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## An Analysis of the Aegean Disputes under International Law

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*Greece and Turkey have been unable to resolve interrelated disputes in the Aegean Sea involving the breadth of the territorial sea, the delimitation of the continental shelf, the demilitarization of certain islands, and the passage rights of ships and planes. This article examines the historical background of these disputes and offers recommendations for possible solutions.*

**Keywords** Aegean, air defense zones, continental shelf, delimitation, demilitarization, Greece, overflight, passage rights, straits, territorial sea, treaty interpretation, Turkey

### Introduction

The disputes between Turkey and Greece in the Aegean Sea have festered for many years, blocking amicable relations between the two neighbors. The two countries even disagree about how many separate controversies are truly “in dispute.” Greece has taken the position that the delimitation of the continental shelf is the only unresolved issue,<sup>1</sup> but Turkey contends that questions of sovereignty over certain islands, the demilitarized status of other islands, the breadth of the territorial sea around Greece’s Aegean Islands, the air defense zones around Greece’s islands, the control of air traffic over the Aegean, and rights of passage through the Aegean are also in need of resolution. The Cyprus controversy also haunts relationships between Greece and Turkey, as do feelings on each side of the Aegean that the other nation has engaged in oppression and abuses in the past and harbors expansionist plans for the future.<sup>2</sup> It should be emphasized at the outset that the width and delimitation of the territorial sea in the Aegean, and the rights of navigational freedom and overflight affected by such claims, are at the center of these

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disputes. This article explores all the Aegean conflicts, examines the extent to which they can be viewed separately or must be examined and resolved as a package, outlines the relevant principles of international law, and offers some suggestions for resolution.

### **The Governing Treaties**

Because some of the central legal questions turn primarily on an interpretation of the governing treaties, this preliminary section explains the treaties and the issues raised by them.

#### ***The Treaty of London of May 17–30, 1913<sup>3</sup>***

In this agreement, the Ottoman Empire ceded Crete to Greece and agreed to allow the “great powers” of Europe to decide the fate of the islands of the Eastern Aegean, namely Lemnos, Samothrace, Lesvos (Mytilene), Chios, Samos, and Ikaria (Nikaria).

#### ***The Decision of the Six Powers Dated November 14, 1913, Which Was Communicated to Greece on February 13, 1914 (and Is Usually Referred to as the 1914 Decision)<sup>4</sup>***

This “Decision” was issued by the “great powers,” namely the governments of Germany, Austria-Hungary, France, Great Britain, Italy, and Russia, to the Hellenic Royal Government (Greece). It referred to Article 5 of the 1913 Treaty of London, described above, and to Article 15 of the Treaty of Athens between Turkey and Greece of November 1–14, 1913, and then stated and reinforced the territorial provisions regarding the northeastern Aegean Islands, i.e., that all Aegean islands actually occupied by Greece<sup>5</sup> except Gokceada (Imbros), Bozcaada (Tenedos), and Meis (Castellorizo, Megisti) should be ceded by Turkey to Greece, on the condition that Greece would not fortify or use them for any military or naval purposes, and also on the condition that Greece would withdraw its troops from southern Albania and the small island of Saseno (off the southwest coast of Albania).<sup>6</sup> The Turkish government was not involved in this pronouncement and did not formally accept the division of islands until the 1923 Lausanne Treaty,<sup>7</sup> which confirmed this division in Article 12.

#### ***Treaty of Peace, Signed at Lausanne, July 24, 1923***

This treaty played a central role in bringing a degree of closure to the disputes of the previous decades. Four provisions address sovereignty over islands. Article 6, which deals primarily with the land boundary,<sup>8</sup> states in its second paragraph that, “In the absence of provisions to the contrary, in the present Treaty, islands and islets lying within three miles of the coast are included within the frontier of the coastal State.” Article 12 explicitly confirms the territorial decisions made in the 1913 Treaty of London and the 1914 Decision, i.e., that Turkey has sovereignty over the eastern Aegean Islands of “Imbros, Tenedos and Rabbit Islands”<sup>9</sup> and that Greece has sovereignty over “Lemnos, Samothrace, Mytilene, Chios, Samos and Nikaria.” The second paragraph of this article also repeats the general statement found in Article 6 regarding coastal islands by saying that: “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.”

Then, Article 16 addresses these issues once again, saying that:

Turkey hereby renounces all rights and title whatsoever over or respecting the territories situated outside the frontiers laid down in the present Treaty and the islands other than those over which her sovereignty is recognised by the said Treaty, the future of these territories and islands being settled or to be settled by the parties concerned.

This final phrase appears to refer in part to the Boundary Commission established in Article 5 of the Lausanne Treaty, which had the responsibility to define the detailed land division, but it is also drafted in general terms because Ottoman territory in other regions was also covered by Turkey's renunciation in Article 16. The *Eritrea-Yemen Arbitration* (1998–1999), discussed below,<sup>10</sup> interprets and applies the 1923 Lausanne Peace Treaty, particularly Article 16, as a living and important agreement, giving it a literal interpretation in most respects, but applying its language to adjacent coastal



Figure 1. Aegean Sea.

islands in a more dynamic fashion that may be important for the sovereignty disputes over unnamed islands.

Article 15 of the 1923 Lausanne Treaty covers the sovereignty over the Dodecanese Islands in the southeastern Aegean. Turkey ceded 14 islands “and the islets dependent thereon” to Italy utilizing the following language:

Turkey renounces in favour of Italy all rights and title over the following islands: Stamalia (Astrapalia), Rhodes (Rhodos), Calki (Kharki), Scarpanto, Casos (Casso), Piscopis (Tilos), Misiros (Nisyros), Calimnos (Kalymnos), Leros, Patmos, Lipsos (Lipso), Simi (Symi), and Cos (Kos), which are now occupied by Italy, and the islets dependent thereon, and also over the island of Castellorizzo (see Map No. 2).

This terminology—“islets *dependent* thereon”—is different from the language used in the 1947 Paris Peace Treaty with Italy,<sup>11</sup> which transferred the 14 named islands from Italy to Greece, along with their “*adjacent* islands.”

Article 13 expressly prohibits the militarization of Lesvos (Mytilene), Chios, Samos, and Ikaria (Nikaria) (but does not mention Samothrace or Lemnos) using the following language:

With a view to ensuring the maintenance of peace, the Greek Government undertakes to observe the following restrictions in the islands of Mytilene, Chios, Samos and Nikaria:

- (1) No naval base and no fortification will be established in the said islands.
- (2) Greek military aircraft will be forbidden to fly over the territory of the Anatolian coast. Reciprocally, the Turkish Government will forbid their military aircraft to fly over the said islands.
- (3) The Greek military forces in the said islands will be limited to the normal contingent called up for military service, which can be trained on the spot, as well as to a force of gendarmerie and police in proportion to the force of gendarmerie and police existing in the whole of the Greek territory.

***The Convention Relating to the Regime of the Straits,  
Signed at the Same Place and Time (and Viewed as  
an Integral Part of the 1923 Peace Treaty)***<sup>12</sup>

Article 4 of this linked agreement establishes a demilitarized status for Samothrace and Lemnos (as well as for Gokceada (Imbros) and Bozcaada (Tenedos) and Rabbit Islands).<sup>13</sup> The nature of the demilitarization is spelled out in Article 6 and is included in full here to show the details of this regime.

Subject to the provisions of Article 8 concerning Constantinople, there shall exist, in the demilitarised zones and islands, no fortifications, no permanent artillery organisations, no submarine engines of war other than submarine vessels, no military aerial organisation, and no naval base.

No armed forces shall be stationed in the demilitarised zones and islands except the police and gendarmerie forces necessary for the maintenance of

order; the armament of such forces will be composed only of revolvers, swords, rifles and four Lewis guns per hundred men, and will exclude any artillery.

In the territorial waters of the demilitarised zones and islands, there shall exist no submarine engines of war other than submarine vessels.

Notwithstanding the preceding paragraphs Turkey will retain the right to transport her armed forces through the demilitarised zones and islands of Turkish territory, as well as through their territorial waters, where the Turkish fleet will have the right to anchor.

Moreover, in so far as the Straits are concerned, the Turkish Government shall have the right to observe by means of aeroplanes or balloons both the surface and the bottom of the sea. Turkish aeroplanes will always be able to fly over the waters of the Straits and the demilitarised zones of Turkish territory, and will have full freedom to alight therein, either on land or on sea.

In the demilitarised zones and islands and in their territorial waters, Turkey and Greece shall similarly be entitled to effect such movements of personnel as are rendered necessary for the instruction outside these zones and islands of the men recruited therein.

Turkey and Greece shall have the right to organise in the said zones and islands in their respective territories any system of observation and communication, both telegraphic, telephonic and visual. Greece shall be entitled to send her fleet into the territorial waters of the demilitarised Greek islands, but may not use these waters as a base of operations against Turkey nor for any military or naval concentration for this purpose.

The details found in this provision demonstrate that it was a central component to the agreement and the subject of substantial deliberation and negotiation. Also of possible relevance is Article 9, which contains the following language:

If in the case of war, Turkey, or Greece, in pursuance of their belligerent rights, should modify in any way the provisions of demilitarisation prescribed above, they will be bound to reestablish as soon as peace is concluded the regime laid down in the present Convention.

This language indicates that the parties understood that Greece and Turkey had “belligerent rights” to modify the demilitarization restrictions in time of war, but also anticipated an enduring demilitarization status, because they were supposed to restore the restrictions “as soon as peace is concluded.”

#### ***The Italian-Turkish Treaty of 1932 (“The Ankara Agreement”)***<sup>14</sup>

This agreement between Italy and Turkey was signed on January 4, 1932, and came into force on May 10, 1933. It was designed to resolve the dispute over the maritime boundary between the tiny Mediterranean islet of Castellorizo (then held by Italy) and the Turkish Coast, which had been submitted in 1929 to the Permanent Court of International Justice.<sup>15</sup> The agreement withdrew the dispute from the Court and addressed in detail the sovereignty of the disputed islets and the maritime boundary in this area.

At the same time that the Castellorizo boundary was being resolved, letters were also exchanged (on January 4, 1932) saying that the countries agreed that a technical committee should be formed to delimit the maritime boundary between the Dodecanese

Islands (then controlled by Italy) and the Turkish coast. This led to a *proces verbal* signed by representatives of Turkey and Italy in Ankara on December 28, 1932, which delimited this boundary by fixing 37 pairs of reference points.<sup>16</sup> This *proces verbal* also addressed remaining sovereignty disputes, and referred to the “Kardak islets” as belonging to Italy, with the territorial waters boundary being at the median line between the Kardak rocks and “Kato I (Anatolia).”<sup>17</sup> This December 28, 1932 *proces verbal* was initialed by the negotiators, but it was never ratified by the Turkish Grand National Assembly (even though the Ankara Agreement itself was ratified by the Assembly on Jan. 14, 1933), and it was not registered with the League of Nations. Turkey views the December 1932 *proces verbal* as the record of a meeting of technicians, without the force of law and without any relevance to the current disputes,<sup>18</sup> but Greece argues that it has the force of law, as a supplemental agreement interpreting the main Ankara Agreement.<sup>19</sup>

The status of this agreement was reviewed in 1946 by the Political and Territorial Commission for Italy, a body formed to address the postwar boundaries of Italy. At the meeting of October 4, 1946, the Greek Delegation pushed this body to recognize the maritime boundaries of the Dodecanese that they felt had been established in the January and December 1932 agreements. But this suggestion proved to be controversial, the Russian delegate objected, and the Commission members decided to omit any reference to these agreements and instead invited the Greek Delegation to prepare a draft map and to refer the dispute to the Legal and Drafting Commission for later discussion in the Plenary Session.<sup>20</sup> Turkish scholars point out that the failure to refer to the December 1932 *proces verbale* in the 1947 agreements supports their view that the December 1932 document is without legal effect.

### ***The Montreux Convention of 1936***<sup>21</sup>

This important treaty was designed primarily to restructure the regime that governs passage through the Turkish straits.<sup>22</sup> The disagreement among scholars on the impact of this treaty on the demilitarized status of the eastern Aegean Islands is discussed in detail below.<sup>23</sup>

### ***The Paris Treaty of Peace with Italy, February 10, 1947***<sup>24</sup>

Greece was a party to this treaty to resolve World War II disputes, but Turkey was not.<sup>25</sup> In Article 14(1), Italy ceded “full sovereignty” over the Dodecanese Islands to Greece, listing 14 named islands—Stampalia (Astropalia), Rhodes (Rhodos), Calki (Kharki), Scarpano, Casos (Casso), Piscopis (Tilos), Misiros (Nisyros), Calimnos (Kalymnos), Leros, Patmos, Lipsos (Lipso), Simi (Symi), Cos (Kos), plus the Mediterranean islet of Castellorizo—“as well as the adjacent islets.” As mentioned above, this terminology is different from that utilized in Article 15 of the 1923 Lausanne Treaty, which referred to “the islets dependent thereon.” This word change may be significant, but it is unclear whether the negotiators intended that different islands would be included in the category of “adjacent islets” from those that are “dependent.” “Adjacent” is a more precise term because it refers to geographic contiguity and allows the distinction to be made by cartographers rather than psychologists or philosophers. The term “adjacent,” as applied to the Kardak/Imia Rocks, supports the Turkish claim, because these rocks are closer to the Turkish coast (3.8 nautical miles) than to any of the named Greek islands (it is 5.5 nautical miles from Kalimnos).<sup>26</sup>



Article 14(2) of the 1947 Treaty says that these islands “shall be and shall remain demilitarized” and Annex XIII(D) defines this key term as follows:

For purposes of the present Treaty, the terms “demilitarization” and “demilitarized” shall be deemed to prohibit, in the territory and territorial waters concerned, all naval, military and military air installations, fortifications and their armaments; artificial military, naval and air obstacles; the basing or the permanent or temporary stationing of military, naval and military air units; military training in any form; and the production of war material. This does not prohibit internal security personnel restricted in number to meeting tasks of an internal character and equipped with weapons which can be carried and operated by one person, and the necessary military training of such personnel.

Article 87 establishes a dispute-resolution procedure—calling for binding arbitration by a tribunal composed of representatives of each disputing party plus a third member selected by mutual agreement—but this procedure does not appear to be relevant to the dispute between Greece and Turkey because Turkey was not a party to the Treaty. Turkish scholars argue nonetheless that the substantive requirement that the Greek Dodecanese Islands remain demilitarized can be enforced by Turkey because these provisions were adopted “for the security of Turkey,” thus creating a “legally protected interest” on behalf of Turkey.<sup>27</sup>

### *The United Nations Law of the Sea Convention, Dec. 10, 1982*<sup>28</sup>

This global treaty has been ratified by Greece, but has not been signed or ratified by Turkey. Its importance and relevance will be explained in the materials that follow.

## **Sovereignty over Disputed Islands**

### *Greek–Turkish Disputes*

Sovereignty disputes exist as a result of ambiguous language in the governing treaties listed above and also because certain small islands were not mentioned by any treaty. These documents are clear in their major provisions, but leave other matters in doubt, including how to define “adjacent” or “dependent” islands as those terms are used in the agreements. With regard to the Kardak/Imia Rocks dispute, which flared after December 25, 1995, when the Turkish bulk carrier *Figen Akat* ran aground on it, Greece argues that these two small barren rocks (one is reputed to be 2.5 hectares and the other is said to be 1.5 hectares) are “dependent” islands of Kalimnos, because Kardak/Imia is 5.5 nautical miles from Kalimnos (and is 1.9 miles southeast of the Greek-claimed islet of Kalolimnos).<sup>29</sup> Turkey argues on the other hand that Kardak/Imia is not covered by any of the treaties that transferred islands and should belong to Turkey because it is only 3.8 nautical miles from the Turkish coast (and is 2.2 nautical miles from the nearest Turkish islet (Cavus Island)) and is thus closer (or more “adjacent”) to Turkey than it is to any Greek island named in any of the treaties.<sup>30</sup> (As explained above,<sup>31</sup> Article 15 of the 1923 Lausanne Peace Treaty had referred to islets “dependent” on the 14 named Dodecanese Islands transferred to Italy, but Article 14 of the Paris Peace Treaty of 1947, which transferred these islands from Italy to Greece, referred instead to islets “adjacent” to the named islands.)



Supporters of Turkey's claim also point out that a "title deed of the rocks" is "registered on the Karakaya village of Bodrum prefecturate, Mugla province," that "[f]or years Turkish fishermen have engaged in fishing activities around these rocks without any problem," and that "Turkish ships have navigated freely through the waters surrounding them."<sup>32</sup> Greek writers, in contrast, point out that the islets are within the Greek administrative district of Kalimnos,<sup>33</sup> and assert that, although both Kardak/Imia rocks are uninhabited, "for a long time Greek shepherds from Kalymnos have been bringing their goats for graze."<sup>34</sup>

Another type of dispute exists with regard to the islets of Gavdos and Gavdopula, which are situated about 30 km south of the western portion of Crete. Turkey's claim for these islets rests on the fact that they were once within the sovereignty of the Ottoman Empire and are not explicitly mentioned in any treaty in which the Ottoman Empire ceded islands. Greece rests its claim to Gavdos and Gavdopula on its exercise of authority over these islets during most of the 20th century, Turkish acquiescence to Greek authority, and the contiguity of these islets to Crete as "dependent" or "adjacent" islets.<sup>35</sup>

In 1898, when the Ottoman army withdrew, Crete declared itself to be an autonomous state, under the control of the Great Powers, and included its "adjacent islets" in its definition of its newly autonomous self.<sup>36</sup> As a formal matter, the Ottoman Empire ceded Crete to Greece in the 1913 Treaty of London, but that treaty made no mention of tiny Gavdos and Gavdopula. The 1913 Treaty authorized the six Great Powers (Germany, Austria-Bohemia, Russia, Italy, France, and the United Kingdom) to determine the future status of other Aegean Islands, but Gavdos and Gavdopula are not thought of as Aegean Islands, because of their location south of Crete.

On February 13, 1914, the Great Powers ruled that those Aegean Islands under Greek occupation, with the exception of Gokceada (Imbros) and Bozcaada (Tenedos) (near the entrance to the Dardanelles) and Meis (Castellorizo, Megisti)(off the Turkish Mediterranean coast near the town of Kas) would be formally ceded to Greece. Gavdos and Gavdopula were not occupied by Greece at the time of this determination, and on May 30, 1996, the Turkish General Staff opposed the inclusion of Gavdos in a NATO military exercise "due to its disputed status of property." Greece presently exercises administrative control over these two islets.

The Turkish position on sovereignty over the unnamed islets was summarized by one scholar as follows:

An assumption that Turkish sovereignty over the islands beyond three miles from Anatolia has terminated, is inconsistent with the text and spirit of Lausanne Peace Treaty, with the interpretation of treaties in general and with the rules of international law requiring explicit declaration of consent for the cession of territorial sovereignty. Such a conclusion is also incompatible with the rationale of that principle within the context of Lausanne Peace Treaty.<sup>37</sup>

### ***The Governing Law on Obtaining Sovereignty over Isolated Islets***<sup>38</sup>

Although the governing documents reviewed above will provide the primary sources for resolving the islet sovereignty disputes between Greece and Turkey, where such documents fail to provide answers, guidance may be provided from the decisions of international tribunals that have adjudicated similar disputes in the past.<sup>39</sup> In all these cases, the

decision makers have tended to ignore ancient historical claims and have looked instead at evidence of actual occupation and administration of the islets during recent times, generally focusing only on the last 100 years.

