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REPORT

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DELIMITATION PRACTICE IN THE EASTERN MEDITERRANEAN

I noticed that, early next week, you will be treated to a more comprehensive presentation of the topic of delimitation generally and so you can consider this a kind of warming up in the context of a specific situation. I believe – and hope you can agree with me – that the three EEZ delimitation agreements of Cyprus with Egypt (2003), with Lebanon (2007) and with Israel (2010) are model agreements and deserve to be emulated based, as they are, on the application of the median line and with a third party dispute settlement, between an island state and three of its continental neighbours.

Questions of delimitation of the maritime zones (territorial sea, contiguous zone, exclusive economic zone and continental shelf) between states the coasts of which are opposite or adjacent to each other have been a major issue of the law of the sea over the years.

There are currently many situations in the world where such questions give rise to disputes which are potentially dangerous for international peace and security since they involve matters of national sovereignty and major economic interests. South China Sea is one prime example. Other such situations are in the Arctic Ocean, the Bay of Bengal, Falklands/Malvinas, but also Greece/ Turkey in the Aegean, Japan/China, Japan/Korea in the Pacific and indeed the Eastern Mediterranean, which is the focus of our attention today.

The massive six-volume work "Maritime Delimitations" provides the evidence of the many such situations in the practice of states. The fact is that in recent years much of the legal work before the International Court of Justice, before international arbitral tribunals and, most recently, before the International Tribunal on the Law of the Sea has been primarily concerned with issues of maritime delimitation. Part of the explanation is the economic significance of the resources involved as well as sensitive issues of national sovereignty. The other part of the explanation for this volume of litigation and third party adjudication is the vagueness of the relevant rules in the 1982 Law of the Sea Convention, particularly Articles 74 (EEZ) and 83 (Continental Shelf). On the positive side, the result of virtually all of the recent cases (before the ICJ, arbitral tribunals and ITLOS) has been to clarify, through judicial practice, these articles on the basis of the application of the median/equidistance line as the starting point of the given delimitation situation, subject to variation where special circumstances so warrant so as to achieve an equitable solution.

This paper was originally presented by Ambassador Andreas Jacovides at a lecture at the Rhodes Academy of Maritime Law and Policy on July 6th, 2012.

State practice in the large majority of cases (some 80%), where delimitation was agreed upon without resort to third party settlement, has also been based on equidistance/special circumstances.

In order to better understand the present situation in the Eastern Mediterranean a flashback to the 1982 UNCLOS III is appropriate.

During the Third United Nations Conference on the Law of the Sea (UNCLOS III, 1973-82) and, earlier, during the Preparatory Commission stage (1970-3), the main objectives of the Cyprus delegation, which I had the honour to head, in addition to establishing the new institution of the EEZ, the 12 mile territorial sea, protecting archaeological objects in the seabed, environmental objectives, among others, were:

One, to ensure that, in terms of entitlement to the zones of maritime jurisdiction (territorial sea, contiguous zone, EEZ, continental shelf), islands – except "rocks" – are in the same position as continental territories ("Islands" includes both island states, such as Cyprus, Malta, Jamaica, and islands belonging to a state having also a continental component, such as Greece or India). This objective was fully achieved through the hard-fought over adoption by the Conference of Article 121, "Regime of Islands." This marked the rejection of the claim, put forward by Turkey and other states, that the entitlement of islands to the zones of maritime jurisdiction depended on factors such as size, population, geographical location and geomorphological factors (such as being "located on the continental shelf of another state"). The DOALOS publication "Regime of Islands- Legislative History" provides a useful account of the evolving situation on this important issue during the various phases of the Conference.

Second, that the rules adopted by the Conference on open seas (such as the Atlantic, the Pacific, the Indian Ocean) apply equally to enclosed and semi-enclosed seas (such as the Mediterranean, the Baltic, the Caribbean, the Black Sea, the Caspian, etc.). This was also achieved through the adoption by the Conference of Articles 122 and 123 ("Enclosed and Semi-Enclosed Seas") providing only for a duty of the riparian states to such seas to cooperate in terms of fisheries preservation, environmental protection, and scientific research – all of which we were quite content to accept as applicable and proper. This marked the rejection of the view, strongly advocated by Turkey and other states, that different rules should apply to such enclosed or semi-enclosed seas than to open seas and oceans.

