

INTERNATIONAL COURT OF JUSTICE

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

(ROMANIA v. UKRAINE)

COUNTER-MEMORIAL

SUBMITTED BY UKRAINE

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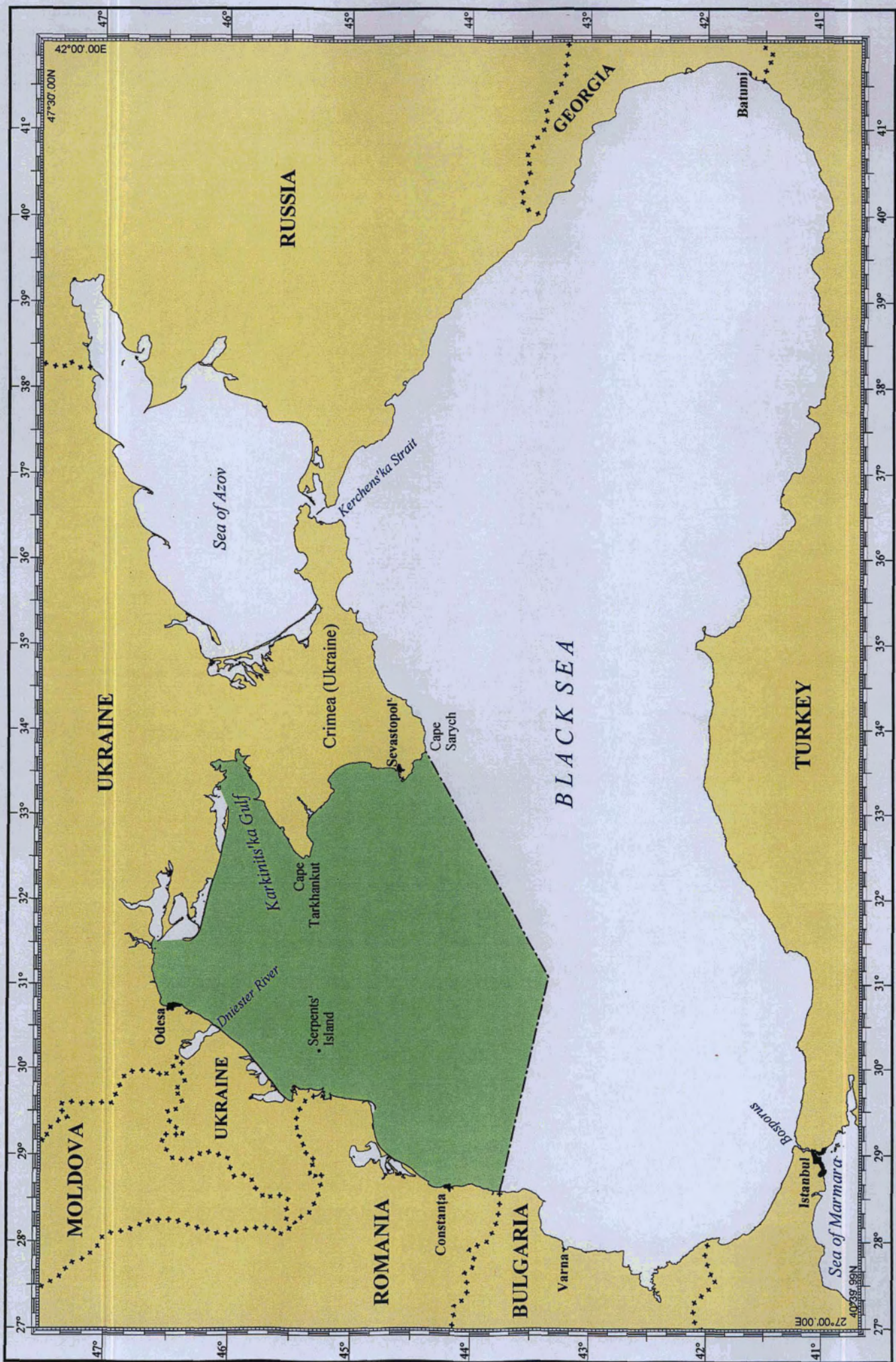
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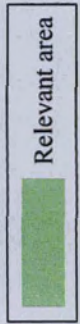
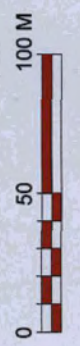
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Black Sea Overview
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CHAPTER 1

THE BACKGROUND AND SCOPE OF THE DISPUTE

Section 1. Introduction

1.1 This Counter-Memorial is filed by Ukraine in accordance with the Order of the Court dated 19 November 2004 fixing 19 May 2006 as the time-limit for the submission of Ukraine's Counter-Memorial.

1.2 The dispute of which the Court has been seized by Romania concerns the delimitation of the continental shelf areas and exclusive economic zones of Ukraine and Romania in the Black Sea. There is, of course, no dispute between the Parties as to the general geographical configuration of the Black Sea. Romania has included as Figure 1 in its Memorial, at page 8, a map giving a "General View of the Black Sea", and for convenience Ukraine includes as Figure 1-1 to this Memorial an equivalent map of the general Black Sea area.

1.3 The dispute between the Parties is a relatively straightforward dispute about the way in which the maritime boundary should be delimited in accordance with the applicable rules of international law.

1.4 It may assist the Court to emphasise at the very outset not only what this case is about, namely the delimitation of the Ukraine-Romania continental shelf and EEZ maritime boundary, but also what it is *not* about. It is, in particular, *not* about -

- (i) any matters of territorial title: sovereignty over the relevant coasts and inland areas, and over relevant islands, is not in dispute between the Parties, and Romania acknowledges that "[t]here are no outstanding territorial claims"¹;

¹ Romania's Memorial (hereafter "RM"), para. 1.10, 2nd sentence.

- (ii) the delimitation of the territorial sea: this follows from the terms in which the Parties agreed to this reference to the Court as set out in paragraph 4(h) of the 1997 Ukraine-Romania Exchange of Letters (the "1997 Exchange of Letters"), which refers only to the continental shelf and EEZ, and is expressly accepted by Romania²;
- (iii) the rights and wrongs of historical events: the present legal and factual circumstances regarding geography and territorial title are not in dispute between the Parties, and are therefore "givens" on the basis of which the Court is required to determine the maritime boundaries in question;
- (iv) the validity or otherwise of past agreements concluded by Romania with the USSR or with Ukraine: Romania has expressly disavowed any intention of seeking to challenge past agreements or other transactions: " ... before this Court Romania does not ask for the reversal of prior transactions, whatever their merits or auspices"³.

1.5 One aspect of the coastal geography which has an impact upon the delimitation is Serpents' Island. The proper Ukrainian name of this island, in accordance with the United Nations Conference on the Standardization of Geographical Names, is Zmiinyi Island. However, for purposes of this case, Ukraine will use its English denomination: Serpents' Island. Three points must be made straight away about Serpents' Island and its significance for this case.

1.6 As is the case in other territorial respects, Serpents' Island raises no question of territorial title. Romania accepts that Serpents' Island is under Ukrainian sovereignty, recognising that it "now belongs to Ukraine"⁴ and that "Romania ... accepted by these treaties that Serpents' Island belongs to Ukraine"⁵. It is moreover incorrect to suggest, as Romania does, that Serpents' Island is an unimportant and insignificant feature and is therefore to be

² RM, para. 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 zone"), and para. 7.19 ("The question of territorial sea delimitation is not before the Court"). The text of the 1997 Exchange of Letters (in the original Romanian and Ukrainian languages and English translation) is attached as Annex 1, Vol. 2.

³ RM, para. 5.19.

⁴ RM, para. 1.2.

⁵ RM, para. 4.30; see also paras. 4.34, 5.16 and 5.18.

disregarded (see further Chapter 7). Serpents' Island has for a long time been much more than an uninteresting and inconsequential island outcrop in the Black Sea. Finally, while Serpents' Island has an impact upon the construction of a correctly delimited maritime boundary, that impact is not the central issue in this case. In arriving at an equitable solution for the delimitation of the Ukraine-Romania continental shelf and EEZ, the configuration and other circumstances of a much larger area of the Black Sea than that in the immediate vicinity of Serpents' Island are relevant.

1.7 The precise extent of that relevant "larger area of the Black Sea" is a matter on which the Parties have different views. Romania has set out its views in paragraphs 9.26-9.29 of its Memorial, and has illustrated this approach of the relevant delimitation area in Figure 12 at page 140 of its Memorial. Ukraine's differing views are set out in detail later in this Counter-Memorial (see Chapter 3 below), but at the outset Ukraine notes that it disagrees with Romania's delineation of the relevant area in two major respects:

- (i) Romania seeks to exclude from the relevant area a large area in the northern part of the Black Sea, to the north of a line joining Cape Tarkhankut and a point referred to by Romania as Point S (at the mouth of the Dniester River), whereas that area - and the coast abutting to it - is very relevant to the achievement of an equitable solution and has to be included in the relevant area; and
- (ii) Romania seeks to include in the relevant area an area at the south east corner of the area delineated on Figure 12, whereas that area is in no way relevant to Romania's maritime entitlements: it lies beyond any maritime area claimed by Romania, and it relates to the delimitation already effected between the USSR and Turkey in 1978 and which is now effective as between Ukraine and Turkey. As will be explained (see Chapter 3), the correct closing line of the relevant area in this southeastern sector is a line drawn from Cape Sarych to the Ukraine-Romania-Turkey tri-point.

Section 2. The Structure of Ukraine's Counter-Memorial

1.8 Ukraine's Counter-Memorial comprises 11 chapters including this introductory Chapter.

1.9 Chapter 2 discusses the basis of the Court's jurisdiction in this case based on the 1997 Treaty on Relations of Good Neighbourliness and Cooperation (the "1997 Treaty", also called the "Additional Agreement" in Romania's Memorial)⁶ and the 1997 Exchange of Letters and the 2003 Treaty on the Ukrainian-Romanian State Border Regime (the "2003 Treaty")⁷.

1.10 In Chapter 3, Ukraine will set out the relevant geographic facts. The coastal geography of the parties abutting the area to be delimited is obviously of prime importance in any case of maritime delimitation. The need for a comprehensive discussion of the geographic facts is necessary not simply for this reason, but also because of the manner in which Romania has attempted to refashion geography in its Memorial by unjustifiably eliminating a large segment of Ukraine's relevant coast. After reviewing the relevant geographic details, Chapter 3 will also address the identification of the "relevant area" in the case.

1.11 Chapter 4 will then explain why the delimitation methodology advanced by Romania is erroneous and artificial and does not even begin to reflect the applicable rules of law or geographic facts, and thus does not produce an equitable result. As part of this discussion, Ukraine will also address Romania's irrelevant argument that the fact that the Black Sea is an "enclosed sea" has a bearing on the method of delimitation in this case and Romania's arguments based on so-called State practice.

1.12 Chapter 5 deals with the diplomatic history of the dispute, including the negotiations conducted between the Soviet Union and Romania prior to Ukraine's independence. As part of its discussion of these events, Romania has introduced a selective and self-serving version

⁶ Annex 2, Vol. 2.

⁷ Annex 3, Vol. 2.

of certain historical elements which, while not relevant to the present case, does need to be corrected as a matter of principle and for the sake of the record.

1.13 Romania also argues that a maritime boundary around Serpents' Island was agreed with the Soviet Union and is now binding on Ukraine. Chapter 5 will demonstrate that this is a fictitious argument and that the diplomatic negotiations have always proceeded on the basis that delimitation of the continental shelf (and the exclusive economic zone) south and west of Serpents' Island remains to be agreed.

1.14 Chapter 6 then turns to the applicable law. In this connection, Ukraine will first address the 1997 Treaty and the 1997 Exchange of Letters, which form the jurisdictional basis for the case, and the five so-called "principles" set out in paragraph 4(h) of the 1997 Exchange of Letters, which Romania has fundamentally misinterpreted. Ukraine will also demonstrate that there is no previous agreement on delimitation within the meaning of Articles 74(4) and 83(4) of the 1982 Convention. Chapter 6 then takes up the question of the principles and rules of international law governing maritime delimitation relevant to the case as those principles have been developed in the jurisprudence of the Court and arbitral tribunals.

1.15 Chapter 7 will then discuss the construction of the provisional equidistance line as the first step in the delimitation process based on the "equitable principles/relevant circumstances" rule. Contrary to Romania's submissions, it is apparent that the provisional equidistance line must be a line which is equidistant from the nearest points on the baselines of each of the Parties from which the breadth of their territorial seas is measured, including the relevant mainland coasts of the Parties and Serpents' Island, which is unquestionably a full-fledged island, not a "rock", within the meaning of Article 121 of the Law of the Sea Convention.

1.16 It is clear that the determination of an equitable delimitation of the continental shelves and exclusive economic zones of the Parties is a function of the relevant circumstances characterizing the area subject to delimitation. Chapter 8 discusses the relevant circumstances in this case and the weight to be attributed to such circumstances. The key relevant circumstances that Chapter 8 will address are as follows: (i) the geographic facts, including the relevant coasts of the Parties abutting the area to be delimited, and the presence, location,

history and importance of Serpents' Island, (ii) State activities that Ukraine has carried out within the relevant area that must be taken into account in achieving an equitable result, and (iii) the presence of third States to the south of the area subject to delimitation.

1.17 In Chapter 9, Ukraine will set out its own delimitation line which is based on a balancing up of the facts and circumstances of the case in the light of the applicable law, and on the corresponding need to adjust the provisional equidistance line in order to achieve an equitable result.

1.18 In Chapter 10, Ukraine will then test the equitableness of its own position in order to demonstrate why that position achieves an equitable solution, and will show why the Romanian claim fails to satisfy the test of proportionality and disregards other equitable principles that have been previously identified by the Court.

1.19 Chapter 11 of Ukraine's Counter-Memorial ends with a brief summary of the case pursuant to the Court's Practice Direction No. II. Ukraine's Submissions then follow.

1.20 The Counter-Memorial is accompanied by 4 volumes of documentary annexes which are annexed hereto.

CHAPTER 2

THE COURT'S JURISDICTION

2.1 In instituting these proceedings by an Application filed in the Registry of the Court on 16 September 2004, Romania has based the jurisdiction of the Court on paragraph 4(h) of the 1997 Exchange of Letters, taken together with Article 36(1) of the Statute of the Court.

2.2 Suffice it to recall at the outset that Article 36(1) of the Statute provides that the Court has jurisdiction over all cases referred to it by agreement of the parties and over all matters specially provided for in treaties in force.

2.3 The 1997 Exchange of Letters was concluded pursuant to Article 2 of the 1997 Treaty and appended to that Treaty. Article 2, paragraph 2 of the 1997 Treaty provided that:

"The Contracting Parties shall conclude a separate Treaty on the regime of the boundary between the two states and shall settle the problem of the delimitation of their continental shelf and of economic exclusive zones in the Black Sea on the basis of the principles and procedures agreed upon by an exchange of letters between the ministers of foreign affairs, which shall take place simultaneously with the signature of this Treaty. The understandings included in this exchange of letters shall enter into force simultaneously with entry into force of this Treaty"¹.

2.4 According to paragraph 4 of the 1997 Exchange of Letters, the two Governments had undertaken to negotiate a delimitation agreement on the basis of "principles and procedures" enumerated therein. Thus, various principles were set out in sub-paragraphs (a) to (e), and sub-paragraph (f) established a moratorium on the exploitation of mineral resources, while sub-paragraph (g) stipulated that the negotiations on the delimitation were to begin as soon as possible but no later than three months after the entry into force of the 1997 Treaty. Sub-paragraph (h) then provided that, should the negotiations not result in the conclusion of an agreement within two years, the problem of delimitation would be brought before the International Court of Justice at the request of either of the Parties, provided that the separate Treaty on the regime of the border between the two States had entered into force.

¹ For a copy of the 1997 Treaty, see Annex 2, Vol. 2.

2.5 The jurisdiction of the Court under this provision was thus made dependent upon three conditions - not only two "preconditions" as stated incorrectly in the Romanian Memorial². Those conditions were as follows:

- 1) The entry into force of the 1997 Exchange of Letters, which itself depended upon the entry into force of the 1997 Treaty;
- 2) The absence of conclusion of a delimitation agreement after two years of negotiations; and
- 3) The entry into force of the 2003 Treaty on the Ukrainian-Romanian State Border Regime.

2.6 The 1997 Treaty and the associated 1997 Exchange of Letters entered into force on 22 October 1997. The delimitation negotiations, which began in January 1998 and were allowed substantially more time than the anticipated two-year period, did not result in the conclusion of any agreement. The Treaty on the Ukrainian-Romanian State Border Regime, signed on 17 June 2003, entered into force on 27 May 2004. Therefore, the three conditions for the Court's jurisdiction were satisfied at the time of the filing of the Application, and the Court obviously has jurisdiction to decide this case.

2.7 However, the Court's jurisdiction in this case is limited to what Ukraine and Romania have agreed to refer to the Court.

2.8 The two States have defined the subject-matter and scope of the case to be decided by the Court as concerning "the problem of the delimitation of their continental shelf and of exclusive economic zones in the Black Sea" (as stated in Article 2, paragraph 2 of the 1997 Treaty), or "the problem of delimitation of the continental shelf and the exclusive economic zones" (as indicated in paragraph 4 (h) of the 1997 Exchange of Letters).

2.9 Two main consequences arise from the limited character of the jurisdiction conferred upon the Court in the present case.

² RM, para. 1.6.

2.10 First, the Court has not been granted jurisdiction to decide any questions outside the problem of maritime delimitation. In particular, the Court has no jurisdiction to decide any question of title to or status of a territory, notably an insular territory³. The Parties agreed neither to ask the Court to decide upon historical events and past actions undertaken by Romania or the Soviet Union⁴, nor to adjudicate internal matters such as freedom of information⁵. Consequently, Ukraine will not deal at any length with such questions in this Counter-Memorial, since the Romanian allegations concerning those questions and their possible rebuttal by Ukraine in no way fall within the jurisdiction of the Court in the present case, and have been advanced by Romania for purely prejudicial purposes.

2.11 The second consequence arising from the limited character of the jurisdiction conferred upon the Court is that the Court has been given jurisdiction only to delimit the continental shelf and the exclusive economic zones between the two States. It has not been given jurisdiction to delimit other maritime zones pertaining to either of the Parties, and in particular their respective territorial seas.

2.12 From this point of view, the situation of the Court in this case, *mutatis mutandis*, is comparable to that of the 1977 Anglo-French Court of Arbitration entrusted with the delimitation of the continental shelf in the English Channel and the Atlantic Western Approaches. The Court of Arbitration did not find itself empowered, under the terms of the Arbitration Agreement, to draw a delimitation line between the Channel Islands archipelago and the French coasts of Normandy and Brittany, because the line in that area would have been a continental shelf boundary for one party and a territorial sea boundary for the other. As a matter of fact, from 1971 onwards France claimed a 12-mile territorial sea, while at that time the breadth of the territorial waters around Jersey and Guernsey was still 3 miles with a fishing zone of up to twelve miles⁶. Thus, the Court of Arbitration had to underline that its mandate was strictly confined to the drawing of a continental shelf boundary. It stated:

³ In this respect, many aspects of the Romanian Memorial deal with questions not properly related to maritime delimitation. See for numerous examples: RM, paras. 10.12-10.131.

⁴ See, in particular, RM, paras. 5.1-5.19.

⁵ See RM, para. 10.10.

⁶ *Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, Decision of 30 June 1977, U.N.R.I.A.A., Vol. XVIII, pp. 21-24, paras. 13-20.

"The task entrusted to the Court by Article 2(1) of the Arbitration Agreement is to decide 'what is the course of the boundary (or boundaries) between the portions of the continental shelf appertaining to the United Kingdom and the Channel Islands and to the French Republic' within the arbitration area. The preamble to the Agreement likewise speaks of differences 'between the two Governments concerning the delimitation of the portion of the continental shelf ... appertaining to each of them which could not be settled by negotiation'. It is, therefore, clear that the competence conferred on the Court by Article 2(1) of the Agreement relates specifically to the delimitation in the arbitration area of the boundary of the continental shelf. ... It follows, in the opinion of the Court, that the Arbitration Agreement does not confer upon it any competence to settle differences between the Parties regarding the boundary of their respective zones of territorial sea or of their respective fishery zones..."⁷.

2.13 Accordingly, in this case, the Court's delimitation has to begin at the outer limit of the territorial waters of the two States, because of the legal definition of the two categories of zones involved. As a matter of fact, "[t]he continental shelf of a coastal State comprises the sea-bed and subsoil of submarine areas that extend *beyond its territorial sea*"⁸, while the exclusive economic zone (EEZ) is defined as "an area *beyond and adjacent to the territorial sea*"⁹.

2.14 Besides, in a *note verbale* from the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of Romania dated 18 October 2002, it was made perfectly clear that, when the 1997 Exchange of Letters established a link between the potential submission to the ICJ of the issue of maritime delimitation, on the one hand, and the 1997 Treaty on the other hand, it was because "from the technical point of view, this document [the 1997 Treaty] should legally fix the last joint point of Ukrainian-Romanian State border in the territorial sea of the Black Sea, which shall become the initial point of the delimitation of the continental shelf and the exclusive economic zones"¹⁰.

2.15 The same approach is apparently adopted by Romania in its Memorial, when it recognizes that "the point where the outer limits of the territorial seas appertaining to Romania and Ukraine intersect ... constitutes the starting point of the delimitation line"¹¹ in the present case.

⁷ *Ibid.*, p. 21, para. 13.

⁸ According to the first sentence of Article 76 of the 1982 United Nations Convention on the Law of the Sea (emphasis added).

⁹ Article 55 of the United Nations Convention on the Law of the Sea (emphasis added).

¹⁰ *Note verbale* n° 72/22-431-2399, Annex 4, Vol. 2.

¹¹ RM, para. 9.3.

2.16 However, Romania then wrongly considers that there is an "initial segment of the boundary separating the Romanian exclusive economic zone and continental shelf from the Ukrainian territorial waters around Serpents' Island" which was allegedly established by previous agreements, and which the Court is asked to "confirm"¹². As a matter of fact, this is simply incorrect¹³. At this stage, and for the purpose of the present Chapter, suffice it to note that such a position is certainly not in accordance with what Ukraine and Romania have agreed to refer to the Court, and is therefore beyond the Courts' jurisdiction¹⁴.

2.17 The jurisdiction of the Court being restricted to the delimitation of the areas of continental shelf and the exclusive economic zones of the Parties, the Court's task cannot include the drawing of a line separating other maritime zones, either in full or in part. The line to be drawn by the Court shall be a line dividing exclusively areas of continental shelf and EEZ.

2.18 The Court is thus excluded from drawing a boundary line in any maritime area where the continental shelf and exclusive economic zone of one of the Parties would be adjacent to the territorial sea of the other Party, on the hypothesis that such an area could really exist in the region concerned by the present delimitation – *quod non*. The reason for that is that such a line would divide the territorial sea of one State from the continental shelf and exclusive economic zone of the other State, and consequently it would not be the exclusively continental shelf/EEZ delimitation which the Court is asked to draw in the present case.

2.19 That is why, for example, as already mentioned¹⁵, the Court has no jurisdiction for the drawing of a delimitation line as claimed by Romania between the so-called points F and X along a 12-nautical mile segment of arc around Serpents' Island, since that portion of line would delimit Ukraine's territorial sea and Romania's alleged areas of continental shelf and EEZ. Incidentally, that situation is reflected in Figure 30 of the Romanian Memorial in which different colours are used to differentiate the areas of territorial sea from the other maritime zones¹⁶. Nevertheless, Romania contradictorily asserts, on the preceding page of the

¹² RM, para. 11.62.

¹³ See below Chapter 5.

¹⁴ See also para. 2.19 below.

¹⁵ See para. 2.16 above.

¹⁶ RM, p. 224.

Memorial, that "the maritime *boundary between the continental shelf and the exclusive economic zones of Romania and Ukraine* runs in Sector 1 from Point F ... up to Point X"¹⁷. That Romanian claim is also in full contradiction with what is said elsewhere in the Memorial concerning "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"¹⁸.

2.20 Those contradictory statements in the Memorial are in themselves an indication of Romania's indecision and uncertainty as to the jurisdiction of the Court to draw a dividing line in that particular area.

2.21 Therefore, in this case, the Court is only asked to draw a single maritime boundary delimitating the areas of continental shelf and the exclusive economic zones pertaining respectively to Ukraine and Romania in the Black Sea.

¹⁷ RM, para. 11.74 (emphasis added).

¹⁸ RM, para. 11.62 (emphasis added).

CHAPTER 3

THE GEOGRAPHY OF THE RELEVANT AREA

Section 1. The Geography of the Black Sea

3.1 The areas of continental shelf and exclusive economic zone in dispute in this case are located in the northwestern part of the Black Sea.

3.2 The Black Sea is a sea of 420,300 square kilometres¹ (See Figure 1-1). It is connected to the Mediterranean Sea by the Bosphorus and to the Sea of Azov by the Kerchens'ka Strait. Whilst Romania purports to find significance in the fact that the Black Sea is an "enclosed sea" for purposes of the delimitation, this is irrelevant, as will be discussed in Chapter 4 below. Nonetheless, as in any delimitation case, the presence of third States in the vicinity of the area subject to delimitation between Ukraine and Romania may be a relevant factor in determining the extent or prolongation of the maritime boundary, but it is not a relevant factor that has a bearing on the method or methods of delimitation that produce an equitable result as between Ukraine and Romania.

3.3 Six countries border the Black Sea: other than Ukraine and Romania, these are Turkey, Bulgaria, Russia and Georgia. All the Black Sea littoral States have claimed a 12-nautical mile territorial sea and 200 nautical mile EEZ. No point on the coast of any riparian State is more than 400 nautical miles from the coast of another riparian State.

3.4 The southern coast of the Black Sea is relatively uncomplicated and comprises the northern littoral of Turkey. This coastline runs in an east-west direction, stretching in the west from the Turkish-Bulgarian border, located to the north-west of the Bosphorus, to the Turkish-Georgian border in the east.

3.5 The western coast of the Black Sea follows a general southwest-northeast direction from the Turkish-Bulgarian border up until a point near Odesa, an important Ukrainian city

¹ *Sailing Directions of the Black Sea and Sea of Azov for Waters of Ukraine*, No. 101, Department of Transport and Communications of Ukraine, Kyiv, 2005, p. 33, Annex 5, Vol. 2.

with over one million inhabitants. The western coast of the Black Sea includes the entirety of the coastlines of Bulgaria and Romania, and part of the Ukrainian Black Sea coast.

3.6 The Ukrainian Black Sea coast then turns towards the east, and continues until the Karkinit'ska Gulf. This part of the Ukrainian coast faces in a general southerly direction before reaching the Crimean Peninsula.

3.7 The Crimean Peninsula, which is Ukrainian territory, is a prominent geographical feature in the northern part of the Black Sea. It separates, to the west, that part of the Ukrainian coast which is relevant to the delimitation with Romania from areas lying to the east, bordering the Sea of Azov, which are relevant in the context of an eventual maritime delimitation with Russia.

3.8 The eastern coast of the Black Sea follows a northwest-southeast direction and is divided between Russia and Georgia before meeting the eastern terminus of the Turkish coastline, which borders Georgia just south of the Georgian city of Batumi.

Section 2. The Relevant Coasts of the Parties

3.9 It follows from the jurisprudence of the Court and of international arbitral tribunals that the coasts to be regarded as relevant for delimitation purposes are those which generate a legal entitlement to continental shelf and exclusive economic zone rights which overlap and intersect with each other. Frequently, the relevant coasts are also defined as the coastal fronts or façades of the parties abutting the relevant maritime area.

3.10 In other words, the initial step in the examination of the coastal geography is to identify the coasts of the Parties which generate continental shelf and exclusive economic rights which project into the area subject to delimitation. It is these coasts which are the "relevant coasts" for purposes of effecting an equitable delimitation. As the Court stated in the *Tunisia-Libya* case:

"It should first be recalled that exclusive rights over submarine areas belong to the coastal State. The geographic correlation between coast and submerged areas off the coast is the basis of the coastal State's legal title. As the Court explained in the *North*

Sea Continental Shelf cases the continental shelf is a legal concept in which 'the principle is applied that the land dominates the sea'².

The Court then added:

"As has been explained in connection with the concept of natural prolongation, the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it. Adjacency of the sea-bed to the territory of the coastal State has been the paramount criterion for determining the legal status of the submerged areas, as distinct from their delimitation, without regard to the various elements which have become significant for the extension of these areas in the process of the legal evolution of the rules of international law"³.

And the Court concluded:

"The coast of each of the Parties, therefore, constitutes the starting line from which one has to set out in order to ascertain how far the maritime areas appertaining to each of them extend in a seaward direction, as well as in relation to neighbouring States situated either in an adjacent or opposite position"⁴.

3.11 In its Memorial, Romania has provided only the briefest description of the coasts of the Parties relevant to the delimitation of their respective continental shelves and exclusive economic zones⁵. Clearly, Romania is sensitive to a proper analysis of the coastal geography, which is not in Romania's favour, and its Memorial reflects this sensitivity.

3.12 Moreover, in what brief description of the relevant coasts that Romania does provide, the Romanian Memorial presents a very selective and self-serving treatment of the respective coasts of the two States. Thus, while Romania considers as relevant the entire Romanian coast from the border with Ukraine in the north to the border with Bulgaria in the south⁶, and even double counts part of that coast, it is intent on eliminating as much as possible of the Ukrainian coast abutting the area where the delimitation falls to take place. Accordingly, Romania jumps immediately to a comparison of its entire Black Sea coast with only a partial section of Ukraine's coast abutting the same part of that sea in order to minimize the

² *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 61, para. 73.

³ *Ibid.*

⁴ *Ibid.*, p. 61, para. 74, cited with approval in *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 40, para. 47.

⁵ See, for example, RM, para. 2.4.

⁶ RM, paras. 9.20 and 9.23.

substantial disparity that exists in reality, and as matter of geographic fact, between the length of the coastal fronts of the Parties bordering the area to be delimited⁷.

3.13 By considering as irrelevant large stretches of Ukraine's coast which are situated north of the mouth of the Dniester River on the western side of the Black Sea (labelled "Point S" by Romania on its Figure 11 at page 137 of its Memorial), and virtually all of the Ukrainian south-facing coast between that river and Cape Tarkhankut⁸, Romania not only gives a false picture of the geography of the relevant area, but also completely distorts the notion of the relevant coasts of the Parties which generate maritime entitlements in the area to be delimited. In short, Romania refashions geography.

3.14 In order to correct this arbitrary and unsupportable treatment of the relevant coasts, Ukraine hereafter will provide a complete description of the relevant coastal geography and geographical features which have a key bearing on the determination of an equitable delimitation line between the Parties.

A. Ukraine's Coast

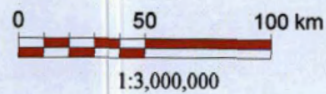
(i) The Continental Coasts of Ukraine

3.15 The Ukrainian Black Sea coast is extensive and comprises the entire northwestern coastline of the Black Sea. It stretches northeastward from the mouth of the Danube river, where the border with Romania is located, along the south-facing littoral east of the city of Odesa, until it turns to the south, encompassing the Crimean Peninsula, terminating at Ukraine's border with Russia in the Sea of Azov.

3.16 For purposes of delimitation with Romania, the relevant coast of Ukraine is comprised of three distinct sectors each of which generates an entitlement to continental shelf and exclusive economic zone rights in the area subject to delimitation. These can be seen on Figure 3-1.

⁷ *Ibid.*, paras. 9.24-9.25.

⁸ *Ibid.*, para. 9.21.



Relevant Ukrainian Coast

Figure 3-1

3.17 As Figure 3-1 shows, the first sector extends from the State border with Romania until a point located just north of the city of Odesa. South of Odesa is the city of Illichivs'k which deserves particular mention since it is the largest industrial port in the Black Sea. This stretch of coast follows a northeasterly trend and assumes the same general direction that characterizes the Romanian coast. The length of this stretch of coast is 253 kilometres when taking into account the actual coastline. If, instead, one adopts a coastal front measured in accordance with the general direction of the coast, this part of Ukraine's relevant coast is approximately 173 kilometres in length.

3.18 North of Odesa, the Ukrainian coast turns to the east and comprises the south-facing littoral along the northwestern part of the Black Sea facing the area subject to delimitation with Romania. This is the second sector of Ukraine's coast relevant for purposes of this case which is shown on Figure 3-1. There is an important town in this sector, the city of Mykolaiv where a large ship-building facility is situated. There are also two significant bays along this portion of Ukraine's coast - the Dniprovs'kyi Firth and the Yahorlyts'ka Gulf - both of which cut into the general direction of the coast. The Ukrainian coast then extends into the Karkinits'ka Gulf to a point located east of the city of Skadovs'k, depicted on Figure 3-1. The total length of this stretch of coast is some 380 kilometres. When measured according to its general direction, Ukraine's south-facing coastal façade measures approximately 237 kilometres.

3.19 The third sector of Ukraine's coast relevant to the delimitation comprises the western coast of the Crimean Peninsula from the easternmost point of the Karkinits'ka Gulf to Cape Sarych lying to the southeast of the city of Sevastopol'. This portion of Ukraine's coast is characterized by the indentation created by the Karkinit'ska Gulf and by the less pronounced Gulf of Kalamits'ka. The total length of this stretch of Ukraine's coast is some 425 kilometres. When measured as two straight lines reflecting the general direction of the coast as a whole, this west-facing sector measures roughly 274 kilometres as also shown in Figure 3-1.

3.20 The total length of the Ukrainian coastal front from the Romanian border to Cape Sarych is thus approximately 1,058 kilometres taking into account the sinuosity of the coast. Measured in accordance with its general direction, Ukraine's coastal façades measure some 684 kilometres in total.

3.21 On 5 June 1993, Ukraine adopted a system of straight baselines, a depiction of which, together with Romania's straight baselines, is provided at Figure 3-2⁹. If one were to measure Ukraine's coast using Ukraine's baselines (both low-water mark and straight baselines, where applicable), the total length of Ukraine's baselines between Romania's border with Ukraine and Cape Sarych would be some 664 kilometres.

3.22 As noted above, Romania has arbitrarily excluded from its determination of the relevant coasts a lengthy part of Ukraine's coastline extending from the southern point of the mouth of the river Dniester (labelled "Point S" by Romania) to Cape Tarkhankut on the Crimean Peninsula¹⁰. In other words, Romania simply disregards an important stretch of Ukraine's relevant coast between the so-called "Point S" and Cape Tarkhankut, a relevant coast which is some 630 kilometres in length (see Figure 3-3).

3.23 Romania characterises this part of the Ukrainian coast as "analogous to an interior Ukrainian bay"¹¹, and argues that this sector of Ukraine's coast is neither adjacent to nor opposite Romania's coast and that the maritime spaces to the north of the line Point S - Cape Tarkhankut therefore "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"¹².

3.24 As illustrated on Figure 3-4, and as a matter of basic principles of the law of the sea, Romania's description of the relevant coasts is demonstrably wrong. The seaward extensions of the Ukrainian coastal fronts, including the part of Ukraine's coast located between "Point S" and Cape Tarkhankut, converge in a southerly direction. In particular, it should be emphasised that this entire south-facing coast generates, subject to delimitations with third States, a 200 nautical mile continental shelf/EEZ entitlement that extends well south of the parallel of latitude of the Romanian/Bulgarian border. Thus, the south-facing, central sector of Ukraine's coastline is clearly relevant for the purposes of delimitation of the Parties' continental shelves and exclusive economic zones. Just as Ukraine's east-facing coast lying north of the Ukraine/Romania land boundary and Ukraine's coast along the Crimean

⁹ For the relevant extract from the Resolution of the Ukrainian cabinet, see Annex 6, Vol. 2.

¹⁰ See RM, Figure 11, at p. 137.

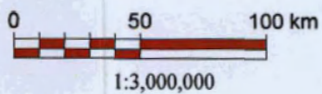
¹¹ RM, para. 9.21.

¹² RM, para. 9.22. Romania's artificial closing line linking "Point S" and Cape Tarkhankut is some 92 miles (172 km) long, far longer than any geographic description of a bay under Article 10 of the 1982 Law of the Sea Convention. This underscores the contrived nature of Romania's closing line.



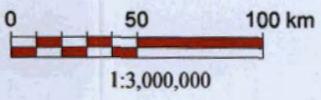
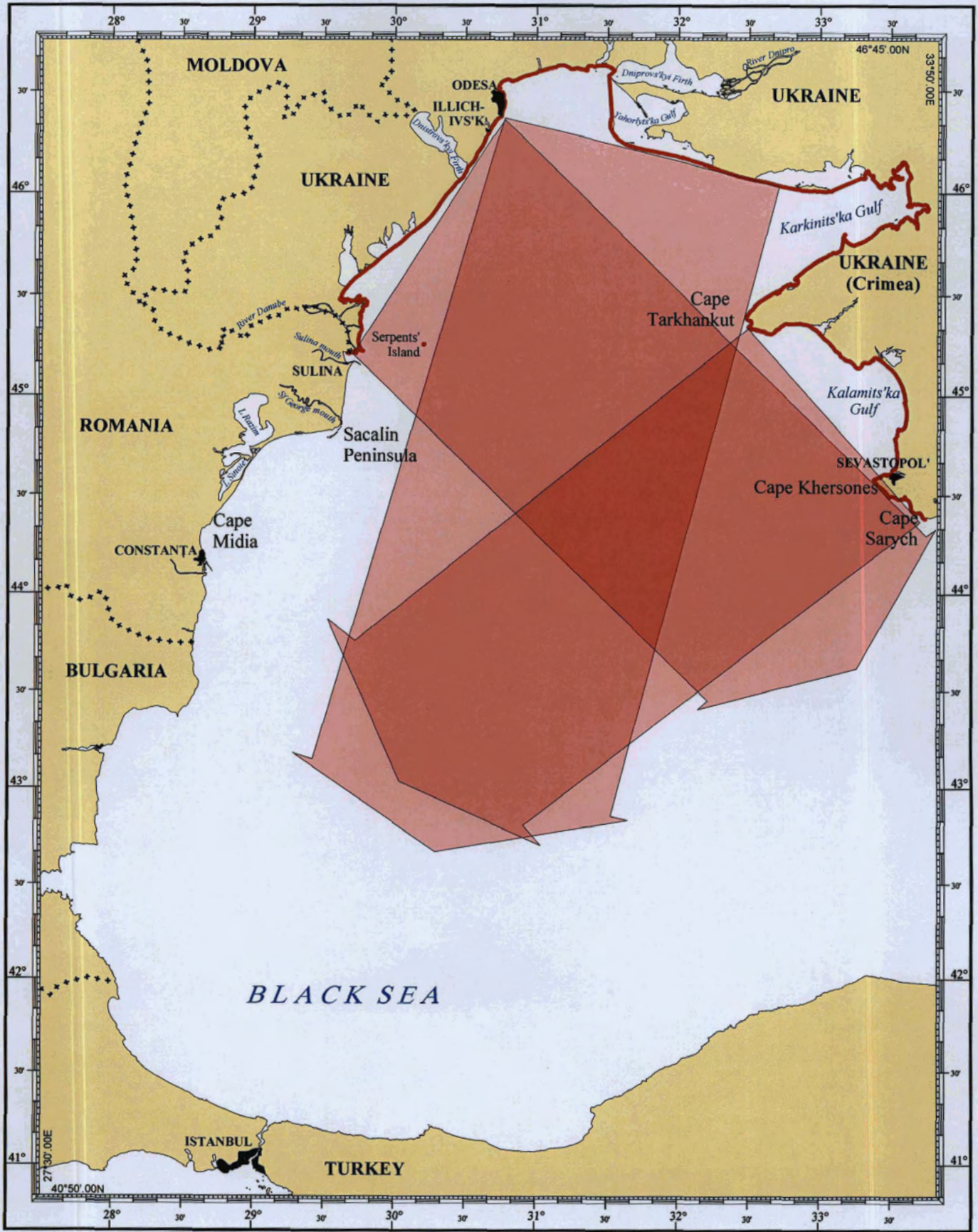
The Parties' Straight Baselines

Figure 3-2



Ukrainian Coast Eliminated by Romania

Figure 3-3



Projection of Ukraine's Coastal Fronts

Figure 3-4

Peninsula, the south-facing stretch of Ukraine's coast also generates continental shelf and EEZ rights throughout the area to be delimited with Romania.

3.25 It therefore follows that to exclude Ukraine's south-facing coast, as Romania attempts to do, is completely unjustified. As noted above, this portion of Ukraine's coast generates maritime entitlements projecting into the area subject to delimitation with Romania under Articles 55 and 76 of the 1982 Convention. As the Court noted in the *Jan Mayen* case:

"The 'area of overlapping claims', defined in paragraph 18 above, between the two lines representing the Parties' claims, is of obvious relevance to any case involving opposed boundary claims. But maritime claims have the particular feature that there is an area of overlapping entitlements, in the sense of overlap between the areas which each State would have been able to claim had it not been for the presence of the other State; this was the basis of the principle of non-encroachment enunciated in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 36, para. 57; p. 53, para. 101(C)(1)). It is clear that in this case a true perspective on the relationship of the opposing claims and the opposing entitlements is to be gained by considering both the area of overlapping claims and the area of overlapping potential entitlement"¹³.

3.26 In this connection, reference may also be made to the Court's treatment of the relevant coasts of the parties in the *Tunisia-Libya* case and in the *Gulf of Maine* case. In *Tunisia-Libya*, the Court had no hesitation in treating the entire Tunisian coast along the Gulf of Gabes as part of the relevant coasts despite the fact - to use Romania's terminology applied to the south-facing coast of Ukraine - that the Gulf of Gabes was "analogous to an interior [Tunisian] bay"¹⁴. Similarly, in *Gulf of Maine*, the Chamber of the Court included Canada's coast along the Bay of Fundy as part of the relevant coasts and took that length of coast into account in establishing an equitable boundary based, in part, on the marked difference in the lengths of the coasts of the parties¹⁵. It therefore follows that the Court's jurisprudence fully supports treating the entire Ukrainian coast abutting the northwest portion of the Black Sea as relevant to the delimitation with Romania in this case.

3.27 The Ukrainian coast in the northwestern part of the Black Sea is also of considerable economic importance. Apart from the Danube Delta, this sector of the Ukrainian coast

¹³ *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 64, para. 59.

¹⁴ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, pp. 61-62, para. 75 and p. 91, para. 131.

¹⁵ *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 336, para. 221.

incorporates the mouths of the rivers Dniester and Dnipro and a number of important coastal cities and ports. These include the major regional capital of Odesa with a population of over one million inhabitants, and the city of Sevastopol' with a population of some 378,000 inhabitants, along with other important ports such as Illichivs'k, Bilhorod Dnistrovs'kyi, Ochakiv, Mykolaiiv, Kherson, Skadovs'k and Yevpatoriia on the Crimean Peninsula.

3.28 These cities are depicted on Figure 3-5 along with the populations of the four Ukrainian administrative regions which border this part of the Black Sea. The total population of these coastal administrative regions is in the order of 6,600,000 representing some 15% of Ukraine's total population. In other words, the social and economic importance of this part of Ukraine is commensurate with the predominance of Ukraine in the area as reflected in the coastal geography comprising Ukraine's extensive coastline abutting the area of delimitation.

(ii) The Geographical Characteristics of Serpents' Island

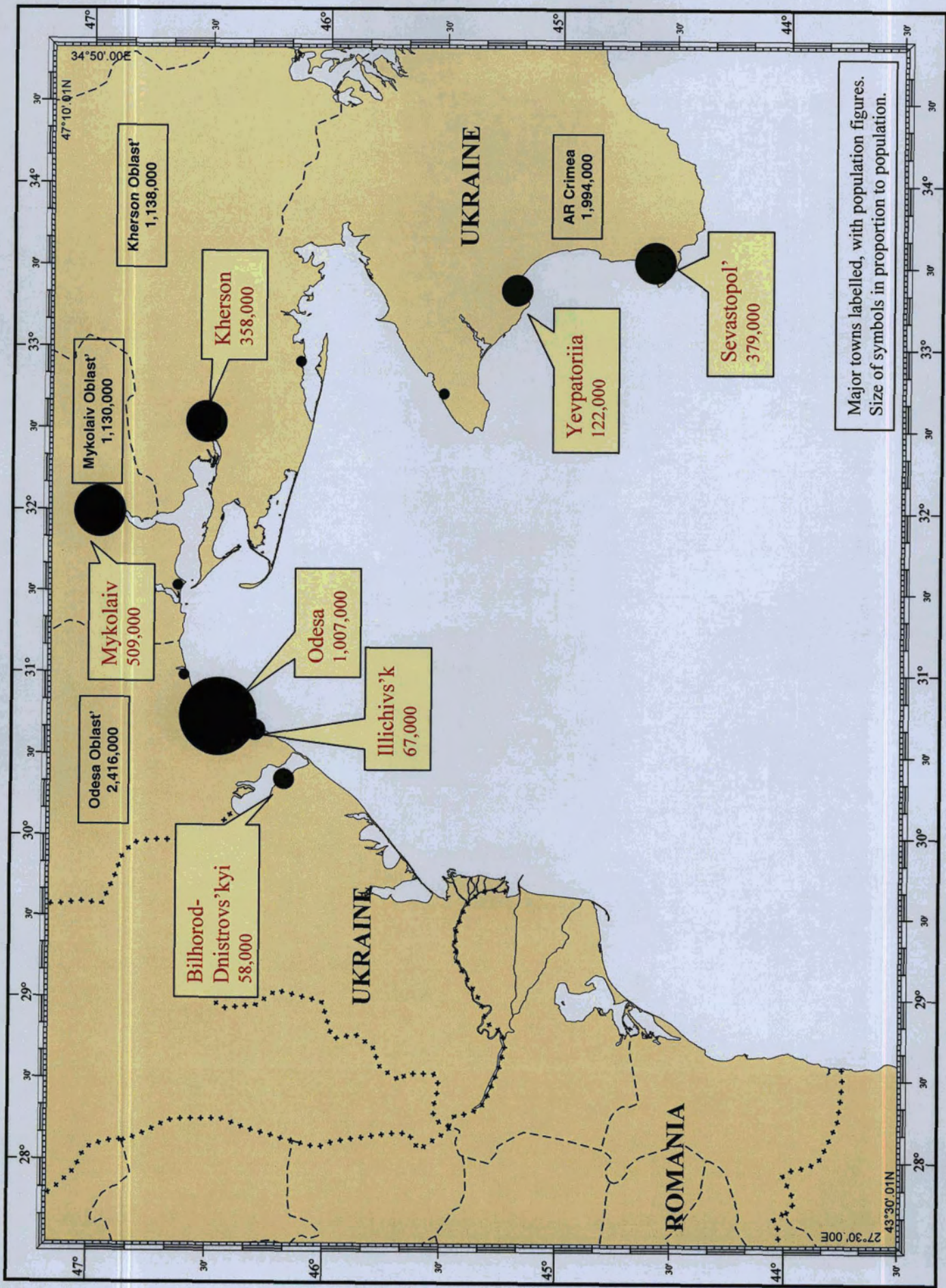
3.29 Apart from the mainland coasts of Ukraine, the other salient geographical feature in the relevant area appertaining to Ukraine is Serpents' Island. As noted in Chapter 1, there is no dispute between the Parties that Serpents' Island forms part of the national territory of Ukraine and is under Ukrainian sovereignty.

3.30 This sub-section deals with a description of Serpents' Island's physical and geographical characteristics. The island's overall importance and its legal status under Article 121 of the Law of the Sea Convention will be discussed in Chapter 7, Section 3.

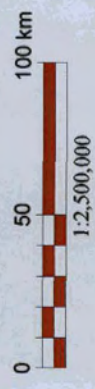
3.31 Serpents' Island is situated in the northwestern portion of the Black Sea, some 19 nautical miles due east and opposite Ukraine's mainland coast in the vicinity of the boundary of Ukraine with Romania¹⁶.

3.32 With respect to Serpents' Island, Romania's Memorial exhibits a fundamentally contradictory approach. On the one hand, it deals at great length with Serpents' Island's history, its repute throughout the centuries and the geopolitical role it has played in the Black Sea region. Chapter 10 of Romania's Memorial devotes no less than 50 pages to the island,

¹⁶ *Sailing Directions of the Black Sea and Sea of Azov for Waters of Ukraine*, No. 101, Department of Transport and Communications of Ukraine, Kyiv, 2005, p. 35, Annex 5, Vol. 2.



Population Centres on Ukraine's Black Sea Coast
Figure 3-5



and thirty of the Annexes attached to Romania's Memorial are articles or book extracts concerning Serpents' Island. Significantly, every single one of the maps contained in Romania's Map Atlas identifies and depicts this island. Clearly, Serpents' Island is an important feature and has been treated as such throughout history.

3.33 Romania's Memorial itself contains several passages attesting to Serpents' Island's importance. To cite a few notable examples, Romania states the following:

- "*Chapter 3* outlines the important historical background, noting the strategic significance accorded to Serpents' Island since at least the 19th century ..."¹⁷.
- "Due to its importance for security in this area, during the First World War, Serpent's Island was the scene of several war episodes, such as the bombing of the lighthouse by German forces, its occupation by Russian soldiers and the sinking of a Russian torpedo-carrier by German mines"¹⁸.
- "The attention given by the European powers to the mouths of the Danube (the Danube delta) and to Serpents' Island ... is a proof of the geo-strategic importance of these regions at that time"¹⁹.
- "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"²⁰.
- On 23 May 1948, a procès verbal was "actually signed on Serpents' Island" by the Deputy Foreign Minister of Romania and the First Secretary of the Soviet Embassy²¹.

3.34 As will be seen, Romania's recognition of the historical, cultural, religious, strategic and military significance of Serpents' Island is inevitable given its location off the Danube Delta and the fact that it enjoys a well-documented history and notoriety.

3.35 Despite these facts, Romania's Memorial is at pains to argue that Serpents' Island is no more than a "rock"; in other words, that it is entitled simply to a 12 nautical mile belt of territorial sea, but no continental shelf or exclusive economic zone of its own.

¹⁷ RM, para. 1.17.

¹⁸ *Ibid.*, para. 3.15.

¹⁹ *Ibid.*, para. 3.19.

²⁰ *Ibid.*, para. 3.25.

²¹ *Ibid.*, para. 3. 29.

3.36 As will be shown in Chapter 7, Romania's attempt to reduce Serpents' Island's status to that of a barren rock, so negligible that it should not have any role to play in the delimitation of the continental shelf and exclusive economic zones between the Parties, cannot be reconciled with the historic and geographical facts or with Romania's own evidence which confirms the importance of the island. Serpents' Island's location, in close vicinity to and opposite the Ukrainian mainland, its well-documented history spanning a period of over one thousand years, its strategic importance and the unique attention it commanded throughout the centuries, clearly demonstrate its significance as an island. In addition, the evidence shows that Serpents' Island can readily sustain human habitation and that it has an ample and well-documented capacity to sustain an economic life of its own.

3.37 From above, Serpents' Island resembles a triangle, one of the angles of which is elongated and creates a cape jutting out into the sea. The topographic map of Serpents' Island reproduced at Figure 3-6 shows the island's physical contours. On both sides of the narrowest part of this cape there are broad and convenient bays, which are deep enough to enable vessels to moor. The Romanian author, R. I. Calinescu, in his 1931 monograph, recorded that "Serpents' Island can be landed in 3 places", adding in a footnote that "all ships, small or big, will anchor at least 50m away from the island"²². The photographs reproduced as Photos A, B and C in the following pages illustrate the island's general appearance from the air.

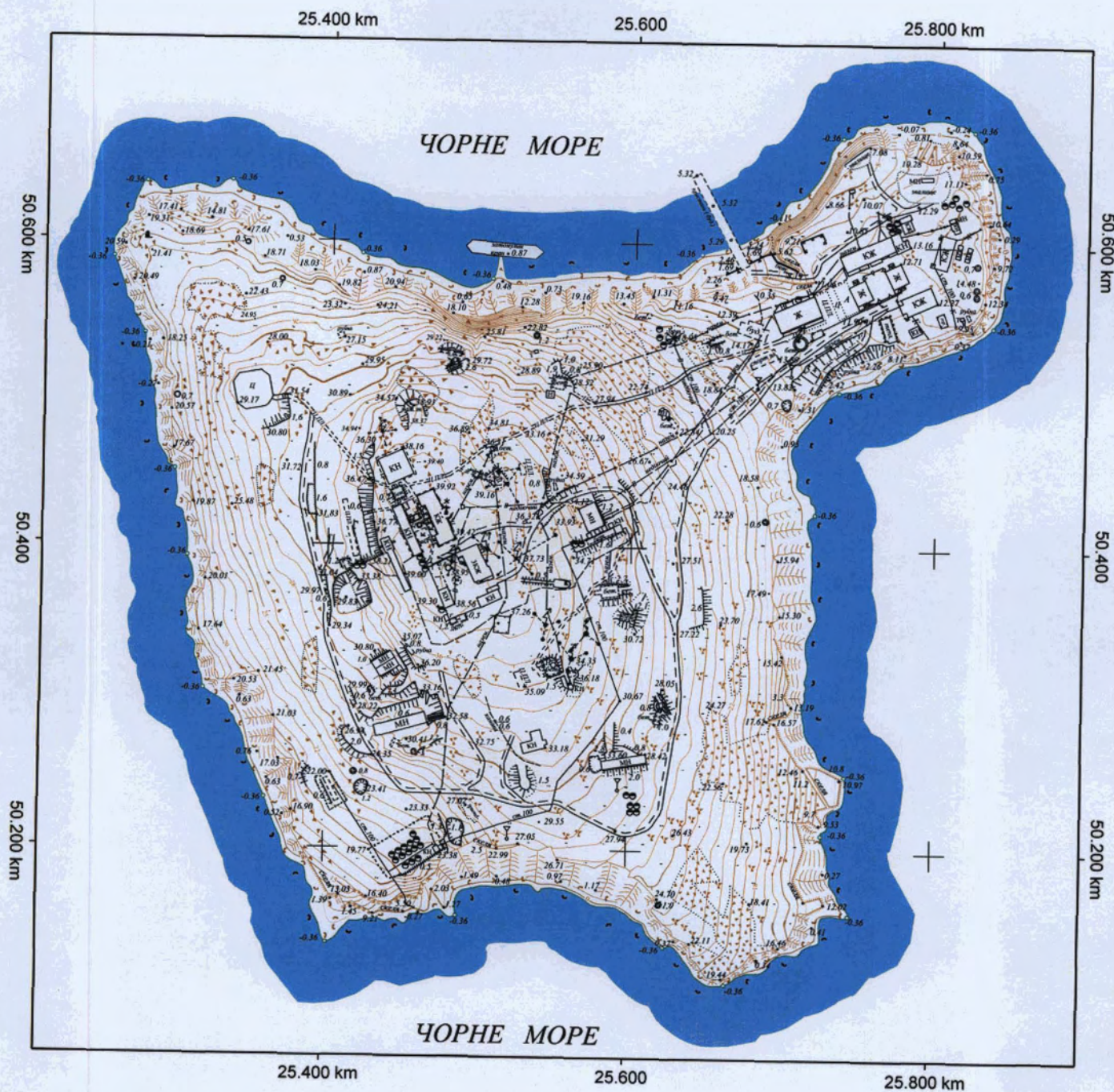
3.38 Serpents' Island is characterised by a hill in the middle of the island, the slopes of which lead down to the island's shores from which the shores of the island slope down towards the sea. Viewed in silhouette the island therefore has the general shape of a shallow inverted cup. Photo A illustrates its general appearance when seen at sea level.

3.39 Serpents' Island's coordinates are 45°15'N, 30°12'E²³. The island is 615 metres long, and 560 metres wide; its mean height above sea level is 37 metres, with a highest point of 41.3 metres above sea level. Its total area is about 20 hectares²⁴.

²² R.I. Calinescu, *Insula Serpilor. Schita Monografica*, 1931, p. 2 (Annex RM 6).

²³ *Sailing Directions of the Black Sea and Sea of Azov for Waters of Ukraine*, No. 101, Kiev, 2005, p. 35, Annex 5, Vol. 2.

²⁴ See Resolution No. 197-XXII of Odesa Regional Council dated 13 February 1998; Resolution No. 844/371C of the Executive Committee of the Odesa Oblast Soviet of Deputies of Working People dated 29 November 1965; Resolution No. 149-XXIII of Vilkovo Town Council dated 22 November 2001; Resolution No. 167-XXIII-X of Kilia District Council dated 27 November 2001; Resolution



Extract of 1:2,000 map of:
 Odesa Oblast: (1-G) Serpents' Island.
 Одеська область: (1-Г) о. Зміїний

Produced by Ministry of Ecology and
 Natural Resources, Ukraine, 2002.

Topographic Map of Serpents' Island

Figure 3-6



Aerial View of Serpents' Island from the Northeast



Aerial View of Serpents' Island from the West

Photo B



Surface View of Serpents' Island from the North

3.40 Contrary to Romania's assertion that Serpents' Island possesses no natural water and is entirely dependent on external supplies²⁵, Serpents' Island has a small but sufficient supply of fresh water. The existence of wells and cisterns was recorded by Romanian writers in 1925 and 1931. Writing in 1925, the Romanian author Popa-Lisseanu mentioned two fresh water wells located on Serpents' Island and recalled that the Roman historian Ammianus Marcellinus had stated about the island: "Ibi et aquae sunt" (*i.e.*, where there is also water), thus indicating the presence of fresh drinking water, rather than salt water²⁶. The same author also mentions the existence of two water reservoirs, one of which was situated in the vicinity of the temple of Achilles.

3.41 In 1931, the Romanian writer Calinescu²⁷ rejected the view that Serpents' Island had a particularly dry climate, and instead noted a considerable rainfall²⁸. He also recorded the use of rainwater, collected in four reservoirs, for drinking and laundry purposes by the 10 or so people living at that time on the island²⁹.

3.42 In 2003, specialists on an expedition from the Dnipropetrovsk geological survey drilled three boreholes on Serpents' Island to a depth of 40-60 metres. Each of them produced fresh water. The approximate hourly flow is about 2 cubic metres from each borehole. The water is usable after purification, and equipment has been installed for that purpose. The capacity of the equipment coupled with the flow of water from the boreholes allows the residents of the island to obtain a sufficient volume of fresh water for their everyday needs³⁰. As the 1925 and 1931 Romanian studies mentioned above show that, even before the development of these boreholes, sufficient rainwater was available for the people who used the island, and the existence of water storage reservoirs and cisterns on the island for many years is confirmed by a number of ancient maps showing the location of reservoirs³¹.

No. 393-XXIII of Odesa Regional Council dated 27 December 2001; Resolution No. 3002-III of Verkhovna Rada of Ukraine dated 17 January 2002, Annex 7, Vol. 2.

²⁵ RM, para. 2.10.

²⁶ G. Popa Lisseanu, *Romanica. Studii istorice, filologice și archeologice*, Bucharest 1925, pp. 119-120, Annex 8, Vol. 2.

²⁷ R.I. Calinescu, *op. cit.*, p. 13 (Annex RM 6).

²⁸ *Ibid.*

²⁹ *Ibid.*, p. 49.

³⁰ "Information about research on drinking underground waters on Zmiinyi Island in 2002-2004", State Committee of the Natural Resources of Ukraine, Dnipropetrovsk, 2004, Annex 9, Vol. 2.

³¹ R.I. Calinescu, *op. cit.*, Annex 10, Vol. 2.

3.43 The lighthouse located on the island was built in 1838-1843 and has always been manned. It consists of a building of octagonal shape with a revolving glass lantern that flashes at regular intervals³². A radio beacon is installed at the lighthouse and one lighthouse keeper has traditionally lived permanently on the island³³. The technical equipment of the lighthouse is serviced by eight specialists. At present, management of the lighthouse is carried out by the State Hydrographical Service of Ukraine which renovated the lighthouse complex in 2002-2003. The coordinates of the lighthouse were frequently used to indicate Serpents' Island's geographical position; those coordinates are 45° 15' 19.00"North and 30°12' 15.5"East.

3.44 The geological composition and morphological structure of Serpents' Island shows it to be an inalienable part of the large tectonic block of the East European platform, a sunken part of which forms the shelf of the north-western Black Sea. At one time, some 50,000 years ago, Serpents' Island was linked to what is now the Ukraine mainland, with which it has the same geological origin.

3.45 Romania contends that Serpents' Island is a rock "in the geological sense" due to its essentially rocky composition³⁴. For effect, and in order to enhance its arguments, Romania has reproduced in its Memorial some highly selective pictures of the island - such as, for instance, Figures 15, 16 and 17 showing some rocky shores - which convey a misleading image of its physical conditions.

3.46 Romania's efforts to reduce Serpents' Island's status to that of a "rock" do not in any event improve its legal position for the maritime delimitation. Indeed, even if Serpents' Island was "rocky" in a purely geological sense, this would still not turn it into a "rock" in the legal sense of Article 121 (3) of the Law of the Sea Convention. In point of fact, in spite of its modest size, Serpents' Island is unquestionably an island. As can be seen from the photographs of Serpents' Island reproduced with this Counter-Memorial, in reality the island bears no resemblance to the arid and inhospitable rock depicted by Romania in its Memorial. The island shown in these photographs has a large number of structures built on it, supports

³² See the Appendix to the letter of the Ukraine's National Academy of Science, No. 11/295 of 30 March 2005, Annex 11, Vol. 2 and the *Black Sea and Sea of Azov Sailing Directions*, Fourth edition, 1903, Annex 12, Vol. 2 and Seventh edition, 1931, Annex 13, Vol. 2.

³³ *Black Sea Sailing Directions*, 1954, Annex 14, Vol. 2.

³⁴ RM, paras. 10.12-10.27.

considerable human and economic activity, has wells and cisterns for fresh water, and vegetation.

3.47 Romania also suggests that the climate on Serpents' Island is harsh. In reality, due to the island's proximity to the coast, its climate resembles closely that of the nearby mainland. In short, Serpents' Island is a significant geographical feature which is indisputably an island, supports human habitation and economic and other activities, and has figured prominently in the history of the region.

B. Romania's Coast

3.48 Compared to the length of the coastline of Ukraine, the Black Sea coast of Romania is relatively short. Whereas the length of the Ukrainian coast abutting the relevant area totals approximately 1,058 kilometres, the total Romanian Black Sea coast is only some 258 kilometres long taking into account the sinuosities of that coast.

3.49 As can be seen on Figure 3-7, and as Romania itself acknowledges³⁵, the Romanian coast comprises two segments. The southern part of the Romanian coast follows a northerly direction from the Bulgarian border, past Constanța, until Cape Midia. The coast then turns to the northeast and encompasses several lagoons, including Lake Razim and Lake Sinoie. This part of the Romanian coast is approximately 185 kilometres long measured along the actual coast.

3.50 The northern part of the Romanian coast is characterised by a promontory, the Sacalin Peninsula, which is essentially an uninhabited sand spit extending from the coast in a southwesterly direction for several miles³⁶. The length of Romania's northern stretch of coast between the Sacalin Peninsula and the border with Ukraine is some 73 kilometres measured according to the sinuosities of the coast.

3.51 Overall, the general direction of the Romanian coast follows a line trending from the Bulgarian border in a northeasterly direction towards Sulina, a Romanian town located near the land boundary with Ukraine. The general direction of the Romanian coast is illustrated on

³⁵ See RM, paras. 2.4 and 9.20.

³⁶ See Figure 4-1 facing page 38.

the sketch map at Figure 3-8 and, in contrast to Ukraine's coast, projects in essentially a single direction - southeastwards - as seen on Figure 3-9.

3.52 The total length of Romania's coast from its border with Bulgaria to the border with Ukraine thus amounts to approximately 258 kilometres. When measured as a single coastal façade, as depicted on Figure 3-8, the length of that façade is roughly 185 kilometres.

3.53 For purposes of Romania's construction of its claim line, Romania has used two base-points on its coast³⁷. The first is described by Romania as "the eastern end of the Sulina dyke". The Sulina Dyke is a purely man-made feature which extends some 4.5 kilometres into the sea³⁸. As will be described in the next Chapter, Romania's use of this artificial structure as the sole base-point for purposes of calculating its proposed boundary in the north has a significant effect on the course of its claim. The second base-point employed by Romania for its claim is the tip of the Sacalin Peninsula. Figure 32 at page 228 of Romania's Memorial illustrates the pronounced effect that the Sacalin Peninsula has on a so-called "equidistance line" drawn between Romania and the Crimean Peninsula as calculated by Romania without taking into account the presence of Serpents' Island. Both the Sulina Dyke and the Sacalin Peninsula can be seen on Figure 4-1 facing page 38.

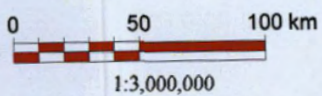
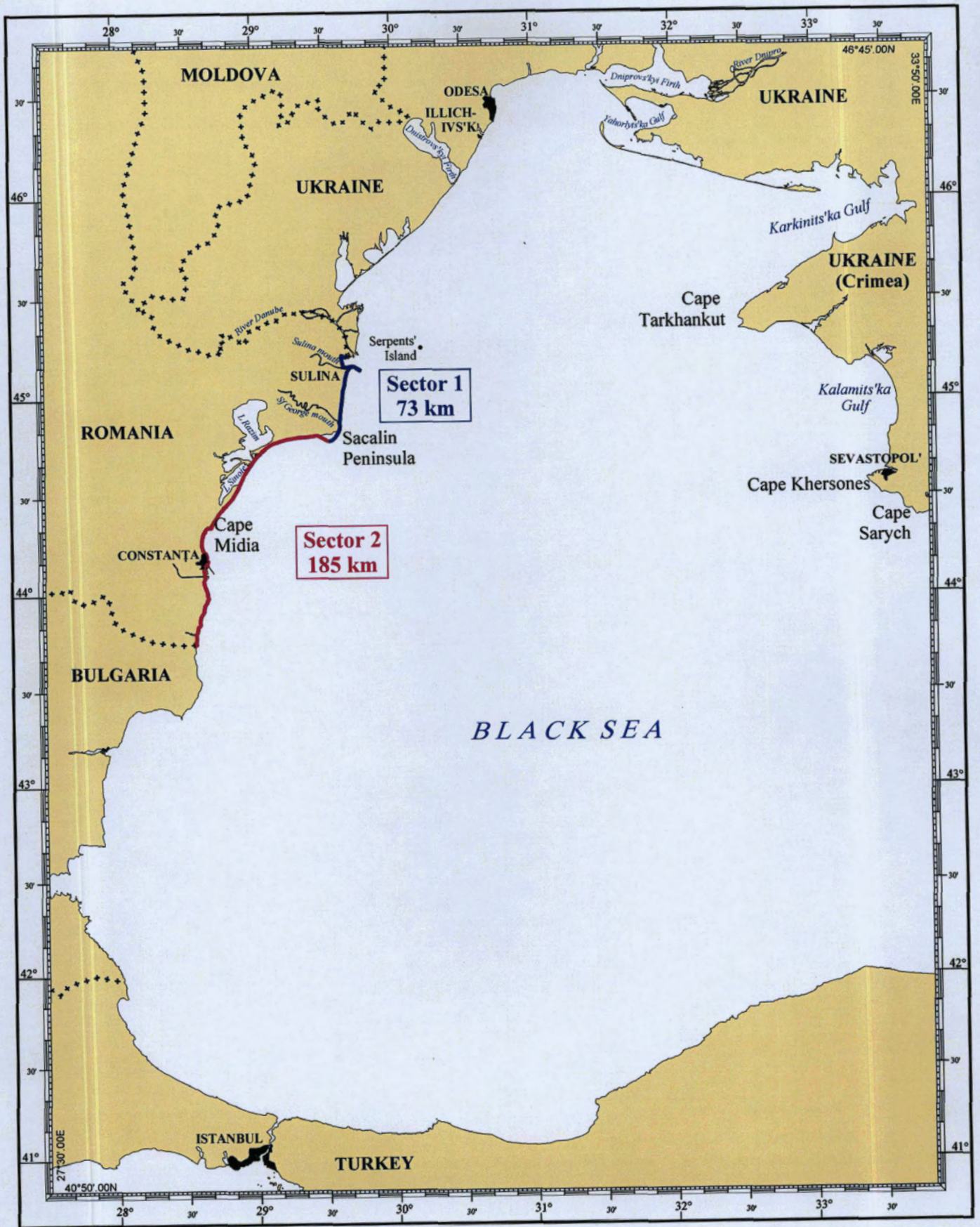
3.54 There is a further notable feature of Romania's treatment of what it considers to be its relevant coasts. As has been noted, Romania divides its coast into a northern sector labelled by Romania Sector 1 (adjacent coasts) and a southern sector labelled by Romania Sector 2 (opposite coasts)³⁹. In constructing its claim line, Romania has double counted a significant part of its coast represented by the northern sector of that coast.

3.55 For purposes of what Romania terms the part of its claim line delimiting the "adjacent coasts" of the Parties, Romania uses its northern, or Sector 1, coast which Romania states is 70.25 kilometres long. Romania then compares this length of coast with the part of the Ukrainian coast it deems relevant for the "adjacent coasts" segment of its claim - *i.e.*, Ukraine's coast from the Ukraine-Romania border to "Point S" well south of Odesa.

³⁷ See RM, paras. 11.63-11.78.

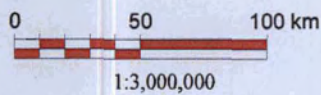
³⁸ See Figure 4-1 facing page 38.

³⁹ RM, para. 9.23.



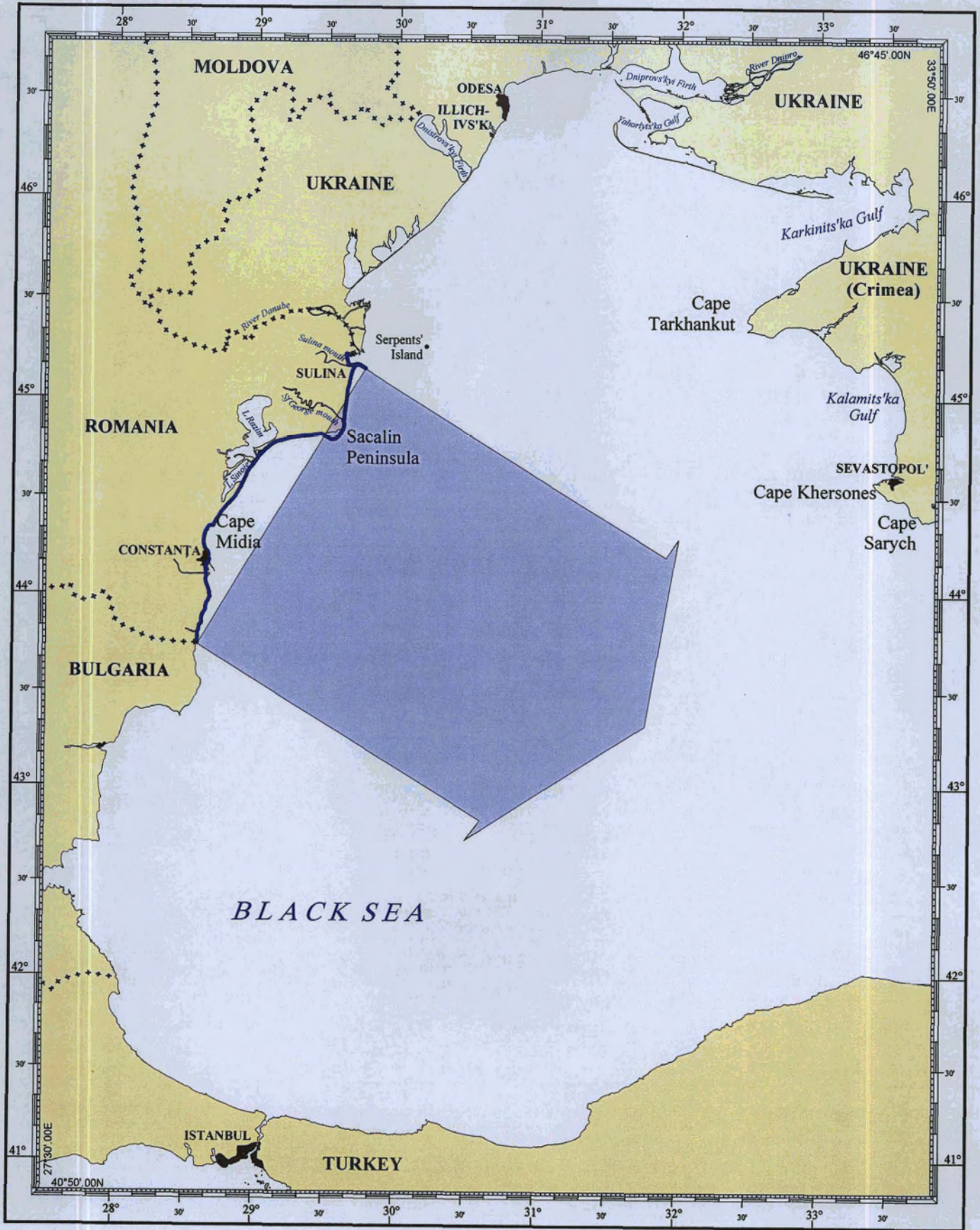
Relevant Romanian Coast

Figure 3-7



Romanian Coastal Façade

Figure 3-8



Projection of Romania's Coastal Front

Figure 3-9

3.56 When it comes to Romania's claim line delimiting the area between what it terms "opposite coasts", Romania then uses its entire coast from the Ukrainian border to the Bulgarian border - in other words, it double counts the 70 kilometre long stretch of its northern coast relevant for its "adjacent coasts" delimitation, and adds that coast to its southern coast. At the same time, Romania only counts the Ukrainian coast between Cape Tarkhankut and Cape Sarych on the Crimean Peninsula without either taking into account Ukraine's coast from the Romanian border to "Point S" or, indeed, any of the more than 600 kilometre long stretch of Ukrainian coast north and east of "Point S" up to Cape Tarkhankut⁴⁰.

3.57 This highlights the distorted nature of Romania's treatment of the coastal geography of the Parties. For purposes of constructing its maritime boundary claim, Romania relies exclusively on a very short (70 kilometres) stretch of its own coast just south of the land border with Ukraine and just two base-points on this coast (one of which is a man-made dyke and the other the end of a sand spit named the Sacalin Peninsula) and then double counts that coast as relevant for both the "adjacent" maritime boundary and the "opposite" boundary. Moreover, in an effort to minimize the obvious disparity between the lengths of the coasts of the Parties, Romania has no hesitation in counting its entire coast up to its boundary with Bulgaria when it comes to applying the element of proportionality. At the same time, Romania ignores more than half of Ukraine's coast facing southwards onto the relevant area as well as the presence of Serpents' Island. The result, as will be more fully discussed in Chapters 4 and 10, bears no relation to the actual geography of the area, is artificial in the extreme, and has led Romania to claim an inequitable and legally unsupportable maritime boundary with Ukraine.

Section 3. The Relevant Area

3.58 On the basis of the foregoing, it is readily possible to identify the relevant area for purposes of the delimitation and to understand why Romania's description of the relevant area is flawed primarily due to Romania's failure to take into account the actual coasts of the Parties that abut the area to be delimited and their legal entitlements.

⁴⁰ *Ibid.*, paras. 9.23-9.24.

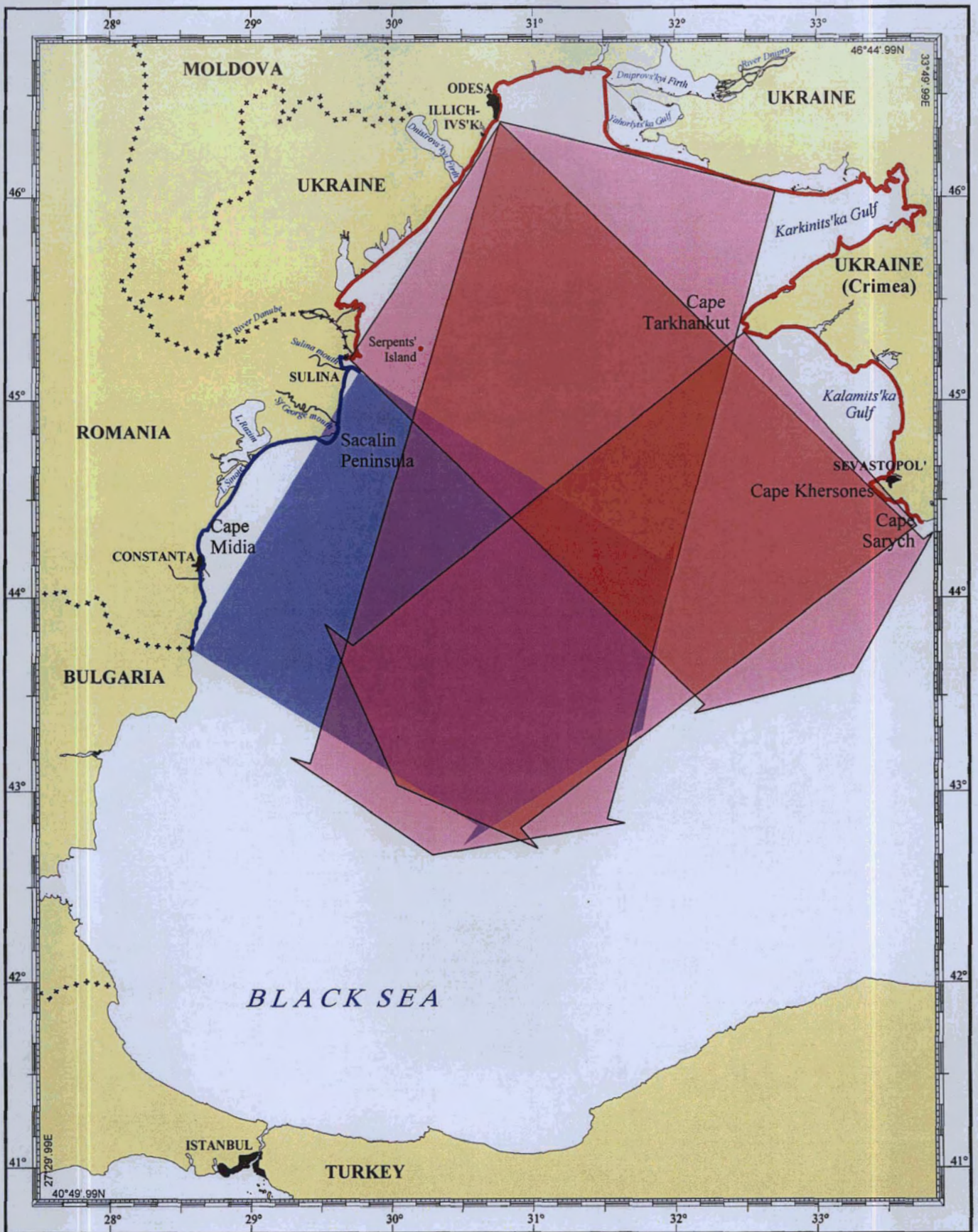
3.59 By definition, the relevant area is circumscribed by the relevant coasts of the Parties that generate maritime entitlements that meet and overlap and between which the delimitation of the Parties' respective continental shelves and exclusive economic zones is to be effected. The basic elements of this overlapping of coastal projections are illustrated on Figure 3-10. Ukraine and Romania in fact agree on the terminal points on each Party's coast that circumscribe the relevant area (the Romanian border with Bulgaria and the Ukrainian coast at Cape Sarych).