The *Palmas Island* dispute was between the United States (which, as the colonial power then governing the Philippine Islands, succeeded to the claim of Spain) and the Netherlands (the colonial power governing Indonesia). The United States based its claim on Spain's earlier "discovery" and the island's "contiguity" or proximity to the main Philippine islands. The Netherlands invoked its contact with the region and its agreements with native princes. Judge Max Huber, the sole arbitrator,<sup>40</sup> favored the Dutch, based on their peaceful and continuous display of authority over Palmas. In language subsequently quoted in the *Eritrea-Yemen* Arbitration,<sup>41</sup> Judge Huber says: "It is quite natural that the establishment of sovereignty may be the outcome of a slow evolution, of a progressive intensification of State control."<sup>42</sup> Spain's "discovery" did not confer title because it was not accompanied by any subsequent occupation or attempts to exercise sovereignty. Judge Huber also rejected the U.S. claim based on "contiguity," concluding that international law does not support such a principle.<sup>43</sup>

The International Court of Justice addressed these issues in 1953 in the *Minquiers and Ecrehos* case.<sup>44</sup> Both France and the United Kingdom claimed title to a groups of islets and rocks between the British island of Jersey and the coast of France.<sup>45</sup> Each party produced ancient historical titles from the Middle Ages, but the Court found these materials to be inconclusive<sup>46</sup> and instead focused on actual displays of authority during the 19th and 20th centuries.<sup>47</sup> The *Eritrea-Yemen* Tribunal later summarized the *Minquiers and Ecrehos* decision by saying that even though "there had also been much argument about claims to very ancient titles, it is the relatively recent history of use and possession that ultimately proved to be a main basis of the Tribunal decisions."<sup>48</sup> Based on this recent evidence, the International Court of Justice determined that the United Kingdom had exercised state functions over the features,<sup>49</sup> and that France had not established any similar assertions of authority during this period. The Court thus awarded title over all the islets to the United Kingdom.<sup>50</sup> The Court also relied for its decision on the view that the Minquiers group were a "dependency" of the Channel Islands (Jersey and Guernsey) and thus should be subject to the same sovereign authority.<sup>51</sup>

The case of the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*,<sup>52</sup> decided by a chamber of the International Court of Justice in 1992, involved a dispute over sovereign ownership of several small islands in the Gulf of Fonseca, which is located where the boundaries of El Salvador, Honduras, and Nicaragua meet. This area had been governed by a colonial power—Spain—until 1821 when the region became independent and established the Federal Republic of Central America.<sup>53</sup> This entity disintegrated in 1839, when the presently existing states of Honduras, El Salvador, Nicaragua, Costa Rica, and Guatemala were established.<sup>54</sup> The Chamber ruled that the Fonseca islands were not *terra nullius* at that time, but instead were inherited by the new entities from Spain. The Chamber then focused on which of the new countries occupied the islands, what actions indicated the exercise of authority over them, and to what extent the other states acquiesced in the exercise of authority.<sup>55</sup> The Chamber emphasized that it was not deciding whether occupation by one state over time could establish ownership in a case where a pre-existing title was held by another state. Instead, the Chamber made clear that it was relying upon occupation and acquiescence as evidence of the recognition by the states of the region regarding which country had proper title over each of the disputed islands when the evidence regarding a pre-existing title was ambiguous.<sup>56</sup>

Based on these principles, the Chamber awarded the island of El Tigre to Honduras because of its occupation of this island for more than 100 years, accompanied by some evidence of recognition by El Salvador that Honduras was authorized to exercise authority over the island.<sup>57</sup> The Chamber then turned to Meanguera Island (1586 hectares and long-inhabited) and Meanguerita Island (26 hectares and uninhabited, lacking fresh water).<sup>58</sup> The Chamber found evidence of occupation (“effective possession and control”) of these islands by El Salvador since 1854 and found no effective protests by Honduras.<sup>59</sup> The Chamber’s conclusion was thus that “Honduras was treated as having succeeded to Spanish sovereignty over El Tigre, and El Salvador to Spanish sovereignty over Meanguera and Meanguerita,” with Meanguerita being viewed as an “appendage” to or “dependency” of Meanguera.<sup>60</sup>

The *Eritrea-Yemen* arbitration relied explicitly on the *Minquiers and Ecrehos* judgment for the proposition that it is the relatively recent history of use and possession of the islets that is most instructive in determining sovereignty, concluding that the historical-title claims offered by each side were not ultimately helpful in resolving the dispute.<sup>61</sup> The test utilized by the tribunal was described as follows:

The modern international law of acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis. The latter two criteria are tempered to suit the nature of the territory and the size of its population, if any.<sup>62</sup>

The tribunal relied on evidence of public claims, legislative acts seeking to regulate activity on the islands, licensing of activities in the surrounding waters, enforcement of fishing regulations, licensing of tourist activity, search and rescue operations, environmental protection, construction on the islands, and the exercising of criminal and civil jurisdiction on the islands.<sup>63</sup> The tribunal awarded the waterless, volcanic islets of the Zuqar-Hanish group to Yemen based on its greater showing “by way of [recent] presence and display of authority.”<sup>64</sup> The tribunal also awarded to Yemen the lone island of Jabal al-Tayr and the al-Zubayr group, because Yemen’s activities on these barren islands were greater and they are located on the Yemen side of the median line between their uncontested land territories.<sup>65</sup>

The tribunal gave some attention to geographical proximity or contiguity, utilizing the “presumption that any islands off one of the coasts may be thought to belong by appurtenance to that coast unless the State on the opposite coast has been able to demonstrate a clearly better title.”<sup>66</sup> The Mohabbakahs and the Haycock Islands were thus awarded to Eritrea because they were mostly within 12 nautical miles of the Eritrean coast.<sup>67</sup> The tribunal also included at the end of its opinion the enigmatic, but perhaps important, statement that: “Western ideas of territorial sovereignty are strange to peoples brought up in the Islamic tradition and familiar with notions of territory very different from those recognized in contemporary international law.”<sup>68</sup>

The *Eritrea-Yemen* arbitration is also instructive to the Aegean disputes in another way, because it interprets and applies the same 1923 Lausanne Peace Treaty that is central to the Aegean controversies. The arbitral tribunal treated the Lausanne Treaty as having present meaning and interpreted most of its provisions literally. With respect to Article 16, the tribunal said that none of the islands previously governed by the Ottoman Empire could be viewed as having a *res nullius* status after the treaty, because their status was said to be subject to being “settled by the parties concerned.” For this reason, sovereignty over previously-Ottoman islands cannot be resolved by a single party “uni-

laterally . . . by means of acquisitive prescription.”<sup>69</sup> Nonetheless, displays of authority might still be relevant for showing an understanding of the settlement that “the parties concerned” had reached.

### ***How Do These Precedents Apply to the Aegean Islets?***

Discovery or a declaration of sovereignty or an ancient title may not always be sufficient to establish current title, and the decision makers usually focus on evidence of “effective occupation” during the past century of island features. Although the requirements for “discovery” of remote uninhabited islands (in a *terra nullius* status) may be less strict than for populated territories,<sup>70</sup> in cases of ambiguity and dispute a tribunal will look closely at evidence of occupation, exercise of authority, and acquiescence by other nations. Proximity to an adjacent larger land mass is frequently, but not always, decisive. Recognition by other countries is certainly relevant. Although abandonment cannot always be presumed by nonuse, especially if it is not voluntary,<sup>71</sup> tribunals will require effective exercise of authority in cases where evidence of discovery is disputed or ambiguous.

The disputed features in the Aegean, such as Kardak/Imia, tend to be small and remote, and in some cases no one has ever lived on them permanently or successfully exploited them economically. Efforts have been made by Turkish scholars to support the Turkish claim regarding the unnamed islets, such as Kardak/Imia, by close explanations of the governing treaties,<sup>72</sup> but probably a stronger argument, at least for those islets near Turkey’s shore, would be based on the expanded current notion of the territorial sea, as utilized by the *Eritrea-Yemen* Tribunal. The 1923 Lausanne Peace Treaty was clear in allocating to Turkey those islets within three miles of Turkey’s coast, a distance that must have been chosen because three nautical miles was the most commonly accepted width of the territorial sea at the time. Today, the width of the territorial sea has been extended—to 12 nautical miles in most areas and to six nautical miles in the Aegean. The *Eritrea-Yemen* Arbitral Tribunal allocated all disputed islands within the territorial sea of either country to that adjacent country.<sup>73</sup> Turkey can thus contend that it should have sovereignty over those unnamed islets that are within its six-mile territorial sea, or, if its territorial sea is less because of an adjacent named Greek island, over those within the median or equidistance line drawn between uncontested Turkish and Greek territory. Under this approach, Kardak/Imia would be considered to be within Turkey’s territorial sea, because it is closer to Turkey’s coast than to the Greek island of Kalimnos.

The Turkish claim to sovereignty over the tiny islets of Gavdos and Gavdopula, south of Crete, is, however, weaker, because it rests primarily on the absence of any specific mention of these islets in any treaty of cession. The Greek claim, based on “adjacency,” “dependency,” “contiguity,” or “proximity,” as well as on its exercise of administrative control over these islets during most of the past century, would inevitably be deemed to be stronger.

## **Demilitarization of the Eastern Aegean Islands**

### ***History***

As explained above,<sup>74</sup> the demilitarization of the six eastern Aegean islands of Samothrace, Lemnos, Lesvos (Mytilene), Chios, Samos, and Ikaria (Nikaria) was established in the 1914 Decision, the 1923 Lausanne Peace Treaty, and its companion, the 1923 Straits Convention. The demilitarized regime was quite detailed, and it is clear that the demili-

tarization requirement was an important component of the Turkish agreement to cede these islands to Greece. During the 1923 Lausanne Conference, Turkey sought sovereignty over Samothrace, as well as Gokceada (Imbros), and Bozcaada (Tenedos), and pressed for demilitarization of the eastern Aegean islands because of their concern “about their possible use as a springboard for Greek attacks on Turkey. Turkey’s demands that its security concerns be met were bolstered by the fact that it had only recently experienced an invasion by Greek forces.”<sup>75</sup> The final agreement gave Turkey only Gokceada and Bozcaada, and gave Samothrace to Greece, but the demilitarization of the Eastern Aegean Islands was written explicitly into the 1923 Lausanne Peace Treaty and into the Straits Convention.

Turkish and Greek scholars disagree on the impact of the Montreux Convention of 1936<sup>76</sup> on the demilitarized regime established in the 1923 Lausanne Straits Convention.<sup>77</sup> The Preamble to the Montreux Convention says that its signatories “have resolved to replace by the present convention the convention signed at Lausanne on the 24<sup>th</sup> July, 1923,” but the focus of the Montreux Convention was on the Turkish Straits, passage rights through the Straits, and Turkish security in light “of threatening Italian and German activities.”<sup>78</sup> The treaty makes no specific mention of Lemnos and Samothrace, the two Greek islands demilitarized in the Straits Convention. The Protocol permits Turkish remilitarization of the shores of the Turkish Straits,<sup>79</sup> and other language in the Preamble refers to “Turkish security and . . . the security, in the Black Sea, of the riparian States.” Because nothing in the Convention refers to Lemnos and Samothrace, it is possible to argue that the “resolved to replace” language should be viewed restrictively, as applied only to the Straits themselves, and thus that the Montreux Convention does not replace everything in the 1923 Lausanne Straits Regime.<sup>80</sup> Turkish scholars also emphasize that the agreement to keep the Eastern Aegean islands demilitarized was an essential precondition to the cession of these islands by the Ottoman Empire to Greece:

the demilitarized status of these islands provided for in this [1914] decision was made a constituent of consent on the part of Turkey to the cession of territory; what was ceded is not territory but territory over which sovereign rights of Greece is restricted at the very moment it was established, in order to meet the security interests of Turkey.<sup>81</sup>

Under this view, Turkish scholars argue, if the demilitarized status of the islands was eliminated, then Greek sovereignty over these islands becomes questionable.

Scholars from outside the region tend to see the Montreux Convention as having altered the demilitarized status of the eastern Aegean islands, at least to some extent. One scholar has said that because “the more pressing issue at Montreux was the passage of warships through the Straits, it looked as though the abolition of the demilitarisation clause of the Lausanne Convention were taken for granted,” and hence that “of all the Aegean islands, only the Dodecanese islands still remain demilitarised.”<sup>82</sup> A former diplomat with experience in the region concluded, on the other hand, that the Montreux Convention allowed for the remilitarization of Lemnos and Samothrace, but not the four islands listed in Article 13 of the 1923 Lausanne Convention (Lesvos (Mytilene), Chios, Samos and Ikaria (Nikaria)).<sup>83</sup>

The issue of demilitarization was addressed again in the 1947 Paris Treaty of Peace between the Allied Powers and Italy, in which the Dodecanese Islands were transferred from Italy to Greece. Article 14(2) said that these islands “shall be and shall remain demilitarized.” Greece has argued that Turkey has no standing to seek to enforce this provision, because it was not a party to the 1947 Peace Treaty.<sup>84</sup>

During the 1960s, Greece began slowly to introduce military fortifications into Eastern Aegean Islands.<sup>85</sup> Turkey protested the Greek build up in 1964, 1969, and 1970, referring explicitly to the limits imposed on the size of the “gendarmerie” in Article 13 of the 1923 Lausanne Treaty.<sup>86</sup> Greece replied at the time by saying that its infrastructure investments were not military in nature, “that it meant only to improve the law enforcement capabilities of the local police,”<sup>87</sup> and that it was continuing to adhere to its obligations under the 1923 Lausanne Treaty and the 1947 Paris Peace Treaty.<sup>88</sup> The Greek activity increased when Turkey sent troops to Cyprus in 1974. Military installations were introduced on Lesbos (Mytilene), Chios, Samos, and Ikaria (Nikaria), and a major air base was built on Lemnos.<sup>89</sup> Permanently stationed on that base are two F-16 fighter aircraft, six to ten other planes, one brigade (5,000 soldiers), a missile system containing Exocet missiles, and a sophisticated radar system, posing, in Turkey’s eyes, a threat to passage through the Turkish Straits.<sup>90</sup> But even after its military buildup, Greece responded to a Turkish note of protest regarding rearmament of the eastern Aegean Islands by saying that no Greek island had “‘any means of attacking Turkish territory,’ [and that Greece] did not challenge the obligation to keep the islands demilitarized.”<sup>91</sup>

One Greek scholar reported in a 1997 publication that:

The islands of Limnos, Lesbos, Chios, Samos, Kos and Rhodes have been in recent years fortified and some 30,000 troops are entrenched there. New airfields have been constructed in some Aegean islands (e.g. Syros, Karpathos) so that the Greek Air Force would not have to operate from remote bases on the mainland.<sup>92</sup>

Turkey insists that Greece’s action is in violation of its treaty commitments, but Greece now takes the position that the demilitarization requirements of the 1923 Lausanne Peace Treaty are obsolete, because of “the demonstrated Turkish will to use force (e.g., Cyprus) and the power-projection capability the Turks now possessed in the region.”<sup>93</sup> Greece has thus “invoked a ‘constant threat’ by Turkey, implying an inherent right of self-defense according to Article 51 of the Charter of the United Nations,”<sup>94</sup> and arguing that “the inalienable right of self-defence, as recognized by the United Nations Charter, takes precedence over other treaty obligations.”<sup>95</sup>

The current status of the demilitarization requirement is complicated because the geopolitical dynamics and technological and military realities have changed since 1923 and 1947, even though some of the tension between the Aegean neighbors continues. Are treaty agreements permanently obligatory, or do the obligations evolve and change as time, technology, and relationships unfold? Treaties delimiting boundaries are deemed under the Article 62(2)(a) of the Vienna Convention on the Law of Treaties<sup>96</sup> to be permanent and unchangeable, but does this status mean that each and every detail in such treaties are permanently binding? If a breach does occur with regard to the terms in such a treaty, what are the consequences of such a breach? Before addressing the complicated international law principles that apply to treaty interpretations, a survey of other demilitarized zones in other regions will be provided.

### *The Status of Demilitarized Zones under International Law*

To determine the continued legitimacy of the demilitarization regimes established on the Greek islands in the eastern Aegean, it is useful to survey other demilitarized areas in other eras. One international-law scholar has suggested that the proper test for determining whether a demilitarized zone is legitimate is whether the demilitarization continues to



contribute to the prevention of armed conflict.<sup>97</sup> This test is somewhat subjective, but is nonetheless useful because it recognizes that the geo-political relationship among neighbors can change dramatically and also that as technology and diplomacy have developed, demilitarized zones have also evolved.

The term “demilitarized zone” was used in the 19th century and at the beginning of the 1900s to refer to an area where no forces of the contending parties could enter, or could enter with only limited weaponry to keep order. The purpose of the demilitarized zone was to ensure that the military forces of the parties were not in proximity with one another. The goal of putting distance between them was to prevent any action that could lead to retaliation, and eventually escalate, renewing whatever conflict existed. The breadth of a demilitarized zone was typically designed to be “greater than one day’s march for troops and [greater] than the range of medium artillery.”<sup>98</sup>

Early demilitarized zones were often imposed by a victorious state on a vanquished state to limit the defeated state’s ability to reassert its military abilities. These zones were unilateral actions that often exempted forces of the victor from any limitation on entry or fortification. Other demilitarized areas have been established by outside powers to defuse tension between hostile neighbors. And a third mechanism for establishing such zones is by agreement of the bordering countries, on a reciprocal basis. The examples that follow illustrate the range of demilitarized zones that have been utilized during the last two centuries.

*Russia–Turkey.* In the Treaty of Peace between Russia and Turkey in May 1812, the two states agreed upon a demilitarized area along the Danube.<sup>99</sup> This treaty was overridden 14 years later, and Russia later conquered part of it, establishing a demilitarized zone that excluded all Turkish forces for “2 hours’ march south” of the river delta.<sup>100</sup>

*United States—Canada.* A long portion of the U.S.–Canadian border was demilitarized under the Great Lakes Agreement between the United States and Canada in April 1817.<sup>101</sup> The two sides limited their naval forces on the Great Lakes to “four vessels on either side, not exceeding 100 tons each, and armed with a single 18-pounder gun apiece,” but the United States eventually introduced a more powerful gunboat into the region, thereby violating the limitations of the Agreement.<sup>102</sup>

*Aaland Islands (between Finland and Sweden).*<sup>103</sup> This small archipelago is strategic to military control of the Baltic Sea. Sweden, Finland, and Russia entered into a treaty March 30, 1856 to demilitarize the Aaland Islands.<sup>104</sup> Then, in October 1921, a neutralization regime was established for these islands, in a treaty brokered by the League of Nations. The League awarded the archipelago to Finland, but it remained under the “tutelage” of the League of Nations.<sup>105</sup> The demilitarized status of these islands was confirmed in a 1940 treaty between Finland and the Soviet Union<sup>106</sup> and again at the Paris Peace Treaty with Finland signed February 10, 1947, which stated that: “The Aaland Islands shall remain demilitarized in accordance with the situation as at present existing.”<sup>107</sup> This demilitarized area is significant because it has lasted for almost 150 years, but it is also significant that the demilitarized status of these small islands has been reconfirmed in four separate treaties during this period.

*Ionian Islands.* In the Poxa Treaty, signed Nov. 14, 1863 by Austria, France, Great Britain, Prussia, and Russia, certain islands in the Ionian Sea were assigned to Greece, but the islands were designated as demilitarized with “a view to appeasing Turkish fears.”<sup>108</sup>



*The Tangier Zone.* On April 8, 1904, France and the United Kingdom established a demilitarized zone on the southern shore of the Strait of Gibraltar, between Melilla and the right bank of the Sebou River, and this zone was reiterated in the Treaty of November 12, 1912 between France and Spain.<sup>109</sup> On December 18, 1923, Great Britain, France, Spain, and Italy all agreed to demilitarize what became known as the Tangier Zone, south of the Gibraltar Strait, which had formerly been maintained by an international diplomatic body. The treaty included provisions for French and Spanish forces to protect their possessions from hostile tribes in the case of “real necessity” by permitting passage of troops and supply columns through the zone in transit from the port of Tangier. The international status of the Tangier Zone ended in 1956.

*Sakhalin Island and the Gulf of Tartary.* In the Treaty of Portsmouth,<sup>110</sup> in 1905, after the defeat of Russia by Japan, Sakhalin Island and the Gulf of Tartary were demilitarized. This treaty remained in effect for more than 30 years, probably because of the reciprocal nature of the treaty. The Treaty provided for demilitarization of the most sensitive area of interest between the two States, the island of Sakhalin and the Gulf of Tartary, located between the island and the Russian mainland.

*The Rhineland.* In the Versailles Treaty of March 1919 ending World War I,<sup>111</sup> the Rhineland was deemed to be demilitarized, but this requirement did not prohibit recruiting within the zone, nor taxation of inhabitants for the benefit of the German military budget. Germany was required to abolish compulsory military service, reduce its army to 100,000, demilitarize all the territory on the left bank of the Rhine River and also the territory within 50 kilometers on the right bank, to stop all importation, exportation, and nearly all production of war material, limit its navy to 24 ships (with no submarines), limit its naval personnel to 15,000, and abandon all military and naval aviation by October 1, 1919.<sup>112</sup> The demilitarization was unilaterally imposed on Germany to provide for French security.<sup>113</sup> Germany violated the limits imposed on its military during the 1930s, taking the steps that led to World War II.

*Treaty of Tartu.*<sup>114</sup> The treaty between Russia and Estonia of February 2, 1920 divided their border into three sectors. The agreement demilitarized the lake area around the southern third, and the center third was demilitarized reciprocally, but the northern section was demilitarized unilaterally and applied only to Estonia. The new Bolshevik government in Russia would not participate in these peace negotiations until Estonia withdrew its forces within a radius of 10 kilometers from an area Russia regarded as a threat to St. Petersburg. The demilitarization measures were designed to last for only two years, and they were not extended.

*Finland and Russia.* The treaty between Finland and Russia demilitarized the shores and islands of the Gulf of Finland.<sup>115</sup> This treaty involved little reciprocity on Russia’s part. The two states later signed a demilitarization agreement at Helsingfors in 1922 demilitarizing a small area on either side of the border along their common border for 700 miles.<sup>116</sup> Most of this border, however, was inaccessible in any event to military operations.

*Dominican Republic and Haiti.* A demilitarized zone was established along the border between these two neighbors in February 1929, banning fortifications or military works within ten kilometers.<sup>117</sup> Modern weaponry makes such a demilitarized zone ineffective.

*Japan.* Article 9 of the 1946 Japanese Constitution, which says that the Japanese people forever renounce war as a sovereign right and the threat or use of force as a means of settling international disputes, severely restricts Japan's ability to militarize, but Japan is not a "demilitarized zone" because substantial U.S. forces are based in Japan and it has its own "Self-Defense Forces." When these troops have been challenged as a violation of Article 9, the Japanese courts have ruled that because Japan has the right to self-defense, it can protect itself against external attack.

*Italian Islands.* The 1947 Paris Peace Treaty between the Allied Powers and Italy, in addition to demilitarizing the Dodecanese, also established a demilitarized regime for the Italian islands of Pantelleria, Lampedusa, Lampione, Linosa, and Pianosa in the Adriatic and for the larger islands of Sardinia and Sicily, barring naval, military, or air force installations on those islands.<sup>118</sup> But in 1951, "Italy began a process of revision of the military clauses of the 1947 Peace Treaty and it no longer feels obliged to keep the islands in question demilitarized, nor to keep its military structures within the limits set out in the Peace Treaty."<sup>119</sup> The parties to the 1947 agreement, including "the Soviet Union and other Eastern bloc countries," eventually "acquiesced" to the Italian "abrogation of military clauses."<sup>120</sup> The 1947 treaty also required the island of Pelagosa, and its adjacent isles, which were ceded to Yugoslavia, to remain demilitarized,<sup>121</sup> and that requirement apparently has not been questioned.<sup>122</sup>

*Demilitarized Zones after the United Nations.* Modern warfare has eliminated much of the purpose of the earlier "demilitarized zones," because most states now have the capacity to strike at each other across a much wider geographical area. In the modern era, a demilitarized zone usually involves a situation where neutral peacekeeping forces seek to keep the parties apart, monitor violations, and promote peace.

*The Arab–Israeli Conflict.* Peacekeeping forces have been introduced repeatedly to separate the warring parties, including, for instance, after the Suez Crisis in 1956. After France and the United Kingdom vetoed a U.S.-backed Security Council resolution for the withdraw of Israeli forces, an emergency session of the General Assembly passed Resolution 1000 establishing the United Nations Emergency Force (UNEF), and Secretary-General Dag Hammarskjöld ordered UNEF to replace the British and French forces in Egypt, with the limited military mandate of securing peaceful conditions, acting as a buffer force, and providing a supervisory role.

*The Korean Peninsula.* Although termed a "demilitarized zone," the border between North and South Korea following the 1953 ceasefire has been heavily militarized on both sides, including thousands of land mines placed in the intervening space by the United States. Because both sides have weaponry that could cross the intervening space to strike at the enemy, regardless of distance, the threat of military losses replaces the concept of demilitarization to prevent confrontation.

