

## **MARITIME DELIMITATION IN THE BLACK SEA (ROMANIA V. UKRAINE DISPUTE)**

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The International Court’s of Justice (ICJ’s) judgment in this case was the first unanimous judgment in the Court’s history without any separate or dissenting opinions. The 2009 case *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*<sup>1</sup> presented the International Court of Justice (ICJ) with an opportunity to define and give meaning to the ambiguous and disputed phrase in Article 121(3): “rocks which cannot sustain human habitation or economic life of their own.”<sup>2</sup> The Court declined to provide a definitive definition for these words in its opinion, but by determining that Ukraine’s tiny Serpents’ Island should have no impact whatsoever on the maritime boundary, the Court reconfirmed that small uninhabited islands will generally have limited or no impacts on delimitations and that such features should not generate extended maritime zones.

### Summary of the Case.

Romania and Ukraine share a terrestrial border in the northwest corner of the Black Sea on the River Danube delta. Romania is a member of the European Union and the NATO alliance. Ukraine, which gained its independence from the USSR in 1991, is not of member of either international organization; however, it is a NATO “partner state.” The Black Sea Maritime Boundary dispute between the two states was resolved in 2009. Romania has accepted compulsory ICJ jurisdiction under Article 36(2) of the ICJ Statute; Ukraine has not. Both states are parties to the United Nations Convention for the Law of the Sea (UNCLOS). Romania has not declared a preferred forum for compulsory settlement of UNCLOS disputes under Article 287 of UNCLOS, nor has it entered an Article 298 declaration excluding any matters from compulsory dispute settlement. When it ratified UNCLOS in 1999, Ukraine declared its preference for compulsory arbitration under Annex VII and Annex VIII, as appropriate. Under Article 298 of UNCLOS Ukraine rejected compulsory procedures for disputes relating to sea boundary delimitations or involving historic bays or titles.

Serpents’ Island (also called Snake Island and Ostrov Zmeinyy) is virtually the only island in the Black Sea, except for a few that hug the coasts. It has

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<sup>1</sup> *Maritime Delimitation in the Black Sea (Rom. v. Ukr.)*, 2009 I.C.J. 1 (Feb. 3).

<sup>2</sup> The text of Article 121(3) of the United Nations Convention on the Law of the Sea is as follows:..  
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (UNCOS).

0.17 square kilometers of land area (forty-two acres or seventeen hectares) and is thirty-five kilometers (about twenty nautical miles) east of the Danube Delta (also called Dragon's Beard), which forms the border between Ukraine and Romania. It lacks freshwater resources and has never been inhabited historically, although it has had a lighthouse on it since the 1800s and recently Ukraine has built structures and a pier on it, apparently to strengthen its claim to the ocean space around it. Its name is said to have come from the snakes that lived in a temple built on the islet in ancient times. The ocean space around it has become a focus of great interest because recent explorations have indicated that high-quality oil and substantial amounts of natural gas may be found around this islet.

Although sovereignty over Serpents' Island was contested for many years, in 1997 Romania accepted that this feature belonged to Ukraine<sup>3</sup>. Romania argued before the Court that Ukraine had agreed in the 1997 treaty that Serpents' Island was a "rock" under Article 121(3) and therefore that it could not affect the maritime delimitation between the two countries<sup>4</sup>, but Ukraine rejected that contention, stating that the reference to Article 121(3) was in a Romanian "declaration," which Ukraine had not accepted, and that the Romanian assertion was "groundless."

The Court's opinion, issued February 3, 2009, avoided giving a comprehensive definition of the words in Article 121(3), but it did address the role that Serpents' Island should play in the delimitation and determined that this islet should have a twelve-nautical-mile territorial sea, but otherwise had no effect on the delimitation. Ukraine argued first that Serpents' Island should be considered as part of Ukraine's coast, because it "forms part of the geographical context and its coast constitutes part of Ukraine's relevant coasts." Romania responded by arguing that Serpents' Island "constitutes merely a small maritime feature situated at a considerable distance out to sea from the coasts of the Parties."

The Court accepted Romania's perspective on this matter, saying that "[t]he coast of Serpents' Island is so short that it makes no real difference to the overall length of the relevant coasts of the parties." The Court went on to say that Serpents' Island cannot be viewed as part of Ukraine's coast because it is "lying alone and some 20 nautical miles away from the mainland" and thus "is not one of a cluster of fringe islands constituting 'the coast' of Ukraine."