3.60 The western limits of the relevant area corresponds to the Romanian coastline between the land boundaries with Bulgaria and Ukraine and the stretch of the Ukrainian coastline extending from the border with Romania until a point located just north of Odesa, discussed in paragraph 3.17, above. In the north, the relevant area is bordered by the south-facing Ukrainian coastline running along the northwest portion of the Black Sea. In the east, the relevant area is bounded by the west-facing coast of the Crimean Peninsula terminating at Cape Sarych, which represents the final point on the Ukrainian coastline which faces the area to be delimited.

3.61 As mentioned above, whereas the length of the total Black Sea coast of Romania is approximately 258 kilometres, the length of the Ukrainian coast abutting the relevant area is over four times longer, totalling approximately 1062 kilometres.

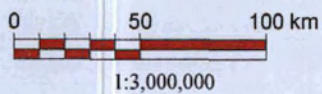
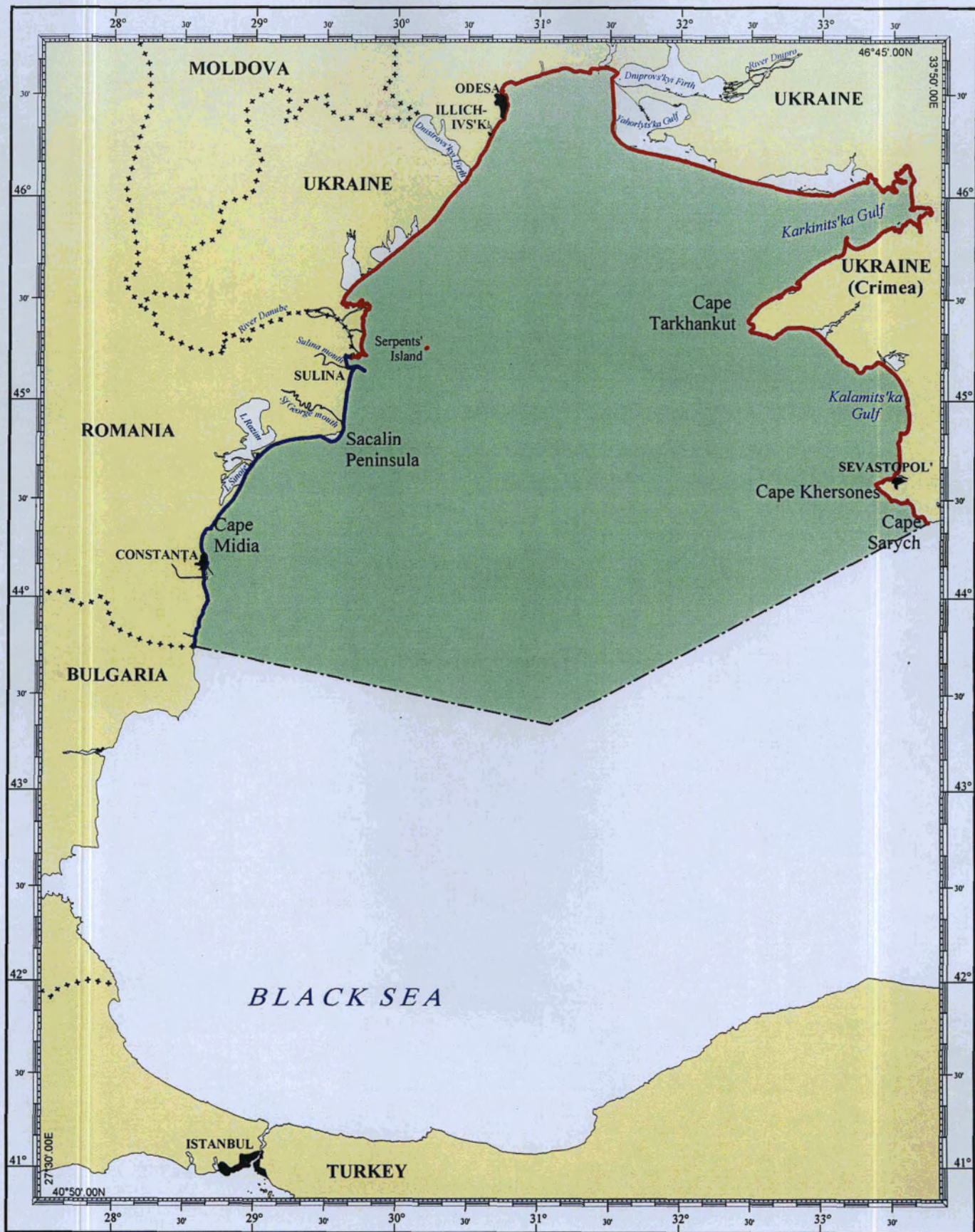
3.62 The southern limit of the relevant area is defined by a line drawn roughly perpendicular from the mainland coast from the point where the Bulgarian/Romanian land boundary reaches the Black Sea until a point between the Romanian and Ukrainian coasts where the interests of third States potentially come into play. This point is then connected to Cape Sarych by a straight line which represents the southeastern limit of the area to be delimited.

3.63 The relevant area as thus described is depicted on Figure 3-11. It represents a maritime area falling exclusively between the coasts of Ukraine and Romania where third States have no purported or actual continental shelf or exclusive economic rights. It is, by definition, an area which falls to be delimited between Ukraine and Romania.



Both Parties' Coastal Projections

Figure 3-10



The Relevant Area

Figure 3-11

3.64 If reference is made to Romania's description of the relevant area, which, for convenience, is reproduced as Figure 3-12A, it can immediately be seen that there are certain elements of agreement between the Parties and other areas where Romania's version clearly runs counter to the law and the geographic facts.

3.65 The points of agreement concern the terminal points on the mainland coasts of the Parties. Both Parties agree that the southern limits of the relevant area extend, on the Romanian side, from the land boundary between Romania and Bulgaria and, on the Ukrainian side, from Cape Sarych on the southwestern coast of the Crimean Peninsula. It follows, both legally and as a matter of pure geography, that all of the coasts of the Parties that lie between these two points and are less than 400 nautical miles from each other front the area to be delimited and thus are relevant to the identification of the relevant area.

3.66 However, Romania's selection of the relevant area suffers from two obvious defects which are apparent if the areas identified by the two Parties are compared as illustrated on Figure 3-12B.

3.67 In the north, Romania has artificially excluded a large area which lies off the south-facing Ukrainian coast between the point labelled "Point S" by Romania and Cape Tarkhankut illustrated by green cross-hatching on Figure 3-12B. This is a consequence of Romania's arbitrary elimination of this important stretch of Ukraine's coast discussed above. There is no reason in fact or in law why this portion of Ukraine's coast should be irrelevant (while Romania treats its entire Black Sea coast as relevant) and why the area lying behind the fictitious closing line constructed by Romania should be excluded.

3.68 Not surprisingly, the Court in the past has firmly rejected similar attempts to exclude the coasts of the parties or significant maritime areas that are closed off by a unilaterally established closing line as part of the relevant area. For example, in the *Tunisia-Libya* case, the Court emphasized that it was necessary to compare "like with like", and thus refused to accept Tunisia's argument that the maritime areas lying landward of a straight closing line drawn by Tunisia across the Gulf of Gabes should be excluded from the relevant area⁴¹. The

⁴¹ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p. 76, para. 104.*

Court ruled that the "relevant area" comprised the entire maritime area lying up to and off the relevant coasts of the Parties.

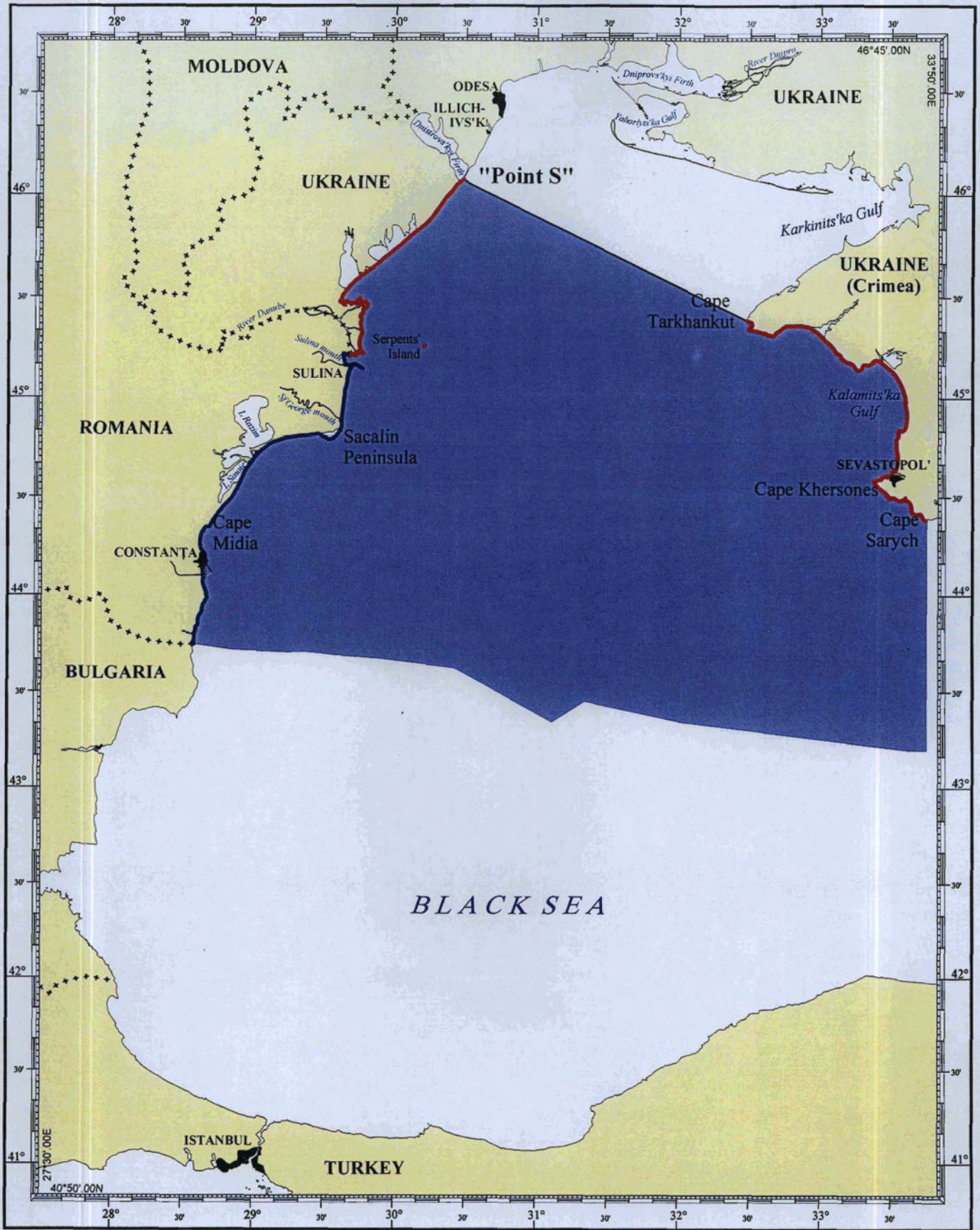
3.69 In the present case, Ukraine has not enacted a system of straight baselines between Romania's "Point S" and Cape Tarkhankut. That line is entirely a product of Romania's imagination. Nonetheless, even if Ukraine had adopted such a closing line, this would not have meant, as the *Tunisia-Libya* case makes clear where Tunisia had enacted a system of straight baselines closing the Gulf of Gabes, that the waters lying landward of such a line would be excluded from the relevant area or that Ukraine's coast in this area should be ignored. It follows that the absence of any such closing line in actual fact reinforces the conclusion that all of the maritime areas lying off the relevant coasts of the Parties are to be considered as falling within the relevant area⁴².

3.70 The second error Romania makes with respect to defining the "relevant area" concerns a triangle of sea area lying south of Cape Sarych on the Ukrainian coast of Crimea. This area is depicted in red cross-hatching on Figure 3-12B.

3.71 It is evident that this area, which Romania has included within its "relevant area", has nothing to do with the delimitation between Ukraine and Romania. It concerns a maritime area lying exclusively between Ukraine, on the one hand, and either Turkey or Bulgaria on the other. While it is obviously in Romania's interest to try to include such areas for purposes of applying the test of proportionality, they clearly have nothing to do with Romania (even according to Romania's own method of delimitation), and thus cannot in any way be considered as forming part of the relevant area in the case. Just as the Court held in the *Tunisia-Libya* case that, "[t]he only areas that can be relevant for the determination of the claims of Libya and Tunisia to the continental shelf in front of their respective coasts are those which can be considered as lying either off the Tunisian or off the Libyan coast"⁴³, similarly, the only areas relevant to delimitation in this case are those that lie off the respective coasts of Ukraine and Romania. The "triangle" included by Romania in its definition of the relevant area clearly does not satisfy this criterion.

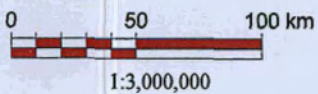
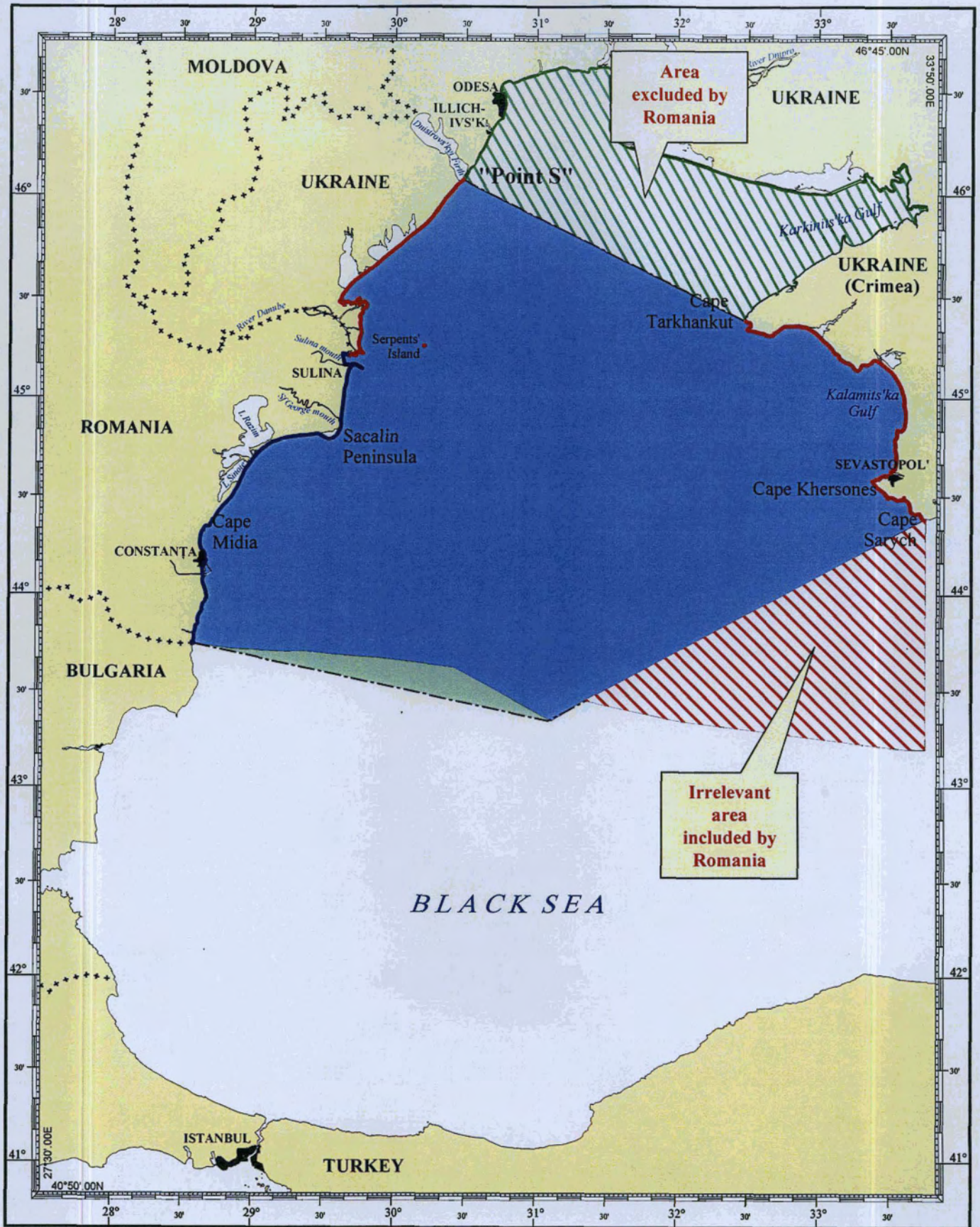
⁴² It is significant that in the *Gulf of Maine* case, the Chamber of the Court also ruled that the Bay of Fundy, while bounded exclusively by Canadian coasts, still comprised part of the relevant coasts of the Parties for purposes of effectuating an equitable delimitation. *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, pp. 268-270, para. 31.

⁴³ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 61, para. 74.



Relevant Area According to Romania

Figure 3-12A



Comparison of Relevant Areas

Figure 3-12B

3.72 On the basis of the foregoing, the relevant area within which the delimitation is to take place, as defined by the Parties' relevant coasts, is that which is depicted in Figure 3-11. The implications of assessing the claims of the Parties for purposes of applying the proportionality test within the relevant area are discussed in Chapter 10 below.

CHAPTER 4

THE ERRONEOUS AND ARTIFICIAL NATURE OF ROMANIA'S METHODOLOGY

Section 1. Introduction

4.1 At the very beginning of its Memorial, Romania asserts that the boundary between the respective maritime zones of the Parties "can be readily drawn"¹. At first sight, such an assertion appears to be astonishing, to say the least. When the adverb "readily" is used to qualify an action, this indeed implies something which can be done not only "promptly" or "quickly", but also "easily"². So, if the drawing of the maritime delimitation line between Ukraine's and Romania's maritime zones were so "easy", as Romania now contends, one might be surprised that the two States were unable to settle directly an allegedly unsophisticated issue through several years of negotiations; and one might ask why it has been necessary to submit to the Court such a would-be uncomplicated question.

4.2 In reality, Romania resorts to an artifice. By stating that the case is simple and easy to settle, Romania paves the way to its oversimplification of the methodology which is then applied when presenting its claim. The artifice appears as early as the Introduction of the Memorial, in the paragraphs dedicated to a summary of Romania's position³. And in the following chapters of the Memorial, the artificial character of Romania's methodology becomes perfectly clear concerning both its two-sector approach of the delimitation area and the construction of its claimed line.

4.3 This Chapter will demonstrate the contrived nature of Romania's methodology. Section 2 will address the distortions inherent in Romania's two-section approach which result primarily from Romania's selective approach to the geography of the relevant area. Section 3 will then show that the only so-called relevant circumstance that Romania alludes to - the

¹ RM, para. 1.10.

² For example, the *Shorter Oxford English Dictionary* (Third Edition) defines "readily" as "1. Promptly, in respect of the voluntariness of the action; hence, willingly, cheerfully. 2. Quickly, without delay; also, without difficulty, with ease or facility".

³ RM, paras. 1.10-1.15.

argument that because the Black Sea is an "enclosed sea", the delimitation in this case must use the same methodologies that have been employed elsewhere in the Black Sea between third States - is unsupported and irrelevant. Section 4 will place the issue of State practice, which Romania has also sought to deploy, in its proper legal and factual context to demonstrate that Romania is wrong when it asserts that small islands are invariably given a reduced or no effect in maritime delimitation.

Section 2. The Artificial Character of Romania's Two-Sector Approach

4.4 When dividing the delimitation area into two sectors, depending on whether the relevant Ukrainian and Romanian coasts are adjacent or opposite to each other, Romania manifestly has been inspired by previous cases in which the Court has acted in this way, in particular the 1982 *Tunisia/Libya Continental Shelf* case⁴, and more recently the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case⁵. By itself, a division of the delimitation may be appropriate insofar as it appears as based on the actual coastal relationship. But the method followed by Romania in the application of that principle to the present situation neglects the relevant coastal geography and is completely disingenuous.

4.5 In its Memorial, the two-sector division is based on the fact that Romania's coast may itself be divided into two sectors⁶. But, as pointed out in Chapter 3, it is the same Romanian coastal sector, between the Sulina Dyke and the Sacalin Peninsula, which is presented as being both adjacent and opposite to the Ukrainian coast, and therefore is used twice in Romania's methodology, both for the lateral delimitation and the frontal delimitation. Thus, the second sector of Romania's coast, south of the Sacalin Peninsula to the border with Bulgaria, actually plays no role in the construction of Romania's claim line although it is counted by Romania for proportionality purposes⁷.

⁴ The Court dealt "with the area as divided into two sectors" (*I.C.J. Reports 1982*, p. 82, para. 114), because the change in direction of the Tunisian coast was "said to modify the situation of lateral adjacency of the two States, even though it clearly [did] not go so far as to place them in a position of legally opposite States" (*ibid.*, p. 63, para. 78).

⁵ A distinction was made between "the southern part of the delimitation area, which is situated where the coasts of the Parties are opposite to each other," (*I.C.J. Reports 2001*, p. 91, para. 169) and a northern part "where the coasts of the two States are no longer opposite to each other but are rather comparable to adjacent coasts" (*ibid.*, para. 170).

⁶ RM, para. 2.4.

⁷ See Chapter 10 below.

4.6 At the same time, in constructing its claim, Romania has no hesitation in ignoring over half of Ukraine's relevant coast. The consequence is that Romania proceeds on the basis that its entire coast should be used for establishing the delimitation line - and that parts of its coast (the northern sector) should in fact be used twice for this purpose - while Ukraine's extensive south-facing coast - between "Point S" and Cape Tarkhankut - should be ignored. There is nothing equitable about such an approach, and it is scarcely surprising that Romania's methodology results in a grossly disproportionate claim line, as shown in Chapter 10.

4.7 In order to expose the shortcomings in Romania's methodology, it is convenient to address Romania's two-sector approach in turn. First, Ukraine will review the mechanics behind Romania's northern (or "adjacent coasts") sector of its claim line; second, Ukraine will turn to Romania's southern sector of its claim (the so-called "opposite coasts" sector).

A. Romania's Northern "Adjacent Coasts" Sector

4.8 Romania's methodology with respect to its "adjacent coasts" sector is set out in Section 2 of Chapter 11 of the Romanian Memorial (pages 195-223). It is a convoluted exercise which, at each step of the process, is characterized by incorrect premises and erroneous geographic constructs and comparisons.

4.9 Romania's first error is to proceed on the assumption that there is a pre-existing 12-mile enclave around Serpents' Island based on an alleged Soviet Union/Romania agreement of 1949⁸. The course of this fictitious boundary up to a point - labelled "Point X" by Romania at paragraph 11.54 of its Memorial - is depicted on Figure 28 of Romania's Memorial. Ukraine will show that this argument is completely fallacious in Chapter 5. There is no pre-existing delimitation agreement binding on the Parties beyond the point identified in the 2003 Treaty, which was the starting point for the negotiation of the boundary of the areas of continental shelf and the exclusive economic zones between the Parties and from which the Parties agree that the Court is to delimit the boundary in this case.

4.10 Romania is obviously sensitive to the weakness of its argument, and for this reason makes the alternative argument that "the maritime boundary around Serpents' Island would be

⁸ RM, paras. 11.5-11.44.

the same independent of any agreement between the Parties"⁹. As will be seen, this assertion is advanced at the expense of a distortion of both the law and the geographic facts.

(i) Romania's Provisional Equidistance Line Is Wrongly Calculated

4.11 While the plotting of the provisional equidistance line as the first step in the delimitation exercise is more fully discussed in Chapter 7, it is appropriate to point out here that Romania first posits a "provisional equidistance line" which is erroneously constructed. According to Romania -

"... 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*) ..."¹⁰.

4.12 As is clear from this formulation, Romania's calculation of the "provisional equidistance line" is not, in fact, a true equidistance line, but one which already prefigures, and discounts, what Romania contends is a "special circumstance justifying the shifting of the provisional equidistance line"¹¹. This so-called "special circumstance" is the presence of Serpents' Island which, in Romania's view, is entitled to "no weight at all in delimiting the continental shelf and exclusive economic zones of Romania and Ukraine"¹². As a result, Romania fails to construct the proper "provisional equidistance line", which should be a line that is equidistant from the baselines of the Parties from which the breadth of their territorial seas is measured (*i.e.*, including Serpents' Island), before any account is taken of special or relevant circumstances. Instead, Romania jumps immediately to an "adjusted" equidistance line which accords Serpents' Island no more than a 12 nautical mile enclave of territorial sea and no continental shelf or exclusive economic zone at all. This starting point is unjustified in law and is unsupported in fact when the nature and importance of Serpents' Island is taken into account as Chapter 7 will show.

⁹ *Ibid.*, paras. 11.45-11.50.

¹⁰ *Ibid.*, para. 9.7 (emphasis added).

¹¹ *Ibid.*, para. 11.47.

¹² *Ibid.*, para. 11.49.

(ii) Romania's Use of Artificial Basepoints on Its Coast while Ignoring Geographic Basepoints on Ukraine's Coast

4.13 Romania then compounds its error by using, as the relevant basepoint on the Romanian side for constructing its equidistance line, the seawardmost point on a man-made feature - the Sulina Dyke - which Romania itself concedes, although without giving details, "underwent major extension works from the 1950s until the 1980s"¹³ and which extends some 4.5 kilometres out to sea from Romania's actual coast (see Figure 4-1).

4.14 The end result is a "provisional equidistance line" which ignores the relevant basepoints on actual Ukrainian territory (*i.e.*, on Serpents' Island) while making full use of artificial basepoints on Romania's side represented by the seawardmost extension of an artificial structure, the Sulina Dyke. The pronounced effect that this distorted approach produces is illustrated on Figure 4-2, which shows (i) Romania's "provisional equidistance line" making full use of Sulina Dyke as a basepoint but ignoring Serpents' Island; (ii) the effect that the use of the man-made Dyke has on the course of this line by showing the line that would result if both the Dyke and Serpents' Island were ignored, and (iii) the actual "provisional equidistance line" drawn in accordance with the law.

(iii) Romania then Claims More than Its "Provisional Equidistance Line"

4.15 Apparently unsatisfied with even this exaggerated approach, Romania then claims even more to the north of its incorrectly calculated "provisional equidistance line". This additional slice of continental shelf and exclusive economic zone claimed by Romania is graphically shown on Figure 29 of Romania's Memorial.

4.16 Romania's Memorial makes clear that this aspect of Romania's claim has no basis in the relevant circumstances characterizing the area, but rather is advanced as a vague notion of "compensation" or "distributive justice" for what Romania perceives were past injustices. As the Romanian Memorial itself states:

¹³ RM, para. 11.17.

"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"¹⁴.

4.17 Such a plea of equity flies in the face of the Court's clear-cut jurisprudence. In the first place, the Court is not empowered to take a decision *ex aequo et bono*. Secondly, in both the *Tunisia-Libya* and the *Libya-Malta* cases, the Court left no doubt that maritime delimitation under international law is not an exercise in distributive justice. As the Court stated in the *Tunisia-Libya* case, in distinguishing its task from a decision taken *ex aequo et bono*:

"The task of the Court in the present case is quite different: it is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result. While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice"¹⁵.

4.18 The Court then reiterated this reasoning in the *Libya-Malta* case:

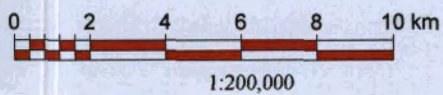
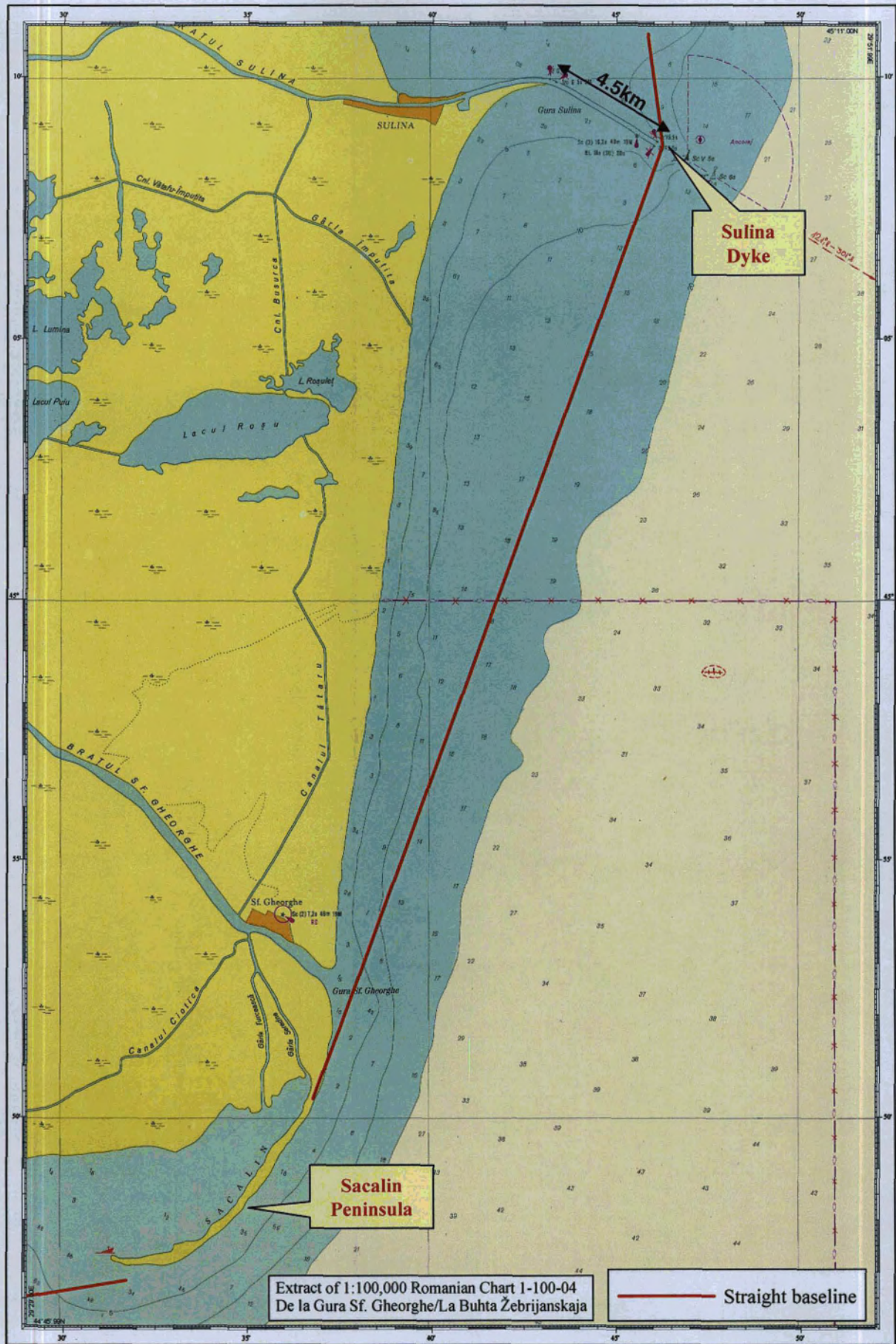
"That equitable principles are expressed in terms of general application, is immediately apparent from a glance at some well-known examples: the principle that there is to be no question of refashioning geography, or compensating for the inequalities of nature; the related concept of non-encroachment 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; the principle of respect due to all such relevant circumstances; the principle that although all States are equal before the law and are entitled to equal treatment, 'equity does not necessarily imply equality' (*I.C.J. Reports 1969*, p. 49, para. 91), nor does it seek to make equal what nature has made unequal; and the principle that there can be no question of distributive justice"¹⁶.

4.19 It follows that Romania's claim, which is based in part on Romania's fictitious "Point X" - a point which was never previously agreed by either the Parties or their predecessors - and in part on an artificial construct to the east whereby Romania arbitrarily links up "Point X" with a mysterious point - labelled "Point Y" on the figure - lying halfway between "Point X" and Romania's "Point T", has no basis whatsoever in law or in fact.

¹⁴ RM, para. 11.72.

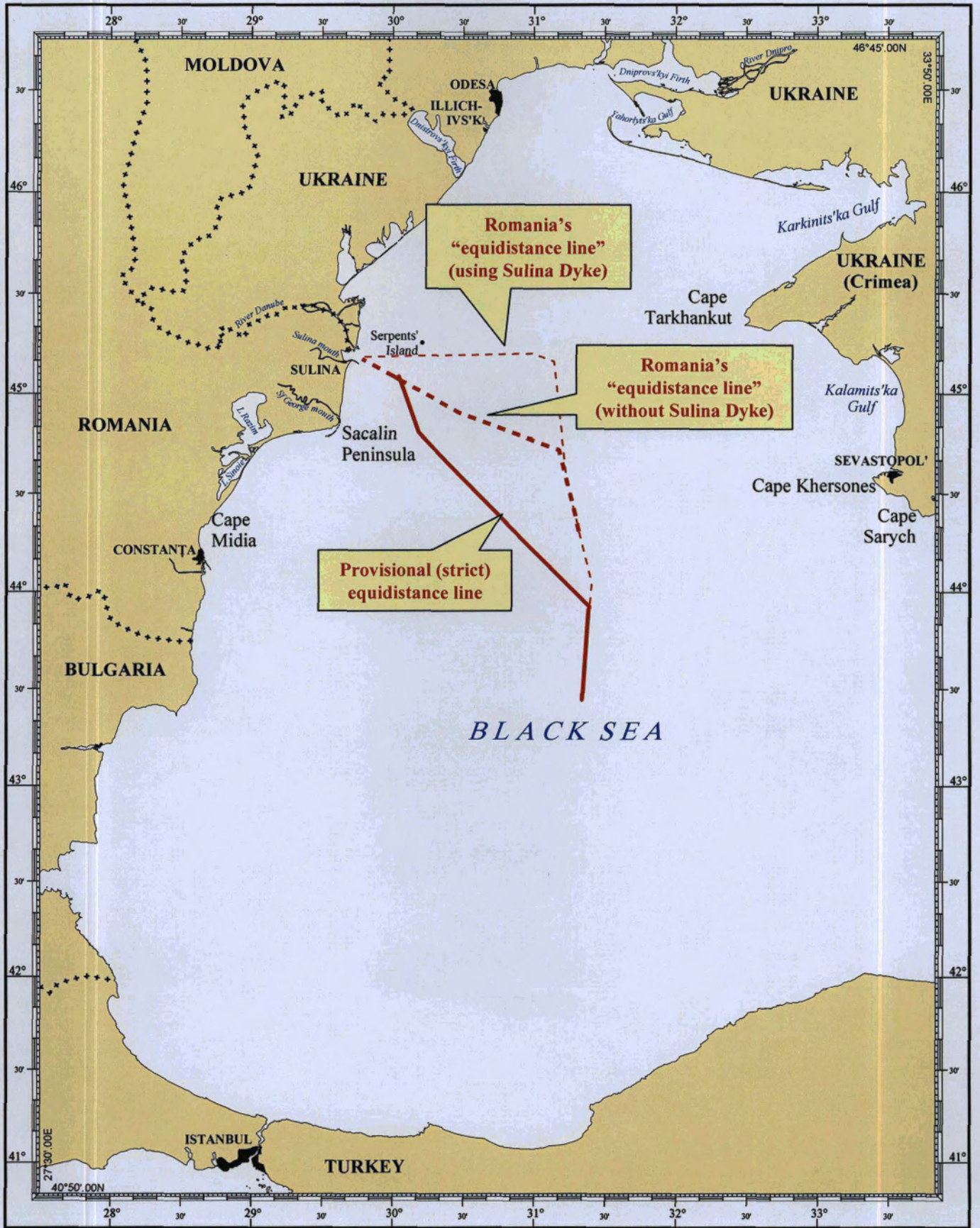
¹⁵ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, *I.C.J. Reports 1982*, p. 60, para. 71.

¹⁶ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, *I.C.J. Reports 1985*, pp. 39-40, para. 46.



Sulina Dyke and Sacalin Peninsula

Figure 4-1



Effect of Sulina Dyke

Figure 4-2

(iv) Romania's Methodology Ignores All of Ukraine's South-Facing Coast

4.20 Apart from Serpents' Island, the other geographical factor which Romania's methodology systematically ignores is the entire south-facing coast of Ukraine - a stretch of coast which, as Chapter 3 pointed out, is over 600 kilometres long. Romania unabashedly treats this coast - which runs between "Point S" and Cape Tarkhankut - as non-existent, and its claim line in the north therefore takes no account whatsoever of this coast by passing directly in front of it thereby cutting off its seaward projection.

4.21 The mere fact that Ukraine's coast changes direction north of the city of Odesa in no way means that this part of the coast becomes irrelevant or should be ignored. As the Court stated in the *Tunisia-Libya* case with respect to the change of direction of the Tunisian coast at the back of the Gulf of Gabes:

"The most evident geographical feature of the coastlines fronting on that area of shelf relevant for the delimitation is the radical change in the general direction of the Tunisian coastline marked by the Gulf of Gabes; and clearly no delimitation of the continental shelf in front of the coasts of the Parties could be regarded as equitable which failed to take account of that feature"¹⁷.

4.22 Moreover, it is not simply the change of direction of the Ukrainian coast which is relevant - in fact, the Ukrainian coast changes direction twice: once north of Odesa and a second time when that coast turns to the south along the west coast of Crimea; the marked difference in the lengths of the coasts of the Parties abutting the area to be delimited is also a relevant circumstance which must be taken into account in order to arrive at an equitable delimitation. This important factor is discussed in Chapter 8. For present purposes, it suffices to note that Romania's claim line takes no account of this geographical reality either with respect to the first sector of Romania's method or, indeed, for the second sector as well.

4.23 It can thus be seen that the northern sector of Romania's claim ignores the basic geographic setting of the area. To summarize:

¹⁷ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p. 86, para. 122.*

- It is based on an alleged delimitation agreement between the Parties which does not exist;
- It ignores the presence of Serpents' Island when it comes to establishing the provisional equidistance line delimiting the continental shelf and exclusive economic zones of the Parties;
- It employs a man-made basepoint located on the Sulina Dyke for purposes of constructing Romania's claim while discarding basepoints located along the actual territory of Ukraine on Serpents' Island;
- It then claims areas lying even to the north of the wrongly-constructed provisional equidistance line;
- It treats Ukraine's south-facing coast as non-existent, and cuts off the legal entitlements of that coast; and
- It ignores the substantial disparity that exists between the lengths of the relevant coasts of the Parties in this part of the area to be delimited.

B. Romania's Southern "Opposite Coasts" Sector

4.24 As with the "adjacent coasts" sector of its claim line, Romania also presents a distorted view of the geography of the relevant area in its approach to the "opposite coasts" segment of its claim. This leads Romania not only to select an inappropriate starting point in the north for its claim line in this sector, but also to neglect the overall coastal geography of the area and the marked disparity that exists between the length of the coasts of the Parties in arriving at its line.

(i) Romania's Selective Approach to the Parties' Relevant Coasts

4.25 By its own admission, the only part of the Romanian coast which controls the course of Romania's claim in the second sector is the short (70 km long) stretch of coast between the border with Ukraine and the tip of the Sacalin Peninsula. As Romania itself observes, only two points on the Romanian side are relevant to establish what it calls the "median line" in this sector. These are (i) the outer end of the Sulina Dyke and (ii) the southeastern end of the Sacalin Peninsula¹⁸. Yet this is the exact same stretch of coast that Romania previously identified as relevant to the "adjacent coasts" sector of its claim line. In other words, Romania uses its northern coast twice - once for the "adjacent" sector and again for the "opposite" sector.

¹⁸ RM, para. 11.78.

4.26 Romania's use of Sulina Dyke as a basepoint for its claim has been addressed earlier in this chapter. As for the "southeastern end of the Sacalin Peninsula", Romania has used as its basepoint the tip of a sandy and uninhabited projection that extends considerably out to sea and commonly described as an island¹⁹. These features can be seen on Figure 4-1. Thus, Romania has attempted to maximize its claim by using an artificial structure, on the one hand, and an uninhabited sand spit, on the other, for purposes of calculating a so-called equidistance line. At the same time, none of the Romanian coast lying south of the Sacalin Peninsula up to the border with Bulgaria provides any basepoints for Romania's claim.

4.27 On the Ukrainian side, Romania identifies two basepoints which are said to control the median line. These are located at Cape Tarkhankut and Cape Khersones²⁰. Even accepting these points, the length of Ukraine's coast between Cape Tarkhankut and Cape Khersones is some 200 kilometres long - or three times longer than the stretch of Romanian coast between its basepoints on the Sulina Dyke and the Sacalin Peninsula. Romania's methodology takes no account of this significant difference in coastal lengths.

4.28 Moreover, as previously discussed, Romania ignores the existence of Serpents' Island as a basepoint for its "opposite coasts" claim. Yet, as explained in Chapter 7, Serpents' Island is inhabited and supports considerable economic and other activities²¹. Consequently, Romania's "opposite coasts" claim is based on an incorrectly constructed "provisional equidistance line" just as its "adjacent coasts" equidistance line was also incorrectly calculated. The result is that the starting point in the north for Romania's claim in the second sector - the point labelled "Point T" by Romania and depicted on Figure 30 in the Romanian Memorial - bears no relation to an actual equidistance line.

¹⁹ See the *Enciclopedia Geografică a României*, Editura Enciclopedică, Bucharest, 2002: The entry for Sakalin reads (unofficial translation): "The Sakalin, the sand-formed island, is uninhabited and located in the Black Sea near the Romanian coastline opposite to the outfall of the river head of the Saint George Danube River tributary. The island was formed on a base of a sand shoal which was silted in with a long time after the catastrophic flood in the Danube River in 1897. Afterwards the island was elongated (now its length amounts to almost 10 km) under the influence of waves, but last time it was divided in half forming the island Big Sakalin (in the north) and the island Small Sakalin (in the south)". Annex 15, Vol. 2. Moreover, the 1996 *Sailing Direction of the Black Sea* published by the Ministry of Defence of the Russian Federation states that (unofficial translation): "[i]n Spring when strong storm winds blow sea waves sometimes roll over the island Sakalin, and it turns out to be under water temporarily". Annex 16, Vol. 2.

²⁰ RM, para. 11.79.

²¹ See paras. 7.47-7.88 below.

4.29 In addition, Romania again ignores all of Ukraine's south-facing coast and even a significant part of Ukraine's coast along the west side of the Crimean Peninsula north of Cape Tarkhankut. As for the portion of Ukraine's coast that Romania does take into account - from Cape Tarkhankut to Cape Khersones - even that coast is three times longer than the Romanian coast between the basepoints identified by Romania on its own coast.

4.30 In the light of these basic geographical facts, Romania's blanket assertion that "[t]he opposite coastlines [of the Parties] are broadly equal to each other and present no special features²²" is demonstrably inaccurate. Romania can only advance such a contention by manipulating the actual coastal relationships of the Parties and ignoring Serpents' Island. This involves the following selective approach to the geographic facts:

- Double counting Romania's coast between the Sulina Dyke and the Sacalin Peninsula for both Romania's "adjacent coasts" and "opposite coasts" claim line;
- Ignoring all of Ukraine's south-facing coast and a large segment of its Crimean coast north of Cape Tarkhankut;
- Ignoring the presence and maritime entitlements of Serpents' Island; and
- Counting the entire Romanian coast south of the Sacalin Peninsula even though that coast generates no basepoints that control either sector of Romania's claim.

4.31 As explained in Chapters 3, 8 and 10, the Ukrainian coast is some four times longer than the Romanian coast within the relevant area, whether those coasts are measured along the actual coastline or in accordance with their general direction as coastal façades. Yet Romania's methodology takes no account of this disparity which is obviously an important relevant circumstance in the case.

4.32 These considerations completely undermine the legitimacy of Romania's second sector of its proposed delimitation. The starting point ("Point T") for that line is insupportable and not based on equidistance, and the subsequent course of the line neither reflects the actual provisional equidistance line nor the adjustment that has to be made to that line to take account of the important difference in the lengths of the coasts of the Parties abutting the area to be delimited no matter how those coasts are measured.

²² RM, para. 11.84.

Section 3. Romania's "Enclosed Sea" Argument

4.33 Apart from the defects in Romania's methodology explained in Section 2, Romania's Memorial also purports to find significance in the fact that the Black Sea is an "enclosed sea" and even goes so far as to identify this element as a "special circumstance" having a bearing on the Ukraine-Romania delimitation²³. At paragraph 8.126(h) of its Memorial, Romania summarises its argument as follows:

"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."

4.34 In support of this argument, Romania cites the 1978 Agreement between Turkey and the U.S.S.R. on the Delimitation of the Continental Shelf in the Black Sea²⁴, and the 1997 Agreement between Turkey and Bulgaria on the Delimitation of the Maritime Areas Between the Two States in the Black Sea²⁵. Romania contends that, because the Black Sea is an enclosed sea within the meaning of Article 122 of the 1982 Law of the Sea Convention, these agreements, and the fact that, in Romania's submission, they were based on equidistance, constitute a relevant circumstance for the purposes of the present dispute. Consequently, Romania argues, the delimitation of Romania and Ukraine's continental shelf and EEZ should be carried out in accordance with the principle of equidistance in order to satisfy what Romania says is the "need for consistency among all cases of delimitation in the Black Sea", and because "using different methods in the other delimitation processes would tend to bring about inequitable results"²⁶.

4.35 This line of argument is devoid of merit. There is no legal authority, whether deriving from Article 122 of the 1982 Convention or otherwise, that maritime boundaries between littoral States bordering an enclosed sea should be determined on the basis of a pre-ordained, single method of delimitation. Nor does the fact that the Black Sea is an "enclosed sea" have

²³ RM, para. 8.124

²⁴ Signed on 23 June 1978 and entered into force on 15 May 1981. Annex 17, Vol. 2.

²⁵ Signed on 4 December 1997 and entered into force on 4 November 1998. Annex 18, Vol. 2.

²⁶ RM, para. 6.25.

any bearing on the method of delimitation that should be applied in order to produce an equitable result in a bilateral delimitation between Ukraine and Romania.

4.36 Article 122 of the 1982 Convention provides:

"For the purposes of this Convention, 'enclosed or semi-enclosed sea' means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States".

4.37 There is no dispute between the Parties that the Black Sea falls within this definition. But there similarly can be no dispute that Article 122 contains no implications deriving from this fact for purposes of identifying the method of delimitation that may be relevant between two riparian States bordering an enclosed sea for delimiting their maritime zones. The delimitation of the exclusive economic zone and continental shelf is governed by Articles 74 and 83 of the 1982 Convention, respectively, whereas the delimitation of the territorial sea, which is not relevant in this case, is governed by Article 15.

4.38 No special rules are included in the Convention for the delimitation of maritime areas in enclosed or semi-enclosed seas; in particular, Articles 74 and 83 of the 1982 Convention include no reference to the terms "enclosed sea" or "semi-enclosed sea". The matter is left to be determined by the application of the normal rules of international law governing questions of delimitation.

4.39 The only other article in the Convention falling under the rubric of Part IX (Enclosed or Semi-Enclosed Seas) is Article 123. It provides:

"Co-operation of States bordering enclosed or semi-enclosed seas

States bordering an enclosed or semi-enclosed sea should co-operate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:

- (a) to co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea;
- (b) to co-ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;

- (c) to co-ordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
- (d) to invite, as appropriate, other interested States or international organizations to co-operate with them in furtherance of the provisions of this article."

4.40 As can be seen, Article 123 also has nothing to do with the delimitation of the continental shelf or exclusive economic zone. It deals solely with technical issues of co-operation relating to the management and conservation of the living resources and marine environment of the sea.

4.41 It is true that Romania, in the course of the negotiation of the 1982 Convention, made various proposals that the delimitation of exclusive economic zones/continental shelves of States bordering semi-enclosed seas should be effected taking into account the fact that the delimitation was to take place in a semi-enclosed sea²⁷. However, it should be emphasised that these proposals were not accepted and consequently were not reflected in the agreed text of the Convention.

4.42 Neither can it be argued - as Romania does - that the "enclosed character" of the Black Sea is a relevant/special circumstance in this delimitation. "Relevant circumstances" and "special circumstances" in the context of maritime delimitation are terms of art. They connote circumstances which relate to the delimitation being undertaken in such a way as to affect the outcome of that delimitation. While in a general sense the fact that the Black Sea is an enclosed or semi-enclosed sea is a relevant part of the overall background against which the delimitation between Ukraine and Romania takes place, this is more a matter of general geography than a particular circumstance of legal significance for the delimitation.

4.43 Nothing in the enclosed nature of the Black Sea affects the delimitation to be undertaken as between Ukraine and Romania except, as explained in Chapter 8, in connection with determining the end-point of the boundary. Whether the Black Sea is a sea enclosed by Bulgaria, Turkey and Georgia on the west, south and east shores, or whether it was an open

²⁷ See the proposal made by Romania and other States in respect of semi-enclosed seas dated 22 June 1977, in R. Platzöder, *Third United Nations Conference on the Law of the Sea, Documents*, Oceana, Dobbs Ferry, NY, 1982, Vol. IV, p. 486, and the Informal Suggestion made by several States including Romania on 1 September 1978 (U.N. Document C.2/Informal Meeting/18/Rev.1).

sea with those States having disappeared from the locations where they actually are, this would have no impact upon the delimitation of the Ukraine-Romania EEZ and continental shelf (except perhaps in relation to the southerly extension of the line of delimitation).

4.44 Two precedents taken from the Court's jurisprudence illustrate the fallacy in Romania's argument. These are the *Tunisia-Libya* and *Libya-Malta* cases, both of which concerned bilateral delimitations between States that were located in an enclosed sea - the Mediterranean Sea.

4.45 In neither case was the enclosed nature of the Mediterranean a relevant circumstance which affected the method of delimitation that the Court identified as producing an equitable delimitation between the contesting parties. Nor did the Court feel obligated to draw on other bilateral delimitations negotiated between third States in the Mediterranean as binding precedents for the actual disputes before the Court. To the contrary, in both cases, the Court's delimitation of an equitable boundary depended on the facts and circumstances particular to the actual disputes before it.

4.46 In *Tunisia-Libya*, the Court based its decision on a combination of factors having to do with the conduct of the parties and their colonial predecessors, and on the geographic configuration of the relevant coasts of the parties. In *Libya-Malta*, the Court determined an equitable boundary on the basis of a provisional equidistance line adjusted northwards in order to take into account the marked disparity that existed between the lengths of the relevant coasts of the parties.

4.47 To the extent that the presence of third States in the Mediterranean was a relevant factor in either case (as opposed to bilateral delimitation agreements which were not relevant), this factor was only germane to identifying the end-point or end-points on the resulting delimitation line. But the actual methods of delimitation adopted by the Court were very much a product of the geographic and other circumstances characterizing the actual areas in dispute without reference to methods that other States in the Mediterranean may have had recourse to for purposes of delimiting parts of the Mediterranean that were subject to a different set of geographical and other facts.

4.48 Romania further argues that the alleged failure of Turkey and Bulgaria to modify the continental shelf/EEZ boundary to take into account the fact that Turkey's Black Sea coast is disproportionately longer than that of Bulgaria obliges the Court in this case, "for considerations of logic and equity", not to take into account the disproportionate length of Ukraine's coast as a relevant circumstance²⁸.

4.49 This attempt by Romania to invoke a treaty between two third States in order to prejudice Ukraine's continental shelf/EEZ entitlement runs directly contrary to basic principles of international law. Whether, as a matter of fact, those third States took into account this or that reason can only be, so far as Romania and Ukraine are concerned, a matter of speculation; and whatever factors may have been taken into account, or discounted, by Turkey and Bulgaria, their reasons for doing so in an agreement that settled on a global basis land and territorial sea boundaries, as well as that of their continental shelf and EEZ, are entirely irrelevant to the different circumstances obtaining between Ukraine and Romania. Any attempt by Romania to speculate about such matters, and draw conclusions from its speculations, have no place in the context of the present dispute.

4.50 It follows therefore that Romania's arguments that the enclosed nature of the Black Sea is a special or relevant circumstance such that the Court should be influenced by factors that allegedly influenced other delimitation agreements between Black Sea littoral States are groundless, and should be rejected outright.

Section 4. The Relevance of State Practice

4.51 Paragraph 4 of the 1997 Exchange of Letters made reference to the fact that the Governments of Ukraine and Romania should negotiate a maritime boundary agreement on the basis of, *inter alia*:

- Sub-paragraph (a): The principle stated in Article 121 of UNCLOS "as applied in the practice of States and in international jurisprudence";
- Sub-paragraph (c): The principle of equity and the method of proportionality, "as they are applied in the practice of States and in the decisions of

²⁸ RM, para. 6.33.

international courts regarding the delimitation of continental shelf and exclusive economic zones".

4.52 Thus, as explained more fully in Chapter 6, in 1997 the Governments only agreed to *negotiate* on the basis of these principles and procedures in an attempt to agree a mutual boundary. The extent to which State practice is relevant to the identification of concrete principles and rules of delimitation in the context of a particular boundary dispute subject to a separate and different set of geographical and other circumstances, is another question which will be dealt with below.

A. Legal Constraints on the Relevance of State Practice

4.53 Apart from what is discussed in Chapter 8 below relating to the presence of third States at the southern extremity of the relevant area, it should be emphasised that State practice must be treated with caution when it comes to trying to derive hard and fast rules of maritime delimitation from what are generally bilateral, negotiated agreements. First, every delimitation is unique and must be viewed on the basis of its own particular facts. Second, negotiated delimitation agreements frequently do not indicate the principles on which they are based, and do not enumerate other political considerations that may have been factored into the ultimate agreement.

4.54 In the light of these considerations, it is not surprising that the Court itself has treated State practice very cautiously. As early as the 1969 *North Sea* cases, the Court articulated two conditions that State practice had to satisfy in order to be legally relevant, and which were not satisfied when it came to trying to identify a particular method of delimitation, such as the equidistance method, that was legally obligatory in all cases as a matter of State practice. In the Court's words:

"The essential point in this connection - and it seems necessary to stress it - is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*; - for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned

must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough"²⁹.

4.55 Sixteen years later, in the 1985 *Libya-Malta* decision, the Court reached the same conclusion. It held that State practice, "however interpreted, falls short of proving the existence of a rule prescribing the use of equidistance, or indeed of any method, as obligatory"³⁰.

4.56 It is in the light of this clear statement of law that the miscellaneous examples of State practice cited by Romania in which States have attributed small or isolated islands no or limited effect in the context of bilateral delimitation agreements must be examined.

4.57 Moreover, it bears repeating that the individual cases cited by Romania are particular to the geographical characteristics of the area in which each individual delimitation was agreed and bear no relation to the geophysical context of the present case. Aside the geographical features which are specific to each case, there are also other legal and extra-legal factors which may have formed part of the underlying basis of individual agreements but which will not necessarily be identifiable from the face of the agreements themselves.

B. Individual Examples Cited by Romania

4.58 Not only has Romania failed to represent correctly the circumstances in which State practice may be relevant as reflective of an international legal norm, but the examples of State practice listed in Romania's Memorial are misleading and, in important respects, incomplete. In particular, none of these examples cited by Romania involved delimitations where the mainland coasts of one of the parties bordering the area to be delimited was significantly longer than those of the other party, as is the case here. It is for this reason that Ukraine considers it necessary to discuss the particular circumstances of each of the examples of State practice cited by Romania for the proposition that small islands should be given a reduced effect or disregarded in maritime delimitation.

²⁹ *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, at p. 44, para. 77.

³⁰ *Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985*, p. 38, para. 44.

4.59 Moreover, as will be evident in the paragraphs below, many bilateral agreements do attribute full effect to islands in establishing maritime boundaries based on equidistance. Where less than full effect is given, this is generally explicable by the individual circumstances of individual agreements, and often indicates the interplay of extraneous factors.

4.60 Before turning to those examples of State practice reflective of a wide-spread practice whereby islands are accorded full effect, the following comments deserve to be made in respect of the examples listed at paragraphs 8.106 to 8.121 of Romania's Memorial:

- (1) In the Continental Shelf Agreement between Iran and Qatar of 20 September 1969 (which was largely motivated by economic considerations), *both* Iranian and Qatari islands were ignored as part of a trade-off: the boundary was thus delimited so as to be equidistant from the nearest points on the coasts of the parties' mainland territories³¹.
- (2) In the Agreement between Indonesia and Malaysia Relating to the Delimitation of the Continental Shelf of 1969, although in the sector between Borneo and Sarawak certain Indonesian islands were not given full effect, as noted by Charney & Alexander "Indonesia is believed to have conceded to Malaysian claims [in this segment], to enlist Malaysian support for its archipelagic claims"³². It should also be pointed out that, as is commented by Jayewardene, the "distance from the coast appears to have been a factor of considerable significance in determining the area of the shelf to be attributed"³³. Moreover, Romania omits to mention that islands of both parties were given full effect in the other segments of the boundary³⁴.
- (3) Regarding the 1974 Agreement between India and Sri Lanka, it should first be noted that this established a boundary separating the States' historic waters. Although the island of Kachchativu appears to have been discounted as a basepoint, this would seem to be explained by the fact that the two countries had disagreed as to the

³¹ See J.I. Charney & L.M. Alexander (Ed.), *International Maritime Boundaries*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993, Vol. II, p. 1513.

³² *Ibid.*, Vol. I, p. 1022.

³³ H.W. Jayewardene, *The Regime of Islands in International Law*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1990, p. 419.

³⁴ Charney & Alexander, *op. cit.*, Vol. I, p. 1021.

ownership and sovereignty of the island³⁵. To the contrary, other small islands, notably those in Adam's Bridge, appear to have been accorded full effect.

- (4) The delimitation line agreed in the 1977 Agreement between Greece and Italy on the Delimitation of the Zones of the Continental Shelf in most parts does not mirror an equidistance line. As regards the various Greek Ionian islands, it should be recalled that some islands were given full effect (Corfu, Kefallinia and Zakynthos), the Otranto Channel islands (in particular Fanos (Othonoi) Island, which is located approximately 10 n.m. from the mainland) were given 75% effect, whereas the more remote island of Stamphani (one of the Strofades Islands) was given half-effect. However, as noted in the commentary on this agreement by Charney & Alexander, the reduced effect of certain islands is "compensated for elsewhere"³⁶.
- (5) The Agreement between Italy and Yugoslavia Concerning the Delimitation of the Continental Shelf of 1968 attributed a reduced effect to certain Yugoslav and Italian islands. However, it should be emphasised that, unlike Serpents' Island, these islands were located in the middle of the maritime area to be delimited between the two States' opposing coasts, and the Yugoslav islands were relatively distant from the Yugoslav mainland³⁷.
- (6) Similarly, in respect of the Agreement between Italy and Tunisia Relating to the Delimitation of the Continental Shelf of 1971, which likewise concerned the delimitation of maritime areas between opposing coastlines, the Italian islands were located in the middle of the area to be delimited and, for the most part, were closer to Tunisia than to Italy. Moreover, it is important to recall that, as noted in the commentary by Charney & Alexander, "[i]t is commonly said that Italy [...] gave up rights on the continental shelves of its islands in exchange for a wider package deal with Tunisia resolving various political and economic questions. This included also a fishing agreement [...]"³⁸. Aside the islands of Lampione, Lampedusa, Linosa and

³⁵ *Ibid.*, Vol. II, p. 1412.

³⁶ *Ibid.*, p. 1595. As is evident from the U.S. State Department *Limits in the Seas* study most points are approximately equidistant from the small Greek islands and the Italian mainland (available at [www.law.fsu.edu/library/collection/Limits in Seas](http://www.law.fsu.edu/library/collection/Limits%20in%20Seas)).

³⁷ See Charney & Alexander, *op. cit.*, Vol. II, p. 1633.

³⁸ *Ibid.*, p. 1612.

Pantelleria, it should also be noted that Article 1 of the agreement stated that the delimitation was accomplished by "the median line [...] taking into account islands, islets, and low-tide elevations": thus the small islands of La Galite, Galitons de l'Est, Cani, Zembra, Kuriate (Tunisia) and Toro, Cavoli and Marettimo (Italy) were given full effect, along with the Tunisian low-tide elevations of Maruka and El Mzebla³⁹.

- (7) Regarding the 1988 Agreement between Sweden and the U.S.S.R. on the Delimitation of the Continental Shelf and the Swedish Fishing Zone and the Soviet Economic Zone in the Baltic Sea, the question of the treatment of the islands of Gotland and Gotska Sandön cannot be separated from extraneous political issues. As stated by Charney & Alexander, "[t]he outcome of the political compromise could perhaps best be translated by stating, in the spirit of the political compromise, that the islands were only taken into account for about 75 percent"⁴⁰.
- (8) Regarding the 1968 Agreement Concerning the Sovereignty over the Islands of Al-'Arabiyah and Farsi and the Delimitation of the Boundary Line Separating the Submarine Areas Between Saudi Arabia and Iran, it should first be recalled that the agreement resolved a political dispute over the sovereignty of two small islands and that equal effect was given to the Saudi island of Al-'Arabiyah and the Iranian island of Farsi. Although Iran's Kharg Island was reputedly given half effect (although this is not spelled out in the document), this result must be viewed in the context of the fact that the relevant area (where the effect of Kharg Island on an equidistance line came into play) was highly prospective and that both States had awarded oil concessions in that area. Thus, the boundary line finally agreed between the parties was equidistant between the States' respective claim lines - indeed, it was subsequently modified to apportion equitably the petroleum structure to which both States had laid claim⁴¹.
- (9) Similarly, the treatment of the Qatari island of Daiyina in the 1969 Agreement on Settlement of Maritime Boundary Lines and Sovereign Rights over Islands between

³⁹ *Ibid.*, p. 1615.

⁴⁰ *Ibid.*, p. 2062. This presumably influenced the fact that the island of Gotland was similarly given only 75% in the Agreement on the Delimitation of the Continental Shelf between Poland and Sweden signed shortly afterwards, in 1989. However, as is mentioned below, in the latter agreement the small uninhabited island of Utklippen was given full effect.

⁴¹ *Ibid.*, Vol. II, p. 1522.

Qatar and Abu Dhabi must be considered in the light of the context of the agreement which settled on a global basis territorial disputes between the parties (in relation to Daiyina and other islands) and provided for equal rights to the Al-Bunduq oilfield. As noted by Charney & Alexander, "[e]conomic considerations motivated the delimitation and to a certain extent influenced the location of the boundary"⁴². Moreover, Jayewardene comments that this agreement does not represent a good example of a formal delimitation technique⁴³.

- (10) As regards the 1974 Offshore Boundary Agreement between Iran and U.A.E. (Dubai), it should first be noted that the agreed boundary was not an equidistance line⁴⁴. To the extent the line approximated to equidistance, it was one that ignored the effect of islands belonging to both Iran (other than the 12 nautical mile arc around Sirri island)⁴⁵ and U.A.E. (Sir Abu Nu'ayr island). Thus, the location of both parties' islands resulted in them being offset against each other.
- (11) The 1994 Agreement between Finland and Sweden Concerning the Delimitation in the Åland Sea and the Northern Part of the Baltic Sea of the Finnish Continental Shelf and Fishing Zone and the Swedish Economic Zone established a boundary that was not an equidistance line, but based primarily on a pre-existing treaty⁴⁶. In any event, the relevance of the fact that the parties attributed no effect to the Bogskär Islands (which are relatively remote from the main islands of the Åland group) is undermined by the fact that these islands were given full effect in the 1980 Agreement between Finland and the U.S.S.R.⁴⁷.
- (12) The relevance of 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 is unclear. The agreed boundary between the small British Dependency (with total relevant coasts of

⁴² *Ibid.*, Vol. II, p. 1544.

⁴³ Jayewardene, *op. cit.*, pp. 437-438.

⁴⁴ Charney & Alexander, *op. cit.*, Vol. II, p. 1533.

⁴⁵ Iran had claimed a 12 nautical mile territorial sea.

⁴⁶ Charney & Alexander, *op. cit.*, Vol. III (1998), p. 2539. See also Vol. II, pp. 1945-1957 for the 1972 Agreement.

⁴⁷ As noted by Prosper Weil in his essay, *Geographic Considerations in Maritime Delimitation*, published in Charney & Alexander, *op. cit.*, Vol. I, pp. 115-130; at p. 128.

42.5 n.m.) and the Dominican Republic (of which the length of the relevant coast is about 155 n.m.) was located some distance to the north of a median line, and is described by the British negotiators as having been a "pragmatic solution"⁴⁸.

- (13) Romania appears to rely particularly on the 2004 Sino-Vietnamese Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin, notably the fact that the Vietnamese island of Bach Long Vi was attributed allegedly a 25% effect. However, the important distinction between this island and Serpents' Island is that Bach Long Vi is a mid-ocean island, almost equidistant between the parties' respective coasts⁴⁹. As regards the island of Can Co, although this island (which was given 50% effect) was located relatively close to the Vietnamese mainland, the reduced effect of this island has been noted to have been "obviously a negotiated compromise"⁵⁰.
- (14) Similarly, the Ashmore Islands, which were attributed a 24 n.m. belt of continental shelf/EEZ in the 1997 Agreement between Australia and Indonesia establishing an Exclusive Economic Zone and Certain Seabed Boundaries are located mid-ocean, significantly closer to western Timor than the Australian mainland. Any analogy with Serpents' Island, which lies close to and opposite the Ukrainian coast and in a geographic situation where the mainland Ukrainian coast is at least three times as long as the corresponding Romanian coast, is consequently misplaced⁵¹.
- (15) The treatment of the islands of Lubainah Al-Kabirah (Saudi Arabia) and Lubainah Al-Saghirah (Bahrain) in the 1958 Agreement between Bahrain and Saudi Arabia concerning Delimitation of the Continental Shelf must be regarded in the context of the fact that sovereignty over the islands had been disputed prior to the Agreement. In any event, these islands were not discounted, as Romania suggests, but rather they appear to have been given equal importance and used as boundary turning points.

⁴⁸ Charney & Alexander, *op. cit.*, Vol. III, p. 2239.

⁴⁹ See the map published with the interview with Vietnam's Foreign Minister published on 7 July 2004 by *Thanhnieu News*, Annex 19, Vol. 2.

⁵⁰ Zou Keyuan, "The Sino-Vietnamese Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin", 36 *Ocean Development and International Law*, 2005, pp. 13-24, at p. 15, Annex 20, Vol. 2.

⁵¹ Charney & Alexander, *op. cit.*, Vol. IV (2002), p. 2713.

Romania also omits to mention that other small islands belonging to the parties were given full effect in this agreement⁵².

- (16) Romania's reliance on the fact that Hans Island was disregarded in the 1973 Agreement between Denmark and Canada Relating to the Delimitation of the Continental Shelf is confusing since sovereignty over the island was disputed and, consequently, the boundary in the area of the island was not delimited⁵³. As regards the treatment of Lady Franklin Island (which appears to have been given less than full effect), this must be considered in the context of the fact that its location was relatively remote from Canada's coast.
- (17) The reference to the treatment of the enclaved Australian islands of Boigu and Saibai in the 1978 Treaty between Australia and Papua New Guinea Concerning Sovereignty and Maritime Boundaries again would appear to be quite misplaced since these islands were located very close (within a few hundred yards) to the Papua New Guinea mainland. Other than these enclaves, it would appear that the small islands in the area, including the uninhabited islands of Kawa, Mata Kawa and Kussa, which were effectively ceded to Papua New Guinea, were given full effect as basepoints⁵⁴.

C. Examples of State Practice Where Full or Substantially Full Effect Was Given to Small Islands

4.61 The most remarkable aspect of Romania's overview of State practice is its failure to refer to any examples of agreements where islands were given full effect or where a substantial disparity in the coastal lengths of the parties was a relevant circumstance affecting the course of the delimitation line. This omission is all the more egregious given the impressive body of such examples as compared to instances where small islands were given less than full effect.

⁵² Charney & Alexander, *op. cit.*, Vol. II, pp. 1489-1497.

⁵³ *Ibid.*, Vol. I, p. 372.

⁵⁴ *Ibid.*, pp. 931-932.

4.62 Indeed, Romania's blanket statement that "[w]hen the equidistance method is used, the predominant tendency is to give no or little effect to [small islands]"⁵⁵ is contradicted by the numerous examples of delimitation agreements where small islands are used as basepoints when offset by islands of similar size"⁵⁶. Aside such examples, the geography of which is quite distinct from that in the present case, there nevertheless exist numerous cases where small islands are given full effect even when opposing much larger features or in the context of delimitation between adjacent States. Ukraine will first list several examples where States with adjacent coasts have agreed to give islands, some of which are very small, full effect before turning to "opposite coast" examples.

(i) **Adjacent Coasts**

- (1) In respect of the maritime boundary between the U.S.A. and Mexico (established provisionally by a 1976 exchange of notes and re-stated in the 1978 treaty), as stated by Charney & Alexander, "[a]ll islands and low-tide elevations were given full effect in the determination of the equidistant lines"⁵⁷. These included the small Mexican islands off the Arrecife Alacran in the Gulf of Mexico (located about 75 n.m. of the Yucatan Peninsula), as well as, in the Pacific, two islands located approximately 60 n.m. off the U.S. mainland, along with the Mexican island of Guadalupe, situated about 145 n.m. off the mainland coast⁵⁸.

⁵⁵ RM, para. 8.105.

⁵⁶ See, for example, the small offshore islands of Isla del Coco (Costa Rica) and Malpelo (Columbia) in the 1984 Agreement between Columbia and Costa Rica, discussed in Charney & Alexander, *op. cit.*, at Vol. I, pp. 801-805; the small features used as basepoints in the 1988 Agreement between the Government of the Solomon Islands and Australia, discussed in Charney & Alexander at Vol. I, pp. 977-982; the islands used as basepoints in the 1980 Treaty between the United States of America and the Cook Islands, discussed in Charney & Alexander at Vol. I, pp. 985-990; the 1983 Agreement between France (New Caledonia) and Fiji, discussed in Charney & Alexander at Vol. I, pp. 995-999; the 1983 Convention on Maritime Boundaries between France and the United Kingdom, discussed in Charney & Alexander at Vol. I, pp. 1003-1008, in which all basepoints were located on small features, including Oeno in respect of which Charney & Alexander state: "Oeno, lying 75 n.m. from Pitcairn, is about 1400 m long and between 300 and 1000 m wide. Although uninhabited, it is visited regularly by Pitcairn islanders for fishing, as well as gathering coconuts and other foods. Oeno is an island for the purposes of international law" (p. 1005); the 1980 Convention between France (Wallis and Futuna) and Tonga, discussed in Charney & Alexander at Vol. I, pp. 1011-1015; the 1980 Treaty between the United States (American Samoa) and New Zealand (Tokelau) discussed in Charney & Alexander at Vol. I, pp. 1125-1130; the 1976 Agreement between India and the Maldives discussed in Charney & Alexander at Vol. II, pp. 1389-1396; and the 1978 Agreement between India and Thailand on Delimitation in the Andaman Sea, discussed in Charney & Alexander at Vol. II, pp. 1433-1439.

⁵⁷ Charney & Alexander, *op. cit.*, Vol. I, p. 428.

⁵⁸ *Ibid.*, Vol. I, pp. 427-445.

- (2) An island analogous in size to Serpents' Island is the Isla de Lobos in Uruguay. Other than a lighthouse, the only permanent human installation on this small island was connected to the exploitation of a marine seal colony. Nevertheless the island was attributed full effect as a basepoint in the 1973 Agreement between Argentina and Uruguay relating to the *Delimitation of the River Plate and the Maritime Boundary*⁵⁹.
- (3) With respect to the British Orders in Council that established maritime boundaries between Sarawak, North Borneo and Brunei in 1958, Charney & Alexander note that "[s]o far as can be determined [...] all islands in the vicinity of the central and eastern boundaries were given full effect in constructing a boundary which lies very close to a strict line of equidistance"⁶⁰.
- (4) In the 1980 Agreement between Indonesia and Papua New Guinea Concerning the Maritime Boundary, all islands, including the small Papua New Guinean island of Wuvulu, which is located some 80 n.m. offshore, were given full effect. As noted by Charney & Alexander, "in the delimitation of the present boundary, islands have significantly affected its actual location"⁶¹.
- (5) The 1968 Treaty between the German Democratic Republic and Poland Concerning the Delimitation of the Continental Shelf in the Baltic Sea gave the small island of Greifswalder Oie full effect even though this had a pronounced effect on the location of the boundary. The island is 1.5 k.m. long and 750 m. wide. Although the 1989 Treaty between the two States was not expressly based on equidistance, as noted by Charney & Alexander, the island can nevertheless be seen to have played a role in the drawing of a single maritime boundary (which is located even further to the east of the 1968 boundary line)⁶².

⁵⁹ *Ibid.*, Vol. I, p. 760.

⁶⁰ *Ibid.*, p. 918.

⁶¹ *Ibid.*, p. 1041.

⁶² *Ibid.*, Vol. II, pp. 2005-2022. The 1989 boundary was confirmed by the Federal Republic of Germany in 1990.

(ii) **Opposite Coasts**

- (1) As noted in the commentary by Charney & Alexander, in the 1977 Maritime Boundary Agreement between the U.S.A. and Cuba, "[f]or the portion of the boundary that was an equidistant line, all islands and rocks were given full weight in its determination". These included the small islands forming the Florida Keys, which extend to over 50 n.m. from the Florida mainland⁶³.
- (2) Although apparently not based upon strict equidistance, the 1977 Treaty on Delimitation of Marine and Submarine Areas between Colombia and Costa Rica accorded equal weight to the small Colombian archipelago of Albuquerque and the Costa Rica mainland⁶⁴.
- (3) The Treaty on the Delimitation of Marine and Submarine Areas Between the Dominican Republic and Venezuela of 1979 used a number of islands, including the Los Monjes Archipelago of small islands, as basepoints. Charney & Alexander's conclusion deserves to be quoted in full:

"Thus, the Dominican Republic-Venezuela Agreement of 1979 constitutes another significant example of one of the main distinctive features of the process of delimitation of maritime areas in the Caribbean. As might be expected, it predominantly involves islands. A clear trend may be observed, both in the western and eastern Caribbean, towards full consideration of all islands whatever their characteristics may be"⁶⁵.

- (4) It should be emphasised that the Venezuelan Aves Island (580 m. x 150 m. at its widest, 50 m. at its narrowest and 3 m. of maximum altitude) was given full effect in agreements entered into with Venezuela by the United States⁶⁶ and The Netherlands⁶⁷, as well as in the 1980 Delimitation Treaty between Venezuela and France in which it was given the same weight as Martinique. As noted by Charney & Alexander, "The

⁶³ *Ibid.*, Vol. I, p. 419.

⁶⁴ *Ibid.*, p. 468.

⁶⁵ *Ibid.*, p. 582.

⁶⁶ The 1978 Maritime Boundary Treaty between the United States of America and the Republic of Venezuela, discussed at Vol. I, pp. 695-696.

⁶⁷ The 1978 Delimitation Treaty between the Kingdom of the Netherlands and the Republic of Venezuela, discussed at Vol. I, p. 623.

France-Venezuela treaty constitutes a very important precedent regarding the legal regime of islands and the way they are to be considered within the framework of a maritime boundary delimitation. It should be borne in mind that the treaty was negotiated and signed when there was already certainty as to what the provisions of the 1982 United Nations Convention on the Law of the Sea would contain. It entered into force after the adoption by UNCLOS III of the 1982 Convention⁶⁸.

- (5) As between Colombia and Costa Rica, Isla del Coco was given full effect in drawing the equidistance line between Costa Rica and the much larger Galapagos Islands in the 1985 Agreement between Costa Rica and Ecuador relating to the Delimitation of Maritime Areas⁶⁹.
- (6) In the 1982 Agreement on Marine Delimitation between Australia and France (New Caledonia), Australia's Middleton Reef, a mid-oceanic low-tide elevation situated 125 n.m. offshore, was given full effect as one of its basepoints in drawing the equidistant line with New Caledonia. It would appear that equivalent weight was given to Australia's similarly remote Norfolk Island⁷⁰.
- (7) In the 1974 Agreement between Japan and South Korea Concerning the Establishment of a Boundary in the Northern Part of the Continental Shelf Adjacent to the Two Countries, numerous small islands appear to have been given full effect and gave rise to the many turning points in the equidistant line used in drawing the maritime boundary⁷¹.
- (8) In the 1982 Agreement on Marine Delimitation between Australia and France (Kerguelen Islands) the small Australian islands of Heard and McDonald were given full effect vis-à-vis the French Kerguelen Islands even though they were considerably smaller⁷².

⁶⁸ Charney & Alexander, *op. cit.*, Vol. I, p. 608.

⁶⁹ *Ibid.*, Vol. I, pp. 819-828.

⁷⁰ *Ibid.*, p. 907.

