

A LEGAL SURVEY OF SOME OF THE AEGEAN
ISSUES OF DISPUTE AND PROSPECTS FOR A NON-JUDICIAL
MULTIDISCIPLINARY SOLUTION.

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The Maritime Boundaries and the Breadth of Territorial Waters in the Aegean as well as the Aegean Continental Shelf disputes concern the Aegean Seas two coastal states: Turkey and Greece. Turkey perceives each as a genuine issue requiring examination and resolution. Greece's position has been that the only legitimate dispute that needs to be settled between Greece and Turkey in the Aegean is the delimitation of the Aegean continental shelf. This paper demonstrates that by virtue of the existence of legitimate arguments in Turkey's favor regarding each issue, all of the issues ought to be settled. A favored method of settlement would be bilateral negotiations resulting in a durable, nonjudicial, multidisciplinary solution.

I. ISSUES OF DISPUTE¹

A. Territorial Seas

Turkey and Greece presently claim territorial waters of 6 nautical miles (nm) in the Aegean. This leaves nearly one-half of the Aegean as high seas, international waters to be utilized freely by Turkey, Greece and third States. Because Greece maintains sovereignty over most of the islands in the Aegean, over four-fifths of the territorial seas in the Aegean are Greek.

Greece is a party to the United Nations Convention on the Law of the Sea² (the UNCLOS), which grants signatories the right to claim 12-nm territorial seas. Prior to the ratification vote, Greek Deputy Prime Minister George Mangakis told his Parliament that Greece will exercise its rights whenever its interest dictate. Upon ratifying the UNCLOS, Greece declared its intention to extend its territorial sea at an appropriate time and according to its national strategy³. Should Greece expand its Aegean territorial sea claim to 12-nm Turkey, according to its domestic law and traditional practice, would do the same. In June 1995, the Turkish Parliament enacted a law authorizing the Turkish Government to employ all necessary measures in response to any possible extension by Greece of its Aegean territorial waters beyond 6-nm. Thus, latent conflict rests in any potential change from Greece's present 6-nm claim. Clearly, a unilateral extension would create a severe crisis with fearsome consequences.

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¹ This paper is a shortened version of a more comprehensive paper bearing the same title.

² December 10, 1982, U.N.Doc. A/CONF. 62/122, reprinted in 21 I.L.M. 1261, in force since November 16, 1994.

³ Even before ratification, President Clinton sent a letter to the Turkish President and Prime Minister indicating that he had received reliable assurances from Greece that the territorial sea would not be extended.

An extension of territorial sea claims to 12-nm would redistribute the portion of the Aegean basin controlled by each State. The current 6-nm limit renders 43.68 percent of the basin's waters under Greek control and 7.47 percent under Turkish control. A change to 12-nm limits would augment the area under Greek control to 71.53 percent of the basin, while Turkey's share would increase only slightly to 8.76 percent. The practical effect of this would be to reduce the area of high seas dramatically from 48.85 percent of the basin to 19.71 percent⁴. In effect, this would turn the Aegean into a Greek mare clausum, or closed sea.

Though Turkey enjoys a 2,820-km coastline along the Aegean, expanding to 12-nm the territorial seas around the numerous Greek islands laying close to the Turkish mainland would: (i) result in the isolation of Turkey's Aegean ports, forcing ships on the high seas wishing to enter Turkey's Aegean ports or the Turkish Straits to pass through Greek territorial waters; (ii) impinge upon Turkey's ability to defend its western shores, as Turkish Naval vessels would be forced to cross Greek territorial waters to enter the Aegean or pass to from the Aegean to the Mediterranean; (iii) make access to parts of the Aegean by Turkish military aircraft subject to Greek permission⁵; (iv) deny Turkey all but the slimmest Aegean continental shelf and exclusive economic zone; (v) deny Turkey access to subsurface resources; (vi) deny Turkey sea-based scientific and tourism opportunities which are currently available to Turkey and Greece on an equal basis; and (vii) destroy the present de facto 6-nm territorial sea boundaries between the Turkey and Greece in the Aegean that have existed for decades and have proven sensible and durable.

A unilateral extension of territorial waters in the Aegean, though permissible under Article 3, is not favored by the UNCLOS for several reasons. First, the 12-mile territorial sea limit envisaged in Article 3 is neither compulsory nor applied automatically. No compelling authority points to the opposite. Second, Article 25 permits a coastal State such as Turkey the right to protect its land, territorial waters and internal waters. Thus, Turkey's right to protect itself in any manner not violative of the United Nations Charter (the UN Charter) or other aspect of international law is preserved⁶. Although the movement of Turkish warships may be impinged by an extension of

⁴ These figures are derived from Turkish maps. Alternate published figures yield similar results.

