

**Implementing and Enforcing Regional Environmental Policies
in Comparative Perspective**

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Introduction

The struggle for a comprehensive EU Constitution raised attention to the challenge of focusing initiatives in “technical” or practical cooperation that are both closer to the real (albeit prosaic) interests of European citizens and worthy of serious attention in the near term. EU member states increasingly confront the realities of both economic globalization and environmental degradation, but progress has thus far been in fits and starts, with much left to be done, particularly in national implementation, inspection, and enforcement. If the EU emerges out of the “constitution crisis” energized as a stronger political community, the Common Fisheries Policy may well be an area for enhanced attention. But the questions of viable implementation and enforcement loom large.

The “green” member states of the EU, led by Germany, the Netherlands and Scandinavia are predictably well out in front of what Alberta Sbragia (1997) (following Peter Haas, 1993) refers to as the large number of “laggard” EU member states on environmental policy generally. Nonetheless, many would regard the EU’s commitment and progress here as an important model for other regional governance efforts, and certainly well ahead of the global governance efforts thus far.

There is some clarity in the legal environment for commercial use and pollution control of the Aegean Sea, Dardanelles, Sea of Marmara, Bosporus Strait, and the Black Sea, but these areas are not without political contention. Conflict between Greece and Turkey over territorial claims in the Aegean appears to have moderated somewhat for several reasons, but a complete solution is not imminent.

At the same time, water quality and fishing stocks are likely degraded from chemical and sewage dumping into the rivers of Eastern Europe, which then flow into the Black Sea without adequate regional monitoring or control, and there is continuing pressure from Russia and other Black Sea shippers for more rapid and higher volume traffic through “Turkish waters” toward the Aegean with attendant collision and pollution risks. There are efforts to enhance maritime and resource cooperation in the Black Sea region, but one probably cannot yet regard these as concrete steps toward effective regional governance, and Turkish candidacy (but not assured membership) complicates the prospect for EU governance.

This paper is essentially a progress report of some on-going research in Greece and Turkey in connection with an annual study abroad program co-sponsored by Michigan State University, the National Technical University of Athens, the Hellenic Center for Marine Research, the University of Crete, the University of the Aegean, Istanbul University and Koc University. The overarching research question is quite simply: what has been the impact of the EU’s common fisheries policy on the fishing industries and fisheries in the Eastern Mediterranean Basin? A series of sub questions include: 1) have the fishing fleets been reduced in size, number and power? 2) has employment in the fishing sector been reduced? 3) have there been effective inspection and enforcement efforts to ensure compliance with CFP regulations on catch size and methods? 4) has there been interaction between efforts to control water pollution in the region and the efforts to maintain or rescue threatened fishery stocks?

Global Fisheries in Crisis

Our global fisheries are in a parlous state. Systematic overfishing of commercial species combined with the “bycatch” of unmarketable fish and sea mammals has left our oceans and seas gravely depleted: “The FAO has estimated that about 10% of the world’s fisheries are depleted, 15-18% are overexploited, and 47-50% are fully exploited, leaving just one-quarter of the world’s fish populations underexploited or moderately exploited.”¹ Apart from the obvious environmental wrong of destroying so much diversity and beauty as our ocean resources possess, some 20% of the world’s population derives 20% of its protein from fish, and the countries most dependent on fish as a food source and economic commodity are primarily in the developing world.²

Two modern trends have contributed to this potentially disastrous state: 1) government subsidies to the fishing industry, and 2) modern technology for industrialized fishing, which harvests not only too much of the targeted species but an appalling amount of bycatch as well.³ The governments of coastal nations have tended to encourage a more vigorous fishing industry than is sustainable because it provides employment in coastal communities where other forms of employment may be limited, giving fishermen and fish-processors disproportionate political clout.⁴ The legal regimes in place, moreover, have historically done little to address the problem of overfishing, particularly on the high seas, where illegal fishing is rampant; indeed, the incentives all tend toward milking the commons of the ocean for swift profits regardless of the future.⁵

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) gave ownership of the fisheries to coastal states by setting up territorial waters up to 12 nautical miles from the mainland and Exclusive Economic Zones (EEZs) up to 200 miles; these are the areas where fish are most

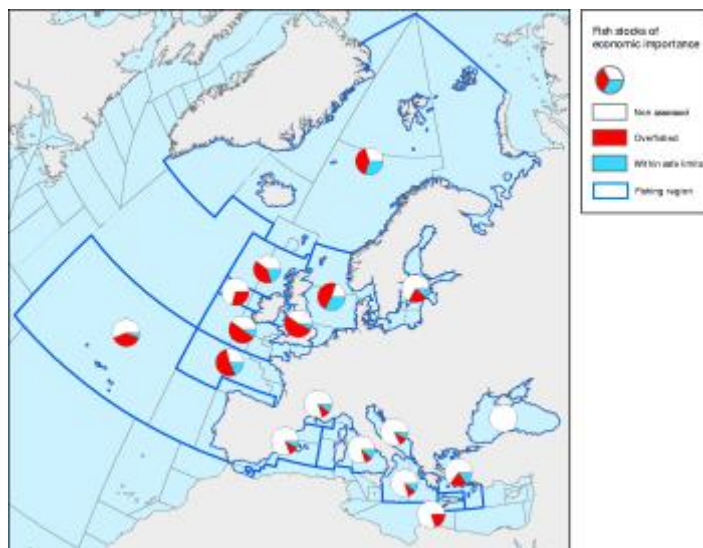
abundant, corresponding more or less to the continental shelf zones. The rationale was that coastal states would then have incentives to regulate and conserve marine resources. But the reality became something different: coastal nations exhausted their own fisheries and moved on to the high seas. Coastal states in the developing world sold their fishing rights to wealthier nations, and when fleets from Europe exhausted the North Atlantic, they moved to the shores of Africa.⁶ UNCLOS attempted to check overfishing by imposing a responsibility on coastal states to conserve the living resource within their EEZs, in Arts. 61-67, and even on the high seas, in Arts. 117-118, but the language was consistently counterbalanced by the right to exploit, and little could actually be done to police the high seas in particular.

