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The Greek-Turkish Maritime Disputes: An International Law Perspective

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Summary

- Greece and Turkey have markedly different positions both as to the existing disputes between them and as to the legal framework governing their substance. Greece's consistent view is that there is only one outstanding legal dispute between the two States, namely that concerning the delimitation of the continental shelf. On the other hand, Turkey has been systematically widening the spectrum of the perceived 'disputes' between the two States.
- The application to the ICJ in 1976 and the judgment of the Court that lacked jurisdiction to adjudicate the case illustrates how hazardous it is to institute proceedings in the ICJ by way of unilateral Application. Also, simultaneous recourse to the Security Council proved unsuccessful.
- The right of Greece to unilaterally extend its territorial sea up to 12 n.m. is well-founded in international law of the sea, while a closer look at Turkish claims to the contrary reveals their tenuous legal ground. Greece may extend its territorial sea whenever and wherever it considers politically appropriate.
- As to the law of maritime delimitation, Turkey seems to accept the median line for the delimitation of the territorial sea, and the customary nature of the provisions of the 1982 UN Convention on the Law of the Sea on the delimitation of the continental shelf and the EEZ. Yet, it continues its 'cherry-picking' policy in invoking the relevant rules of international law, especially with respect to the effect of islands in the delimitation and the cut-off effect.
- It is reasonable to presume that the 'three-stage approach', as developed by the relevant jurisprudence, would be the applicable legal framework of the delimitation of the continental shelf/EEZ between Greece and Turkey before any international court and tribunal. Also, both States know well which arguments would be more convincing in view of the relevant *acquis judiciaire*. That said, each case is unique and requires specific treatment.
- As to the means for the settlement of the maritime delimitation dispute, the recourse to the International Court of Justice is preferable for many reasons, including that it has a steady and, to a certain extent, foreseeable jurisprudence; it is the principal judicial organ of the United Nations, whatever this means for its credibility not only on the international, but also on the national political plane; and in terms of the execution of its Judgments, States seem to be less prone to disobey an ICJ judgment.

Introduction

"Greece appears quite reserved in exercising its rights under international law of the sea; strikingly, Greece has declared no maritime zones, and has only one continental shelf delimitation agreement in force (with Italy in 1977)."

Greece is admittedly a traditional maritime nation -the Greek-owned fleet represents nearly 21% of the global merchant fleet capacity-,[1] but also a coastal State that has a remarkably extensive coastline, thanks mainly to its hundreds of islands in the Aegean and Ionian Seas.[2] Also, Greece is situated at a strategic geographical position, linking the maritime commerce between the East and the West. Yet, notwithstanding these attributes, Greece appears quite reserved in exercising its rights under international law of the sea; strikingly, Greece has declared no maritime zones,[3] and has only one continental shelf delimitation agreement in force (with Italy in 1977),[4] while on 9 June 2020, Greece signed a second multi-purpose boundary agreement with Italy.[5]

In relation to the Aegean Sea, the reason behind this is, arguably, the pending Greek-Turkish maritime dispute(s). Greece has never concluded a maritime delimitation agreement with Turkey resolving the dispute over the continental shelf of the Aegean Sea pending since the 1970s, which, according to Greece, is the only unresolved dispute between the two countries.[6] On the other hand, Turkey has been regularly adding to the list of 'unresolved disputes' numerous others issues, including questions of sovereignty over certain islands, the demilitarized status of other islands, the right of Greece to extend its territorial sea up to 12 nautical miles (n.m.) and the delimitation of the territorial sea, the10 n.m. national airspace of Greece, the control of air traffic in the Aegean.[7]

Relatedly, on numerous occasions Turkey has submitted to the United Nations *Note Verbales* with her continental shelf claims in the maritime areas of the Eastern Mediterranean, most recently on 18 March 2020.[8] This Note Verbale, which included an updated chart illustrating the Turkish claims (see Annex I), followed the conclusion of the

[1] See IHS Markit, World Shipping Encyclopedia, January 2019; as cited by the Greek Shipowners Union's Report on Greek Shipping (2019); available at <https://www.ugs.gr/media/13634/eee_brochure.pdf>

[2] Greece has the most extensive coastline among all Mediterranean countries. The total coastline measures 13 780 km and includes many islands;
see at <https://ec.europa.eu/maritimeaffairs/sites/maritimeaffairs/files/docs/body/greece_climate_change_en.pdf>

[3] Greece could proclaim a contiguous zone (up to 24 n.m.) from its coast), and an Exclusive Economic Zone (EEZ) (up to 200 n.m. from its coast), but to date has abstained from doing so. Also. Greece has a 6 n.m. territorial sea since 1936 (and 10 n.m. national airspace since 1931). Finally, Greece exercises sovereign rights over its continental shelf, a zone which does not need to proclaim. However, absent delimitation with all the neighboring States, Greece has not determined the final outer limits of its continental shelf. See on these zones Key Terms. For all legislations and treaties of Greece registered with the Secretariat of the United Nations (Division for Ocean Affairs and the Law of the Sea, DOALOS),
see <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/GRC.htm>

[4] See Agreement between the Hellenic Republic and the Italian Republic on the Delimitation of the Zones of the Continental Shelf Belonging to Each of the Two States; signed: 24 May 1977, and entered into force 12 November 1980
<https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/GRC-ITA1977CS.PDF>

[5] See at <https://www.ekathimerini.com/253489/article/ekathimerini/news/greece-and-italy-sign-historic-maritime-borders-accord>. The text of the agreement has not been made public yet. Most likely, it is an agreement establishing a multi-purpose boundary along the delimitation line of 1977 (see *ibid*), namely it sets out that the 1977 boundary is the boundary for the purposes not only of the continental shelf but for any other maritime zone that either State declares, practically speaking an EEZ or a contiguous zone. The agreement does not declare an EEZ as such, since this would require relevant domestic legislation and due publicity at the United Nations (see Article 75 of the 1982 UN Convention on the Law of the Sea).

[6] See at <https://www.mfa.gr/en/issues-of-greek-turkish-relations/>

[7] See at <http://www.mfa.gov.tr/background-note-on-aegean-disputes.en.mfa>

[8] See Letter dated 18 March 2020 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General, A/74/757 (18 March 2020), at < https://undocs.org/en/a/74/757>

"As the COVID-19 pandemic is (for the time being) facing out, one can reasonably predict that the maritime disputes between Greece and Turkey, further exacerbated by the ongoing migration/refuge e crisis, will forcefully come to the fore."

controversial Memorandum of Understanding Between the Government of the Republic of Turkey and the Government of National Accord-State of Libya on Delimitation of Maritime Jurisdiction Areas in the Mediterranean, which was signed on 27 November 2019, and entered into force on 8 December 2019 (Turkey-Libya MoU).[9] Greece has vehemently protested against this MoU: amongst others, 'the Greek Government express[ed] its strong opposition to the unlawful delimitation aimed at by the above agreement, which illegally overlaps on zones of legitimate and exclusive Greek sovereign rights, and rejects it in its entirety as null and void and without any effect on its sovereign rights'.[10]

Undoubtedly, the maritime disputes between Greece and Turkey in the Aegean and the Eastern Mediterranean raise significant concerns and may seriously threaten the peace and security in the region, particularly in the event of unilateral hydrocarbon exploration drillings in disputed maritime areas, like those already occurring by Turkey off Cyprus. As the COVID-19 pandemic is (for the time being) facing out, one can reasonably predict that the maritime disputes between Greece and Turkey, further exacerbated by the ongoing migration/refugee crisis, will forcefully come to the fore. Indeed, as reported recently (1 June 2020), Turkey purports to grant exploration licenses to the Turkish State Petroleum Company (TPAO) in areas very close to Greek islands on the basis, amongst others, of the Turkey-Libya MoU.[11]

"…the paper argues that the international law provides a sufficient, clear and predictable legal framework for the resolution of the Greek-Turkish maritime dispute, which will be of the outmost benefit for both States and for the Eastern Mediterranean region as a whole."

Against this backdrop, this paper aims to unpack the maritime disputes between Greece and Turkey, with particular emphasis placed upon those concerning maritime delimitation and the breadth of the territorial sea, and to explore the potential of resolving the maritime delimitation dispute under international law.

Accordingly, the remainder of this paper is structured as follows: In Section II, the paper sets out the historical and legal background of the continental shelf dispute in the Aegean Sea, in particular Greece's applications before the International Court of Justice (ICJ) and the UN Security Council in 1976. In Section III, the paper considers the different legal positions of Greece and Turkey concerning the issues of the breadth of the territorial sea and the maritime delimitation and examines those positions against the background of the international law of the sea. In Section IV, the paper discusses the various means for the settlement of the present dispute under international law, in particular, its submission to the ICJ, which has often been at the front line of public and scholarly discourse. By way of conclusion, in Section V, the paper argues that the international law provides a sufficient, clear and predictable legal framework for the resolution of the Greek-Turkish maritime dispute, which will be of the outmost benefit for both States and for the Eastern Mediterranean region as a whole.

[9] For the text of the agreement see at <https://www.nordicmonitor.com/2019/12/the-full-text-of-turkey-libya-maritime-agreement-revealed/>; and for the coordinates ibid. See also Annex I.

[10] See Letter dated 9 December 2019 from the Permanent Representative of Greece to the United Nations addressed to the Secretary-General, annexed to the letter dated 14 February 2020 (A/74/706); available at <https://undocs.org/en/A/74/706>.

[11] See <https://www.kathimerini.gr/1080824/article/epikairothta/politikh/h-agkyra-dromologei-ereynes-sthn-ellhnikh-yfalokrhpida> (1 June 2020) (in Greek).

The Historical and Legal Background of the Continental Shelf Dispute: The Recourse to the UN Security Council and the ICJ

"This strategy of Greece, namely the simultaneous appeal to the most political of the political organs of the United Nations, the Security Council, and its principal judicial organ, the Court, did not prove particularly fruitful."

On 10 August**,** 1976, Greece addressed a communication to the President of the Security Council requesting an urgent meeting of the Council on the ground that 'following recent repeated flagrant violations by Turkey of the sovereign rights of Greece in the continental shelf in the Aegean, a dangerous situation has been created threatening international peace and security'.[12] On the same day, Greece filed with the Registrar of the International Court of Justice an Application instituting proceedings against Turkey in respect of a dispute concerning the delimitation of the continental shelf appertaining to Greece and Turkey in the Aegean Sea and the rights of the parties thereover.[13] Also, on the same day Greece filed a request for interim measures of protection asking the Court to direct that both Greece and Turkey (1) unless with consent of each other and pending the final judgment of the Court in this case, refrain from all exploration activity or any scientific research, with respect to the continental shelf areas within which Turkey has granted such licenses or permits or adjacent to the Islands, or otherwise in dispute in the present case, (2) refrain from taking further military measures or actions which may endanger their peaceful relations.'[14]

This strategy of Greece, namely the simultaneous appeal to the most political of the political organs of the United Nations, the Security Council, and its principal judicial organ, the Court, did not prove particularly fruitful. Greece was only partly successful in obtaining some relief from the Security Council in paragraphs 1 and 2 of Resolution 395(1976),[15] although it failed to receive from the Court satisfaction for its request for interim measures.[16] Turkey was successful before the Court in so far as the denial of the Greek request was concerned though it failed to persuade the Court that the Greek Application was 'premature'. Turkey was also partly successful in the Security Council inasmuch as paragraph 3 of Resolution 395(1976) called for resumption of direct negotiations and paragraph 4 invited both governments 'to take into account the contribution that appropriate judicial means, in particular the International Court of Justice, are qualified to make to the settlement of any remaining legal differences which they may identify in connection with their present dispute.'[17] Finally, Turkey was successful in the rejection of Greek application, as on 19 December 1978 the Court delivered its judgment finding that it is without jurisdiction to entertain the Application.[18] This was the position of Turkey from the initiation of the proceedings before the Court and was underscored by her absence in the proceedings.[19]

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[12] UN Doc. S/12167.

[13] Application Instituting Proceedings Submitted by the Government of Greece, Aegean Sea Continental Shelf case (Greece v Turkey); available at <https://www.icj-cij.org/files/case-related/62/9481.pdf>.

[14] See Request for the Indication of the Interim Measures of Protection Submitted by the Government of Greece; available at <https://www.icj-cij.org/files/case-related/62/10709.pdf>.

[15] The first two operative paragraphs of SC Res 395(1976) read as follows: 1. Appeals to the Governments of Greece and Turkey to exercise the utmost restraint in the present situation; 2. Urges the Governments of Greece and Turkey to do everything in their power to reduce the present tensions in the area so that the negotiating process may be facilitated'. S/RES/395 (1976), paras 1-2.

[16] See *Aegean Sea Continental Shelf*, Interim Protection, Order of 11 September 1976, I.C.J. *Reports* 1976, p. 3, at p. 14.

[17] S/RES/395 (976), para 4.

[18] *Aegean Sea Continental Shelf* Judgment, I.C.J. *Reports* 1978, p. 3, at p. 45. The Court had decided to adjudicate first the issue of whether it has jurisdiction over the case, prior to turning into the merits, *id*, p. 3.

[19] The main grounds for the Turkish contention vis-à-vis the issue of jurisdiction appear to have been that negotiations between the two sides had not yet been exhausted; that the dispute was a political rather than a legal one because it related to the balance of power in the Aegean Sea area; that the General Act of 1928 was no longer in force; and that, even if it was, the Court lacked jurisdiction because of the reservation (b) appended by Greece to its accession to the General Act in 1931. See relevant analysis in

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The origin of the dispute lays in the decision of the Turkish Government, towards the end of 1973, to grant to the Turkish State Petroleum Company (TPAO) the right to carry out exploration for petroleum in 27 regions of the Aegean continental shelf east of a line starting at the mouth of the Evros River in the north and extending southwards and to the West of the Greek islands of Chios and Psara, which Greece considered to encroach upon the continental shelf of its islands.[20] In replying to Greece, Turkey submitted, amongst others, that while since the 1960's Greece had granted numerous exploration licenses and drilled for oil in the Aegean 'outside Greek territorial waters', Turkey had 'started its research activities on the natural prolongation of Anatolian peninsula in 1974, 11 years later than Greece'.[21]

The dispute that started at the end of 1973 had numerous other episodes,[22] including various bilateral meetings between representatives of the two States, ranging from meetings at the highest level between the two Prime Ministers (e.g. in Brussels on 31 May 1975)[23] to a technical meeting of the delegations and experts of the two Governments in Berne on 19 and 20 June 1976 (Berne Meeting),[24] and other incidents at sea, such as the sending of Turkish seismographic vessels in the Aegean. It was exactly the activities of the Turkish research vessel *MTA Sismik-I* on 6 August 1976, which was observed engaging in seismic exploration of an area of the continental shelf of the Aegean,[25] that prompted the reaction of Greece before the UN Security Council and the ICJ.

As to the process before the Security Council, Greece, invoking Article 35 (1) of the UN Charter,[26] appealed to the Council 'in order to avert the danger of disturbing the peace, which is being seriously threatened' by the above-mentioned 'seismological explorations' conducted by Turkey with the vessel *Sismik-I.* In the Council, Greece maintained its stand and asked the Council to let Turkey know 'that it must suspend its provocative acts. The United Nations was not in time to stop the tragedy of Cyprus. It can now prevent a new tragedy in the Aegean'.[27] Turkey responded by restating its position with respect to the substantive dispute, namely that in the absence of an agreed delimitation of the continental shelf 'the Greek claim of violation of the Greek sovereign rights is completely unfounded'.[28] In addition, Turkey related the incident with the alleged 'militarization' by Greece of its islands in violation of its international obligations.[29]

D. H. N. Johnson, "The International Court of Justice Declines Jurisdiction again (Aegean Sea Continental Shelf Case)" (1976-1977) 7 *Australian Yearbook of International Law* 309, p. 311.

[20] See Application of Greece to the ICJ, supra note 13, para 1.

[21] Letter from the permanent representative of Turkey to the Secretary-General of the UN of Aug. 18, 1976, UN Doc. S/12182.

[22] For further analysis see: A. Syrigos, *Greek-Turkish Relations* (Patakis: Athens, 2015, in Greek), pp. 241-248 and 315-338.

[23] On 31 May 1975 the Prime Ministers of the two countries met in Brussels and issued the joint communiqué relied on by Greece as conferring jurisdiction in the Aegean Continental Shelf case. They also defined the general lines on the basis of which the subsequent meetings of the representatives of the two Governments would take place and decided to bring forward the date of a meeting of experts concerning the question of the continental shelf of the Aegean Sea; see ICJ Judgment (1978), *supra* note 18, para 19.

[24] On the Berne Meeting see Application by Greece, *supra* note 13, paras 22-3 and Annex VI.

[25] See Application by Greece to the ICJ, *ibid*, paras 25-26 and ICJ Judgment, *supra* note 18, para 25.

[26] "Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly"; United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 35 (1) (hereinafter: UN Charter).

[27] UN Doc. S/PV.1949, Aug. 12, 1976, at 16.

[28] UN Doc. S/12172, Aug. 11, 1976, Annex I and Annex II, at 1.

[29] UN Doc. S/PV.1950, at 6, 7-10. The representative of Turkey also alluded to 'illegal acts' of Greece 'aimed at transforming the international air space of the Aegean into national Greek air space, thus depriving Turkey and other countries of their inherent and traditionally established rights to use the international air space over the Aegean'; *id.* at 17.

"… the Security Council did not attempt to assess blame on one side or the other for the situation in the Aegean nor did it attempt to deal directly with the substance of the dispute."

As expected, the Security Council did not attempt to assess blame on one side or the other for the situation in the Aegean nor did it attempt to deal directly with the substance of the dispute, although it made a recommendation with respect to the procedure which it considered appropriate, i.e. the recourse to the ICJ.[30] Indeed, Resolution 395(1976), as is so often the case with Security Council Resolutions, did not indicate on which article of the Charter it was based. Members of the Council expressed different views in this respect.[31] Evidently, as indicated earlier, Resolution 395(1976) has two parts: in the first part, paragraphs 1 and 2, the Council calls, as the United Kingdom representative put it, 'for restraint on both sides and must then go on to urge them to do everything in their power to reduce the present tensions'.[32] In paragraphs 3 and 4, the Resolution addresses itself to the legal aspects of the dispute, calling for its resolution by legal means. This appears to raise a question of principle, namely the propriety of the Council making a recommendation with regard to the method of settling a dispute when the same dispute was *sub judice* in the ICJ. In fact, this was accepted with comfort by Turkey, since it could be construed as an indication that the application then pending before the ICJ was 'premature'. In any event, the Council succeeded in having the tension diffused. However, as Leo Gross observes, 'Greece, in appealing to the Court, has taken a step in the direction of depoliticizing the dispute; the Security Council has taken a step in repoliticizing it'.[33]

"…key fact militating against the order of interim measures was that the seismic exploration undertaken by Sismik-I involved no risk of physical damage to the seabed or subsoil or to their natural resources."

