

## INTERNATIONAL DECISIONS

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*International Court of Justice—maritime delimitation methodology—relevant coasts—test of disproportionality—selection of base points—relevant circumstances*

MARITIME DELIMITATION IN THE BLACK SEA (Romania v. Ukraine). At <http://www.icj-cij.org>. International Court of Justice, February 3, 2009.

On February 3, 2009, the International Court of Justice delivered a unanimous decision in the case between Romania and Ukraine concerning the delimitation of their maritime boundary in the Black Sea.<sup>1</sup> The delimitation was carried out in the northwestern part of the Black Sea in the concavity formed by Romania's coast to the west and Ukraine's coast to the west, north, and east (see map). The adjacent coasts of the parties meet at their shared land boundary terminus on the River Danube delta. Ukraine's Serpents' Island lies approximately twenty nautical miles east of the Danube delta. The Court used the equidistance method to delimit a five-point boundary starting at Point 1: the intersection of the outer limits of the Romanian and Ukrainian (Serpents' Island) territorial seas agreed by the parties in their 2003 State Border Regime Treaty (2003 Treaty), which entered into force on May 27, 2004.<sup>2</sup> Between Point 1 and Point 2, the boundary follows the twelve-nautical-mile territorial sea outer limit of Serpents' Island. Beyond Point 2 the maritime boundary is an equidistance line measured from the adjacent mainland coasts of Romania and Ukraine (Point 2–Point 3–Point 4) and then between the opposite mainland coasts of Romania and Ukraine's Crimean Peninsula (Point 4–Point 5). South of Point 5 the boundary continues in a specified direction “until it reaches the area where the rights of third States may be affected” (para. 219).<sup>3</sup>

Romania initiated the proceedings before the Court with its September 16, 2004, submission of an application requesting the Court to draw “a single maritime boundary between the

<sup>1</sup> Maritime Delimitation in the Black Sea (Rom. v. Ukr.) (Int'l Ct. Justice Feb. 3, 2009). The basic documents, decisions, pleadings, transcripts, press releases, and other materials for this case and others are available on the Court's Web site, <<http://www.icj-cij.org>>.

<sup>2</sup> The Court used “2003 State Border Regime Treaty” to simplify the name of the Treaty Between Romania and Ukraine on the Romanian-Ukrainian State Border Regime, Collaboration and Mutual Assistance on Border Matters, June 17, 2003, 2277 UNTS 3 (para. 21).

<sup>3</sup> The third states whose rights may be affected are Bulgaria and Turkey. These two states have delimited most of their maritime boundary, leaving the endpoint along the northeasternmost segment to be “finalized later at subsequent negotiations.” Agreement Between the Republic of Turkey and the Republic of Bulgaria on the Delimitation of the Boundary in the Mouth of the Rezovska/Mutludere River and Delimitation of the Maritime Areas Between the Two States in the Black Sea, Art. 4(1), Dec. 4, 1997, 2087 UNTS 5. Similar language is used to describe the endpoint in the westernmost segment of the maritime boundary between Ukraine and Turkey. See Agreement Concerning the Delimitation of the Continental Shelf in the Black Sea, Turk.-U.S.S.R., Art. 1, June 23, 1978, 1247 UNTS 137. Romania and Bulgaria have not delimited their maritime boundary.

FIGURE 1. MARITIME DELIMITATION AREA.



continental shelf and the exclusive economic zones of the two States” (para. 11, quoting Romania’s application). Romania sought to found jurisdiction on Article 36(1) of the ICJ Statute and paragraph 4(h) of the Additional Agreement to the Treaty on the Relations of Good Neighbourliness and Co-operation Between Romania and Ukraine (1997 Treaty). Both the Additional Agreement and the 1997 Treaty were signed June 2, 1997, and entered into force simultaneously on October 22, 1997. As quoted by the Court (para. 20), the compromissory clause of paragraph 4(h) of the Additional Agreement reads, in relevant part:

If these negotiations shall not determine the conclusion of the above-mentioned [delimitation] agreement in a reasonable time, but not later than 2 years since their initiation, the Government of Romania and the Government of Ukraine have agreed that the problem of delimitation of the continental shelf and the exclusive economic zones shall be solved by the UN International Court of Justice, at the request of any of the Parties, provided that the Treaty on the regime of the State border between Romania and Ukraine has entered into force.