*The Former Yugoslavia.* NATO and United Nations peacekeeping forces have been inserted into the former Yugoslavia for the purpose of disarming the various combatting armies and preventing retaliation. The United Nations Preventive Deployment Force (UNPREDEP) is a multilateral (U.S., Denmark, Finland, Sweden, Norway, and Canada) force with more than 1,000 personnel charged with monitoring the actions along the 420 kilometer border with Albania. This installation includes 24 permanent and 33 temporary monitoring posts for "monitoring and observation."

*Serpents Island: Romania–Ukraine.* On June 7, 1997, Ukraine and Romania signed an agreement that recognizes Serpents/Zemiyiniy Island, which is 19 nautical miles east of the terminus of the Romania–Ukraine land boundary on the Black Sea coast, as Ukrainian territory, in exchange for a Ukrainian promise not to place military units on the island.<sup>123</sup>

### *Applying These Precedents to the Eastern Aegean*

As these examples demonstrate, many demilitarized zones have been temporary, while others have lasted for a substantial amount of time. Whether a permanent demilitarized zone is compatible with international law is a difficult question. The inherent right of a state to self-defense is recognized in Article 51 of the United Nations Charter,<sup>124</sup> and it can be argued that a permanent demilitarized area would be inconsistent with the right of self-defense.<sup>125</sup> Although a demilitarized status for an area may bring stability and security to neighboring states for a time, permanent demilitarization under a treaty can cause problems if one state develops a military advantage and may wish to reopen hostilities. Such a change could present either a “material breach” or a “fundamental change in circumstances,” both permitting the nonbreaching party to withdraw from or terminate the treaty.

*Greece’s Arguments.* Greece has argued that the conduct of Turkey’s air force, flying over islands off-limits for more than three-quarters of a century, has violated article 13(2) of the Lausanne Treaty,<sup>126</sup> a material provision of the Treaty, thus constituting a “material breach” allowing Greece to terminate its obligations under the treaty.<sup>127</sup> Greece also argues that a “fundamental change of circumstances”<sup>128</sup> has occurred, because Turkey’s military advantage has grown dramatically since the time the Lausanne Treaty was written. Greece thus argues that its inherent right to self-defense permits and requires it to remilitarize the islands for defensive purposes.<sup>129</sup>

Greece also maintains that the Montreux Convention eliminated its obligation not to remilitarize Greek islands in the Aegean Sea. The Montreux Convention impliedly permitted at least some immediate remilitarization because of its statement in its preamble that the contracting parties “Have resolved to replace by the present Convention the Convention signed at Lausanne on the 24<sup>th</sup> July, 1923” (referring to the Straits Convention). Greece argues that this language modifies the status of all the eastern Aegean Islands. Turkey argues that the Montreux Convention eliminates the demilitarization regime only for those Turkish islands mentioned in article 14 of the Lausanne Convention because the Montreux Convention in its preamble notes that it was intended to address the security of Turkey and the Black Sea riparian states. But, in support of their position, Greek officials quote a statement made by Turkish Foreign Minister Aras to the Turkish Parliament in 1936:

The provisions concerning the islands of Lemnos and Samothrace which belong to our friend and neighbour, Greece, and which had been demilitarised by the Treaty of Lausanne in 1923, are abolished also by the Treaty of Montreux and we are particularly pleased about this. . . .<sup>130</sup>

Foreign Minister Aras’s statement may not have legally binding force in and of itself,<sup>131</sup> but it is certainly part of the “context” and “subsequent practice” that must be considered in interpreting a treaty, according to Article 31(1) and (3)(b) of the Vienna Convention on the Law of Treaties. On the other hand, the fact that the Greeks did not

immediately remilitarize Lemnos and Samothrace after the Montreux Convention came into force undercuts the importance of the Aras statement and refutes the conclusion that Turkey “acquiesced” in such a remilitarization and that the Greeks understood the situation as having been changed.<sup>132</sup>

The demilitarized status of Lesbos (Mytilene), Chios, Samos, and Ikaria (Nikaria) presents, in any event, a separate legal problem from that of Samothrace and Lemnos, because those islands are demilitarized in Article 13 of the main Lausanne Peace Treaty rather than the Straits Convention, which covers Samothrace and Lemnos. Foreign Minister Aras said nothing in his statement about these four islands, and so any Greek argument that their demilitarized status has been lifted by a subsequent treaty has little support. Greece has argued that the Lausanne Peace Treaty does not prohibit local self-defense, but “the extent and posture of the Greek military forces do appear to many to exceed that permitted, a point which the United States has made to its Greek ally.”<sup>133</sup> An argument that the demilitarized status of these four islands has been lifted must rest, therefore, on arguments based on a “material breach” by Turkey or on a “fundamental change of circumstances (*rebus sic stantibus*).”

Greece has no argument that the demilitarization of the Dodecanese Islands has been superceded by any other treaty, but it argues instead that Turkey cannot enforce this requirement because it was not a party to the 1947 Paris Peace Treaty that included this requirement. During the negotiations that led to the transfer, Italy raised no objection to ceding the islands to Greece, but the matter still received some discussion. The British Foreign Minister, Ernest Bevin, suggested that the tiny Mediterranean islet of Castellorizo be transferred to Turkey, with Greece receiving the 13 Dodecanese islands, but subsequently withdrew that idea, and agreed that Castellorizo should also go to Greece.<sup>134</sup> The Soviet Union had their eyes on the Dodecanese also, because of their desire to have a Mediterranean naval base, but subsequently acquiesced in the transfer of these islands to Greece.<sup>135</sup> The demilitarization requirement was included to prevent any future naval base from being built on these islands, by the Soviets, by Greece, or by any other power.<sup>136</sup>

The demilitarization of the Bosphorus Strait, Eastern Thrace, and the Dardanelles was a main feature of the 1923 Lausanne Peace Treaty and its companion, the Straits Convention. Thirteen years later, however, the Montreux Convention replaced the Lausanne Convention’s requirement for demilitarization, at least in part. Both Turkey and Greece prospered from the development of the demilitarized zone in the eastern Aegean, but a formula utilized for a very different world—both diplomatically and militarily—may not be appropriate or applicable to today’s world.

Turkey does not fear a full-scale invasion from Greece, but is concerned that the eastern Aegean “islands could be used by Greece for air strikes against targets on the Turkish mainland.”<sup>137</sup> Greece argues, in response, that its military installations on the eastern islands are defensive, in response to “the deployment of the Turkish Fourth Army (dubbed the ‘Army of the Aegean’) along Turkey’s Aegean coast since 1975, and the presence of landing craft in Turkish ports close to the islands, [which] pose a serious threat to Greece and warrant the countermeasures.”<sup>138</sup> Each side accuses the other of starting the modern military build-up.

Because demilitarized zones are designed to diffuse tension and bring peace and stability to a region until a more enduring security system can be established, many of the demilitarized zones described above did expire or evolve into something else as conditions changed, including even some of those established in the 1923 Lausanne Peace Treaty (i.e., the demilitarized Turkish Straits) and in the 1947 Paris Peace Treaty

Between the Allied Powers and Italy (i.e., the Italian islands). One scholar has explained the dynamics by which treaty obligations evolve in the following language: “Outside the bounds of the Vienna Convention, it has been argued that customary international law knows the possibility that a treaty may be amended or modified by the tacit consent of the parties, which is shown by a pattern of consistent and accepted practice by the parties at variance from the treaty’s provisions.”<sup>139</sup> Treaties and treaty provisions are sometimes unilaterally ignored, denounced, or modified: “International law doctrine has considerable difficulty in accounting for the unilateral termination of treaties, although as a matter of practice treaties are regularly denounced by states unilaterally.”<sup>140</sup>

The security system designed to bring peace and stability to the Aegean is the North Atlantic Treaty Organization (NATO), so it could be argued that when Greece joined NATO on February 18, 1952, the demilitarization requirements came to an end.<sup>141</sup> NATO itself has not adopted this perspective, however, and has been sensitive to the Turkish–Greek disputes regarding demilitarization of the Eastern Aegean Islands.<sup>142</sup> Ultimately, because the NATO treaty is designed to provide a security umbrella to protect the European nations, the NATO partners should determine whether the demilitarization requirements on the Eastern Aegean Islands have or should come to an end.

Greece’s arguments thus include: (a) the 1923 Treaty of Lausanne does not prohibit local self-defence measures;<sup>143</sup> (b) with regard to Lemnos and Samothrace, and possibly to Lesbos, Chios, Samos, and Ikaria as well, the Montreaux Convention replaced the 1923 Lausanne Peace Treaty and Straits Regime and lifted the demilitarization requirement; (c) its inherent right of self-defense, recognized in Article 51 of the UN Charter; (d) fundamental change of circumstances (*rebus sic stantibus*) referring to Turkey’s militarization of the coastal areas around the Turkish straits and the establishment of the Army of the Aegean; (e) Turkey’s material breach by posing military threats to Greece; (f) Greece’s right to take appropriate countermeasures in response to Turkish military actions; (g) the defense of “necessity” to act to ensure self-preservation (similar to self-defense); and (h) with regard to the Dodecanese Islands, Turkey was not a party to the 1947 Paris Peace Treaty and hence is unable to claim any benefit from it.<sup>144</sup>

*Turkey’s Arguments.* Turkish scholars argue that the demilitarization of the Eastern Aegean islands was an essential precondition to the agreement by Turkey to cede these islands to Greece,<sup>145</sup> and that nothing has changed to alter the necessity to maintain their demilitarized status. Professor Sevin Toluner has presented the more detailed view that, in the context of the Montreaux Convention, the right of Turkey to remilitarize the straits is conceptually and legally distinct from the right of Greece to remilitarize the islands of Lemnos and Samothrace.<sup>146</sup> The goal of modifying the 1923 Lausanne Treaty and its companion, the Straits Convention, with a subsequent treaty, she explains, was to accomplish two purposes: (1) to replace the regime for the Turkish Straits; and (2) to protect the security of Turkey. The first reason, evidenced by the preparatory work and the preamble, which refer to the regulation of transit and navigation in the Turkish Straits, creates no basis for the elimination Greece’s obligations not to remilitarize its islands outside the straits. The second reason permits Turkey to remilitarize to the extent necessary, but grants no comparable right to Greece.

This right to remilitarize would thus include the previously demilitarized Turkish shores of the Straits (mentioned in Article 4(1) of the Straits Convention), plus the Turkish islands in the straits as well as those at the opening to the Dardanelles (Straits Convention, Article 4(2)). Professor Toluner has emphasized that the Straits Convention distinguishes between “zones” and “islands” to be militarized under the regime by separating

statements about islands outside the straits (Article 4(2)) from those that are located within the straits (Article 4(3)). Further, these islands are distinguished from the various zones. These distinctions show the intent of the drafters to limit the exemption from demilitarization to the immediate straits area, and to exclude the Greek islands from this exemption. Even if Greece were permitted to remilitarize Lemnos and Samothrace, the 1936 Montreux Convention does not discuss abrogation of the Greek responsibility not to remilitarize the islands of Lesbos (Mytilene), Chios, Samos, and Icaria (Nikaria), nor, of course, does it say anything about the Dodecanese Islands, which were demilitarized in the 1947 Paris Peace Treaty. These islands are specifically to be maintained in a demilitarized fashion by Greece.

Greece has responded to these arguments by saying that it is improper to assume that demilitarized zones, created to keep the forces of two states away from each other, could be abrogated or adjusted in a fashion that would give one side a distinct advantage. Greece thus argues that the doctrine of "*rebus sic stantibus*," or a "fundamental change in circumstances," permits Greece to engage in some remilitarization despite the treaty requirements. Turkey's actions of developing its professional army, its purchase of significant amounts of new military equipment, and its increasing propensity to engage Greek aircraft create, in Greece's view, circumstances that amount to a clear threat to the Greek state. Greece's small population, its difficult military position geographically, and its weaker economy justify taking a defensive posture to deter would-be aggressors. Furthermore, Greek writers argue that the conduct of Turkey's air force flying over Greek islands violates article 13(2) of the Lausanne Treaty, a material article of the Treaty. These changes in conditions since the time of the Lausanne Treaty, the Greek writers argue, justify any failure to fulfill international obligations concerning demilitarization.

The Turkish scholar Sevin Toluner has emphasized in her writings that treaties establishing boundaries have a special status under international law, and that they cannot be easily altered or modified.<sup>147</sup> This view receives strong support from the language of Article 62(2) of the Vienna Convention on Treaties, which says that: "A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary. . . ." This view is also supported from the recent *Eritrea-Yemen* arbitration, discussed above,<sup>148</sup> which interpreted and applied the 1923 Lausanne Peace Treaty as a currently-valid document. But the careful language in Article 62(2) still leaves unresolved the question of whether all aspects of a boundary treaty are forever binding, or whether aspects and details can be modified by a "fundamental change of circumstances" even as the boundary divisions themselves remain in force. As one international scholar has explained:

It may . . . be possible to object to some treaty clauses and accept the rest either if the treaty so provides or if the objectionable clauses are both "separable from the remainder of the treaty with regard to their application" and "not an essential basis of the consent" of other parties, so long as "continued performance of the remainder of the treaty would not be unjust."<sup>149</sup>

Treaties typically do not confer rights or obligations on countries that are not parties to the treaties,<sup>150</sup> but some exceptions exist to this rule. If a treaty provision is clearly designed to provide benefits for a third state, and the intent of the contracting parties to provide those benefits is explicit, then the third state should be able to take advantage of the benefit and invoke the treaty provision. With regard to the 1947 Paris Peace Treaty, the key questions would concern the purpose of the demilitarization pro-



vision (to ensure peace in the eastern Aegean and free passage into and through the Turkish Straits) and the extent to which the parties were consciously trying to provide rights and benefits for Turkey. Turkey appears to have a strong argument that the demilitarization provision was designed to protect Turkish security, and hence that it should be entitled to enforce this provision.

*Summary and Conclusion.* As the material in this long section demonstrates, many separate and complex issues are raised by the question of whether the demilitarization requirements still apply to the eastern Aegean Islands. Turkey has good legal arguments based on the texts of the governing treaties. Greece's arguments focus on the nature of the demilitarization requirements, which, by their very nature, have a sense of being temporary—until a more stable security regime can be established.<sup>151</sup> Greece argues that demilitarization requirements are inconsistent with the right of self-defense, which is characterized as “inherent” in Article 51 of the United Nations Charter, and which may be a peremptory norm of international law, which would prevail over any contrary treaty under Articles 53 and 64 of the Vienna Convention on the Law of Treaties. But that argument ignores the resilience of demilitarized zones, which have been utilized repeatedly during the past 200 years and some key demilitarized zones, such as in the Aaland Islands in the Baltic, have now lasted almost 150 years. Ultimately, as explained above, the current validity of the demilitarized status of the Eastern Aegean Islands must be resolved by the contracting parties to the North Atlantic Treaty Organization, in light of all the security concerns of the region.

### **Breadth of the Territorial Sea**

This issue is the most important of all the Aegean disputes, because of its impact on navigational and overflight freedoms and resource exploitation. Since 1936,<sup>152</sup> Greece has claimed a 6-nautical-mile territorial sea around its Aegean islands, but it has also insisted repeatedly that it is entitled to claim a 12-nautical-mile territorial sea under the 1982 Law of the Sea Convention.<sup>153</sup> Turkey has responded that such an extension would be a *casus belli* because it would convert most of the Aegean into Greek territorial waters and restrict freedom of movement of the ships and planes of Turkey and other nations.<sup>154</sup>

The unique geography of the Aegean constitutes a “special circumstance” that requires Greece and Turkey to fashion a unique solution to the territorial sea question.<sup>155</sup> If Greece doubled its claimed territorial sea from 6 to 12 nautical miles, it would increase the percentage of Aegean waters under its sovereign control from about 35% to about 64%.<sup>156</sup> Turkey would have sovereignty over only 8.3% of the Aegean waters, and the percentage that would be “high seas” would be reduced from about 56% to about 26%.<sup>157</sup> Article 3 of the 1982 Law of the Sea Convention says that all states have the “right” to establish a territorial sea “up to a limit not exceeding 12 nautical miles” from their coasts. Turkey has not signed or ratified the Convention, however, and has done everything it possibly can do to establish itself as a “persistent objector,” resisting the establishment of this norm.<sup>158</sup> It can thus claim that a “regional state practice” in the Aegean limits all territorial sea claims to six nautical miles.

With regard to the territorial sea boundaries between the Greek Aegean islands hugging the Turkish coast and the coast itself, Turkey can point to the language of Article 15 of the 1982 Law of the Sea Convention, which recognizes that “historic title or other special circumstances” may justify a departure from the use of the median line as the appropriate means for delimiting territorial sea boundaries between opposite states.<sup>159</sup>



Turkish scholars argue that the unique geography of the Aegean, and the smothering effect presented by the Greek islands that are so close to the Turkish coast, give Turkey a strong equitable claim for being allocated more territorial waters than the median line drawn between the islands and the coast would allow,<sup>160</sup> or perhaps more appropriately, to require that territorial sea claims in this area be limited to three nautical miles, as is done in other congested areas.<sup>161</sup>

With regard to the territorial seas from the Greek Aegean islands facing Westward, Turkey can point to Articles 122 and 123 of the Law of the Sea Convention which—although written in vague and general language—recognize that “semi-enclosed seas,” such as the Aegean, require special management measures and require states bordering on such seas to cooperate in coordinating their policies. Turkey can also cite to Article 300 of the Convention, which says that states must exercise their rights under the Convention “in a manner which would not constitute an abuse of right.”<sup>162</sup> If Greece were to establish a 12-nautical-mile territorial sea, especially around its islands in the Eastern Aegean, such action would appear to constitute an abuse because the expanded territorial sea would fill most of the Aegean and would completely fill it in the southern sector.<sup>163</sup>

Such a move would, in Turkey’s view, “upset the equilibrium which was established between the two States by the Lausanne Treaty,” which, “according to Turkey, recognizes economic, commercial, navigational, and security rights of both Greece and Turkey in the Aegean.”<sup>164</sup> This extension would deny Turkey the right to exercise high seas freedoms in the Aegean that it has “enjoyed uninterruptedly . . . for hundreds of years.”<sup>165</sup> These freedoms include “freedoms of overflight, navigation, fishing, cable and pipeline laying, scientific research, survey activities, etc.,”<sup>166</sup> but include, in particular, Turkey’s unimpeded ability to move its ships and planes between the Turkish Straits and the Mediterranean. The threats to Turkey’s navigational freedoms exist because only the right of innocent passage exists through territorial seas. Innocent passage can be suspended in times of war or emergency, and innocent passage does not permit submerged passage by submarines or overflight by planes, even in peacetime.<sup>167</sup> Turkey may, thus, be able to argue that the waters in the Aegean beyond Greece’s 6-mile territorial seas are “historic waters” governed by a condominium regime of sharing between Greece and Turkey, similar to the waters of the Gulf of Fonseca (and the EEZ corridor extending from the Gulf to the high seas), which are shared between El Salvador, Honduras, and Nicaragua,<sup>168</sup> and also similar in some respects to the waters in Palk Bay, which are historic waters shared between India and Sri Lanka.

Examples can be found where states have agreed to establish territorial seas around islands of less than 12 nautical miles, when they are in cramped locations or are on the “wrong” side of the median line. Hiran W. Jayewardene, in his 1990 book, cites the cases of the Venezuelan island of Isla Patos (between Venezuela and Trinidad & Tobago),<sup>169</sup> the Abu Dhabi island of Dayyinah (between Abu Dhabi and Qatar),<sup>170</sup> and the Australian islands in the Torres Strait (between Australia and Papua New Guinea),<sup>171</sup> all of which have been given only three nautical miles of territorial sea. Ambassador Jayewardene cites these cases to support the view that “[s]imilar solutions may be considered with regard to” the Greek islands that are adjacent to Turkey’s coast.<sup>172</sup> Another intriguing example is found in the 1984 agreement between Argentina and Chile, where these two countries limited their territorial sea claim *in relation to each other* to 3 nautical miles, but claimed 12-nautical-mile territorial seas with regard to all other countries.<sup>173</sup> As explained below,<sup>174</sup> several examples can be found of countries limiting their territorial sea claims adjacent to straits in order to permit unimpeded navigational passage.

Also of some possible significance is the fact that Greece, in its continental shelf

delimitation agreement with Italy,<sup>175</sup> accepted that in the north its island of Fanos would receive only a three-quarter effect and that in the south the Greek islands of Strophades would receive a semi-effect.<sup>176</sup>

Turkey's position is strongest with regard to the islands in the eastern Aegean, particularly those near its coast. Some of the islands in the western Aegean are very close to Greece's continental coast and thus are practically part of the Greek mainland.<sup>177</sup> But those on the eastern half do not have the same geographical links with the Greek mainland and present security and navigational threats to Turkey. One possible compromise might be to accept a 12-nautical-mile territorial sea from Greece's coasts, but not from its islands.<sup>178</sup> Another might be to permit at least some of Greece's islands in the Western Aegean to generate 12-nautical-mile zones, while continuing to insist that the eastern Greek islands limit their territorial seas to 6 nautical miles. Some observers have suggested that even a 6-nautical-mile territorial sea is too wide in some parts of the Eastern Aegean, because of the congestion provided by the islands and the need to permit free navigational passage.<sup>179</sup> It may be appropriate and equitable, therefore, to reach an agreement where some 12-nautical-mile territorial seas would be accepted in the Western Aegean, in exchange for a reduction of territorial-sea claims in parts of the Eastern Aegean to 3 nautical miles.

### **Air Defense Zones around the Greek Islands**

Beginning in 1931, five years before it expanded its territorial sea from 3 to 6 nautical miles, Greece claimed a 10-nautical-mile air defense zone around each of its islands.<sup>180</sup> This claim appears to be one of sovereignty over this 10-nautical-mile area and a claim to be able to exclude all non-Greek aircraft from this airspace.<sup>181</sup> Obviously, if enforceable, it has significant impacts on the ability of Turkish planes to fly over the Aegean. The United Kingdom protested this claim in 1940, and, beginning in 1974, Turkey has challenged this zone repeatedly.<sup>182</sup> Turkey argues that it was not aware of Greece's 10-nautical-mile claim until June 2, 1974, when the International Civil Aviation Organization (at Greece's request) formally announced the claim, and Turkey vigorously denies that it has acquiesced to the Greek claim. Since then, "almost on a daily basis, Turkey has sent its military airplanes to penetrate Greek airspace between six and ten miles,"<sup>183</sup> and "US aircraft in NATO exercises over the Aegean have also regularly contested the outer four miles of the Greek airspace."<sup>184</sup> Turkey argues that the close proximity of the two states makes it difficult to justify drawing a strict boundary in such a tight amount of airspace.