As to the recourse to the ICJ, the following remarks are in order: first, with respect to the request for the indication of provisional measures, this had two objectives: to enjoin both Greece and Turkey (a) from conducting further exploration or research in the contested areas and (b) from taking measures likely to endanger their peaceful relations. The request was based on Article 33 of the General Act of 1928 for the Pacific Settlement of International Disputes ('1928 Act').[34] The Court found it unnecessary 'to reach a final conclusion at this stage of the proceedings' on the question of jurisdiction and proceeded to examine the request of Greece. In particular, the Court examined whether the concessions granted and the seismic explorations undertaken by Turkey were in the nature of causing or threatening an irreparable prejudice to the rights claimed by Greece as its own. The Court stated that a prejudice is not irreparable if it is 'capable of reparation by appropriate means', and found that in the present case there was no threat of irreparable injury, and therefore no need or justification for granting provisional measures.[35]

In terms of substance of this Order, it appears that the key fact militating against the order of interim measures was that the seismic exploration undertaken by *Sismik-I* involved no risk of physical damage to the seabed or subsoil or to their natural resources, and that 'no suggestion had been made that Turkey has embarked upon any operations involving the actual appropriation or other use of the natural resources of the areas of the continental shelf which are in dispute'.[36] It is telling that almost 40 years later, in 2015, the International Tribunal for the Law of the Sea (ITLOS) held in the *Ghana/Côte d'Ivoire case* that exploratory drillings, which might cause permanent damage on the seabed and subsoil of the continental shelf, could bring about irreparable harm or prejudice. Accordingly, the Tribunal

[30] See the relevant remarks by L. Gross, "The Dispute between Greece and Turkey Concerning the Continental Shelf in the Aegean" (1977) 71 *American Journal of International Law* 31, p. 35 et seq.
[31] France, one of the sponsors, referring to paragraph 4 of the resolution, mentioned specifically Article 36(3). Panama referred to Article 33(1) and (2), Tanzania and Japan referred to Article 33 of the Charter. See *ibid*, p. 36.
[32] UN Doc. S/PV.1953, at 7.
[33] Gross, supra note 30, p. 39.
[34] League of Nations, *Treaty Series*, vol. 93, p. 343.
[35] See ICJ, Provisional Measures Order, *supra* note 16, para 33.
[36] *Ibid*, para 30. See also Arbitration between Guyana and Suriname (Annex VII Tribunal) (2007) XXX RIAA 1, para 467.

"… the decision not to prescribe interim measures in a case, over which the jurisdiction of the Court was rather controversial, and in which the Security Council had not considered to constitute a matter of urgency, was, arguably, a prudent choice."

upheld the request for provisional measures and ordered Ghana not to commence any new drillings.[37]

In terms of judicial policy, the decision not to prescribe interim measures in a case, over which the jurisdiction of the Court was rather controversial, and in which the Security Council had not considered to constitute a matter of urgency, was, arguably, a prudent choice. Indeed, as one commentator observes, 'taken together with certain statements made by Members of the Court in their individual opinions, invites the suspicion, confirmed by the Judgment of 1978, that the Court already had doubts whether it would eventually find that it had jurisdiction on the merits and did not wish to get itself once again into a situation in which it would have indicated interim measures of protection without being able eventually to affirm its jurisdiction to deal with the merits'.[38]

"...the Court had the task to establish whether both parties had given their consent to its jurisdiction, which is a prerequisite for a case to be heard by the ICJ."

Second, with respect to the Court's Judgment on its jurisdiction (1978), noteworthy is, first, that the Court refused Greece's request for a postponement just before the case heard on 4 October 1978 and was equally firm in rejecting the Turkish contention that the Court should decline to exercise jurisdiction because negotiations were in progress. The Court said that 'the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function'.[39] On the main issue of its jurisdiction, the Court had, in essence, the task to establish whether both parties had given their consent to its jurisdiction, which is a prerequisite for a case to be heard by the ICJ (Article 36 of the ICJ Statute).[40] In the case at hand, Greece contended that its jurisdiction was found on Article 17 of the 1928 Act and alternatively, on the Joint Brussels Communiqué of 31 May 1975 between the two Prime Ministers, while Turkey, which, as indicated above, did not take part in the proceedings, contended that the Act was no longer in force and if it was, the dispute was excluded by the Greek reservation.

The Court avoided to take a firm position on whether the Act of 1928 was still in force, stating that 'any pronouncement of the Court as to the status of the 1928 Act, whether it were found to be a convention in force or to be no longer in force, may have implications in the relations between States other than Greece and Turkey'.[41] Accordingly, the Court next turned its attention to the Greek reservation appended to Greece's instrument of accession to the Act, dated 14 September 1931, which read as follows: '[t]he following disputes are excluded from the procedures described in the General Act…(b) disputes concerning questions which by international law are solely within the domestic jurisdiction of States, *and in particular disputes relating to the territorial status of Greece,* including disputes relating to its rights of sovereignty over its ports and lines of communication' (emphasis added).

Under international law, either of the parties to the case may, in line with the principle of reciprocity, 'enforce', i.e. invoke the reservation of the other party, such as here, Greece, to any treaty that grants jurisdiction over a dispute to the Court pursuant to Article 36 (1) of the ICJ Statute. In the view of the Court, Turkey did so in its observations to the Court on

[37] *Delimitation of the Maritime Boundary in the Atlantic Ocean* (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS *Reports* 2015*,* p. 146, paras 88-91.
[38] D. H. N. Johnson, *supra* note 19, p. 314.
[39] *ICJ Reports* 1978, *supra* note 18, at p.12.
[40] Under international law, the parties to a dispute must have consented to the jurisdiction, i.e. the competence, of the ICJ to adjudicate that dispute. Such consent is expressed through: i) a special agreement; ii) another treaty or a compromissory clause to a treaty; iii) an optional declaration accepting *a priori* the compulsory jurisdiction of the Court in relation to any future dispute; iv) tacit consent ('*forum prorogatum'*). See further analysis infra pp. 45-47.
[41] *ICJ Reports 1978, supra* note 18,, at p. 17, para 39.

"…the Court observed that it would be difficult to accept the proposition that delimitation is entirely extraneous to the notion of territorial status, and pointed out that a dispute regarding delimitation of a continental shelf tends by its very nature to be one relating to territorial status."

"…this case demonstrates how hazardous it is to institute proceedings in the ICJ by way of unilateral Application. This should be remembered in view of the still pending-after 45 years- Aegean Sea continental shelf dispute."

25 August 1976.[42] As to the reservation itself, Greece maintained that reservation (b) could not be considered as covering the dispute regarding the continental shelf of the Aegean Sea and therefore did not exclude the normal operation of Article 17 of the Act.[43]

Nevertheless, the Court was of the view that the expression 'disputes relating to the territorial status of Greece' must be interpreted in accordance with the rules of international law as they exist today and not as they existed in 1931.[44] In examining whether the reservation in question should or should not be understood as comprising disputes relating to the geographical extent of Greece s rights over the continental shelf in the Aegean Sea, the Court observed that it would be difficult to accept the proposition that delimitation is entirely extraneous to the notion of territorial status, and pointed out that a dispute regarding delimitation of a continental shelf tends by its very nature to be one relating to territorial status, inasmuch as a coastal State's rights over the continental shelf derive from its sovereignty over the adjoining land. Hence, Turkey's invocation of the reservation had the effect of excluding the dispute from the application of Article 17 of the 1928 Act, which therefore could not have been a valid basis for the Court's jurisdiction.[45]

As to the alternative basis that Greece put forth, i.e. the Brussels Joint Communiqué of 31 May 1975, it was a Communiqué issued directly to the press by the Prime Ministers of Greece and Turkey following a meeting between them on that date, which according to Greece directly conferred jurisdiction on the Court. The relevant paragraphs of the Brussels Communiqué read as follows:'… the two Prime Ministers decided ***[ont décidé]*** that those problems should be resolved ***[doivent être résolus]*** peacefully by means of negotiations and as regards the continental shelf of the Aegean Sea by the International Court at The Hague. They defined the general lines on the basis of which the forthcoming meetings of the representatives of the two Governments would take place'.[46] The Court did not preclude the possibility that this instrument might constitute an agreement under international law, yet it found nothing to justify the conclusion that it did constitute 'an immediate commitment by the Greek and Turkish Prime Ministers, on behalf of their respective Governments, to accept unconditionally the unilateral submission of the present dispute to the Court'.[47]

In conclusion, even if the Court's position that a dispute about the boundary of continental shelf related to the territorial status of Greece was not particularly convincing,[48] it is true that this case demonstrates how hazardous it is to institute proceedings in the ICJ by way of unilateral Application. This should be remembered in view of the still pending-after 45 years- Aegean Sea continental shelf dispute.

To date, there has been no other significant milestone concerning the settlement of the continental shelf dispute, albeit various negotiating efforts, such as the exploratory talks between delegations of the two States (2002-2016).[49]

[42] *Ibid*, at p. 19, para 43.
[43] *Ibid*, at p. 29, para 70.
[44] *Ibid*, at p. 34, para 80.
[45] *Ibid*, at pp. 34-38, paras 80-90.
[46] *Ibid*, at pp. 39-40, para 97.
[47] *Ibid*, at p. 44, para 107.
[48] See *inter alia* Dissenting Opinion of Judge Stasinopoulos, *ibid*, pp. 79-81 and Johnson, *supra* note 19, pp. 328-9.
[49] For the period up to 2000 see also K. Ioannou and A. Strati, *The Law of the Sea* (4th edn, Nomiki Vivliothiki, 2013), Epimetro I, pp. 413-439 [in Greek]; H. Dipla, "The Greek-Turkish Dispute over the Aegean Sea Continental Shelf: Attempts of Resolution" in Th. Kariotis (ed.), *Greece and the Law of the Sea* (Kluwer, 1997), 153-185.

"...Greece's consistent view is that there is only one outstanding legal dispute between the two States, namely that concerning the delimitation of the continental shelf (and potentially the -future- Exclusive Economic Zone [EEZ] between the two States). On the other hand, Turkey has been systematically widening the spectrum of the perceived 'disputes' between the two States (e.g. demilitarization, grey zones, airspace)."

The Maritime Disputes between Greece-Turkey under International Law of the Sea

Greece and Turkey have markedly different positions both as to the existing disputes between them and as to the legal framework governing their substance. As indicated in the Introduction, Greece's consistent view is that there is only one outstanding legal dispute between the two States, namely that concerning the delimitation of the continental shelf (and potentially the -future- Exclusive Economic Zone [EEZ] between the two States).[50] On the other hand, Turkey has been systematically widening the spectrum of the perceived 'disputes' between the two States (e.g. demilitarization, grey zones, airspace).[51] This paper focuses only on the maritime disputes between the two countries, i.e. those concerning maritime boundaries and the breadth of the Greek territorial sea.

The concept of the term 'dispute', which this paper adopts for its purposes, is based on the legal definition of 'dispute' under international law. According to widely accepted jurisprudence, a dispute is 'a disagreement on a point of law or fact, a conflict of legal views or of interests between parties'.[52] In order for a dispute to exist, '[i]t must be shown that the claim of one party is positively opposed by the other and that the two sides must 'hold clearly opposite views' concerning the question of the performance or non-performance of certain international obligations'.[53] Further, international courts and tribunals note that the 'determination of the existence of a dispute is a matter of substance, and not a question of form or procedure', and that whether a dispute exists is a matter for 'objective determination'.[54]

In light of the foregoing, it readily appears that in view of the opposing legal views of the two States concerning matters of delimitation and the breadth of the territorial sea of Greece, these 'disagreements on points of law' constitute 'disputes under international law', and in particular, the law of the sea. Accordingly, in the remainder of the present section we will put forth these 'legal views' of Greece and Turkey concerning the issues of the breadth of the territorial sea and the maritime delimitation and examine them against the background of the international law of the sea.

1. The Breadth of the Territorial Sea

a) The Greek Position

Greece enjoys sovereignty in its territorial sea, which is considered part of its territory, within the limits that it has set out by national legislation. Indeed, the breadth of Greece's territorial sea was set at 6 nautical miles from its coastline ('normal baselines')[55] in 1936 (Law No 230/1936 as amended by Presidential Decree 187/1973). The limits of the

[50] See at <https://www.mfa.gr/en/issues-of-greek-turkish-relations/>

[51] See at <http://www.mfa.gov.tr/site_media/html/Outstanding-Issues-in-the-Eastern-Mediterranean-and-the-Aegean-Sea-Turkey-s-Views-and-Policies.pdf>

[52] *Mavrommatis Palestine Concessions* (Greece v. United Kingdom) Judgment, P.C.I.J. *Series* A, No. 2, p. 11

[53] *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands v. India) Jurisdiction and Admissibility, Judgment, I.C.J. *Reports* 2016, p. 255 at p. 269, para. 34. See also *South West Africa Cases* (Ethiopia v. South Africa; Liberia South Africa) Preliminary Objections, Judgment, I.C.J. *Reports* 1962, p. 319, p. 328.

[54] *Nuclear Arms and Disarmament*, *ibid*, paras 35-36.

[55] Baselines are the lines from where the breadth of the territorial sea and of all the other maritime zones (contiguous zone, EEZ, continental shelf) of the coastal State is measured. See Annex, Key Terms. Article 5 of the UN Convention on the Law of the Sea provides that '[e]xcept where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.'

"Greece's assertion is that under customary law, which is the applicable law between the two States, Greece has an unfettered right to extend the breadth of its territorial sea up to 12 n.m, a right which Turkey cannot dispute. Such right is neither restricted, nor subject to any exception by international law."

superjacent airspace of the territorial sea of Greece remains at 10 nautical miles, pursuant to the Decree of 6 September 1931 in conjunction with the Law 5017/1931.[56]

As the Greek Ministry of Foreign Affairs (MFA) states: 'according to customary international law, which is also codified in the UN Convention on the Law of the Sea (UNCLOS), Greece has the right to extend its territorial waters to 12 nautical miles'.[57] The reference to customary international law at the start is intentional, since the applicable law between Greece and Turkey is customary international law and not UNCLOS,[58] to which Turkey is not a party.[59]

Further, Greece notes that '[t]his right to extend territorial waters up to is a sovereign right which can be unilaterally exercised and is therefore not subject to any kind of restriction or exception and cannot be disputed by third counties. Article 3 of UNCLOS which codifies a rule of customary law, does not provide for any restrictions and exceptions with regard to that right. The overwhelming majority of coastal States, except for a few exceptions, have determined the breadth of their territorial sea at 12 nautical miles. Turkey itself has extended its territorial waters to 12 nautical miles in the Black Sea and the Mediterranean already since 1964'.[60]

In short, Greece's assertion is that under customary law, which is the applicable law between the two States, Greece has an unfettered right to extend the breadth of its territorial sea up to 12 n.m, a right which Turkey cannot dispute. Such right is neither restricted, nor subject to any exception by international law, as Turkey may contend. Further, Greece underscores that even Turkey itself has proclaimed a 12 nm territorial sea in the Black Sea and the Mediterranean. Thus, Greece is entitled to extend, whenever it considers this appropriate, its territorial sea up to 12 n.m. (circa 20 km) from its coast.

Indeed, upon ratifying the UNCLOS Greece made the following statement under Article 310 UNCLOS: '[I]n ratifying the United Nations Convention on the Law of the Sea, Greece secures all the rights and assumes all the obligations deriving from the Convention. *Greece shall determine when and how it shall exercise these rights, according to its national strategy. This shall not imply that Greece renounces these rights in any way.'*[61] Such statement was not, in strict legal terms, necessary for the actual exercise of the right to extend the territorial sea, since the right under Article 3 of UNCLOS is not subject to any deadline or extinction. However, it bears significance in preempting any allegations that Greece has lost

[56] See in this regard G. Assonitis 'The Greek Airspace: The Legality of a Paradox', 8 *United States Air Force Academy Journal of Legal Studies*, 1997/98, 159-195.
[57] See at <https://www.mfa.gr/en/issues-of-greek-turkish-relations/relevant-documents/territorial-sea-casus-belli.html>
[58] See UN Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 3 (hereinafter: UNCLOS). Greece ratified UNCLOS on 21 July 1995 (Law No. 2321/1995).
[59] UNCLOS has 168 parties, including the European Union. Turkey neither signed, nor ratified the Convention; see status of UNCLOS at:https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en. Treaties, such as UNCLOS, bind only their contracting parties, which means that the legal relationships between parties to a treaty (e.g. Greece as to UNCLOS) and third States, i.e. States that have not ratified the treaty concerned (e.g. Turkey as to UNCLOS) are governed exclusively by customary international law-the other main source of international law. Customary international law may, however, be reflected in a treaty, such as is the case with UNCLOS, which by and large reflects customary law.
[60] See *supra* note 57.
[61] See Greece' Declarations pursuant to Article 310 UNCLOS; at <https://treaties.un.org> (emphasis added). Greece made a similar statement in the Law ratifying UNCLOS: Greece reserves the inalienable right under Article 3 of the ratified Convention to extend, whenever it decides, its territorial sea up to 12 nautical miles' («Η Ελλάδα έχει το αναφαίρετο δικαίωμα κατ'εφαρμογή του άρθρου 3 της κυρούμενης Σύμβασης να επεκτείνει σε οποιονδήποτε χρόνο το εύρος της χωρικής θαλάσσεως μέχρι αποστάσεως 12 ναυτικών μιλίων», βλ. Αρθρο 2 του Κυρωτικού Νόμου της Σύμβασης ΔΘ (Ν.2321/1995, ΦΕΚ Α΄ 136/1995)).

this right due to its inaction (along the lines of desuetude,[62] or extinctive prescription,[63] or renunciation of rights[64] in international law) or that it has acquiesced to, i.e. it has tacitly accepted,[65] the Turkish positions in the Aegean Sea. In any case, according to well-established case-law, 'waivers or renunciations of claims or rights must either be express or *unequivocally implied from the conduct* of the State alleged to have waived or renounced its right'.[66] Greece's conduct in no way warrants such implication. Thus, any claim for the renunciation of this right in the case of the Aegean Sea shall not be taken lightly.

b) The Turkish Position

On the other hand, Turkey has firmly negated the right of Greece to extend its territorial sea in the Aegean. As the Turkish MFA notes:

"'It holds true that Turkey has long objected to any extension of the territorial sea in the Aegean Sea more than 6 n.m."

'under the present 6 mile limit, Greek territorial sea comprises approximately 43.5 percent of the Aegean Sea. For Turkey, the same percentage is 7.5 percent. The remaining 49 percent is high seas. It is evident that the extension by Greece of her territorial waters beyond the present 6 miles in the Aegean would have most inequitable implications and would, therefore, *constitute an abuse of right*. If the breadth of Greek territorial waters is extended to 12 miles due to the existence of the islands, Greece would acquire approximately 71.5 percent of the Aegean Sea, while Turkey's share would increase to only 8.8 percent….The impact of such a Greek extension of its territorial waters would be to deprive Turkey, one of the two coastal States of the Aegean, *from her basic access to high seas from her territorial waters, the economic benefits from the Aegean, scientific research etc*'.[67]

It holds true that Turkey has long objected to any extension of the territorial sea in the Aegean Sea more than 6 n.m.[68] For example, throughout the Third Conference on the Law of the Sea (1973-1982) (UNCLOS III), Turkey tried to insert a clause into the draft Article 3 (the breadth of the territorial sea) that 'would require states bordering enclosed and semi-enclosed seas to determine the breadth of their territorial waters by mutual agreement'.[69] Also, as the Turkish representative noted in a speech at the Plenary of the Conference, '…in regions of semi-enclosed seas where the present breadth of territorial sea was less than 12 nautical miles, States should not exercise unilaterally the right given to them under Article 3 without taking into account the legitimate interests of neigbouring countries'.[70]

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[62] 'Desuetude' could be generally defined as the rejection of a rule through subsequent non-enforcement or non-compliance; see M. Kohen, 'Desuetude and Obsolescence of Treaties' in E. Cannizaro (ed.), *The Law of Treaties beyond the Vienna Convention* (Oxford University Press, 2011), 350.

[63] Prescription may take the form of the extinction of international claims after a certain lapse of time. Extinctive prescription is the result of unreasonable delay in the presentation of an international claim; see J. Wouters, and S. Verhoeven, 'Prescription' in Max Planck Encyclopedia of Public International Law (online edition) (last updated November 2008).

[64] See I. Feichtner, Waiver' in Max Planck Encyclopedia of International Law (online edition) (last updated October 2006).

[65] 'Acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent' ICJ, *Obligation to Negotiate Access to the Pacific Ocean* (Bolivia v. Chile), (Merits), Judgment of 1 October 2018, para 152; available at <https://www.icj-cij.org/files/case-related/153/153-20181001-JUD-01-00-EN.pdf> and ICJ, *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada/United States of America), Judgment, I.C.J. *Reports* 1984, p. 305, para. 130.

