equidistance-special circumstances’ (see paragraph 46 above). It is thus apparent that special circumstances are those circumstances which might modify the result produced by an unqualified application of the equidistance principle. General international law, as it has developed through the case-law of the Court and arbitral jurisprudence, and through the work of the Third United Nations Conference on the Law of the Sea, has employed the concept of ‘relevant circumstances’. This concept can be described as a fact necessary to be taken into account in the delimitation process.

56. Although it is a matter of categories which are different in origin and in name, there is inevitably a tendency towards assimilation between the special circumstances of Article 6 of the 1958 Convention and the relevant circumstances under customary law, and this if only because they both are intended to enable the achievement of an equitable result. This must be especially true in the case of opposite coasts where, as has been seen, the tendency of customary law, like the terms of Article 6, has been to postulate the median line as leading prima facie to an

equitable result. It cannot be surprising if an equidistance-special circumstances rule produces much the same result as an equitable principles-relevant circumstances rule in the case of opposite coasts, whether in the case of a delimitation of continental shelf, of fishery zone, or of an all-purpose single boundary. There is a further finding of the Anglo-French Court of Arbitration to this effect when, after referring to the rule in Article 6, and to the rule of customary law based upon equitable principles and ‘relevant’ circumstances, it said that the double basis on which the parties had put their case,

‘confirms the Court’s conclusion that the different ways in which the requirements of “equitable principles” or the effects of “special circumstances” are put reflect differences of approach and terminology rather than of substance’ ...”¹⁵⁷

(a) The provisional equidistance/median line and special circumstances

8.78. The starting element is accordingly the equidistance or median line drawn from the basepoints which are relevant for the delimitation of the zone(s) in question.¹⁵⁸ As observed by the Court in the *Cameroon/Nigeria* case:

“The Court has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdictions is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an equitable result.”¹⁵⁹

¹⁵⁷ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, ICJ Reports 1993, pp. 62-63 (paras. 54-56) citing the Anglo-French arbitration, RIAA, Vol. XVIII, p. XX, at p. 75, para. 148; (1977) *I.L.R.*, vol. 54, p. 84; *International Legal Materials*, vol. 18, p. 435.

¹⁵⁸ Thus where a small island, islet, rock or other feature cannot constitute a basepoint for the delimitation or does not generate the maritime zone in question, it is ignored in constructing the equidistance line.

¹⁵⁹ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, ICJ Reports 2002, judgment of 10 October 2002, para. 288.

8.79. The Court has previously adopted this approach in a number of cases; thus in the *Jan Mayen* case, a case of opposite coasts, having concluded that “both for the continental shelf and for the fishery zones in this case, it is proper to begin the process of delimitation by a median line provisionally drawn”,¹⁶⁰ the Court went on to consider the factors which might require an adjustment to that provisional line.¹⁶¹

8.80. Similarly, in the *Qatar/Bahrain* case, having referred to the approach adopted in the *Jan Mayen* case, the Court followed the same course, ruling that:

“For the delimitation of the maritime zones beyond the 12-mile zone it will first provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line.”¹⁶²

8.81. However, as emphasised by the Court in the *Jan Mayen* case, in the context of delimitations between *opposite* States, equidistance has a particular significance. In that case, the 1958 Continental Shelf Convention was applicable; neither party had ratified 1982 UNCLOS, although both had signed it, and in any case it had not at that point acquired the requisite number of ratifications in order to enter into force. However, the Court, having referred to the 1977 decision of the Anglo-French Court of Arbitration, observed that:

“If the equidistance-special circumstances rule of the 1958 Convention is, in the light of this 1977 Decision, to be regarded as expressing a general norm based on equitable principles, it must be difficult to find any material difference--at any rate in regard to delimitation between opposite coasts-- between the effect of Article 6 and the effect of the customary rule which also requires a delimitation based on equitable principles.”¹⁶³

¹⁶⁰ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, ICJ Reports 1993, p. 62 (para. 53). For the Court’s discussion of the appropriateness of starting from a provisional median line, see ICJ Reports 1993, pp. 59-62, (paras. 49-53), referring to the approach adopted by the Court in the *Libya/Malta (Continental Shelf (Libyan Arab Jamahiriya/Malta))*, ICJ Reports 1984, p. 13) and *Gulf of Maine (Delimitation of the Maritime Boundary in the Gulf of Maine Area)*, ICJ Reports 1984, p. 246) cases.

¹⁶¹ For the Court’s discussion, see *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, ICJ Reports 1993, pp. 64-77 (paras. 59-86).

¹⁶² *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment, ICJ Reports 2001, p. 111 (para. 230).

¹⁶³ ICJ Reports 1993, p. 58 (para. 46)

The Court went on to observe, again referring to the decision of the Anglo-French Court of Arbitration, that:

“Although it is a matter of categories which are different in origin and in name, there is inevitably a tendency towards assimilation between the special circumstances of Article 6 of the 1958 Convention and the relevant circumstances under customary law, and this is only because they both are intended to enable the achievement of an equitable result. This must be especially true in the case of opposite coasts where, as has been seen, the tendency of customary law, like the terms of Article 6, has been to postulate the median line as leading *prima facie* to an equitable result.”¹⁶⁴

Finally, the Court observed that:

“*Prima facie*, a median line delimitation between opposite coasts results in general [is] an equitable solution, particularly if the coasts in question are nearly parallel. When, as in the present case, delimitation is required between opposite coasts which are insufficiently far apart for both to enjoy the full 200-mile extension of continental shelf and other rights over maritime spaces recognized by international law, the median line will be equidistant also from the two 200-mile limits, and may *prima facie* be regarded as effecting an equitable division of the overlapping area.”¹⁶⁵

8.82. This approach was followed by the Eritrea-Yemen Arbitral Tribunal in its Award in the Second Phase of the arbitration, where the Tribunal took “as its fundamental point of departure, that, as between opposite coasts, a median line obtains”,¹⁶⁶ while noting the difference between the situation in confined waters and that of the “great oceans”.¹⁶⁷ In that case, UNCLOS was not directly applicable, although the parties in the Arbitration Agreement had stipulated that the Tribunal was to apply UNCLOS “and any other pertinent factor”.

¹⁶⁴ ICJ Reports 1993, p. 62 (para. 56)

¹⁶⁵ ICJ Reports 1993, p. 66 (para. 64)

¹⁶⁶ Eritrea-Yemen, *Second Stage: Maritime Delimitation*, Award of 17 December 1999, *International Legal Materials*, vol. 40, p. 998 (para. 83). See also *RIAA*, Vol. XXII (2001), Part IV, p. 354 (para. 83).

¹⁶⁷ *International Legal Materials*, vol. 40, p. 446 (para. 85). *RIAA*, Vol. XXII (2001), Part IV, p. 355 (para. 85).

- 8.83. Given the equivalence of the equitable principles-relevant circumstances approach under customary international law (as embodied in UNCLOS) and the equidistance-special circumstances approach (as applicable under the Additional Agreement), it does not seem to matter which approach the Court actually applies.
- 8.84. In the end, the fundamental principle is that the delimitation should produce an equitable result, and that an equitable result is produced by an equidistance/median line, adjusted for relevant/special circumstances.
- 8.85. Of the factors which have been considered to be relevant, the primary one is the geophysical situation of the area to be delimited, i.e. its configuration. This includes the projection of the relevant coasts, and the connected principle that, where possible, zones should be delimited so as to avoid any cut-off, as well as the eventual disproportion between the relevant coastal lengths or the presence of islands, islets or rocks in the delimitation area.

(b) Islands as a special circumstance

- 8.86. The role of islands as a special circumstance in maritime delimitation can be seen as merely part of the wider requirement to take account of the geographical context in order to reach an equitable solution. However, islands have a special significance in maritime delimitation.
- 8.87. A review of delimitation awards and of State practice reveals that, quite independently of whether they count as “rocks” within the meaning of Article 121(3) of the 1982 UNCLOS, and therefore have no continental shelf or exclusive economic zone, small islands have almost always been given very reduced or no effect in the delimitation of the continental shelf, exclusive economic zone or other maritime zones due to the inequitable effect they would produce. Often they have been limited only to a maximum 12 nm territorial sea enclave. In a number of cases they have been ignored altogether.

(i) *Judicial and arbitral decisions*

8.88. On numerous occasions, international courts and tribunals have stated that limited or no effect should be given to islands that have the potential to distort the delimitation line and thus to preclude an equitable overall result.

8.89. In the *North Sea Continental Shelf* case, in referring to delimitation between States having opposite coasts, the Court observed that

“The continental shelf area off, and dividing, opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be delimited by means of a median line; and, ignoring the presence of islets, rocks and minor coastal projections, the disproportionally distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved.”¹⁶⁸

The Court accordingly made clear even prior to the inclusion of Article 121(3) in the 1982 UNCLOS, that, in performing the delimitation between opposite States, small insular formations (“islets” and “rocks”), as well as “minor coastal projections” were not to be taken into account if they would have a disproportionate effect, and accordingly would preclude an equitable solution.

8.90. In the case concerning *Delimitation of the Continental Shelf between the United Kingdom and France*, the Tribunal found that the Channel Islands could not generate full maritime zones (as advocated by the United Kingdom), but that their position meant that they were to be treated as a “special circumstance” for the purposes of the delimitation.¹⁶⁹ The Islands were not given any effect in drawing the median line as between the French and English mainland coasts,¹⁷⁰ and were given only 12 nautical mile enclaves of continental shelf to their west and north, separated from the remainder of the continental shelf awarded to the

¹⁶⁸ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, ICJ Reports 1969*, p. 36 (para. 57).

¹⁶⁹ Court of Arbitration, Award of 30 June 1977, *RIAA*, Vol. XVIII (1977), p. 93 (para. 196); (1977) *I.L.R.*, vol. 54, p. 101; *International Legal Materials*, vol. 18, pp. 443-444.

¹⁷⁰ *RIAA*, Vol. XVIII, (1977), p. 94-95 (para. 201); (1977) *I.L.R.*, vol. 54, p. 102; *International Legal Materials*, vol. 18, p. 444.

United Kingdom by a region of French continental shelf.¹⁷¹ This solution was reached despite the fact that the Channel Islands possess

“a considerable population and a substantial agricultural and commercial economy, they are clearly territorial and political units which have their own separate existence, and which are of a certain importance in their own right separately from the United Kingdom.”¹⁷²

8.91. In the same case, the Scilly Islands, which lie roughly 21 nm off the British mainland and have a significant population,¹⁷³ were also treated as constituting a “special circumstance”, on the basis that if given full effect they would have deflected the equidistance line considerably further south in an inequitable manner and producing disproportionate effects.¹⁷⁴ Accordingly, they were given only half-effect in drawing the median equidistance line.¹⁷⁵

8.92. In the arbitral decision in the case concerning the *Boundary Dispute between Dubai and Sharjah*, the Tribunal considered it equitable to disregard, for the purposes of delimitation of the continental shelf, the island of Abu Musa (which is a large maritime feature, having a significant population and economic importance). The Tribunal indicated that

“[t]he entitlement of an island to a continental shelf is an inherent right, deriving from the physical fact of the existence of the shelf as a prolongation of the landmass...

... the island of Abu Musa lies on a common shelf which is geologically as much a prolongation of the land-mass of Dubai as that of Sharjah.

The question, however, necessarily arises as to whether an inherent entitlement of the island of Abu Musa to a share of this

¹⁷¹ *RIAA*, Vol. XVIII, (1977), p. 95 (para. 202); (1977) *I.L.R.*, vol. 54, pp. 102-103; *International Legal Materials*, vol. 18, pp. 444-445

¹⁷² *RIAA*, Vol. XVIII, (1977), p. 88 (para. 184); (1977) *I.L.R.*, vol. 54, p. 96; *International Legal Materials*, vol. 18, p. 441.

¹⁷³ *RIAA*, Vol. XVIII, (1977), p. 107 (para. 227); (1977) *I.L.R.*, vol. 54, pp. 114-115; *International Legal Materials*, vol. 18, pp. 450-451.

¹⁷⁴ *RIAA*, Vol. XVIII, (1977), p. 113-115 (paras. 243-245); (1977) *I.L.R.*, vol. 54, pp. 121-122; *International Legal Materials*, vol. 18, p. 454.

¹⁷⁵ *RIAA*, Vol. XVIII, (1977), p. 117 (para. 251); (1977) *I.L.R.*, vol. 54, p. 124; *International Legal Materials*, vol. 18, p. 455.

common shelf may be displaced by a consideration of exceptional geographical circumstances...

Certain islands are clearly capable of giving rise to 'special circumstances' and thus to the invocation of equitable considerations where their existence would otherwise produce a distortion of the equidistance line or an exaggerated effect which would be inequitable. It may thus be necessary, in the delimitation of a boundary, to abate the effect of an island which forms an incidental special feature.

...

[The Court] has come to the conclusion [...] that to allow to the island of Abu Musa any entitlement to an area of the continental shelf of the Gulf beyond the extent of its belt of territorial sea would indeed produce a distorting effect upon neighboring shelf areas. The application of equitable principles here, so as to achieve a limitation that is a function or reflection of the geographical and other relevant circumstances of the area, must lead to no effect being accorded to the islands of Abu Musa for the purpose of plotting median or equidistance shelf boundary between it and the neighboring shelf areas.

...

To give no effect to the continental shelf entitlement to the island of Abu Musa would preserve the equities of the geographical situation and would be consistent for example, with comparable regional practice as applied to the islands of Al-'Arabiyah and Farsi in the Saudi Arabian-Iranian Agreement of January 1969, and Dayinah in the Abu Dahbi-Qatar Agreement of March 1969, where the continental shelf rights of islands were limited as to coincide with their respective territorial waters, but not used as basepoints for the purpose of constructing median or equidistance boundaries in respect of the continental shelves between opposite or adjacent states.¹⁷⁶

- 8.93. In the *Tunisia/Libya Continental Shelf* case, the International Court of Justice gave only half-effect to the Kerkennah Islands,¹⁷⁷ despite their considerable size (180 km²)¹⁷⁸, while the presence of the large island of Jerba, located close to the

¹⁷⁶ *Dubai-Sharjah Border Arbitration*, (1981) *I.L.R.*, vol. 91, pp 675-677.

¹⁷⁷ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *ICJ Reports 1982*, pp. 88-89 (paras. 128-129).

¹⁷⁸ *Ibid.*, p. 89 (para.128).

mainland, was ignored even as a special circumstance given the other relevant circumstances present.¹⁷⁹

8.94. In the *Gulf of Maine* case, the Chamber, having quoted the passage from the *North Sea Continental Shelf* cases cited above at para. 8.89, pointed out

“the potential disadvantages inherent in any method which takes tiny islands, uninhabited rocks or low-tide elevations, sometimes lying at a considerable distance from terra firma, as basepoints for the drawing of a line intended to effect an equal division of a given area. If any of these geographical features possess some degree of importance, there is nothing to prevent their subsequently being whatever limited corrective effect may equitably be assigned them, but that is an altogether different operation from making a series of such minor features the very basis for the determination of the dividing line”.¹⁸⁰

The Chamber considered appropriate that only half effect should be given to Seal Island, although it is about 3 miles long, between 1-1½ miles wide and, as the Chamber underlined, is inhabited throughout the year.

8.95. In the *St Pierre et Miquelon* case, the Tribunal awarded the French islands (of substantial size and with a long-standing resident population) only a limited extension of the enclave beyond the territorial sea, and then only in the form of a narrow corridor pointing in a direction which did not cut off the projection of any relevant Canadian (i.e. Newfoundland) coast.¹⁸¹

8.96. In the *Jan Mayen* case, Denmark argued on a number of bases (including that it could not sustain human habitation or an economic life of its own) that Jan Mayen should be given no effect as against Greenland’s continental shelf in the delimitation.¹⁸² While not accepting the contention based on Jan Mayen’s

¹⁷⁹ ICJ Reports 1982, p. 64 (para. 79) and p. 85 (para. 120).

¹⁸⁰ *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, ICJ Reports 1984, pp. 329-330 (para. 201)

¹⁸¹ Court of Arbitration, *Delimitation of Maritime Areas between Canada and France (St. Pierre et Miquelon)*, Award of 10 June 1992, *International Legal Materials*, vol. 31, p. 1145.

¹⁸² *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, ICJ Reports 1993, p. 64-65 (para. 60) for the Court’s summary of these arguments.

inability to sustain human habitation or an economic life of its own,¹⁸³ the Court nevertheless found it necessary to adjust the provisional median line, moving it closer to the coast of Jan Mayen on the basis of the disproportionality between the respective lengths of the coast lines of Jan Mayen and Greenland.¹⁸⁴

8.97. In the second phase of the *Eritrea/Yemen* arbitration, relating to the maritime boundary, the Arbitral Tribunal observed, in its discussion of certain small uninhabitable islands belonging to Yemen in the Red Sea (the Jabal al-Tayr and the Zubayr group) :

“...this requirement of an equitable result directly raises the question of the effect to be allowed to mid-sea islands, which, by virtue of their mid-sea position and if allowed full effect, can obviously produce a disproportionate effect – or indeed a reasonable effect – all depending on their size, importance and like considerations in the general geographical context...”¹⁸⁵

The Tribunal continued:

“In its assessment of the equities of the ‘effect’ to be given to these northern islands and islets, the Tribunal decided not to accept the Yemen plea that they allowed a full, or at least some, effect on the median line. This decision was confirmed by the result that, in any event, these mid-sea islands would enjoy an entire territorial sea of the normal 12 miles – even on their western side...”¹⁸⁶

The Tribunal accordingly decided to draw a median equidistance line in the northern sector on the following basis:

- on the one hand utilizing baselines on the Yemeni coast (including the fringing islands, which the Tribunal found to be an integral part of the Yemeni coast),¹⁸⁷ ignoring Jabal al-Tayr and the Zubayr group whose effect, it was found, would have been disproportionate;¹⁸⁸

¹⁸³ *ICJ Reports 1993*, pp. 73-74 (para. 80).

¹⁸⁴ *ICJ Reports 1993*, p. 69 (para. 69); see also at p. 77 (para. 87) and pp. 79-81 (paras. 90-93).

¹⁸⁵ *Eritrea-Yemen, Second Stage: Maritime Delimitation*, Award of 17 December 1999, *International Legal Materials*, vol. 40, p. 1003 (para. 117).

¹⁸⁶ *International Legal Materials*, vol. 40, p. 1004 (para. 119).

¹⁸⁷ *International Legal Materials*, vol. 40, p. 1008 (paras. 149-151).

¹⁸⁸ *International Legal Materials*, vol. 40, p. 1008 (paras. 147-148).

- on the other hand, baselines drawn on the outer islands in the Eritrean Dahlak group (ignoring the Negileh Rock), and the Eritrean mainland coast.¹⁸⁹

The equidistance line drawn on this basis continued southwards, until the presence of the Yemeni Jabal Zuqar and Hanish group and their territorial seas compelled a diversion westwards.¹⁹⁰

8.98. In *Qatar/Bahrain*, the Court disregarded the maritime feature of Qit'at Jaradah when constructing the delimitation line between the territorial seas of the two countries. The Court observed that

“...Qit'at Jaradah is a very small island, uninhabited and without any vegetation. This tiny island, which – as the Court has determined ... – comes under Bahraini sovereignty, is situated about midway between the main island of Bahrain and the Qatar peninsula. Consequently, if its low-water line were to be used for determining a basepoint in the construction of the equidistance line, and this line taken as the delimitation line, a disproportionate effect would be given to an insignificant maritime feature...

In similar situations the Court has sometimes been led to eliminate the disproportionate effect of small islands... The Court thus finds that there is a special circumstance in this case warranting the choice of a delimitation line passing immediately to the east of Qit'at Jaradah.”¹⁹¹

8.99. The Court also chose to ignore the islet of Fasht al Jarim when tracing the delimitation line between the continental shelves and exclusive economic zones of Qatar and Bahrain. The Court found that

“... [t]he only noticeable element is Fasht al Jarim as a remote projection of Bahrain's coastline in the Gulf area, which, if given full effect, would ‘distort the boundary and have disproportionate

¹⁸⁹ *International Legal Materials*, vol. 40, pp. 1007-1008, (paras 139-146)

¹⁹⁰ *International Legal Materials*, vol. 40, p. 1010 (para. 160-162)

¹⁹¹ *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment, ICJ Reports 2001, pp. 104 and 109 (para. 219), referring to the passages from the *North Sea Continental Shelf* case and the *Libya/Malta Continental Shelf* case quote above at paras. 8.89 and 8.40 respectively.

effects’ (Continental Shelf Case (France/United Kingdom) United Nations, Reports of International Arbitral Awards, Vol XVIII, p 114, paragraph 244)”.¹⁹²

In the view of the Court, such a distortion, due to a maritime feature located well out to sea and of which at most a minute part is above water at high tide, would not lead to an equitable solution which would be in accord with all other relevant factors referred to above. In the circumstances of the case, considerations of equity require that Fasht al Jarim should have no effect in determining the boundary line in the northern sector.

The Court accordingly decides that the single maritime boundary in this sector shall be formed in the first place by a line which, from a point situated to the north-west of Fasht ad Dibal, shall meet the equidistance line as adjusted to take account of the absence of effect given to Fasht al Jarim.¹⁹²

8.100. In the *Nova Scotia/Newfoundland* arbitration, the domestic Canadian Tribunal applying international law in order to delimit the maritime boundary between two of the constituent provinces of Canada, carefully analysed the effect that should have been given to Sable Island, a sand island of substantial size, inhabited only by federal officials engaged as lighthouse keepers or as scientists or engaged in conservation and conservators. The Tribunal began by noting that:

“Sable Island is an isolated, sandy, crescent-shaped island oriented in an east-west direction, 22 nm long and less than one nautical mile wide, situated 120 nm south of Scatarie Island and about 88 nm from the mainland of Nova Scotia. It has an area of 33 square kilometers...”¹⁹³

The Tribunal then concluded that although Sable Island is considerably more substantial than Fasht al Jarim (at issue in the Qatar/Bahrain case), nevertheless “in the context of the present delimitation, it is clearly a ‘special’ or ‘relevant’ circumstance which needs to be taken into account”.¹⁹⁴

¹⁹² *ICJ Reports 2001*, pp. 114-115 (paras. 247-249).

¹⁹³ *Newfoundland and Labrador v. Nova Scotia*, Award of the Tribunal in the Second Phase, Ottawa, 26 March 2002 (available at <http://www.boundary-dispute.ca>), para. 4.32

¹⁹⁴ *Ibid.*, para. 4.36

8.101. Later in the Award, the Tribunal addressed the question of the effect to be given to Sable Island “[h]aving regard to its remote location and the very substantial disproportionate effect this small, unpopulated island would have on the delimitation if it were given full effect”.¹⁹⁵ The Tribunal initially considered whether an equitable solution would be achieved by giving Sable Island only half effect in adjusting the provisional equidistance line.¹⁹⁶

8.102. However, the Tribunal eventually took the view that, although giving only half-effect to Sable Island substantially reduced the cut-off effect on the southwest coast of Newfoundland, the effect given to Sable Island should be still further reduced. The Tribunal continued:

“Moreover, the Tribunal is of the view that a further adjustment of the equidistance line (beyond giving only half effect to Sable Island) would accommodate in a reasonable way the disparity in the lengths of the Parties’ coasts (as determined by the Tribunal) in both the inner and outer areas. Accordingly, the Tribunal further adjusts the equidistance line by *giving no effect whatever to Sable Island.*”¹⁹⁷ (emphasis added).

8.103. Finally, it may be noted that in the *Libya/Malta* case, the Court, in addition to ignoring the island of Filfla for the purposes of drawing baselines,¹⁹⁸ further did not give full effect to Malta, an independent State, vis-à-vis Libya, a solution stemming from the striking difference in the lengths of their relevant shores.¹⁹⁹ The Court had earlier suggested that

“it might well be that the sea boundaries in this region would be different if the islands of Malta did not constitute an independent State, but formed a part of the territory of one of the surrounding countries...”²⁰⁰

¹⁹⁵ *Ibid.*, para. 5.13

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*, para. 5.15

¹⁹⁸ *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, ICJ Reports 1985*, p. 20 (para. 15), quoted above in para. 8.40.

¹⁹⁹ *ICJ Reports 1985*, pp. 51-52 (paras. 71-73).

²⁰⁰ *ICJ Reports 1985*, p. 42 (para. 53).

thereby seeming to imply that if Malta had been a dependent territory, its entitlement to maritime areas would have been further reduced.²⁰¹

(ii) *State practice*

8.104. In addition to the decisions of courts and tribunals, there is a clear pattern in international practice to either disregard small or isolated islands entirely, or to award only limited effect to certain islands because of their lack of importance and because of their potential to distort an otherwise equitable line.

8.105. When a method other than equidistance is used (for example, the parallel of latitude, or the perpendicular to the general direction of the coast) small islands are usually totally ignored²⁰². When the equidistance method is used, the predominant tendency is to give no or little effect to such maritime formation. Various examples can be invoked in this respect.

8.106. In the Continental Shelf Agreement between Iran and Qatar of 20 September 1969, various small islands were ignored when drawing the median line.²⁰³

8.107. In the Agreement between the Government of the Republic of Indonesia and the Government of Malaysia Relating to the Delimitation of the Continental shelf between the Two Countries of 1969,²⁰⁴ the boundary between the adjacent coast of Borneo/Kalimantan (Indonesia) and Sarawak (Malaysia) gives less than full effect to various Indonesian islands.

²⁰¹ Cf. the discussion, *ICJ Reports 1985*, pp. 51-52 (para. 72), discussing the northern-most course of the boundary could possibly take on the hypothetical basis of the situation if Malta belonged to Italy.

²⁰² See *International Maritime Boundaries, vol I*, edited by Jonathan I. Charney and Lewis M. Alexander, Martinus Nijhoff Publishers, 1996, p. 134

²⁰³ Iran/Qatar Agreement concerning the Boundary Line dividing the Continental Shelf between Iran and Qatar, Doha, 20 September 1969; 787 *United Nations Treaty Series* 172. See also *International Maritime Boundaries, vol II*, edited by Jonathan I. Charney and Lewis M. Alexander, Martinus Nijhoff Publishers, 1996, p. 1513.

²⁰⁴ Kuala Lumpur, 27 October 1969; see US Department of State, "Indonesia-Malaysia Continental Shelf Boundary", *Limits in the Seas*, No. 1 (1970). See also *International Maritime Boundaries, vol I*, edited by Jonathan I. Charney and Lewis M. Alexander, Martinus Nijhoff Publishers, 1996, p. 1021.

- 8.108. In the 1974 agreement between India and Sri Lanka, the island of Kachchativu appears to not have affected the delimitation line.²⁰⁵
- 8.109. In the Agreement between Greece and Italy delimiting their respective continental shelf areas of 1977, various effects were given to Greek islands in the Channel of Otranto and the Strofades group, according to their size and their population.²⁰⁶
- 8.110. In the Agreement between Italy and Yugoslavia concerning the Delimitation of the Continental Shelf between the Two Countries of 1968²⁰⁷, the Yugoslav islands of Jabuka, Pelagruz and Kajola (Galijula) were given zero effect, as was the small Italian island of Pianosa. The islands of Pelagruz and Kajola, lying almost exactly on the median line so drawn were however given 12 nautical mile enclaves.
- 8.111. The Agreement between the Government of the Italian Republic and the Government of the Tunisian Republic Relating to the Delimitation of the Continental Shelf between the Two Countries of 1971,²⁰⁸ disregarded the Italian islands Pantelleria, Linosa, Lampedusa, and Lampione for the purposes of drawing an equidistance median line. 12 nautical mile territorial sea/contiguous zones were then given to each of the Italian islands, and an further 1 nautical mile zone of continental shelf outside those 12 nautical mile arcs were given to Pantelleria, Lionosa and Lampedusa.

²⁰⁵ Sri Lanka/India Agreement on the maritime boundary between the two countries in the Gulf of Mannar and the Bay of Bengal and related matters, New Delhi, 23 March 1976, 1049 *United Nations Treaty Series* 43. See also *International Maritime Boundaries, vol II*, edited by Jonathan I. Charney and Lewis M. Alexander, Martinus Nijhoff Publishers, 1996, p. 1412.

²⁰⁶ Agreement between the Hellenic Republic and the Italian Republic on the delimitation of the respective continental shelf areas of the two States, Athens, 24 May 1977, 1275 *United Nations Treaty Series* 427. See also *International Maritime Boundaries, vol II*, edited by Jonathan I. Charney and Lewis M. Alexander, Martinus Nijhoff Publishers, 1996, p. 1594.

²⁰⁷ Rome, 8 January 1968; see US Department of State, "Italy – Yugoslavia; Continental Shelf Boundary", *Limits in the Seas*, No. 9 (1970). See also *International Maritime Boundaries, vol II*, edited by Jonathan I. Charney and Lewis M. Alexander, Martinus Nijhoff Publishers, 1996, p. 1630.

²⁰⁸ Tunis, 20 August 1971; 1129 *United Nations Treaty Series* 255; see also US Department of State, "Italy – Tunisia; Continental Shelf Boundary", *Limits in the Seas*, No. 89 (1980). See also *International Maritime Boundaries, vol II*, edited by Jonathan I. Charney and Lewis M. Alexander, Martinus Nijhoff Publishers, 1996, p.1616-1617.

- 8.112. Less than full effect was also given to the Swedish islands of Götland and Gotska Sandön, which have roughly 55 000 inhabitants, in the 1988 Agreement between Sweden and the USSR in relation to the continental shelf and exclusive economic zone/fishing boundary between the two States.²⁰⁹
- 8.113. Half effect was given to islands in the case of the Agreement concerning the sovereignty over the Islands of Al-‘Arabiyah and Farsi and the delimitation of the boundary line separating the submarine areas between the Kingdom of Saudi Arabia and Iran (Kharg Island).²¹⁰
- 8.114. The Agreement between Qatar and Abu Dhabi of 1969 is an example of an agreement where the equidistant line between the two adjacent coasts is diverted around a 3-mile arc surrounding the island of Daiyina, which was otherwise given no effect at all.²¹¹
- 8.115. The Offshore Boundary Agreement between Iran and Dubai of 1974 provided for only a slight deviation of the boundary otherwise drawn on the basis of a 12 nautical mile arc around the Iranian island of Sirri.²¹²
- 8.116. The Agreement between Finland and Sweden on delimitation in the Åland Sea and northern Baltic Sea of 1994²¹³ ignores as basepoints the Bogskär Islands, which consists of two uninhabited rocks with a total area of 4-5 km².

²⁰⁹ Agreement between the Government of the Kingdom of Sweden and the Government of the Union of Soviet Socialist Republics on the Delimitation of the Continental Shelf and of the Swedish Fishing Zone and the Soviet Economic Zone in the Baltic Sea, Moscow, 18 April 1988; 1557 *United Nations Treaty Series* 283. See also *International Maritime Boundaries, vol II*, edited by Jonathan I. Charney and Lewis M. Alexander, Martinus Nijhoff Publishers, 1996, p. 2061-2062.

²¹⁰ Tehran, 24 October 1968, 696 *United Nations Treaty Series* 212. See also *International Maritime Boundaries, vol II*, edited by Jonathan I. Charney and Lewis M. Alexander, Martinus Nijhoff Publishers, 1996, p. 1521.

²¹¹ Qatar/Abu Dhabi (United Arab Emirates), Agreement on settlement of maritime boundary lines and sovereign rights over islands, 20 March 1969: see US Department of State, “Qatar – United Arab Emirates (Abu Dhabi); Continental Shelf Boundary”, *Limits in the Seas*, No. 18 (1970). See also *International Maritime Boundaries, vol II*, edited by Jonathan I. Charney and Lewis M. Alexander, Martinus Nijhoff Publishers, 1996, p. 1543.

²¹² Tehran, 31 August 1974; see US Department of State, “Iran – United Arab Emirates (Dubai); Continental Shelf Boundary”, *Limits in the Seas*, No. 63 (1975). See also *International Maritime Boundaries, vol II*, edited by Jonathan I. Charney and Lewis M. Alexander, Martinus Nijhoff Publishers, 1996, p. 1535.