In 1995, however, some of the shortcomings of UNCLOS were addressed in the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of December 10, 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Treaty). This treaty aims to limit high seas fishing, placing it under the authority of regional organizations and giving coastal nations enhanced abilities to police the high seas.⁷ Unfortunately, six of the world's top fish producers, including China and Japan, are not signatories to the Fish Stock Treaty.⁸ Another action of the U.N., in 1991, led to a global ban on driftnets, one of the more wasteful and destructive techniques modern fishing has used to take entire schools of fish as well as masses of bycatch.⁹ The EU banned driftnets in 1998.¹⁰

These agreements have helped, but much more needs to be done if the global ocean resource is to be preserved. The UN has considered placing a complete moratorium on bottom trawling, another high-tech fishing technique which literally scrapes the seabed to trap bottom dwelling species,

destroying their breeding habitat at the same time and contributing to even longer-term ecological problems. There is, however, no consensus as yet, with the fishing industry crying foul.¹¹ Marine reserves where no fishing is permitted have shown promise for regenerating stocks,¹² and moratoria on fishing for individual species (like cod) help as well. Some have gone so far as to suggest that the global community needs to ban any of the modern means by which fishing has become too efficient to sustain.¹³ The answer is surely that *all* of these measures need to be pursued. What can we expect from regional institutions as part of the response to the crisis?

The European Union has been relatively aggressive in addressing overfishing, and rightly so, given that its traditional fisheries are some of the most overfished in the world. The following graphic, compiled by the European Environment Agency, gives an overview of the European seas, where the red represents overfished stocks, the blue represents stocks within safe biological limits, and the white represents the percentages which have not been adequately assessed.¹⁴



The health of Fisheries in the Mediterranean are affected significantly by pollution that has a wide range of sources. As researchers at the University of Pavia, Italy put it:

...the Mediterranean and the Black Sea form an integrated oceanographic system. The waters of the Black Sea, which are at a higher level than those of the Mediterranean, flow into the Mediterranean basin through the Bosphorus, the Sea of Marmara and the Dardanelles. The Black Sea collects waters coming from an enormous drainage basin which includes a large part of central and east Europe and Turkey. Due to the pollution brought mainly by rivers, the Black Sea is dying; as its polluted waters continuously flow into the Mediterranean, all marine life, ecological balance and biological resources are seriously threatened in the whole system.

(http://www.unipv.it/webcib/edu_Mediterraneo_uk.html)

Environmental Policies and Programs in the European Union

The EU's progress on common environmental policies is commendable, but implementation due to domestic economic and social concerns remains limited in key areas beyond the "green" members. One can see this in all of the main areas of EU environmental progress. Peterson and Bomberg (1999, pp. 173-5) point to more than 200 pieces of legislation by the late 1990s on environmental quality or on the environmental aspects of internal market mechanisms relating to: controlling air and water pollution, protection from chemical and nuclear hazards and noise pollution, waste management, and wildlife protection. These include a series of six Environmental Action Programmes (EAPs) since 1973 which have come to focus increasingly on sustainable use of natural resources and management of wastes. The most recent (10 year) EAP, issued in 2002, identified four key environmental priorities: climate change, nature and biodiversity, environment and health,

and natural resources and waste. Seven thematic strategies were proposed as Commission Directives by 2006 on air pollution, marine environment, prevention and recycling of waste, sustainable use of resources, urban environment, soil, and pesticides. Concerns from a variety of EU Commission and member state actors arose, fearing that "...new legislative action in areas such as air pollution could give rise to high costs for industry and undermine the EU's ambitions to become the most competitive knowledge economy by 2010 (the "Lisbon agenda"). (EurActiv.com, 21 February 2007). The Commission and the European Environmental Agency have not been unduly cowed by these arguments, but these concerns do tend to limit resource allocation and national implementation efforts.

This progress can be seen against the backdrop of emerging distinctions in the direction and focus of other major regional and state actors. For example, Robert Kagan (2003) discussed the emerging division between Europe and the U.S. in Of Paradise and Power. Jeremy Rifkin, in The European Dream, argued that Europe is not only different from the US, but also is arguably better -- possessing both a brighter future and one that will directly challenge the US "model." In his words:

The European Dream emphasizes community relationships over individual autonomy, cultural diversity over assimilation, quality of life over the accumulation of wealth, sustainable development over unlimited material growth, deep play over unrelenting toil, universal human rights and the rights of nature over property rights, and global cooperation over the unilateral exercise of power (2004, p. 3).

On the other hand, one can argue that the EU and many of its member states have done little to address the growing global economic competition challenges facing them. The recent uproar in the U.S. over the competitive manufacturing trade challenge of China (see, for example, Shenkar, 2005; and Fishman, 2005), and India's growing strength in software and services (see, for example,

Prestowitz, 2005) has not been matched by similar concern, let alone any real policy adjustment in Europe. Indeed, the labor and youth unrest, so clearly evident in France in late 2005 and 2006, helps to explain the political reluctance to take even the most timid structural reforms, particularly anything that seeks to rein in social welfare guarantees and expenditures.

Is there a European solution to this, perhaps with serious implementation of the precepts of the “Lisbon process”? How does this constrain environmental programming? What can the EU accomplish reasonably, given these constraints and debates?

While EU members are still suffering under what has been a lengthy period of stagnation, high unemployment, and seemingly ineffectual economic policies, the core of the region must be regarded as prosperous and stable in large measure. The project of European economic integration must be given due credit for much of this achievement -- an achievement that even the strongest "Euro-pessimists" would hardly expect to crumble in the near to medium term future. The prospect for remedy through closer economic and political union in the EU also seems firmly constrained. Andrew Moravcsik's argument on “Why Europe Said ‘No’” to the Constitution is somewhat persuasive. He concludes:

The EU's distinctive system of multilevel governance is the only new form of state organization to emerge and prosper since the rise of the welfare state at the turn of the twentieth century. Now it is a mature constitutional order, one that no longer needs to move forward to legitimate its past and present successes. Left behind must be the European centralizers and democratizers for whom “ever closer union” remains an end in itself. They will insist that the answer to failed democracy is more democracy and the answer to a failed constitution is another constitution. But Europe has moved beyond them. (Moravcsik, 2005, p. 259)

Europe has moved beyond them in one sense. The EU works as an increasingly common market. Not everyone agrees that the harmonization of economic policies reflected in the effort to establish

the Eurozone has been successful (see Gurfinkiel, 2005), but again, the “progress” must be regarded as an impressive achievement for mature states with long histories of enmity and independence. Is Europe, though, a project only to be completed by achievement of total economic integration and political union? Or is it better to implement what has been agreed upon in key sectors, while possibly adding several more members beyond the present 27, to stabilize the region and enhance the prospects of effective policy responses to transnational challenges? (See Graham, 2007 for an expanded argument on this point.) There may be greater prospects for both enhanced stability for Eurasia and realistic adjustment (largely national and local) to the imperatives of both globalization and environmental degradation with a strategy that is more inclusive (including Turkey!).

