

Judicial Decisions

Aegean Sea Continental Shelf Case

Greece v. Turkey.

Request for the Indication of Interim Measures of Protection Order of 11 September 1976

On 10 August 1976 Greece filed an application with the International Court of Justice, instituting proceedings against Turkey, asking the Court to declare, *inter alia*, what is the course of the boundary between the portions of the continental shelf appertaining respectively to Greece and Turkey in the area, and to declare that Turkey is not entitled to undertake any activities on the Greek continental shelf, whether by exploration, exploitation, research or otherwise, without the consent of Greece.

On the same day Greece also requested the Court to indicate interim measures of protection to the effect that the Governments of both States should: (a) refrain, unless with the consent of each other and pending the final judgment of the Court, from all exploration activity or any scientific research in respect to the area in dispute; (b) refrain from taking further military measures or actions which may endanger their peaceful relations.

In justification of its request for interim measures, Greece alleged: (a) that certain acts on the part of Turkey (the granting of petroleum exploration permits, the explorations of the vessel *MTA Sismik I*) constituted infringements of its exclusive sovereign rights to the exploration and exploitation of its continental shelf, and that the breach of the right of a coastal State to exclusivity of knowledge of its continental shelf constituted irreparable prejudice; (b) that the activities complained of would, if continued, aggravate the dispute. Turkey contended: (a) that these activities could not be regarded as involving any prejudice to the existence of any rights of Greece over the disputed area and that, even if they could, there would be no reason why such prejudice could

not be compensated; (b) that Turkey had no intention of taking the initiative in the use of force.

On 11 September 1976, the Court ruled by twelve votes to one that the circumstances then presented to the Court were not such as to require the exercise of its power under Article 41 of its Statute to indicate interim measures of protection. In its order, the Court stated with respect to (a) that, viewing the matter in the context of that Article, it was unable to find in the alleged breach of Greece's rights such a risk of irreparable prejudice to rights in issue as might require the exercise of the power to indicate interim measures. With regard to (b) the Court considered that it is not to be presumed that either Government would fail to heed its obligations under the United Nations Charter or fail to heed Security Council Resolution 395 (1976) of 25 August 1976, wherein the two Governments were urged "to do everything in their power to reduce the present tensions in the area," and called on "to resume direct negotiations over their differences."

The Court observed that, to pronounce on the present request for interim measures, it was not called upon to decide any question of its jurisdiction to entertain the dispute, and that its present decision in no way prejudged any question relating to its jurisdiction or the merits of the case. It was unable, at the present stage of the proceedings, to accede to Turkey's request that the case be removed from the list, but it would be necessary to resolve as the next step the question of its jurisdiction with respect to the case.*

Excerpts from the Court's Opinion follow:

The International Court of Justice . . . Makes the Following Order:

* * *

19. Whereas the Greek Government bases its request for interim measures of protection not only on Article 41 of the Statute of the Court but also on Article 33 of the above-mentioned General Act of 1928; whereas however the Turkish Government has communicated to the Court its view that the General Act of 1928 is no longer a treaty in force between Greece and Turkey; and alternatively that, even if it were so in force and applicable, the matters submitted to the Court in the Application fall within the terms of reservation (b) to Greece's instrument of accession to the Act, dated 14 September 1931; and whereas this reservation excludes from the procedures described in the General Act "disputes concerning questions which by international law are solely within

*The foregoing summary was taken substantially from a communique issued by the Registrar of the Court (No. 76/9) on 11 September 1976.