According to the Court, "too 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."<sup>5</sup>

After determining that "the coasts" of the two countries basically followed their mainland coasts (without regard to Serpents' Island), the Court began the

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<sup>3</sup> Treaty on the Relations of Good-Neighbourliness and Co-operation between Romania and Ukraine, June 2, 1997, 2159 U.N.T.S. 335.

<sup>4</sup> Application Instituting Proceedings, Maritime Delimitation in the Black Sea (Rom. v. Ukr.) (Sept. 16, 2004).

<sup>5</sup> (analogizing Serpents' Island to Malta's tiny and unpopulated isle called Filfla (a bird sanctuary), which was completely ignored in Continental Shelf (Libya v. Malta), 1985 I.C.J. 13 (June 3)).

delimitation process “by drawing a provisional equidistance line” between the adjacent and opposite coasts of Romania and Ukraine, and then examining “whether there are factors calling for the adjustment... of the provisional equidistance line in order to achieve an equitable result,” and whether there was “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” requiring an adjustment.

Positions of the Disputing States.

On September 16, 2004, Romania filed an application<sup>6</sup> with the Registry of the ICJ instituting proceedings against Ukraine in respect of its dispute with Ukraine “concerning the establishment of a single maritime boundary between the two States in the Black Sea, thereby delimiting the continental shelf and the exclusive economic zones appertaining to them.”

Romania asserted ICJ jurisdiction under Article 36(1) of the ICJ Statute and the compromissory clause in paragraph 4(h) of the Additional Agreement to the Treaty on the Relations of Good Neighbourliness and Co-operation Between Romania and Ukraine.

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).

Although both states agreed (as is increasingly common) that a single boundary line should delimit their EEZs and continental shelves, they each proposed delimitation lines that favored the proposing state

Romania argued that Serpents’ Island should be ignored because it is “a rock incapable of sustaining human habitation or economic life of its own” under Article 121(3), and because “using this island as a base point would result in an inordinate distortion of the coastline.”

Ukraine responded that Serpents’ Island should be viewed as a “coastal island” because it is within twenty nautical miles of Ukraine’s coast and thus its territorial sea “partly overlaps with the area of territorial sea bordering the Ukrainian mainland.”

Ukraine also argued that Serpents’ Island is “indisputably an ‘island’ under Article 121[(2)]... rather than a ‘rock’” because it “can readily sustain human habitation and that it is well established that it can sustain economic life of its own.” In particular, the island has vegetation and a sufficient supply of fresh water” and has “appropriate buildings and accommodation for an active population.”

Finally, Ukraine argued that Article 121(3) “is not relevant to this delimitation because that paragraph is not concerned with questions of delimitation but is, rather, an entitlement provision that has no practical application” to a maritime area within 200 nautical miles of a mainland coast.

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<sup>6</sup> Application Instituting Proceedings, Maritime Delimitation in the Black Sea (Rom. v. Ukr.) (Sept. 16, 2004).

The Court did not directly respond to these contentions, but instead simply ruled that Serpents' Island was entitled to a twelve-nautical-mile territorial sea around it but had no other impact on or relevance to the maritime delimitation between the two countries. "As the jurisprudence has indicated, the Court may on occasion decide not to take account of very small islands or decide not to give them their full potential entitlement to maritime zones, should such an approach have a disproportionate effect on the delimitation line under consideration."<sup>7</sup>

That statement is understandable, focusing on the "disproportionate effect" that tiny Serpents' Island would have on the delimitation. The Court's statements in the paragraphs that follow are somewhat more obscure, but, taken together, there can be no doubt but that the Court felt that Serpents' Island should have no effect on the maritime delimitation. In the resulting delimitation, the maritime boundary goes south of the twelve-nautical-mile territorial sea around Serpents' Island, but otherwise Romania received most of the ocean space it was seeking.

#### Key Substantive Issues.

The Court cited the longstanding principle that "the land dominates the sea through the projection of the coasts or coastal fronts" (para. 77 and again in para. 99).