Some commentators have observed that no other country in the world has a different territorial water boundary from its airspace and that this situation creates the anomaly that a helicopter lifting off from a Turkish ship on the high seas, 7 nautical miles from a Greek island, would be entering into claimed Greek airspace as it rises into the air.<sup>185</sup> Greek scholars argue that because Greece would be entitled to claim a territorial sea of 12 nautical miles, under Article 3 of the Law of the Sea Convention, its claim of a 10-nautical-mile air defense zone must also be permissible under international law.<sup>186</sup>

It is not altogether unusual for nations to establish air defense identification zones (ADIZs), but these zones are usually not claims of jurisdiction, nor are they usually designed to be exclusionary. Regional and national security zones extending into the high seas have been established during times of armed conflict, including a 25-mile naval and air security zone claimed by Nicaragua in 1983, zones claimed by the Persian/Arabian Gulf nations during the Iran-Iraq conflict, and a 200-nautical-mile exclusion

zone declared by the United Kingdom around the Falklands/Malvinas Islands in 1982.<sup>187</sup> North Korea declared a 50-mile security zone off its coast in 1977, and South Korea declared a 150-mile zone into the Sea of Japan and a 100-mile zone into the Yellow Sea in the 1970s. In 1973, Libya claimed the 100 miles of coastal waters in the Gulf of Sidra (or Sirte) as a maritime security zone or “restricted area,” but later changed this claim to one of historic waters.

The United States first claimed an ADIZ in September 1950, extending 300 miles off its coasts.<sup>188</sup> The United States has required aircraft in this zone approaching U.S. land territory to provide identification and location in the interest of national security. Although these zones do not restrict overflight, planes that do not provide identification are escorted to a military air base. Other nations that have established ADIZs include Burma, Canada, Iceland, India, Japan, South Korea, Oman, the Philippines, Sweden, Taiwan, and Vietnam. Although the United States utilizes one of these zones to protect its own coasts, “the United States does not recognize any ADIZ [established by other countries] that requires identification by aircraft that are merely transiting the zone without seeking entry to national airspace.”<sup>189</sup>

The Greek air defense zone is thus not completely unique or without precedent, but it is unusual and presents awkward challenges for Turkey, because it covers so many islands in the crowded, semi-enclosed Aegean Sea and because it is designed to be exclusionary. In fact, it presents greater restrictions on overflight freedoms than an expansion of the territorial sea would present with regard to navigational passage, because planes do not have the same rights of innocent passage that ships possess. Turkey believes that it must, therefore, continue to protest the existence of this zone, just as it must object to any expansion of the territorial sea. And Greece’s air defense zone must be part of the ultimate compromise regarding the territorial seas claims in the Aegean. It is particularly important for Greece to reduce its air defense zone back to six nautical miles around its islands in the eastern Aegean, and perhaps even to three nautical miles at some of the most congested locations, in order to protect the navigational and overflight freedoms of Turkey and other nations using this region for passage.

### **Flight Information Region**

A somewhat related problem was created in 1952, when the International Civil Aviation Organization (ICAO) assigned to Greece air traffic control responsibility for the Aegean Flight Information Region (FIR), and drew the dividing line between this region and that of the Istanbul FIR at the median line between the Eastern Aegean Greek Islands and the Turkish coast.<sup>190</sup> These FIR zones are established “for the purpose of assisting and controlling aircraft” and “[a]ircraft passing into them can be required to provide a flight plan and position reports.”<sup>191</sup>

Formally, the ICAO has jurisdiction only over civilian (nonmilitary) aircraft,<sup>192</sup> but military and governmental planes are expected “to operate with due regard for the safety of civil aviation,”<sup>193</sup> and thus to cooperate with the ICAO system. The Law of the Sea Convention also instructs governmental and military planes exercising their right of transit passage over straits to “observe the Rules of the Air established by the International Civil Aviation Organization as they apply to civil aircraft.”<sup>194</sup> Pursuant to these guidelines, Greece asks Turkish military planes to provide their flight plans whenever they enter the international air space of the Aegean.<sup>195</sup> This arrangement presents an awkward situation for the Turkish military, because safety considerations encourage them to cooperate with the Greek authorities operating the FIR in the Aegean, even though

their country's political position opposes any recognition of Greek authority over this region.<sup>196</sup>

In August 1974, after the Cyprus intervention, Turkey issued a notice requiring all aircraft approaching Turkish airspace to report their position and provide a flight plan once they reached the Aegean median line. Greece protested, and tension was high until 1980, when both countries withdrew their declarations that the Aegean was a "dangerous region," although Turkey reserved the right to revise the FIR boundaries. An FIR cannot confirm or deny international boundaries, but Greece does cite the FIR boundary as evidence that Turkey has "accepted that there already existed maritime delimitation in the region,"<sup>197</sup> and this issue presents a major annoying problem between the two neighbors.

### Delimitation of the Continental Shelf

The delimitation of the continental shelf boundary in the Aegean offers a challenge that many authors have written about. The close proximity of the eastern Greek islands to Turkey's coastline presents a geographical configuration unlike any other in the world. The Greek island of Samos comes to about one nautical mile from the Turkish coast, and Kos and some others are almost as close. Because these eastern Greek islands hug the Turkish coast, the boundary issues involve delimitation of both the territorial sea and the continental shelf. If the Law of the Sea Convention reflects customary international law in this matter, the delimitation of the territorial sea would be governed by Article 15 of the Convention, while that of the continental shelf would be governed by Article 83.<sup>198</sup> In the recent decision of the International Court of Justice in the *Qatar-Bahrain Maritime Delimitation and Territorial Questions*, the Court relied upon the principles of the Law of the Sea Convention, even though Qatar had only signed but not ratified it, because the parties agreed that most of the provisions of the Convention relevant to their dispute reflected customary international law.<sup>199</sup> In particular, the Court noted that Article 15 of the 1982 Convention was virtually identical to Article 12(1) of the 1958 Convention on the Territorial Sea and the Contiguous Zone and was to be regarded as having a customary character.<sup>200</sup> Article 83 can probably also be considered to be a codification of customary international law, because it requires that continental shelf delimitation "be effected by agreement on the basis of international law . . . in order to achieve an equitable solution."

Another important issue addressed squarely in the *Qatar-Bahrain* case was the question of drawing baselines. Some Greek authors have argued that Greece should be allowed to draw baselines connecting their islands,<sup>201</sup> similar to those that can be drawn around archipelagic states,<sup>202</sup> thus strengthening its claim to maritime space in the Aegean. The International Court of Justice rejected Bahrain's argument that it should be able to draw baselines connecting its islands, as a *de facto* archipelagic state, and ruled instead that it was improper to draw baselines around islands that are part of an overall geographical configuration, unless they were a fringe of islands along a coastline.<sup>203</sup> The waters between Bahrain's islands are thus territorial waters, rather than internal waters, and the right of innocent passage exists in these waters.<sup>204</sup>

The linkage between the breadth of the territorial sea and the delimitation of the continental shelf should be obvious. If the territorial sea in the Aegean is expanded from its present 6 nautical miles to 12 nautical miles, it would fill more than three-fourths of the Aegean and would leave very little to be delimited under the principles governing continental shelf delimitation. From Turkey's perspective, and indeed from the perspective of reaching an equitable result to this complicated problem, it is important that the

territorial sea claims be kept at the 6-nautical-mile limit in order to leave enough territory to permit an equitable solution to be reached on the continental shelf. As explained above,<sup>205</sup> a strong argument can be made that the territorial sea claims in some parts of the congested Eastern Aegean should be rolled back to 3 nautical miles in order to provide the navigational and overflight freedoms that are so important to Turkey and to third states.

Turkey has argued that the continental land masses should be given primary emphasis in drawing continental shelf boundaries, because the continental shelf is the natural prolongation of such continental land masses and because the Greek islands do not possess continental shelves of their own.<sup>206</sup> Turkey has also stressed its long coastline,<sup>207</sup> its large coastal population,<sup>208</sup> its long maritime tradition, and its historical usage of the Aegean for navigation<sup>209</sup> and resource exploitation for many centuries.<sup>210</sup> Turkey has insisted that the unique geography of the Aegean and its status as a semi-enclosed sea present an undeniable case of “special circumstances,” requiring an equitable solution that will enable Turkish vessels to reach the high seas from its Aegean ports without passing through Greek waters.<sup>211</sup>

In fact, islands have been given reduced power to generate extended maritime zones in every major judicial or arbitral decision delimiting maritime boundaries,<sup>212</sup> and this same approach would appear to be appropriate in the Aegean, to achieve the “equitable result” required by Article 83 of the 1982 Law of the Sea Convention and by customary international law. Turkey also points out that it has neither signed nor ratified the 1982 United Nations Law of the Sea Convention and has persistently rejected any argument that would allow Greece to extend its territorial seas in the Aegean or limit Turkish access to maritime areas it has traditionally utilized for resources and navigation.<sup>213</sup> Those authors who have found the Turkish legal arguments to be sound have concluded that Turkey should be entitled to about one-third of the continental shelves and exclusive economic zones in the Aegean.<sup>214</sup>

Authors supporting the Greek position cite Article 121 of the 1982 United Nations Law of the Sea Convention for the proposition that islands are entitled to generate continental shelves and exclusive economic zones in the same manner as continental land masses, and hence that the continental shelf boundary should be the median or equidistance line between the eastern Greek islands and the Turkish coastline.<sup>215</sup> Greek authors also emphasize their security concerns and argue that if the continental shelf boundary were a median line in the middle of the Aegean between the continental land masses of the two countries (ignoring the islands), such a line would threaten the physical contiguity and military security of the Greek nation. One Greek scholar who has written several articles on this topic summarizes his position as follows:

First, equidistance is the main factor and coastlengths come in only where the disproportion of the proposed shares to lengths is gross and only for a moderate correction. Second, all maritime fronts which face the delimitation area in all directions are treated equally and irrespective of whether they belong to mainlands or islands. Third, a minimum shelf and exclusive zone of 12 miles is recognized under all circumstances, subject, of course to the median line limitation. Fourth, whether the area is a “semi-enclosed sea” is irrelevant in determining the maritime zones, although, of course, the availability of space affects all sorts of calculations relating especially to the proportionality adjustments and the tangential factors. It is a major error, therefore, to calculate the shares in the Aegean as if proportionality were the only

factor or on the assumption, detached from the proportionality process, that the territorial sea of some islands is not only their minimum but also their maximum entitlement.<sup>216</sup>

Utilizing these principles, Professor Kozyris concludes that Turkey is entitled, at most, to “between 11-12%” of the Aegean’s waters and continental shelf.<sup>217</sup> Greek authors have characterized the idea that territorial-sea enclaves be drawn around the eastern Greek islands as “unthinkable.”<sup>218</sup> Some have acknowledged that some degree of “proportionality” would be considered by an international tribunal, although they are reluctant to grant Turkey much of a share under this principle.<sup>219</sup> Another Greek scholar has agreed with Professor Kozyris’s estimate and has argued that the most Turkey could expect under the “equity principle” would be “10-15% of the total continental shelf area of the Aegean.”<sup>220</sup>

In earlier writings,<sup>221</sup> the author has suggested that the most equitable solution to this dispute would involve dividing the Aegean into three sectors because of the different geography as one goes from north to south.<sup>222</sup> In the northern Aegean, which has relatively few islands, a median line could be drawn between the continental land masses of the two countries, which would be adjusted somewhat toward Turkey because of the location of the islands and the proportionality of the coasts. Six-nautical-mile territorial-sea enclaves could be drawn around the Greek islands on the Turkish side of this line.

In the central sector, the number of Greek islands increases, so the maritime boundary would move eastward toward Turkey’s coast. But Turkey should be allocated enough maritime area to give it a corridor from Istanbul to the Mediterranean Sea and thus to protect its security needs. In the southern sector, the number of Greek islands increases once again, and thus the maritime boundary line would move further east, but a Turkish corridor must still be provided to ensure unimpeded access.

In drawing the precise lines, attention must be given to the comparative length of the coastlines of the two countries.<sup>223</sup> If all islands are ignored, this ratio favors Greece by 59 to 41, and if the islands are included, the ratio is in favor of Greece by a 4 to 1 margin. Decisions of the International Court of Justice have not used such figures with precision, but nonetheless have examined them to determine if a solution comports with a sense of rough justice or relative fairness. If its earlier decisions are followed, the International Court of Justice would probably adopt a solution that allocated to Turkey somewhere between 20% and 41% of the Aegean’s exclusive economic zone and continental shelf, while also protecting its security and navigational interests by ensuring that it has a corridor connecting the Turkish Black Sea Straits to the Mediterranean.<sup>224</sup>

Another solution that has appealed to authors seeking an equitable result in this complex geographical context is the “fingers” approach.<sup>225</sup> Under this solution, Turkish sovereignty would be recognized over the continental shelf that extends from Turkey’s Aegean coast through the three or four gaps in the eastern Greek islands that hug Turkey’s coast. One Greek writer has acknowledged that this approach might be appropriate to give Turkey a continental shelf “in the wide openings of the sea between the islands.”<sup>226</sup>

If the Aegean boundary delimitation were submitted to an international tribunal for adjudication, the tribunal would have to determine what adjustments should be made from the standard “median-line/equidistance” approach in the name of “equity” in light of the “special circumstances” created by the geography of the Aegean, the unique security interests of Turkey, and the disproportionate nature of the outcome if the median line from Greece’s eastern islands were to be used. The disproportionate outcome is linked to access to resources, as well as to the security claim.



With regard to small islands, tribunals have not given islands full power to generate maritime zones if the outcome of such generation would be to limit the zones created by adjacent or opposite continental land masses. Tiny islets are frequently ignored altogether,<sup>227</sup> but even some substantial islands are given less power to generate zones than their location would warrant.<sup>228</sup> This approach was also followed in the *Eritrea-Yemen* Arbitration, where the tribunal gave no effect whatsoever to the Yemenese island of Jabal al-Tayr and to those in the al-Zubayr group, because their “barren and inhospitable nature and their position well out to sea . . . mean that they should not be taken into consideration in computing the boundary line.”<sup>229</sup>

Similarly, in the recent *Qatar-Bahrain* case, the International Court of Justice ignored completely the presence of the small, uninhabited, and barren Bahraini islet of Qit’at Jaradah, situated about midway between the main island of Bahrain and the Qatar peninsula, because it would be inappropriate to allow such an insignificant maritime feature to have such a disproportionate effect on a maritime delimitation line.<sup>230</sup> The Court also decided to ignore completely the “sizeable maritime feature” of Fasht al Jarim located well out to sea in Bahrain’s territorial waters, which Qatar characterized as a low-tide elevation and Bahrain called an island, and about which the tribunal said “at most a minute part is above water at high tide.”<sup>231</sup> Even if it cannot be classified as an “island,” the Court noted, as a low-tide elevation it could serve as a baseline from which the territorial sea, exclusive economic zone, and continental shelf could be measured.<sup>232</sup> But using the feature as such a baseline would “distort the boundary and have disproportionate effects,”<sup>233</sup> and, in order to avoid that undesirable result, the Court decided to ignore the feature altogether.

Greek writers try to ignore or explain away these precedents by saying that they are based on “proportionality,”<sup>234</sup> or because the islands were totally embraced by the opposite land mass,<sup>235</sup> or because of some other equitable consideration.<sup>236</sup>

The concept of “special circumstances” or “relevant circumstances” has been utilized by tribunals to make adjustments that seem appropriate in light of relationships, geographical and otherwise, between the opposite or adjacent states. As explained elsewhere,<sup>237</sup> these circumstances include security needs as well as geographical anomalies. The attention tribunals give to security interests was restated recently in the *Eritrea-Yemen* Arbitration, where the tribunal quoted from Judge Manfred Lachs’s opinion in the *Guinea/Guinea-Bissau* Arbitration, saying that “our principal concern has been to avoid, by one means or another, one of the Parties finding itself faced with the exercise of rights, opposite to and in the immediate vicinity of its coast, which might interfere with its right to development or put its security at risk.”<sup>238</sup>

In the Aegean, Turkey’s security needs are significant, and it is highly likely that any tribunal would recognize and try to accommodate them. The Greek islands trap the Turkish coastline,<sup>239</sup> and the maritime zones claimed by some Greek authors would significantly impair Turkish navigational freedoms. One aspect of the customary international law “principle of nonencroachment” is codified in Article 7(6) of the Law of the Sea Convention,<sup>240</sup> and this principle seems generally to stand for the proposition that the maritime zones of one state should not be permitted to cut off the extension of another state’s entry into the high seas.<sup>241</sup> The principle of nonencroachment has been recognized by the International Court of Justice in several cases, including the *North Sea Continental Shelf* cases,<sup>242</sup> the *Jan Mayen* case,<sup>243</sup> and the *Gulf of Fonseca* case.<sup>244</sup> In the *Gulf of Fonseca* case, the Court recognized a shared or “condominium” control over the resources of the Gulf and extended that condominium regime into an exclusive economic zone corridor projecting to the high seas.<sup>245</sup> And in the *St. Pierre and Miquelon*



Arbitration between France and Canada, the tribunal gave the French islands a narrow 200-nautical-mile exclusive economic zone corridor across the Grand Banks to the high seas.<sup>246</sup>

With regard to resources, tribunals have tended to ignore them, with the notable exception of the *Jan Mayen* case, where the International Court adjusted its outcome to ensure equitable access by both parties to the important capelin fishery. This decision has been (unenthusiastically) summarized by a Greek author as follows:

*Jan Mayen* is the only case where the location of resources was expressly considered and given some effect on the delimitation line. The Court divided a portion on Jan Mayen's side of the median line into three unequal zones and Zone 1, although comparatively small within the entire region, contained most of the capelin, the high stakes of the dispute. While the Court quantified proportionality to require roughly a two-thirds share in favor of Jan Mayen [i.e., Norway] in Zones 2 and 3, it drew a median line through Zone 1 on the theory that *equitable* access of Denmark to the fishing resources in the circumstances required *equal* access to those areas.<sup>247</sup>

How precisely a tribunal would balance all these considerations in the Aegean context is difficult to predict with any level of certainty, but it can be concluded with some confidence that adjustments would be made to a median line approach, in light of the unique geography and security considerations of this region. One Greek author has acknowledged that "under the present conditions of customary law, neither Greece nor Turkey may expect the exclusive application of their preferred method of delimitation"<sup>248</sup> and that the locations of the eastern Greek islands "might be considered as relevant circumstances justifying a deviation from the strict median line suggested by Greece."<sup>249</sup> Indeed, Greece itself has departed from a strict median line approach in its boundary delimitation with Italy, where "there was an obvious diversion from it at its southernmost part, to the detriment of Greece, and an equally obvious departure from the logic of the baselines in the case of the Gulf of Taranto."<sup>250</sup>

## Passage Rights

Turkey's need for a navigational corridor through the Aegean is so central to its security interests that it must be part of any solution to this dispute. Even under the present situation, with Greece claiming a 6-nautical-mile territorial sea in the Aegean, Turkey has only limited and narrow routes whereby its ships and planes can pass from Turkish territory into the Mediterranean without passing through or over Greece's territorial sea. If Greece expanded its territorial sea from 6 to 12 nautical miles, "Turkey would be deprived of a valuable high seas corridor, open at present and running from the Mikonos-Ikaria strait down the Dodecanese islands through to the Karpathos-Rhodes strait."<sup>251</sup> Even Greek scholars have recognized that they can understand why Turkey would view such an expansion as "a quasi-asphyxiation of its naval interests in the region."<sup>252</sup> Other maritime powers, including the United States and Russia, would also be concerned about limitations on their naval mobility in the region.<sup>253</sup>

If any expansion of the territorial seas around some of the Greek islands were to occur, it would be crucial to ensure that a route is identified through which Turkish ships and planes, as well as those of third parties, can travel as a matter of right. These routes include, of course, the busy routes from the Black Sea and Istanbul into the

Mediterranean Sea, but they also include the route from Turkey's second most important port, Izmir. The right of innocent passage would exist through Greece's territorial sea, but this right does not apply to aircraft; submarines exercising the right must surface; and the status of this passage regime in wartime is unclear.<sup>254</sup> Also,

innocent passage through a state's territorial sea must be both continuous and expeditious; it may include stopping and anchoring only as required by navigation or *force majeure*. Further, it must indeed be "innocent," i.e., not prejudicial to the peace, good order, or security of the coastal state. Additionally, no fishing or research is allowed while in innocent passage. For that matter, no activity inconsistent with passage itself is permitted, absent approval of the coastal state.

Restrictions on military activities are even more severe. Any threat or use of force against the coastal state is obviously unacceptable; so too are such specific activities as military exercises, weapons firing, the launching, landing, or embarking of aircraft or helicopters, and intelligence collection.<sup>255</sup>

The right of transit passage through international straits would also exist, but it is not entirely clear whether this right is a norm of customary international law or is a right given only to those countries that have ratified the Law of the Sea Convention.<sup>256</sup> It is also not clear whether this right applies to each and every strait or only those designated by the coastal state as permitting such passage. One would think that this right of transit passage would exist at least for the major shipping routes leading from the Turkish Straits into the Mediterranean, but one Greek scholar recently suggested that "[i]t would be reasonable to assume" that "the narrows between the Kos and Astipalaia islands, Amorgos and Kalimnos, Naxos and Patmos, [and] Mikonos and Ikaria," which he characterized as "borderline cases," "fall short of the definition of straits used for international navigation, and consequently would be subject to the more restrictive, innocent passage regime."<sup>257</sup> These "borderline" "narrows" are, in fact, the major and most logical route to get from the Turkish Strait into the eastern Mediterranean and the many ports in the Middle East.

Opinions are decidedly mixed on this topic, and other commentators, neutral to the Aegean region, have observed that "minor" straits, including perhaps those in the Aegean that connect an exclusive economic zone or high seas area with a territorial sea, may be governed by the regime of "nonsuspendable innocent passage,"<sup>258</sup> which differs from transit passage because it does not allow submarines to pass submerged nor does it guarantee overflight rights of airplanes.<sup>259</sup> If transit passage will not exist in these straits, then the fears of Turkey and other maritime powers about the consequences of Greece's expansion of its territorial sea from 6 to 12 nautical miles are indeed justified.