[66] *Case concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda) (2005) ICJ Rep 168 para. 293 (emphasis added). See also Campbell [United Kingdom v Portugal], 1156; Kronprins *Gustav Adolf* [Sweden v United States of America], 1254, 1299; *Island of Las Palmas Case* [Netherlands v United States of America], 843

[67] See *supra* note 7 (emphasis added).

[68] For an overview of the Turkish positions see D. Bölükbaşı, *Turkey and Greece. The Aegean Disputes* (Cavendish, 2004), p. 146 et seq.

[69] *Ibid*, p. 175.

[70] As cited in *ibid*, p. 176

"…Turkey in course of the preparatory stages of the Conference as well as during the Conference, has been a persistent objector to the 12 nautical miles limit…this limit cannot be claimed vis-à-vis Turkey.'"

At the Final Session of UNCLOS III, the Head of the Turkish Delegation made a comprehensive statement on Turkey's position, which with respect to the territorial sea enunciated that:
'in the narrow seas, such as enclosed and semi-enclosed seas, on which Turkey is bordered, the extension of the territorial sea in disregard of special circumstances of these seas and in a manner which would deprive another littoral State of its existing rights and interests creates inequitable results which certainly call for the application of the doctrine of abuse of right. Turkey is of the opinion that *the 12-nautical miles limit for territorial waters has not acquired the character of the rule of customary law in cases where the application of such a rule constitutes an abuse of right. Turkey in course of the preparatory stages of the Conference as well as during the Conference, has been a persistent objector to the 12 nautical miles limit…this limit cannot be claimed vis-à-vis Turkey.*'[71]

Noteworthy is also that Turkey promulgated a new Territorial Sea Act (No. 2674) of 20 May 1982, which repealed the 1964 legislation (Law No 476), in which it enunciated that 'the breadth of the territorial sea shall be of six nautical miles'.[72] However, it reserved that 'the Council of Ministers has the right to establish the breadth of the territorial sea, in certain seas, up to a limit exceeding six nautical miles, under reservation to take into account all special circumstances and relevant situations therein, and in conformity with the equity principle'.[73] Indeed, by Decree No. 8/5742 of 1982, Turkey maintained the 12-nautical miles territorial sea limit which previously existed in the Black Sea and in the Mediterranean Sea.[74] In justifying the extension of the territorial sea in the Black Sea, Turkey claims that this had occurred on the basis of the principle of reciprocity in relation to its neighbors there, which had already proclaimed a 12 miles territorial sea.[75]

A final point on this is that Turkey has vehemently objected to date to any thoughts of Greece or indications that it is about to extend the breadth of the territorial sea in the Aegean Sea, with the highlight being the Resolution of the National Assembly of Turkey on 8 July 1995 (just prior to the ratification of UNCLOS by Greece) authorizing the Turkish government to use military means against Greece, should the latter decide to extend its territorial waters over 6 nautical miles (the famous casus-belli of Turkey).[76]fto
To summarize the relevant Turkish positions:

i) Turkey contends that it is not bound by the provision of Article 3 of UNCLOS either as treaty or as customary law, since, first, Article 3 does not reflect custom, and second, in any case, Turkey has persistently objected to this rule. Thus, the 12 nm rule cannot be claimed vis-à-vis Turkey.

ii) Any extension of the territorial sea of littoral to semi-enclosed seas States, such as Greece and Turkey in the Aegean Sea shall be based on a mutual agreement.

iii) Due to the special circumstances of the Aegean Sea, any unilateral extension of the territorial sea of Greece beyond the 6 n.m. would constitute an abuse of right under international law.

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[71] Official Records of the Third Conference on the Law of the Sea, Vol. XVII, pp. 77-78, as cited in *ibid*, p.179 (emphasis added).
[72] Article 1 (2) of the Act No. 2674 of 20 May 1982, on the Territorial Sea of the Republic of Turkey; available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TUR_1982_Act.pdf>
[73] Article 1 (3), ibid.
[74] See Decree by the Council of Ministers No. 8/4742; available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TUR_1992_Decree.pdf>
[75] See D. Bölükbaşı, *supra* note 68, p. 219. That said, there is no similar justification for the Mediterranean put forth.
[76] See *supra* note 57.

iv) Any such extension would restrict the access of Turkey to the high seas regime, including fisheries, marine scientific research etc.

c) The Relevant International Law

i) Law of the Sea

"…in order to be able to oppose their territorial seas to third States, it is of paramount significance that coastal States, adhere to the requirements of UNCLOS and customary law concerning the breadth of the territorial sea."

Article 2 (1) UNCLOS ascribes to the coastal State sovereignty over the territorial sea. The sovereignty of the coastal State extends also to the airspace above the territorial sea, in addition to its seabed and subsoil. The rights of the coastal State over the territorial sea do not differ in nature from rights exercised over land territory, but they are subjected to limitations, as noted in Article 2 (3) UNCLOS, that is, the regimes of innocent and transit passage and other rules of international law.

As the International Court of Justice (ICJ) has stated in the *1951 Fisheries case*, 'although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law'.[77] Therefore, in order to be able to oppose their territorial seas to third States, it is of paramount significance that coastal States, such as here Greece, adhere to the requirements of UNCLOS and customary law concerning the breadth of the territorial sea.

"The right of the coastal States to extend their territorial sea up to 12 n.m. is considered also part of customary law, and as such applicable vis-à-vis Turkey."

Article 3 UNCLOS provides that 'every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention'.[78] In contrast to the continental shelf, which exists *ipso facto* and *ab initio*, i.e. without any declaration on the side of the coastal State,[79] the coastal State must act to establish the breadth of the territorial sea. The State establishes the territorial sea in a unilateral act, which must be undertaken within the limits circumscribed by international law, that is the 12 n.m. limit in accordance with the UNCLOS. The right of the coastal States to extend their territorial sea up to 12 n.m. is considered also part of customary law,[80] and as such applicable vis-à-vis Turkey. As two leading authorities observe, 'no State seems to be in a position to object to a 12 NM limit'.[81]

"States may decide to gradually extend their territorial seas or may use different limits in different parts of their coast."

Accordingly, the State is free to choose any breadth of the territorial sea as long as it does not exceed 12 n.m., but, there is no obligation to use the full distance…'.[82] States may decide to gradually extend their territorial seas or may use different limits in different parts of their coast. As the authoritative Virginia Commentary to the UNCLOS observes, '[i]t is clear from the text that article 3 confers upon every coastal State the right to establish the breadth of its territorial sea up to the maximum limit of 12 nautical miles, measured from the baselines. The article does not preclude a State from establishing different breadths, within that maximum limit, for different parts of its coast'.[83] Thus, any gradual extension by Greece

[77] ICJ, *Fisheries Case* (United Kingdom v. Norway), Judgment of 18 December 1951, ICJ *Reports* (1951), 116, at p. 132.
[78] See commentary in Trumpler, 'Article 3', in A. Proelss (ed.), *The UN Convention on the Law of the Sea: A Commentary* (Hart/Beck, 2017), 34.
[79] See Article 77 UNCLOS.
[80] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), Merits, Judgment, I.C.J. *Reports* 2001, pp. 101‑102, para. 205; see also *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007 (II), p. 751, para. 302.
[81] R.R. Churchill & AV. Lowe, *The Law of the Sea* (3rd edn. Manchester University Press, 1999), 80. In particular, the USA, a non-party to UNCLOS, accepted territorial seas of other States based on customary law as reflected in the Convention, see Statement by the President of 10 March 1983, LOSB 1 (1983), 80, 81.
[82] See Trumpler, *supra* note 78, at p. 37.
[83] Βλ. Nordquist et al (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Brill, 1995) 3.8.(a), p. 81.

of its territorial sea to 12 n.m., for example starting from the the Ionian Sea and moving to Crete etc., is lawful and in no way may implies any renunciation of Greece's right to do so subsequently in other parts of its territory.

"Thus, any gradual extension by Greece of its territorial sea to 12 n.m., is lawful and in no way may implies any renunciation of Greece's right to do so subsequently in other parts of its territory."

Noteworthy is also that neither in Article 3 nor in other parts of the Convention, such as, aptly, Part IX concerning enclosed or semi-enclosed seas,[84] does UNCLOS pose any other limitation or qualification for such extension, as Turkey advocated during the Third Conference on the Law of the Sea, e.g. a requirement for mutual agreement.[85] In particular, Article 123 UNCLOS calling for the cooperation of States bordering semi-enclosed seas is 'interpreted as a provision that '*stimulates the cooperation* of States and international organisations in respect of the use and protection of enclosed or semi-enclosed seas as well as to the adoption of regional and sub-regional rules concerning particular seas',[86] but in no way dictates such cooperation, as evinced by the use of the term 'should' by the relevant provision.[87] In any case, it is indisputable that the jurisdiction, rights, including the rights under Article 3, and duties of coastal States and other maritime States are not affected by Article 123 UNCLOS.[88] That said, the obligation of coastal States bordering semi-enclosed seas to cooperate for the conservation of marine living resources, i.e. fisheries, and the protection of the marine environment remain intact under other provisions of the UNCLOS and customary law.

"Such right to extend the territorial sea is subject to no exception or qualification, be it temporal or geographical Hence, in principle, Greece is entitled to extend its territorial sea up to 12 n.m., and this entitlement is opposable to Turkey under customary international law."

Nor is there any time frame or deadline for the exercise of the right in question. *E contrario*, in the cases that the Convention intended to pose a time frame for the exercise of rights thereunder, it did so explicitly, e.g. in relation to the faculty of coastal States to submit information to the Commission on the Limits of Continental Shelf in order to claim a continental shelf beyond 200 n.m.[89] It is inferred from the lack of any similar requirement under Article 3 UNCLOS that coastal States are free to extend the breadth of their territorial sea whenever they decide to do so. In fact, the imposition of strict temporal requirements to claim a 'full' territorial sea would run contrary to State sovereignty, as construed in the famous *Lotus case* (Permanent Court of International Justice, 1927).[90]

In concluding, under the law of the sea, as reflected in Article 3 UNCLOS, coastal States may extend their territorial seas up to 12 n.m., provided that there are no overlapping areas of territorial sea between neighbouring States, whether opposite or adjacent to each other, which calls for delimitation pursuant to Article 15 UNCLOS. Such right to extend the territorial sea is subject to no exception or qualification, be it temporal (time frame for the extension) or geographical (territorial seas in semi-enclosed sea). Hence, in principle, Greece is entitled to extend its territorial sea up to 12 n.m. (where applicable), and this entitlement is opposable to Turkey under customary international law, that is, Turkey must respect this right of Greece.

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[84] See Part IX UNCLOS and the relevant commentary by Winkelmann in A. Proelss (ed), UNCLOS: A Commentary, *supra* n 78, pp. 881-92.

[85] See *supra* note 69.

[86] B. Vukas, 'The Mediterranean: An Enclosed or Semi-Enclosed Sea?', in: B. Vukas (ed.) *The Legal Regime of Enclosed or Semi-Enclosed Seas: The Particular Case of the Mediterranean* (University of Zagreb, 1988), 49, 64 (emphasis added).

[87] 'States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention', Article 123 UNCLOS.

[88] Winkelmann, *supra* note 84, 887.

[89] See Article 76 (9) and Annex II UNCLOS.

[90] Restrictions upon the independence of States cannot therefore be presumed"; *Lotus,* 1927 P.C.I.J. (ser. A) No. 10, at 18

ii) Persistent Objector

Turkey contends that even if Article 3 UNCLOS reflects customary law, its provision is not opposable to Turkey, since the latter has been a *persistent objector* to the rule in question. Indeed, it is widely held that a State that has persistently objected to an *emerging* rule of customary international law, and maintains its objection after the rule has crystallized, is not bound by it.[91] Decisions of international and domestic courts and tribunals have referred to the 'persistent objector' rule,[92] and, the International Law Commission (ILC) -the secondary UN organ responsible for the codification and progressive development of international law- has included the rule in its -*non-binding*- 2018 Draft Conclusions on the Identification of Customary International Law.[93] Interestingly, both the Commentary to the Draft Conclusion 15 on 'persistent objector' and the Third Report of the Special Rapporteur of the ILC on this topic, allude to Turkey's stance vis-à-vis the 12 n.m. rule during the Third Conference on the Law of the Sea as an example of State practice in support of the 'persistent objector' doctrine.[94]

Without dwelling upon the legal status and merits of the 'persistent objector' rule in international law,[95] suffice it to note that Turkey, notwithstanding the above references, cannot claim to be a 'persistent objector' to the 12 n.m. rule for the very simple reason that it has accepted itself the rule in the Black Sea and the Mediterranean.[96] By extending its territorial sea to 12 n.m. in these regions in 1964 (and later confirmed in 1982), Turkey negated the strict requirement which the rule in question is subjected to, i.e. that, as stated by the ILC, 'the objection must be clearly expressed, meaning that non-acceptance of the emerging rule or the intention not to be bound by it must be unambiguous'.[97] By benefiting from the rule itself, to which, allegedly it objects, a State loses its right to be considered as a 'persistent objector' in this regard.[98]

As a matter of fact, Turkey never intended to be a persistent objector to the rule that a coastal State may claim up to 12 n.m. territorial sea; rather its intention was to add further qualifications to the 12 n.m. rule with respect to semi-enclosed seas, like the need for

[91] See inter alia H. Lauterpacht, 'International Law —The General Part', in E. Lauterpacht (ed.), *International Law: Collected Papers of Hersch Lauterpacht*, Vol. I (Grotius, 1970), 66; J.I. Charney, 'The Persistent Objector Rule and the Development of Customary International Law' (1985) 56 *British Yearbook of International Law*1, 9-11; M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Clarendon Press, 1997), 60.

[92] See: *Asylum case*, Judgment of November 20th, 1950, I.C.J. *Reports* 1950, p. 266, at pp. 277-278. See also *Fisheries case*, Judgment of December 18th, 1951,I.C.J. *Reports* 1951, p. 116, at p. 131.

[93] 'Conclusion 15 Persistent objector 1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection. 2. The objection must be clearly expressed, made known to other States, and maintained persistently'; ILC, Draft conclusions on identification of customary international law, Adopted by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10, para. 65). See https://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/1_13_2018.pdf&lang=EF

[94] See ILC, Draft conclusions on identification of customary international law, with commentaries (A/73/10) (2018), p. 33, fn 779: 'see for example, the intervention by Turkey in 1982 at the Third United Nations Conference on the Law of the Sea, document A/CONF.62/SR.189, p. 76, para. 150 (available from http://legal.un.org/diplomaticconferences/lawofthesea-1982/Vol17.html)'. See also ILC, Third report on identification of customary international law by Michael Wood, Special Rapporteur (27 March 2015) A/CN.4/682, p. 61, fn. 205. In agreement is also J. Green, *The Persistent Objector Rule in International Law* (OUP, 2016), p. 70.

[95] Cf. amongst others E Roucounas, *Public International Law* (3rd edn, Nomiki Vivliothiki, 2019), p. 63 [in Greek] who asserts that the concept of 'persistent objector' is of relevance only at the stage of the formation of the custom, and not when the overwhelming majority of States has accepted the norm concerned.

[96] See supra note 74.

[97] See supra note 93.

[98] For example, the US ceased considering itself persistent objector to the 12 n.m. rule when it extended its breadth of the territorial sea to 12 n.m. see: Territorial Sea of the United States of America, A Proclamation of 27 December 1988, *Law of the Sea Bulletin* 12 (1988), 18.

reciprocity or mutual agreement. As the ICJ famously acknowledged in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (1986),* the significance of invoking an exception to a rule is 'to confirm rather than to weaken the rule'.[99] In the present case, the endeavour to include an exception to the 12 n.m. rule confirms rather than weakens the emerging normative status of the rule concerned. The fact that Turkey never flatly rejected the 12 n.m. rule is also evident from its relevant statements at the Third Conference.[100] Such exception or qualification in respect of semi-enclosed seas was never accepted by the Conference, nor has it entered the corpus of the treaty and customary international law. Moreover as recently upheld in the *South China Sea Arbitration*, the unilateral modification of the UNCLOS and the relevant customary law requires, most importantly, the acquiescence of all parties involved,[101] which Greece, obviously, has never displayed.

iii) Abuse of right

Turkey maintains that any extension of the territorial waters of Greece beyond 6 n.m. would amount to an abuse of right.[102] The doctrine of 'abuse of rights', enshrined in Article 300 UNCLOS, is considered a general principle of law, which controls the exercise of rights by States.[103] It prohibits a State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State. However, its customary nature is not unequivocally accepted. Indeed, as Kiss asserts, 'it may be considered that international law prohibits the abuse of rights. However, such prohibition does not seem to be unanimously accepted in general international law'.[104] Indeed, on several occasions before the Permanent Court of International Justice (PCIJ) abuse of rights was pleaded and rejected at the merits phase for want of sufficient proof.[105] Similarly, the International Court of Justice (ICJ) has abstained from taking a firm position on its status, and in no case has explicitly accepted the argument.[106]

Whatever its customary status, the plea of 'abuse of rights' has a very high threshold under international law, which, arguably, is unlikely to be reached in the case of a unilateral extension of the territorial sea of Greece. Even if Greece extends its territorial sea to the

[99] *Military and Paramilitary Activities in und against Nicaragua* (Nicaragua v. United States of America). Merits, Judgment. I.C.J. *Reports* 1986, p. 14, para 186.

[100] See *supra* notes 69 and 70. See also other statements of Turkish authorities which are far from dismissive of the 12 n.m. rule in D. Bölükbaşı, *supra* note 68, pp. 203-224.

[101] 'The Tribunal does not consider it necessary here to address in general whether and under which conditions the Convention may be modified by State practice. It is sufficient to say that a unilateral act alone is not sufficient. Such a claim would require the same elements discussed above with respect to historic rights: *the assertion by a State of a right at variance with the Convention, acquiescence therein by the other States Parties, and the passage of sufficient time to establish beyond doubt the existence of both the right and a general acquiescence'*; see In the Matter of an Arbitration before an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People's Republic of China, Award on Merits, 12 July 2016; para 275 (emphasis added).

[102] See *supra* note 71.

[103] On abuse of rights see A. Kiss, 'Abuse of Rights' in *Max Planck Encyclopedia of Public International Law* [MPEPIL] (last updated December 2006), M Byers 'Abuse of Rights: An Old Principle, a New Age' (2002) 47 *McGillLJ* 389–431, and G. Kyriakopoulos, *The Abuse of Rights in International Law* (Nomiki Vivliothiki, 2018) [in Greek].

[104] Kiss, ibid, p. 3.

[105] For example, in *Certain German Interests in Polish Upper Silesia*, the Court said: "Germany undoubtedly retained until the actual transfer of sovereignty the right to dispose of her property, and only a misuse of this right could endow an act of alienation with the character of a breach of the Treaty; such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement." (Merits, Judgment No. 7, 1926, P.C.I.J., *Series* A, No. 7, p. 30.)

[106] See e.g. recently, ICJ, *Jadhav case* (India v. Pakistan), Judgment of 17 July 2019, I.C.J. *Reports* 2019, paras 51-53; ICJ, *Immunities and Criminal Proceedings* (Equatorial Guinea v. France) Preliminary Objections, Judgment, I.C.J. *Reports* 2018 (I), p. 337, para. 151.

fullest possible extent, i.e. 12 n.m., in the Aegean Sea, Turkey may still enjoy its rights under international law, including its own right to extend its territorial sea (for the overlapping areas there should be delimitation process), or the rights that it enjoys as a flag State, such as the freedoms of fishing, marine scientific research and of course navigation in the remaining areas of the high seas (and the rights of innocent and transit passage in Greece's territorial seas). Actually, in no way the extension of the territorial sea of Greece would seem to be 'an arbitrary exercise of a right by one State resulting in an injury to a second State'.[107] In such an assessment of arbitrariness, the overall conduct of Greece, which never ceased to be willing to resolve the bilateral issues in good faith, would be a key factor.