⁷¹ *Ibid.*, pp. 1057-1089.

⁷² *Ibid.*, Vol. II, pp. 1185-1194.

- (9) Regarding the 1971 Agreement between Australia and Indonesia Establishing Certain Seabed Boundaries, islands belonging to both parties were granted full effect, including the small uninhabited islets of Pulau Enu, New Year Islet and Crocodile Island⁷³.
- (10) In the 1974 Agreement between India and Indonesia, all insular features were given full effect, including the small, uninhabited wooded island of Pulau Rondo and the small, uninhabited rocky island of Pulau Benggala, neither of which has an area in excess of 1 sq. km. These are the only Indonesian features used as basepoints⁷⁴.
- (11) The small islands of Pulau Weh (5 n.m. from Sumatra) and Koh Racha Noi (15 n.m. from the Thai mainland), which are not known to have any permanent residents, were given full effect in the 1971 Agreement between Indonesia and Thailand Relating to the Delimitation of a Continental Shelf Boundary in the Northern Part of the Strait of Malacca and in the Andaman Sea⁷⁵.
- (12) In the 1971 Agreement Concerning Delimitation of the Continental Shelf between Iran and Bahrain, both the Iranian islands of Nakhilu and Jabrin and the Bahraini island of Jazirat Al Muharraq were given full effect⁷⁶.
- (13) In the 1965 Agreement between Finland and the U.S.S.R. Concerning the Boundaries of Sea Areas and of the Continental Shelf in the Gulf of Finland, as noted by Charney & Alexander, "[a]s a general rule, islands and islets appear to have been given full effect"⁷⁷. Similarly, in the subsequent 1967 Agreement between the two States, numerous islands located outside the Gulf of Finland were given full effect despite the fact that they were smaller than those within the Gulf and were more numerous on the Finnish side of the boundary⁷⁸.

⁷³ *Ibid.*, p. 1197.

⁷⁴ *Ibid.*, p. 1365.

⁷⁵ *Ibid.*, pp. 1455-1463.

⁷⁶ *Ibid.*, p. 1483.

⁷⁷ *Ibid.*, p. 1962.

⁷⁸ *Ibid.*, pp. 1971-1978.

- (14) In the 1989 Agreement on the Delimitation of the Continental Shelf and the Fishery Zones between Poland and Sweden the small uninhabited island of Utklippan (size of approximately 0.12 sq. km.), situated approximately 9.5 n.m. from the mainland, was given full effect⁷⁹.
- (15) The 1988 Treaty between Denmark and the German Democratic Republic attributed full effect to a number of islands, including the small German island of Greifswalder Oie (which had been recognised as being entitled to full effect in the 1968 Poland / G.D.R. treaty, discussed under item (i)(5) above)⁸⁰.
- (16) In the Muscat Agreement on the Delimitation of the Maritime Boundary between Oman and Pakistan signed in 2000, Sail Rock (Gurab), located just off the Pakistani coastal Astola Island, was used as a basepoint. Despite the fact that Astola Island is small (2 n.m. in length) and uninhabited, Charney & Alexander note that "There is no doubt that Astola Island is an island in the terms of Article 121.1 of the 1982 LOS Convention or that Sail Rock is a feature from which extended maritime claims can be made"⁸¹.
- (17) In the 1999 Agreement between Denmark and the United Kingdom relating to the Maritime Delimitation between the Faroe Islands and the United Kingdom, it appears that various small islands were taken into account, including Sule Skerry (0.01 sq. km., located 30 n.m. to the north of the Scottish mainland), Rona (1.2 sq. km., located 39 n.m. to the north of the Scottish mainland), Sula Sgeir (0.12 sq. km., located 34 n.m. to the north of island of Lewis in the Outer Hebrides) and the Flannan Islands (0.39 sq. km., located 16 n.m. to the west of the island of Lewis)⁸².

4.63 As illustrated by this survey, there are many examples reflected in the practice of States where islands have been given full effect in the drawing of equidistance lines. This practice extends to the treatment of small, uninhabited islands even if they are located at a substantial distance from the coast of the nearest mainland or of a larger island, and is

⁷⁹ *Ibid.*, Vol. II, p. 2080.

⁸⁰ *Ibid.*, p. 2090.

⁸¹ *Ibid.*, Vol. IV, pp. 2812-2813.

⁸² *Ibid.*, pp. 2962-2963.

reflected in agreements between States with adjacent or opposite coasts. Given this pattern of State practice, it follows that there are no grounds for Romania's argument that State practice invariably dictates that an island of the strategic and historical importance of Serpents' Island, located close to and opposite the Ukrainian coast, should not be given effect in delimiting the continental shelf/EEZ boundary between Ukraine and Romania, quite apart from the additional geographic and other relevant circumstances which militate in favour of a boundary substantially at odds with the claim advanced by Romania.

(iii) **Examples Where the Length of the Coasts Was an Important Factor**

4.64 A further salient omission in Romania's discussion of State practice is its failure to refer to examples of State practice when the disproportionality of the lengths of the parties' relevant coasts was taken into account in maritime boundary agreements. As noted by Legault and Hankey:

"Proportionality has a double role. In one role, a comparison of the coastal and areal ratios is sometimes used as a test of the equity of a provisional delimitation. In the other role, an assessment of the relative lengths of the coastlines may be one of the factors taken into account in determining the method used to effect the delimitation"⁸³.

4.65 This distinction was set out clearly by the Court in its Judgment in the *Libya/Malta* case⁸⁴. However, as noted by the authors, in State practice "it is difficult to determine with any degree of precision what role it [proportionality] plays in negotiated boundaries"⁸⁵.

4.66 Thus, although proportionality or disproportion appears to have played an implicit role in the Agreement between Italy and Yugoslavia Concerning the Delimitation of the Continental Shelf of the Two Countries of 1968⁸⁶, the 1972 Agreement between Brazil and Uruguay Relating to Maritime Delimitation⁸⁷, and the 1981 Delimitation Convention between

⁸³ L. Legault and B. Hankey, *Method, Oppositeness and Adjacency, and Proportionality in Maritime Boundary Delimitation*, in Charney & Alexander, *op. cit.*, Vol. I, pp. 203-241, at p. 217.

⁸⁴ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 49 at para. 66.

⁸⁵ Legault and Hankey, in Charney & Alexander, *op. cit.*, Vol. I, p. 219.

⁸⁶ Charney & Alexander, Vol. II, p. 1627.

⁸⁷ *Ibid.*, Vol. I, p. 785.

France (Martinique) and Saint Lucia⁸⁸, this can be only be inferred from the circumstances of those agreements.

4.67 However, two examples of State practice where disproportion in coastal lengths played a decisive role in determining the location of the agreed boundary deserve to be cited:

- (1) In the Convention between France and Spain Concerning the Delimitation of the Continental Shelf in the Bay of Biscay of 29 January 1974⁸⁹, the agreed boundary line departs from an equidistant line due to the greater length of the French coastal facade. As discussed by Legault and Hankey, an account published by an advisor to the Spanish negotiating team confirms that the greater length of the French coast was a decisive factor in the delimitation⁹⁰.
- (2) In the 1978 Delimitation Treaty between the Netherlands (Netherlands Antilles) and Venezuela⁹¹, the portion of Venezuela's coast facing the Netherlands Major Antilles was longer than the southern coastal perimeter of the Netherlands islands by a ratio of 7 to 3, and the maritime boundary was thus agreed that allocated to the Netherlands Antilles 56 percent of the maritime area that would have been allocated by strict equidistance. Thus, in this agreement, the parties acknowledged that the disproportionality of the parties' coastal lengths was a determinative factor in the location of the maritime boundary.

D. Conclusions to Be Drawn from State Practice

4.68 In the light of the foregoing discussion, reference to State practice is of limited assistance in determining an equitable delimitation in this case. Each case is unique and a product of its own individual geographic and other facts. This case is no different. It is clear that the basic starting point for delimitation is the geographic context of the particular dispute and the drawing, as a first step in the delimitation process, of a provisional strict equidistance

⁸⁸ *Ibid.*, p. 591.

⁸⁹ *Ibid.*, Vol. II, p. 1719.

⁹⁰ *Ibid.*, pp. 219-220.

⁹¹ *Ibid.*, Vol. I, p. 615.

line. This issue is taken up in Chapter 7. Thereafter, it is necessary to weigh up the relevant circumstances, geographic and others, which characterize this particular case (Chapter 8).

CHAPTER 5

THE DIPLOMATIC HISTORY

Section 1. Introduction

5.1 In its Memorial Romania has set out an account of the historical background to the present dispute, and has also sought to show that Romania and the Soviet Union (and now Ukraine) agreed in 1949 that the Soviet Union/Ukraine had no continental shelf or EEZ rights to the south of the semi-circular 12 nautical mile territorial sea boundary around Serpents' Island to a point lying virtually due east of Serpents' Island.

5.2 In this Chapter, Ukraine will first address the historical background to the dispute and will try to correct some of the inaccuracies in Romania's presentation of the historical circumstances (Section 2). In Sections 3 through 6 Ukraine will show that the 1949 agreement on which Romania relies did not have the effect which Romania claims, and that no subsequent Romanian agreements with the Soviet Union or Ukraine had any such effect. In Section 7 Ukraine will discuss Romania's 1997 notification of its straight baselines to the United Nations, which similarly go to undermine Romania's interpretation of the 1949 agreement. Ukraine will then address the cartographic evidence relied on by Romania in Section 8, which is supplemented by an Appendix to this Chapter in which the individual maps filed by Romania in support of its argument regarding the alleged delimitation around Serpents' Island are discussed individually. Section 9 contains Ukraine's conclusions to this Chapter.

Section 2. Brief Review of Historical Developments

5.3 Throughout its Memorial, Romania complains that it was the victim of a number of political and historical injustices, including the incorporation of Serpents' Island in the territory of the USSR and the establishment of the maritime boundary by the September 1949

Procès Verbal which in its view resulted in Romania losing a maritime area of approximately 70 square kilometers¹. Consequently, Romania argues, it cannot suffer more injustices than it already has, and requests the Court in this case to achieve a solution taking into account "any historical or political prejudice previously inflicted"².

5.4 In light of this request, Romania has somewhat surprisingly dedicated two whole chapters of its Memorial to what it admits are no more than "its own historical frustrations"³. However, as Romania itself admits when it states that it is not asking "for the reversal of prior transactions"⁴, the equitableness of earlier territorial settlements as well as the appreciation of past deeds of sovereign powers are outside the scope of this case.

5.5 Romania devotes a rather long section of Chapter 3 of its Memorial to the period 1700-1939 and particularly to the Russian-Ottoman rivalry in the relevant area and how this affected Serpents' Island⁵, presumably to recall that - at one point in time - Serpents' Island was under its sovereignty. Although Romania's historical account has at least the merit of underscoring the geo-strategic importance of Serpents' Island in the region, it is legally irrelevant.

5.6 The Parties agree that Ukraine's sovereignty over the island is not in question and Romania is not questioning the validity of the 1949 *Procès Verbal* which it recognizes as being one of the relevant agreements between the Parties. Nonetheless, given Romania's distorted version of events, it may be useful to clarify some of the historical background in order to restore the proper balance.

5.7 It should be noted that the relevant historical developments related to the problem of recent maritime delimitation in the Black Sea between Ukraine and Romania started in the 19th century. At the time, neither Ukraine nor Romania existed as independent States and played no active role in international politics. However, the geopolitical struggle which

¹ RM, para. 5.4.
² *Ibid.*, para. 5.19.
³ *Ibid.*, para. 5.16.
⁴ *Ibid.*, para. 5.19.
⁵ *Ibid.*, paras. 3.4-3.19.

developed in the area periodically triggered important changes concerning Ukrainian and Romanian ethnic territories and borders.

5.8 After the Russo-Turkish wars in the early 19th century, Russia obtained title over Bessarabia from the Ottoman Empire through the Bucharest Treaty of Peace of 1812⁶. After the signing of the Treaty of Adrianopole in 1829⁷ Russia assumed control of the Danube Delta and Serpents' Island. This was an important gain as it enabled Russia to control the lower Danube; moreover Southern Bessarabia was mostly ethnically Ukrainian.

5.9 Following its defeat in the Crimean war, Russia ceded Bessarabia to the Ottoman Empire by the Treaty of Paris of 1856⁸ and the Protocol signed in January 1857⁹. By this Protocol, Serpents' Island also passed to the Ottoman Empire. This was the first international agreement which referred to Serpents' Island. It is important to note that according to the Protocol "*that Island is to be considered as an appendage to the Delta of the Danube, and must, in consequence follow its destination*" (emphasis added). This was confirmed in Article III of a further Treaty relating to the Frontier in Bessarabia, the Isle of Serpents and Delta of the Danube, signed at Paris in June 1857¹⁰.

5.10 After Russia's victory in the war with Turkey in 1877-1878, the Ottoman Empire suffered considerable political and territorial losses in the region. Weakened by military defeats and internal crises, the Ottoman Empire was forced to recognize the independence of the Romanian Principality, which emerged on the Southern borders of the Russian Empire and Austro-Hungary as a result of the unification of Moldova and Wallachia. By the Treaty of

⁶ Treaty of Peace between Russia and Turkey, Bucharest, 16(28) May 1812, *Consolidated Treaty Series*, Vol. 62, p. 25.

⁷ Treaty of Peace between Russia and Turkey, Adrianopole, 2(14) September 1829, *Consolidated Treaty Series*, Vol. 80, p. 83.

⁸ General Treaty for the Re-Establishment of Peace between Austria, France, Great Britain, Prussia, Sardinia and Turkey and Russia, Paris 18 (20) March 1856, *Consolidated Treaty Series*, Vol. 114, p. 409.

⁹ 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, *Consolidated Treaty Series*, Vol. 116, p. 155.

¹⁰ 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, *Consolidated Treaty Series*, Vol. 117, p. 59.

Berlin of 13 July 1878¹¹, Russia again obtained title over Bessarabia, while Romania acquired sovereignty over islands in the Danube Delta and Serpents' Island, since it was located in the vicinity of the Delta.

5.11 Up to the beginning of the 20th century, there were no dramatic geopolitical changes involving Bukovyna, since from 1775 it was incorporated into the Austro-Hungarian Empire and ruled by the Habsburgs, first as part of the Ukrainian province of Galicia, and later as a separate crownland.

5.12 It should be noted that immediately after the beginning of World War I, the Russo-Romanian Secret Agreement on Benevolent Neutrality of Romania was concluded on 1 October 1914¹². According to the Agreement, a "population majority principle" was to be a basis for the territorial division of Bukovyna between Russia and Romania upon the defeat of the Austro-Hungarian Empire. During World War I, the Secret Alliance Treaty was signed between France, Italy, Russia and the United Kingdom, on the one hand, and Romania, on the other¹³. According to this Treaty Romania undertook the obligation to declare war on Austro-Hungary. In return, the Allied Powers recognized Romania's rights to annex territories of Bukovyna situated to the South of the river Prut. Hence it was agreed that, should the Austro-Hungarian Empire be defeated, the territory of Bukovyna was to be divided between the Russian Empire and Romania in accordance with the principle of ethnicity.

5.13 It should be noted that, throughout their history, Bessarabia and Bukovyna belonged to various States and consequently have developed as multiethnic entities with Southern Bessarabia and Northern Bukovyna being settled mostly by Ukrainians.

5.14 Taking advantage of the disintegration of the Russian and Austro-Hungarian Empires and the weakness of newly formed Ukrainian States - the Ukrainian People's Republic, the Western Ukrainian People's Republic and the Ukrainian Soviet Republic, Romania, obsessed

¹¹ Treaty between Austro-Hungary, France, Germany, Great Britain, Italy, Russia and Turkey for the Settlement of Affairs in the East, Berlin, 13 July 1878, *Consolidated Treaty Series*, Vol. 153, p. 171.

¹² *Collection of Treaties between Russia and Other States, 1856-1917*, Moscow, State Publishing House of Political Literature, 1952, pp. 426-427.

¹³ *România in Războiul Mondial, 1916-1919*, Vol. 1, București, 1934.

with the idea to create "a Greater Romania - Romania Mare", illegally seized the ethnic Ukrainian territories of Southern Bessarabia and Northern Bukovyna in 1918.

5.15 At the beginning of 1918, in violation of generally recognized rules of international law relating to State succession, and ignoring the right of the Ukrainian population in the Southern part of Bessarabia to self-determination, Romania occupied the entire territory of Bessarabia. Despite the protest of the Government of the Ukrainian People's Republic¹⁴ and the Government of Soviet Russia¹⁵, as successor States of the Russian Empire, Bessarabia was incorporated into Romania's territory as one of its ordinary provinces on 10 December 1918.

5.16 At the end of 1918, Romania occupied Northern Bukovyna thus disregarding the Russo-Romanian Benevolent Neutrality Agreement of 1914 and the Alliance Treaty of 1916 with France, Italy, Russia and the United Kingdom which recognized the rights of Romania only to that part of Bukovyna which was populated by Romanians.

5.17 Moreover, Romania ignored the will and choice of the Ukrainian population of that region, as well as arrangements on Bukovyna reached between representatives of Austro-Hungarian Government and the Ukrainian and Romanian communities in the course of the disintegration of Austro-Hungarian Empire.

¹⁴ Resolution of the Central Rada concerning Annexation of Bessarabia by Romania, 13 April 1918; Note of Protest by Vsevolod Holubovych, the Chairmen of the Council of People's Ministers (of the Ukrainian People's Republic) to the Government of Romania with Regard to Annexation of the Bessarabian territory, April 1918; Note of the Government of the Ukrainian State to the Government of Romania in reply of the Diplomatic Note of the Last of 20 April 1918, sent to the Romanian Government on 5 June 1918: see V.I. Serhiichuk, *Non-consciousness of Ukraine. The World's Attitude toward Ukrainian Statehood: A Look at 1917-1921, with Analysing the Today*, L'viv, "Svichado", 2002, pp. 469-470, 473-476.

¹⁵ A Resolution of the Council of People's Commissars Regarding Rupture of Diplomatic Relations with Romania, 13(26) January 1918; Protest of the Soviet Government against the Annexation of Bessarabia by Romania, 18 April 1918: *Documents of the Foreign Policy of the USSR*, Moscow, 1957, Vol. 1, pp. 89-90, 248-249. A Wireless Message of the People's Commissar for Foreign Affairs of the Russian Soviet Federal Socialist Republic to the Chairman of the Council of Ministers of Romania with the protest against annexation of Bessarabia, 27 November 1918: *Struggle of Working People of Bukovyna for Social and National Liberation and Reunion with Ukrainian SSR, 1917-1945, Documents and Materials*, Chernivtsi, Regional Publishing House, 1958, p. 133.

5.18 On 3 November 1918, the Ukrainian People's Assembly of Bukovyna adopted a Declaration to unite Northern Bukovyna with the Western Ukrainian People's Republic, a newly proclaimed Ukrainian State¹⁶. On 5 November 1918, the Ukrainian People's Council of Bukovyna adopted an Act establishing its authority over Northern Bukovyna¹⁷. On 6 November, a representative of the Austro-Hungarian Central Government signed a Protocol transferring all powers in Bukovyna to representatives of the Ukrainian People's Council and Romanian People's Council¹⁸. On 6 November 1918, the Chairmen of the Ukrainian and Romanian Councils issued a Joint Declaration on the supremacy of their authority in the respective parts of Bukovyna until the peaceful territorial settlement¹⁹.

5.19 However, on 11 November 1918, after suppressing armed Ukrainian resistance, Romanian troops seized Chernivtsi, an important town in Bukovyna, and occupied its entire territory. To justify its occupation, Romanian authorities hastily convened the Central Congress of Bukovyna which, on 28 November 1918, declared the unification of Bukovyna with Romania. Despite Romania's claims, the peace conference at Saint Germain on 10 September 1919 recognized Romania's right only to the part of Bukovyna settled by Romanians. But later, on 10 August 1920, the Peace Conference at Sèvres decided to cede all Bukovyna to Romania. The Governments of the Western Ukrainian People's Republic, the Ukrainian People's Republic and the Ukrainian SSR protested this action²⁰.

5.20 On 28 October 1920, Britain, France, Italy and Japan, on the one hand, and Romania, on the other, signed the so-called Paris Treaty which recognized the sovereignty of Romania over Bessarabia. This triggered resolute protests from Soviet Ukraine and Russia. As early as

¹⁶ People's Viche of Bukovyna, 1918-1933, Documents and Papers of the Regional Scientific and Practical Conference devoted to the 75th anniversary of the Bukovyna People's Viche of 18 November 1918, Chernivtsi: "Prut" Publishing House, 1994, pp. 116-117.

¹⁷ *Ibid.*, pp. 117-120.

¹⁸ *Ibid.*, pp. 120-121.

¹⁹ *Ibid.*, pp. 121-123.

²⁰ Note of the Government of the Ukrainian Soviet Socialist Republic to the Minister of Foreign Affairs of Romania, 1 May 1919, Joint Note of the Government of the Russian Soviet Federal Socialist Republic and the Ukrainian Soviet Socialist Republic to the Minister of Foreign Affairs of Romania, 1 May 1919: *Struggle of Working People of Bukovyna for Social and National Liberation and Reunion with Ukrainian SSR, 1917-1941, Document and Materials*, Chernivtsi, Regional Publishing House, 1958, pp. 172-175.

2 November 1920, the heads of the Russian and Ukrainian foreign services, in a joint radiotelegram to the parties of the Paris Treaty, stated the following:

"Soviet Republics of Russia and Ukraine declare that they cannot recognize as legally binding the agreement concerning Bessarabia as it was concluded without their participation"²¹.

5.21 Following the Romanian occupation of Southern Bessarabia and Northern Bukovyna, an intense effort was made to denationalize the Ukrainian population. The Ukrainian school system was dismantled and the study of Romanian became compulsory. Ukrainian cultural and civic life was restricted. The Ukrainian church was persecuted by the introduction of the Romanian language into the liturgy. When Romania became an authoritarian State in 1938 the persecution of the Ukrainians grew even worse.

5.22 Romania's repressive anti-Ukrainian policy accompanied by its obstinate refusal to negotiate and reach a fair and equitable territorial settlement with Ukraine and Russia, and later with the Soviet Union, resulted in further tension and stalemate in relations. As a result, there was no legally established State border between the USSR and Romania: before 1940 their territories were divided by a provisional demarcation line.

5.23 Geopolitical changes that took place in Europe in the late 1930s and early 1940s permitted the Soviet Union to restore Ukraine's legitimate rights to Northern Bukovyna and Southern Bessarabia. On the demand of the Soviet Union, Romania withdrew from the occupied territories without any armed resistance in the summer of 1940. According to the exchange of notes between the USSR and Romania in June 1940²², the territories of Northern Bukovyna and Southern Bessarabia were returned to the Soviet Union and became parts of the Ukrainian and Moldavian republics. On the basis of a law adopted by the Supreme Soviet of the USSR on 2 August 1940²³, Northern Bukovyna and the Khotyn, Akkerman and Izmail districts of Bessarabia predominantly inhabited by Ukrainians were united with Ukraine. The rest of Bessarabia was incorporated into a Moldavian Autonomous SSR, which subsequently

²¹ *Documents of the Foreign Policy of the USSR*, Moscow, 1959, p. 312.

²² Annex 21, Vol. 3.

²³ *Collection of Valid Treaties, Agreements and Conventions Concluded by the USSR with Foreign States*, Issue X, Moscow: State Publishing House of Political Literature, 1958, pp. 229-230.

was granted the status of a union republic. After that, a border between Ukraine and Moldavia was established on the basis of the joint submission of the Ukrainian SSR and the Moldavian SSR that was ratified by a decree of the Presidium of the Supreme Soviet of the USSR on 4 November 1940²⁴.

5.24 At the same time, the USSR and Romania started to establish the State border along its Ukrainian and Moldavian sections. It should be emphasized in this context that neither the so-called Molotov-Ribbentrop Pact nor the Secret Additional Protocol concluded on 23 August 1939 between the USSR and Germany contained any provisions establishing the territorial settlement concerning the State border between the USSR and Romania.

5.25 The official title of the Molotov-Ribbentrop Pact is the "Treaty on Non-Aggression between the USSR and Germany"²⁵. It contained no provisions concerning territorial issues and was aimed against third States. The Treaty became void after Germany's assault upon the USSR on 22 June 1941.

5.26 The Additional Protocol²⁶ was legally null and void from the moment of its signing due to the arbitral provisions concerning Estonia, Latvia, Lithuania, Finland and Poland. Although Romania was not directly mentioned in this document, Article 3 referred to the USSR's interest regarding Bessarabia. It is important to stress that the interest of the USSR regarding Bessarabia did not arise on the basis of the Protocol; it had existed long before the Protocol was concluded. So, the invalidity of the Protocol from the moment of its signature has no effect whatsoever on the issues relating to the territorial settlement between the USSR and Romania.

²⁴ *Molotov-Ribbentrop Pact and its Consequences for Bessarabia, Collection of Documents*, Chisinau, Universitas, 1991, pp. 107-110.

²⁵ Treaty of Non-Aggression between Germany and the Soviet Union entered into in Moscow, 23 August 1939, *Foreign Policy of the USSR, Collection of Documents*, Vol. IV (1935-June 1941), Moscow, 1946, pp. 442-443.

²⁶ Secret Additional Protocol to the Treaty on Non-Aggression between the USSR and Germany, 23 August 1939, *Molotov-Ribbentrop Pact and its Consequences for Bessarabia, Collection of Documents*, Chisinau, Universitas, 1991, p. 8.

5.27 On the eve of Nazi Germany's attack on the USSR on 22 June 1941, the establishment of the Soviet-Romanian State border had been almost completed, but some border issues remained unsettled, relating mainly to the islands in the Danube Delta, including Serpents' Island.

5.28 Romania joined Nazi Germany in the war of aggression against the USSR, and in 1941-1944 it occupied considerable parts of Ukrainian territory, including South Bessarabia and Northern Bukovyna²⁷. During the Romanian occupation, Ukraine suffered great human and material losses, particularly because of the war crimes committed by Romanian military authorities on occupied Ukrainian territory²⁸.

5.29 In its Memorial, Romania complains that, after 23 August 1944, it "was occupied by Soviet troops"²⁹, and 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"³⁰. However, it should be recalled in this respect that Romania was occupied during and after the World War II as an aggressor State and that this occupation was legitimate. Even though in its Memorial Romania endeavours to reassure the Court that it puts great value in "the need for order and stability of the international community"³¹, this is not the first time that Romania has publicly voiced its discontent at the earlier territorial settlements, and Romanian officials and media have made prejudicial and propagandist comments aspiring to a "Greater Romania"³².

²⁷ See USSR 152-154, 237, 242, 295: "The Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg", Part 6, 2 February 1946-13 February 1948, H.M.S.O., London, 1946, pp. 272-281. The Nuremberg legal proceedings against main German war criminals, Moscow, 1958, Vol. 2, pp. 582 and 689.

²⁸ Odesa in the Great Patriotic War of the Soviet Union: the collection of documents and material, Odesa, 1950, Vol. 2, p. 47; *Pravda*, 10 May 1944 and 17, 18, 19 May 1945. Chisinau, *Moldavian SSR in the Great Patriotic War of the Soviet Union*, 1970, pp. 166-168, 172-176, 203-204. A.A. Shevyakov, *Relations between Soviet Union and Rōmania, [sic] 1944-1949*, Moscow, Science, 1985, pp. 10-20.

²⁹ RM, para. 5.5.

³⁰ RM, para. 5.8.

³¹ RM, para. 5.16.

³² Declaration of the Romanian Parliament on the Molotov-Ribbentrop Pact, 24 June 1991, and the Declaration of the Romanian Government on the Referendum in Ukraine dated 29 November and 1 December 1991; and Statements to the Romanian Senate, 4 December 1995 (Melescanu), Annex 22, Vol. 3.

5.30 In this case the Court cannot revisit Romania's earlier grudges. It was for the Powers negotiating the Paris Peace Treaty of 1947 to decide what reparations Romania - as an aggressor State in World War II - should make after the war. The Court should not be expected to review and pass judgment on the history of the region in its determination of an equitable solution to the dispute which the Court has jurisdiction to hear, nor can it somehow grant atonement for wrongs allegedly committed in the past and ignore treaties and conventions in force between the Parties because - in Romania's view - such treaties may "constitute a basis for further injustice"³³. In any event, Romania has disclaimed any attempt to undo past settlements. Moreover, all these treaties and conventions, being legitimate and legally binding, remedied only to some extent the injustices suffered by Ukraine in the past.

Section 3. Establishment of the Border Between the Soviet Union and Romania, and the Allocation of Serpents' Island to the Soviet Union, 1947-1948

5.31 As mentioned above, before 1940 there was no legally established State border between the USSR and Romania, and their territories were divided by a provisional demarcation line. The Exchange of Notes concluded in 1940 between the USSR and Romania³⁴ provided a legal basis for various territorial changes affecting Ukrainian territory in areas previously occupied by Romania. But then, in the summer of 1941 Nazi Germany attacked the USSR, and, as noted in Section 2 above, Romania allied itself with Germany and again occupied parts of Ukrainian territory. That occupation came to an end in 1944, and a permanent settlement of the USSR-Romania State border was agreed in the Paris Peace Treaty of 1947³⁵.

5.32 An element in the boundary settlement agreed between Romania and the Soviet Union after the Second World War involved agreement in 1949 on part of a 12-mile arc around Serpents' Island. Romania contends that:

³³ RM, para. 5.19.

³⁴ See para. 5.23, above. Annex 21, Vol. 3.

³⁵ See below, paras. 5.34-5.36.

- (a) the part of the arc in question extended anti-clockwise around Serpents' Island from a point approximately south west of the island to a point approximately due east of the island (see illustration in Figure 5-1); and
- (b) the settlement agreed in 1949 made that part of the 12-mile arc the Soviet Union's all-purpose maritime boundary to the south of which the Soviet Union had agreed in 1949 that it could have no maritime claims, in particular claims to a continental shelf and an EEZ.

In both respects Romania's contention is wrong.

5.33 In this Chapter Ukraine will show that over the past half century the development of Soviet-Romanian (and later Ukrainian-Romanian) arrangements reveal a clear and consistent pattern based on the initial agreement that Serpents' Island was part of the territory of the Soviet Union. The main features of that pattern (which is examined in detail in para. 5.34 *et seq.*) will be shown to be the following:

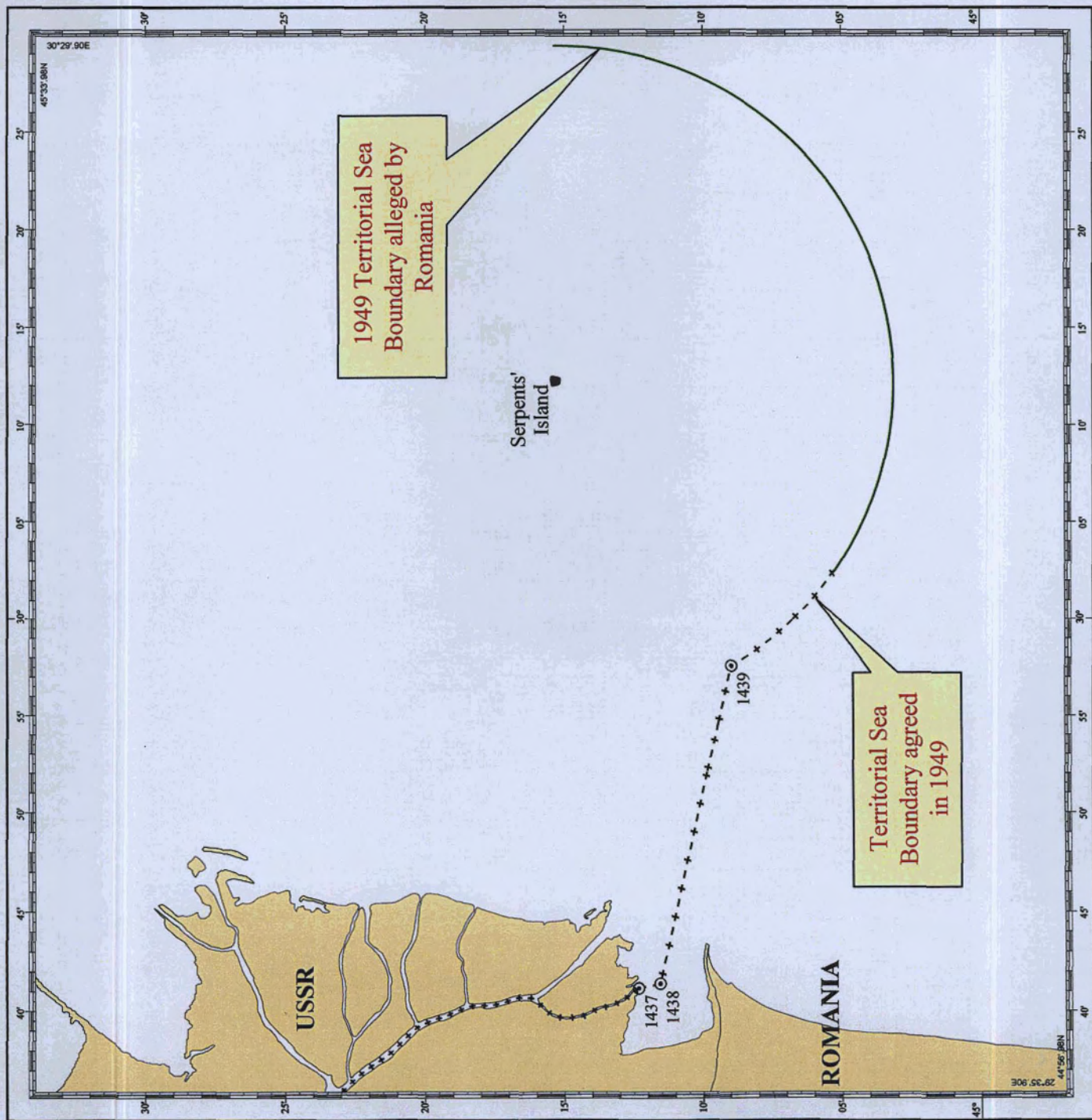
- (i) In 1949 Romania and the Soviet Union made a start on agreeing their maritime boundary beyond the mouth of the Danube by agreeing a *general Procès Verbal* describing their agreed line. At a time when Romania claimed only a 6 mile territorial sea while the Soviet Union claimed 12 miles, their agreement could only be limited, but it did establish the starting point of the boundary in the Danube Delta (referred to in the *Procès Verbal* as Point 1437) and the first two points out to sea (referred to as Points 1438 and 1439), the latter of which took the boundary line out to the point where it met the outer limit of the Soviet Union's 12 nm territorial sea around Serpents' Island; the line was also agreed to go a further short, but verbally unspecified, distance following part of the outer limit of the arc delimiting the Soviet Union's 12 n.m. territorial sea around Serpents' Island.

- (ii) But only the first 6 n.m. of this agreed line could be a proper State boundary between the two States' areas of sovereignty (*i.e.*, territorial waters). Beyond that 6 n.m. limit the line agreed was no more than the outer limit of the Soviet Union's territorial sea - for the first 2 n.m. beyond the 6 n.m. limit the line represented its territorial sea limit calculated from its mainland coast at and to the north of the mouth of the Danube, and then for a further 5.1 n.m. the line consisted of part of the 12 mile arc of territorial sea around Serpents' Island.

- (iii) Although at this time (1949) Romania claimed only a 6 n.m. territorial sea, Romania moved to a 12 n.m. territorial sea limit in 1951. That possibility would seem to have been in mind already in 1949 since it appears to have determined the distance to which the agreed line followed the Soviet Union's 12 n.m. territorial sea arc around Serpents' Island - in effect, as indicated on a map (identified as Map 134: see Figure 5-2) annexed to the general 1949 *Procès Verbal*, the short distance beyond Point 1439 to the point at which Romania's prospective 12 n.m. territorial sea would intersect with the 12 n.m. arc around Serpents' Island. But since Romania had not actually legislated for its 12 n.m. claim it was not possible to be precise about its consequences, and as a result the exact prospective point of intersection could not be precisely identified and was left open until it could be fixed later.

- (iv) Once Romania had moved definitively to a 12 n.m. territorial sea in the 1950s, it was possible for the situation to evolve further. This it did with Romania's acceptance in a 1963 *Procès Verbal* that the 12 n.m. arc around Serpents' Island was the arc defining the limit of the Soviet Union's "territorial sea" around Serpents' Island.

- (v) In 1997 the conclusion by Ukraine and Romania of the Treaty on Relations of Good Neighbourliness and Cooperation, Article 2.2, effectively put an end to any dispute about their common land boundary by the reaffirmation of "the existing border". The final stage in agreeing the common boundary between their sovereign territories was then reached in 2003 with the conclusion of the Treaty on the Ukrainian-Romanian State Border Regime, in which the two States accepted that the intersection of their



Territorial Sea Boundary Agreed in 1949 Contrasted to the Boundary that Romania Alleges Was Agreed in 1949

Figure 5-1

КАРТА
ГОСУДАРСТВЕННОЙ ГРАНИЦЫ МЕЖДУ СОЮЗОМ
СОВЕТСКИХ СОЦИАЛИСТИЧЕСКИХ РЕСПУБЛИК
И РУМЫНСКОЙ НАРОДНОЙ РЕСПУБЛИКОЙ

Лист
 Planşa **134**
 Пограничные знаки
 Semnele de frontieră
 от dela № 1438 до până la № 1439

HARTA
FRONTIEREI DE STAT ÎNTRE UNIUNEA
REPUBLICILOR SOVIETICE SOCIALISTE
ŞI REPUBLICA POPULARĂ ROMÂNĂ



Смешанная Советско-Румынская Комиссия
 по демаркации государственной границы
 между СССР и РНР

СОВЕТСКАЯ ДЕЛЕГАЦИЯ:
 Председатель Советник Занкин А. И.
 Генерал-майор Казакевич А. В.
 Генерал-майор Куцов Я. А.
 Члены: Инженер-капитан 1 ранга Шинков А. В.
 Капитан 3 ранга Тельный Я. Я.

1:150 000

Букарест 1949 г.
 Выходит 1949

Comisiunea Mixtă Sovieto-Română
 pentru demarcarea frontierei de Stat
 între U.R.S.S. și R.P.R.

ДЕЛЕГАȚIA ROMÂNĂ:
 Președinte General Locotenent Comișel P.
 General Maior Burcă M.
 Lt. Colonel Popescu I.
 Membri: Căpitan Popescu N.
 Roman L.

Map 134 Annexed to the 1949 Procès Verbal

Figure 5-2

respective territorial sea limits on the 12 n.m. arc around Serpents' Island, which hitherto had not been specified but only indicated in a general way, was now fixed at the point the coordinates of which they had agreed and which lay only a short distance along the 12 n.m. arc around Serpents' Island; they further agreed that their territorial sea boundary went "up to", *i.e.*, not further than, that point of intersection.

- (vi) In concluding their various agreements from 1949 onwards the Parties were only concerned with what was eventually to be their complete territorial sea boundary in that area, and were not concerned with their further continental shelf or EEZ boundary. This they confirmed by acknowledging in Article 2.2 of the 1997 Treaty that the delimitation of their continental shelf and EEZ boundaries still remained to be settled: this was to be done through negotiations on the basis of principles and procedures set out in what became known as the 1997 Exchange of Letters. In effect, having definitively fixed the full length of their common land and territorial sea boundary and specified the coordinates of its final easterly point, they put that on one side as already settled and moved on to the search for a settlement of their continental shelf and EEZ boundary - a search which they now pursue in the present proceedings.

**A. Treaty of Peace between Romania and the Allied and Associated Powers
1947 ("the 1947 Peace Treaty")**

5.34 The 1947 Peace Treaty³⁶ was concluded between the Allied and Associated Powers (which included the Ukrainian Soviet Socialist Republic) and Romania. It made provision regarding Romania's frontiers in Article 1, which stated:

"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.

³⁶ 42 *UNTS* p. 3; Annex 23, Vol. 3.

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."

5.35 Neither the 1947 Peace Treaty, nor the 1940 Soviet-Romanian Agreement to which it referred, made any mention of Serpents' Island. Both were concerned essentially with the mainland frontiers of Romania. The Peace Treaty was, indeed, not a special agreement on borders at all, but simply included border provisions along with numerous other provisions appropriate to a general peace treaty: it accordingly provided only a general outline of the border with Romania.

5.36 The map annexed to the 1947 Peace Treaty was a very small scale map (1:1,500,000). A copy has been provided by Romania at RM A 10 in its Map Atlas. Consistently with its essentially mainland purpose, that copy of the map shows the land frontiers of Romania outlined in a thick green line - a form of marking which in practice made exact identification of the borderline impossible, especially with regard to areas not previously defined, including the area of the Danube Delta. In any event, there is no continuation of that frontier out to sea, even for the normal distance of the territorial sea. Serpents' Island is shown on the map but, contrary to the statement in Romania's Memorial, the map does not "show [...] Serpents' Island as forming part of Romania"³⁷. There is no line marked in the sea carrying any such indication, nor is any other indication to that effect discernible from the copy of the map in Romania's Map Atlas, or from copies of the map kept by the UN Secretariat and the Public Records Office, London (a reproduction of which is included as Figure 5-3).

B. Protocol of 4 February 1948 to Specify the Line of the State Boundary Between the People's Republic of Romania and the Union of the Soviet Socialist Republics ("the 1948 Protocol")

5.37 The frontier provisions of the 1947 Peace Treaty were in very general terms, and the green line by which the mainland frontier was depicted was quite crudely drawn. Given the consequential boundary uncertainties, the Soviet Union and Romania concluded the 1948

³⁷ RM, para. 3.27.

КАРТА РУМЫНИИ



**Map Annexed to the
1947 Peace Treaty**

Figure 5-3

Protocol³⁸ by which the two States bilaterally clarified the provisions of the Peace Treaty regarding their common land frontier. Paragraph 1 of the Protocol provided:

"The State border between the USSR and Romania shown on maps enclosed to this Protocol (Appendices I and II) shall pass as follows:

a) According to Appendix I:

...

b) According to Appendix II:

Along the river of Danube from Pardina to the Black Sea, leaving islands of Malyi Tataru, Malyi and Velykyi Daller, Maican and Limba on the side of the USSR, and the island of Big Tataru, Cernovca and Babia on the side of Romania;

The island of Zmiinyi/Şerpilor/ located in the Black Sea eastward of the mouth of Danube shall become a part of the USSR."

5.38 The maps which are referred to in the 1948 Protocol as Annexes I and II are not attached to the text of the Protocol supplied by Romania: they are attached to this Counter-Memorial under Annex 24, Volume 3. Annex I is principally a map showing the entirety of Romania's land boundaries, but it also depicts Serpents' Island off the mouth of the Danube, with "(СССР)" [*i.e.*, USSR] written beneath it. Annex II shows the mainland frontier along the Danube from Pardina to the Black Sea, and, in a separate box insert at the bottom right hand corner, depicts Serpents' Island (named in both languages) with the subscription "СССР" [*i.e.*, USSR]. The Annex II map depicts no border seaward of the coastline of the Danube Delta, and the box insert shows no boundary or arc around Serpents' Island. Although paragraph 1 of the Protocol describes the border by reference to the maps at Annexes I and II, paragraph 2 states that "[i]n case of difference between the description of the border in the text and the one in the maps, the description in the text shall be considered as the accurate one".

5.39 By a note dated 28 July 1995 Romania purported to declare the 1948 Protocol invalid³⁹. Romania contended that the Protocol had been concluded under duress applied by the former USSR, that it exceeded the scope of the 1947 Peace Treaty, and that it was never

³⁸ Text at Annex 24, Vol. 3.

³⁹ *Note verbale* No. H(01)/2805 dated 28 July 1985, Annex 25, Vol. 3.

ratified by the Romanian Parliament. None of these contentions has any merit: Romania has adduced no evidence of the alleged duress (and cannot do so since there was none); the 1948 Protocol did not exceed the scope of the 1947 Peace Treaty, but simply clarified the border as imprecisely determined by that Treaty; and the provisions of the Protocol were substantially repeated in the USSR-Romania 1949 State Border Treaty⁴⁰ and in the USSR-Romania 1961 Border Regime Treaty⁴¹, both of which were ratified by the Romanian Parliament. Moreover, a 1948 treaty cannot be validly denounced in 1995, some 47 years later. Ukraine has never accepted the validity of Romania's purported denunciation. Despite repeated requests from Ukraine, Romania has declined to withdraw its Note of 28 July 1995⁴². Yet Romania has invoked this Protocol in its Memorial as if it were still in force⁴³, and has expressly stated that it was not challenging past settlements⁴⁴.

C. *Procès Verbal* of 23 May 1948 ("the 1948 *Procès Verbal*")

5.40 By the 1948 *Procès Verbal*, signed on Serpents' Island itself, the two States acknowledged that "the formalities of the handing over of the island have been fulfilled"⁴⁵.

Section 4. The 1949 State Border Line Delimitation and Demarcation

A. *Procès Verbal* Signed on 27 September 1949 ("the General 1949 *Procès Verbal*")

5.41 Paragraph 3 of the 1948 Protocol provided for the establishment of a Joint Soviet-Romanian Border Commission for the demarcation of the border in accordance with paragraph 1 of the Protocol. This Joint Commission performed its demarcation task in 1948-1949. It recorded its work in the general 1949 *Procès Verbal*, which consisted of three

⁴⁰ See below, paras. 5.78 *et seq.*

⁴¹ See below, paras. 5.84 *et seq.* Although in 1993 Romania also purported to denounce this 1961 Border Regime Treaty, that denunciation, even if valid (which it was not), would still have left the provisions of the 1949 State Border Treaty unaffected, and would not have affected the established State border itself.

⁴² See *Note Verbale* from the Ukrainian Foreign Ministry to the Romanian Foreign Ministry No. 15-3915/015 of 7 November 1995, Annex 26, Vol. 3.

⁴³ See, for example, RM, paras. 3.28-3.32.

⁴⁴ RM, para. 5.19.

⁴⁵ Annex 27, Vol. 3.

volumes, together with six annexed volumes of individual *Procès Verbaux* recording the details of the border signs at each particular border point. In accordance with the final substantive provision of the *Procès Verbal*, it was to be approved by the Governments of the USSR and Romania, and was to enter into force immediately after its signature on 27 September 1949.

5.42 The final pages of Volume III⁴⁶ of the general 1949 *Procès Verbal* record the fixing of the last three, most easterly, points along the State border, namely Points (or sometimes, border sign numbers) 1437, 1438 and 1439.

5.43 Point 1437 was located in the Musuna (Musura) channel of the Danube Delta, marked by concrete pillars on both the east and west shores of the channel. From that location the *Procès Verbal* stipulates that

"the boundary passes from boundary mark No. 1437 along the middle of Musuna (Musura) branch south-south-eastward to the mouth of Musuna (Musura) branch,... to boundary mark No. 1438 (buoy).

The boundary mark No. 1438 (buoy) is placed on water at the turning point of boundary line which passes in the Black Sea.

...

From state boundary mark No. 1438 (buoy), the state boundary in the Black Sea passes in the straight line in azimuth of 102°30',0 to state boundary mark No. 1439 (pole).

The state boundary mark No. 1439 (pole) is placed on water in a turning point of state boundary line which passes in the Black Sea, at the intersection of a direct line, which goes from state boundary mark No. 1438 (buoy) in azimuth 102°30',0, with the external edge of 12-mile maritime boundary strip of the USSR around of Zmiinyi Island.

...

⁴⁶

Annex 28, Vol. 3.

The state boundary from state boundary mark No. 1439 (pole) passes along external line of a 12-mile maritime boundary strip, leaving Zmiinyi Island on the side of the USSR."

5.44 In brief, therefore, the seaward part of the boundary followed a line running from point 1437 in the Musuna (Musura) channel of the mouth of the Danube, to a buoy at point 1438, then to a beacon at point 1439 lying on the Soviet Union's 12 mile territorial sea arc around Serpents' Island, and then for an unspecified distance along that arc. That agreed line was depicted on a map annexed to the *Procès Verbal* (map sheet 134): that map is discussed at paragraphs 5.48 to 5.50, below, and a copy is at Figure 5-2.

5.45 Although Romania complains at what it claims to perceive as certain injustices in the agreed line⁴⁷, the facts are that the line was part of the immediate post-war settlement in which Romania was on the side of Nazi Germany, that States can in negotiating agreements take into account or disregard such factors as they consider appropriate, that approaches to maritime delimitation were in 1949 less highly developed than they are today, that the line was an *agreed* line, and that Romania has expressly disavowed any intention of challenging past settlements⁴⁸.

5.46 It may be noted that:

- (i) the general 1949 *Procès Verbal* refers to the 12 mile arc as "the exterior margin of the Soviet marine boundary zone, of 12 miles" and (a few lines later) "the exterior margin of the marine boundary zone, of 12 miles"⁴⁹ - it seems that, because of its own lesser claim to a 6 mile territorial sea, Romania was at this time inhibited from referring to this purely Soviet maritime limit as a "territorial sea" limit and it was instead referred to as a "Soviet marine zone", until Romania itself adopted a 12 n.m. limit for its own territorial sea⁵⁰;

⁴⁷ RM, paras. 5.4, 5.16.

⁴⁸ RM, para. 5.19.

⁴⁹ Annex 28, Vol. 3.

⁵⁰ See below, para. 5.82.

- (ii) the general 1949 *Procès Verbal* did not in words stipulate how far around the 12 mile arc the boundary was to run; and
- (iii) the general 1949 *Procès Verbal* does not give any reason for the change of direction of the boundary at Point 1438, or for the selection of the particular azimuth which the boundary was to follow from Point 1438 to Point 1439: it thus offers no explanation why Point 1439 was located precisely where it was on the 12 mile arc around Serpents' Island (and not further to the north west or the south east).

5.47 At this time, however, Romania was contemplating moving to a 12 n.m. territorial sea limit (which it did in 1951)⁵¹, and it is noteworthy that not only was Point 1439 located on the 12 n.m. arc around Serpents' Island but also that the boundary was depicted on the annexed map sheet 134⁵² at approximately the point at which that prospective Romanian 12 n.m. limit extending seawards from the Romanian coast would intersect with the Soviet Union's 12 n.m. arc around Serpents' Island, at a point some 12 n.m. from Romania's baselines. That explanation is borne out by three facts.

- (i) First, when in 1997 Romania notified the United Nations of its straight baselines it accompanied that notification with a chart: a copy is attached as Figure 5-4, with the relevant portion enlarged at Figure 5-5. That chart depicts a partial arc joining points numbered "1'" and "2'", each on the 12 nm arc around Serpents' Island: the coordinates of Point 1' are 45°08'51.2"N, 29°57'39.4"E, which is remarkably close to the coordinates of Point 1439 (at 45°08'59.21"N, 29°57'39.42"E).
- (ii) The second fact is that when in 2003 Ukraine and Romania agreed upon the terminal point of their territorial sea boundary, they agreed that the boundary would continue from Point 1439 up to the point of 45°05'21"N, 30°02'27"E, representing the point at which their common territorial sea boundary would end: again this latter point is remarkably close to the location of Point 2' on the straight baseline chart

⁵¹ See below, para. 5.82.

⁵² See below, para. 5.48.

(45°04'31.4"N, 30°02'13.0"E). Given that in 1949 the point of intersection of the prospective 12 n.m. territorial sea limit and the 12 n.m. arc around Serpents' Island could only be calculated approximately, the likelihood that Point 2' was intended to represent such a point of intersection is very strong.

- (iii) Romania's Memorial confirms the close relationship between the end point of the line depicted on the 1949 annexed map and the point of intersection of Romania's and the Soviet Union's 12 n.m. territorial seas⁵³.

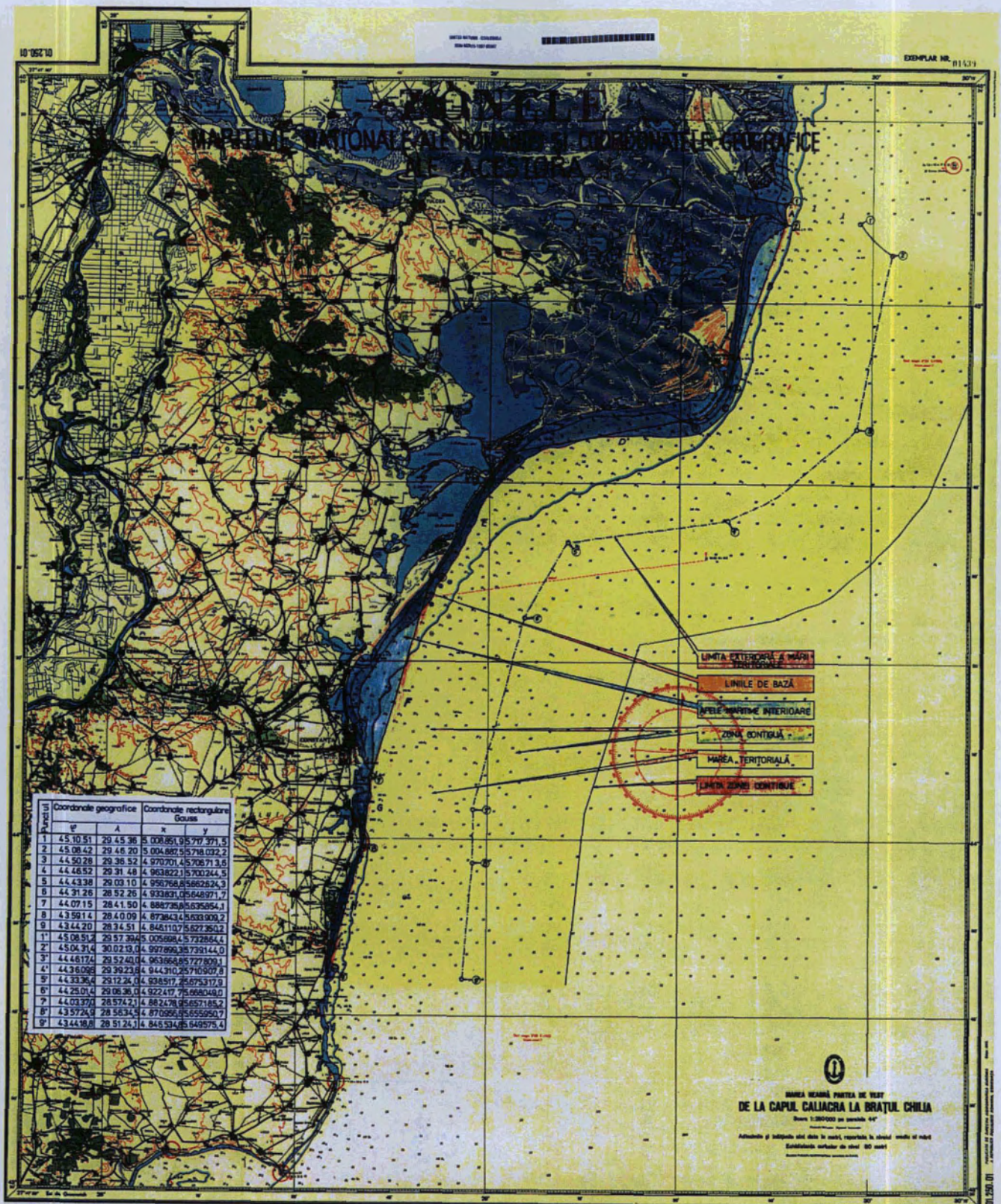
5.48 The general 1949 *Procès Verbal* stated that to it there "are annexed: 1. The maps of State border, between the USSR and the PRR, at scale 1:25,000. ..." ⁵⁴. This appears to refer to maps prepared by the Joint Soviet-Romanian Commission for the Demarcation of the State Border between the Union of Soviet Socialist Republics and the People's Republic of Romania. No map at that scale for the maritime sector of the boundary has been provided by Romania. Instead, Romania has provided a copy of a map sheet numbered "134" apparently prepared by the Joint Demarcation Commission, and depicting the State boundary from Point 1438 to Point 1439⁵⁵. This map, however, is at a scale of 1:150,000, not 1:25,000 as described in the general 1949 *Procès Verbal*. It seems, nevertheless, that this map sheet numbered 134 is, as Romania acknowledges, the map intended to be referred to in the general 1949 *Procès Verbal* as covering this sector of the border, the change in scale probably being attributable to the change from land boundary to sea boundary where distances are larger and surface detail much less. Given the importance of this map as the only map annexed to a boundary agreement between the Parties and depicting the agreed boundary, it is convenient to include a further copy of it in this Counter-Memorial as Figure 5-6.

5.49 This map sheet 134 appears to show, in dark blue, a three mile band of territorial sea along the mainland coast and around Serpents' Island, the boundary between points 1438 and 1439 (which is marked in manuscript as being 11.7 miles from point 1438), and a

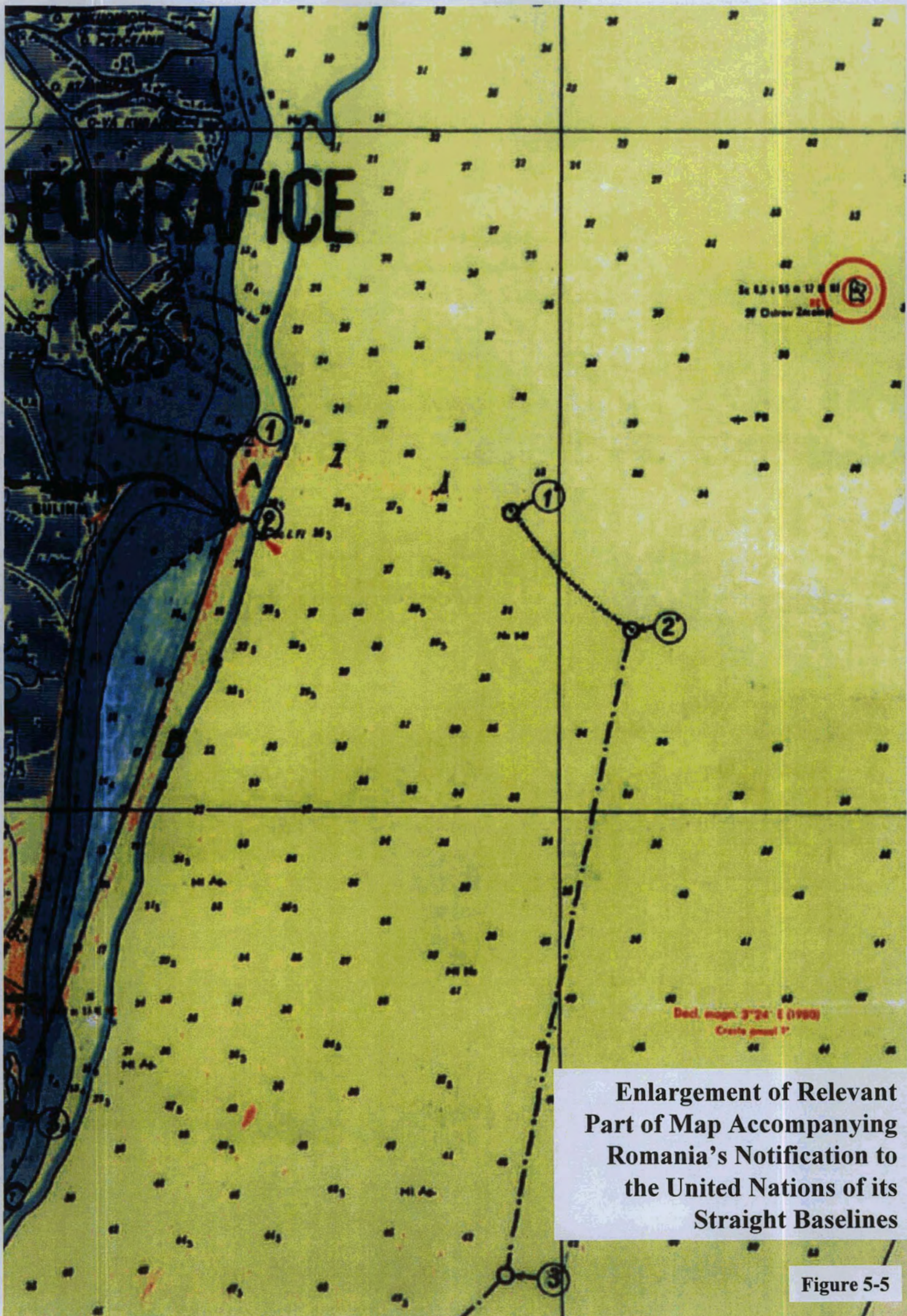
⁵³ See RM Figure 24 at p. 202.

⁵⁴ Annex RM 13, bottom of penultimate page and top of final page.

⁵⁵ Map RM A 11 in Romania's Map Atlas.



Map Accompanying Romania's
Notification to the United Nations
of its Straight Baselines



Enlargement of Relevant Part of Map Accompanying Romania's Notification to the United Nations of its Straight Baselines

Figure 5-5

КАРТА
ГОСУДАРСТВЕННОЙ ГРАНИЦЫ МЕЖДУ СОЮЗОМ
СОВЕТСКИХ СОЦИАЛИСТИЧЕСКИХ РЕСПУБЛИК
И РУМЫНСКОЙ НАРОДНОЙ РЕСПУБЛИКОЙ

Лист 134
Planşa
Пограничные знаки
Semnele de frontieră
от № 1438 **до** № 1439
dela № 1438 **până la** № 1439

HARTA
FRONTIEREI DE STAT ÎNTRE UNIUNEA
REPUBLICILOR SOVIETICE SOCIALISTE
ŞI REPUBLICA POPULARĂ ROMÂNĂ



Смешанная Советско-Румынская Комиссия
по демаркации государственной границы
между СССР и РНР

СОВЕТСКАЯ ДЕЛЕГАЦИЯ:
Председатель Советник Залкин А. И.
 Генерал-майор Казикоич Д. В.
Члены: Генерал-майор Куцее Я. А.
 Инженер-капитан 1 ранга Шинков А. В.
 Капитан 3 ранга Тельный Я. Я.

1:150 000

Букарест 1949 г.
 Визарест 1949

Comisiunea Mixtă Sovieto-Română
pentru demarcarea frontierei de Stat
între U.R.S.S. şi R.P.R.

DELEGAȚIA ROMÂNĂ:
Preşedinte General Locotenent Comișel P.
 General Major Burec M.
Мембри: Lt. Colonei Popescu I.
 Căpitan Popescu N.
 Roman L.

Map 134 Annexed to the 1949 Procès Verbal

Figure 5-6

continuation of the boundary beyond Point 1439 around part of the arc around Serpents' Island (which is marked in manuscript as being 12 miles distant from the island).

5.50 It is to be noted that, while the mainland coast and its accompanying territorial sea are marked right up to the bottom edge of the map, the 12 n.m. arc around Serpents' Island does not go as far as the edge of the map (as already noted⁵⁶ the arc's terminal point is approximately at the point at which Romania's 12 n.m. territorial sea intersects with the Soviet Union's 12 n.m. territorial sea arc around Serpents' Island). It cannot therefore be said - as Romania argues⁵⁷ - that the only reason why the arc is only partially depicted on this map is simply that the depiction had reached the edge of the map: the arc could have been depicted further if that had been intended, just as the mainland has been depicted right to the edge of the map; or the fact that the line was to continue could have been indicated by an arrow pointing in the desired direction. But neither course was adopted. Instead the depiction of the arc was deliberately stopped after it had covered only approximately 22° of the arc.

B. The Individual *Procès Verbaux* for Points 1438 and 1439

5.51 In addition to the general 1949 *Procès Verbal* for the whole boundary, individual *Procès Verbaux* were signed as part of the same process for each separate Point along the boundary, and these individual *Procès Verbaux* were set out in 6 volumes annexed to the general 1949 *Procès Verbal*.

5.52 The individual *Procès Verbal* for Point 1438⁵⁸ describes in a little greater detail than does the general *Procès Verbal* the location and characteristics of the marker (a buoy) at Point 1438, but (so far as immediately relevant) essentially repeats without significant variation the description of Point 1438 in the general 1949 *Procès Verbal*: in particular it continues to refer to the 12 n.m. arc around Serpents' Island as "the exterior margin of the *Soviet* marine boundary zone, of 12 miles, surrounding Serpents' Island" (emphasis added).

⁵⁶ See above, para. 5.33(iii).

⁵⁷ RM, paras. 11.6, 11.8 (final sentence).

⁵⁸ Annex 29, Vol. 3.

5.53 The individual *Procès Verbal* for Point 1439⁵⁹ describes in similarly greater detail the location and characteristics of the marker (a beacon) at Point 1439, but again (so far as immediately relevant) in essentially the same terms as were used in the general 1949 *Procès Verbal*, although, unlike that *Procès Verbal's* reference to Point 1439, now describes the continuation of the boundary beyond Point 1439 as a line which "passes on the exterior margin of the Soviet marine boundary zone, of 12 miles" (emphasis added).

5.54 Each individual *Procès Verbal* was accompanied by a "sketch" depicting the location of the point to which it related. The sketches for Points 1438 and 1439 are unreliable. The *Procès Verbaux* do not appear to indicate the relationship between the "sketches" and the verbal descriptions, or which prevails in case of discrepancy: while the "sketches" go together with the verbal descriptions, they do not appear to have been formally made integral parts of them⁶⁰. These sketches for Points 1438 and 1439 are reproduced in Figures 5 and 6 of Romania's Memorial (at pp. 36 and 37); they are reproduced here for convenience, as Figures 5-7 and 5-8. The sketch for Point 1438 is marked as being at a scale of 1:50,000; the sketch for Point 1439 does not indicate its scale.

5.55 Indeed although apparently loosely based on the relevant part of the sheet from which the sketch for Point 1438 was taken, it is clear that the sketch for Point 1439 is not to any consistent scale. It appears to have been no more than a rough illustrative sketch drawn without reference to considerations of scale. This is apparent from the length of the line from the mouth of the Musuna/Musura channel to Point 1438, as compared with the length of the line from that Point to Point 1439. The sketch shows these two lines as of broadly similar length. However, the distances involved are very, and not just fractionally, different. As marked on the sketch for Point 1438 the distance from the Musuna/Musura channel to Point 1438 is given as 3,879.3 metres⁶¹, while the distance from Point 1438 to Point 1439 is given as 21,750.0 metres, *i.e.*, over five times as long. This bears no relation to the broadly similar lengths depicted on the sketch for Point 1439. A more accurate representation of the relative

⁵⁹

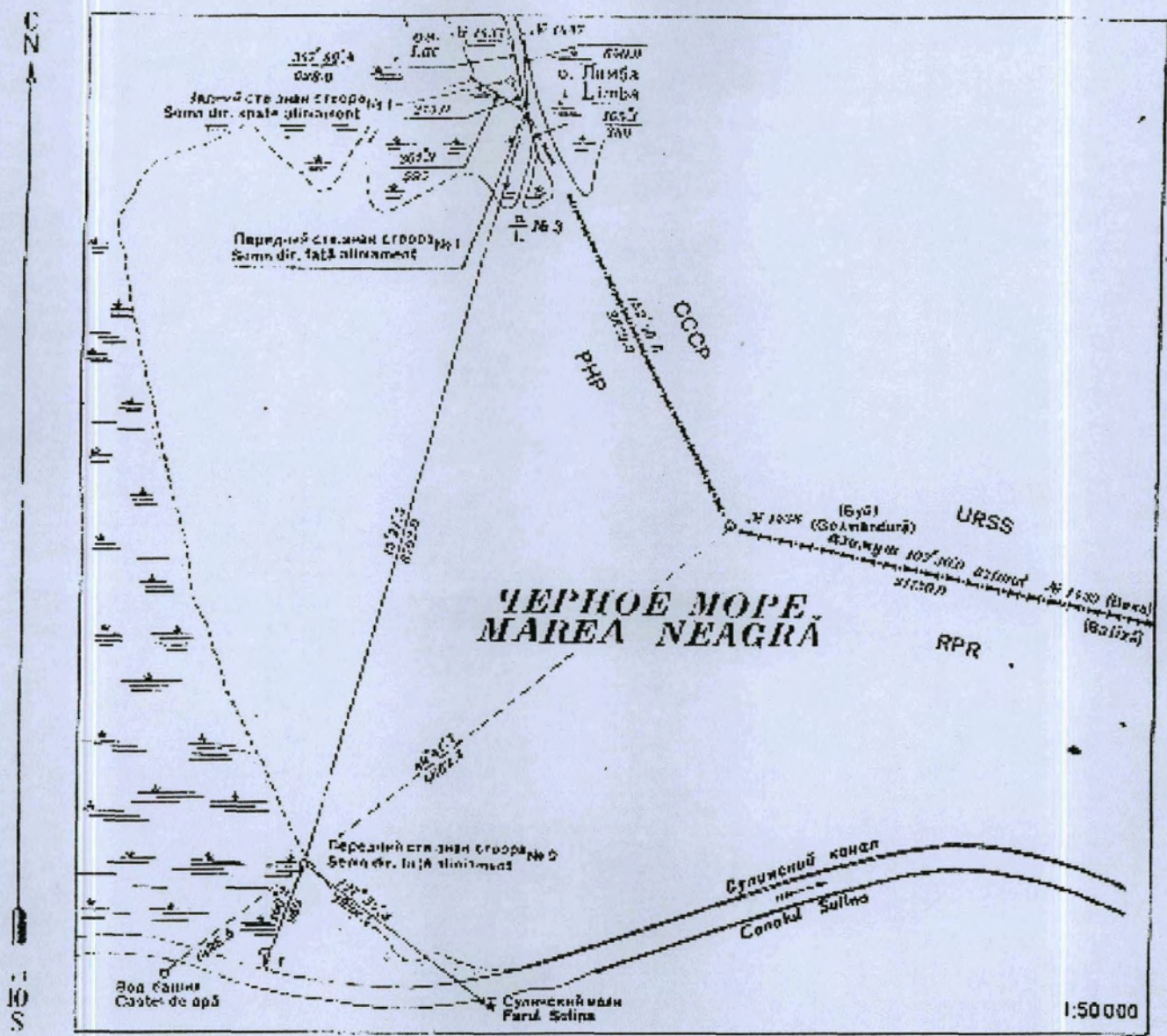
Annex 30, Vol. 3.

⁶⁰

RM, para. 4.10, asserting that they are "integral parts" of the texts.

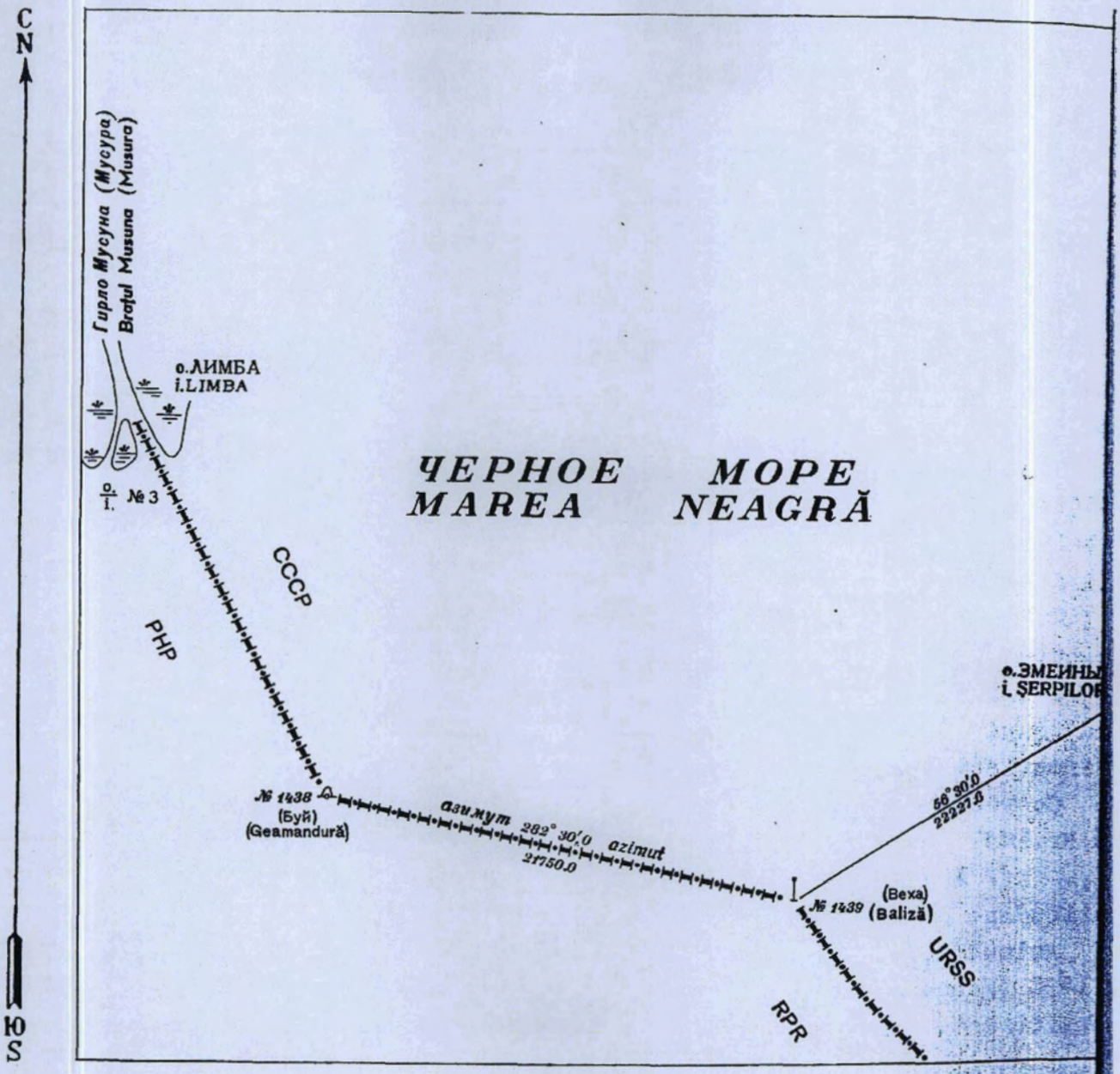
⁶¹

The *Procès Verbal* of the Description of the State Border Line, on the other hand, stated that "[t]he length of the boundary line from border sign no. 1437 to border sign no. 1438 (buoy) is of 4502 m." (see Annex 28, Vol. 3).



Sketch Included in the 1949 Procès Verbal of Border Point 1438

Figure 5-7



Sketch Included in
 the 1949 *Procès Verbal* of
 Border Point 1439

distances involved is apparent on the map sheet 134 accompanying the general 1949 Procès Verbal (above, paragraph 5.49 and Figure 5.6).

5.56 In contrast with the depiction of the 12 n.m. arc on that map sheet 134 (above, paragraph 5.50), the depiction of the arc on this sketch for Point 1439 does continue right to the edge of the sketch. However, this is not inconsistent with the truncated depiction of the arc on sheet 134, nor does it support Romania's contention⁶² that the line was intended to extend further around Serpents' Island but was only prevented from doing so by the fact that the line met the edge of the map. First, as just demonstrated, the sketch is generally unreliable. Second, the southern limit of this sketch map is located further north than the southern border of map sheet 134: accordingly, if Serpents' Island were marked where the distances given suggest it should be marked, the arc depicted on the sketch covers approximately the same 22° degrees of arc as the truncated arc depicted on map sheet 134, *i.e.*, the reason that the arc extends to the edge of this sketch map is simply that the southern border of the map runs further north than the southern border of map sheet 134, and comes at a point which just enables those same 22° of arc to be depicted on it.

C. The Overall Effect of the 1949 *Procès Verbaux*

5.57 Taken together, the individual *Procès Verbaux* and their accompanying sketches do not depart in their essentials from the delimitation of the boundary set out in the general 1949 *Procès Verbal*. In particular, the three points noted at paragraph 5.46 above remain applicable (namely, the 12 mile arc is referred to as "the exterior margin of the Soviet marine boundary zone, of 12 miles"; there is no verbal indication how far around the 12 mile arc the boundary was to run; and no reason is given for the boundary's change of direction at Point 1438, or for the selection of the particular azimuth to reach Point 1439).

⁶² RM, paras. 11.6 and 11.8 (last sentence).

5.58 The significance of the delimitation and demarcation settlement recorded in the various 1949 *Procès Verbaux* can only be assessed in the light of two important facts existing at that time.

5.59 The first concerns the territorial sea claims of Romania and the Soviet Union. In 1949 the Soviet Union had for many years claimed a territorial sea of 12 nautical miles⁶³, while Romania claimed only 6 nautical miles⁶⁴.

5.60 The second concerns the state of international law regarding the extent of States' rights over maritime spaces. In 1949 it was generally accepted that States were entitled to a territorial sea of 3 nautical miles, although there were some States which were even at that time claiming more (including Romania (6 miles) and the Soviet Union (12 miles)). It was also generally accepted that States were entitled to contiguous zones of up to 12 n.m. for certain limited purposes (such as customs, health and safety). But claims to continental shelf rights were embryonic, particularly in Europe⁶⁵, and were not generally accepted, while claims to EEZ rights were (at least in their modern form) unknown⁶⁶.

5.61 Taking these two elements into consideration, the settlement recorded in the various 1949 *Procès Verbaux* can be seen, *in the circumstances of September 1949*, to have had the following nine characteristics.

5.62 First, the external limit of Romania's territorial sovereignty extended only as far as the outer limit of its claimed 6 mile territorial sea.

5.63 Second, since Serpents' Island lies within 24 miles from the mainland coast of Soviet territory at the mouth of the Danube, the external limit of the Soviet Union's territorial sovereignty extended from its mainland coast and out to the limits of its claimed 12 mile

⁶³ RM, para. 11.12.

⁶⁴ RM, para. 11.11.

⁶⁵ At that time such claims were limited to certain States in the American continents.

⁶⁶ See below, paras. 5.71-5.72.

territorial sea all round Serpents' Island. These Soviet and Romanian sovereignty limits are illustrated on Figure 5-9.

5.64 Third, as can be seen from that sketch map, the boundary line between Point 1437 (in the Musura/Musuna channel) and Point 1438 (buoy) is a true State boundary between the territorial sea and/or internal waters of Romania and the Soviet Union.