⁵ When signing the UNCLOS, Greece reserved the right to determine which of its straits would be subject to transit passage, limiting all others to innocent passage. Greece's declaration was most likely issued to prevent Turkish aircraft from flying through straits near the Greek mainland, particularly the Kea Strait southeast of Athens. The reservation runs counter to the UNCLOS in that it violates Article 38(1), the so-called Messina Exception, which provides that "if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route . . . of similar convenience . . ." The Kea Strait is just such a case, raising the question of why Greece continues to persist in its approach. More compelling, the UNCLOS, by its own terms, prohibits reservations. Greece has attempted to circumvent this by labeling the reservation a declaration. However, the UNCLOS prohibits declarations that purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State. That is precisely what the Greek declaration does vis-a-vis the transit passage regime.

⁶ Article 29 requires warships that do not comply with the laws and regulations of the coastal State to leave the territorial sea immediately. Articles 32 and 35, however, preserve the immunities of

territorial seas from 6 to 12-nm, the level of impingement, and indeed the totality of the circumstances, would be viewed in light of this article and the U.N. Charter.

Third, the UNCLOS requires in complex cases exemplified by the Aegean to be negotiated and solved based on mutual consent. To this end, Article 15 of the UNCLOS imposes an obligation for states to take into consideration the historic title and special circumstances of their case in delimiting territorial waters. Then, Article 300 stipulates that obligations assumed under this Convention must be fulfilled in good faith, and that the rights, jurisdiction and freedoms recognized in the Convention must be exercised in a manner that does not constitute an abuse of right. It is Turkey's belief that a unilateral extension of territorial seas from 6 to 12-nm by Greece would constitute an abuse of right and would ignore the historic responsibilities of coastal states in the Aegean as ratified in numerous treaties prior to the UNCLOS and in the UNCLOS itself.

Finally, Part XV of the UNCLOS covers the settlement of disputes. As an initial matter, Article 279 places the obligation on all parties to settle disputes in a peaceful manner. Following that, a comprehensive dispute settlement regime is offered. This regime defers, however, to prior bilateral or regional agreements that may produce a binding decision. As a non-party to the UNCLOS, unless Turkey explicitly consents, it will not be subject to the UNCLOS' dispute settlement regime. Nevertheless, a similar regime exists, established according to the UN Charter, to which both Turkey and Greece are parties -- the ICJ. Moreover, the UNCLOS strongly urges parties to seek binding bilateral solutions external to the UNCLOS itself.

Thus, although Greece may make a prima facie argument that it may unilaterally extend its territorial waters to 12-nm, pursuant to both the UNCLOS and customary international law, Turkey may posit that such would constitute an abuse of right according to Article 300 of UNCLOS. Turkey remains reluctant to admit that Greece has the right to extend its territorial seas to 12-nm. Yet Article 300 strongly implies that to apply its strictures, one must first acknowledge that the right exists, that Greece has the right to extend. Moreover, Turkey must also contend with the fact that as a non-party to the UNCLOS, its ability to assert a violation of its provisions is limited.

Regardless of any legal justification pro or con, unilateral extension would demonstrably increase the likelihood of hostilities. Turkey's security and commercial concerns are too significant to be swept away by an overreliance on Article 3 of the UNCLOS. It would also seem reasonable for Turkey to object to being limited to innocent and transit passage through the Aegean.

Turkey's concerns are shared to a large extent by NATO, which regularly conducts exercises in the Aegean as well as relies upon unimpeded passage through the area for operations. If Greece unilaterally extends, many NATO activities in the Aegean would be subject to Greek acquiescence. The United States harbors similar concerns.

Given such considerations, the current scheme in the Aegean ought to be maintained because it

warships, allowing them to avoid the jurisdiction of any State other than the flag State. Article 111 provides that the hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that state. This right ends once the ship enters the territorial waters of its own State or a 3rd State.

benefits all parties. More importantly, it ought to be solemnized by agreement.

B. Maritime Delimitations and the Aegean Continental Shelf

Because sovereignty over territorial seas and airspace proceeds directly from sovereignty over land, the larger dispute in the Aegean is the one discussed above -- who owns that which pokes above the surface of the water. For the most part, the parties have refrained from openly disputing the precise methods of establishing maritime boundaries in the Aegean. Nevertheless, a latent conflict rests here, too, as the territorial seas of Turkey and Greece directly abut one another in numerous places, whether under the current 6-nm claim or the potential 12-nm claim. Moreover, it has become necessary to fix boundaries other than territorial seas to address the multitude of other interests at stake in the Aegean.