"…the claim that the extension of the territorial sea will deprive Turkey from its fundamental rights, such as access to the high seas, is untenable."

iv) Navigation and other Turkish interests

Finally, the Turkish position, inexorably linked with the above argument of abuse of rights, is that a future Greek extension of its territorial waters would deprive Turkey, '*from her basic access to high seas from her territorial waters, the economic benefits from the Aegean, scientific research etc*'.[108] As claimed above, international law safeguards such rights, including in the territorial sea of a third State. In particular, Turkey will never cease to enjoy the freedoms of the high seas, enshrined in Article 87 UNCLOS, which reflects customary law, in the remaining parts of the high seas. Such freedoms are predominantly the freedoms of navigation, overflight, fishing, marine scientific research etc.[109] More pertinently, the access of Turkey to the high seas of the Eastern and mainly the Central Mediterranean through the Greek territorial waters will be safeguarded by the rights of innocent and transit passage that UNCLOS and customary law provide for. And whereas the customary legal framework of the right of transit passage, i.e. the freedoms of navigation and overflight through straits used for international navigation,[110] is not crystal-clear yet,[111] the right of Turkish ships[112] to innocent passage, i.e. to navigate through the territorial sea of Greece without requesting permission to do so, under certain requirements posed by Article 18 (meaning of term 'passage')[113] and Article 19 (meaning of term 'innocent') UNCLOS,[114] is undisputed under customary international law. It follows that the claim that the extension

[107] See O'Brien, 'Article 300' in A. Proelss (ed.), UNCLOS Commentary, *supra* note 78, p. 1942. See in similar fashion ICJ, *Southwest Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgement of 18 July 1966, ICJ *Reports* (1966), 6, p. 480–483.

[108] See *supra* note 67 (emphasis added).

[109] Article 87 UNCLOS includes in a non-exhaustive list of all States' high- seas freedoms: (a) freedom of navigation; (b) freedom of overflight; (c) freedom to lay submarine cables and pipelines, subject to Part VI; (d) freedom to construct artificial islands and other installations…subject to Part VI; (e) freedom of fishing, subject to…section 2; (f) freedom of scientific research, subject to Parts VI and XIII'.

[110] See Articles 37-38 UNCLOS.

[111] The right of transit passage was a creation of the Third Conference on the Law of the Sea (UNCLOS), and thus it is questioned whether it has come to represent customary law. There is no jurisprudence that either confirms or denies this customary status. Yet, it appears very unlikely that a permissive rule of such fundamental norm-creating character would not have passed into the corpus of customary law after nearly 40 years. The question is whether all provisions of UNCLOS governing straits used for international navigation (Articles 34-45) have passed to the customary law.

[112] The right of innocent passage applies to the ships of all States, including warships, as was recently clarified by the International Tribunal for the Law of the Sea (ITLOS) in the Case concerning the Detention of Three Ukrainian Vessels (Ukraine v The Russian Federation), ITLOS, Provisional Measures Order of 25 May 2020, para 68*:* 'Under the Convention, passage regimes, such as innocent or transit passage, apply to all ships'.

[113] As to the meaning of 'passage', the general rule under Article 18 UNCLOS, subject to the specified exceptions, is that passage must be continuous and expeditious\.

[114] As to the meaning of 'innocent', a vessel's passage through the territorial sea will be considered innocent provided that it is not prejudicial to the peace, good order or security of the coastal State (Article 19 (1) UNCLOS). In order to help determine what constitutes a prejudicial act, a list of twelve non-innocent activities, such as fishing, serious pollution, research, weapons' exercise, is provided in Article 19 (2).

"… the extension of the territorial sea in the Aegean Sea is part of a wider political matrix that calls for careful consideration. Legally speaking, though, it would be totally lawful."

of the territorial sea will deprive Turkey from its fundamental rights, such as access to the high seas, is untenable.

v) Concluding Remarks

The right of Greece to unilaterally extend its territorial sea up to 12 n.m. is well-founded in international law of the sea, while a closer look at Turkish claims to the contrary reveals their tenuous legal ground. Greece may extend its territorial sea whenever and wherever it considers politically appropriate. It goes without saying that the extension of the territorial sea in the Aegean Sea is part of a wider political matrix that calls for careful consideration. Legally speaking, though, it would be totally lawful.

2. Maritime Delimitation

Maritime delimitation is indisputably the main dispute between Greece and Turkey. As was argued above, the definition of 'dispute' under international law is very broad, and its existence is a matter for 'objective determination'.[115] Accordingly, it is arguable that Greece and Turkey have not only a dispute over the delimitation of the continental shelf (and a future EEZ), but also over the delimitation of the territorial sea -especially in the Northeast Aegean Sea, where there is no delimitation treaty.

In the remainder of this Section, the legal positions of the two States concerning the issue of maritime delimitation will be succinctly set out. This will be followed by a brief, yet concise introduction to the relevant legal framework.

a) Position of Greece

Greece has a very consistent position on the matter of the delimitation of maritime zones with Turkey. Fist, with respect to the territorial sea, it is the submission of Greece that:

'maritime boundaries between Greece and Turkey are clearly delimited. More specifically, the maritime region of the Evros estuary is delimited on the basis of the Athens Protocol of 26 November 1926; in the adjoining maritime region extending south from Evros to Samos and Icaria, in the absence of relevant agreements with Turkey, the principle of median line/equidistance applies, in accordance with customary international law…; south of Samos, between the Dodecanese and Turkey, the maritime boundaries are delimited based on the Agreement of 4 January 1932 and the Protocol of 28 December 1932, between Italy and Turkey. Greece was the successor State in the relevant provisions of these agreements, on the basis of Article 14 (1) of the Peace Treaty of 10 February 1947…; any contentions on the part of Turkey regarding the abovementioned existing status are unfounded and contravene international law. The delimitation agreements are in full force and are binding for Turkey, whereas in regions where there is no agreement on the maritime boundary, the principle of equidistance/median line is implemented based on customary law, which is valid *erga omnes*'.[116]

[115] See supra notes 53and 54.
[116] See at <https://www.mfa.gr/en/issues-of-greek-turkish-relations/relevant-documents/maritime-boundaries.html>

On the issue of the delimitation of the continental shelf, the long-standing position of Greece, as reflected in Greek national legislation,[117] and submitted to the United Nations and to Turkey bilaterally,[118] can be summarized as follows:[119]

-The UNCLOS and customary international law provide for exclusive rights *ipso facto* and *ab initio* of a coastal State on its continental shelf which has a minimum breadth of 200 n.m. provided the distance between opposing coasts allows this.[120]

-Islands, regardless of their size, have full entitlement to maritime zones (continental shelf/exclusive economic zone), as other land territory, a rule clearly stipulated in Article 121 (2) of UNCLOS, which reflects customary international law as confirmed by international jurisprudence. This is also confirmed by international practice, including existing delimitation agreements in the Eastern Mediterranean.

-Regarding the method of delimitation, Greece argues that the delimitation of the continental shelf or EEZ between States with opposite coasts (both continental and insular) should take place in accordance with the pertinent rules of international law on the basis of the equidistance/median line principle. More specifically, Greece refers to article 83 (1) of UNCLOS, according to which, 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. In view of Greece, 'the jurisprudence of the international courts and tribunals on maritime delimitation affirms the central importance of the equidistance line in maritime delimitation, in the application of articles 74 and 83 of the United Nations Convention on the Law of the Sea and the corresponding rules of customary international law. This jurisprudence has developed a consistent methodology based on equidistance which has been practiced overwhelmingly by international courts and tribunals'.[121]

-In response, particularly, to the Turkey-Libya MoU, Greece claimed, amongst others, that 'Turkey and Libya have no opposite or adjacent coasts and therefore have no common maritime boundaries. Consequently, there is no geographical and thus no legal basis to conclude a maritime delimitation agreement… In particular, …given that the insular territories of the Dodecanese islands and of Crete, lying between Turkey and Libya, belong neither to Turkey nor to Libya, but to Greece. Moreover… the inclusion of "base points" in the said memorandum, in an attempt to give a semblance of legitimacy to the purported

[117] According to article 156 of Law 4001/2011 (Government Gazette A΄ 179 – "For the operation of electricity and gas energy markets, for exploration, production and transmission networks of hydrocarbons and other provisions"),
in the absence of a delimitation agreement with neighbouring States, the outer limit of the continental shelf is the median line between the Greek coasts and the coasts opposite or adjacent to those'. See also note verbale No. 974 dated 8 May 2012 of Greece to the UN; see *Law of the Sea Bulletin*, vol. 79, p. 14.

[118] Greece has on many occasions registered the above positions with the United Nations (note verbale dated 24 February 2005, see *Law of the Sea Bulletin*, vol. 57, p. 129; note verbale No. 389 dated 20 February 2013, see *Law of the Sea Bulletin*, vol. 81, p. 23; and letters from the Permanent Representative of Greece dated 23 May 2016 (A/70/900-S/2016/474), 8 December 2016 (A/71/675-S/2016/1043), 10 May 2017 (A/71/901-S/2016/416) and 25 April 2019 (A/73/850-S/2019/344) and has also communicated them bilaterally to Turkey.

[119] For the official positions of Greece see at https://www.mfa.gr/en/issues-of-greek-turkish-relations/relevant-documents/delimitation-of-the-continental-shelf.html. See also inter alia the Letter dated 19 February 2020 from the Permanent Representative of Greece to the United Nations addressed to the Secretary-General, A/74/710–S/2020/129.

[120] Nowhere in the Mediterranean Sea a coastal State may claim a continental shelf/EEZ up to 200 n.m. from the baselines, which renders the need for maritime delimitation imperative. See on maritime delimitation in the Eastern Mediterranean Sea, M. Gavouneli, *Energy Installations at Sea* (Nomiki Vivliothiki, Athens, 2016), pp. 19-70 [in Greek] and A. Strati, *Greek Maritime Zones and its Delimitation with Neighbouring* States (Nomiki Vivliothiki, Athens, 2012) [in Greek].

[121] See Letter dated 19 February 2020, supra note 119.

"More importantly, Greece contends that all islands, wherever it is situated, and not only on the 'right side', as Turkey claims, may have their own continental shelf/EEZ and thus they may constitute the relevant coasts upon which the median line will be drawn."

"delimitation", is unlawful and cannot produce any legal effect, since the projection of the coasts of Turkey on which the base points are placed overlaps with the projection of the coasts of the Greek islands…'.[122]

In sum, Greece's main argumentation for the delimitation of the continental shelf)/EEZ is predicated upon the principle of median line, i.e. that the boundary should be established at the line every point of which is equidistant from the nearest points of the baselines (along the coasts) of each State (see the Greek claims based on median line: Annex II). In view of Greece, this principle is affirmed by international jurisprudence and plays a pivotal role in every delimitation case. More importantly, Greece contends that all islands, wherever it is situated, and not only on the 'right side', as Turkey claims, may have their own continental shelf/EEZ and thus they may constitute the relevant coasts upon which the median line will be drawn.

b) Position of Turkey

As to the alleged dispute on the delimitation of the territorial waters between the two countries, Turkey submits, first, that 'it is a fundamental rule of international law that delimitation of maritime boundaries between adjacent and opposite states in locations where maritime areas overlap or converge should be effected by agreement on the basis of international law. In the case of the Aegean Sea, however, there exists no maritime delimitation agreement between Turkey and Greece with respect to the territorial sea in the area of adjacent coasts as well as opposite coasts'.[123]

"Turkey has never claimed that islands cannot generate maritime zones. Rather, its long-held position is that islands constitute 'special circumstances' and they may have reduced or no effect especially when they are 'on the wrong side of the delimitation line'."

With respect to the method of delimitation of the territorial sea, during UNCLOS III, Turkey presented a 'draft article on territorial sea delimitation where it restated its preference on the application of equitable principles over the median line, stating also that the mere existence of islands constitutes a special circumstance'.[124] However, subsequently, it seems that Turkey has accepted the median line as a method of delimitation, retaining its positions on islands.[125]

On the issue of islands and whether they may have maritime entitlements, i.e. territorial sea, contiguous zone, continental shelf and EEZ, similar to the other land territory of the coastal State, it is apt to underscore that_Turkey has never claimed that islands cannot generate maritime zones. Rather, its long-held position is that islands constitute 'special circumstances' and they may have reduced or no effect especially when they are 'on the wrong side of the delimitation line'. For example, during the discussions on the regime of islands at UNCLOS III, Turkey -invoking the natural prolongation criterion- argued that in some regions (implying the Aegean) islands rest on the continental shelf of another state and that islands should be deemed 'special circumstances' in respect of maritime

[122] See Letter dated 20 April 2020 from the Permanent Representative of Greece to the United Nations addressed to the Secretary-General, A/74/819, pp. 1-2.

[123] See at <http://www.mfa.gov.tr/maritime-issues---aegean-sea---the-outstanding-aegean-issues.en.mfa>

[124] *Official Records of the Third United Nations Conference on the Law of the Sea* Vol III, A/CONF.62/C.2/L.9; UN Doc A/AC.138/SC.II/L.22 and Rev. 1. Reproduced in the Report of the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National Jurisdiction (1973) Annex II: Report of the Sub-Committee II, Appendix V, pp. 22-23. See also N. Ioannides, *Maritime Claims and Boundary Delimitation. Tensions and Trends in the Eastern Mediterranean Sea* (Routledge, 2020), p. 90 [forthcoming; on file with the author].

[125] See Turkey's Ministry of Foreign Affairs, 'Outstanding Issues in the Eastern Mediterranean and the Aegean Sea' (18.02.2020), p. 25; available at <http://www.mfa.gov.tr/site_media/html/Outstanding-Issues-in-the-Eastern-Mediterranean-and-the-Aegean-Sea-Turkey-s-Views-and-Policies.pdf>

"…islands cannot have a cut-off effect on the coastal projection of Turkey, the country with the longest continental coastline in Eastern Mediterranean"

delimitation.[126] As Ioannides observes, 'for the sake of clarity, it must be noted that Turkey recognised, in principle, that islands form part of the territory of a state and, hence, have a continental shelf of their own, but sought clarifications on the applicable method in terms of the designation of the sea areas where the state would exercise its sovereign rights generated from islands. Even so, Turkey attempted to deny a continental shelf to islands with a certain location, namely the Greek islands in the Aegean Sea, so as to create some kind of regional deviation.'[127]

Subsequent to the UNCLOS III, Turkey has further clarified its position in relation to the islands and their role in maritime delimitation. According to recent Letter from the Permanent Representative of Turkey to the UN Secretary-General (18 March 2020), 'following the precedent of various judgments by international bodies of adjudication, (a) islands cannot have a cut-off effect on the coastal projection of Turkey, the country with the longest continental coastline in Eastern Mediterranean; (b) the islands which lie on the wrong side of the median line between two mainlands cannot create maritime jurisdiction areas beyond their territorial waters'.[128] On the other hand, according to Ambassador Erciyes, whose views are reproduced by the Turkish MFA, delimitation and entitlement produced by islands are not the same and 'islands may get zero or reduced EEZ/CS if their presence distorts equitable delimitation'.[129] Also, Ambassador Erciyes asserts that 'islands (i) cutting off Turkey's coastal projection and CS [continental shelf] (ii) lying on the wrong side of the median line between mainlands (iii) with minimal coastal lengths comparing to Turkey's mainland should not generate CS and EEZ'.[130]

"…refutes the median line and contends that the delimitation of the continental shelf (and the EEZ) should be effected on the basis of equity or equitable principles"

As to the method of delimitation, Turkey consistently refutes the median line and contends that the delimitation of the continental shelf (and the EEZ) should be effected on the basis of equity or equitable principles taking into account relevant circumstances with a view to achieving an equitable solution.[131] These relevant circumstances should include: the regional geography, including particular features of the region (semi enclosed sea); configuration of the coasts; the presence of islands, including their size and position in the context of general geographic configuration; non-geographic circumstances, such as historic rights and the presence of third states, as well as other factors affecting delimitation, like proportionality and non-encroachment (or non-cut-off effect).[132]

It readily appears that the two States hold diametrically opposed views on the legal rules governing maritime delimitation. In the remainder of this Section, these views will be assessed against the background of the relevant rules of international law with the view to shedding some light on the legal framework of maritime delimitation between Greece and Turkey.

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[126] Turkish note verbale (27 February 1974). Reproduced in the *Aegean Sea Continental Shelf case Pleading Aegean Sea Continental Shelf Case (Greece v Turkey)* (Application instituting proceedings) [1976] ICJ Pleadings, pp. 23-25; *Official Records* (n 123) Vol I, A/CONF.62/SR.39, paras 29, 38. See also inter alia Y. Acer, *The Aegean Maritime Disputes and International Law* (Ashgate Publishing 2002), 14, 16-17, 230-231.

[127] N. Ioannides, supra note 124, pp. 81-82. According to Bolükbasi: 'these islands are an incidental feature of the western coast of Anatolia, superimposed upon the area constituting seaward extension of that coast', *supra* note 66, 531.

[128] Letter dated 18 March 2020 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General, UNGA, A/74/757;
available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/TUR.htm>

[129] See Çağatay Erciyes, Eastern Mediterranean Turkey's Legal and Political Views (5 February 2020), p. 12; available at <http://www.mfa.gov.tr/site_media/html/Eastern-Mediterranean-Turkey-s-Legal-and-Political-Views-5-February-2020.pdf>

[130] Ibid.

[131] Turkey's Ministry of Foreign Affairs, 'Outstanding Issues in the Eastern Mediterranean and the Aegean Sea', supra note 125, p. 25

[132] Ibid, p. 26.

c) The Relevant Rules of International Law

i) Delimitation of the territorial sea

"…the ICJ has accepted that this 'equidistance/ special circumstances' rule represents customary international law. Also Turkey seems to accept this rule as the applicable legal framework."

Even though Greece does not recognize that there exists a legal dispute with Turkey on the issue of the delimitation of the territorial sea between the two States, there is merit in setting out the relevant legal rules in case such issue arises either in the context of negotiations or in judicial proceedings. Notably, it is often the case that the International Court of Justice (ICJ) and other international tribunals are called to delimit all the maritime zones of the parties, including the territorial sea, the continental shelf, and the EEZ. In those cases, the ICJ and tribunals do draw a 'single maritime boundary' between the parties, which, as we will discuss, may raise certain methodological concerns.

In terms of the rules on the delimitation of overlapping territorial seas, Article 15 UNCLOS provides that: 'Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith'. Significantly, the ICJ has accepted that this 'equidistance/special circumstances' rule represents customary international law.[133] Also Turkey seems to accept this rule as the applicable legal framework.[134]

As acknowledged by the ICJ in the Costa-Rica/Nicaragua case, there is an established jurisprudence, according to which the Court proceeds in two stages: first, the Court will draw a provisional median line; second, it will consider whether any special circumstances exist which justify adjusting such a line.[135] In practice, international courts and tribunals have very exceptionally departed from the median line in drawing the boundary between overlapping territorial seas. It has happened only in cases that: i) there were geographical or geological difficulties, including difficulties in identifying reliable basepoints on the coast;[136] ii) there were historical arrangements and navigational interests;[137] and iii) there was a tiny island ('rock' in legal terms) situated at the provisional equidistance line.[138]

It is very rare that an international court or tribunal would have only to delimit the territorial sea. On the contrary, the delimitation of the territorial sea is often only one part of the delimitation process and the question is whether the process for the delimitation of the

[133] See *Qatar/Bahrain*, *supra* note 78, para 230 and *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v Nigeria: Equatorial Guinea Intervening) (Merits) Judgment, 2002, ICJ *Reports* 2002, p. 303, para 288.
[134] See *supra* note 125.
[135] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* (Costa Rica v. Nicaragua), ICJ, Judgment of 2 February 2018, para 98 (hereinafter: Costa Rica/Nicaragua case). See also *Qatar/Bahrain*, *supra* note, para 176.
[136] See *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, (Nicaragua v Honduras) (Judgment) (2007) ICJ *Reports* 2007, p. 659, paras 278-281.
[137] See Arbitration between Guyana and Suriname, *supra* note 36, paras 323–325.
[138] 'The Court observes that Qit'at Jaradah is a very small island, uninhabited and without any vegetation. This tiny island, which - as the Court has determined (see paragraph 197 above) - comes under Bahraini sovereignty, is situated about midway between the main island of Bahrain and the Qatar peninsula. Consequently, if its low-water line were to be used for determining a basepoint in the construction of the equidistance line, and this line taken as the delimitation line, a disproportionate effect would be given to an insignificant maritime feature … In similar situations the Court has sometimes been led to eliminate the disproportionate effect of small islands … The Court thus finds that there is a special circumstance in this case warranting the choice of a delimitation line passing immediately to the east of Qit'at Jaradah'; *Qatar/Bahrain*, supra note 78, para 216.

territorial sea should be subsumed by that of an EEZ/continental shelf. This is of importance in case the ICJ or other Tribunal is called to draw a 'single maritime boundary', i.e. a boundary for all maritime zones, between Greece and Turkey.