The EU’s Common Fisheries Policy

Initial steps toward a Common Fisheries Policy (CFP) were taken in 1970 in response to provisions in the original Treaty of Rome, Article 38.. The initial measures set rules for access to fishing grounds, markets and structures. It was agreed that, in principle, EU fishermen should have equal access to Member States' waters. However, in order to ensure that smaller vessels could continue to fish close to their home ports, a coastal area was reserved for local fishermen traditionally working those areas. A common market in fish products was developed, along with structural policy to coordinate the modernization of fishing vessels and facilities. In 1976, Member States followed international law of the sea negotiations to extend resource control from 12 to 200 miles from their coasts. The European Union became central to managing fisheries in the combined member state waters and to conduct international negotiations. The CFP was consolidated in 1983, taking a precautionary posture to 1) protect and conserve living aquatic resources; 2) provide for their

sustainable exploitation; and 3) minimize the impact of fishing activities on marine eco-systems. The overall goals were to promote efficient fishing within economically viable and competitive fisheries and aquaculture industry, providing a fair standard of living for those dependent on fishing activities, but with the interests of consumers in mind.

The CFP included Common measures in:

- **Conservation and limitation of the environmental impact of fishing**
- **Structures and fleet management**
- **Markets**
- **Relations with other regions and institutions**

The CFP sets maximum quantities of fish that can safely be caught every year. The Council of Ministers endeavors to use scientific findings to decide on the amount of fish that EU fishermen will be allowed to catch the following year, taking into account the biological, economic and social dimension of fishing. This system of quantities is referred to as the total allowable catches (TACs) which is divided among EU member states to establish national quotas. A system of technical rules, for example, on net mesh sizes, closed areas, appropriate fishing gear, and minimum fish sizes is established. Catches and landings must be recorded in special log books. (For more detail on the CFP provisions, see: <http://ec.europa.eu/fisheries/cfp>; for an analysis of the politics of the evolution of the policy, see Lequesne, 1994)

The CFP was reformed substantially in 2002, with a focus on limitation of catches and technical measures for long term management of fisheries. Multi year recovery plans were established for threatened stocks, and the EU Commission launched an Action Plan to integrate environmental

protection requirements into the CFP. This effort put some attention on by-catches and discards, especially on juvenile fish, dolphins, sharks or marine birds particularly affected by fishing activities. Economic incentives to encourage more appropriate fishing activities and gear. Funding was established through the Financial Instrument for Fisheries Guidance (FIFG) for a variety of related projects, especially temporary cessation of fishing activities, modernization of fishing fleets and reducing excess fishing capacity. Some support of socio-economic measures was also envisioned. The FIFG covered the period 2000-2006, and is to be replaced with the European Fisheries Fund for 2007-2017.

Market measures included work on: common marketing standards for fresh products on quality, grades, packaging and labeling; forming voluntary producers' organizations (POs) to help stabilize markets; and a price support system which sets minimum prices below which fish products cannot be sold; and rules for trade with non-EU countries.

The extension of national territorial limits had an impact on EU member vessels which had traditionally fished them on long distance trips. A series of negotiations were opened with "third countries" then to seek compensation or access. After 2002, the EU developed a focus on "Partnership agreements" with third countries for responsible/sustainable/rational fishing.

The regulation of total allowable catches is a crucial part of the effort to reduce overfishing and promote sustainability. As noted above, commercial fishing vessels are required to maintain logs of their catches available for inspection. The EU has established a modest team of (perhaps 25 or so) inspectors, but implementation and enforcement is left largely to the national authorities. But an EU

Fisheries Control Agency was established with the 2002 CFP reform, in order to help coordinate EU and national resources and promote uniformity.

These efforts and mechanisms must be regarded as serious and impressive in some respects, but the reliance on national implementation and enforcement in an domestic context under pressure by heightened global competition, social welfare expenditure challenges, and unemployment levels has been problematic. The CFP reforms of 2002 were motivated by the sheer fact that in many cases and sub-regions, far too many fish had been taken to achieve biological, environmental and economical sustainability.

Action Plans adopted since the 2002 Reforms:

- [sustainable development of European aquaculture](#) (📄 125 Kb) .
- the [integration of environmental protection requirements into the CFP](#) (📄 35 Kb) .
- the [eradication of illegal fishing](#) (📄 48 Kb) in order to ensure sustainable fisheries beyond EU waters.
- [measures to counter the social, economic and regional consequences of fleet restructuring](#) (📄 134 Kb) .
- the [creation of a single inspection structure](#) (📄 203 Kb)
- the [reduction of discards of fish](#) (📄 321 Kb)
- **Mediterranean Fisheries [Action Plan](#)** (📄 185 Kb)

National level enforcement in cooperation with the EU can work in some cases. In early 2007, the EU adopted a Commission Regulation which provides for the reduction of certain fishing

quotas for the UK and Ireland over the period 2007 to 2012. This is in response to overfishing of herring and mackerel quotas during the period 2001 to 2005, determined by UK investigations. Given concern about negative social and economic impacts on the fleets and processing industry, the maximum annual reduction under this regulation will be 15% of the annual quota to be set by the Council in future TACs and quotas regulations. European Commissioner for Fisheries and Maritime Affairs Joe Borg commented,

Over quota landings has a cost not only on account of their impact on the fish stocks but also in economic and social terms for the industry concerned. I welcome the full cooperation of both the UK and Ireland in this matter. We now need to move forward to ensure that this type of activities cannot happen again.

The UK's national quotas were exceeded by 112,546 tons in the case of mackerel and 43,961 tons in the case of herring. Over the same period the Irish mackerel quota was overfished by 33,486 tons. The two Member States involved reported details of the overfishing to the Commission, in full compliance with their obligations under Community law.