Third, on issues of delimitation of states the coasts of which are located opposite or adjacent to each other, our position, supported by several other states, was that the median or equidistant line should apply as an objective and fair criterion of particular importance to small island states such as Cyprus. The opposite view, advocated by Turkey and several other states, was that the matter should be governed by "equitable principles" and had some support in the North Sea Continental Shelf case decided in 1969 by the International Court of Justice. This issue was argued intensely throughout the Conference with no consensus reached in the relevant Working Group (headed by Judge Manner, Finland). It befell to the President of the Conference, Tommy Koh (Singapore) to propose a formula, based on "constructive ambiguity," ["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 reach an equitable solution"]enabling each side to argue that its position was vindicated. This formula, which formed the basis of the relevant Articles 74 (EEZ) and 83 (Continental Shelf) was adopted by the Conference as a compromise. In the course of the subsequent three decades, in several cases before the ICJ (Norway/Denmark - Jan Mayen, Qatar/Bahrain, Cameroon/Nigeria – Bankassi, Romania/Ukraine, etc.), arbitral tribunals (Eritrea/Yemen, Barbados/Trinidad & Tobago, Guyana/Suriname) and, most recently, ITLOS (Bangladesh/Myanmar) these Articles were interpreted and clarified by determining that the starting point of delimitation for the EEZ and the continental shelf is the median line but subject to variation if there exist special circumstances so as to achieve an

equitable solution. This, in m view, is the right approach combining the certainty and predictability of the median line with the flexibility of taking into account special circumstances so as to achieve a truly equitable outcome. This, as I indicated earlier, is the approach largely followed in state practice.

Fourth, our last major objective in the Conference was that the substantive provisions of the Convention should be subject to an effective third party settlement system. This was largely, but not fully, achieved through the adoption of Chapter XV of the Convention. However, the price for consensus was that, in certain cases and unfortunately this included delimitation disputes, this system was made subject to optional exceptions (Article 298).

We can now turn our attention to the Delimitation Agreement of the Exclusive Economic Zones of the Republic of Cyprus, recently reached with three of its neighbours viz. Egypt (2003), Lebanon (2007) and Israel (2010). The Republic of Cyprus, let me remind you (and as you can see from the maps displayed on the board) is an island state located between continental states, Egypt to the south (Africa), Israel, Lebanon, and Syria to the east (Asia), Turkey to the north (Asia), and the Greek islands of Crete, Carpathos, Rhodes and Castellorizo to the west (Europe). Cyprus is of course also considered European and since 2004 a European Union member. I shall first describe the main features of the three Agreements and then briefly address the situation with the other three neighbouring states viz. Syria, Greece, and Turkey, where for a variety of reasons, no such agreements exist as yet. I trust that most of you had the opportunity to glance at my 2006 paper "Some Aspects of the Law of the Sea: Islands, Delimitation and Dispute Settlement Revisited" (itself based on a lecture I gave at the Rhodes Academy in 2004), incorporated in my book "International Law and Diplomacy" 2011, and also from the same book the 2009 paper on "Current Issues of the Law of the Sea and Their Relevance to Cyprus," by way of background. Let me clarify at the outset that, while I hold strong views on the issues involved, especially on islands (Art. 121), enclosed and semienclosed seas (Arts. 122-123), delimitation (Arts. 15, 74, 83) and on dispute settlements (Chapter XV), I am fully aware that this is an academic non-political forum which does not offer itself for polemics or the pursuit of political objectives. If any of you so wish, we can discuss informally later these and any other issues of particular interest to you.

Addressing now the three Agreements concerned, respectively, with Egypt, Lebanon, and Israel, these are very similar to each other with very minor variation.

Each contains a Preamble in which reference is made to the desire of the Parties to strengthen further the ties of good neighbourliness and cooperation between the two countries; recognizing the importance of the delimitation of the Exclusive Economic Zone for the purpose of development in both countries; recalling the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, relating to the Exclusive Economic Zone; basing themselves on the rules and principles of international law of the sea applicable to the matter, the two Governments, in each case, agreed:

In Article 1 that the median line (as defined therein) shall be the basis of the delimitation (subject to being reviewed and/or modified as necessary in light of a future agreement regarding the delimitation of the EEZ with other neighbouring states concerned).

In Article 2 it is provided that in case there are natural resources extending from the exclusive economic zone of the other, the two Parties shall cooperate in order to reach an agreement on the modalities of the exploitation of such resources (such agreement was reached with Egypt in 2006 though not as yet ratified and it is currently very near conclusion with Israel).

Article 3 provides that "if either of the two parties in engaged in negotiations aimed at the delimitation of the Exclusive Economic Zone with another state, that Party, before reaching final

agreement with the other state, shall notify and consult the other Party…" This, I understand, happened when Cyprus concluded the agreement with Israel in 2010 with both Egypt and Lebanon.