In this regard, it was particularly welcome that in the most recent judgment in the delimitation case between Costa Rica and Nicaragua in the Caribbean Sea, the ICJ did, even implicitly, clarify the relevant legal framework that was gratuitously obscured by the Arbitral Award in Croatia and Slovenia case. In between, ITLOS had already taken some distance from the Croatia-Slovenia pronouncement on the delimitation of territorial sea in the *Ghana* v *Cote d'Ivoire* case.[139]

In the Croatia-Slovenia case, the Tribunal in essence assimilated the rules on the delimitation of territorial seas with those applicable to the delimitation of continental shelf/Exclusive Economic Zone (EEZ). The Tribunal had, amongst others, to delimit the territorial sea boundary between Croatia and Slovenia. The tribunal noted that the applicable law was Article 15 of the UNCLOS yet highlighted the similarity of the methods of delimitation for all maritime zones, which was to begin with the construction of an equidistance line and then consider whether that line required adjustment in the light of any special circumstances. In its words, 'in relation to the delimitation both of the territorial sea and of the maritime zones beyond the territorial sea, international law thus calls for the application of an equidistance line, unless another line is required by special circumstances'.[140] In so doing, the Tribunal readily favoured the position of Slovenia in this regard and espoused the rationale of the 'no cut-off effect' that is more pertinent to the delimitation of the EEZ/continental shelf rather than that of territorial seas.[141]

"This is particularly welcome in respect of the Greek-Turkish dispute, since in the case that a Court or Tribunal is called to draw a single maritime boundary between all maritime zones of the two States, it would be very handy for Turkey to[...]and plead for a territorial sea delimitation along the lines of continental shelf/EEZ delimitation."

It is submitted that this is a marked departure from the relevant provisions of UNCLOS. It is readily apparent from the face of these provisions that the territorial sea is to be delimited on the basis of the equidistance principle, unless historic titles or special circumstances call for other delimitation, while the continental shelf/EEZ is to delimited on the basis of international law with the view to achieving an equitable result. What in essence the Arbitral Tribunal did was to unwarrantedly import to the generally simple and foreseeable exercise of territorial sea delimitation all the exigencies of continental shelf/EEZ delimitation, including the disparity of the length of the coasts (proportionality), the concavity of the coastline and the concomitant principle of the no cut-off effect, the idea of natural prolongation coined in the North Sea Continental Shelf cases, and so forth. Hence, in applying the methodology used in continental shelf delimitation, the Arbitral Tribunal deviated from the strict equidistance line and gave significantly more territorial seas area to Slovenia to the detriment of Croatia. It stands to reason to assume that the result would have been different if the delimitation had proceeded as provided for under Article 15 UNCLOS.

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[139] See ITLOS, *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean* (Ghana/Côte d'Ivoire), Judgment of 23 September 2017, paras 260-264. On this case see Gavouneli, Maria, Delimiting Delimitation: Lessons Learned from the ITLOS Chamber Judgment on the Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte D'Ivoire in the Atlantic Ocean (October 13, 2017).
Available at SSRN: https://ssrn.com/abstract=3054575 or http://dx.doi.org/10.2139/ssrn.3054575

[140] *In the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia*, Final Award, 29 June 2017, para 1000.

[141] See a rather exaggerated view on the said principle, and notably, in favour of the Turkish position, in Y.E. Acikgonul, 'Reflections on the Principle of Non-Cut Off: A Growing Concept in Maritime Boundary Delimitation Law' (2016) 47 *Ocean Development & International Law*, pp. 52-71.

This assumption finds significant support in the recent ICJ Judgment in the Costa Rica/Nicaragua case. In that case and in a similar vein with Croatia, Nicaragua pleaded that the law applicable to the delimitation of the territorial sea and continental shelf/EEZ is identical.[142] This of course would have been beneficial for Nicaragua, due to its more extended length of its coast and the concavity of the pertinent coastline, which leads to certain cut-off effect of its natural prolongation, especially in the Pacific Ocean.[143] However, this argument was not sustained by the Court, as it held that it is Article 15 UNCLOS that is applicable and not the regime governing the delimitation of the continental shelf/EEZ.[144]

Consequently, the recent ICJ judgment marks a return to orthodoxy and legality in respect of territorial sea delimitation and this is very commendable development. This is particularly welcome in respect of the Greek-Turkish dispute, since in the case that a Court or Tribunal is called to draw a single maritime boundary between all maritime zones of the two States, it would be very handy for Turkey to assume the position of Slovenia in the Croatia/Slovenia case or that of Nicaragua in Nicaragua/Costa Rica case and plead for a territorial sea delimitation along the lines of continental shelf/EEZ delimitation.

"…safe prognosis would seem to be that, absent any exceptional geographical instability or historic rights in the relevant maritime area, it would be difficult for a Court to depart from the median line in any future hypothetical delimitation of the overlapping territorial seas between Greece and Turkey."

In concluding, the delimitation of the territorial sea is subject to a very clear and foreseeable legal framework under customary law, which Turkey seems to accept, in principle. Thus, a safe prognosis would seem to be that, absent any exceptional geographical instability or historic rights in the relevant maritime area, it would be difficult for a Court to depart from the median line in any future hypothetical delimitation of the overlapping territorial seas between Greece and Turkey.[145]

ii) Delimitation of Continental Shelf and the EEZ

-*The Applicable Rules*: In stark contrast to the rather straightforward rule on territorial sea delimitation, the UNCLOS rules on the delimitation of the continental shelf and EEZ are markedly vague. Articles 74(1) and 83(1) of the LOSC both provide that such delimitations are to 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'. As Evans observes, 'it is of next to no practical utility at all for those seeking to better understand how to delimit a boundary. As a result, it is to the work of the ICJ, ITLOS and other arbitral bodies that one must look for the articulation and development of the principles applicable under both the LOSC and customary international law'.[146]

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[142] As the Court stated, 'Nicaragua argues that Article 15 of UNCLOS does not stipulate how the delimitation is to be effected, but only how States must act failing an agreement on delimitation. According to Nicaragua, a flexible application of the equidistance/special circumstances rule is necessary in order to "take into account local characteristics of the configuration of the coastline". Nicaragua further argues that *there is no practical difference between the regime of delimitation of the territorial sea according to Article 15 of UNCLOS and the regime applicable to the delimitation of the exclusive economic zone and the continental shelf, respectively outlined in Articles 74 and 83 of UNCLOS. In its view, "the approaches to delimitation of the different maritime zones are convergent" and all relevant provisions of UNCLOS must be read together and in context*.'; para 92 (emphasis added).

[143] *Ibid*, paras 101 and 174.

[144] The Court implicitly rejected the argument of Nicaragua by employing its well-established 'two-stage' methodology in delimiting territorial seas; see ibid, para 98.

[145] A pending issue would be the role of tiny islands/rocks at the middle of the provisional equidistance line, which needs geographical expertise to safely address in the case of the Aegean Sea.

[146] M. Evans, 'Maritime Boundary Delimitation' in D. Rothwell et el (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015), 254, p. 268. See also RR Churchill and AV Lowe, *supra note 80,* p. 191.

Such principles have been found after numerous twists and turns of the relevant case-law, starting from the seminal 1969 North Sea Continental Shelf cases,[147] moving to the 1985 Libya/Malta[148] and the 1993 Jan Mayen case,[149] and culminating in the 2009 Black Sea case and the 'three stage approach', which, arguably, offers some degree of specificity and predictability. Accordingly, courts and tribunals first provisionally draw an equidistance line using the most appropriate base points on the relevant coasts of the Parties. Second, they consider whether there exist relevant circumstances, which are capable of justifying an adjustment of the equidistance line provisionally drawn. Third, they assess the overall equitableness of the boundary resulting from the first two stages by checking whether there exists a marked disproportionality between the length of the Parties' relevant coasts and the maritime areas found to appertain to them.[150] This *acquis judiciaire* is supplemented by two preliminary, yet very significant considerations, i.e. the establishment of the 'relevant coasts', namely those that "generate projections which overlap with projections from the coast of the other Party",[151] and the designation of the 'relevant maritime area'. As the Court indicated in *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, "[t]he relevant area comprises that part of the maritime space in which the potential entitlements of the parties overlap".[152]

"…it is reasonable to presume that the 'three-stage approach', as developed by the relevant jurisprudence, would be the applicable legal framework of the delimitation of the continental shelf/EEZ between Greece&Turkey before any international court& tribunal."

In concluding, it is reasonable to presume that the 'three-stage approach', as developed by the relevant jurisprudence, would be the applicable legal framework of the delimitation of the continental shelf/EEZ between Greece and Turkey before any international court and tribunal. Turkey would be difficult to contest this, and in any case, it appears that it accepts the relevant provisions of UNCLOS underlining the fact that the ultimate goal is an 'equitable solution'.[153]

-*Relevant Circumstances*: It goes without saying that a key factor is which would be the relevant circumstances, if any, that a Court would take into consideration at the second stage of the delimitation process in a future case between Greece and Turkey. Relevant circumstances are an open-ended category comprising an undefined set of factors considered on a case-by-case basis.[154] Thus, there is no legal limit as to what factors can be considered as a relevant circumstance.[155] However, while there is no fixed list of relevant circumstances,[156] theory usually distinguishes between geographical and non-geographical ones, with state practice and the relevant case law according precedence to the former particularly concerning the delimitation of continental shelf and the EEZ. 'Such a geography-centric approach is faithful to the adage that the land dominates the sea and the fact that

[147] See *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) (1969) I.C.J. *Reports* 1969, pp. 51–52
[148] See *Case Concerning the Continental Shelf Delimitation* (Libyan Arab Jamahiriya v. Malta), (1985) I.C.J. *Reports* 1985, p. 68.
[149] *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment (1993) I.C.J. *Reports* 1993, p. 38, 61.
[150] See *inter alia Maritime Delimitation in the Black Sea* (Romania v Ukraine) (Judgment) (2009) I.C.J. *Reports* 2009, p. 61, paras. 115-122; *Territorial and Maritime Dispute* (Nicaragua v. Colombia), Judgment, I.C.J. *Reports* 2012 (II), pp. 695-696, paras. 190-193; *Maritime Dispute* (Peru v. Chile), Judgment, I.C.J. *Reports* 2014, p. 65, para. 180; *Delimitation of the Maritime Boundary in the Bay of Bengal* (Bangladesh/Myanmar), Judgment, ITLOS *Reports* 2012, pp. 64-68, paras. 225-240.
[151] *Black Sea case, ibid*, para 99.
[152] See *Nicaragua/Colombia, supra* note 150, para. 159.
[153] See *supra* note 131 and corresponding text.
[154] See M. Evans, *Relevant Circumstances and Maritime Delimitation* (Oxford: Clarendon Press, 1989), pp. 17-26.
[155] See *North Sea Continental Shelf cases*, *supra* note 114, at para. 93. See also *Delimitation of Maritime Boundary Between Guinea and Guinea-Bissau*, Award of 14 February 1985, 25 *I.L.M.* 252, at para. 89.
[156] See *inter alia* S. Fietta & R. Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (Oxford University Press, 2016), p. 67 and M. Kałduński & T. Wasilewski, 'The International Tribunal for the Law of the Sea on Maritime Delimitation: The Bangladesh v. Myanmar Case' (2014) 45 *Ocean Development & International Law*, p. 123, at p. 128.

State entitlements to maritime space derive from the coast, and are thus dictated by coastal geography'.[157]

Indeed, there is an overwhelming propensity of courts and tribunals to rely on geography-related factors in order to adjust the provisional equidistance line, with the cases in which other, non-geographical, factors have played a role being rather exceptional. Notable exceptions have been the Jan Mayen case (fisheries),[158] Nicaragua/Colombia case ('orderly management of maritime resources, policing and the public order of the oceans in general'),[159] and older cases, like Tunisia/Libya[160] with respect to the existence of natural resources, including petroleum fields or wells within the relevant area.

"When it comes to delimitation, particularly of the continental shelf/EEZ, maritime features, are taken into account twofold: first, as base points for the drawing of the provisional baseline at the first stage of the delimitation process, and second, as relevant circumstance calling for an adjustment of the provisional equidistance line."

Among these circumstances, it is worth having a closer look at few, which presumably would play a role in the delimitation between Greece and Turkey, in view also of the relevant position of Turkey.[161]

-*Islands:* It is a truism that maritime features, including islands, or according to the Award in the South China Sea case, 'fully entitled islands',[162] and rocks, play a significant role in maritime delimitation cases.[163] According to Article 121 UNCLOS, which reflects customary law,[164] '1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide. 2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf'.

As observed by the ICJ in the *Nicaragua/Colombia* case, all rocks, however small and insignificant, can generate a territorial sea of 12M from their baselines.[165] By contrast, any island feature that is capable of sustaining human habitation or economic life of its own will (subject to the overlapping claims of any neighbouring State) generate full EEZ and continental shelf rights.

It was only relatively recently, namely in the 2016 South China Sea Award, that the cryptic provision of Article 121 (3) was for the first time construed by an international court or tribunal. This case, even though criticized by many authorities,[166] offers us some practical guidance on how to apply the Article 121 distinction to specific features.[167] Interestingly, in the most recent ICJ judgment on maritime delimitation (*Costa Rica* v *Nicaragua*), the ICJ did not refer to the South China Sea in applying Article 121 to certain maritime features.

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[157] Fietta & Cleverely, *ibid,* at p. 67.
[158] See *Jan Mayen case, supra* note 149, at paras. 73–76
[159] See *Nicaragua/Colombia case*, *supra* note 150, at para 230.
[160] See *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), Judgment of 24 February 1982, I.C.J. *Reports* 1982, at paras 77 and 133.
[161] See *supra* note 131.
[162] *South China Sea Arbitration*, *supra* note 101, para 280.
[163] See S. Talmon, 'Article 121' in A. Proelss (ed.), UNCLOS Commentary, *supra* note 78, 858-880. See also H. Dipla, 'Islands' *in Max Planck Encyclopedia of Public International law*, Edition 2008.
[164] See *Nicaragua/Colombia, supra* note 150, para 139.
[165] *Ibid*, paras 177-8.
[166] See inter alia Y. Tanaka, 'Reflections on the Interpretation and Application of Article 121(3) in the South China Sea Arbitration (Merits)' (2017) 48 *Ocean Development & International Law*, 365-385, M. Loya, 'The Spratly Islands as a Single Unit Under International Law: A Commentary on the Final Award in Philippines/China Arbitration' (2016) 47 *Ocean Development & International Law*, 309-326.
[167] See South China Sea case, supra note 101, paras 475-553.

When it comes to delimitation, particularly of the continental shelf/EEZ, maritime features, such as fully entitled islands or rocks, are taken into account twofold: first, as base points for the drawing of the provisional baseline at the first stage of the delimitation process,[168] and second, as relevant circumstance calling for an adjustment of the provisional equidistance line.[169] Against this backdrop, the most recent ICJ Judgment in the Costa Rica/Nicaragua case (2018) offers valuable insights with respect to both the ways that the courts and tribunals take into account maritime features, i.e. as base points and as relevant circumstances (See Annex IV).

"…even very small islets fringing the coastline may be assimilated to it, even if as such they could never qualify as fully-entitled islands and ergo used as base points. This is also particularly welcome for Greece, since many small maritime features are situated in close proximity of its main continental or insular territory."

First, the Court had to assess, whether it would use Corn Islands and some other tiny maritime features belonging to Nicaragua as base points for the construction of the provisional equidistance line between their respective continental shelves/EEZs in the Caribbean Sea. These two were the only issues concerning base points on which the parties were divided. With respect to the Corn Islands, it is noteworthy that these same Nicaraguan features were given full effect by the ICJ in the delimitation with Colombia.[170] The Court did not have much problem to conclude that base points should be placed on the Corn Islands for the purpose of constructing a provisional equidistance line. In its view, "these islands have a significant number of inhabitants and sustain economic life. They therefore amply satisfy the requirements set forth in Article 121 of UNCLOS for an island to be entitled to generate an exclusive economic zone and continental shelf. The effect that has to be attributed to the Corn Islands in the adjusted delimitation is a different question, that should not affect the construction of the provisional equidistance line".[171]

This *dictum* is one of the very few instances that the Court justifies, even laconically, the designation of a maritime feature either as 'fully-entitled island' or as a 'rock'. The fact that they have 'significant number of inhabitants (approximately 7,400)[172] and 'sustain economic life' (mainly tourism) did suffice for the Court to rightly reach this conclusion. They did meet the requirements that, *e contrario*, Article 121 para 3 UNCLOS sets out, i.e. the capacity to sustain human habitation or economic life of their own. Corn islands had obviously the capacity to do both.

While it was not particularly difficult for the Court to select the Corn Islands as base points, the same was not true with respect to some minor maritime features, Paxaro Bovo and Palmenta Cays, which are situated at a short distance from Nicaragua's mainland coast near Punta del Mono. Costa Rica, rather reasonably, argued that base points should not be placed on small insular features located along the coast and underscored that islets, cays and rocks do not generate entitlements to an exclusive economic zone or a continental shelf.[173] In Costa Rica's view, placing base points on those features would create an "excessive and disproportionate distortion" of the provisional equidistance line.[174] To put some geographical context to these claims, Palmenta Cays are islets lying at a distance of about one nautical mile from the coast, while Paxaro Bovo, which is a rock situated 3 nautical miles off the coast south of Punta del Mono.

[168] See e.g. Nicaragua/Colombia, *supra* note 150, paras 201-202.
[169] See inter alia C. Schofield, 'Islands or Rocks? Is that the Real Question? The Treatment of Islands in the Delimitation of Maritime Boundaries' in M. Nordquist (ed.) *The Law of the Sea Convention: US Accession and Globalization* (Martinus Nijhoff, 2012), 322-340.
[170] *Nicaragua/Colombia, supra* note 150, para 201.
[171] See *Costa Rica/Nicaragua, supra* note 135, para 140.
[172] See *Nicaragua/Colombia, supra* note 150, para 26.
[173] *Costa Rica/Nicaragua, supra* note 135, para 141.
[174] Ibid.

"Thus, depending on their size, status, and distance from the mainland, they may be given limited or no weight or effect."

The Court, faithful to its previous jurisprudence, namely that "a cluster of fringe islands"[175] or "islands fringing the Nicaraguan coast"[176] may be assimilated to the coast, held that Palmenta Cays fit this description and the same conclusion may apply with regard to Paxaro Bovo. The Court considered thus appropriate to place base points on both features for the construction of the provisional equidistance line.[177] Certainly, this is a notable addition to the jurisprudence of the Court that even very small islets fringing the coastline may be assimilated to it, even if as such they could never qualify as fully-entitled islands and *ergo* used as base points. This is also particularly welcome for Greece, since many small maritime features are situated in close proximity of its main continental or insular territory.

Maritime features are also taken into account at the second stage of the continental shelf/EEZ delimitation process. As Fietta and Cleverley underscore, 'it is important to note, however, that islands, rocks, or other features will only constitute relevant circumstances where they have a distortive effect on the geography of the delimitation area, and thus on the course of an equidistance or median line.[178] And Evans observes, 'it is not geographical features that might be special circumstances, but unusual geographical features: unusual in the sense that they do not conform to the general geographical relationship that is held to exist'.[179] Thus, depending on their size, status, and distance from the mainland, they may be given limited or no weight or effect.