It is also unclear whether the right of transit passage would apply, for instance, to ships leaving Izmir and traveling to the Mediterranean, because the right is defined as applying to "straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."<sup>260</sup> A ship departing from Izmir would be leaving from Turkish territorial sea and would not, therefore, be passing from one area of high seas or exclusive economic zone into another.<sup>261</sup> The vessel may not be involved in "international navigation" either, because it may, for instance, be going to a Turkish port on the Mediterranean, such as Antalya, Mersin, or Iskenderun.

A final unresolved issue is what the passage rights through the Aegean would be in

times of war. An Italian scholar has written that “the status of international straits in time of war has never been completely clarified.”<sup>262</sup>

Greece opposed the concept of “transit passage through international straits,” when this notion was being developed in the negotiations that led to the 1982 Law of the Sea Convention.<sup>263</sup> And when it signed the Law of the Sea Convention in December 1982, Greece made the following declaration:

The present declaration concerns the provisions of Part III “on straits used for international navigation” and more especially the application in practice of articles 36, 38, 41 and 42 of the Convention on the Law of the Sea. In areas where there are numerous spread out islands that form a great number of alternative straits which serve in fact on and the same route of international navigation, it is the understanding of Greece, that the coastal State concerned has the responsibility to designate the route or routes, in the said alternative straits, through which ships and aircrafts of third countries could pass under transit passage regime, in such a way as on the one hand the requirements of international navigation and overflight are satisfied, and on the other hand the minimum security requirements of both the ships and the aircrafts in transit as well as those of the coastal State are fulfilled.<sup>264</sup>

This rather feisty declaration (repeated when Greece ratified the Convention in 1995) raises a number of issues, which would become particularly acute if Greece should ever extend its Aegean territorial seas to 12 nautical miles. Greece asserts the right to designate those straits that international shipping (and aircraft) can utilize, but the United States and other maritime powers have argued that the transit passage right applies to every strait and that no rights of designation exist. Some commentators have speculated that Greece would like to “prevent Turkish aircraft from flying through straits near the Greek mainland, particularly the Kea Strait southeast of Athens.”<sup>265</sup> The Kea Strait may not be subject to transit passage under the regime established by the Law of the Sea Convention, in any event, because of the “Messina exception” in Article 38(1), which says that “transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.”<sup>266</sup>

Turkey’s contention that the 12-nautical mile limit is not appropriate for tightly congested shared bodies of water is supported by examples from around the globe where countries have claimed less than 12-mile territorial seas. Denmark, for instance, has claimed only a 3-nautical-mile territorial sea and Finland’s claim is only 4 nautical miles.<sup>267</sup>

The closest geographical analogy is found in the Gulf of Finland, where the important Russian port of St. Petersburg (formerly Leningrad) sits at the eastern end, wedged in between Finland in the north and Estonia in the south.<sup>268</sup> Finland has claimed a 12-nautical-mile territorial sea generally, but has limited its claim to three nautical miles in the Gulf of Finland to enable Russia to have a corridor for unimpeded access to the Baltic Sea.<sup>269</sup>

Another close analogy is in Northeast Asia, where Japan, which asserts a 12-nautical-mile territorial sea in general, claims only a 3-nautical mile territorial sea in the Soya Strait, the Tsugaru Strait, the eastern and western channels of the Tsushima Strait, and the Osumi Strait.<sup>270</sup> In fact, both the Republic of Korea and Japan have limited their territorial-sea claims around the land areas adjacent to the Korean Strait to 3 nautical miles, in order to permit unimpeded passage through this area.<sup>271</sup>

Similarly, Belize has defined its territorial sea as extending 12 nautical miles from its coast, but has limited the claim to only 3 nautical miles between the mouth of the Sarstoon River and Ranguana Caye in order to give Guatemala a corridor for unimpeded transit into the Caribbean Sea, pending further negotiations.<sup>272</sup> Another example is provided in the France-Monaco Maritime Delimitation Agreement of 1984 which allocated a 12-nautical-mile corridor to Monaco, to give it direct access to the Mediterranean.<sup>273</sup>

An equitable solution to this conundrum in the Aegean must utilize creative innovations to protect the interests of Greece, Turkey, and third states. Such a solution should include reducing the territorial sea claims in certain congested locations in the Eastern Aegean to three nautical miles in order to provide appropriate corridors for unimpeded navigational and overflight passage.

### **The Interrelationships among the Issues**

The controversies described above are all important and are all interrelated, but some are clearly more important than others. Crucial to Turkey are its navigational and overflight freedoms, because they are central to Turkey's ability to move goods and maintain its military readiness. The resource issues have a potential economic importance, and the delimitation of maritime space also has deep symbolic meaning for both countries. Both countries have a stake in the ecological health of the Aegean and understand that they must cooperate to maintain and improve that environmental sustainability.

The width of the territorial sea (and the associated regulation of the air space) around the Aegean islands and the delimitation of the continental shelf are interrelated, because both impact on Turkey's ability to exercise navigational freedoms. The issues regarding sovereignty over unnamed islands and demilitarization of the Eastern Aegean islands are conceptually different, but Turkish scholars continue to link them to the maritime-space issues, perhaps because they remain as festering disputes and their solution might be appropriately found as part of a "package deal."<sup>274</sup>

Although none of the issues involved are unimportant to the Aegean neighbors, for each the security concerns are paramount, and for Turkey this issue focuses in particular on the free mobility of its naval vessels and planes. If any expansion of the Greek territorial sea is to occur, then the rights of transit passage must be crystal clear. One Greek scholar has suggested that Greece limit its territorial sea claim around those navigational corridors that must be used to move from the Turkish Straits into the Mediterranean.<sup>275</sup> A former Greek diplomat, Ambassador Byron Theodoropoulos, who focused on Turkish and Cypriot affairs during his career, has suggested an approach that would include: (1) imposing a 30- to 50-year moratorium on the delimitation and exploitation of the continental shelf; (2) claiming a 12-nautical-mile territorial sea around only Greek's continental shores; (3) leaving the territorial sea around the Aegean islands at 6 nautical miles; and (4) "rearranging the width of its air-space accordingly."<sup>276</sup>

This proposed solution is somewhat similar to the views of many outside scholars who have promoted the idea of establishing a joint development zone for some or all of the Aegean that lies beyond the territorial sea.<sup>277</sup> But Ambassador Theodoropoulos's approach may be more practical, because it requires less in the way of action by either party at the present time. His solution would be even better if it included reducing territorial sea claims in certain parts of the Eastern Aegean to three nautical miles to offset the increases to 12 nautical miles along continental Greece.

Under Ambassador Theodoropoulos's proposal, the sovereignty claims would be set

aside for the time being, similar to what has happened to the national claims over Antarctic territory.<sup>278</sup> This freezing of territorial claims in the Aegean would recognize the *de facto* sharing of the waters between Greece and Turkey beyond each nation's territorial sea. Neither side would have to forego its claims during such a moratorium, but the passage of time might allow the neighbors to develop greater economic and cultural links, thus promoting a different approach toward settlement when these disputes are reexamined after a generation or two have passed. And, for now, both sides could continue to utilize the Aegean, exercising freedoms of navigation, and cooperating with regard to resource exploration and environmental protection.

## Summary of Conclusions and Recommendations

### *Sovereignty over Disputed Islets*

The status of the December 28, 1932 *proces verbal* between Turkey and Italy<sup>279</sup> remains unresolvable. It was never ratified by Turkey's legislature, never recorded at the League of Nations, and not mentioned in the 1947 Paris Peace Treaty, so it can only be viewed as the views of the representatives of the two countries who were authorized to address the issue. Although it cannot be completely dismissed as irrelevant, it is clearly not decisive in resolving the sovereignty disputes.

Turkey's strongest argument regarding sovereignty over the Kardak/Imia Rocks rests on the location of these rocks, only 3.8 nautical miles from the Turkish coast, compared to 5.5 nautical miles from the named Greek island of Kalimnos. Not only are these rocks "more adjacent" to the Turkish coast than to Kalimnos, but also they appear to be within Turkey's territorial sea, which logically reaches the median line between Turkey and Kalimnos, and thus would fall within Turkey's sovereignty if the reasoning utilized in the *Eritrea-Yemen* Arbitration were followed, namely that unnamed islets within a country's territorial sea are presumptively under the sovereignty of the adjacent coastal country.<sup>280</sup>

It is particularly significant that the *Eritrea-Yemen* Tribunal relied explicitly on Article 16 of the 1923 Lausanne Peace Treaty for this conclusion, and that it extrapolated that the principle applied to the currently expanded territorial sea.<sup>281</sup> To review the language in the Lausanne Treaty,<sup>282</sup> Turkey is recognized as having sovereignty over "islands and islets lying within three miles of the coast" in Articles 6 and 12, and then in Article 16 "renounces all rights and title whatsoever over or respecting . . . islands other than those over which her sovereignty is recognised by the said Treaty." The *Eritrea-Yemen* Tribunal concluded that the "3 miles" figure was used in Articles 6 and 12 because that was the mostly widely accepted width for the territorial sea in 1923 and it extrapolated from this language a recognition that islets within a coastal country's territorial sea would presumptively belong to that country. The Tribunal then ruled that this presumption should apply today, even though the territorial sea has expanded (to 12 nautical miles in most areas, and to 6 nautical miles in the Aegean). Utilizing the reasoning of the *Eritrea-Yemen* opinion, those islets within the current territorial sea, which in the Aegean extends to 6 nautical miles, or to the median line between opposite land areas if they are less than 12 nautical miles apart, would belong to the closest adjacent country. Under this reasoning, the Kardak-Imia Rocks would belong to Turkey.<sup>283</sup>

If decision makers found the treaties governing the Aegean islands to be inconclusive regarding sovereignty over the unnamed islets, they would probably look for evidence of recent administrative authority to determine which country had the strongest

claim over the features.<sup>284</sup> With regard to Kardak-Imia, both countries have offered some evidence of recent usage and administrative control, and, if this approach were used, the country that had the strongest evidence would prevail.

Turkey's claim of sovereignty over the tiny islets of Gavdos and Gavdopula, south of Crete, is inevitably weaker than its claim over Kardak/Imia because of the greater distance between Gavdos and Gavdopula and the Turkish coast. Turkey's claim is based primarily on the absence of any specific mention of these islets in any treaty of cession. The autonomous state of Crete did, however, refer to "adjacent islets" in its self-definition when it drafted its 1898 Constitution, after the Ottoman army had withdrawn.<sup>285</sup> The Greek claim over Gavdos and Gavdopula is thus based on "adjacency" or "dependency" or on "contiguity" or "proximity," and also on the fact that it has exercised administrative control over these islets during most of the past century. The basis for the Greek claim must, therefore, be viewed as stronger than the basis for the Turkish claim over these islets.

### *Demilitarization of Eastern Aegean Islands*

The 1923 Lausanne Peace Treaty<sup>286</sup> is a foundational treaty that addresses a wide range of issues and clearly has continuing validity. The respect shown to this treaty by the *Eritrea-Yemen* Arbitral Tribunal<sup>287</sup> leaves no doubt that the treaty continues to be important and to have application to current affairs. But can it be said that every aspect of the treaty is equally valid? Some parts have been explicitly revised, by, for instance, the 1936 Montreux Convention.<sup>288</sup> Other parts have been implicitly revised, as the *Eritrea-Yemen* Tribunal explained when it adapted the three-mile coastal limit to encompass the current, broader, territorial sea limit. Some parts make little sense in our greatly changed world of the 21st century. Whether the demilitarization provisions are still applicable depends on whether they have been superceded by other security arrangements, on whether they continue to serve a useful purpose in reducing military tension, on whether the concerned countries act as if they are still in force, and, ultimately, on whether the NATO treaty partners view these provisions as still in force. Turkey still believes they are in force. Greece, as late as 1975, indicated it believed they were in force,<sup>289</sup> but in 1986, its Prime Minister said that Greece had renounced them.<sup>290</sup> The issue thus turns on how other nations view the matter, whether they have "acquiesced" to Greece's renunciation, or whether they still believe that Greece is obliged to maintain the demilitarized status of the islands. The views of Greece's NATO partners are particularly important on this matter, and NATO thus far has acted as if the demilitarization requirements are still in force.

The 1923 Lausanne Treaty is particularly significant because it is a boundary treaty, and such treaties are designed to be sacrosanct and permanent. Article 62(2) of the Vienna Convention on the Law of Treaties is explicit in saying that boundary treaties cannot be terminated or abrogated because of a "fundamental change of circumstances." Nonetheless, the details in boundary treaties are frequently modified, sometimes through later treaties and sometimes from unilateral initiatives combined with acquiescence by other countries. Italy's militarization of its islands, in direct violation of language in the 1947 Paris Peace Treaty, provides an example of such a modification resulting from unilateral action plus acquiescence.<sup>291</sup> Greece has taken some action to militarize some of its eastern Aegean Islands.<sup>292</sup> Turkey has protested, so it has not "acquiesced" in this action. As stated above, the actions of other concerned countries will be decisive to determine whether the Greek action will be tolerated and accepted.



Has there been a “fundamental change of circumstances” (*rebus sic stantibus*)? Certainly we live in a very different world today from the world of 1923. Relations between Greece and Turkey have undergone many changes during that time. But tensions still exist, as does the possibility of military conflict. The technological changes are perhaps most important. No longer is adjacency important for launching air strikes or missile attacks, so the militarization or lack thereof of the eastern Aegean islands is less significant in the military balance of power. Although the symbolism of demilitarization may still be important for the Aegean neighbors, the practical military aspects seem less significant. International law, as reflected in Article 62 of the Vienna Convention on the Law of Treaties, provides a narrow but significant ground for altering treaty obligations based on changes to circumstances that were “an essential basis of the consent of the parties to be bound” and that “radically” transform the obligations incurred in the treaty.<sup>293</sup> Turkey argues that demilitarization was an essential component of its agreement to accept Greek sovereignty over the Eastern Aegean Islands, and therefore that if demilitarization ends, sovereignty itself would be in doubt.

Both Greece and Turkey have accused the other country of committing “material breaches” of the 1923 Lausanne Peace Treaty. Article 60(3)(b) of the Vienna Convention on the Law of Treaties defines a “material breach” as “the violation of a provision essential to the accomplishments of the object or purpose of the treaty.”<sup>294</sup> This definition is somewhat circular in the present context, because the question presented is whether some militarization of the eastern Aegean Islands, or some overflights by Turkish airplanes, does, in fact, defeat the “object or purpose of the treaty.” If such actions are viewed as relatively minor alterations of the treaty, then the rest of the treaty would still be binding and obligatory. If, on the other hand, the demilitarization provisions were essential conditions to the package deal found in the 1923 Treaty, their violation could alter the fundamental treaty relationship and, in the language of Article 60(1) of the Vienna Convention on the Law of Treaties, could entitle the non-breaching party “to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.” If Greece and Turkey have both engaged in some violations of the strict language of the Lausanne Treaty, then their violations could be viewed as canceling each other, leaving the remainder of the Treaty as binding upon the parties.

Articles 53 and 64 of the Vienna Convention on the Law of Treaties say that treaties are void if they conflict with a peremptory norm of general international law (*jus cogens*). The right of a country to engage in self-defense has been characterized as “inherent” in Article 51 of the United Nations Charter. Although the right of self-defense is not usually included in lists of *jus cogens* norms, because they tend to focus on the fundamental human rights of individuals, it is probable that most international law scholars would rank the right of self-defense high on the scale of transcendent norms of international law. To the extent, therefore, that the demilitarization clauses in the 1923 Lausanne Peace Treaty, as applied to the present security situation, deprive Greece of the inherent right to defend its sovereign territory, they might be viewed as void, in violation of a *jus cogens* norm of international law.<sup>295</sup> On the other hand, demilitarized zones remain common, and some, such as the one governing the Baltic’s Aaland Islands, have lasted for many generations. As long as a demilitarized zone continues to serve a useful role in reducing military tension, it should be recognized as valid.

Professor Toluner has offered a spirited explanation to support the conclusion that the 1936 Montreux Convention does not lift the demilitarization requirement on Lemnos,<sup>296</sup> and her reasoning is not without logic and force. But the actual language in the Preamble,

the lack of reciprocity in the lifting of the demilitarization requirement for Turkish islands and territories while leaving it in place for Greek islands, combined with Foreign Minister Aras's statement to the Turkish Parliament<sup>297</sup> leave the matter in some doubt. The most important evidence in support of Professor Toluner's conclusion is the fact that Greece did not immediately militarize Lemnos and appears to have viewed the demilitarization requirement as remaining in force for a number of decades after 1936.

The demilitarization requirement governing Lemnos and Samothrace found in Article 4(3) of the 1923 Straits Convention<sup>298</sup> still exists unless it has been modified in the 1936 Montreux Convention, or unless it has been altered by subsequent Greek initiatives accompanied by acquiescence of other countries, or unless it has been eroded or undercut by the passage of time, the change of conditions, or the recognition that the right of self-defense ultimately prevails over temporary demilitarization requirements.

The demilitarization requirement governing Lesvos (Mytilene), Chios, Samos, and Ikaria (Nikaria) found in Article 13 of the 1923 Lausanne Peace Treaty<sup>299</sup> has not been altered explicitly by any subsequent agreement, although a few authors read the 1936 Montreux Convention so broadly that it alters the demilitarization clauses in the main Peace Treaty as well as the provision in Article 4(3) of the companion Straits Convention covering Lemnos and Samothrace. If the requirement has not been explicitly modified, it remains in force unless it has been altered by the subsequent unilateral Greek initiatives accompanied by acquiescence of other countries, or unless it has been eroded or undercut by the passage of time, the change of conditions, or the recognition that the right of self-defense ultimately prevails over temporary demilitarization requirements.

The demilitarization requirement governing the Dodecanese Islands found in Article 14 of the 1947 Paris Peace Treaty Between the Allied Powers and Italy<sup>300</sup> has not been altered explicitly by any subsequent agreement, so it remains in force unless it has been altered by the subsequent unilateral Greek initiatives accompanied by acquiescence of other countries, or unless it has been eroded or undercut by the passage of time, the change of conditions, or the recognition that the right of self-defense ultimately prevails over temporary demilitarization requirements. The question of whether Turkey, a non-party to the 1947 Treaty, can enforce the requirement presents a separate question (see below). Also, the action of Italy militarizing its named islands despite the explicit prohibition in the 1947 Peace Treaty<sup>301</sup> demonstrates that the demilitarization requirements are subject to alteration through unilateral action combined with acquiescence.

Most treaties do not create rights or duties for noncontracting parties and are not enforceable by them. But some treaties have a more universal purpose and impact, because they are designed to provide enduring rules governing a topic. Peace treaties and boundary treaties are the most prominent examples of such important treaties, and the 1923 Lausanne Peace Treaty and the 1947 Paris Peace Treaty Between the Allied Powers and Italy are examples of such peace and boundary treaties. Article 36(1) of the Vienna Convention on the Law of Treaties incorporates this idea by saying that

A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

Although Turkey was not a party to the 1947 Treaty, it was certainly affected by the treaty, and the requirement that the Dodecanese Islands remain demilitarized was designed to promote stability and security in the eastern Mediterranean, and Turkey was clearly

intended to be a prime beneficiary of this requirement. Although this area is somewhat murky, Turkey can argue that it is entitled to invoke and enforce the demilitarization clause, as a third-country beneficiary. The issues raised above regarding unilateral initiatives, acquiescence, and changed circumstances would still remain as potential problems.

What would be the consequences of a Greek breach of its demilitarization obligation? Article 60 of the Vienna Convention on the Law of Treaties allows countries to terminate treaties if another contracting party engages in a material breach of its obligation. For violations that do not rise to the majesty of a “material breach,” international law imposes an obligation on the party committing the violation to provide reparations that are adequate to place the injured party in the position it would have been in had the violation not occurred.<sup>302</sup> It is difficult to be clear on how this standard would be met in the present context, but the injured party typically must present evidence regarding the harm it has suffered to document its claim.

As the preceding paragraphs explain, Turkey has a relatively strong legal position that the demilitarization provisions found in the 1923 Lausanne Peace Treaty and the 1947 Paris Peace Treaty are still in effect. The argument is strongest for the Dodecanese, because no supervening treaties have modified the requirement; it is fairly strong for Lesbos (Mytilene), Chios, Samos, and Icaria (Nikaria), because the 1936 Montreux Convention does not appear to be designed to affect the demilitarization requirement covering these islands; and it is somewhat weaker (but not without substantial textual support) for Lemnos and Samothrace, because it can be argued that the 1936 Montreux Convention was designed to revise the regime established in the 1923 Straits Convention.

### ***Breadth of the Territorial Sea***<sup>303</sup>

Article 3 of the United Nations Law of the Sea Convention recognizes the “right” of countries to establish territorial seas of “up to a limit not exceeding” 12 nautical miles, but Turkey has established itself as a “persistent objector” to the assertion of such a claim in the Aegean, and a number of examples exist where narrower territorial seas have been claimed in crowded semi-enclosed seas to recognize navigational freedoms of others and historical uses of the waters and its resources.<sup>304</sup> Turkey is on firm legal ground with regard to its position on this issue but may wish to be flexible with regard to Greek territorial waters adjacent to Greece’s continental areas and those islands that hug Greece’s continental coast in the western Aegean. In other words, Turkey could permit Greece to declare a territorial sea of 12 nautical miles around its continental coasts, including perhaps the islands in the western half of the Aegean, in exchange for maintaining 6 nautical miles elsewhere and reducing its claims to 3 nautical miles in certain highly congested areas of the eastern Aegean. It is the Eastern Aegean Islands that create the problem for Turkey, with regard in particular to its navigational and overflight freedoms. By focusing on its needs for navigational corridors that do not pass through Greek territorial waters, Turkey may be able to protect its fundamental interests. With regard to resource exploitation, it may be best to promote a moratorium on hydrocarbon exploration and exploitation for another generation or two, or to work toward a sharing of efforts in a joint development zone that would cover part of the Aegean.