- 8.117. In the Agreement between the Dominican Republic and the United Kingdom concerning the delimitation of the maritime boundary between the Dominican Republic and the Turks and Caicos Islands,²¹⁴ the boundary agreed runs to the north of the equidistant line for its whole length, by up to as much as 7 miles, favouring thus the Dominican Republic.
- 8.118. The Agreement between the People's Republic of China and the Socialist Republic of Viet Nam on the Delimitation of the Territorial Sea, the Exclusive Economic Zone and Continental Shelf in Beibu Bay/Gulf of Tonkin of 25 December 2000 gives only limited (25 per cent) effect to the Vietnamese island of Bach Long Vi, which is located in the centre of the Gulf of Tonkin, slightly closer to Viet Nam, so that in addition to territorial waters of 12 nm it also has a 3 nautical mile zone of exclusive economic zone and continental shelf. Similarly, the small island of Con Co which lies close to the shore of Viet Nam was given only 50 per cent effect in drawing the boundary between the two States at the closing line of the Gulf of Tonkin²¹⁵
- 8.119. The island of Bach Long Vi faces the Chinese island of Hainan, has a total area of 2.5 km², is permanently inhabited, and has a flourishing economic life of its own. It is situated in the centre of the Tonkin Gulf (about 110 km off the coast of Viet Nam and some 130 km off the coast of the Chinese island of Hainan).²¹⁶

²¹³ Agreement between the Republic of Finland and the Kingdom of Sweden on the delimitation of the boundary between the continental shelf and fishery zone of Finland and the economic zone of Sweden in the Åland Sea and the Northern Baltic Sea, Stockholm, 2 June 1994; 1887 United Nations Treaty Series 238. See also *International Maritime Boundaries, vol III*, edited by Jonathan I. Charney and Lewis M. Alexander, Martinus Nijhoff Publishers, 1996, p. 2543-2544.

²¹⁴ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Dominican Republic concerning the delimitation of the Maritime Boundary between the Dominican Republic and the Turks and Caicos Islands, 2 August 1996 - See *International Maritime Boundaries, vol III*, edited by Jonathan I. Charney and Lewis M. Alexander, Martinus Nijhoff Publishers, 1996, p. 2239.

²¹⁵ See the declaration of the Vietnamese minister of foreign affairs, Mr. Nguyen Dy Nien published by the Vietnamese newspaper *Nhân Dân* on 1 July 2004 (**Annex RM 32**). See also Zou Keyuan, "Implementing the United Nations Convention on the Law of the Sea in East Asia: Issues and Trend", *Singapore Yearbook of International Law, vol. 9* (2005), p. 1.

²¹⁶ This Agreement between China and Viet Nam is also of important significance for this case from the point of view of the method of delimitation used. The particulars of this case are similar to those of the Romanian-Ukrainian maritime delimitation in the Black Sea. Thus, in the delimitation area, China and Viet Nam have both adjacent and opposite coasts, while the Vietnamese Bach Long Vi island (a minor maritime feature situated at 110 km away from Viet Nam's mainland and 130 km away from the

8.120. The Agreement between Australia and Indonesia concluded in 1997²¹⁷ will, when it enters into force, delimit certain of the continental shelf boundaries between the two States, as well as defining the exclusive economic zone boundary between the two States. The Agreement is of note in this context due to its treatment of the Ashmore Islands; those islands are not given full weight in drawing the boundary with the opposite coast of the Indonesian island of Roti, but are restricted to a 24 nautical mile belt of continental shelf and exclusive economic zone as against Indonesia, despite the fact that the line so drawn is considerably closer to the islands than the median line between the islands and the opposite coast of Indonesia.

8.121. Other examples include²¹⁸:

- The islands Luibainah al-Saghirah and Lubainah al-Kabirah appear to have been discounted when establishing the boundary of the continental shelf between Bahrain and Saudi Arabia²¹⁹;
- In the delimitation of the continental shelf between Canada and Denmark (Greenland) it appears that the islands Crozier, Franklin and Hans were disregarded by the parties when establishing the boundary.
- The large Australian islands of Boigu and Saibai, together with their associated island Aubusi and Moimi, and Duan and Kaumang respectively, were awarded

Hainan island of China), straddles the equidistant/ median line between the relevant coasts. The delimitation line agreed upon by the two Parties was constructed “in line with the principles of equality , taking into consideration all circumstances concerned in the Gulf to reach an equal (sic) solution” – see the declaration of the Vietnamese minister of foreign affairs, Mr. Nguyen Dy Nien published by the Vietnamese newspaper *Nhân Dân* on 1 July 2004 (**Annex RM 32**)

²¹⁷ Australia/Indonesia, Treaty establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, 14 March 1997 (not yet in force), *International Legal Materials*, vol. 36, p. 1053. [1997] ATNIF 4, Arts. 1 and 2.

²¹⁸ See Hiran W. Jayewardene, *The Regime of Islands in International Law*, Martinus Nijhoff Publishers, 1990, p. 402

²¹⁹ See also *International Maritime Boundaries, vol II*, edited by Jonathan I. Charney and Lewis M. Alexander, Martinus Nijhoff Publishers, 1996, p. 1489-1494.

only 3-mile belts of territorial sea (in the agreement between Australia and Papua-New Guinea)²²⁰.

(iii) *Conclusions*

8.122. The general trend of international jurisprudence and State practice may thus be summarised as follows:

- Insular formations located at some distance from the mainland coast of a State are to be treated as a “special circumstance” (or analogously, as a “relevant circumstance” under customary international law) where giving them full effect would result in an inequitable result, and accordingly are to be given reduced effect, and most often no effect, in constructing the line for the purposes of delimitation;
- Small formations are entitled to a maximum 12 nautical mile territorial sea enclave, unless that enclave overlaps with the territorial sea of the entitlement of the territory of another State, cases in which the breadth of their territorial sea is reduced accordingly;
- This approach has been adopted irrespective of the question of whether or not such formations constituted “rocks” capable of sustaining human habitation or an economic life of their own within the meaning of Article 121(3) of the 1982 UNCLOS – in many of the cases they could not have been qualified as such.

8.123. Most of the cases presented above, both from jurisprudence and State practice, considered maritime features far more important than Serpents’ Island. Most of these insular formations have sizes over 1-10 km², are permanently inhabited and have a developing economic life. They would not fall in the category of rocks covered by Article 121(3) of the 1982 UNCLOS. Nonetheless, they were given no or only a limited effect in terms of the delimitation of the exclusive

²²⁰ See also *International Maritime Boundaries, vol I*, edited by Jonathan I. Charney and Lewis M. Alexander, Martinus Nijhoff Publishers, 1996, p. 932.

economic zones or the continental shelf between the mainland coasts of the States concerned.

(c) The enclosed nature of the Black Sea as a special circumstance

8.124. The enclosed nature of the sea to be delimited is a constituent part of the wider requirement to take account of the geographic context of the area to be delimited, as a special/relevant circumstance in delimitation.

8.125. The relevance of the enclosed character of the Black Sea, seen in conjunction with the existing delimitation agreements, as well as their possible consequences were analysed in paras. 6.21-6.34 of Chapter 6 of this Memorial.

(7) Conclusions

8.126. In Chapter 11 of this Memorial, Romania will analyse the relevance of each of the factors chosen by the Parties in Article 4 of the Additional Agreement for the facts of this case. For the present, however, the following general conclusions may be drawn:

- (a) The five delimitation “principles” established by the Additional Agreement show the significance attached by the Parties to an equitable solution of delimitation;
- (b) The systematic interpretation of the five principles, together with the references to the international State practice and jurisprudence that has to be respected in applying certain principles, leads to the conclusion that the approach to be taken in delimitation is the one known as *equitable principles-relevant circumstances* (under customary international law as embodied by the 1982 UNCLOS), equivalent to *equidistance-special circumstances* approach (under the 1958 Convention), consisting in first drawing a provisional

equidistant/median line between the relevant coasts, and then eventually shifting it to take into account the relevant/special circumstances;

- (c) This above-mentioned approach is consistent not only with the Additional Agreement, but also with the recent constant case-law of this Court;
- (d) By specifically referring, in the Additional Agreement, to Article 121 of the 1982 UNCLOS, at a time when this Convention was not in force between the Parties, and by not objecting to the Romanian declaration made upon signature, and confirmed upon ratification, of UNLCLOS, Ukraine accepted the applicability of the third paragraph of Article 121 to the present case;
- (e) The provisional equidistance/median line to be established as part of the delimitation process is drawn between the relevant mainland coasts of the Parties, minor maritime formations being only relevant/special circumstances to be considered at a later stage;
- (f) Thus minor maritime formations are given limited, often no, effect;
- (g) Proportionality is not an independent method of delimitation, but a test of the equitableness of the delimitation solution;
- (h) The enclosed character of the sea is a relevant/special circumstance to be considered together with any pre-existing delimitation agreements; in consequence, any new delimitation should not dramatically depart from the method previously used in the same sea between other riparian States in order not to produce inequitable results.

PART III

THE EQUITABLE SOLUTION

CHAPTER 9

RELEVANT COASTS AND RELEVANT AREAS

(1) Introduction: the two sectors of delimitation

- 9.1 As summarised in Chapter 1, this Court should approach the delimitation in the present case in two sectors, in accordance with the factual relations between the coasts of the two Parties – adjacency and oppositeness.
- 9.2 The boundary between the territorial seas of the two States was described by the 2003 Border Regime Treaty as following the course originally agreed in 1949 between Romania and the Soviet Union, and which has been adopted in every agreement between both Romania and the USSR, and subsequently Ukraine since that date. From Point 1439 as laid down in the 1949 Procès Verbal and subsequent agreements, that boundary runs along a 12 nautical mile arc drawn around Serpents' Island until it reaches the last point laid down in the 2003 Border Regime Treaty (which Romania has defined as Point F), and which constitutes the outer limit of Romania's territorial sea and the outer limit of the territorial sea around Serpents' Island.
- 9.3 The course of this boundary is not within the scope of the present Application. The Court should nevertheless take account of the 2003 Border Regime Treaty since Point F, as the point where the outer limits of the territorial seas appertaining to Romania and Ukraine intersect, constitutes the starting point of the delimitation line, and since this Treaty confirmed the validity of the previous documents concluded between Romania and the USSR.
- 9.4 The **first sector** of delimitation is the one where the relationship of adjacency between the Romanian and Ukrainian coasts is dominant. The boundary in this first sector runs from Point F up to the turning point, where it becomes governed by points on the Ukrainian coast (on the Crimean peninsula) which

are opposite to the Romanian coast. As already explained, the first segment of the boundary in this sector was already agreed upon by treaties between Romania and the USSR – it follows the 12 nm arc surrounding Serpents’ Island.

9.5 The **second sector** is the one where the coasts are opposite to each other, and the boundary runs from the turning point in a broadly southerly direction.

9.6 At the most southerly extreme of this sector, the Court is requested to indicate the direction of the maritime boundary, the precise location of the tri-point with a third State being a matter for subsequent negotiations.

9.7 As discussed in Chapter 8, the correct approach in relation to both sectors is first to draw a provisional equidistant/median line (excluding any maritime features that are not to be taken into account at this stage), and then, if necessary, to adjust that line to take account of any relevant/special circumstances (including the provisions of any relevant agreement which already established a certain sector of the boundary).

9.8 Given the circumstances of the coastlines of the two Parties, an approach on the basis of two sectors, in the first of which the coasts are to be treated as adjacent, and in the second of which the coasts are to be treated as opposite to each other, is justified.

9.9 For example, the Court in the *North Sea Continental Shelf* cases observed that

“[i]n certain geographical situations... a given equidistance line may partake in varying degrees both of the nature of a median and of a lateral line.”²²¹

9.10 Such situations occurred in different cases before this Court or other arbitral tribunals. Thus, in the Anglo-French Continental Shelf arbitration, the Tribunal treated the delimitation in two distinct sectors, within the English Channel and in the Atlantic. In the Tribunal’s words:

²²¹ *ICJ Reports 1969*, p. 17 (para. 6).

“the actual coastlines of the two countries abutting on the continental shelf to be delimited are comparatively short; and ... although separated by some 100 miles of sea, their geographical relation to each other vis-à-vis the continental shelf to be delimited is one of lateral rather than opposite coasts.”²²²

9.11 In the *Gulf of Maine* case, within the Gulf the relevant coastlines were opposite to each other, whereas beyond the “closing line” of the Gulf of Maine they were in a situation more like that of adjacent coasts.²²³

9.12 In the *Qatar-Bahrain* case, the Court distinguished between the southern area and the area further north in the Gulf. As the Court said:

“In the southern part of the delimitation area, which is situated where the coasts of the Parties are opposite to each other, the distance between these coasts is nowhere more than 24 nm... More to the north, however, where the coasts of the two States are no longer opposite to each other but are rather comparable to adjacent coasts, the delimitation to be carried out will be one between the continental shelf and exclusive economic zone belonging to each of the Parties, areas in which States have only sovereign rights and functional jurisdiction. Thus both Parties have differentiated between a southern and a northern sector.”²²⁴

9.13 The case of the delimitation of the maritime areas of Romania and Ukraine in the Black Sea involves the adjacent coasts of the Parties in the Danube delta region faced entirely, across a large expanse of sea, by the Ukrainian coast of Crimea. Thus, the same approach as in previous cases where coasts of the parties have been regarded as being in part adjacent to each other, and in part as having the nature of opposite coasts, can be taken.

9.14 Given the geography of the relevant coasts, the location of the turning point where the relation of adjacency turns into oppositeness is easy to find. This point, which will be hereafter referred to as "Point T", is constituted by the point

²²² *RIAA*, Vol. XVIII, p. 109 (para. 233); *I.L.R* 1977, vol. 54, p. 213; *International Legal Materials*, vol. 18, p. 452.

²²³ Further within the Gulf and approaching the area of the land boundary between the United States and Canada, the coastlines were in a situation of “lateral adjacency”; see *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, ICJ Reports 1984*, p. 334 (para. 216).

where the equidistance line changes from being governed by points located on the coasts of Ukraine which are adjacent to those of Romania, to being governed by points on the coast of the Ukrainian Crimean Peninsula opposite the Romanian coast.

(2) Determination of the relevant coasts

9.15 As already explained in Chapter 8, the appropriate method to conduct the delimitation of the maritime areas in this case is to first draw a provisional equidistant/median line, then to eventually adjust it in case of relevant/special circumstances that would justify this.

9.16 In order to draw the provisional equidistance/median line, the relevant coasts of the two States have to be identified; as stated by the Court in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*:

“Before it can draw an equidistance line and consider whether there are relevant circumstances that might make it necessary to adjust that line, the Court must, however, define the relevant coastlines of the Parties by reference to which the location of the base points to be used in the construction of the equidistance line will be determined.”²²⁵

9.17 In the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the Court defined the equidistance line in the following terms:

“The equidistance line is the line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured.”²²⁶

²²⁴ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Judgment, ICJ Reports 2001*, pp. 91, 93 (paras. 169-170).

²²⁵ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening), ICJ Reports 2002*, judgment of 10 October 2002, (para. 290).

²²⁶ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Judgment, ICJ Reports 2001*, p. 94 (para. 177).

9.18 However, in calculating relevant coast lengths and areas in order to assess the proportionality of a provisional delimitation, it is not the entirety of the coast line of the State which is to be taken into account, but rather merely those areas of the coast of which the maritime areas are the “natural prolongation”. As the Court observed in the *Tunisia/Libya Continental Shelf* case:

“for the purpose of delimitation between the Parties, it is not the whole of the coast of each Party which can be taken into account; the submarine extension of any part of the coast of one Party which, because of its geographic situation, cannot overlap with the extension of the coast of the other, is to be excluded from further consideration by the Court. It is clear from the map that there comes a point on the coast of each of the two Parties beyond which the coast in question no longer has a relationship with the coast of the other Party relevant for submarine delimitation. The sea-bed areas off the coast beyond that point cannot therefore constitute an area of overlap of extensions of the territories of the two parties and are therefore not relevant for the delimitation”²²⁷

9.19 As to geographical configuration of the coasts, the following elements need to be considered.

9.20 The Romanian coast is indisputably composed of two distinct sectors: a short and more or less straight sector from the last point of the river border with Ukraine to the southern extremity of the Sacalin Peninsula, and a longer, slightly concave sector from the extremity of the Sacalin Peninsula to the border with Bulgaria. The first sector is in a relation of adjacency with the Ukrainian coast situated to the north. At the same time, the whole Romanian coast is in a relation of oppositeness with the Ukrainian coast of Crimea, which it faces. This relation can be easily seen in **Figure 11** (page 137 of this Memorial).

9.21 In respect to Ukraine, as to the coast of the Crimean peninsula, **Figure 11** clearly shows that north to the Cape Tarkhankut the Ukrainian coast suddenly and completely changes direction and ends its relation of oppositeness towards the Romanian coast. In the sector of adjacent coasts, the most salient point on

the Ukrainian coast is the southern point of the mouth of the Nistru/Dniestr River (Romania will refer to this point as "Point S"). From this point, the Ukrainian coast changes its direction and the maritime area situated to the north of the Point S – Cape Tarkhankut line is analogous to an interior Ukrainian bay, each of its coasts facing coasts belonging to the same State (Ukraine) and there not being any Ukrainian water areas overlapping the Romanian ones.

9.22 Consequently, the maritime spaces situated to the north of the line Point S–Cape Tarkhankut do not pertain to the area where the projections of the coasts of the two Parties overlap and should not be taken into account in the delimitation process.

9.23 Having regard to these elements, the coasts relevant for delimitation are as follows:

Sector 1 (adjacent coasts):

on the Romanian side: the coast situated between the last point of the land/river border between Romania and Ukraine (45°13'06"N, 29°40'00"E) and the outer extremity of the Sacalin Peninsula (44°47'21"N, 29°32'55"E);

on the Ukrainian side: the coast situated between the last point of the land/river border between Romania and Ukraine (45°13'06"N, 29°40'00"E) and Point S (46°04'20"N, 30°28'30"E).

These are depicted on **Figure 11** (page 137 of this Memorial).

²²⁷ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, ICJ Reports 1982*, pp. 61-62, (para. 75).

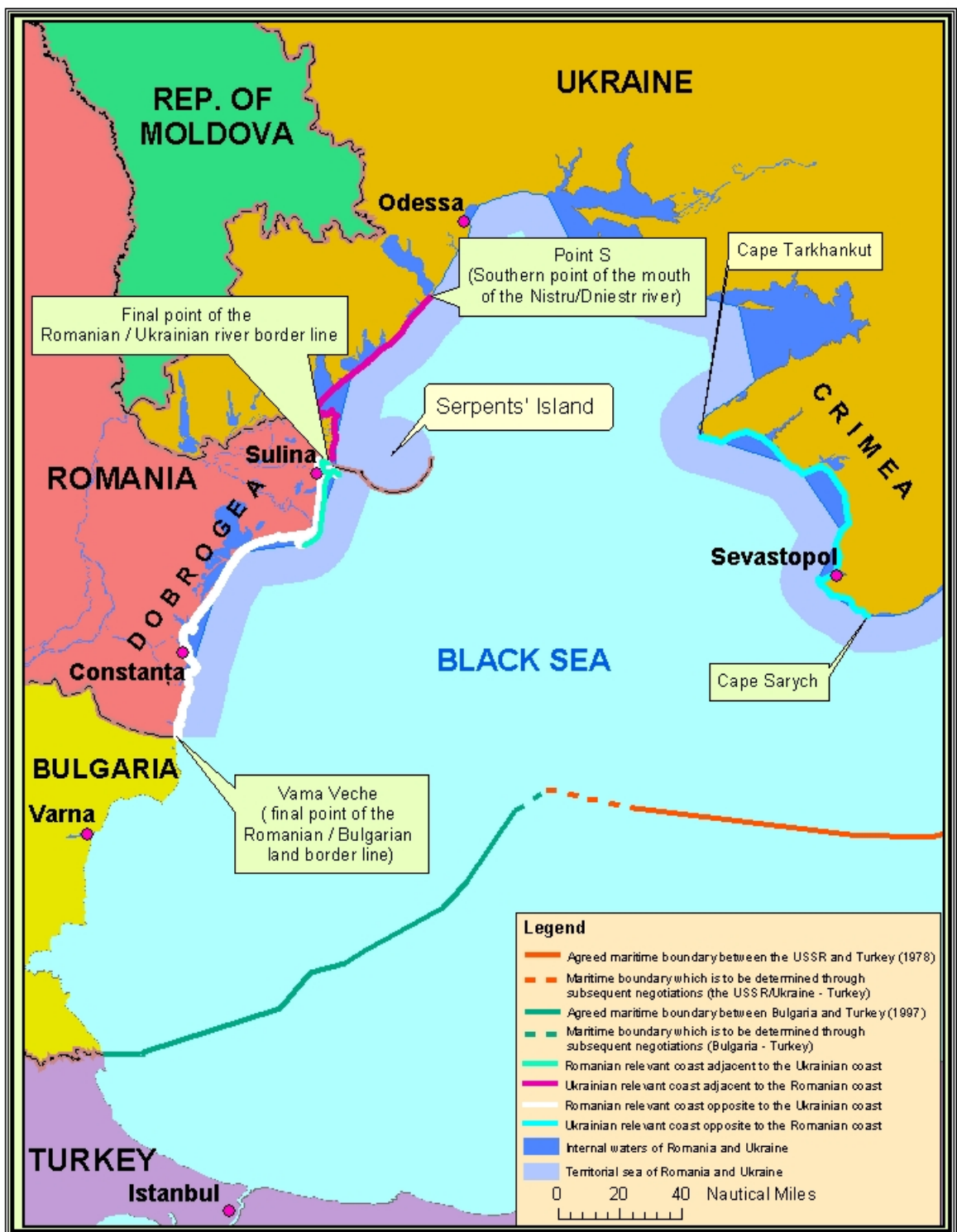


Figure 11
The relevant coasts of the two States

Sector 2 (opposite coasts):

on the Romanian side: the whole Romanian coast, defined by the last point of the land/river border between Romania and Ukraine (45°13'06"N, 29°40'00"E) to the north and the final point of the land Romanian-Bulgarian border (43°44'20"N, 28°34'51"E) to the south;

on the Ukrainian side: the Crimean coast between Cape Tarkhankut (45°20'50"N, 32°29'43"E) to the north and Cape Sarych (44°23'07"N, 33°44'28"E) to the south.

These are also depicted on **Figure 11** (page 137 of this Memorial).

9.24 The respective lengths of the relevant coasts are accordingly:

Sector 1 (adjacent coasts): the Romanian coast: 70.25 km
the Ukrainian coast: 172.40 km.

Sector 2 (opposite coasts): the Romanian coast: 269.67 km
the Ukrainian coast: 215.74 km.

Total – relevant coasts: the Romanian coast: 269.67 km
the Ukrainian coast: 388.14 km.

9.25 As between the Romanian and the Ukrainian coasts there is a visible discrepancy, the former being more linear, while the latter being more indented, the calculation of the lengths of the baselines of the coasts is also useful:

Sector 1 (adjacent coasts): the Romanian baselines: 41.45 km
the Ukrainian baselines: 119.90 km.

Sector 2 (opposite coasts): the Romanian baselines: 204.90 km
the Ukrainian baselines: 172.73 km.

Total – baselines of relevant coasts: the Romanian baselines: 204.90 km
the Ukrainian baselines: 292.63 km.

(3) The relevant area

9.26 Having regard to the comparative simplicity of the area to be delimited there is no special difficulty in identifying the relevant area, i.e. the area potentially affected by the delimitation. It is as follows:

In the north, this area is bordered by a line uniting Point S (46°04'20"N 30°28'30"E) and Cape Tarkhankut (45°20'50"N, 32°29'43"E) on the Ukrainian coasts.

In the south, it is bordered by the line equidistant between the adjacent Romanian and Bulgarian coasts²²⁸, the line median between the opposite Romanian and Turkish coast and the delimitation line agreed upon by the USSR and Turkey, to which Ukraine confirmed its succession.

In the south-east this area shall be delimited by the meridian uniting the southern extremity of the Crimean Peninsula (Cape Sarych) with the delimitation boundary between Ukraine and Turkey.

In the west and in the east the area is bordered by the Romanian and Ukrainian relevant coasts, as specified in paragraph 9.23 above.

9.27 As specified above, the maritime area situated north to the Point S–Cape Tarkhankut line does not overlap with Romanian water areas and has no significance for the delimitation which, as between adjacent coasts, is determined by points much closer to the common land border and, as between opposite coasts, is determined by the coastal frontage of the Crimean Peninsula.

9.28 As far as the southern limit of the delimitation area so defined is concerned, the eventual extension of the relevant area south to this southern limit could affect interests of third States, like Bulgaria and Turkey.

9.29 The relevant area is depicted on **Figure 12** (page 140 of this Memorial).

²²⁸ The determination of the line equidistant between the Romanian and Bulgarian coasts is calculated for the purposes of the present case and is not meant to prejudice on the Romanian-Bulgarian negotiations for the delimitation of their maritime areas in the Black Sea.



Figure 12
The relevant delimitation area

CHAPTER 10

SERPENTS' ISLAND AS A ROCK WITHIN THE SCOPE OF ARTICLE 121(3) OF THE 1982 UNCLOS

(1) Introduction

- 10.1 As already specified in paras. 4.3-4.26 of this Memorial, by various agreements concluded between Romania and the USSR starting from 1949, the two States established in principle the course of the maritime boundary in the area of Serpents' Island, on the 12-mile arc around it. But, independently of these agreements, the course of the boundary in this region would be substantially the same, since, according to Article 121(3) of the 1982 UNCLOS, as well as to State practice and case-law as shown in paras. 8.86-8.123 of this Memorial, this minor maritime feature would be given nil effect in the delimitation of the exclusive economic zones or the continental shelf of Romania and Ukraine.
- 10.2 The purpose of the present Chapter is to show that Serpents' Island is a rock incapable of sustaining human habitation or economic life of its own, therefore having no exclusive economic zone or continental shelf, as provided for in Article 121(3) of the 1982 UNCLOS. Not only is this the case on the normal interpretation of Article 121(3), but the Parties acknowledged its relevance to the delimitation even before Article 121 was binding on them as a result of the entry into force of the 1982 UNCLOS between Romania and Ukraine. Paragraph 4(a) of the Additional Agreement expressly refers to

“The principle stated in Article 121 of the United Nations’
Convention on the Law of the Sea of December 10, 1982 as

applied in the practice of states and in international jurisprudence.”²²⁹

In addition, the Parties agreed on a 12 nm all-purpose maritime zone around Serpents’ Island at the time it was forcibly transferred to the Soviet Union in 1949. Taking into account all these circumstances, Serpents’ Island should be given no additional effect in the delimitation.

(2) The meaning of the term “rocks” in Article 121 (3)

10.3 The term “rocks” in Article 121(3) should not be given a restrictive definition. It is clear from an analysis of Article 121 as a whole that “rocks” within the meaning of Article 121(3) are a subset of the category of islands, i.e. they are naturally formed, entirely surrounded by water, and above water at high tide; this corresponds to the general definition of islands given in paragraph 1. Moreover, this is also obvious from the very inclusion of paragraph 3 within Article 121: both Part VIII and Article 121 are entitled “Regime of Islands” and the *travaux préparatoires* of the Convention show that the intent of the drafters was to institute an exceptional regime in respect to very small islands incapable of sustaining human life. The fact that rocks constitute exceptions in respect to the general principle embodied in paragraph 2 of Article 121 is clearly confirmed by the words “Except as provided for in paragraph 3...” which introduce paragraph 2.

10.4 Article 121(3) does not specify any size limit. There is no reason to limit it to tiny features a few metres large, i.e. to mere isolated rocks; such features could not on any view support human habitation or economic life, so that if the word “rocks” was limited to such protuberances above sea-level the qualifying phrase would be unnecessary. In the *Jan Mayen*

²²⁹

For an analysis of this principle, see above, para. 8.4-8.41 of this Memorial.

case, the Court appears to have accepted that the rocky island of Jan Mayen did not fall within the category described in Article 121(3). But Jan Mayen is a large and mountainous island roughly 50 kilometres in length and varying between 2.5 and 16 kilometres in width, giving an area of 380 km².²³⁰ By contrast, Serpents' Island has an area of only 0.17 km²; in other words, Jan Mayen's surface area is 2,235 times that of Serpents' Island.

10.5 Whatever maximum size threshold might be set by interpretation of the term "rocks", Serpents' Island does not surpass that threshold. As correctly noted by the 13 July 2002 edition of the Ukrainian newspaper *Iug*: "...even to denominate Serpents' Islands an 'island' is excessive. Its total length is 615 meters, its width is 560 meters and in narrower places a little over 90 meters..."²³¹ The tiny surface of Serpents' Island is nevertheless an important element to be taken into account when addressing the definition contained in Article 121(3) of the 1982 UNCLOS. Its small size is, at least, an indication of its unfitness for human habitation.

10.6 In all respects, taking into account its natural characteristics, Serpents' Island qualifies as a "rock" within the meaning of Article 121(3):

- (i) it is a rocky formation;
- (ii) it is devoid of water sources other than rainfall, and virtually devoid of soil, vegetation and fauna;
- (iii) it is incapable of sustaining human life of its own; and
- (iv) it is incapable of generating any economic life of its own.

²³⁰ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, ICJ Reports 1993, p. 46 (para. 15). See also *Conciliation Commission on the Continental Shelf Area Between Iceland and Jan Mayen: Report and Recommendations to the Governments of Iceland and Norway*, 20 *International Legal Materials* pp. 801-802. See also *International Maritime Boundaries, vol II*, edited by Jonathan I. Charney and Lewis M. Alexander, Martinus Nijhoff Publishers, 1996, p. 1756.

²³¹ Article titled "The apple of discord tasting like oil", published in *Iug*, issue no. 51 (15053), of 13 July 2002; author: Alexandr Iurcenko (**Annex RM 33**).

- 10.7 Furthermore, the relevance of Article 121(3) is to be analyzed in the light of the Romanian declaration made upon signature of the 1982 UNCLOS and confirmed upon ratification, which refers to the uninhabited islands without economic life which cannot affect the delimitation of the maritime areas belonging to the mainland coasts of States.²³²
- 10.8 In this Chapter studies of various authors published at the end of the 19th century and the first half of the 20th century (until the World War II), as well as articles published in the Ukrainian press after Ukraine's independence in 1991, will be cited. Unfortunately, Romania could find no documentary mentions of Serpents' Island from the period when it was under Soviet rule (1948–1991); this is probably due to its then military status, which might have been the reason for it not being covered by public reports.
- 10.9 The studies and the other texts published before 1948 which are cited here were written at a period when Serpents' Island belonged to Romania and no change in its status was foreseen. Furthermore, the question of delimitation of maritime areas between neighbouring States, let alone the role of islands and other maritime features in such delimitations, was not debated at that time. Thus, the authors of the quoted studies could in no way be suspected of trying to create a false image on Serpents' Island in order to bring about eventual benefits for Romania. The facts and images presented in their writings represented the reality of Serpents' Island, as perceived by the authors concerned.
- 10.10 As far as the recent Ukrainian articles are concerned, some explanations are also relevant. Freedom of expression in Ukraine was under question at the time these articles were published. This can be seen from resolutions of bodies such as the Parliamentary Assembly of the Council of Europe, which reported on the control the Ukrainian media were

²³² See paras. 8.20-8.30 of this Memorial.

subjected to by the Ukrainian authorities at that time.²³³ For example, the Rapporteur of the Council of Europe pointed out

“the strong tendency [of the Ukrainian State authorities] to control and regulate everything”²³⁴.

The Ukrainian mass media were regarded as a political instrument for the State officials of that period to promote their guidelines, by a

“continuing practice of imposing on journalists officially approved guidelines (*temnyki*) for covering events, which constitute[d] a newly-created type of implicit censorship.”²³⁵

10.11 In this context, the articles published in the Ukrainian media, covering a subject which was an issue of diplomatic debate with a neighbouring State, can be considered as reflecting not mere impressions of journalists who reported on Serpents’ Island from the private sector, but rather the quasi-official position of Ukraine. Comments published or broadcast by the Ukrainian mass-media on this issue can be considered to have expressed the position of the Ukrainian authorities in relation to the situation of Serpents’ Island.

²³³ See the *Opinion of the Committee on Culture and Education of the Parliamentary Assembly of the Council of Europe on the freedom of expression in Ukraine*, Rapporteur: Andrzej Urbanczyk, Poland, Socialist Group; Doc. 8946/ 23 January 2001 (**Annex RM 34**). Referring, *inter alia*, to the well-known *Gongadze Case*, the rapporteur characterized Ukraine as "one of the countries in Europe where the profession of journalist [wa]s the most dangerous".

