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## Regulation of the Turkish Straits: UNCLOS as an Alternative to the Treaty of Montreux and the 1994 Maritime Traffic Regulations for the Turkish Straits and Marmara Region

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# Regulation of the Turkish Straits: UNCLOS as an Alternative to the Treaty of Montreux and the 1994 Maritime Traffic Regulations for the Turkish Straits and Marmara Region

Serge V. Pavlyuk

## **Abstract**

This Note discusses the need for a modern international legal regime that would address navigational and environmental safety in the Turkish Straits in a manner consistent with customary international law of the transit passage through the straits used for international navigation. Part I provides an overview of the recent history of the Turkish Straits and the legal regimes regulating navigation in the Turkish Straits and other straits used for international navigation. Part II explores the positions and arguments of the parties involved in the dispute over the legality of the 1994 Turkish Regulations. Part III proposes that the circumstances surrounding this conflict warrant the termination of the Treaty of Montreux and adoption of the United Nations Convention on the Law of the Sea<sup>22</sup> ("UNCLOS") as the binding legal regime of the Turkish Straits. Part III argues that this action will supply contemporary and internationally-accepted rules of transit through the Turkish Straits and will provide an authoritative international tribunal to serve as an independent arbitrator between the parties. This Note concludes that UNCLOS's regime of transit passage through the Turkish Straits should help to decrease the possibility of confrontation in the region and to address Turkey's navigational and environmental safety concerns.

## NOTES

### REGULATION OF THE TURKISH STRAITS: UNCLOS AS AN ALTERNATIVE TO THE TREATY OF MONTREUX AND THE 1994 MARITIME TRAFFIC REGULATIONS FOR THE TURKISH STRAITS AND MARMARA REGION

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#### INTRODUCTION

The international community rarely accepts the unilateral action of one government if the action affects the rights of the international community.<sup>1</sup> Although an action may be justified by a policy of environmental protection, the international community is likely to challenge it.<sup>2</sup> One such challenge occurred when Turkey unilaterally adopted the Maritime Traffic Regulations for the Turkish Straits and Marmara Region<sup>3</sup> ("1994 Turkish Regulations") in 1994.<sup>4</sup> Several nations<sup>5</sup> that depend on the

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1. See, e.g., Martin H. Belsky, *Using Legal Principles to Promote the "Health" of an Ecosystem*, 3 TULSA J. COMP. & INT'L L. 183 (1996) (discussing what responses may be appropriate to challenges of laws and policies enacted to protect environment).

2. See *id.* at 183 (noting that environment protection policies justifying such programs and laws that provide for different rules as to activities that affect human health, water quality, resource conservation, air quality, land use, oceans, or coasts are under challenge in United States and worldwide).

3. MARITIME TRAFFIC REGULATIONS FOR THE TURKISH STRAITS AND THE MARMARA REGION (entered into force July 1, 1994) (visited Nov. 15, 1998) <<http://inter.mfa.gov.tr/GRUPF/default.asp?Param@grupf/marimenu.htm>> (on file with the *Fordham International Law Journal*) [hereinafter 1994 TURKISH REGULATIONS].

4. See Michael Rank, *Russia and Turkey Clash over Control of Bosphorus*, REUTERS, July 25, 1997 (reporting Russia's complaint that Turkey is illegally interfering with shipping in Straits of Dardanelles and Bosphorus ("Turkish Straits" or "Straits")). A Russian official, who asked not to be identified, said that "Turkey tackles this problem illegally . . . . They have adopted a fanatical nationalist approach that assumes that if countries like Turkey go it alone they can unilaterally impose their own rules." *Id.*; see Maryann Bird, *The Dire Straits: Is Turkey Making One of the World's Busiest Seaways Safer, or Just Reaching for Oil Profits?*, TIME, Mar. 24, 1997, at 44 (discussing controversy between Russia and Turkey over Maritime Traffic Regulations for the Turkish Straits and Marmara Region ("1994 Turkish Regulations")).