In early 1976, Turkish parties conducted a series of scientific and geological research missions on the Aegean continental shelf beneath international waters. Soon thereafter, Greece applied to the United Nations Security Council and the ICJ to prevent Turkey from further exploration, claiming absolute right to the entire continental shelf⁷. On August 10, 1976, Greece requested that the Security Council hold an urgent meeting to address what it considered, repeated flagrant violations by Turkey of the sovereign rights of Greece upon the continental shelf in the Aegean. The same day, Greece instituted proceedings in the ICJ against Turkey in order to confirm Greece's exclusive rights to explore and exploit the continental shelf of the Aegean. With the ICJ application, Greece filed a request for interim measures to prevent Turkey from conducting further exploration until the issue before the ICJ was resolved.

On August 25, 1976, the Security Council issued Resolution 395 calling upon the parties to resume direct negotiations over their differences, while offering the ICJ as a potential arbiter. On September 11, 1976, the ICJ denied the Greek request for interim measures. The Court also decided that areas beyond the territorial waters of each state, were in fact areas in dispute⁸. On November 11, 1976, Turkey and Greece entered an agreement in Bern to negotiate the delimitation of the continental shelf. Turkey and Greece also undertook to refrain from any initiative or act concerning the Aegean continental shelf. The 1976 Bern Agreement is still valid and its terms continue bind both countries. Turkey continues to favor a negotiated settlement on this dispute.

Final resolution has been elusive. When Greece announced in 1987 that it planned to begin drilling for oil near the island of Thassos⁹, Turkey announced in that it was going to send the Sismik I also to conduct oil explorations. Turkey further protested that the Greek plans would violate of the

⁷ As the continental shelf crisis flared and in the wake of the Cyprus intervention, the Greek Foreign Minister suggested on April 17, 1976, that Turkey should unconditionally state that war between the two countries is inconceivable. He also asked that Turkey agree to bring disputes concerning the interpretation of the Lausanne and Paris Peace Treaties before the ICJ.

⁸ In 1978, the Court decided that it did not have subject matter jurisdiction to hear the Greek application.

⁹ According to some studies, there are at least six oil basins in the Aegean continental shelf, the largest near the island of Thassos in the northern Aegean. Greece estimates that the overall oil potential of the Aegean is significant and could rival that of Alaska and Malaysia.

1976 Bern Agreement, which had called for a moratorium on unilateral exploration and exploitation in the contested area until an agreement could be reached. Greece responded that the agreement had become inoperative through the passage of events¹⁰. Meanwhile in March 1987, Greece and Turkey again exchanged threats after a Turkish seismic vessel arrived in disputed waters to prospect for oil. Greece placed its armed forces on alert. The crisis was averted by intense American and NATO pressures, and both sides made certain concessions.

As discussed earlier, present claims of both sovereignty and territorial seas in the Aegean are derived in large measure from a series of agreements, which resulted in the dismantling of the Ottoman Empire and the establishment of the Turkish Republic. These agreements, though, fall well short of establishing international maritime boundaries. The 1923 Lausanne Peace Treaty lacks any description of maritime boundary delimitation between the ceded islands and the Turkish coast. Maps prepared by the International Boundary Commission in the years following the Lausanne Treaty provide lines of allocation, or so-called international boundary line[s]. Though it was the evident purpose of the Boundary Commission to settle the Greek and Turkish frontiers insofar as they indicated ownership of islands and islets on either side of the boundary, these lines of allocation function poorly as international maritime boundaries. Likewise, the 1932 Treaty between Italy and Turkey draws boundaries primarily to settle the ownership of islands, islets and rocks, but not to establish international maritime boundaries.

The international law concerning the definition of international maritime boundaries has developed highly since the era of those treaties and reveals a cogent system for determining maritime boundaries quite different from the ones evinced in these earlier agreements. When applying contemporary international legal standards for maritime boundary delimitation to the inadequate methods employed in the earlier treaties, which were primarily concerned with land boundary delimitation, the results can be incongruous. For instance, a Greek island may appear to rest in a Turkish territorial sea or the converse. This disturbing prospect must be addressed. At a minimum, incongruities between sovereignty over an island and its surrounding seas, otherwise known as enclaving, should be precisely settled and subsequently recorded in a lasting manner that will preclude future dispute.

Although maritime delimitation principles have evolved since the Lausanne era in a manner such that maritime boundaries should be simpler to establish, following the North Sea Continental Shelf Cases (North Sea cases) beginning in the late 1960s, the rules in fact became cloudier. The case law in particular demonstrates confusion over maritime delimitation around islands and the waning of the principle of equidistance. Courts have since been able to avoid the problems raised in the North Sea cases by resorting to the concept of proportionality of maritime sovereignty to coastal lengths.

The North Sea cases begin with the ICJ establishing the general rule of equidistance, a rule that was incorporated in Article 6 of the 1958 Geneva Convention on the Continental Shelf, modified by the

¹⁰ The situation took on international dimensions when Prime Minister Papandreou intentionally briefed ambassadors from the Warsaw Pact countries on the crisis before doing so with those from NATO nations. Papandreou cast blame for the situation on NATO and ordered operations suspended at the United States communications base at Nea Makri.

exception of special circumstances¹¹. Examples of such circumstances are where the coastline is of an exceptional configuration and where there exist a large number of small islands or navigable channels. The Aegean fits this description.

