The European and Euro-Atlantic Integration of Romania and the Bilateral Negotiations with Ukraine on the State Border and the Maritime Areas in the Black Sea*

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In September 2002, the official visit of Mr. Ion Iliescu, President of Romania, took place in Kiev, for a couple of days. On that occasion, a Joint Declaration on developing a bilateral Partnership for Europe was signed with Mr. Leonid Kucima, President of Ukraine. This document, which has the character of a political statement, thus not being legally binding, sets forth in a paragraph that both parties will try to finalize the negotiation on the border treaty and on the delimitation of the maritime zones of the two States in the Black Sea by June 1, 2003. Despite this common statement, between September and November 2002, the international public opinion was able to notice a certain press campaign undertaken by the Ukrainian newspapers, some of them being reproduced by the Western media, trying to assert that Romania has territorial claims against its neighbour, attitude that "enables" Romania to become a NATO member. After the official invitation for Romania to join the Alliance, at the Prague Summit, this press campaign stopped.

But from both theoretical and practical point of view the issue is still worthy to be analysed: is there any connection between the European or Euro-Atlantic integration of a certain State and some of its bilateral negotiations on border and maritime delimitation with another neighbour?

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The Treaty on Good Neighbourliness and Co-operation between Romania and Ukraine, concluded in 1997, in the eve of the forthcoming first NATO enlargement Madrid Summit, has postponed two major issues to be settled by separate documents for the future: the Treaty on the State Border Regime and the Agreement on Delimitation of the Continental Shelf and of the Exclusive Economic Zones of the Two States in the Black Sea.

The 1997 Basic Political Treaty and its additional Agreement concluded by exchange of letters by the ministers of foreign affairs of Romania and Ukraine have established the general framework and principles by which the parties should conduct themselves during the negotiation of the two future documents.

The Treaty on the State Border Regime was to be concluded in conformity with the principle of succession of States to frontiers, according to which the proclamation of the independence of Ukraine does not affect the existing State border between Romania and Ukraine, as it was defined and described in the Treaty of 1961 on the regime of the Romanian-Soviet border and in the corresponding demarcation documents, valid on 16 July 1990 (the date of the adoption of the Declaration on the State sovereignty of Ukraine). The principles of the Helsinki Final Act on the inviolability of frontiers were to be taken into account so that the process of establishing the frontiers on the new political map of Europe after the fall of the Berlin wall that marked the end of the Cold War should not threaten the stability of the zone.

* The opinions expressed in this material represent personal views of the authors.

Unlike the frontier aspects, the Soviet heritage of the issue of delimiting the maritime areas in the Black Sea between Romania and Ukraine consisted in a process of difficult negotiations, started in 1966 between Romania and the ex-USSR that could not reach an outcome by 1989. In 1982 the Montego Bay Convention on the Law of the Sea was adopted, establishing the 12 maritime miles limit as a maximum breadth of the territorial sea that States could claim. It has also established new rules on delimiting the exclusive economic zones. After the extension of the territorial seas of the two countries to the limit of 12 maritime miles, during the Romanian-Soviet negotiations an agreement could not have been reached on delimiting the maritime areas in the Black Sea. The most difficult aspect in the negotiations was the presence of the Serpent's Island, as Soviet territory since 1948, in the proximity of the Romanian coast and the relevance that should be given to this natural rocky formation in the delimitation process.

Thus, the Montego Bay Convention on the Law of the Sea established in its Part VIII, article 121 a new rule concerning the regime of the islands. This rule reflects the different opinions among States on the definition of islands and on the question to know whether or not all islands have right to continental shelf and exclusive economic zone. During the negotiations of the Montego Bay Convention, continental States, including Romania, who had a very active participation to the debates on this issue, advanced the view that not all islands are entitled to such maritime spaces. Consequently, article 121 established a compromise rule according to which rocks that cannot sustain human life and have no economic activities of their own have only territorial waters, but are not entitled to continental shelf and exclusive economic zone. Such an approach was repeatedly confirmed by the practice of States and by the international jurisprudence[1].