5.65 Fourth, as can similarly be seen, the boundary line running out to sea from Point 1438 in the direction of Point 1439 (beacon) is a true State boundary between the territorial seas of Romania and the Soviet Union only as far out as a point 6 nautical miles from the baseline from which Romania's territorial sea is measured.

5.66 Fifth, it can also be seen that the boundary running further out to sea beyond that 6 mile point and to the beacon at Point 1439 itself, and thereafter following the first part of the 12 n.m. arc around Serpents' Island, is not the boundary *between* Romania's and the Soviet Union's sovereign territorial seas, but rather the boundary *of* the Soviet Union's sovereign territorial sea and between it and adjacent high seas (the term "boundary" being consistent with both senses). The description of the 12 n.m. arc in the various *procès verbaux* as "the exterior margin of the *Soviet marine boundary zone*, of 12 miles" (emphasis added) thus accurately describes the arc as the outer limit of the Soviet Union's 12 n.m. zone, and not as a boundary between waters subject to the sovereignty of the two States.

5.67 Sixth, the waters on the non-Soviet side of the 12 n.m. arc were high seas. Neither Romania nor the Soviet Union claimed otherwise: Romania's claimed sovereign territorial sea extended no further than 6 miles out to sea, while the Soviet Union's extended no further than 12 n.m. No depiction on a map, or description in a *procès verbal*, can serve to "give" Romania sovereignty over maritime areas which Romania itself did not claim. Neither State claimed, or would have been entitled in international law at the time (or now) to claim, a territorial sea of more than 12 n.m. Waters beyond their territorial sea limits were high seas, which in 1949 meant (for Romania) the waters beyond 6 n.m., and (for the Soviet Union) waters beyond 12 n.m.

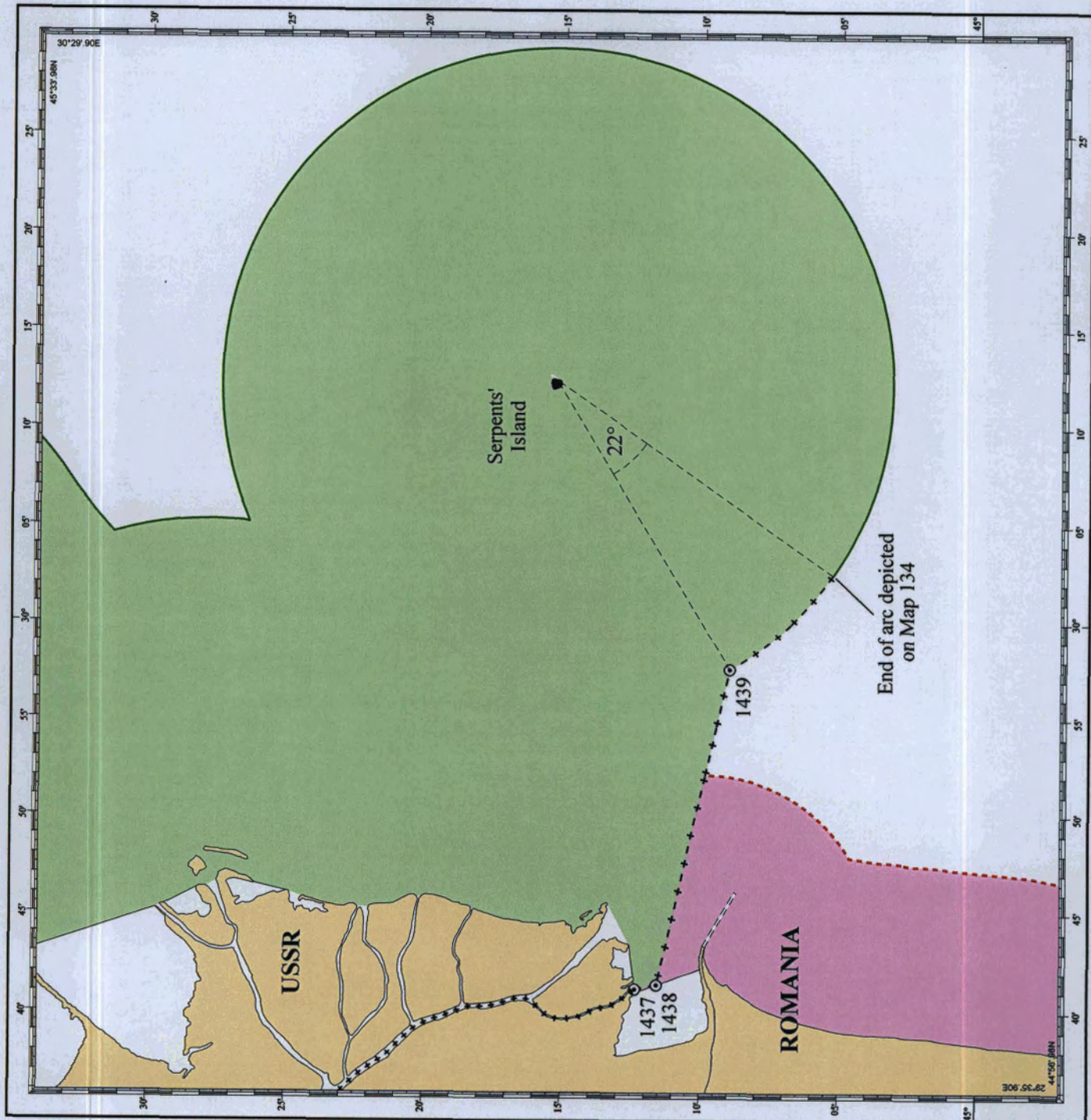
5.68 Seventh, the *procès verbaux* are entirely consistent with the conclusion that the Parties were in 1949 concerned only with the limits of the areas over which they possessed sovereignty. The *procès verbaux* have to be seen in their context as part of the arrangements for settling the State border between the two States - a border which delimited the areas under the sovereignty of the two States and which for almost its entire length was a mainland border between their mainland territories, with only a minor element consisting of the final maritime sector in areas where one or other, or both, Parties had sovereign territorial sea rights.

5.69 Eighth, nothing in the *procès verbaux* (or elsewhere) indicates that the Parties were considering anything other than the limits of the areas over which they possessed sovereignty. In particular, there is nothing to suggest that in 1949 the Parties had in contemplation anything in the nature of continental shelf or EEZ rights, neither of which was in 1949 an established part of international law. Their agreement as to the boundaries of their respective sovereign territories and territorial seas cannot be interpreted as signifying anything in relation to yet-to-be-established maritime rights.

5.70 Romania contends⁶⁷ that the agreed line through and beyond Point 1439 "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" - adding for good measure that "the issues of the regime of maritime areas situated beyond the territorial sea were already broadly debated at that time, as the concept of the continental shelf had already emerged in international law, and States had started to claim the exercise of sovereign rights and jurisdiction over extended maritime areas"⁶⁸.

⁶⁷ RM, para. 11.14.

⁶⁸ RM, para. 11.15.



Points 1437, 1438 and 1439, the Romanian and Soviet Territorial Seas, and the Line Agreed in the 1949 Procès Verbal as Depicted on Map 134.

Figure 5-9

5.71 Romania's attempt to transform "notions ... under debate", "issues ... broadly debated", "emerg[ing] concepts" and the "start [...] of claims to exercise" certain rights into actual provisions of *lex lata* in 1949 is nothing if not bold: more important, it is wholly unavailing. At that time the EEZ in its modern form had not been heard of. As for the continental shelf regime, although its origins are usually traced to the Truman declaration of 1945⁶⁹, and its development advanced in the 1950s⁷⁰, the generally accepted view of the position even in the early 1950s, let alone when the *Procès Verbal* was concluded in 1949, is that expressed by Lord Asquith, as sole arbitrator in the *Abu Dhabi* arbitration, as follows: "I am of opinion that there are in this field so many ragged ends and unfilled blanks, so much that is merely tentative and exploratory, that in no form can the doctrine [of the continental shelf] claim as yet to have assumed hitherto the hard lineaments or the definitive status of an established rule of International Law"⁷¹.

5.72 The plain fact is that in 1949 the concepts which are known today as the continental shelf and the EEZ were not part of then-prevailing international law. "Taking into account the stage of development of the international law of that time", as Romania seeks to do⁷², one is led to precisely the opposite of the conclusion which Romania asserts: instead of Romania's astonishing assertion that the state of international law at the time shows that "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" (emphasis added)⁷³, the only conclusion to which the state of international law at the time can lead is that the line agreed in 1949 could not possibly have been intended by the parties as a line separating sea areas subject to distinctive regimes which at that time simply did not exist and which there is not the slightest evidence that they had in mind. This is particularly the case given that the Soviet Union and the Communist States of Eastern Europe were conceptually unsympathetic to the general idea

⁶⁹ *AJIL*, Vol. 40 (1946), Suppl., p. 47.

⁷⁰ Sir Robert Jennings QC and Sir Arthur Watts QC (eds.), *Oppenheim's International Law*, Vol. 1, 9th ed., 1992, pp. 768-770.

⁷¹ *Petroleum Development Ltd. v. Sheikh of Abu Dhabi*, I.L.R., Vol. 18 (1951), pp. 144, 155.

⁷² RM, para. 11.15.

⁷³ *Ibid.*

of customary international law⁷⁴, and are therefore unlikely in 1949 to have had in mind or to have invoked⁷⁵ the emerging customary concept of the continental shelf or the non-existent concept of the EEZ (particularly in relation to off-shore maritime rights where, in 1949 and indeed for some years thereafter⁷⁵, customary international law did not even accept the territorial sea breadths then claimed by the Soviet Union (12 n.m.) and Romania (6 n.m.)).

5.73 Moreover, even if the parties in 1949 could be considered to have been blessed with the necessary foresight, it must be unlikely in the extreme that they would have disposed of what they would have realised would have been extremely important maritime rights in such an incidental, implicit and off-hand way, without adverting to the (future) rights they were restricting and without defining clearly the terminal seaward point at which the restriction ceased to operate. All they did in that respect was refer to the agreed line as "go[ing] on the exterior margin of the [Soviet] marine boundary zone, of 12 miles" and depict in the annexed map sheet 134 the limited 22° of arc extent of that "exterior margin".

5.74 Even if continental shelf rights had been an established part of international law in 1949 (which they were not) they would have been - and this is true at whatever future time it may be considered that they became established in customary international law - rights which *automatically* and *by operation of law* flowed for the benefit of the coastal State from its sovereignty over its land territory⁷⁶ - which means as much Soviet sovereignty over Serpents' Island as Romania's sovereignty over its mainland territory. That clear basic legal entitlement to sovereign rights, flowing directly and automatically from sovereignty over land territory, is not to be supposed to have been given up except on the basis of clear agreement or other evidence to that effect. There is no such agreement or evidence in relation to the area of the Soviet Union's continental shelf beyond its territorial sea around Serpents' Island. The Soviet

⁷⁴ Sir Robert Jennings QC and Sir Arthur Watts QC, *Oppenheim's International Law*, 9th ed., 1992, pp. 95-96, esp. works cited in nn. 21, 22.

⁷⁵ Thus the Geneva Conference on the Law of the Sea failed to agree on this issue in 1958, and that failure was repeated at the Second Geneva Conference in 1960.

⁷⁶ *North Sea Continental Shelf Cases*, I.C.J. Reports 1969, p. 29, para. 39.

Union's *entitlement* to continental shelf rights cannot be questioned; the *delimitation* of the spatial extent of that Soviet (and now Ukrainian) entitlement remains to be determined, which is in part what the present proceedings are about.

5.75 Ninth, Map 134 annexed to the general 1949 *Procès Verbal* shows that the relevant part of the arc around Serpents' Island extends only for about 22° of arc beyond Point 1439, *i.e.*, as far as approximately due south west of Serpents' Island; nothing in the 1949 *Procès Verbaux*, either their texts or in the accompanying maps and sketches, suggests that the relevant part of the 12 n.m. arc around Serpents' Island extended to the southeast or east around Serpents' Island, as contended by Romania⁷⁷. Indeed, it is significant that the chart which Romania in 1997 submitted to the United Nations when giving notice of its straight baselines, a copy of which is at Figure 5-4, depicts a partial arc joining points numbered as "1" and "2", and that Romania describes that line of arc as "the outer limit of Romania's territorial sea". That arc, which lies some 12 n.m. distant from Serpents' Island and represents an arc of approximately 22°, lies between the coordinates of Point 1', which, as mentioned above, are remarkably close to the coordinates of Point 1439 (at 45°08'59.21"N, 29°57'39.42"E), and the coordinates of Point 2' which, at 45°04'31.4"N, 30°02'13.0"E, are very close to the final point on the maritime boundary agreed in the 2003 Ukraine-Romania Border Regime Treaty (*i.e.*, 45°05'21"N, 30°02'27"E).

5.76 No other conclusion is possible than that the general 1949 *Procès Verbal* and the individual 1949 *Procès Verbaux* established a boundary which was at the time intended to be, and was later expressly confirmed by Romania as being, a territorial sea boundary extending out to sea as far only as the point at which the outer limits of Ukraine's and Romania's 12 n.m. territorial seas diverged.

5.77 It is thus apparent that the *Procès Verbaux* of 27 September 1949:

- (i) did not in terms fix the eastward extent of the line following the Soviet Union's 12 n.m. arc around Serpents' Island, and did not depict an arc extending more than

⁷⁷ RM, paras. 11.5, 11.7.

about 22° south eastwards from the beacon at Point 1439, and in particular did not establish an arc extending right round the south of Serpents' Island to a point approximately due east of that island;

- (ii) did not establish even that limited 22° arc as anything more than the outer limit of the Soviet Union's 12 mile territorial sea around Serpents' Island; and
- (iii) did not establish the waters to the south of that arc as anything other than high seas.

D. The USSR-Romania Treaty on the Regime of the Romanian-Soviet State Border, 25 November 1949 ("the 1949 State Border Treaty")

5.78 Article 1 of the 1949 State Border Treaty⁷⁸ provides that:

"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."

The Treaty entered into force on 20 June 1950.

5.79 The two States thus, some two months later, formally confirmed by treaty the demarcation described in the *Procès Verbaux* of 27 September 1949. They did not add to it in any way, and accordingly it was confirmed as it stood, *i.e.*, with the limitations to which attention has been drawn.

5.80 In summary, it is clear that by the end of 1949 neither of Romania's principal contentions about the 1949 settlement⁷⁹ was borne out by the terms of the settlement

⁷⁸

Annex 31, Vol. 3.

⁷⁹

See above, para. 5.32.

negotiated and agreed in that year: there is no evidence, textual or cartographic, in the events of 1949 to show either:

- (a) that the agreed line extended right round the south of Serpents' Island and as far as a point approximately due east of the Island: the only available evidence from 1949 suggests that the agreed line continued from the buoy at Point 1439 for at most a further 22° of arc; or
- (b) that any part of the agreed line, including the 22° of arc, constituted an all-purpose maritime boundary to the south of which the Soviet Union could have no continental shelf or EEZ claims: the only available evidence from 1949 suggests that the agreed line in the area beyond Romania's 6 n.m. territorial sea limit was the outer limit of the Soviet Union's 12 n.m. territorial sea, and signified nothing in relation to continental shelf and EEZ rights which did not then (or for many years) come to be established in international law.

Section 5. Soviet-Romanian Border Agreements after 1949

A. Act Relating to Border Sign 1439, 26 December 1954

5.81 Border sign 1439 had to be replaced because the beacon had disappeared, and this was done and the location of Point 1439 recorded anew in an Act which was signed by the two States' authorized border officers on 26 December 1954⁸⁰. In referring to the line running from Point 1438 to Point 1439 and beyond, it followed closely the language of the September 1949 *Procès Verbaux*. In particular, it referred to the line running seawards from Point 1439 as following the "exterior margin of the Soviet marine boundary zone of 12 miles", and thereby confirmed that line as the external limit of the Soviet Union's territorial sea.

⁸⁰ Annex 32, Vol. 3.

5.82 It is perhaps noteworthy that this Act made no reference to a relevant development which was taking place around this time, namely the extension in the 1950s of Romania's territorial sea to 12 nautical miles measured from "the shore" (which seems to mean the easterly point of the man-made Sulina Dyke, shown on Map RM Atlas 37). While the circumstances are not altogether clear, and Romania's Memorial is not precise, it appears that this happened by virtue of Article 1.4 of Decree No. 176 of 1951, and then more formally by virtue of Decree No. 39 of 1956⁸¹. 12 n.m. measured from Romania's shore took the outer limit of Romania's territorial sea beyond the beacon at Point 1439 (which lies fractionally over 8 n.m.⁸² from the Romanian shore) and out to a point on the agreed Soviet territorial sea boundary a little further to the east around Serpents' Island. This situation is illustrated on Figure 5-10. It is readily apparent that that point on the arc is very close to if not exactly at:

- (i) the terminal point of the arc depicted on map sheet 134 accompanying the general 1949 *Procès Verbal* and giving rise to the 22° of arc there depicted⁸³;
- (ii) the location of the point marked "2" on Romania's 1997 chart submitted to the United Nations⁸⁴; and
- (iii) the location of the final point of the maritime boundary agreed in the Ukraine-Romania State Border Treaty 2003⁸⁵.

All three points are, it seems clear, intended to be one and the same.

5.83 It is further noteworthy that Romania's own legislation shows that Romania did not regard the 1949 *Procès Verbaux* as dealing with anything other than a territorial sea boundary. Article 1 of Romania's 1956 Decree states that "The territorial waters of ... Romania ... are delimited by the territorial waters of the neighbouring countries ... in the

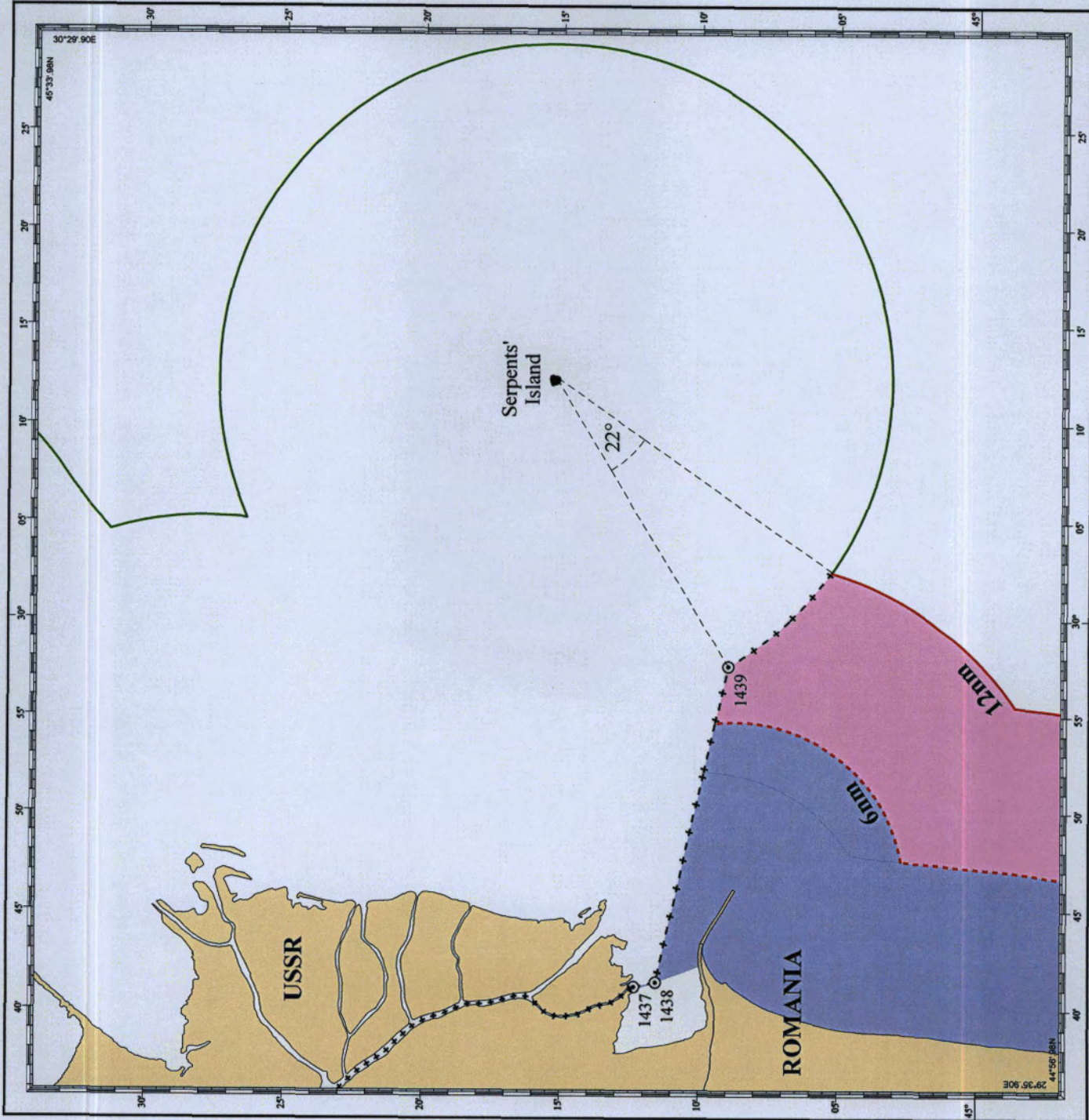
⁸¹ RM, para. 11.11; Annexes RM 80 and RM 81.

⁸² This appears to be the most plausible explanation for the references sometimes made by Romania to a "factual situation" whereby it only had an 8 or 9 n.m. territorial sea: see RM, para. 5.4, footnote 64.

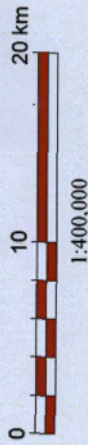
⁸³ See above, paras. 5.48-5.50.

⁸⁴ See above, paras. 5.47 and 5.75.

⁸⁵ *Ibid.*



- + - + - + - + Agreed boundary
- Romania - 12nm limit
- · - · - · - Romania - 6nm limit
- USSR - 12nm limit
- Romania - 12nm Territorial Sea
- Romania - 6nm Territorial Sea



The Breadth of the 6nm and 12nm Territorial Seas, Claimed by Romania Pre- and Post-1951/1956

Figure 5-10

north by a line determined by agreement between [Romania and the USSR]". When Romania enacted its equivalent decree in respect of the EEZ in 1986, (*i.e.*, some 36 years after the 1949 *Procès Verbaux*), no equivalent reference was made to a delimitation line having been agreed with the USSR. Taken together these two pieces of legislation show that Romania regarded the line established by the 1949 *Procès Verbaux* as only a territorial sea boundary and not, in particular, as an EEZ boundary⁸⁶.

B. Soviet-Romanian State Border Regime Treaty, 27 February 1961 ("the 1961 Border Regime Treaty")⁸⁷

5.84 Article 1(1) of the 1961 Border Regime Treaty again confirmed the line as described in the demarcation documents of 27 September 1949 (although allowing also for any subsequent additions which might be made to those demarcation documents (such as the 1954 Act just referred to)). The Treaty entered into force on 27 July 1961.

5.85 The Treaty's confirmation of the 1949 documents was, however, by reference to "The demarcation documents signed on the 27th of September 1949" (Article 1(1)(b)). It went on, in Article 1(2), to stipulate that:

"Demarcation documents are:

(a) the Minutes describing the trace of the state border line between the People's Republic of Romania and the Union of the Soviet Socialist Republics, from the 'Tur' border sign, set up at the meeting point of the state border lines of the People's Republic of Romania, of the Union of the Soviet Socialist Republics and of the People's Republic of Hungary, up to the border sign 1439, which is set up in the Black Sea;

(b) The maps of the State border between the People's Republic of Romania and the Union of the Soviet Socialist Republics;

(c) The protocols of the border signs with their draft sketches, as well as their respective annexes and additions."

⁸⁶ It should be noted that, according to the U.N. Law of the Sea office database of maritime legislation, Romania has enacted no continental shelf legislation. See www.un.org/Depts/los/LEGISLATIONANDTREATIES/index.html (updated 3 November 2005; last checked on 2 May 2006).

⁸⁷ Annex 33, Vol. 3.

5.86 It is notable that this definition only incorporates the written descriptions of the boundary "up to the border sign 1439, which is set up in the Black Sea". The parties were evidently not intending to take their border beyond that point; certainly nothing in the 1961 Border Regime Treaty can be taken to envisage an extension of the line eastwards beyond (at most) what was depicted in map sheet 134⁸⁸ (but not in terms described) in 1949.

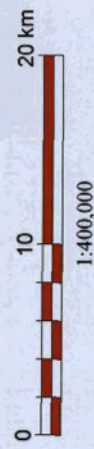
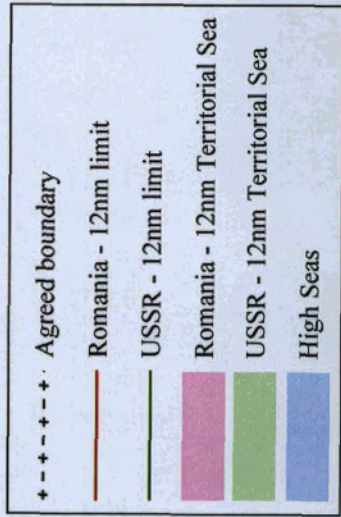
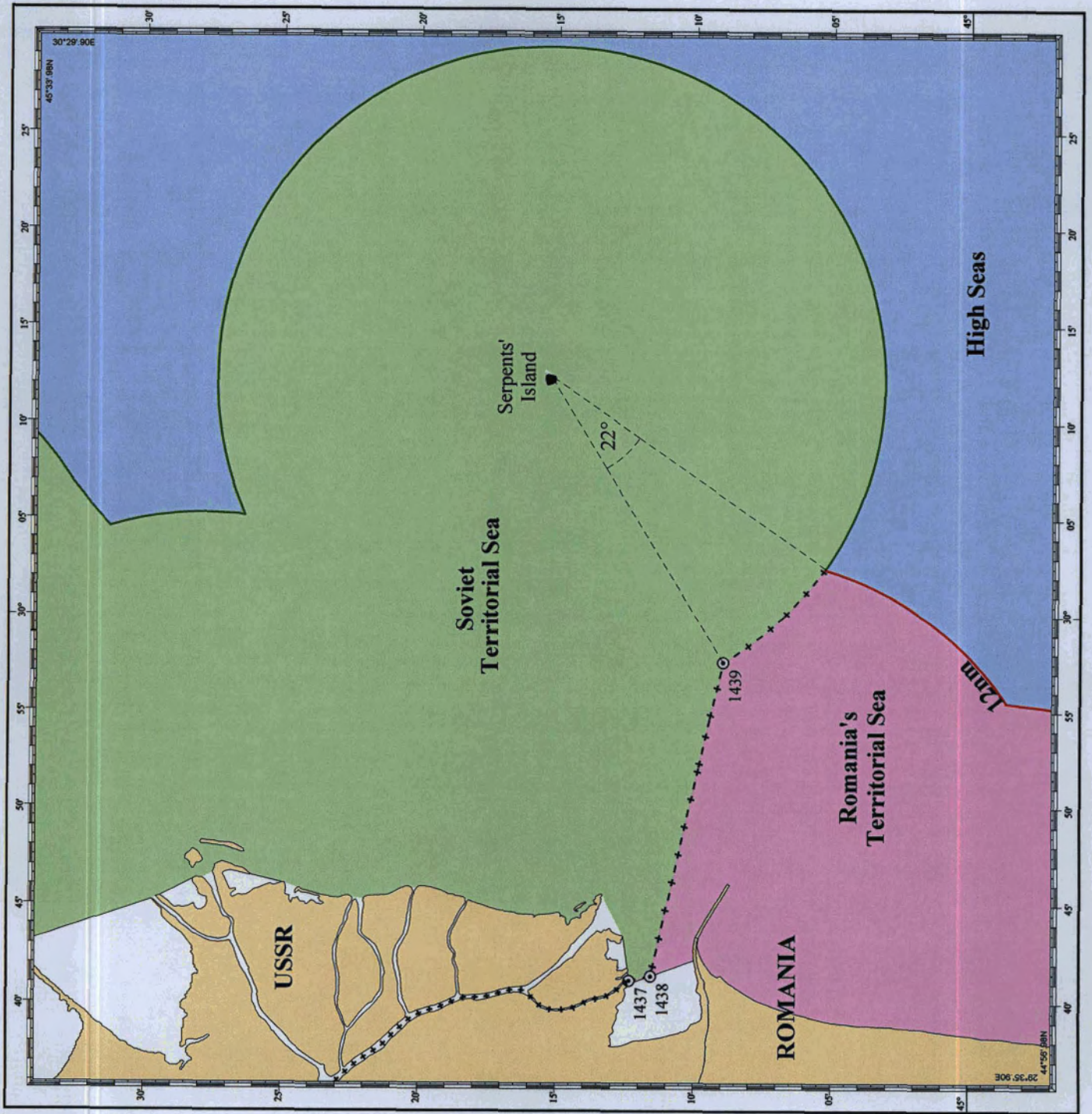
5.87 Nor does anything in the 1961 Border Regime Treaty affect the conclusion to be drawn from previous instruments as to the legal status of the waters on either side of the 12 n.m. arc around Serpents' Island, namely Soviet territorial sea inside the arc and (except for a small sector seaward of Point 1439: see Figure 5-11) high seas outside it.

5.88 Generally, apart from the points just made, the terms of the 1961 Border Regime Treaty did not add to the 1949 documents and accordingly did no more than confirm them as they stood, *i.e.*, with the limitations upon their operation and effect to which attention has been drawn.

5.89 The Treaty did, however, contain several provisions (Chapter I, Articles 3-12) which dealt with the detailed ways in which the border was to be demarcated and maintained. These all concern the border on land, or on the waters of navigable or non-navigable rivers, rivulets and channels; they do not appear to be applicable to the off-shore maritime waters of the two States. Chapters II ("The Usage of the Border Waters, Railways and Roads Crossing the State Border Line") and III ("Fishing, Hunting, Forestry, Subsoil Exploitation") appear similarly to be confined to the mainland border on land or on rivers, and not to be relevant to the off-shore maritime waters. This is fully in accord with the fact that the "State border" between the Soviet Union and Romania was essentially a mainland border.

5.90 Moreover, Chapter I made provision for joint verification of the border line and for written records to be made of such technical matters as minor corrections to the location of border markers, or their replacement by different markers, or changes in the flows of rivers (see *e.g.* Articles 4.4-4.7, 5, 6.3, 9, 10.5-10.6). The joint verification process envisaged in the

⁸⁸ See above, para. 5.50.



**The Territorial Seas
of the Soviet Union
and Romania (as of 1961)
and the High Seas**

Figure 5-11

Treaty took place between 1961 and 1962, and its work was recorded in a *Procès Verbal* of 20 August 1963 ("the 1963 *Procès Verbal*")⁸⁹. According to the first paragraph of its Introduction it embodied "new demarcation documents in sectors where modifications as compared to the 1948-1949 demarcation documents occurred". It seems to have done so by describing the whole length of the border line, with such modifications as were agreed, together with individual *Procès Verbaux* where particular modifications were made.

5.91 No modification was recorded for the border sign (beacon) at Point 1439, so there was no individual *procès verbal* relating to it. However, the general description of the border line in the 1963 *Procès Verbal* concluded by describing Points 1437 (in the Musuna/Musura channel of the Danube Delta), the buoy at Point 1438 and the beacon at point 1439 in terms substantially the same as those used in the general 1949 *Procès Verbal*.

5.92 It is notable, however, that in its description of the location at which the beacon is to be placed, *i.e.*, where the line from Point 1438 on an azimuth of 102°30'00" meets the arc around Serpents' Island, the text refers to that arc as "the exterior margin of the Soviet territorial sea of 12 miles, around Serpents' Island", and later as "the exterior margin of the 12-mile territorial sea of the USSR, leaving Serpents' Island on the USSR side" (emphasis added). This is wholly consistent with, and simply makes explicit, what was in any event the ordinary meaning of the 1949 *Procès Verbaux*, with their references to the "Soviet marine zone of 12 miles" - a formula chosen to mask the fact that at that time Romania did not itself adopt a 12 mile limit for its territorial sea⁹⁰. In particular, the formula adopted in the 1963 *Procès Verbal* carries with it no implication that the waters within the arc are anything other than the Soviet Union's territorial sea or that the waters outside and to the south of the arc around Serpents' Island are anything other than high seas; nor does it say anything to imply that the line extended any further eastwards around the arc than the 22° of arc which was depicted in 1949 on map sheet 134⁹¹.

⁸⁹ Annex RM 19.

⁹⁰ See, for example, para. 5.46(i), above.

⁹¹ See above, para. 5.50.

5.93 On 22 April 1993 Romania purported unilaterally to denounce this 1961 Border Regime Treaty⁹². Such purported denunciation was not only inconsistent with the relevant rules of international law, but also with the provisions of the Treaty regarding its termination. Ukraine did not accept the validity of that purported denunciation. Despite repeated requests from Ukraine, Romania has declined to withdraw its Note of 22 April 1993. Yet Romania has invoked this Treaty in its Memorial as if it were still in force, and has expressly stated that it was not challenging past settlements⁹³; moreover, as Romania itself records⁹⁴, it was Romania itself which registered this Treaty with the UN in 2004; and further, Article 1 of the 2003 Treaty⁹⁵, expressly invokes the 1961 Treaty in relation to the current border. The continued validity and effectiveness of the 1961 Treaty cannot be denied by Romania.

C. *Procès Verbal* of 4 September 1974 ("the General *Procès Verbal* 1974")⁹⁶

5.94 Further demarcation work took place in the early 1970s, giving rise again to both a general *Procès Verbal* containing a general description of the boundary points as a whole, and a series of individual *procès verbaux* for each boundary point. The general *Procès Verbal* 1974 followed the language of the 1963 *Procès Verbal*, in particular in describing the location of Point 1439, and its onward route thereafter, by reference to "the exterior margin of the 12-mile territorial sea of the USSR".

5.95 The individual *Procès Verbal* for Point 1439⁹⁷ in substance follows earlier descriptions of that Point, although it reverts in both places to the earlier formula referring to "the exterior margin of the Soviet/USSR marine boundary zone of 12 miles". There is, however, no difference of substance in the two formulations. The former expressly refers to the Soviet Union's 12 n.m. belt of "territorial sea". The latter leaves no doubt in the circumstances that that was also its meaning - the Soviet Union was known to have a 12 n.m. territorial sea, the arc around Serpents' Island was 12 n.m. around the island, and the 12 mile zone was described as the marine boundary zone appertaining to the Soviet Union: no

⁹² See *note verbale* No. 618 of 22 April 1993, Annex 34, Vol. 3.

⁹³ RM, para. 5.19.

⁹⁴ RM, para. 4.16, at n. 46.

⁹⁵ Annex 3, Vol. 2.

⁹⁶ Annex RM 21.

⁹⁷ Annex RM 22.

construction other than that the zone in question was a territorial sea zone is reasonably possible.

5.96 That individual *Procès Verbal* is accompanied by a sketch, which is reproduced at Figure 7 (page 42) of Romania's Memorial. This sketch appears to be based on the same sketch as was used in 1949 for Point 1439, and reproduced as Figure 6 (page 37) of Romania's Memorial, with the difference that a scale marking of 1:50,000 has been added, as has the location of Serpents' Island.

5.97 This sketch must be disregarded as being wholly unreliable, and its scale marking of 1:50,000 as fanciful. As already noted⁹⁸, the line joining Points 1438 and 1439 is completely out of scale with the line joining Point 1438 with the Musuna/Musura channel. In addition, on this new version of the sketch the line joining Point 1439 with Serpents' Island is completely out of scale with the line joining Point 1439 with Point 1438: the former should be longer than the latter (22,227.6 m. compared with 21,750.0 m.) whereas it is depicted in Figure 7 as noticeably shorter (6.2 cm. compared with 7.1 cm.). An accurate placement of Serpents' Island on the sketch would require it to be at least a centimetre further to the north east, which in turn affects the accuracy of the depiction of the segment of the arc around Serpents' Island shown on the sketch (as to which see above, paragraph. 5.56).

5.98 Romania seeks to place the general *Procès Verbal* 1974, together with the *Procès Verbaux* of 1949 and 1963, within the framework of Articles 74(4) and 83(4) of UNCLOS as agreements on "questions relating to the delimitation of the exclusive economic zone or the continental shelf"⁹⁹. As such, so Romania contends, under those Articles the delimitation of the Ukraine-Romania continental shelf and EEZ "shall be determined in accordance with the provisions of that agreement". Romania, however, as will be shown in Chapter 6, misrepresents and misinterprets Articles 74(4) and 83(4), and mischaracterises the scope of the 1949, 1963 and 1974 *Procès Verbaux*.

⁹⁸ See above, para. 5.55.

⁹⁹ RM, paras. 7.4-7.6.

5.99 Those two provisions of UNCLOS do not refer, as Romania (mis)quotes them as referring, to "agreements on 'questions relating to the delimitation of the exclusive economic zone or the continental shelf'"¹⁰⁰. This is a misleading elision of the texts of the Articles in question. In the text the reference to agreements is quite distinct from the reference to questions of delimitation, and it distorts the meaning of the paragraph to link the two as though they constituted a single reference to "agreements in force relating to the delimitation". The reference to an agreement is to the existence of a condition which must be satisfied before the questions relating to delimitation come into play.

5.100 Paragraph 4 of each of the Articles begins "Where there is an agreement in force between the States concerned, ...": *i.e.*, the existence of "an agreement" - the nature of which is not referred to - is a condition to be satisfied before one applies the substantive part of the paragraph, namely "questions relating to the delimitation ... shall be determined in accordance with the provisions of that agreement". This begs the question as to the nature of the agreement which is here being referred to. To answer that question paragraph 4 has to be read in the context of the Article as a whole. Paragraph 1 stipulates that delimitation is to "be effected by agreement"; paragraph 2 deals with the situation which arises "If no agreement can be reached"; paragraph 3 deals with what is to happen "Pending agreement as provided for in paragraph 1"; then comes paragraph 4, dealing with the situation "Where there is an agreement". The progression through the paragraphs follows a logical and natural order, from which it follows that the agreement being referred to in paragraph 4 is an agreement which effects "the delimitation of the continental shelf/EEZ between States with opposite or adjacent coasts". This is entirely consistent with the rest of paragraph 4, which stipulates how questions relating to "the delimitation" (*i.e.*, the delimitation effected by the agreement referred to) are to be dealt with - namely, they are to be dealt with "in accordance with the provisions of that agreement".

5.101 As explained, the various *Procès Verbaux* 1949-1974 do not delimit any continental shelf or EEZ boundaries: they are therefore not agreements of the kind referred to in Articles 74(1) and 83(1) and to which Articles 74(4) and 83(4) refer back - even if, which is denied, the various 1949 and other early *procès verbaux* could be construed as dealing with the

¹⁰⁰ RM, para. 7.5.

continental shelf or EEZ which were not accepted concepts at the time¹⁰¹. They are not therefore agreements in accordance with the provisions of which questions relating to the delimitation of the EEZ or continental shelf are, under Articles 74(4) and 83(4), to be determined.

5.102 Moreover, and in any event, those *Procès Verbaux* 1949-1974 are not (as Romania refers to them) agreements "establishing the direction of the maritime boundary on the 12 mile arc around Serpents' Island"¹⁰² or "establishing the initial segment of the maritime boundary between them, from Point F ... on the 12-mile arc around Serpents' Island"¹⁰³. As explained above, the so-called "initial segment" of the arc - the 22° of arc depicted on map sheet 134¹⁰⁴ - was initially in 1949 no more than the outer limit of the Soviet Union's territorial sea and part of the whole boundary between that territorial sea and the adjacent high seas¹⁰⁵, while after Romania increased the breadth of its own territorial sea to 12 n.m. that 22° segment of arc became the boundary between Soviet and Romanian territorial seas¹⁰⁶. At no time has that segment of arc had any other character as a maritime boundary; in particular, it has at no time served as a boundary delimitation between the areas of continental shelf and EEZ appertaining to the Soviet Union (or Ukraine) and Romania. It is accordingly wholly erroneous for Romania to assert that the 12 n.m. breadth of water area surrounding Serpents' Island was agreed to have "had the character of an *all-purpose* maritime boundary" (emphasis in original) and that in consequence "there existed a delimitation between Romania and the USSR around Serpents' Island to the effect that Serpents' Island was limited to a 12nm zone, and that zones to the south of that boundary appertained to Romania"¹⁰⁷. *Nothing* in the terms or accompanying map or sketches of the series of agreements in the period 1949-1974 supports any such conclusion. The 12 n.m. zone was a boundary for the Soviet Union's sovereign area, *i.e.*, its territorial sea, and said or implied nothing about the limits for those less-than-sovereignty rights (such as sovereign rights for limited purposes over the continental shelf and EEZ) which subsequently became established in international law and

¹⁰¹ See above, paras 5.71-5.72.

¹⁰² RM, para. 7.6.

¹⁰³ RM, para. 7.11.

¹⁰⁴ See above, para. 5.50.

¹⁰⁵ See above, para. 5.56.

¹⁰⁶ See above, para. 5.82.

¹⁰⁷ RM, para. 11.20.

which affected areas appurtenant to the Soviet Union's land territory as represented by Serpents' Island.

5.103 Ukraine's denial that any such consequences flowed from the 1949-1974 agreements does not mean that Ukraine is now seeking to deny their binding character. Ukraine accepts the commitments flowing from those agreements, as well as the general principle of territorial stability to which Romania has referred¹⁰⁸. But those commitments extend only so far as the terms of the various instruments provide, and do not extend to the extravagant if not fanciful interpretation which Romania seeks to place on them.

D. Soviet-Romanian Border Negotiations After 1974

5.104 There were no substantial developments in Soviet-Romanian negotiations on this particular boundary issue before August 1991 when Ukraine resumed its independent statehood. Thus the situation at the end of the Soviet Union's era was essentially as it was at the conclusion of the general *Procès Verbal* 1974. As explained in the preceding paragraphs, that situation was that:

- (i) there was no express verbal agreement between Romania and the Soviet Union as to the southeastward and eastward extent of the boundary line beyond Point 1439 and around the 12 n.m. arc surrounding Serpents' Island;
- (ii) the only depictions of the extent of that line went no further than the 22° of arc depicted on map sheet 134 annexed to the general 1949 *Procès Verbal*;
- (iii) the waters within the 12 n.m. arc surrounding Serpents' Island were part of the Soviet Union's territorial sea;

¹⁰⁸ RM, paras. 11.21-11.25.

- (iv) the waters outside and southward of that arc were (save for the 22° of arc immediately to the southeast of Point 1439) high seas;
- (v) the waters southward of the line joining Points 1438 and 1439 and beyond, as far as the southeastern limit of the 22° of arc, are part of Romania's 12 n.m. territorial sea, and beyond that distance are high seas¹⁰⁹;
- (vi) the two States had not come to any agreement about the extent (whether laterally or frontally) of their continental shelf or EEZ rights in and under those (or other) areas of high seas.

5.105 Although there were no substantial developments specifically addressing border issues after 1974, and the Soviet-Romanian negotiations on continental shelf and EEZ delimitation which ended in 1987 (see next section), in the final years before the break-up of the Soviet Union Romania did attempt to re-open the territorial question with regard to the islands in the Danube Delta as well as Serpents' Island. In 1991 Romania handed to the Soviet Ambassador in Bucharest an *Aide Mémoire* which questioned the validity of the instruments concluded between 1940 and 1948 relating to the delimitation of the Soviet-Romanian State boundary (including the 1948 Protocol). The Romanian *Aide Mémoire* does not seem, however, to have had anything to say about the status or significance of the 12 n.m. arc around Serpents' Island. The Soviet Foreign Ministry prepared a draft reply to this Romanian *Aide Mémoire*, but although it appears to have been discussed in Ukraine, it does not appear to have been sent before Ukraine resumed its independent statehood later in the year.

E. Soviet-Romanian Continental Shelf and EEZ Negotiations 1967-1987

5.106 While there appear to have been no further negotiations after 1974 between the Soviet Union and Romania directly related to these border issues around Serpents' Island, there were

¹⁰⁹ Note, however, that the definition of "high seas" changed with the entry into force of UNCLOS for those States Parties to it. See UNCLOS, Article 86, compared with Article 1 of the Convention on the High Seas 1958.

Soviet-Romanian negotiations between 1967 and 1987 on the continental shelf and EEZ. Ten rounds of negotiations took place: the first three (in 1967, 1972 and 1974) were between technical experts only, while the Parties' full delegations took part in the remaining seven rounds (in 1975-1978, 1980, 1986 and 1987).

5.107 However, those negotiations led to no agreement on continental shelf and EEZ delimitation. The Soviet Union, of course, is not a party to the present proceedings, and its records of what transpired in the negotiations are not before the Court. For its part Ukraine has no access to those records, and cannot therefore study them or make them available to the Court. Romania does apparently have its own records of the negotiations, but the documents which Romania has submitted are incomplete (being only extracts chosen to serve Romania's own purposes¹¹⁰) and are devoid of any indication of their context. Those negotiations are thus irrelevant to the present proceedings.

5.108 Upon regaining its independence in 1991 Ukraine took up negotiations with Romania unaffected by what might have transpired, without any agreed outcome, in the Soviet-Romanian negotiations of 1967-1987.

5.109 It is nevertheless worth noting that Romania has recalled that the head of the Romanian delegation, at the tenth and final round of negotiations on 1-2 October 1987, is said to have summed up the Romanian position as follows:

"As at the date of the conclusion of [the 1949] 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 agreed then is the maximum effect that can be given to this island"¹¹¹.

¹¹⁰ Annexes RM 28, RM 29, RM 30, and RM 31.

¹¹¹ Quoted at RM, para. 5.15; and Annex RM 31.

5.110 This purported explanation of the arrangements agreed in 1949 is unconvincing, and demonstrates Romania's basic misunderstanding or misrepresentation of the events of several decades earlier. It is an attempt in 1987 to explain what was done nearly 40 years before, but without sufficient attention to the surrounding details. Thus:

- (i) Since at the time (1949) Romania only claimed a 6 mile territorial sea, it follows that the waters beyond that 6 mile limit were high seas (above, para. 5.67);
- (ii) it equally follows that the line between Romanian and Soviet territorial seas out to that 6 mile limit was a line separating the two States' territorial seas (above, paras. 5.65-5.66);
- (iii) and it equally follows that the line beyond that 6 mile point separates Soviet territorial seas (of 12 miles) from the high seas (above, para. 5.67);
- (iv) the Romanian argument that the waters beyond the Romanian 6 mile limit "would have" been high seas "in the absence of any agreement", thereby suggesting that there had been some relevant agreement to the contrary, ignores the undoubted facts that (a) high seas were at that time understood to be "all parts of the sea that are not included in the territorial sea or in the internal waters of a State"¹¹², and (b) nothing in the 1949 *Procès Verbaux* or in any of the later agreed instruments said or necessarily implied any "agreement" about the waters beyond the Romanian 6 (or later, 12) mile limit not being high seas;
- (v) Romania's reference to the line established in 1949 and confirmed in later instruments as a "delimitation" line misrepresents the language of those earlier agreements, which refers to a "boundary" or "border" line, which is a term capable of covering both a boundary between two adjacent areas of sovereign space and an outer limit of one area of sovereign space: there is no suggestion in the 1949 or later texts that the parties were "delimiting" their general and potential future maritime spaces;

¹¹² Convention on the High Seas, 1958, Article 1.

- (vi) Romania's statement that the governments allocated to Serpents' Island "a semicircular maritime space" is not borne out by anything contained in the 1949 or later texts, or the maps or sketches accompanying them: the most that those documents do is indicate a short 22° of arc running south east from Point 1439, with no indication by word or depiction that the line follows the arc any further (indeed, such indication as there is is to the contrary) - and certainly not all the way round, "semicircularly", to a point on the 12 n.m. arc due east of Serpents' Island;

- (vii) Romania's assertion that the external limit of that 12 n.m. maritime space "separat[ed] Romanian waters from Soviet waters" ignores the fact that nothing in Romanian law or practice in 1949 made any waters as far out as the maritime space around Serpents' Island into "Romanian waters": at that time the outward extent of Romanian waters, under Romania's own laws, was 6 miles from its mainland baseline, and any claim that the waters lying generally to the south of Serpents' Island were "Romanian waters" would have involved a claim to a territorial sea of a breadth of more than 12 miles which was not only greater than that provided for under Romanian law but also greater than was permissible at the time (or now) under international law; and

- (viii) the assertion that what was agreed in 1949 was a 12 n.m. maximum effect for Serpents' Island is not borne out by anything in the 1949 or later texts: the fact is that the 12 n.m. limit around Serpents' Island which was recognised in those texts was the extent of territorial sea established by the Soviet Union (see particularly above, para. 5.77). The 1949 agreement carried with it no implication that maritime limits in and under areas of high seas for different purposes, which in 1949 were yet to become established, were being foreclosed - particularly given that continental shelf rights, once established in customary international law, are acknowledged to be rights vesting automatically *ipso jure* in the coastal State, and as such require specific and clear action if they are to be derogated from. Those (future) dispositions regarding State rights in respect of areas of high seas and its seabed and subsoil remained, in 1949, to be dealt with in whatever way might become appropriate in the light of the developing law of the sea.

Section 6. Ukraine-Romania Maritime Negotiations After 1991

5.111 As with the Soviet-Romanian continental shelf negotiations, so too the various Ukraine-Romania maritime negotiations which took place from 1991 onwards touched on matters which could have some bearing on the issues presently under consideration. While the substance of these negotiations is touched on briefly and in part elsewhere¹¹³, the essential fact remains that they did not result in any agreement, which is why these present proceedings are taking place. Nevertheless it will be convenient here to consider what, if any, relevance those negotiations have for the status and significance of the 12 n.m. territorial sea arc around Serpents' Island.

5.112 By way of preface it should be noted that on 12 September 1991 the Ukrainian parliament enacted a law "On the State Succession of Ukraine"¹¹⁴. This law included provision to the effect that the State border which existed on 16 July 1990 and separated the territory of the former USSR from other States was adopted as the State border of Ukraine. Ukraine thus inherited the State border-line with Romania which existed at the time of the collapse of the USSR: this was consistent with generally recognized rules of international law regulating State succession, particularly as reflected in Article 11 of the Vienna Convention on State Succession in respect of Treaties 1978. Ukraine's territorial inheritance included the territorial waters around Serpents' Island and sovereign rights to the continental shelf and EEZ adjacent to this island.

A. The 1997 Treaty¹¹⁵

5.113 In Article 2.1 of this Treaty the Parties reaffirmed that "the existing border" - by which was meant the State border - between them was inviolable. They said nothing further by way of definition of what they meant by this reference to the existing border, which therefore remains as it was hitherto, with no further additions or amendments. Even assuming that

¹¹³ See below, Chapter 9.

¹¹⁴ See Annex 36, Vol. 3.

¹¹⁵ *UNTS*, Vol. 2159, p. 335, Annex 2, Vol. 2.

"existing border" includes the maritime State border between the respective territorial seas, it is clear that Article 2.1 adds nothing to the conclusions which are to be reached, as indicated above¹¹⁶, on the basis of the terms of the *Procès Verbaux* of 1949, 1963 and 1974 and their accompanying map and sketches. As shown, those instruments only establish agreement upon the 12 n.m. limit of the Soviet Union's territorial sea around Serpents' Island, and do not establish an all-purpose 12 n.m. maritime boundary to the south of Serpents' Island and continuing round to a point due east of the island.

Article 2.2 provided:

"2. The Contracting Parties shall conclude a separate Treaty on the regime of the boundary between the two states and shall settle the problem of the delimitation of their continental shelf and economic exclusive 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 entry into force of this Treaty."

5.114 This provision, too, adds nothing to the scope and effect of the agreements reached in 1949, 1963 and 1974, which remain as described above. It does, however, acknowledge that there was still a problem over continental shelf and EEZ delimitation, and says nothing to suggest that, as Romania now argues, that delimitation line had already been agreed as far out from the shore as a 12 n.m. point due east of Serpents' Island.

B. The 1997 Exchange of Letters

5.115 That conclusion is not affected by the fact that Article 2.2 refers to delimitation having to be on the basis of the principles and procedures agreed upon in the simultaneously concluded exchange of letters between Ministers of Foreign Affairs constituting what is known as the 1997 Exchange of Letters¹¹⁷.

¹¹⁶ See particularly paras. 5.77, 5.92 and 5.102-5.103.

¹¹⁷ Annex 1, Vol. 2.

5.116 Paragraph 1 of that the 1997 Exchange of Letters committed Ukraine and Romania to conclude a Treaty on their State Border Regime,

"on the basis of the principle of succession of states with regard to borders, according to which, declaration of independence of Ukraine shall not affect the existing border between Ukraine and Romania as determined and described by 1961 Treaty on the Regime of Soviet-Romanian State Border and relevant demarcation documents effective as of 19 July 1990 ..."

That reference back to the 1961 Border Regime Treaty does not involve any amendment to the existing boundary settlement, and as already noted¹¹⁸, nothing in the 1961 Border Regime Treaty itself affected the conclusion to be drawn from previous instruments as to the legal status of the waters on either side of the 12 n.m. arc around Serpents' Island, namely Soviet territorial sea inside the arc and (except for a small sector seaward of Point 1439: see Figure 5-12) high seas outside it.

5.117 The 1997 Exchange of Letters dealt separately with the continental shelf and EEZ, showing that they were still in dispute and were not covered by the general reference in paragraph 1 to the "border" settlement recorded in the 1961 Border Regime Treaty. In effect the parties accepted that the land border had been settled, and that it was time to move on to the delimitation of their continental shelf and EEZ boundaries. Accordingly paragraph 4 committed the two States to "negotiate an Agreement on the delimitation of the continental shelf and the exclusive economic zones in the Black Sea, on the basis of the following principles and procedures" - and there then followed a number of relevant principles which were to be applied in the negotiations on which the two States were to embark. As is explained elsewhere¹¹⁹, those "principles" do not themselves alter, or presuppose any alteration of, the conclusions to be drawn from the actual terms of the 1949, 1963 and 1974 instruments. It is significant, however, that the "principles" do not include any mention of earlier delimitation agreements which Romania now argues had already been concluded. Indeed, during the negotiations Romania never even raised the argument by which it now sets such store, namely that it had been agreed in 1949 that there was a continental shelf and EEZ boundary along the 12 nautical mile arc to the south of Serpents' Island.

¹¹⁸ See above, para. 5.87.

¹¹⁹ See Chapter 6, below.

C. The 2003 Treaty

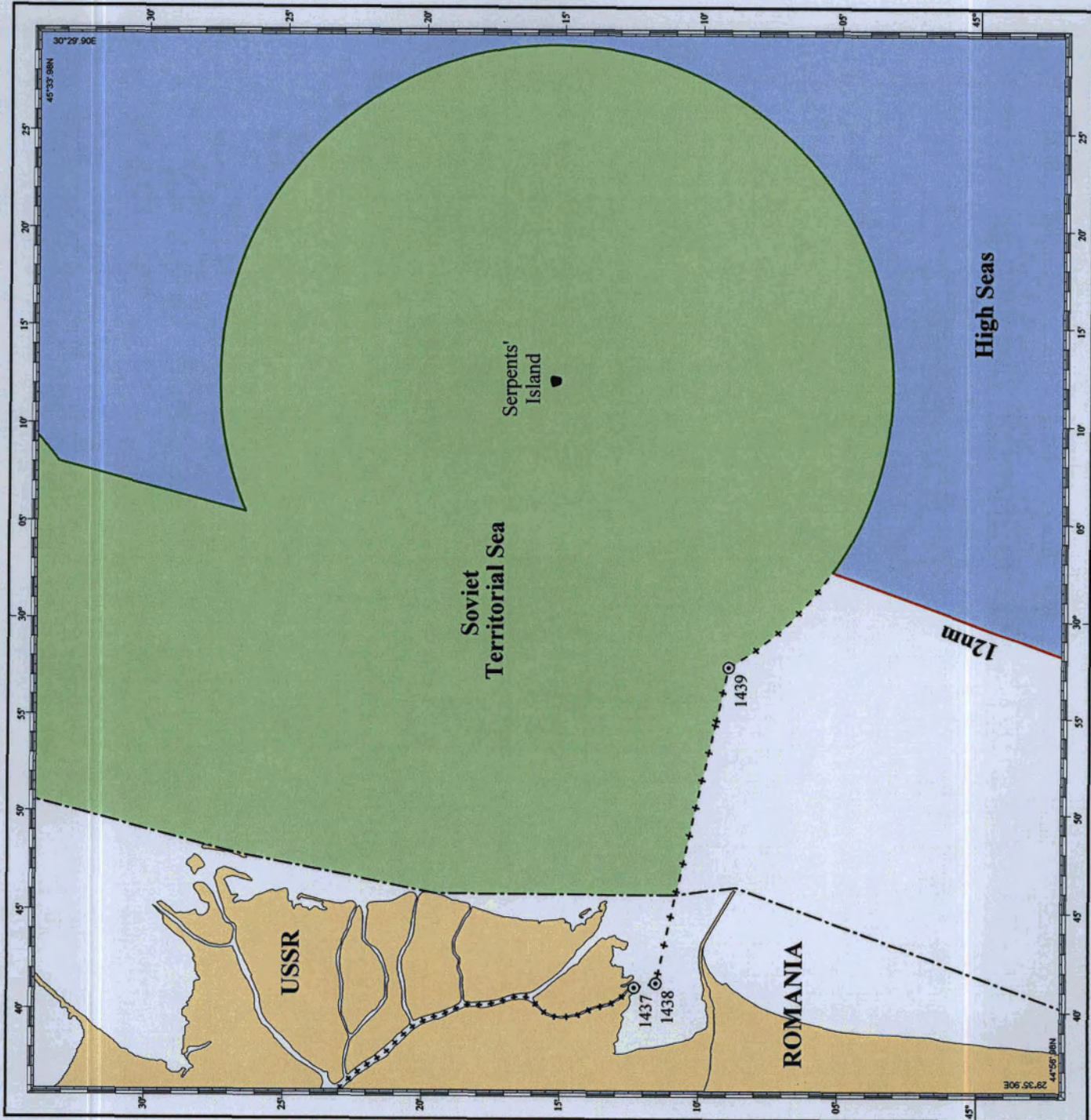
5.118 Ukraine and Romania concluded a Border Regime Treaty 2003¹²⁰, as foreseen in the 1997 Agreements. That Treaty entered into force on 27 May 2004. Article 1 of this Treaty provides that the State border between Romania and Ukraine passes "on the ground" (which seems to imply that the Treaty is here referring to the mainland border) as defined and described in the Soviet-Romanian Border Regime Treaty 1961, as well as in all the associated demarcation documents, in force on the 16th of July 1990. The border is then described as continuing:

"from border mark No. 1439 (spar buoy) along the external border of the territorial sea of Ukraine around Zmiinyi island to the point with co-ordinates of 45°05'21" N, 30°02'27" E, which is the junction point with the state border of Romania that passes along the external border of its territorial sea. The territorial seas of the Contracting Parties measured from baselines shall be permanently 12 miles wide at the point of their junction".

5.119 Several important points are to be noted about this provision.

- (i) Romania again, and clearly, accepts that the 12 n.m. zone around Serpents' Island is a zone of territorial waters;
- (ii) the point of intersection the coordinates of which are given is acknowledged to be the point at which Ukraine's 12 n.m. territorial water boundary around Serpents' Island intersects with Romania's 12 n.m. territorial water boundary measured from its baseline: since this elaboration of the State border is stated (in the final sentence of Article 1) not to represent a revision of the existing border between Romania and Ukraine, it follows that the description of the point of intersection marks no change to, but only a precision of, the boundary which previously existed - *i.e.*, that boundary

¹²⁰



The Territorial Sea of the Soviet Union and the High Seas

Figure 5-12

was *already*, under previous agreements, a *territorial waters* boundary going out to sea only as far the point of intersection of the outer limits of the two States territorial waters;

- (iii) it is particularly significant that Romania states in its Memorial that the agreed terminal point of the territorial sea boundary (which Romania refers to as "Point F") "constitutes the starting point of the delimitation line which the Court is called upon to establish"¹²¹; this is an important admission that there is no agreed continental shelf or EEZ boundary further to the east than that agreed terminal point, and in particular no agreed continental shelf or EEZ boundary as far east as any point on the 12 n.m. territorial sea arc around Serpents' Island lying due east of that island, as elsewhere maintained by Romania;
- (iv) the boundary is stated to continue "up to the point of [the given coordinates]": *i.e.*, it continues "up to" the point of intersection of the two States' 12 mile territorial waters limits, with no provision for any further continuation - which, of course, is consistent with the concept of the State boundary being a boundary between areas subject to the sovereignty of each State, *i.e.*, their areas of adjacent territorial waters;
- (v) there is no suggestion in Article 1 that beyond the point of intersection of the limits of territorial waters there is an agreed boundary of any kind delimiting the extent of the two States' continental shelf and EEZ: the remainder of the 12 mile limit beyond that point of intersection is simply the boundary marking the outer limit of Ukraine's territorial sea around Serpents' Island.

5.120 Romania seeks to qualify these consequences flowing from the 2003 Treaty by drawing attention to a declaration which it made at the time of signature of that Treaty on 17 June 2003¹²². In this declaration¹²³ Romania expressed the hope that the signature of the

¹²¹ RM, para. 7.19.

¹²² RM, para. 4.37.

¹²³ The declaration is reproduced under Annex 37, Vol. 3.

Treaty would provide impetus for negotiations for the delimitation of the continental shelf and EEZ, and "wishes to reiterate its position according to which none of the provisions of the Treaty on the State Border Regime, including the mentioning of the geographical coordinates of the last point of the Romanian-Ukrainian frontier affects in any way whatsoever the process of delimitation of the maritime areas nor does it prejudge upon the result of this process". Romania repeated the substance of this declaration when the Treaty entered into force¹²⁴.

5.121 Ukraine responded to the Romanian Note of 17 June 2003 by noting that "some provisions of this Treaty have direct legal and technical connection with the future Agreement on the delimitation of the aforementioned space between both States in the Black Sea"¹²⁵. On Romania's repetition, in its note of 27 May 2004¹²⁶, of its Declaration of 17 June 2003, Ukraine amplified its position by stating as follows:

"In this connection, the Ukrainian Side once again lays emphasis on the organic political, juridical and technical connection existing between the mentioned instruments. The Ukrainian Side proceeds from the fact that this connection was established in the Additional Agreement to the Treaty on Good-neighbourly and Cooperation Relations Between Ukraine and Romania dated 2 June 1997, when the Sides made the settlement of the problem of delimitating sea areas in the Black Sea dependent on entering into force of the Treaty on the Ukrainian-Romanian State Border Regime.

Following this logic, during further negotiation process the delegations of Ukraine and Romania considered both issues at the same time, constantly emphasizing their interrelation, specifically in the part concerning the role and effect of the geographic coordinates of the last point of the Ukrainian-Romanian state border, fixed in the Treaty, upon the delimitation of the continental shelf and exclusive economic zones of Ukraine and Romania in the Black Sea. In this context, the Ukrainian delegation made numerous examples of international practice, including the practice of the Black Sea States, which are indicative of the fact that the delimitation of the continental shelf and exclusive economic zones between states with adjacent coasts, including Ukraine and Romania, always begins with the last point of the common state border"¹²⁷.

¹²⁴ Annex RM 24.

¹²⁵ *Note verbale* No. 72/22-432-2377 of 30 June 2003, Annex 39, Vol. 3.

¹²⁶ *Note verbale* of 27 May 2004, Annex 38, Vol. 3.

¹²⁷ *Note verbale* of 22 July 2004, Annex 40, Vol. 3.

5.122 This Romanian statement is not, of course, an agreed term of the Treaty, and is as such neither binding for Ukraine nor for the Court. It can at most be regarded as a unilateral interpretative declaration; it cannot detract from, *i.e.*, amend, the terms of the Treaty to which the two States had agreed. While Romania may have sought to protect itself from certain possible consequences which might flow from the agreed terms of the Treaty, that cannot derogate from the agreed provisions, which establish that:

- (a) the 12 n.m. zone around Serpents' Island is a zone of territorial waters;
- (b) the point of intersection the coordinates of which are given is the point at which Ukraine's 12 n.m. territorial water boundary around Serpents' Island intersects with Romania's 12 n.m. territorial waters;
- (c) the agreed territorial waters boundary continues only "up to" the point of intersection of the two States' 12 n.m. territorial waters limits, with no provision for any further continuation;
- (d) the Treaty in no way suggests that beyond the agreed point of intersection of the limits of territorial waters there is an agreed boundary of any kind delimiting the extent of the two States' continental shelf and EEZ; and
- (e) in any event the "process" of delimitation of the maritime areas is not affected by any of the above points, nor do they "prejudge the result" of that process: what they do is establish the agreed starting point (*i.e.*, the territorial sea limits) on the basis of which the process of delimitation will proceed, and the result of that process will follow by application of the relevant rules of international law.

Section 7. Romania's 1997 Notification of Its Straight Baselines to the United Nations

5.123 Romania has omitted to bring to the Court's attention the important Note which, on 18 June 1997, the Romanian Permanent Mission to the UN delivered to the Secretary-General¹²⁸. By that Note, and in accordance with Article 16 of UNCLOS, Romania deposited a chart depicting Romania's baselines for measuring the breadth of its territorial sea and the limits derived from those baselines, as well as a list of the appropriate geographical coordinates. Although the chart, and the enlarged part of it directly relevant to the waters near Serpents' Island, have already been reproduced as Figures 5-4 and 5-5¹²⁹. The chart and the relevant enlargement are for convenience again attached at Figures 5-13 and 5-14. The Note of 18 June 1997 states that the map being submitted is a "map containing the national marine spaces", yet the map (and the accompanying Statute) makes no reference to any Romanian continental shelf or EEZ even though it is Romania's contention that at least part of these marine spaces had been attributed to Romania by agreement half a century earlier.

5.124 The chart shows the first two points on Romania's baselines, numbered "1" (at 45°10'51"N, 20°45'36"E) and "2" (at the eastern end of the man-made Sulina Dyke, at 45°08'42"N, 29°46'20"E). At sea the chart states that it depicts the "outer limit of Romania's territorial sea" as derived from those basepoints. That outer limit runs from a point marked "1'" (derived from basepoint 1) along a sector of an arc to a point marked "2'" (derived from basepoint 2) and thence in a straight line in a generally southward direction, parallel to Romania's baseline, to the next turning point marked "3'" (derived from basepoint 3).

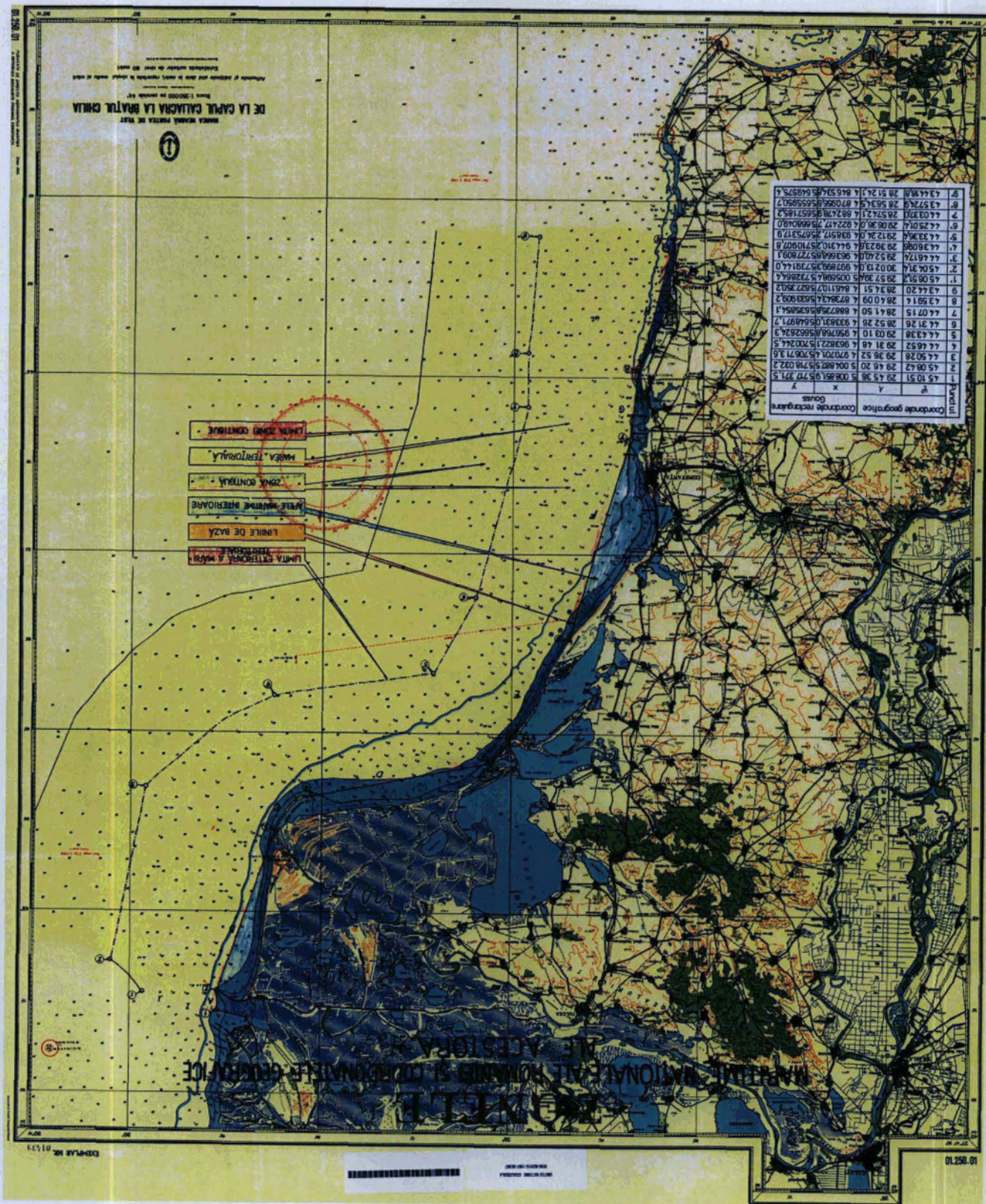
5.125 Romania itself describes this outer line as the "outer limit of Romania's territorial sea". This means that the sector of the arc between the points marked 1' and 2' is acknowledged by Romania to be a territorial sea boundary. Moreover, that sector of arc is depicted by a line using symbols which are the same as those used for the line running out

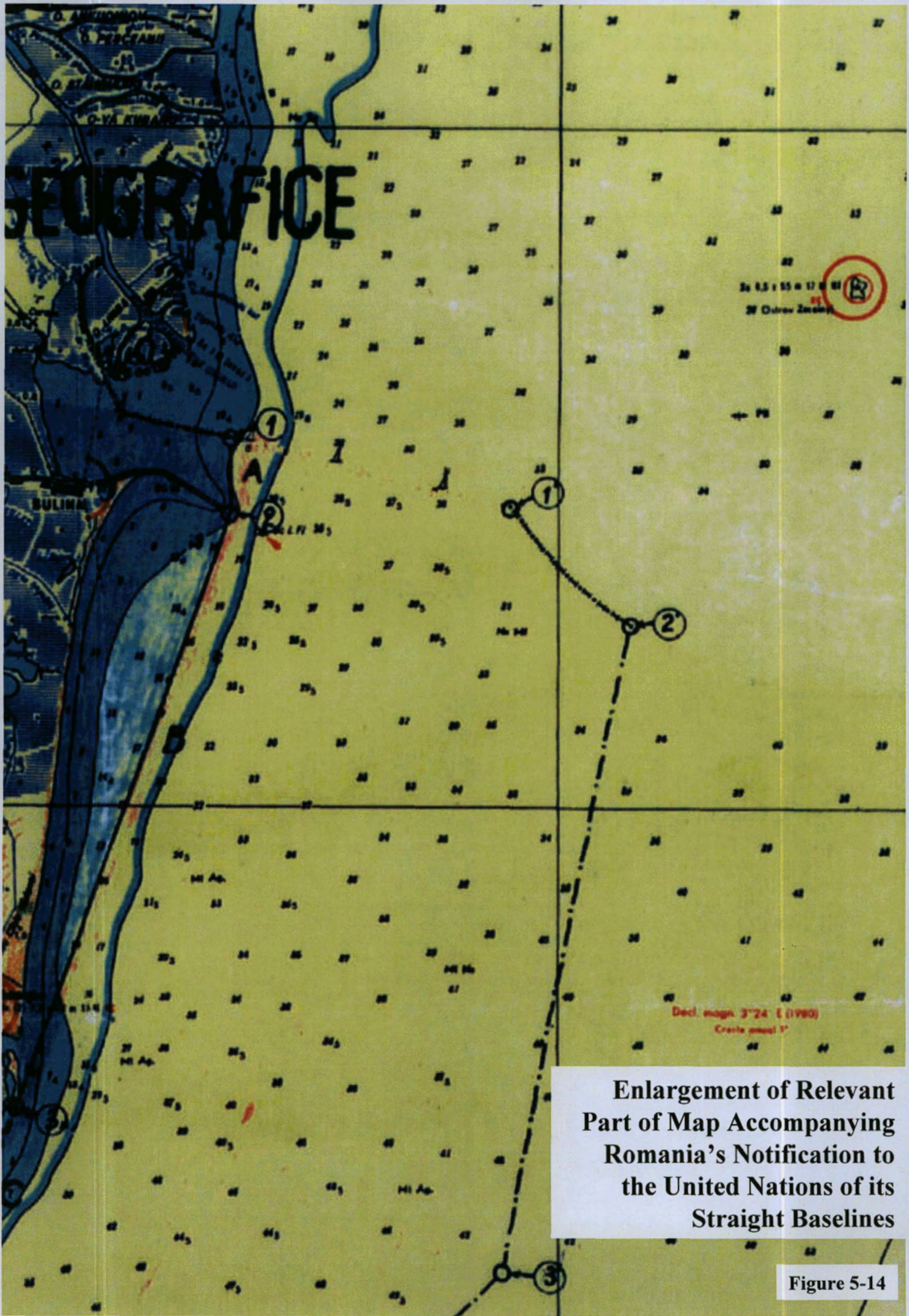
¹²⁸ Annex 41, Vol. 3.

¹²⁹ See above, para. 5.47.

Map Accompanying Romania's Notification to the United Nations of its Straight Baselines

Figure 5-13





Enlargement of Relevant Part of Map Accompanying Romania's Notification to the United Nations of its Straight Baselines

Figure 5-14

from the shore to point 1', but different from the symbols used for the outer limit running generally southwards from point 2'. The markings used for the maritime lines out to point 2' clearly show that the lines represent a boundary with the neighbouring State, Ukraine, whereas the different marking for the line southwards from point 2' shows that that line is the outer limit of Romania's territorial sea facing on to the open sea - *i.e.*, a boundary of Romania's sovereign territorial sea, not a boundary *between* Romanian and Soviet/Ukrainian territorial sea.

5.126 A particularly significant feature of this chart is its depiction of the segment of arc between points 1' and 2'. That segment is part of the Soviet Union's/Ukraine's 12 nautical mile territorial sea boundary round Serpents' Island. It is essentially the same 22° of arc as was depicted on map sheet 134 accompanying the general 1949 *Procès Verbal*:¹³⁰ the coordinates of point 1' are virtually the same as those the boundary point 1439 agreed in 1949¹³¹, and the coordinates of point 2' are virtually the same as those agreed in 2003 as the end point of the agreed territorial sea boundary between Ukraine and Romania¹³², and as the starting point of the delimitation which the Court is requested to make¹³³. This chart thus clearly bears out Ukraine's contention that all that was agreed in 1949 was a territorial sea boundary, and that the boundary was to follow the 12 nautical mile arc around Serpents' Island only as far as the intersection of Romania's (then prospective) 12 nautical mile territorial sea limit with the 12 nautical mile limit around Serpents' Island - a point of intersection which gave rise to the 22° of arc subtended from Serpents' Island, as depicted on map sheet 134 accompanying the general 1949 *Procès Verbal*.

¹³⁰ See above, para. 5.50.

¹³¹ Para. 5.75 above.

¹³² *Ibid.*

¹³³ See, para. 5.119(iii) above.

Section 8. The Cartographic Evidence

A. Cartographic Evidence in General

5.127 Before considering the cartographic evidence in this case, Ukraine will first draw attention to some general considerations relating to such evidence.

5.128 Romania has attached a lot of weight to map evidence in alleged support of its claim that the 1949 agreement established an almost semi-circular continental shelf and EEZ boundary to the south of Serpents' Island. Romania has devoted no fewer than 23 of its Map Annexes to this aspect of the case (a detailed review of these maps is carried out in an Appendix to this Chapter, at pp. 135-145 below)¹³⁴. Romania has also, of course, devoted paragraphs 11.26-11.38 of its Memorial to the alleged significance of these maps. Romania's enthusiasm for the map evidence which it has adduced is in marked contrast to the caution with which international tribunals have treated the value of map evidence.

5.129 The classical statement of the Court's position in relation to map evidence is that of a Chamber of the Court in the *Case concerning the Frontier Dispute (Burkina Faso v. Mali)*¹³⁵. In that case the Chamber was notably cautious about the weight to be attached to maps as evidence of title. The Court said:

"54. [T]he Chamber can confine itself to the statement of a principle. Whether in frontier delimitations or in international territorial conflicts, maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case,

¹³⁴ RM, para. 11.30.

¹³⁵ *I.C.J. Reports 1986*, p. 554. The Chamber was composed of Judge Bedjaoui (President), Judges Lachs and Ruda, and Judges *ad hoc* Luchaire and Abi-Saab.

maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real fact.

55. The actual weight to be attributed to maps as evidence depends on a range of considerations. Some of these relate to the technical reliability of the maps. This has considerably increased, owing particularly to the progress achieved by aerial and satellite photography since the 1950s. But the only result is a more faithful rendering of nature by the map, and an increasingly accurate match between the two. Information derived from human intervention, such as the names of places and of geographical features (the toponymy) and the depiction of frontiers and other political boundaries, does not thereby become more reliable ...