²³⁴ *Ibid.*

²³⁵ *Resolution 1346 (2003) of the Parliamentary Assembly of the Council of Europe* "Honouring of obligations and commitments by Ukraine", para. 5 (vii) (**Annex RM 35**).

(i) *Serpents' Island is a rocky formation*

10.12 It is not necessary in the present case for the Court to decide whether the term “rocks” within Article 121(3) is restricted to insular formations which geologically can be so described, i.e. that such formations are composed mainly of stone and no or little accompanying soil. Whether or not Article 121(3) applies to sand cays or similar formations is not in point: it is clear that Serpents' Island qualifies as a rock in the geological sense. Geologically, Serpents' Island is composed of hard siliceous grit-stone, conglomerate and quartzite. In this context, it may be noted that it has a composition similar to the mountains of Dobrogea, appearing to be a natural sudden peak/rise of the prolongation of the continental plate of Dobrogea's offshore. Its rocky character appears from **Figures 3, 4** (page 18 of this Memorial), **13 - 22** (pages 147, 149, 153, 158, 182 and 183 of this Memorial), as well as from further pictures annexed to this Memorial (**Annexes RM 89 to RM 93**).

10.13 Various travellers, journalists, scientists or representatives of the European Danube Commission have acknowledged its rocky composition, providing details about its appearance. All these statements reveal the fact that Serpent's Island is – as the Ukrainian newspaper “Kievskie Vedomosti” put it – “a rock of compact stone”²³⁶.

10.14 Thus, in 1856, in a report to Count Boul-Schauenstein, the Baron of Hübner wrote

“It results from this work that this island,[...] *is a rock of small size*, of a length of 600 metres and a circumference of 2000 [...]”²³⁷ (emphasis added)

²³⁶ Article titled “The Tourist Island”, published in the Ukrainian newspaper *Kievskie Vedomosti*, issue no. 56 (2861) of 17 March 2003; author: Serghei Milosevich (**Annex RM 36**).

²³⁷ *Report of Baron of Hübner to Count Boul-Schauenstein with respect to the condition of Serpents' Island: geographical data about it, opinion on who would be entitled to own it, etc.* Xerographic Collection of Vienna, CCVI/1, pp. 105-112 (**Annex RM 37**).



Figure 13

The rocks of Serpents' Island
- from the 1931 volume of R. I. Călinescu "Insula Șerpilor. Schiță monografică" – see Annex RM6



Figure 14

Image of Serpents' Island
- from the 1931 volume of R.I. Călinescu "Insula Șerpilor. Schiță monografică" – see Annex RM6

10.15 In a report on the improvement of navigation on lower Danube, written in 1857 by C.A. Hartley, Chief Engineer of the European Danube Commission, it was recorded that:

“In respect of its geological composition, the island is formed of a very rough siliceous conglomerate, and the huge blocs of stone which make up the cliffs that surround it naturally suggest the idea of using them for constructions [...]. But the transportation would be very difficult, given the isolated position of the island and the stormy character of the sea.”²³⁸

10.16 In 1920, the European Danube Commission issued document no. 5/0, in which it referred *inter alia* to the lighthouse on Serpents’ Island. It noticed

“the transport difficulties to the island which is a *lonely rock* situated at about 24 nautical miles from the mouth of Sulina [...]”²³⁹ (emphasis added).

10.17 R. I. Călinescu, in his monographic study on Serpents’ Island, published in 1931, concluded:

“Serpents’ Island is entirely constituted of grit stones and quartzite conglomerates, the same that *Peters* presumes to exist in the Telița Valey, under the loess, constituting the subsoil of the delta towards the sea.

These grit stones and conglomerates are very wide-ranging as particles, but they are monotonous as a composition, being constituted almost entirely of various ranges of quartz. Usually there are grit stones and conglomerates made out of a single sort of quartz, colourless, transparent or translucent. [...]

²³⁸ *Report on the improvement of navigation on Lower Danube, presented to the European Commission by Mr. C.A. Hartley, its chief-engineer, Galatz, 17 October 1857*, General Department of the National Archives, Galatz, Romania, European Danube Commission, 5/1857-1858, pp. 19-20 (**Annex RM 38**).

²³⁹ Document no. 5/0, issued by the Technical Department of the European Danube Commission on 28 June 1920, at Sulina, General Department of the National Archives, Galatz, Romania, European Danube Commission. S. G., 82/1919-1923, pp. 7,8 (**Annex RM 39**).

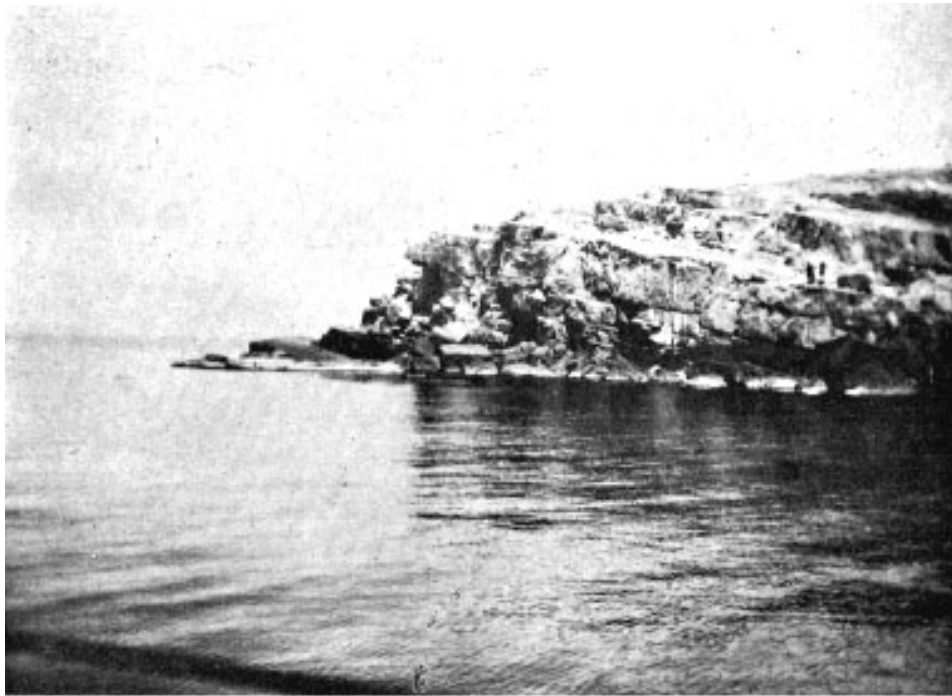


Figure 15, 16

**The cliffs and rocks of Serpents' Island
- from the 1931 volume of R.I. Călinescu "Insula Șerpilor.
Schiță monografică" – see Annex RM6**

According to Murgoci, the little layer of red lehm (terra rosa) maintained here on the quartzites or even conglomerates (especially at east, as those at the base of the loess) is a hint that the entire island has been covered in the past with terra-rosa and loess, although the loess is missing nowadays, as far as we know, being probably washed out afterwards by the rains and the sea waters...²⁴⁰

10.18 In an internal report addressed to the Romanian Minister for Home Affairs in 1938, there is also a complete description of Serpents' Island. The authors of the report refer to it as

“... a huge oval monument of black stone, getting out from the waves of the sea with a chapel (the lighthouse) in its middle [...]

The island is made up of volcanic rocks and is covered with a thin layer of black soil, having its origin in droppings of countless migratory birds...²⁴¹

10.19 The Great Soviet Encyclopaedia described, in 1933, Serpents' Island as follows:

“Serpents' Island (in Romanian, *Insula Șerpilor*) is a small rocky island at the mouths of the Danube...²⁴²

10.20 In the 1938 Romanian newspaper *Acțiunea*, the author, D.L. Stahiescu, also notes the rocky nature of Serpents' Island:

“A remainder of a huge mountain that fell down under the waters of the sea long time ago, it is obviously a rock...²⁴³

²⁴⁰ R.I. Calinescu, *Insula Șerpilor. Schiță monografică (Serpents' Island. Monographic Study)*, published in the *Analele Dobrogei* magazine, “Glasul Bucovinei” Publishing House, Cernauti, 1931 (**Annex RM 6**), pp. 9-11.

²⁴¹ Report addressed to the Romanian Minister for Home Affairs with respect to Serpents' Island, drafted and signed by a Police Inspector and by the M.D. in Chief of the Ministry of Home Affairs (indecipherable signatures), 14 May 1938 (**Annex RM 40**).

²⁴² The Great Soviet Encyclopaedia, Volume 27, Moscow, 1933, p. 74 (**Annex RM 41**).

²⁴³ Article titled “*Insula Șerpilor*” (“Serpents' Island”), published in the Romanian newspaper *Acțiunea (The Action)*, issue 2343, of 25 March 1938; author: D. L. Stahiescu (**Annex RM 42**).

10.21 Ion Simionescu, in his *Picturesque of Romania*, volume I, *Between Danube and the Sea* (1942) described the rocky appearance of Serpents' Island:

“... you find yourself near the stony rock getting up about 20 metres, at the most, above the sea level. [...] It is the evidence remaining further to the falling down of Dobrogea, as the foundation of the island is made up of rocks similar to those of the northern shore of Dobrogea.”²⁴⁴

10.22 Serpents' Island is subject to a continuous process of erosion, which was noted by several of the scientists that studied it. In his 1894 study on Serpents' Island, the Romanian researcher George Popa recalls a poem by Festus Rufus Avienus, *Descriptio orbis terrae*, evoking the rocky *Leuce* as a place where “the rocks unfasten due to the crumbling of the land, their hollowed vault hanging above.”²⁴⁵

10.23 Another Romanian scientist, R. I. Călinescu, in his already quoted work from 1931, *Serpents' Island*, also remarks that one can see, at each of the edges of the maritime feature, big masses of fallen stone blocks. According to the scientist,

“all these blocks represent the outcome of the crumbling of the shore due to the ongoing striking of the waves, and also due to the specific petrographic structure of the island”²⁴⁶.

10.24 A comparison of older and contemporary writings reveals the way in which the island itself was being eroded.

“Thus, Nordmann, comparing the island, in 1841, with the map of Kritsky (drawn in 1824) reaches the conclusion that ‘instead of 3 rocks elevated above the water, existing in 1824 (in N-W), a collapse of the shores was produced,

²⁴⁴ Ion Simionescu, *Pitorescul României (The Picturesque of Romania)*, volume I, *Între Dunăre și mare (Between the Danube and the Sea)*, “Cartea Românească” Publishing House, 1942 (**Annex RM 43**), p. 62.

²⁴⁵ George Popa, *Λευκή. Insula Șerpilor (Λευκή. Serpents' Island)*, in the Romanian Magazine for History, Archaeology and Philology, published by the “I.V. Socecu” Publishing House, Bucharest, 1894 (**Annex RM 44**), p. 13.

²⁴⁶ R.I. Calinescu, *Insula Șerpilor. Schiță monografică (Serpents' Island. Monographic Study)*, published in the *Analele Dobrogei* magazine, “Glasul Bucovinei” Publishing House, Cernăuți, 1931 (**Annex RM 6**), p. 2.

completely altering the appearance of this cape’ – ‘in S-W, a significant opening, determined (perhaps) by the tearing apart of the stone block; [...] among the caves mentioned by the antique writers, only one still exists, on the South-Western edge of the island, at the sea level’

Today, not even this cave is to be seen, only a mass of rolled down rocks and boulders can be noticed in its place.”²⁴⁷

10.25 Călinescu draws the conclusion that

“the future of Serpents’ Island is gloomy: sooner or later it will perish, further to the action of the sea waves”²⁴⁸.

10.26 Mihai Drăghicescu, in his book published in 1943, *The History of the Main Landmarks on the Danube, from the Tisa’s Mouth to the Sea and on the Sea Shore, from Varna to Odessa*, remarks:

“There is no doubt about the fact that its [Serpents’ Island’s] dimensions are continuously shrinking because of the strong striking waves.”²⁴⁹

²⁴⁷ R.I. Calinescu, *Insula Șerpilor. Schiță monografică (Serpents’ Island. Monographic Study)*, published in the *Analele Dobrogei* magazine, “Glasul Bucovinei” Publishing House, Cernăuți, 1931 (**Annex RM 6**), p. 12.

²⁴⁸ Ibid., p. 12.

²⁴⁹ Mihai Drăghicescu, *Istoricul principalelor puncte pe Dunăre dela Gura Tisei până la Mare și pe coastele mării dela Varna la Odesa (The History of the Main Landmarks on the Danube, from the Tisa’s Mouth to the Sea and on the Sea Shore, from Varna to Odessa)*, Bucharest, 1943 (**Annex RM 45**), p.490.



Figure 17

The rocks on Serpents' Island
- from the 1931 volume of Radu Călinescu "Insula Șerpilor. Schiță monografică" – see Annex RM6



Figure 18

Inter-bellum picture of Serpents' Island
As it is noticed, the rocky maritime feature exhibits no vegetation, the only building being the lighthouse

10.27 G. Raşcu has a similar opinion, referring to the stormy waves “that reduced its [Serpents' Island's] surface to less than a half.”²⁵⁰

(ii) *Serpents' Island is devoid of water sources other than rainfall and practically devoid of soil, vegetation and fauna*

10.28 The rocky and poor soil of Serpents' Island only allows for very poor vegetation. No mammals live on it – its fauna comprising mainly insects, reptiles and birds. It is sporadically visited by migratory birds, but the lack of any fresh water sources means that the feature remains generally only a resting place for them.

10.29 The desolate appearance of Serpents' Island was noticed by foreign travellers in the early 1800s. Thus, Edward Daniel Clarke, in the 1810 edition of his *Travels in Various Countries of Europe, Asia and Africa*, noted that Serpents' Island

“is so small, that as we passed we could view its whole extent[...] It is quite bare; being covered only with a little grass and very low herbage.”²⁵¹

10.30 These remarks are confirmed by numerous observers who studied Serpents' Island during the inter-war years, a period – it should be once again emphasised – when its status and appurtenance were not in issue in any way.

10.31 Thus, on 1 June 1926 Professor Alexandru Borza from the Cluj University (Romania) visited Serpents' Island. The results of his detailed research on its vegetation were published in a booklet entitled *Phytosociologic observations on Serpents' Island*, published in 1929. Professor Borza wrote that:

“...From the agents that caused the apparition of plants on this island I have to mark off especially the waters of the Black Sea. As shown by my experiments made in

²⁵⁰ George Rascu, *Insula Serpilor (Serpents' Island)*, “Atelierele Grafice Emil Grabovschi” Publishing House, Chişinău, 1940 (**Annex RM 46**), p.7.

²⁵¹ Edward Daniel Clarke, *Travels in various countries of Europe, Asia and Africa, Part the First, Russia, Tartary and Turkey*, Cambridge, Printed at the University Press by H. Watts, 1810, p. 649-650 (**Annex RM 47**).

collaboration with Mr. G. Bujoreanu (1926) using seeds of 21 species of plants existing on Serpents' Island, all of them might have come floating, preserving their germinating power even after a period of 7-45-60 days of damping and staying in water [...]

From information provided by the lighthouse keepers - people from Sulina working on the island, I find that extreme, prolonged draught, lack of rain and of water on the island, as well as dryness of the air are the most striking climacteric phenomena here. For good reasons I can infer that the minimal presence of the water factor and the maximal evaporation due to solar heat are the most decisive factors that influence the selection of the plants that arrived by chance on the island and are trying to germinate here.

The plateau dominated by an extremely draughty climate, with little rain and large evaporation is covered [...] by a thick bed of Gramineae and weeds, is a herbaceous steppe [...].

During summertime the entire vegetation is dried or yellow-greyish, only in small depressions *Hordeum leporinum* remains still green [...]

The inconstancy of this association is certainly due to the soil having little cohesion, which freezes and unfreezes, slides and is disaggregated [...]”²⁵²

From these observations, Borza concluded that:

“the importance of the water factor – in minimum, and of evaporation – in maximum for the admission in the area of this island of new plants brought by hazard on the island and in their distribution is of a striking evidence”²⁵³.

10.32 Details about the flora and fauna on the Serpents' Island are given also by George Popa, in his monographic study about this maritime feature, carried out at the end of the 19th century:

“There are no smelling flowers or plants; either trees or bushes [...]

²⁵² Alexandru Borza, *Observațiuni fitosociologice pe Insula Șerpilor (Phyto-sociological observations on the Serpents' Island)*, the Publishing House of the Romanian Naturalists Society, Cluj, 1929 (**Annex RM 48**), p. 2-5.

²⁵³ Alexandru Borza, *Observațiuni fitosociologice pe Insula Șerpilor (Phyto-sociological observations on the Serpents' Island)*, the Publishing House of the Romanian Naturalists Society, Cluj, 1929 (**Annex RM 48**), p. 6

The real masters of the island are, indeed, the birds. They are countless, although there are only two species. The *yellow-legged gulls* (*larus cachinans*) [...] and the *black cormorants* (*phalacrocorax*). The yellow-legged gulls are white and beautiful, but they are so nasty, that will not allow any other bird to rest on the island. They will even chase people. [...]

Apart from birds, there are *black serpents* (*coluber hydrus*) wandering about on the island – and that explains its very name, the Serpents’ Island – having a small head, a red belly and a 4-5 feet length. [...]

Finally, the ultimate masters of the island, and, at the same time, the most dangerous, are the so called *scolopendrae cingulatae* insects, the most part of which hide in the ground.”²⁵⁴

10.33 The already mentioned internal report addressed to the Romanian Minister for Home Affairs in 1938 mentions the fact that

“On the island there is no tree, the growing of taller plants being hindered by powerful marine storms and the thinness of the soil.

[...] During spring and autumn, a small scarce grass and some little marine flowers cover almost the entire island, which is sprinkled, at small distances, with big stone blocks, belonging to the volcanic rocks fundament of the island.”²⁵⁵

10.34 In 1938, in the Romanian newspaper *Acțiunea* (*The Action*), D.L. Stahiescu writes:

“Having an area of 17 hectares, the white rock, not too high above the sea waters, seems, from far, the top of a foamy wave turned into stone in the same place from millennia. A remainder of a huge mountain that fell down under the waters of the sea long time ago, it is obviously a rock, covered only with a thin layer of soil strangely kept and remained there. In the huge desert of the sombre surrounding waters, the island is itself desert, inhabited

²⁵⁴ George Popa, *Λευκή. Insula Șerpilor (Λευκή. Serpents’ Island)*, in the Romanian Magazine for History, Archaeology and Philology, published by the “I.V. Socecu” Publishing House, Bucharest, 1894 (**Annex RM 44**), p. 6-7.

²⁵⁵ Report addressed to the Romanian Minister for Home Affairs with respect to Serpents’ Island, drafted and signed by a Police Inspector and by the M.D. in Chief of the Ministry for Home Affairs (indecipherable signatures), 14 May 1938 (**Annex RM 40**).

only by birds that cross the air near the surface of the waters, in order to catch their assiduously-searched prey and by black serpents that crawl on the stones. With its poverty and isolation, the island can be useful for us only as a guarding border post in front of the mouths of the Danube...²⁵⁶

- 10.35 Other observations are made, in his 1931 monographic study about Serpents' Island, by R.I. Călinescu, who collected his impressions *in situ*. These remarks refer to the soil, vegetation and fauna of Serpents' Island:

“Serpents' Island is situated in the driest area of the East-European steppes [...]

Among the plants brought in the island, it is obvious that not all had the chance to acclimatise here; some species disappeared sooner or later and they could no longer be noticed.

The first to come, most likely the Graminaeae, brought by man or birds, had the advantage of lacking concurrence, although they had to fight with the poor condition of the soil and with the climate of the island, very dry during summer²⁵⁷.

- 10.36 In the same vein, G. Rașcu, a teacher at the Military College and the Theological Seminary in Chișinău, remarked in 1940, in his monographic study dedicated to Serpents' Island:

“Barren rock all over the place, on which Gramineae hardly grows, green only in spring. Nowhere could I find yellow soil or loess, which must have existed once, but it was washed off by natural agents. Man can cultivate nothing on this ingrate land [...] The fauna of the island is as poor as the flora.”²⁵⁸

²⁵⁶ Article titled “Insula Serpilor (Serpents' Island)”, published in the Romanian newspaper *Acțiunea (The Action)*, issue 2343, of 25 March 1938; author: D. L. Stahiescu (**Annex RM 42**).

²⁵⁷ R.I. Calinescu, *Insula Șerpilor. Schiță monografică (Serpents' Island. Monographic Study)*, published in the *Analele Dobrogei* magazine, “Glasul Bucovinei” Publishing House, Cernăuți, 1931 (**Annex RM 6**), p. 13, 23.

²⁵⁸ George Rascu, *Insula Serpilor (Serpents' Island)*, “Atelierele Grafice Emil Grabovschi” Publishing House, Chișinău, 1940 (**Annex RM 46**), p. 8.



Figures 19, 20

**The poor life on Serpents' Islands
- pictures from the inter-bellum period -**

10.37 Another relevant example in this respect is the chapter dedicated to Serpents' Island in *România Pitorească (Picturesque Romania)*, published in 1901, by the Romanian writer Alexandru Vlahuță:

“We are on the top, near the lighthouse. There is no tree about, no bush to be seen on the cracked limed wrinkles of this island. The waves are sighing all around us. They keep on coming from far away, like nations never to find their peace, breaking in a howl by the rocky shores of the island, constantly beating it as if wanting to put it out of place”²⁵⁹.

10.38 Ion Simionescu also noted in his 1942 study about Serpents' Island:

“The island is empty or almost empty; it is not only the fact that it is placed so far away that prevents it to be populated, but also the inhospitable soil, rock burnt by the steppe sun, little sprinkled by rain and randomly covered with a thin layer of red soil, always dry [...]

During summer, the island looks like burnt off, just like the Dobrogea hills, just like the Popina island, of Raselm. The steppe sun quickly burns it, while the tree shadow is unknown there. Only during spring is it adorned with some spots of green grass, sprinkled with few small flowers of daisies, mallow, yellow little coins of dandelion, and a small number of some other flowered plants, small and ordinary. There are hardly about 40 plants, belonging to the category of the unhappy ones that have no choice whatsoever. As they are supposed to survive anyway, they do it wherever and however they can.”²⁶⁰

10.39 The sterile condition of Serpents' Island is also revealed by the fact that there are no local fresh water resources – the only fresh water supplies being provided by rain or by the mainland. Numerous remarks, of those visiting Serpents' Island (including modern Ukrainian sources) confirm this assertion.

²⁵⁹ Alexandru Vlahuta, *Romania Pitorească (Picturesque Romania)*, “I.V. Socecu” Publishing House, Bucharest, 1901 (**Annex RM 49**), p. 63.

²⁶⁰ Ion Simionescu, *Pitorescul României (The Picturesque of Romania)*, volume I, *Între Dunăre și mare (Between the Danube and the Sea)*, “Cartea Românească” Publishing House, 1942 (**Annex RM 43**), pp. 63-64.

10.40. Thus, as Mihai Drăghicescu concluded in his 1943 work, *The History of the Main Landmarks on the Danube, from the Tisa's Mouth to the Sea and on the Sea Shore, from Varna to Odessa*,

“there aren't any resources of fresh water but the rain water collected in tanks and this water is not drinkable, because of the snakes dead bodies...”²⁶¹

10.41. In the same work, the author reveals that

“in 1856, as it [Serpents' Island] had been occupied by the Turkish army, they were compelled to bring drinkable water from the Danube.”²⁶²

10.42. In the same vein, the Romanian scientist Raul I. Călinescu noted in 1931 the way people at the lighthouse supplied themselves with fresh water. He then noticed the existence of four water tanks, two of them being placed on each of the sides of the Island, a third one, in its northern part and a fourth, the most important one, in the yard of the lighthouse. Referring to the latter, he described the way the rainwater was collected: trough pipes and hoses, together with dirt and debris deposited on the roof of the lighthouse building.²⁶³

10.43. Reference to the necessity to use rainwater, due to the lack of any other water resource, is also made by the above-quoted 1938 report to the Romanian Minister for Home Affairs – its authors drawing, in addition, conclusions with respect to the consequences that this kind of water had on the health of the people at the lighthouse who drank it:

“The lack of fresh water on the island is hard to bear; the few sailors and guardians of the lighthouse have to drink rain water, which is collected in some big cement reservoirs.

²⁶¹ Mihai Drăghicescu, *Istoricul principalelor puncte pe Dunăre dela Gura Tisei până la Mare și pe coastele mării dela Varna la Odesa (The History of the Main Landmarks on the Danube, from the Tisa's Mouth to the Sea and on the Sea Shore, from Varna to Odessa)*, Bucharest, 1943 (**Annex RM 45**), p. 492.

²⁶² *Ibid.*, p. 491

²⁶³ R.I. Calinescu, *Insula Șerpilor. Schiță monografică (Serpents' Island. Monographic Study)*, published in the *Analele Dobrogei* magazine, “Glasul Bucovinei” Publishing House, Cernăuți, 1931 (**Annex RM 6**), pp. 49-50.

This permanent need for water is more obvious in the case of those brought up on the land, used to the land, as the rain water can affect, in a negative way, the alimentary canal, as a consequence of its strange taste and of its specific chemical composition.”²⁶⁴

10.44. Nowadays, the want of fresh water continues to be one of the great difficulties of Serpents’ Island. This fact is acknowledged by the Ukrainian side too. Thus, according to the Ukrainian newspaper *Moloda Ukraina*, in a 2002 article commenting on the measures undertaken by the Ukrainian authorities to develop the infrastructure on Serpents’ Island, “[...] in summer, significant supplies of drinking water and fuel were brought”²⁶⁵ there. Further on, the author of the article underlines that

“there is a series of problems to which a solution has not been found yet, among which *the supplying with drinkable water and the sewage*”²⁶⁶ (emphasis added).

10.45. In the same vein, another Ukrainian newspaper, *Golos Ukraini*, of 23 April 2003, acknowledges the fact that

“because of the bad weather and storms, all supplies, including potable water, are brought from the continent to last for several months.”²⁶⁷

10.46. Taking these factors into account, it is clear that the lack of vegetation, the lack of fresh water, the scarcity of the soil to sustain such vegetation, and life, in general, characterise Serpents’ Island. The efforts of the Ukrainian authorities (referred to later in this Memorial) to change the appearance of this maritime feature are relevant in a way which is presumably unintended, as they reveal the genuine condition of Serpents’

²⁶⁴ Report addressed to the Romanian Minister for Home Affairs with respect to Serpents’ Island, drafted and signed by a Police Inspector and by the M.D. in Chief of the Ministry for Home Affairs (indecipherable signatures), 14 May 1938 (**Annex RM 40**).

²⁶⁵ Article titled “The taming of the serpents”, published by the Ukrainian newspaper *Ukraina Moloda*, issue no. 167 (1973) of 12 September 2002; author: M. Axaniuk (**Annex RM 50**).

²⁶⁶ Ibid.

²⁶⁷ Article titled “A patch of Ukraine between sea and sky”, published in the Ukrainian newspaper *Golos Ukraini*, issue no. 78 (3078) of 23 April 2003 (**Annex RM 51**).

Island. Thus, numerous Ukrainian newspapers, when talking about the measures carried out by the authorities in order to transform Serpents' Island, convey information about its actual state.

10.47. Recent Ukrainian articles show that the Ukrainian authorities have lately brought fertile soil on Serpents' Island. Thus, on 7 May 2003, the newspaper *Golos Ukraini* notes that

“on Serpents' Island in the Black Sea a little forest of acacias and shrubs has appeared. The team of the ship GS-212 has brought here young trees and 2 tons of fertile chernozem [...]. Until now on the island there was only one tree, near the lighthouse.”²⁶⁸

10.48. In another article published on 17 March 2003 by the newspaper *Kievskie Vedomosti*, it was noted that

“on this very little piece of land, with the dimensions of 500/600 meters, hundreds of trees and shrubs are to be transplanted. This work is very complex, the island represents a rock of compact stone and for the planting of the vegetation it is necessary to make special excavations and to fill them up with soil brought from the continent.”²⁶⁹

10.49. An article entitled *The little town of the lighthouse on Serpents' Island* published by *Odesskie Izvestia*, on 3 November 2004, includes the following paragraphs:

“Presently, the works for the creation of green areas continue. The planting of 400 olive-trees is intended. As the director of the “Ostrovnoe” Enterprise, Viktor Ostrogliaida, mentioned, the specialists of the Botanical Garden of Odessa have tried to plant 18 species of trees and bushes on Serpents' Island [...] Together with the trees, the ship will bring to the island about 8 tons of fertile soil for the plants”²⁷⁰.

²⁶⁸ Article titled “Acacias are going to blossom on Serpents' Island, too”, published in the Ukrainian newspaper *Golos Ukraini*, issue no. 83 (3083), of 7 May 2003; author: Gheorghii Vorotniuc (**Annex RM 52**).

²⁶⁹ Article titled “The Tourist Island”, published in the Ukrainian newspaper *Kievskie Vedomosti*, issue no. 56 (2861); author: Serghei Milosevich (**Annex RM 36**).

²⁷⁰ Article titled “The little town of the lighthouse on Serpents' Island”, published by the Ukrainian newspaper *Odesskie Izvestia*, issue no. 207 (3025), of 3 November 2004 (**Annex RM 53**).

(iii) *Serpents' Island is incapable of sustaining human habitation*

10.50. Not only the isolation of Serpents' Island, but also the natural environment, the lack of fresh water, the hard climate and the dependence on external supplies have always been constraints for even temporary inhabitants. It is clear that Serpents' Island has never sustained human life on a permanent basis.

10.51. This fact has been averred from the most remote antiquity. Serpents' Island, known to the ancients under the name of "Leuce" or "the White" in Greek, is said by Flavius Arrianus to have been "empty with people"²⁷¹ and Philostratus points out that "no one could build up a dwelling here, either Greeks or Barbarians"²⁷². In *Res gestae*, the Roman historian Ammianus Marcellinus refers also to Serpents' Island (Leuce), as "the Leuce island with no inhabitants" ("*insula Leuce sine habitatores*").²⁷³

10.52. Dionisus Perigenet mentions the "deserted valleys of the island"²⁷⁴, while Scylacis Caryandensis talks about Serpents' Island as an "island [...], barren, it is true..."²⁷⁵

10.53. The Romanian historian George Popa concludes a careful archaeological study as follows:

"the soil which was exposed to natural influences from each and every direction was not able to produce enough food for families. Had Serpents' Island become a

²⁷¹ *Periplus Ponti Euxini*, 32. Quoted by George Popa, *Λευκη. Insula Şerpilor (Λευκη. Serpents' Island)*, in the Romanian Magazine for History, Archaeology and Philology, published by the "I.V. Socecu" Publishing House, Bucharest, 1894 (**Annex RM 44**), p. 15.

²⁷² *Heroica*. Quoted by George Popa, *Λευκη. Insula Şerpilor (Λευκη. Serpents' Island)*, in the Romanian Magazine for History, Archaeology and Philology, published by the "I.V. Socecu" Publishing House, Bucharest, 1894 (**Annex RM 44**), p. 19.

²⁷³ *Res gestae*, XXII.8. Quoted by George Popa, *Λευκη. Insula Şerpilor (Λευκη. Serpents' Island)*, in the Romanian Magazine for History, Archaeology and Philology, published by the "I.V. Socecu" Publishing House, Bucharest, 1894 (**Annex RM 44**), p. 10.

²⁷⁴ Dionisus Perigenet, *Orbis Descriptio*. Quoted by George Popa, *Λευκη. Insula Şerpilor (Λευκη. Serpents' Island)*, in the Romanian Magazine for History, Archaeology and Philology, published by the "I.V. Socecu" Publishing House, Bucharest, 1894 (**Annex RM 44**), p. 11.