The ICJ began the North Sea cases era by citing three basic instructions for the delimitation of the continental shelf: (1) negotiate in good faith to reach an agreement; (2) do not encroach on natural prolongation; and (3) apply equitable principles, taking all circumstances into account and employing appropriate methods, including equidistance. Together, these formed an equitable doctrine for the North Sea. Many commentators oppose equitable decisions; they believe that they force the courts to make arbitrary policy rather than merely review, interpret or apply policy. Indeed, it has long been held that equity's role should be reserved for a limited number of situations. Nevertheless, within the equity concept rules emerged. The simplest rule is that a State can only have maritime sovereignty if it possesses a coastline, and the logical extensions of this notion. From there, one examines the geographic peculiarities of the situation and considers whether it would be more equitable to favor equidistance versus natural prolongation, and how to weigh such factors as natural resources and coastal length. The North Sea cases, for example, weighed most heavily the relative coastal lengths.

In the post-North Sea cases decisions the ICJ continued to refuse to apply consistent rules. Indeed, in the Anglo-French Arbitration and the Tunisia-Libya case, though the ICJ said it would find objective principals to determine which circumstances are relevant to the ultimate equitable consideration, in each of these cases the ICJ applied equity to determine those principals. Thus, the ICJ lapsed back to a purely equitable inquiry.

What is left is a seemingly arbitrary morass. In the North Sea cases and the Anglo-French Arbitration the principle of equidistance was applied as a juridical starting point for the application of equity. In the Gulf of Maine case, involving the single boundary of the continental shelf and the fishery zone between Canada and the United States, the U.S. argued issues of natural prolongation and historical fishing rights, distinguishing also between primary and secondary coasts. Canada proposed instead equitable equidistance, excluding certain U.S. coasts, acquiescence and economic repercussions. The ICJ rejected all of these contentions, yet could find nothing specific in international law justifying the equitable criteria and methods. The ICJ chose to provide no systematic definition of the relevant equitable criteria. They did, however, apply the following theories: (a) the land dominates the sea; (b) divide areas of overlap equally; (c) recognize non-encroachment and no cut-off; (d) apply proportionality to the length of coast lines; (e) preserve vital existing fishing patterns; (f) optimize conservation and management of living resources; and (g) draw lines which reduce the potential for future disputes¹².

After similarly fumbling through the Guinea-Bissau and Libya-Malta cases without enunciating a clear rule, the ICJ finally settled on the current scheme by which equidistance is given greater weight, while preserving the notion of proportionality. Equity seems to have been demoted and

¹¹ April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 449 U.N.T.S. 311

¹² There is no apparent connection between these criteria and what is known as equity. Their content is different from that of the traditional equitable principles, and their function is neither to override nor to remedy the unintended effects of a rigid rule.

coastal geography has thus become the prime factor. Considerations such as the size, shape or depth of the land territory behind the coast, or whether the coastal land territory is entirely surrounded by water (island), or whether it belongs to a landmass (mainland) have largely been bypassed. The idea of the physical natural prolongation for the continental shelf and, by extension, the exclusive economic zone has also been abandoned. Thus, the characteristics of the ocean floor no longer count. Where distance counts, then, it is measured not on the seabed, but on the surface of the water.

To this general regime a series of refinements have been made. First among them is the renewed importance of equidistance. In the *Jan Mayen* case the ICJ stated, that the median line occupies an important place in the practice of states. The ICJ also rejected the notion that proportionality requires a direct and mathematical application of ratios. Rather, the court determined that when the shares are “so disproportionate . . . it has been found necessary to take this circumstance into account in order to ensure an equitable solution.” Thus, equidistance and proportionality appeared only as a moderating factor to test the results reached under other geographical methods.

Still other factors need to be considered such as the location of natural resources and no-cut-off. The case law shows that nations may jointly share resources that bstride a boundary. In effect, the location of natural resources in the continental shelf or EEZ is irrelevant to their delimitation. When, however, resources happen to be located on or about the equidistance/proportionality line, there is some discretion to adjust the line to reflect the internal considerations of delimitation overall. The no-cut-off idea merely says that a boundary decision should not result in a coastal State being prevented access to its ports. No-cut-off is an issue for Turkey as many of Turkey's Aegean ports are vulnerable to being cut off from direct access to the high seas should Greece, for example, claim 12 nm territorial seas.