Against this background, the Romanian-Ukrainian negotiations for the conclusion of the Treaty on the State Border Regime and of the Agreement on the Delimitation of the Continental Shelf and the Exclusive Economic Zones of the Two States in the Black Sea have started in 1998 and over 16 rounds of negotiations have been held since then.

The process was difficult, and the new political environment, less predictable that the one characterising the Cold War period, influenced the conduct of the parties during negotiations. The different approach of the two States towards the integration taking place in the European and Euro-Atlantic areas have put their footprint on the conduct of negotiations. Romania wanted to stress the common European values that both countries tended to achieve in their common way towards the united Europe. Ukraine manifested understandable national sensitivities that were reflected in the context of the complex negotiations on the State border and the maritime areas.

Ukrainian media have repeatedly accused Romania of having "territorial claims" against Ukraine and have revealed their fears that Romania's NATO membership would become a supplementary factor of pressure upon Ukraine, thus influencing the outcome of the negotiations.

The authors of this article are of the opinion that the allegations on Romania's territorial claims do not find justification in the Romanian conduct during the negotiations at stake. They would also note that, in the present geopolitical context, characterised by the imminence of Romania's *de iure* integration to NATO and, on a medium term, to the European Union, such allegations have not obtained the support from the members and the public opinion of the international community. Their answer received to their accusations was that the process of negotiations between Romania and Ukraine is to remain a bilateral issue and the two parties are to solve it by consultations.

At the same time, it should be noted that, in case the two parties would not reach a commonly acceptable solution by negotiations, they have consented in the Agreement additional to the Basic Political Treaty of 1997 to defer the issue of delimitation of the maritime areas in the Black Sea to the International Court of Justice for settlement. The appeal to the

International Court of Justice for such issues is a modern way of solving divergences between States that could not be settled through negotiations. It is also in line with the practice of Western States that share the same values of democracy, respect for the independence of States and peaceful settlement of disputes between them.

I. The issue of "territorial claims" in the light of the Euro-Atlantic integration

The 1997 Basic Political Treaty stated the obligation of the two parties to conclude a separate Treaty on the Regime of the State Border, the general co-ordinates of which were established in the Agreement concluded by exchange of letters between the ministers of foreign affairs of the two countries, additional to the Basic Political Treaty: the principle of the succession of States to frontiers, according to which the proclamation of Ukraine's independence does not affect the frontier existent between Romania and Ukraine, as it was defined in the 1961 Treaty on the Regime of the Romanian-Soviet State frontier and in the corresponding demarcation documents, valid at 16 July 1990 (the date of adoption of the Declaration on the State sovereignty of Ukraine).

Once accepting this principle, Romania has constantly affirmed its position of drawing a frontier line in accordance with the principles set forth in the 1961 Romanian-Soviet Treaty on the State frontier, that is to say the principle of the main navigable channel or the middle of the river, principles widely recognised in international law and used in the practice of States and by the international jurisprudence.

The result of the application of such principles in drawing the frontier line would be the correction of the old Romanian-Soviet border taking into account the various natural modifications occurred in the course of the frontier during the past decades. Indeed, various morphologic evolutions can be observed on the river border between Romania and Ukraine, especially in the Danubian sector.

The endeavour of the Romanian side to reflect such modifications in the text of the new Treaty on the State Border Regime was received with strong opposition by the Ukrainian authorities that accused Romania of having territorial claims towards Ukraine and of attempting to affect the territorial integrity of this State. Having been recognised the beneficiary of an inheritance of a time governed by values very different and often opposed to the ones that form today the foundation of the Romanian-Ukrainian relations, Ukraine has contended itself during negotiations to require the confirmation of the old Romanian-Soviet frontier, deliberately ignoring the fact that the same border was established also in conformity with the principle of the main navigable channel.

The Romanian authorities, faithful to the principle of good neighbourliness, have tried to give a moderate response to such allegations, stressing that by concluding the 1997 Basic Political Treaty, they have understood to renounce their rights on territories occupied by the Soviet Union and have confirmed the Romanian-Ukrainian border. In fact, broadly speaking, the boundary between Romania and Ukraine was agreed.