56. Other considerations which determine the weight of maps as evidence relate to the neutrality of their sources towards the dispute in question and the parties to that dispute. Since relatively distant times, judicial decisions have treated maps with a considerable degree of caution: less so in more recent decisions, at least as regards the technical reliability of maps. But even where the guarantees described above are present, maps can still have no greater legal value than that of corroborative evidence endorsing a conclusion at which a court has arrived by other means unconnected with the maps. In consequence, except when the maps are in the category of a physical expression of the will of the State, they cannot in themselves alone be treated as evidence of a frontier, since in that event they would form an irrebuttable presumption, tantamount in fact to legal title. The only value they possess is as evidence of an auxiliary or confirmatory kind, and this also means that they cannot be given the character of a rebuttable or *juris tantum* presumption such as to effect a reversal of the onus of proof."

5.130 It is against that background of judicial caution about the evidentiary weight to be given to maps when determining questions of title (to which questions of the extent of a State's entitlement to continental shelf and EEZ rights may be assimilated) that the particular maps put in evidence by Romania fall to be considered.

5.131 Romania has submitted 23 maps in support of its argument as to the existence of a semi-circular all-purpose maritime boundary to the south of Serpents' Island¹³⁶. Any consideration of the map evidence relating to the waters around Serpents' Island has to begin with four clear propositions:

¹³⁶

RM, paras. 11.26-11.38.

- (i) First, that none of the 23 maps adduced by Romania falls into the category of "maps [which] are annexed to an official text of which they form an integral part";
- (ii) Second, as fully demonstrated in Sections 2-7 of this present Chapter, none of the dealings between the USSR (and later Ukraine) and Romania establishes the existence of any agreement upon any maritime boundary going beyond the agreed terminal point of the territorial sea boundary at 45°05'21"N; 30°02'27"E, and in particular none of their dealings establishes any agreement as to the delimitation of the two States' continental shelf and EEZ boundary: accordingly, no map can be regarded as visually depicting a continental shelf or EEZ boundary already formally agreed verbally by the States concerned.
- (iii) As the Chamber of the Court said in the *Frontier Dispute* case, even in the most propitious circumstances (and apart from maps annexed to treaties) "maps can still have no greater legal value than that of corroborative evidence endorsing a conclusion at which a court has arrived by other means unconnected with the maps"¹³⁷. Since nothing in the 1949 agreement (or indeed in any other agreement) provides any basis for Romania's alleged all-purpose maritime boundary around the southern arc of Serpents' Island's territorial sea boundary, there is nothing which depictions of such a boundary on maps can be said to be corroborating or confirming. Without any such basis in the documentary record, the maps cannot in themselves alone create in maritime areas a legal entitlement to rights for which there is no other legal basis.
- (iv) Moreover, the fact that "[t]he only value [such maps] possess is as evidence of an auxiliary or confirmatory kind, ... also means that they cannot be given the character of a rebuttable or *juris tantum* presumption such as to effect a reversal of the onus of proof"¹³⁸.

¹³⁷

I.C.J. Reports 1986, p. 554, para. 56 (quoted at para. 5.129 above).

¹³⁸

Ibid.

5.132 Before examining in some detail each of the 23 maps included by Romania in the Map Atlas accompanying its Memorial and said by Romania¹³⁹ to be relevant to the alleged delimitation around Serpents' Island, mention must first be made of one of the maps in Romania's Map Atlas which, surprisingly, was not included by Romania in its catalogue of 23 relevant maps. This is **Map RM A 11 (Romania-USSR Mixed Boundary Commission, 1949)**. This map is map sheet 134 which was annexed to the general 1949 *Procès Verbal*¹⁴⁰. It is significant because it is the *only* cartographically reliable map which is annexed to an agreement establishing a Soviet-Romanian or Ukraine-Romania boundary. Because of its importance this map is reproduced again here as Figure 5-15.

5.133 The circumstances in which this map was created have been set out at paragraphs 5.48-5.50 above. As there made clear, the map depicts only a very small sector of the 12 mile territorial sea arc around Serpents' Island, namely the 22° of arc extending from where the territorial sea boundary meets the Serpents' Island arc at the buoy at Point 1439 to where Romania's prospective 12 n.m. territorial sea boundary intersects with the arc around Serpents' Island. Since the map depicts that 22° of arc as stopping clearly short of the bottom of the map it is evident that that limit to the extent of the territorial sea arc was intentional and not accidental.

5.134 It is that map, with those characteristics, which was annexed to the Parties' agreement constituted by the general 1949 *Procès Verbal*. As such it is, in the language of the Chamber in the *Frontier Dispute* case¹⁴¹, one of those "cases [in which] maps may acquire ... legal force ... because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part". It is thus only as far as the southern end of that limited 22° of arc that there exists a map which has acquired legal force.

5.135 No other map among the 23 charts referred to by Romania is of the same character. Since the category of maps constituting physical expressions of the will of the State or States

¹³⁹ RM, para. 11.30.

¹⁴⁰ See above, paras. 5.48-5.50 and Figures 5-2 and 5-6.

¹⁴¹ *I.C.J. Reports 1986*, p. 554, at para. 54 (quoted above at para. 5.129).

concerned was seen by the Chamber as the *only* case ("Except in this clearly defined case") in which a map can amount to "a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights"¹⁴², all the other maps now to be considered can only fall into the category described by the Chamber as "maps [which] are only extrinsic evidence of varying reliability or unreliability"¹⁴³.

5.136 These other 23 maps put in evidence by Romania are examined in detail in the Appendix to this Chapter. They are there examined in chronological order, and on the basis of their descriptions as given by Romania in its Map Atlas. These 23 maps are to be found at Maps RM A 15-42, comprising 23 separate maps plus enlargements of parts of 5 of those maps.

5.137 While detailed comments on each of those 23 maps are set out in the Appendix to this Chapter, a number of general comments are made here by way of comment upon the 23 maps considered collectively.

5.138 **None of the 23 maps forms part of a written agreement establishing a Soviet-Romanian or Ukraine-Romania boundary.** Consequently none of them can be regarded as a physical expression of the will of the States concerned.

5.139 **None of the 23 maps correctly depicts the different legal elements which comprise the maritime boundary off Ukraine's coast and to the south of Serpents' Island.** That maritime boundary comprised two legally distinct elements: a boundary between the sovereign territorial seas of the Soviet Union and Romania (extending until the 1950s up to 6 n.m. from the mainland coast, and subsequently up to 12 n.m. from the coast), and then, beyond that common territorial sea boundary, a boundary between the Soviet Union's (and, after 1991, Ukraine's) territorial sea and the high seas lying beyond Romania's territorial sea. Instead of depicting the maritime boundary in such a way as to indicate the different legal qualities of different stretches of the boundary, all 23 maps depict the boundary with only a single boundary marking.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

КАРТА
ГОСУДАРСТВЕННОЙ ГРАНИЦЫ МЕЖДУ СОЮЗОМ
СОВЕТСКИХ СОЦИАЛИСТИЧЕСКИХ РЕСПУБЛИК
И РУМЫНСКОЙ НАРОДНОЙ РЕСПУБЛИКОЙ

Лист **134**
 Planşa

Пограничные знаки
 Semnele de frontieră
 от **№ 1438** до **№ 1439**
 de la **№ 1438** până la **№ 1439**

HARTA
FRONTIEREI DE STAT ÎNTRE UNIUNEA
REPUBLICILOR SOVIETICE SOCIALISTE
ŞI REPUBLICA POPULARĂ ROMÂNĂ



Смешанная Советско-Румынская Комиссия
 по демаркации государственной границы
 между СССР и РНР

СОВЕТСКАЯ ДЕЛЕГАЦИЯ:

Председатель Советник Завкин А. И.

Генерал-майор Казиков А. В.

Члены: Генерал-майор Куцов Я. А.

Инженер-капитан 1 ранга Шинков А. В.

Капитан 3 ранга Тельный Я. Я.

1:150 000

Издание 1949 г.
 Изменения 1949

Comisiunea Mixtă Sovieto-Română
 pentru demarcarea frontierei de Stat
 între U.R.S.S. și R.P.R.

DELEGAȚIA ROMÂNĂ:

Președinte General Locotenent Comișel P.

General Major Bureș M.

Lt. Colonel Popescu I.

Мембри: Căpitan Popescu N.

Roman L.

Map 134 Annexed to the 1949 Procès Verbal

5.140 None of the 23 maps contains any maritime boundary or other marking indicating that to the south of the arc around Serpents' Island the maritime areas were areas of either EEZ or continental shelf belonging to Romania. Although this is the situation which Romania asserts has existed for over 50 years, and although there are accepted chart symbols for continental shelf and EEZ boundaries, and although such markings appear on some of the maps in relation to *other* such boundaries (see, *e.g.* Map RM A 25, which shows the USSR-Turkey continental shelf and EEZ boundary, Map RM A 28 which depicts a fishery zone off Romania's St. Gheorge and Map RM A 15 which depicts the USSR-Turkey maritime boundary), it is highly significant that none of those symbols or markings has been used on any of the 23 maps (even Romanian maps) to attribute to Romania areas of continental shelf or EEZ lying immediately to the south of Ukraine's 12 n.m. territorial sea arc around Serpents' Island.

5.141 **The 23 maps do not make consistent use of maritime chart symbols.** At this point it may be helpful to note some general considerations as to the significance of the symbols used on maps of this kind.

5.142 As an initial general observation, boundary symbols represent "[i]nformation derived from human intervention, such as ... the depiction of frontiers and other political boundaries, [and] does not thereby become more reliable"¹⁴⁴. In short, the fact that certain boundary symbols are used on (or omitted from) a map says nothing of decisive legal value, and does not mean that they correctly represent the true legal situation.

5.143 Subject to that general point, whereas there is a measure of international uniformity about the use of symbols on maritime charts (see, for example, the relevant page of the chart of symbols used by the International Hydrographic Office ("IHO") reproduced at Annex 42, Vol. 3), different symbols are used on different maps filed by Romania without any apparent explanation.

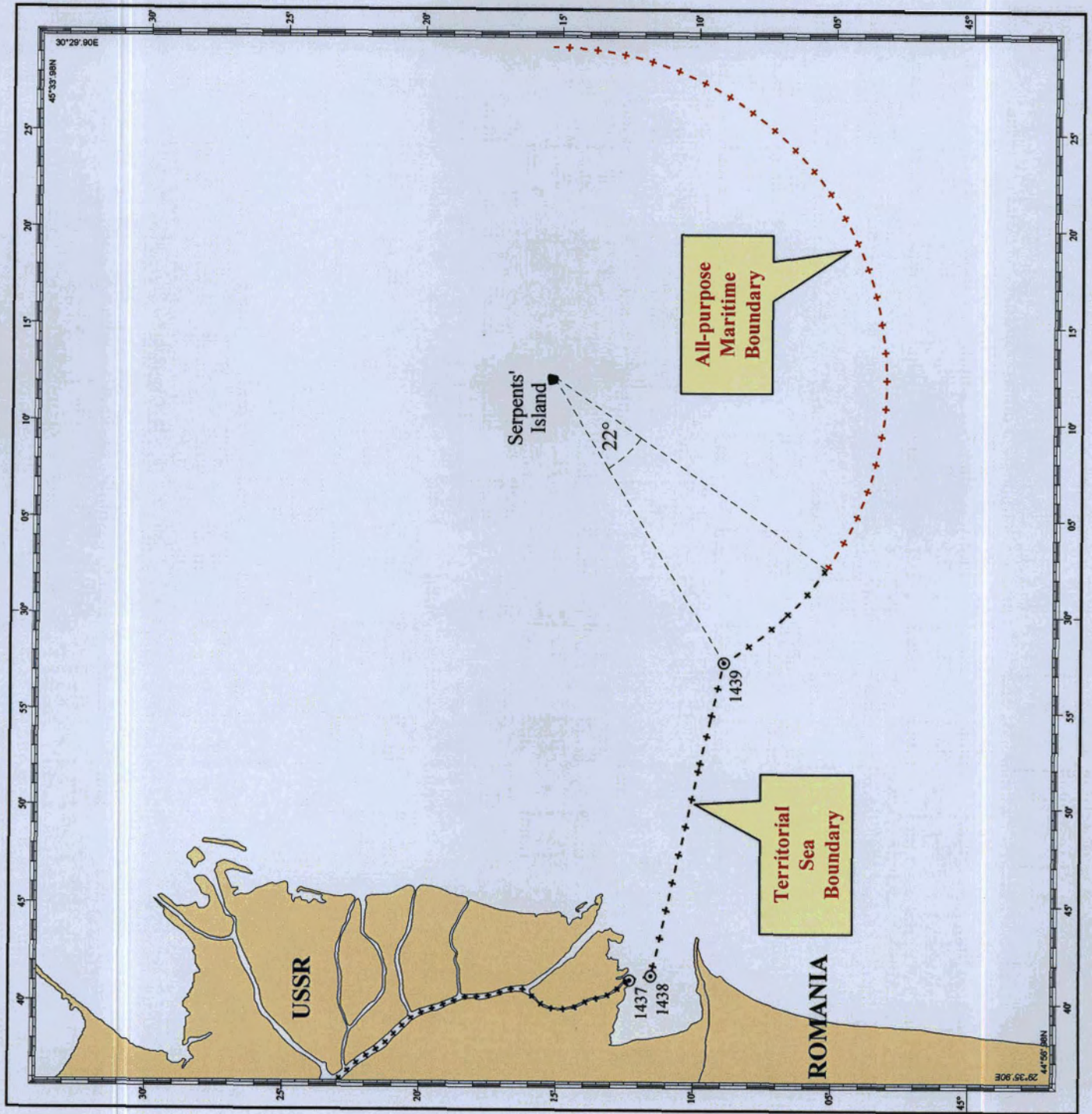
¹⁴⁴ *Frontier Dispute, I.C.J. Reports 1986*, pp. 582-583, para. 55.

5.144 Thus, the generally accepted symbol for an international boundary (a line made up of alternate crosses and dashes (+ - + - + -)) is used on some maps for the arc around the south of Serpents' Island (e.g. Maps RM A 21-22, 23-24, 25, 31, 32, 33, 34, 35, 36 and 39-40), but a different symbol is used for that arc on other maps (e.g. Maps RM A 16-17, 18, 19, 20, 26, 27, 28, 29, 30, 35 and 38) and yet it appears that a third symbol is used on Map RM A41. No explanation has been provided for this inconsistent use of maritime chart symbols.

5.145 Moreover, neither are the symbols used in a manner which strictly reflects the true legal position as a matter of the law of the sea. This is apparent even on the basis of Romania's own hypothesis as to the maritime boundaries in the waters off Serpents' Island. Thus Romania asserts that the agreed maritime boundary comprises two sectors: the first sector is the agreed territorial sea boundary running from the coast to the point at which Romania's 12 n.m. territorial sea limit intersects with the 12 n.m. territorial sea arc around Serpents' Island, and the second sector continues, as (so Romania alleges) an all-purpose maritime boundary, along that arc from that point of intersection and thence around the south of Serpents' Island until an unspecified point due east of Serpents' Island. This Romanian hypothesis is illustrated in Figure 5-16.

5.146 In terms of maritime boundaries these two sectors represent very different legal situations. The first sector is a true international boundary, separating different national sovereign areas. There is no such true international boundary in the second sector: while waters "inside" the arc are Ukraine's sovereign territorial sea, the waters "outside" the arc are not Romanian territorial waters. This part of the arc is thus, in terms of areas subject to State sovereignty and even on Romania's own hypothesis, a different kind of international boundary from that in the first sector: it is an international boundary in the sense of an outer limit of Ukraine's territorial sea as against an area not subject to any State sovereignty.

5.147 The Romanian hypothesis, however, asserts that the boundary in the second sector is not just the outer limit of Ukraine's 12 n.m. territorial sea but is also a Ukraine-Romania EEZ and continental shelf boundary. But EEZ and continental shelf rights are not the same as sovereignty, and it would follow that an international boundary signifying the limits of areas



**The Two Sectors of
Romania's Alleged
Maritime Boundary**

Figure 5-16

of national sovereignty is inappropriate for the depiction of EEZ and continental shelf boundaries.

5.148 If weight is to be attached to the symbols used on the various maps relied on by Romania, then it is also noteworthy that none of those maps depicts Romania's territorial sea limit, and only one of them depicts Ukraine's territorial sea limit beyond the 12 nm arc around Serpents' Island (Map RM A 23-24).

5.149 Ukraine does not seek to draw from this lack of symbols depicting territorial sea limits the conclusion that Romania does not have a territorial sea. Rather Ukraine draws from that lack of symbolic representation, taken together with other inconsistencies in the use of map symbols, the simple conclusion that no great legal weight can be attached to the symbols used (or not used) on these maps. They merely represent "human intervention" on the cartographic record, and more than anything else they are included on maps as little more than a matter of convenience for users. Hydrographers cannot be expected to reflect in their charts all the niceties of a complex legal situation, especially one which remains unresolved. Along this stretch of coast what matters in practice are the lateral limits of relevant areas of State sovereignty: off Romania's coast that involves a line extending out from the coast to a point 12 n.m. off shore, while off Ukraine's coast that lateral line involves a further extension of that line around the southern side of Serpents' Island - stopping, for convenience, due east of Serpents' Island since going further round to the north of the Island was unnecessary since on that side the Island and its waters faced "inwards" onto Ukraine's mainland territories.

5.150 **None of the 23 maps offers any explanation of why the final point on the semi-circular arc around Serpents' Island is located where it is (i.e., due east of the Island).** The fact is that the terminal point of the arc due east of Serpents' Island is simply a point of convenience: it bears no relation to any point which might be relevant to the drawing of maritime delimitation lines. Romania acknowledges that, if Serpents' Island were to be wholly disregarded for delimitation purposes, the appropriate lateral boundary between Romania's and Ukraine's (and formerly the Soviet Union's) territorial seas would be an equidistance line running out from the coastal terminus of the land boundary. That

equidistance line would not, however, run from the coastal terminus and through a point 12 n.m. due east of Serpents' Island, but would instead run significantly further south¹⁴⁵.

5.151 If the arc which is depicted as running round Serpents' Island to a point due east of the Island were to be, as Romania asserts, the all-purpose boundary which Romania says it is, it would not only mean that the Soviet Union and Romania are to be understood as having agreed in 1949 upon a boundary for maritime concepts which at that time were not established in international law, and that the Soviet Union agreed in 1949 to give up to Romania a large area of the continental shelf to which it had an automatic entitlement and a large area of EEZ to which it would later acquire sovereign rights, but that in giving up those then-non-established rights the Soviet Union also gave up such rights in areas lying well on its own side of any equidistance line which would have separated Romanian and Soviet waters.

5.152 Such a cumulation of improbabilities demonstrates the wholly unrealistic nature of Romania's assertion that an all-purpose maritime boundary was agreed as far round as the point depicted on Map RM A 16-17, due east of Serpents' Island - quite apart from the fact, fully demonstrated in Section 4 above, that there is no basis whatsoever to show that there was any such Soviet-Romanian agreement on an all-purpose maritime boundary as Romania asserts.

5.153 Although Romania sustains that the depiction of an arc around Serpents' Island extending as far as a point due east of the island is evidence of an agreement that the all-purpose maritime boundary was agreed going that far round the island, this is far from being the case. It is commonplace for maps to show boundaries out to sea simply on an approximate basis and so far as necessary for the practical purposes which the map is intended to serve, particularly as regards territorial appurtenance. The depiction of the sovereignty limit around Serpents' Island does not need to go any further round the island than due east of the island, since it is clear that to the north the Island faces towards the Soviet Union (and now Ukraine) and away from the only other State which might have pretensions in the area (Romania). Many (and probably most) of the 23 maps derive directly or indirectly from maps produced

¹⁴⁵ See RM Figures 8 (p. 52) and 29 (p. 222).

by the Defence authorities of the Soviet Union. Those authorities, being concerned with the defence of the Soviet Union's external borders, inevitably needed to be aware of the Soviet Union's "outer" limits.

5.154 Several of the 23 maps are self-evidently not intended to serve as maritime boundary maps. These are Maps RM A 21 (and thus the partial enlargement at RM A 22), 35, 36 and 31. All of these were published after the continental shelf and EEZ boundaries between the USSR and Turkey, and between Bulgaria and Turkey, had been concluded. Maps intended to be maritime boundary maps would have included depictions of those agreed boundaries, but these maps did not do so.

5.155 Many of the 23 maps (and probably most of them) are merely copies of or are based upon earlier maps and thus have no independent significance of their own. This is admitted by Romania in a number of instances (as identified in the Appendix to this Chapter), and in others is readily apparent from a comparison of the maps in question (*e.g.* Maps RM A 35 and 36). In fact the cartographic underpinnings of many, if not most, of the 23 maps, particularly those dating from earlier years, are to be found in Soviet maps and cartographic data assembled by the Soviet hydrographic services, motivated by the needs of the Soviet Union's Black Sea fleet.

5.156 Romania's collection of 23 maps conveys (no doubt intentionally) the impression that the depiction of the arc around Serpents' Island is the standard practice, but this is incorrect. Ukraine is aware of at least five maps, from relevant and authoritative sources, which carry no depiction of an arc to the south of Serpents' Island. These are three maps published by Turkey in 1989 (with a new edition in 2003), 1993 and 2000; one British Admiralty chart No. 2232 published in 1995 and re-issued in 2004 ("Black Sea - Romania and Ukraine: Constanta to Yalta"), which although based on "Romanian and Russian Government charts of 1980 to 1994 with later corrections", omits any line around Serpents' Island; and one published by Romania itself in 1994 (being a later edition of the 1982 map at RM A 29, but this time without the controversial arc). These five maps are at Annexes 43-45, Volume 3.

5.157 Any survey of the maps put in evidence by Romania shows clearly that

- (i) only one of those maps has substantial legal value by virtue of being annexed to a boundary agreement concluded by the parties (namely map sheet 134 at Map RM A 11; above paragraphs 5.48-5.50 and Figures 5-2, 5-6 and 5-15), and
- (ii) *all* the other maps - *i.e.*, all the 23 maps relied on by Romania - are (to use the language of the Chamber in the *Frontier Dispute* case) no more than "extrinsic evidence of varying reliability or unreliability".

5.158 In fact, all those other maps are simply irrelevant. The extensive arc which they show around the south side of Serpents' Island and continuing to a point due east of that Island is simply an "outer limit" marking of the area subject to Ukraine's sovereignty (*i.e.*, its territorial sea boundary), and the way in which that extensive arc is marked (with the same marking for the whole length of the maritime boundary from the coast to the point due east of Serpents' Island) does nothing to suggest that while the in-shore part of the line was a territorial sea boundary the outer stretch of the line, around Serpents' Island, had some other character, such as an "all-purpose" maritime boundary. Nothing about any of the maps, or their purpose or provenance, suggests that they were intended to have any significance for the extent of continental shelf or EEZ rights, or that they otherwise depicted some kind of "all-purpose" maritime boundary. The fact that the terminal point of the arc was depicted due east of Serpents' Island was evidence of nothing more than that the cartographers followed a not uncommon geographical practice as a matter of convenience.

5.159 The only maps submitted by Romania which might possibly be regarded as having particular characteristics apparently at odds with the legal position as it has evolved in the relations between Ukraine and Romania are the Ukrainian map at Map RM A 23-24 (Appendix, paragraph 5.207) and the German map at Map RM A 41-42 (Appendix, paragraph 5.192). But as there explained, neither the different ways in which the maritime boundary is marked on the Ukrainian map, nor the appellation given to the waters on either side of the outer sector of the Serpents' Island arc, support the arguments being put forward

by Romania. The apparent anomalies in those two maps are readily explicable on other grounds, and do not override the legal situation as it has clearly evolved between the Parties and as equally clearly depicted on the one map which has legal value through being annexed to the Parties' boundary agreement.

5.160 Although Romania attaches significance to the fact that no maps depict any maritime delimitation line running south from the 12 mile arc around Serpents' Island¹⁴⁶, that fact does not demonstrate anything other than that - as both Parties acknowledge, and as these present proceedings demonstrate - their 12 mile territorial sea limits do not extend into those waters, and there is as yet no agreed continental shelf or EEZ delimitation in those waters. Once a delimitation is agreed (*e.g.*, as a result of these proceedings) no doubt suitable lines will begin to appear on future maps.

5.161 Romania has also sought to argue that Ukraine, by failing to protest against published maps, has thereby acquiesced in the position depicted on those maps¹⁴⁷ - that being the position, so it is said, which Romania puts forward in these proceedings. However, Ukraine's consistently expressed position is that, apart from the agreed Ukraine-Romania territorial sea boundary in the waters out to the point on the Serpents' Island arc agreed in 2003¹⁴⁸ and the rest of Ukraine's acknowledged 12 n.m. territorial sea arc around Serpents' Island, there has been no agreement between Ukraine and Romania as to maritime boundaries, in particular those of the Parties' continental shelf and EEZs. Since there is nothing in the maps which were published after the general 1949 *Procès Verbal* and its annexed map (at RM A 11) which was inconsistent with that Ukrainian (and previously Soviet) position and represented by that 1949 map, there was no call for Ukraine to lodge protests against those later maps. There was, legally, nothing for Ukraine to protest about.

¹⁴⁶ RM, para. 11.29.

¹⁴⁷ RM, paras. 11.31 and 11.56.

¹⁴⁸ *I.e.*, 43°05'21"N, 30°02'27"E.

5.162 It follows that Ukraine's failure to protest cannot amount to acquiescence by Ukraine in any position represented by those maps which is inconsistent with Ukraine's repeatedly expressed position, since there was no such inconsistency.

5.163 In any event, however, whatever those post-1949 maps might appear to say or suggest is essentially beside the point. *None* of those maps has any substantial legal value¹⁴⁹. They do not even confirm or corroborate some legally-based proposition as to the alleged all-purpose maritime boundary, since there is no such proposition to which such confirmation or corroboration can relate¹⁵⁰. Since no Soviet Union-Romania or Ukraine-Romania agreement establishes or even supports the existence of Romania's alleged all-purpose maritime boundary extending around Serpents' Island to the "convenience point" due east of the island, the *only* basis for such a boundary is the depictions on the post-1949 maps put in evidence by Romania. However, not only are they equivocal, inconsistent and unreliable as to what it is they depict in the way of maritime boundaries, but reliance cannot be placed on maps in order to "confirm or corroborate" something which is itself based only on other similar maps, most particularly so when the *only* map of legal value is that annexed to the 1949 *Procès Verbal* (*i.e.*, map 134) which manifestly stops the maritime boundary at a point well to the south west of Serpents' Island and nowhere near the "convenience point" due east of it¹⁵¹.

Section 9. Conclusion

5.164 Looking back over the course of the agreements concluded between Romania and the Soviet Union, and then Ukraine, the 2003 Border Regime Treaty can be seen as the penultimate¹⁵² element in a series of events over more than half a century which reveal a clear and consistent pattern. Those events establish the agreement of the parties to their land and territorial sea boundary as far out to sea as the final point agreed in that 2003 Treaty, and support nothing whatsoever in the way of an agreement on a continental shelf and EEZ

¹⁴⁹ See above, para. 5.131.

¹⁵⁰ See above, Section 4.

¹⁵¹ See above, for example, para. 5.50

¹⁵² The final element will, of course, be the decision of the Court completing the task of maritime delimitation which the Parties have begun but which only took them as far out to sea as the outer limit of their territorial waters.

delimitation line beyond that final point. The clear and consistent pattern which events over more than half a century have established has been set out in the preceding Sections of this Chapter, and may be summarised as follows.

- (i) In 1949 Romania and the Soviet Union made a start on agreeing their maritime boundary beyond the mouth of the Danube. They did so by agreeing a general *Procès Verbal* describing their agreed line. At a time when Romania claimed only a 6 n.m. territorial sea while the Soviet Union claimed 12 n.m. their agreement could only be limited, but it did establish the starting point of the boundary in the Danube Delta (Point 1437) and the first two points out to sea (Points 1438 and 1439), the latter of which took the boundary line out to the point where it met the outer limit of the Soviet Union's territorial waters around Serpents' Island; the line was also agreed to go a further short, but verbally unspecified, distance following part of the outer limit of the Soviet Union's territorial waters around Serpents' Island.
- (ii) But in 1949 only the first 6 n.m. of this agreed line could be a proper State boundary between their areas of sovereignty, while beyond that 6 n.m. limit the line agreed was no more than the outer limit of the Soviet Union's territorial waters - for the first 2 n.m. the line was its territorial sea boundary calculated from its mainland coast at and to the north of the mouth of the Danube, and then for a further 5.1 n.m. it followed the first part of the Soviet Union's 12 n.m. arc of territorial sea around Serpents' Island. It seems that, because of its own lesser claim to a 6 n.m. territorial sea, Romania may at this stage have been inhibited from referring to this purely Soviet maritime limit as a "territorial sea" limit, and it was instead referred to as a "Soviet marine zone".
- (iii) Although at this time (1949) Romania claimed only a 6 n.m. territorial sea, Romania moved to a 12 n.m. territorial sea limit in 1951. That possibility would seem to have been in mind already in 1949 since it appears to have determined the distance to which the agreed line followed the first part of the Soviet Union's 12 n.m. territorial sea arc around Serpents' Island - in effect, as indicated on Map 134 accompanying the general 1949 *Procès Verbal*, the short distance beyond Point 1439 to the point at

which Romania's prospective 12 n.m. territorial sea would intersect with the Soviet Union's 12 n.m. arc around Serpents' Island. But since Romania had not actually legislated for its 12 n.m. claim it was not possible to be precise about its consequences, and as a result the prospective point of intersection could not be precisely identified.

- (iv) Once Romania had moved definitively to a 12 n.m. territorial sea in the 1950s, it was possible for the situation to evolve further. This it did with Romania's acceptance in the 1963 *Procès Verbal* that the 12 n.m. arc around Serpents' Island was the arc defining the limit of the Soviet Union's "territorial sea" around Serpents' Island.
- (v) In 1997 the conclusion by Ukraine and Romania of the Treaty on Relations of Good Neighbourliness and Cooperation effectively put an end to any dispute about their common land boundary by the reaffirmation, in Article 2.2, of "the existing border". The final stage in agreeing the common boundary between their sovereign territories was then reached in 2003 with the conclusion of the Treaty on the Ukrainian-Romanian State Border Regime, in which the two States accepted that the intersection of their respective territorial sea limits on the 12 n.m. arc around Serpents' Island, which hitherto had not been specified but only indicated in a general way, was now fixed at the point the coordinates of which they had agreed and which lay only a short distance along the 12 n.m. arc around Serpents' Island; they further agreed that their territorial sea boundary went "up to", *i.e.*, not further than, that point of intersection.
- (vi) In concluding their various agreements from 1949 onwards the Parties were only concerned with what was eventually to be their complete territorial sea boundary in that area, and were not concerned with their further continental shelf or EEZ boundary. This they confirmed by acknowledging in Article 2.2 of their 1997 Treaty that the delimitation of their continental shelf and EEZ boundaries still remained to be settled: this was to be done through negotiations on the basis of principles and procedures set out in the 1997 Exchange of Letters.

5.165 This account of the gradual progression of the Parties' settlement of the first section of their maritime boundary off the Danube Delta bears out the view demonstrated in the previous paragraphs of this Chapter that in concluding their various agreements from 1949 onwards they were only concerned with what was eventually to be their complete territorial sea boundary in that area, and were not concerned with their further continental shelf or EEZ boundary. Having definitively fixed the full length of their common territorial sea boundary and specified the coordinates of its final easterly point in their 2003 Treaty, they put that on one side as already settled and moved on to the search for a settlement of their continental shelf and EEZ boundary - a search which, in the absence of a settlement reached through negotiations, they now pursue in the present proceedings.

5.166 One further point is remarkable by its absence. Romania's entire argument in respect of the alleged maritime boundary following the 12 n.m. arc around the southern half of Serpents' Island is based on that boundary having been agreed as far round the Island as a point due east of the island, identified by Romania as Point X: *i.e.*, a point 12 n.m. distant from the island on an azimuth of 90°. *Nowhere* is such a point referred to in any of the numerous agreements concluded by the Soviet Union or Ukraine with Romania. Yet this is the vitally important point as far as and to the south of which Romania claims that it has already acquired, and the Soviet Union/Ukraine has already given up, all EEZ and continental shelf rights. Not only is it fanciful to think that States deal with such important rights on such an imprecise basis, but there is no legal basis for such a point (other than the alleged 1949 agreement): Romania's own maps show that it lies well to the north of any equidistance line calculated without any effect being given to Serpents' Island¹⁵³. As for the alleged 1949 agreement, it has been shown with abundant clarity that there is nothing in the record to show any agreement to a boundary going as far as Romania's Point X due east of Serpents' Island. The most that the record shows is agreement, as depicted on map sheet 134 annexed to the general 1949 *Procès Verbal*, to a territorial sea boundary along 22° of the Serpents' Island arc beginning at Point 1439 and ending south west of the Island at the point of intersection of Romania's 12 n.m. territorial sea with the 12 nm arc around Serpents' Island.

¹⁵³ RM, Figures 8 and 29. Even those equidistance lines were constructed by giving full effect to the man-made feature of Sulina Dyke.

5.167 So far as concerns the cartographic evidence submitted by Romania, the *only* map of any legal weight is that which accompanied the 1949 *Procès Verbal* and depicted the maritime boundary as agreed in that instrument. That map - map sheet 134 (above, paragraphs 5.48-5.50, and Figures 5-2, 5-6 and 5-15) - shows an agreed maritime boundary following a territorial sea boundary along 22° of the Serpents' Island arc beginning at Point 1439 and ending south west of the Island at the point of intersection of Romania's 12 n.m. territorial sea with the 12 n.m. arc around Serpents' Island. All the other maps on which Romania relies are, as shown in Section 8 of this Chapter, defective and unreliable in one way or another, and do not provide a legal basis for the delimitation line which Romania claims. Those maps cannot serve to establish a legal title to areas of continental shelf or EEZ for which there is, in the long line of relevant agreements, no legal basis whatsoever.

APPENDIX TO CHAPTER 5
ROMANIA'S 23 MAPS

5.168 **Map RM A 16 and (in enlargement) A 17 (Soviet Hydrographic Service of the Black Sea Navy, 1957).** This map is admitted by Romania to be the 1957 edition of a map the first edition of which was published in 1951. Romania has not provided a copy of that 1951 edition.

5.169 The map depicts the "maritime boundary" with the same symbol throughout its length, irrespective of the different international legal qualities of different lengths of that "boundary". The only single legal quality possessed by that line is that it represented throughout its length the outer extent of the Soviet Union's area of sovereignty.

5.170 This map is thus consistent with the view that the maritime line it depicts is the external limit of the Soviet Union's area of territorial sovereignty (*i.e.*, the limit of its territorial sea), whether this limit occurs where the Soviet Union's territorial sea abuts the territorial sea of Romania or where, beyond that distance from the coast, it marks the outer limit of the Soviet Union's territorial sea before the waters become high seas. Such an "outer limit" marking of the area subject to the Soviet Union's sovereignty is an entirely appropriate concern for the Soviet Black Sea Navy, whose Hydrographic Service published the map.

5.171 Nothing in this map suggests that it was intended to have any significance for the extent of continental shelf or EEZ rights, or that it otherwise depicted some kind of "all-purpose" maritime boundary. Such a reading of the map is fanciful - as would a reading which suggests that since the map does not depict the territorial sea limits of Romania along its Black Sea coast therefore the Soviet Union was denying that Romania had any territorial sea along that coast. The simple fact is that this map was not concerned with all the refinements of territorial and maritime rights and claims in the area covered by the map, but simply with the practical matter of the "outward" extent of Soviet territorial sovereignty.

5.172 **Map RM A 26 (Maritime Hydrographic Directorate of the People's Republic of Romania, 1958)**. This map is admitted by Romania to be based on "Soviet map no. 502". Romania has not provided a copy of that Soviet map, or given its date.

5.173 This Romanian map - not surprisingly since it is based on an earlier Soviet map - calls for the same comments as have just been made in relation to the 1957 Soviet map at Map RM A 16-17. Thus the delimitation line drawn on the map uses the same marking for the whole length of the line, while the line itself is an "outer limit" marking of the area subject to the Soviet Union's sovereignty. Nothing in the map suggests that it was intended to have any significance for the extent of continental shelf or EEZ rights, or that it otherwise depicted some kind of "all-purpose" maritime boundary.

5.174 **Map RM A 27 (Maritime Hydrographic Directorate of the People's Republic of Romania, 1959)**. This map is admitted by Romania to be based on an earlier Soviet map, but this time "Soviet map no. 507". Although Romania does not say so, there is in Romania's Map Atlas a Soviet map numbered 507: see Map RM A 18, which has the number "507" in the bottom right hand corner. However, that "map 507" is the 1982 edition¹⁵⁴, which could not therefore have served as the basis for Map RM A 27 which was published in 1959. An earlier edition of the Soviet map presumably served as the basis for the 1959 map at RM A 27, but Romania has omitted to provide a copy of any such earlier edition.

5.175 To the extent that the pre-1959 edition of the Soviet map no. 507 was the same as the later edition of that map at RM A 18, the comments about that later map at paragraphs 5.180-5.182 below are relevant to the depictions on Map RM A 27. This Romanian map RM A 27 - again not surprisingly, since it is based on an earlier Soviet map - calls for the same comments as were made above in relation to Maps RM A 16-17 and 26.

5.176 **Map RM A 28 (Hydrographic Directorate of the Socialist Republic of Romania, 1970)**. This Romanian map is said by Romania to be the 1970 edition of a map the first edition of which was published in 1953. It depicts - with the same symbol throughout its

¹⁵⁴ See Romania's cover note preceding Map RM A 18.

length - a maritime boundary running from the coastal terminus of the land boundary to a point on the 12 n.m. territorial sea arc around Serpents' Island approximately south-south-east of Serpents' Island (at which point the arc reaches the edge of the map).

5.177 The map depicts a fishery zone off Romania's St. Gheorghe, but has no indication of a Romanian EEZ south of the Serpents' Island arc.

5.178 This Romanian map RM A 28 calls for no other special comments. Nothing in the map suggests that it was intended to have any general maritime boundary significance or any special significance for the extent of continental shelf or EEZ rights, or that it otherwise depicted some kind of "all-purpose" maritime boundary.

5.179 **Map RM A 15 (General Directorate for Navigation and Oceanography, Ministry of Defence of the USSR, 1977).** This map appears to be a later edition of the 1957 map which appears as Map RM A 16-17 (see above, para. 5.166): it looks geographically similar, and has the same sheet number ("500") at the bottom right hand corner.

5.180 Map RM A 15 was the map annexed to the 1978 Continental Shelf Agreement between Turkey and the USSR. Its purpose was thus to depict the delimitation of the continental shelf as between those two States. Although depicting that boundary it used no similar marking for any alleged continental shelf boundary around the south of Serpents' Island. In any event, the purpose for which it was prepared had nothing to do with any kind of delimitation around Serpents' Island. Moreover, as a map annexed to a USSR-Turkey Agreement, it was *res inter alios acta* so far as concerns Romania, and depictions of lines on it cannot give rise to rights in favour of Romania and to the detriment of Ukraine.

5.181 The map calls for no other special comment. In so far as the map is but a repetition of the earlier 1957 Soviet Map RM 16-17, it calls for the same comments as were made above in relation to that Map.

5.182 **Map RM A 18 (General Directorate for Navigation and Oceanography, Ministry of Defence of the USSR, 1982).** This Soviet map has already been mentioned as, in an earlier edition, apparently the basis for the Romanian map at Map RM A 27 (see above, para 5.172).

5.183 Its depiction, by the same symbol throughout its length, of the maritime boundary around Serpents' Island is only partial, because of its closeness to the bottom edge of the map. But it shows the boundary in two parts: the first part runs from the coastal terminus of the land boundary to a point very close to the beginning of the arc around Serpents' Island (where the line runs into the bottom edge of the map), and the second part emerges from the bottom edge of the map some 20 n.m. further east and continues around the arc to the familiar point due east of Serpents Island.

5.184 For the rest, being another Soviet map repeating elements of earlier Soviet Maps, it calls for no other special comments than were made above in relation to them (see particularly paragraphs 5.166-5.169).

5.185 **Map RM A 29 (Maritime Hydrographic Directorate of the Socialist Republic of Romania, 1982).** Romania again admits that this Romanian map is based on an earlier Soviet map, "no. 507". As with Map RM A 27, although Romania does not say so, there is in Romania's Map Atlas a Soviet map numbered 507: see Map RM A 18, which has the number "507" in the bottom right hand corner. That "map 507" is the 1982 edition¹⁵⁵, and could therefore have served as the basis for Map RM A 29 which was also published in 1982, but this is far from certain.

5.186 To the extent that the 1982 edition of the Soviet map no. 507 at RM A 18 was used as the basis for Map RM A 29, the comments about Map RM A 18 at paras. 5.180-5.182 above are relevant to the depictions on Map RM A 29. In other respects the Romanian map at RM A 29 - not surprisingly since it is based on an earlier Soviet map - calls for the same comments as have been made above in relation to earlier Soviet maps. It may be noted, however, that the arc around Serpents' Island is not continued as far as a terminal point due

¹⁵⁵ See Romania's cover note preceding Map RM A 18.

east of Serpents' Island because the arc ran into the edge of the map at a point somewhere south-south-east of Serpents' Island.

5.187 It should further be noted that the 1994 edition of this map (at Annex 45) did not depict any semi-circular arc to the south of Serpents' Island.

5.188 **Map RM A 20 (General Directorate for Navigation and Oceanography, Ministry of Defence of the USSR, 1983)**. This 1983 Soviet map is of limited use, since it only depicts part of the arc lying to the south and east of Serpents' Island. It does so using the symbol appropriate for the Soviet Union's maritime boundary.

5.189 In so far as, like other Soviet maps, it adopts features common to such maps since the map at RM A 16-17, this map calls for the same comments as were made above in relation to that and other Soviet or Soviet-based maps.

5.190 **Map RM A 30 (Maritime Hydrographic Directorate of the Socialist Republic of Romania, 1985)**. This Romanian map just shows the maritime boundary from the coast to part-way round the arc to the south of Serpents' Island. It depicts the boundary with the same symbols throughout its length.

5.191 In so far as this map adopts features common to other similar maps since the map at RM A 16-17, it calls for no special further comments.

5.192 **Map RM A 19 (General Directorate for Navigation and Oceanography, Ministry of Defence of the USSR, 1985)**. In respect of the depiction of the maritime boundary line this Soviet map, like other Soviet maps, adopts features common to other similar maps since the map at RM A 16-17, and calls for no further special comments.

5.193 **Map RM A 39 and (in enlargement) 40 (Hydrographic and Oceanographic Service of the French Navy, 1990)**. This French - *i.e.*, third State - map is, as indicated at the bottom of the chart itself, simply a checked reproduction of chart INT 310 published previously by Turkey. The depiction of the maritime boundary on this French map, by use of

the same symbols throughout its length, is no different from that on most of the maps put in evidence by Romania. Being substantially the same as the depiction in Map RM A 16-17 it calls for no other special comments.

5.194 **Map RM A 41 and (in enlargement) 42 (German Federal Institute for Maritime Navigation and Hydrology, 1991).** This German (*i.e.*, non-Black Sea, and third State) map depicts the maritime boundary in the usual way, with the boundary being marked by the same symbol from the coastal terminus of the land boundary to the point on the arc due east of Serpents' Island. The boundary symbol used is, however, throughout its length the symbol appropriate for a *land* boundary. The depiction of the arc is broken due south of Serpents' Island by the interposition of the edge of the map.

5.195 For the first time in any of the maps submitted in evidence by Romania¹⁵⁶, the maritime boundary is marked, along its straight line from the coast to the beginning of the Serpents' Island arc with "UdSSR" to the north of the line and "Rumänien" to the south of the line: this is correct, because at that point the waters on either side of the line are, respectively, the territorial seas of those two States. Where, after the break in the depiction of the arc caused by the interposition of the edge of the map, the map resumes its depiction of the arc, that resumed section of the arc is again marked in the same way as the earlier, initial section of the boundary. One can only speculate why the German hydrographers felt it appropriate to do so, although one possibility which comes readily to mind is that without some such marking the resumed sector of the arc would appear unexplained on the map, and that therefore in the interests of explaining what the line signified the German hydrographers simply (but incorrectly) adopted the common hydrographic practice of repeating the marking which they had given (correctly) to the initial section of the boundary.

5.196 Be that as it may, it can be no more than speculation. What is beyond doubt, however, is that there was no legal basis for the German hydrographers inserting those incorrect markings on the resumed section of the arc. Nor are German hydrographers well placed to have authoritative views on the course of the maritime boundary between Ukraine and

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Other later maps bearing similar markings are the Ukrainian 2000 map at Map RM A 21-22 (see para. 5.204), and the Romanian 2003 maps at Map RM A 35 and 36 (see paras. 5.212-5.213).

Romania. Their views, lacking as they do both legal basis and circumstantial authority, cannot "give" to Romania maritime areas which substantive legal considerations¹⁵⁷ and the one map which has firm legal weight do not attribute to Romania¹⁵⁸.

5.197 Subject to that point, the depiction of the maritime boundary is no different from that on most of the maps put in evidence by Romania, and thus otherwise it calls for no further special comments.

5.198 **Map RM A 31 (Maritime Hydrographic Directorate of Romania, 1993)**. Like several other Romanian maps, this map is admittedly based on other maps - in this case seven Soviet maps and two Romanian maps. Given their numbering, some of these other base maps appear to be included in Romania's Map Atlas, but others are not: the base maps which are included appear to be the maps at Map RM A 30 (= Romanian map 1.250.01), Map RM A 19 (= Russian map 32100), and Map RM A 15 and 16-17 (= Russian map 500).

5.199 Given the admitted extent to which this map is in effect a copy of others, it has little original value. In the circumstances it is not surprising that it has many features in common with other maps in Romania's Map Atlas, and calls for no additional special comments.

5.200 **Map RM A 38 (Hydrographic Service, Ministry of Defence of the Republic of Bulgaria, 1993)**. This Bulgarian (*i.e.*, third State) map is no different from most of the other maps in its depiction of the maritime boundary, using the same symbol throughout. It accordingly calls for no additional special comments.

5.201 **Map RM A 37 (General Directorate for Navigation and Oceanography, Ministry of Defence of the Russian Federation, 1994)**. This Russian map is in material respects substantially the same as most of the other maps, although it only depicts (using the same symbol throughout) the maritime boundary as far as a point on the arc due south of Serpents' Island (because of the interposition of the edge of the map). It accordingly calls for no additional special comments.

¹⁵⁷ As set out above, para. 5.131.

¹⁵⁸ *I.e.* map sheet 134, at Map RM A 11.

5.202 **Map RM A 32 (Maritime Hydrographic Directorate of Romania, 1995)**. Like other Romanian maps, this is admittedly based on other maps, namely (but without details being given) "Bulgarian maps of 1982" and "Soviet maps of 1987 (with small corrections)". Given the admitted extent to which this map is in effect a copy of others, it has little original value.

5.203 In the circumstances it is not surprising that it has many features in common with other maps in Romania's Map Atlas, particularly the map at Map RM A 16-17. It accordingly calls for no additional special comments, other than to note that while it depicts a fishing zone off Romania's St. Gheorghe, it contains no depiction of any Romanian EEZ to the south of Serpents' Island.

5.204 **Map RM A 33 (Maritime Hydrographic Directorate of Romania, 1997)**. Like other Romanian maps, this is admittedly based on other maps, namely (but without details being given) "Maps edited by the hydrographic services of Romania, Bulgaria, Russia and Turkey". Given the admitted extent to which this map is in effect a copy of others, it has little original value.

5.205 In the circumstances it is not surprising that it has many features in common with other maps in Romania's Map Atlas, and accordingly calls for no additional special comments, other than that, while it could have depicted the Bulgaria-Turkey maritime boundary, it did not do so, thereby showing that it was not intended to be a maritime boundary map.

5.206 **Map RM A 21 and (in enlargement) 22 (State Hydrographic Service of Ukraine, Kiev, 2000)**. This Ukrainian map depicts the maritime boundary in the usual way, using the same symbols throughout, but, like the 1991 German map at RM A 41-42, with "Ukraine" written to the north of the straight-line sector of the boundary (*i.e.*, from the coast to where it joins the arc around Serpents' Island) and "Romania" written to the south of that line. That is, of course, correct since in those areas the waters marked are the territorial seas of those two States.

5.207 Otherwise, this map has many features in common with other maps in Romania's Map Atlas, particularly the map at Map RM A 16-17, and accordingly calls for no additional special comments.

5.208 **Map RM A 34 (Romanian Maritime Hydrographic Directorate, 2000)**. This Romanian map depicts the maritime boundary in the usual way, using the same symbol throughout, just as in Map RM A 16-17, except that (because of the location of the edge of the map) it only depicts the line around the Serpents' Island arc to a point approximately due south of that island. It calls for the no other special comments.

5.209 **Map RM A 23 and (in enlargement) 24 (Ukrainian State Hydrographic Institution Branch "Ukrmorcartographia", 2001)**. This Ukrainian map is unusual in that it depicts the maritime boundary almost completely around Serpents' Island and not, as is more usual, just as far as a point due east of the island. Since the boundary line also depicts Ukraine's territorial sea boundary running northwards from the end of the arc around Serpents' Island but not Romania's territorial sea to the south of the Ukraine/Romania lateral maritime boundary, the purpose of the map was clearly not to serve as a general maritime boundary but simply to indicate the limits of Ukraine's territorial sovereignty over all its territorial sea area, both to the north of Serpents' Island as well as to the south.

5.210 That comprehensive depiction of Ukraine's maritime boundary is given two separate kinds of marking, one running from the coast and following the arc around the south of Serpents' Island to the usual point of convenience due east of the island, at which point the other marking begins and continues for the rest of the territorial sea boundary depicted on the map. Romania draws attention to the fact that the symbols used for the first kind of markings represent the international maritime boundary, while the second kind of markings represent the outer, seaward limit of the territorial sea. The explanation for this differential treatment of the maritime boundary markings lies in the point already made in paragraph 5.151 above, to the effect that it is not unusual for a depiction of a boundary to deal differently with, on the one hand, the maritime area on that side of an island which faces towards the mainland territory of the State to which it belongs and, on the other hand, that side of the island which

faces away from that State's mainland territory. The "outward" facing boundary cannot be a true international boundary in the waters to the seaward of Romania's 12 nm territorial sea, since Romania does not and cannot have sovereignty over those waters: in so far as Romania claims EEZ and continental shelf rights in those waters (claims which Ukraine opposes), the proper boundary marking would be that for an EEZ and continental shelf boundary, but no such marking appears on the map.

5.211 For cartographic purposes the "outward" facing boundary is "international" in the sense that it separates Ukraine's sovereign areas from areas not subject in international law to any other sovereignty. To mark the "outward" facing boundary as an international boundary cannot serve, of itself, to establish that some other State (such as Romania) has sovereignty or sovereign rights on the other side of the boundary, particularly in the absence of any other basis for the assertion of such sovereignty or sovereign rights: and as fully demonstrated in Section 4 above, there is no other basis for any such assertion. This map alone cannot create that basis. The only map which does so is the map at Map RM A 11, *i.e.*, map sheet 134, which was annexed to the general 1949 *Procès Verbal* - and which took the maritime boundary line only a very limited distance along the Serpents' Island arc¹⁵⁹.

5.212 Apart from those points, the general depiction of the maritime boundary in Map RM A 23-24 follows the depiction on Map RM A 16-17, and calls for no additional comments. As with all earlier maps relied on by Romania, nothing in the map suggests that it was intended to have any significance for the extent of continental shelf or EEZ rights, or that it otherwise depicted some kind of "all-purpose" maritime boundary.

5.213 **Map RM A 25 (Ukrainian State Hydrographic Institution Branch "Ukrmorcartographia", 2003).** This Ukrainian map follows the general manner of depiction of the maritime boundary used in most of the other maps. Although the map shows an EEZ boundary between the USSR and Turkey, it shows no equivalently marked boundary around Serpents' Island. It calls for no other additional comments to those made in relation to Map RM A 16-17 and most later maps.

¹⁵⁹ See above, paras. 5.48-5.50.

5.214 **Map RM A 35 (Romanian Maritime Hydrographic Directorate, 2003)**. This Romanian map follows the usual pattern for the depiction of the maritime boundary, with the boundary depicted by the same symbols throughout its length. However, as with the Ukrainian map at Map RM A 21-22, this Romanian map depicts the maritime boundary with "Ukraine" written to the north of the straight-line sector of the boundary (*i.e.*, from the coast to where it joins the arc around Serpents' Island) and "Romania" written to the south of that line. That is of course correct since in those areas the waters marked are the territorial seas of those two States. Otherwise, the general depiction of the maritime boundary in Map RM A 35 follows the depiction on Map RM A 16-17, and calls for no additional comments.

5.215 **Map RM A 36 (Romanian Maritime Hydrographic Directorate, 2003)**. This Romanian map is based on the same sources as, and appears to be very similar to, RM A 35 except for being at a larger scale and thus covering a smaller area. But there are no other substantive differences in the depiction of the maritime boundary, and this map is therefore subject to the same comments as that other map.

CHAPTER 6

THE APPLICABLE LAW

Section 1. Introduction

6.1. The delimitation dispute having been properly referred to the Court for resolution, it follows that the Court is obliged to decide that dispute in accordance with international law, as is laid down in Article 38.1 of the Statute:

"The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply..."

and then follows the well-known listing of international conventions, international custom, general principles of law, and (as subsidiary means for the determination of rules of law) judicial decisions and teachings of publicists.

6.2. It is not necessary to look further than that provision in order to determine the law which the Court has to apply in this case.

6.3. However, Romania has asserted that the Court is required to apply certain "principles" listed in paragraph 4 of the 1997 Exchange of Letters. Given Romania's approach it is therefore necessary to say something about the Ukraine-Romania Agreements concluded in 1997 and the Treaty concluded in 2003.

Section 2. The 1997 Agreements

6.4. Following Ukraine's resumption of independence in 1991, Ukraine and Romania embarked upon new negotiations to establish a firm basis for their future relations, including settlement of their differences over delimitation of their continental shelf and EEZ boundaries.

6.5. On 2 June 1997 the Parties to the present proceedings concluded the 1997 Treaty¹. In Article 2 of this Treaty they reaffirmed the inviolability of the existing border between them², and agreed to conclude a separate Treaty on the regime of the border between the two States; and they further agreed to

"settle the problem of the delimitation of their continental shelf and of economic exclusive zones in the Black Sea on the basis of the principles and procedures agreed upon by an 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 entry into force of this Treaty".

6.6. That simultaneous exchange of letters is referred to as the 1997 Exchange of Letters³. By paragraph 1 of this Exchange of Letters the Parties agreed to conclude a Treaty on their State Border Regime⁴. By paragraph 4 the Parties agreed to "negotiate an Agreement on the delimitation of the continental shelf and the exclusive economic zones in the Black Sea", on the basis of certain principles and procedures which were then set out⁵.

6.7. Paragraph 4(g) of the 1997 Exchange of Letters provided for negotiations on such an Agreement to begin as soon as possible; and paragraph 4(h) provided that if they did not result in the conclusion of an Agreement then in certain circumstances either Party could request that the question of delimitation be solved by this Court⁶.

6.8. Both the 1997 Treaty and the 1997 Exchange of Letters entered into force on 22 October 1997.

1 Annex 2, Vol. 2.
2 See above, para. 2.3.
3 Annex 1, Vol. 2.
4 See above, para. 5.116.
5 See above, paras. 2.4 and 2.5.
6 *Ibid.*

Section 3. The 2003 Treaty

6.9. One of the circumstances which had to be satisfied before the Court could be seised of the question of delimitation was the entry into force of the 2003 Treaty on the Ukrainian-Romanian State Regime Border between the two States which they had undertaken to conclude in Article 2 of the 1997 Treaty. That 2003 Treaty was concluded on 17 June 2003⁷, and it entered into force upon the exchange of instruments of ratification on 27 May 2004⁸. Apart from the significance to be attached to the substantive provisions of the 2003 Treaty⁹, the fact of its entry into force fulfilled a condition which had to be satisfied before the Court's jurisdiction to hear the present case could be established.

Section 4. Romania's Arguments Regarding the Five "Principles" Set Out in Paragraph 4 of the 1997 Exchange of Letters Are Mistaken

6.10. Romania's argument that the Court is required to apply certain "principles" listed in sub-paragraphs (a) to (e) of paragraph 4 of the 1997 Exchange of Letters is mistaken, on two counts.

- (i) First, the "principles" set out in paragraph 4 do not apply as such to the present proceedings before the Court; and
- (ii) Second, even if they did apply, their provisions do not bear the interpretation which Romania seeks to give them.

A. The Five "Principles" Set Out in Paragraph 4 of the 1997 Exchange of Letters Do Not As Such Apply to the Present Proceedings

6.11. Ukraine accepts that the 1997 Exchange of Letters constitutes an international treaty binding upon the Parties. But it is clear from the language of paragraph 4 of the Exchange of

⁷ Annex 3, Vol. 2.

⁸ Annex 38, Vol. 3.

⁹ See above, paras. 5.118-5.122.

Letters that its provisions do not embody an agreement which relates to the present proceedings.

6.12. Paragraph 4 sets out certain "principles and procedures". The "procedures" are set out in sub-paragraphs (f), (g) and (h), and relate to the way in which the Parties are to conduct themselves in the course of their endeavours to settle the problem of delimitation by a negotiated agreement.

6.13. The five "principles" are set out in sub-paragraphs (a) to (e), as follows:

- "(a) The principle provided under article 121 of the UN Convention on the Law of the Sea of 10 December 1982 as applied in the practice of States and international adjudication;
- (b) The principle of equidistant line in delimitation areas where coasts are adjacent, and the principle of median line in areas where coasts are opposite;
- (c) The principle of equity and method of proportionality as applied in practice of States and decisions of international institutions related to delimitation of continental shelf and exclusive economic zones;
- (d) The principle, according to which none of the Contracting Parties shall reject the sovereignty of other Contracting Party over any part of its territory adjacent to the delimitation area;
- (e) The principle of effect of special circumstances within the delimitation zone;"

6.14. These "principles" are introduced with a *chapeau* to paragraph 4 which reads as follows:

"The Government of Ukraine and the Government of Romania shall conduct negotiations on the Agreement on Delimitation of the Continental Shelf and the Exclusive Economic Zones of both States in the Black Sea on the basis of following principles and procedures:"

6.15. It is apparent on the face of this language that the "principles" which were subsequently enumerated were to form the basis on which the Parties were to "negotiate" a delimitation agreement. They were not agreed by the Parties as applying to the subsequent

judicial proceedings for which provision was made in sub-paragraph (h) if the negotiations failed.

6.16. Such a view of the applicability of the "principles" makes practical sense. There are no guiding substantive principles for diplomatic negotiations. In order to give them focus, and as a first step towards solving the problem for which a solution was to be negotiated, setting out such guiding principles as could be agreed at the outset was an obviously helpful step. But in contemplating the possibility that the negotiations might fail, and agreeing that in that case the matter should be referred for settlement to a standing judicial tribunal with a well-known *and mandatory* applicable law provision and a well-established jurisprudence relating to the matter in question, it would have been impertinent to seek to tell the tribunal what "principles" to apply. Nor did the parties in fact seek to do so: they expressly agreed only that they "shall *negotiate an Agreement ... on the basis of the following principles ...*" (emphasis added).

6.17. Romania, of course, acknowledges that the five "principles" set out in paragraph 4 of the 1997 Exchange of Letters are not the totality of relevant principles, but only the Parties' view "as to the most relevant factors"¹⁰. Within the "negotiating" limits of that paragraph 4, this may be so: but, as explained, those limits restrict the relevance of that paragraph to the negotiations which were to take place. Paragraph 4 does not purport to, and does not, determine the extent of the Parties' agreement upon "the most relevant factors" in the judicial proceedings which were to follow upon the failure of the negotiations.

6.18. Romania is aware of the difficulty of trying to transpose "principles" agreed as the basis for a diplomatic negotiation into "principles" to be applied by a judicial body in resolving the problem when the negotiations have failed. Romania accordingly argues that the Parties having agreed on the "principles" to apply in their negotiations, and those negotiations having failed, and the matter therefore having been referred to the Court for resolution, the Court is to be taken as acting on behalf of the Parties and thus to be bound to apply the same

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RM, para. 8.1.

agreed "principles" which the Parties themselves were to treat as the basis for their bilateral negotiations¹¹.

6.19. In so arguing Romania seriously misrepresents the relationship between negotiation and judicial proceedings, and also the role of the Court in exercising its judicial function.

- (a) As to the former, Romania asserts that "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"¹². There is no basis for any such alleged equivalence: the text of paragraph 4 of the 1997 Exchange of Letters relates in terms *only* to the negotiations which were envisaged, and far from those same "principles" being agreed to be applicable by the Court, the Parties in agreeing to refer their unsolved dispute to the Court did so in the knowledge that the Statute of the Court contains a mandatory provision as to the legal rules which it is to apply to disputes brought before it.
- (b) As to the role of the Court, the Court is an autonomous judicial institution, acting in the exercise of *its own* authority. When seized of a dispute by two States the Court does not act "on their behalf"¹³; still less does it act on their behalf in the exercise of their task of negotiating an agreement, which is the only task for which the Parties agreed that the "principles" set out in paragraph 4 of the 1997 Exchange of Letters should form the basis. And contrary to Romania's assertion that there would be no point in agreement on the relevant factors in a delimitation if the Court were free to ignore those factors in delimiting the boundary¹⁴, it is precisely because the "principles" agreed as the basis for negotiations failed to result in agreement that it is appropriate for the Court, in the exercise of its own autonomous authority, to apply the applicable rules of international law in order to achieve the delimitation which the Parties had failed to negotiate. It is not a question of the Court ignoring the factors

¹¹ RM, para. 7.7.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

which had been agreed for purposes of negotiation, but of the Court applying rules of international law - which may or may not, and in whole or in part, include the "principles" agreed upon for the negotiations. The distinction between applying the "principles" as part of paragraph 4, and applying them, wholly or in part, as part of normally applicable rules of international law, is important.

6.20. In submitting that the five "principles" set out in paragraph 4 of the 1997 Exchange of Letters do not apply *as such* to the present proceedings before the Court, Ukraine acknowledges that some of those "principles" may, at least in part, apply *as part of the normal rules of international law which the Court will apply*. In that latter respect - *i.e.*, as part of normally applicable rules of international law - the "principles" will apply, but only:

- (i) within the framework of other associated aspects of international law rather than simply as stated in the Additional Agreement and as a part of that bilateral agreement;
- (ii) without such qualifications as might be read into them on the basis of the negotiating history of paragraph 4; and
- (iii) without any implications as to relative importance or priority as might be drawn from the order in which they appear in paragraph 4.

B. The Five "Principles" Set Out in Paragraph 4 of the 1997 Exchange of Letters Do Not Bear the Meaning Attributed to Them by Romania

6.21. Paragraph 4 of the 1997 Exchange of Letters sets out five "principles" which were to form the basis for the delimitation negotiations which were to take place. Taken at a suitably general level, those "principles" - UNCLOS Article 121, equidistance, equity and proportionality, territorial sovereignty, and relevant circumstances - are unexceptionable. They all represent rules or principles which form part of the general international law of maritime delimitation which the Court is in any event required to apply. As such, Ukraine has no quarrel with them.

6.22. However, as treaty stipulations in the 1997 Exchange of Letters, as interpreted and "glossed" by Romania, and as self-contained "principles" taken out of their context within applicable rules of international law and stripped of their associated legal surroundings, they are either incorrect or incomplete as statements of the law or unsuitable for application by the Court (for which, as explained, they were never intended), or both. These deficiencies in the five "principles" will become apparent in the treatment which follows in subsequent Chapters of the applicable rules of international law which relate to them.

Section 5. The Soviet-Romanian Agreements of 1949, 1961, 1963 and 1974, and the Ukraine-Romania 1997 Exchange of Letters, Do Not Constitute Agreements as Provided for by UNCLOS Articles 74(4) and 83(4)

6.23. Ukraine accepts that the Soviet-Romanian agreement embodied in the general 1949 *Procès Verbal* (and the associated individual *Procès Verbaux* annexed to it)¹⁵, the 1949 State Border Treaty¹⁶, the 1961 Border Regime Treaty¹⁷, the 1963 *Procès Verbal*¹⁸, and the general *Procès Verbal* 1974 (and its associated individual *Procès Verbaux*)¹⁹ continue to be binding upon Ukraine after its resumption of independence in 1991. Ukraine also accepts that the 1997 Exchange of Letters²⁰ is binding on Ukraine as well as on Romania. Consequently, those agreements are in principle part of the rules to be applied by the Court - but, of course, only in so far as their terms are applicable to the matter now before the Court.

6.24. However, those agreements are applicable (so far as they are applicable at all) by virtue of the general rule that treaties binding upon the parties are to be applied by the Court so far as their terms allow. They are not applicable, as contended by Romania²¹, by virtue of UNCLOS Articles 74(4) and 83(4). As already explained²² the opening reference in each of those paragraphs (4) to "an agreement in force" is, given the context and purpose of the Articles, a reference back to the kind of agreement referred to in the opening paragraphs of

¹⁵ Above, paras. 5.41-5.77.

¹⁶ Above, paras. 5.78-5.80.

¹⁷ Above, paras. 5.84-5.90.

¹⁸ Above, paras. 5.90-5.92.

¹⁹ Above, paras. 5.94-5.103.

²⁰ Above, paras. 5.115-5.117.

²¹ RM, paras. 7.5-7.6.

²² Above, paras. 5.114, 5.117.

those two Articles, namely an agreement delimiting the continental shelf/EEZ on the basis of international law. The agreements of 1949, 1961, 1963, 1974 and 1997 were not agreements delimiting the continental shelf and/or EEZ, and did not therefore fall within Articles 74(4) or 83(4): the invocation of those provisions cannot give the agreements in question a character which they have never had.

6.25. In any event, as also already explained²³, so far as concerns the 1997 Exchange of Letters in particular, it related (so far as concerns its five "principles") only to the basis for diplomatic negotiations and was not concerned at all with the present judicial proceedings.

6.26. While the Court has drawn attention to the importance of settling questions of maritime delimitation by agreement²⁴, and while Articles 74 and 83 of UNCLOS require that delimitation "be effected by agreement", it is clear, as shown in Chapter 5, that there has not yet been any agreement binding upon Ukraine and Romania regarding the delimitation of their continental shelf or EEZ boundaries. The only agreement relevant in this general maritime context has been the agreement reached between the Soviet Union and Romania, and confirmed between Ukraine and Romania, regarding the delimitation of the *territorial sea* boundary off the mainland coast in the region of the mouth of the River Danube and extending out to sea to a point lying to the south west of Serpents' Island. While that agreement remains binding on Ukraine, as on Romania, it does so only with respect to their territorial sea boundary. It is not a continental shelf or EEZ delimitation agreement, and its only relevance to that wider question is that it provides (in Romania's own words) an agreed "starting point" for further agreement upon, or judicial determination of, an equitable continental shelf and EEZ delimitation²⁵.

²³ Above, paras. 6.15-6.17.

²⁴ *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, pp. 4, 46-47 (para. 85), 53 (para. 101(C)(1)).

²⁵ Above, 5.119(iii).

Section 6. The Applicable Rules of International Law

A. The Basic Rule: Equitable Principles/Relevant Circumstances-Equidistance/Special Circumstances

6.27. For parties to UNCLOS (and both Ukraine and Romania are parties) the basic rule of law to be applied to the delimitation of an EEZ or continental shelf boundary is derived from Articles 74 and 83 of UNCLOS. They require that the delimitation shall be made "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". For the Court this requirement is only to be inferred from those Articles, since in terms they only apply to the basis and ultimate purpose of the agreement which the States concerned are required to seek to negotiate.

6.28. The language of delimitation has been influenced by the terms of the earlier 1958 Geneva Conventions on the Continental Shelf and on the Territorial Sea. Articles 6 and 15 respectively of those Conventions refer to delimitation on the basis of a "median" line²⁶, defined as a line every point of which is "equidistant" from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured, unless some other line is called for because of "special circumstances".

6.29. Not all maritime delimitation cases since 1958 have been decided on the basis of the 1958 Geneva Conventions or, more recently, the 1982 UNCLOS, since in a number of cases one or both parties have not been parties to those Conventions. In such cases the Court or tribunal has decided the case on the basis of customary international law. This has sometimes led to the use of terminology slightly different from that used in the Conventions, in particular the use of the term "relevant circumstances" as an alternative to "special circumstances".

6.30. Courts and tribunals have not, however, been distracted by these differences in terminology. No particular distinction of great substance has been drawn between "special"

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The Convention on the Continental Shelf does not refer to a median line in relation to the delimitation of the continental shelf in the case of adjacent States.

and "relevant" circumstances²⁷, and since both a "median" line and an "equidistance" line are constructed by the application of equidistance principles, both kinds of lines can properly be referred to as "equidistance" lines (although the term "median" line may, in strict consistency with the 1958 Convention on the Territorial Sea, be kept for the line of territorial sea delimitation between opposite coasts - and, by extension of that usage, for the line of delimitation for the EEZ and continental shelf between opposite coasts).

6.31. These various terminological differences tend to be subsumed within what is now usually referred to as the "equitable principles/relevant circumstances" or "equidistance/special circumstances" rule. That rule is well-established in the relevant judicial and arbitral decisions as appropriately to be applied in order to achieve the "equitable solution" which Articles 74 and 83 of UNCLOS and customary international law²⁸ require.

B. Principles of "Natural Prolongation" and "Non-Encroachment"

6.32. Before considering how the equidistance/special circumstances rule is to be applied, it is as well to recall that underlying any consideration of the elements which contribute to the process of delimitation in respect of the continental shelf is "the fundamental principle that the continental shelf appertains to a coastal State as being the natural prolongation of its territory"²⁹. That principle establishes a framework within which the process of delimitation takes place. That principle was most authoritatively expounded by the Court in the *North Sea Continental Shelf Cases*, where the Court said that

"it entertains no doubt [as to] the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it, - namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the

²⁷ In the *Jan Mayen* case the Court distinguished between these two concepts by saying that "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 ... 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." *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, at p. 62, para. 55.

²⁸ *Jan Mayen, I.C.J. Reports 1993*, at p. 59, para. 48.

²⁹ *Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, Decision of 30 June 1977, *U.N.R.I.A.A.*, Vol. XVIII, p. 58, para. 101.

land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed ... To echo the language of the Geneva Convention, it is 'exclusive'...³⁰.

The exclusive and inherent nature of continental shelf rights, needing no express claim or actual exercise of rights, was reaffirmed in Article 77 of UNCLOS (following Article 2 of the 1958 Geneva Convention).

6.33. The inherent nature of the coastal State's continental shelf rights over the "area of continental shelf which constitutes a natural prolongation of its land territory" carries with it the need for other States, whether adjacent or opposite, not to truncate, cut across or encroach upon that submarine area over which the coastal State has inherent rights. As the Court said in the *Libya/Malta* case, the

"principle of non-encroachment by one party on the natural prolongation of the other ... 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"³¹.

6.34. Where the geographical configuration of the adjacent or opposite coastlines of two States is such that the natural prolongation of each coastal State's land territory will cut across the natural prolongation of the other's land territory, clearly neither can assert that its natural prolongation has priority over the other's. It is, as the Court has put it, a "dispute about boundaries [... involving ...] a disputed marginal or fringe area, to which both parties are laying claim". That is what delimitation is about, since

"the process of delimitation is essentially one of drawing a boundary line between areas which already appertain to one or the other of the States affected. The delimitation itself must indeed be equitably effected ..."³².

The Court applied the principle of non-encroachment in the following terms:

³⁰ *I.C.J. Reports 1969*, at p. 22, para. 19.

³¹ *I.C.J. Reports 1985*, at p. 39, para. 46.

³² *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, at p. 22, para. 20.

"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"³³.

C. The Area of Delimitation

6.35. Moreover, delimitation takes place within a particular geographical area, the characteristics of which play an important role in the process of delimitation. It is therefore necessary at the outset to form a view as to the maritime area which is relevant for the purposes of delimitation, and the coastlines around that area which are similarly relevant. These concepts of "relevant area" and "relevant coastline" have been considered more fully in Chapter 3.

D. The Establishment of a Provisional Line, Subject to Possible Subsequent Adjustment

6.36. The equidistance/special circumstances rule is one which has to be applied in two main stages. It is first necessary to establish on a provisional basis the geographically equidistant or median line, and thereafter to consider whether that provisional line requires adjustment in order to arrive at a final line which achieves an equitable solution. This order of proceeding was clearly acknowledged by the Court in the *Libya/Malta* case³⁴ and in the *Jan Mayen* case³⁵. In the latter the Court said:

"Judicial decisions on the basis of the customary law governing continental shelf delimitation between opposite coasts have likewise regarded the median line as a provisional line that may then be adjusted or shifted in order to ensure an equitable result. The Court, in the Judgment in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* ..., in which it took particular account of the Judgment in the *North Sea Continental Shelf* cases, said:

'The Court has itself noted that the equitable nature of the equidistance method is particularly pronounced in cases where delimitation has to be effected between States with opposite coasts'. (*I.C.J. Reports 1985*, p. 47, para. 62)

³³ *Ibid.*, at p. 47, para. 85, see also the Court's *dispositif* at p. 53, para. 101(C)(1).

³⁴ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, *I.C.J. Reports 1985*, p. 13, at pp. 47, para. 63, 48, para. 65 and 57, para. 79.

³⁵ *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment, *I.C.J. Reports 1993*, p. 38, at p. 60, para. 50.

It then went on to cite the passage in the Judgment in the *North Sea Continental Shelf* cases, where the Court stated that the continental shelf off, and dividing, opposite States 'can ... only be delimited by means of a median line' (*I.C.J. Reports 1969*, p. 36, para. 57; see also p. 37, para. 58). The Judgment in the *Libya/Malta* case then continues:

'But it is in fact a delimitation exclusively between opposite coasts that the Court is, for the first time, asked to deal with. It is clear that, in these circumstances, the tracing of a median line between those coasts, by way of a provisional step in a process to be continued by other operations, is the most judicious manner of proceeding with a view to the eventual achievement of an equitable result.'" (*I.C.J. Reports 1985*, p. 47, para. 62)

6.37. The same approach was followed by the Court in *Qatar v. Bahrain*, where the Court dealt first with the delimitation of the territorial sea on the basis of Article 15 of UNCLOS. Referring to the rule set out in that Article as "the equidistance/special circumstances" rule, the Court said:

"The most logical and widely practised approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances. Once it has delimited the territorial seas belonging to the Parties, the Court will determine the rules and principles of customary law to be applied to the delimitation of the Parties' continental shelves and their exclusive economic zones or fishery zones. The Court will further decide whether the method to be chosen for this delimitation differs from or is similar to the approach just outlined"³⁶.

In subsequently dealing with the delimitation of the EEZ and continental shelf boundaries the Court adopted the same approach as it had done in the *Jan Mayen* case. Quoting extensively from the Judgment in that case, the Court said:

"227. ... With regard to the delimitation of the continental shelf the Court stated that

'Even if it were appropriate to apply ... customary law concerning the continental shelf as developed in the decided cases [the Court had referred to the *Gulf of Maine* and *Libyan Arab Jamahiriya/Malta cases*], it is in accord with precedents to begin with the median line as a provisional line and then to

³⁶

Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001, p. 94, para. 176.

ask whether 'special circumstances'³⁷ require any adjustment or shifting of that line.' (*I.C.J. Reports 1993*, p. 61, para. 51).

228. After having come to a similar conclusion with regard to the fishery zones, the Court stated:

'It thus appears 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.' (*Ibid.*, p. 62, para. 53.)

229. The Court went on to say that it was further called upon to examine those factors which might suggest an adjustment or shifting of the median line in order to achieve an 'equitable result'. The Court concluded:

'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.' (*Ibid.*, p. 62, para. 55.)

230. The Court will follow the same approach in the present case. 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.

231. The Court further notes that the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are closely interrelated³⁸.

6.38. In its most recent observation on this question, in *Cameroon v. Nigeria*, the Court adopted the same approach. It said:

"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

³⁷ "Special circumstances" was the term used in Article 6 of the 1958 Geneva Convention on the Continental Shelf, which was the applicable law as between the parties to the case.

³⁸ *I.C.J. Reports 2001*, pp. 110-111, paras. 227-231.

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'³⁹.

6.39. It may be noted that these cases involved not only territorial sea but also EEZ and continental shelf delimitations (*Qatar v. Bahrain*), States with opposite coastlines (*Libya/Malta*), States with adjacent coastlines (*Cameroon v. Nigeria*), and States with both opposite and adjacent coastlines (*Qatar v. Bahrain*). The Court's various Judgments have therefore applied the equidistance/special circumstances rule to both geographic categories of coastlines (*i.e.*, adjacent and opposite), and to all relevant maritime zones (*i.e.*, territorial sea, fishery zones, EEZ and continental shelf).

6.40. In addition to these clear and comprehensive statements by the Court, most recently in 2002, it is relevant to mention briefly the Award in the *Anglo-French Continental Shelf* case. There the Court of Arbitration accepted that the appropriate starting point for the delimitation process was the determination of the median or equidistance line, and said that

"... it seems to the Court 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"⁴⁰.

6.41. The foregoing consistent line of judicial and arbitral authority establishes that the current rule of international law requires that in cases involving the delimitation of EEZs and continental shelves, the process of delimitation involves the following steps:

- (i) First, a line is drawn on the basis of strict equidistance (which may be called a median line in relation to a line between opposite coasts, and an equidistance line in relation to a line off adjacent coasts);
- (ii) second, this equidistance line is adopted as a provisional line only;

³⁹ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 441, para. 288.

⁴⁰ *Delimitation of the Continental Shelf (UK/France)* (1977), U.N.R.I.A.A., Vol. XVIII, at p. 116, para. 249.