A major problem in synthesizing the equidistance and proportionality methods is that because either by itself can produce a total delimitation, some type of balancing and prioritizing between them is necessary. Further complicating the task is the different nature of the two methods. Equidistance is rather concrete and geometric while proportionality is less reducible to sizes and lines. The case law indicates that priority ought to be given to equidistance because of several inadequacies in proportionality, among them its poor applicability to opposing coastlines such as Greece and Turkey's. Proportionality, by contrast, fares much better with adjacent coastlines. In recent cases, the ICJ has given priority to equidistance. It has only resorted to a correction by proportionality if the result between coasts and shares obtained under equidistance in the particular region or sector is in excess of twice the coastal ratios in that region or sector. The UNCLOS at Article 83(1) provides that, the delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

Of greater interest to Turkey is the status of island coastal fronts. While international agreements and case law recognize the equal status and rights of all coastal territory, including that of islands, in some cases minor or small islands are somehow given lesser effect. For instance, while the UNCLOS explicitly confirms that islands are entitled to a territorial sea of their own, with no equitable limits placed thereon, the UNCLOS does not include among such islands having a full

coastal front rocks which are incapable of supporting human habitation. This would appear to be the case for Kardak/Imia. Indeed, it raises still another issue: defining precisely what is an island for delimitation purposes. The time is ripe to search for and establish such guidelines.

When islands are mentioned in agreements, they tend to enjoy equal status with other lands. Both Article 1 of the Geneva Convention and Article 121(2) of the UNCLOS recognize that islands enjoy equal status and equal continental shelf and exclusive zone maritime rights with any other configuration of territory. UNCLOS does say, however, that distant islands project no economic zone or continental shelf of their own. The UNCLOS does not provide much assistance; it does not specifically address the maritime rights of islands in the context of a semi-enclosed sea. Thus, one can surmise that islands situated near another state are not just special circumstances sitting on another State's continental shelf¹³. They may in fact be entitled to full status either on their own. In the case law, in every instance where an island was by some means given lesser effect, or status below equidistance, a proportionality adjustment was made. In no case was an island of comparable coastal dimensions with a mainland treated differently. The share of every island, however, like that of any other coastal territory, is affected by applicable considerations in the general geographical context. Thus, whereas the Aegean is concerned, one would expect equidistance to be adjusted by proportionality.

Negotiated settlements on maritime delimitations have not produced a stable body of international law because the settlements have often reflected considerations beyond those now favored by the ICJ. Thus, although it seems appropriate that equity or subjective principles ought not form the basis of ICJ maritime boundary decisions one must respect that the same principles can form the basis of durable bilateral or multilateral non-judicial settlements of boundary disputes. Turkey believes equitable principles should be considered, whereas Greece wishes to rely more on equidistance, presently the ICJ's preferred criterion. Thus, as the newly evolving principals tend to favor Greece, it would be to Turkey's advantage to keep this issue on the negotiating table and out of the hands of the ICJ. One available conclusion may be that Greece and Turkey would be able to reach a more durable and comprehensive solution if they do not submit their Aegean Sea boundary issues to the ICJ.

II. PROSPECTS FOR A NON-JUDICIAL, MULTIDISCIPLINARY SOLUTION

Before the parties arrive at the negotiating table to ponder a non-judicial solution, there must be some sort of agreement on what is in dispute. Turkey's starting point is that all of the issues thus far discussed are, at least in theory, subject to bilateral, or even multilateral, non-judicial resolution. Greece has been more or less consistent in asserting that only the continental shelf issue may be discussed. Greece considers all other issues unilateral Turkish claims. If indeed any other issues exist, Greece suggests, then perhaps they may be considered independently by the ICJ. More precisely, Greece characterizes the issues as purely legal whereas Turkey views them as also having important political components.

¹³ Concerning islands, the UNCLOS has adopted an approach favoring Greece. While it refers to pursuit of an equitable solution in Article 83, it does not call for the application of equitable principles. Based upon this outcome, it is believed, Turkey elected not to sign the UNCLOS.

A. Whether Issues are In Dispute

Recent signs of rapprochement notwithstanding, the positions of the parties toward the issues have not changed. Thus, there seems to be little room to initiate a dialogue. However, I would posit that as long as one party insists there is a dispute, there indeed exists a dispute that both parties ought to address. When Greece asserts that all issues but the continental shelf issue have been raised unilaterally by Turkey, it should be taken merely as a statement of Greece's position in the dispute, that it prefers the status quo as viewed from Athens.

Regardless, one cannot force another to the negotiating table by mere semantics or for that matter by proving the mere existence of a dispute. Rather, there must be: (1) recognition of the existence of differences of opinion that create tension; (2) sincere desire to deflate this tension; and (3) willingness on the part of both sides to make doctrinal changes and other compromises which would produce a durable solution.