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"; and whereas Turkey accordingly contends that it is entitled to consider the matters comprised in the Application as excluded from the scope of the Act;

20. Whereas Greece asks the Court to consider the said Act as presumptively in force between Greece and Turkey, and maintains that the subject-matter of its Application of 10 August 1976 does not fall within the terms of the said reservation (*b*) contained in Greece's instrument of accession;

21. Whereas it is not necessary for the Court to reach a final conclusion at this stage of the proceedings on the questions thus raised concerning the application of the 1928 Act as between Greece and Turkey, and it will therefore examine the request for the indication of interim measures only in the context of Article 41 of the Statute;

22. Whereas the power of the Court to indicate interim measures under Article 41 of the Statute has as its object to preserve the respective rights of either party pending the decision of the Court; and whereas, in the present case, this power relates essentially to the preservation of the rights which are invoked in Greece's application;

23. Whereas the several claims formulated in the submissions of the Greek Government in the Application are either different aspects or different incidents of its general claim to exclusive sovereign rights of exploration and exploitation in certain areas of the continental shelf of the Aegean Sea; and whereas, therefore, it is essentially the preservation of those alleged rights of exploration and exploitation which concerns the Court in examining the present request for the indication of interim measures of protection;

24. Whereas with respect to those alleged rights Greece requests the Court to direct that the Governments of both Greece and Turkey shall "unless with the consent of each other and pending the final judgment of the Court in this case, refrain from all exploration activity or any scientific research" in certain designated areas of the continental shelf; and whereas, in support of this request, Greece points to the above-mentioned grant by Turkey of exploration licences in respect of the said areas of continental shelf and to seismic exploration activity therein undertaken by or under licence from Turkey;

25. Whereas the power of the Court to indicate interim measures under Article 41 of the Statute presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings and that the Court's judgment should not be anticipated by reason of any initiative regarding the matters in issue before the Court;

26. Whereas, in this regard, the Greek Government contends that the concessions granted and the continued seismic exploration undertaken by Turkey

in the areas of the continental shelf which are in dispute threaten to prejudice the exclusive sovereign rights claimed by Greece in respect of those areas; and whereas it further contends that Turkey's seismic exploration threatens in particular to destroy the exclusivity of the rights claimed by Greece to acquire information concerning the availability, extent and location of the natural resources of the areas; that the acquisition and dissemination of such information without the consent of Greece prejudices its negotiating position in relation to potential purchasers of exploitation licences, thereby permanently impairing its sovereign rights with respect to the formulation of its national energy policy;

27. Whereas, on the basis of the foregoing considerations, the Greek Government maintains that the continued Turkish seismic exploration in the disputed areas constitutes a threat of irreparable prejudice to the rights claimed by Greece in its Application; that it threatens to prevent the full restoration of those rights to Greece in the event of its claims being upheld by the Court; and that the Court's power to indicate interim measures ought to be exercised when "the parties' rights might not be restored in full measure in the event of a judgment if that judgment is anticipated";

* * *

29. Whereas, moreover, it is clear that neither concessions unilaterally granted nor exploration activity unilaterally undertaken by either of the interested States with respect to the disputed areas can be creative of new rights or deprive the other State of any rights to which in law it may be entitled; whereas in representations made on 7 February 1974, 24 May 1974, 14 June 1974, 22 August 1974, 21 and 23 July 1976, and 7 and 9 August 1976, the Greek Government has persistently protested against what it considered as Turkey's infringements of its rights in the continental shelf areas in question; whereas in a statement to Radio Ankara on 24 July 1976 the Turkish Foreign Minister recognized that seismic research "cannot establish rights in the areas where this research is carried out"; and whereas the Government of Turkey, in its observations communicated to the Court on 26 August 1976, declared that:

Exploration by Turkey of the kind of which complaint is made by Greece cannot be regarded as involving any prejudice to the existence of any possible rights of Greece over continental shelf areas in the Aegean Sea. The sovereign rights over the continental shelf (including the exclusive right to exploration) that may exist are not taken away or diminished by exploration.