### ***Air Defense Zones Around the Greek Islands***<sup>305</sup>

The ten-nautical-mile Greek air defense zone restricts overflight even more dramatically than an expansion of the territorial sea would restrict sea passage, because planes have

no rights of innocent passage. Although military security zones are not entirely without precedent, this Greek zone is unusual because it is exclusionary and in a crowded semi-enclosed sea. Turkey has been persistent in objecting to this zone, and has been successful in preventing any argument from being made that it has “acquiesced” in the establishment of such a zone. If compromise is necessary or appropriate in the future, Turkey might agree to this air defense zone around Greece’s continental shores, and perhaps around its western Aegean Islands, so long as it is eliminated completely around the Eastern Aegean Islands.

### ***Flight Information Region***<sup>306</sup>

The assignment by the International Civil Aeronautic Organization of the Aegean Flight Information Region (FIR) to Greece has presented an annoyance to Turkey, even though the assignment has no direct impact on jurisdictional rights or sovereignty over territory. It is important for Turkey to explain regularly that the FIR has no relationship to territorial or jurisdictional rights and to ensure that the FIR does not turn into or support a jurisdictional claim.

### ***Delimitation of the Continental Shelf***<sup>307</sup>

Because the delimitation of the continental shelf in the Aegean is so complex, the best approach is probably to postpone the delimitation as long as possible, unless active exploration or exploitation of hydrocarbons is occurring or is anticipated. Many authors have written on this topic, and the solution that international law requires is presented above.<sup>308</sup> Although the view here is that an international court or arbitral tribunal should and would allocate Turkey between 20% and 41% of the Aegean continental shelf, such an outcome cannot be guaranteed, and thus it may be better to submit the matter to a nonbinding conciliation commission rather than a binding tribunal.<sup>309</sup> It is also important, before any submission would be made, to clarify precisely the facts underlying the submission and the questions being presented. It would be best if the issues related to the width of the territorial sea and the air defense zone, as well as passage rights, could be resolved through negotiations, before the continental shelf delimitation were presented to a conciliation commission or tribunal.

### ***Passage Rights***<sup>310</sup>

Navigational and overflight freedoms are crucial to Turkey and to the many other nations that utilize the Aegean for passage. Preserving, protecting, and explicitly identifying these freedoms must be the highest priority for Turkey in its efforts to resolve these issues. The optimal outcome would be to keep the territorial sea in the Aegean at 6 nautical miles, with claims in the congested eastern Aegean reduced to 3 nautical miles, and to reduce the air defense zone to these limits, as well. As part of a compromise, Turkey might consider accepting an expansion of the territorial sea to 12 nautical miles along Greece’s continental coasts and perhaps also around some or all of its western Aegean Islands. Another possibility, but somewhat less ideal, would be to have certain corridors designated for uninterrupted passage and overflight for all civilian and military ships and planes. It is disconcerting that the academic writing on this subject is so diverse.<sup>311</sup> Because views vary so widely, it is essential to clarify the rules. Especially since Turkey has not ratified the Law of the Sea Convention, it becomes important for a

navigational regime for the Aegean to be clarified, to ensure the free passage of ships and planes.

### *The Interrelationships among the Issues*

Even though Greece acts as if not all of these issues are on the table for discussion, it is clear that they all play a role in dividing the neighbors, and all need some attention and eventual settlement. One of the more sensible proposals for a present solution is that offered by the retired Greek Ambassador Byron Theodoropoulos, who has suggested: (1) imposing a 30- to 50-year moratorium on the delimitation and exploitation of the continental shelf; (2) claiming a 12-nautical-mile territorial sea around Greece's continental shores; (3) leaving the territorial sea around the Aegean islands at 6 nautical miles; and (4) "rearranging the width of its air-space accordingly."<sup>312</sup> Such a solution would protect most of Turkey's interests in an appropriate fashion and would allow the countries to work together on other issues before returning to the Aegean for a more comprehensive solution during the next generation. An even better solution would include reducing the territorial sea claims in the most congested parts of the eastern Aegean to 3 nautical miles to protect the navigational and overflight freedoms of all nations. A delay in the delimitation of the continental shelf might also enable Turkey to promote the idea that the high seas areas of the Aegean are now *de facto* zones of shared jurisdiction and that Turkey has historical rights in these waters that cannot be ignored in a future delimitation. A formal joint development zone would be ideal, but even if one cannot be established as a formal matter, informal cooperative efforts might be undertaken to protect the Aegean environment and to study the hydrocarbon possibilities.

### Notes

1. See, e.g., Byron Theodoropoulos, *The So-Called Aegean Dispute: What Are the Stakes: What Is the Cost?* in *Greece and the Law of the Sea* 325, 327 (Theodore C. Kariotis ed. 1997): "In the case of the Aegean there is only one claimant party, namely Turkey, while Greece claiming nothing, is reduced to fending off an ever increasing number of Turkish claims."

2. See, e.g., Aslan Gunduz, *A Tentative Proposal for Dealing with the Aegean Disputes*, in *The Aegean Sea 2000* at 139–51 (Bayram Ozturk ed. 2000).

3. 107 *British and Foreign State Papers* 656 and see also *The Treaty of London, 1913*, <http://www.mtholyoke.edu/acad/intrel/boshtml/bos145.htm> (site visited Sept. 12, 2001).

4. 107 *British and Foreign State Papers* 893.

5. In this document, the Great Powers (Germany, Austria-Hungary, Great Britain, Italy, and Russia) said that they had decided "de remettre a la Grece toutes les iles de la mer Egee actuellement occupees par elle, a l'exception de Tenedos, d'Imbros et de Castellorizo, qui doivent etre restituee" to Turkey. See Krateros M. Ioannou, *The Greek Territorial Sea*, in Kariotis, *supra* note 1, at 115, 151 n. 49.

6. See, e.g., Sevin Toluner, *Some Reflections on the Interrelation of the Aegean Sea Disputes*, in Ozturk, *supra* note 2, at 121–26. The 1914 Decision stated that the Greek government should give satisfactory guarantees that these islands "ne seront ni fortifiees ni utilisees pour aucune but naval ou militaire" ("will be neither fortified nor used for any naval or military purposes"). Natalino Ronzitti, *The Aegean Demilitarization, Greek Turkish Relations and Mediterranean Security*, in *The Aegean Issues: Problems and Prospects* 295, 297 (Foreign Policy Institute, Ankara, 1989)(citing Simsir, *Aegean Question, Documents*, vol. II (1913–1914), Ankara, 1982, at 392–93).

7. 28 *L.N.T.S.* 11 (1924), also published in 2 *The Treaties of Peace 1919–1923* at 959 (Carnegie Endowment of Peace 1924). This treaty was between "the British Empire, France,

Italy, Japan, Greece, Roumania and the Serb-Croat-Slovene State, on the one part, and Turkey, on the other part.” The treaty was registered with the League of Nations on Sept. 5, 1924.

8. The land boundary between Greece and Turkey is described in general terms in Article 2(2) of the Lausanne Treaty, and then Article 5 creates a Boundary Commission to define the specific boundary, using criteria provided in the first paragraph of Article 6.

9. Article 14 of the Lausanne Treaty says that the Turkish islands of Imbros and Tenedos: shall enjoy a special administrative organisation composed of local elements and furnishing every guarantee for the native non-Moslem population in so far as concerns local administration and the protection of person and property. The maintenance of order will be assured therein by a police force recruited from amongst the local population by the local administration above provided for and placed under its orders.

The agreements which have been or may be concluded between Greece and Turkey relating to the exchange of the Greek and Turkish populations will not be applied to the inhabitants of the islands of Imbros and Tenedos.

10. The Eritrea-Yemen Arbitration, <http://www.pca-cpa.org> (1998–1999), see *infra* text accompanying note 69.

11. See *infra* text accompanying notes 24–27.

12. 28 *L.N.T.S.* 21–23 (1924), also published in 2 *The Treaties of Peace 1919–1923*, *supra* note 7, at 1023.

13. The relevant language in Article 4 is as follows:

The zones and islands indicated below shall be demilitarised:

...

(3) In the Aegean Sea, the islands of Samothrace, Lemnos, Imbros, Tenedos and Rabbit Islands.

14. Convention for the Delimitation of the Territorial Waters Between the Coasts of Anatolia and the Island of Kastellorizo, 138 *L.N.T.S.* 243 (1933), registered with the League of Nations May 24, 1933, as No. 3191.

15. The Special Agreement concluded on May 30, 1929, submitted the following question to the Permanent Court of International Justice:

Whether according to the Treaty of Peace of Lausanne the following islets should be assigned in their entirety, to either of the parties: Volo (Catal Ada), Ochendra (Uvendire), Furnachia (Furnakya), Cato Volo (Katovolo), Prasoudi, Rho (San Giorgio), Maradi, Tchatulata (Catulata), Pighi (Pigi), Dassia (Dasya), Macri (Makri), Psomi, San Giorgio (Aya Yorgi), Polifados, Psoradia (Psoradya), Ipsili, Alimentaria (Alimentarya), Caravola (Karavola), Roccie Vutzachi (Roksi Vucaki), Mavro Poini and Mavro Poinachi (Mavro Poinaki).

The Court was also asked to determine the sovereignty over the islet of Kara Ada in the Bay of Bodrum. The Kardak/Imia Rocks were not included in the listing given to the Court. See Ioannou, *supra* note 5, at 141 (quoting from P.C.I.J. Delimitation of the Territorial Waters Between the Island of Castellorizo and the Coast of Anatolia Case, Series C, No. 61, at 10).

16. Ioannou, *supra* note 5, at 142.

17. *Id.*

18. See, e.g., Ali Kurumahmut, *A New Greek–Turkish Dispute: Who Owns the Rocks?* in Ozturk, *supra* note 2, at 109, 113–14.

19. See Greek Transmittal to Turkey, Feb. 16, 1996, in Ali Kurumahmut, *Ege’de Temel Sorun*, at EK-21 (1998) (tentative English translation).

20. United States Delegation Journal, Forty-Second Meeting of the Political and Territorial Commission for Italy, October 4, 1946, 3:30 P.M., 3 *Foreign Relations of the United States—1946* at 665–66 (U.S. GPO 1970) and Report of the Political and Territorial Commission for Italy, Oct. 5, 1946, 4 *Foreign Relations of the United States—1946* at 299, 310 (1970). See Yuksel Inan and Sertac H. Baseren, *The Troubled Situation of the Aegean Territorial Waters*, 4:2 *Etudes Helleniques/Hellenic Studies* 55, 65 (1996) (“[D]uring the negotiations of the 1947 Paris Treaty, when Greece demanded a reference to be made to the mentioned [December 28, 1932]



accord, Russia's objections and doubts about the validity of this accord led to the refusal of the Greek proposal. . .").

21. 173 *L.N.T.S.* 215 (1936).

22. See Jon M. Van Dyke, *Legal and Practical Problems Governing International Straits*, in 12 *Ocean Yearbook* at 109, 110–12 (1996).

23. See *infra* text and notes at notes 76–83.

24. Treaty of Peace Between the Allied Powers and Italy, Paris, Feb. 10, 1947, 49 *U.N.T.S.* 126, *TIAS No.* 1648, 61 *Stat.* 1245 (1950), Dept. of State Publication 2743, reprinted and discussed in *European Peace Treaties After World War II* (Amelia C. Leiss ed. 1954).

25. One commentator has noted that although the Dodecanese Islands transferred from Italy to Greece in this treaty “lie just off the Turkish coast” and “had been Turkish until the Italian–Turkish War of 1912, there was little Turkey could do, given its neutral stance during [World War II], to prevent the transfer.” Lt.Col. Michael N. Schmitt, *Aegean Angst—The Greek Turkish Dispute*, 49:3 *Naval War College Review* 42, 47 (1996).

26. The dispute over the Kardak/Imia Rocks is described and analyzed *infra* at notes 29–34 and 72.

27. Kurumahmut, *supra* note 19, at 40 (citing an interview with Professor Sevin Toluner).

28. United Nations Convention on the Law of the Sea, Dec. 10, 1982, UN Doc. 62/122, reprinted in 21 *I.L.M.* 1265 (1982).

29. Ioannou, *supra* note 5, at 140.

30. Inan and Baseren, *supra* note 20, at 65.

31. See *supra* text accompanying notes 11 and 26.

32. Anna Lucia Valvo, *The Aegean Sea between Greece and Turkey: the Kardak Rocks and the Other Islands Never Given*, in Ozturk, *supra* note 2, at 117, 117.

33. Ioannou, *supra* note 5, at 143.

34. *Ibid.*, at 140.

35. See David S. Saltzman, *A Legal Survey of the Aegean Issues of Dispute and Prospects for a Non-Judicial Multidisciplinary Solution*, in Ozturk, *supra* note 2, at 179, 182. Turkey denies that it has “acquiesced,” and has in recent years protested any NATO activity on the islets because of their disputed status. *Ibid.* at 182 n. 58.

36. See Ioannou, *supra* note 5, at 151 n. 53 quoting Article 1 of the 1899 Cretan Constitution as saying that “L’île de Crete avec les îlot adjacent constitue un Etat. . . .”

37. Kurumahmut, *supra* note 18, at 112.

38. For a more complete discussion of some of the material that follows, see Mark J. Valencia, Jon M. Van Dyke, and Noel A. Ludwig, *Sharing the Resources of the South China Sea* 17–20 (1997).

39. Among the decisions that provide guidance regarding the rules that govern the ability of a nation to claim ownership of isolated uninhabited island features are: the *Arbitral Award of His Majesty the King of Italy on the Subject of the Difference Relative to the Sovereignty over Clipperton Island (France v. Mexico)*, Jan. 28, 1931, 26 *Am. J. Int’l L.* 390 (1932); the *Arbitral Award Rendered in Conformity with the Special Agreement Concluded on January 23, 1925, Between the United States of America and the Netherlands Relating to the Arbitration of Differences Respecting Sovereignty over the Island of Palmas (Miangas)*, 2 *R.I.A.A.* 829 (April 4, 1928), reprinted in 22 *Am. J. Int’l L.* 867, 909 (1928) [hereafter cited as *Palmas* arbitration]; the decisions by the International Court of Justice (ICJ) in the *Minquiers and Ecrehos Case (France/United Kingdom)*, [1953] *I.C.J. Reports* 47, and the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*, [1992] *I.C.J. Reports* 351 [hereafter cited as *Gulf of Fonseca* case]; and the recent arbitral decision in the *Eritrea–Yemen* Arbitration, *supra* note 10.

40. Judge Huber was at the time the President of the Permanent Court of International Justice.

41. *Eritrea–Yemen* Arbitration, *supra* note 10, 1998 Award, para. 104.

42. *Palmas Island Arbitration*, *supra* note 39, 2 *R.I.A.A.* 829 at 867.

43. *Ibid.* at 893–94.

44. *Minquiers and Ecrehos* case, *supra* note 39.

45. Each group contains “two or three habitable islets, many smaller islets and a great number of rocks.” *Ibid.*, at 53.

46. The Court noted that “even if the Kings of France did have an original feudal title” to the adjacent Channel Islands, “such a title must have lapsed as a consequence of the events of the year 1204 and following years.” *Ibid.*, at 56. “To revive its legal force to-day by attributing legal effects to it after an interval of more than seven centuries seems to lead far beyond any reasonable application of legal considerations.” *Ibid.* at 57.

47. “What is of *decisive importance*, in the opinion of the Court, is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to *the possession* of the Ecrehos and Minquiers groups.” *Ibid.*, at 57 (emphasis added).

48. *Eritrea–Yemen* Arbitration, *supra* note 10, 1998 Award, para. 450.

49. The United Kingdom submitted evidence that the Jersey courts had exercised criminal jurisdiction over the Ecrehos and Minquiers islets during the nineteenth and twentieth centuries, that the few habitable houses on the islets had been required to pay property taxes, that deeds conveying property had been registered in Jersey, that custom-houses had been established by Jersey officials in both islet groups, and that Jersey officials visited the islets on occasion to license boats, collect census data, and supervise construction of maritime safety facilities. 1953 *Minquiers and Ecrehos* case, *supra* note 39, at 65–66, 69.

50. *Ibid.*, at 53, 67, 72.

51. *Ibid.*, at 71.

52. *Gulf of Fonseca* case, *supra* note 39.

53. *Ibid.*, at 380–81, para. 29, and 558, para. 333.

54. *Ibid.*, at 380–81, para. 29.

55. The Chamber quoted, as what it described as “a classic dictum,” the opinion of Judge Huber in the *Island of Palmas* case: “‘Practice, as well as doctrine, recognizes—though under different legal formulae and with certain differences as to the conditions required—that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title’ (United Nations, *Reports of International Arbitral Awards*, Vol. II, p. 839).” *Ibid.*, at 563, para. 342.

The Chamber then went on to say with regard to the dispute before it:

Where the relevant administrative boundary was ill-defined or its position disputed, in the view of the Chamber the behaviour of the two newly independent States in the years following independence may well serve as a guide to where the boundary was, either in their shared view, or in the view acted on by one and acquiesced in by the other. . . . This aspect of the matter is of particular importance in relation to the status of the islands, by reason of their history.

*Ibid.* at 565, para. 345.

56. *Ibid.*, at 566, para. 347.

57. *Ibid.*, at 566–70, paras. 348–55.

58. *Ibid.*, at 570, para. 356.

59. *Ibid.*, at 570–79, paras. 356–68. Honduras made one protest in 1991, but the Chamber viewed this effort as untimely. *Id.* at 575–77, paras. 362–64. The Chamber also emphasized that Honduras should have protested a delimitation of the Gulf of Fonseca that had the effect of casting doubt on Honduras’s claim of sovereignty over Meanguera. *Id.* at 577–78, paras. 365–66.

60. *Ibid.*, at 579, para. 368.

61. *Eritrea–Yemen* Arbitration, *supra* note 10, 1998 Award, para. 450, citing *Minquiers and Ecrehos*, *supra* note 39, at 47. See generally Barbara Kwiatkowska, *The Future of Islands in the Light of the Eritrea/Yemen Awards* (paper presented to the SEAPOL Interregional Conference, Bangkok, March 21–23, 2001).

62. *Eritrea–Yemen* Arbitration, *supra* note 10, 1998 Award, para. 239.

63. *Ibid.*, paras. 451–52.

64. *Ibid.*, paras. 507–08.

65. *Ibid.*, paras. 509–24.

66. *Ibid.*, para. 458.

67. *Ibid.*, paras. 472, 476–80 citing, among other things, Article 6 of the 1923 Lausanne Peace Treaty, *supra* note 7, to support the presumption that islands within territorial waters are under the same sovereignty as the nearby mainland.

68. *Ibid.*, para. 525. At another point (paragraph 446), the tribunal said: “there is the problem of the sheer anachronism of attempting to attribute to such a tribal, mountain and Muslim medieval society the modern Western concept of a sovereignty title, particularly with respect to uninhabited and barren islands used only occasionally by local, traditional fishermen.”

69. *Ibid.*, para. 165. In paragraph 445, the tribunal characterized the islands as being in “an objective state of indeterminacy.”

70. The International Court of Justice agreed that less in the way of formal displays of sovereignty are required for uninhabited or thinly populated areas in the *Advisory Opinion on Western Sahara*, [1975] *I.C.J. Reports* 12, 43 (1975).

71. See Daniel J. Dzurek, *Southeast Asian Offshore Oil Disputes*, in 11 *Ocean Yearbook* at 157, 170 (1994).

72. See, e.g., Toluner, *supra* note 6, at 121–26 and Sertac Hami Baseren, *Legal Status of the Islands, Islets and Rocks in Aegean as Determined by International Treaties*, in Kurumahmut, *supra* note 19.

73. The *Eritrea–Yemen* Arbitration, concluded that islets within 12 nautical miles of the Eritrean coast (utilizing the breadth of the territorial sea accepted for that region) belonged to Eritrea. *Eritrea–Yemen* Arbitration, *supra* note 10, 1998 Award, para. 472 citing D. Bowett, *The Legal Regime of Islands in International Law* 48 (1978) and Lindley, *The Acquisition and Government of Backward Territory in International Law* 7 (1926), for the proposition that it is presumed that islands within territorial waters are under the sovereignty of the mainland state).

74. See *supra* text and notes at notes 6–13.

75. Tozun Bahcheli, *Greek–Turkish Relations Since 1955* at 146 (1990).

76. 173 *L.N.T.S.* 215 (1936).

77. “Theories abound whether the Montreux Convention relieves Greece of the obligation to demilitarize.” Saltzman, *supra* note 35, at 182.

78. Schmitt, *supra* note 25, at 63.

79. The Protocol to the Convention explicitly said that “Turkey may immediately remilitarise the zone of the Straits as defined in the Preamble to the said Convention.” This language has been understood to permit Turkey to remilitarized the three islands near the mouth of the Dardanelles that were awarded to Turkey in the 1913–23 treaties and agreements. See Henri Adam, *Military Status of the Aegean Islands*, in Ozturk, *supra* note 2, at 205.

80. See Sevin Toluner, *The Pretended Right to Remilitarize the Island of Lemnos Does Not Exist (Limni Ada’sinin Hukuki Statusu ve Montreaux Bogazlar Konvansiyonu)* (1987).

The factual context and meaning of the Montreux Convention is also complicated by a statement the Turkish foreign minister made to the Turkish Grand National Assembly that the “provisions concerning the islands of Lemnos and Samothrace, which belong to our friend and neighbor, Greece, and which had been demilitarized by the Treaty of Lausanne in 1923, are abolished also by the Treaty of Montreux,” discussed *infra* text accompanying notes 124–126.

81. Toluner, *supra* note 6, at 124. See also Gunduz, *supra* note 2, at 144: “The demilitarisation which was the pre-condition of the transfer to Greece of the ownership of the islands is now seriously *de facto* changed or revised by Greece.”

82. Masahiro Miyoshi, *The Aegean Sea and the Aegean Islands in Historical Perspective*, in Ozturk, *supra* note 2, at 86, 87.

83. Adam, *supra* note 79, at 206. *But* see Ronzitti, *supra* note 6, at 298–99, who supports Professor Toluner’s position that the Montreux Convention did not alter the demilitarized status of Lemnos.