Regarding the effect on delimitation of prior agreements between the disputing parties, the Court cited UNCLOS 74(4) and 83(4), which provide that where there is an agreement in force between the States concerned, questions related to the delimitation of the EEZ and continental shelf "shall be determined in accordance with the provisions of that agreement" (para. 69). However, the Court qualified that by explaining that only an "agreement" delimiting the EEZ or continental shelf would have such an effect, and none of the cited Soviet-era agreements qualified.

The Court followed the three-stage approach to delimitation it has used in the past (para. 116), including a final check for any disproportionality of maritime areas which would produce an outcome that was not equitable (para. 122). In its disproportionality analysis, the Court ruled that the disparity in the length of the states coasts (1:2.8) and the ratio of maritime areas falling to the parties (1:2.1) was not significant enough to require adjustment.

In section 8.1 of the decision on selection of base points, the Court analyzed whether Sulina Dyke qualified as a "harbor work" (para. 133). The Court found that the landward end of the dyke, not the manmade end, should be the basis for the equidistance principle. The Court noted that a dyke has a different function from a port, and only harbor works form part of the coast.

The Court confirmed that "legitimate security considerations of the Parties may play a role in determining the delimitation line (para. 204), but that there was no need to adjust the line in this case.

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<sup>7</sup> citing *Continental Shelf (Libya v. Malta)*, 1985 I.C.J. 13 (June 3); *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.)*, 2001 I.C.J. 40 (Mar. 16); and *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.)* (Oct. 8, 2007).

The Court also noted the potential relevance of state activities (fishing, oil and gas concessions, and naval operations), but found that they were not a relevant circumstance calling for adjustment of the delimitation line in this case (para. 198).

In a section potentially relevant to China's arguments on the importance of prolongation, the Court held that: "the coast, in order to be considered as relevant for the purpose of delimitation, must generate projections which overlap with projections from the coast of the other Party. Consequently, 'the submarine extension of any part of the coast of one Party which, because of its geographic situation, cannot overlap with the extension of the coast of the other, is to be excluded from further consideration by the court.'" (para. 99, citing *Continental Shelf case (Tunisia/Libya)* [1982] I.C.J. Rep. 61, para. 75).

The parties disputed the classification of Serpent Island under UNCLOS Article 121. Ukraine argued that it qualified as a full juridical island (para. 184), while Romania, which had signaled its views on such islands in a declaration when it ratified the UNCLOS in 1996, argued that it was a mere rock incapable of sustaining human habitation or economic life of its own (para. 124). Further, Romania accused Ukraine of attempting to build up the islet to justify its claim.

#### Implementation of the Tribunal's Decision.

While the judgment drew a line that has been described as equitable for both parties, Romania received nearly 80 percent of the disputed area. At the same time, however, according to Ukrainian commissioner Volodymyr Vasylenko, nearly all the oil and gas reserves are concentrated in the seabed that went to Ukraine.

It appears that both states accepted the Court's decision. The Romanian Ministry of Foreign Affairs website 11 asserts: "The judgment the ICJ rendered is final, binding and without appeal. The two states are bound to observe the judgment, which is enforceable immediately, no further bilateral agreements, interpretations of the judgment or additional acts being needed." Similarly, Ukraine announced on February 5, 2009, that it considered the ruling "just and final" and hoped that it would open "new opportunities for further fruitful cooperation in all sectors of the bilateral cooperation between Ukraine and Romania."

#### Factors which limit the relevance of this case to the East China Sea disputes.

How does the *Romania v. Ukraine* decision apply to the maritime delimitation in the East Sea/Sea of Japan? This boundary remains unresolved, in large part because Japan still disputes Korea's sovereignty over Dokdo, a set of tiny islets located between the two countries. The *Romania v. Ukraine* decision provides strong support for the conclusion that Dokdo should have a twelve-nautical-mile territorial sea, but should not otherwise affect this delimitation. Dokdo is virtually the same size as Serpents' Island, having 0.18 square kilometers of land area, as compared to Serpents' Island's 0.17 square kilometers.

Dokdo has stark physical beauty, military personnel have been stationed on it for the past several decades, and fishing families occasionally take up temporary residence on it. But its two main islets and smaller outcroppings remain essentially barren, rocky, and uninhabitable. The distinguished Korean scholar Choung Il Chee wrote in his 1999 book that Dokdo "is a rocky island and unsuitable for

human inhabitation”. Similarly, Han Key Lee has written that “this barren group of islets is unfit for sustained human habitation.” Professor (now Judge) Jin-Hyun Paik of Seoul National University wrote in 1998 that “the natural conditions of the Dokdo Islands would suggest that these islands might not generate their own EEZs or continental shelves.”<sup>8</sup> It would appear, therefore, that Dokdo should be considered to be a “rock” that “cannot sustain human habitation or economic life of its own” under Article 121(3).