Excess fishing capacity remains a crucial issue in relation to several states. Greece has the largest number of fishing vessels (18,045 as of 2006), while Spain has the largest fleet by tonnage, more than twice that of number two (the UK). Total employment in fishing was 19,705 in Greece, as of 2005 (declining from 22,290 in 1995). Turkey employed 33,614 in 1995, up from 32,000 in 1990 (Eurostat, 2007, pp. 52-56). The fishing resources of the Mediterranean have long been considered over-exploited. (see EU COM (2002) 535, p. 7)

As noted above, some stress was placed on Mediterranean fisheries through adoption, in October 2002, of an Action Plan focused on sustainability. This included attention to declaring fisheries protection zones with enhanced cooperation in management and modernization. Unfortunately, effective cooperation must extend to non-members and candidate members. The complicated maritime and political relations between Greece and Turkey help to illustrate the challenge of addressing these fishery concerns.

The Eastern Mediterranean Basin: Legal Framework

The Aegean Disputes

A continuing core disagreement between Greece and Turkey centers on rights over the Aegean Sea, namely: a) the extent of the territorial waters, b) the extent of national airspace, c) EEZs and the limits of the continental shelf, and d) national claims to some disputed islands and the militarization of others. We do not concern ourselves here with issues of airspace or of militarization, but we will focus rather on the territorial waters and continental shelf disputes, with their implications for fisheries and environmental protections. We also do not consider the continually vexing problem of Cyprus.

Under the 1982 UNCLOS, coastal nations can ordinarily claim exclusive jurisdiction over adjacent waters up to 12 nautical miles from the mean low water mark, although by no means all

states do so; foreign vessels have a right to innocent passage within this zone (Arts. 2 and 3). Both Greece and Turkey claim a territorial waters zone of only 6 nautical miles in the Aegean.¹⁵ Beyond this 12 mile limit, there is a contiguous zone of another 12 miles, within which nations can assert limited enforcement of national laws, such as of customs and immigration (Art. 33). Beyond that, an EEZ often extends out 200 miles from the coast; this is a zone of commercial exploitation. Few nations bordering the Mediterranean claim an EEZ in it; neither Greece nor Turkey does, although Turkey does assert its EEZ claims in the Black Sea.¹⁶ Islands belonging to a coastal state are entitled to the same territorial waters under Art. 121 of UNCLOS (which gives Greece a distinct advantage in the Aegean):

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.

Greece is a signatory to UNCLOS and uses it to justify its stance in the Aegean, but since it has not been in its national interest to do so, Turkey has never signed on to UNCLOS and does not recognize its consequences for itself.¹⁷

Greece has never actually attempted to claim its full 12 mile territorial zone around its mainland and islands in the Aegean, but it reserves the right to extend its territorial waters to 12 miles in the future, a right to which it deems it is entitled by force of positive and customary law; given that Turkey is not a party to the governing conventions, Greece also relies on custom to argue its case. Greece only acknowledges one actual dispute over Aegean issues, i.e. sovereignty over the continental shelf, and it prefers a legal remedy, i.e. resolution by the ICJ. Turkey has not unnaturally

been concerned that if Greece did lay claim to all of the waters and the seabed to which it might be entitled by UNCLOS, Turkey's access to the Aegean and its resources would be effectually eliminated; Turkey asserts an equitable claim that the 12 mile limit in the Aegean cannot be applied, and maintains that an attempt by Greece to claim 12 miles would constitute a casus belli.¹⁸ It is noteworthy in this context that Turkey's shoreline along the Aegean is its longest, at 2805 km, with a shoreline of 1695 km on the Black Sea and 1677 km on the Mediterranean.¹⁹ Turkey maintains that there are multiple claims in dispute (the 12 mile territorial waters, air space issues, ownership of the continental shelf and the so-called gray islands, those whose national allegiance is in doubt) and it prefers negotiation between the two states to resolve issues, or a political solution.²⁰

The 1958 Convention on the Continental Shelf as well as UNCLOS (Arts. 76-78, 82), moreover, "recognizes 'sovereign rights' of coastal states over the natural resources of the continental shelf," both living species and non-living resources.²¹ The zone of the continental shelf zone incorporates the shallows subjacent to the shoreline, up to 200 meters deep; it extends either to the actual limit of the continental shelf or to 200 nautical miles, giving considerable control over fisheries to the coastal nation.²² Customary law, on the other hand, generally only recognized a nation's sovereignty to the end of the territorial waters.²³ Drawing the boundaries of both the EEZ and the continental shelf can be very difficult where the zones would overlap or other physical factors intervene; more than 50 treaties are in force between nations whose continental shelf zones impinge on one another.²⁴ The Aegean Sea is itself only 186 miles wide to begin with, and the situation is complicated by its many islands, most of which Greece can claim and many of which lie very close to Turkey's shores.²⁵

Sovereignty over disputed islands in the Aegean, such as Imia (or Kardak to the Turks), may seem a minor point on the face of it, since they amount to little more than uninhabited rocks, but populating them and exerting economic control over them also confers control over their territorial waters under UNCLOS Art. 121, above, as well as their airspace and their seabeds, and thus becomes critical especially to Turkey in defending its rather tenuous rights to access to the Aegean. Controversy over Imia, which is very close to the Turkish mainland, nearly precipitated a military clash in 1996, when both countries attempted to lay claim to the islets and interpreted one another's efforts as attempts to extend their rights in general in the Aegean.

We return now to issues of the continental shelf. One European dispute over demarcation of the continental shelf gave rise to the *North Sea Continental Shelf Cases*, [1969] I.C.J. 1, involving the Federal Republic of Germany, Denmark, and the Netherlands. Denmark and the Netherlands wished to use the equidistance principle to delimit the contested boundary, meaning that a line would be drawn midway between two chosen points on either side of the boundary, and this arbitrary line would become the boundary. Since this would have reduced the German shelf considerably, however, Germany contested the method of determination. In this case, the court found that "use of the equidistance method of delimitation was not obligatory as between the Parties ... and that, if such delimitation produced overlapping areas, they were to be divided among the Parties, in agreed proportions, or failing agreement, equally, unless they decided on a regime of joint jurisdiction, user or exploitation." In other words, the parties were ordered to negotiate an equitable solution.²⁶