84. Andrew Wilson, *The Aegean Dispute* 16 (London, Institute for Strategic Studies, Adelphi Paper No. 155, 1979).

85. Schmitt, *supra* note 25, at 62.

86. Bahcheli, *supra* note 75, at 147.
87. Schmitt, *supra* note 25, at 62.
88. Bahcheli, *supra* note 75, at 147 citing Turkish Ministry of Foreign Affairs, *Turkish Views on the Demilitarized Status of Lemnos and the Eastern Aegean Islands* 10.
89. Schmitt, *supra* note 25, at 62 citing Rinn S. Shinn (ed.), *Greece: A Country Study* 316 (U.S. GPO 1986).
90. The buildup on Lemnos raises particular concern for Turkey, because this island was used as a staging area against Turkey during World War I.
91. Ronzitti, *supra* note 6, at 300 citing U.N.Doc. S/11672, April 14, 1975.
92. George P. Politakis, *The Aegean Dispute in the 1990s: Naval Aspects of the New Law of the Sea Convention*, in Kariotis, *supra* note 1, at 291, 307 and George P. Politakis, *The Aegean Agenda: Greek National Interests and the New Law of the Sea Convention*, 10 *Int'l J. Marine & Coastal L.* 497 (1995).
93. Schmitt, *supra* note 25, at 62. Greece has apparently intentionally repudiated the demilitarization provisions of the 1923 Lausanne Treaty. Prime-Minister Andreas Papandreu said on April 7, 1985: "Did we violate the Lausanne Treaty by militarizing the islands? Yes we did." Saltzman, *supra* note 35, at 181 n. 54.
94. Saltzman, *supra* note 35, at 180. See also Athanassios G. Platias, *Greek Deterrence Strategy, in The Aegean After the Cold War* 61, 83 (Chircop, Gerolymatos and Iatrides eds. 2000).
95. Bahcheli, *supra* note 75, at 149. See also <http://www.mfa.gr/foreign/bilateral/aegean.htm> where the following statement of the Hellenic Ministry of Foreign Affairs is found: "The right of legitimate defense, one of the fundamental rights of the international legal order, possesses the character *jus cogens*. Article 103 of the U.N Charter states that the right of legitimate defense contained in Article 51 overrides any conventional obligation to the contrary."
- Turkey responds to this argument by pointing out that Article 51 of the U.N. Charter authorizes countries to take only temporary steps for self-defense, and only if they are subjected to an "armed attack," and requires threatened countries to report their threat to the United Nations Security Council, seeking its assistance. Greece has not gone to the Security Council for assistance.
96. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF.39/27. Article 62(2)(a) says that "A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary. . . ."
97. See Major General J. H. Marshall-Cornwall, *Geographic Disarmament, A Study of Regional Demilitarization* 170 (1935).
98. *Ibid.*
99. *Ibid.*, at 54–55.
100. *Ibid.*, at 60.
101. *Ibid.*, at 54–55.
102. *Ibid.*, at 58.
103. See generally Anders Gardberg, *Aland Islands: A Strategic Survey* (Finland National Defence College 1995).
104. Convention on Demilitarization of the Aland Islands, March 30, 1856, reprinted in Gardberg, *supra* note 103, at 87. See Adam, *supra* note 79, at 210.
105. Convention Relating to the Non-Fortification and Neutralisation of the Aaland Islands, Oct. 20, 1921, 1922 *L.N.T.S.* 213, reprinted in Gardberg, *supra* note 103, at 90; and see Marshall-Cornwall, *supra* note 97, at 150. The 1921 treaty was ratified by Germany, Denmark, Finland, France, the British Empire, Sweden, Italy, Poland, and Latvia. It prohibited all military activity, but Article 6 allowed Finland to lay mines and take "measures of a maritime nature as are strictly necessary" in times of war in the Baltic.
106. Treaty Between Finland and the Soviet Union Concerning Aland Islands, Oct. 11, 1940, in Gardberg, *supra* note 103, at 95.
107. Treaty of Peace Between the Allied Powers and Finland, Article 5, *Dept. of State Publication* 2743, reprinted in Leiss, *supra* 24; and see Adam, *supra* note 79, at 210.
108. Adam, *supra* note 79, at 211 citing Marcel Sibert, *Traite de Droit International Public*, vol. 1, p. 401 (Paris, 1951).

109. Ronzitti, *supra* note 6, at 295 citing, respectively, 51 *British and Foreign State Papers* 1053 and De Martens, *Nouveau Recueil general de Traites*, III serie, vol. 7, pp. 323–41, Art.1.
110. Treaty of Peace between Japan and Russia, signed at Portsmouth, 5 September 1905, reprinted in C. Parry, ed., *The Consolidated Treaty Series*, Vol. 199, at 144.
111. Treaty of Peace with Germany (Versailles Treaty), signed 28 June 1919, reprinted in *United Kingdom Treaty Series* 4 (1919).
112. See “Versailles, Treaty of,” *Microsoft Encarta Encyclopedia* 99 (1999).
113. See Marshall-Cornwall, *supra* note 97, at 150.
114. Treaty of Peace between Russia and Estonia, signed at Tartu, 2 February 1920, reprinted in 11 *L.N.T.S.* 30 (1922).
115. Peace Treaty between Finland and Russian Socialist Federal Soviet Republic, signed at Dorpat, 14 October 1920, reprinted in 3 *L.N.T.S.* 65 (1921).
116. Convention between Finland and Russian Socialist Federal Soviet Republic regarding Measures taken in Order to Secure Peace at the Frontier, signed at Helsinfors, 1 June 1922, reprinted in 16 *L.N.T.S.* 337 (1923).
117. Treaty of the Delimitation of the Frontier between the Dominican Republic and Haiti, signed at Santo Domingo, 21 January 1929, reprinted in 105 *L.N.T.S.* 207 (1930).
118. 1947 Paris Peace Treaty, *supra* note 24, Articles 49–50.
119. Ronzitti, *supra* note 6, at 295–96 citing Natalino Ronzitti, *Demilitarization and Neutralization in the Mediterranean*, *Italian Y.B. Int’l L.* 35–38 (1985).
120. *Ibid.*, at 296.
121. 1947 Paris Peace Treaty, *supra* note 24, Article 11(2).
122. Ronzitti, *supra* note 6, at 296.
123. Young-Koo Kim, *Northeast Asian Maritime Boundaries and Islands Disputes*, in *Maritime Boundary Issues and Islands Disputes in East Asian Region* 71–72 (1997).
124. See United Nations Charter, Article 51: “Nothing the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.”
125. See Greek and Turkish comments set out at *supra* note 95.
126. The text of Article 13(2) is provided above between notes 11 and 12.
127. The Vienna Convention on the Law of Treaties, *supra* note 96, Article 60(1), “entitles the [non-breaching] party [in a bilateral treaty] to invoke [a material] breach as a ground for terminating the treaty or suspending its operation in whole or in part.” Greece has ratified the Vienna Convention, but Turkey has not. Most commentators view the Vienna Convention as codifying the customary international law of treaties, and thus as binding on all countries, whether they have ratified or not. The Vienna Convention was drafted after the treaties at issue were completed, but the concepts of “material breach” and “fundamental change of circumstances” were previously-existing norms of customary international law that were codified in the Vienna Convention.
128. A “fundamental change of circumstances” can be invoked for treaty termination if “(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of the obligations still to be performed under the treaty.” Vienna Convention on the Law of Treaties, *supra* note 96, Article 62(1).
129. See Greek comments *supra* note 95.
130. Bahcheli, *supra* note 75, at 148 quoting from The Journalists Union of Athens Daily Newspapers, *Threat in the Aegean* 33 (Athens). See also Toluner, *supra* note 80, at 81 translating the Aras statement as follows: “This would mean that the provisions concerning Lemnos and Samothrace belonging to our neighbor and friend Greece which had been demilitarized by the Lausanne Convention of 1923 is also being lifted by the Montreux Convention, about which we rejoice similarly.” Turkish officials explain the Aras statement by saying that it “has to be read, as an expression of goodwill in the light of the international political climate prevailing at that time which cannot change, in any way, the provisions of international treaties.” Bahcheli, *supra*

note 75, at 148 quoting from Ministry of Foreign Affairs, *Turkish Views on the Demilitarized Status of Lemnos and the Eastern Aegean Islands* 9.

131. Professor Toluner, *supra* note 80, at 82 explains that the Aras statement was not made in response to a Greek question and did not constitute a unilateral act, and thus does not bind Turkey under the cases of *Legal Status of Eastern Greenland*, (1933) *P.C.I.J., Series A/B, No. 53*, p. 71, or *Nuclear Tests (Australia v. France)*, *Judgment of Dec. 20, 1974*, [1974] *I.C.J. Reports* 253, 267–69, paras. 43–51.

132. Toluner, *supra* note 80, at 83–84. See also *supra* text accompanying notes 87–91.

133. Schmitt, *supra* note 25, at 64.

134. Leiss, *supra* note 24, at 61.

135. *Ibid.* quoting from a statement made by Senator Tom Conally in U.S. Congress, 79th Cong., 2d sess. S. Doc. 243, at 5.

136. *Ibid.* again quoting from Senator Conally's statement.

137. Bahcheli, *supra* note 75, at 148.

138. *Ibid.*

139. Mark W. Janis, *An Introduction to International Law* 34 (3rd ed. 1999).

140. *Ibid.* at 37 citing A.E. David, *The Strategy of Treaty Termination* at ix (1975). Janis also explains, at 38, that:

Only rarely is the legality of a unilateral denunciation tested by an international court or arbitral tribunal. More frequently, one state's denunciation of a treaty and its legal justification is simply countered by another state's objection of illegality; both claims are ultimately left dangling and unresolved. Objecting states may, of course, retaliate by denouncing other treaty commitments.

141. Ronzitti, *supra* note 6, at 298.

142. *Ibid.*

143. Bahcheli, *supra* note 75, at 148.

144. *Ibid.*, at 148–49.

145. Toluner, *supra* note 80, at 57.

146. *Ibid.*, at 61–85.

147. Toluner, *supra* note 80, at 64 citing Lord McNair, *The Law of Treaties* 255 (1961).

148. See *supra* text at notes 61–69.

149. Janis, *supra* note 139, at 34–35 citing the Vienna Convention on the Law of Treaties, *supra* note 96, Article 44(1) and (3).

150. Vienna Convention on the Law of Treaties, *supra* note 96, Article 34.

151. As explained above, *supra* at notes 77–81, it is clear that some of the demilitarization requirements in the 1923 Lausanne Peace Treaty have been modified, namely the limitations on Turkish islands and territories, so the reciprocity found in that treaty no longer exists. Also of importance is the action of Italy in remilitarizing its islands, despite the language in the 1947 Paris Peace Treaty. See *supra* text accompanying notes 118–122.

152. Law No. 230 of Sept. 17, 1936, *Official Gazette (Greece)*, vol. A. No. 450/1936. When Greece increased its territorial sea claim in 1936 from three to six nautical miles, the United Kingdom objected, but Turkey did not. Greece and Turkey were on friendly terms at that time, and were being threatened by Italy, and some ideas were being exchanged regarding the possibility of the formation of a confederation. When Turkey extended its Aegean territorial sea to six nautical miles in 1964, Greece objected, arguing that this extension interfered with Greek fishing practices. Statement of Ambassador Namik Yolga, at the Aegean Issues Conference, Istanbul, Jan. 20, 1995.

153. See Ioannou, *supra* note 5, at 130 explaining the Greek enactments and quoting from Article 2 of Greek Law 2321/1995, which arose from ratification of the Law of the Sea Convention, and said that “Greece has the inalienable right, in application of Article 3 of the Convention which is being ratified, to extend at any time the breadth of its territorial sea up to a distance of 12 nautical miles.”

154. See, e.g., Gunduz, *supra* note 2, at 150 and Ioannou, *supra* note 5, at 118.



155. Some of the material that follows in this section is adapted from Jon M. Van Dyke, *The Aegean Sea Dispute: Options and Avenues*, 20 *Marine Policy* 397, 401–02 (1996).

156. Politakis, *The Aegean Dispute*, supra note 92, at 294 and Ioannou, supra note 5, at 132. Some articles give different figures, depending, perhaps, on how the Aegean is defined. See, e.g., Theodore C. Kariotis, *The Case for a Greek Exclusive Economic Zone*, 19 *Marine Policy* 3, 5 (1990) stating that Greece currently exercises sovereignty over 43.5% of the Aegean, Turkey has 7.5%, and 49% is high seas, and Inan and Baseren, supra note 20, at 63 use the same figures as those used by Kariotis.

157. Faraj Abdullah Ahnish, *The International Law of Maritime Boundaries and the Practice of States in the Mediterranean Sea* 268 (1993).

158. See Toluner, supra note 6, at 127–31. The “persistent objector” position is somewhat controversial, because customary law can emerge despite disagreement about or rejection of a norm by a few countries. See, e.g., Jordan J. Paust, Joan M. Fitzpatrick, and Jon M. Van Dyke, *International Law and Litigation in the U.S.* 93, 96–97 (2000). Whether a persistent objector can opt out of a norm appears to depend on the nature and importance of the norm—i.e., does it require a global approach or are regional or unique perspectives appropriate—and whether the objector has a particular stake in the norm and the clout to prevent it from emerging as an obligatory global norm. Because of the geographical diversity of the world’s oceans and coastlines and the need to recognize and accommodate unique geographical situations, the breadth of the territorial sea is an appropriate example of a norm that can be successfully objected to by a persistent objector.

159. Article 15 of the Law of the Sea Convention, supra note 28, reads as follows:

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

160. See, e.g., Inan and Baseren, supra note 20, at 62. These authors also argue that the delimitation of the territorial sea boundary will not resolve the continental shelf boundary, saying that “Turkey has *ab initio* and *ipso facto* exclusive rights over the continental shelf areas beyond those limits, which are the natural prolongation of the Anatolian peninsula.” Id. at 67–68 n. 3.

161. See *infra* text and notes accompanying notes 267–273.

162. See Inan and Baseren, supra note 20, at 62: “extension of territorial waters in the Aegean Sea for the purpose of restricting or acquiring the continental shelf areas of Turkey is an obvious example of an abuse of right concerning the determination of the extent of territorial waters, which is contrary to law.”

163. In the *Norwegian Fisheries Case (U.K. v. Norway)* [1951] *I.C.J. Reports* 116, the Court stated that the establishment of baselines was not something that a nation could do unilaterally, without consideration of its effect on other nations.

164. Ahnish, supra note 157, at 268.

165. Gunduz, supra note 2, at 145.

166. *Ibid.*

167. Law of the Sea Convention, supra note 28, Articles. 17–19.

168. See *Gulf of Fonseca* case, supra note 39.

169. Hiran W. Jayewardene, *The Regime of Islands in International Law* 425 (1990).

170. *Ibid.*, at 437.

171. *Ibid.*, at 441, 455, and 485.

172. *Ibid.*, at 484 and see also 485. At another part of the book, Ambassador Jayewardene states that “State practice and equity” would indicate that an equidistance line should *not* be drawn between the Greek islands and Turkey’s coast and that some “compromise” should be reached to enable both countries to have some maritime space. Id. at 446–47.

173. Treaty of Peace and Friendship Between Argentina and Chile, November 29, 1984, reprinted in Jonathan Charney and Lewis Alexander, *International Maritime Boundaries* 719 (1994). See also Papal Proposal in the Beagle Channel Dispute Proposal of the Mediator (December 12, 1980), Article 9, 24 *I.L.M.* 1, 13 (1985).

174. See *infra* text accompanying note 267–273.

175. Agreement between Greece and Italy on the Continental Shelf, May 24, 1977, *U.S. Dept. of State, Limits in the Sea* No. 96 (1982).

176. See G. Francalanci and Tullio Scovazzi, *Lines in the Sea* 222 (1994).

177. Turkey's declaration of and acceptance of 12-nautical-mile territorial seas in the Black Sea and the Mediterranean indicate that Turkey accepts this limit as valid in appropriate (and reciprocal) circumstances. But by focusing on the eastern Aegean, where Turkey's navigational and security interests are most directly impacted, Turkey can make a strong case that Greece should be limited to a 6- (or 3-) nautical-mile territorial sea in this area.

178. See Theodoropoulos, *supra* note 1, at 331: "Greece might then be willing to exercise its right to a 12-mile territorial sea only along its continental coast, leaving the territorial sea round the islands in its present status and rearranging the width of its air-space accordingly."

179. Interview with Professor Bernard Oxman, Istanbul, May 12, 2001.

180. See Ioannou, *supra* note 5, at 129 explaining the sequence of Greek laws and presidential decrees that claimed airspace extending to 10 nautical miles around Greek land territory and a territorial sea of 6 nautical miles.

181. See Schmitt, *supra* note 25, at 59 explaining that "Greece bases its assertion of aerial sovereignty on security, arguing that the speed of aircraft necessitates a wider territorial reach in the air than on the water."

182. "Naturally, neither Turkey nor another country respects this unusual practice inconsistent with the norms of international law, which has no similar practice over the world." Kurumahmut, *supra* note 19, at 35.

183. Ioannou, *supra* note 5, at 133.

184. Politakis, *The Aegean Dispute*, *supra* note 92, at 298.

185. Paolo Bargiacchi, *Freedom of Overflight in the High Seas*, in Ozturk, *supra* note 2, at 214, 219 n. 92. Even a Greek scholar has characterized the situation as "unorthodox and unprecedented," "arbitrary," and "manifestly controversial and unreasonable." Politakis, *The Aegean Dispute*, *supra* note 92, at 298.

186. Schmitt, *supra* note 25, at 60 has observed that "a protest of the present Greek airspace claim might well be upheld, but it could lead Greece simply to extend its territorial sea—which would be even more destabilizing in the Aegean than the current situation."

187. The material in this paragraph and the one that follows is from Jon M. Van Dyke, *Military Exclusion and Warning Zones on the High Seas*, 15 *Marine Policy* 147, 153–54 (1991); Louis B. Sohn, *International Navigation Interests Related to National Security*, in *International Navigation: Rocks and Shoals Ahead?* 312–15 (J. Van Dyke, L. Alexander, and J. Morgan eds. 1988); Choon-ho Park, *The 50-Mile Boundary Zone of North Korea*, 72 *Am.J.Int'l L.* 826 (1978); and E. Cuadra, *Air Defense Identification Zones: Creeping Jurisdiction in the Airspace*, 7/8 *Va. Int'l L.J.* 485–92 (1978).

188. See generally John Taylor Murchison, *The Contiguous Air Space Zone in International Law* (1956) analogizing the claims of Canada and the United States for ADIZs to claims for continental shelves and contiguous zones, and relying ultimately on the doctrine of necessity to justify these zones.

189. Schmitt, *supra* note 25, at 62.

190. *Ibid.* at 60.

191. *Ibid.*

192. Article 3(a) of the Convention on International Civil Aviation (Chicago Convention), December 7, 1944, says that the Convention applies only to civil aircraft.

193. See Article 3(d) of the Chicago Convention establishing the ICAO. See generally Schmitt, *supra* note 25, at 61.

194. Law of the Sea Convention, *supra* note 28, Article 39(3).

195. Kurumahmut, *supra* note 19, at 34.

196. Similar problems exist, for instance, when United States military planes exercise their rights of transit passage through international straits or archipelagic straits passage through archipelagic waters. Coastal and archipelagic countries seek to have the U.S. military planes report their flight plans and adhere to instructions from the local flight coordinators, but the U.S. military insists on being free to fly through these corridors without restrictions of any sort. Interview with Haşim Djalal, Indonesian Ambassador at Large, Honolulu, Sept. 5, 2001. Schmitt, *supra* note 25, at 61–62 says that “though U.S. military aircraft generally follow ICAO rules and use FIR services on point-to-point routes, they do so explicitly as a matter of policy, not legal obligation. They do not strictly comply with ICAO requirements in military contingency operations, classified or politically sensitive missions, or during carrier operations, but instead operate with ‘due regard’ to the safety of civil aviation.”

197. See Greek Transmittal to Turkey, Feb. 16, 1996, in Kurumahmut, *supra* note 19, at EK-21.

198. Turkish scholars argue that the delimitation of the continental shelf is governed by different principles than those governing the delimitation of the territorial sea, and that, in particular, the natural prolongation principle supports Turkey’s claim to a continental shelf in the Aegean. See Inan and Baseren, *supra* note 20, at 67–68 n. 3.

199. *Qatar-Bahrain* Case, [http://www.icj-cij.org/icjwww/idocket/iq...ment\\_20010316/iqb\\_ijudgment\\_20010316.htm](http://www.icj-cij.org/icjwww/idocket/iq...ment_20010316/iqb_ijudgment_20010316.htm), Decision of March 16, 2001, para. 167.

200. *Ibid.*, paras. 175–76.

201. See, e.g., Politakis, *The Aegean Dispute*, *supra* note 92, at 300 arguing that “a reasonable claim” could be made to draw straight baselines around the northern Sporades and Cyclades islands in the Aegean, which, “under the current 6-mile [territorial sea] limit . . . would eliminate several pockets of high seas existing today in between the islands.”

202. Law of the Sea Convention, *supra* note 28, Article 47.

203. *Qatar-Bahrain* decision *supra* note 199, paras. 210–16. In paragraph 212, the Court said that straight baselines can be drawn only if certain conditions are met, and that “[s]uch conditions are primarily that either the coastline is deeply indented and cut into, or that there is a fringe of islands along the coast in its immediate vicinity.”

204. *Ibid.*, para. 223.

205. See *supra* text accompanying notes 177–179.

206. *Note verbale* from Turkey to Greece, February 27, 1974, quoted by Clive R. Symmons, *The Maritime Zones of Islands in International Law* 137 (1979). In 1976, Turkish President Fahri Koruturk said that the Aegean is “an extension of Asia Minor, and we will never allow it to be turned into an internal sea of another country.” *Time*, August 23, 1976, at 33.

Some authors contend that the natural prolongation theory cannot help either claimant, as a matter of geography, because the Aegean seabed consists of a “continuous island shelf slope” with two troughs that constitute “incidental break[s]” in the continuous shelf, and therefore that “neither the geomorphology nor the geology of the Aegean could provide a proper criterion for delimitation.” See, e.g., Ahnish, *supra* note 157, at 357 n. 2.

207. Turkey’s coastline stretches 2,820 km along the Aegean Sea. Augusto Sinagra, *The Problem of Delimiting the Territorial Waters Between Greece and Turkey in the Aegean Sea*, in Ozturk, *supra* note 2, at 170, 172.