Some have argued otherwise by quoting from Professor Charney’s 1999 article where he speculated that economic activity in the waters surrounding an islet could arguably constitute an “economic life of their own” to allow the islet to generate an exclusive economic zone (EEZ). This bootstrapping approach has not been accepted, however, and when it has been asserted – by, for instance, Japan with regard to Okinotorishima – it has met with strong resistance by neighboring countries.

Even if Dokdo were somehow to be considered to be an “island” rather than a “rock” under Article 121, it would not be given much importance by a tribunal asked to delimit the maritime boundary between Korea and Japan because of its tiny size and relative insignificance because, as explained above, tribunals have repeatedly ignored or slighted islands in maritime delimitations, even ones that have substantial populations residing on them. The boundary in the East Sea should therefore be drawn without regard to Dokdo and should follow the equidistance line between Korea’s Ullungdo and Japan’s Oki Islands.

Given the focus of this undertaking, perhaps the two most salient differences between the Black Sea boundary dispute and the ongoing dispute in the East China Sea are the willingness of Romania and Ukraine to accept binding adjudication of their dispute by the ICJ and the absence of a sovereignty dispute over title to the single relevant maritime feature (Serpent Island)<sup>9</sup>.

It is also noteworthy that both states came under the Soviet orbit after WWII, Ukraine as a member-state of the USSR, and Romania as the former Socialist Republic of Romania. Neither Romania nor Ukraine is a major naval or maritime power<sup>10</sup>, nor are they governed by a single party under a dominant party leader.

Geopolitical differences aside, the geography and usage of the enclosed<sup>11</sup> Black Sea is also quite different from that of the East China Sea. Finally, in contrast to China’s position in the East and South China Seas, time was not on the side of Romania and Ukraine, neither of which is a rising power in the region.

### Conclusions.

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<sup>8</sup> Jon M. Van Dyke, *The Romania v. Ukraine Decision And Its Effect On East Asian Maritime Delimitations*, 15 *Ocean & Coastal L.J.* (2010).

<sup>9</sup> In the 1997 Treaty, Bucharest and Kyiv “reaffirmed that the existing border between them is inviolable and therefore, they shall refrain, now and in future, from any attempt against the border, as well as from any demand, or act of, seizure and usurpation of part or all the territory of the Contracting Party.”

<sup>10</sup> Ukraine’s 18 percent treaty share of the former combined USSR Black Sea Fleet has dwindled to just one 25-year old frigate. Romania’s single Frigate Flotilla consists of three frigates (two of which were transferred to Romania after being retired by the UK Royal Navy) and seven corvettes.

<sup>11</sup> The ICJ characterized the Black Sea as a “closed sea,” (para. 15), which the Court considered a relevant factor in its decision.

The Romania v. Ukraine case is a territorial dispute with Romania, namely regards the Black Sea shelf. The Court's conclusion that it did not need to determine the classification of Serpent Island under UNCLOS Article 121 left that issue (and Romania's argument that Ukraine was attempting to build up the island to bolster its status as a full juridical island) unresolved until the arbitration panel's 2016 decision in *The South China Sea Arbitration* (Rep. Philippines v. Peoples' Rep. China), PCA Case No. 2013-19. Professor Bederman suggested that "eliminating a feature before calculating the provisional equidistance line is unusual, but it could prove a useful procedural model in the future." He goes on to note that this model will "give parties to future delimitation cases additional arguments regarding the role of small features in delimitation, as well as rationales for their elimination."

The Court's invocation of the disproportionality test might prove relevant in the East China Sea. The Court noted in the Black Sea Delimitation case that its "jurisprudence has indicated, it may on occasion decide not to take account of very small islands or decide not to give them their full potential entitlement to maritime zones, should such an approach have a disproportionate effect on the delimitation line under consideration". The Court explained that "to count (Serpent) 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". Accordingly, the Court concluded that Serpent Island "should have no effect on the delimitation in this case, other than that stemming from the role of the 12-nautical-mile arc of its territorial sea."