The Court concluded that both conditions of the compromissory clause had been fulfilled: the parties had negotiated without success from 1998 to 2004, and the 2003 Treaty had entered into force several months before Romania filed its application (para. 21).

Ukraine did not contest the Court’s jurisdiction, but it did question the scope of that jurisdiction in relation to the first segment of Romania’s boundary claim—between Point F (Romania’s name for the endpoint of the 2003 Treaty) and Point X. Between these two points

Romania's claim followed the twelve-nautical-mile outer limit of Serpents' Island's territorial sea and would separate Ukraine's territorial sea from Romania's exclusive economic zone (EEZ) and continental shelf. Romania argued that segment F-X had been established by agreement between the parties and asked the Court to confirm this segment of the boundary before proceeding to delimit the remaining boundary beyond Point X. Ukraine argued on the merits that this segment had not been agreed, and made the jurisdictional argument that it was beyond the scope of the Court's jurisdiction to delimit maritime zones other than those specifically referred to in paragraph 4(h) of the Additional Agreement—namely, the EEZ and continental shelf (para. 24). The Court agreed that it had “no jurisdiction to delimit the territorial seas of the Parties” but disagreed that it was therefore prevented from delimiting between “on the one hand, the exclusive economic zone and the continental shelf of one State, and, on the other hand, the territorial sea of the other State at its seaward limit” (para. 30).

From Point X to Point T, the Romanian claim followed the median line between the parties' adjacent mainland coasts. The Romanian claim turned south at Point T following the median line between the parties' opposite mainland coasts and stopped at Point Z. Ukraine's boundary claim started at Point 1 (Ukraine's name for the endpoint of the 2003 Treaty) and followed a median line between Romania's mainland coast and the coast of Serpents' Island through Point 2 to Point 3. From Point 3 the Ukraine boundary claim followed a specified azimuth “until it reach[e]d a point where the interests of third States potentially come into play” (para. 13). The equidistance method underlay both claims. The major differences between them concerned the starting point of the equidistance delimitation (Ukraine's Point 1 versus Romania's Point X) and the treatment of Serpents' Island—that is, whether to give Serpents' Island full effect in the delimitation or no effect beyond its own twelve-nautical-mile territorial sea.

The Court first resolved the difference between the parties' starting-point positions. It rejected Romania's argument that Point X represented the endpoint of an agreed maritime boundary either between the territorial seas of the parties (paras. 55–66) or between Ukraine's territorial sea and Romania's continental shelf and EEZ (paras. 67–76). Instead, the Court found that Article 1 of the 2003 Treaty established the starting point of the present delimitation by fixing the endpoint of the parties' territorial sea boundary at Point 1 (para. 66).<sup>4</sup>

The Court then turned to its analysis of the relevant coasts and relevant maritime area, determining that the entire Romanian coast was relevant to the delimitation and that most of Ukraine's mainland coast was relevant, from the land boundary terminus with Romania to Cape Sarych on the southern tip of the Crimean Peninsula (paras. 88, 98–103). However, the Court found that the coasts of Ukraine's Karkinit's'ka Gulf were not relevant since they “face each other” and “do not project in the area to be delimited” (para. 100),<sup>5</sup> and that the “coast of Serpents' Island is so short that it makes no real difference to the overall length of the relevant coasts of the Parties” (para. 102). The Court found a coastal length ratio between Romania and Ukraine of 1:2.8 (para. 104). The Court excluded the waters of the Karkinit's'ka Gulf from its relevant maritime area, which otherwise included all the area in the northwest Black Sea

<sup>4</sup> Article 1 of the 2003 Treaty provides the coordinates of what the Court and Ukraine call Point 1. The text of Article 1 is quoted at paragraph 63.

<sup>5</sup> The Court's approach here is different from that taken with respect to the Bay of Fundy in *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, 1984 ICJ REP. 246, para. 221 (Oct. 12).

from the coasts of the parties to actual or notional delimitations with neighboring states to the south (paras. 110–14).

The Court followed a standard, three-stage delimitation methodology, first establishing a provisional equidistance line based on “methods that are geometrically objective” (para. 116), second considering “whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result” (para. 120), and third verifying that the provisional equidistance line, adjusted or not, does not “lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State” (para. 122).