30. Whereas, according to the information before the Court, the seismic exploration undertaken by Turkey, of which Greece complains, is carried out by a vessel traversing the surface of the high seas and causing small explosions to occur at intervals under water; whereas the purpose of these explosions is to send sound waves through the seabed so as to obtain information regarding the

geophysical structure of the earth beneath it; whereas no complaint has been made that this form of seismic exploration involves any risk of physical damage to the seabed or subsoil or to their natural resources; whereas the continued seismic exploration activities undertaken by Turkey are all of the transitory character just described, and do not involve the establishment of installations on or above the seabed of the continental shelf; and whereas no suggestion has 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;

31. Whereas seismic exploration of the natural resources of the continental shelf without the consent of the coastal State might, no doubt, raise a question of infringement of the latter's exclusive right of exploration; whereas, accordingly, in the event that the Court should uphold Greece's claims on the merits, Turkey's activity in seismic exploration might then be considered as such an infringement and invoked as a possible cause of prejudice to the exclusive rights of Greece in areas then found to appertain to Greece;

32. Whereas, on the other hand, the possibility of such a prejudice to rights in issue before the Court does not, by itself, suffice to justify recourse to its exceptional power under Article 41 of the Statute to indicate interim measures of protection; whereas, under the express terms of that Article, this power is conferred on the Court only if it considers that circumstances so require in order to preserve the respective rights of either party; and whereas this condition, as already noted, presupposes that the circumstances of the case disclose the risk of an irreparable prejudice to rights in issue in the proceedings;

33. Whereas, in the present instance, the alleged breach by Turkey of the exclusivity of the right claimed by Greece to acquire information concerning the natural resources of areas of continental shelf, if it were established, is one that might be capable of reparation by appropriate means; and whereas it follows that the Court is unable to find in that alleged breach of Greece's rights such a risk of irreparable prejudice to rights in issue before the Court as might require the exercise of its power under Article 41 of the Statute to indicate interim measures for their preservation;

* * *

37. Whereas the Court has cognizance of the fact that, simultaneously with the proceedings before it in respect of the request for interim measures of protection, the United Nations Security Council also has been seised of the dispute between Greece and Turkey regarding the Aegean Sea continental shelf; whereas, on 10 August 1976 (the day on which the Application and request for interim measures were filed), the Permanent Representative of Greece to the United Nations wrote to the President of the Security Council requesting an urgent meeting of the Council in view of "recent repeated flagrant violations

by Turkey of the sovereign rights of Greece on its continental shelf in the Aegean"; and whereas the Security Council discussed the question at meetings held on 12, 13 and 25 August 1976, with the participation of the representatives of Greece and Turkey;

* * *

40. Whereas the Foreign Minister of Greece stated in the Security Council following the adoption of resolution 395 (1976) that he trusted that the resolution would "clear away the obstacles to a resumption of the dialogue [with Turkey] and lead to the solution of the problem of the continental shelf by peaceful means"; and whereas the Foreign Minister of Turkey stated, following the adoption of the resolution, that the paragraph of the resolution calling for a resumption of direct negotiations was "fully in accord with the policy that has been consistently pursued by Turkey";

41. Whereas both Greece and Turkey, as Members of the United Nations, have expressly recognized the responsibility of the Security Council for the maintenance of international peace and security; whereas, in the above-mentioned resolution, the Security Council has recalled to them their obligations under the United Nations Charter with respect to the peaceful settlement of disputes, in the terms set out in paragraph 39 above; whereas, furthermore, as the Court has already stated, these obligations are clearly imperative in regard to their present dispute concerning the continental shelf in the Aegean; and whereas it is not to be presumed that either State will fail to heed its obligations under the Charter of the United Nations or fail to heed the recommendations of the Security Council addressed to them with respect to their present dispute;

* * *

44. Whereas, in order to pronounce on the present request for interim measures of protection, the Court is not called upon to decide any question of its jurisdiction to entertain the merits of the case; and whereas the decision given in these proceedings in no way prejudices any such question, or any question relating to the merits, and leaves unaffected the rights of the Greek and Turkish Governments to submit arguments in respect of any of these questions;

45. Whereas, having regard to the position taken by the Turkish Government in its observations communicated to the Court on 26 August 1976, that the Court has no jurisdiction to entertain the Greek Application, it is necessary to resolve first of all the question of the Court's jurisdiction with respect to the case;

46. Whereas, having regard to the foregoing, the Court cannot, at the present stage of the proceedings, accede to the request of the Turkish Government, in

its observations communicated to the Court on 26 August 1976, that the case be removed from the list,

Accordingly,

THE COURT

Finds, by 12 votes to 1, that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power under Article 41 of the Statute to indicate interim measures of protection;

Decides that the written proceedings shall first be addressed to the question of the jurisdiction of the Court to entertain the dispute;

And reserves the fixing of the time-limits for the said written proceedings, and the subsequent procedure, for further decision.