5. See Bird, *supra* note 4, at 44 (explaining that Greece and Russia, most frequent

Straits of Dardanelles and Bosphorus<sup>6</sup> ("Turkish Straits" or "Straits") for shipping to and from the Black Sea ports challenged the 1994 Turkish Regulations.<sup>7</sup> Those nations claim that the 1994 Turkish Regulations violate the 1936 Convention Regarding the Regime of the Straits<sup>8</sup> ("Treaty of Montreux" or "Treaty") that guarantees free and unhampered passage of commercial ships through the Turkish Straits.<sup>9</sup>

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users of Straits, as well as other countries such as Romania, Bulgaria, and Ukraine are sensitive about 1994 Turkish Regulations); *see also* Alan Abrams, *Ship Collision in Bosphorus Kills 15—Turkey Feared Accident Before Tanker Disaster*, J. COM., Mar. 15, 1994, at 8B (explaining that Turkish Straits is sole outlet to sea for Ukrainian Port of Odessa, Russian ports of Novorossiysk and Rostov-na-Donu, and Romania's ports).

6. *See* 3 THE NEW ENCYCLOPAEDIA BRITANNICA 884 (15th ed. 1994) (noting that Dardanelles is narrow strait in northwestern Turkey, 38 miles long, linking Aegean Sea with Sea of Marmara). Dardanelles' width varies from three quarters of a mile to four miles. *Id.* It lies between the peninsula of Gallipoli in Europe (northwest) and the mainland of Asia Minor (southeast). *Id.* Dardanelles' average depth is 180 feet, reaching a maximum of 300 feet in the narrowest central section. *Id.* The waters are rich in various kinds of fish that migrate between the Black and Aegean seas. *Id.*; *see* 2 THE NEW ENCYCLOPAEDIA BRITANNICA, *supra*, at 402 (noting that Bosphorus, also spelled Bosphorus, unites Black Sea and Sea of Marmara and separating parts of Asian Turkey (Anatolia) from European Turkey). The Bosphorus is 19 miles long, with a maximum width of 23 miles at the northern entrance and a minimum width of 2450 feet. *Id.* Its depth varies from 120 to 408 feet in midstream. *Id.* The Bosphorus is heavily fished because the channel is a seasonal migration route for fish to and from the Black Sea. *Id.*; *see* Bird, *supra* note 4, at 44 (explaining that currently about 50,000 ships and about 2000 ferries and smaller passenger boats pass through straits annually). "They, and countless fishing, cruise and leisure craft, contribute to making the straits one of the most crowded waterways in the world—four times busier than the Panama Canal. Most of the traffic is made up of tankers." *Id.*

7. *See* Bird, *supra* note 4, at 44 (reporting that "a host of neighbor nations say the regulations violate the Treaty of Montreux" and that Greece and several former Soviet republics view introduction of 1994 Turkish Regulations as Turkey's move "to tighten shipping regulations in the straits as a grab for both regional power and oil money"); *see also* An Accident Waiting to Happen, J. COM., Nov. 29, 1994, at 6A (reporting that Russia, Bulgaria, and Romania are opposed to any interference with shipping in Turkish Straits); *see also* Nigel Lowry, *Turkey Pledges Action over Bosphorus Safety*, LLOYD'S LIST INT'L, July 16, 1997, 1997 WL 17819012, at \*1 (explaining that "Russia and Ukraine, which are stepping up oil exports from the Black Sea, have been particularly strident in their objections").

8. Convention Regarding the Regime of the Straits, July 20, 1936, 173 L.N.T.S. 213 (entered into force Nov. 9, 1936) [hereinafter Treaty of Montreux]. Convention Regarding the Regime of the Straits ("Treaty of Montreux" or "Treaty") was adopted by the U.S.S.R., the United Kingdom, Australia, Bulgaria, France, Greece, Japan, Romania, Turkey, and Yugoslavia. *Id.* at 215 n.2.

9. *See* Safety Rules Revamp for Turkish Straits, LLOYD'S LIST INT'L, Mar. 4, 1998, 1998 WL 9965830, at \*3 (reporting that "several countries, notably Russia, objected that the rules were an infringement of the Montreux Convention"); *see also* Geoff Winestock, *Russia Hits Turkey's Plan for Controls on Straits*, J. COM., July 1, 1994, at 1B (reporting that "Russia had sent a memorandum to the Turkish Embassy in Moscow, calling on it to

In response, Turkey states that the 1994 Turkish Regulations do not violate the Treaty of Montreux<sup>10</sup> and that Turkey enacted them to alleviate the great danger of pollution that could result from collisions between increasing number of oil tankers and other vessels currently sailing through the Straits.<sup>11</sup> In addition, Turkey threatens to stop tankers carrying oil<sup>12</sup> from passing through the Straits<sup>13</sup> and urges oil exporters to invest in