- (iii) any relevant circumstances are then to be examined in order to determine whether they require that the provisional equidistance line needs to be adjusted or shifted in order to achieve an equitable solution;
- (iv) if there are no relevant circumstances, or if those claimed by the parties are found by the tribunal not to require an adjustment to or shifting of the provisional line in order to achieve an equitable solution, then the provisional line will become the final delimitation line;
- (v) but if there are circumstances which require that the provisional line be adjusted or shifted, then the necessary adjustment or shift will be made by the tribunal, and the resulting adjusted or shifted line will become the delimitation line;
- (vi) finally, since the purpose of the delimitation is to achieve an equitable solution, the equitableness of the delimitation line is assessed, most usually by considering whether there is any significant disproportion between the maritime areas which the delimitation line attributes to each of the coastal States and their relative coastal lengths.

6.42. Given this sequence of steps in the delimitation process, it is apparent that the first step - the determination of the provisional equidistance line - has to take place on the basis of strict geographical considerations and calculations. The provisional line has to be "the result produced by an *unqualified* application of the equidistance principle"⁴¹. This follows from the fact that relevant or special circumstances are taken into account in order to determine whether the provisional line needs adjustment, which means *after* that line has been drawn: if the equidistance line is drawn on the basis that it already takes account of those circumstances, the staged process of delimitation so consistently laid down by the Court would be undermined. These matters are more fully discussed below, Chapter 7.

⁴¹ *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 62, para. 55, as quoted with approval in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 111, para. 229.

E. Relevant Circumstances

6.43. The existence of "relevant circumstances" and the impact (if any) which they may have on the provisionally drawn equidistant line is a matter about which it is impossible to generalise since the relevant circumstances are, almost by definition, dependent upon the specific circumstances of any given case. The geographic and other circumstances of each case are unique, and need to be assessed on their own merits within the context of that case. So far as the present case is concerned the relevant circumstances which affect the Ukraine-Romania delimitation line in the Black Sea are primarily geographical factors, State practice in the relevant area, and third State delimitations in the Black Sea. These relevant circumstances are fully discussed below, Chapter 8.

F. The Aim of an Equitable Solution

6.44. The purpose of any adjustment to the provisional equidistant line which may be called for by the relevant circumstances of the particular case is "to achieve an equitable solution". As the Court stated in the *Jan Mayen* case, referring to the requirement in Articles 74 and 83 of UNCLOS for an equitable solution:

"[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 zones"⁴².

6.45. In the same case the Court said that, after establishing the provisional line:

"[t]he Court is now called upon to examine every particular factor of the case which might suggest an adjustment or shifting of the median line provisionally drawn. The aim in each and every situation must be to achieve 'an equitable result'..."⁴³.

So too, in *Cameroon v. Nigeria* the Court remarked that the appropriate method of delimitation involved:

⁴² *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, at p. 59, para. 48.

⁴³ *Ibid.*, at p. 62, para. 54.

"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'"⁴⁴.

6.46. It is in the nature of this quest for an "equitable result" that it is to a large extent a matter for assessment. The Court, and other tribunals, have however indicated two considerations in particular which are applicable in this context.

G. The Geography Is a "Given"

6.47. The first is that in seeking an equitable delimitation it is well-established that it is not the function of the Court to re-fashion geography. The Court must take as it is the geography of the area in which the delimitation is to take place, even though this may involve geographic inequalities as between the States concerned. The Court's task is nevertheless to effect a delimitation on the basis of the geography as it is, not as one or other of the parties might wish it to be. A delimitation is not an exercise in "provid[ing] equitable compensation for a natural inequality"⁴⁵.

6.48. The Court's statement of the position in the *North Sea Continental Shelf* cases has been the basis for the subsequent development of the relevant legal considerations:

"Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy"⁴⁶.

6.49. The Court has applied these principles in several cases. In the *Tunisia-Libya* case, faced with an argument about whether or not one or the other State was favoured by nature as regards its coastline, considered it:

⁴⁴ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 441, para. 288.

⁴⁵ *Ibid.*, at p. 446, para. 299.

⁴⁶ *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, pp. 49-50, para. 91.

"not ... to be relevant since, even accepting the idea of natural advantages or disadvantages, 'it is not such natural inequalities as these that equity could remedy'⁴⁷.

So too in the *Gulf of Maine* case the Chamber, in rejecting U.S. and Canadian arguments about alleged geographic anomalies which ought to be ignored, recalled:

"that the facts of geography are not the product of human action amenable to positive or negative judgment, but the result of natural phenomena, so that they can only be taken as they are"⁴⁸.

In *Libya/Malta* the Court observed that:

"[t]he pertinent general principle ... is that there can be no question of 'completely refashioning nature'; the method chosen and its results must be faithful to the actual geographical situation"⁴⁹.

In *Cameroon v. Nigeria* the Court emphasized that:

"[t]he geographical configuration of the maritime areas that the Court is called upon to delimit is a given. It is not an element open to modification by the Court but a fact on the basis of which the Court must effect the delimitation"⁵⁰.

H. Proportionality

6.50. The second consideration which is well-established in the context of achieving an equitable result is that one measure of the equitableness of the solution reached is to be found in considerations of proportionality - that is, the "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

⁴⁷ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, I.C.J. Reports 1982, at pp. 63-64, para. 79.

⁴⁸ *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment*, I.C.J. Reports 1984, at p. 271, para. 37.

⁴⁹ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, at p. 45, para. 57.

⁵⁰ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, at pp. 444-445, para. 295.

coastlines"⁵¹. This aspect of the present case, and the relevance of the ratio of the Parties' coastlines as a relevant circumstance calling for an adjustment of the provisional equidistance line, are fully discussed below, Chapter 10.

Section 7. Conclusion Regarding the Applicable Law

6.51. While certain particular provisions in paragraph 4 of the 1997 Exchange of Letters may, at least in part, apply as part of the normal rules of international law which the Court will apply, those provisions are essentially relevant to the negotiations which the Parties were to undertake and do not *as such* apply to the present proceedings. Similarly, the Agreements concluded by Romania with the Soviet Union in 1949, 1961, 1963 and 1974, and with Ukraine in 1997, are not agreements delimiting the continental shelf/EEZ and are thus not agreements applicable as provided for by Articles 74(4) and 83(4) of UNCLOS.

6.52. Rather, for the reasons set out in this Chapter, the law to be applied by the Court in effecting the delimitation which has been requested from the Court is the general body of rules of international law which under Article 38.1 of the Statute it is incumbent upon the Court to apply to any case before it. In relation to maritime delimitation and as between the Parties to the present case, that applicable body of rules of international law comprises principally the provisions of UNCLOS and certain specific rules which have become well-established in the jurisprudence of the Court.

⁵¹ *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 52, para. 98.

CHAPTER 7

THE PROVISIONAL EQUIDISTANCE LINE

Section 1. Introduction

7.1 As discussed in the previous Chapter, the Court's recent case law makes it clear that the "equitable principles/relevant circumstances" rule constitutes the basic principle of delimitation for the continental shelf and exclusive economic zone. As the Court explained in the *Cameroon-Nigeria* case:

"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'¹.

7.2 This holding built on the Court's earlier decision in the *Qatar-Bahrain* case where the Court observed:

"The Court further notes that the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are closely interrelated"².

7.3 It follows that the first step in determining an equitable continental shelf and exclusive economic zone boundary between the Parties in this case consists of establishing the provisional equidistance line between the relevant basepoints on the Parties' respective coasts. The second step in the delimitation process is then to identify the relevant circumstances characterizing the area to be delimited and to determine whether, and to what extent, those circumstances call for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result. The third step is to test the equitableness of the result by

¹ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)*, Judgment, I.C.J. Reports 2002, p. 441, para. 288.

² *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits*, Judgment, I.C.J. Reports 2001, p. 111, para. 231.

reference to the criterion of proportionality and other equitable factors previously identified by the Court.

7.4 As will be seen, Romania's approach fails at every step of the process. Section 2 of this Chapter will discuss the correct approach for establishing the provisional equidistance line and will show why Romania's construction of that line is fundamentally flawed. In Section 3, Ukraine will discuss the status of Serpents' Island and the appropriateness of using basepoints on the island for purposes of constructing the provisional equidistance line. And in Section 4, Ukraine will identify the relevant basepoints for connecting the provisional equidistance line and will provide a map showing the tracing of the correct line. Chapter 8 will then address the identification of the relevant circumstances affecting the maritime delimitation and Chapter 9 will show how those circumstances call for an adjustment of the provisional equidistance line to achieve an equitable result. In Chapter 10, Ukraine will test the equitable nature of the claims advanced by each Party by reference to the element of proportionality and other criteria.

Section 2. The Provisional Equidistance Line Is a Strict Equidistance Line Drawn from the Relevant Basepoints on Each Party's Coasts

7.5 It is well-established that the provisional equidistance line is a strictly calculated equidistance line - that is, a line which is equidistant from the nearest basepoints on the two Parties' coasts (or baselines) from which the breadth of their territorial seas is measured. This follows not simply from the provisions of Article 6 of the 1958 Continental Shelf Convention and Article 15 of the 1982 Law of the Sea Convention, from which the "equidistance/special circumstances - equitable principles/relevant circumstances" rule derives, but also from the practice of this Court and of other international arbitral tribunals.

7.6 With respect to the "equidistance/special circumstances" rule, it will be recalled that Article 6, paragraph 1 of the 1958 Convention provides:

"Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other [or adjacent to the territories of two adjacent States (paragraph 2)], the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the

median line [shall be determined by application of the principle of equidistance (paragraph 2)] *every point of which is equidistant from the nearest point of the baselines from which the breadth of the territorial sea of each State is measured*³.

7.7 A similar provision is reflected in Article 15 of the 1982 Convention on the delimitation of the territorial sea. It provides that, absent historic title or other special circumstances, the States concerned are not entitled to extend their territorial sea beyond the median 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.*"⁴

7.8 These provisions make it clear that the provisional equidistance line is a line which is equidistant from the baselines from which the breadth of the respective States' territorial seas is measured. In order to construct the provisional equidistance line, therefore, it is first necessary to identify the relevant baselines of both Ukraine and Romania from which the outer limit of their territorial seas is measured. Any basepoint which lies on such baselines, and which has a controlling influence on the construction of the provisional equidistance line, must therefore be used in this process. This is the standard definition of a "strict" or unqualified equidistance line - a line which, as a strict matter of geography, is equidistant from the nearest territory of the two States - and it is the basis on which the provisional equidistance line has to be plotted as the first step in the delimitation exercise.

7.9 The Romanian Memorial purports to accept this basic starting point. At paragraph 8.78 of its Memorial, under a heading entitled "The provisional equidistance line/median line and special circumstances", Romania says the following:

"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".

7.10 However, Romania subsequently adopts a fundamentally incorrect approach by seeking, in the course of drawing a provisional equidistance line, to ignore relevant basepoints on the Ukrainian coast of Serpents' Island because, according to Romania, Serpents' Island is a special circumstance. Thus Romania argues that:

³ Emphasis added.

⁴ Emphasis added.

"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"⁵.

This has to be wrong: if "relevant circumstances" are to be taken into account in the initial drawing of the provisional equidistance line, then they lose their character as factors which might call for an adjustment of the provisional equidistance line once it has been plotted. Accordingly, Romania's attempt to ignore certain basepoints on Ukraine's coast from which the breadth of Ukraine's territorial sea is measured, particularly those basepoints located on the Ukrainian territory of Serpents' Island, is legally unsound.

7.11 Romania also purports to find support in its approach in paragraph 4(b) of the 1997 Exchange of Letters. That paragraph, which sets out the principles agreed by the Parties to guide them in their negotiations, refers to "the principle of the equidistance line". In an effort to obscure the fact that Serpents' Island also provides relevant basepoints for establishing the provisional equidistance line, Romania contends that "the focus of paragraph 4(b) is the situation of mainland coasts".⁶ This argument is clearly incorrect. Nowhere does paragraph 4(b) refer only to an equidistance line drawn between mainland coasts ignoring islands. The reference is simply to "the equidistance line" without any qualification. As shown in this Counter-Memorial, in order not to prejudge any potential relevant circumstances, the provisional equidistance line which is drawn in the first step of the delimitation process has to be a strictly calculated equidistance line.

7.12 Elsewhere in its Memorial, Romania further attempts to disregard Ukraine's baselines around Serpents' Island by arguing that there is a pre-existing agreement delimiting a twelve-mile territorial sea around the island and that the island is no more than a "rock" which is entitled to no continental shelf or exclusive economic zone rights of its own. The first leg of this argument has been thoroughly rebutted in Chapter 5. The second part of the argument - the status of Serpents' Island as a full-fledged island within the meaning of paragraphs 1 and 2 of Article 121 of the 1982 Convention, and hence its appropriateness in providing basepoints for the construction of the provisional equidistance line - will be addressed in Section 3 of this Chapter.

⁵ RM, para. 8.126(e) (emphasis added).

⁶ *Ibid.*, para. 8.43.

7.13 For present purposes, the important point is that Romania has failed to use the correct basepoints on the Parties' baselines from which to construct the provisional equidistance line. In short, Romania has effectively treated Serpents' Island as a "special circumstance" to be ignored for purposes of establishing the provisional equidistance line, and has thus wrongly based such provisional line on the Parties' mainland coasts (and even on man-made features on Romania's coast such as the Sulina Dyke and uninhabited sand spits such as Sacalin Peninsula) without taking into account Ukraine's basepoints on Serpents' Island from which the breadth of its territorial sea is also measured and from which any calculation of the initial, "strict", provisional equidistance line must be based.

7.14 Apart from the provisions of the 1958 and 1982 Conventions referred to above, the case law of this Court and of arbitral tribunals leaves no doubt that the provisional equidistance line should be a strict equidistance line drawn from the Parties' baselines which does not prefigure any account to be taken of special or relevant circumstances characterizing the area. Those circumstances, so far as they exist, only come into play at the second stage of the process once the "strict" provisional equidistance line has been established. Romania's position thus runs counter to the proper method of proceeding with the first step of establishing the equitable maritime boundary and cannot be squared with the jurisprudence on this issue.

7.15 The manner of constructing the provisional equidistance line was first addressed by the Court of Arbitration in the *Anglo-French Arbitration*. With respect to the Atlantic region of the maritime boundary, the Court of Arbitration emphasized that what was effectively the provisional equidistance line should be drawn from the nearest points on the baselines of the parties. In the Court of Arbitration's words:

"The rules of delimitation laid down in the two paragraphs of Article 6 [of the 1958 Convention] are essentially the same. In the absence of agreement, and unless another boundary is justified by special circumstances, the boundary is to be the line which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured"⁷.

⁷ *Case Concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, Decision of 30 June 1977, reprinted in *U.N.R.I.A.A.*, Vol. XVIII, at p. 111, para. 238.

7.16 Based on this starting point, the Court of Arbitration first drew a provisional equidistance line giving full effect to the relevant basepoints on each Party's respective coasts. This includes using basepoints located on the U.K. Scilly Islands. It was only at the second step of the delimitation process - determining whether there were any special or relevant circumstances justifying a modification of the strict equidistance line - that the Court of Arbitration considered the effect of the Scilly Islands on the overall boundary. As the Court of Arbitration stated:

"The question is whether, in the light of all the pertinent geographical circumstances, that fact [the location of the Scilly Islands] amounts to an inequitable distortion of the equidistance line producing disproportionate effects on the areas of shelf accruing to the two States"⁸.

7.17 In the final analysis, the Court of Arbitration decided that the location of the Scilly Islands was a "special circumstance justifying a boundary other than the *strict* median line."⁹ However, two points are worth noting in this connection. The first is that the Court of Arbitration posited a "strict" equidistance line as the first step in the analysis using the Scilly Islands as basepoints for the construction of that provisional line. The second is that, unlike in the present case, there was no marked disparity in the lengths of the mainland coasts of the United Kingdom and France fronting the Atlantic region which could also have constituted a special or relevant circumstance to be taken into account at the second stage.

7.18 Turning to the Court's own practice, the Court adopted a similar approach in the *Libya-Malta* case. There, the Court first adopted a provisional median line drawn between the coasts of the Parties, and only afterwards, in a second stage of the process, adjusted that line northwards to take into account the significant difference in the lengths of the relevant coasts of Libya and Malta bordering the area to be delimited¹⁰.

7.19 A similar approach was employed by the Court in the *Denmark-Norway* case involving delimitation between Greenland and Jan Mayen. As the Court stated:

⁸ *Ibid.*, p. 114, para. 243.

⁹ *Ibid.*, p. 114, para. 245 (emphasis added).

¹⁰ *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 48, para. 65 and p. 51, para. 71.

"It thus appears that, for both 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"¹¹.

7.20 It was only at the second stage of the exercise after the provisional equidistance line had been drawn that the Court indicated that it was "now called upon to examine every particular factor of the case which might suggest an adjustment or shifting of the median line provisionally drawn"¹². In this connection, the Court explained:

"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'"¹³.

7.21 In analysing the role of "special circumstances", the Court added the following important observation which deserves to be quoted in its entirety:

"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"¹⁴.

7.22 The significance of this passage lies in the Court's emphasis that "special circumstances" (and, by analogy, "relevant circumstances") are those circumstances which might justify the modification of the result produced by the *unqualified* application of equidistance. The "unqualified" application of the equidistance principle necessarily entails

¹¹ *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 62, para. 53.

¹² *Ibid.*, p. 62, para. 54.

¹³ *Ibid.*

¹⁴ *Ibid.*, p. 62, para. 55 (emphasis added).

the construction of a strict ("unqualified") equidistance line as the provisional line using all of the relevant basepoints on the Parties' coasts as the first step in the process. It was only at the second stage of the exercise that the Court examined the question whether, and to what extent, that provisional line required adjustment. As the Court stated:

"Having thus concluded that it is appropriate to have recourse to a median line provisionally drawn as a first stage in the delimitation process, the Court now turns to the question whether the circumstances of the present case require adjustment or shifting of that line ..."¹⁵.

7.23 More recently, the Court adopted a similar approach in the *Qatar-Bahrain* case. Recalling the Court's reasoning in the *Jan Mayen* case, the Court noted:

"The court will follow the same approach in the present case. 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"¹⁶.

7.24 With respect to the offshore features in the case, Fasht al Azm and Qit'at Jaradah, the Court first examined the result of a strict application of equidistance using these features as basepoints. The results of this analysis were depicted on the figure appearing on Sketch Map No. 3 at p. 69 of the Court's Judgment. The Court then turned to the issue whether these features constituted special circumstances making it necessary to adjust the equidistance line as provisionally drawn, and decided that they did.¹⁷ Once again, this approach was consistent with adopting as the first stage of the delimitation a strict equidistance line, and subsequently adjusting that line to reflect the certain geographic circumstances characterizing the area.

7.25 The Court also followed the same approach in the *Cameroon-Nigeria* case. Quoting with approval its earlier holding in *Qatar-Bahrain*, the Court again noted that the equidistance line should be drawn from the nearest points on the baselines of the parties. In the Court's words:

¹⁵ *Ibid.*, p. 64, para. 59.

¹⁶ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 111, para. 230.

¹⁷ *Ibid.*, pp. 104-105, paras. 217-222.

"As the Court made clear in its Judgment in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*,

'[t]he 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.' (*I.C.J. Reports 2001*, para. 177)"¹⁸.

7.26 Based on the foregoing discussion, it is clear that, contrary to Romania's argument, the provisional equidistance line to be drawn between Ukraine and Romania at the first stage of the delimitation is a "strict", or unqualified, equidistance line drawn from the nearest basepoints on the Parties' coasts or baselines from which the breadth of their territorial seas is measured. Since one set of relevant basepoints is provided, on the Ukrainian side, by Serpents' Island, it is next appropriate to turn to the status of this island under international law and the location of the relevant basepoints on the island.

Section 3. Serpents' Island Is Necessarily One of the Basepoints

7.27 It has been previously demonstrated¹⁹ that the provisional equidistance line should be a "strict" equidistance line constructed from the nearest basepoints on the baselines from which the breadth of the territorial seas of the Parties is measured. Accordingly, account has to be taken of the national legislation of the Parties dealing with the definition of their territorial seas. As far as Ukraine is concerned, Article 5 of the 1991 Statute concerning the State Frontier provides that: "The territorial sea of Ukraine includes the coastal marine waters having a width of 12 nautical miles measured from the line of minimum low tide *both on the mainland and on islands belonging to Ukraine*, or from the straight baselines joining the corresponding points"²⁰. Moreover, Article 2 of the Ukrainian Law relating to the EEZ provides that: "The exclusive (marine) economic zone of Ukraine shall be comprised of maritime areas beyond and adjacent to the territorial sea of Ukraine, *including areas surrounding islands belonging to Ukraine*", and that the breadth of that zone "shall not exceed a distance of 200 nautical miles measured from the same baselines as the territorial sea of

¹⁸ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, *I.C.J. Reports 2002*, para. 290.

¹⁹ See above, paras. 7.5-7.26.

²⁰ Statute dated 4 November 1991, as amended on 18 June 1996 and 3 April 2003 (emphasis added), Annex 46, Vol. 4.

Ukraine"²¹. Thus, the low-water mark on Serpents' Island's shore may be used, together with any other appropriate point on Ukraine's mainland baselines, in order to determine the relevant basepoints for the construction of the provisional equidistance line between the exclusive economic zones of Ukraine and Romania.

7.28 Before entering into a discussion of the aspects advanced by Romania with regard to Serpents' Island, it is necessary to state Ukraine's position concerning the extraordinary Romanian allegation based on the declaration made by Romania upon the signature and ratification of the Law of the Sea Convention with respect to Article 121 concerning the regime of islands²². In paragraph 3 of that unilateral declaration, Romania considered that "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".

7.29 It must be recalled that that unilateral statement was made according to Article 310 of the Convention. Since no reservation may be made to the Law of the Sea Convention, Romania was only entitled to make a declaration under that article. As a matter of fact, while Article 309 expressly prohibits any reservations to the Convention, it is said in Article 310 that: "Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State." Keeping in mind the purpose thus assigned to such declarations, and taking into consideration the fact that the Romanian declaration was just an attempt to introduce, as an understanding of the delimitation rules of the Convention²³, an amendment already proposed by Romania at the very end of the Law of the Sea Conference²⁴, it is obvious that, from a legal point of view, the

²¹ Law dated 16 May 1995, amended on 6 March 1996, 17 December 1996, and 3 April 2003 (emphasis added), Annex 47, Vol. 4.

²² RM, paras. 8.20-8.30. See also RM, paras. 8.34, 8.126 and 10.7.

²³ During the Third U.N. Conference on the Law of the Sea, the negotiations on the delimitation of the continental shelf and the EEZ were closely connected to the discussions dealing with the regime of islands, in particular during the ninth session of the Conference. See B.H. Oxman, "The Third United Nations Conference On the Law Of The Sea : The Ninth Session (1980)", *American Journal of International Law*, 1981, pp. 211-256 (at pp. 232-233).

²⁴ In 1982 Romania proposed an amendment to the article on the regime of islands in the draft Convention adding a fourth paragraph: "Uninhabited islets should not have any effects on the maritime spaces belonging to the main coasts of the States concerned". (Doc.A/CONF.62/L.118 of 13 April 1982; UNCLOS III, *Official Records*, Volume XVI, p. 225).

Romanian declaration is of limited significance. It is therefore impossible, as a matter of principle, to draw the conclusion, as Romania does, that the interpretation unilaterally stated by Romania in its declaration should be automatically applied in a maritime delimitation litigation in which Romania is involved.

7.30 Moreover Romania's position is contradictory. On the one hand, Romania pays particular attention to demonstrating that its declaration was an "interpretative declaration", not a reservation; but, on the other hand, it contends that Ukraine did not object or otherwise react to that declaration. Romania is thus applying incorrectly to declarations the provision of Article 20, paragraph 5, of the Vienna Convention on the Law of Treaties concerning acceptance of reservations. According to that provision, "a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation". However, no such rule applies to statements or declarations which are not reservations properly speaking, even when they are considered as interpretative declarations.

7.31 Romania has simply forgotten to mention that there is no need to object to a declaration which is not a reservation and which does not modify the legal effect of the treaty in question. In such a situation, there is no legal obligation for a State to react, and no legal effect can be derived from its abstention to do so. It is to be noted, incidentally, that Romania itself is conscious of this legal situation when it states: "Neither the USSR nor Ukraine made any comment or objection to the Romanian declaration. *Nor did any other State*"²⁵. If no State has reacted to the Romanian declaration, it is certainly not because all the other States were ready to accept the so-called Romanian interpretation of Article 121; it is simply because none of them felt itself obliged to react. And – to say the least – it would certainly be unreasonable to infer that all of them are now bound by the Romanian declaration.

7.32 For those reasons, the Court cannot accept the extravagant Romanian contention according to which "[t]he 1982 UNCLOS ... must be applied and interpreted by the Court on the basis of the only interpretation accepted by Romania"²⁶. And therefore the Court does not have to take into consideration Romania's declaration.

²⁵ RM, para. 8.22 (emphasis added).

²⁶ RM, para. 8.30.

7.33 For the same reasons, the Court cannot accept the extraordinary Romanian contention according to which the reference made to Article 121 of UNCLOS in the 1997 Exchange of Letters as one of the principles to be applied in the delimitation was a clear indication that "Ukraine accepted the applicability of the third paragraph of Article 121, as interpreted by the Romanian declaration, to the present situation"²⁷. That contention is based on a very simplistic and entirely wrong reasoning, which may be summarized as follows: (a) At the time of the conclusion of the 1997 Agreement, the rules of international law concerning islands applicable to Ukraine and Romania were those established by the 1958 Conventions, since UNCLOS was not in force between the two States²⁸; (b) Therefore, at that time, when they made a specific reference to Article 121 of UNCLOS, they referred necessarily to the only provision of that article enunciating a new rule of international law, that is the third paragraph²⁹; (c) Since at that time Ukraine was well aware of the interpretative declaration made by Romania with respect to that provision, Ukraine has implicitly accepted the application to Serpents' Island of the third paragraph of Article 121 in conformity with the interpretation given to that provision by the Romanian declaration³⁰.

7.34 Romania contends that Serpents' Island is simply a "rock" under Article 121 (3) of the Law of the Sea Convention, and as such does not generate any maritime zone beyond the external limit of its territorial waters. And under those conditions, Romania asserts, Serpents' Island cannot qualify as a possible basepoint for the drawing of an equidistant line dividing the respective areas of continental shelf and the exclusive economic zones of Ukraine and Romania. Those contentions and assertions are deprived of any *raison d'être*, as will be seen in the following sub-sections where it will be demonstrated that Serpents' Island is not a mere "rock", and that it is not insignificant, contrary to what is said in the Romanian Memorial.

A. Serpents' Island Is an "Island", Not a "Rock"

7.35 It is first to be noted that since time immemorial Serpents' Island has been known as just that – Serpents' Island. Even if it has enjoyed different names throughout the centuries, it was always referred to as "Island X...". Unlike other marine features which are true rocks and

²⁷ RM, para. 8.34.

²⁸ RM, para. 8.32.

²⁹ RM, para. 8.33.

³⁰ RM, paras. 8.34-8.35.

are named accordingly³¹, so far as Ukraine has been able to discover Serpents' Island has never been known as "Serpents' Rock" or some similar non-island name³². While such matters of nomenclature may not be decisive of the legal status of a geographical feature, they are - especially when used over a very long period of time - strongly indicative of the appropriate legal status and raise a presumption in favour of the status which the name indicates.

7.36 The legal definition of an "island" confirms that presumption. The only relevant provision of the 1982 Law of the Sea Convention which defines an "island" does so in terms which clearly include Serpents' Island within the definition. Article 121(1) defines an island as "a naturally formed area of land, surrounded by water, which is above water at high tide". Serpents' Island is manifestly a naturally formed area of land, surrounded by water, and above water at high tide.

7.37 This legal definition coincides with the ordinary meaning of the term "island". The insular status of Serpents' Island is evident from its appearance. As clearly shown on the photographs reproduced in this Counter-Memorial, it is a physical feature of some size and substance, when compared for example with the Persian Gulf feature of Qit'at Jaradah which was recently defined by the Court as "a very small island"³³. It is also clear from those photographs that Serpents' Island is not just an uninhabited and uninhabitable feature, but is very much an island with appropriate buildings and accommodation for an active population. Romania seeks to argue that much of that population has only recently moved to the island, but this is to ignore the long history of human presence on the island³⁴. From that point of view, Serpents' Island is to be considered in comparison with several other maritime features which are clearly islands but which have minimal population like Pitcairn Island³⁵, Kerguelen Islands³⁶, Crozet Island³⁷, or even no permanently resident population like South Georgia and South Sandwich Islands.

³¹ Such are, for example, "Rockall", located in the North Atlantic Ocean about 200 nautical miles west of the Hebrides, and "Eddystone Rock", off the southern coast of England at the entrance of Whitesand Bay in the British Channel.

³² It is noteworthy that, despite its small size, Serpents' Island was never called "Serpents Islet", it being generally understood that an "islet" is a very small island.

³³ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 99, para. 197. At high tide the length and breadth of Qit'at Jaradah are about 12 by 4 metres, and its altitude is approximately 40 centimetres.

³⁴ See below, paras. 7.50-7.88.

³⁵ 54 inhabitants in 1995.

³⁶ 60 people working in scientific research stations.

³⁷ About 20 people in a meteorological and scientific station.

7.38 To some extent Serpents' Island's status as an island is the counterpoint to it not being a rock as that term is understood in Article 121(3) of UNCLOS. That provision, which is vaguely worded, states: "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf". This language is not without its difficulties.

7.39 First, it does not define what is meant by a "rock". Implicitly Article 121(3) is a derogation from Article 121(2), introducing an exception to the general equality between islands and mainland coasts and disentitling rocks from the shelf and EEZ maritime zones to which an island is entitled; a rock is therefore implicitly a kind of island. Beyond that, the word must bear its ordinary meaning in its context and in the light of the object and purpose of UNCLOS. On that basis a "rock" must be understood as a small and insignificant feature composed essentially of material commonly regarded as rocky³⁸, in contradistinction to an "island" which is an altogether larger and more substantial feature. Romania argues that since Serpents' Island is composed of rocky material it must be regarded as a "rock", but this cannot be so since most islands are to a greater or lesser extent composed of rocky material. Ukraine submits that on the basis of the ordinary meaning of the term as used in Article 121(3) of UNCLOS, Serpents' Island cannot be regarded as a "rock".

7.40 Second, the language of Article 121(3) is ambiguous as to whether the two subsequent conditions which apply to rocks are to be understood disjunctively or conjunctively: *i.e.*, to fall within Article 121(3) must a rock be *both* unable to sustain human habitation *and* unable to sustain economic life of its own, or is it sufficient to bring it within that provision if only one of those conditions is met? Ukraine submits that the two conditions have to be read conjunctively, given that both are introduced by the single verb "cannot sustain". From that it follows that, since Serpents' Island, manifestly can - and does - sustain human habitation, Serpents' Island, even if it were a rock (which is denied), does not fall within Article 121(3).

³⁸

There is a question how literally this provision is to be taken since, if taken literally, it would exclude minor above-water features composed of sandbanks and suchlike. It seems unlikely to have been intended to allow such sandy features to have a continental shelf and EEZ, while precluding "rocks" from having them.

7.41 Third, in respect of both "human habitation" and "economic life of its own", there is considerable ambiguity as to what precisely is meant by these terms. It might be possible to read them as meaning that, in order not to fall within the scope of Article 121(3), human habitation must be possible on the rock without the need for any outside assistance whatsoever, and that similarly the rock must be able to sustain an economic life of its own without any outside assistance whatsoever. If such a degree of self-sufficiency were to be required, however, in order for a maritime feature not to fall within Article 121(3), many features which are universally treated as islands would have to be regarded as caught by Article 121(3) and thus deprived of a continental shelf and EEZ. This would come as a great surprise to a large number of States: particularly (but not exclusively) in climatically inhospitable zones. Even some quite large islands are incapable, without considerable outside support, of sustaining human habitation or a separate economic life. "Human habitation" is not the same as a permanent resident population; and "economic life" is not the same as viability as an independent, self-contained and self-sufficient economy involving the development of natural resources, since these terms refer to lesser forms of economic activity. Accordingly, and particularly in relation to small maritime features, these criteria can be satisfied by small-scale activities generating income and expenditure and the flow of goods and services (such as scientific research and tourism). Moreover, if one is tempted to use economic importance as a criterion, it is then necessary to include the potential economic importance that an island might have if it generated an EEZ or its own continental shelf; and when applied to Serpents' Island, the existence of substantial natural resources "of its own" cannot therefore be excluded.

7.42 Given the language, context and purpose of Article 121 of UNCLOS, a less stringent interpretation of the ability to sustain human habitation and economic life is required, which takes account of the realities of human existence. For the purposes of Article 121, the ability to sustain human habitation is to be understood as meaning that, as a matter of practice over a number of years, human habitation has been shown to be possible on the island, while the ability to sustain an economic life of its own is to be understood as meaning that, as a matter of practice over a number of years, life on the island has proved economically sustainable.

7.43 Fourth, the requirement which has to be satisfied if a feature is to fall within Article 121(3) is that human habitation and economic life "cannot" be sustained. It is the absolute *inability* to sustain those two activities which has to be established, not just that in practice

and at any particular time they are not currently sustained. It is apparent that, *in fact*, human habitation has existed on Serpents' Island for a long time: the lighthouse was built by Russia between 1837 and 1843, and certainly since the early years of the 20th century, *i.e.*, for nearly 100 years, there has been a continuous human residential presence on the island all year around.

7.44 Seen in the light of the foregoing observations, not only is Serpents' Island an "island" when tested against traditional practice, the ordinary meaning of the term, its definition in UNCLOS, its physical features and inhabitants, and its uses over many years, but it also falls outside the meaning of "rocks" to which Article 121(3) applies, and is in any event able to sustain human habitation and economic life of its own as those terms are properly to be understood in their context.

7.45 Consequently, Serpents' Island is governed by Article 121(2) of the Convention, and as the Court stated in the *Qatar v. Bahrain* case: "In accordance with Article 121, paragraph 2, of the 1982 Convention on the Law of the Sea, which reflects customary international law, islands, regardless of their size ... generate the same maritime rights, as other land territory"³⁹. That is also why Serpents' Island must be used as a basepoint from which the provisional equidistance line dividing the areas of continental shelf and the exclusive economic zones appertaining respectively to Ukraine and Romania is drawn.

7.46 Romania has denied the right of Ukraine to use Serpents' Island as a basepoint for delimiting its continental shelf and exclusive economic zone in the Black Sea, because Ukraine did not include that island among the relevant points when it had notified to the United Nations of the geographical coordinates of the points defining the baselines for measuring the breadth of the territorial sea⁴⁰. But the argument made by Romania in this respect is of no consequence. In fact, if that list of geographical coordinates did not include any point on Serpents' Island, it was because it was not necessary. As a matter of fact, the list defined the basepoints of a system of straight baselines, and Serpents' Island was not part of that system. Moreover, it must also be recalled that communication of those coordinates to the United Nations was done through a *note verbale* dated 11 November 1992, *i.e.*, shortly after

³⁹ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 97, para. 185.

⁴⁰ RM, para. 4.46.

Ukraine's independence. At that time, Ukraine took the system of baselines that had been previously adopted by the USSR in the Black Sea⁴¹. Consequently, the use of Serpents' Island as a basepoint in the drawing of the provisional equidistance line cannot be denied.

B. Serpents' Island Is a Significant Island

7.47 Serpents' Island may be a small island, but it has been historically very significant and remains so today. Records of its use and importance go back many centuries. Reference to Serpents' Island is contained in works by authors such as Aristotle, Alkeos, Pliny, Pausanias and Ammianus Marcellinus⁴². The island was praised by Ovid, Ptolemeus and a number of other classical poets and writers who honoured it as the final resting place of the hero Achilles and, as such, a sacred site where "the souls of departed Heroes enjoyed [...] perpetual repose and felicity"⁴³.

7.48 Subsequently, Serpents' Island continued to play an important role in the region. In the 18th and 19th centuries, the island maintained strategic and military importance due to its location in the Black Sea. During the First and Second World Wars, Serpents' Island was located in the theatre of military operations and, during World War II, it was occupied by German troops. During the period of Soviet rule, it became a military post and Soviet troops were permanently stationed on the island. Today, Serpents' Island has been the object of several legislative measures issued by the Ukrainian Government to further its economic development. A number of buildings and installations have been renovated or completed and presently between 25 and 150 people reside on the island, depending on the season.

⁴¹ http://www.un.org/depts/los/doalos_publications/los_bwt.htm (last checked on 19 April 2006).

⁴² Account by Rufius Festus Avienus cited in the publication: *Ancient Greek Sites on the Northwestern Coast of the Black Sea*, Hellenic Foundation for Culture, Odessa Branch Mystetsvo, 2001, p. 155, Annex 48, Vol. 4. See also M. Koehler, "Mémoire sur les îles et la course consacrées à Achille dans le pont-Euxin", and attached map "Carte de l'île de Leucé, aujourd'hui Ilan-Adassi", in *Mémoires de l'Académie Impériale des Sciences de St. Petersbourg*, Tome X pp. 531-819, which contains an extensive description of Serpents' Island and its legendary fame, including ancient accounts of Achilles' life on the island and the cult devoted to this hero. Special mention deserves the detailed depiction of Achilles' temple and of the good quality of the potable water that could be obtained from the well and cistern located on the island. This book mentions the remains of three other constructions, in addition to the temple, large buildings which the author believes were the living quarters of priests and guardians of the Achilles temple and contained areas where the animals used for sacrifices were kept. The book also describes the island's rich fauna and flora. See, in particular, pp. 531-534, 556-559, 562-564, 566-571, 599-614. Annex 49, Vol. 4.

⁴³ E.D. Clarke, *Travels in Various Countries of Europe, Asia and Africa*, Third Edition, Printed for T. Cadell and W. Davies, Strand, London, MDCCCXIII, p. 650, Annex 50, Vol. 4.

7.49 In the light of Serpents' Island's historical background, geographical position and its present importance for Ukraine, it is not justifiable for Romania to dismiss it as an insignificant feature, or mere rock, that should play no role in the present delimitation.

(i) **The Historical Importance of Serpents' Island**

7.50 As Romania's Memorial itself acknowledges, Serpents' Island was for centuries a well-known centre of worship and it harboured a sanctuary and a statue of the Greek hero and demigod Achilles⁴⁴. At the same time, the temple's wealth attracted looters and pirates and ancient accounts refer to military operations conducted on and around Serpents' Island in the middle of the 3rd century B.C.⁴⁵.

7.51 Serpents' Island enjoyed a number of names throughout the centuries. It was referred to as "Leuce", or "white island" by the philosopher Arrian⁴⁶, "white shore of Achilles" by Euripides⁴⁷, presumably on account of the seabirds that migrate there during certain periods of the year, and which apparently covered its entire surface in ancient times. Pindar called it "the conspicuous island". Another common Greek name is "Fidonisi", corresponding to the Turkish denomination "İlan Adası", "İlanda" or "İlanada"⁴⁸.

⁴⁴ For an account of the archaeological findings made on the island, including Achilles' Statue, see *Memoirs, Odesa Community, Antique Stories*, Vol. II, First Part, Odesa, Gity Printing-House, 1848, Annex 51, Vol. 4. See also M. Koehler, *op. cit.*, Annex 49, Vol. 4. The report of a hydrographical survey conducted on Serpents' Island in 1823, following the request of the Saint Petersburg Academy of Sciences, mentioned for the first time the remains of the Ionian temple of Achilles and attracted the attention of archaeologists. However, by the time the Odesa Society for History and Antiquity organised an expedition to the island, in 1841, part of the ruins of the temple had been removed and used to build a lighthouse whose construction began in 1837 and was completed in 1843. See S. B. Okhotnikov, "Notes of the Faculty of History", Issue 3, Odessa National University 1996, p. 158, Annex 52, Vol. 4. See, also, the publication *Zmeinyi Island: Yesterday, Today, Tomorrow*, Museum of Odesa, Annex 53, Vol. 4, and Annex RM 8, p. 23. RM, para. 3.2.

⁴⁵ *Ancient Greek Sites on the Northwestern Coast of the Black Sea*, *op. cit.*, pp. 160-161, Annex 48, Vol. 4.

⁴⁶ Arrian Peripl. Pont. Eux. p. 21 in *Travels in Various Countries of Europe, Asia and Africa*, Printed for T. Cadell and W. Davies, Strand, London, MDCCCXIII, p. 648.

⁴⁷ Euripides, *Iphigenia in Taurides*.

⁴⁸ E. Taitbout de Marigny, *Portulan de la Mer Noire et de la Mer d'Azov ou description des côtes de ces deux mers à l'usage des navigateurs*, Odesa, 1830, p. 113, Annex 54, Vol. 4. See, also, the various denominations of the island used in the antique maps listed at footnote 53 below and the list of names contained in Annex 112, Vol. 5.

7.52 Serpents' Island's reputation did not fade when the Roman Empire expanded its influence over this region and deployed garrisons on the island in the 1st century A.D.⁴⁹. With the advent of Christianity, the cult of Achilles changed nature and - while retaining a spiritual component - became more influenced by elements associated with sailing and the after-life⁵⁰.

7.53 Numerous artefacts associated with the worship of Achilles, as well as antique coins and gems, have been discovered on the island and in the waters surrounding it and are presently collected in the Archaeological Museum of Odesa, the oldest museum of Ukraine, founded in 1825⁵¹. These finds testify to the religious rituals that were carried out on the island⁵². Pottery was also found which can be attributed to the 9th and 12th centuries as well as a number of Byzantine coins⁵³. In addition, a great number of anchors were retrieved in Serpents' Island's waters, a collection which is believed to be one the largest of its kind dating from the ancient Greek world⁵⁴.

7.54 The first appearance of the island in a geographical guide - bearing the name "Filoxia" - was in the Italian portolan *Compasso de navigare*, drawn up in Pisa in 1250-1265. This is probably linked to the arrival of Venetian and Genoese merchants in the northern Black Sea coast⁵⁵.

7.55 From the 16th century onwards, Serpents' Island was frequently depicted (with its different names) as a significant feature on maps and navigational pilots of the region. Romania itself has submitted older maps of the area depicting Serpents' Island (if not always fully accurately) as a prominent feature of appreciable size, referred to as "Fidonisi" (map dated 1584)⁵⁶, "Ilanada Isle" and "Fidonisi" (1665)⁵⁷, "I Nanada" (1680)⁵⁸, "Ilanda I"

⁴⁹ *Ancient Greek Sites on the Northwestern Coast of the Black Sea, op. cit.*, pp. 163-165, Annex 48, Vol. 4. See, also, S. B. Okhontikov, "Notes of the Faculty of History", Issue No. 3, Odesa National University, Odesa, 1996, p. 51, Annex 52, Vol. 4.

⁵⁰ S. B. Okhontikov, "Notes of the Faculty of History", *op. cit.*, Annex 52, Vol. 4 and *Ancient Greek Sites on the Northwestern Coast of the Black Sea, op. cit.*, p. 166, Annex 48, Vol. 4.

⁵¹ See the flyers of the Museum and pictures of the artefacts reproduced at Annex 55, Vol. 4.

⁵² *Ancient Greek Sites on the Northwestern Coast of the Black Sea, op. cit.*, pp. 160-161, Annex 48, Vol. 4. See also S. B. Okhotnikov, "Notes of the Faculty of History", *op. cit.*, pp. 48-49, Annex 52, Vol. 4.

⁵³ S. B. Okhotnikov, "Notes of the Faculty of History", *op. cit.*, p. 55, Annex 52, Vol. 4.

⁵⁴ *Ibid.*, p. 163. See also A. S. Ostroverkhov, "Anchorage of Achilles' Sanctuary on Leuke (Zmiinyi) Island", *Archaeology Science Journal, Ukrainian Academy of Science - Institute of Archaeology, Kyiv*, 2, 2002, Annex 56, Vol. 4.

⁵⁵ S. B. Okhotnikov, "Notes of the Faculty of History", *op. cit.*, p. 56, Annex 52, Vol. 4.

⁵⁶ Map RM A5.

(1772)⁵⁹, "Ilan adasy" and "Isle du Serpent" (1780)⁶⁰, and "Insula Serpilor", "Leuce" and "Phidonisi" (undated)⁶¹. Other examples of early maps which depict the island with its different denominations, can be found in the publication entitled *Descriptio Romaniae* deposited by Romania with the Court. In addition, reference can be made to sixteen maps spanning from the 16th to the 18th centuries kept in the Map Room of the Library of Congress, in Washington, D.C.⁶².

7.56 In the 18th and 19th centuries, the River Danube, and its Delta leading into the Black Sea, represented the boundary zone between the competing interests of Russia and the Ottoman Empire and were the focus of particular rivalry. Successive treaty settlements of the 19th century (in 1812, 1829 and 1856) fixed the boundary between Russia and the Ottoman Empire along various arms of the Danube Delta⁶³. Given its location off the northern branches of the Delta, Serpents' Island's strategic importance grew further.

⁵⁷ Map RM A1.

⁵⁸ Map RM A4.

⁵⁹ Map RM A3.

⁶⁰ Map RM A2.

⁶¹ Map RM A6.

⁶² The antique maps kept in the Library of Congress are listed below. Where available, the denomination used for Serpents' Island is indicated in parenthesis after the title and date of each map:

- *Black Sea*, Agneso Atlas Map (1535-1546);
- *Pontus Euxinus*, Ortelius (1590) (Leuce Insula Lychophonis) (1:3.800);
- *Pontus Euxinus*, Ortelius (ca. 17th century) (1:3.800);
- *Pontus Euxinus*, Sanson (1694) (2 maps on 1 sheet) (1:3.800.00);
- *Nova Mappa Maris Nigri*, Lotter (ca. 18th century) (Ilanda island) (1:6.000.00);
- *Nouvelle carte de la Mer Noire et du Canal de Constantinople*, Visscher (ca. 18th century) (Ilanda island);
- *Nouvelle carte de la petite Tartarie, et la Mer Noire montrant les frontières de l'Impératrice de Russie et l'Empereur des Turcs, tant en Europe qu'en Asie désignée selon la proposition de Guillaume de l'Isle*, Otteus (ca. 18th century);
- *Nova Mappa Maris* by Leutter (1731);
- *Nouvelle carte de la Crimée et toute la Mer Noire* (1737) (Ilanda island);
- *Carte réduite de la Mer Noire*, Bellin (1772) (Ilan Adasi ou Ile des Serpents);
- *First Part of Turkey in Europe*, S. Dunn (1774) (Ilan Adasi or Serpents I.) (1:2.900);
- *Carte des environs de la Mer Noire*, F. Santini, (1777) - Ilan Adasi);
- *Carte des environs de la Mer Noire*, F. Santini, (1780) - Ilan Adasi);
- *Carte réduite de la Mer Noire* (1785) (Ile des Serpents);
- *Nouvelle carte de la petite Tartarie, ou Taurie, montrant les frontières de l'Impératrice de Russie, et l'Empereur des Turcs, tant en Europe qu'en Asie, compilée sur les observations plus nouvelles*, Elwe & Langeveld, Amsterdam (1787);
- *A new draft of the Black Sea*, Sayer (1788) (Ilan Adasi or Serpents Island).

⁶³ See RM, paras. 3.4-3.7.

7.57 After the conclusion of the Treaty of Adrianople in 1829⁶⁴, Russia assumed control of Serpents' Island, and in 1837 it began building a lighthouse on the island to assist navigation in the Black Sea. The construction of the lighthouse was completed in 1843.

7.58 From 1841 to 1851, a quarantine commissioner, a corporal and 12 soldiers were sent to the island by Russia "with the purpose of control of the quarantine precautionary regulations"⁶⁵. The commissioner took an active role in the collection and protection of the antique objects found on the island and hired workers to conduct the excavations which were carried out on the instructions of the Imperial Russian Society of Archaeology. During the archaeological surveys that followed, numerous artefacts were unearthed and the site of an ancient necropolis was discovered⁶⁶.

7.59 The quarantine commissioner drew up a plan of the island showing the ruins found and the archaeological digs that had been carried out and the excavation surveys ended in 1856 when the officer and soldiers who lived on Serpents' Island were withdrawn from it after Russia's defeat in the Crimean war and the subsequent transfer of the island to the Ottoman Empire⁶⁷.

7.60 While earlier treaty settlements did not expressly refer to Serpents' Island, an express treaty reference to the island was made as early as the Protocol of 6 January 1857 between the representatives of the European Powers which were parties to the Treaty of Paris of 30 March 1856⁶⁸. In that Protocol, Serpents' Island was stated "to be considered as an appendage to the Delta of the Danube". The Ottoman Government agreed to maintain on the island "a Lighthouse destined to render secure the navigation of vessels proceeding to the Danube and to the Port of Odessa", while the River Commission established by the Treaty of Paris "will

⁶⁴ Treaty of Peace between Russia and Turkey, Adrianople, 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.

⁶⁵ See I.V. Tunkina, *Russian Science on Classical Antiquities of the Russian South (XVIII-Mid XIX Centuries)*, p. 410, Annex 57, Vol. 4.

⁶⁶ *Ibid.*, pp. 410-411.

⁶⁷ *Ibid.*, p. 414.

⁶⁸ 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, 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.

see to the regular performance of the service of such Lighthouse⁶⁹. The lighthouse has continued to play a significant part in the importance attaching to Serpents' Island.

7.61 Despite the lighthouse, in foggy weather in 1914 a British ship ran aground on the island and was wrecked, the rescue ships coming from Constantinople. As a result of this incident, the European Danube Commission arranged for a signal device to be used on the island in case of foggy weather, the necessary explosive being kept in a storehouse built on the southern coast of the island⁷⁰.

7.62 During the First World War, Serpents' Island was the scene of military action on several occasions⁷¹. The island was occupied by Russian soldiers, and the lighthouse was bombed and destroyed by a German cruiser in 1917. Germany laid mines in the vicinity of the island, and a Russian torpedo-boat which had come to supply the Russian soldiers stationed on the island sank in the waters off the north of the island after striking a German mine. An obelisk and memorial plaques were erected to commemorate the soldiers who perished in these incidents⁷².

7.63 In 1922, the European Danube Commission rebuilt the lighthouse after its destruction during the war⁷³. Again - in April 1931 - the Commission repaired the lightning conductor on the lighthouse which had broken in a violent storm.

7.64 In the period between the two World Wars, when Serpents' Island was under Romanian administration, the Romanian Government considered a number of plans for its development, including the building of a monastery, a rescue station for ships in distress and a

⁶⁹ A map annexed to the Protocol (Map RM A8) showed the mainland in the region of the Danube Delta and Serpents' Island at an appropriate distance off-shore, but the map did not show the island "as appurtenant to the delta" as stated by Romania: the relationship between the island and the Delta as depicted on the map was simply one of geography, with no indication of appurtenance. The relevant provisions of the 1857 Protocol were substantially repeated in a further Treaty concluded on 19 June 1857. See RM, para. 3.10, n. 23.

⁷⁰ R. I. Calinescu, *Insula Serpilor. Schita monografica* (1931), p. 15, Annex RM 6.

⁷¹ See R.I. Calinescu, *op. cit.*, pp. 50-51, Annex RM 6.

⁷² Odesa Regional State Administration Cultural Heritage Protection Department, *Protection and Research of the Monuments of Archaeology in Odesa Blast (Province)* Issue I, Odessa 1999, p. 26, Annex 58, Vol. 4.

⁷³ R.I. Calinescu, *op. cit.*, p. 50, Annex RM 6. See also, Protocol N. 914 in the Archive of Galats, Fund of the European Commission of the Danube, Vol. 56, 1921 and Vol. 59, 1922, Annex 59, Vol. 4.

hospital for lepers under the patronage of the Order of Malta⁷⁴. Perhaps the most ambitious of Romania's projects for the island was the establishment of a prison for political prisoners with 1,500 cells. All necessary supplies and equipment were to be carried to the island on ships of the European Danube Commission⁷⁵. None of these plans was put into practice due to the start of World War II.

7.65 Writing in 1931, the Romanian author R.I. Calinescu, in a monograph devoted to Serpents' Island, recorded that 8 people resided on the island: 4 lighthouse staff and 4 military personnel. In addition, he mentioned that other persons - such as archaeologists or other scholars - lived on the island for periods of time⁷⁶. Calinescu also recorded a temporary stay on the island of a party of 32 Russian emigrants in 1922, and another such visit in July 1925, as well as others who took refuge on the island during storms⁷⁷.

7.66 This Romanian author further stresses the importance of Serpents' Island - which at times was, it should be recalled, under Romanian administration - under several different aspects: i) its potential for tourism, given the island's climate, suitable for the establishment of a balneal station and the construction of a resort; ii) its strategic importance; iii) its scientific significance, not only for meteorological and environmental research, but also for ornithology, botany, geology, palaeontology, etc⁷⁸.

7.67 During the Second World War, Romania allied itself with Germany, and Serpents' Island was placed under the authority of the Commandant of the German forces in the Black Sea, and consequently was occupied by German troops. Between 1941 and 1944 the waters around Serpents' Island and the Danube Delta were the theatre of naval operations. An authority cited by Romania itself shows that the lighthouse building had been destroyed by aerial bombardment, and that an engineering unit was sent to the island in 1944 in order to construct emplacements for cannons and machine guns and to rebuild the destroyed

⁷⁴ D.L. Stekhlescu, "Insula Serpilor, azil pentru deportati politici" in *Actiunea*, 25 March 1938, Annex 60, Vol. 4. D. Perte, *Serpents' Island in the Way of Sharks*, Bucharest, 1996, p. 69. Annex 61, Vol. 4.

⁷⁵ *Informația*, 22 March 1938, Annex 62, Vol. 4, *Curentul*, 21 March 1938, Annex 63, Vol. 4, D.L. Stekhlescu, *op. cit.*, Annex 60, Vol. 4. Dutse Alexandru, "Lighthouses of the European Commission of the Danube (ECD) located in the Danube Delta and on the island Zmiinyi (1856-1939)", extracted from *Association of Prakhov povit history*, Vol. VIII, Ploieshti, 1996, Annex 64, Vol. 4.

⁷⁶ R.I. Calinescu, *op. cit.*, p. 52, Annex RM 6.

⁷⁷ *Ibid.*, p. 50.

⁷⁸ See the excerpts from the monograph by R.I. Calinescu filed under Annex 10, Vol. 2.

building⁷⁹. It also shows that "water supplies were getting shorter" which meant that water had to be rationed - a fact which demonstrates that water was available on the island.

7.68 Servicemen consisting of Air Defence Troops of the USSR were permanently stationed on Serpents' Island from 1946 until Ukraine's independence.

7.69 On 23 May 1948, representatives of the Soviet Union and Romania met on Serpents' Island in order to sign a *Procès Verbal* acknowledging the completion of the formalities for handing over the island to the Soviet Union⁸⁰. Thereafter, the island was transformed into a military post under the direct control of the central military authorities in Moscow.

7.70 The reconstruction of the lighthouse was completed in 1952 and the beacon's light-optical systems were improved on three occasions: in 1955, 1967 and 1975. The lighthouse and its residential quarters underwent total renovation and modernization during the period 2002-2004⁸¹. Photos D and E show the lighthouse before and after the most recent renovation.

7.71 On 29 November 1965, the territory of Serpents' Island, previously used by military units of the Odesa Naval Garrison, was listed as one of the plots of land to be allocated for "actual land use"⁸².

(ii) Present Importance of Serpents' Island

7.72 After Ukraine's independence on 24 August 1991, and particularly over the last ten years, Serpents' Island has been administered by Ukraine as part of the State administration of Odesa⁸³. The Government of Ukraine has enacted a number of legislative measures designed to promote Serpents' Island's development and demilitarise the island in conformity with the 1997 Exchange of Letters. The first stage of development of the island began with Resolution

⁷⁹ Stefanescu, "Din amintirile veteranilor", in *Revista de istorie militara*, No. 3(31)/1995, p. 48, Annex RM 10.

⁸⁰ See above, para. 5.40.

⁸¹ See extract of the article "Serpents' Island Lighthouse" from the Lighthouse's records, Annex 65, Vol. 4. See also the lay-out of the lighthouse complex at Annex 66, Vol. 4.

⁸² See Decision No. 844/371C, Annex 7, Vol. 2.

⁸³ See Decision No. 197-XXII of 13 February 1998, Annex 7, Vol. 2. See, also, Decision No. 167-XXIII-X of 27 November 2001, Annex 7, Vol. 2 and Resolution No. 3003-III of the Supreme Rada of Ukraine of 17 January 2002, which established the borders of the Chilia district of Odesa, including the territory of Serpents' Island. Annex 7, Vol. 2.



Photo D: The Lighthouse Complex in 2002 before Reconstruction



Photo E: The Lighthouse Complex in 2004 after Reconstruction

No. 1009 of the Cabinet of Ministers of 18 December 1995 regarding the further development of the infrastructure and economic life on Serpents' Island and on the continental shelf⁸⁴.

7.73 Resolution No. 1009 envisaged the construction of a berth and a wind-diesel power plant and the construction and repair of the residential premises on the island, to be carried out by the Ministry of Defence. Other planned installations included "an automated earthquake precursor recording station and a post to observe the effects of Danube sediments on geology and ecology of the coastal territories and waters areas adjacent to the island" and a meteorological station. All these have been completed. Members of the hydro-meteorology centre for the Black Sea and the Sea of Azov reside on the island from time to time⁸⁵.

7.74 Two further resolutions of the Cabinet issued on 18 June 1996 and on 8 October 1997 allocated funds for the construction of the infrastructure already referred to in Resolution No. 1009, and included additional funds for the building of a seasonal ornithological station⁸⁶. An important component of the work to be carried out concerned the assessment of geo-chemical contamination of the sea floor by industrial and municipal concerns of Ukraine and Romania⁸⁷.

7.75 On 13 December 2001, the Cabinet of Ministers of Ukraine adopted a new Resolution entitled "On the Comprehensive Development of Serpents' Island" and on 19 February 2002 the Resolution entitled "On the Allocation of Funds for Completing Construction of a Stationary Berth on Zmiinyi Island"⁸⁸. Pursuant to these resolutions, the construction of the mooring complex was completed and a facility was opened in November 2004⁸⁹. As can be seen from the photographs on the opposite page, there presently exists a large berth which can receive a variety of cargo deliveries. A smaller berth is under construction.

⁸⁴ See Annex 67, Vol. 4.

⁸⁵ See the document entitled "1998 Information Concerning the Implementation of the Cabinet of Ukraine Regulation of 8 October 1997 No. 1114", at Annex 68, Vol. 4.

⁸⁶ Resolution No. 652 of 18 June 1996 and Resolution No. 1114 of 8 October 1997, Annexes 69 and 70, Vol. 4.

⁸⁷ See the document entitled "1998 Information Concerning the Implementation of the Cabinet of Ukraine Regulation of 8 October 1997 No. 1114", at Annex 68, Vol. 4.

⁸⁸ The Resolutions are attached as Annexes 71 and 72, Vol. 4.

⁸⁹ See "Information Concerning the Fulfilment of the Complex Program of the Further Development of the Infrastructure and the Realization of the Economic Activities on Zmiinyi Island and the Continental Shelf for the Period of 2002-2004". The State Regional Administration Odesa, the Central Administrative Board of Economy, November 2004, Annex 73, Vol. 4.

7.76 On 31 May 2002, the Cabinet of Ministers of Ukraine enacted a Resolution regarding the "Comprehensive Programme of the Further Development of the infrastructure and conduct of economic activities on Serpents' Island and on the Continental Shelf" for the period 2002-2006⁹⁰. The programme was aimed at demilitarising the island, ensuring reliable connections and transport communications with the mainland, diversifying economic and other activities and ensuring respect for the environmental regime of the island and its continental shelf.

7.77 The Resolution listed a series of activities connected with the programme, which included: complete withdrawal of all armed forces from the island, construction of a jetty, establishment of a frontier post, performance of work connected with the water supply, treatment, drainage and sewage, completion of the works connected with the lighthouse, installation of a station to allow telephone and television connections via satellite, repairs to the post office, establishment of a medical station, creation of a scientific and educational complex, setting up a fishery guards station, adoption of a tourist development programme and creation of a museum on the island⁹¹.

7.78 At present, communication with the island is carried out by means of telephone and e-mail and post. There is a satellite antenna allowing the viewing of television and a post office situated in the lighthouse complex.

7.79 The Ministry of Education and Sciences supervises a programme of scientific research on Serpents' Island⁹² and has declared the island a State Zoological Reservation Area⁹³. In addition, Serpents' Island is listed in the Geological Registry of Ukraine and - as a historical monument - in the State Register for National Heritage⁹⁴. Six research expeditions were carried out on the island in 2003 alone which involved scientific research in the areas of

⁹⁰ Resolution of 31 May 2002, No. 713, Annex 74, Vol. 4.

⁹¹ Some of these installations are shown in the photographs under Annex 75, Vol. 4, together with other snapshots of life on the island and some of the artefacts kept in its museum.

⁹² See Order of the Ministry of Education and Sciences of Ukraine of 13 December 2002, No. 706, and "Principles on the Research Station 'Zmiinyi Island' of the Mechnikov's Odesa National University (RS21 of ONU), Kyiv, 2002, Annex 76, Vol. 4. For the specific plan of activities on Serpents' Island supervised and financed by the Ministry, see Annex 77, Vol. 4.

⁹³ See Order of Ministry of Natural Environment Protection of Ukraine of 25 January 2004, No. 54, Annex 78, Vol. 5. See, also, Order of 27 January 2005, No. 54, Annex 78, Vol. 5, Pledge of Protection No. 6 of 10 October 2003 and Decree of the President of Ukraine of 9 December 1998, No. 1341/98 and relevant "Provisions", Annexes 79 and 80, Vol. 5.

⁹⁴ See Order of 15 June 1999, No. 393, Annex 82, Vol. 5. See also the Special issue of the scientific journal published by the Ministry of Culture and Arts of Ukraine, *Pamiatky Ukrainy: Istorii i kultura*, 2/2002, Year XXXII, Issue 2 (127), Annex 83, Vol. 5.

hydrobiology, microbiology, ichthyology, hydrology, hydrochemistry, marine geology, soil science, ornithology, archaeology, astronomy, etc.⁹⁵.

7.80 On 10 January 2003, the Odesa Regional Council established the Regional Utility Company "Ostrivne" as the sole managing authority on Serpents' Island⁹⁶. By a subsequent Decree issued by the Chief Executive of the Odesa Regional State Administration on 29 August 2003, any visit to the island and its facilities was restricted for environmental reasons and for the protection of the island's cultural heritage and was made subject to Ostrivne's prior authorisation⁹⁷.

7.81 In the Spring of 2002, Ukraine decided to withdraw its anti-aircraft defences from Serpents' Island⁹⁸. It is surprising to see Romania complaining about this (especially only on the basis of a newspaper report)⁹⁹, since such a step in the reduction of the military facilities on Serpents' Island was carried out in pursuance of the 1997 Exchange of Letters and represented evidence of improving relations between Ukraine and Romania which made the continuation of such military facilities no longer appropriate. The reduction of military facilities and their replacement by civilian facilities is a development to be welcomed, rather than criticized.

7.82 The property of the military stations located on Serpents' Island was transferred from the Ministry of Defence to the management of the Odesa State Administration by Direction of the Cabinet of Ministers of Ukraine of 30 May 2002 (No. 277-r)¹⁰⁰. On 20 August 2002, in accordance with Order No. 61 of 13 July 1994 of the Head of the State Border Committee of

⁹⁵ See "Analytical Brief on the Implementation of the Comprehensive Program for Further Development of the Infrastructure and Conduct of Economic Activities on Zmiinyi Island and on the Continental Shelf", Annex 84, Vol. 5. See also the lists of the island's fauna, flora and fish species reproduced at Annex 85, Vol. 5. The study and research of Serpents' Island's ecosystem and the biological resource conditions near the island is an on-going activity, carried out under the supervision of the Ministry of Education and Sciences, see the reports attached at Annex 86, Vol. 5.

⁹⁶ Resolution No. 111-XXIV of 10 January 2003, Annex 87, Vol. 5. See also the company's Articles of Association approved by the Odesa Regional State Administration on 21 March 2003, Annex 88, Vol. 5.

⁹⁷ Decree of 29 August 2003, No. 700/A-2003, Annex 89, Vol. 5.

⁹⁸ See "Plan for Withdrawing of the Ukrainian Armed Forces Elements from Zmiinyi Island", approved by the Ministry of Defence of Ukraine, 18 May 2002, Annex 90, Vol. 5.

⁹⁹ RM, para. 10.111.

¹⁰⁰ Annex 91, Vol. 5. See, also, the Subsequent Directions reproduced therein.

Ukraine¹⁰¹, a frontier observation post comprising 30 personnel was created on Serpents' Island to guard the State border of Ukraine.

7.83 With a Decree of 12 July 2004, the Odesa State Administration approved a programme of tourism development on Serpents' Island which identified the main types of tourism which could be developed under the supervision of the company "Ostrivne" on the island taking into account the vulnerability of its ecosystem¹⁰². Also in 2004, the State of Odesa authorized the design and construction of a monument to be erected on Serpents' Island to commemorate the sanctuary of Achilles¹⁰³.

7.84 On 21 September 2004, the Odesa Regional Division of the National Bank of Ukraine approved the opening of a branch of the Ukrainian bank Aval on Serpents' Island¹⁰⁴. Contrary to what Romania's Memorial asserts¹⁰⁵, this has nothing to do with Romania's application in the present case on 16 September 2004. Indeed, the opening of a new branch of a bank is not something which is decided and implemented overnight, but something which follows a longer period of consideration beginning many months before the eventual opening of the new branch. In the present instance, the Board of Aval Bank decided to open a regional branch on Serpents' Island on 11 May 2004, *i.e.*; long before Romania filed its application in this case¹⁰⁶. The opening of the new branch is testimony to the growing needs of the people living on Serpents' Island and was simply a natural continuation of the kinds of activities that had taken place on the island previously. The photographs in the following pages show the branch of Aval Bank, the stationary berth and some of the residential accommodations built for the people living on Serpents' Island.

7.85 Romania's complaints at the continuing development of Serpents' Island after the present proceedings were started are misplaced¹⁰⁷. As shown in this Section, Serpents' Island has been for a long time a feature of considerable significance in the region, and for over a century has had a resident population. At first, these people were principally associated with

¹⁰¹ Annex 92, Vol. 5.

¹⁰² Decree of 12 July 2004, No. 535/a-2004, Annex 81, Vol. 5.

¹⁰³ See the relevant documents under Annex 93, Vol. 5.

¹⁰⁴ Decree No. 159 of 21 September 2004, Annex 95, Vol. 5.

¹⁰⁵ RM, para. 10.108.

¹⁰⁶ See Annex 95, Vol. 5.

¹⁰⁷ RM, para. 10.113 *et seq.*



Photo F: The Stationary Berth on Serpents' Island – Docking Procedures



Photo G: The Stationary Berth on Serpents' Island – Distant View



Photo H: Residential Accommodations on Serpents' Island

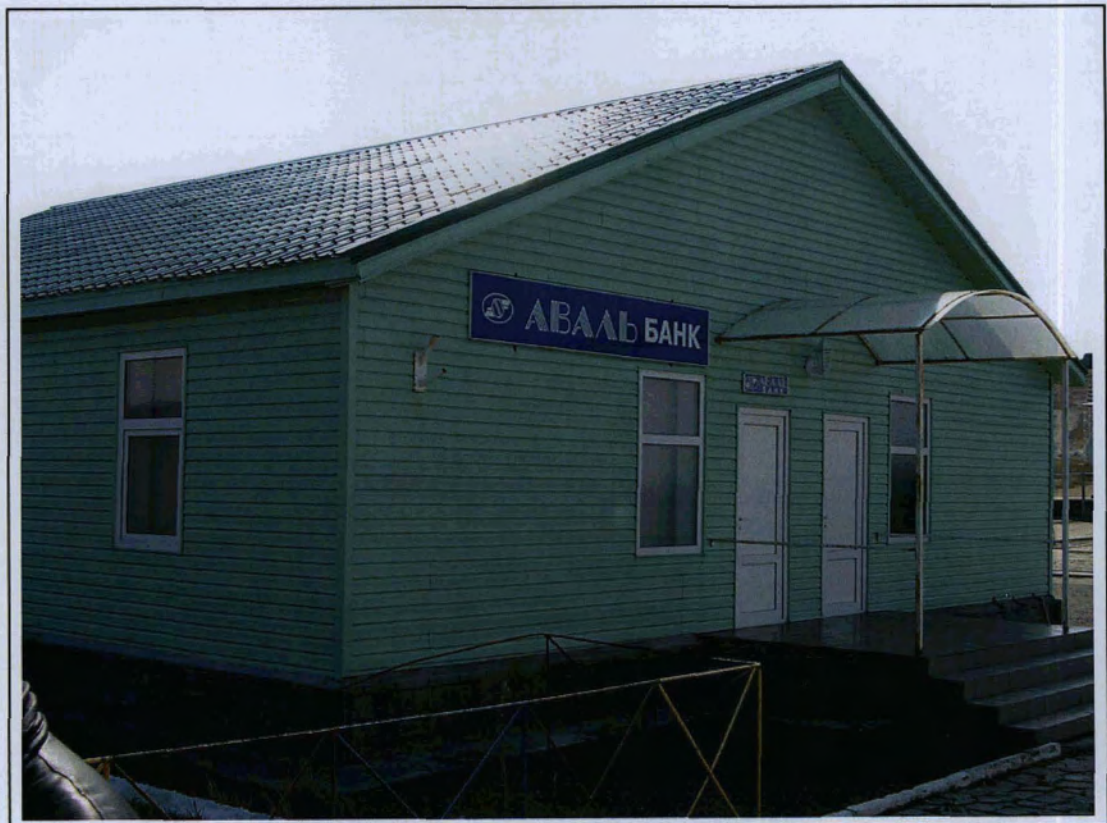


Photo I: Aval Bank

the maintenance of the lighthouse, but as the record shows¹⁰⁸, their numbers grew, and military, scientific and frontier protection functions were added to those of navigational safety. The growth in number of those with direct functions on the island was accompanied by an increase in the number of support facilities and staff on the island which has steadily grown over the past half century.

7.86 It is thus clear that Serpents' Island cannot be equated to a barren and unused rock suddenly "occupied" by the creation of spurious and artificial human activity: it is an island which has been the focus of economic, military and religious activity for many years. These activities - which include safety of navigation, military protection, coastguard, frontier protection, scientific research - are part of the legitimate sovereign activity of Ukraine, and arise from a natural development of the island's long established uses.

7.87 The introduction of a maritime transport link to the island in 2004¹⁰⁹, and the possibility of establishing leisure facilities on the island¹¹⁰, are also a natural part of this development. It represents behaviour by Ukraine which is neither being carried out in bad faith, nor conduct amounting to an abuse of rights¹¹¹, nor acquiescence by Ukraine in Romania's thesis that Serpents' Island is only a rock¹¹².

7.88 When the activities historically carried out in relation to Serpents' Island are taken into account along with the more recent undertakings which have been recounted in this Section, it is apparent that Serpents' Island, despite its small size, has for a long time played a significant role in the history and life of this area and has done so continuously up to the present day. This has involved continuous human presence and activity on the island since at least the middle of the 19th century. The geo-strategic importance of Serpents' Island and the region as a whole is also acknowledged by Romania¹¹³. It would fly in the face of the historical and current record if Serpents' Island were to be treated as no more than an insignificant speck lost in the vastness of the Black Sea.

¹⁰⁸ See above in this Section, and also Section 2 above.

¹⁰⁹ Letter from Ostrivne Odesa Oblast Municipal Enterprise to Oleksandr Mykhaylovych Hordiyenko, Chief of the Main Department of Economy, Oblast State Administration dated 5 March 2005 concerning transport communications with Zmiinyi Island, Annex 96, Vol. 5.

Decree of Approval of the Program of Tourism Development at Zmiinyi Island Up to 2006 dated 12 July 2004, Annex 81, Vol. 5.

¹¹¹ RM, paras. 10.119-10.125.

¹¹² *Ibid.*, paras. 10.126-10.131.

¹¹³ *Ibid.*, paras. 3.4, 3.15, 3.19, 3.25, 3.31.

Section 4. The Course of the Provisional Equidistance Line

7.89 In the light of the foregoing discussion, which has shown that the provisional equidistance line should be strictly calculated using the nearest basepoints on the baselines of the Parties from which the breadth of their territorial seas is measured, and that Serpents' Island provides relevant basepoints in this respect, it is possible to trace the course of the provisional equidistance line.

7.90 The relevant basepoints for establishing the provisional equidistance line are located at the following points:

On the Ukrainian side:

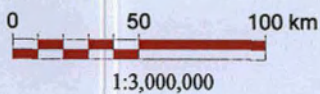
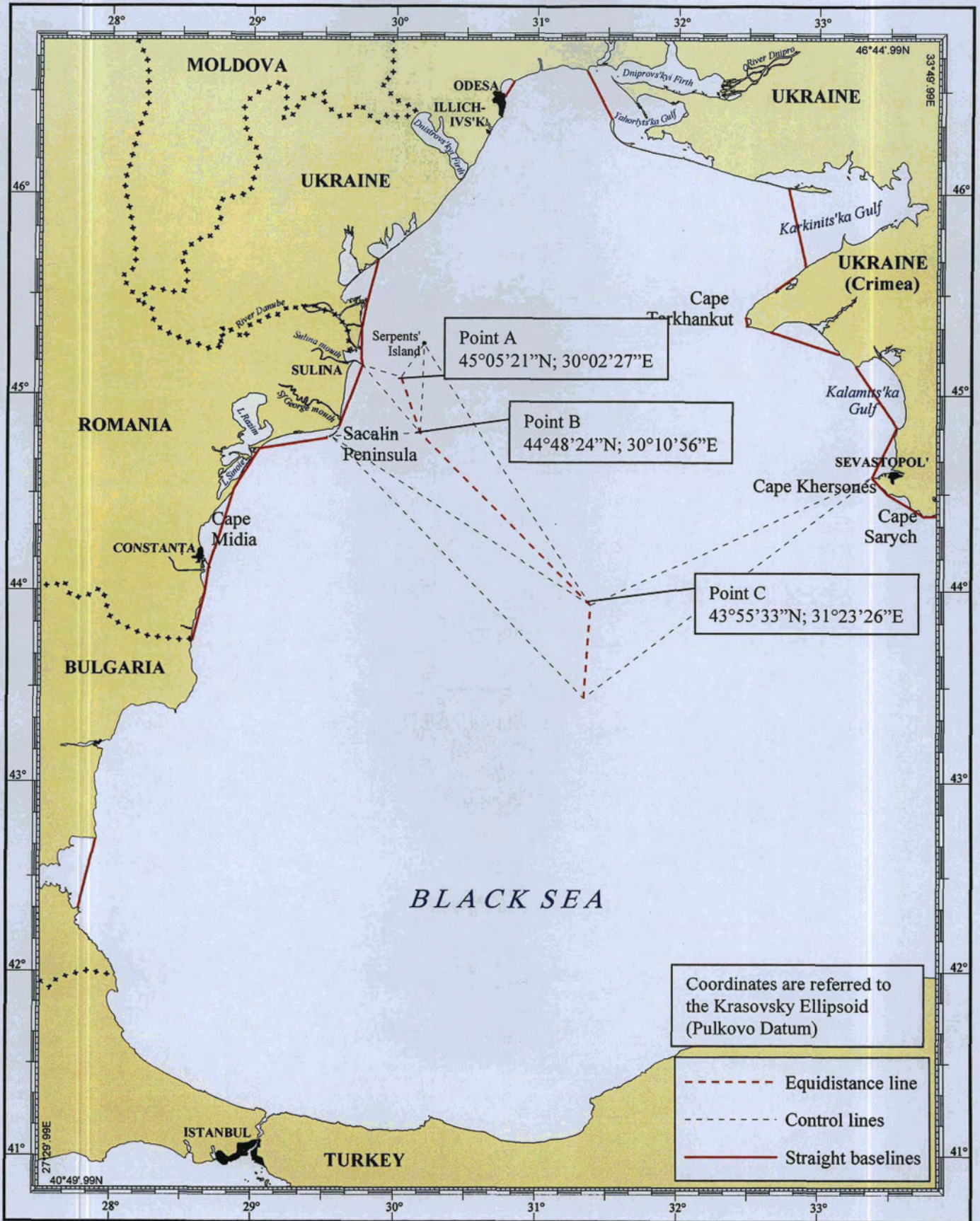
- Serpents' Island
- Cape Kherstones

On the Romanian side:

- The end of the Sulina Dyke
- The southwestern end of the Sacalin Peninsula.

7.91 Figure 7-1 shows the basepoints so identified which control the course of the provisional equidistance line, and the provisional equidistance line itself. As can be seen, the line descends from the starting point for the delimitation identified in the 2003 Treaty (labelled "Point A" on the Figure) in a southerly direction, controlled by basepoints on Serpents' Island on the Ukrainian side and Sulina Dyke on the Romanian side, until a turning point ("Point B") where the basepoints on Sacalin Peninsula on the Romanian coast come into effect. The line then continues in a southeasterly direction until a turning point ("Point C") representing the point where the basepoints on Cape Kherstones on the Ukrainian coast become relevant. The end-point of the provisional equidistance line lies at roughly the location where the interests of third States may come into play.

7.92 Figure 7-1 thus depicts the result that obtains from the first step in the delimitation process. The next step in the exercise is to identify the relevant circumstances characterizing



Provisional Equidistance Line

Figure 7-1

the area which may justify a modification of the provisional equidistance line. This subject is taken up in the next chapter.

CHAPTER 8

THE RELEVANT CIRCUMSTANCES

Section 1. The Geographical Factors

A. Introduction

8.1 Geography, and more particularly coastal geography, has always played an important role in the drawing of international maritime boundaries, either through delimitation negotiations or through adjudication. Very often, it has even been considered as the sole factor to be referred to for the drawing of the delimitation line. Significantly, on numerous occasions in its 1977 decision, the Anglo-French Court of Arbitration made use of the wording "the geographical and other relevant circumstances"¹.