An objective observer of the situation would note that the mere fact that Romania insists on the application of the regime of the border inscribed in all the Romanian-Soviet legal instruments invoked by Ukraine, cannot be characterised as a territorial claim. Ukraine's allegations are therefore unfounded and ignoring the fact that the process of Romanian-Ukrainian negotiations should lead to the establishment of a stable and sustainable border, that would become the external border of the European Union and of the NATO area. What better way could ensure such a result than the establishment of a border and of a border regime in conformity with generally recognised principles of international law?

The Study on NATO enlargement[2], issued in 1995, states that the aim of an improved security architecture is to provide increased stability and security for everybody

in the Euro-Atlantic area. The NATO enlargement would ensure the broad concept of security created at the end of the Cold War, embracing political and economic, as well as defence components, also by promoting good neighbourly relations.

That means that a bilateral relationship of two neighbouring states cannot and should not be reduced or conditioned by the result of a negotiation process regarding a border and its legal regime. It is something more that makes a good-neighbouring relation: a common approach to European values, development of political and human contacts at all levels, deepening of economic and commercial relations; all of these depends on the political willingness of both parties. This was the approach of the Romanian side towards its Eastern neighbour.

The Romanian authorities have always expressed their view that the process of negotiations on the conclusion of the Treaty on the State Border Regime and of the Agreement on Delimitation of the Continental Shelf and Exclusive Economic Zones of the Two States in the Black Sea should not hinder the development of the bilateral relations between the two countries and their co-operation in all fields, that would lead to the strengthening of the security and stability of the whole area.

Such an approach, always expressed, including at the highest level, by the Romanian authorities, is consistent with the concept of good neighbourliness promoted by NATO, as a conduct required from all states that want to become members of the Alliance.

The Study on NATO enlargement requires new members to commit themselves, among others, "to settle any international disputes in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered".

Our opinion is that Romanian authorities consider that the very process of bilateral negotiations was the right way to respond to this reccomandation of the Study.

It should be noticed that there are nations particularly inclined to emotional over commitment[3], especially in the context of territorial issues having direct implications on the concept of sovereignty. This is particularly true in case of newly established States, such as in the Central-Eastern European region marked by several dissolution processes at the end of the Cold War.

Thus, while recognising the importance that Ukraine attaches to the integrity of its Soviet succession in the field of frontiers, due consideration should be paid to Romania's opinion that this goal should not be pursued in the detriment of other country's legitimate interests.

In the Charter on a Distinctive Partnership between the North Atlantic Treaty Organisation and Ukraine[4], the latter has committed itself to recognise that "no State should pursue its security at the expenses of that of another State".

In this respect, the role of the principle of international law of conducting negotiations in good faith would mean that the negotiations, as one of the means of peaceful settlement of disputes embodied in the Charter of the United Nations[5], should be construed as an opportunity to reconcile such divergent interests and to find a convergent solution. Solving such issues through the means provided by the Charter of the United Nations and respecting the OSCE principles represent a normal exercise of conduct within the frame of the commonly shared European values.

On the other hand, the pursuit of its national interests by a country cannot be characterised by another country as inamicable gestures towards it. In order to overcome such diplomatic inertia, Romania acted with determination in full conformity with the principle of seeking agreed resolution of differences, instead of urging the other party to accept unconditionally its claim in a certain matter.

Generally speaking, countries prove their ability to contribute to the stability and security of the geo-political area to which they belong precisely by the manner they are capable of solving bilaterally their divergences, which would entail a certain degree of flexibility from the States involved.

Romania and Ukraine should prove their political maturity and their capacity to deal with their own difficulties and thus to

contribute to the security and stability within the Euro-Atlantic area.

We think that Romanian authorities have understood that NATO membership means cultivating a certain type of conduct such as preserve the characteristics of a defensive organisation whose members must promote the shared values of democracy, freedom and peaceful settlement of disputes. Romanian authorities want to continue their line of conduct consisting in promoting understanding and good neighbourly relations, convinced that such approach is the most suitable to bring the best results in the co-operation with other States, including Ukraine.