"…'the effect to be given to an island in the delimitation of the maritime boundary in the exclusive economic zone and the continental shelf depends on the geographic realities and the circumstances of the specific case. There is no general rule in this respect."

In acknowledging this the Court in the Costa Rica/Nicaragua case gave half effect to the Corn Islands. Even though it took them into account as base points for the drawing of the provisional equidistant line,[180] the Court considered 'appropriate to give them only half effect. This produces an adjustment of the equidistance line in favour of Costa Rica'.[181] The Court explained this as follows: 'With regard to the effect to be given to the Corn Islands in the determination of the maritime boundary, the Court observes that, while they are entitled to generate an exclusive economic zone and a continental shelf, they are situated at about 26 nautical miles from the mainland coast and their impact on the provisional equidistance line is out of proportion to their limited size. As was noted by the ITLOS in *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (*Judgment, ITLOS Reports 2012*, p. 86, para. 317): 'the effect to be given to an island in the delimitation of the maritime boundary in the exclusive economic zone and the continental shelf depends on the geographic realities and the circumstances of the specific case. There is no general rule in this respect. Each case is unique and requires specific treatment, the ultimate goal being to reach a solution that is equitable'"[182]

It readily appears that the decisive factors were the distance of the islands from the coast (26n.m.) and their limited size (9.6 square km (Great Corn) and 3 square km (Little Corn)),[183] which would have entailed a disproportionate effect of they had been given full effect.

[175] See *Black Sea case, supra* note 150, para 149.
[176] See *Nicaragua/Colombia, supra* note 150, para 201.
[177] See *Costa Rica/Nicaragua, supra* note 135, para 142.
[178] Fietta & Cleverley, *supra* note 156, p. 74.
[179] M. Evans, *supra* note 154, p. 135.
[180] See Costa Rica/Nicaragua, *supra* note 135, para 140.
[181] *Ibid*, para 140.
[182] *Ibid*, para 153.
[183] See *Nicaragua/Colombia case*, *supra* note 150, para 21.

In applying the above pronouncements in the context of the Greek-Turkish disputes, the following remarks are in order:

- *first,* in view of the recent *Costa-Rica v. Nicaragua case*, small rocks/islets close to the main coasts of the two parties may be used as base points for the drawing of the provisional equidistance line.[184]

- *second,* no jurisprudence affirms the contentions of Turkey that 'islands on the wrong side of the median line between two mainlands, or those that they have minimal coastal projection in relation to Turkey, cannot create maritime jurisdiction areas beyond their territorial waters'.[185] On the contrary, the Nicaragua/Colombia case (see Annex III), which Ambassador Erciyes cites in favour of the Turkish position,[186] affirmed the exact opposite, namely that islands close to Nicaragua and far from the 'mainland Colombia' did have CS/EEZ.

"…Greece's counterargument would be, along the lines of the Nicaragua/ Colombia case, that any adjustment or shifting of the provisional median line must not have the effect of cutting off Greece from the entitlements generated by its islands in the area to the south or west of those islands towards its mainland."

- *third*, it is true that depending on their status and their location, islands may have reduced effect in the delimitation process. As stated, this would depend 'on the geographic realities and the circumstances of the specific case'.[187] In any case, contentions, such as those of Turkey, implicit in the Turkey-Libya MoU, that islands like Crete (8.336 square km, Rhodes (1.401 square km) or Karpathos (302 square km), should have no effect at all, i.e. only a territorial sea of 6 n.m. manifestly lack any legal ground. Suffice it only to say that in the Costa Rica-Nicaragua, islands of far more limited size (9.6 square km (Great Corn) and 3 square km (Little Corn) and 26 n.m. from the coast, were given half effect.

-*Cut-off effect/non-encroachment:* The juridical foundation of the principle is found in the *North Sea Continental Shelf* cases of 1969, where the ICJ held that the three States parties were obliged to delimit their boundary in a way that would safeguard the physical natural prolongation of each of their respective continental shelves, without encroaching upon the physical natural prolongation of the others. While the concept of physical natural prolongation has lost relevance given the advent of distance-based entitlements under UNCLOS, the principle of non-encroachment remains relevant in modern delimitation jurisprudence and State practice. Two leading recent examples of adjustment to provisional equidistance lines so as to abate a 'cutoff effect' were provided by the *Bay of Bengal* cases (*Bangladesh/Myanmar* and *Bangladesh/India*), where the geographical configuration of the coastline was strikingly similar to that in the *North Sea* cases, and where Bangladesh stood to lose out from an equidistance-based delimitation in the same way as West Germany did in the 1969 case.[188]

It is true that a situation in which the principle of non-encroachment can constitute a relevant circumstance is where small islands belonging to one State are located off the mainland coast of another. Thus, in *Nicaragua/Colombia*, the ICJ observed that a provisional median line between a group of small Colombian islands and the Nicaraguan mainland had the effect of cutting off Nicaragua from three-quarters of the maritime area into which its coast projected. This led the Court to make a significant adjustment to its provisional line in favour of Nicaragua. Yet, significantly, for the purposes of the present enquiry, the Court 'agreed with Colombia that any adjustment or shifting of the provisional median line must

[184] This appears to be also consistent with the practice of Turkey, as in the Turkey/Libya MoU, reportedly, Turkey used small rocks/islets as base points.
[185] See Turkey's MFA, 'Outstanding Issues in the Eastern Mediterranean and the Aegean Sea', *supra* note 125, p. 25.
[186] See Çağatay Erciyes, 'Eastern Mediterranean Turkey's Legal and Political Views', *supra* note 129, p.16.
[187] See Costa Rica/Nicaragua, supra note 135, para 153.
[188] See inter alia S. Fietta & R. Cleverley, supra note 156, p.68.

"…a fundamental principle of international law that a treaty between two States cannot, by itself, affect the rights of a third State."

not have the effect of cutting off Colombia from the entitlements generated by its islands in the area to the east of those islands. Otherwise, the effect would be to remedy one instance of cut‑off by creating another. An equitable solution requires that each State enjoy reasonable entitlements in the areas into which its coasts project. In the present case, that means that the action which the Court takes in adjusting or shifting the provisional median line should avoid completely cutting off either Party from the areas into which its coasts project'.[189]

In the light of the foregoing, even if Turkey claims, as it is most likely to do so, that the Greek islands cut off its coastal projection, Greece's counterargument would be, along the lines of the Nicaragua/Colombia case, that any adjustment or shifting of the provisional median line must not have the effect of cutting off Greece from the entitlements generated by its islands in the area to the south or west of those islands towards its mainland. Also, another cogent argument drawn from the Nicaragua/Colombia case, which could be advanced against any proposal to enclave the Greek islands, would be that this enclavement would have 'unfortunate consequences for the orderly management of maritime resources, policing and public order' of the region.[190]

-*Third States in the region:* one of the factors that Turkey proposes for the purposes of assessing whether a delimitation is equitable is the presence of third States in the region,[191] which conveniently, Turkey set aside in signing the MoU with Libya. The issue of third States, which may have maritime claims that overlap with the 'relevant maritime area' under delimitation between the two litigants, has been under the scrutiny of international courts and tribunals. In the present context, in a future delimitation case between Greece and Turkey, there would be third States in the region, but more interestingly, there would also be -at least, as things stand now- a delimitation agreement between one of the parties to the dispute, Turkey, with a third State, Libya, whose scope of application overlaps with part of the maritime area that the Court would, hypothetically, be called to delimit ('relevant maritime area').

It is beyond the bound of the present paper to address this complex issue; suffice it to note the following: first, as to the effect of existing maritime delimitation agreements, such as, arguably, Turkey-Libya MoU,[192] the *Nicaragua/Colombia case* is telling also here: Colombia had concluded a maritime boundary agreement with Jamaica in 1993, and had also entered into an agreement with Panama on the boundary between the Colombian islands and the Panamanian mainland and had signed an agreement with Costa Rica on the boundary extending from the Colombia/Panama boundary. Similar to what Turkey would most likely do, Colombia argued that these agreements amounted to a recognition by those states of Colombian entitlements in parts of the relevant area [Turkish entitlements off Crete and Rhodes], which the ICJ should take into account. The Court refuted this argument, recalling

[189] See *Nicaragua/Colombia, supra* note 150, para 216.

[190] As the Court held, 'confining Colombia to a succession of enclaves drawn around each of its islands, as Nicaragua proposes, would disregard that second requirement. Even if each island were to be given an enclave of 12 nautical miles, and not 3 nautical miles as suggested by Nicaragua, the effect would be to cut off Colombia from the substantial areas to the east of the principal islands, where those islands generate an entitlement to a continental shelf and exclusive economic zone. In addition, the Nicaraguan proposal would produce a disorderly pattern of several distinct Colombian enclaves within a maritime space which otherwise pertained to Nicaragua with unfortunate consequences for the orderly management of maritime resources, policing and the public order of the oceans in general, all of which would be better served by a simpler and more coherent division of the relevant area'; *ibid*, para 230.

[191] See Turkey's MFA, 'Outstanding Issues in the Eastern Mediterranean and the Aegean Sea', *supra* note 128, p. 26.

[192] The position of Greece is that this MoU is null and void and does not have any legal effects whatsoever for third parties, in particular Greece. The paper does not address the alleged invalidity of this MoU and proceeds with the assumption that Turkey would invoke this MoU before a court or tribunal in a future delimitation case in order to exclude the MoU area from the area to be delimited between Greece and Turkey.

that it 'is a fundamental principle of international law that a treaty between two States cannot, by itself, affect the rights of a third State.'[193] The Court held that its decision 'addresses only Nicaragua's rights as against Colombia and vice versa and is, therefore, without prejudice to any claim of a third State or any claim which either Party may have against a third State.'[194] Nevertheless, as a result of the delimitation, along part of the former Colombia/Panama boundary and Colombia/Costa Rica boundary, the maritime zones on the other side of the boundary from Panama and Costa Rica became areas where Colombia has no entitlement to exercise sovereign rights, as they were apportioned to Nicaragua.[195]

"To place this in our context, a similar finding by the ICJ or another Tribunal in a hypothetical Greek-Turkish maritime delimitation case would practically mean that the area that is supposed to be Turkish pursuant to the Turkey-Libya MoU would be apportioned to Greece by the Court."

To place this in our context, a similar finding by the ICJ or another Tribunal in a hypothetical Greek-Turkish maritime delimitation case would practically mean that the area that is supposed to be Turkish pursuant to the Turkey-Libya MoU would be apportioned to Greece by the Court.

Regardless whether there are agreements in the region, there might be maritime entitlements of a third State overlapping or potentially overlapping with the entitlements claimed by the parties to that case. A Court or Tribunal delimiting a boundary in such a situation must take a position on whether the existence of overlapping claims of third states should be taken into account.[196] In this regard, the recent case-law indicates:

-*first*, while 'the impact of the rights of third States in the areas that may be attributed to one of the Parties cannot be determined, the spaces where third States have a claim may nevertheless be included'.[197] Thus, for the purposes of the delineating the 'relevant maritime area, third States' claims would be included in the area under delimitation;

-*second,* the case-law since *Guinea/Guinea-Bissau case,* which is the only case that international courts and tribunals have adjusted the delimitation methodology to accommodate third States' interests,[198] appears reasonably consistent, and indicates that the presence of third states is not a relevant factor in the choice of delimitation methodology.[199]

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[193] Nicaragua/Colombia, supra note 150, para 227. See also Article 34 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), 1155 *U.N.T.S.* 331, which is taken as codifying the pre-existing customary law: "A treaty does not create either obligations or rights for a third State without its consent".

[194] *Ibid,* para 208. This pronouncement was affirmed by the Court also in the 2018 Costa-Rica/Nicaragua case, *supra* note 135, para 123.

[195] Judge Xue considered that: [t]he boundary line in the south would virtually produce the effect of invalidating the existing agreements on maritime delimitation that Colombia has concluded with Panama and Costa Rica respectively and drastically changing the maritime relations in the area'; Declaration of Judge Xue, *Nicaragua/Colombia, ibid*, para 15. Judge *ad hoc* Cot considered that the agreements ceased to exist 'since their object disappears with the substitution of Nicaragua for Colombia as the holder of sovereignty or of sovereign rights in the spaces concerned', Declaration of Judge Cot, Nicaragua/Colombia, *ibid* para 10.

[196] Notably, courts and tribunals never took into account the national legislation of the Parties or their practice and positions in the context of agreements with third States, i.e. whatever Greece does in the Ionian Sea, e.g. in the Agreement with Italy, would bear no significance in a future maritime delimitation with Turkey.

[197] *Costa-Rica/Nicaragua case*, *supra* note 135, para 121. In the *Black Sea case,* the Court observed that: "where areas are included solely for the purpose of approximate identification of overlapping entitlements of the Parties to the case, which may be deemed to constitute the relevant area (and which in due course will play a part in the final stage testing for disproportionality), third party entitlements cannot be affected", *supra* note 150, para 114.

[198] In *Guinea/Guinea-Bissau,* the arbitral tribunal considered that the somewhat concave nature of the of the West African coastline as whole rendered the equidistance method unsuitable, and called for a method which could be integrated with existing and future delimitations in the region coastline from Guinea-Bissau to Sierra Leone and the convex character; *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, [1985] XIX *RIAA* 149, para 14.

[199] See also N. Burke O' Sullivan, 'The Case Law's Handling of Issues Concerning Third States', in A. Oude Elferink (ed.), *Maritime Boundary Delimitation: The Case-Law* (Cambridge University Press, 2018), 262, at 283.

"…it should be expected that the Court would not fix the endpoint of the delimitation line between Greece and Turkey at points where third States may have claims, such as Cyprus and Egypt."

-*third,* international courts and tribunals, while insisting on the relative effect of their decisions, have taken steps to protect the legal interests of third states. In this regard, the dominant trend is to draw a delimitation line without a fixed endpoint,[200] which has been described by Pellet as 'an elegant, simple and globally satisfactory solution'.[201] This approach was used by the ICJ in *Qatar/Bahrain*, *Cameroon v. Nigeria, Nicaragua v. Honduras, Black Sea,* and most recently*, Costa Rica v. Nicaragua.*

In our context, it should be expected that the Court would not fix the endpoint of the delimitation line between Greece and Turkey at points where third States may have claims, such as Cyprus and Egypt.

"The law of maritime delimitation has been developed to such extent as to offer a clear and foreseeable picture concerning the process and the relevant circumstances which might be taken into account by an international court or tribunal in a maritime delimitation case."

-*Concluding Thoughts:* The law of maritime delimitation has been developed to such extent as to offer a clear and foreseeable picture concerning the process and the relevant circumstances which might be taken into account by an international court or tribunal in a maritime delimitation case. Even though it is often stated that each case is unique, and thus no safe prognosis can be made as to the result of a delimitation case between Greece and Turkey, one can reasonably presume what would be the arguments that the parties would put forward and what would be their weight in line with the *acquis judiciaire.*

Accordingly, Greece would put forth, *inter alia*: i) the importance of the median line, at least as the first stage of the delimitation process; ii) that all islands generate maritime entitlements in the area; iii) the full effect of the islands with significant status, size and population and those that comprise of a constellation or a 'chain of islands'; iv) the reverse cut-off effect, i.e. that any potential Court's adjustment or shifting of the provisional median line should avoid completely cutting off either Party from the areas into which its coasts project; v) the need to ensure the proper management of resources and the public order of the sea, which runs counter to any proposal for enclaves; vi) the non-applicability here of the disproportionality of the relevant coasts due to the calculation of the coasts of all the relevant Greek islands;[202] vii) the irrelevance of third parties' claims, in particular the Turkey-Libya MoU.

On the other hand, Turkey would underscore, amongst others, i) the fact that the end-result of any delimitation should be an equitable solution under Articles 74 and 83 UNCLOS and customary law; ii) the cut-off effect of its coastal projection due to the presence of Greek islands (as per Nicaragua in the delimitation with Colombia); iii) the distortive effect of islands in the delimitation, entailing that should be given reduced of no effect; iv) the overall geographical context that should not be juridically refashioned;[203] iv) the validity and relevance of the Turkey-Libya MoU; and v) alleged marked disparity between the length of the relevant coastlines etc.

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[200] See *ibid*.

[201] A. Pellet, 'Land and Maritime Tripoints in International Jurisprudence,' in H. Hestermeyer et al. (eds.), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Martinus Nijhoff Leiden, 2011) 245.

[202] If Turkey insists that their claims extend to the west of the 26th meridian, i.e. west of islands like Limnos, Lesvos, Samos, then not only the eastern-facing coasts of those islands, but the whole perimeter would be taken into account and calculated as a 'relevant coast', i.e. as projecting into a maritime area over which the parties have overlapping claims. See in this regard, Nicaragua-Colombia, supra note 150, para 149.

[203] In two cases, namely, the Black Sea case and the Myanmar/Bangladesh case, the ICJ and ITLOS respectively opted to give only a 12 n.m. territorial sea to a maritime feature very close to the coast of the other party and not to take it into account in the delimitation of the continental shelf, because any other treatment would entail a 'judicial refashioning of geography'. In the words of the ICJ in the *Black Sea case*, 'to count Serpents' Island as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine's coastline; the consequence would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes. The Court is thus of the view that Serpents' Island cannot be taken to form part of Ukraine's coastal configuration'; *supra* note 150, para 149.

Resolution of the Maritime Delimitation Dispute

In the previous Section, the legal framework governing the question of the breadth of the territorial sea of Greece and the delimitation of the maritime zones between Greece and Turkey was explored. Bearing in mind that Greece recognizes only the dispute concerning the delimitation of the continental shelf (and EEZ), it is unlikely that all the potential maritime disputes between the two countries would be put before an international court and tribunal. That said, it is apt to underscore that the issue of the breadth of the territorial sea as well as issues of sovereignty of islands, may be indirectly or incidentally addressed by a court or tribunal, as will be subsequently analyzed. This Section will discuss a) the means for the dispute settlement between the two States and the prospects; and b) the recourse to the ICJ through a 'compromis'.

1. Dispute Settlement Means under International Law

One of the fundamental principles of international law is the peaceful resolution of disputes between States.[204] First, Article 2 (3) of the UN Charter requires Members of the United Nations to 'settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'. In addition, Article 33 (1) of the Charter provides that '[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.' Article 33 bears significance in cases where the dispute may endanger international peace and security, as that had occurred in 1976 and, arguably, may happen again very soon in the Aegean Sea and the Eastern Mediterranean.

As it has been already stated, the term dispute should be understood in its ordinary meaning in international law, enunciated by the PCIJ, as 'a disagreement over a point of law or fact, a conflict of legal view of interests between two persons', and confirmed and developed by the ICJ.[205]

The defining characteristic of a peaceful means of settling disputes is that it avoids the use or threat of force, contrary to Article 2 (4) of the Charter of the United Nations. States do not have a strict obligation to resolve the dispute in any manner whatsoever, i.e. an obligation of result, but an obligation of conduct, i.e. to make efforts to resolve the dispute by peaceful means; yet, in no case they shall resort to the use of force or threat to use.[206] Related to the present enquiry, namely, the dispute concerning the maritime delimitation and the relevant actions in undelimited maritime areas, such threat of use of force was considered to be the expulsion by a Surinamese naval vessel of an oil rig and drill ship operating under license from Guyana from an area of continental shelf disputed between the parties. The Surinamese naval vessel had ordered the operator, a private party, to leave

[204] See inter alia Ph. Pazartzis, *Les engagements internationaux en matière de règlement pacifique des différends entre États*, Paris, L.G.D.J. 1992.
[205] See *supra* note 52 and corresponding text.
[206] In his Separate Opinion in the Land Reclamation case, Judge Jesus said that Article 279 UNCLOS, echoing Article 2 (3) of the UN Charter, 'does not create an obligation for States to settle their dispute either specifically through negotiations or by any other particular peaceful means. Rather, it was 'the flip side of the general principle of international law, as embodied in [Article 2 (4) of] the United Nations Charter' prohibiting the use or threat of force as a way of settling disputes'; ITLOS, *Land Reclamation in and around the Straits of Johor* (Malaysia v. Singapore), Provisional Measures, Separate Opinion of Judge Jesus, ITLOS *Reports* (2003), p. 52, at p. 53.

the area within 12 hours or, in the words of the commander, the 'consequences would be theirs'.[207]

"…negotiations in order to resolve the existing maritime disputes between the two States should always be welcomed, since, amongst others, it would alleviate the danger for an escalation of the dispute to an episode involving the use or the threat of the use of force. A preliminary, yet very thorny issue, is the question of the 'disputes' under negotiation."