B. Functional Theory of Management

Contrary to Greek assertions, the numerous issues in the Aegean are intricately bound together. For example, one cannot solve the issue of Aegean airspace without addressing the limits of each nation's territorial seas. One cannot solve the territorial seas issue without addressing the sovereignty over disputed islands, islets and rocks. Thus, the entire management of the Aegean basin must be examined if a durable solution is to be found. The prime concern from which all other issues would be considered will be the settling of maritime boundaries in the Aegean.

To date, approximately 120 maritime boundary settlements have been registered with the United Nations. The majority of them rely primarily on geography, attributes of the land bordering the waters subject to the agreement. This is in keeping with the UNCLOS general preference for expanded coastal State jurisdiction. Several agreements, however, consider the full variety of functions of the maritime environment such as shipping, military use, overflight, fishing, tourism, research, mining, and habitation by indigenous islanders. Among those relying on something other than geography are the Jan Mayen Conciliation Case, discussed earlier, the Gulf of Maine Case, and the Torres Strait Treaty between Australia and Papua New Guinea¹⁴.

In the Gulf of Maine case, the United States and Canada negotiated a functional fishery management regime in an effort to avoid the larger maritime boundary dispute. U.S. fisherman opposed the result and the agreements collapsed, leaving the U.S. and Canada no choice but to enter negotiations strictly on the boundary question. When negotiations failed, the ICJ was given the case and eventually established a line. The ICJ's line, however, has not proven workable

¹⁴ In the Libya-Malta case the ICJ took a functional approach after refusing to permit Italy to intervene in the case. Though the court referred to the interests of third States and addressed the broader geographical context, it is the boundaries themselves were delimited based on the geographical relationship between the two competing states. If the Court truly had been open to a functional solution, it would have permitted Italy to intervene and would have considered facts other than geography.

because it did not solve the resource management problems. The United States and Canada are considering taking another look at the management issues. A functional solution may prevail, but first it required a resolution of the boundary dispute by unitarian, not functional, rules.

C. The Australia-Papua New Guinea Agreement

The Australia-Papua New Guinea Agreement, otherwise known as the Torres Strait Treaty¹⁵, represents an inventive solution to a complex maritime boundary problem. The Torres Strait Treaty, negotiated and signed by Australia and Papua New Guinea in 1978, should be favored by Turkey as an example of a functional approach and by Greece as an example of a method to permanently reduce tensions and forestall armed conflict. The Torres Strait Treaty provides a special negotiation system by which both Turkey and Greece may protect their interests through a bilateral agreement. Moreover, the Torres Strait Treaty establishes a superb precedent for the position that countries are bound by the maritime territorial limits to which they solemnly agree with a another party, despite provisions such as Article 3 of the UNCLOS which would permit a State to extend those limits.

The Torres Strait divides southwestern Papua New Guinea from northern Australia's Cape York peninsula. The strait is studded with small and medium-sized islands inhabited by nationals of both States as well as indigenous peoples who maintain little attachment to either State. Many of the small islets, reefs, and cays are uninhabited. The islands are somewhat evenly distributed throughout the strait. All of the islands, including the major inhabited ones are under Australian sovereignty except for a few small islands lying directly off the Papuan coast. Many of the Australian islands lay within several hundred meters of the Papuan coast. In these important respects, the Torres Strait is analogous to the Aegean.

The Treaty establishes separate boundaries for seabed and fisheries jurisdictions and makes special provision for residual jurisdiction. In general, the two lines defining seabed and fisheries jurisdiction are identical. However, in the Torres Strait area itself, away from the mainland coasts, the lines diverge. Seabed jurisdiction under the treaty includes sovereign rights over the continental shelf and jurisdiction over low-tide elevations. In the central part of the strait, the seabed line passes to the south of a number of Australian islands, which have only a 3-mile territorial sea around them. Thus, a number of Australian enclaves were created within Papuan seabed jurisdiction.

The seabed boundary line achieves a reasonable balance between the rights of Papua New Guinea, based on its mainland coast, and the rights of Australia, based on its ownership of the majority of the islands scattered throughout the Strait. As a modified median line, the boundary conforms modestly to the current practice in international law. Had every island been granted a 12-nm territorial sea, the entire strait would have become Australian. The compromise resulted in Australia retaining jurisdiction over a majority of the seabed, but with Papua New Guinea having jurisdiction over a relatively large portion of the seabed north of the Strait.

¹⁵ For a complete discussion of the Torres Strait Treaty, see, Burmester, *The Torres Strait Treaty: Ocean Boundary Delimitation by Agreement*, 76 A.J.I.L. 321 (1982).

The fisheries boundary line, though largely identical to the seabed boundary line diverges only to provide fisheries for those Australian islands just off the Papuan coast. This preserves the islanders' ability to maintain their lifestyle and not feel cut off from Australia.