A similar idea was expressed by Lord George Robertson, the NATO Secretary General in response to the Ukrainian allegations that Romania has territorial claims towards it and hence it does not fulfil the criteria of becoming a NATO member State. This proves the convergent perspective of the Romanian and NATO authorities on this issue.

NATO's Secretary General has stated that the fact that a candidate country has divergences with its neighbours is not in itself a reason for disqualifying that country from the integration process. Such divergences must be settled bilaterally, the North Atlantic Treaty Organisation not having as a purpose its involvement in the solution of the problems of its members[6].

The lesson to be drawn from the statement, which is particularly important for newly established States, is that there is a need to cultivate a habit of consensus seeking.

From this perspective, Romania's conduct has consistently been directed towards the creation of good relations with its neighbours. In the Romanian-Ukrainian bilateral relations, Romania has always respected the OSCE principles of the inviolability of frontiers and of the impossibility of revising borders otherwise than by peaceful means. This conduct is illustrated by the provisions of the 1997 Basic Political Treaty, where, despite the moral wounds of the past, Romania has considered that security and stability of the region should be its prevailing goals. The Romanian-Ukrainian Basic Political Treaty of 1997 thus reaffirms the commitment of the two parties to the principles of the inviolability of the frontiers, of the respect for human rights and to the promotion of a new conduct, in conformity with the democratic values assumed by the parties.

II. The issue of "territorial claims" in the light of the European integration

A similar approach is used within the other great integrative process characterizing the continent. One of the main priority areas identified for the candidate States to the European Union relates to their ability to take on the obligations of meeting the Copenhagen criteria which state that membership requires the ability to take on the obligations of membership, including the adherence to the aims of political union.

At its meeting in Helsinki (December 1999), the European Council stated that the candidate countries must share the values and objectives of the European Union as set forth by the Treaties. In this respect, the European Council stressed the principle of peaceful settlement of disputes in accordance with the United Nations Charter and urged candidate States to make every effort to resolve any outstanding border dispute and other related issues. Failing this, they should within a reasonable time bring the dispute to the International Court of Justice[7].

Romania, as a candidate country, has committed itself to act for strengthening the security and stability in the whole Europe and to intensify the cooperation among States to this purpose Romania has implicitly recognized the importance of the role of the International Court of Justice to maintaining the peace and stability in the world, as the principal judicial organ of the United Nations.

Among Ukraine's stated foreign policy goals is to become a candidate country to the European Union. The special attention that Ukraine enjoys from the European Union is reflected in the European Council

Common Strategy of 11 December 1999 on Ukraine[8], adopted on the occasion of the same Helsinki meeting. In this document, the European Council recognized the importance of the geopolitical situation of Ukraine, situated along the North-South and East-West axes, that gives it a unique position in Europe and a regional importance.

At the same time, the European Council stated that it is in the interest of this country to develop the relations with all its neighbours and to maintain such relations strong and stable. The recourse to the International Court of Justice for the delimitation of the continental shelf and of the exclusive economic zones of the two States in the Black Sea would be in line with the position expressed by the European Union in this respect.

III. The Recourse to the International Court of Justice for solving differences between States

In the context of their bilateral relations, the two parties envisaged this possibility when including in the Agreement by exchange of letters additional to the Basic Political Treaty of 1997 a provision stating that, in case a solution could not be agreed upon by negotiations, each of the parties could seize the International Court of Justice for the delimitation of the continental shelf and of the Exclusive Economic Zones of the two States in the Black Sea.

This document establishes two situations where the ICJ could be seized unilaterally by each of the parties (art. 4, letter h). In case the negotiations shall not determine the conclusion of the Agreement on the Delimitation in a reasonable period of time, each Party could unilaterally seize the ICJ, provided that the Treaty on the regime of the State border has entered into force. However, there is also a possibility of unilaterally seizing the ICJ in case the Treaty on the Regime of State Border is not in force, if it is proven by the applicant that the delay of entering into force of the Treaty is a result of the other party's fault.