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abandon the new shipping rules through the Black Sea straits on the grounds that they contradict accepted norms of international sea law"). The memorandum stated that 1994 Turkish Regulations contained "unjustified restrictions, which could even have the effect of stopping shipping in the straits." *Id.* Grigory Karasin, a spokesman for the Russian Foreign Ministry, explained that Turkish Straits "were vital to Russia and the other Black Sea states" and that "Russia could not accept a system that gives Turkey the right to effectively deny passage through the straits to certain categories of ships." *Id.*; see Treaty of Montreux, *supra* note 8, art. 2, at 219 (guaranteeing complete freedom of passage for commercial vessels through Turkish Straits in time of peace). Article 2 of the Treaty of Montreux provides that "[i]n time of peace, merchant vessels shall enjoy complete freedom of transit and navigation in the Straits, by day and by night, under any flag with any kind of cargo, without any formalities." *Id.*

10. See Gunduz Aybay, *Turkey's Role Over Straits Precautions*, LLOYD'S LIST INT'L, July 25, 1997, 1997 WL 17819278, at \*5 (explaining Turkish position that 1994 Turkish Regulations do not violate Treaty of Montreux because Turkish Straits are internal waters of Turkey rather than international waterway and because Treaty of Montreux merely provides for freedom of passage, thus leaving power to organize traffic through Turkish Straits to Turkey).

11. See Sibel Akbay, *Turkey Seeks to Limit Bosphorus Tanker Transit*, LLOYD'S LIST INT'L, May 27, 1996, 1996 WL 6275800, at \*3 (quoting Turkish Maritime Undersecretary Rezat Ozkan, who stated that Turkey cannot allow more oil passage without harming people or environment); see also Yusuf Kanli, *Gonensay Hints at New Measures for Oil and Other Cargo Vessels*, TURKISH DAILY NEWS, May 14, 1996 (reporting that Turkish Foreign Minister Emre Gonensay stated that Turkey's experiences showed that additional security measures were required in order to cope with heavy traffic that increased dangers for Istanbul). Summarizing Turkey's new Straits policy as taking "adequate measures to decrease the risk of collisions or accidents and to decrease the impact of accidents," the minister mentioned that new regulations "may ask for certain standards for oil and other cargo vessels." *Id.*; see Frank McDonald, *Turkey Worried 250% More Supertankers in Bosphorus Will Mean More Oil Disasters*, IR. TIMES, Sept. 29, 1997, at 10 (quoting Turkish Environment Minister, Imrem Aykut, who said at "The Black Sea in Crisis" symposium that Turkey is concerned about prospect of another 150 supertankers a year transporting oil from Caspian Sea to Mediterranean through Bosphorus, which is already one of most world's hazardous waterways).

12. See Thomas Land, *Oil Fuels Russia-Turkey Wrangle*, LLOYD'S LIST INT'L, Feb. 27, 1996, 1996 WL 6273759, at \*5 (discussing export of oil from Caspian Sea region by tankers through Turkish Straits). The Caspian Sea oil reserves rival those of the Persian Gulf. *Id.* Only two fields of known reserves in Azerbaijan are 4.5 billion barrels. *Id.* Their estimated capacity is several times greater. *Id.*

13. See Dev George, *Caspian's Russian Route a Certainty*, OFFSHORE, Nov. 1995, at 8 (quoting Turkish official who said that Turkey will not let Russia move oil through Turkish Straits); see also Land, *supra* note 12, at \*5 (explaining economic reasons of

the construction of an oil pipeline through Turkey.<sup>14</sup> In contrast, the opposing countries<sup>15</sup> attack the 1994 Turkish Regulations, claiming large economic losses caused by vessel delays at the Straits,<sup>16</sup> and reject Turkey's environment protection arguments.<sup>17</sup> Because the 1994 Turkish Regulations threaten Russia's prospects for big revenues from oil export,<sup>18</sup> Russia may even resort to the use of force to resolve this conflict.<sup>19</sup>

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Turkey's imposition of restrictions on tanker traffic carrying Caspian oil). Such impositions will promote the alternative oil export route by pipeline through Turkey. *Id.*