Before undertaking to construct the actual or objective provisional equidistance line, the Court took the preliminary, and arguably subjective, step of selecting base points to be used in the construction. The Court’s goal in this part of the delimitation exercise was to “identify the appropriate points on the Parties’ relevant coast or coasts which mark a significant change in the direction of the coast, in such a way that the geometrical figure formed by the line connecting all these points reflects the general direction of the coastlines” (para. 127). Notably, the Court eliminated Serpents’ Island as a source of base points on Ukraine’s coast, stating that 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” (para. 149).<sup>6</sup> The Court also eliminated the base point on the seaward end of Romania’s 7.5-kilometer-long Sulina dyke and substituted a base point on the landward end of the dyke (paras. 138–41). The Court selected two base points on Romania’s coast (on the Sacalin Peninsula and the landward end of Sulina dyke) and three base points on Ukraine’s coast (on Tsyganka Island on Ukraine’s side of the entrance to the Danube and on Cape Tarkhankut and Cape Khersones) to construct its provisional equidistance line A-B-C (para. 154).

The Court then considered several factors or relevant circumstances that might call for the adjustment of the provisional equidistance line. The relevant circumstances included disproportionate coastal lengths (paras. 158–68), the enclosed nature of the Black Sea and existing maritime delimitations in the region (paras. 169–78), the presence of Serpents’ Island in the delimitation area (paras. 179–88), the conduct of the parties (paras. 189–98), possible cutoff effects (paras. 199–201), and security considerations (paras. 202–04). The Court found no reason to adjust its line on the basis of these factors, though it did make minor adjustments in order to start the boundary at the point fixed in the 2003 Treaty (Point 1) and to allow a full twelve-nautical-mile territorial sea for Serpents’ Island (Point 2). The Court turned to the third stage of its delimitation—the disproportionality test—and found no significant disproportionality between the coastal length ratio (1:2.8) and the ratio of maritime area falling to the parties (1:2.1) (paras. 210–16).

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<sup>6</sup> The phrase “refashioning of geography” has more often been used in arguments *against* reducing the effect of a naturally occurring feature or coastal configuration. *See, e.g.*, North Sea Continental Shelf (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3, paras. 89–91 (Feb. 20) (recognizing the concave configuration of Germany’s coast as “a natural geographical feature” and noting that the application of equitable principles under these circumstances would not equate to a complete refashioning of geography); Continental Shelf (UK/Fr.), 18 R.I.A.A. 3, 113–14 (June 30, 1977) (noting that the projection of the Cornish peninsula and Scilly Isles “is a geographical fact, a fact of nature”). Here the Court uses the phrase as a justification *for* the elimination of a naturally occurring feature.

The Court delivered a straightforward, single maritime boundary applying the equidistance method to the adjacent and opposite mainland coastal geography of the parties. The unanimous, reasoned judgment is not likely to stir much excitement or controversy within the delimitation community. Nonetheless, the Court's treatment of Serpents' Island—the central feature in this delimitation—merits brief comment.

Serpents' Island had four potential roles to play in this delimitation. First, the coast of Serpents' Island could form part of Ukraine's relevant coast for the purpose of determining coastal length. The Court neither included nor explicitly eliminated the coast of Serpents' Island when calculating coastal length, noting that, because it was so short, including it or not would be inconsequential to the generalized exercise of determining the overall coastal lengths of the parties (para. 102).<sup>7</sup>

Second, the coast of Serpents' Island is a legitimate source of base points from which to measure the breadth of any maritime zones it might generate. Which maritime zones Serpents' Island is entitled to generate is a question of its status under Article 121 of the UN Convention on the Law of the Sea.<sup>8</sup> Romania argued that Serpents' Island was "incapable of sustaining human habitation or economic life of its own" and was therefore a "rock" not entitled to an EEZ or continental shelf under Article 121(3) (para. 124). Ukraine argued that Serpents' Island was not a rock, but an island entitled to generate the same maritime zones as any other coastal territory in accordance with Article 121(2) (para. 184). Having removed Serpents' Island from the delimitation process at an earlier stage, the Court noted that it did "not need to consider whether Serpents' Island falls under paragraphs 2 or 3 of Article 121 . . . nor their relevance to this case" (para. 187).