(Signed) E. JIMÉNEZ DE ARÉCHAGA,
President

(Signed) S. AQUARONE,
Registrar

President JIMÉNEZ DE ARÉCHAGA, Vice-President NAGENDRA SINGH and Judges LACHS, MOROZOV, RUDA, MOSLER, ELIAS and TARAZI append separate opinions to the Order of the Court.

Judge *ad hoc* STASSINOPOULOS appends a dissenting opinion to the Order of the Court.

Separate Opinion of President Jiménez de Aréchaga

I concur in the Order of the Court for the reasons stated therein. I wish, however, to add a few general comments on the question of the jurisdiction of the Court with respect to the merits of the dispute and its relation to the power of the Court under Article 41 of the Statute.

Article 41 constitutes the basis of the Court's power to act with respect to a request for interim measures. It is a provision which has been accepted by all parties to the Statute and in such acceptance lies the element of consent by States to this special form of jurisdiction. It has been described as incidental jurisdiction because it is one which the Court is called upon to exercise as an incident of proceedings already before it. It may be compared from this point of view with the jurisdiction granted by Article 36, paragraph 6, of the Statute, according to which "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." Both forms of incidental jurisdiction must normally be exercised before jurisdiction over the merits is finally determined.

The fact that Article 41 is an autonomous grant of jurisdiction to the Court, independent from its jurisdiction over the merits of the dispute, does not signify that the prospects of the Court's jurisdiction with regard to the merits are irrelevant to the granting of interim measures. They are, on the contrary, highly relevant, but they come into play at a different level and at a subsequent stage: not as the basis for the Court's power to act on the request, but as one among the circumstances which the Court has to take into account in deciding whether to grant the interim measures.

The essential object of provisional measures is to ensure that the execution of a future judgment on the merits shall not be frustrated by the actions of one party *pendente lite*. In cases in which there is no reasonable possibility, *prima facie* ascertained by the Court, of jurisdiction on the merits, it would be devoid of sense to indicate provisional measures to ensure the execution of a judgment the Court will never render.

But the possibility of jurisdiction over the merits is only one among other relevant circumstances. There are others to be taken into consideration—such as the questions whether provisional measures are necessary to preserve the rights of either party and whether the acts complained of are capable of causing or of threatening irreparable prejudice to the rights invoked. According to general principles of law recognized in municipal systems, and to the well-established jurisprudence of this Court, the essential justification for the impatience of a tribunal in granting relief before it has reached a final decision on its competence and on the merits is that the action of one party "*pendente lite*" causes or threatens a damage to the rights of the other, of such a nature that it would not be possible fully to restore those rights, or remedy the infringement thereof, simply by a judgment in its favour. The Court's specific power under Article 41 of the Statute is directed to the preservation of rights "*sub-judice*" and does not consist in a police power over the maintenance of international peace nor in a general competence to make recommendations relating to peaceful settlement of disputes.

Before interim measures can be granted all relevant circumstances must be present—including the possibility of jurisdiction over the merits. However, to refuse interim measures it suffices for only one of the relevant circumstances to be absent. From this point of view all the circumstances of the case—including that relating to the possibility of jurisdiction over the merits—are placed on the same level: none has a logical priority with respect to another. In view of the wide measure of discretion granted by Article 41, the Court is entirely free to determine in each case which of the relevant circumstances it will examine first.