The residual jurisdiction applies to areas not included within the fisheries or seabed boundaries. The functions considered there are preservation of the marine environment, scientific research, and the production of energy from the water, currents and winds

Sovereignty over certain islands in Torres Strait became an issue of dispute that affected the delimitation of maritime areas. The Treaty, however, entirely disposes of any latent conflict. Article 2, provides that Papua New Guinea recognizes the sovereignty of Australia over more than a dozen named islands north of the seabed line, and all islands lying between the mainland of the two countries and south of the seabed jurisdiction line. In a reciprocal manner, Australia recognizes the sovereignty of Papua New Guinea over all the other islands that lie between the mainlands of the two countries and north of the seabed line other than those specified. To eliminate all possibility of disagreement it also states that north of the seabed boundary, Australia has sovereignty only over those islands specified in a list and no others. This also helped determine the status of the numerous reefs and shoals and low-tide elevations. Finally, the provision relating to sovereignty over islands also included a provision whereby Australia recognizes Papuan sovereignty over 4 specific islands concerning which Australia had been unable to produce adequate evidence of prior sovereignty, despite a prior belief that they were under Australian sovereignty. This provision superseded all prior agreements and settled firmly and completely the issue of sovereignty over any possible land masses in the area.

Among the provisions addressing the status of islands, the parties agreed to limit their territorial seas. Though Australia had only claimed a 3-nm territorial sea compared to Papua New Guinea's 12-nm claim prior to the treaty, Australia now limits the territorial sea around its islands north of the seabed line to 3 miles. For Australia's northernmost islands sitting just off the Papuan mainland, the territorial sea has been apportioned according to a specific method provided in an annex to the treaty. Papua New Guinea consequently has agreed not to extend its territorial sea into certain areas. This seems fair as the majority of territorial seas remain Australian due to the overwhelming number of Australian islands and the consequent seabed and fisheries lines drawn to accommodate them. Moreover, during treaty negotiations Australia refrained from requesting 12-nm territorial seas in recognition of the fact that such a claim would effectively have turned the Torres Strait into an entirely Australian jurisdiction, much as a unilateral Greek expansion to 12-nm would turn the Aegean into an entirely Greek jurisdiction.

The Torres Strait, like the Aegean, is a major international shipping route. Since Australia has sovereignty over all the islands in the Strait, the security and control of the shipping route lies with Australia. Still, there remains a right of innocent passage through the territorial seas of the islands. Furthermore, the Torres Strait, like many passages in the Aegean, qualifies under the definition in the UNCLOS as an international strait through which a right of transit passage would exist. Nevertheless, the treaty ensures Papua New Guinea its navigational and other rights through the area.

Thus, the treaty includes special provisions on navigation for both vessels and aircraft within the

Protected Zone. There, vessels and aircraft are accorded the ordinary rights applicable to the high seas, subject to certain limitations, for example, for the prevention and reduction of pollution, and for compliance with the immigration, customs, and fiscal laws of the other party.

Another concern of Papua New Guinea was the prospect of certain of its ports being denied direct access to the high seas in the strait. Consequently, the treaty guarantees a right of passage through routes used for international navigation. This right is analogous to transit passage through international straits as described in the UNCLOS. Because of the security provided by the navigation provisions, it no longer became important for Australian seabed jurisdiction or territorial seas to reach nearly to the Papuan coast. Likewise, it no longer became important for Papua New Guinea to assert sovereignty over certain traditionally Australian islands near its coast.

In sum, the Torres Strait Treaty established, not one, but several maritime boundaries governing distinct political and economic interests. The net agreement may be summarized as follows:

1. The treaty establishes a modified median line for maritime delimitation between the southern coast of Papua New Guinea and the northern coast of Australia. This median defines the seabed and fisheries jurisdiction between the two states. As for that area of the maritime median that includes the central part of the Torres Strait, the treaty carves out a Protected Zone. Within the Protected Zone, a modified median line defines the various political and economic interests of the parties through distinct boundary lines for each interest. The conventional rules governing the sea have been suspended for the purpose of satisfying the political and economic interests of Australia and Papua New Guinea in a just and equitable manner. Both parties agree to a 3-nm territorial sea delimitation. The islanders continued to enjoy the representation of their historic government, Australia. And, the islanders continue to exploit the natural resources of the seas around them upon which they depended for their livelihood. Papua New Guinea extended its maritime and seabed jurisdiction to half of the Torres Strait.
2. Within the Protected Zone, the treaty recognizes Australia's sovereignty over the overwhelming number of the islands and their inhabitants.
3. The treaty limits the territorial sea jurisdiction to 3-nm for Australia's Islands as well as that part of the southern coast of Papua New Guinea that fall within the Protected Zone. Papua New Guinea's 12-nm territorial sea does not impact the strait.
4. Related to the issue of sovereignty, the treaty recognizes Australia's duty to protect the livelihood of the islanders who depend on the natural resources of the sea. The treaty provides Australia with fisheries resources jurisdiction over the sea around the islands. Of particular interest to both parties, in a section of the Protected Zone holding Australian islands on Papua New Guinea's side of the median line, Papua New Guinea agrees to extend Australia's fisheries resources jurisdiction north of the median boundary, up to Papua New Guinea's coastal 3-nm territorial sea boundary. Yet, the treaty provides that Australia's fisheries resources jurisdiction not intrude upon Papua New Guinea's continental shelf jurisdiction.
5. The treaty defines the seabed in general as the continental shelf. The treaty defines the seabed jurisdiction of the islands according to their territorial seas, i.e., 3-nm. The seabed