8.2 Surprisingly, Romania's treatment of geography is rather succinct. However, in its lengthy commentaries concerning the various "principles" enumerated in sub-paragraphs (a) to (e) of paragraph 4 of the 1997 Exchange of Letters, Romania rightly summarizes the jurisprudence of the Court and other international tribunals relating to the taking into consideration of the relevant circumstances in maritime delimitation cases. It states:

"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"².

8.3 Unfortunately, in the Memorial, Romania does not substantially comply with those requirements. The Memorial does not really consider the different characteristics of the geographical situation in the maritime area subject to the present delimitation proceedings.

¹ *Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, Decision of 30 June 1977, *U.N.R.I.A.A.*, Vol. XVIII, pp. 45, paras. 69-70, 112, para. 239, and 117, para. 251.

² RM, para. 8.85.

8.4 Assuming that, in that area, "Serpents' Island apart – no major circumstance could pose problems", Romania is content with the assertion according to which the geographical context is "a simple one"³. Besides, that position is then purely and simply reasserted when Romania presents its claimed maritime delimitation line. It just says that no relevant circumstance is "to be considered"⁴ or "discernible"⁵ in the two sectors which have been artificially defined⁶.

8.5 But nowhere in the Memorial is it possible to find any explanation of the so-called "simplicity" of the geographical situation. Nowhere is there the smallest detailed description of the coastal geography in the relevant area. That is probably why, fully aware of the necessity at least to pay lip service to the identification of some circumstance characterizing the area, Romania has added, in two distinct footnotes, the same broad reference to "[t]he general circumstance represented by the geographical configuration of the Black Sea" without further particulars, and the same cross-reference to what is said elsewhere in the Memorial concerning either the delimitation agreements involving third States, or the enclosed nature of the Black Sea⁷.

8.6 With respect to the latter reference, it must be underlined once more that the enclosed character of the Black Sea is not by itself a circumstance which ought to be regarded as relevant for delimitation purposes, as has been previously indicated⁸. The fact that, under Article 122 of the 1982 Law of the Sea Convention, the Black Sea qualifies as an "enclosed or semi-enclosed sea" has no bearing at all on the method of delimitation to be applied in the present proceedings.

8.7 As for the existing or potential delimitations with or between third States in the western region of the Black Sea, whatever their relevance might be, they do not constitute a geographical factor properly speaking, and are therefore examined separately⁹.

³ RM, para. 1.10.

⁴ RM, para. 11.73.

⁵ RM, para. 11.84.

⁶ On the artificial character of the Romanian two-sector division, see Chapter 4, section 2, above.

⁷ RM, footnote 386, at p. 221; fn. 389, at p. 229.

⁸ See above Chapter 4, section 3, paras. 4.33-4.50.

⁹ See section 3 of this Chapter below dealing with the presence of third States in the region.

8.8 In this Section, the purpose of Ukraine consists in presenting the actual picture of the geographical configuration in the northwestern part of the Black Sea. As a matter of fact, it is essential to start with that picture because, according to the Court's Judgment of 10 October 2002, "[t]he geographical configuration of the maritime areas that the Court is called upon to delimit is a given ... not an element open to modification ... but a fact on the basis of which the Court must effect the delimitation..."¹⁰. And, in that Judgment, the Court has insisted on the idea that

"Although certain geographical peculiarities of maritime areas to be delimited may be taken into account by the Court, this is solely as relevant circumstances, for the purpose, if necessary, of adjusting or shifting the provisional delimitation line"¹¹.

8.9 Ukraine will thus record the different aspects of the geographical situation which may be deemed relevant for the drawing of an equitable maritime boundary dividing the continental shelf and exclusive economic zones of Ukraine and Romania in that area. It must however be understood that the geographical situation is not restricted to the various aspects of the physical geography, but possibly includes also some element of political geography.

B. The Physical Geographical Framework of the Area

8.10 From a mere glance at a map of the western part of the Black Sea, three main observations may be made concerning the geographical framework of the northern half of that region, where the present delimitation is to take place. Those observations, based on the coastal configuration and coastal relationship, relate successively to the shape of the relevant maritime area, the geographical predominance of Ukraine in the area, and the disparity between coastal lengths.

(i) The Shape of the Relevant Maritime Area

8.11 The coastal configuration, from the land-border terminus between Bulgaria and Romania to the southern tip of the Crimean Peninsula (Cape Sarych), appears as forming a

¹⁰ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, pp. 443-445, para. 295.

¹¹ *Ibid.*, at p. 445.

broad concavity. It is the most evident geographical characteristic of the coastline fronting the relevant area. It gives to the entire maritime area the strongly marked feature of a gulf, bordered on three sides by land, as illustrated on Figure 8-1 showing the general direction of the coasts bordering that gulf-like area.

8.12 That particular coastal configuration is a major geographical factor, since it leads to a situation where the relevant mainland coasts of the Parties are both adjacent and opposite to each other, a situation which is always of great significance for the drawing of a maritime boundary. It introduces in this case an element which, to some extent, is reminiscent of the geographical situation prevailing in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area*.

8.13 Moreover, within that kind of gulf, a few geographical features stand out slightly in relief from the general direction of the different coastal segments, and may technically be used as basepoints for the drawing of a provisional equidistance line, as it has already been previously demonstrated¹². They are, successively clockwise, the Sacalin Peninsula standing out against the Romanian main coast, Zmiinyi or Serpents' Island lying off the Ukrainian western mainland coast, Cape Tarkhankut and Cape Khersones constituting two protuberances of Crimea's western coast.

8.14 What is called Sacalin Peninsula on the northern part of the Romanian coast is not really a promontory, properly speaking. It is rather an uninhabited narrow sand spit extending southwesterly from the main coast, and looking like a strip of land running into the sea over several miles¹³. It is noteworthy that Romania's Memorial does not include a detailed description of that "peninsula", which however is given a significant importance in the construction of the delimitation line claimed by Romania¹⁴.

8.15 The position of Serpents' Island, in front of Ukraine's mainland coast on the western side of the gulf-shaped relevant area, needs some clarification, since Romania has been constantly tempted to put some smoke-screen on that important aspect. Situated at 19 nautical

¹² See Chapter 7 section 3 above.

¹³ See para. 3.50 above.

¹⁴ See RM, Figure 32 at p. 228.



The General Directions of the Coasts of Ukraine and Romania

Figure 8-1

miles due east from Ukraine's mainland coast¹⁵, Serpents' Island is located sufficiently close to that coast, so that the territorial sea around the island is not distinct, or separate from the territorial sea belt off the mainland coast. Thus, Serpents' Island, even if not fully integrated to the Ukrainian coastal front properly speaking, does not however appear as an isolated island¹⁶. On the contrary, Serpents' Island, as a coastal island, forms an integral part of the Ukrainian maritime ensemble in the western side of the relevant area.

8.16 From another point of view it is also noteworthy that, while it is situated in the vicinity of Ukraine's land boundary with Romania in one of the arms of the Danube Delta, Serpents' Island is entirely and exclusively in front of the Ukrainian coast, *i.e.*, to the north of the coastal terminus of the mainland frontier. It is therefore largely inaccurate to say, as Romania does, that it "is a maritime feature bordering the adjacent Romanian and Ukrainian shores in the vicinity of the Danube delta"¹⁷, because such a statement could give the false impression that the island is directly opposite to the end point of the land boundary between the two States. In fact, Serpents' Island is an island adjacent to Ukraine's mainland coast, and facing only that coast. Its location is illustrated in Figure 8-2.

8.17 On the coast of Crimea abutting on the relevant area, Cape Tarkhankut and Cape Khersones are two significant prominences flanking Kalamits'ka Gulf. The first one in particular is undeniably the most salient projection of the Ukrainian coast in the whole area.

8.18 Those different features are pure facts of geography which can only be taken as they are. Each of them cannot *a priori* be regarded as a geographical "anomaly" or "distortion" which ought to be ignored, unless to refashion nature or geography. Their significance can only be assessed by reference to the relevant area taken as a whole. In other words, the appraisal of any geographical feature is always a relative question, since the apparent unimportant character of one feature may well be counterbalanced by the greater impact of another feature.

¹⁵ See para. 3.31 above.

¹⁶ This is expressly recognized by Romania when it speaks of "the close proximity of Serpents' Island to the adjacent coasts of Romania and Ukraine". RM, para. 11.49.

¹⁷ RM, para. 2.9.

8.19 Such an approach was pointed out by the Tribunal in the 1977 Anglo-French Arbitration on the *Delimitation of the Continental Shelf*:

"The appreciation of the effect of individual geographical features on the course of an equidistance line has necessarily to be made by reference to the actual geographical conditions of the particular area of continental shelf to be delimited and to the actual relation of the two coasts to that particular area"¹⁸.

(ii) **The Geographical Predominance of Ukraine in the Area**

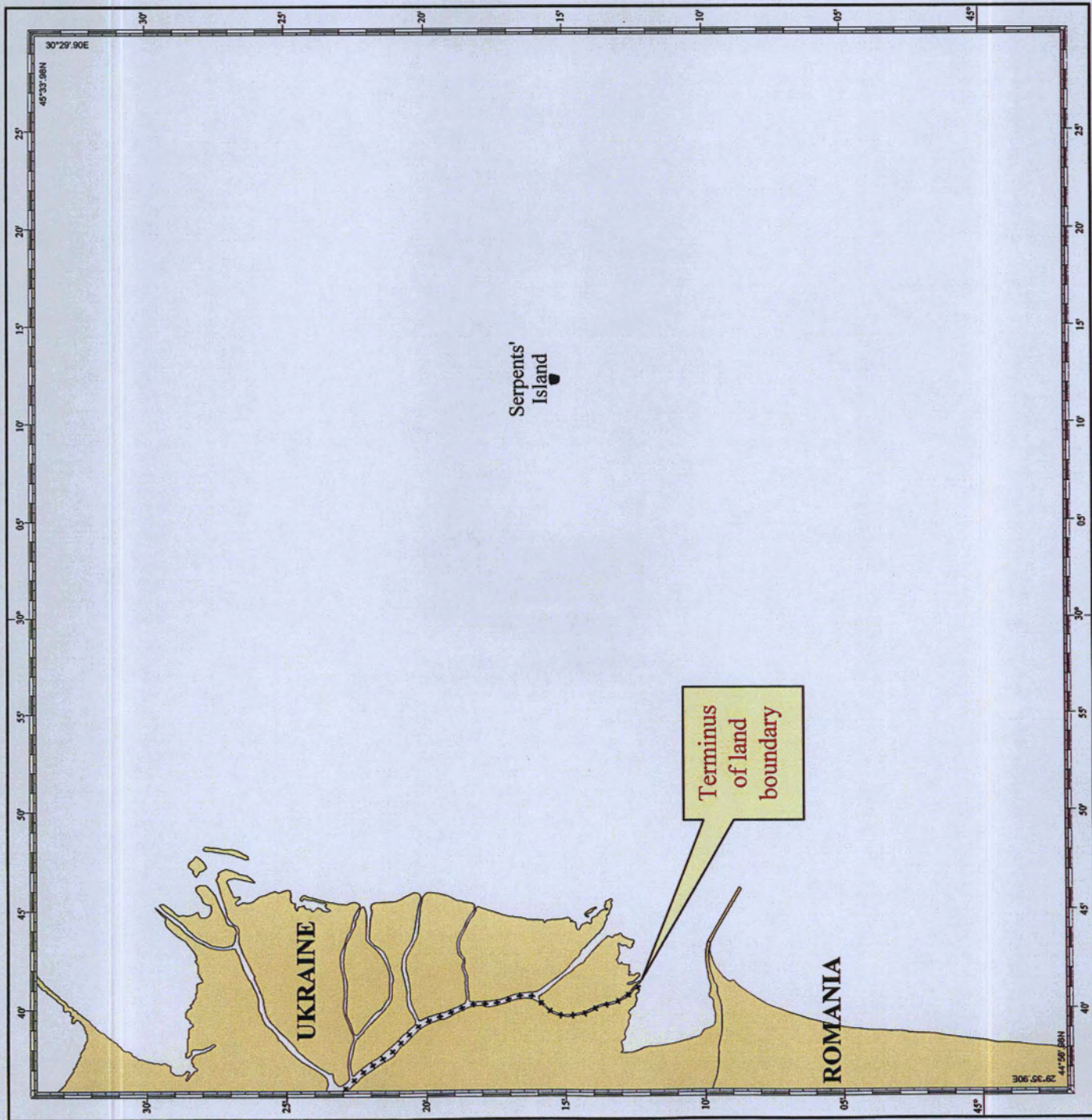
8.20 Within that area looking like a gulf, the geographical predominance of Ukraine is obvious, and does not need to be demonstrated at length. The Ukrainian geographical predominance is overwhelming not only in the various coastal regions bordering the gulf, but also and especially in the maritime areas encompassed by those coasts.

8.21 In fact, the seaward extension of the various Ukrainian coastal segments creates three distinct but converging coastal projections, as clearly illustrated on Figure 8-3 showing the convergent seaward extensions of Ukrainian coastal fronts:

- (a) the coastal segment from the border with Romania up to a point located near Odesa projects in a south-eastern direction;
- (b) the south-facing coastal segment situated in the northern part of the gulf projects mainly in a southern-south-western direction;
- (c) the coastal segment along the west-facing coast of the Crimean Peninsula projects in a western-south-western direction.

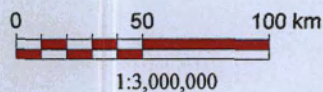
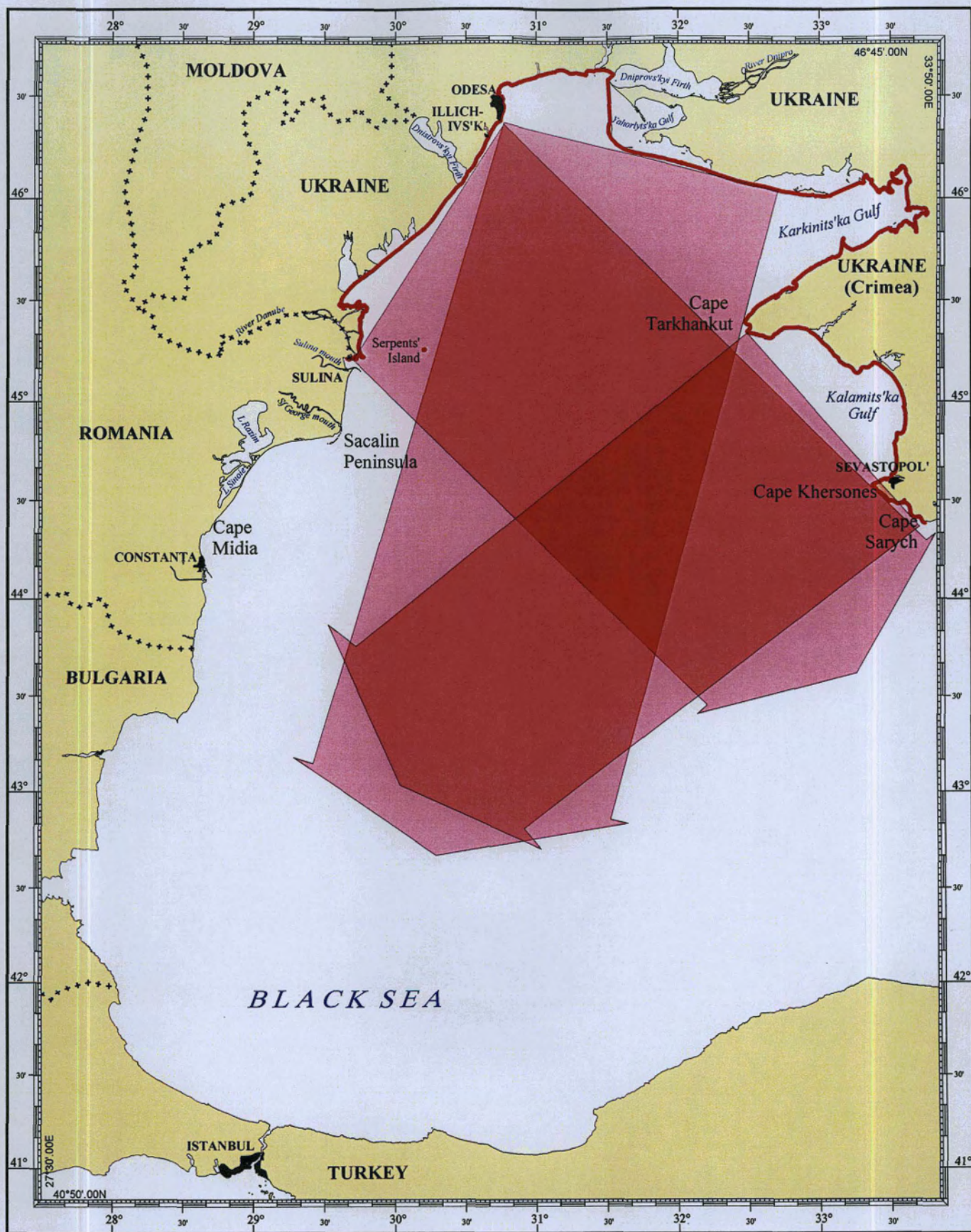
8.22 In contrast, the Romanian coast only projects in one direction – essentially south-eastwards, as shown on Figure 8-4, and its seaward extension therefore appears as being spatially less important than that of Ukraine. Saying that is not at all an attempt to deny the rights of Romania over the maritime areas lying off its coast. It simply implies that the taking into consideration of the particular geographical configuration, which inevitably leads to a

¹⁸ U.N.R.I.A.A., Vol. XVIII, p. 112, para. 240.



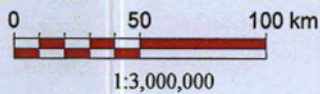
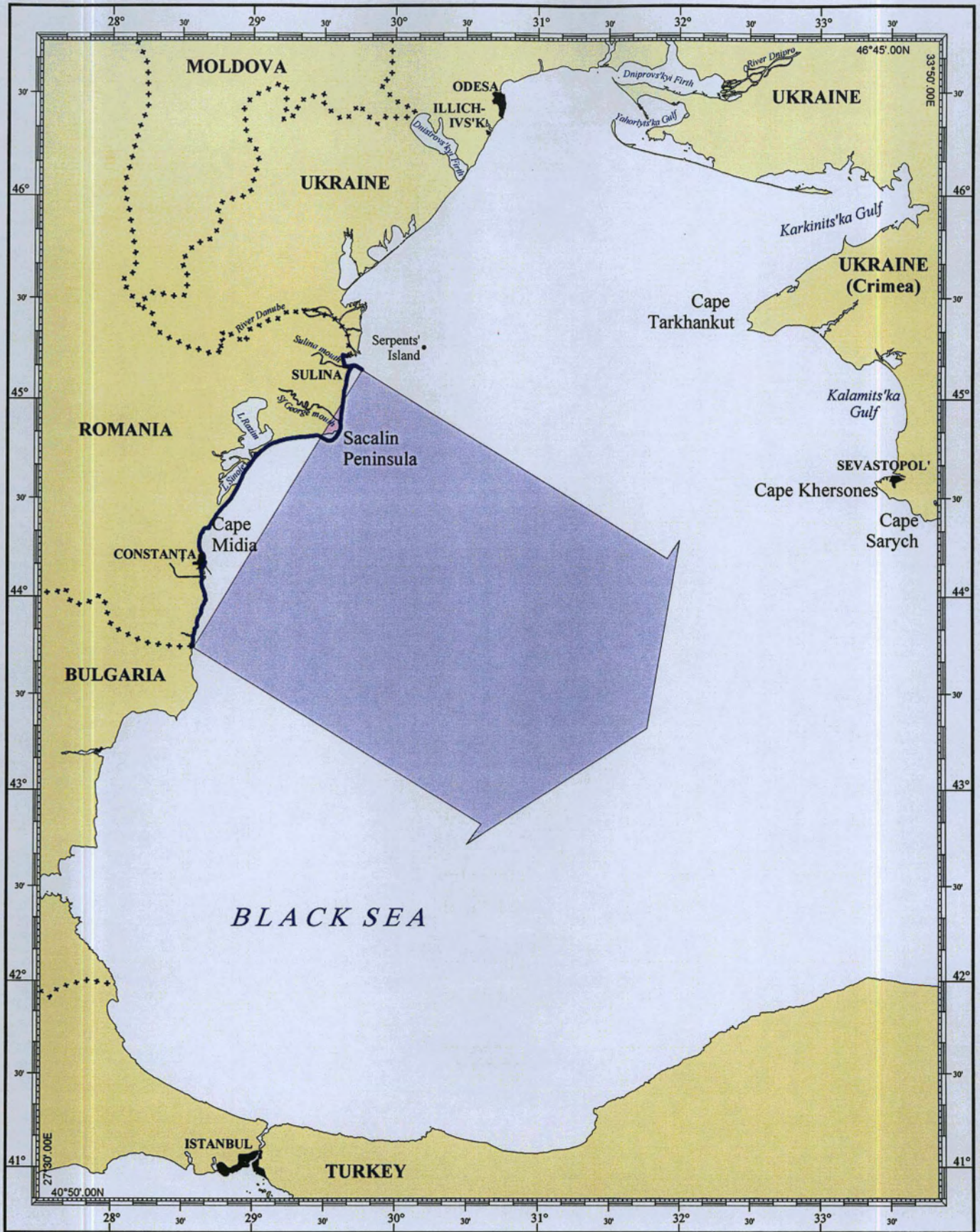
Location of Serpents' Island

Figure 8-2



Projection of Ukraine's Coastal Fronts

Figure 8-3



Projection of Romania's Coastal Front

Figure 8-4

massive projection of the Ukrainian coasts in the relevant area, is necessary to reach the equitable solution required by the law.

8.23 In that respect, the often-quoted formula used by the Court in 1969 must be quoted here again:

"Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane ..."¹⁹.

8.24 Romania has tried to fly in the face of facts in an attempt to reduce substantially the geographical presence of Ukraine's territory around the gulf-shaped area. Refashioning entirely the geography of the area, the Romanian definition of the relevant coasts leads to eliminating entirely the Ukrainian coast situated at the bottom of the gulf²⁰. That elimination is done on the basis of the misleading pretension that "the maritime area situated to the north of the Point S – Cape Tarkhankut line is analogous to an interior Ukrainian bay"²¹.

8.25 In the *Gulf of Maine* case, a tentative distinction between "primary" and "secondary" coasts was made by the United States, the former being presented as of greater importance than the latter for the purpose of maritime delimitation. The United States submitted that the Canadian southwestern coast of Nova Scotia, between Brier Island and Cape Sable, opposite to the U.S. coast of Massachusetts, ought to be considered as a "secondary" coastal front of the Gulf of Maine, since it appeared as being perpendicular to the general direction of the North-American continental coasts, while the U.S. coast of Maine, situated at the bottom of the Gulf, was regarded as forming a "primary" coastal front. But the Chamber of the Court rejected that distinction. It considered that "[t]he very legitimacy of such a distinction ... [was] very dubious"²², because "geographical facts are not in themselves either primary or secondary: the distinction in question is the expression, not of any inherent property of the facts of nature, but of a human value judgment, which will necessarily be subjective and

¹⁹ *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, pp. 49-50, para. 91.

²⁰ See paras. 3.12-3.13 above.

²¹ RM, para. 9.21.

²² *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 271, para. 36.

which may vary on the basis of the same facts, depending on the perspectives and ends in view"²³. And, in this respect, the Chamber of the Court recalled that "the facts of geography are not the product of human action amenable to positive or negative judgment, but the result of natural phenomena, so that they can only be taken as they are"²⁴.

8.26 In the present case, the argument adopted by Romania is even more extreme. Romania does not limit itself to considering that a large stretch of the Ukrainian coast would be "secondary" for delimitation purposes. It simply contends that, for the purpose of the present delimitation, there is no Ukrainian coast at all beyond an imaginary line artificially drawn between two points arbitrarily selected²⁵. It is difficult to be more distant from the geographical reality!

8.27 Under the Romanian approach of the coastal configuration, the present delimitation would be one taking place in a maritime area situated off two adjacent mainland coasts: in the south, the entire Romanian coast comprised between the respective terminus of the land boundaries with Ukraine and Bulgaria; and in the north, the short continental coast of an hypothetical Ukrainian State deprived of the major part of its land territory. Within that maritime area there would be two offshore islands: a small one in the vicinity of those coasts, named Serpents' Island; and a larger one at a greater distance, the name of which would be "Crimea Island". That extraordinary approach is illustrated on Figure 8-5, which is not a caricature of Romania's presentation, but simply an illustration of the actual result which could be reached through the Romanian approach. That figure clearly demonstrates, better than any long development, the erroneous and false presentation of geographical facts by Romania.

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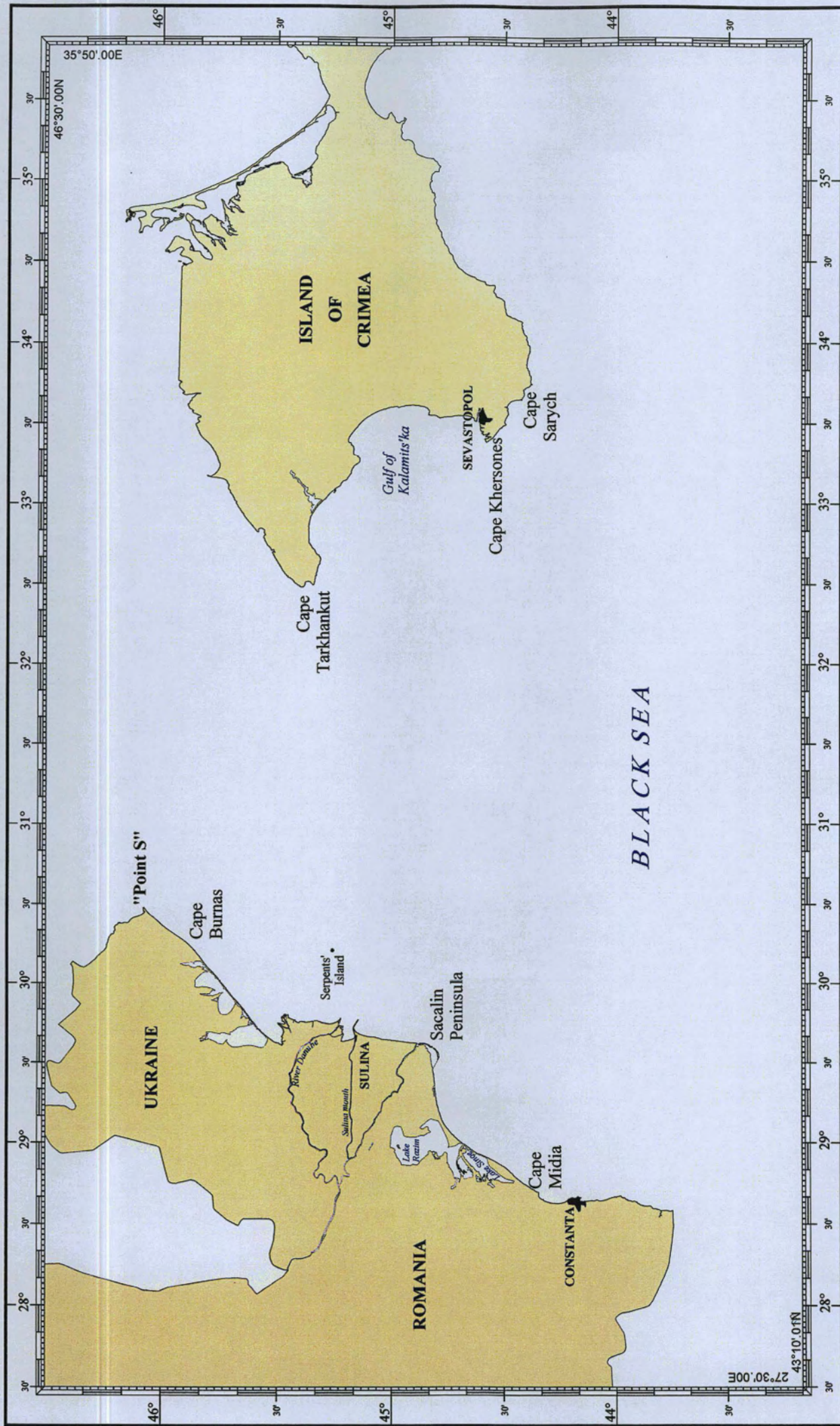
Ibid.

24

Ibid., p. 271, para. 37.

25

See RM, para. 9.21 and Figure 11 at p. 137.



Romania's Version of the Relevant Coasts

Figure 8-5

(iii) The Disparity Between Coastal Lengths

8.28 The geographical predominance of Ukraine finds also an expression in terms of coastal length. As is made perfectly clear on Figure 8-6 showing the general direction of the coasts bordering the gulf, there is a very significant disparity in the lengths of Ukraine's and Romania's relevant coasts measured according to their general direction. The Ukrainian relevant coastline is more than four times longer than the coast of Romania²⁶.

8.29 What is here "a given" of the coastal relationship consists in a geographical situation of fundamental inequality between the two neighbouring States in terms of length of their respective coastal fronts abutting on the relevant area. From that point of view, the situation in this case to some extent is reminiscent of the *Libya/Malta* case, where "the existence of a very marked difference in coastal lengths"²⁷ ascertained by the Court was considered by three Judges, in a joint opinion, as "a striking physical fact which is a particularly 'relevant circumstance'"²⁸. No doubt that the existing disparity between Ukraine and Romania with respect to the lengths of coasts might be appraised in the same manner.

8.30 From the *North Sea Continental Shelf* cases onwards, the dissimilarity between coastal lengths – should the occasion arise – has been a factor the relevance of which has been constantly affirmed in the jurisprudence. When States have not been given "broadly equal treatment by nature"²⁹, *i.e.*, when their respective coasts are not "comparable in length"³⁰ or are not "in a relation of approximate equality"³¹, as is precisely the situation in this case, this is obviously a particularly relevant factor.

8.31 Thus, the Court stated in its Judgment delivered in the *Jan Mayen* case :

"There are ... situations ... in which the relationship between the length of the relevant coasts and the maritime areas generated by them by application of the

²⁶ For the measurements of the two relevant coasts and a comparison between the respective coastal lengths, see above Chapter 3, paras. 3.17-3.20.

²⁷ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, *I.C.J. Reports 1985*, p. 49, para. 66.

²⁸ Separate opinion of Judges Ruda, Bedjaoui and Jimenez de Aréchaga, *I.C.J. Reports 1985*, p. 85 para. 25.

²⁹ *North Sea Continental Shelf*, Judgment, *I.C.J. Reports 1969*, p. 50, para. 91.

³⁰ *Ibid.*

³¹ Decision of 30 June 1977 of the Anglo-French Court of Arbitration, *U.N.R.I.A.A.*, Vol. XVIII, p. 88, para. 181.

equidistance method, is so disproportionate that it has been found necessary to take this circumstance into account in order to ensure an equitable solution. The frequent references in the case-law to the idea of proportionality - or disproportion - confirm the importance of the proposition that an equitable delimitation must, in such circumstances, take into account the disparity between the respective coastal lengths of the relevant area"³².

8.32 When emphasizing the actual disparity in the coastal relationship, Ukraine is not claiming the application of a so-called "principle of proportionality", not only because it is beyond all question that "it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor"³³, but also because proportionality is relevant to the testing of the equitableness of the delimitation line rather than its construction. But it is a very important relevant circumstance to be taken into account. As the Court said in the *Libya/Malta* case:

"It is ... 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"³⁴.

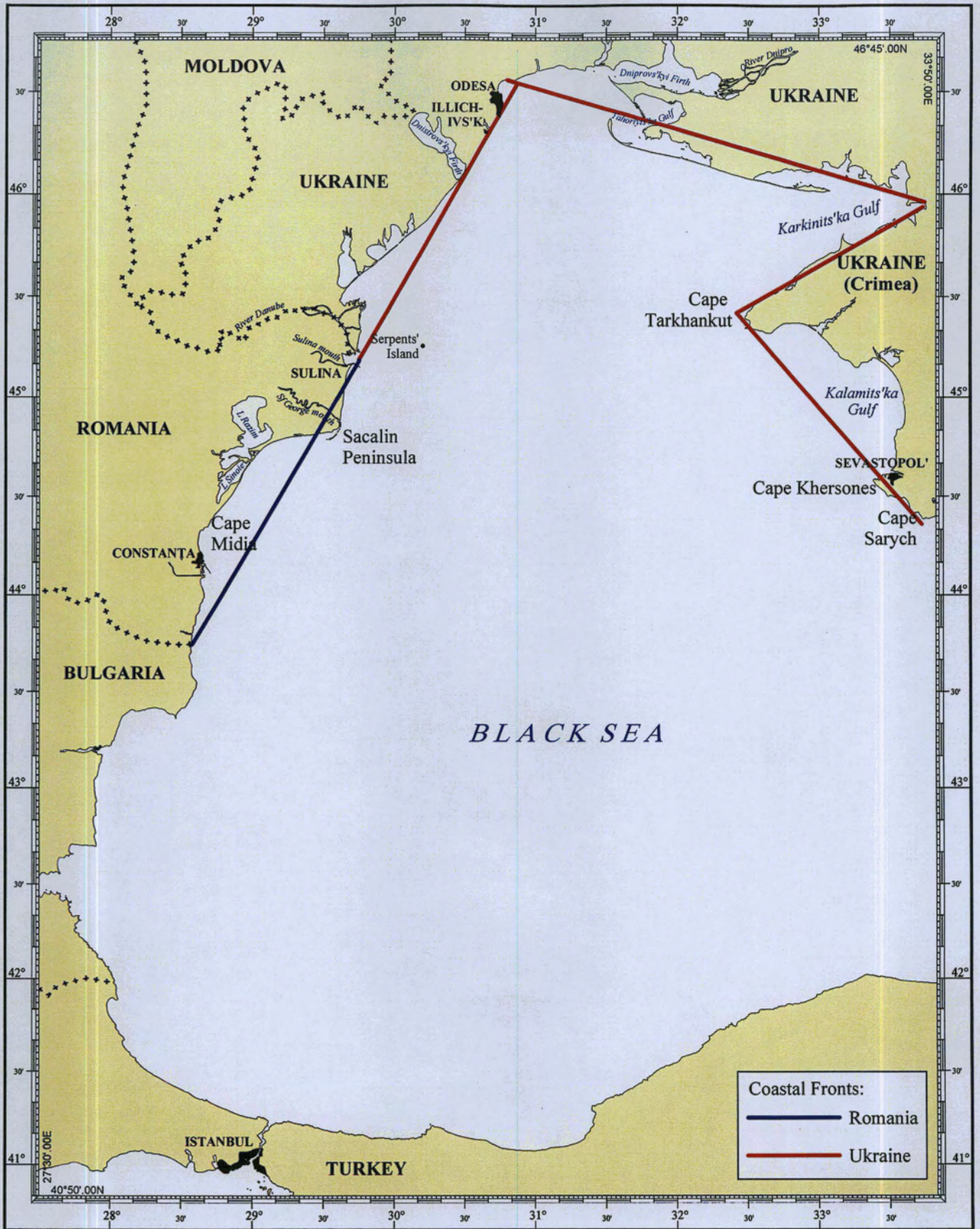
8.33 Of course, Ukraine is well aware of the observation made by the Chamber of the Court in the *Gulf of Maine* case, where the parties were also seeking a single maritime boundary for the continental shelf and their exclusive fishery zones:

"a maritime delimitation can ... not be established by a direct division of the area in dispute proportional to the respective lengths of the coasts 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

³² *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 67, para. 65.

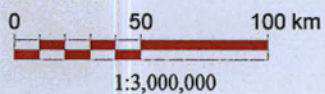
³³ According to the 1977 Decision of the Anglo-French Court of Arbitration, *U.N.R.I.A.A.*, Vol. XVIII, p. 58, para. 101.

³⁴ *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 49, para. 66.



**The Parties' Coastal Fronts
in the North West Black Sea**

Figure 8-6



different basis would constitute a circumstance calling for an appropriate correction"³⁵.

8.34 But, when quoting the *Gulf of Maine* Judgment, it is also noteworthy that the disparity in coastal lengths between the United States and Canada in that case was not as important as in the present case. In fact, according to the Chamber of the Court, the total length of the United States' coastlines in the Gulf of Maine was approximately 284 nautical miles, while the overall length of the Canadian coastline was approximately 206 nautical miles. Thus the ratio between the respective coastal fronts on the Gulf of Maine was considered as being 1.38 to 1. However, it was regarded as an important circumstance by the Chamber of the Court, leading to a correction of the provisional median line: "the ratio to be applied for the purposes of determining the location of the corrected median line [was] approximately 1.32 to 1 in place of 1.38 to 1"³⁶.

C. The Relevant Factors of Political Geography

8.35 The position of the terminus of the land boundary, that is the intersection of the frontier with the coast, may have sometimes operated as "a circumstance of considerable relevance"³⁷ in other maritime delimitation proceedings. But, in the present case, it is an element of no relevance for the drawing of the maritime boundary. It is mentioned however because of it being creative of the Ukrainian geographical predominance previously recorded³⁸.

8.36 On the contrary, the terminal point of the boundary separating the Ukrainian and Romanian territorial waters, as opposed to the terminal point on the land boundary, is highly relevant for the determination of the course of the maritime delimitation line beyond the territorial seas. That terminal point has been agreed between the two States in Article 1 of the 2003 Treaty on the Ukrainian-Romanian State Border Regime³⁹. Defined by its geographical coordinates as being "the point of 45°05'21" north latitude and 30°02'27" east longitude", this is the starting point of the single maritime boundary dividing the continental shelf and the

³⁵ *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 323, para. 185.

³⁶ *Ibid.*, p. 337, para. 222.

³⁷ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 65, para. 82.

³⁸ See para. 8.20 above.

³⁹ See Chapter 5, section 5, sub-section C, above.

exclusive economic zones of Ukraine and Romania in the Black Sea that will be decided by the Court.

8.37 That view is shared by Romania. In the Memorial, Romania has called that point "Point F", and it has expressly stated that "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"⁴⁰. For its part, Ukraine prefers to have that point named "Point A", as previously indicated⁴¹ since the Parties agree that that is the starting point of the delimitation to be effected by the Court.

8.38 Since the Parties are in full agreement on that point, it is not necessary to add any further developments dealing with geographical factors, and it is appropriate now to examine whether there are other circumstances which may be regarded as relevant. This will be done in the two following sections, first through an examination of the conduct of the Parties as revealed by State activities in the area, and second by assessing the incidence of existing delimitation agreements between third States in the Black Sea.

Section 2. State Activities in the Relevant Area

8.39 Whereas Ukraine has consistently carried out and/or licensed sovereign and economic activities in the relevant area, Romania has not. To the contrary, in authorising State activities in its continental shelf/EEZ, Romania has respected a line located well to the south and west of its claim line as representing the limit of its continental shelf/EEZ.

8.40 As will be illustrated in this Section, the mutual conduct of both Ukraine and Romania support Ukraine's position regarding the location of the continental shelf/EEZ boundary. It is relevant to emphasize in this respect that the Parties' conduct concerns the exercise of sovereign activities (*e.g.*, in respect of the licensing of hydrocarbon exploration and exploitation) as well as obligations assumed by the respective States, notably regarding activities of the State border guard in policing fishing areas.

⁴⁰ RM, para. 9.3.

⁴¹ See para. 7.91 above.

8.41 In Ukraine's submission, these State activities cannot be ignored, and constitute a relevant circumstance which operates in favour of the continental shelf/EEZ claim line proposed by Ukraine.

8.42 Ukraine will first review the Parties' activities in respect of the licensing of oil and gas exploration and exploitation in the relevant area (Section A), before turning to the activities of the State border guard in relation to illegal fishing (Section B).

A. Licences Granted for the Exploration and Exploitation of Oil and Gas in the Relevant Area

8.43 Ukraine has licensed activities relating to the exploration and exploitation of oil and gas deposits in its continental shelf in the north-west part of the Black Sea since shortly after its independence from the Soviet Union.

8.44 In 1993, a Licence Agreement was concluded by the Ukrainian State Committee on Geology and the Utilization of Mineral Resources, on the one hand, and the Crimean Petroleum Company (a Joint Venture between the Crimean State Property Fund and J.P. Kenny Exploration and Production Ltd.)⁴², on the other⁴³.

8.45 The licence area covered by the Licence Agreement entered into with the Crimean Petroleum Company is that defined by the co-ordinates: 44°30'00" N, 31°30'00" E (Point A); 44°30'00" N, 30°00'00" E (Point B); 45°00'00" N, 31°00'00" E (Point C); and 45°00'00" N, 31°30'00" E (Point D).

8.46 This licence area, known as the Delphin block, is depicted on Figure 8.7⁴⁴. As can be seen, this area lies well within the continental shelf area claimed by Ukraine.

⁴² J.P. Kenny Exploration and Production Limited is a subsidiary of JKX Oil & Gas plc, a U.K.-registered company listed on the London Stock Exchange.

⁴³ Annex 97, Vol. 5.

⁴⁴ Note that the adjacent area to the west (the "Alternate Area") was to be granted to CPC in the event of the boundary issue being resolved in Ukraine's favour.

8.47 In 1995, Crimean Petroleum Company drilled one exploration well in accordance with its commitments under the Licence Agreement⁴⁵.

8.48 On 12 October 2001, the Ukrainian company Chornomornaftogaz was granted a 5-year permit by the Ministry of Ecology and Natural Resources of Ukraine for the exploration and exploitation of oil and gas deposits situated in the Olympiiska block, defined by the co-ordinates: 44°41'55" N, 30°17'53" E; 44°45'45" N, 30°17'04" E; 44°47'10" N, 31°29'21" E; 44°43'22" N, 31°30'11" E⁴⁶.

8.49 Olympiiska block is depicted on Figure 8-7: it is located close to the limit of, but still within, the area of continental shelf/EEZ claimed by Ukraine.

8.50 In 2001-2002, two exploratory wells were drilled in the Olympiiska block⁴⁷.

8.51 On 12 August 2003, Chornomornaftogaz was granted by the Ministry of Ecology and Natural Resources of Ukraine a permit for the exploration and exploitation of oil and gas deposits in the Gubkina block, defined by the following co-ordinates: 45°05'30" N, 30°09'14" E; 45°09'40" N, 30°52'00" E; 45°05'00" N, 30°52'40" E; 45°01'30" N, 30°09'30" E⁴⁸.

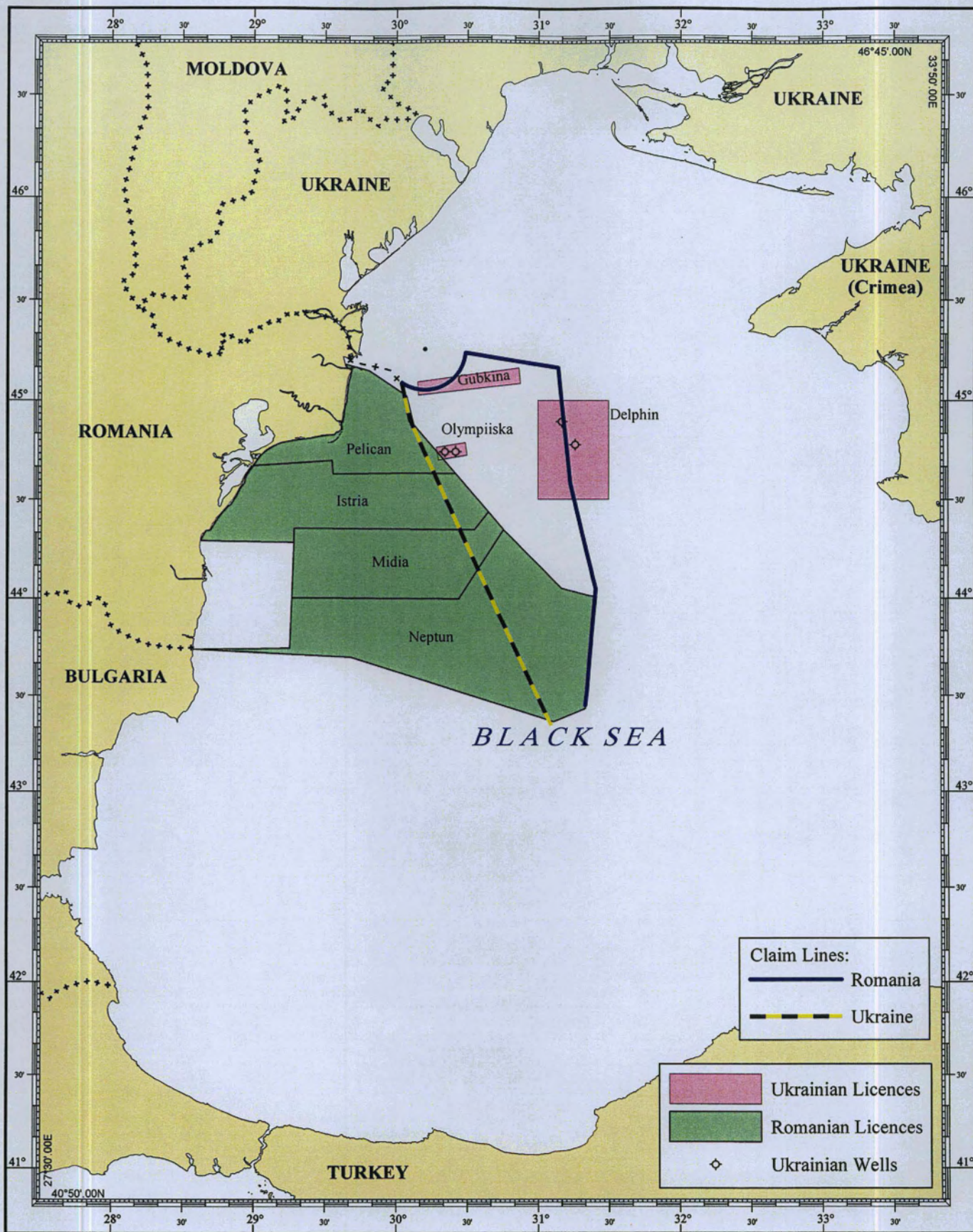
8.52 The Gubkina block is depicted on Figure 8-7. The block straddles the southern limit of the territorial sea of Serpents' Island, but otherwise is located in Ukraine's continental shelf/EEZ.

⁴⁵ As stated on the JKK website.

⁴⁶ A copy of the licence, with English translation, is at Annex 98, Vol. 5.

⁴⁷ It should be noted that Chornomornaftogaz had been directed by the Ukrainian Government that it was not authorised to carry out any exploitation (as opposed to exploration) activities in the areas in respect of which Romania disputed Ukraine's entitlement pending settlement of the maritime boundary dispute with Romania.

⁴⁸ A copy of the licence, with English translation, is at Annex 99, Vol. 5.



**Relevant Ukrainian and Romanian Licences
in Relation to the Parties' Claim Lines**

Figure 8-7

8.53 Thus, activities, particularly related to the exploration of oil and gas structures, have consistently been carried out under licence from the Ukrainian State authorities in zones falling within the area of the continental shelf/EEZ claimed by Ukraine in this case.

8.54 In contrast, Romania has, in awarding oil and gas exploration permits in the north-west part of the Black Sea, respected a line which is entirely inconsistent with the exaggerated claim line which it has set out in its Memorial.

8.55 The first Romanian offshore well was apparently drilled by Petromar, a subsidiary of the State entity Petrom, in August 1976 and named Ovidiu-1. Its location, within Block XV (Midia), is depicted on the Petroconsultants map reproduced at Figure 8-8⁴⁹. This well was eventually abandoned, but a discovery was made in the Lebada (Swan) Est field which was spudded in June 1978 and completed in January 1980. Lebada Est was brought onstream in 1987⁵⁰.

8.56 After the collapse of the Ceaucescu regime in 1989, exploratory activity in the offshore region declined, and efforts were made to attract foreign investment. In 1992, a British company, Enterprise Oil, signed production sharing contracts for Block XIII (Pelican) and Block XV (Midia). The location of these blocks are depicted on the Petroconsultants map at Figure 8-8. Drilling was apparently commenced by Enterprise Oil and its partners in 1994. Further drilling took place in areas east of Lebada Est in August 1995 and in Block XV in 1997⁵¹.

8.57 For the purposes of the present dispute, however, it is important to emphasise that the eastern limit of Romania's Blocks XII (Pelican) and XV (Midia), as well as the intervening block (Istria) and that lying to the south (Neptune) which are depicted on the Petroconsultants map reproduced at Figure 8-8, bear absolutely no relation to the outer limit of Romania's

⁴⁹ See also Jeremy Benton, *Exploration History of the Black Sea Province*, in *Regional and Petroleum Geology of the Black Sea and Surrounding Region*, Edited by A.G. Robinson, The American Association of Petroleum Geologists, 1997, at p. 8. A copy of this chapter, with an earlier Petroconsultants map (entitled *Black Sea Province Exploration Status*, August 1997) which was enclosed in the publication, is at Annex 100, Vol. 5.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, pp. 8-9.

continental shelf/EEZ as presently claimed. Although the limit does not acknowledge the full extent of Ukraine's continental shelf/EEZ, it is clearly relevant as evidence that Romania has previously regarded a significant part of an area that it now claims as properly belonging to Ukraine⁵². This is clearly demonstrated on the sketch map at Figure 8-7.

B. State Activities in Respect of Fishing Practices in the Relevant Area

8.58 The EEZ/continental shelf boundary claimed by Ukraine furthermore corresponds generally to the limit of the Parties' exclusive fishing zones as respected by both Romania and Ukraine in their administration of fishing in the north-west part of the Black Sea.

8.59 This is evidenced particularly by the fact that it is Ukraine and not Romania which has been active in policing that part of the area in respect of illegal fishing carried out by fishermen from third States, notably Bulgaria and Turkey.

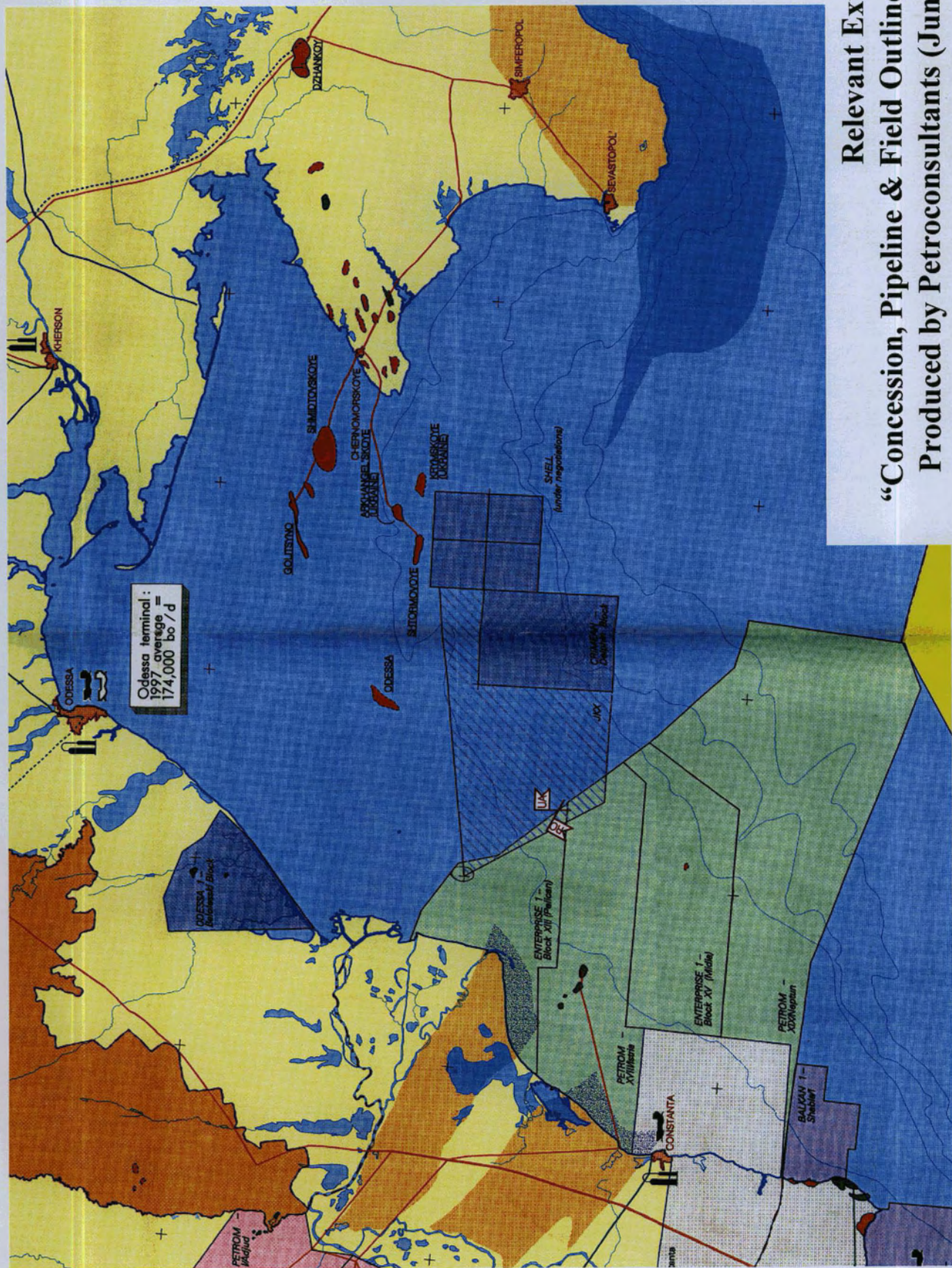
8.60 Although the Ukrainian Exclusive (Marine) Economic Zone Act of 16 May 1995 does not give coordinates for the limits of Ukraine's Exclusive Economic Zone⁵³, it should be recalled that in its diplomatic note to Romania dated 7 November 1995 the Ministry of Foreign Affairs of Ukraine communicated the coordinates: 45°05'5"N, 30°01'0"E; 44°54'0"N, 30°06'0"E; 43°42'6"N, 31°27'8"E; 43°27'0"N, 31°20'8"E, and stated that, pending the final determination of the boundary between the two States' continental shelf/EEZ, the boundary line followed these coordinates⁵⁴. In other words, Ukraine at the time regarded only those areas lying south and west of these coordinates to be potentially in dispute between the Parties. Areas lying to the north and east of the line were deemed unquestionably to appertain to Ukraine.

8.61 Moreover, it is appropriate to emphasise that this Ukrainian interim boundary line was communicated to third States. For example, subsequent to several incidents of Bulgarian fishermen being arrested for illegal fishing in Ukraine's EEZ, on 3 October 2002 the

⁵² The co-ordinates of the Neptune block, along with a sketch map of the area, were communicated to Ukraine by Romania in its *note verbale* dated 2 July 2001, Annex 101, Vol. 5.

⁵³ No. 162/95-VR, copy at Annex 47, Vol. 4. Article 2 provides that "the exclusive (marine) economic zone of Ukraine shall be comprised of maritime areas beyond and adjacent to the territorial sea of Ukraine, including areas surrounding islands belonging to Ukraine [...]".

⁵⁴ See Annex 26, Vol. 3.



Relevant Extract of
 “Concession, Pipeline & Field Outline Map”
 Produced by Petroconsultants (June 1998)

Bulgarian Embassy in Kyiv requested information regarding the competent fishing authorities in Ukraine and as to the wording of relevant legal instruments⁵⁵. The Ukrainian Ministry of Foreign Affairs responded on 19 November 2002 confirming that, until an agreement with Romania was reached, the limit of Ukraine's EEZ was defined by the line that connects the co-ordinates: 45°05'5" N, 30°01'00" E; 44°54'0" N, 30°06'0" E; and 43°42'6" N, 31°27'8" E⁵⁶.

8.62 . Despite the fact that Romania responded through diplomatic channels to the effect that it did not accept the validity of the Ukrainian interim boundary line, it is appropriate to emphasize that it has been Ukraine and not Romania which has been active in patrolling the area limited by the interim boundary line, and it has been the Ukrainian and not the Romanian border guard which has intercepted foreign fishing vessels caught fishing illegally in those areas.

8.63 Furthermore, it is relevant to point out that none of the fishing boats intercepted by the Ukrainian border guard in question was Romanian, which suggests that the area in question was properly regarded by the relevant Romanian authorities as forming part of Ukraine's EEZ, and in no instance did the offending Turkish or Bulgarian fishermen, or the Governments of these two States, plead in their defence that the fishermen were in Romanian waters.

8.64 A number of these incidents gave rise to diplomatic protests on the part of Ukraine to the Governments of Bulgaria and Turkey. A review of several individual incidents is recounted in detail below. For ease of reference, the location of these incidents is depicted on the sketch map at Figure 8-9.

(1) On 6 March 1997, the Ukrainian Ministry of Foreign Affairs sent *note verbale* No. 15-905/015 to the Government of Turkey, stating⁵⁷:

"On 17 February this year in the exclusive (maritime) economic zone of Ukraine 30 miles to the south-east of Zmiinyi island (44°55'N; 30°50'E) and on 18 February 40 miles to the south-east of Zmiinyi island (44°38'N;

⁵⁵ *Note verbale* No. UB-12-723, at Annex 102, Vol. 5

⁵⁶ *Note verbale* No. 613/23-400-5121, at Annex 103, Vol. 5.

⁵⁷ Annex 104, Vol. 5.

30°30'E) were detected respectively 15 and 9 Turkish fishing schooners engaged in the poaching catch of fish.

Referring to similar facts, which already took place in the recent past, the Ministry of Foreign Affairs of Ukraine finds these actions of the Turkish Party intolerable and considers them to be grave violation of the Treaty between the USSR and the Republic of Turkey on the Delimitation of the Continental Shelf in the Black Sea of 23 June 1978 and the Treaty between the USSR and the Republic of Turkey on the Establishment of the Boundary of the Economic Zones of 23 December 1986 and of 16 February 1987 legally succeeded by Ukraine and the Republic of Turkey (notes of the Ministry of Foreign Affairs of Ukraine No DPU/43 of 19-01-94, No DPU/609 of 30-05-94, note of the Republic of Turkey No VKDH-II-442 of 25-03-94)".

The Turkish Embassy responded on 12 March 1997 confirming that "[t]he Turkish authorities will take the necessary measures to prevent occurrence of such acts [...]"⁵⁸.

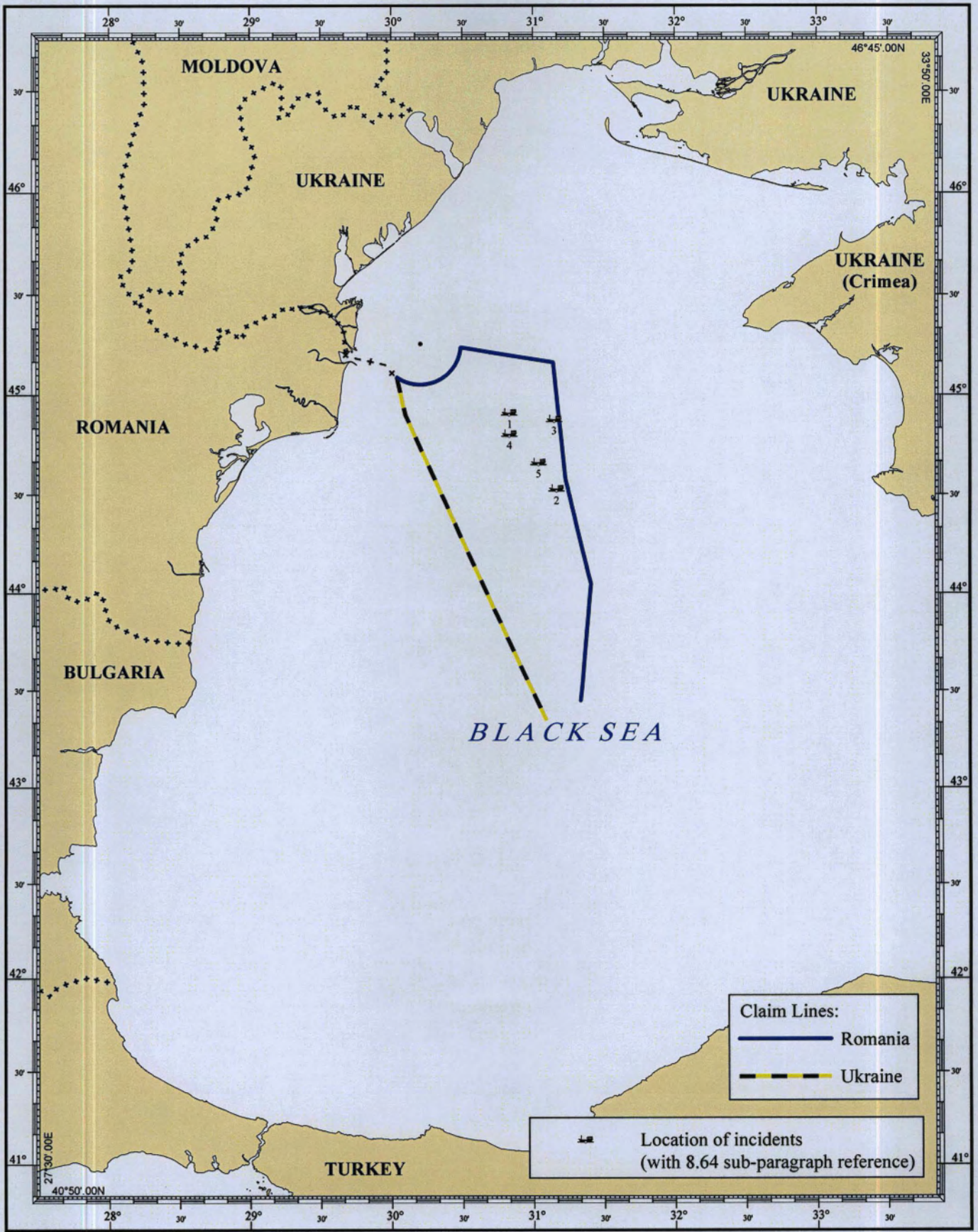
- (2) On 15 January 1998, the Ukrainian Ministry of Foreign Affairs issued a press release regarding an incident that had taken place earlier that day in which 17 Turkish fishing boats had been discovered fishing illegally at 44°47'N; 31°28'E⁵⁹. One of the Turkish fishing boats was pursued and sank at 44°32'N, 31°10'E. Regrettably, a Turkish sailor died in this incident.
- (3) On 7 February 2000, the Ukrainian Ministry of Foreign Affairs protested to the Turkish Embassy about an illegal fishing incident that had taken place on 14 January 2000, when 19 Turkish fishing boats were intercepted at 44°40'N, 31°40'E, and one that had taken place on 17 January 2000, when 20 Turkish fishing boats were located at 44°53'N, 31°09'E⁶⁰.
- (4) A further incident occurred on 2 May 2002 38 nautical miles southeast of Serpents' Island when a Turkish fishing boat was caught by the Ukrainian border guard fishing illegally. This was notified to the Turkish Foreign Ministry by *note verbale* dated 31 May 2002⁶¹.

⁵⁸ Annex 105, Vol. 5. The date on the *note verbale* (12 March 1996) would appear to be erroneous.

⁵⁹ Annex 106, Vol. 5. An official statement was forwarded to the Turkish Embassy in Kyiv on 16 January 1998: see Annex 107, Vol. 5.

⁶⁰ Annex 108, Vol. 5.

⁶¹ Annex 109, Vol. 5.



Locations of Illegal Fishing Incidents Involving Ukrainian Border Guard

Figure 8-9

- (5) The Ukrainian Ministry of Foreign Affairs communicated a further *note verbale* to the Turkish Embassy in Kyiv on 5 April 2003 regarding illegal fishing carried out by 4 Turkish fishing boats 50 miles southeast of Serpents' Island⁶².

8.65 As is demonstrated by these activities of the Ukrainian State border guard, Ukraine has invested substantial expense in maintaining the exclusivity of its fishing zone, extending up to the interim line which was communicated to Romania. Romania, to the contrary, has to Ukraine's knowledge not only abstained from licensing its own fishermen in respect of this area, but has been noticeably absent in failing to intercept fishing boats from third States which have persistently been fishing illegally in this area. In Ukraine's submission, this is a further relevant factor that supports the boundary line proposed by Ukraine. In particular, it clearly demonstrates that Romania has not considered that it possesses sovereign rights in this area and has consciously abstained from undertaking activities that characterise those that are customarily undertaken by a State in areas to which it claims sovereign rights.

Section 3. Third State Delimitations in the Black Sea

A. The Relevance of Third State Delimitations in the Black Sea

8.66 In the light of the provisions of UNCLOS and the Court's jurisprudence, Romania's Memorial fundamentally misinterprets the relevance of the presence of third States and third State delimitations in the Black Sea for purposes of this case. Thus Romania is plainly wrong when it asserts that the delimitation method applicable as between Ukraine and Romania must be based on the "same treatment" which other States have adopted in the Black Sea, and that otherwise "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"⁶³. This aspect of the matter is more fully dealt with in Chapter 4, Section 3.

8.67 Romania is, however, correct when it points out that:

⁶² Annex 110, Vol. 5.

⁶³ RM, para. 6.34.

"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"⁶⁴.

8.68 It is clear that the presence of third States in the vicinity of the area to be delimited is a relevant circumstance to be taken into account. However, the relevance of this factor has nothing to do with the choice of the actual method of delimitation that will produce an equitable result between the contesting States, but rather with how far that delimitation, whatever method is adopted, can be extended without prejudicing the putative rights of third States or trespassing onto areas that potentially appertain to third States. This is not a factor that is limited to situations where there is an enclosed or semi-enclosed sea. Indeed, the presence of third States is always a circumstance to take into account when such States are situated in the general area being delimited between two other States whether the delimitation takes place in an enclosed sea or not.

8.69 The point is clearly illustrated by the Court's approach in the *Tunisia-Libya* case - a delimitation which took place in the Mediterranean Sea, also an enclosed sea. The method, or methods, of delimitation which the Court applied to the facts of that particular case were a function of the geographical relationship of the coasts of Tunisia and Libya and based on the Parties' past conduct. Those methods had nothing to do with any method or methods which third States in the Mediterranean (such as Italy, Greece, Spain or France) may have previously adopted in their own bilateral agreements.

8.70 What was relevant, in contrast, was the presence of third States (such as Malta) in the area being delimited when it came to identifying how far seaward the Tunisia-Libya delimitation should be extended. As the Court stated:

"How far the delimitation line will extend north-eastwards will, of course, depend on the delimitations, ultimately agreed with third States on the other side of the Pelagian Sea"⁶⁵.

Accordingly in its *dispositif* the Court, in referring to the element of proportionality which the delimitation ought to bring about, required "account [to be] taken for this purpose of the

⁶⁴ *Ibid.*, para. 6.26.

⁶⁵ *Continental Shelf (Tunisia/Libya Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 91, para. 130.

effects, actual or prospective, of any other continental shelf delimitation between States in the same region"⁶⁶.

8.71 The Court adopted a similar approach in the *Libya-Malta* case, another delimitation carried out in an enclosed sea. In that case, the method of delimitation decided by the Court was based on a provisional median line adjusted to take account of the marked disparity in the lengths of the coasts of the parties abutting the area to be delimited.

8.72 The method thus adopted bore no relation to the methods of delimitation which third States may have utilized in their bilateral agreements in the Mediterranean Sea or which such States had proclaimed as unilateral claims in the area. What was relevant, on the other hand, were the existence of Italian claims in the area subject to delimitation between Libya and Malta. However, as the Court made clear in its judgment, these claims only limited the lateral extent of the Libya-Malta delimitation without in any way impacting on the delimitation method decided by the Court to produce an equitable delimitation between Libya and Malta themselves. In the Court's words:

"The present decision must, as then foreshadowed, be limited in geographical scope so as to leave the claims of Italy unaffected, that is to say the decision of the Court must be confined to the area in which, as the Court has been informed by Italy, that State has no claims to continental shelf rights"⁶⁷.

8.73 A further relevant precedent is provided by the Court's decision in the *North Sea Continental Shelf* cases. While in that case the Court was requested simply to articulate the principles and rules of delimitation applicable between the parties for the delimitation of their continental shelves in what was a semi-enclosed sea, the Court in no way considered itself bound by the delimitation methods that other States (such as the United Kingdom or Norway) had employed for their bilateral boundary agreements in the North Sea⁶⁸.

8.74 Romania refers to the fact that in the *North Sea* cases, the Court stated that, in considering the "reasonable degree of proportionality" which the delimitation should bring

⁶⁶ *Ibid.*, p. 93, para. 133 (B)(5).

⁶⁷ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 26, para. 21.

⁶⁸ Similarly, in the *Qatar-Bahrain* case, the Court also did not rely on the practice of third States in the Persian Gulf for determining the equitable maritime boundary. The delimitation decided by the Court was based on the particular facts of the case and the applicable international law.

about between the extent of the continental shelf areas appertaining to the coastal States and the lengths of the relevant parts of their coasts, account should be taken for this purpose of "the effects, actual or prospective, of any other continental shelf delimitation between States in the same region"⁶⁹. However, the relevance of this statement of the Court for the purposes of the present dispute is the same as that which has been previously discussed: the presence of third States in the area may be a relevant factor determining how far the delimitation can be extended, but it has no bearing on the actual delimitation method selected in order to produce an equitable result between the parties to the dispute.

8.75 As regards the dictum of the Arbitral Tribunal in the *Guinea/Guinea-Bissau Arbitration* cited at paragraph 6.29 of Romania's Memorial - that "[a] delimitation designed to obtain an equitable result cannot ignore the other delimitations already made or still to be made in the region" - this merely reinforces the point. In that case, the Arbitral Tribunal took into account the coasts of neighbouring States, notably that of Sierra Leone, in concluding that due to the concave nature of the coast of that part of West Africa, "[t]he equidistance method has the other drawback of resulting in the middle country being enclaved by the other two and thus prevented from extending its maritime territory as far seaward as international law permits"⁷⁰. However, once again, this was germane to the extent of the delimitation to be effected, not to the method of delimitation adopted.

8.76 The clear conclusion is that the fact that the Black Sea is an "enclosed sea" is irrelevant to the method of delimitation which is appropriate for determining an equitable boundary as between Ukraine and Romania. Equally irrelevant is the basis for the maritime boundary delimitations agreed as between Turkey and the USSR on the one hand, and between Turkey and Bulgaria on the other. Those agreements may be - indeed, are - relevant for purposes of determining how far the Ukraine-Romania delimitation should be extended into the middle of the Black Sea, but they are not germane to the choice of method or methods that will produce an equitable result in this case. Any factors which third States considered to be, or not to be, relevant in the context of their respective boundary agreements

⁶⁹ RM, paras. 6.27-6.28, citing *North Sea Continental Shelf cases, Judgment, I.C.J. Reports 1969*, p. 54, para. 101D(3) and *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 93, para. 133B(5).

⁷⁰ *Arbitral Tribunal for the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, Award of 14 February 1985, *ILM*, Volume XXV, No. 2, p. 295, para. 104.

cannot affect Ukraine's or, indeed, Romania's continental shelf/EEZ entitlement under international law.

B. The Black Sea Agreements Cited by Romania

8.77 Romania refers to pre-existing delimitation agreements in such a way as to imply that there were several. Thus Romania refers to "the delimitation practice existing in the Black Sea"⁷¹, "a number of these [possible Black Sea] delimitations have already been settled"⁷², "all the delimitation agreements concluded in the Black Sea"⁷³, "all concluded agreements"⁷⁴, "the homogenous practice regarding delimitations of maritime areas [scil. in the Black Sea]"⁷⁵ and "all other delimitations completed in the Black Sea"⁷⁶.

8.78 In fact there are agreements concluded between only two pairs of States - a continental shelf delimitation agreement concluded in 1978 between Turkey and the USSR⁷⁷ (to which Ukraine has now succeeded in so far as it affects Ukraine) and the other concluded in 1997 between Turkey and Bulgaria⁷⁸. Maritime delimitation is still not agreed as between Ukraine-Romania, Ukraine-Russian Federation, Ukraine-Bulgaria, Romania-Bulgaria, and Romania-Turkey.

8.79 It is thus apparent that there is no widespread network of pre-existing bilateral agreements between the riparian States of the Black Sea. Out of 7 possible bilateral delimitation agreements in the Black Sea only 2 have been concluded. Even if only the western half of the Black Sea is taken into account, there are 5 possible bilateral delimitation agreements, and only one of the existing agreements solely concerns that western half (the other - USSR-Turkey - is mostly concerned with delimitation in the central and eastern parts of the Black Sea).

⁷¹ RM, para. 6.1.

⁷² *Ibid.*, para. 6.3.

⁷³ *Ibid.*, para. 6.24.

⁷⁴ *Ibid.*, para. 6.25.

⁷⁵ *Ibid.*, para. 6.30.

⁷⁶ *Ibid.*, para. 6.34.

⁷⁷ *UNTS*, Vol. 1247, p. 141; Annex 17, Vol. 2. The agreement entered into force on 15 May 1981. The Exchange of Notes between Turkey and the USSR on the Delimitation of the Exclusive Economic Zones in the Black Sea, dated 23 December 1986 and 6 February 1987, provided that the continental shelf boundary should also be valid with regard to the Exclusive Economic Zones: *UNTS*, Vol. 1460, p. 136, Annex 111, Vol. 5.

⁷⁸ *UNTS*, Vol. 2087, p. 6. The agreement entered into force on 4 November 1998, Annex 18, Vol. 2.

8.80 The two existing bilateral agreements both resulted in delimitation lines which potentially impinge upon the entitlements of Ukraine and Romania, with consequences for the locations of the Ukraine-Romania-Turkey and Romania-Bulgaria-Turkey tri-points. As will be seen, it appears that the parties to the two bilateral agreements tried to be careful to avoid any conflict of that kind.

8.81 Given those possible impacts, the Court clearly has to be informed of such maritime boundary agreements or claims of third parties. But this is *not* because, as Romania asserts, the solutions established by the existing delimitation agreements are relevant to the delimitation in the area of concern to Ukraine and Romania, the geographical characteristics of which are in any event very different from those which gave rise to the two existing agreements, but only because of the possibility of practical conflict between the delimitation lines drawn in those two pre-existing agreements and the delimitation line to which Ukraine and Romania are entitled. In particular, as has been seen⁷⁹, the methodologies adopted in those two agreements have no implications for the methodology to be adopted by the Court in the present case.

(i) Turkey-USSR Agreements, 1978 and 1986-1987

8.82 The delimitation line established by the Turkey/USSR agreement on the continental shelf⁸⁰ and the later 1986-1987 agreement on the EEZ⁸¹ is said by Romania to represent a simplified equidistance line⁸². To the extent that that may be true⁸³, it can be readily explained by the fact that there was no significant disproportionality or other relevant circumstances between the Black Sea coasts of Turkey and the USSR, unlike as between Ukraine and Romania. No consequent adjustment to a provisional equidistance line would therefore have been necessary.

⁷⁹ See above, Chapter 4, Section 3.

⁸⁰ *UNTS*, Vol. 1247, p. 141, Annex 17, Vol. 2. The agreement entered into force on 15 May 1981.

⁸¹ *UNTS*, Vol. 1460, p. 136, Annex 111, Vol. 5. This agreement consisted of an Exchange of Notes between Turkey and the USSR on the Delimitation of the Exclusive Economic Zones in the Black Sea, dated 23 December 1986 and 6 February 1987: it provided that the continental shelf boundary should also be valid with regard to the Exclusive Economic Zones.

⁸² *RM*, para. 6.11.

⁸³ But see above, Chapter 4, section 3.

8.83 Romania further states that the USSR/Turkey continental shelf agreement "envisaged that, in principle, the end-point of the delimitation [...] would be at or about the point 43°26'59" N and 31°20'48" E"⁸⁴, which, Romania points out, corresponds almost exactly to a tripoint between the USSR (now Ukraine), Turkey and Romania calculated on the basis of equidistance⁸⁵.

8.84 Article 1 of that agreement needs to be considered more fully. Article 1 sets out the continental shelf delimitation line by reference to sets of coordinates, the line running more or less diagonally north west and then westerly across the eastern and central sectors of the Black Sea and into the western sector. The last point on that agreed delimitation line is set at 43°20'43"N, 32°00'00"E. That point is approximately south west of Sevastopol'. Having established that last agreed point on the delimitation line, Article 1 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 of 43°20'43" north latitude and 32°00'00" east longitude 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."

8.85 The two points in question (43°20'43"N/32°00'00"E, and 43°26'59"N/31°20'48"E), together with the delimitation line leading to the first of these points, are shown on Figure 8-10.

8.86 It is apparent from the text of Article 1 that it only *settled* the delimitation line as far as the point at 43°20'43"N and 32°00'00"E. The further, *prospective*, extension of the delimitation line going as far as 43°26'59"N and 31°20'48"E - some 29.3 nautical miles further - was only to be "settled later, in the course of subsequent negotiations": no date for

⁸⁴ RM, para. 6.9.

⁸⁵ RM, para. 6.10. Note that the commentary of Charney and Alexander on this agreement provides that this point "is approximately the equidistant trijunction Romania-Soviet Union-Turkey. The nearest points on the territory of the coastal states are respectively 110.8 n.m. (Soviet Union), 111.6 n.m. (Turkey), 110.8 n.m. (Romania), and 119.9 n.m. (Bulgaria)". J.I. Charney and L.M. Alexander, (eds.) *International Maritime Boundaries*, Martinus Nijhoff Publishers, Dordrecht/Boston/ London, Volume II, p. 1694.

those negotiations was fixed, it being agreed that they would be "held at a convenient time". Thus the parties expressly provided that there would be no agreement on the extension of the boundary until a later date, a fact that is readily explained by the absence at that time of any other continental shelf delimitation agreements in the Black Sea, notably with Romania.