14. See Land, *supra* note 12, at \*5 (discussing Turkish US\$1.8 billion project to construct 1685 kilometer oil pipeline through Turkey, which would reactivate Turkish oil terminal at Ceyhan, which has been idle for several years); see also Akbay, *supra* note 11, at \*3 (reporting on Russia's claim that Turkey uses 1994 Turkish Regulations to force construction of oil pipeline from Baku, Azerbaijan to Turkish southern oil terminal of Ceyhan ("Baku-Ceyhan pipeline")); Dev Goerge, *Blocking the Bosphorus*, OFFSHORE, July 1994, at 7 (stating that without trans-Turkey pipeline for transporting oil, when oil fields begin renewed production, estimated 45 million tons of crude and 13 billion square meters of gas will be transported annually by tankers through Turkish Straits). Thus, current number of vessels transiting the Turkish Straits will double and will likely result in gridlock, environmental disaster, or both. *Id.*

15. See Bird, *supra* note 4, at 44 (identifying opposing parties as Black Sea countries such as Russia, Greece, Romania, Bulgaria, and Ukraine).

16. See *id.* (describing Greek, Russian, Romanian, Bulgarian, and Ukrainian ship-owners frustration over delays causing multi-million dollar losses due to traffic in Turkish Straits); see also Land, *supra* note 12, at \*5 (explaining that Russia's claim is that Turkey is unreasonably making hundreds of Russian vessels wait to enter Straits for many hours).

17. See Bird, *supra* note 4, at 44 (describing Greece's and several former Soviet republics' contention that Turkey tightened shipping regulations in Turkish Straits "as a grab for both regional power and oil money"). The spokesman for Greece's Merchant Marine Ministry, Thrasivoulos Stavridopoulos, claimed that "Turkey's environmental argument is a bluff, an excuse for other political and economic aspirations." *Id.*

18. See Land, *supra* note 12, at \*5 (asserting that confrontation will decide Europe's access to enormous estimated oil reserves that can generate US\$100 billion of revenues over next 30 years).

19. See Debora Schweikart, *Dire Straits: The International Maritime Organization in the Bosphorus and Dardanelles*, 5 Y.B. INT'L L. 29, 42-43 (1996-1997) (stating that Western countries consider use of force as viable means to protect energy reserves in Central Asia); see also Martin Walker, *Battle of the Black Stuff*, GUARDIAN, Oct. 3, 1995, at T6 (noting that former Sen. Robert Dole defined world's oil and gas supplies as strategic interest of United States). Mr. Dole said, recalling the Gulf War, that "[t]he security of the world's oil and gas supplies remain a vital interest of the United States and its major allies. But its borders now move north, to include the Caucasus, Siberia and Kazakhstan. Our forward military presence and diplomacy need adjusting." *Id.* Many analysts consider the Black Sea region as a "crisis arch" that "may become a theater of major conflicts where the West will inevitably confront the Muslim world in the 21st century." Dmitry Sergeyev, *Great Is Russia but There Is Nowhere to Retreat from Sevastopol*, RUSSIAN PRESS DIC., June 8, 1995, 1995 WL 7718292, at \*1. "[I]n the near future the Black Sea will become a new economic gate of Europe, linking it with the Middle East, Central

This Note discusses the need for a modern international legal regime that would address navigational and environmental safety in the Turkish Straits in a manner consistent with customary international law of the transit passage<sup>20</sup> through the straits used for international navigation.<sup>21</sup> Part I provides an overview of the recent history of the Turkish Straits and the legal regimes regulating navigation in the Turkish Straits and other straits used for international navigation. Part II explores the positions and arguments of the parties involved in the dispute over the legality of the 1994 Turkish Regulations. Part III proposes that the circumstances surrounding this conflict warrant the termination of the Treaty of Montreux and adoption of the United Nations Convention on the Law of the Sea<sup>22</sup> ("UNCLOS") as the binding legal regime of the Turkish Straits. Part III argues that

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and Southeast Asia, oil-abundant Siberia, Kazakhstan and Azerbaijan. However, the favorable role of a bridge is now been effectively taken away from Russia." *Id.*

20. See William L. Schachte, Jr. & J. Peter A. Bernhardt, *International Straits and Navigational Freedoms*, 33 VA. J. INT'L L. 527, 530-32 (1993) (defining customary international law of transit passage prior to United Nations Convention on Law of the Sea ("UNCLOS") as freedom of navigation and overflight in straits used for international navigation). In addition to the international law concept of the right of transit passage through international straits, the customary international law recognized innocent passage through a coastal state's territorial sea. *Id.* Prior to UNCLOS, the customary international law defined innocent passage as navigation through the territorial sea without entering internal waters, or proceeding to or from internal waters. *Id.* The territorial sea state could not interfere with innocent passage through the territorial sea and through straits that are used for international navigation. *Id.*