As to the means listed in the UN Charter, these are: 'negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice'. This is simply a menu of choices and there is no requirement to resort to all of them in turn, much less in the order in which they appear. It is a well-established principle of international law that States are free to choose their own means for the settlement of their disputes.[208] The question we shall turn is the extent to which these means may be applied for the resolution of the maritime delimitation dispute.

-*Negotiation:* through negotiations the parties to a dispute establish direct contacts between themselves and discuss litigious points. Only if the two sides submit statements as to the merits of the dispute can one speak of negotiations in the sense contemplated. It is extremely doubtful, however, whether the ICJ is right in holding that the parties to a negotiation 'are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it'.[209] Actually, the duty of negotiation has a purely procedural character and there is no legal obligation to achieve a resolution of the dispute.

In the context of the Greek-Turkish dispute concerning the maritime delimitation, the two States have been under negotiation even prior to the 1978 ICJ case, with the last round of 'negotiations' being in the format of Exploratory Talks (2002-2016), to no avail. Be that as it may, negotiations in order to resolve the existing maritime disputes between the two States should always be welcomed, since, amongst others, it would alleviate the danger for an escalation of the dispute to an episode involving the use or the threat of the use of force.[210] A preliminary, yet very thorny issue, is the question of the 'disputes' under negotiation. As noted, Greece officially acknowledges a single dispute, while on other hand, Turkey piles up several issues to be potentially resolved. Thus, the prospect of prompt and successful resolution of the maritime disputes through negotiations seems readily unlikely.

-*Mediation:* The mediator participates in the negotiations between the parties to the dispute and can advance his own proposals aimed at a mutually acceptable compromise solution. In the practice of the UN, mediation plays an important role: the Secretary-General has repeatedly been mandated to act as a mediator, offering his 'good offices'. Such a prospect in the case of the maritime dispute between Greece and Turkey is very remote.

-*Conciliation:* Conciliation combines elements of both inquiry and mediation. An organ of conciliation is normally charged with the task of investigating the facts and submitting to the parties proposals for a solution. Such proposals are not binding on the parties. A

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[207] *Guyana/Suriname, supra* note 36, paras. 425–445. See also on use of force at sea, E. Papastavridis, 'The Use of Force at Sea in the 21st Century: Some Reflections on the Proper Legal Framework(s)', 2 *Journal of Territorial and Maritime Studies* (2015), pp. 119-138.

[208] See also to this end Article 280 UNCLOS: 'Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.'

[209] See *North Sea Continental Shelf Case* [1969] I.C.J. *Reports* 1969, p. 47; cf also *Gabčíkovo-Nagymaros Project* [1997] I.C.J. *Reports* 1997,, p. 77; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment of 20 April 2010) para 146; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Judgment of 1 April 2011, paras 157–59.

[210] Cf the Imia islands incident. For commentary see *inter alia* K. Ioannou and A. Strati, *supra* note 49, 441-453; E. A. Georgiades, "The IMIA Islets: A Beginning to the Maritime Delimitation of the Aegean Sea Dispute", 17 *Ocean & Coastal L.J*. 103 (2011); Scott Keefer, "Solving the Greek Turkish Boundary Dispute" (2003) 11 *Cardozo J Int'l & Comp L*, p. 55.

conciliation mechanism can be a permanent institution or can be established by the parties with respect to an individual case. Under UNCLOS, there is provision for conciliation in Article 284, while compulsory conciliation is envisaged in cases of maritime delimitation cases between contracting parties, such as Greece,[211] which have optionally exempted their disputes concerning maritime delimitation from the compulsory procedures under the Section 2 of Part XV of UNCLOS.[212] Such conciliation, i.e. compulsory conciliation proceedings initiated by one party to the dispute pursuant to Article 298 UNCLOS, was conducted very recently between East Timor and Australia for the delimitation of their continental shelf/EEZ.[213] It proved very successful,[214] as it led to the signing of a delimitation agreement between the two States on 6 March 2018.[215]

"…the prospect of conciliation proceedings, conducted by a conciliation commission comprising of highly-skilled and esteemed diplomats and lawyers seems appealing. It appears the only non-binding and non-judicial means of dispute settlement that may lead to a delimitation agreement between the parties."

Arguably, the prospect of conciliation proceedings, conducted by a conciliation commission comprising of highly-skilled and esteemed diplomats and lawyers, such as those that participated in the proceedings between Australia and East Timor, seems appealing. It appears the only non-binding and non-judicial means of dispute settlement that may lead to a delimitation agreement between the parties, provided that the parties would be willing to endorse the Report of the Conciliation Commission and ultimately resolve the dispute.

An additional benefit of conciliation would seem to be that other neighbouring States could be invited to participate in such proceedings, which could lead to a comprehensive resolution of all maritime boundary disputes in the region. Since Turkey is not a party to UNCLOS, any conciliation proceedings could only be established on the basis of the mutual consent of the States involved, i.e. through a conciliation agreement between the parties which would set out all the technicalities. Such agreement would again need negotiations to this end. Hence, one could reasonably argue that if there is the need for negotiations to reach an agreement to submit the dispute to conciliation, it is preferable to negotiate an agreement to submit the dispute to the ICJ or to arbitration, which would bring about a legally binding outcome. It should be reiterated here that the conciliation proceedings do not produce a legally binding document, and any outcome has still to be accepted by the parties.

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[211] See Declaration of Greece under Article 298 UNCLOS (16 January 2015); available at <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI6&chapter=21&Temp=mtdsg3&clang=_en>

[212] Under Article 298 (1) (a), 'disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached by negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission; (ii) after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree'.

[213] See further information at <https://pca-cpa.org/en/cases/132/>

[214] As reported, 'to avoid litigation-style positions of the parties, the Commission asked the parties not to provide it with any written memorials or formal submissions. Rather, it would like to meet separately with each party for an open-ended and informal exploration of the issues. In support of this aim, the Commission also asked the parties to keep their delegations small in order to facilitate a 'free-flowing discussion with the Commission. After six rounds of meetings, on 1 September 2017, just 3 weeks before the 12-month deadline for the Commission to produce its report was due to expire (on 19 September), the parties confirmed with the Commission that they accepted the Commission's proposal on a Comprehensive Package Agreement—being a bilateral treaty covering not only a permanent maritime boundary, but also a special development regime for the Greater Sunrise field; see A. Kedgley Laidlaw and H. Duy Phan, 'Inter-State Compulsory Conciliation Procedures and the Maritime Boundary Dispute Between Timor-Leste and Australia' (2019) 10 *Journal of International Dispute Settlement,* pp.126-159.

[215] See Treaty between Australia and the Democratic Republic of Timor-Leste Establishing Their Maritime Boundaries in the Timor Sea, signed 8 March 2018.

In concluding on conciliation, it is certainly an option that should be in the mind of the parties as an alternative to judicial or arbitration proceedings, which, however, has the obvious shortcoming of not ensuring a binding result.

-*Arbitration*: In contrast to the procedures already discussed, arbitral awards are binding on the contending parties. However, the establishment of an arbitral tribunal requires the prior consent of the parties to be bound. As a rule, an arbitral body is distinguished from the ICJ by its greater flexibility: the parties determine the composition of the bench and can also make determinations regarding the applicable law and procedure. Generally, each side appoints an equal number of arbitrators, and a neutral umpire is appointed either by these arbitrators or by a third party. As noted, 'while on the one hand this flexibility is an important asset, the financial burden entailed by the establishment and operation of arbitral bodies and their often somewhat erratic jurisprudence are a serious disadvantage'.[216]

"…the recourse to the ICJ is preferable, since it seems a safer option in comparison with arbitration for many reasons; it is the principal judicial organ of the United Nations, but also on the national political plane; and in terms of the execution of its Judgment, States seem to be less prone to disobey an ICJ judgment rather than an arbitral tribunal award."

In the Greek-Turkish context, there is no treaty in force, as e.g. UNCLOS, providing for arbitration as one of the means for the resolution of the maritime disputes between the two States. Indeed, under UNCLOS, arbitration is one of the adjudicating bodies entitled to exercise compulsory jurisdiction concerning disputes relating to the interpretation or application of the Convention arising between States parties to it under Article 287 UNCLOS.[217] Yet, in any case, Greece has opted out for any compulsory judicial proceedings in relation to maritime delimitation under Article 298.

Subsequently, any recourse to arbitration concerning the delimitation of the continental shelf/EEZ would require a *compromis d'arbitrage* between the two States. In any case, it is the view of the present author that the recourse to the ICJ is preferable, since it seems a safer option in comparison with arbitration for many reasons, including that it has a steady and, to a certain extent, foreseeable jurisprudence; it is the principal judicial organ of the United Nations, whatever this means for its credibility not only on the international, but also on the national political plane; and in terms of the execution of its Judgment, States seem to be less prone to disobey an ICJ judgment rather than an arbitral tribunal award.

2. Recourse to the International Court of Justice

a) Jurisdiction of the Court

The last, but apparently the most preferable option for the settlement of the maritime disputes between Greece and Turkey is the recourse to the ICJ.[218] At the outset, it must be underlined that it is a *sine qua non* condition, i.e. an absolute necessity that both parties to the dispute should have conveyed their consent to the jurisdiction of the Court to adjudicate a dispute (consensual jurisdiction). According to the legal doctrine, no State can be compelled to accept the jurisdiction of the ICJ. As said, Article 33, para. 1 UN Charter

[216] See C. Tomuschat, 'Article 33', in B. Simma et al (eds), *The Charter of the United Nations: A Commentary*, Volume I (3rd Edition) (Oxford University Press, 2012), p. 1080.

[217] Particularly, arbitration under Annex VII plays a special role, as this is the procedure that a State not having made a declaration is deemed to have accepted (Art. 287 (3)) and the 'only procedure' to which the dispute may be submitted in case the parties have not accepted the same procedure (Art. 287 (5)).

[218] On this issue see also P. Liacouras, 'Possibilities for the Settlement of the Delimitation of the Continental Shelf and EEZ Dispute between Greece and Turkey through International Judicial Mechanisms' in A. Bredimas, Ph. Pazartzis, and Ch. Tsiliotis (eds.), *Law of the Sea and the Mediterranean* (Mediterranean Agenda, EPLO, 2017), 13-51 [in Greek]. See also on the ICJ, K. Antonopoulos, 'The Settlement of Disputes by the International Court of Justice' in K. Antonopoulos and K. Magliveras (eds.), *The Law of the International Society* (3rd edn, Nomiki Vivliothiki, 2017), 563 [in Greek].

explicitly sets forth that the parties to any dispute have the right to resort to methods of settlement 'of their own choice'.

"Among these means of reaching the Court, compromis seems the only way to consent to the jurisdiction of the ICJ to resolve the maritime delimitation dispute between Greece and Turkey."

Article 36 of the ICJ Statute provides for the means that States have to express their consent to the jurisdiction of the Court, namely its jurisdictional bases. In particular, Article 36, para. 1 deals with instances where the agreement of the parties concerned is expressed in conventional form, either (a) in a *compromis* (special agreement) or (b) in a compromissory clause in a pre-existing international agreement, which would ascribe jurisdiction to the Court to address disputes concerning the interpretation and application of that particular agreement;[219] while c) Article 36, para. 2 governs unilateral declarations which States are free to make under the optional clause. Under Art 36(2) ICJ Statute, a State may deposit with the UN Secretary-General a declaration whereby it accepts the jurisdiction of the Court in respect of international legal disputes in relation to any other State accepting the same obligation.[220] To the extent that the declarations coincide, a consensual bond is formed between the States concerned which fulfils the general requirement for the exercise of jurisdiction by the Court. States append very often reservations to an optional clause declaration, excluding thus certain categories of disputes. This is linked with the idea of 'reciprocity' enshrined in Art 36(2) ICJ Statute, namely that the acceptance of jurisdiction is contingent on any other State accepting the *same* obligation. Finally, (d) a respondent State is free implicitly to accept the jurisdiction of the Court, even if the relevant application has not been able to identify any title of jurisdiction, by answering the application and the supporting memorial without raising any preliminary objections (*forum prorogatum*, Article 38, para. 5 of the Rules).

Among these means of reaching the Court, *compromis* seems the only way to consent to the jurisdiction of the ICJ to resolve the maritime delimitation dispute between Greece and Turkey. By elimination, there is no other means readily available to the States concerned: first, there is no treaty with a compromissory clause –even if the 1928 General Act were in force, Turkey has denounced it,[221] and in any case, the Greek reservation concerning territorial disputes is an obvious bar;[222] second, the optional clause declaration is not applicable at present, since on the one hand, Turkey has not accepted the jurisdiction of the Court pursuant to Article 36 (2) of the ICJ Statute, and even if it did so, the reservations of Greece to the acceptance of the Court seem to preclude both *ratione materiae* and the *ratione temporis* such possibility.

In more detail, Greece has accepted the jurisdiction of the ICJ in 2015, but excluded disputes, amongst others, 'concerning State boundaries or sovereignty over the territory of the Hellenic Republic, including any dispute over the breadth and limits of its territorial sea and its airspace' (*ratione materiae* reservation), and 'any dispute in respect of which any other party to the dispute has accepted the compulsory jurisdiction of the Court only in relation to or for the purpose of that dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other party to the dispute was deposited or ratified

[219] Such a compromissory clause enshrined in Article 21 of the 1995 Interim Accord between Greece and the then FYROM was the basis for the Court's jurisdiction in the latter's application to the ICJ against Greece for the violation of Article 11 of the Accord in 2008; see *Application of the Interim Accord of 13 September 1995* (the former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011, I.C.J. *Reports* 2011, p. 644

[220] As the Court has stated 'declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements that States are absolutely free to make or not to make'; see ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. *Reports* 1984, p. 392*,* 418, para. 59.

[221] Turkey denounced it on 18 December 1978;
see at <https://treaties.un.org/Pages/LONViewDetails.aspx?src=LON&id=572&chapter=30&clang=_en#12>

[222] See the ICJ *Aegean Continental Shelf case*, *supra* note 18.

less than twelve months prior to the filing of the application bringing the dispute before the Court' *(ratione personae* and *ratione temporis* reservation).[223] It follows therefrom, that, fist, Turkey has to subscribe to the optional clause declaration and to wait for 12 months until either State filing an application to the ICJ based on Article 36 (2), and, second, it is controversial whether the Court would have jurisdiction to proceed to the delimitation of the continental shelf/EEZ, due to the exclusion of disputes concerning 'State boundaries'.[224] Definitely, the Court would lack jurisdiction to address questions concerning the delimitation of the territorial sea and its breadth or any application in relation to the sovereignty of Greek islands. In any case, the scenario of Turkey subscribing to the Optional Clause Declaration seems fictional.

"In concluding a compromis, the States concerned, here, Greece and Turkey, are free to decide what disputes will request the Court to adjudication and what disputes, if any, will explicitly exclude. The Court's jurisdiction will be confined to the disputes that the parties have agreed to submit to it."

Hence, the only available jurisdictional basis would be a *compromis*, i.e. a special agreement between the parties. In the remainder of this Section, the paper will discuss the prospect for such *compromis* and explore certain issues that may raise concern in this regard.

b) Submission of the maritime disputes to the ICJ through a compromis

The easiest way for two States that wish to have their disputes settled by the ICJ is to express their consent by entering into an agreement to that effect. In such case, they will conclude a special agreement (*compromis*), determining in detail the questions which the Court is requested to adjudicate, and recording the agreement of the parties in accepting the Court's decision as binding. There is no need for a specific form or type for the *compromis*; only that both parties have manifested their will unequivocally to have a specific dispute adjudicated by the Court.[225] Submitting a dispute through a *compromis* has also the advantage of expediency, since in such instances, as a rule, no preliminary objections are raised, given that both parties are genuinely interested in obtaining a determination on the controversial issues by the Court. Also, one can generally expect that a judgment based on a *compromis* will be faithfully complied with by the parties, including the 'losing State'.

In concluding a *compromis,* the States concerned, here, Greece and Turkey, are free to decide what disputes will request the Court to adjudication and what disputes, if any, will explicitly exclude. The Court's jurisdiction will be confined to the disputes that the parties have agreed to submit to it.

Thus, should Greece and Turkey agree to submit their maritime disputes to the ICJ, they will need to negotiate the text of the *compromis,* and most importantly, which disputes will be asking the Court to adjudicate. Given the diametrically opposed views on what are the existing legal disputes between the two States, reaching an agreement on this point seems particularly difficult.

Assuming that Greece manages to convince Turkey to include only the issue concerning the delimitation of the continental shelf (and a future EEZ) in the *compromis*, few remarks or points of caution are in order:

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[223] See Greece, Declaration Recognizing the Jurisdiction of the Court as Compulsory (13 January 2015); available at < https://www.icj-cij.org/en/declarations/gr>

[224] The question is whether the term 'State boundaries' denotes all the boundaries of States, including CS/EEZ boundaries, or only territorial seas' boundaries. As to the interpretation of optional clause declaration, the Court usually proceeds from the assumption that the will of the declarant State must be duly taken into account. The Court will take the text together with the reservations attached to it 'as it stands', while relevant words are to be interpreted in a 'natural and reasonable way'. See *inter alia Fisheries Jurisdiction* (Spain v. Canada), Judgment, I.C.J. *Reports* 1998, pp. 432, 454, para. 49; *Whaling in the Antarctic*, Judgment, I.C.J. *Reports* 2014, pp. 226, 244, para. 36.

[225] Cf *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, I.C.J. *Reports* 1994, p. 112, 122, para. 29 with the *Aegean Sea case, supra* note 18, paras 94-108.

"…it is advisable that the compromis requests the Court in the special agreement to draw a boundary not only for the continental shelf, but for the EEZ, whenever the parties decide to proclaim one."

-*first,* if the *compromis* requests the Court to delimit only on the continental shelf, the boundary that the Court will establish will be only for the continental shelf, and not for a future EEZ. Thus, it is advisable that the *compromis* requests the Court in the special agreement to draw a boundary not only for the continental shelf, but for the EEZ, whenever the parties decide to proclaim one. Thus, there will be no need for new round of negotiations in the future, when States display their intention to proclaim an EEZ.

-*second,* in case the Court is requested to delimit only the continental shelf, it will take the existing breadth of the territorial sea of the litigants as granted, and will apportion to the parties only the remaining areas of the continental shelf. In such case, and as things stand today, Greece will be limited to 6 n.m. of territorial sea, since in the *compromis* would have accepted to delimit the areas of continental shelf. Any unilateral extension of the breadth of the territorial sea to areas apportioned by the Court to the parties as areas of continental shelf/EEZ could be taken as a violation of the ICJ' judgment and the *compromis* itself.

This could be rectified threefold: i) by extending the breadth of the territorial sea prior to conclusion of the *compromis* (needless to say, this would not exactly be music to the ears of Turkey); ii) by requesting the Court to draw a multi-purpose maritime boundary, i.e. a boundary for all the maritime zones, either existent (territorial sea, continental shelf) or future (contiguous zone and EEZ), noting that Greece claims a 12 n.m. territorial sea; and iii) by including in the *compromis* a disclaimer, i.e. a 'without prejudice clause' that it reserves the right to exercise in the future all the rights under the UNCLOS and customary law in the maritime areas to be apportioned to Greece by the Court.