Third, the Court distinguished the above role of Serpents' Island as a source of base points for measuring the breadth of its maritime zones from its possible role as a source of base points for constructing an equidistant boundary (para. 137).<sup>9</sup> Whereas the selection of base points for measuring the breadth of maritime zones is largely a matter for the particular coastal state, the selection of base points in a judicial delimitation between states is for the court to decide (*id.*). In the case at hand, the Court exercised this power prior to, and for the purpose of, calculating its provisional equidistance line: it eliminated *ex proprio motu*<sup>10</sup> the seaward end of Sulina dyke (paras. 138–40) and also, as Romania had argued, any points on Serpents' Island (para. 149).

<sup>7</sup> The total length of Serpents' Island's coast is approximately 2 kilometers, whereas the Court assessed Ukraine's relevant coast to be approximately 705 kilometers (paras. 16, 103).

<sup>8</sup> Article 121 ("Regime of islands") provides:

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

<sup>9</sup> The Court noted that

the issue of determining the baseline for the purpose of *measuring the breadth* of the continental shelf and the exclusive economic zone and the issue of identifying base points for drawing an equidistance/median line for the purpose of *delimiting* the continental shelf and the exclusive economic zone between adjacent/opposite States are two different issues. (Para. 137, emphasis added)

<sup>10</sup> Both parties used the seaward end of Sulina dyke in the construction of their equidistance-based boundary claims (paras. 151–52). In the course of oral argument, however, Ukraine questioned why it would be "equitable

The elimination of these features as base points occurred in the first step of the first stage of the Court's three-stage delimitation methodology. While the result—giving no effect in the final delimitation to base points on Sulina dyke or Serpents' Island—is not surprising, the order in which the Court addressed these features was not in keeping with the recent procedural practice of international courts and tribunals. More commonly, a court or tribunal will construct the provisional equidistance line using all features.<sup>11</sup> This "strict" provisional equidistance line is then scrutinized in light of relevant circumstances, including the disproportionately large effect that small features, such as islands or extensive drying banks, might have on the direction of the provisional equidistance line.<sup>12</sup> If such a disproportionate effect is created, the provisional equidistance line may then be adjusted—in the second stage of the delimitation—by giving less than full effect to the distorting feature, or by eliminating it from the equidistance calculation entirely, in order to achieve an equitable result.<sup>13</sup>

Fourth, by removing Serpents' Island from the delimitation calculation at an earlier stage, the Court reduced the importance of Serpents' Island's potential role as a relevant circumstance or factor calling for an adjustment to the provisional equidistance line. Even so, the Court did take into account the presence of Serpents' Island and, having already eliminated it from the equidistance calculation, found that it "does not call for an adjustment of the provisional equidistance line" (para. 187).<sup>14</sup>

Eliminating a feature before calculating the provisional equidistance line is unusual,<sup>15</sup> but it could prove a useful procedural model in the future. Here, it allowed the Court to avoid the question of Serpents' Island's Article 121 status—a question that was not central to the case. This procedural model will, moreover, give parties to future delimitation cases additional arguments regarding the role of small features in delimitations, as well as rationales for their

to accord a man-made structure consisting of two low, thin stone embankments, about 150 m apart, jutting 7.5 km long, a full effect for the delimitation of the continental shelf and exclusive economic zone, while a much larger natural island should receive no equivalent treatment." Verbatim Record, ICJ Doc. CR 2008/32, para. 90 (Sept. 18, 2008).

<sup>11</sup> See *Continental Shelf (UK/Fr.)*, 18 R.I.A.A. 3 (June 30, 1977); *Maritime Delimitation in the Area Between Greenland and Jan Mayen (Den. v. Nor.)*, 1993 ICJ REP. 38 (June 14); *Eritrea v. Yemen, Second Stage, Maritime Delimitation (Perm. Ct. Arb. Dec. 17, 1999)*, at <http://www.pca-cpa.org> (reported by W. Michael Reisman at 94 AJIL 721 (2000)); *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.)*, 2001 ICJ REP. 40 (Mar. 16) (reported by Glen Plant at 96 AJIL 198 (2002)); *Nova Scotia v. Newfoundland and Labrador, Second Phase, Maritime Boundary (Mar. 26, 2002)*, at <http://www.nr.gov.nl.ca/mines%26en/publications/offshore/dispute/phaseII.pdf>; *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.; Eq. Guinea intervening)*, 2002 ICJ REP. 303 (Oct. 10) (reported by Peter Bekker at 97 AJIL 387 (2003)); *Barbados v. Trinidad and Tobago*, 27 R.I.A.A. 147 (Apr. 11, 2006); *Guyana v. Suriname (UN Law of the Sea Annex VII Arb. Trib. Sept. 17, 2007)*, at <http://www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf> (reported by Stephen Fietta at 102 AJIL 119 (2008)).