This case has direct bearing on the situation in the Aegean. Greece, by virtue of the Convention on the Continental Shelf and its numerous islands, all with their haloes of territorial rights,

could technically lay claim to almost all of the seabed of the Aegean, some 71.5%, as opposed to Turkey's 8.8%, the remainder being "high seas" and open to all.²⁷ This must be a matter of grave concern to Turkey, since it would effectively cut off shipping lanes between the Dardanelle Straits and the Mediterranean as well as most of the fishery. In 1973, moreover, a crisis was precipitated when Greece began exploration for oil and other minerals in the Aegean, prompting Turkey to do the same.²⁸ Both nations continued to exert this right in defiance of one another for some years afterward. In 1976, Greece applied to the ICJ both to declare that the Greek islands in the Aegean possessed their own continental shelf and also to delimit the boundary of the continental shelf in general. The ICJ refused to do so, stating that there was no proof of lasting harm to Greece's interests if it did not enjoin Turkey's activities, and also that Turkey had not consented to the court's jurisdiction.²⁹

This stalemate resulted in negotiations at Berne Switzerland and the Berne Protocol, setting out guidelines for negotiating the continental shelf dispute. One key provision of the Protocol was that neither country was allowed to take unilateral actions in the matter.³⁰ Since then the countries have violated this agreement and reaffirmed it, but have never reached consensus. Greece has continued to push for a legal solution, trial in a neutral court, while Turkey continues to push for a negotiated political settlement between the two countries.

Where do the two parties wish to fix the divide? "Greece proposes that the delimitation of the Aegean Sea Continental Shelf between Greece and Turkey should be effected by a median line between the Greek Aegean islands and such baselines on the Turkish coast established for delimiting its territorial water."³¹ Greece claims all of the Aegean basin to a depth of 200 meters or the zone of

“exploitability.”³² Note here also that the Greek island of Samos is only 2 km. from the Turkish mainland. Turkey, on the other hand, would like to see a median line drawn between the coasts of the two nations, giving it rights to half of the Aegean seabed; this would, however, isolate a large number of Greek islands within Turkey’s continental shelf zone.

There is general agreement that relations between the countries have eased over the past few years, largely as a result of Greece’s assistance to Turkey after the disastrous earthquake of 1999.³³ The Aegean dispute, however, lingers on as evidence of the strained history between these two nations.

What are the implications for the fisheries and environmental protections? An estimated 65% of commercial fish stocks in the Aegean have not been assessed for sustainability, but an estimated 10-20% of Mediterranean commercial species are deemed to be outside safe biological limits for sustainability.³⁴ Cooperation between Turkey and Greece is clearly necessary if the overall situation is to be assessed, monitored, and then addressed, in order to sustain declining stocks. Sovereignty over the contiguous zones gives a nation the power to regulate for “sanitary” purposes, an old-fashioned term which is often construed by courts today to provide for regulation for environmental reasons which were not anticipated when treaties were drafted, while much of the purpose of granting a continental shelf zone is in allowing a coastal state preferential rights to its fisheries. Obviously, these rights are compromised when nations cannot agree on the boundaries.

What is needed to resolve these issues? Turkey’s belligerent attitude does not avail it, nor does Greece’s rather smug reliance on its legal claims. Admitting Turkey into the EU would help, since it would entitle Turkey to access to EU member nations’ waters and to its negotiating bodies.

The EU, moreover, has proposed establishing fishery zones, distinct from EEZs in having no implications for seabed mineral rights, of 200 nautical miles, which would allow improved fisheries management in the Mediterranean. It would clearly be to the advantage of both Greece and Turkey to cooperate in the management of Aegean resources. It seems clear that Greece's purely legal solution cannot work: Greece undoubtedly has the stronger arguments under international law, which would leave Turkey without significant rights to Aegean resources and create still more lasting resentments. Turkey's solution, on the other hand, that of a negotiated political solution between the two nations, does seem to have a greater chance to succeed without lasting rancor; it would allow a nuanced and particularized settlement on each possible grievance. This was, moreover, to be the method imposed by the ICJ in the *North Sea Continental Shelf Cases*, and that court recognized that an equitable solution rather than a strictly legal one could legitimately be reached under the existing framework of international law. Greece should, then, accede to Turkey's desire for a negotiated settlement, with the oversight and assistance of the United Nations. The reduced prospect for a bonanza of mineral and energy deposits in the region would seem to ease the stakes on both sides.

The Turkish Straits and the Black Sea

The Straits of the Bosphorus and the Dardanelles as well as the Sea of Marmara (collectively "the Turkish Straits") might appear to be "internal waters" of Turkey, but access to them is regulated by the Treaty of Montreux (1936),³⁵ which guarantees that they must be international waters, used for commercial traffic between the Black Sea and the Aegean in times of peace without a tariff, if ships do not stop at a port (Art. 2). Art. 3 of the treaty gives Turkey the right to regulate traffic on

the Bosphorus for “sanitary reasons,” including quarantining ships bearing victims of contagious disease. Even in times of war or in fear of war, Turkey must keep them open to traffic from nations not hostile to it, under Articles 4-6. The Treaty goes on to limit the aggregate tonnage permitted to the Black Sea powers to 30,000 in times of peace (Art. 18).³⁶

The Bosphorus Strait, it should be noted, cuts Istanbul, a city of some 11,000,000 inhabitants, in two. The Bosphorus is 30 km. long, and it varies between 3700 meters in width at its northern opening to 700 meters at its narrowest point.

Since the Treaty of Montreux was ratified, there has been an explosive growth in the exploitation of the Central Asian and Caucasus oil reserves and the concomitant necessity of shipping them to market, from the Black Sea port of Novorossiysk to the Mediterranean and onward. Naturally, the Straits offer the most convenient way of doing so and, by some estimates, traffic along them has increased by a factor of 6, while tonnage has increased ten-thousand-fold, and the nature of the cargo has changed from grain to oil, chemicals, and even nuclear waste. But since they are narrow and twisting, ill-suited to the size of modern day tankers and cargo ships, Turkey has become increasingly alarmed at the hazards this shipping presents and has unilaterally attempted to regulate traffic through the Straits in ways unanticipated by the Treaty.³⁷

In addition to many minor incidents, there have been several major oil spills in the Bosphorus. On November 15 1979, “the Independenta and the Evrialy collided at the southern entrance of the Bosphorus. The Independenta exploded and both vessels began to burn. The Independenta grounded a half of a mile from the port of Hydarpassa. The tanker burned until December 14. The Independenta was carrying 714,760 barrels of Es Sider crude oil.”³⁸ The area is heavily built up, and there was

concern about recreational beaches and the impact on fisheries, although the latter apparently were not seriously affected because of the season during which the spill occurred.³⁹ On March 13, 1994, there was “a fiery collision . . . between the tanker Nassia and the freighter Shipbroker, both Cypriot-flagged. The accident, the worst in the Bosphorus in 15 years, killed 29 crewmen.”⁴⁰ On January 4, 2000,