²⁷⁵ Scylacis Caryandensis, *Periplus*, 68. Quoted by George Popa, *Λευκη. Insula Şerpilor (Λευκη. Serpents' Island)*, in the Romanian Magazine for History, Archaeology and Philology, published by the "I.V. Socecu" Publishing House, Bucharest, 1894 (**Annex RM 44**), p. 10.

permanent residence, ancient relics, such as vessels, statues etc., would have been thus destroyed and it is sure that the great quantity of Roman-Greek coins would have disappeared further to land cultivation. First, the fear of Achilles, then the fear of snakes and poverty, together with uncertainty have always prevented people to settle their dwellings on this solitary island.”²⁷⁶

- 10.54. Frequent mentions of Serpents’ Island during the ancient times seem to have been related to its presumed sacred character. It was regarded as a holy place, and a series of taboos, which confirm its uninhabited character, are said to have been created in relation to it. Thus, Ammianus Marcellinus underlines the fact that every sailor landing on the island had to go back on his ship in the evening, as it was said that spending the night time there could put one’s life in danger.²⁷⁷
- 10.55. Philostratus wrote that “it was absolutely forbidden for any woman to set foot on the island.” He thus told the story of a young woman brought on Serpents’ Island by a merchant, at Achilles’ request. Knowing the interdiction, the merchant expressed its surprise at Achilles’ wish, but he nevertheless fulfilled his task. After leaving the maid on the island, he could hear her desperate cries, "as Achilles was tearing [her] apart in a thousand pieces."²⁷⁸
- 10.56. The reluctance of the ancient people to step onto Serpents’ Island is also mentioned by George Popa, in his 1894 monographic study, quoting the philosopher Maximus of Tyr, who, in his work, *Disertatio XV*, 7, states

²⁷⁶ George Popa, *Λευκή. Insula Șerpilor (Λευκή. Serpents’ Island)*, in the Romanian Magazine for History, Archaeology and Philology, published by the “I.V. Socecu” Publishing House, Bucharest, 1894 (**Annex RM 44**), p. 29.

²⁷⁷ “*Vesperī repetunt naves: aiunt enim, non sine discrimine vitæ illic quemquam pernoctare*” in *Res gestæ*, XXII.8. Quoted by George Popa, *Λευκή. Insula Șerpilor (Λευκή. Serpents’ Island)*, in the Romanian Magazine for History, Archaeology and Philology, published by the “I.V. Socecu” Publishing House, Bucharest, 1894 (**Annex RM 44**), p. 10.

²⁷⁸ *Heroica*. Quoted by George Popa, *Λευκή. Insula Șerpilor (Λευκή. Serpents’ Island)*, in the Romanian Magazine for History, Archaeology and Philology, published by the “I.V. Socecu” Publishing House, Bucharest, 1894 (**Annex RM 44**), pp. 20-21.

that “no man willingly goes there, but in order for him to make sacrifices.”²⁷⁹

10.57. In 1837, the English author Edmund Spencer confirmed the ‘magical’ character of Serpents’ Island. Thus, he wrote that Serpents’ Island

“appears to have been an object of great interest to the ancients. Some affirm it was sacred to Achilles, and given him by Thetis: at all events, it contained his statue, and a temple dedicated to his worship. Pindar called it the Conspicuous Island: Euripides, the White shores of Achilles; while Strabon and Arrien described it as Leuce, the White Island, name that it still retains, in conjunction with its modern appellation, “Serpents’ Island.” Various absurd reports and traditions are current among the Greek, Russian and Turkish mariners that navigate this sea; the most generally credited being, that it is infested by supernatural serpents of enormous size, which keep guard over boundless treasures, and devour every human being who has the temerity to land. Strange to say, we find in the records of Ammianus Marcellinus, that a similar belief existed even in his days. So firmly, indeed, is this superstitious opinion impressed upon the mariners of the Black Sea at the present time, that not a single man belonging to the crew of any ship would venture to trust his safety to the mercy of the hissing inhabitants of Serpents’ Island. And it is not, I believe, on record, that any traveller, however daring, has performed the exploit of exploring it, notwithstanding the tempting facility offered by the water being twenty fathoms deep within a cable’s length of the shore”²⁸⁰.

10.58. This feeling towards Serpents’ Island is reported to have lasted until modern times. Edward Daniel Clarke, remarked that

“An opportunity rarely occurs in which ships can lie-to in order to visit it; and, if this was to happen, not a man of any

²⁷⁹ George Popa, *Λευκή. Insula Șerpilor (Λευκή. Serpents’ Island)*, in the Romanian Magazine for History, Archaeology and Philology, published by the “I.V. Socecu” Publishing House, Bucharest, 1894 (**Annex RM 44**), p.14.

²⁸⁰ Edmund Spencer, *Travels in Circassia, Krim, Tartary, &c., including a stream voyage down the Danube, from Vienna to Constantinople and round the Black Sea, in 1836*, London, Henry Colburn, Great Marlborough Street, 1837) (**Annex RM 54**), p. 214-215.

of their crews would venture on shore; [...] neither is it known that any traveller ever ventured here[...].”²⁸¹

- 10.59. This very status of sacredness attributed to Serpents’ Island should be perceived as testimony to the special nature of this maritime feature – which was never regarded as being able to sustain a common day-to-day existence. No domestic settlements are reported to have developed on Serpents’ Island. The only relics found are of a religious kind, such as tribute pottery, objects honouring Achilles, sacrifice vessels etc., while the only construction (the temple dedicated to Achilles) served similar purposes.
- 10.60. The situation of Serpents’ Island is curiously similar to the situation of Filfla – the islet that, in the decision of this Court in *Libya/Malta* case was referred to as a rock and denied any entitlements to maritime areas.²⁸² On Filfla, a Christian chapel, dedicated to the Assumption of Our Lady, was built inside a small cave, in the 14th century.
- 10.61. As shown above, Serpents’ Island has never provided the necessary conditions for normal daily living. The tough environment preventing people to settle there, which was remarked by ancient witnesses²⁸³, continued to be pointed out by modern sources, as well.
- 10.62. A volume published in 1876 presents various pieces of information related to Serpents’ Island. The author, who wrote under the pen-name of *Cyrille*, tells the story of several Turkish sailors shipwrecked on Serpents’ Island, whose adventures show that Serpents’ Island could not ensure even survival at subsistence level:

²⁸¹ Edward Daniel Clarke, *Travels in various countries of Europe, Asia and Africa, Part the First, Russia, Tartary and Turkey*, Cambridge, Printed at the University Press by H. Watts, 1810, p. 649-650 (**Annex RM 47**).

²⁸² See para. 8.40 of this Memorial.

²⁸³ As George Popa pointed out in his well documented study about the Serpents’ Island, “There were no inhabitants on Leuce, according to all the quoted writers”. See George Popa, *Λευκή. Insula Șerpilor (Λευκή. Serpents’ Island)*, in the Romanian Magazine for History, Archaeology and Philology, published by the “I.V. Socecu” Publishing House, Bucharest, 1894 (**Annex RM 44**), p. 20.

“This island was once dedicated to Achilles. Wonderful stories about it were still told in the last century, as the following:

Returning from Crimea, a Turkish ship captain named Hassan, was thrown on Serpents’ Island by a terrible storm. The shipwrecked, in number of twenty-five, built shutts with the wrecks of their ship. They spent a whole year in these desolated places, fighting nature’s elements and supporting their miserable existence with flesh of big fish, the capture of which often put them in great danger. Thus, captain Hassan was one day engaged in a terrible fight against a shark weighing nine hundred pounds. The cast-away ended by eating one another; there survived only four of these misfortunated, when the arrival of a ship saved them from hopelessness and a certain death...²⁸⁴

10.63. For his part, the author describes Serpents’ Island as follows:

“this small sterile rock, situated almost at equal distance from the mouths of Kilia and Sulina...²⁸⁵

10.64. The barren remoteness of Serpents’ Island represented an economic and, moreover, a psychological argument for people not to settle permanent dwellings there. Its harsh living conditions, as well as the impression of loneliness it created, are described by most of its visitors – scientists, journalists, border patrols, writers etc. Thus, G. Raşcu talked in his 1940 monographic study on Serpents’ Island about

“this mysterious rock beaten by the waves [...] that nobody ever visits, that nobody ever asks about and that is reproduced not even on a postal card in the bookstores of Cetatea Albă or Constanța [...]

The appearance of the island, when one approaches it, is impressive; huge rocks broken by the waves, with a parallel and inclined stratification, cracked and blacken by a moss of moisture and time. [...] One would find himself as isolated as on the Robinson’s island...²⁸⁶

²⁸⁴ Cyrille, *From Paris to Serpents’ Island across Romania, Hungary and the Mouths of the Danube (De Paris à l’Île des Serpents à travers la Roumanie, la Hongrie et les bouches du Danube)*, « Ernest Leroux » Publishing House, Paris, 1876 (**Annex RM 55**), p. 62.

²⁸⁵ *Ibid.*, p. 63

²⁸⁶ George Rascu, *Insula Serpilor (Serpents’ Island)*, “Atelierele Grafice Emil Grabovschi” Publishing House, Chişinău, 1940 (**Annex RM 46**), p. 3, 5, 7.

10.65. In the same vein, Ion Simionescu noticed the hard living conditions on Serpents' Island, that provided a tough environment even for the animals brought there:

“Only the guardian of the lighthouse, as well as a couple of border patrols can be found there, *living like exiled people*. There are also 2-3 goats and a poor donkey, master of the place, but unhappy to be often starving, *living, most of the time, on an empty stomach* [...]”(emphasis added)²⁸⁷

10.66. And, as a conclusion to his trip on Serpents' Island, this writer noted:

“Desolate now, as it has always been, it is not tempting. Alone in the openness of the Black Sea, at the dangerous entrance of the area where the eastern wind raises dangerous waves, the rocky island is linked with the rich imagination of the few navigators losing their way at the mouths of the Istrus. [...] Today, it sits as deserted as it was at the time of the Herodotus' trips. At various, rather long periods of time, a small ship brings the necessary supplies to the lighthouse keeper, to the patrols taking care of the light... The hugeness of the sea surrounds them. Only the white restless sea-gulls accompany their loneliness, shouldn't their cries be numbed by the furious torment of the waves, pouring over the island a rain of salted water, as pernicious to the life of the plants as it is the burning sun.”²⁸⁸

10.67. Moreover, according to the researches undertaken in 1938 by the representatives of the Romanian Ministry for Home Affairs in a report to the Minister for Home Affairs,

“the influence of Serpents' Island, situated on rocks, 40 meter high above the sea level, and 43 kilometres and 200 metres away from the last lighthouse of the Sulina dyke and almost 50 kilometres away from the shores of the mainland, which can never be seen, and with the perspective of seeing and hearing only the rhythm of the waves, almost always stormy and accompanied by continuously changing winds, (the influence) is damaging, affecting the human nervous system, especially in the case of the nervously sensitive people.

²⁸⁷ Ion Simionescu, *Pitorescul României (The Picturesque of Romania)*, volume I, *Între Dunăre și mare (Between the Danube and the Sea)*, “Cartea Românească” Publishing House, 1942 (**Annex RM 43**), p. 63-64.

²⁸⁸ *Ibid.*, p. 65

These nervously sensitive people are likely to be affected by a specific debility, consisting of a general depression, nervous breakdowns, psychical asthenia, insomnia, etc. The only preoccupation they can have in this monotonous and irritating seclusion is but the continuous preoccupation to save themselves from this sepulchre of human oblivion.

Only the sea-gulls, with their wailing cries, comprising the large population of the island towards its edges, together with the various species of birds can bring them a small ray of hope.

The influence of the marine currents and of the salted air of the island is even worse as far as the human respiratory system is concerned, provoking lung respiratory modifications, dry and liquid pleurisies, these diseases being likely to aggravate if the staying on the island of those affected is prolonged, and even likely to provoke death.²⁸⁹

- 10.68. The extreme harshness of human life on Serpents' Island is caused not only by the scarcity of supplies or by its isolating position, but also by the capriciousness of its climate, characterised by strong winds, often storms, and, generally, by more than uncomfortable temperatures during summer or winter. Thus, as R.I. Călinescu mentioned in his monographic study, further to direct experience and observations,

“Hurricanes are not rare at all on Serpents' Island, especially during winter.

Thus, on Christmas day (25.XII.1930), the lighthouse tower, otherwise a very solid construction, shifted from its place and the wall of the building it was attached to broke – just like the lightning conductor”.

“Fog is a frequent phenomenon in winter and spring, presenting great hazards for navigation. In foggy weather, in 1914 a British ship of the Weston Company went ashore on the rocks of the island, failing to notice the light of the lighthouse installed here.”²⁹⁰

- 10.69. These remarks are endorsed by the Ukrainian media, as shown by several press reports with respect to the conditions on Serpents' Island, published

²⁸⁹ Report addressed to the Romanian Minister for Home Affairs with respect to Serpents' Island, drafted and signed by a Police Inspector and by the M.D. in chief of the Ministry for Home Affairs, (indecipherable signatures), 14 May 1938 (**Annex RM 40**).

in the Ukrainian press. As the Ukrainian newspaper *Golos Ukraini* noticed,

“The only entertainment of the people on the island is, during winter, the TV, while during summer, bathing in the sea and picnics. ‘Once the bad weather arrives, the island is hit by winds from everywhere, so that we have to protect our windows with shutters, so that they would not be broken.’ Because of the bad weather and the storms, all supplies, including potable water, are brought from the continent, to last for a several months.”²⁹¹

10.70. As a further example in this respect, another Ukrainian journalist mentions, in *Odeskie Izvestia*, the difficult weather conditions on the Island, pointing out “the strong marine winds”, as well as the fact that, “during summer, the soil can reach temperatures as high as 50°-60°C.”²⁹²

10.71. The difficult conditions on Serpents’ Island had already been recognised in an article published on 19 August 1995, where the author, Anatoli Murahovski, shares this appreciation:

“Serpents’ Island is a difficult place to live. There are no plants, with the exception of sparse grass and some thorns and, of course, there is no drinking water. In the summer the sun is merciless, while in the winter a piercing wind blows...”²⁹³

10.72. In the same vein, the author of an article published in the 2002 *Vecherniia Odessa* newspaper draws the conclusion that “nowadays, Serpents’ Island represents: 18 ha of rocky land, brambles and one tree [...]”, to further complete her “definition” with the following elements:

“Serpents’ Island represents also the romanticism of this rocky island and the tough life of people living here; the

²⁹⁰ R.I. Calinescu, *Insula Șerpilor. Schiță monografică (Serpents’ Island. Monographic Study)*, published in the *Analele Dobrogei* magazine, “Glasul Bucovinei” Publishing House, Cernăuți, 1931 (**Annex RM 6**), p. 13-15.

²⁹¹ Article titled “A patch of Ukraine between sea and sky”, published in the Ukrainian newspaper *Golos Ukraini*, issue no. 78 (3078), of 23 April 2003 (**Annex RM 51**).

²⁹² Article titled “The number of the islanders is going to increase”, published in the Ukrainian newspaper *Odeskie Izvestia*, issue no. 192 (2766), of 16 October 2003; author: Vladislav Kitik (**Annex RM 56**).

²⁹³ Article titled “The Serpents’ Island is the most important island in the Black Sea and it belongs to Ukraine”, published in the Ukrainian newspaper *Zerkalo Nedeli*, issue of 19 August 1995; author: A. Murahovski (**Annex RM 57**).

service, *in which one year counts as two*, is difficult.”²⁹⁴
(emphasis added).

10.73. Considering all these natural circumstances which do not favour a normal human habitation, it is not surprising that Serpents’ Island has never been inhabited by a permanent population.

10.74. This later fact is acknowledged, for example, by the 1920 *Black Sea Pilot*, published in London, for the Hydrographic Department of the Admiralty, which, when giving details about Serpents’ Island, points out that

“The only people on the island are the light-keepers and the sentries to whom provisions are sent monthly.”²⁹⁵

10.75. In 1930, the eighth edition of the same *Black Sea Pilot* confirms that “the only people on the island are the light-keepers and some soldiers”²⁹⁶.

10.76. This fact is revealed by other sources, too, with respect to various other years. Thus, the 1933 edition of the Great Soviet Encyclopaedia mentioned that “except for the guardians of the lighthouse and of the Romanian border patrols, there is no population”²⁹⁷ on Serpents’ Island. According to G. Popa, in 1891 the lighthouse was guarded by one sergeant and six soldiers²⁹⁸. In April 1931, there were one corporal and three soldiers (and two other soldiers, who had been sent here by way of punishment).²⁹⁹

²⁹⁴ Article titled “Serpents’ Island of the Kilia District”, published in the Ukrainian newspaper *Vecherniia Odessa*, issue no. 27 (7565) of 19 February 2002; author: Dora Dukova (**Annex RM 58**).

²⁹⁵ *The Black Sea Pilot comprising the Dardanelles, Sea of Marmara, Bosphorus, Black Sea, and Sea of Azov*, Seventh Edition, 1920, London, printed by the Hydrographic Department, Admiralty, p. 218 (**Annex RM 59**).

²⁹⁶ *The Black Sea Pilot comprising the Dardanelles, Sea of Marmara, Bosphorus, Black Sea, and Sea of Azov*, Eighth Edition, 1930, London, printed by the Hydrographic Department, Admiralty, p. 168 (**Annex RM 60**).

²⁹⁷ *The Soviet Great Encyclopaedia*, Volume 27, Moscow, 1933, p. 74 (**Annex RM 41**).

²⁹⁸ George Popa, *Λευκή. Insula Șerpilor (Λευκή. Serpents’ Island)*, in the Romanian Magazine for History, Archaeology and Philology, published by the “I.V. Socecu” Publishing House, Bucharest, 1894 (**Annex RM 44**), p. 5.

²⁹⁹ R.I. Calinescu, *Insula Șerpilor. Schiță monografică (Serpents’ Island. Monographic Study)*, published in the *Analele Dobrogei* magazine, “Glasul Bucovinei” Publishing House, Cernăuți, 1931 (**Annex RM 6**), p. 50.

- 10.77. As far as the civil staff is concerned, whose duty was to take care of the lighthouse, they are reported to be very few, as well: there were four in 1891³⁰⁰, three in 1931³⁰¹, three in 1933³⁰².
- 10.78. All the elements presented above clearly demonstrate that Serpents' Island is inappropriate for human habitation. Its only inhabitants were (and still are) the guardians of the lighthouse, soldiers or customs officers posted on it. As Kolb points out, the criterion of "human habitation" of a rock implies that it be capable of sustaining "human groups steadily rooted and organized", which "have the intention to establish there a much more global connection"³⁰³. This view is largely shared by other commentators³⁰⁴. Clearly, Serpents' Island does not meet this criterion.
- 10.79. At a time when human life can be supported in outer space for long periods, it is in theory possible, assuming the expenditure of enough resources and money, to permit human survival on any area marginally above sea level. It cannot be the correct interpretation of Article 121(3) that a maritime formation falls outside its scope as long as there is some area where a human being can survive above water level when supported by supplies from the mainland. And that is all that Serpents' Island is – a barren outcrop that supports nothing and produces nothing.

³⁰⁰ George Popa, *Λευκή. Insula Șerpilor (Λευκή. Serpents' Island)*, in the Romanian Magazine for History, Archaeology and Philology, published by the "I.V. Socecu" Publishing House, Bucharest, 1894 (**Annex RM 44**), p. 5.

³⁰¹ R.I. Calinescu, *Insula Șerpilor. Schiță monografică (Serpents' Island. Monographic Study)*, published in the *Analele Dobrogei* magazine, "Glasul Bucovinei" Publishing House, Cernăuți, 1931 (**Annex RM 6**), p. (47).

³⁰² Document no. 2093/345, of 10 August 1933, issued by the Technical Service of the European Danube Commission, Sulina, General Department of the National Archives, European Danube Commission, S. G., 364/1929-1939, p. 127 (**Annex RM 61**).

³⁰³ R. Kolb, *L'interprétation de l'article 121, paragraphe 3, de la Convention de Montego Bay sur le droit de la mer : Les rochers qui ne se prêtent pas à l'habitation humaine ou à une vie économique propre*, *A.F.D.I.*, vol. XL, 1994, p. 906.

³⁰⁴ See e.g. G.Gidel, *Le droit international public de la mer. Le temps de paix*, Tome III, La mer territoriale et la zone contiguë, Sirey, Paris, 1934, p. 684 ; S. Karagiannis, *Les rochers qui ne se prêtent pas à l'habitation humaine ou à une vie économique propre et le droit de la mer*, 29 *Revue belge de Droit international*, 559 (1996), p. 572 ; J.M. van Dyke, R.A. Brooks, *Uninhabited Islands : Their Impact on the Ownership of the Oceans' Resources*, 12 *Ocean Development and International Law* 265 (1983), p. 286.

(iv) *Serpents' Island is incapable of sustaining any economic life of its own*

10.80. As shown above, Serpents' Island has never had a settled population. Only military and similar personnel have ever been stationed there, and only because they are obeying orders to be there. It has never had any industrial or agricultural activity. It has no harbour or other natural feature that would make it useful for trade. No natural resources have been discovered on Serpents' Island. Moreover, access to the island is very difficult.

10.81. Leaving aside some other recent artificial activities promoted by Ukraine in view of the present case,³⁰⁵ the only activities of any sort which have taken place on Serpents' Island have been military and the keeping of the lighthouse. Even those very special and limited activities must be sustained at great cost and difficulty and are dependent exclusively on external supplies.

10.82. Human survival on Serpents' Island depends on the continual importation not only of water but of all other supplies. The people sent to live there (military and lighthouse staff) have to be continually provided with supplies in order to be able to survive and this supply itself is extremely difficult.

10.83. This is no new phenomenon. A memorandum of the Inspectorate for Harbour Navigation (issued at Galatz, on 12 October 1894) reports that, up to 16 April 1894, the ship *Bistrița* remained anchored at Sulina, "as it was used for the inspection and for the supplying of Serpents' Island".³⁰⁶ There are also reports about a certain ship *Grivița* in charge with supplying Serpents' Island.³⁰⁷

³⁰⁵ See paras. 10.101-10.131 of this Chapter below.

³⁰⁶ *Documente privind istoria militară a poporului român - iulie 1891-decembrie 1894* (Documents on the Military History of the Romanian People – July 1891 – December 1894), Editura Militară (Military Publishing House), Bucharest 1976 (**Annex RM 62**), p. 431.

³⁰⁷ *Documente privind istoria militară a poporului român - iulie 1891-decembrie 1894* (Documents on the Military History of the Romanian People – July 1891 – December 1894), Editura Militară (Military Publishing House), Bucharest 1976 (**Annex RM 62**), p. 457.

10.84. A hard frost was mentioned to have happened in 1929, when the sea was frozen for several kilometres around Serpents' Island, compelling the civil and military staff to remain there completely isolated for a two month period. Fortunately they had a sufficient store to survive until the thaw, though with considerable hardship.³⁰⁸

10.85. In 1935, in the Romanian newspaper *Curentul*, the journalist I. Dimitrescu referred to the fact that the lighthouse keepers and the soldiers posted on Serpents' Island had to bring all necessary supplies for their stay there. Further, the same journalist introduced a terrible image of the living conditions on Serpents' Island:

“There is no need to spend money at the movies should you want to offer yourself a show of a remarkable nightmare, populated by horrible adventures and sadistic tortures.

Neither ‘The Count of Monte-Cristo’, nor ‘The Vampire of Prague’ will overdo it, with their macabre festive scenes – this is the tragic experience of the sailors that the hazardous fate punished to the forced seclusion on Serpents' Island, our modest colony in the East!...

You read in the yesterday newspaper the dramatic description of Mr. Gh. Economu, recently returned from a study expedition on the little island, and you are stunned: the existence of the five sailors and of the three guardians of the lighthouse is not, today [...] more compassionate than that of the invaded people during the time of the Volsces.

One month leave – in order for them to recover from the neurosis of solitude – this is the only gratification awarded to the lighthouse guardians after three months of vigilant guarding; for the whole period of this guarding – that definitely looks like the staying in a penitentiary cell – the miserable convicts will bring, when they settle there, the necessary supplies, the corn flour for the whole trimester. Once left among serpents by the ship of the European Commission, the poor guardians are forgotten in the subsistence of hurricanes and hail: if one of them gets sick, he will treat himself with lizard juice or reptile mush – just like during the brave times of Pyrrhus...

A heavy piece of the lighthouse fell and broke the leg of one of the guardians, about the middle of last month: for three nights in a row have the comrades of the misfortunate begged, through light signals, for the urgent help of the maritime bosses in Sulina. Three days later, when gangrene

³⁰⁸ R.I. Calinescu, *Insula Șerpilor. Schiță monografică (Serpents' Island. Monographic Study)*, published in the *Analele Dobrogei* magazine, by “Glasul Bucovinei” Publishing House, Cernăuți, 1931 (**Annex RM 6**), p.15.

had already begun to attack the metatarsus of the wounded, here came the leisurely ship of the European Commission!”³⁰⁹

10.86. On 8 June 1944, a group of Romanian soldiers were sent to Serpents’ Island, with a view to rebuilding the lighthouse building, damaged by bombing. One of these militaries, major (retired) Silviu Ștefănescu recalls that they “remained there until 20 August 1944, when, by a radiogram, [they] informed about the fact that [they] had no more food and that, especially, the water supplies were getting shorter”. Two days later they were rescued by a ship that brought them all to Sulina.³¹⁰

10.87. As mentioned before, in 1920, the European Danube Commission referred *inter alia* to the lighthouse on Serpents’ Island. In this context it noted:

“ the transport difficulties to the island which is a lonely rock situated at about 24 nautical miles from the mouth of Sulina ”³¹¹

10.88. Similarly, the Romanian authors Cucu and Vlăsceanu describe the hazards for ships trying to land there:

“At first sight, it would seem that these depths are favourable for the ships anchoring even near the shore, except in the north, but in fact this is far from the truth. Firstly, the mentioned gulfs are extremely large and offer no convenient shelter for the ships, secondly, a specific petrographic structure of the island, under the action of the waves, causes the crumbling of the shores. The island is surrounded by fragments of stone, and bigger and smaller blocks, submerged or risen above the water, can be seen everywhere. Bigger clusters of rocks can be seen especially in the NW, SE, NE and SW of the so-called

³⁰⁹ Article titled “Geamanduri în uniformă” (“Buoys in Uniform”), published in the Romanian newspaper *Curentul*, issue 2795 of 14 November 1935; author Ion Dimitrescu (**Annex RM 63**).

³¹⁰ Major (retired) Silviu Ștefănescu, *Din amintirile veteranilor (War Veterans’ Memories)*, published in *Revista de istorie militară (Military History Magazine)*, issue no 3 (31)/1995, p. 48 (**Annex RM 10**).

³¹¹ Document no. 5/0 of 28 June 1920, issued by the European Danube Commission, General Department of the National Archives, Galatz, Romania, European Danube Commission, S. G., 82/1919-1923 (**Annex RM 39**), pp.7,8.

quadrilateral. No ship dares to come nearer than 50 meters from the shores...³¹²

- 10.89. The difficulties of getting ashore Serpents' Island are also mentioned by G. Rascu:

“the way to the island is usually hard to go on [...]. The ship needs to anchor in the open sea, as the submarine rocks allow only for a boat to ashore and, what is more, only when the weather is calm.”³¹³

- 10.90. The danger of getting near the island was noted, by Mihai Draghicescu, as well, in *The History of the Main Landmarks on the Danube, from the Tisa's Mouth to the Sea and on the Sea Shore, from Varna to Odessa*:

“Getting near and landing on the island is dangerous to ships, because of the shallow waters and of the rocks spread under the water up to a great distance around. [...] [B]ecause of its reduced dimensions, the island cannot shelter ships against the waves.”³¹⁴

- 10.91. Ion Simionescu, in his *Picturesque of Romania*, also notes:

“the landing of the small ship is difficult. It is compelled to anchor in the open sea, as the stone fangs, blackened by the sea-weed dressing are dangerous needles even for the thicker belly of a torpedo boat. The broken skeleton of a ship, thrown by the storms much too near the island urges to precaution.”³¹⁵

- 10.92. These hard conditions of living, artificially maintained by external supplies of drinking water and food are confirmed by articles recently published in Ukrainian newspapers, which stress that the only possible regular link with the outside world is by helicopter:

³¹² Vasile Cucu, Gheorghe Vlăsceanu, *Insula Șerpilor (Serpents' Island)*, „Viața Românească” Publishing House, Bucharest, 1991 (**Annex RM 5**), pp. 15-16.

³¹³ George Rascu, *Insula Șerpilor (Serpents' Island)*, “Atelierele Grafice Emil Grabovschi” Publishing House, Chișinău, 1940 (**Annex RM 46**), p. 4-5.

³¹⁴ Mihai Drăghicescu, *Istoricul principalelor puncte pe Dunăre dela Gura Tisei până la Mare și pe coastele mării dela Varna la Odesa (The History of the Main Landmarks on the Danube, from the Tisa's Mouth to the Sea and on the Sea Shore, from Varna to Odessa)*, Bucharest, 1943 (**Annex RM 45**), p. 491.

³¹⁵ Ion Simionescu, *Pitorescul României (The Picturesque of Romania)*, volume I, *Între Dunăre și mare (Between the Danube and the Sea)*, “Cartea Românească” Publishing House, 1942 (**Annex RM 43**), p. 63.

“the rocky vertical shores and underwater rocks do not permit the maintaining of regular links with the continent.”³¹⁶

10.93. An article published by the *Vecernia Odessa* on 19 February 2002, notes:

“... Serpents’ Island represents also the romanticism of this rocky island and the tough life of people living here; the service, in which one year counts as two, is difficult. On the island the heating is done by hearths, the only TV channel that can be received is ‘Inter’, but only when the weather is fine. The medical assistance is done by a paramedic. But when urgent medical help is needed? There is a helicopter, but there isn’t always the fuel for taking off. There is a need for an energy cable and for a communication cable, but, most of all, there is a need for a landing stage.”³¹⁷

10.94. The Ukrainian daily *Iug* noted on 23 March 2002 that:

“The necessary transports between the island and mainland are few and are done by a helicopter that secures only the transport on the island of those securing the service on a rotational basis and only a minimum of all that is needed.”³¹⁸

10.95. The 13 July 2002 edition of the same newspaper remarked that

“Right now ships can approach the island at the most 400 meters distance, and boats at 100 meters. So the goods are brought on the island with a helicopter, which is very expensive... In the case of a more or less serious storm the ships cannot remain near the shore and have to take to the open sea.”³¹⁹

10.96. The daily *Moloda Ukraina* noted on 12 September 2002 that:

³¹⁶ Article titled “The map of depths near Serpents’ Island – navigation of maritime ships to the island is to be ensured by the experts of the GOSHIDROGRAFIA enterprise, of Ukraine”, published by the Ukrainian newspaper *Odesskie Izvestia*, issue no. 213 (2541) of 13 November 2002, quoting Alexandr Boris, first deputy director of Ukrmorcartografia (a State-owned cartographic enterprise) (**Annex RM 64**).

³¹⁷ Article titled “Serpents’ Island of the Kilia District”, published in the Ukrainian newspaper *Vecerniia Odessa*, issue no. 27 (7565) of 19 February 2002; author: Dora Dukova (**Annex RM 58**).

³¹⁸ Article titled “The Military does not need Serpents’ Island”, published in the Ukrainian newspaper *Iug*, issue no. 22 (15024) of 23 March 2002; unsigned (**Annex RM 65**).

³¹⁹ Article titled “The apple of discord tasting like oil”, published in *Iug*, issue no. 51 (15053), of 13 July 2002; author: Alexandr Iurcenko (**Annex RM 33**).

“Until now, the helicopter remains the only means of transportation for the border guards, the researchers and the construction workers that live and work on the island. In summer, significant supplies of drinking water and fuel were brought, and at this moment repairs at the administrative buildings are under way. There is a series of problems to which a solution has not been found yet, among which the supplying with drinkable water and the sewage... The officials in Kiev are surprised that the financing of construction and setting works (which are initiated by the capital mainly for political reasons) are left to the local administration.”³²⁰

10.97. Similarly, the edition of *Golos Ukraini* of 23 April 2003 describes Serpents’ Island as being a

“rocky land with a surface of 1,5 square kilometres, surrounded by sea at 12 miles from the shore, where the links with the external world are limited to the rare helicopter flights and the letters of the beloved ones... Today on this island live around 30 people: the border guards that service the local border post, the supervisor of the lighthouse with his wife and daughter... The island is hit by winds from everywhere, so that we have to protect our windows with shutters so that they would not be broken. Because of the bad weather and the storms, all supplies, including potable water, are brought from the continent to last for several months.”³²¹

10.98. An article published by the daily *Fakti* on 6 October 2004 quotes the radiotelegraphist Tatiana Litvinenko as saying that:

“Of course we don’t have a store [...] We have to bake bread, but there are enough food supplies [...] For the rest, we order all the other commodities, for personal hygiene, medicines and other necessary objects and they are brought by the emissaries of the ‘great land’.”³²²

10.99. These articles are mere confirmation of a situation faced by the Ukrainian authorities from the very beginning of their activities undertaken on

³²⁰ Article titled “The taming of the serpents”, published by the Ukrainian newspaper *Ukraina Moloda*, issue no. 167 (1973) of 12 September 2002; author: M. Axaniuk (**Annex RM 50**).