Article 4 is very significant in that it provides that any dispute arising shall be settled through diplomatic channels, failing which shall be referred to arbitration.

It is evident that these agreements are solidly based on the 1982 Convention: Islands are, in accordance with Article 121, paragraph 2, entitled to EEZ "in accordance with the provisions of the present Convention applicable to other land territory." The median line was unqualifiedly applied as the appropriate line of delimitation (as generally applied in the practice of states and as judicially interpreted by a variety of tribunals of the relevant articles 15, 74, and 83). And, equally important, it was established that third party dispute settlement entailing a binding decision, namely arbitration, is the method of settling disputes not settled by diplomatic means.

I submit – as I said earlier - that these are model Agreements which could and should be emulated in other instances where the EEZ needs to be delimited between states the coasts of which are opposite or adjacent to each other. If I may be permitted to say it, it is of special satisfaction to me since these very concepts (rights of islands, median line and third party dispute settlement) I have defended and promoted persistently over the years since 1970, in the Preparatory Commission, in the Conference itself where the very institution of the EEZ was created and subsequently through official statements and academic writings and lectures.

Some additional comments: Both the Egyptian and the Israeli Agreements have been signed and ratified by both parties and are fully in effect. The Agreement with Lebanon is not yet ratified by the Lebanese government in light of a dispute that arose with Israel as to the entitlement of the latter to a portion of the EEZ between Lebanon and Israel, involving some 860 square kilometers. There have very recently been reports of progress in resolving this issue with American mediation and with the discreet engagement with the Cyprus Foreign Ministry. It would be of interest to note that the President of the Lebanese Parliament Nabih Berri, in an official visit to Cyprus earlier this year, stated that the ratification by Lebanon is a matter of two weeks once the problem that had arisen with Israel is resolved. He rightly confirmed that the dispute is between Israel and Lebanon, not between Lebanon and Cyprus.

With Syria (a non-party to the 1982 Convention) negotiations on the EEZ have not progressed for a variety of reasons but an agreement remains a possibility once conditions become more propitious.

With Greece no agreement was attempted for a variety of reasons which are not for the present to go into. Logically, the agreement between Cyprus and Greece would have been the first EEZ agreement to conclude as early as the signing of the Convention in 1982 with the conclusion of UNCLOS III but it was not proceeded with and in fact Greece has not as yet proclaimed its EEZ. Following the June 17 elections, the three Parties which form the present government adopted a declaration which, on this issue, states: "Systematic preparation for proclaiming the EEZ within the framework of international law and practice so as to expedite the exploitation of energy wealth".

With Turkey, the matter is much more complicated and serious. I shall restrict myself to stating the relevant facts.

Following the July 15, 1974 military coup in Cyprus by the junta then ruling Greece, Turkey invaded and occupied more than a third of the territory of the Republic of Cyprus invoking the 1960 Treaty of Guarantee. Much can be argued against the legality of this action but this is neither the place nor the time to do it. The fact is that numerous UN Security Council Resolutions called for the withdrawal of the occupation troops and for respect of the sovereignty and territorial integrity of Cyprus. Security Council

Resolution 541 (1983) and 550 (1984) refer to the UDI (Unilateral Declaration of Independence) of the "TRNC" (so called Turkish Republic of Northern Cyprus) as "legally invalid" and called for its non-recognition. Successive UN mediation efforts and talks between the Greek and Turkish Cypriot communities have not as yet produced a breakthrough and the situation remains an unfortunate anachronism. In 2004 the Republic of Cyprus became a member of the European Union (and, in fact, as of 1 July this year, its president for 6 months).

Turkey did not sign or accede to UNCLOS III, having been dissatisfied with a number of its provisions (as we have already seen) and the fact that the Treaty permits no reservations. This did not prevent Turkey from declaring EEZs in the Black Sea and delimiting them with its neighbours there (Russia, Bulgaria and Romania) on the basis of the median line and proclaim 12 mile territorial waters in the Black Sea and its South coast but not in the Aegean. During the annual consideration by the UN General Assembly of the Law of the Sea item every year, Turkey is the only state to vote against the omnibus resolution covering all current aspects of the law of the sea and, in particular, calling on all states to accede to the 1982 Convention (162 states have so far become parties, including the European Union). In the last such occasion, in December 2011, the vote was 134 in favour, 1 against (Turkey) and with 6 abstentions (certain Latin American states). As you know, the US Administration is currently in the process of ratifying UNCLOS III, having signed it some years ago. Professor Moore is a leading advocate of this commendable effort.