Fuel oil blackened kilometers of Istanbul's coast along the Bosphorus after a Russian-registered tanker split apart in the strait that cuts through Istanbul. About 900 tons of fuel oil had spilled before it stopped pouring out of the Volganefit 248, and oil could be seen along five kilometers of the coast. Turkey is trying to reduce oil tanker traffic in the strait, through which about 440 million barrels of oil are transported each year. Some 200 accidents over the last decade in the strait have caused oil spills and fires that sometimes shut down the strait.⁴¹

And again on October 6, 2002, the “Gotia, carrying 163 metric tons of fuel oil in her fuel tanks, rammed into Emirgan Pier in the Bosphorus.”⁴² The leaking ship continued on its way to the Marmara Sea, and “during its passage the oil slick contaminated the sea water, the boats, and the waterfront structures along the western coast of the Bosphorus . . .”⁴³ Clearly, then, Turkey’s safety and environmental concerns over the prospect of a toxic spill in the middle of Istanbul are justifiable. The Bosphorus fishing industry has virtually collapsed owing to the traffic and pollution, while dolphins, which used the Bosphorus as a migration route, have disappeared from the area.⁴⁴

In order to address these concerns, Turkey passed regulations in 1994 that slow down and regulate commercial traffic, including limitations on the size of vessels, limitations on how many may pass through at one time, requirements to check in with Turkish authorities in the case of nuclear material, restrictions on night-time travel, and a requirement that weather must be appropriate. The International Maritime Organization approved these regulations, but they have still led to controversy

with other states. Russia in particular alleges that the measures are political in nature rather than reflecting a genuine concern for safety and the environment, and accuses Turkey of violating its commitments under the Treaty of Montreux. Turkey contends that its measures are within the parameters that the Treaty set; it is not clear who is in the right.⁴⁵ Most of the provisions of the Treaty actually address times of war, however, and they are very explicit about what sorts of vessels may pass and of what tonnage they may be in wartime. They do not provide for the unanticipated growth in merchant traffic during peacetime. There would consequently seem to be an equitable argument that the circumstances have changed so drastically since the signing of the Treaty that it is no longer just to expect Turkey to comply with its literal terms; perhaps a new treaty of the Bosphorus is in order.

Article 62 of the Vienna Convention, moreover, permits the termination of a treaty because of a “fundamental change in circumstances:”

The concept that (whether by an implied term or otherwise) a treaty may become inapplicable by reason of a fundamental change in circumstances obviously presents serious dangers to the security of treaties. Nevertheless, the doctrine that a fundamental change in circumstances may operate to bring about the termination of a treaty is of ancient origin. Traces of the *rebus* [i.e. *rebus sic stantibus*, or “so long as the circumstances remain the same”] principle can be found in early canon law.

Gentili appears to have been the first to apply this private law concept in the sphere of international relations, maintaining in his *De iure belli libri tres* that a treaty need not be performed when the condition of affairs is changed, if **the change could not have been foreseen**. [Emphasis added.]⁴⁶

Interestingly for the current dispute over the Bosphorus, Russia herself was one of the foremost nations to argue the *rebus* doctrine in assailing the provisions of the 1856 treaty regarding the neutralization of the Black Sea, which it considered were no longer binding on it because of changed circumstances.⁴⁷

When the commission drafted the text on *rebus sic stantibus*, it provided 2 conditions under which a treaty might be violated:

- The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
- The effect of the change was radically to transform the scope of obligations still to be performed under the treaty.⁴⁸

Given this small degree of flexibility in the Vienna Convention, Turkey would need to proffer cogent arguments that the increase in merchant traffic and the dangerous and polluting nature of its cargo has led to the impossibility of performing the treaty obligations as they were drafted. This should not be difficult to document, given the vast increase in tonnage and number of ships since the Treaty was signed, coupled with the nature of modern day cargoes. Turkey should also be able to cite the environmental degradation of the region, which is indeed significant, and the number of oil spills over the past several decades in its behalf. And significantly, Turkey can also point to the precedent set by Russia herself, in using the doctrine of *rebus sic stantibus* to her own advantage in the past.

The sticking point is that Russia and the Central Asian Republics can transport oil much more cheaply by shipping it through the straits, while Turkey would benefit economically if a pipeline were built through it. This allows Russia to argue that Turkey is motivated by economic factors rather than strategic or environmental.

The solution for now has been to build a pipeline by which Central Asian oil can reach European markets, but even this has not stopped traffic through the Bosphorus or satisfied Turkey's

environmental concerns.⁴⁹ Meanwhile, the Turks have not stringently enforced the 1994 regulations, averting a showdown on the issue (but leading to complaints of preferential treatment for some Black Sea nations). Then, too, the Bosphorus is likely to become less important as alternative methods of transporting oil are developed, e.g. more pipelines, and as alternative fuels begin to supplant oil as sources of energy.⁵⁰

As noted earlier, some experts argue that the Black Sea is dying from pollution sourced in a very large drainage basin including rivers in Central and Eastern Europe. The polluted water from this and shipping spillage flows through the Bosphorus ultimately into the Aegean and Mediterranean seas. The impact on marine life is regarded as quite serious, particularly on the cetacean population, but impact measurement and surveys are limited at this point.

(for more detail on this see: http://www.unipv.it/webcib/edu_Mediterraneo_uk.html)

Enforcement, Monitoring and Control

As admitted in a key EU Commission document on the common fisheries policy,

The effective implementation of conservation measures continues to be eroded by shortcomings in the enforcement, monitoring and control of CFP rules by a number of Member States. This, in turn is undermining progress towards sustainable fisheries, and thus the future of the Community fishing industry itself.

(http://ec.europa.eu/fisheries/efp/control_enforcement/scoreboard_en.htm)

One could well argue that the problem of monitoring and enforcement is also the result of limited inspection personnel employed by the EU. But then the design of the CFP implementation effort

provided largely for national level compliance and enforcement. What seems to be missing in the case of both Greece and Turkey is political will (and thus resource allocations at the national level) and a developed culture of environmental crime enforcement on the part of national and local police forces and natural resource conservation units.