In the present case the Court has found that interim measures were not required in view of two circumstances: the existence of appropriate means of

reparation or satisfaction, with respect to the first Greek complaint, and the action taken by the Security Council, with respect to military actions or steps which might extend or aggravate the dispute. Having reached this conclusion it was not necessary for the Court to make any determination as to the prospects of its jurisdiction with regard to the merits, even on a *prima facie* basis. The question of jurisdiction over the merits could thus be left entirely unprejudiced, as was done in similar cases by the Permanent Court in the *Prince von Pless* (P.C.I.J., Series A/B, No. 54, p. 153) and *Polish Agrarian Reform* (P.C.I.J., Series A/B, No. 58, p. 179) cases and by this Court in the *Interhandel* (I.C.J. Reports 1957, p. 111) and *Trial of Pakistani Prisoners of War* (I.C.J. Reports 1973, p. 330) cases.

The question of the Court's jurisdiction thus remains entirely reserved for a future judgment, after giving the parties full opportunity to plead the important and delicate questions of law which have been raised in this respect.

(Signed) E. JIMÉNEZ DE ARÉCHAGA.

Separate Opinion of Judge Lachs

I write this separate opinion, firstly, because I am unable to agree with the Court's treatment of the issue of jurisdiction (para. 44). Not only was the Court's jurisdiction contested by Turkey but the Court was in my view under an obligation to consider the issue *proprio motu* and make clear its provisional views thereon, notwithstanding the negative answer it felt bound to give the request for interim measures.

Secondly, and this is for me a subject of serious preoccupation, I have some doubts with regard to the manner in which the Court has disposed of that request. Greece applied simultaneously to the Court and the Security Council, thus seeking both legal and political relief. The Court is called upon to pronounce after a period of negotiations. The Order it has made appears after a resolution in which the Security Council has urged 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," and called upon the two States "to resume direct negotiations over their differences." Thus further negotiations may now ensue. This is the general background against which the Court has to consider the request, and which lends the case a specific and most unusual character. The time of seisin of the Court is never of its own choice, but lies in the hands of applicants. It sometimes falls in a twilight zone as regards the situations either of fact or of law.

Emphasis has been placed by the Court on the strict interpretation of the wording of the Greek request. But this, to my mind, should have been viewed as just one among several possible responses to the provisions of Article 66, paragraph 1, of the Rules of Court, according to which "the request shall

specify . . . the rights to be protected, and the interim measures of which the indication is proposed." In fact, the same Article of the Rules reveals how it is the *situation concerning the dispute as a whole* with which the Court is expected to concern itself.

In general, it is true, the Court must take a restrictive view of its powers in dealing with a request for interim measures. Such proceedings may not be the best framework for the enunciation by the Court of such judicial opinions as it has been ready to articulate in many a final decision. Yet even if the Court had to reach the present negative decision, I feel that a positive contribution to the solution of the dispute in question was still a possibility.

This brings me to a wider issue. The Court does not, to my way of thinking, arrogate any powers excluded by its Statute when, otherwise than by adjudication, it assists, facilitates or contributes to the peaceful settlement of disputes between States, if offered the occasion at any stage of the proceedings.

On one occasion the Permanent Court observed:

. . . the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such dispute between the Parties; . . . consequently, it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement (*P.C.I.J., Series A, No. 22, p. 13*).

On another occasion, while unable to find on a submission said to lie outside the scope of the proceedings, the Court found it possible to stress at the end of its reasoning the great desirability of a negotiated settlement (*P.C.I.J., Series A/B, No. 78, p. 178*). *A fortiori* the present Court, whose Statute is much more intimately bound up with the United Nations Charter than that of its predecessor with the Covenant of the League, should the more readily seize the opportunity of reminding the member States concerned in a dispute referred to it of certain obligations deriving from general international law or flowing from the Charter. In the present instance some of these obligations have been mirrored in the Security Council's resolution of 25 August 1976.

The Court has given due prominence to this resolution in the reasoning of the Order.

There was in my view no statutory bar to its spelling out the legal consequences of the Security Council's resolution and the official statements of the representatives of the two States. The pronouncements of the Council did not dispense the Court, an independent judicial organ, from expressing its own view on the serious situation in the disputed area.