Turkey, a non-party to the 1982 Treaty, has objected to the Agreements of the Republic of Cyprus with Egypt, Lebanon and Israel. Turkey does not recognize the Republic of Cyprus or its Government (the only state in the world not to do so) even though, under the 2005 Ankara Protocol with the EU, it is under the obligation to recognize all the EU members and to open its ports, airports, and airspace to Cypriot ships and airplanes Turkey has recently (last September) purported to make a continental shelf delimitation agreement with the "TRNC" (a "legally invalid" entity under SC Resolution 541 and 550 and its own subsidiary body, as per the European Court of Human Rights – which is recognized by no state in the world other than Turkey- the principle ex injuria non oritur jus aptly applies). I need to say no more on this "delimitation agreement" as it has no legal standing in international law.

What is more ominous, however, is that Turkey has arbitrarily declared that the line west of parallel 32 16' 18" (as per the map on the board) falls under its jurisdiction has announced the strengthening of its naval presence in the region and has authorized its Petroleum Authority to drill there. Several of these areas (see map) conflict with plots which Cyprus has declared to be within its EEZ under its Agreement with Egypt and has opened them for bids by international bidders (a process concluded on 11 May 2012 and currently under consideration).

I understand that Turkey has been carrying on exploratory talks with Egypt on the delimitation of the space between the south coast of Asia Minor and the north coast of Egypt. I will say no more as this is a matter that concerns primarily Greece in the absence, as yet, of a delimitation agreement between Greece and Cyprus, although Cyprus has also a say on the basis of the median line and Article 121 of UNCLOS III. I will simply recall that during the 1973-82 Conference, Turkey suggested that a median line be drawn between the west coast of Turkey and the continental part of Greece opposite to it, thereby ignoring the rights of the Aegean islands east of that line. This was of course not even considered by Greece and the Conference, by adopting Article 121, gave its conclusive reply in terms of the rights of the islands of the Aegean.

Cyprus's sovereign rights to its EEZ under the 1982 Convention and the agreements reached and to be reached with its neighbours and its right to conduct drilling in its EEZ (substantial quantities of natural gas have been discovered by Noble Energy, a Houston-based American corporation on contract with the Cyprus Government in plot 12, "the Aphrodite field") have been recognized by the EU and its member

states, the USA, Russia, Israel, and the international community as a whole. Cyprus is under no doubt as to its legal rights under the 1982 Convention (which it helped negotiate and formulate) or under its Agreements with Egypt (in fact Egypt currently is inviting bids to its side of the median line scrupulously adhering to the terms of its agreement with Cyprus), Israel and Lebanon. Agreements for joint exploitation of resources straddling the line have been reached with Egypt (not as yet ratified) and are at an advanced stage of negotiation with Israel. Indeed, the Republic of Cyprus is entitled to jurisdiction over the whole island and its zones of maritime jurisdiction even though, for self-evident reasons, are not in a position to exercise these rights at present (as much as it cannot at present, because of foreign occupation, exercise its sovereignty over the occupied part of the island). Hopefully, a solution to the Cyprus problem will be found, in accordance with UN resolutions and EU principles, whereby all Cypriot citizens – Greek and Turkish Cypriots, Armenian, Maronites and Latins - will benefit from the natural resources in its EEZ. Such a settlement can be a win-win situation for all parties, including Turkey. But unless and until this happens, Turkey has no right to appropriate arbitrarily what the Republic of Cyprus is entitled to under the 1982 Convention. Even though Turkey is not a party to it, the international consensus is that the provisions of the Convention have acquired the legal force of customary law, having been adopted by the overwhelming number of the international community. Turkey's publicly made threats to companies that have made bids to the EEZ of Cyprus are contrary to the UN Charter and to the law of the sea. The UN Security Council should, if necessary, exercise its responsibilities under the UN Charter. When a dispute arises the way to settle it is through the means enumerated in Article 33 of the UN Charter. If the other means of settlement do not produce results, the way to resolve disputes is through resort to the various methods of dispute settlement viz. the International Court of Justice, the Law of the Sea Tribunal, or Annex VII arbitration, not through anachronistic notions of imperialistic *Pax Ottomana* and gunboat diplomacy.

To end on a positive note, I think that those who formulated the 1982 Convention on this, the 30th anniversary of its adoption, can justifiably take satisfaction that its practical implementation in the Eastern Mediterranean, at least as far as Cyprus, Egypt, Israel and Lebanon are concerned. It points the way that the orderly allocation of resources, especially in the Levantine Basin, among these countries, will benefit the people concerned in each of these countries and, hopefully, to the other countries of the Eastern Mediterranean as well, once political tensions are resolved, in accordance with the rule of law and the applicable law of the sea.