There is some evidence of change here, though, as criminal justice programs worldwide begin to address environmental crime more vigorously and directly.⁵¹ One can also point to examples of effective political response to scientific testing and monitoring of water pollution levels funded by national and local governments and the EU. For example, “hot spots” of pollution flows have been uncovered in the Bosphorus and Sea of Marmara regions of Turkey by researchers at Istanbul University’s Institute of Marine Sciences and Management. The revelations then led to corrective action by local municipal government authorities with the polluters subsequently identified (see for example Algan et al, 2004 and 2007).

Moreover, satellite based tracking systems now required on board all EU fishing vessels 15 meters and larger would seem to provide technical means for a more effective monitoring and enforcement effort, despite the limited number of inspectors available to survey the large and geographically dispersed EU member fishing fleets. The challenge of “prosecution” remains daunting; and if we can assume that monitoring and curtailment of violations could now be more effective, we are still left with the related challenge of “resettling” the redundant labor force in fishing communities with few alternative options for employment.

This being said, one can certainly point to impact from the CFP on enforcement of the limitation on EU member fishing fleet size:

The main objective of the Common Fisheries Policy is to achieve sustainable exploitation of fisheries resources. To that end the management of fleet capacity is an essential tool. Under Community law, the total capacity of the fishing fleet cannot increase; and if public financing is granted for decommissioning a vessel, the corresponding capacity cannot be replaced—the reduction in fleet capacity must be permanent. Over the past ten years the capacity of the EU-15 fishing fleet has decreased steadily at an annual rate of approximately 1.5% in terms of tonnage and 2% in terms of power. Despite the enlargement of the EU in 2004, the number of vessels in January 2006 was slightly less than 90,000 – 17,000 less than in 1995. (Facts and Figures on the CFP, Edition 2006, p. 12)

Moreover, the EU has taken steps to “level the playing field” in assisting member states on the enforcement and inspection side, with establishment of the Community Fisheries Control Agency (CFCA) after a Council of Ministers decision in April 2005 (Council Regulation No 768/2005). A key feature of the effort is shared EU and national responsibilities for “control and inspection:”

The Agency was created to help national authorities achieve this by ensuring national resources – patrol vessels, airplanes and inspectors – are deployed according to wider European requirements and not narrower domestic priorities. (<http://ec.europa.eu/cfca/pdf/factsheet05.pdf>)

CFCA touts the success of the joint efforts of the EU, the Faroe Islands, Iceland, Norway and Russia to bring back the Atlanto-Scandian herring, after its demise through overfishing by the 1960s - - as illustrative of what can be achieved when there is political will and thus adequate control resources. CFCA has just decided to devote its 2008 Joint Deployment Plan for the recovery of blue fin tuna in the Eastern Atlantic and the Mediterranean Sea. It will organize and coordinate control, inspection and surveillance of the fishery activities at sea and on land, pooling EU and national resources from Cyprus, France, Greece, Italy, Malta, Portugal and Spain. The headquarters of CFCA will move to Vigo, Spain in 2008.

Conclusions

We would argue that the current stagnation and constitutional “crisis” in the EU should be seen as a reality check. “Ever Closer Union” may not be viable in Europe now. But the remarkable progress and momentum achieved by the EU on numerous sectoral issues should not be lost. There are limitations and constraints in EU environmental programs and policies, especially on the enforcement side, but there is little that compares favorably with it by other states and regional groups and institutions now facing the apparent global fisheries crisis and related environmental degradation.

The EU’s commitment to dialog with the fisheries industry and related groups affected by the CFP reflects the realization that an exchange of views with the stakeholders is essential to effective policy and buy-in. Promising work by the Advisory Committee on Fisheries and Aquaculture (AFCA), which succeeded the old Advisory Committee on Fisheries in 2000, helps to incorporate new NGOs and fish farming and processing industry representatives, as well as vessel owners and fishermen for advice to the Commission. Regional Advisory Councils (RACS) were added after 2004. Inclusivity is crucial, but the obvious competing interests in the fisheries sector make the challenge of effective policy and uniform rule application a work in progress, particularly with implementation and enforcement left to diverse national control systems. Obviously, this is more problematic for fisheries in the Mediterranean and Black Sea because of the prominence of “third” countries. Notably remiss in the broader Mediterranean Basin context is agreement on bottom trawling bans and on the establishment of extensive marine reserves so that fish stocks can recover from the plague of overfishing.

Effective “enforcement” of EU, other regional and national regulations on pollution and fisheries policies clearly remains an important area for development and innovation. The current legal system of “polluter pays” is well enshrined in international and national law, but it remains dependent on catching and proving the polluter. Similarly, the regulations on total catch and species protection in the European Union area are laudable and worthy of emulation, but the enforcement of the regulations up to now has been inadequate. With limited resources available from the national and regional agencies relevant to these challenges, is there a viable strategy forward? Are there best practices implemented in other regions or national jurisdictions that might apply to the Black and Aegean Seas? The Community Fisheries Control Agency appears to be a useful development, particularly given its interest in collaborating with national enforcement assets, as well as other organizations. The discussion underway at the behest of the Commission on the prospect of adopting a Rights Based Management system in some national jurisdictions may lead to a viable economic model for conservation. Moreover, one may find solace in the decision of the “Slovenian Presidency” of the EU in 2008 to declare priority to the challenge of illegal, unreported and unregulated fishing (IUU).⁵²

Next Steps

1. Collect data on changing catch sizes in the Eastern Mediterranean Basin, and estimates on the health of key fishery stocks
2. Collect data on national level inspections and enforcement actions
3. Collect data on employment trends and social relocation efforts in the fishing industries of

Greece and Turkey

3. Explore the legal framework for fishing and pollution in the Black Sea and its associated river system especially in Eastern Europe
4. Explore the interacting governance and legal environment of fisheries management and water pollution control in the region with respect to other IGOs and NGOs

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¹ David Hunter, James Salzman, and Durwood Zaelke, *International Environmental Law and Policy*, 2nd Ed. (New York, 2002), 673.

² Ibid. 674.

³ Ibid. 674-75.

⁴ Christian Lequesne, *The Politics of fisheries in the European Union* (Manchester, 2004), 9.

⁵ Cf. such recent works as Richard Ellis, *The Empty Ocean* (Washington, 2003) and G. Bruce Knecht, *Hooked: Pirates, Poaching and the Perfect Fish* (Rodale, 2006).

⁶ Hunter et al. 677; cf. Ellis, 301.

⁷ Ibid. 695.