<sup>12</sup> See *Continental Shelf*, para. 244 (questioning whether the Scilly Isles might "distort the boundary and have disproportionate effects as between the two states").

<sup>13</sup> See, e.g., *Continental Shelf* (adjusting strict equidistance line by giving the Scilly Isles only half effect); *Eritrea v. Yemen* (adjusting strict equidistance line by giving no effect to island of al-Tayr and island group of al-Zubayr); *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (adjusting strict equidistance line by giving no effect to extensive drying banks of Fasht al Jarim); *Newfoundland v. Labrador and Nova Scotia* (adjusting strict equidistance line by giving no effect to Sable Island).

<sup>14</sup> However, Serpents' Island was given a full, twelve-nautical-mile territorial sea, which had the effect of adjusting the Court's provisional equidistance line.

<sup>15</sup> The Court cites at paragraph 149 of the judgment to its treatment of the islet of Filfa in the delimitation case between Libya and Malta. There the Court "[found] it equitable not to take account of Filfa in the calculation of the provisional median line between Malta and Libya." *Continental Shelf (Libya/Malta)*, 1985 ICJ REP. 13, para. 64 (June 3).

elimination. Many maritime delimitation cases have contained small, potentially distorting features, including one delimitation case on the Court's docket at the time of this writing.<sup>16</sup>

The Court's boundary completes most of the maritime boundary between Romania and Ukraine from their shared land boundary terminus on the Danube delta to a tripoint among the parties and, most likely, Turkey as their southern maritime neighbor. However, the southern end of the Court's boundary is open-ended and will be closed only through agreement with a third state. The two other existing boundaries in this part of the Black Sea—between Ukraine and Turkey and between Bulgaria and Turkey—are also “unfinished” in the area of the tripoint.<sup>17</sup> The fourth boundary in the area—between Romania and Bulgaria—has not yet been delimited but will likely extend into this same area, creating a second tripoint or possibly a quadpoint in the western Black Sea.

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*WTO—TRIPS Agreement—enforcement of intellectual property—copyright on censored works—donations and auctions of seized goods—criminal prosecution thresholds*

CHINA—MEASURES AFFECTING THE PROTECTION AND ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS. WT/DS362/R. At [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds362\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm). World Trade Organization Panel, January 26, 2009 (adopted March 20, 2009).

The United States filed a complaint under the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>1</sup> (TRIPS Agreement) against China concerning three intellectual property aspects of Chinese law and practice, namely, the denial of copyright protection of censored works; the disposal by donation and auctions of seized counterfeit goods; and the unavailability of criminal sanctions for piracy and counterfeiting of copyright and trademark rights below certain thresholds. The panel report, subsequently adopted by the WTO Dispute Settlement Body (DSB), accepted the complaint on the first point but mostly rejected the other two.<sup>2</sup> Beyond its analysis of the three claims, the report is interesting because it suggests an unexpected degree of flexibility in WTO members' compliance with the TRIPS Agreement and because it may also have blurred both the traditional distinction between “as such” and “as applied” claims and the line separating TRIPS violations from non-violations.

In its first claim, the United States argued that Article 4 of China's Copyright Law is inconsistent with Articles 5(1) and 5(2) of the Berne Convention for the Protection of Literary and

<sup>16</sup> The effect of islands, islets, and cays will be central to the delimitation between Nicaragua and Colombia currently before the Court. See Territorial and Maritime Dispute (Nicar. v. Colom.), Preliminary Objections (Int'l Ct. Justice Dec. 13, 2007).

<sup>17</sup> See *supra* note 3 and accompanying text.

<sup>1</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C [hereinafter TRIPS Agreement], Art. 27, in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 365, *reprinted in* 33 ILM 1197 (1994).

<sup>2</sup> Panel Report, China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS362/R (Jan. 26, 2009) (adopted Mar. 20, 2009) [hereinafter Panel Report]. Materials on specific WTO disputes are available online at [http://www.wto.org/english/tratop\\_e/dispu\\_e/find\\_dispu\\_cases\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm).