

# ROMANIA V. UKRAINE

A Case Summary for the  
Maritime Dispute Resolution Project



U.S.-ASIA LAW INSTITUTE  
NEW YORK UNIVERSITY SCHOOL OF LAW



Maritime Dispute Resolution Project

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

Case Summary by Craig H. Allen\*



A research project of the  
U.S.-Asia Law Institute

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## Project Overview

This case summary was prepared as part of the U.S.-Asia Law Institute's Maritime Dispute Resolution Project. The institute began the project in 2018 in order to better understand the circumstances in which interstate maritime disputes are successfully resolved and distill lessons for governments.

The two main questions the project seeks to answer are:

- When are international institutional dispute resolution mechanisms effective in resolving maritime disputes?
- What insights can be applied to the maritime disputes in East Asia?

To address these questions, leading international lawyers and legal scholars held workshops to analyze selected disputes from around the world. This and other case studies were prepared for the workshops and are based on the official records.

Citation:

Case Concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine) ICJ GL No. 132, Judgment, [2009] I.C.J. Rep. 61 (Feb. 3).

### **I. & II. Summary of the Case and Procedural History**

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.” It should be noted that the Black Sea Maritime Boundary dispute between the two states was resolved in 2009, five years before Russia forcibly “annexed” the Crimean Peninsula.

Romania has accepted compulsory International Court of Justice (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.

Romania’s maritime claims in the Black Sea include a 12 NM territorial sea, a 24 NM contiguous zone, a 200 NM exclusive economic zone, and a continental shelf extending to the 200-meter isobath or to the depth of exploitation. Ukraine has made identical

claims, except that it has not yet claimed a 24 NM contiguous zone.<sup>1</sup> Reportedly, seabed resources in the area include an estimated 100 billion cubic meters of deposits and 15 million tons of oil.

The presence of Serpent Island (also known as Snake Island<sup>2</sup>), a small and sparsely inhabited island depicted in Figure 1 that is situated in the northwestern part of the Black Sea, approximately



*Figure 1: Serpent Island (Black Sea)*

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1 On December 6, 2018, Ukraine's legislature (Verkhovna Rada) adopted a bill on the legal regime of an adjacent (contiguous) zone of Ukraine. The measure extends Ukraine's control up to 24 NM seaward into the Black Sea. In the covered waters, Ukraine will exercise the control necessary to prevent violations of the customs, fiscal, immigration, and sanitary legislation of Ukraine. Initial reports suggested the measure was aimed at Russian interference with access to the Sea of Azov and sounds more like a security zone than a contiguous zone.

2 The island, which is inhabited by approximately 100 residents, has a circumference of 2,000 meters and a surface area of 0.17 square kilometers (para. 16). The highest area is 41 meters above sea level and is above water at high tide.

20 nautical miles east of the Danube delta, could have played a significant role in determining the states' maritime boundary.<sup>3</sup>

Following the dissolution of the Soviet Union in 1991, Ukraine inherited control over the island. Although initially Romania contested Ukraine's title to the island, that dispute was resolved in Ukraine's favor by treaty in 1997. As explained below, in its 2009 judgment, the ICJ limited the island's role in fixing the states' exclusive economic zone (EEZ) and continental shelf boundary and declined to determine the island's Article 121 classification.

### Jurisdiction and Procedural History

On September 16, 2004, Romania filed an application 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."<sup>4</sup> 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

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<sup>3</sup> See Coalter G. Lathrop, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, 103 *Am. J. Int'l L.* 543, 547-48 (2009) (noting that the island could have served four potential roles).

<sup>4</sup> Although UNCLOS prescribes separate rules for delimiting EEZ boundaries and continental shelf boundaries between adjacent and opposite states (compare UNCLOS Articles 74 (EEZ) and 83 (continental shelf)), the disputing states in this case agreed that the boundary should be the same for both.

Ukraine,<sup>5</sup> which provided that, if unresolved, the maritime boundary dispute was to be brought to the ICJ.<sup>6</sup> Ukraine did not contest jurisdiction; however it did question its scope (paras. 23-30).

### Respective Positions of the Disputing States

Although both states agreed (as is increasingly common<sup>7</sup>) that a single boundary line should delimit their EEZs and continental shelves, they each proposed delimitation lines that favored the proposing state (see Figure 2 below, which is copied from page 69 of the ICJ decision). The red line in the figure indicates Romania's claimed delimitation line, while the blue line indicates Ukraine's claim. The differing claims are explained in part by the differing claims regarding the status of Serpent Island and its effect on delimitation of the EEZs and continental shelves, the role of a series of *Procés-Verbaux* concluded between Romania and the USSR in 1949, 1963, and 1974, and how the two states conceptualized their relevant coasts and the relevant area.

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5 36 I.L.M. 340-53 (1997). The Treaty and the Additional Agreement were executed on June 2, 1997, and entered into force on October 22, 1997. See generally Andrew D. Sorokowski, Treaty on Relations of Good-Neighborliness and Cooperation between Ukraine and Romania, 20 Harv. Ukrainian Studies 330-339 (1996).

6 Negotiations between the two states over the maritime boundary dispute between 1998 and 2004 spanned some 34 rounds, yet failed to produce an agreement (para. 18).

7 See Keyuan Zou, China and Maritime Boundary Delimitation: Past Present and Future, in Conflict Management and Dispute Settlement in East Asia, at 150 (Ramses Amer & Keyuan Zou, eds., 2011) (“the judicial practice also shows that a single line is preferred to delimit EEZs and continental shelves”).



The deciding ICJ panel included President Rosalyn Higgins and Vice-President Awn Al-Khasawneh; ICJ Judges Raymond Ranjeva, Shi Jiuyong, Abdul Koroma, Thomas Buergenthal, Hisashi Owada, Peter Tomka, Ronny Abraham, Kenneth Keith, Bernardo Sepulveda-Amor, Mohamed Bennouna, and Leonid Skotnikov; and Judges ad hoc Jean-Pierre Cot and Bernard Oxman.

The Court delivered its unanimous judgment on February 3, 2009, fixing the “single” EEZ/continental shelf boundary between the two states’ with a five-part line.<sup>8</sup> Several excellent reviews of the decision are available.<sup>9</sup> In constructing the line, the Court applied the three-stage approach used in past cases, including application of the disproportionality test and to guard against an inequitable result.

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<sup>8</sup> Because neither state was represented by a judge on the ICJ, each was invited to nominate an ad hoc judge, as provided by Article 31(3) of the ICJ Statute. Romania nominated Jean-Pierre Cot and Ukraine nominated Bernard Oxman.

<sup>9</sup> See, e.g., *Maritime Boundary Delimitation: The Case Law: Is it Consistent and Predictable* (Alex G. Oude Elferink, et al., eds., 2018); Coalter G. Lathrop, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, 103 *Am. J. Int’l L.* 543 (2009); Bogdan Aurescu, *Current Legal Developments: Case concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, 21 *Int’l J. Marine & Coastal L.* 535 (2006); Alex Oude Elferink, *Maritime Delimitation in the Black Sea (Romania v. Ukraine): A Commentary*, *The Hague Justice Portal*, Mar. 27, 2009; L. Tymchenko & V. Kononenko, *The Delimitation of Ukrainian Maritime Boundaries*, 2013 *Law of Ukraine* 184 (2013).