Four years have lapsed since the beginning of the negotiations on the Agreement, and the positions of the two parties remain essentially different.

The Agreement additional to the Basic Political Treaty of 1997 sets the principles of delimitation that are to be used by the parties in establishing the line of delimitation of their maritime areas in the Black Sea: the presence of the Serpent's Island, the principle of the median and equidistant line, the principle of equity and the method of proportionality, as they are applied in the practice of states and in the decisions of the international courts regarding the delimitation of the continental shelf and of the exclusive economic zones, the special circumstances of the zone subject to delimitation.

Although the necessity of establishing the delimitation according to these principles is not contested by any of the parties, the main difference between the parties consists in the method of delimitation to be used in application of these principles.

Romania has proposed a method of drawing the line of delimitation in conformity with the practice of States and by the most recent jurisprudence of the International Court of Justice and other courts. It applies the principles of the median and equidistant line between the continental shores of the two countries, and takes into account the presence of the Serpent's Island with its territorial waters belonging to Ukraine. This line can be adjusted in order to satisfy the Ukraine's interests, provided that the result would constitute an equitable solution for both countries.

The Ukrainian side has proposed a delimitation method that finds no correspondent in the practice of States and international jurisprudence. The line proposed is splitting the maritime area between the Romanian shore and the Serpent's Island, creating an unequitable result, since the Serpent's Island is situated some 46 kilometres from the Romanian coast. By this method, the Serpent's Island,

a natural formation of about 17 hectares in surface, would acquire maritime areas comparable to the whole Romanian shore. It should be also noted that Ukraine's claim of maritime areas in the Black Sea is more than twice as the maximum Soviet claim expressed during the negotiations held before 1989.

Additional allegations of territorial claims have been formulated by Ukrainian officials and media, stating that Romania contests the sovereignty of Ukraine over the Serpent's Island. The artificial nature of such allegations is obvious, since in 1997 Romania has accepted that the Serpent's Island belongs to Ukraine.

The delimitation of the maritime spaces in the Black Sea is a problem of great importance and economic relevance, since the natural resources of the sea bed in this area could be very profitably exploited by the oil companies that received licenses from the two States. Such companies have incurred important costs for the exploration of the area, costs that cannot be covered because of the impossibility of exploiting in the area, until the delimitation process between the two countries is not accomplished.

These aspects illustrate the importance of settling the delimitation issue as soon as possible, either by negotiations or by applying the principles of international law, any delay having effects on the prosperity and stability of the whole Black Sea area.

Of course, bilateral negotiations must remain the main formula of solving the divergences on the delimitation of the maritime areas. Romania will continue to make efforts to find a negotiated solution to the problem.

However, it must be noted that the issues involved are mainly technical and legal in nature and consist in finding a method of drawing the delimitation line. From this perspective, in case negotiations could not lead to an equitable result, judicial settlement by recourse to the ICJ is facilitated given the legal and technical nature of the disagreement.

The International Court of Justice, as the principal judicial organ of the United Nations has an outstanding experience in drawing delimitation lines in cases where States were unable to reach a solution by negotiations. Most of its boundary cases are of this type, involving mainly technical problems.

Over the past decade, the impartiality and the professional outstanding record of its judges have greatly contributed to its prestige as a method of peaceful settlement of disputes between States.

Its jurisprudence in the field of maritime delimitation has consistently developed in recent years. The main directions of its practice of delimitation are towards the application of the principle of equidistance, adjusted following the relevant and special circumstances of the area, so that the result should be equitable. These orientations correspond to the highest extent to the position promoted by Romania during negotiations with Ukraine.

Such aspects could constitute arguments favouring the recourse to the International Court of Justice for settling the maritime delimitation issue between Romania and Ukraine.

Of course, given the preponderant legal nature of the dispute, during negotiations, as the most recommendable way of solving this issue, the parties could apply the relevant legal rules, but they have also a more flexible way of reaching a solution, within the standards of international, which is the compromise.