³²¹ Article titled “A patch of Ukraine between sea and sky”, published in the Ukrainian newspaper *Golos Ukraini*, issue no. 78 (3078) of 23 April 2003 (**Annex RM 51**).

Serpents' Island after the dismantlement of the USSR. Thus, already in 1995, Anatoli Murahovski wrote in an article published in *Zerkalo Nedeli*:

“The supply of the necessary goods for the islanders has always been a difficult task. True, before, the main burden was on the Black Sea Fleet, the subunits of which defended the island.

Now, the Ministry of Defence of Ukraine has to bear the burden, and it lacks the means for the timely assurance of fuel, potable water, products and other materials, while the renting of a special barge is too expensive. There is no stationary quay, and the special barge that served as quay sunk a few years ago.”³²³

10.100. The clear conclusion from all the above is that Serpents' Island is incapable of sustaining an economic life of its own.

(3) Ukraine's recent activities on Serpents' Island cannot change its qualification as a rock within the scope of Article 121(3)

10.101. In parallel with the Romanian-Ukrainian negotiations regarding the delimitation of the maritime areas of the two countries in the Black Sea, in which the relevance of Serpents' Island is of certain importance, Ukraine engaged in a massive attempt to mask the real nature of this rock and to create artificial conditions for human survival on it.

10.102. In this respect, the Court's attention is drawn to the images of Serpents' Islands from the 1931 study³²⁴, as well as other images dated prior to 1949 (e.g. **Figure 21** – page 182 of this Memorial³²⁵), in comparison with a recent image reproduced in the following pages (**Figure 22** – page 183 of this Memorial).

³²² Article titled “I wanted so bad to have a French perfume...and, in a fortnight, I had it, when they brought the correspondence by helicopter”, published in the Ukrainian newspaper *Fakti*, issue of 6 October 2004; author: Aleksandr Levit (**Annex RM 66**).

³²³ Article titled “The Serpents' Island is the most important island in the Black Sea and it belongs to Ukraine”, published in the Ukrainian newspaper *Zerkalo Nedeli*, issue of 19 August 1995; author: A. Murahovski (**Annex RM 57**).

³²⁴ R.I. Calinescu, *Insula Șerpilor. Schiță monografică (Serpents' Island. Monographic Study)*, published in the *Analele Dobrogei* magazine, “Glasul Bucovinei” Publishing House, Cernăuți, 1931 (**Annex RM 6**).

- 10.103. As can be seen from these images, prior to 1949 on Serpents' Island there were only the lighthouse, the huts of the light-keepers and the soldiers posted on it, as well as the water-collection system already mentioned. The recent pictures show, further to the already existing elements, alleys, a pontoon and certain additional buildings. However, the general picture remains one of a deserted territory, arid and inhospitable and without any facilities to sustain a permanent community.
- 10.104. Consequently, this transformation is pure appearance and bears no relationship to reality.
- 10.105. In this context, it is worth mentioning that, during the bilateral Romanian-Ukrainian negotiations, the Romanian side officially proposed that the experts of the two Parties should pay a visit to Serpents' Island, in order to assess *in situ* its natural characteristics³²⁶. While not directly rejecting this proposition, the Ukrainian side invoked “technical reasons” and postponed indefinitely the proposed visit³²⁷.
- 10.106. The process of transformation began when the Ukrainian Council of Ministers adopted Decision no. 1009, of 18 December 1995, on the future developing of the infrastructure and of the economic life on Serpents' Island and Decision no. 1114, of 8 October 1997, on the modernization of the infrastructure and of economic activity on Serpents' Island, establishing a complex program for the development of the infrastructure on Serpents' Island. The provisions of these decisions were furthered by Decision no 713/2002, approving the Complex Program of Developing the Infrastructure and the carrying out of the economic activity on the Serpents' Island. To the Romanian authorities' knowledge, the texts of these decisions are not public; they

³²⁵ See also **Maps RM A 12, RM A 13, RM A 14 in the Map Atlas.**

³²⁶ Notes verbales no. EVI-1/2803 dated 4 May 2004 of the Ministry of Foreign Affairs of Romania to the Embassy of Ukraine in Bucharest (**Annex RM 67**) and EVI/204 dated 9 August 2004 of the Ministry of Foreign Affairs of Romania to the Embassy of Ukraine in Bucharest (**Annex RM 68**)

³²⁷ Note verbale no. 72/22-446-4290 dated 18 August 2004 of the Ministry of Foreign Affairs of Ukraine to the Embassy of Romania in Kiev (**Annex RM 69**)

are not in the possession of the Romanian side. They were, however, mentioned in the Ukrainian media.³²⁸

10.107. This process of transformation of Serpents' Island envisages the carrying out of a complex of measures such as: bringing soil, planting trees, installing a mobile phone communications system, establishing a postal office, opening a store etc. Although, as reported by the Ukrainian mass-media, among the 66 inhabitants, there is only one woman³²⁹, a gynaecological post has been opened.

10.108. In September 2004 (after Romania had seized the Court with the present case), a branch of the Ukrainian bank "Aval" has began to function on Serpents' Island.³³⁰ It is also reported that the Ukrainian authorities have plans for the construction of other buildings (such as a hotel or a museum).

³²⁸ See articles published in the Odessa-based *Odeskie Izvestia*, issues no. 171 (2499) of 14 September 2002 ("Serpents' Island concerns are our concerns"; author: Aleksandr Seryi – **Annex RM 70**) and 192 (2766) of 16 October 2003 ("The number of islanders is going to increase"; author: Vladislav Kitik - **Annex RM 56**), and *Odeskyi Vestnik*, issue no. 80 (3337) of 13 April 2005 ("I find myself again at the end of the world"; author: Valentina Surmina – **Annex RM 71**).

³²⁹ Article titled "I wanted so bad to have a French perfume...and, in a fortnight, I had it, when they brought the correspondence by helicopter", published in the Ukrainian newspaper *Fakti*, issue of 6 October 2004; author: Aleksandr Levit (**Annex RM 66**).

³³⁰ Article titled "On the island the weather is fine", published in the Ukrainian newspaper *Odeskie Izvestia*, issue no. 238 (3056) of 14 December 2004; author: Vladislav Kitik (**Annex RM 72**).

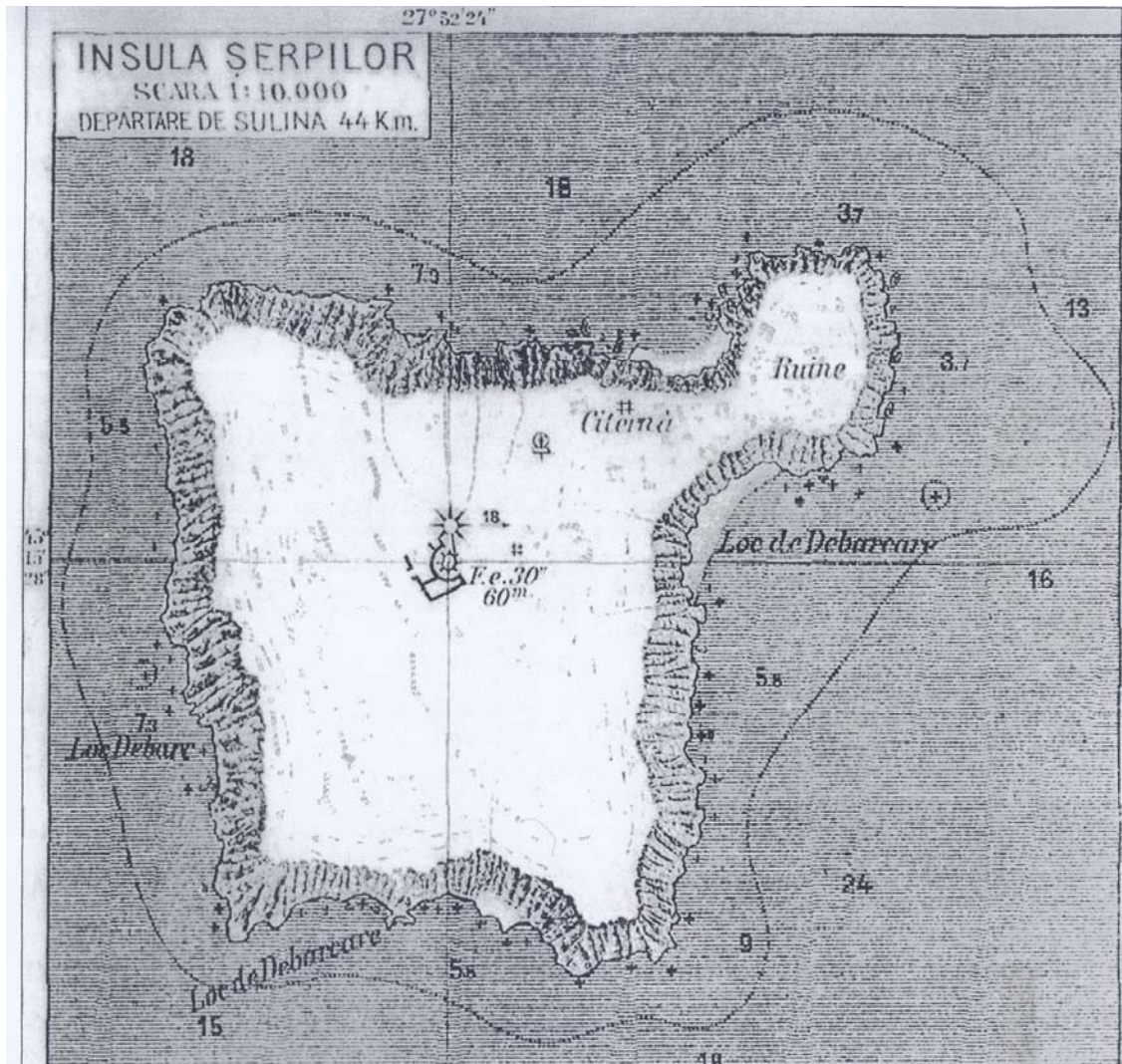


Figure 21

1939 Map of Serpents' Island

Source: Romanian Ministry of National Defense Archives

As it can be seen, the only buildings on Serpents' Island were the lighthouse and the water-cisterns (Romanian "Citerna"); in the north-eastern corner, the position of the ancient ruins (Romanian "Ruine") is indicated



Figure 22

Recent picture of Serpents' Island

Source: the picture was taken in the Ukrainian town of Vilkove, on 27 May 2005, from a board featuring Serpents' Island, at the Centre for Monitoring of Navigation on the Danube

As is can be seen, in spite of the erection of new buildings, the inhospitable and arid character of Serpents' Island, consequently its inappropriateness for human habitation, as well as the lack of an economic life, are evident

10.109. As the Ukrainian press admits, all these activities are extremely costly:

“The main means of transportation remains the helicopter which, to sustain the activity on the island, makes more than 60 flights a year. Consequently, the maintenance of the island costs more than half a million dollars.

Why does the State consciously admit such expenses, why has President Leonid Kuchma instructed the heads of the Ministry of Defence, Foreign Affairs, of State Committees for Border Guard and Geology to personally evaluate the interest of the State in this remote, difficult-to-reach spot?”³³¹

10.110. The answer to those questions is clear enough: Ukraine seeks to artificially transform a barren rock into an island capable of sustaining some kind of human habitation and a limited economic life of its own in order to entitle it to an exclusive economic zone and a continental shelf.

10.111. That aim has been avowed and explained in the Ukrainian press. Thus, the Ukrainian newspaper *Slovo* in its edition of 3 May 2002, published an article entitled “Ukraine decided to withdraw its anti-aircraft defence from Serpents’ Island”. The content of the article is revealing with respect to the nature of the activities carried out by the Ukrainian authorities on this maritime feature:

“Ukraine decided to withdraw from Serpents’ Island the anti-aircraft military company posted there. This information was provided, on the occasion of a press conference, by the head of the State Committee for the defence of the state border, Nikolai Litvin [...] According to Litvin, the decision was adopted within the framework of the program regarding the demilitarization of the island and the creation of a civilian infrastructure. He expressed the view that this initiative will consolidate the position of

³³¹ Article titled “The Serpents’ Island is the most important island in the Black Sea and it belongs to Ukraine”, published in the Ukrainian newspaper *Zerkalo Nedeli*, issue of 19 August 1995; author: A. Murahovski (**Annex RM 57**).

Ukraine in the negotiations with Romania – that is raising claims with respect to Serpents’ Island.”³³²

10.112. In the same vein, the newspaper *Stolichnye Novosti* commented, in its edition of 28 January 2003, that

“it seems that last year Ukraine found an original method to convince the stubborn Romanians, (a method) which, we must admit, entails significant financial investments. Benefiting from a certain passivity of the Romanian party in expectance for the NATO summit, Kiev has actively started to develop Serpents’ Island so that it could have more of the attributes of a real island. Thus, at the end of the year 2002, the Cabinet of Ministers approved the Program of developing the infrastructure and the economy on the island and in the surrounding continental shelf, for the years 2002-2006.

The fulfilment of this program shall transform the island in a place suitable for human life, conferring to it features specific for an administrative–territorial unit [...] Probably the Ukrainian party thinks that the Romanians, noticing how fast Serpents’ Island is developing, shall realize that they were wrong when they named this island, *flourishing and densely populated*, a ‘rock’ [...]

Ukraine should intensify not only the negotiations with Romania, but the accomplishment of the Program of development of the island, so that nobody could doubt that it is an island and not a rock. Without any doubt, this is an argument in the Ukrainian-Romanian boundary dispute.”³³³ (emphasis added)

10.113. This enterprise is destined to fail quite apart from its economic unsustainability, and this for at least three reasons:

- the changes do not correspond to any reality;

³³² Article titled “Ukraine decided to withdraw its anti-aircraft defense from Serpents’ Island” published in the Ukrainian newspaper *Slovo*, issue no. 18 (491) of 3 May 2002; author: Viktor Vepruk (**Annex RM 73**).

³³³ Article titled “The issue of Serpents’ Island failed once again to be solved”, published in the Ukrainian newspaper *Stolychnie Novosti*, issue no. 3 (248) of 28 January 2003; author: Tatiana Visotzkaia (**Annex RM 74**).

- artificial as they are, they have only occurred after the critical date when the dispute between the Parties had begun and they are self-serving;
- in any case, even a “transformation” of the island such as is planned is not capable of having any legal effect.

10.114. Like Potemkin villages artificially built in pasteboard in order to create an illusion of real villages, the semblance of human life maintained on the rock is the result of artificial conditions created with a view to the present case. They have not changed the real nature of Serpents’ Island which has always been, and remains, a rock within the meaning of Article 121(3): as soon as Ukraine would relax its attempts, the rock will recover its usual natural state: that of a barren rock incapable of sustaining human and economic life of its own:

- in the absence of fresh water supplies brought in by boat or helicopter there would be no water for human consumption;
- in the absence of regular supplies of food, human survival on Serpents’ Island would be impossible for any period.

10.115. It is also to be noted that the two above-mentioned decisions of 1995 and 1997, which initiated the process of the so-called “economic development” of Serpents’ Island, were issued and implemented while the Romanian authorities repeatedly expressed, during the bilateral negotiations (regarding the 1997 Treaty on Relations), their position concerning Serpents’ Island’ status as a rock within the meaning of article 121(3). The Ukrainian authorities were thus well aware of Romania’s contention that Serpents’ Island is not entitled to continental shelf and exclusive economic zone.

10.116. Works to artificially transform Serpents’ Island are still being carried on, notwithstanding the fact that, on 16 September 2004, Romania seized the International Court of Justice with respect to the delimitation

of the maritime spaces of the two States in the Black Sea. Thus, in a revealing article, titled “On the island the weather is fine” published by the *Odesskie Izvestia* on 14 December 2004 it is stated that

“The general plan for the development of Serpents’ Island has been approved [...] This year a transport line to the island was opened, using the ship *Kasatka*, allotted by the Ministry of Transportation of Ukraine to the State Regional Administration of Kilia and rented by the municipality-owned enterprise Ostrovnoe [...] Presently, the border guards, the personnel servicing the lighthouse and the scientists live permanently on the island [...] *An intensive activity is conducted in order to determine the recognition by the international community of the status of island for Serpents’ Island.* In this respect a project elaborated following an initiative of the Regional State Administration and of the National University “I. Mecinikov”, together with the Ministry for Environmental Protection of Ukraine, was forwarded to the board of the European Coordinating Committee [...] Unfortunately, the process of transformation of the island could lose momentum because of the lack of financing.”³³⁴ (emphasis added)

10.117. Another article published by the daily *Vecernia Odessa* in its 25 December 2004 edition, shows the extent of the Ukrainian planned measures in relation to Serpents’ Island, as well as the difficulties the Ukrainian authorities are encountering due to the objective conditions existing on Serpents’ Island:

“The new project of the general plan was elaborated by the Territorial Institute “Odessgradproiect” and approved by a decision of the State Administration of the Kilia District [...] In the coastal area, they projected the construction of the facilities for diving activities, for fish protection, as well as the building of the seasonal rescuing services and a special building for sheltering yachts and motor-boats. A landing stage for small sized ships shall also be built, thus allowing that small sized yachts and motor-boats come near the island. The food issue is also proposed to be

³³⁴ Article titled “On the island the weather is fine”, published in the Ukrainian newspaper *Odesskie Izvestia*, issue no. 238 (3056) of 14 December 2004; author: Vladislav Kitic (**Annex RM 72**).

solved in a new way. In the jointly managing area, they envisage the construction of a small bakery, of general stores [...]

V. Iarovoi mentioned that all of these are based on a very important factor: in the first stage, the island has to be consolidated by technical-engineering works, its seismic stability has to be ensured and the removal of pluvial and residual waters has to be organised.”³³⁵

10.118. These activities continued in 2005 as well. Thus, the Ukrainian news agency *MIGnews* quoted Mr. Anatoliy Kinah, the first-deputy-prime-minister of Ukraine, who, on 9 June 2005 stated that

"One of the priority tasks of the Government and of the State, generally, is to ensure conditions favourable to human life and development of human activities on the island, as well as implementation of economic activities.”³³⁶

10.119. All these elements clearly prove an attempt at artificially altering the natural conditions of Serpents’ Island by seeking to create an appearance of human habitation and economic life. While not contesting the rights of any State to implement whatever measures it may find necessary to develop parts of its territory, Romania made clear in several Notes Verbales addressed to the Ukrainian side that the measures taken on Serpents’ Island cannot have any legal effect. Moreover, the Romanian authorities advised the Ukrainian authorities that such a conduct is inconsistent with the principle of good faith.³³⁷

10.120. It is generally accepted that any right can be exercised legitimately if at least two conditions are met. First, the right has to be exercised in

³³⁵ Article titled “Changes are expected to be carried out on Serpents’ Island”, published in the Ukrainian newspaper *Vecherniia Odessa*, issue no. 197-198 (8138-8139) of 25 December 2004; author: Natalia Harcenko (**Annex RM 75**).

³³⁶ News titled "The Cabinet of Ministers will take care of Serpents' Island" of the Ukrainian news agency *MIGnews*, available on Internet at <http://mignews.com.ua/articles/164879.html> (**Annex RM 76**).

conformity with its social objective, the purpose for which it was acknowledged. Second, any right is to be exercised in such a manner as not to affect the rights of other States. As Kolb wrote in an article in 2000,

“the State achieves its destiny and fulfils its functions in an autonomy which is only relative, limited by its belonging to a necessary community, which guarantees this common good which is the equal respect of rights of everybody”³³⁸.

The exercise of rights

“must not be anti-social, meaning to affect the fundamental interests of the community on which they depend (or simply those of another subject)”³³⁹.

- 10.121. Moreover, article 300 of the 1982 UNCLOS provides for the obligation of the States Parties to the Convention to fulfil in good faith their obligations and to exercise their rights “in a manner which would not constitute an abuse of right”. In other words, a State Party to the 1982 UNCLOS cannot exercise its rights established by the said document so that it could affect the rights enjoyed by other States Parties.
- 10.122. In this case, it is clear that the objective followed by the programme of development of Serpents’ Island, as stated by the Ukrainian authorities and media, is not only to artificially create maritime entitlements, but to create them in the detriment of the entitlements of Romania.
- 10.123. As D. Bowett mentioned in an article published in 1979,

³³⁷ Notes verbales of the Ministry of Foreign Affairs of Romania to the Embassy of Ukraine in Bucharest no. C23/2473 dated 25 April 2002 (**Annex RM 77**), C26/5805 dated 15 November 2002 (**Annex RM 78**) and C26/1794 dated 25 April 2003 (**Annex RM 79**)

³³⁸ Robert Kolb, *La bonne foi en droit international public*, Publications de l’Institut Universitaire de Hautes Etudes Internationales – Geneva, Presses Universitaires de France, 2000, p. 435.

³³⁹ Robert Kolb, *op.cit.*, p. 436.

“The phrase ‘of their own’ [from the Article 121(3) of the 1982 UNCLOS] means that a State cannot avoid a rock being denied both an exclusive economic zone and a shelf by injecting an artificial economic life, based on resources from its other land territory.”³⁴⁰

10.124. Even if the need for some external support could probably be accepted, such aid and support

“must be reasonable under the circumstances; they must not seem the result of a malicious skill with purposes to divert the rule on which they are based in relation with their social goal. This idea has a different name: *abuse of right*. The limit of the admissible dependence of an islet will be there where the undertaken action would seem abusive, account taken of its nature aimed at turning the effects of paragraph 3 (*Rechtsumgehung*)”³⁴¹.

10.125. Thus, the Ukrainian conduct regarding Serpents’ Island can be given no consequence on the issue of the delimitation of the maritime areas in the Black Sea. Any other approach would contradict the principles embodied by the 1982 UNCLOS, namely the objective of reaching an equitable solution for the delimitation. Equity cannot be based on abuse.

10.126. At the same time, the continuous carrying out of these works, as well as their well recognised objective – to determine Romania and this Court to consider Serpents’ Island an island entitled to its own exclusive economic zone and continental shelf³⁴²- represent an indirect, but clear and eloquent, recognition by Ukraine that Serpents’ Island, according to its

³⁴⁰ D. W. Bowett, *The Legal regime of Islands in International Law*, Oceana Publication/ Sijthoff & Noordhoff, Cobbs Ferry/ Alphen aan den Rijn, 1979, p. 34.

³⁴¹ « [...] doivent être raisonnables dans les circonstances; il ne doivent pas paraître l'œuvre d'une habileté malicieuse à des fins détournant la règle sur laquelle elle se fonde de son but social. Cette idée a un autre nom: abus de droit. La limite de la dépendance admissible d'un îlot sera là où l'action entreprise apparaîtra abusive, vu son caractère destinée à tourner les effets du paragraphe 3 (*Rechtsumgehung*) ». See R. Kolb, « L'interprétation de l'Article 121, paragraphe 3, de la Convention de Montego Bay sur le droit de la mer: Les rochers qui ne se prêtent pas à l'habitation humaine ou à une vie économique propre ... », *A.F.D.I.*, vol. XL, 1994, p. 908; see also p. 906.

³⁴² It is worth mentioning that, in the bilateral negotiations on the issue of the delimitation of the maritime areas, the Ukrainian negotiators confirmed this goal of the works carried out on Serpents’ Island.

natural features, falls within the scope of paragraph 3 of Article 121 of the 1982 UNCLOS – a rock incapable of sustaining human habitation or economic life of its own.

10.127. Recognition³⁴³, as a type of unilateral act, could result not only from a declaration, but also from a specific conduct of a State³⁴⁴. In this case, the development plan adopted by the Ukrainian Government was followed by implementing activities that represent a certain State conduct. Recognition can be express or implicit³⁴⁵. This has been accepted by the Court in its Judgment in the case concerning the *Right of Passage over Indian Territory* with regard to the attitude of Great Britain towards Portugal's sovereignty:

“The British found the Portuguese in occupation of the villages and exercising full and exclusive administrative authority over them. They accepted the situation as they found it and left the Portuguese in occupation of, and in exercise of exclusive authority over, the villages. [...] The exclusive authority of the Portuguese over the villages was never brought in question. Thus Portuguese sovereignty over the villages was recognized by the British in fact and by implication and was subsequently tacitly recognized by India”³⁴⁶.

10.128. Equally, in the *Temple case*, the Court found:

“That the Siamese authorities by their conduct acknowledged the receipt, and recognized the character, of these maps, and what they purported to represent, is shown

³⁴³ « Recognition means acknowledgement and acceptance by a State of a fact ... » (“*La reconnaissance, c’est la constatation et l’acceptation par un Etat d’un état de fait*” ...), Dominique Carreau, *Droit International*, 8e édition, Pedone, 2004, p. 219

³⁴⁴ International Law Commission mentioned State conduct as one of the forms of unilateral acts, together with declarations, proclamations and notifications, written or oral. See ILC Report A/52/10, 1997, para. 210; ILC Report A/53/10, 1998, para. 167.

³⁴⁵ « Often realized by means of an explicit act, it can nonetheless be implied from a conduct, with the condition that this should be clearly imputable to the competent bodies of the respective state ” “*Souvent effectué par voie de déclaration explicite, elle peut néanmoins résulter d’un comportement à la condition que celui-ci soit clairement imputable aux organes compétents de l’Etat concerné*”, Pierre Marie Dupuy, *Droit International Public*, 7th edition, Dalloz, 2004, p. 342.

³⁴⁶ *Right of Passage over Indian Territory (Portugal v. India), Judgment, I.C.J. Reports 1960*, p. 39.

by the action of the Minister of the Interior, Prince Damrong, in thanking the French Minister in Bangkok for the maps, and in asking him for another fifteen copies of each of them for transmission to the Siamese provincial Governors”³⁴⁷.

10.129. In the *Land and Maritime Boundary* case between Cameroon and Nigeria, the Court accepted the principle of implied recognition or acknowledgment by implication, too. To give an example, it had been decided that by requesting permissions to enter on the Bakassi Island, Nigeria clearly accepted the application of the 1913 Anglo-German Agreement:

“In assessing whether Nigeria, as an independent State, acknowledged the applicability of the provisions of the Anglo-German Agreement of 11 March 1913 relating to Bakassi, the Court has also taken account of certain formal requests up until the 1980s submitted by the Nigerian Embassy in Yaoundé, or by the Nigerian consular authorities, before going to visit their nationals residing in Bakassi. This Nigerian acknowledgment of Cameroon sovereignty is in no way dependent upon proof that any particular official visit did in fact take place”³⁴⁸.

10.130. The case of the Ukrainian conduct in respect to Serpents’ Island, to the extent that its purpose consists in seeking to confer on Serpents’ Island an unjustified entitlement to maritime areas, could be qualified as an implicit recognition by conduct that without this attempt Serpents Island is only a rock, not entitled to a continental shelf or an exclusive economic zone. As “recognition has the effect to bar its author from subsequently contesting the validity of the situation it acknowledges and accepts”³⁴⁹, the implicit recognition by Ukraine of the status of Serpents’ Island as a “rock” under the 1982 UNCLOS deprives the activity of any basis. The conduct of the Ukrainian side shows the lack of trust in the legitimacy of

³⁴⁷ *Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 24.

³⁴⁸ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening), ICJ Reports 2002*, judgment of 10 October 2002, para. 216.

³⁴⁹ «*La reconnaissance [a] pour effet d’empêcher celui qui l’émet de contester ultérieurement la validité de la situation qu’elle a pour objet de constater et d’accepter*», Pierre Marie Dupuy, *Droit International Public*, 7^e édition, Dalloz, 2004, p 342

its own claim for maritime spaces based on the characteristics of the Serpents' Island³⁵⁰.

10.131. It may be noted that the USSR, which seized Serpents Island for strategic reasons, never undertook such development activities, nor did Ukraine, for a long period of time, until the Ukrainian authorities became aware of the importance of the issue of the legal status of Serpents' Island.

(4) Conclusions

10.132. The following general conclusions may be drawn:

- according to its natural characteristics, Serpents' Island is a rock unable to support human habitation and an economic life of its own;
- due to its manifest inhabitability, Serpents' Island has never had – and it does not have now – a permanent settled population, nor has it ever sustained an economic life of its own; the few persons posted there completely depend on external supplies;
- the recent attempts of the Ukrainian authorities to “develop” Serpents' Island have no influence on this maritime feature's lack of entitlement to exclusive economic zone and continental shelf and are not opposable to Romania;
- on the other hand, by their declared goals, these attempts represent a clear recognition of the Ukrainian side that Serpents' Island is a rock

³⁵⁰ The conduct of the Ukrainian side also reinforces the opposability to Ukraine of the “rock” statute of Serpents' Island - as confirmed by jurisprudence, “[...] instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule [...] then, whether or not a State conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule”, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p.98 (para. 186).

that cannot sustain human habitation and has no economic life of its own;

- moreover, the Ukrainian attempts aimed at artificially transforming Serpents' Island with the purpose of creating an appearance of habitability and economic life cannot represent a basis for any solution for this case;
- Serpents' Island has no right to an exclusive economic zone or continental shelf, which is in conformity with its status as a rock falling within the scope of Article 121(3) of the 1982 UNCLOS and with the bilateral agreements concluded between Romania and the USSR starting from 1949.

CHAPTER 11
THE MARITIME BOUNDARY ACCORDING TO THE
APPLICABLE LAW

(1) Introduction

- 11.1. On the basis of the applicable law and agreements subsisting between the Parties, it is proposed to consider the appropriate course of the maritime boundary in each of the sectors set out above in Chapter 9.

**(2) Sector 1: the boundary between adjacent coasts - from Point F around
Serpents' Island and to the median line**

- 11.2. Sector 1 is shown in **Figure 23** (page 197 of this Memorial).

(a) Introduction: the primacy of agreement in maritime delimitation

- 11.3. Taking into account relevant existing agreements, in force between Romania and Ukraine, that established the first part of the maritime boundary between the two States on the 12 nm arc around Serpents' Island, the maritime boundary in Sector 1 needs to be discussed in two portions: the 12 nm arc surrounding Serpents' Island and seawards, beyond this 12 nm arc.
- 11.4. Turning to the first portion of Sector 1, i.e. that part of Sector 1 where the maritime boundary continues the 12 nm arc around Serpents' Island from Point F, the relevant principle is the primacy of agreements in matters relating to maritime delimitation, as recognised first in the Truman Proclamation, and as

now embodied in Articles 74(4) and 83(4) of the 1982 UNCLOS. That principle is applicable in two ways:

- first, the agreements concluded between Romania and the Soviet Union starting in 1949, which are binding on Ukraine by way of succession, are dispositive of the maritime boundary between the two States around Serpents' Island in the form of a 12 nautical mile arc;
- second, the principles contained in the 1997 Additional Agreement are to be applied as between the Parties in delimiting their respective entitlements to continental shelf and exclusive economic zones.



Figure 23

Sector 1 of delimitation

(b) The agreed boundary around Serpents' Island

- 11.5. As already presented in paras. 4.3-4.26 this Memorial, various Romanian-Soviet agreements (procès verbaux) concluded in 1949, 1954, 1963 and 1974 established that the maritime boundary between the two States followed the 12 nm arc around Serpent's Island.
- 11.6. On the sketches included in the individual Procès Verbaux of Border Sign 1439 (beacon), from 1949³⁵¹ and 1974,³⁵² as well as on the map enclosed to the 1949 Procès Verbal on the Description of the Border³⁵³, the boundary is clearly drawn to a point on the 12 nautical mile arc drawn around Serpents' Island (hereinafter referred to by Romania as "Point B"). Point B represents the point of intersection between the arc of circle around Serpents' Island and the edge of the sketch or the map – the point where they terminate.
- 11.7. Neither the texts of the Procès Verbaux, nor the sketches or the map define Point B as the final point of the delimitation boundary between the Romanian and Soviet maritime areas. On the contrary, both indicate that the boundary continues on the external limit of the 12 nm arc surrounding Serpents' Island.
- 11.8. Moreover, the position of Point B varies if the sketches included in the Procès Verbaux and the enclosed map are compared. Indeed, the coordinates of Point B can easily be calculated from the sketches and the map.