## Maritime Dispute Resolution Project

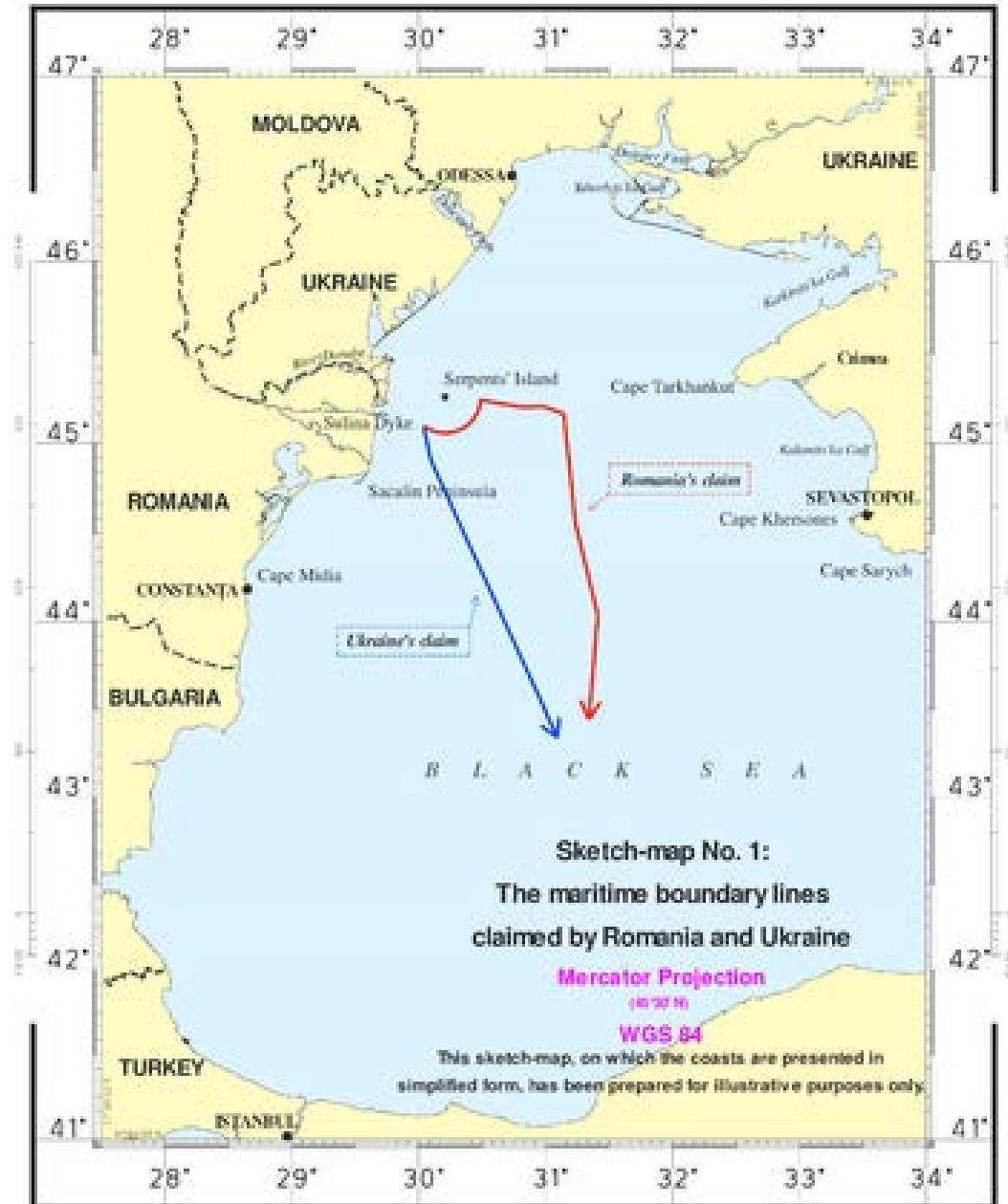


Figure 2: Claims by Romania and Ukraine. Source: ICJ Judgment.

The boundary line constructed by the Court begins at Point 1, the intersection of outer limits of the two states' previously agreed upon territorial sea (see Figure 3 below). From Point 1 to Point 2 the boundary follows the outer limit of the 12 NM territorial sea extending from Serpent Island. The lines between Points 2 and 3 and Points 3 and 4 were constructed using the equidistant method measured from the *adjacent* mainland coasts of Romania and Ukraine. The line between Points 4 and 5 followed the equidistant method measured from the *opposite* coasts of Romania's mainland and Ukraine's Crimean Peninsula. South of Point 5 the boundary continues until it reaches the area where the rights of third states (Bulgaria and Turkey) may be affected.

### III. Summary of Key Substantive Issues

- A. 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).
- B. 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.
- C. 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.



Figure 3: Boundary determined by the ICJ. Source: ICJ Judgment.



- D. 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.
- E. 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.
- F. 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).
- G. 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).
- H. 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.

### **IV. 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.<sup>10</sup>

It appears that both states accepted the Court's decision. The Romanian Ministry of Foreign Affairs website<sup>11</sup> 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, former President Viktor Yushenko announced on February 5, 2009, that Ukraine 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."

### **V. Conclusions**

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

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10 Ukraine gets bulk of oil, gas reserves in delimitation dispute with Romania, says commissioner to international court, Interfax-Ukraine (February 3, 2009).

11 <https://www.mae.ro/en/node/2094>.

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 “[e]liminating a feature before calculating the provisional equidistance line is unusual, but it could prove a useful procedural model in the future.”<sup>12</sup> 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.<sup>13</sup> 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” (para. 185). 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” (para. 149). 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.”

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<sup>12</sup> Lathrop, *supra*, at 548-49 (observing that the status of Serpent Island “was not central to the case”).

<sup>13</sup> See section 9.1 of the ICJ decision (Disproportion between Lengths of Coasts). See also Yoshifumi Tanaka, *The Disproportionality Test in the Law of Maritime Delimitation*, in *Maritime Boundary Delimitation: The Case Law*, *supra*, at 291.

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

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>14</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>15</sup> nor are they governed by a single party under a dominant party leader. They share a land border and both face the threat of a revanchist Russia in the region (Bucharest supported Kyiv when Russia annexed the Crimean Peninsula). Geopolitical differences aside, the geography and usage of the enclosed<sup>16</sup> Black Sea is also quite different from that of the East China Sea. Finally, in contrast to China's position in the East

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14 In the 1997 Treaty, Bucharest and Kyiv “reaffirm[ed] 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.”

15 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.

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



and South China Seas, time was not on the side of Romania and Ukraine, neither of which is a rising power in the region.<sup>17</sup>

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<sup>17</sup> Time favors a rising power. See Robert S. Ross, Nationalism, Geopolitics, and Naval Expansionism: From the Nineteenth Century to the Rise of China, 71 *Naval War College Rev.* 11 (2018).





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