beyond the islands 3-nm zones and within Papua New Guinea side of the median line, is under the full seabed jurisdiction of Papua New Guinea.

III. CONCLUSION

Although the Torres Strait Treaty is primarily a delimitation agreement, it demonstrates the necessity of addressing all related issues to arrive at a maritime boundary solution. Though drafted to meet the peculiar geographic and political circumstances of the Torres Strait, the treaty remains consistent with the general principles of international law. It relies on a median line modified to account for the predominance of one States islands near the coast of the opposite State. Moreover, as the UNCLOS does not preclude an agreement among the parties to territorial seas of less than 12-nm breadth, the treaty shows how States can agree to lesser territorial seas in exchange for other concessions. The successful conclusion by agreement of the Torres Strait Treaty serves as a valuable precedent for other negotiators faced with similarly complex problems.

The Aegean Sea lends itself well to a Torres Strait-style, all-purpose system of boundaries that integrates conventional maritime medians with protected zone concepts and other modifications. Unfortunately, the Aegean lacks coastal States who agree on the nature and scope of the debate. Indeed, the coastal States bordering the Torres Strait had a special relationship that allowed them to productively consider all of the pertinent issues. In addition, one of the parties, Australia, expressed from the outset a willingness to make concessions about the sovereignty of certain islands in the strait and the weight to be given to that sovereignty. This was akin to the settlements reached in the Paris Peace Treaty and the Lausanne Straits Regime whereby sovereignty over islands was transferred in exchange for a promise that they would be demilitarized.

To borrow an aphorism from the scientific world: nature abhors a vacuum. And so does the law. Greece in some circumstances has presumed a conclusion when none was warranted in the case of islands of undetermined status. The way to fill the vacuum created by these issues left long unresolved in from treaties negotiated earlier this century is by creating durable bilateral solutions. These solutions, be they a series of individual agreements or an integrated document along the lines of the Torres Strait Treaty, should reflect the present equality in bargaining position of Turkey and Greece.

Earlier this century, the positions were vastly different. For example, the debilitating Treaty of Sevres after World War I was an inequitable surrender forced upon a vanquished Ottoman Empire. After it proved unworkable and the Republic of Turkey was born, the Treaty of Lausanne replaced Sevres. The Lausanne Peace Treaty reflects a Turkish Republic recovering from a difficult war of independence and just happy to be alive. The concessions it contains probably would not have been given today. Turkey does not wish to revisit the Lausanne Peace Treaty; rather, it wishes to complete what it left undone. The Montreux Agreement and Paris Peace Treaty reflect a stronger, more confident Turkey. Yet, Greece, with an active and wealthy diaspora and numerous foreign State benefactors continued to occupy the vacua left by prior agreements until the era of the Cyprus conflict.

Now the two states may look eye to eye. Greece must become accustomed to a Turkey that is on

equal footing. Correspondingly, Turkey has to learn to deal with its past neglect of certain issues. It is often said Greek-Turkish animosity is indelibly etched on the national psyche of both countries. True, Greece celebrates the outbreak of their struggle for liberation from the Ottoman Turks in 1821, while Turkey celebrates Mustafa Kemal Atatürk's victory over the Greeks in 1921. Nonetheless, to blame the two States inability to yet reach a durable solution on psychology is to revel in excuses.

Though Greece proposes to limit the debate with certainty and indignation of the sort the U.S. would pronounce were the Russian Federation to suggest that Seward did not properly purchase Alaska and therefore it still belongs to Russia, it cannot ignore that Turkey may make plausible arguments for each of the issues discussed in Section I above. For the parties to reach a durable solution, all plausible arguments should be brought to the table. For its part, Turkey should not attempt to use these plausible arguments as a cudgel to force Greece to the negotiating table. Instead, these arguments should stand on their own as quiet reminders that comprehensive negotiations are necessary. Each side must have something to gain. Despite the divergence of Turkey and Greeces general positions, each side has almost identical interests : the settling of borders, the guarantee of security, and the establishment of a stable environment in which political and economic relations could flourish.