Point B – according to the map: 45°05'24" N, 30°02'17" E;
– according to the sketches: 45°05'35" N, 30°02'12" E.

The different positions of Point B, calculated according to documents concluded at the same time and having the same legal value, are an additional proof that Point B was not meant as the final point of the maritime boundary. It simply represented a point where the sketch and the map terminated.

³⁵¹ Procès Verbal of Border Sign no. 1439 (beacon), signed at Bucharest, on 27 September 1949 (**Annex RM 15**).

³⁵² Procès Verbal of Border Sign no. 1439 (beacon), signed in Ismail, on 4 September 1974 (**Annex RM 22**).

³⁵³ **Map RM A 11 in the Map Atlas.**

- 11.9. The description of the boundary regulated by the September 1949 Procès Verbal on the general description of the Romanian-Soviet border and the 1949 individual Procès Verbal of Border Sign 1439 was maintained in the 1963 and 1974 general Procès Verbaux and 1974 Procès Verbal of Border Sign no. 1439 (beacon). The only change which occurred was that the term “Soviet marine boundary zone” used to describe the area around Serpents’ Island, was changed so as to read “Soviet 12-mile territorial sea” - in the 1963 and 1974 general Procès-Verbaux (but not in the individual 1974 Procès-Verbal of Border Sign no. 1439).
- 11.10. In this context, it should be noted that when the 1963 and 1974 Procès Verbaux were adopted, the legal regime of the water areas delimited by the agreed boundary had changed.
- 11.11. When the 1949 Procès Verbaux were concluded Romania claimed a territorial sea of only 6 nautical miles. Romania first mentioned a 12 nm breadth of its territorial sea in 1951, in the Decree no. 176 of 29 September 1951³⁵⁴. This was confirmed by the provisions of the Decree No. 39 on Regulating the Regime of the Territorial Waters of the People’s Republic of Romania of 21 January 1956.³⁵⁵ This first Romanian legislation dedicated expressly to the legal regime of its territorial waters was adopted over six years after the conclusion of the 1949 Procès Verbal on 27 September 1949.
- 11.12. The USSR, by contrast, had already established its maritime boundaries out to areas of 12 nm by a succession of laws, starting with a law adopted in 1909, which established a 12 nm breadth in relation to customs issues³⁵⁶. Further regulations in this respect were adopted in 1911 (a law on fishing, dated 29 May 1911, establishing the breadth of the territorial sea at 12 nm), 1918 (a decree dated 15 May 1918 on the establishment of a customs guard), 1921 (a further decree dated 24 May 1921 reaffirming the provisions of the 1911 law) and 1923

³⁵⁴ *Decree No. 176 for the Modification of Articles 4, 120, 159 and 172 from the Decree No. 41 of 14 February 1950 Regarding the Surveillance, Order and Control of Maritime and River Navigation*, in the Official Bulletin of the People’s Republic of Romania no. 98 of 29 September 1951 (**Annex RM 80**).

³⁵⁵ *Decree No. 39 of the Presidium of the Great National Assembly of the People’s Republic of Romania on Regulating the Regime of the Territorial Waters of the People’s Republic of Romania* of 21 January 1956 (**Annex RM 81**).

(a decree dated 7 September 1923 on the protection of the borders of the USSR)³⁵⁷. In 1927, by the Decision of the Central Executive Committee and the Council of the People's Commissars of the USSR on Approval of the Regulation on the Protection of the State Border of the USSR, the 12 nm breadth of the territorial sea was further confirmed.³⁵⁸ Article II paragraph 9 letter B) established that

“In order to protect the State border of the USSR, it is established...

B) on the maritime boundary – the maritime area established from the maximum low-water line, both in cases of continental mass and islands, on a breadth of 12 miles, unless provided otherwise by international conventions of the USSR.”³⁵⁹

11.13. Point 1439, which constitutes the last point of the Romanian-Soviet maritime boundary the position of which is precisely defined by geographical coordinates in the 1949 Procès Verbal and the subsequent agreements, is situated at a distance of 9.2 nm from the Romanian baselines determined according to the coastal situation in 1949. Moreover, Point B is situated at a distance of more than 12 miles from the 1949 Romanian coast (taking into account the factual situation of 1949³⁶⁰).

11.14. Accordingly, taking into account the legal regime of the Romanian and Soviet territorial seas at the time of conclusion of the 1949 Procès Verbaux, it is clear that the maritime boundary defined by them delimited maritime areas subject to two distinct legal regimes:

- first, it delimited the territorial seas of the two States, from the final river border point up to a point on the maritime boundary line situated at a distance of 6 miles (the then-breadth of the Romanian territorial sea) from the Romanian coast as it was configured in 1949. Romania will refer to this point as "Point A"; it is located at 45°09'44"N and

³⁵⁶ See Pierre Solodovnikov, *La Navigation maritime dans la doctrine et la pratique soviétiques*, Paris, Librairie Générale de Droit et de Jurisprudence, R.Pichin et R.Drand-Auzias, 1980, p. 206

³⁵⁷ Ibid., p. 207-209

³⁵⁸ Ibid., p. 209. See also the *Decision of the Central Executive Committee and the Council of the People's Commissars of the USSR on Approval of the Regulation on the Protection of the State Border of the USSR* of 15 June 1927 (**Annex RM 82**)

³⁵⁹ See **Annex RM 82**.

³⁶⁰ See para. 11.17 of this Chapter.

29°53'07"E on the maritime boundary line delimited by the 1949 Procès Verbal;

• second, seawards beyond Point A, through Point 1439 and Point B and beyond them, it delimited maritime areas with different regimes: on the one hand, the Soviet marine boundary zone around Serpents' Island (later referred to as territorial sea) to the north of the boundary and, on the other hand, an area appertaining to Romania to the south of the boundary. From the point of view of the rights enjoyed by Romania, this area to the south of the boundary corresponded, at that moment, to what in modern law is referred to as a contiguous zone, an exclusive economic zone and a continental shelf – notions that, at that time, were already under debate.³⁶¹

A presentation of these areas is shown in **Figure 24** (page 202 of this Memorial).

11.15. The provisions of Romanian and Soviet legislation in effect in 1949 were clear and unequivocal and they would have been known by the signatories of the 1949 Procès Verbaux. Moreover, the issues of the regime of maritime areas situated beyond the territorial sea were already broadly debated at that time, as the concept of continental shelf had already emerged in international law, and States had started to claim the exercise of sovereign rights and jurisdiction over extended maritime areas³⁶². Thus, taking into account the stage of development of the international law of that time, the boundary agreed upon in 1949 must have been intended not only to separate the territories of the two States (i.e., their territorial seas), but also maritime areas situated beyond, where the two States would exercise certain sovereign rights. The provisions of the 1949 Procès Verbaux are also clear and unequivocal in this respect: this boundary is to follow a rectangular trace between Points 1438 and 1439 through Point A and then to continue on the 12 nm arc around Serpents' Island.

³⁶¹ See para. 11.15 of this Chapter.

³⁶² For instance, the Truman Proclamation was released on 28 September 1945. Other countries had followed in 1946-1948, such as Mexico, Argentina, Chile, Peru, Costa Rica, Ecuador. See *Digest of International Law Volume 4*, Department of State Publication 7825, Washington D.C., 1965, pp. 752-764

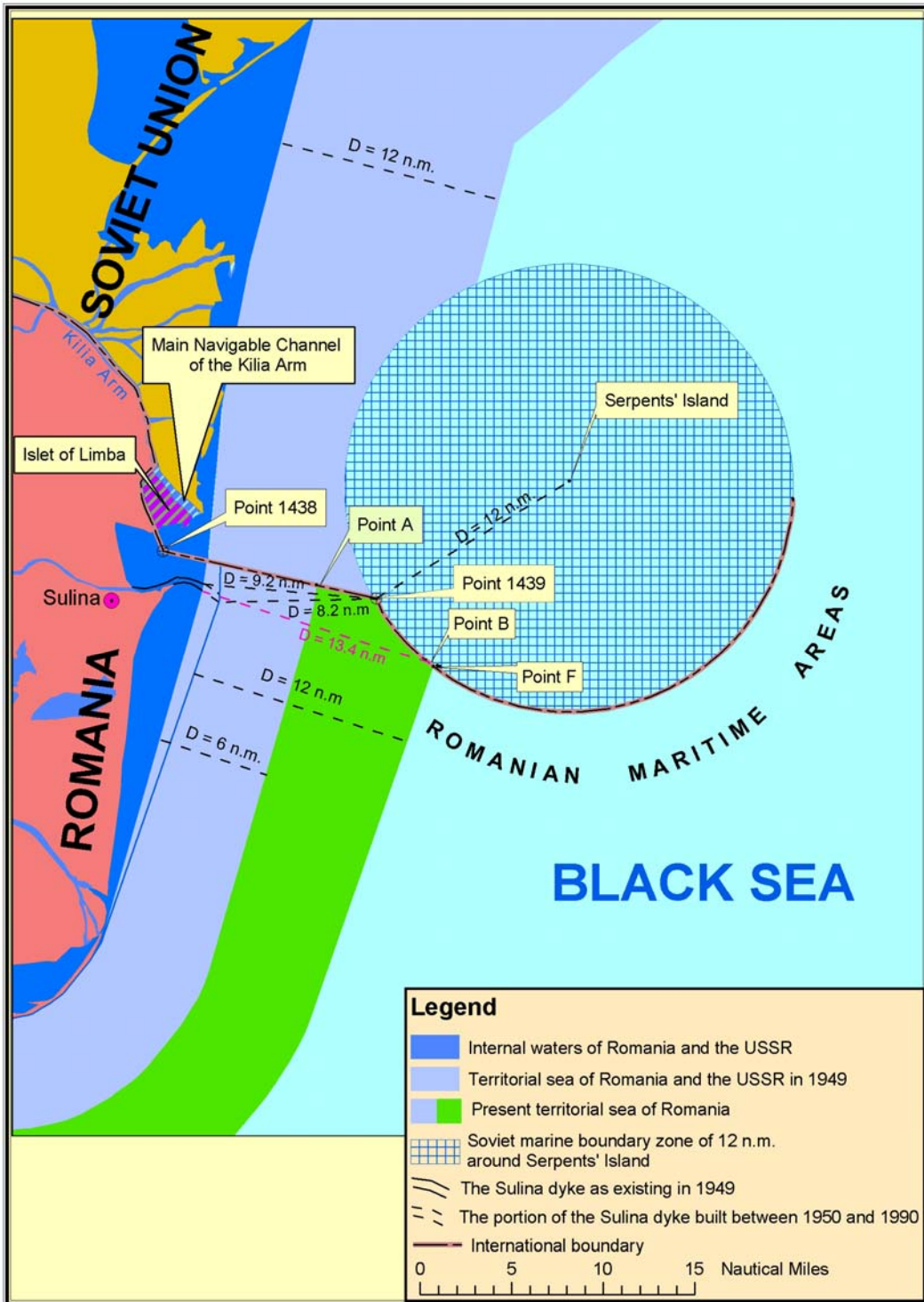


Figure 24

The Maritime Boundary Agreed in 1949

Taking into account the 1949 legal regime, this boundary separated:

- between Points 1438 and A, the territorial seas of Romania and the USSR;
- seawards of Point A, the Soviet territorial sea/"marine boundary zone around Serpents' Island" and Romanian areas that could now be characterized as EEZ/continental shelf

- 11.16. By decrees of 1951 and 1956 Romania extended the 6 nautical mile territorial sea previously claimed to a 12 nm territorial sea.³⁶³ Thus, Point A lost its relevance as the final point of the maritime boundary separating the territorial seas of the two States. The final point of this boundary (situated at a 12-mile distance from the Romanian coast on the existing boundary under the 1949 Procès Verbal and later instruments) was never established between Romania and USSR; its position was only finally defined by the Border Regime Treaty of 2003, taking into consideration the present coastal configuration (Point F).
- 11.17. It is worth mentioning that, according to the coastal configuration of 1949, as well as of 1963 or of 1974, Point F would have been situated more to the west. Indeed, the relevant point for establishing the Romanian baselines to measure the breadth of its territorial sea is the outer end of the Sulina dyke. This dyke underwent major extension works from the 1950s until the 1980s; in present it extends onto the sea approximately 3 km more than in 1949³⁶⁴. Thus, according to the factual situation of 1949, Point B was situated at a distance of more than 12 miles from the Romanian coast.
- 11.18. The 1949 delimitation clearly established the trace of the boundary between Points A, 1439 and B and beyond Point B, on the 12 mile arc around Serpents' Island. The later changes of the regime of portions of the maritime waters adjacent to the boundary did not alter the original intention of the Parties regarding the course of the delimitation and its significance.
- 11.19. It must be stressed once more that the 1949 Procès Verbaux referred to the water area surrounding Serpents' Island as a "Soviet marine boundary zone", and not as the "territorial sea" around Serpents' Island. The reference to a "territorial sea" in the delimitation documents only appeared relatively late in the day in the 1963 and 1974 general Procès Verbaux, and was inconsistent

³⁶³ See supra, para. 11.11 of this Chapter.

³⁶⁴ See the representation of the dyke in *Pilotage Guidelines of the Danube River. Navigational description of the Danube from the port of Turnu Severin to the port of Sulina (km.931-nm 0)*, published by the Secretariat of the Danube Commission, Budapest, 1954, sketch at p. 96.

with the accompanying individual Procès Verbaux relating to Point 1439 which they purported to summarise³⁶⁵.

- 11.20. The series of agreements over the period 1949-1974 demonstrate that Romania and the USSR accorded Serpents' Island only a water area surrounding it having a breadth of 12 nm, and which had the character of an *all-purpose* maritime boundary. Accordingly, there existed a delimitation between Romania and the USSR around Serpents' Island to the effect that Serpents' Island was limited to a 12 nm zone, and that zones to the south of that boundary appertained to Romania.
- 11.21. The undertaking by Ukraine to respect the boundary line in force on 16 June 1990 is fully applicable to all points laid down in the prior agreements. The obligation applies fully to all points around the 12 mile arc drawn around Serpents' Island, including those beyond Points F or B.
- 11.22. Neither the USSR, nor Ukraine as its successor denied the boundary fixed in the 1949 or that the instruments that established it were in force in their relations with Romania. The provisions of those instruments were confirmed by the dispositions of the 1997 Treaty on Relations³⁶⁶ and the Additional Agreement,³⁶⁷ as well as expressly adopted by reference in the 2003 Border Regime Treaty.³⁶⁸

³⁶⁵ See paras. 4.3-4.26 of this Memorial

³⁶⁶ Art. 2 (1): "The Contracting Parties, in conformity with the principles and norms of the international law and the principles of the Helsinki Final Act, reaffirm that the existing border between them is inviolable..." (see **Annex RM 1**).

³⁶⁷ Art.1: "The Government of Romania and the Government of Ukraine shall conclude [...] a treaty on the regime of the state border between the two states, on the basis of the principle of succession of states regarding borders, according to which the proclamation of the independence of Ukraine does not affect the existing state-border between Romania and Ukraine, as it was defined and described in the Treaty of 1961 on the regime of the Romanian-Soviet state border and the appropriate demarcation documents, valid on 16 July 1990 [...]" (see **Annex RM 2**).

³⁶⁸ Art.1: "The State Border between Romania and Ukraine passes on the ground as defined and described by the Treaty between the Government of the Romanian People's Republic and the Government of the Union of the Soviet Socialist Republics on the Romanian-Soviet State Border Regime, Collaboration and Mutual Assistance in Border Matters, signed at Bucharest, on 27th of February 1961, as well as by all its corresponding demarcation documents, the maps of the State border between the former Romanian People's Republic and Union of the Soviet Socialist Republics, the protocols of border signs with their sketches [...]" (see **Annex RM 3**).

- 11.23. The effect of the incorporation of the 1949 Procès-Verbal by the 1961 Border Regime Treaty, and the adoption of the boundary delimited in that treaty and the subsequent Procès Verbaux by the 2003 Border Regime Treaty, as well as the undertaking by the Parties to respect the pre-existing boundaries between Romania and Ukraine constitutes a recognition that the boundary as first agreed in 1949 is still in force as between them.
- 11.24. Moreover, it is commonly accepted that maritime boundaries are subject to the principle of stability. Thus, in the *Aegean Sea Continental Shelf (Greece v. Turkey)* and the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, this Court affirmed that the establishment of maritime boundaries involves an element of stability and permanence and is subject to the rule excluding boundary agreement from fundamental change of circumstances, and cannot be put in issue by unilateral actions of States³⁶⁹.
- 11.25. Ukraine has specifically accepted the principle of stability. Thus, the former Ukrainian President Mr. Leonid Kuchma conveyed in 2002 to his Romanian counterpart Mr. Ion Iliescu, that

“any attempt to question at State-level these boundaries [formed as a consequence of the peaceful resolutions after the Second World War] makes real the possibility to undermine the peace and stability of the European House, the boundaries of which become transparent, but remain, from the legal point of view, determined, stable and inviolable”³⁷⁰.

³⁶⁹ See Prof. Jean-Pierre Queneudec, *The General Aspects of Maritime Boundaries*, lecture given on 28 September 2001 at the Genoa Conference – Panel on the Legal Aspects of Maritime Boundaries (organized by the Mediterranean Hydrographic Commission).

³⁷⁰ Letter of Mr. Leonid Kuchma, president of Ukraine, addressed to Mr. Ion Iliescu, president of Romania, on 29 August 2002 (**Annex RM 83**).

***(c) Confirmation of the maritime boundary following the 12 nm arc around
Serpents' Island in official maps produced by the USSR and Ukraine, by Romania
and by third States***

- 11.26. The existence and acceptance of the maritime boundary established in the vicinity of Serpents' Island by both Parties as described above is confirmed by various navigation charts issued after 1949. Thus, official Soviet and later Ukrainian, as well as Romanian, Bulgarian, French and German navigation charts, issued at different points in time, clearly present the Romanian-Soviet, and later the Romanian-Ukrainian maritime boundary in the territorial sea, as well as in the vicinity of Serpents' Island extending beyond Point F.
- 11.27. In all these charts, the boundary is drawn as defined in the 1949 Procès Verbal, stemming from the final point of the land/river border (Point 1438), following a straight line until it reaches the 12 nm arc around Serpents' Island (Point 1439) and then following the arc around the island.
- 11.28. These charts clearly draw the boundary beyond Point F, further eastwards on the 12-mile arc around Serpents' Island until a point situated due east of the island.
- 11.29. It is significant that none of these maps shows a Soviet or Ukrainian maritime boundary extending southwards from the 12 nm arc. They either show no maritime boundary at all or they show a 12 nm maritime boundary proceeding eastwards around Serpents' Island.
- 11.30. Attached to this Memorial are 23 charts of the north-western part of the Black Sea or of various sectors of it, issued by official authorities from the USSR (5 charts issued in 1957, 1977, 1982, 1983 and 1985), Ukraine (3 charts, issued in 2000, 2001 and 2003), Romania (11 charts issued in 1958, 1959, 1970, 1982, 1985, 1993, 1995, 1997, 2000 and 2003), as well as the Russian Federation (1

chart, issued in 1995), Bulgaria (1 chart, issued in 1993), *France* (1 chart, issued in 1990) and Germany (1 chart, issued in 1991)³⁷¹.

11.31. Of special significance in this regard is one map annexed and forming part of the Turkey/USSR Continental Shelf Agreement from 1978³⁷². This map, based on a Soviet chart edited in 1977, in addition to indicating the course of the boundary between the Soviet Union and Turkey, clearly shows the Romanian/Soviet boundary as agreed in 1949, including the 12 nautical mile arc boundary around Serpents' Island which continues round the island to almost due east of it. As this map was registered, together with the said Agreement, with the Secretariat-General of the United Nations, its provisions and indications represent the official position of the USSR, of which all United Nations members have notice.

11.32. The symbols used on these charts to mark the boundary are also of importance. Either the annexed charts use only one symbol for all boundaries they depict, or they make use of different symbols in different situations.

11.33. In the first case, the whole trace of the boundary (be it the land, river or maritime boundary from the last point of the river border passing on the 12-mile arc around Serpents' Island and to the final point situated on this arc east to Serpents' Island) is marked with the same symbol; most often, this symbol is the one used to depict "international maritime boundaries", as internationally endorsed by the International Hydrographic Organisation³⁷³.

11.34. In the second case, various symbols (as endorsed by the International Hydrographic Organisation) are used to reflect the differences of legal regime between various maritime areas. For instance, the Ukrainian chart entitled *Black Sea Western Coast from Odesa to Sulins'ke Mouth*, published by the State

³⁷¹ See **Map Atlas** annexed to this Memorial (**Maps RM A 15 to RM A 42**).

³⁷² **Map RM A 15** in the **Map Atlas**.

³⁷³ See International Hydrographic Organization: Monaco, *International Charts Series INTI Symbols, Abbreviations, Terms Used on Charts*, published by Bundesamt für Seeschifffahrt und Hydrographie, Hamburg/Rostock, 1996, p. 51.

Hydrographic Institution in Kiev, first edition, 2001³⁷⁴ is significant, as it does not show only the Romanian-Ukrainian maritime boundary, but also the outer limit of the territorial sea of Ukraine. The symbols are unequivocal: for the maritime Romanian/Ukrainian boundary from the river border, on the 12 mile arc around Serpents' Island till a point situated east of it, the symbol is the one used for “international maritime boundaries”; for the outer limit of the territorial sea, both to the north of Serpents' Island and for the Ukrainian mainland, the chart uses a different symbol, the one referring to a “seaward limit of territorial sea”. A detailed presentation of the area of interest of this chart is reproduced in **Figure 25** (page 209 of this Memorial).

- 11.35. Some of the charts depict also the State to which the drawn maritime spaces appertain. An example is the German chart entitled *Donaudelta bis Il'ičevsk*, published by the *Bundesamt für Seeschifffahrt und Hydrographie* in Hamburg, fifth edition, 1991³⁷⁵; a detailed presentation of the area of interest of this chart is reproduced in **Figure 26** (page 210 of this Memorial).

³⁷⁴ **Map RM A 23** in the **Map Atlas**.

³⁷⁵ **Map RM A 41** in the **Map Atlas**.

ЧОРНЕ МОРЕ ЗАХІДНИЙ БЕРЕГ
ВІД ОДЕСИ ДО СУЛІНСЬКОГО ГИ
Масштаб 1: 200000 по паралелі 44°
Глибини в метрах прирівнені до середнього багатірічного
Магнітне схилення прирівнене до 2000р.; різниця між 0,0
Пояснення:
1. Ця карта складена з різних, незалежних карток, складених українським Рішенням
Української армії у Чорному і Азовському морях (Української армії чор. моря),
2. Магнітне схилення прирівнене, що в районі Азовського моря магнітне схилення
і відхилення в певній ступіні, що відповідає в галузі Польщі
в Чорному і Азовському морях (Української армії чор. моря),
3. Для території до східного узбережжя ЧОРНОГО МОРЕА використано карти
Української армії на чор. морі, створені на підставі даностей українських морських
сил, створені на її території на широті 44° 33' східного довготи
4. Для території до західного узбережжя ЧОРНОГО МОРЕА використано карти
Української армії на чор. морі, створені на її території на широті 44° 33' східного довготи

41		Denmark FEDERAL REPUBLIC OF GERMANY Internationale Grenze im Seegebiet International maritime boundary	BU +
42		Gerade Basislinie mit Basispunkt Straight territorial sea baseline with base point	
43		Seewärtige Begrenzung des Küstenmeeres (Hoheitsgrenze) Seaward limit of territorial sea	

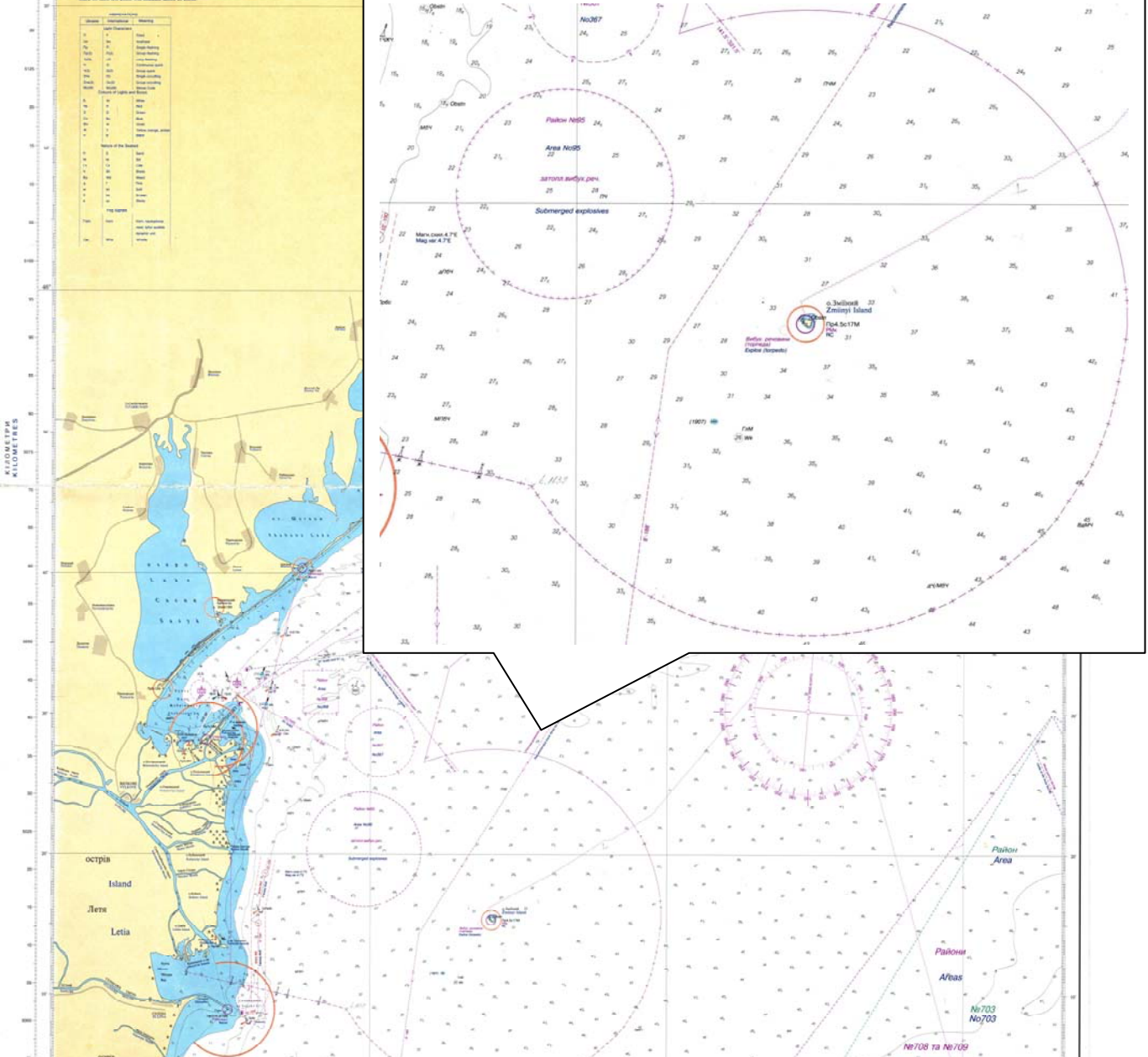


Figure 25
The 2001 Ukrainian chart titled *Black Sea Western Coast from Odesa to Sulins'ke Mouth*
 (see also Map RM A 23)
The arc around Serpents' Island uses, for its southern and south-eastern portions, the symbol of "international maritime boundaries", while for its northern and north-eastern portions the symbol of "seaward limit of territorial sea", as endorsed by the International Hydrographic Organization (see, in the top right of the sketch, an extract from page 51 of International Charts Series INT1 Symbols, Abbreviations, Terms Used on Charts, published by Bundesamt für Seeschifffahrt und Hydrographie, Hamburg/Rostock, 1996)

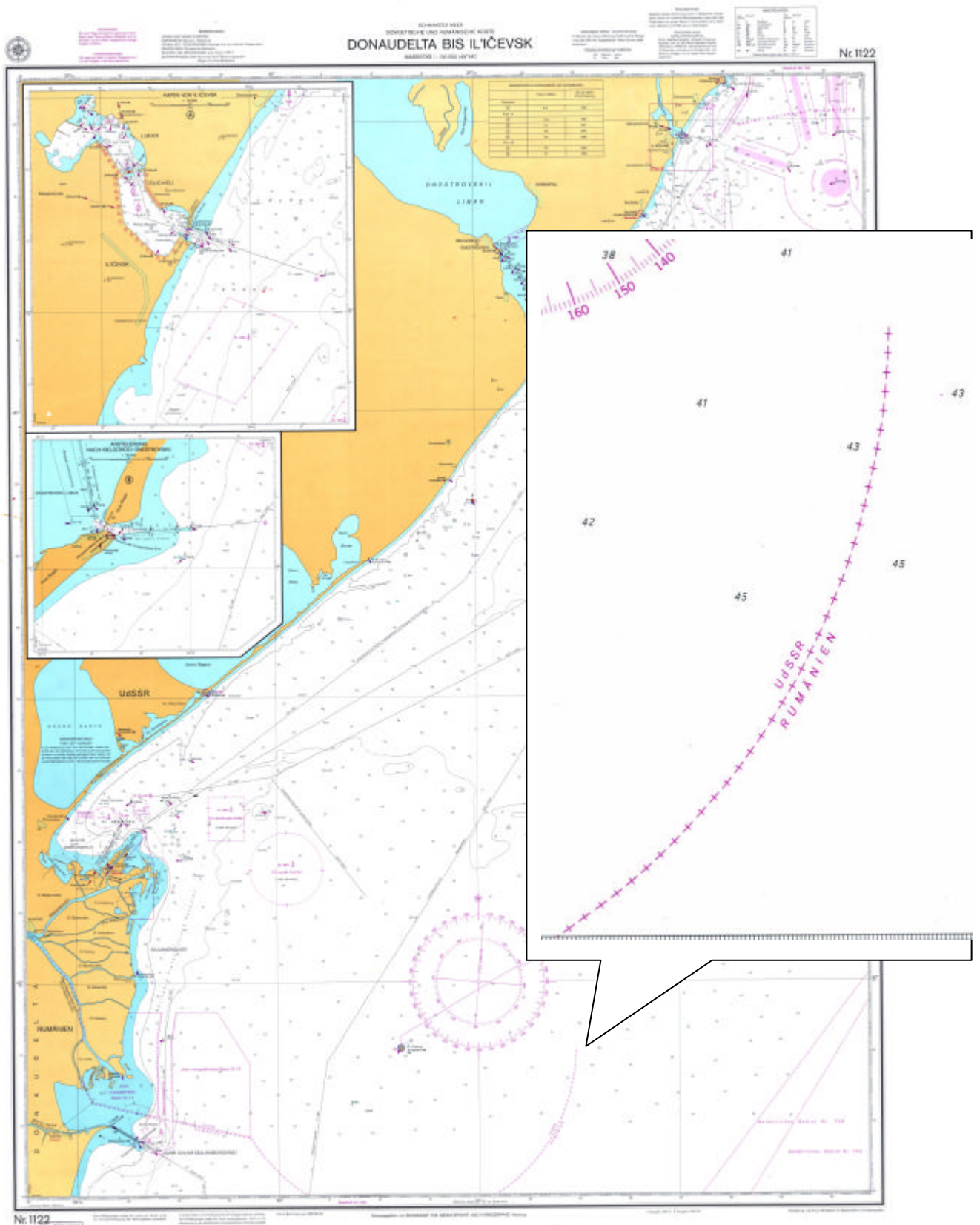


Figure 26
The 1991 German chart titled *Donaudelta bis Il'icevsk*, published by the *Bundesamt für Seeschifffahrt und Hydrographie* (see also Map RM A 41)
There are clear indications as to the appurtenance of the maritime areas surrounding Serpents' Island

11.36. Also attached to this Memorial are official Ukrainian documents regarding the recent Ukrainian demarches of opening a navigational canal in the Danube delta, edited by the Ministry of Transport and Communication of Ukraine in 2004 and 2005 and containing the official Ukrainian presentation of the controversial project of building a Danube-Black Sea deep navigation canal.³⁷⁶ Hard copies and electronic versions of this presentation were distributed by Ukrainian representatives on various occasions in 2004³⁷⁷ and in 2005.³⁷⁸

11.37. The document contains, among other images, copies of a map of the area of the Danube delta, which (under the superimposed text boxes), shows the maritime boundary between the two States. The map has been extracted from the electronic presentation, and is presented separately with and without the obscuring text boxes in **Figure 27** (page 212 of this Memorial). Although the map is on a relatively small scale it is clear that the boundary is as described in the 1949 Procès Verbal and presented by the other charts, and is indicated as extending to a point on the 12 mile arc due east of Serpents' Island.