⁸ Haider Rizvi, *Environment: No Consensus for Moratorium on Bottom Trawling*, at <http://ipsnews.net/news.asp?idnews=33426>.

⁹ Ibid. 701.

¹⁰ Lequesne, 113.

¹¹ Rizvi, Ibid.

¹² Ellis, 297.

¹³ Vaughan Anthony, *Marine Protected Areas and Atlantic Cod: Viewpoints*, at <http://www.pbs.org/emptyoceans/eoen/cod/viewpoints.html>.

¹⁴ European Environment Agency, Status of Commercial Fish Stocks in European Seas, 2003-2004, at <http://dataservice.eea.europa.eu/atlas/viewdata/viewpub.asp?id=702>.

¹⁵ Phillippe Cacaud, *Fisheries Laws and Regulations in the Mediterranean: A Comparative Study*, Studies and Reviews No. 75, General Fisheries Commission for the Mediterranean (Rome,

2005), Table A.1.

¹⁶ Ibid. 33 and Table A.1.

¹⁷ Turkey is not a signatory to UNCLOS, the 1958 Convention on the Continental Shelf, or the 1995 Fish Stocks Agreement.

¹⁸ Haralambos Athanasopoulos, *Greece, Turkey and the Aegean Sea: A Case Study in International Law* (Jefferson, N.C., 2001) 70-71.

¹⁹ F. Rad, *Country Report: Turkey*, at <http://resources.ciheam.org/om/pdf/c59/02600102.pdf>.

²⁰ See generally Athanasopoulos, 49.

²¹ Barry E. Carter, Phillip R. Trimble, Curtis A. Bradley, *International Law* 4th Ed. (New York, 2003), 873.

²² Cacaud, 33

²³ Carter et al., 870.

²⁴ Ibid. 882.

²⁵ Article 12 of the Treaty of Lausanne of 1923 assigns sovereignty over the islands thus:

The decision taken on the 13th February, 1914, by the Conference of London, in virtue of Articles 5 of the Treaty of London of the 17th-30th May, 1913, and 15 of the Treaty of Athens of the 1st-14th November, 1913, which decision was communicated to the Greek Government on the 13th February, 1914, regarding the sovereignty of Greece over the islands of the Eastern Mediterranean, other than the islands of Imbros, Tenedos and Rabbit Islands, particularly the islands of Lemnos, Samothrace, Mytilene, Chios, Samos and Nikaria, is confirmed, subject to the provisions of the present Treaty respecting the islands placed under the sovereignty of Italy which form the subject of Article 15.

Except where a provision to the contrary is contained in the present Treaty, the islands situated at less than three miles from the Asiatic coast remain under Turkish sovereignty.

²⁶ Carter et al., 882-84.

²⁷ Athanasopoulos 72.

²⁸ Ibid 46.

²⁹ Ibid 48.

³⁰ Ibid.

³¹ Ibid., 52.

³² Cacaud, Table A.1.

³³ Cf. Yücel Acer, *The Aegean Disputes: Towards a Comprehensive Settlement*, in *The Journal of Turkish Weekly*, available at <http://www.turkishweekly.net/>.

³⁴ See European Environment Agency, *Status of Marine Fish Stocks* (CSI 032) – Assessment published Nov. 2005, available at:

http://themes.eea.europa.eu/IMS/ISpecs/ISpecification20041007132227/IAssessment1116498234748/view_content.

³⁵ An English translation of the Treaty is available at <http://www.turkishpilots.org/DOCUMENTS/montro.html>.

³⁶ Summary at <http://www.answers.com/topic/montreux-convention-regarding-the-regime-of-the-turkish-straits>:

Montreux Convention, 1936, international agreement regarding the [Dardanelles](#). The Turkish request for permission to refortify the Straits zone was favorably received by nations anxious to return to international legality as well as to gain an ally against German and Italian expansion. The former signatories to the Treaty of Lausanne (1923; see [Lausanne, Treaty of](#)) together with Yugoslavia and Australia met at Montreux, Switzerland, in 1936 and abolished the International Straits Commission, returning the Straits zone to Turkish military control. Turkey was authorized to close the Straits to warships of all countries when it was at war or threatened by aggression. Merchant ships were to be allowed free passage during peacetime and, except for countries at war with Turkey, during wartime.

The Black Sea powers (principally the USSR) were authorized to send their fleets through the Straits into the Mediterranean in peacetime. The convention was ratified by Turkey, Great Britain, France, the USSR, Bulgaria, Greece, Germany, and Yugoslavia, and—with reservations—by Japan.

The treaty gives control of the Bosphorus to Turkey, but provides for “complete freedom of transit and navigation in the Straits, by day and by night, under any flag and with any kind of cargo, without any formalities” for merchant vessels. The only condition that the treaty provides under which Turkey may regulate traffic *in peacetime* is when a vessel does not meet prescribed sanitary conditions.

³⁷ See generally *Bosphorus Straits Regulation & Central Asian Oil*, available at <http://www.american.edu/tes/bosphorus.htm>.

³⁸ *The Independenta Spill*, Oilspills.org, at <http://oilspills.org/Independenta.htm>.

³⁹ Ibid.

⁴⁰ A Chronology of Oil Spills: 1967-2002, at <http://www.foe.org/new/releases/oilchron.pdf>.

⁴¹ The Mariner Group, *Oil Spill History*, at <http://www.marinergroup.com/oil-spill-history.htm>

⁴² Emre N. Otay and Orhan Yenigün, *An Oil Spill in the Bosphorus: the Gotia Accident*, available at <http://www.ce.boun.edu.tr/otay/SeaAccident/Otay&Yenig%C3%BCn2003.pdf>.

⁴³ Ibid.

⁴⁴ Bosphorus Straits Regulations, *supra*.

⁴⁵ Ibid.

⁴⁶ Carter et al., 112:

⁴⁷ See generally *ibid*.

⁴⁸ Ibid.

⁴⁹ Michael Lelyveld, *Turkey: Ankara Threatens to Impose Limits in Bosphorus*, available at <http://www.b-info.com/tools/miva/newsview.mv?url=news/2001-04/text/apr06b.rfe>.

⁵⁰ Bosphorus Straits Regulations, *supra*.

⁵¹ See the papers presented at the Conference on Environmental Crime and Natural Resource Sustainability, September 27-28, 2007, Michigan State University.

⁵² http://www.eu2008.si/en/Policy_Areas/Agriculture_and_Fisheries/Common_fisher_policy.htm