8.87 This part of the USSR/Turkey agreement appears to show that those two States agreed (i) that no third State (whether Bulgaria or Romania) was entitled to claim continental shelf rights further east than the point at 43°20'43"N and 32°00'00"E, and (ii) that a third State (whether Bulgaria or Romania) might have a basis for asserting such rights to the west of that point, (iii) that accordingly they should refrain from agreeing their own delimitation line to the west of that point, (iv) the matter could only be left over for subsequent settlement, and (v) that a possible terminal point - "possible" since only the later agreement could settle the matter definitively - for an extension westwards was the point at 43°26'59"N and 31°20'48"E, which seems to have been chosen as a reasonable (but only approximate)⁸⁶ potential tri-point (subject to agreement). Article 1 of the USSR/Turkey agreement cannot be construed as an acknowledgement by the USSR (now binding on Ukraine) that Romania had a valid claim up to at least 43°26'59"N and 31°20'48"E, let alone further east to the point at 43°20'43"N and 32°00'00"E. To the contrary, the USSR and Turkey simply refrained from agreeing on a maritime boundary in areas to which a third State might possibly lay claim.

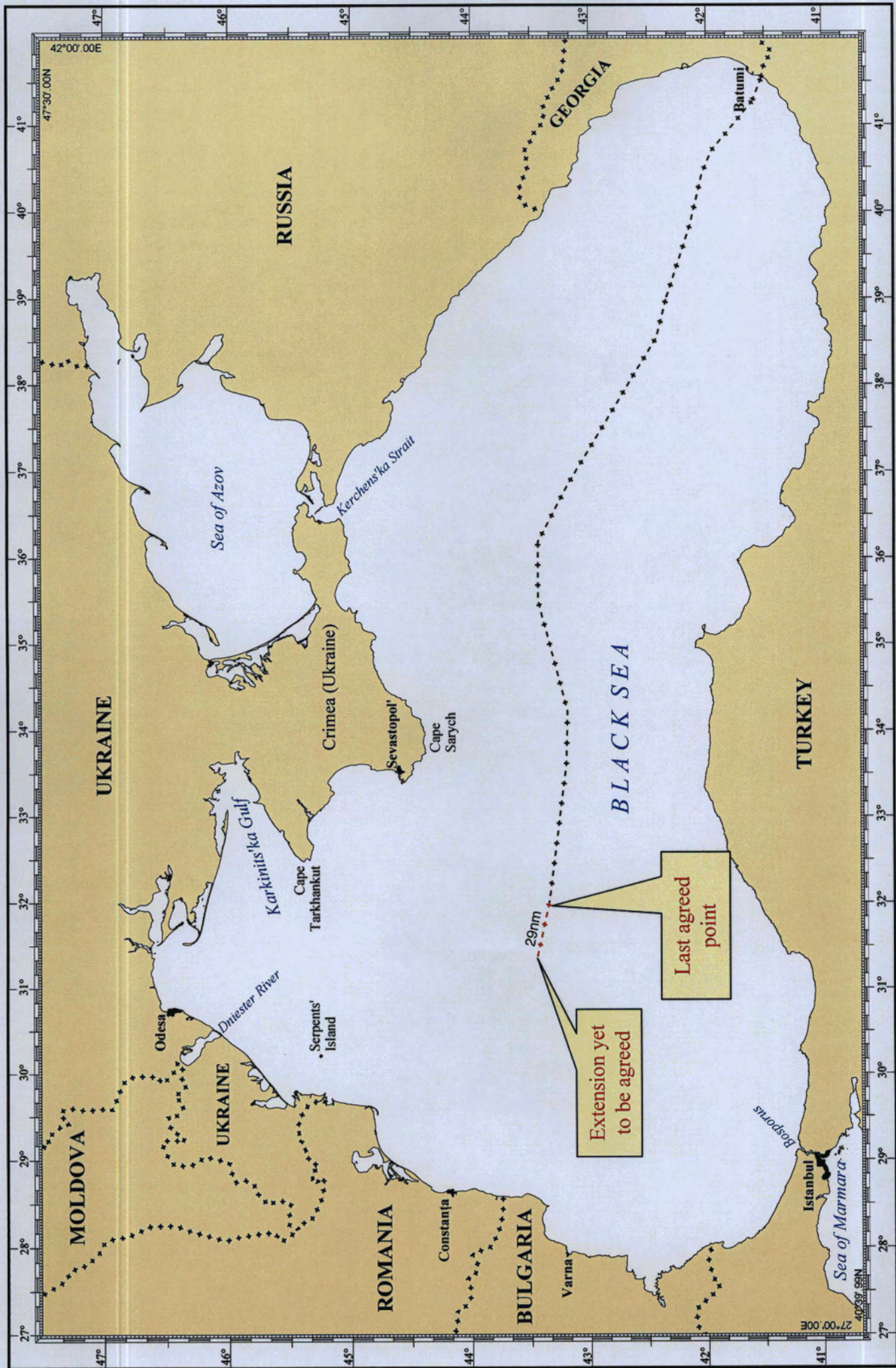
(ii) The Agreement Between Bulgaria and Turkey, 1997

8.88 The 1997 Agreement between Bulgaria and Turkey on the Determination of the Boundary in the North Area of the Mutludere/Rezovska River and the Delimitation of the Maritime Areas Between the Two States in the Black Sea⁸⁷ is discussed at paragraphs 6.13-6.20 of Romania's Memorial.

8.89 As Romania states, that Agreement delimited the territorial sea boundary between the two States (Article 3) and the continental shelf and EEZ boundary (Article 4). The continental shelf and EEZ boundary as delimited runs approximately east-north-east from the outer limit of those States' territorial sea boundary. More particularly it does so by joining

⁸⁶ See above, previous note.

⁸⁷ See Annex 18, Vol. 2. Concluded on 4 December 1997, entered into force on 4 November 1998.



EEZ/Continental Shelf Boundary Agreed by USSR and Turkey (1978 and 1986-1987)

Figure 8-10

certain fixed turning points. The last two turning points are Points 9 and 10. Point 9 is located at 43°19'54"N, 31°06'33"E; Point 10 is located at 43°26'49"N, 31°20'43"E.

8.90 However, the parties again expressly abstained from definitively agreeing on the endpoint of their mutual maritime boundary line, but instead left the endpoint open for further negotiation. Article 4(1) provides:

"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 [*i.e.*, Point 9] and geographic point 43°26'49"N and 31°20'43"E [*i.e.*, Point 10], the Parties have agreed that such a drawing will be finalized later at subsequent negotiations which will be held at a suitable time."

8.91 From this it is clear that Bulgaria and Turkey fixed definitively their continental shelf and EEZ boundary as far only as Point 9, and agreed its further continuation towards Point 10 only on a provisional basis and subject to "finalization" in subsequent negotiations to be held at some future unspecified time. The two points in question (Points 9 and 10), together with the delimitation line leading to the first of these points, are shown on Figure 8-11.

8.92 Romania's suggestion that Turkey and Bulgaria somehow "envisaged that Romania can validly assert a claim beyond Point 9"⁸⁸ does not follow from the language of the Agreement. While the *possibility* of a Romanian claim in those waters was perhaps envisaged by Bulgaria and Turkey, there is nothing to suggest that they acknowledged that any such claim would be valid. The two Parties, aware that beyond Point 9 they would be entering upon controversial waters, simply agreed that beyond Point 9 the delimitation line would have to be finalized later in subsequent negotiations.

8.93 Even if Bulgaria and Turkey had by the terms of their Agreement made the kind of acknowledgement which Romania now alleges (which, however, they did not), such an agreement between two third States would be, for both Romania and Ukraine, *res inter alios acta*: it could on no account operate to Ukraine's prejudice.

⁸⁸

RM, para 6.15.

8.94 All that can be deduced from this part of the Turkey/Bulgaria Agreement appears to be that (as with the earlier USSR/Turkey Agreement)⁸⁹ Turkey and Bulgaria agreed (i) that no third State (whether Romania or Ukraine) was entitled to claim continental shelf rights further west than the point at 43°19'54"N and 31°06'33"E [*i.e.*, Point 9], and (ii) that a third State (whether Romania or Ukraine) might have a basis for asserting such rights to the east of that point, (iii) that accordingly they should refrain from agreeing their own delimitation line to the east of that point, (iv) the matter could only be left over for subsequent settlement, and (v) that a possible terminal point - "possible" since only the later agreement could settle the matter definitely - for an extension eastwards from Point 9 was the point at 43°26'49"N and 31°20'43"E [*i.e.*, Point 10], which seems to have been chosen (subject to later negotiation and agreement) as a reasonable (but only approximate)⁹⁰ potential tri-point even though it was not precisely the same as the equally approximate and provisional tri-point used for the USSR/Turkey Agreement. Article 4 of the Bulgaria/Turkey Agreement cannot be construed as an acknowledgement by the those States that Romania had a valid claim beyond 43°19'54"N and 31°06'33"E (*i.e.*, Point 9). To the contrary, Bulgaria and Turkey simply refrained from agreeing on a maritime boundary in areas to which a third State might possibly lay claim.

(iii) The "Relevant Circumstances" Established by These Agreements

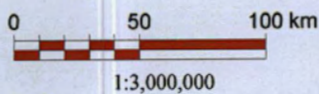
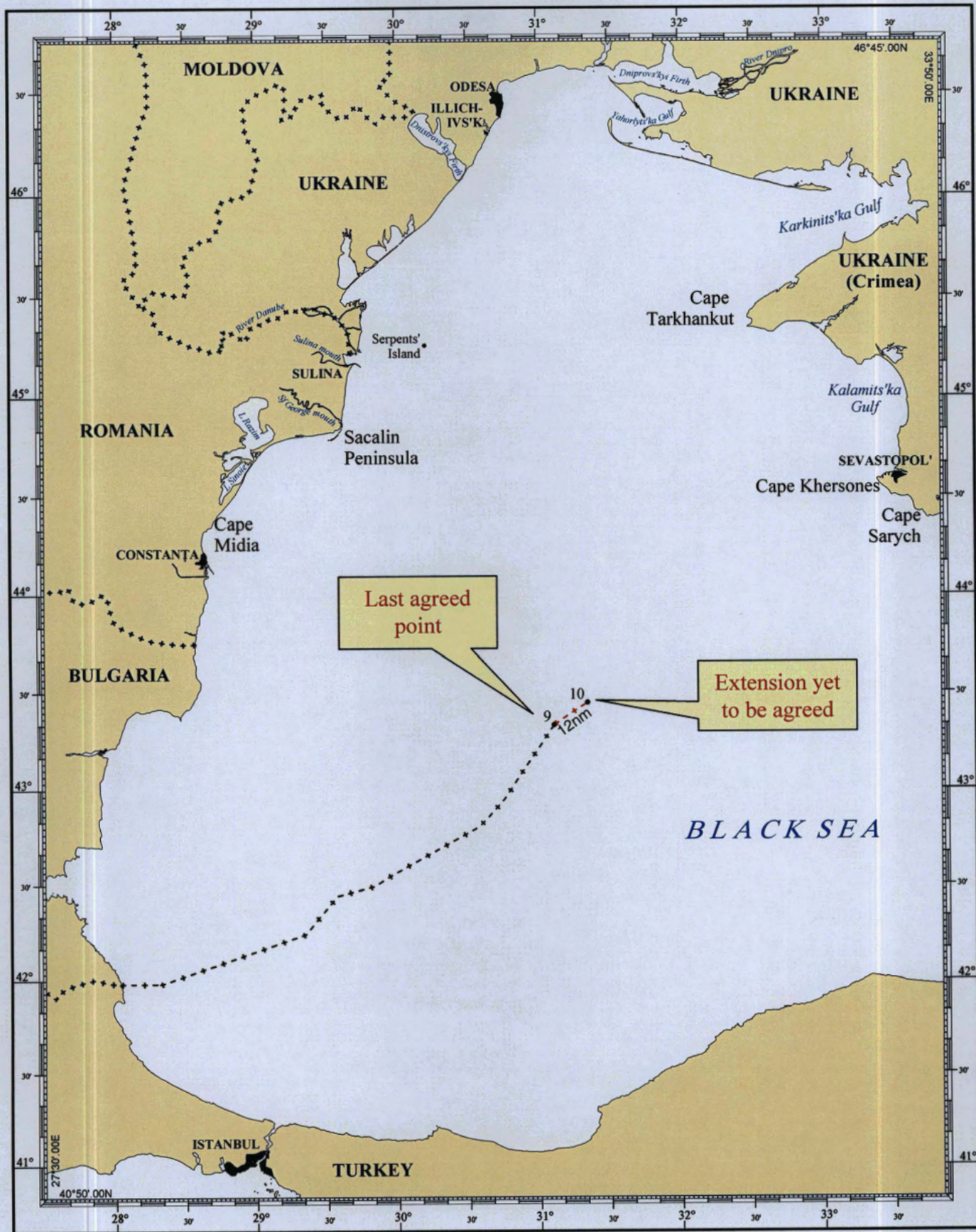
8.95 It is apparent from the USSR/Turkey and Bulgaria/Turkey agreements which delimited those States' maritime boundaries in the Black Sea that they did so in a way which has consequences for the delimitation of the Ukraine/Romania maritime boundary in these present proceedings.

8.96 It is, first, clear that all three sets of maritime boundaries are likely to extend outwards from their territorial sea starting points in such a way as to meet somewhere in the middle of the western half of the Black Sea.

8.97 It is equally clear that the USSR (and now Ukraine)/Turkey maritime boundary has been agreed only as far as the point at 43°20'43"N and 32°00'00"E, and that the

⁸⁹ See above, paras. 8.82-8.87.

⁹⁰ See above, note 86.



**EEZ/Continental Shelf Boundary
Agreed by Bulgaria and Turkey (1997)**

Figure 8-11

Bulgaria/Turkey maritime boundary has been agreed only as far as the point at 43°19'54"N and 31°06'33"E (*i.e.*, Point 9): these points are shown on Figures 8-10 and 8-11.

8.98 It is similarly clear that further westwards from the final USSR (Ukraine)/Turkey agreed point, and further eastwards from the final Bulgaria/Turkey agreed point (*i.e.*, Point 9), the indicative extensions of the agreed delimitation line are no more than provisional lines, *not yet finally agreed*. Those possible potential extensions must await further agreement following further negotiations at some future time which is still to be fixed. The States concerned - *i.e.*, USSR (and now Ukraine), Turkey and Bulgaria - implicitly acknowledged the possibility of overlapping claims in that central area of the western sector of the Black Sea, and expressly refrained from agreeing upon their own boundary lines in that area.

8.99 It follows, consistently with the Court's previous decisions, that the two other delimitations already made in the Black Sea are relevant circumstances which the Court must take into account in deciding whether any adjustment to the provisional equidistance or median line is called for. In the circumstances of the present case such an adjustment is required in so far as the southward extent of the provisional equidistance or median line (adjusted as may be necessary on other grounds) must be restricted in order to:

- (i) enable the Court's decision to "be confined to the area in which [Bulgaria and Turkey have] no claim to continental shelf rights"⁹¹, and
- (ii) ensure that the delimitation line between the continental shelf and EEZ of Ukraine and Romania "[does] not ignore the other delimitations already made"⁹² in the Black Sea by the USSR and Turkey, and by Bulgaria and Turkey.

⁹¹ Above, para. 8.72.

⁹² Above, para. 8.75.

CHAPTER 9

UKRAINE'S DELIMITATION LINE

9.1 The delimitation as proposed by Ukraine results from the application of the equitable principles-relevant circumstances rule. According to that rule, the equitable character of the provisional equidistance line, which is drawn as a first step is to be evaluated in the light of the relevant circumstances, and the balancing up of those circumstances in a second step may involve a modification or an adjustment of the provisional line in order to reach an equitable solution. That is precisely what Ukraine proposes to do here. As indicated in Chapter 7 above, the equitableness of the result will then be tested with reference to the criterion of proportionality. This will be done in Chapter 10 below.

9.2 Before examining the reasons and scope of the adjustment which, in Ukraine's views, is deemed necessary in the present proceedings, some explanations are to be given concerning the line proposed by Ukraine in the delimitation negotiations which took place before the submission of this case to the Court, since that negotiating line can shed some light on the conditions now leading to an adjustment of the provisional equidistance line. In fact, the line put forward by Ukraine in the negotiations with Romania was not only consistent with the framework agreed in 1997 between the two States for those negotiations, as will be seen hereafter, but is also the line which as a matter of international law forms the proper delimitation line for the Ukraine-Romania continental shelf and EEZ boundary.

Section 1. Reminder and Explanation of Ukraine's Negotiating Line Proposed to Romania

9.3 Following Ukraine's resumption of independence in 1991, Ukraine and Romania embarked upon new negotiations to establish a firm basis for their future relations, including settlement of their differences over delimitation of their continental shelf and EEZ boundaries.

9.4 On 2 June 1997 the Parties to the present proceedings concluded a Treaty on the Relations of Good Neighbourliness and Cooperation between Romania and Ukraine¹. In Article 2 of this Treaty they agreed to:

"settle the problem of the delimitation of their continental shelf and of economic exclusive zones in the Black Sea on the basis of the principles and procedures agreed upon by an 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 entry into force of this Treaty".

9.5 By paragraph 4 of that simultaneous exchange of letters the Parties agreed to "negotiate an Agreement on the delimitation of the continental shelf and the exclusive economic zones in the Black Sea", on the basis of certain principles and procedures which were then set out².

9.6 These "principles and procedures" were introduced with a *chapeau* to paragraph 4 which reads as follows:

"The Government of Ukraine and the Government of Romania shall conduct negotiations on the Agreement on Delimitation of the Continental Shelf and the Exclusive Economic Zones of both States in the Black Sea on the basis of the following principles and procedures:"

9.7 The "procedures" referred to were those set out in sub-paragraphs (f), (g) and (h), and relate to the way in which the Parties were to conduct themselves in the course of their endeavours to settle the problem of delimitation by a negotiated agreement³.

9.8 The five "principles" were set out in sub-paragraphs (a) to (e), as follows:

- "(a) The principle provided under article 121 of UN Convention on the Law of the Sea of 10 December 1982 as applied in the practice of States and international adjudication;
- (b) The principle of equidistant line in delimitation areas where coasts are adjacent, and the principle of median line in areas where coasts are opposite;

¹ See above, paras. 5.113-5.114.
² See above, paras. 2.4 and 5.117.
³ See above, para. 2.4.

- (c) The principle of equity and method of proportionality as applied in practice of States and decisions of international institutions related to delimitation of continental shelf and exclusive economic zones;
- (d) The principle, according to which none of the Contracting Parties shall reject the sovereignty of other Contracting Party over any part of its territory adjacent to the delimitation area;
- (e) The principle of effect of special circumstances within the delimitation zone;".

9.9 It is *prima facie* apparent from this language that the "principles" which were enumerated were to form the basis on which the Parties were to "negotiate" a delimitation agreement. They were therefore agreed to be the basis on which the negotiations would be conducted. This made practical sense. There are no guiding substantive principles for diplomatic negotiations. In order to give the negotiations a focus, and as a first step towards solving the problem for which a solution was to be negotiated, setting out such guiding principles as could be agreed at the outset was obviously a helpful step.

9.10 During those negotiations Ukraine acted in accordance with the five principles on which the Parties had agreed (hereafter "Negotiating Principles"). Inevitably various delimitation lines were discussed by the Parties in the negotiations. Ukraine's final negotiating line is depicted on Figure 9-1. That line was arrived at in the following manner.

- (1) Ukraine first drew an equidistance line, which was partly a "strict" equidistance line in the area where the coasts are adjacent, and partly a "strict" median line between opposite coasts, in accordance with Negotiating Principle (b) and established international jurisprudence. (See Figure 9-1 A). In drawing such a line Ukraine gave full effect to the relevant basepoints, including Ukraine's Serpents' Island, in accordance with Negotiating Principles (a) and (d), and also in accordance with established international jurisprudence requiring the initial, provisional line to be drawn on a strict and unadjusted basis. While Romania professes to see in Negotiating Principle (a) a reference only to paragraph 3 of Article 121, there was no such limitation in the terms of Negotiating Principle (a), which referred only to Article 121 as a whole, and Ukraine's use of Serpents' Island for maritime delimitation purposes was fully consistent with that Negotiating Principle.

- (2) As the Parties had agreed in Negotiating Principle (c) that they should negotiate a delimitation agreement on the basis of, *inter alia*, "the method of proportionality", in Ukraine's view, it was necessary to take into consideration the proportional relationship between the Parties' coasts in the relevant area. The ratio of the Parties' coastal lengths, taking account of all the sinuosities of those coasts, was calculated by Ukraine to be in the order of 5 to 1 in Ukraine's favour. A "coastal ratio line" dividing the maritime area in dispute in that proportion was then constructed, as depicted on Figure 9-1 B.
- (3) That coastal ratio line was, however, perceived by Ukraine to be unreasonably close to Romania's coast, and needed to be adjusted by being swung in an anti-clockwise direction, in accordance with Negotiating Principle (c) with its reference to the principle of equity. Ukraine accordingly moved its negotiating line back half way towards the provisional equidistance line, as depicted on Figure 9-1 C.

9.11 It is thus apparent that Ukraine's negotiating line was developed in full accordance with the Negotiating Principles which the Parties agreed should form the basis for their agreement.

9.12 Nevertheless Romania was unable to agree to the line put forward by Ukraine. Consequently, the provisions of the Parties' agreement providing for the reference of their dispute to the Court became applicable, and the present proceedings are the result⁴.

9.13 As also apparent, the line proposed by Ukraine during the negotiations with Romania was not a "proportionality line". Ukraine's negotiating line was a reduction from the extreme proportionality line which, as a matter of negotiation, was perfectly justified.

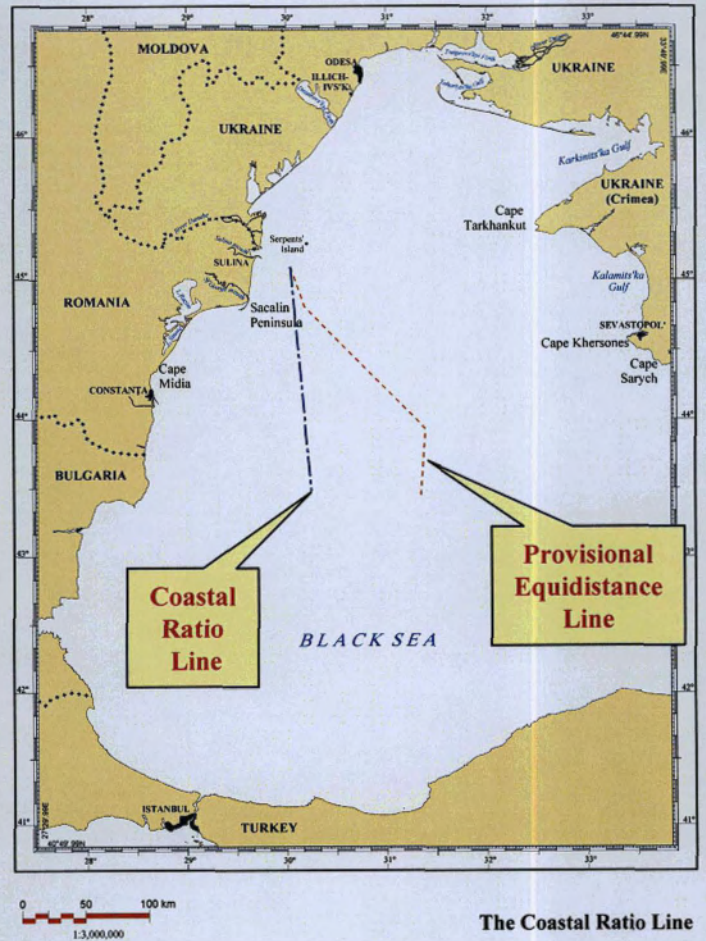
9.14 The delimitation line which Ukraine is now proposing on the basis of applicable legal principles is no more a "proportionality line". Ukraine's delimitation line proposed in the present proceedings involves the movement south-westwards of the provisional equidistance line, as will be seen in the following section, in order to reflect the great difference of length of the coastal fronts.

⁴ See above, paras. 2.5-2.6.



Ukraine's Delimitation Proposal

Figure 9-1A



The Coastal Ratio Line

Figure 9-1B



Ukraine's Delimitation Proposal in Negotiations

Figure 9-1C

Ukraine's Delimitation Proposal in Negotiations

Figure 9-1

Section 2. The Adjustment of the Provisional Equidistance Line in the Present Proceedings to Achieve an Equitable Solution

9.15 Having established a provisional equidistance line on a strict or literal basis,⁵ the next step consists in determining whether there are any relevant circumstances which require that line to be corrected or adjusted in order to achieve an equitable solution. The circumstances that are to be regarded as relevant to the present case have been identified and discussed in the previous Chapter.

9.16 It is to be noted that a relevant circumstance does not afford a basis for correcting or adjusting the provisional equidistance line simply because of factors inherent in that particular circumstance. Thus for example the shortness of a relevant coastline does not *in itself* require an adjustment of the provisional line; nor does the smallness of some particular island (such as Serpents' Island). The adjustment is called for *if and in so far as* the relevant circumstance prevents the provisional line from leading to an equitable solution; *i.e.*, it must *first* be established that the provisional equidistance line does not itself achieve an equitable solution, so that some correction or adjustment becomes necessary for that purpose, which *then* makes it appropriate to invoke a relevant circumstance as a basis for making an adjustment to the provisional line in order to achieve the required equitable solution.

9.17 Such assessments turn on the overall outcome in the waters where the delimitation is to take effect. It means that if, on the basis of the provisional equidistance line, the overall resulting situation in the affected waters would represent an equitable solution, then it would be inappropriate to adjust that line just because some feature – the length of a coastline, the size of an island – might, *taken on its own*, suggest an adjustment one way or the other. As already underlined in this Counter-Memorial, the assessment of one particular feature is to be done within the context of the relevant area taken as a whole, and comparatively to the significance and impact of all the circumstances⁶.

9.18 A perfect illustration of the rationale of adjusting a provisional line in order to reach an equitable result may be found in the 1993 Judgment of the Court relating to *Jan Mayen*. In

⁵ See above, Chapter 7.

⁶ See above para. 8.18.

that case, various factors were regarded as relevant, and account was taken in particular of: (1) the disparity of the coastal lengths, (2) the equitable access to the capelin stock in the area, (3) the presence of ice in the waters of the region, and (4) its effect on access to marine resources. Having examined all those geophysical circumstances, the Court came to the conclusion that "the median line provisionally drawn, employed as starting-point for the delimitation of the continental shelf and the fishery zones, must be adjusted or shifted so as to attribute a larger area of maritime spaces to Denmark"⁷. But the Court considered that a line drawn 200 nautical miles from eastern Greenland, as claimed by Denmark, "would however be excessive as an adjustment, and would be inequitable in its effects"⁸. Therefore, the delimitation line was drawn between the median line and the 200-mile line from the baselines of eastern Greenland, and the area of overlapping claims was divided into three zones, one of them only being divided into two parts of equal area so that "the two Parties should enjoy equitable access to the fishing resources of this zone"⁹.

9.19 Accordingly, taking account of the Court's reasoning in that previous case, it is quite clear that, when needed in order to meet equity requirements, any adjustment of the provisional equidistance or median line must also meet the criterion of reasonableness, which is one of the basic legal principles to be followed in any interpretation and application of a rule of international law¹⁰, including the rules of maritime delimitation. The *raison d'être* for the shifting of the provisional line in the present case consists precisely in realizing a reasonable adjustment.

⁷ *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 79, para. 90.

⁸ *Ibid.*, p. 77, para. 87.

⁹ *Ibid.*, p. 79, para. 92.

¹⁰ See Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1953, Stevens & Sons, London, pp. 34-36; Jean Salmon, "Le concept de raisonnable en droit international public", *Mélanges offerts à Paul Reuter. Le droit international : unité et diversité*, 1981, Editions A. Pedone, Paris, pp. 447-478.

A. Disproportion in Coastal Lengths Must Be Reflected in Order to Reach an Equitable Solution

9.20 As fully demonstrated elsewhere in this Counter-Memorial¹¹, there is a substantial and significant difference between the lengths of the respective coasts of Ukraine and Romania. Compared with the Romanian coast, Ukraine's coasts are at least four times as long. That very marked difference in coastal lengths is so obvious and striking that it does not require precise calculations to be proved. There can be no doubt that this difference in coastal lengths is a highly relevant circumstance, indeed the most relevant of all the circumstances characterizing the present case since it is based on the geographical realities. As such, it cannot be ignored, and must be reflected in the drawing of the delimitation line between the respective areas of continental shelf and EEZ pertaining to Ukraine and Romania.

9.21 This very large disproportion in coastal lengths is to be considered within the broader context of the relevant area, and by taking into consideration other factors such as the shape of that area¹² and the geographical preponderance of Ukraine in the area¹³. In the assessment of equities, when looking at the initial result provided by the provisional equidistance line, account is also eventually to be taken of the State activities of the Parties in the area¹⁴, as well as the presence of third States in the vicinity of the area to be delimited between Ukraine and Romania¹⁵.

9.22 With regard to those various circumstances or factors, the question to be addressed is whether, *viewing the situation in the north-western Black Sea overall*, the provisional equidistance line drawn on a strict or literal basis produces a result which does not represent an equitable solution.

9.23 A strictly drawn provisional equidistance line is illustrated on Figure 9-2. As is apparent from that illustration, the provisional equidistance line starts at the agreed point on the 12 nautical mile arc around Serpents' Island which lies approximately south west of that

¹¹ See above, paras. 3.15-3.22, 3.49-3.57 and 8.28-8.34.

¹² See paras. 8.11-8.19 above.

¹³ See paras. 8.20-8.27 above.

¹⁴ See Chapter 8, Section 2 above.

¹⁵ See Chapter 8, Section 3 above.

island (the point is referred to as Point A). It then runs in a southerly direction to a point at 44°48'24"N; 30°10'56"E referred to as Point B, after which it turns to run in a south-easterly direction until Point C at 43°55'33"N; 31°23'26"E, and hence continues due south, as explained in para. 7.91 above.

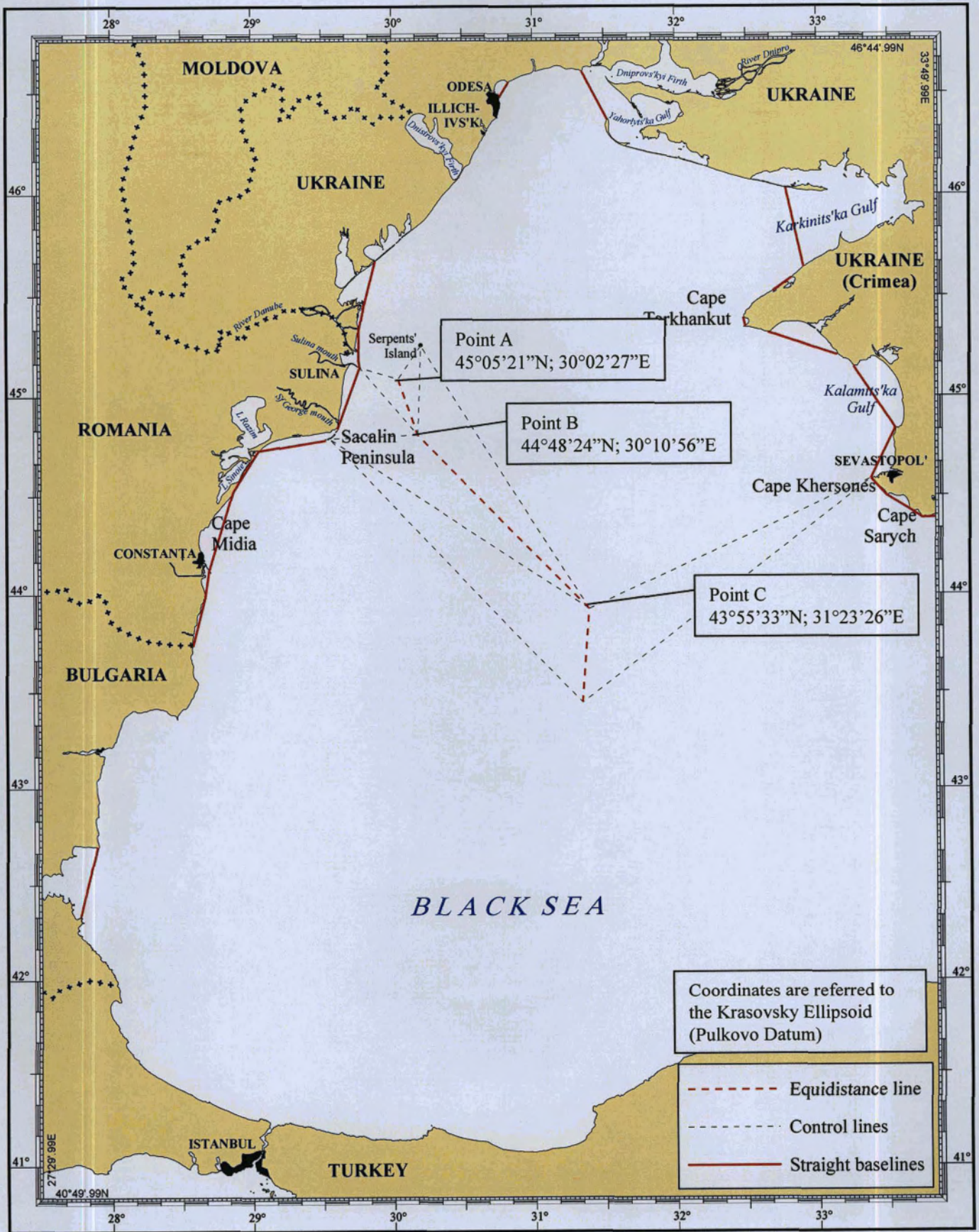
9.24 It appears that such a provisional line dividing the continental shelf and exclusive economic zones of Ukraine and Romania would not be entirely equitable in its effects. As a matter of fact, that line would result in a rather inequitable division of the maritime areas. The area under Ukrainian jurisdiction would have a surface of about 18,140 square miles or 62,230 square kilometres, while the surface of the Romanian area would be 8,010 square miles or 27,480 square kilometres, that is a ratio of 1 to 2.3 in Ukraine's favour, when the ratio of coastal lengths is rather 1 to 3,7 or even 1 to 4,1 in favour of Ukraine.

9.25 Surely, such a division would not satisfy "the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline..."¹⁶. In that respect, it must be underlined that in the *Gulf of Maine* case, where the ratio of coastal lengths was only 1.38 to 1, the Chamber of the Court considered it "impossible to disregard the circumstance, which is of undeniable importance in the present case, that there is a difference in length between the respective coastlines of the two neighbouring States which border on the delimitation area. *Not to recognize this fact would be a denial of the obvious*. The Chamber therefore reaffirms the necessity of applying to the median line as initially drawn a correction which, though limited, will pay due heed to the actual situation"¹⁷.

9.26 In order to satisfy that element and to ensure the achievement of an equitable solution, it would thus be necessary to adjust the provisional line, account being taken of the broad geographical framework of the area and in particular of the very marked disparity between coastal lengths. That adjustment can be realized through a shifting of the provisional line in a south-westerly direction up to a line starting from Point 1 at 45°05'21"N; 30°02'27"E (which is the point agreed in Article 1 of the 2003 Treaty, and is labelled Point A of the provisional

¹⁶ *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 54, para. 101 D (3).

¹⁷ *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, pp. 334-335, para. 218 (emphasis added).



Provisional Equidistance Line

Figure 9-2

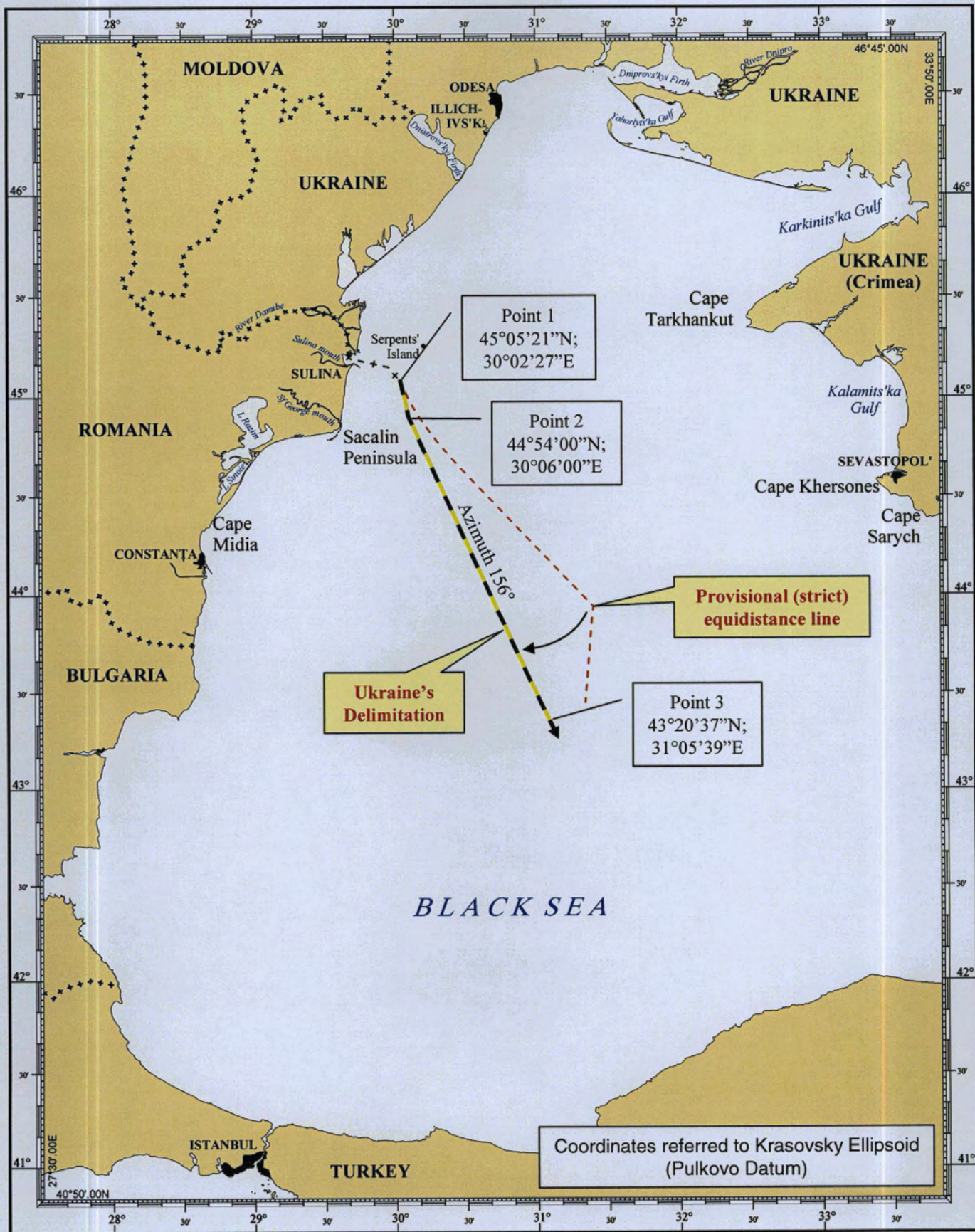
equidistance line), and passing through Point 2 at 44°54'00"N; 30°06'00"E, and then following the azimuth 156 until Point 3 at 43°20'37"N; 31°05'39"E, as illustrated on Figure 9-3. From Point 3, the line continues along the same azimuth until it reaches a point where the interests of third States potentially will come into play. No terminal point can therefore be indicated for that line, which ends with an arrow. Thus, by moving the provisional line closer to the Romanian coast, due account is taken of all the relevant circumstances characterizing the area, including the large disparity between the two coastal fronts. The equitable character of the resulting line will be verified in the following Chapter.

B. Serpents' Island Does Not Justify Any Adjustment of The Provisional Equidistance Line in Romania's Favour

9.27 So far as the effect of Serpents' Island is concerned, there is nothing in such a provisional equidistance line which produces a result which is inequitable for Romania, or which consequently requires that line to be adjusted in a direction favourable to Romania (e.g., by moving it further eastwards). More significantly, however, the provisional equidistance line based on "full effect" for Serpents' Island does in fact produce a result which would be inequitable *for Ukraine*, given the major disparity in the coastal lengths of the two States fronting on to the maritime area relevant for the delimitation which is to be undertaken by the Court. This, however, is not a consequence which flows from the characteristics of Serpents' Island, but one flowing from a quite separate relevant circumstance. The result is that, far from the strict or "full effect" provisional equidistance line needing to be adjusted in Romania's favour because of Serpents' Island, it in fact needs to be adjusted in favour of Ukraine because of another and more substantial relevant circumstance.

9.28 In short, Serpents' Island is not itself a factor which, viewing the situation in the north-western Black Sea overall, calls for any adjustment in Romania's favour to the provisional, "full effect", equidistance line in order to arrive at an equitable solution.

9.29 That conclusion is borne out by testing the line which would result from an equidistance line constructed on a strict or literal basis against the principle of proportionality. As shown in Chapter 10, such a line not only produces a line which is demonstrably not inequitable for Romania, but does indeed produce a line which *is* inequitable for Ukraine.



Ukraine's Delimitation

Figure 9-3

CHAPTER 10

TESTING THE EQUITABLENESS OF THE RESULT

Section 1. Introduction

10.1 The final step in the delimitation process, after the provisional equidistance line has been drawn and then modified to reflect the relevant circumstances, is to test the equitableness of the delimitation line arrived at as a result of the first two steps. The Court's precedents make clear, and the Parties are essentially in agreement, that the equitable nature of a particular delimitation is tested by reference to the criterion of proportionality¹.

10.2 The basic principle was articulated by the Court in the *North Sea Continental Shelf* cases in the following way.

"A final factor to be taken account of 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, - these being measured according to their general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions².

10.3 Elsewhere, both this Court and other international tribunals have noted that it is "disproportion", rather than the use of a strict mathematical apportionment of maritime areas as a method of delimitation, which provides the appropriate test. As expressed by the Court of Arbitration in the *Anglo-French Arbitration*:

"In short, it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor"³.

¹ Romania's position, see, for example, RM, para. 8.65.

² *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 52, para. 98, and see p. 54, para. 101(b)(3).

³ *Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decision of 30 June 1977, U.N.R.I.A.A.*, Vol. XVIII, p. 58, para. 101, cited with approval in, *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 67, para. 66.

10.4 At the same time, the Court has also emphasized that there is a certain relationship, as well as a distinction, between the criterion of proportionality applied to test the equitableness of a result arrived at by other means and the lengths of the coasts of the Parties abutting the area to be delimited as a relevant circumstance to be taken into account in arriving at an equitable delimitation. The matter was addressed by the Court in the *Libya/Malta* case in the following way-

"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 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"⁴.

10.5 Romania purports to accept the dual role that the lengths of the Parties' coasts play as a relevant circumstance and as an element in applying the test of proportionality. For example, the Romanian Memorial states:

"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"⁵.

However, Romania then proceeds to disregard the vast disparity that exists in the lengths of the relevant coasts of the Parties as a relevant circumstance calling for the adjustment of the provisional equidistance line, and to apply the proportionality test to the wrong set of geographical facts.

⁴ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 49, para. 66.
⁵ RM, para. 8.70 (2).

10.6 In Section 2, Ukraine will show that Romania's claim completely fails to satisfy the criterion of proportionality as a test of the equitable nature of the delimitation. The Romanian claim results in a delimitation which is demonstrably "disproportionate" when examined in the light of the relevant coasts of the Parties and the relevant area. This is scarcely surprising given that Romania had based its analysis on a self-serving and manifestly inaccurate description of the relevant coasts and the relevant area.

10.7 In Section 3, Ukraine will then apply the element of proportionality to its own method of delimitation set out in the previous Chapter. As will be seen, whether the criterion is expressed in terms of proportionality or in terms of achieving a result which is not markedly "disproportionate" given the coastal geography, Ukraine's delimitation line more than satisfies the proportionality test.

Section 2. Romania's Claim Line Fails to Satisfy the Proportionality Test

10.8 In Chapter 12 of the Romanian Memorial, Romania contends that its claim line satisfies the test of proportionality. According to Romania, the lengths of the Parties' relevant coasts are:

Romania's relevant coasts: 269.67 Km
(204.90 Km if measured according to Romania's baselines).

Ukraine's relevant coasts: 388.14 Km
(292.63 Km if measured according to Ukraine's baselines)

Romania thus posits a coastal relationship of 1 to 1.439 (1 to 1.428 if the baselines are used) in Ukraine's favour⁶.

10.9 Romania also maintains that the "relevant area" has a surface area of 86,095.3 km², and that its claim produces a division of this area in a ratio of 1 to 1.729 in Ukraine's favour⁷. Based on these calculations, Romania concludes that the ratios of the lengths of the Parties'

⁶ RM, paras. 12.6-12.7.

⁷ *Ibid.*, paras. 12.4 and 12.5.

relevant coasts and the division of the water areas resulting from its claim line "are comparable", and that: "thus, there is no reason to further shift the delimitation line"⁸.

10.10 These calculations suffer from two obvious and fundamental defects. In the first place, Romania misidentifies the relevant coasts of the Parties (particularly the relevant coast of Ukraine). Secondly, Romania's identification of the "relevant area" is wrongly defined. As will be seen, the combination of these two errors produces highly distorted and unsupportable coastal comparisons and thus vitiates Romania's entire attempt to argue that its claim respects the element of proportionality.

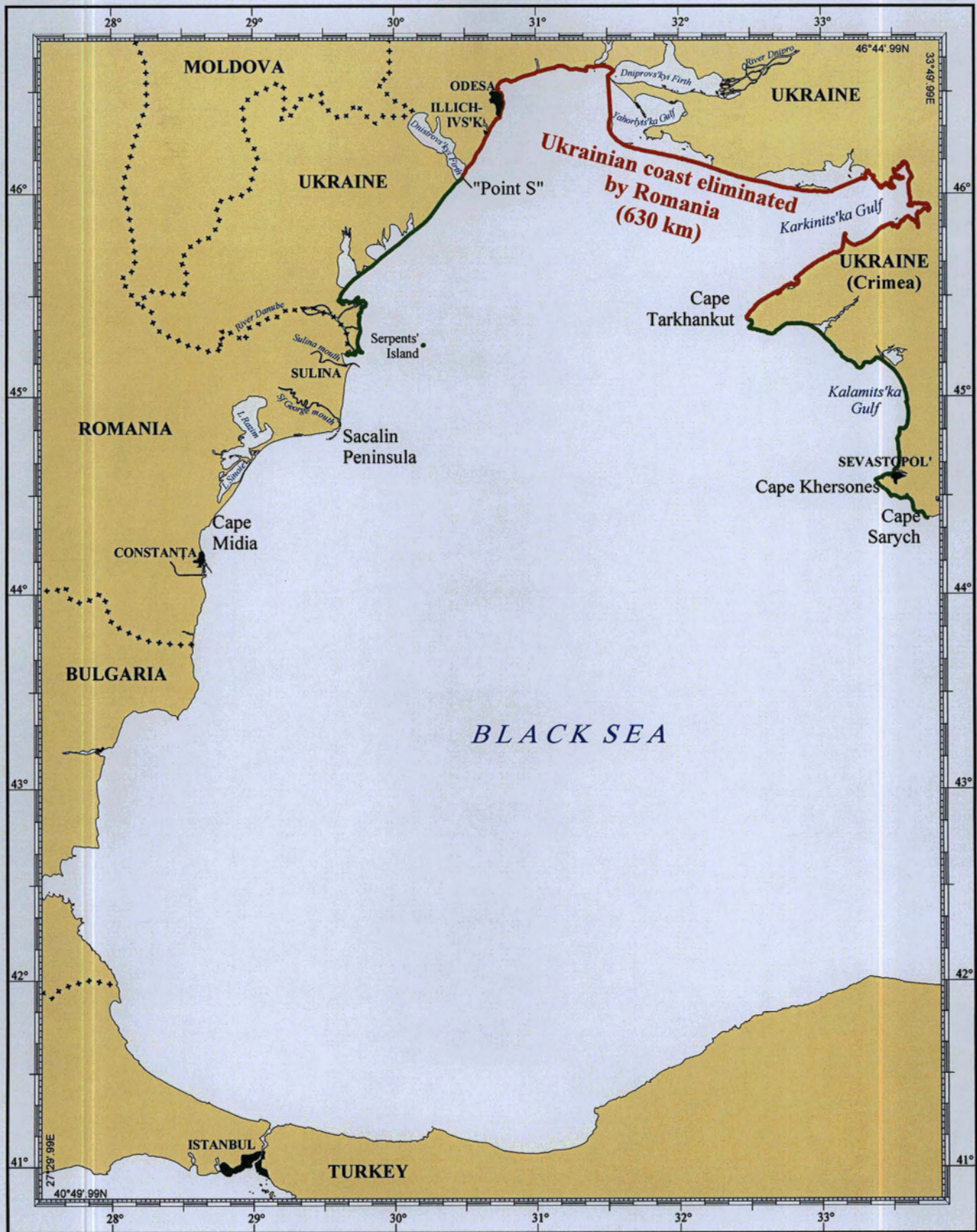
10.11 With respect to the coastal geography, Romania has artificially excluded a 630 kilometre stretch of Ukraine's coast which abuts the maritime area to be delimited in this case. This is the stretch of Ukraine's coast lying between Romania's "Point S" and Cape Tarkhankut in Crimea discussed in Chapter 3⁹. For ease of reference, Ukraine refers to Figure 10-1 facing this page which highlights this important stretch of coast which Romania simply discards.

10.12 At the same time, Romania has no hesitation using its entire coast up to its boundary with Bulgaria despite the fact that the longer segment of this coast, south of the Sacalin Peninsula, has absolutely no effect on the construction of Romania's claim line, and the northern stretch of its coast, between the land boundary with Ukraine and the Sacalin Peninsula, is double counted by being used both for Romania's "adjacent coasts" sector of its claim line and its "opposite coasts" sector as well.

10.13 The end result is quite extraordinary. In effect, Romania treats the delimitation that the Court is asked to effectuate as a delimitation between Romania's entire coast, on the one hand, and a short stretch of Ukraine's coast north of the land boundary with Romania and a limited part of Ukraine's Crimean coast, on the other. All of Ukraine's coast in between (from "Point S" to Cape Tarkhankut) is treated as if it does not exist. The exercise is artificial in the extreme and is a blatant attempt to refashion geography. In this connection, it is appropriate to recall what the Court has said about the need to deal with the geographic facts as they stand.

⁸ *Ibid.*, para. 12.8.

⁹ See, paras. 3.13 and 3.22-3.28 above.



Ukrainian Coast Eliminated by Romania

Figure 10-1

"Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline"¹⁰.

10.14 If the 630 kilometre stretch of Ukraine's coast which has been ignored by Romania is included in Romania's calculation of coastal measurements, the resulting figures are as follows:

<u>Romania's Calculations</u>		<u>Ukraine's Calculations</u>	
Romania's coast:	269.67 Km	Romania's coast:	258 Km
Ukraine's coast:	1,018.14 Km	Ukraine's coast:	1,058 Km
Coastal ratio	1 to 3.8	Coastal ratio	1 to 4.1

10.15 Thus, even accepting Romania's measurements, and including the length of coast disregarded by Romania, the actual coastal ratio is 3.8 to 1 in favour of Ukraine, not 1.4 to 1 as argued by Romania. In other words, Romania's distorted identification of the relevant coasts of Ukraine results in eliminating over 60% of Ukraine's relevant coast. This, in turn, creates a massive distortion in Romania's coastal ratios of almost 300%.

10.16 The second flaw in Romania's proportionality analysis concerns the identification of the relevant area. Once again, the basic shortcomings of Romania's approach have been pointed up in Chapter 3¹¹.

10.17 To recapitulate, Romania has excluded from the relevant area the maritime areas lying off Ukraine's south-facing coast by drawing a fictitious closing line between "Point S" and Cape Tarkhankut. Romania has then compounded its error by including a large triangle of area lying south of Cape Sarych which bears no relationship to the area to be delimited between Ukraine and Romania, but which is relevant exclusively to the delimitations between Ukraine and Turkey and, potentially, Ukraine and Bulgaria.

¹⁰ *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, pp. 49-50, para. 91.
¹¹ See, paras. 3.58-3.72 above.

10.18 Notwithstanding this incorrect definition of the relevant area, even accepting Romania's "relevant area" for purposes of argument, Romania maintains that its claim line results in a division of the area in a ratio of 31,542.8 km² to Romania and 54,552.5 km² to Ukraine, or a ratio of 1 to 1.7¹². As noted above, however, the actual ratios of the Parties' relevant coasts fronting the area to be delimited are in the order of 4.1 to 1 in favour of Ukraine. In other words, Ukraine's coast is some four times longer than that of Romania, yet Romania's claim divides the area in a ratio of only about 1.7 to 1.

10.19 It is abundantly clear, therefore, that Romania's claim, when tested against the criterion of proportionality, produces a grossly disproportionate result. While delimitation does not depend on a strict mathematical apportionment of maritime areas in proportion to the lengths of the Parties' coasts, by any reasonable assessment, a discrepancy of the magnitude of that produced by Romania's claim line fails to satisfy the test of proportionality and thus does not achieve an equitable solution which, as Articles 74(1) and 83(1) of the 1982 Convention make clear, is the ultimate aim of delimitation.

Section 3. Ukraine's Delimitation Fully Satisfies the Proportionality Test

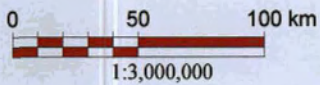
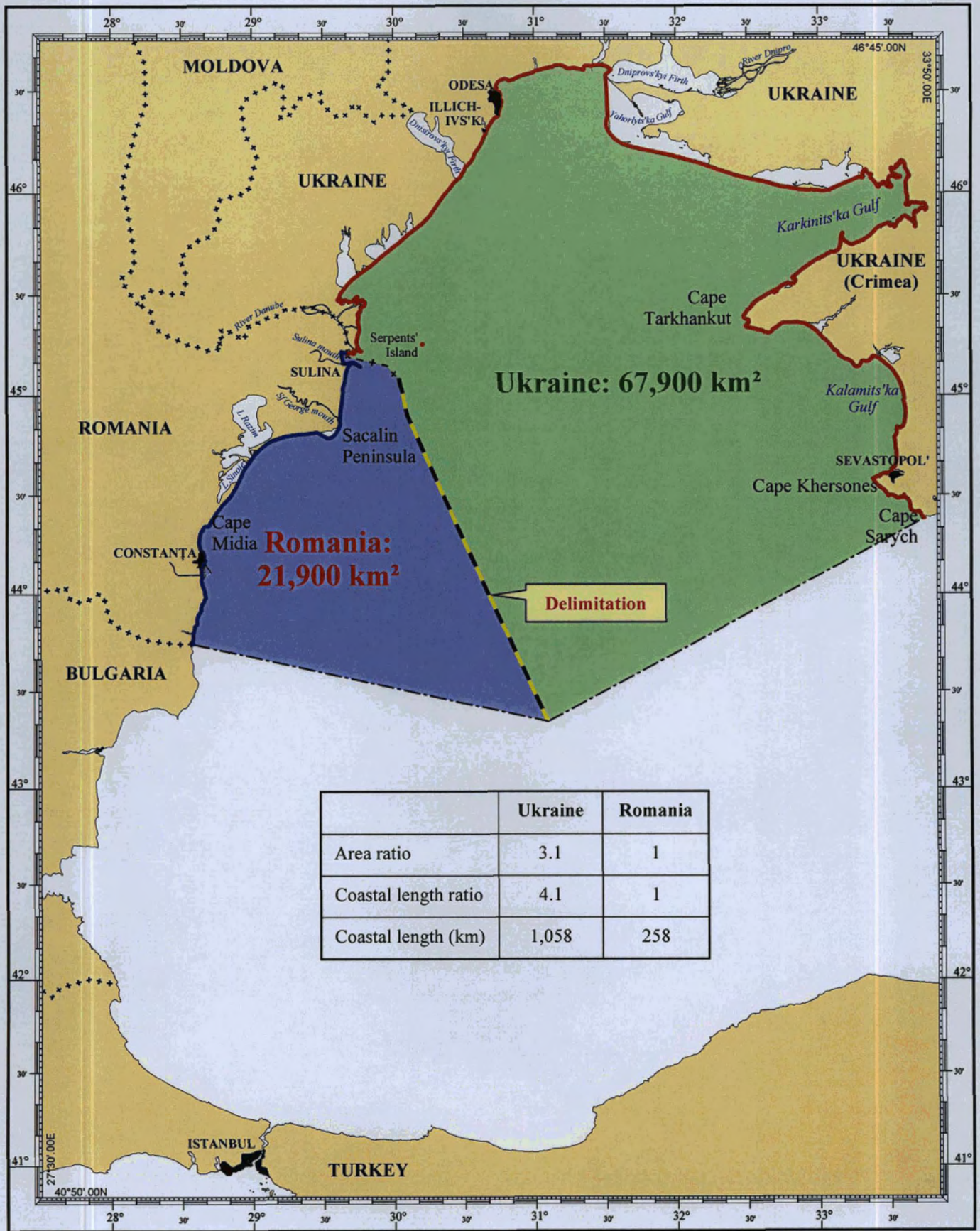
10.20 In contrast, Ukraine's position more than meets the test of proportionality. As will be shown, this confirms the equitable nature of Ukraine's proposed delimitation.

10.21 In order to calculate coastal lengths and resulting ratios, Ukraine has asked experts from the United Kingdom Hydrographic Office to carry out the relevant technical work. According to their calculations, the relevant coasts of the Parties stand in a relationship of 4.1 to 1 in Ukraine's favour when measured along the low-water line of those coasts (Romania's coast: 258 kilometres; Ukraine's coasts 1062 kilometres)¹³.

10.22 Within the relevant area as correctly defined by Ukraine and illustrated on Figure 10-2, Ukraine's delimitation line results in a surface area of roughly 67,900 km² appertaining to

¹² RM, para. 12.5.

¹³ If the relevant coasts of the Parties are measured according to their coastal façades or general direction, the ratio is in the order of 3.7 to 1 (Romania's coastal façade = 185 kilometres; Ukraine's coastal façade = 684 kilometres).



Proportionality Test

Figure 10-2

Ukraine and approximately 21,900 km² appertaining to Romania, or a ratio of 3:1 to 1¹⁴. This ratio is *less* than that which would result from a strict comparison of the length of the coasts of the Parties to the maritime areas that appertain to those coasts under Ukraine's delimitation proposal and thus favourable to Romania. Nonetheless, unlike Romania's claim line, the resulting division of maritime areas produced by Ukraine's method of delimitation is broadly comparable to the lengths of the Parties' relevant coasts, if anything favouring Romania. It follows that Ukraine's delimitation line more than satisfies the element of proportionality as a test of the equitableness of the result.

Section 4. Unlike Romania's Method, Ukraine's Delimitation Does Not Produce Any "Cut-Off" Effect

10.23 The Romanian Memorial also discusses the principle that an equitable delimitation should not produce a "cut-off" effect or encroachment on the maritime zones appertaining to either of the two States¹⁵. It is evident that Ukraine's delimitation proposal respects the "no cut-off" principle while Romania's claim does not.

10.24 The clearest example of Romania's disregard for the "no cut-off" principle lies, once again, in Romania's treatment of the Parties' relevant coasts. Romania's claim, in its northern sector, enclaves the Ukrainian territory of Serpents' Island and then proceeds in an almost due east direction directly in front of, and parallel to, Ukraine's south-facing coast. The consequence is a two-fold cut-off of Ukraine's maritime entitlements. First, the maritime entitlements of Serpents' Island are dramatically truncated by allocating to that island no continental shelf and no exclusive economic zone. Second, Ukraine's south-facing mainland coast is deprived of the area to which it is legally entitled and is treated by virtue of Romania's artificial closing line from "Point S" to Cape Tarkhankut, as non-existent. The end result is clearly inequitable and represents a fundamental encroachment on continental shelf and exclusive economic areas that should appertain to Ukraine under the equitable principles articulated by the Court.

¹⁴ If Romania's relevant area is used instead, the resulting ratio of surface areas produced by Ukraine's proposal would be 1:3.4, a result which is not materially different.

¹⁵ RM, paras. 12.9-12.13.

10.25 Ukraine's proposal, on the other hand, fully respects the non-encroachment principle. It reflects the geographic fact, discussed in Chapter 3, that Ukraine's coast fronting the area to be delimited projects in essentially three directions while Romania's coast projects basically in a single direction - southeastwards. Within the confines of this part of the Black Sea, each of the Parties' coastal façades, as well as Serpents' Island, generates maritime rights lying off these coasts - a factor which is fully respected by Ukraine's proposal.

Section 5. Alleged Security Interests

10.26 Finally, the Romanian Memorial raises the question of security interests¹⁶. While the Court has previously indicated that security interests are not unrelated to the concept of the continental shelf¹⁷, Ukraine does not consider that security interests are a relevant circumstance which have any real role to play in the present case. Certainly, Romania has not demonstrated any such interests on its part. Moreover, Romania has failed to point out that, in paragraph 3 of the 1997 Exchange of Letters, Ukraine committed itself not to locate offensive military devices on Serpents' Island. However, if security interests do have a role to play, it is clear that Ukraine's legitimate interests around Serpents' Island must be respected as well as any purported security interests of Romania. Eliminating any continental shelf or exclusive economic zone rights appertaining to Serpents' Island, as Romania's claim does, scarcely comports with the notion of respecting both Parties' potential security interests.

10.27 Moreover, Romania's claim line cuts right through areas which have traditionally been exploited by Ukraine for both hydrocarbon exploration and fishing. These matters have been discussed in Chapter 8. Romania's claim disregards this relevant circumstance to Ukraine's prejudice, while Ukraine's proposal reflects and respects the economic and security activities that the Parties have historically engaged in within the relevant area. Moreover, in its Memorial, Romania has alluded to no competing economic interests of its own that could be adversely affected in the relevant area.

¹⁶ RM, paras. 12.14-12.19.

¹⁷ *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, pp. 74-75, para. 81, citing *Libya/Malta, I.C.J. Reports 1985*, p. 42, para. 51.

Section 6. Conclusion

10.28 For all of the reasons set out above, Ukraine's delimitation proposal achieves an equitable result. It fully satisfies the test of proportionality, it produces no "cut off" effect but rather respects the coastal projections of each Party, and it respects the security and economic interests of the Parties within the area to be delimited as well as the relevant circumstances in the case.

CHAPTER 11

SUMMARY OF UKRAINE'S REASONING

11.1 In accordance with the Court's Practice Direction II, Ukraine in this Chapter presents a short summary of its reasoning and conclusions as set forth in this Counter-Memorial, and without prejudice to the full exposition of its reasoning and conclusions in the preceding Chapters.

- (i) The jurisdiction of the Court, under Article 36(1) of the Court's Statute, is founded on paragraph 4(h) of the 1997 Exchange of Letters and the subsequent entry into force of the 2003 Treaty.
- (ii) The Court's jurisdiction is limited to the delimitation of the continental shelf and exclusive economic zone between the Parties. The Court has no jurisdiction to decide any question of territorial sovereignty, as to which there is in any event no dispute between the Parties, or to delimit other maritime zones, such as the territorial sea, of either of the Parties.
- (iii) The Court is called upon to decide the question of the delimitation of the continental shelf and exclusive economic zones between the Parties on the basis of international law as set out in Article 38 of the Court's Statute. The "principles" recorded in paragraph 4(h) of the 1997 Exchange of Letters represented "principles" on the basis of which the Parties agreed to attempt to negotiate a delimitation agreement, but they are not binding *per se* on the Court whose task is to decide the case in accordance with international law.
- (iv) Contrary to Romania's contentions, the first segment of the maritime boundary between the Parties which the Court is called upon to delimit - *i.e.*, the segment from the agreed final point of their mutual territorial sea boundary to a point due east of Serpents' Island - was not established by the 1949 *Procès Verbaux* between the Soviet Union and Romania. To the extent relevant, previous agreements between the Parties, or their predecessors, have only delimited the

territorial seas of the Parties and do not, therefore, constitute "agreements" on the delimitation of either the continental shelf or exclusive economic zone within the meaning of Articles 74 and 83 of the 1982 Law of the Sea Convention. Indeed, nothing in the agreements from 1949 onwards gives any support to Romania's alleged semi-circular arc around the south of Serpents' Island.

- (v) The 2003 Treaty confirms that the State border between the Parties has only been delimited for their territorial seas, and that the starting point for the Court's delimitation of the continental shelf and exclusive economic zones between the Parties is the point identified in the 2003 Treaty having the coordinates 45°05'21"N, 30°02'27"E.
- (vi) Under international law, the basic principle of delimitation for the continental shelf and exclusive economic zone is expressed in the "equitable principles/relevant circumstances" rule, which the Court has identified as being similar to the "equidistance/special circumstances" rule applicable to the delimitation of the territorial sea.
- (vii) Application of this rule, both generally and in this case, entails essentially four steps:
 - a) First, it is necessary to establish a "provisional equidistance line", which is a strictly calculated equidistance line drawn between the basepoints on the Parties' coasts, or their baselines, from which the limits of their territorial seas are measured, without prejudging the existence or effect of any potentially relevant circumstances.
 - b) Second, the relevant circumstances characterizing the area to be delimited (the "relevant area") must be identified. These circumstances are primarily of a geographic nature, but may encompass other elements such as State activities undertaken in the relevant area and the presence of third States at the extremities of that area.

- c) Third, in the light of the relevant circumstances so identified, it is then necessary to determine whether, and to what extent, the provisional equidistance line requires adjustment in order to reflect fully the relevant circumstances and to achieve an equitable result.
- d) Fourth, the equitableness of the delimitation line arrived at by a combination of the first three steps is then to be tested by reference to the element of proportionality to verify whether the delimitation is not unduly "disproportionate" and whether it thereby achieves an equitable solution.
- (viii) In the present case, the provisional equidistance line established pursuant to the first step in the delimitation process is the line that is depicted on Figure 7-1 of this Counter-Memorial. That line has been constructed using the appropriate basepoints on each Party's coasts, including basepoints on Serpents' Island. Contrary to Romania's assertions, Serpents' Island is a full-fledged island with a rich and long-standing history. It has supported considerable human habitation and economic and other activities for many years and continues to do so in the present. All of the maps introduced by Romania depict the island, and the historical sources are replete with references to the importance of the island.
- (viii) With respect to the relevant circumstances, Chapter 8 has shown that the overall geographical setting within which the delimitation is to be effectuated constitutes the most important relevant circumstance. Within the relevant area, the relevant coasts of Ukraine are some four times longer than those of Romania, whether such coasts are measured taking into account their sinuosity or in accordance with their general direction or coastal façades. In addition, Ukraine has adduced considerable evidence attesting to the numerous State activities that Ukraine has carried out within the relevant area and the lack of any competing Romanian activities. As for the presence of third States and their potential maritime entitlements, these may be relevant for determining the end-point of the Ukraine-Romania maritime boundary, but they are not otherwise germane to determining the method of delimitation that produces an equitable result between the Parties.

- (ix) In the light of the relevant circumstances, Chapter 9 has shown that the provisional equidistance line must be adjusted in order to take such circumstances into account, and in particular to reflect the substantial disparity that exists between the lengths of the relevant coasts of the Parties abutting the area to be delimited.
- (x) Romania has introduced a highly artificial claim line which neither respects the applicable law nor takes into account the relevant circumstances characterizing the area. Romania first posits a provisional equidistance line which is erroneously constructed by ignoring relevant basepoints on Ukrainian territory along Serpents' Island. Romania then effectively refashions geography by relying on a very short stretch of its own coast represented by a basepoint lying on a man-made structure - the Sulina Dyke - and an uninhabited sand spit - the Sacalin Peninsula - and subsequently double counts that short stretch of coast for both the "adjacent coasts" and "opposite coasts" sector of its claim line. At the same time, Romania artificially excludes a substantial (630 km long) stretch of Ukraine's coast directly fronting the relevant area and thereby fails to take into account the relevant geographical circumstances characterizing the area. Finally, Romania artificially adjusts its wrongly calculated provisional equidistance line in an exercise of so-called "distributive justice" in order to compensate for what Romania perceives to be past injustices imposed on it. None of this is supportable in the law or on the facts, as Chapter 4 has demonstrated.
- (xi) Application of the proportionality test to the delimitation lines advanced by the Parties confirms that Ukraine's delimitation line fully satisfies the criterion of proportionality while Romania's method does not. The lengths of the relevant coasts of the Parties fronting the relevant area stand in a relationship of 4 to 1 in Ukraine's favour. Ukraine's delimitation line, in turn, produces an areal ratio of maritime areas appertaining to the Parties in the order of roughly 3 to 1 in favour of Ukraine. This confirms that Ukraine's methodology more than achieves an equitable result. In contrast, Romania's claim line produces an areal ratio of only 1.7 to 1 in favour of Ukraine, and thus is demonstrably

"disproportionate", and thereby inequitable, when considered in the light of the actual coastal geography. Romania's claim line also deprives the south-facing coast of Ukraine of its legal maritime entitlements and produces an unjustified cut-off effect on Ukraine's maritime entitlement to its continental shelf and exclusive economic zone.

SUBMISSIONS

In the light of the facts and legal principles set out in this Counter-Memorial, and rejecting Romania's claims to the contrary, Ukraine respectfully submits that the Court adjudge and declare that the delimitation of the continental shelf and exclusive economic zones between the Parties is a delimitation line the course of which, employing the Pulkovo datum (*i.e.*, using the Krasovsky ellipsoid), is as follows:

From the point identified in Article 1 of the 2003 Treaty having the co-ordinates of 45°05'21" N; 30°02'27" E, the delimitation line extends in a south-easterly direction to Point 2, having the co-ordinates of 44°54'00" N; 30°06'00" E, and thence to Point 3, having the co-ordinates of 43°20'37" N; 31°05'39" E, and then continues along the same azimuth, until the boundary reaches a point where the interests of third States potentially come into play.

The course of the boundary thus described is depicted on Figure 9.3 of this Counter-Memorial, which is reproduced hereafter for illustrative purposes.

Respectfully submitted,



H. E. Mr. Anton Buteiko
Agent of Ukraine before the
International Court of Justice

19 May 2006

LIST OF ANNEXES

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1. Exchange of Letters dated 2 June 1997 (English translation and Romanian and Ukrainian originals)
2. Treaty on the Relations of Good Neighbourliness and Cooperation Between Romania and Ukraine 1997 (English translation and Ukrainian original)
3. Treaty Between Ukraine and Romania on the Regime of the Ukrainian-Romanian State Border, Collaboration and Mutual Assistance in Border Matters 2003 (English translation and Ukrainian original)
4. *Note verbale* No. 72/22-431-2399 from the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of Romania dated 18 October 2002
5. Sailing Directions of the Black Sea and the Sea of Azov for Waters of Ukraine, Kiev, 2005 (English translation and Ukrainian original)
6. Extract from the Resolution of the Cabinet of Ministers of Ukraine No. 415 dated 5 June 1993 (English translation and Ukrainian original)
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18. Agreement Between the Republic of Bulgaria and the Republic of Turkey on the 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 dated 4 December 1997
19. Interview with Vietnam's Foreign Minister Published on the Thanhnien News Website on 7 July 2004
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54. E. Taitbout de Marigny, *Portulan de la Mer Noire et de la Mer d'Azov ou Description des côtes de ces deux mers à l'usage des navigateurs*, Odesa, 1830, pp. 112-114
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66. Document Evidencing the Layout of the Lighthouse (English translation and Russian original)
67. Resolution of the Cabinet of Ministers of Ukraine No. 1009 dated 18 December 1995 (English translation and Ukrainian original)
68. Documents for Meeting of Cabinet of Ministers of Ukraine Regarding Problems of Development of Zmiinyi Island, and Enclosure (1998 Information Concerning the Implementation of the Cabinet of Ukraine Regulation No. 1114 of 8 October 1997) (English translation and Ukrainian original)
69. Resolution No. 652 of the Cabinet of Ministers of Ukraine dated 18 June 1996 (English translation and Ukrainian original)
70. Resolution No. 1114 of the Cabinet of Ministers of Ukraine dated 8 October 1997 (English translation and Ukrainian original)
71. Direction No. 568-r of the Cabinet of Ministers of Ukraine dated 13 December 2001 (English translation and Ukrainian original)
72. Direction No. 76-r of the Cabinet of Ministers of Ukraine dated 19 February 2002 (English translation and Ukrainian original)
73. Information Concerning the Fulfilment of the Complex Program of the Further Development of the Infrastructure and the Realization of the Economic Activities on Zmiyinyi Island and the Continental Shelf for the Period of 2002-2004, The State Regional Administration Odesa, the Central Administrative Board of Economy, November 2004 (English translation and Ukrainian original)
74. Resolution No. 713 of the Cabinet of Ministers of Ukraine dated 31 May 2002 (English translation and Ukrainian original)
75. Photos of Installations, Artefacts, Fauna and Flora on Serpents' Island
76. Order No. 706 of the Ministry of Education and Sciences of Ukraine dated 13 December 2002, and "Principles on the Research Station 'Zmiinyi Island' of the

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77. Plan of Subjects of Research Activities Financed out of Funds of the State Budget by the Ministry of Science and Education of Ukraine on 2003 for I.I. Mechnikov Odesa National University agreed on the 24 July 2003 (English translation and Ukrainian original)

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78. Order No. 54 of the Ministry of Natural Environment Protection of Ukraine dated 25 January 2005, and Regulation No. 54 on the General Zoological Reserve of National Importance "Island Zmiinyi" dated 27 January 2005 (English translation and Ukrainian original)
79. Pledge of Protection No. 6 by Ostrivne Odesa Utility Company dated 10 October 2003 (English translation and Ukrainian original)
80. Decree No. 1341/98 of the President of Ukraine dated 9 December 1998 and Relevant "Provisions" (English translation and Ukrainian original)
81. Direction No. 535/a-2004 of the Odesa Regional State Administration dated 12 July 2004 (English translation and Ukrainian original)
82. Order of the Ministry for Culture and Arts of Ukraine No. 393 About the State Registry For National Heritage dated 15 June 1999 (English translation and Ukrainian original)
83. *Pamiatky Ukrainy: Istoriiia i kultura, 2/2002, Year XXXII, Issue 2 (127)* (English translation and Ukrainian original)
84. Analytical Brief on the Implementation of the Comprehensive Program for Further Development of the Infrastructure and Conduct of Economic Activities on Zmiinyi Island and on the Continental Shelf (English translation and Ukrainian original)
85. List of the Island's Flora, Fauna and Fish Species (English translations and Ukrainian originals)
86. Documents Showing the Progress of the Scientific Work Done in Connection with Serpents' Island's Marine Ecosystem in 2004 (English translation and Ukrainian original)

87. Resolution No. 111-XXIV of the Odesa Regional Council dated 10 January 2003 (English translation and Ukrainian original)
88. Articles of Association of Ostrivne, Odesa Regional State Administration dated 21 March 2003 (English translation and Ukrainian original)
89. Decree No. 700/A-2003 of the Odesa Regional State Administration dated 29 August 2003 (English translation and Ukrainian original)
90. "Plan for Withdrawing of the Ukrainian Armed Forces Elements from Zmiinyi Island", Approved by the Ministry of Defence of Ukraine on 18 May 2002 and Annexes (Organizational Structure) 1-9 (English translation and Ukrainian original)
91. Direction No. 277-r of the Cabinet of Ministers of Ukraine dated 30 May 2002 and Subsequent Resolutions (English translation and Ukrainian original)
92. Order No. 061 of the Chief Executive of the State Committee for the State Boundary Protection - Commander of the Ukraine's Frontier Troops dated 13 July 1994 and Order No. 073 of the Head State Committee on Protection of the State Border of Ukraine dated 20 August 2002 (English translation and Ukrainian original)
93. Documents Concerning the Design of the Achilles Sanctuary Memorial Sign dated 2004 (English translation and Ukrainian original)
94. Photos of Aval Bank on Serpents' Island
95. Documents Relating to the Opening of a Branch of Bank Aval on Serpents' Island
96. Letter from Ostrivne Odesa Oblast Municipal Enterprise to Oleksandr Mykhaylovych Hordiyenko, Chief of the Main Department of Economy, Oblast State Administration dated 5 March 2005, Enclosing Transport Communications with Serpents' Island for 2004 (English translation and Ukrainian original)
97. License Agreement between Ukrainian State Committee on Geology and the Utilization of Mineral Resources and Crimean Petroleum Company for the Delphin block dated 1993 (English translation and Ukrainian originals)
98. License issued to Chornomornaftogaz by the Ministry of Ecology and Natural Resources of Ukraine dated 12 October 2001 for the Olympiiska Block (English translation and Ukrainian original)

99. License issued to Chornomornaftogaz by the Ministry of Ecology and Natural Resources of Ukraine dated 12 August 2003 for the Gubkina Block (English translation and Ukrainian original)
100. Jeremy Benton, Exploration History of the Black Sea province, in *Regional and Petroleum Geology of the Black Sea and Surrounding Region*, Edited by A.G. Robinson, American Association of Petroleum Geologists 1997, pp. 8-9
101. *Note verbale* No. C23/3341 from the Ministry of Foreign Affairs of Romania to the Embassy of Ukraine in Bucharest dated 2 July 2001 (English translation and Romanian original)
102. *Note verbale* No. UB-12-723 from the Embassy of the Republic of Bulgaria in Ukraine to the Third Territorial Directorate of the Ministry of Foreign Affairs of Ukraine dated 3 October 2002 (English translation and Ukrainian original)
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105. *Note verbale* No. 145/97 from the Embassy of the Republic of Turkey to the Ministry of Foreign Affairs of Ukraine dated 12 March 1997 (English translation and Ukrainian original)
106. *Communiqué* on the Incidents of Illegal Poach Fishing Committed by Turkish Fishing Boats Within the Exclusive (Maritime) Economic Zone of Ukraine dated 15 January 1998 (English translation and Ukrainian original)
107. Letter from the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of Turkey dated 19 January 1998 Enclosing the Official Statement dated 16 January 1998 and Letter from the Ministry of Foreign Affairs of Ukraine to the Turkish Embassy in Kiev dated 16 January 1998 Enclosing the Same Statement (English translation and Ukrainian original)
108. *Note verbale* No. 9781/AE/077-00 from the Ministry of Foreign Affairs of Ukraine to the Embassy of the Republic of Turkey in the Ukraine dated 7 February 2000 (English translation and Ukrainian original)

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112. List of Names for Serpents' Island
113. Agent's Certification