³⁷⁶ Brochures *Creation of the deep-water navigational canal Danube-Black Sea in the Ukrainian part of delta of the river Danube*, Ministry of Transport and Communication of Ukraine, 2004, p. 11 (**Annex RM 84**) and *Revival of Danube-Black sea deep-water navigational channel on Ukrainian part of delta*, Ministry of Transport and Communication of Ukraine, April 2005, p. 33 (**Annex RM 85**). See also the International Commission for the Protection of the Danube River site, at http://www.icpdr.org/pls/danubis/danubis_db_dyn_navigator.show, information on Bystroe, under the chapter *Mission Report – Ukrainian presentation*. The reference to these documents in this Memorial does not represent any endorsement by the Romanian Government regarding their contents on the developments related to the Bystroe issue.

³⁷⁷ e.g. the 2nd Standing Working Group of the International Commission for the Protection of the Danube River – Vienna, 16-17 September 2004, the International Ad-hoc Meeting Regarding the Bystroe Canal - Geneva, 21 September 2004, the Meeting of the UNESCO Man and Biosphere Program Bureau – Paris, 25-29 October 2004, the 24th Meeting of the Standing Committee of the Bern Convention on the Conservation of Wildlife and Natural Habitats – Strasbourg, 29 November - 3 December 2004

³⁷⁸ e.g. the informal meeting of the heads of delegations participating to the process of revision of the 1948 Belgrade Convention on the regime of navigation on the Danube – Kiev, 3-4 March 2005, the International Scientific-Practical Seminar entitled “International examination of monitoring results of realization of the first stage of the «Danube - Black Sea» Deep-Water Navigation Way and influence of other types of economic activity on natural complexes of Danube Delta” – Odessa, 27-28 April 2005.

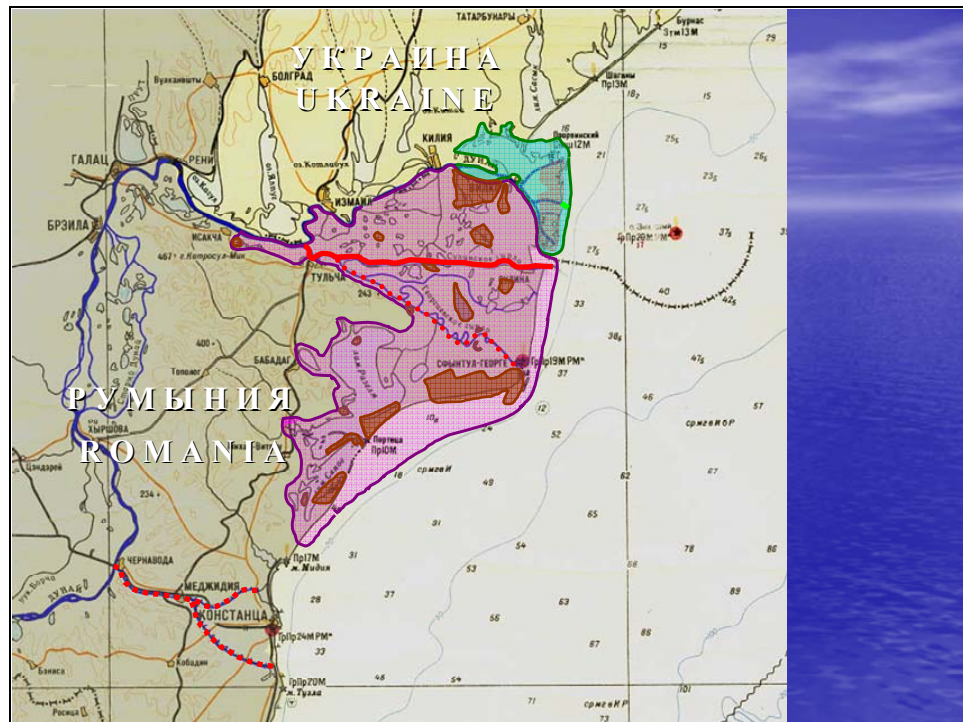
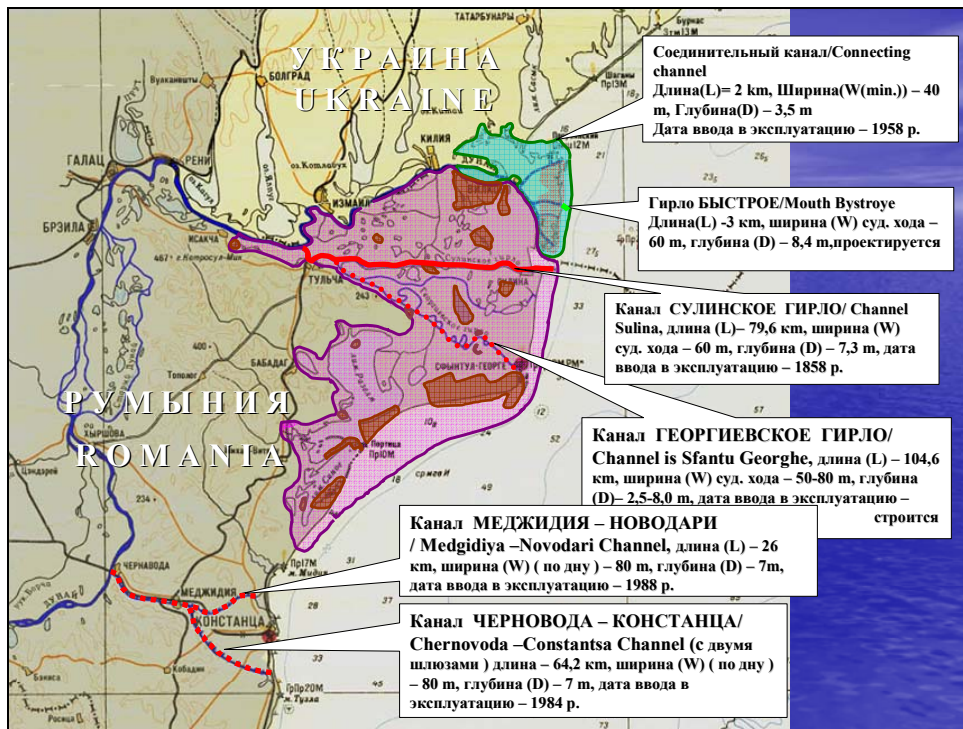


Figure 27

Map of the Danube Mouths Region

Extracted from the electronic presentations on the "Creation of the deep-water navigational canal Danube- Black Sea" (edited by the Ministry of Transport and Communication of Ukraine), presented with and without the text boxes; the maritime boundary around Serpents' Island is clearly visible

11.38. Also annexed to this Memorial is a brochure edited in 2004 by the Ukrainian State-owned enterprise Ukrmorcartographia. The brochure exhibits three different images of a chart of the Black Sea produced by the enterprise, the first one clearly indicating the course of the maritime boundary between Romania and Ukraine in the vicinity of Serpents' Island.³⁷⁹ It is highly significant that the brochure itself specifies (in English in the original text) that

“Ukrmorcartographia ...had been established December 2, 1996 by Order over National Agency of Marine Research and Technologies and is the only specialized and authorized enterprise in State, the main goal of which is fulfilment of State tasks on production of nautical charts...”³⁸⁰

***(d) Agreement as to the applicability of Article 121(3) of the 1982 UNCLOS
(Paragraph 4 (a) of the Additional Agreement)***

11.39. Irrespective of the course of agreement which exists and delimits the maritime boundary around Serpents' Island, Ukraine has in any case recognised that Serpents' Island should be limited to a 12 nm arc around Serpents' Island.

11.40. The relevant principle here is that contained in Article 4 a) of the Additional Agreement, reflecting Article 121(3) of the 1982 UNCLOS. In accordance with these agreements, Serpents' Island is a rock which cannot sustain human habitation or economic life of its own.

11.41. Accordingly, it has no continental shelf or exclusive economic zone of its own, and it is not to be taken into account for the purposes of drawing the provisional equidistance line. Instead, it is restricted to the 12 nm semi-enclave, which it already possessed under the various agreements defining the border binding on Ukraine and which Ukraine expressly undertook to respect.

³⁷⁹ Brochure (**Annex RM 86**), p. 20.

³⁸⁰ Brochure (**Annex RM 86**), p. 1.

11.42. As underlined already, the choice of this principle as the first to be identified in paragraph 4 of the Additional Agreement has particular significance. Evidently the Parties were well aware of the importance of the issue in the delimitation, which is obvious, considering the small size of Serpents' Island and its location immediately off the Danube delta, very close to the terminus of the land boundary. Paragraph 4 (a) of the Additional Agreement put beyond question the direct relevance of Article 121(3) to Serpents' Island.

11.43. Detailed factual information about Serpents' Island is set out above in Chapter 10. From this information it emerges that Serpents' Island:

- (1) is a rocky formation;
- (2) is devoid of water sources other than rainfall, and virtually devoid of soil and vegetation;
- (3) is incapable of sustaining human life on its own;
- (4) is incapable of generating any economic life of its own.

11.44. Thus, independently of any agreement between the Parties (and *a fortiori* when the actual agreements are taken into account) it is clear that Serpents' Island falls within the meaning of Article 121(3) of the 1982 UNCLOS, and accordingly it does not generate a continental shelf or exclusive economic zone.

(e) The maritime boundary around Serpents' Island would be the same independent of any agreement between the Parties

11.45. The equitable character of the maritime boundary around Serpents' Island, as contended for in the previous sections, is confirmed by the fact that even if no account were taken of the series of agreements binding on Romania and Ukraine, the solution adopted pursuant to Articles 74 and 83 of the 1982 UNCLOS would be the same.

11.46. Even if (*quod non*) one were to disregard the various agreements between the Parties in relation to the 12 nautical mile arc beyond Point F or the 1997 Additional Agreement, the maritime boundary would fall to be delimited on the

- basis of the equidistance–special circumstances rule.
- 11.47. As set out in Chapter 8 above, international jurisprudence and State practice indicates that the presence of small maritime features, close to the mainland coast of another State clearly constitutes only a special circumstance justifying the shifting of the provisional equidistance line.
- 11.48. In many cases, the equitable solution may require that a tiny maritime feature is restricted to a maximum 12 nautical mile territorial sea, and that otherwise it is given no effect in shifting the equidistance line. Indeed this solution has been adopted for islands much more significant than Serpents’ Island, as well as for much larger features that do not literally constitute “rocks”³⁸¹.
- 11.49. Given the close proximity of Serpents’ Island to the adjacent coasts of Romania and Ukraine, as well as its status of a rock falling under the provisions of Article 121(3), it is appropriate to give Serpents’ Island no weight at all in delimiting the continental shelf and exclusive economic zones of Romania and Ukraine. This means that the only effect for Serpents’ Island is restricted to a 12 nm semi-enclave.
- 11.50. This result is exactly the same as if effect is given to the agreements between the Parties as to the course of the maritime boundary on the 12 mile arc around Serpents’ Island, or if Serpents’ Island is treated under the provisions of the Additional Agreement, as an Article 121(3) rock generating no continental shelf or exclusive economic zone.

(f) The point of departure of the maritime boundary from the 12 nm arc around Serpents' Island

- 11.51. According to the 1949 Procès Verbaux, the maritime boundary was defined as running from Point 1439 around the 12 nm arc surrounding Serpents’ Island to a point undefined, in the text, by geographical coordinates.

³⁸¹ See paras. 8.86-8.123 of this Memorial.

- 11.52. Nor did the subsequent boundary agreements concluded between Romania and the Soviet Union identify this point by geographical coordinates. The last point appearing in the sketches or on the maps included in these agreements – Point B – was not meant to represent the final point of the boundary. It merely represented the point where these sketches and maps terminated.
- 11.53. However, all the charts³⁸² issued at different points in time by the Soviet Union, Ukraine, Romania and other third States which show the complete boundary on the 12 nm arc around Serpents' Island draw this arc up to a certain point. Unlike the sketches and the maps included in, or attached to, the Romanian-Soviet Procès Verbaux, which draw the boundary on the arc only up to Point B, as this point practically represents the end of those sketches/maps, the final point of the boundary presented on these charts is situated due east of Serpents' Island and its position is not conditioned by any factor such as the end of the map.
- 11.54. Nevertheless, all these charts are consistent in ending the maritime boundary in a point situated on the 12 nm arc surrounding Serpents Island situated east of it. The position of this point (defined in geographical co-ordinates) coincides on all these charts. It is situated at approximately 45°14'20"N, 30°29'12"E. Romania will refer hereafter to this point as "Point X".
- 11.55. This final point of the maritime boundary – Point X – is shown in the same location by Romanian and Soviet charts drafted starting in 1951, immediately after the conclusion of the 1949 Procès Verbal. Consequently, these charts present concordant Romanian and Soviet positions, reflecting, without any doubt, the sense of the agreement concluded in 1949 and subsequently confirmed several times - which is also confirmed by the charts issued by third States.
- 11.56. The Soviet map annexed to the Turkey/USSR Continental Shelf Agreement from 1978³⁸³, registered with the United Nations Secretariat, precisely draws the Romanian/Soviet maritime boundary up to the same Point X. Thus, Point X

³⁸² See **Maps RM A 15 – RM A 42 in the Map Atlas.**
³⁸³ **Map RM A 15 in the Map Atlas.**

is contained in an international treaty duly registered with the United Nations.

11.57. In conclusion, the point of departure of the Romanian/Ukrainian maritime boundary from the 12 mile arc around Serpents' Island, is Point X, situated due east of the island, at approximately 45°14'20"N, 30°29'12"E. This point is represented in the same location on all charts which draw the maritime boundary in the neighbourhood of Serpents' Island.

(g) The course of the boundary beyond Point X

11.58. Beyond Point X, the maritime boundary was never delimited between Romania and the USSR or Ukraine.

11.59. This is not the first time that this Court finds itself in a situation when a segment of a maritime boundary was established by agreement, while itself was called to rule on the delimitation of the areas situated beyond that segment.

11.60. The *Case on Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* dealt with a comparable situation. The first portion of the maritime boundary between the two States (from the last point of the land border to the so-called "Point G") was established by a bilateral agreement, the Maroua Declaration, which the Court found valid. However, the outer segment of the boundary (beyond Point G) had not been established by the two States, thus the Court proceeded to applying the equitable principles/relevant circumstances method in order to conduct the delimitation of the maritime areas beyond point G.

11.61. As Point G did not lie on the equidistance line between the two States, the Court decided that "Cameroon [wa]s therefore entitled to request that from point G the boundary of the Parties' respective maritime areas should return to the equidistance line." The Court went further and decided that "from point G the delimitation line should directly join the equidistance line at a point...called

point X.”³⁸⁴

11.62. The situation in this case is similar: the maritime boundary delimiting the maritime seas of the two States, as well as the initial segment of the boundary separating the Romanian exclusive economic zone and continental shelf from the Ukrainian territorial waters around Serpents’ Island between Points F and X were established by bilateral agreements. However, the other segments of the delimitation line were not established by the two States. Thus, the proper way for the Court to conduct the delimitation of the maritime areas of Romania and Ukraine in Sector 1 is, first, to confirm the boundary between Point F and X, as established by agreement, second, to unite Point X with the equidistance line and third, to follow the equidistance line between the mainland adjacent coasts of the two States.

11.63. The line equidistant between the adjacent Romanian and Ukrainian relevant coasts is shown in **Figure 28** (page 219 of this Memorial).

11.64. To calculate the position of this line, Romania used the nearest points situated on the baselines of the relevant coasts of the two States, as previously defined in Chapter 9 of this Memorial.

³⁸⁴ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, ICJ Reports 2002, judgment of 10 October 2002 (para. 307).



Figure 28

The equidistant line between the adjacent relevant Romanian and Ukrainian coasts

- 11.65. Thus, on the Romanian coast only one point is relevant to construct the equidistance line: the outer (external) end of the Sulina dyke (45°08'42"N, 29°46'20"E).
- 11.66. On the other hand, on the Ukrainian coast, the following points are relevant and most advantageous for the Ukrainian side: Cape Kubansky (45°19'31"N, 29°45'58"E), as well as any points situated on the line uniting Cape Kubansky with Point 1438, and Cape Burnas (45°50'40"N, 30°12'00"E).
- 11.67. From the coasts up to a point that Romania will refer to as "Point D", the equidistance line is governed by the outer (external) end of the Sulina dyke and, respectively, by Cape Kubansky; after Point D to the intersection with the line median between the Romanian and Ukrainian opposite coasts (Point T), the equidistance line is governed by the outer end of the Sulina dyke and, respectively, by Cape Burnas.
- 11.68. As it can be seen from **Figure 28**, Point X is not situated on the equidistance line, but about 2.5 nautical miles on the arc, to the north. Thus, in the absence of any other relevant circumstance, from Point X the boundary should return to equidistance. Under normal circumstances, this would consist in drawing a perpendicular line from Point X direct to the equidistance line – at a point that will be referred to as "Point Y₁" – see **Figure 29** (page 222 of this Memorial).
- 11.69. This approach would be consistent with the solution chosen by this Court in *Land and Maritime Boundary between Cameroon and Nigeria*³⁸⁵. But such a solution would involve awarding Romania a sliver of maritime area only about 1.5 km², pinned between the maritime areas of Ukraine. This would represent a departure from the will of the Parties, who evidently attached importance to Point X, which was drawn in the same location practically on every chart issued by them or by third parties. Since the very purpose of establishing the exclusive economic zone and the continental shelf is to permit the access to, and the sustainable exploitation by a State of, resources in those areas, this approach would be a departure from equity as well: there is no point in a maritime

delimitation which creates maritime zones which are practically neutralized.

- 11.70. For these reasons, to connect Point X directly with the equidistance line between the Romanian and Ukrainian adjacent coasts does not lead to an equitable solution and should be rejected.
- 11.71. The appropriate and equitable method is to join Point X with the point on the equidistance line between the Romanian and Ukrainian adjacent coasts representing approximately the middle of the segment linking the point of intersection of the equidistance line with the arc around Serpents' Island, and Points D and T; this point coincides with the point where the equidistance line intersects the line uniting Point X and Point T. Romania will refer to this point as "Point Y". The position of Point Y is 45°11'59"N, 30°49'16"E. It is shown on **Figure 29** (page 222 of this Memorial).
- 11.72. This solution would lead to the allocation to Romania of a maritime area of about 68 km². This roughly equals the area lost by Romania because of the unjustified departure from equidistance when delimiting the territorial seas between Romania and the USSR, a factor which should be kept in mind when considering the overall equity of the solution adopted.
- 11.73. Apart from the presence of Serpents' Island and the position of the maritime boundary around it established by the Romanian/Soviet Procès Verbaux, in Sector 1 there is no other relevant/special circumstance to be considered³⁸⁶. Consequently, from Point Y, the maritime boundary should follow the line equidistant between the adjacent Romanian and Ukrainian coasts.

³⁸⁵ See paras. 11.60-11.61 of this Chapter.

³⁸⁶ The general circumstance represented by the geographical configuration of the Black Sea also applies to the whole delimitation area and is to be taken into account consequently – see paras. 6.21-6.34 and 8.124-8.125 of this Memorial.

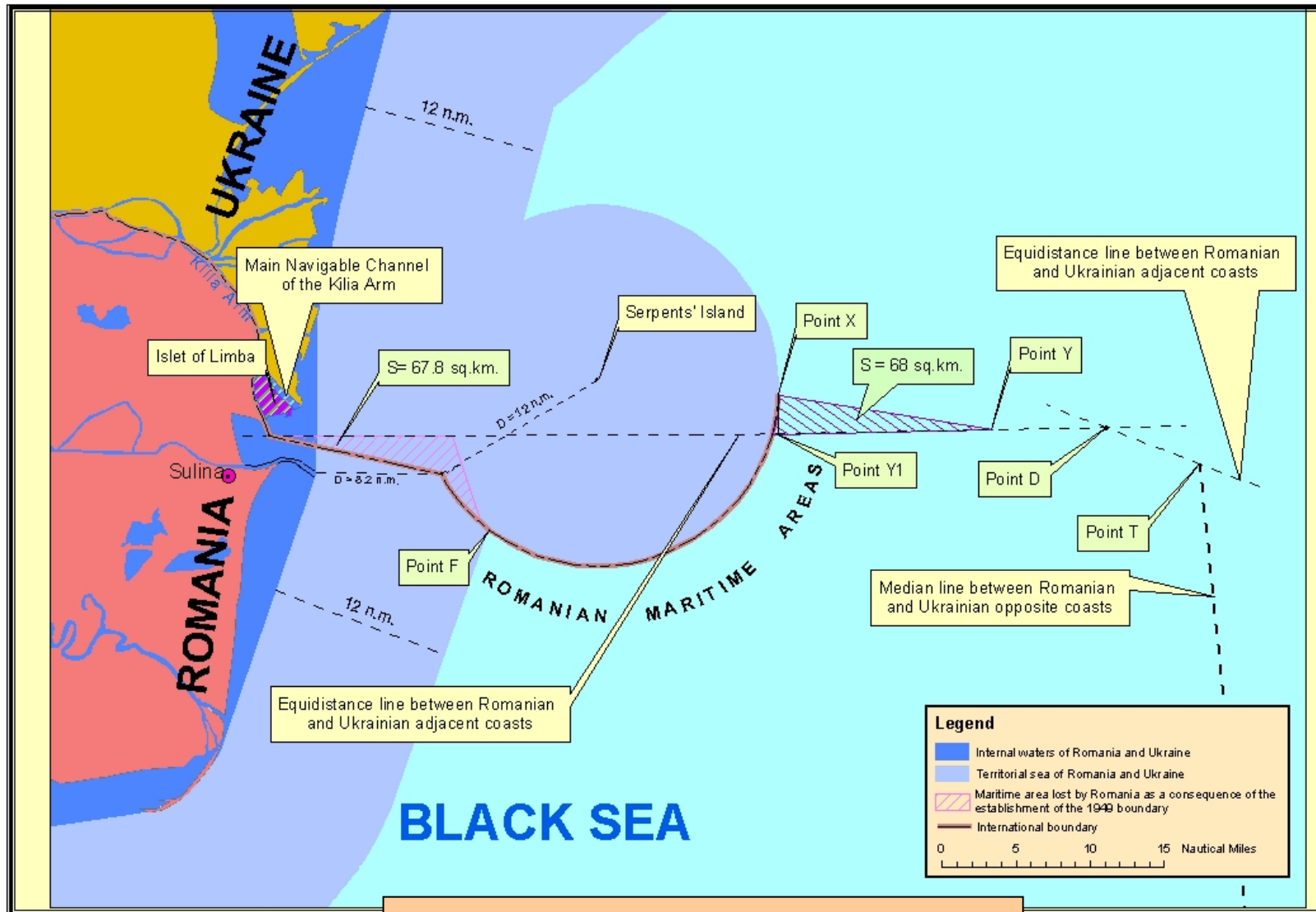


Figure 29
The trace of the maritime boundary between Point X and the equidistant line

(h) The course of the boundary in Sector 1

11.74. For these reasons, the maritime boundary between the continental shelf and the exclusive economic zones of Romania and Ukraine runs in Sector 1 from Point F (45°05'21"N, 30°02'27"E, being the junction of the territorial seas of Romania and Ukraine, as agreed in 2003), along the segment of arc having a radius of 12 nm drawn from Serpents' Island, up to Point X (of 45°14'20"N, 30°29'12"E). From Point X, the boundary joins the equidistance line based on the adjacent coasts of Ukraine and Romania at Point Y (of 45°11'59"N, 30°49'16"E). The boundary is then constructed as the equidistance line, going through Point D (of 45°12'10"N, 30°59'46"E) up to Point T (the turning point, of 45°09'45"N, 31°08'40"E).

11.75. The boundary in Sector 1 is shown in **Figure 30** (page 224 of this Memorial).



Figure 30
The course of the maritime boundary in Sector 1
 From Point F to Point X, it follows the 12-nm arc around Serpents' Island; then it joins the equidistance line at Point Y; beyond Point Y to Point T, it follows the equidistance line

(3) Sector 2: The boundary between opposite coasts (Romania/Crimean Peninsula)

11.76. The boundary in Sector 2 begins at the point where the equidistance line between the adjacent mainland coasts of the Parties meets the opposite coast median line between Romania and the Crimean Peninsula. Sector 2 covers the area for delimitation in a southwards direction until it meets maritime zones appertaining to other States bordering on the Black Sea (see **Figure 31** – page 226 of this Memorial).

(a) The provisional median line in Sector 2

11.77. It is first appropriate to determine the location of the provisional median line between the opposite coasts. The median line is to be constructed taking into account the nearest points situated on the baselines of the relevant coasts of the two States, as previously defined.

11.78. As far as the Romanian side is concerned, due to the geographical situation of the relevant Romanian coast, only two points are relevant to establish the median line:

- the outer (eastern) end of the Sulina dyke (45°08'42"N, 29°46'20"E);
- the south-eastern end of the Sacalin Peninsula (44°47'21"N, 29°32'55"E).

11.79. As to the Ukrainian side, the following points situated on the Crimean coast are applicable:

- Cape Tarkhankut (45°20'50"N, 32°29'43"E);
- Cape Khersones (44°35'04"N, 33°22'48"E).

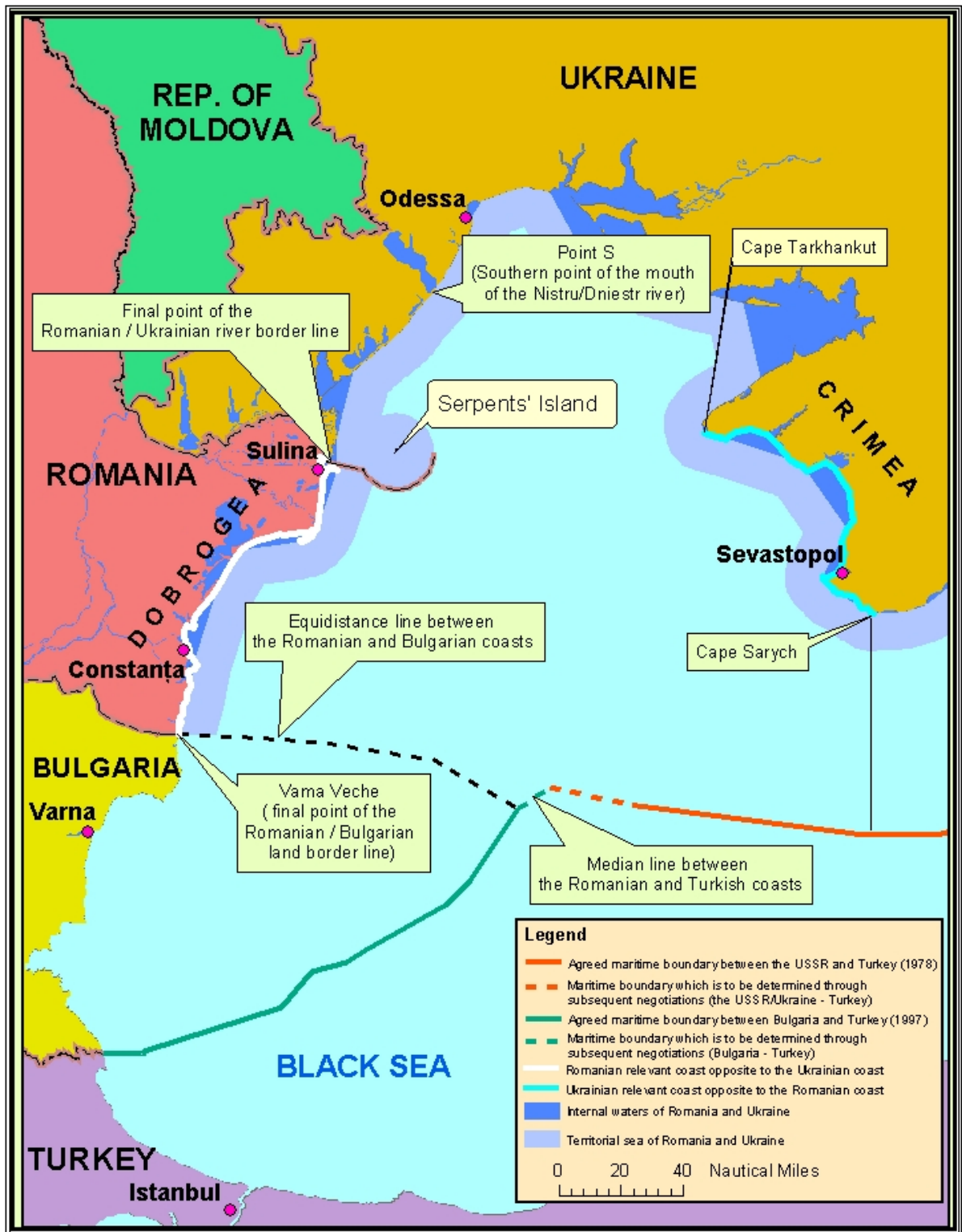


Figure 31
Sector 2 of delimitation

11.80. On this basis, the median line between the opposite coasts is the line joining the points defined by the following geographical coordinates:

- Point T of 45°09'45"N, 31°08'40"E (which is also equidistant to the adjacent Romanian and Ukrainian coasts);

- the point of 44°35'00"N, 31°13'43"E;

- the point of 44°04'05"N, 31°24'40"E;

- the point of 43°26'50"N, 31°20'10"E.

11.81. The final defined point is referred to by Romania as "Point Z". As Point Z coincides practically with Point L from the Soviet/Turkish Agreement³⁸⁷ and Point 10 from the Bulgarian/Turkish Agreement³⁸⁸, its final location should be established by negotiations with third countries (namely Turkey). However, as Point Z is practically the point equidistant to the Romanian, Ukrainian and Turkish coasts, and is farther to the Bulgarian coast, drawing the Romanian/Ukrainian maritime boundary up to Point Z does not affect the entitlements to maritime areas of third countries.

11.82. The provisional median line is depicted on **Figure 32** (page 228 of this Memorial).

³⁸⁷

See para. 6.9 of Chapter 6 of this Memorial.

³⁸⁸

See para. 6.16 of Chapter 6 of this Memorial.



Figure 32
The median line between the relevant Romanian and Ukrainian opposite coasts

(b) The location of Point T - the turning point between Sector 1 and Sector 2

11.83. Point T is the point of intersection of the line equidistant to the Romanian and Ukrainian relevant adjacent coasts and the line median between the Romanian and Ukrainian relevant opposite coasts. Its geographical coordinates are 45°09'45"N, 31°08'40"E.

(c) Identifying relevant/special circumstances in Sector 2

11.84. There is no relevant/special circumstance discernible in Sector 2³⁸⁹. The opposite coastlines are broadly equal to each other and present no special features.

(d) The course of the boundary in Sector 2

11.85. For these reasons, there is no basis for departing from the provisional median line in Sector 2. The maritime boundary in Sector 2 is depicted on **Figure 33** (page 230 of this Memorial).

³⁸⁹ The general circumstance represented by the geographical configuration of the Black Sea applies to the whole delimitation area – see paras. 6.21-6.34 and 8.124-8.125 of this Memorial.



Figure 33
The course of the maritime boundary in Sector 2

(4) The maritime boundary between the exclusive economic zones and the continental shelf of Romania and Ukraine in the Black Sea

11.86. Taking into account all the above, the maritime boundary between the exclusive economic zones and the continental shelf of Romania and Ukraine in the Black Sea should have the following course:

from Point F, at 45°05'21"N, 30°02'27"E, on the 12 nm arc surrounding Serpents' Island, to Point X, at 45°14'20"N, 30°29'12"E,

from Point X in a straight segment to Point Y, at 45°11'59"N, 30°49'16"E,

then on the line equidistant between the Romanian and Ukrainian adjacent coasts, from Point Y to Point T, at 45°09'45"N, 31°08'40"E,

and then on the line median between the Romanian and Ukrainian opposite coasts, from Point T to Point Z, at 43°26'50"N, 31°20'10"E.

