

## COMMENTARY

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

*Case concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine), Merits, Judgment, 3 February 2009*

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#### 1. INTRODUCTION

On 3 February 2009, the International Court of Justice rendered its Judgment on the merits in the *Case Concerning Maritime Delimitation in the Black Sea* between Romania and Ukraine.<sup>1</sup> The Judgment of the Court is in line with recent statements on maritime delimitation law contained in judgments of the Court and a number of arbitral awards.

The dispute between Romania and Ukraine concerned the delimitation of the continental shelf and exclusive economic zone between both States. Under the Additional Agreement to the Treaty on Good Neighbourliness and Co-operation of 2 June 1997 both States had agreed that they “shall negotiate an Agreement on the delimitation of the continental shelf and the exclusive economic zones in the Black Sea”. These negotiations opened in January 1998. Despite the fact that the parties held 24 rounds of negotiations – the last in September 2004 – as well as 10 rounds at an expert level, they did not reach an agreement on delimitation. In view of those circumstances, Romania filed an application instituting proceedings against Ukraine on 16 September 2004.<sup>2</sup> Romania invoked Article 36, paragraph 1 of the Statute of the Court and paragraph 4(h) of the Additional Agreement.<sup>3</sup>

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<sup>1</sup> *Case Concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, 3 February 2009, Documents available at: <<http://www.haguejusticeportal.net/eCache/DEF/6/185.html>>.

<sup>2</sup> *Case Concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Application Instituting Proceedings, 16 September 2004.

<sup>3</sup> Agreement Additional to the Treaty on the Relations of Good Neighbourliness and Co-Operation between Romania and Ukraine, concluded by exchange of letters between the Ministers of Foreign Affairs of Romania and Ukraine, done on 2 June 1997; 2159 UNTS 357 (Romanian letter), 363 (Ukrainian counterpart).

The latter paragraph in principle allowed either of the parties to submit the matter of delimitation of the continental shelf and the exclusive economic zone to the Court if the bilateral negotiations would have remained without result for more than two years.

The parties agreed that the conditions for submitting the dispute to the Court contained in paragraph 4(h) of the Additional Agreement had been met. They disagreed about the exact scope of the jurisdiction conferred on the Court under the Additional Agreement. Ukraine was of the opinion that the jurisdiction of the Court was restricted to delimiting the continental shelf and exclusive economic zone between the parties. According to Ukraine, as a consequence, it would be possible to start the boundary between these two zones at a point on the outer limit of the territorial sea, but it was excluded that the boundary of the continental shelf and exclusive economic zone would in part coincide with that outer limit. On the other hand, Romania considered that the Court would be in the position to establish such a boundary for the continental shelf and exclusive economic zone. This question was of particular importance due to the potential role in the delimitation of Serpents' Island, a small Ukrainian island located about 35 kilometers to the east of the terminus of the land boundary between both States in the Danube estuary.

In its Judgment, the Court first looked into the scope of its jurisdiction under paragraph 4(h) of the Additional Agreement. The Court concluded that it indeed had not been entrusted with the task of delimiting the territorial sea between the parties and that in discharging its task it would duly take into account the agreements between the parties relating to the delimitation of the territorial sea. However, the fact that the Court only had jurisdiction to delimit the continental shelf and exclusive economic zone between both States did not exclude the possibility that a part of that boundary would coincide with the outer limit of the territorial sea of one of the parties.

## 2. APPLICABLE LAW

Next, the Court turned to the question of what constituted the applicable law for the delimitation it was required to effect. The Additional Agreement identified certain principles, which the parties were to take into account in their bilateral negotiations. The Court found that this did not imply that it was bound to apply these principles to the extent that this did not result from the relevant provisions of the 1982 United Nations Convention on the law of the sea ("Convention"), which was the applicable law between both States. The Court also rejected Romania's argument that a declaration of Romania under Article 310 of the Convention was of direct relevance. This declaration of Romania, which provides that "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", no doubt was made with the presence of Serpents' Island (in front of the Romanian coast) in mind. Article 310 of the Convention allows for declarations and statements, provided that they do not purport to exclude or modify the legal effect of the provisions of

the Convention in their application to the State concerned. The Court observed that it would apply the relevant provisions of the Convention in accordance with the 1969 Vienna Convention on the Law of Treaties. The declaration of Romania under Article 310 as such was not relevant to this exercise.