While it would not be proper specifically to advise Greece and Turkey "as to the various courses" they should follow (*I.C.J. Reports 1951, p. 83*), the Court, acting *proprio motu*, should, even while not indicating interim measures, have laid greater stress on, in particular, the need for restraint on the part of both States and the possible consequences of any deterioration or extension of

the conflict. In going further than it has, the Court, with all the weight of its judicial office, could have made its own constructive, albeit indirect, contribution, helping to pave the way to the friendly resolution of a dangerous dispute. This would have been consonant with a basic role of the Court within the international community.

(Signed) MANFRED LACHS

Separate Opinion of Judge Morozov

I accepted the operative part of the Order of the Court but I am unable to share the reasoning of the Order.

Reference is made in the Order to Articles 41 and 48 of the Statute, as well as to Article 66 of the Rules of Court, as arguments to prove that the Court allegedly has a right to consider the request for the indication of interim measures of protection before it has considered and settled the question of its jurisdiction.

But these references in reality are based neither on the Statute of the Court nor on its Rules of Procedure.

The key provisions relating to the competence of the Court are those contained in Chapter II of its Statute, and particularly Article 36, paragraph 1, thereof: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." The same principle is embodied in Article 37 of the Statute.

Articles 41 and 48 of the Statute are to be found in Chapter III of the Statute under the title "Procedure." This means that provisions of that Chapter cannot be regarded as something which may be separated from Chapter II of the Statute, so as to have an independent significance, which could cancel out the above-mentioned provisions of Chapter II concerning the competence of the Court.

As has been stated in the Order (para. 8) the Turkish Government "suggested that the Greek request for interim measures be dismissed and, in view of the lack of jurisdiction, asked the Court to remove the case from the list . . ."

After such a request had been made, it was the primary duty of the Court to consider the question of its jurisdiction.

It is not my intention to express a view now, *pro* or *contra*, on the question of jurisdiction inasmuch as the question has not been considered or settled by the Court.

It is however important to stress that the Court has no right to consider either the question of appointment of a judge *ad hoc* under Article 31, paragraph 3,

of the Statute, or the question of interim measures of protection, before it has satisfied itself that it has jurisdiction in accordance with Articles 36 and 37 of the Statute.

The reference in the Order to Article 48 adds nothing to the matter, since that Article merely provides for the right of the Court to "make orders for the conduct of the case . . ."; it does not permit avoidance of the key provisions of Articles 36 and 37 of the Statute.

The reference to Article 66 of the Rules of Court also cannot be used as an argument to prove that the request for interim measures of protection allegedly has priority over the question of jurisdiction. Article 66 merely establishes that such a request "shall have priority over all other cases," but not over all stages of the case concerned. The provision that "the decision thereon shall be treated as a matter of urgency" means only that at the moment a request for interim measures is made consideration of all *other* cases should be interrupted.

Thus neither the Statute nor the Rules of Court contain any provisions which provide that the request for interim measures of protection has any priority over the question of jurisdiction.

The precedents afforded by cases in which the Court has sometimes made Orders on the question of interim measures of protection contrary to its Statute and Rules cannot be regarded as having any value in the argument.

I should like to conclude by reference to paragraph 13 of the Order, in which we find: "and whereas the non-appearance of one of the States concerned cannot by itself constitute an obstacle to the indication of interim measures of protection . . ."

This conclusion also is not in accordance with the Statute, for two reasons. First: though, if the State concerned could be qualified as a party (which is not so in this case), and does not appear before the Court, or fails to defend its case, the other party may in accordance with Article 53 of the Statute call upon the Court to decide in favour of its claim, yet paragraph 2 of the same Article lays down as a decisive condition that the Court in such a situation must satisfy itself that it has jurisdiction.

Secondly, the filing by one side of an Application cannot of itself create a case, and therefore the State against which the Application is brought could be regarded as a party within the meaning of the Statute only after settlement of the question of the Court's jurisdiction.

(Signed) PLATON MOROZOV