A solution agreed by the parties is completely satisfactory to the international community, whatever its concrete result. It follows that during bilateral negotiations international law is considered and examined, but its use is not authoritative as long as a mutually acceptable solution is obtained[9].

On the contrary, submitting the case to the ICJ would mean that only legal considerations are relevant to the decision-making process, since the function of the court is to "decide in accordance with international law such disputes as are submitted to it"[10]. The Court must decide cases in accordance with international law and not with political influence[11].

Thus, parties to a dispute that seek an important concession from the other side could find negotiations more suitable to their purposes, since a solution by the Court obtained in strict appliance of the norm could be less favourable than the one obtained by compromise. For such considerations, they should act reasonably and in good faith so as to make the negotiation process possible.

Nonetheless, political elements are invariably present in disputes submitted for decision, and the Court has developed an approach to such situations.

In maritime delimitation issues the Court has been constantly preoccupied in drawing lines of delimitation that would lead to an equitable result, and to this purpose by establishing objective criteria to be taken into consideration.

This capacity of the ICJ to find the just solution in a case has contributed to the impressive increase in the cases submitted to it in recent years. One of the reasons that added to its popularity among the members of the international community after the end of the Cold War is the high professional quality of its members.

As far as maritime delimitation issues are concerned, the ICJ is the only court that has such an extensive jurisprudence. Considerable part of this jurisprudence has been developed while judging cases submitted to it by various Western States for settlement of their maritime divergences, such as the USA and Canada[12], F. R. Germany and Denmark, F. R. Germany and the Netherlands[13], Denmark and Norway[14].

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[1] See, for example, Case on the delimitation of the maritime spaces between Tunisia and Libya, ICJ Reports 1981, the sentence of the Arbitral Tribunal between France and Great Britain concerning Sorlingues Islands; on the practice of States, see the Agreement between Saudi Arabia and Bahrein on the Limit of the Continental Shelf (22 February 1958), Agreement between Malaysia and Indonesia on the Delimitation of the Continental Shelf between the Two Countries in the South China Sea (27 October 1969), Agreement between Denmark and Canada on the Delimitation of the Continental shelf between Greenland and Canada (17 December 1973), Agreement between Italy and Greece on the delimitation of the Continental Shelf in the Ionic Sea (24 May 1977) etc.

[2] http://www.nato.int/docu/basictxt/enl-9502.htm

[3] William Hopkinson, *Overcoming Diplomatic Inertia and Constraint in the Resolution of Major Conflict*, in *Peaceful Resolution of Major International Disputes*, Edited by Julie Dahlitz, United Nations, New York and Geneva, 1999, p. 80.

[4] Charter on a Distinctive Partnership Between the North Atlantic Treaty Organization and Ukraine, Madrid, 9 July 1997.

[5] Charter of the United Nations, Art. 33 (1).

[6] *Robertson, între Ucraina şi România*, Ziarul *Gardianul*, 26 noiembrie / 2002, p. 4

[7] Presidency Conclusions, Helsinki European Council, 10 and 11 December 1999, para. 4.

[8] European Council Common Strategy of 11 December 1999 on Ukraine (1999/ 877/ CFSP).

[9] Malcolm N. Shaw, *Peaceful Resolution of 'Political Disputes': the Desirable Parameters of ICJ Jurisdiction*, in *Peaceful Resolution of Major International Disputes*, Edited by Julie Dahlitz, United Nations, New York and Geneva, 1999, p. 53.

[10] Art. 38 (1) of the Statute of the International Court of Justice.

[11] Art. 36, Statute of the International Court of Justice; See also Judge Weeramantry, dissenting opinion, Lockerbie case, ICJ Reports, 1992, p. 3, 56.

[12] Delimitation of the maritime Boundary in the Gulf of Maine case, Canada vs. USA, 1986, ICJ Reports, p. 246.

[13] North Sea continental Shelf case, F. R. Germany vs. Denmark, F. R. Germany vs. the Netherlands, ICJ Reports 1969.

[14] Maritime Delimitation in the Area between Greenland and Jan Mayen, Denmark vs. Norway, ICJ Reports 1993.