11.87. The boundary is shown in **Figure 34**, at page 232 of this Memorial.

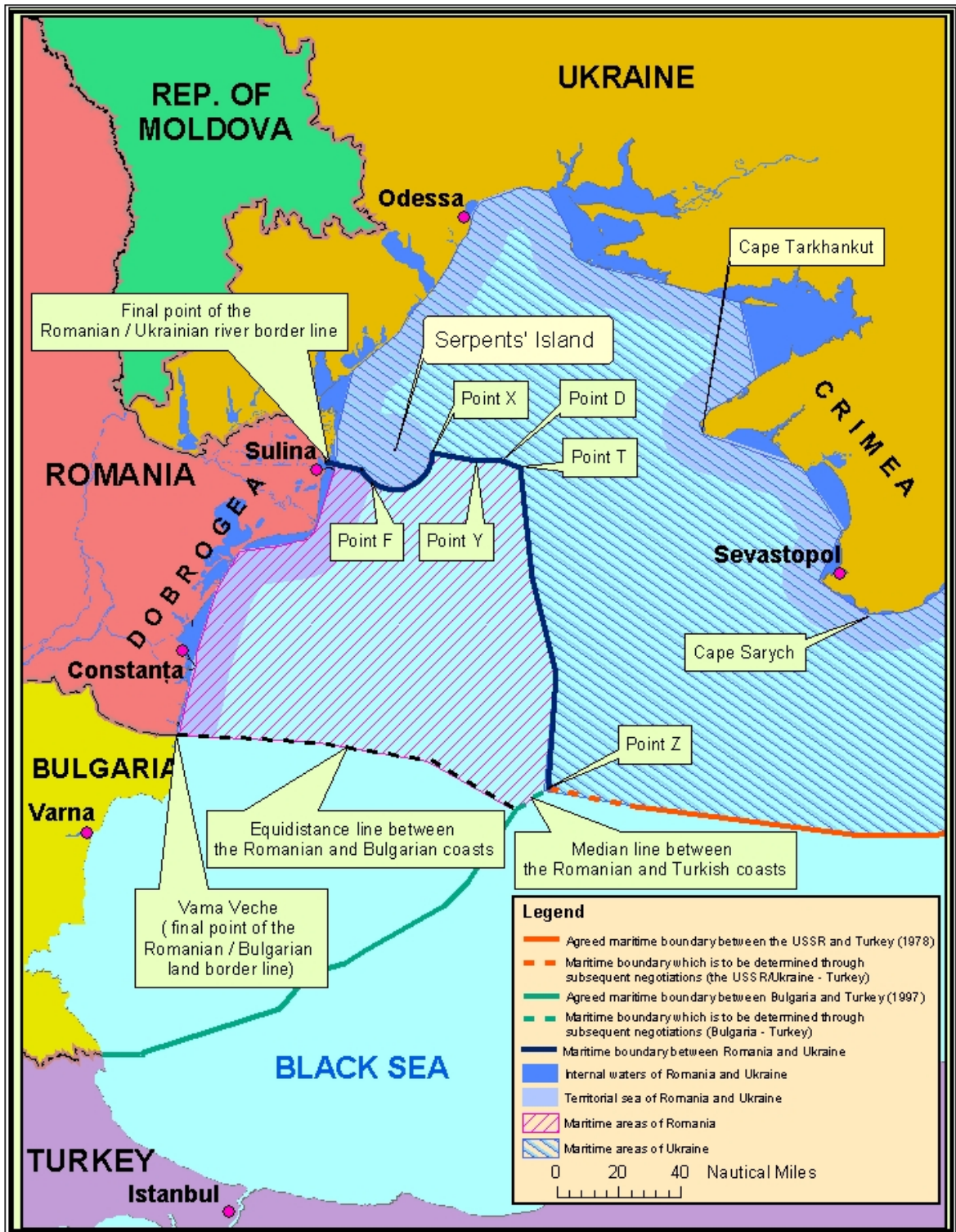


Figure 34
The maritime boundary between the exclusive economic zones and the continental shelf of Romania and Ukraine in the Black Sea

CHAPTER 12

EQUITABLENESS OF THE DELIMITATION LINE

(1) Introduction

- 12.1. As already explained, it has become usual that the equitableness of a maritime delimitation be tested using the so-called “proportionality test”. The aspects regarding proportionality were dealt with in detail in paras. 8.58-8.70 of Chapter 8 of this Memorial.
- 12.2. As well, an equitable delimitation should not encroach upon (should not cut-off) the maritime entitlements of neither of the parties to the delimitation and should not affect their security interests.

(2) The proportionality test

- 12.3. The proportionality test, as applied in various processes of delimitation by this Court or different arbitral tribunals, supposes the comparison between the ratio of the lengths of the coasts relevant for the delimitation and the ratio of the water areas accorded to the two parties by the equidistant/median line as shifted after the consideration of the relevant circumstances.
- 12.4. While analyzing the application of the provisions of article 4(b) of the Additional Agreement, Romania identified the relevant area for delimitation (see paras. 9.26-9.29 of Chapter 9 of this Memorial); it has a surface area of 86,095.3 km².
- 12.5. The water areas from the delimitation area allocated to Romania and, respectively, Ukraine by the equidistant/median line, as shifted to consider the presence of Serpents’ Island and its 12 nm surrounding circle, have the following sizes: Romania 31,542.8 km², Ukraine 54,552.5 km², the ratio being Romania: Ukraine 1:1.729.

12.6. In paras. 9.24-9.25 of this Memorial the lengths of the relevant coasts of the two States (and their baselines) were determined. These are:

Romanian relevant coasts: 269.67 km (baselines: 204.90 km);

Ukrainian relevant coasts: 388.14 km (baselines: 292.63 km).

12.7. Consequently, the ratio is Romania: Ukraine 1: 1.439. If the baselines of the relevant coasts are considered, the ratio becomes Romania: Ukraine 1: 1.428.

12.8. After comparing the ratios between the lengths of the relevant coasts of the two States/their baselines and the water areas allocated to them by the equidistant/median line as modified to take into account the 12 nm arc around Serpents' Island, it is noticeable that they are comparable (they produce only a slight advantage in favour of Ukraine). Thus, there is no reason to further shift the delimitation line.

(3) The principle of no cut-off

12.9. The principle according to which "cut-off" or encroachment on the maritime zone areas of other States is to be avoided as far as possible is well established in international jurisprudence. Thus, the Court in the *North Sea Continental Shelf* case observed that:

"the continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State."³⁹⁰

Similarly, the relevant paragraph of the *dispositif* provided:

"delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the

³⁹⁰ *ICJ Reports 1969*, p. 47 (para. 85).

sea, without encroachment on the natural prolongation of the land territory of the other”³⁹¹

12.10. In the *St Pierre et Miquelon* case, the Court of Arbitration, having discussed the jurisprudence of the Court, endorsed the Canadian formulation of the principle in the following terms:

“the delimitation must leave to a State the areas that constitute the natural prolongation or seaward extension of its coasts, so that the delimitation must avoid any cut-off effect of those prolongations or seaward extensions”³⁹²

12.11. The Court in the *Libya/Malta* case described the question of cut-off, included in its list of the “well-known examples” of the application of “equitable principles”, in the following terms:

“the principle of non-encroachment by one party on the natural prolongation of the other, which is no more than the negative expression of the positive rule that the coastal State enjoys sovereign rights over the continental shelf off its coasts to the full extent authorized by international law in the relevant circumstances”³⁹³

12.12. Romania also had a constant position regarding the necessity that any maritime delimitation should lead to no cut-off. Thus, in the course of the negotiations of the 1982 UNCLOS, while submitting various proposals regarding the role of islands in delimitation, Romania also referred to the principle of no cut-off, stating that its proposals were intended to

“prevent any State from encroaching on the maritime zones of another State by invoking the existence of uninhabited islands in the delimitation area”³⁹⁴

³⁹¹ *ICJ Reports 1969*, p. 53, (para. 101(C)(1)).

³⁹² *International Legal Materials*, vol. 31, p. 1145, at p. 1167, para. 58.

³⁹³ *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, ICJ Reports 1985*, p. 39 (para. 46)

³⁹⁴ 169th Plenary Meeting (1982), para 53, XVI Official Records, 97. See also para. 8.13 of this Memorial.

12.13. In the present case, the maritime boundary as described in Chapter 11 does not cut-off the entitlements to continental shelf and exclusive economic zones of either Romania or Ukraine. The area attributed to each party does not encroach on the natural prolongation of the other.

(4) The necessity to protect security interests of States

12.14. Another factor relevant to maritime delimitations is the necessity that the maritime boundary not imperil on the security interests of any of the parties. As the Chamber said in the *Gulf of Maine* case:

“It is... evident that the respective scale of activities connected with fishing – or navigation, defence or, for that matter, petroleum exploration and exploitation – cannot be taken into account as a relevant circumstance or, if the term is preferred, as an equitable criterion to be applied in determining the delimitation line. What the Chamber would regard as a legitimate scruple lies rather in concern lest the overall result, even though achieved through the application of equitable criteria and the use of appropriate methods for giving them concrete effect, should unexpectedly be revealed as radically inequitable, that is to say, as likely to entail catastrophic consequences for the livelihood and economic well-being of the population of the countries concerned.”³⁹⁵

12.15. A similar approach was taken in the *Jan Mayen* case, when the Court, referring to the Chamber’s dictum in the *Gulf of Maine* case, decided to

“consider whether any shifting or adjustment of the median line, as fishery zone boundary, would be required to ensure equitable access to the capelin fishery resources [...]”³⁹⁶.

12.16. The *Gulf of Maine* and *Jan Mayen* cases concerned issues of economic security and access to resources which had traditionally been used by relevant populations. But the categories of “catastrophic consequences” are not exhausted, and the principle would be triggered, for example, by a proposal for zones of sovereign rights of one State directly in front of the adjacent coastal State.

³⁹⁵ *ICJ Reports 1984*, p. 342 (para 237).

- 12.17. In the present case, the maritime boundary as defined in Chapter 11 of this Memorial ensures the access of both Parties to the resources of the delimitation area. Consequently, it does not affect the security interest of neither of the two States.
- 12.18. In this context, it is worth mentioning that the security interests of Romania were already affected by the establishment of the maritime boundary between Romania and the USSR in the territorial sea and in the area around Serpents' Island, by the 1949 Procès Verbal and the subsequent Romanian-Soviet documents. As already mentioned, this maritime boundary reduced the size of the Romanian territorial sea facing Serpents' Island with approximately 70 km² and thus encroached upon the Romanian maritime entitlements in that area. By its trace and its proximity to the Romanian coast, the boundary embarrasses the exercise of Romanian activities in areas situated immediately in front of the Romanian shore. Allocating further maritime entitlements to Serpents' Island could extend the consequences of the already existing inequitable situation and would further affect, in this way, the legitimate security interests of the Romanian State.
- 12.19. Taking into account all the above, the delimitation identified in this Memorial leads to an equitable solution, in accordance with the applicable law between the two parties, and especially the principles under the Additional Agreement, as well as under Articles 74 and 83 of the 1982 UNCLOS.

³⁹⁶ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, ICJ Reports 1993, pp. 71-72 (para. 75).*

SUMMARY OF CONCLUSIONS³⁹⁷

After reviewing all the elements pertinent to the case of *Maritime Delimitation in the Black Sea*, Romania concludes the following:

- i) The applicable law in this case is represented by the 1997 Additional Agreement (as *lex speciali*), by the 1982 UNCLOS reflecting the general principles of the Law of the Sea (as *lex generalis*) and by the 1949 Romanian-Soviet Procès Verbaux and its subsequent Romanian-Soviet documents concluded in 1954, 1963 and 1974;
- ii) According to the relevant provisions of the Additional Agreement, the delimitation method to be applied in the present case consists in first drawing a provisional equidistant/median line between the relevant adjacent/opposite Romanian and Ukrainian coasts and then taking into consideration the influence of the relevant circumstances of the delimitation area on this line;
- iii) This method corresponds with the method constantly applied in recent jurisprudence of international courts and tribunals, and in particular in the case-law of this Court;
- iv) The first segment of the maritime boundary was already established by the 1949 Procès Verbaux, on the 12 nm arc around Serpents' Island;
- v) Serpents' Island, as a rock unable to support human habitation or an economic life of its own, has no effect upon the delimitation of the continental shelf and the exclusive economic zones of Romania and Ukraine, other than the 12 nm semi-enclave of territorial sea surrounding it;

³⁹⁷ The purpose of this "Summary of conclusions", as well as of the conclusions of certain chapters, is to better underline important findings in this Memorial. It does not represent an exhaustive presentation of the arguments and reasoning of Romania.

- vi) This is not only in conformity with the natural characteristics of Serpents' Island, but also with the provisions of the 1949 Procès Verbaux and is supported by a constant international State practice and jurisprudence;
- vii) Irrespective of the status of Serpents' Island as a rock unable to support human habitation and an economic life of its own in the meaning of Article 121(3), this maritime formation, taking into account its natural characteristics, uninhabitable nature, and geographical position in respect to the Romanian mainland, which leads to the fact that it has the potential to distort an otherwise equitable equidistant line, should be ignored for purposes of delimitation of the continental shelf and exclusive economic zone between Romania and Ukraine, except for the 12 nm semi-enclave of territorial sea surrounding it;
- viii) Ukraine's conduct in relation to Serpents' Island implies a recognition that Serpents' Island cannot sustain human habitation or economic life of its own. In any event the Ukrainian measures cannot lead to any change in respect to the legal status of Serpents' Island;
- ix) According to the geographical background and its relevant circumstances, the provisional equidistant/median line is not to be shifted, apart from the 12 nm semi-enclave around Serpents' Island and the segment uniting the arc around Serpents' Island with the equidistance line (the existing geographical background and relevant circumstances not justifying any further adjustment of the equidistant/median line);
- x) This solution is perfectly equitable, as confirmed by the "proportionality test". It is also in conformity with the established practice of delimitation in the Black Sea.
- xi) Any other solution would encroach upon Romania's entitlements in the delimitation area and would affect its security interests, as well as prolong the inequities perpetrated with regard to Serpents' Island and its surrounding maritime areas, as a consequence of history.

SUBMISSION

For the reasons set out above, the Government of Romania respectfully requests the Court to draw a single maritime boundary dividing the continental shelf and the exclusive economic zones of Romania and Ukraine in the Black Sea, having the following description:

from Point F, at 45°05'21"N, 30°02'27"E, on the 12 nm arc surrounding Serpents' Island, to Point X, at 45°14'20"N, 30°29'12" E,


from Point X in a straight segment to Point Y, at 45°11'59"N, 30°49'16"E,

then on the line equidistant between the Romanian and Ukrainian adjacent coasts, from Point Y to Point T, at 45°09'45"N, 31°08'40"E,

and then on the line median between the Romanian and Ukrainian opposite coasts, from Point T to Point Z, at 43°26'50"N, 31°20'10"E.

This line is depicted, for illustrative purposes, on **Figure 34** on page 232 of this Memorial. It is also shown on the following page.

Dr. Bogdan AURESCU,



Agent of Romania

Bucharest

19 August 2005

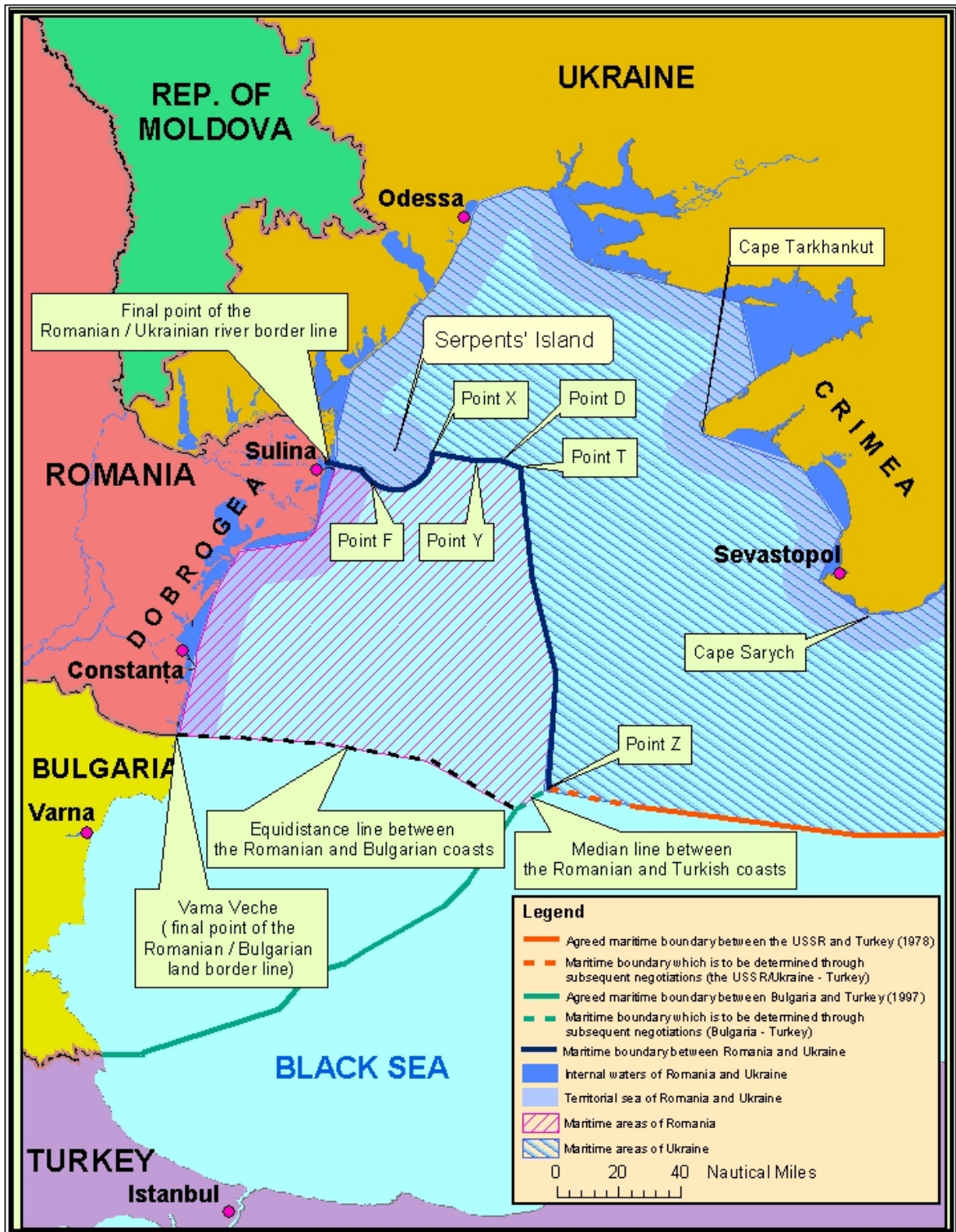


Figure 34

The maritime boundary between the exclusive economic zones and the continental shelf of Romania and Ukraine in the Black Sea

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- Annex RM 3** Treaty between Romania and Ukraine on the Romanian-Ukrainian State Border Regime, Collaboration and Mutual Assistance on Border Matters, signed at Cernăuți, on 17 June 2003;
- Annex RM 4** Protocol on the Exchange of Instruments of Ratification of the Treaty between Romania and Ukraine on the Romanian-Ukrainian State Border Regime, Collaboration and Mutual assistance on Border Matters, Mamaia, 27 May 2004;
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- Annex RM 6** R.I. Călinescu, *Insula Șerpilor. Schiță monografică (Serpents' Island. Monographic Study)*, published in the *Analele Dobrogei* magazine, “Glasul Bucovinei” Publishing House, Cernăuți, 1931;
- Annex RM 7** Note of 27 June 1940 to the Romanian Mission in Moscow;
- Annex RM 8** Note of 28 June 1940 to the Romanian Mission in Moscow;
- Annex RM 9** Note of 28 June 1940 of the Romanian Mission in Moscow;
- Annex RM 10** Major (retired) Silviu Ștefănescu, *Din amintirile veteranilor (War Veterans' Memories)*, published in *Revista de istorie militară (Military History Magazine)*, issue no. 3 (31)/1995;
- Annex RM 11** Protocol to Specify the Line of the State Boundary between the People's Republic of Romania and the Union of Soviet Socialist Republics, signed at Moscow, on 4 February 1948;
- Annex RM 12** Procès Verbal of Delivery-Reception, signed on Serpents' Island on 23 May 1948;

- Annex RM 13** Procès Verbal of the Description of the State Border Line between the People's Republic of Romania and the Union of the Soviet Socialist Republics, demarcated in 1948-1949, signed at Bucharest, on 27 September 1949, volume III;
- Annex RM 14** Procès Verbal of Border Sign no. 1438 (buoy), signed at Bucharest, on 27 September 1949;
- Annex RM 15** Procès Verbal of Border Sign no. 1439 (beacon), signed at Bucharest, on 27 September 1949;
- Annex RM 16** Treaty between the Government of the People's Republic of Romania and the Government of the USSR on the Regime of the Romanian-Soviet State Border, signed at Moscow, on 25 November 1949;
- Annex RM 17** Act signed by the Border Authorized Officer of the People's Republic of Romania for the Tulcea sector and the Border Authorized Officer of the Union of the Soviet Socialist Republics for the Ismail sector, in Ismail on 26 December 1954;
- Annex RM 18** Treaty between the Government of the People's Republic of Romania and the Government of the Union of Soviet Socialist Republics on the Romanian-Soviet State Border Regime, Collaboration and Mutual Assistance on Border Matters (with Procès Verbal), signed at Bucharest, on 27 February 1961;
- Annex RM 19** Procès Verbal of Description of the State Border Line between the People's Republic of Romania and the Union of the Soviet Socialist Republics on Rivers Tur, Tisa, Prut and Danube, drafted on the Basis of the Verification Effected in 1961-1962 in Sectors where Modifications as Compared to the 1948-1949 Demarcation Documents Occurred, signed at Iași, on 20 August 1963;
- Annex RM 20** Procès Verbal of Border Sign no. 1438 (buoy), signed at Iași, on 20 August 1963;
- Annex RM 21** Procès Verbal of Description of the State Border Line between the Socialist Republic of Romania and the Union of the Soviet Socialist Republics from Border Sign no. 1335 to Border Sign no. 1439, Drafted on the Basis of the Verifications Effected in 1972-1973, the Tulcea sector, signed in Ismail, on 4 September 1974;
- Annex RM 22** Procès Verbal of Border Sign no. 1439 (beacon), signed in Ismail, on 4 September 1974;

- Annex RM 23** Note verbale no. C26/3118 dated 17 June 2003 of the Ministry of Foreign Affairs of Romania to the Embassy of Ukraine in Bucharest;
- Annex RM 24** Note verbale no. E VI-1/3559 dated 27 May 2004 of the Ministry of Foreign Affairs of Romania to the Embassy of Ukraine in Bucharest;
- Annex RM 25** Note verbale no. C23/491 dated 24 January 2002 of the Ministry of Foreign Affairs of Romania to the Ministry of Foreign Affairs of Ukraine;
- Annex RM 26** Note verbale no. 72/16-446-119 dated 29 May 2002 of the Ministry of Foreign Affairs of Ukraine to the Embassy of Romania in Kiev;
- Annex RM 27** Ukraine. List of the geographical coordinates of the points defining the position of the baselines for measuring the width of the territorial waters, economic zone and continental shelf of the Black Sea, *Law of the Sea Bulletin no.36/1998*;
- Annex RM 28** Extract from the minutes of the 1976 Romanian-Soviet negotiations;
- Annex RM 29** Extract from the minutes of the 1978 Romanian-Soviet negotiations;
- Annex RM 30** Extract from the minutes of the 1980 Romanian-Soviet negotiations;
- Annex RM 31** Extract from the minutes of the 1987 Romanian-Soviet negotiations;
- Annex RM 32** Declaration of the Vietnamese minister of foreign affairs, Mr. Nguyen Dy Nien, published by the Vietnamese newspaper *Nhân Dân*, on 1 July 2004;
- Annex RM 33** Article titled "The apple of discord tasting like oil", published in *Iug*, issue no. 51 (15053), of 13 July 2002; author: Alexandr Iurcenko;
- Annex RM 34** *Opinion of the Committee on Culture and Education of the Parliamentary Assembly of the Council of Europe on the freedom of expression in Ukraine, Rapporteur: Andrzej Urbanczyk, Poland, Socialist Group; Doc. 8946/23 January 2001*;
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- Annex RM 38** *Report on the improvement of navigation on Lower Danube, presented to the European Commission by Mr. C.A. Hartley, its chief-engineer, Galatz, 17 October 1857*, General Department of the National Archives, Galatz, Romania, European Danube Commission, 5/1857-1858;
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- Annex RM 41** The Great Soviet Encyclopaedia, Volume 27, Moscow, 1933, p. 74;
- Annex RM 42** Article titled “Insula Serpilor” (“Serpents’ Island”), published in the Romanian newspaper *Acțiunea (The Action)*, issue 2343, of 25 March 1938; author: D. L. Stahiescu;
- Annex RM 43** Ion Simionescu, *Pitorescul României (The Picturesque of Romania)*, volume I, *Între Dunăre și mare (Between the Danube and the Sea)*, “Cartea Românească” Publishing House, 1942;
- Annex RM 44** George Popa, *Λευκή. Insula Șerpilor (Λευκή. Serpents’ Island)*, in the Romanian Magazine for History, Archaeology and Philology, published by the “I.V. Socecu” Publishing House, Bucharest, 1894;
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- Annex RM 47** Edward Daniel Clarke, *Travels in various countries of Europe, Asia and Africa, Part the First, Russia, Tartary and Turkey*, Cambridge, Printed at the University Press by H. Watts, 1810;
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- Annex RM 49** Alexandru Vlahuţă, *România Pitorească (Picturesque Romania)*, "I.V. Socecu" Publishing House, Bucharest, 1901;
- Annex RM 50** Article titled "The taming of the serpents", published by the Ukrainian newspaper *Ukraina Moloda*, issue no. 167 (1973) of 12 September 2002; author: M. Axaniuk;
- Annex RM 51** Article titled "A patch of Ukraine between sea and sky", published in the Ukrainian newspaper *Golos Ukraini*, issue no. 78 (3078) of 23 April 2003;
- Annex RM 52** Article titled "Acacias are going to blossom on Serpents' Island, too", published in the Ukrainian newspaper *Golos Ukraini*, issue no. 83 (3083), of 7 May 2003; author: Gheorghii Vorotniuc;
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- Annex RM 54** Edmund Spencer, *Travels in Circassia, Krim, Tartary, &c., including a stream voyage down the Danube, from Vienna to Constantinople and round the Black Sea, in 1836*, London, Henry Colburn, Great Marlborough Street, 1837;
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- Annex RM 56** Article titled "The number of the islanders is going to increase", published in the Ukrainian newspaper *Odeskie Izvestia*, issue no. 192 (2766), of 16 October 2003; author: Vladislav Kitik;
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- Annex RM 63** Article titled “Geamanduri în uniformă” (“Buoys in Uniform”), published in the Romanian newspaper *Curentul*, issue 2795 of 14 November 1935; author Ion Dimitrescu;
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- Annex RM 65** Article titled “The Military does not need Serpents’ Island”, published in the Ukrainian newspaper *Iug*, issue no. 22 (15024) of 23 March 2002; unsigned;
- Annex RM 66** Article titled “I wanted so bad to have a French perfume...and, in a fortnight, I had it, when they brought the correspondence by helicopter”, published in the Ukrainian newspaper *Fakti*, issue of 6 October 2004; author: Aleksandr Levit;

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- Annex RM 69** Note verbale no. 72/22-446-4290 dated 18 August 2004 of the Ministry of Foreign Affairs of Ukraine to the Embassy of Romania in Kiev;
- Annex RM 70** Article titled “Serpents’ Island’s concerns are our concerns”, published in the Odessa-based *Odeskie Izvestia*, issues no. 171 (2499) of 14 September 2002; author: Aleksandr Seryi;
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- Annex RM 73** Article titled “Ukraine decided to withdraw its anti-aircraft defence from Serpents’ Island” published in the Ukrainian newspaper *Slovo*, issue no. 18 (491) of 3 May 2002; author: Viktor Veprik;
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- Annex RM 75** Article titled “Changes are expected to be carried out on Serpents’ Island”, published in the Ukrainian newspaper *Vecherniia Odessa*, issue no. 197-198 (8138-8139) of 25 December 2004; author: Natalia Harcenko;
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- Annex RM 80** *Decree No. 176 for the Modification of Articles 4, 120, 159 and 172 from the Decree No. 41 of 14 February 1950 Regarding the Surveillance, Order and Control of Maritime and River Navigation, in the Official Bulletin of the People’s Republic of Romania no. 98 of 29 September 1951;*
- Annex RM 81** *Decree No. 39 of the Presidium of the Great National Assembly of the People’s Republic of Romania on Regulating the Regime of the Territorial Waters of the People’s Republic of Romania of 21 January 1956;*
- Annex RM 82** *Decision of the Central Executive Committee and the Council of the People’s Commissars of the USSR on Approval of the Regulation on the Protection of the State Border of the USSR of 15 June 1927;*
- Annex RM 83** Letter of Mr. Leonid Kuchma, president of Ukraine, addressed to Mr. Ion Iliescu, president of Romania, on 29 August 2002;
- Annex RM 84** Brochure entitled *Creation of the deep-water navigational canal Danube – Black Sea in the Ukrainian part of delta of the river Danube*, Ministry of Transport and Communication of Ukraine, 2004;
- Annex RM 85** Brochure entitled *Revival of Danube-Black sea deep-water navigational channel on Ukrainian part of delta*, Ministry of Transport and Communication of Ukraine, April 2005;
- Annex RM 86** Brochure edited in 2004 by the Ukrainian State-owned enterprise Ukrmorcartographia;
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- MAP RM A 31** **THE WESTERN PART OF THE BLACK SEA** (Published by the Maritime Hydrographic Directorate of Romania; Edition: 1993);
- MAP RM A 32** **WESTERN AREA OF THE BLACK SEA FROM KALIAKRA CAPE TO THE DANUBE DELTA** (Published by the Maritime Hydrographic Directorate of Romania; Edition: 1995);
- MAP RM A 33** **BLACK SEA WESTERN AREA FROM SULINA TO ZONGULDAK** (Published by the Maritime Hydrographic Directorate of Romania; Edition: 1997);
- MAP RM A 34** **WESTERN COAST OF THE BLACK SEA FROM KALIAKRA CAPE TO THE KILIA ARM** (Published by the Maritime Hydrographic Directorate of Romania; Edition: 2000);
- MAP RM A 35** **WESTERN AREA OF THE BLACK SEA** (Published by the Maritime Hydrographic Directorate of Romania; Edition: 2003);
- MAP RM A 36** **BLACK SEA ROMANIAN COAST FROM KALIAKRA CAPE TO THE DANUBE DELTA** (Published by the Maritime Hydrographic Directorate of Romania; Edition: 2003);
- MAP RM A 37** **BLACK SEA. DANUBE DELTA. ACCESS TO SULINA MOUTH** (Published by the General Directorate for Navigation and Oceanography, Ministry of Defence of the Russian Federation; Edition 1994)
- MAP RM A 38** **NORTH-WESTERN PART OF THE BLACK SEA FROM TUZLA TO YALTA** (Published by the Hydrographic Service, Ministry of Defence of the Republic of Bulgaria, Edition 1993);
- MAP RM A 39** **BLACK SEA** (Published by the Hydrographic and Oceanographic Service of the French Navy - *Service Hydrographique et Océanographique de la Marine*; Edition 1990);
- MAP RM A 40** **BLACK SEA** (Published by the Hydrographic and Oceanographic Service of the French Navy - *Service Hydrographique et Océanographique de la Marine*; Edition 1990 - *detail of the maritime boundary around Serpents' Island*)
- MAP RM A 41** **BLACK SEA MAP. SOVIET AND ROMANIAN COASTS FROM DANUBE DELTA TO IL'ICEVSK** (Published by

the German Federal Institute for Maritime Navigation and Hydrology -*Bundesamt für Seeschifffahrt und Hydrologie*; Edition: 1991);

MAP RM A 42

BLACK SEA MAP. SOVIET AND ROMANIAN COASTS FROM DANUBE DELTA TO IL'ICEVSK (Published by the German Federal Institute for Maritime Navigation and Hydrology -*Bundesamt für Seeschifffahrt und Hydrologie*; Edition: 1991 - *detail of the maritime boundary around Serpents' Island*)