208. Turkey’s current population is about 67 million, compared to Greece’s of about 11 or 12 million. Ahnish said in his 1993 publication that about 10 million Turks lived along its Aegean coast. Ahnish, *supra* note 157, at 363. Using data from the *Statistical Yearbook of Greece* (1986), Ahnish reported, *id.* at 366, that 2,871 persons lived on Samothrace, 15,721 lived on Limnos, 88,601 lived on Lesbos, 48,700 lived on Chios, 31,629 lived on Samos, 7,559 lived on Ikaria, 14,295 lived on Kalimnos, 20,350 lived on Kos, 4,645 lived on Karpathos, 87,831 lived on Rhodes, and 222 lived on Castellorizo. A 1992 report of the European Union stated that the total population of the 130 inhabited Greek Aegean Islands was 488,840, which is about 5% of the total population of Greece. European Union, *Greek Islands in the Aegean Sea*, COM (92) 569 (1992).

209. “[T]he Turkish navy enjoys today a considerable freedom of deployment upon large areas of high seas (56% of total area) in the northern, central and southern Aegean where it operates regularly (the Greek and the Turkish navy hold every year over a dozen air-naval exercises each).” Politakis, *The Aegean Dispute*, supra note 92, at 295.

210. See Republic of Turkey Ministry of Foreign Affairs, *Turkish–Greek Relations Aegean Problems*, <http://www.mfa.gov.tr/grupa/ade/adea/default.htm> (visited April 9, 2000).

211. Schmitt, supra note 25, at 50 citing UNCLOS III Documents A/CONF.62/C.2/L.8–1.9 (1974), and Renate Platzoder (ed.), *Third United Nations Conference on the Law of the Sea*, Vol. V, 131 (1984).

212. See text and notes infra at notes 227–247, and see Van Dyke, supra note 155, at 400; Valencia, Van Dyke, and Ludwig, supra note 38, at 1; Jon M. Van Dyke, *The Role of Islands in Delimiting Maritime Zones—The Boundary Between Turkey and Greece*, in *The Aegean Issues: Problems and Prospects*, supra note 6, at 263.

213. One Greek author has characterized Turkey’s efforts to protest the provisions that were eventually included in the 1982 Law of the Sea Convention as a “near obsession with the notions of equity and of special circumstances in all their various forms.” Ioannou, supra note 5, at 127.

214. See, e.g., Donald E. Karl, *Islands and the Delimitation of the Continental Shelf: A Framework for Analysis*, 71 *Am. J. Int’l L.* 642, 671–72 (1977) and Jon M. Van Dyke, *The Role of Islands in Delimiting Maritime Zones: The Case of the Aegean Sea*, in 8 *Ocean Yearbook* at 44, 67 (1989).

215. See, e.g., Christos L. Rozakis, *The Greek Continental Shelf* in Kariotis, supra note 1, at 100–101 and Phaedon John Kozyris, *Equity, Equidistance, Proportionality at Sea: The Status of Island Coastal Fronts and a Coda for the Aegean*, in Kariotis, supra note 1, at 21, 29 arguing that the decisions in the *St. Pierre & Miquelon* and *Jan Mayen* “suggest . . . that Article 121.2 of the *UN LOS Convention* codifies customary international law.” See also Hellenic Ministry of Foreign Affairs, *Unilateral Turkish Claims in the Aegean*, <http://www.mfa.gr/foreign/bilateral/aegean.htm> (visited April 9, 2000) and Greek Ministry of Press and Mass Media—Secretariat General of Information, *The International Legal Status of the Aegean*.

216. Kozyris, supra note 215, at 47–48 (citations eliminated). See also Phaedon John Kozyris, *Lifting the Veils of Equity in Maritime Entitlements: Equidistance with Proportionality Around the Islands*, 26 *Denver J. Int’l L. & Pol’y* 319 (1998).

217. Kozyris, supra note 215, at 50. At another point, *id.* at 65 n.171, Kozyris cites Andrew Wilson, supra note 84, at 14, for the proposition that “[t]he total Turkish share may range between 8–13% [of the Aegean] depending on how generous one wants to be.” If the median line were drawn between Greece’s eastern islands and Turkey’s coast, Turkey would have 8.75% of the waters and continental shelf of the Aegean.

218. Kozyris, supra note 215, at 64 n. 168 cites Derek W. Bowett, *The Legal Regime of Islands in International Law* 273 (1979), for the proposition that: “The idea of a mid-sea median line which would enclave those Greek islands on the Turkish side of such a line is completely rejected [in state practice].” See also Rozakis, supra note 215, at 101 contending that because of Greece’s security needs, no international judge would “apply a line which would . . . cut off Greek insular territories from the mainland territories.”

219. Rozakis, supra note 215, at 101: “It may also be assumed that because of the difficulties in tracing the median line in some areas (mainly in the central-eastern Aegean), an application of mathematical calculations in attributing the continental shelf, like those applied in the *Libya-Malta* case, might prove unavoidable.”

220. Theodore C. Kariotis, *Greek Fisheries and the Role of the Exclusive Economic Zone*, in Kariotis, supra note 1, at 210.

221. See, e.g., Van Dyke, supra note 155, at 402–03 and Jon M. Van Dyke, *Maritime Delimitation in the Aegean Sea*, in Ozturk, supra note 2, at 165, 166.

222. Although most of the delimitation discussion has focused on the continental shelf, the day may come when Greece and Turkey will also want to claim and delimit exclusive economic zones in the Aegean. Almost all the recent delimitations have drawn a single maritime line for the

continental shelf and the exclusive economic zone, and such an approach may someday be logical for the Aegean as well. See, e.g., Kariotis, *supra* note 220, at 211 summarizing recent cases and saying that a “single maritime boundary is a very reasonable solution for most states.”

223. Van Dyke, *supra* note 155, at 398, 403. See also the *Eritrea–Yemen* Arbitration, *supra* note 39, 1999 Award, paras. 20, 39–43, 117, and 165–68, where the Tribunal relied upon the test of “a reasonable degree of proportionality” to determine the equitableness the boundary line; the tribunal was satisfied that this test was met, in light of the Eritrea–Yemen coastal length ratio (measured in terms of their general direction) of 1:1.31 and the ratio of their water areas of 1:1.09.

224. One oft-cited U.S. scholar suggested that Greece should receive 66–70% of the Aegean continental shelf. Karl, *supra* note 214. Compare this view to that of Professor Kozyris, *supra* note 215, at 50, who argues that Turkey should receive only 11–12% of the maritime space of the Aegean.

225. See, e.g., Wilson, *supra* note 84 and Miyoshi, *supra* note 82, at 92.

226. Rozakis, *supra* note 215, at 101. See also Kariotis, *supra* note 220, at 210, and Kariotis, *Exclusive Economic Zone*, *supra* note 156, at 13 recognizing the possibility that the “fingers” approach might be the appropriate solution, but arguing that it Turkey should receive less maritime space than that shown in Wilson’s map, *supra* note 84, at 14 (reprinted in Kariotis, *supra* note 220) because the Greek islands are entitled to territorial seas of 12 nautical miles around their shores.

227. This approach was first utilized in the *North Sea Continental Shelf Case (Germany v. Denmark; Germany v. Netherlands)*, [1969] *I.C.J. Reports* 3, para. 101(d), where the Court said that “the presence of islets, rocks and minor coastal projections, the disproportionality distorting effects of which can be eliminated by other means,” should be ignored in continental shelf delimitation. In the *Case Concerning the Delimitation of the Continental Shelf Between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, 18 *U.N.R.I.A.A.* 74 (1977), reprinted in 18 *I.L.M.* 397 (1979), the tribunal did not allow the Channel Islands, which were on the “wrong side” of the median line drawn between the French mainland and England, to affect the delimitation at all (giving them 12-nautical-mile territorial sea enclaves), and gave only “half-effect” to Britain’s Scilly Isles, located off the British Coast near Land’s End. Half-effect was also given to Seal and Mud Islands in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. U.S.A.)* [1984] *I.C.J. Reports* 336, para. 222. Seal Island is 2½ miles long and is inhabited year round. And in *Continental Shelf (Libya v. Malta)*, [1985] *I.C.J. Reports* 13, 48 para. 64, the Court ruled that equitable principles required that the uninhabited tiny island of Filfla (belonging to Malta, 5 km south of the main island) should not be considered at all in delimiting the boundary between the two countries.

228. In *Continental Shelf (Tunisia/Libya)* [1982] *I.C.J. Reports* 89 para. 129, the Court gave only half-effect to Tunisia’s Kerkennah Islands, even though the main island is 180 square kilometers and then had a population of 15,000, and completely disregarded the island of Jerba, an inhabited island of considerable size, in assessing the general direction of the coastline. Even more significantly, in the *Libya-Malta Continental Shelf* case, *supra* note 227, the Court refused to give full effect to Malta’s main island, which is the size of Washington, D.C. and contains hundreds of thousands of individuals, and adjusted the median line northward because of the greater power of the Libyan coast to generate a maritime zone.

229. *Eritrea–Yemen* Arbitration, *supra* note 10, 1999 Award, paras.147–48. The tribunal also gave the Yemenese islands in the Zuqar-Hanish group less power to affect the placement of the delimitation line than they would have had if they had been continental landmasses. These islets, located near the middle of the Bab el Mandeb Strait at the entrance to the Red Sea, are given territorial seas, but the median line that would otherwise be drawn between the continental territory of the two countries is adjusted only slightly to give Yemen the full territorial sea around these islets. The tribunal did not, therefore, view these islets as constituting a separate and distinct area of land from which a median or equidistant line should be measured, illustrating once again that small islands do not have the same power to generate maritime zones as do continental land masses. *Id.* paras. 160–61.



230. *Qatar-Bahrain* Decision of March 13, 2001, supra note 199, paras. 219 citing the *North Sea Continental Shelf* cases, supra note 227, at para. 57, and *Libya-Malta Continental Shelf* case, supra note 227, at 48, para. 64, for the proposition that “the Court has sometimes been led to eliminate the disproportionate effect of small islands.” The Court reached this conclusion even though it asserted, in paragraph 185, that Article 121(2) of the Law of the Sea Convention “reflects customary international law” and that “islands, regardless of their size, in this respect enjoy the same status, and therefore generate the same maritime rights, as other land territory.”

231. *Ibid.*, at paras. 245–48.

232. *Ibid.*, at para. 245.

233. *Ibid.*, at para. 247 quoting from *Anglo-French Continental Shelf Arbitration*, supra note 227, para. 244.

234. Kozyris, supra note 215, at 30.

235. As in the case of the Channel Islands in the *Anglo-French Arbitration*, supra note 227. Kozyris, supra note 215, at 64 n. 168, cites Barbara Kwiatkowska, *Maritime Boundary Delimitation Between Opposite and Adjacent States in the New Law of the Sea—Some Implications for the Aegean*, in *The Aegean Issues: Problems and Prospects*, supra note 6, at 202–03, for the proposition that “the *Anglo-French Arbitration* analogy does not apply because the Turkish coast does not embrace the Greek islands, the coasts are not in broad geographical equality and the islands are not detached from their mainland and they dominate the area.”

236. Greek scholars occasionally mischaracterize judicial decisions, as, for instance, when Professor Kozyris argues that the result in the *St. Pierre and Miquelon* Arbitration case, *Delimitation of the Maritime Areas Between Canada and France (St. Pierre and Miquelon)*, 31 I.L.M. 1149 (1992), “laid to rest” “any doubts about the equal treatment of islands.” Kozyris, supra note 215, at 32. In fact, the arbitral tribunal gave the small, but permanently populated French islands of St. Pierre and Miquelon considerably less power to generate zones than the larger Canadian landmasses they are near.

But even the Greek writers have acknowledged that islands are entitled to less attention than land masses in drawing maritime boundaries. See, e.g., Kozyris, supra note 215, at 31, where he explains the treatment of Seal Island in the *Gulf of Maine* case, supra note 227, by saying: “The solution, quite generous to the island in result, was to give the island half-effect for a transverse displacement of the median line.” Professor Kozyris does not explain why this result is “quite generous to the island in result.” Seal Island has a permanent year-round population, and thus would appear to have the same status as any other island, including the Greek islands.

237. See Van Dyke, supra note 155, at 400–01.

238. *Eritrea–Yemen* arbitration, supra note 10, 1999 Award, para. 157 quoting from the *Guinea/Guinea-Bissau Arbitration*, 25 I.L.M. (1986) 251 (emphasis added).

239. See Toluner, supra note 6, at 133. Kozyris, supra note 215, at 65 n. 168, responds to the argument that the principle of nonencroachment should give Turkey some access to the open ocean by asserting that “the Turkish coast is...also encroaching on the Greek islands.” Similarly, Rozakis, supra note 215, at 101, asserts that Greek security would be compromised if Greek insular territories were cut off from its mainland territories.

240. Article 7(6) of the Law of the Sea Convention, supra note 28, says that no state can use straight baselines “in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone.”

241. See also *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway)*, [1993] I.C.J. Reports 38, 69 para. 70, and 79–81 para. 92 delimiting the exclusive economic zone in a manner that protected Norway’s access to the capelin fishery. Inan and Baseren, supra note 20, at 63, explain the impact of expanding Greece’s territorial sea on Turkey’s ability to navigate freely as follows: “The extension of territorial waters beyond six miles will cut the Turkish territorial seas from the high seas of the Aegean. . . . Such a practice . . . of Greece will make the whole Aegean ‘a Greek lake’, which will be an obvious examples of Greek expansionist policy in the Aegean.”

242. *North Sea Continental Shelf* cases, supra note 227.



243. *Jan Mayen* case, supra note 241, at para. 59.

244. *Gulf of Fonseca* case, supra note 39, at para. 351.

245. *Ibid.*, at 606–09 paras. 415–20.

246. *St. Pierre and Miquelon* Arbitration, supra note 236.

247. Kozyris, supra note 215, at 25.

248. Rozakis, supra note 215, at 101.

249. *Ibid.*

250. *Ibid.*, at 91. These modifications apparently “compensated Italy for the full effect that was given to the Greek islands whose position (at least some of them) in the delimitation area was so close to the Greek mainland that it might have justified a slightly different treatment.”

251. Politakis, *The Aegean Sea Dispute*, supra note 92, at 295.

252. *Ibid.*, at 296.

253. *Ibid.*

254. “[I]nnocent passage may be temporarily suspended in specified areas for security reasons, though suspensions must apply equally to all nationalities.” Schmitt, supra note 25, at 49.

255. Schmitt, supra note 25, at 48–49 citing Articles 18 and 19 of the Law of the Sea Convention, supra note 28.

256. See Politakis, *The Aegean Sea Dispute*, supra note 92, at 303 summarizing scholarly discussion that indicates that all aspects of the transit passage regime have not yet crystallized into customary international law. Anastasia Strati, *Greece and the Law of the Sea: A Greek Perspective*, in Chircop, supra note 94, at 89, 94 states: “it is highly questionable whether the LOS Convention provisions on transit passage in all their detail reflect customary law, thereby entitling Turkey to benefit from them.”

257. Politakis, *The Aegean Sea Dispute*, supra note 92, at 301 citing for support Satya H. Nandan and David H. Anderson, *Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea*, 60 *Brit. Y.B. Int’l L.* 179 (1989). Politakis also acknowledged that the counter-argument can be made, i.e., “that all the above-mentioned straits should rather be regarded as organically interconnected, forming continuous maritime routes linking the Mediterranean with the northern Aegean, and thus subject to the transit passage rules.” *Id.* at 302.

258. See, e.g., Erik Franckx, *The Work of the International Law Association’s Committee on Coastal State Jurisdiction Relating to Marine Pollution and Its Implications for the Aegean Sea*, in Ozturk, supra note 2, at 221, 234 citing Tullio Treves, *Navigation*, in *A Handbook on the New Law of the Sea* 835, 970–76 (Vol. 2, 1991).

259. Compare Law of the Sea Convention, supra note 28, Article 39(1)(c), permitting submarines to transit in “their normal modes of continuous and expeditious transit” during transit passage through international straits; with Article 20, requiring submarines to surface when exercising innocent passage.

260. Law of the Sea Convention, supra note 28, Article 37. See, e.g., Politakis, *The Aegean Sea Dispute*, supra note 92, at 302:

It is important to note also that although a large interpretation of Arts. 37–38 and Arts. 53–54 might bring some Aegean straits within the ambit of transit passage, it is not at all clear whether ships heading to or departing from Turkish ports on the Aegean coast, such as that of Izmir, could be equally considered as engage in transit passage. . . . [T]he traditional innocent passage regime would still apply to ships entering or clearing certain Turkish ports on the Aegean coast.

261. One Greek scholar has said that if Greece expands its territorial sea from six to 12 nautical miles, “it would be no longer possible for Turkish warships stationing at Izmir to join the high seas without first passing through Greek territorial waters, and thus subject to the regime of innocent passage.” Politakis, *The Aegean Sea Dispute*, supra note 92, at 295. Of course, it might be argued, on the other hand, that the definition in Article 37 of the Law of the Sea Convention identifies those straits governed by the transit passage regime, without regard to where a particular ship is coming from, or going to.

262. Natalino Ronzitti, *The Law of Naval Warfare* 14 (1993).

263. Anastasia Strati, *Greek Shipping Interests and the UN Convention on the Law of the Sea*, in Kariotis, *supra* note 1, at 279. See also Strati, *supra* note 256, at 92: “where Greece’s ocean resource and national security interests conflicted with its shipping interests, the former took precedence.”

264. This text is available at <http://www.un.org/Depts/los/los94st.htm>. Turkey protested this statement after it was originally made, and also when it was repeated later. See UNCLOS III, 17 *Official Records*, Part B, Doc. A/Conf.62/WS/34, p. 226 and 30 *United Nations Law of the Sea Bulletin* (1996).

265. Saltzman, *supra* note 35, at 187 n. 65.

266. Schmitt, *supra* note 25, at 51 states that the language in Article 38(1) of the Law of the Sea Convention “precisely describes the Kea Strait case.”

267. Kariotis, *supra* note 220, at 206 citing Robert W. Smith and J. Ashley Roach, *National Claims to Maritime Jurisdiction* (U.S. State Dept. 1995).

268. This example and most of those that follow were provided by J. Ashley Roach, of the Office of the Legal Adviser, U.S. Department of State, April 7, 2000. This paragraph and those that follow are adapted from Van Dyke, *Maritime Delimitation*, *supra* note 221, at 167.

269. For the Finnish legislation, see 29 *United Nations Law of the Sea Bulletin* 56.

270. Japanese Law on the Territorial Sea No. 30 of May 2, 1977, listed in *National Legislation on the Territorial Sea, the Right of Innocent Passage and the Contiguous Zone* 177–82 (U.N. Sales No. E.95.V.7, 1995). See also U.S. Dept. of State, *Limits in the Sea No. 120, Straight Baseline and Territorial Sea Claims: Japan* (1998).

271. See, e.g., Choon-Ho Park, *The Korea Strait*, in Van Dyke, Alexander, and Morgan, *supra* note 187, at 173. One informed commentator has written that the same approach of claiming limited three-nautical-mile territorial seas utilized by Japan and Korea to allow navigational freedom has also been used by “Germany and Denmark, and by Denmark, Sweden and Finland.” Bernard H. Oxman, *Applying the Law of the Sea in the Aegean Sea*, in *Problems of Regional Seas 2001* at 266, 279 (Bayram Ozturk ed. 2001).

272. The Belize legislation is at 21 *United Nations Law of the Sea Bulletin* 3.

273. France-Monaco Maritime Delimitation Agreement of 1984, 9 *United Nations Law of the Sea Bulletin* 58.

274. See, e.g., Gunduz, *supra* note 2, at 147.

275. Politakis, *The Aegean Sea Dispute*, *supra* note 92, at 302.

276. Theodoropoulos, *supra* note 1, at 331. Ambassador Theodoropoulos added that “the various command and control arrangements in the Aegean . . . are largely meaningless in the post cold-war situation in the Mediterranean.” *Ibid.*

277. See, e.g., Miyoshi, *supra* note 82, at 92; Martin Pratt and Clive Schofield, *Cooperation in the Absence of Maritime Boundary Agreements: The Purpose and Value of Joint Development*, in Ozturk, *supra* note 2, at 152; Valencia, Van Dyke, and Ludwig, *supra* note 38, at 183–87; and Van Dyke, *supra* note 214, at 68–69.

278. See Valencia, Van Dyke, and Ludwig, *supra* note 38, at 172–80.

279. See *supra* text and footnotes at notes 16–20.

280. See *supra* note 73.

281. See *supra* text at note 69.

282. See *supra* text and footnotes at notes 7–11.

283. See also *supra* text and footnotes at notes 29–34 and 72.

284. See *supra* text and footnotes at notes 38–69.

285. See *supra* text and footnotes at notes 34–35.

286. See *supra* text and footnotes at notes 7–13.

287. See *supra* text and footnotes at notes 61–69.

288. See *supra* text and footnotes at notes 19–21 and 76–83.

289. See *supra* text and footnotes at notes 87–91.

290. See *supra* note 93.

291. See supra text and footnotes at notes 118–122.
292. See supra text at note 92.
293. See supra text and footnotes at notes 128 and 137–142.
294. See supra note 127.
295. See statement of Hellenic Ministry of Foreign Affairs, supra note 95.
296. See supra text and footnotes at notes 76–80.
297. See supra text and footnotes at note 130.
298. See supra text and footnotes at note 13.
299. See supra text just prior to note 12.
300. See supra text and footnotes at note 26.
301. See supra text and footnotes at notes 118–122.
302. This fundamental principle of damages in international law is usually linked to the *Chorzow Factory* case [1928] *P.C.I.J.*, where the Permanent Court of International Justice said that “it is a general conception of law that every violation of an engagement involves an obligation to make reparation” and that under international law “the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured state have suffered as a result of the act which is contrary to international law.”
303. See supra text and footnotes at notes 152–179.
304. See supra text and footnotes at notes 169–76 and 267–73.
305. See supra text and footnotes at notes 180–189.
306. See supra text and footnotes at notes 190–197.
307. See supra text and footnotes at notes 198–250.
308. See supra text and footnotes at notes 221–224.
309. This approach was used between Norway and Iceland with regard to their maritime delimitation in the area around Jan Mayen Island. In that case, the nations followed the recommendation offered by the conciliation commission.
310. See supra text and footnotes at notes 251–273.
311. See supra text and footnotes at notes 256–266.
312. Theodoropoulos, supra note 1, at 331.