There is a number of treaty instruments in force between Romania and Ukraine in respect of their State border, including the territorial sea. A number of these instruments had been concluded between Romania and the Soviet Union, before the independence of Ukraine in 1991. Romania submitted that as a result of these instruments the State border extended to a point to the east of Serpents' Island on the outer limit of the territorial sea. In the alternative, Romania argued that Ukraine was excluded from claiming a continental shelf and exclusive economic zone to the south of this line. After an analysis of the relevant instruments, the Court concluded that they only served to delimit the territorial sea between both States to the extent these overlapped. The terminus of this delimitation had been explicitly defined in geographical coordinates in Article 1 of the 2003 Treaty on the Romanian-Ukrainian State Border Regime, Collaboration and Mutual Assistance on Border Matters. That point contained in Article 1 is located to the southwest of Serpents' Island. In addition, the Court observed that the fact that a map dealing with the State border showing the outer limit of the territorial sea of the then Soviet Union, did not imply that the Soviet Union thereby had given up its entitlement to maritime zones beyond the outer limit of the territorial sea.

### 3. DELIMITATION METHOD: RELEVANT COASTS AND MARITIME AREA

After having dealt with these preliminary questions, the Court turned to the delimitation of the continental shelf and exclusive economic zone between both States. After a (certainly in comparison with other recent case law) detailed consideration of the question as to what constituted the relevant coasts and relevant maritime area for this delimitation, the Court set out the methodology it was going to apply to effect that delimitation. Just like in other recent cases, the starting point for the delimitation would be the provisional equidistance line, a line which is always at the same distance of the baselines of both States. A first question the Court had to confront in this respect was what constituted the relevant basepoints of the parties for defining the equidistance line. In that respect, the attention of the Court focused on the Sulina dyke in particular, which extends seaward from the Romanian side of one of the branches of the estuary of the Danube, and Serpents' Island. In respect of the Sulina dyke, the Court concluded, after among others an analysis of Article 11 of the Convention on the law of the sea concerning permanent harbor works, that it would not take it into consideration in establishing the provisional equidistance line. That analysis leaves one with the impression that the Court was intent on finding a justification for discarding the Sulina dyke as a part of the relevant baseline, which would not be easily generalizable to other geographical features along mainland coasts.

The Court also reached the conclusion that Serpents' Island should be disregarded in drawing the provisional equidistance line. In this case, the Court

indicated that its decision was mostly based on the fact that Serpents' Island could not be considered to form part of "the coast" of Ukraine, in view of the considerable distance between the island and the mainland coast. As a consequence:

To count Serpents' Island as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine's coastline; the consequence would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes (para. 149).

Although this is not explicitly stated by the Court, the treatment of Serpents' Island no doubt is also due to its limited size. The island measures approximately 0.17 square kilometers and has a circumference of some 2,000 meters.

After the establishment of the provisional equidistance line by the Court, it turned to the question whether there were any circumstances calling for an adjustment of this line. The parties had among others invoked arguments concerning the difference in length of their relevant coasts and the regulation of activities in the area to be delimited. The Court concluded that only the presence of Serpents' Island required a minor adjustment of the provisional equidistance line. In the area in which this line was only within 12 nautical miles of Serpents' Island, it was adjusted to let it coincide with the outer limit of the territorial sea. This concerned a minimal adjustment of the provisional equidistance line, as is apparent from a comparison of figures 7 and 8 contained in the Court's Judgment.

Finally, the Court concluded that the line thus established did not lead to a disproportion between the length of the relevant coasts of both States and their respective maritime zones and that the line did not require any further adjustment. The decision of the Court in this respect is unanimous. Furthermore, it is remarkable that none of the judges has appended a declaration or individual opinion to the decision – a first for the Court. This unanimity on the one hand seems to be explained by the large measure of agreement presently existing on the role of equidistance in the delimitation process and circumstances possibly justifying the adjustment of this line. On the other hand, the delimitation between Romania and Ukraine certainly is not of such a complexity that it easily could have led to serious controversy during the deliberations of the Court.