-*third,* Turkey contests the sovereignty of Greece over certain maritime features of the Aegean Sea. It is very unlikely that Greece would agree to have these contestations adjudicated by the Court. [226] Nevertheless, even if the *compromis* calls the Court to adjudicate only the issue of the continental shelf, there is the possibility that the Court may be called to address the sovereignty issue as a preliminary and incidental question in the course of the selection of the base points from which the provisional equidistance line will be drawn at the first stage of the delimitation process. To put it simply, if either of the parties claims that islands X or Y (let's say Imia or Kardak islands for Turkey) should be used as base points, and the other party disputes the other party's sovereignty over that islands, the Court might be called to address this as a preliminary issue prior to the delimitation as such.

"…one can reasonably presume that the ICJ would treat this with extreme caution and prefer to stay aloof from any sovereignty issue."

Indeed, suffice to note in this regard that in the *Chagos Marine Protected Area case* (2015), in which the Arbitral Tribunal under UNCLOS Annex VII had only jurisdiction to adjudicate disputes concerning UNCLOS, it did not rule out the possibility that a minor sovereignty issue could be incidentally adjudicated by the Tribunal.[227] In its words, 'the Tribunal does not categorically exclude that in some instances a minor issue of territorial sovereignty could indeed be concerning the interpretation or application of the Convention. That, however, is not this case, and the Tribunal therefore has no need to rule upon the issue'.[228]

[226] The issue of 'grey areas' and the sovereignty of islands, like Imia or Panagia etc, is beyond the scope of this paper. However, it must be noted that Greece's legal position in this regard is overwhelmingly more cogent than the Turkish one, thanks not only to the provisions of the existing treaties, but also to the application of the principle of *effectivité,* i.e. the actual, continuous and peaceful display of authority by Greek authorities over these islands for a long time prior to the crystallization of the relevant dispute between the two States.

[227] See *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Award of 18 March 2015.

[228] *Ibid,* para 221

"Most likely, the Court would use its prerogative to select other base points than those proposed by the parties."

Notwithstanding this finding, one can reasonably presume that the ICJ would treat this with extreme caution and prefer to stay aloof from any sovereignty issue, especially when it is not requested to adjudicate upon such issue. Most likely, the Court would use its prerogative to select other base points than those proposed by the parties (which may involve 'grey areas'), and thus avoid addressing any sovereignty question. Notably, as the Court clarified in the *Black Sea case*, 'in the delimitation of the maritime areas involving two or more States, the Court should not base itself solely on the choice of base points made by one of those Parties. The Court must, when delimiting the continental shelf and exclusive economic zones, select base points by reference to the physical geography of the relevant coasts'.[229] In any case, it would be advisable to include in the *compromis* a clause explicitly excluding any question concerning sovereignty, be this ancillary to the main dispute ancillary or not, from the jurisdiction of the Court. *A propos* this point, the author is not certain whether an arbitral tribunal would handle the case so delicately, and this is one of the reasons why it is preferable to negotiate a *compromis* for the ICJ rather than international arbitration.

"…recourse to the ICJ is the most preferable solution for both parties to resolve the maritime disputes, in particular the issue of the delimitation of the continental shelf and the EEZ. This recourse, as things stand, can be done only through the adoption of a special agreement - compromis- to this end."

In conclusion, recourse to the ICJ is the most preferable solution for both parties to resolve the maritime disputes, in particular the issue of the delimitation of the continental shelf and the EEZ. This recourse, as things stand, can be done only through the adoption of a special agreement - *compromis*- to this end. It will need, of course, very hard negotiations on the scope of the disputes to include in the *compromis* and this is a matter of each party to decide how many of the 'real or hypothetical disputes' would like to resolve by judicial means. It goes without saying that the more of the 'real disputes' States decide to defer to the Court, the better the future relationships would be. As noted, it would be advisable to have a multi-purpose maritime boundary (for all maritime zones), instead of only a continental shelf boundary, whilst at the same time being entrapped to a 6 n.m. territorial sea. In any case, the recourse to the ICJ remains a bold, yet very positive step that it for the benefit of both parties to take.

Concluding Remarks

The paper discussed the maritime disputes between Greece and Turkey from the viewpoint of international law. In particular, it, first, examined whether Greece has a lawful right to extend its territorial sea to 12 n.m. and second, it discussed the delimitation of the maritime zones between the two countries against the background of international law. Also, it explored the means available for the settlement of the maritime delimitation dispute. It is evident that international law provides a clear and foreseeable framework not only concerning the substance of the relevant disputes, namely, whether Greece may extend its territorial sea or what are the rules for the delimitation of the continental shelf/EEZ, but also concerning the means to settle the disputes, preferably through recourse to the ICJ.

It is the firm belief of the author that the resolution of the pending maritime disputes through a court of law is for the outmost benefit to both countries and the region as a whole. Even though Turkey seems, at face value, reluctant to accept a judicial settlement of the disputes under discussion, a close and careful look at the recent statements and views of the Turkish MFA and its officials reveals a shift in their views towards international law. Suffice it to note that Turkey appears to accept both the median line for the delimitation of the territorial sea and the provisions of the UNCLOS on the delimitation of the continental shelf and EEZ as applicable in the present dispute. Thus, if Turkey can be convinced that the recourse to the ICJ or arbitration for the Aegean and Eastern Mediterranean Sea would be

[229] *Black Sea Delimitation case*, supra note 147, para 137.

overall beneficial for the Turkish foreign policy and financial interests, it might eventually agree on a judicial settlement.

That said, it is true that Turkey continues to manifest a "cherry picking" attitude towards well-established principles of international law, including with respect to the 12 n.m. territorial sea rule and the question of the maritime entitlements of islands. A more significant hurdle seems the issue of the justiciable 'disputes': Greece acknowledges only the dispute on the continental shelf, while Turkey widens the spectrum to the extreme. At the end, however, a mutually beneficial compromise should be reached to this end.

A final remark is that, at least for States, like Greece, which regularly invoke international law as the main legal framework for the regulation and the settlement of any dispute, international law does provide the appropriate setting to this end and this should be pursued further.

Key terms:

- *Arbitration:* Along with negotiation, mediation, inquiry (Fact-Finding), conciliation, and judicial settlement , Art. 33 UN Charter identifies arbitration as a means for the pacific settlement of inter-State disputes. More specifically, arbitration represents a consensual procedure for the final settlement of disputes between States on the basis of law by adjudicators of their own choosing.
States are obligated to implement the Arbitral Award.

-*Baselines:* the lines connecting all the points along a coastal State's shoreline or other accepted marker points such as bay closing lines. Baselines determine where the land ends and where the sea begins under international law.

-*Basepoints:* the nearest points of the baseline of one State which are selected in order to draw the median/equidistance line with another State with adjacent or opposite coasts.

-*Coastal State:* a State which has a sea coast and which enjoys sovereignty, sovereign rights, or jurisdiction over maritime zones, including the territorial sea, the continental shelf, and if applicable, the contiguous zone and the Exclusive Economic Zone (EEZ).

-*Conciliation:* a method for the settlement of international disputes of any nature according to which a commission set up by the parties, either on a permanent basis or on an *ad hoc* basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them, or of affording the parties, with a view to its settlement, such aid as they may have requested. The Reports of the Conciliation Commission are not binding upon the parties. UNCLOS provides for (even compulsory) conciliation in several provisions.

-*Contiguous zone:* it is the zone contiguous to the territorial sea which may not extend beyond 24 nautical miles (n.m.) from the baselines and in which coastal States may exercise certain enforcement powers.

-*Continental Shelf:* The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory, at least, to a distance of 200 nm from the baselines, over which the coastal State enjoys sovereign rights of exploration and exploitation of natural resources.

-*Customary Law:* unwritten rules of international law arising from established State practice accepted as law. As subsidiary means for the determination of such rules we look at judicial decisions (mostly by international courts and tribunals), international legal doctrine (e.g. the works of the International Law Commission), and, arguably, General Assembly Resolutions.

-*Cut-off effect:* it is one of the relevant circumstances that may be taken into consideration at the second stage of the delimitation process of areas of continental shelf/EEZ, i.e. that a State's coastal projection into its maritime territory would be 'cut off' by the application of a strict equidistance line, and thus an adjustment of the provisional equidistance line may be required.

-*Delimitation:* The act of apportionment of maritime areas over which two States with adjacent of opposite coasts have overlapping claims, either by an agreement or by a judgement of the International Court of Justice or other courts and tribunals.

-*Dispute:* under international law, a dispute is 'a disagreement on a point of law or fact, a conflict of legal views or of interests" between parties'. In order for a dispute to exist, '[i]t must be shown that the claim of one party is positively opposed by the other and that the two sides must 'hold clearly opposite views' concerning the question of the performance or non-performance of certain international obligations'.

-*Exclusive Economic Zone (EEZ):* The EEZ is an area beyond and adjacent to the territorial sea not exceeding beyond 200 nautical miles (nm) from the baselines, in which the coastal State enjoys certain sovereign rights and jurisdiction, while other States enjoy the freedoms of navigation, overflight, and the freedom of laying submarine cables and pipelines. All these rights and freedoms of both the coastal State and the other States are governed by the relevant provisions of the UN Convention on the Law of the Sea (UNCLOS) and customary international law.

-*Flag State:* The State of the nationality of a vessel. The jurisdiction of the flag State is the primary jurisdiction that operates on board any vessel flying that State's flag. Landlocked States may also be flag States.

-*High Seas:* all parts of the sea that are not included in the EEZ, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. High seas are open to all States and no State may validly purport to subject any part of the high seas to its sovereignty.

-*Innocent passage*: ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea, i.e. the right to navigate through the territorial sea without stopping or anchoring, provided that this navigation is not prejudicial to the peace, good order or security of the coastal State.

-*Internal waters:* waters landward of the baselines of the coastal States, such as harbours, river mouths, or bays, are designated as 'internal waters', and are fully subject to the sovereignty of the coastal State.

-*International Court of Justice, Jurisdiction*: Jurisdiction is the channel through which a court or tribunal, here the ICJ, receives its power to decide a case with binding force for the parties. Without jurisdiction to cover the particular case before it, any court or tribunal is powerless. In particular, for jurisdiction to exist, it has to be established that each party has given its consent that the Court should decide the dispute that has been brought before it and that the dispute comes within the terms on which the respondent has accepted the jurisdiction.

-*International Tribunal for the Law of the Sea (ITLOS):*ITLOS is an international tribunal established by the UN Convention on the Law of the Sea in order to adjudicate disputes between the parties to the Convention concerning its interpretation and its application. The judgments of the Tribunal are final and binding upon the parties to the dispute. ITLOS has also an advisory jurisdiction, namely it may render (non-binding) advisory opinions addressing questions related to the Convention.

-*Median Line/Equidistance Line:* the line every point of which is equidistant from the nearest points of the baselines of the territorial sea of the adjacent or opposite States.

-*Reservation:* as for treaties, 'reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. When it comes to optional clause declarations under Article 36 (2) ICJ Statute, by which a State accepts the compulsory jurisdiction of the ICJ for any future dispute with any State having accepted the same jurisdiction, reservations appended to such declarations serve to exclude some categories of dispute from the jurisdiction of the ICJ.

-*Single Maritime Boundary:* the method of the international courts and tribunals when delimiting areas of continental shelf and EEZ to draw a 'single', i.e. a unique boundary line for both of these maritime zones by following the same methodology. Often, courts and tribunals are called to draw a 'single maritime boundary' for all maritime zones of the litigants (territorial sea, continental shelf and EEZ). However, the applicable law for the delimitation of those zones differs.

-*Sovereign rights:* Rights of exploration and exploitation of natural resources, which the coastal State enjoys over the continental shelf and in the EEZ.

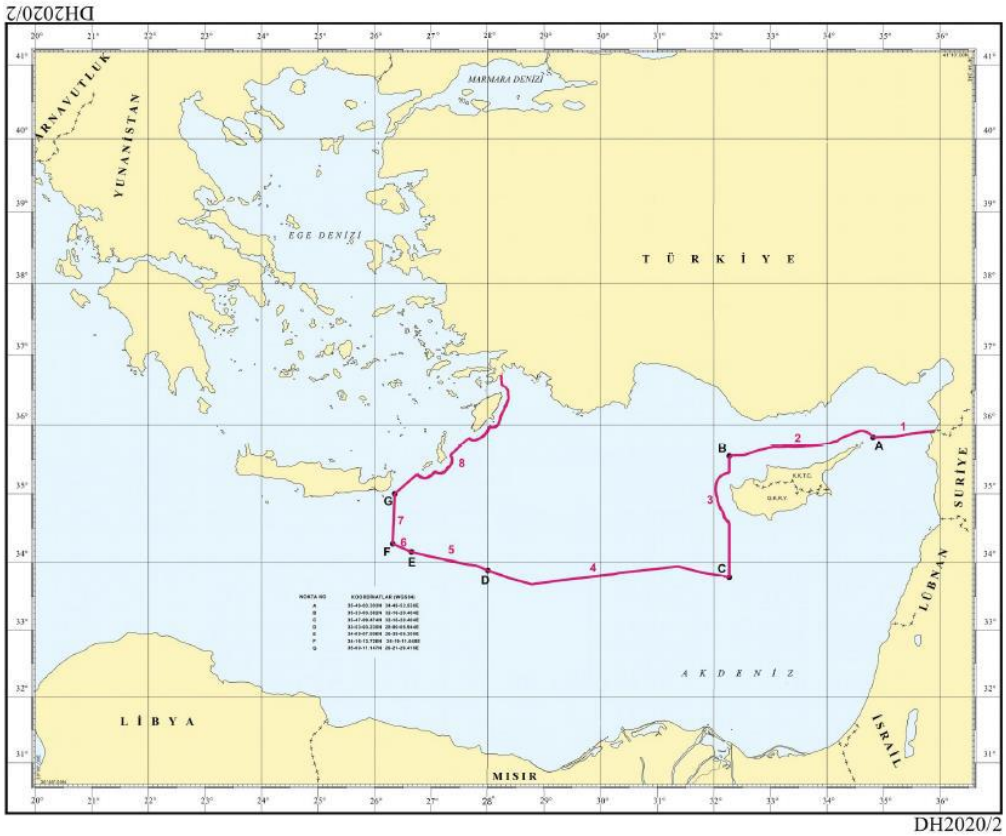
-*Territorial sea*: The sovereignty of a coastal State extends, beyond its land territory and internal
waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea, which is up to a limit not exceeding 12 nm, measured from baselines. The sovereignty of the coastal State extends to both the airspace above and seabed and subsoil below the territorial sea.

-*Transit Passage*: the right of transit passage is acknowledged through 'straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone'. It consists of the exercise in accordance with the relevant Part of the UNCLOS of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone (Article 38 (2) UNCLOS).

Annexes

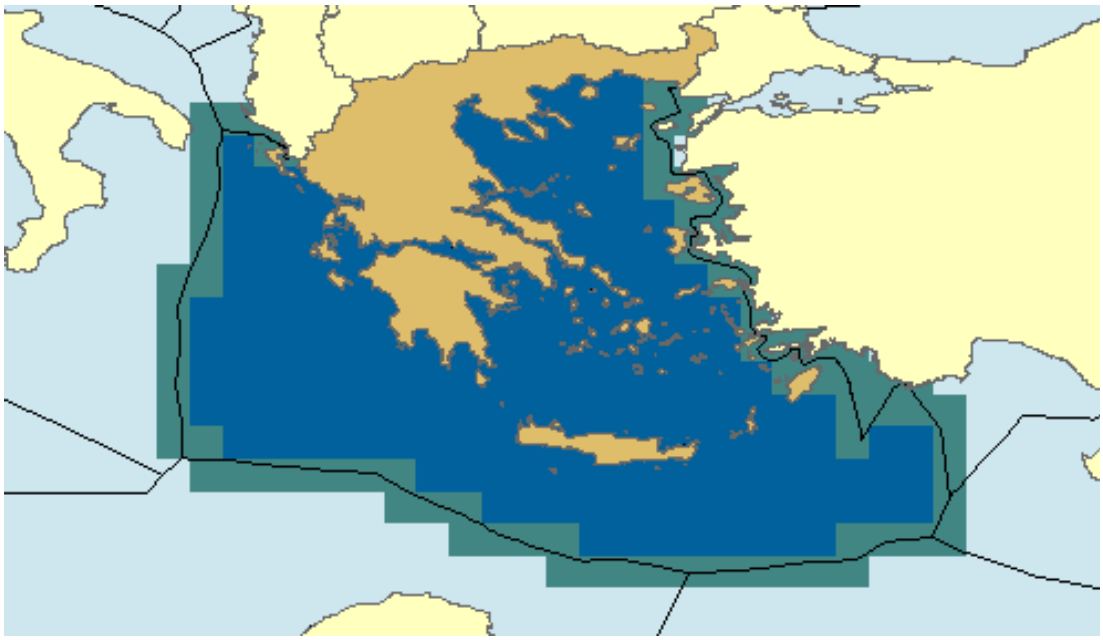
Annex I

Annex to the letter dated 18 March 2020 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General



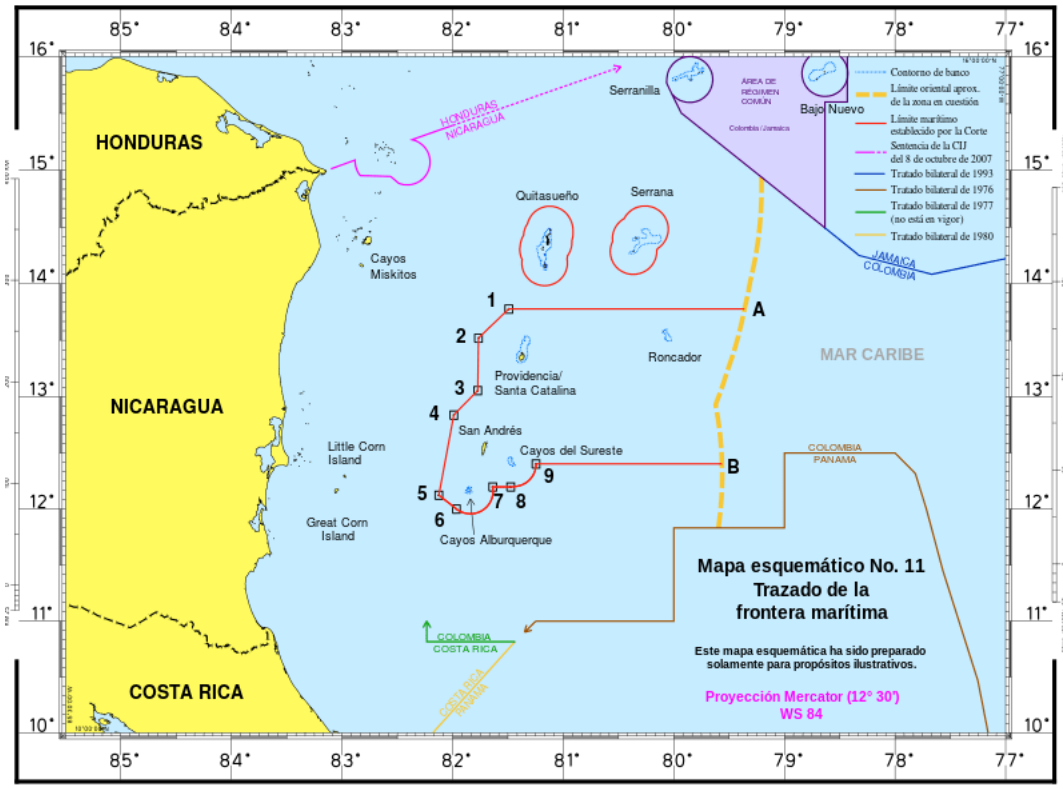
Annex II

Unofficial illustration of Greece's maritime zones on the basis of the median line



Annex III

Nicaragua v. Colombia, ICJ Judgment (2012)



Annex IV

Costa Rica v Nicaragua, ICJ Judgment (2018)