21. See United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, art. 37, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261, 1276 (entered into force Nov. 16, 1994) [hereinafter UNCLOS] (defining straits used for international navigation as straits that connect one part of high seas or exclusive economic zone with another); see also Schachte & Bernhardt, *supra* note 20, at 535-36 (explaining that interpretive position of United States is that straits used for international navigation includes all straits that are used or may be used for navigation; thus all straits are included).

22. UNCLOS, *supra* note 21, 21 I.L.M. 1261, 1261-87. As of December 31, 1997, 158 nations signed UNCLOS and 123 states had ratified UNCLOS. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL, STATUS AS AT 31 DECEMBER 1997, at 799, U.N. Doc. No. ST/LEG/SER.E/16, U.N. Sales No. E.98.V2 (1998). As to the nations that are the parties to the Treaty of Montreux, Australia, Yugoslavia, France, Japan, the Russian Federation, Bulgaria, Romania, and Greece have signed and ratified UNCLOS. *Id.* at 799-801. The United Kingdom has signed and later adopted UNCLOS by accession. *Id.* at 801. Turkey has not signed UNCLOS. *Id.* at 801. UNCLOS transit passage provisions reflect customary international law regardless of whether signatory states have ratified UNCLOS or whether non-signatories have acceded to it. Schachte & Bernhardt, *supra* note 20, at 537. The United States signed UNCLOS on July 28, 1994, and is seeking U.S. Senate advice and consent on it. George K. Walker, *The Interface of Criminal Jurisdiction and Actions Under the United Nations Charter with Admiralty Law*, 20 MAR. LAW. 217, 218 (1996).

this action will supply contemporary and internationally-accepted rules of transit through the Turkish Straits and will provide an authoritative international tribunal to serve as an independent arbitrator between the parties. This Note concludes that UNCLOS's regime of transit passage through the Turkish Straits should help to decrease the possibility of confrontation in the region and to address Turkey's navigational and environmental safety concerns.

### I. RECENT HISTORY OF THE TURKISH STRAITS AND THE LEGAL REGIME REGULATING NAVIGATION IN THE TURKISH STRAITS

Since 1936, the Treaty of Montreux provided the regulatory scheme of maritime traffic in the Turkish Straits.<sup>23</sup> In 1982, UNCLOS codified the law of the transit passage through straits used for international navigation.<sup>24</sup> UNCLOS recognizes, however, that the regimes of straits are governed by prior international treaties.<sup>25</sup> The Treaty of Montreux is a prior international treaty that regulates the Turkish Straits.<sup>26</sup> In 1994, Turkey enacted the 1994 Turkish Regulations to enhance the safety of navigation in the Straits and to protect the environment.<sup>27</sup> Turkey contends that these regulations are consistent with the Treaty of Montreux, the international legal regime governing the Straits.<sup>28</sup>

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23. See H. Warren, *Turkey and the Right to Regulate Traffic Through the Turkish Straits*, LLOYD'S LIST INT'L, Oct. 15, 1997, 1997 WL 17816375, at \*12 (explaining that Treaty of Montreux established regime for passage of ships through Turkish Straits).

24. See UNCLOS, *supra* note 21, pt. III, arts. 34-45, at 1276-78 (providing rules of passage through straits used for international navigation); see also Schachte & Bernhardt, *supra* note 20, at 535 (explaining that one of most important achievements of UNCLOS drafters was codification of transit passage regime of international straits).

25. UNCLOS, *supra* note 21, art. 35(c), at 1276.

26. See *id.* (providing that UNCLOS does not affect "the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits"); see also Schachte & Bernhardt, *supra* note 20, at 538 (explaining that Article 35(c) of UNCLOS applies to Turkish Straits as straits regulated by prior international treaty still in force).

27. See *Background Note on the Regulations for the Turkish Straits* (visited Jan. 18, 1999) <<http://www.mfa.gov.tr/GRUPF/default.asp?Param@GRUPF/Strait2.htm>> (on file with the *Fordham International Law Journal*) [hereinafter *Background Note*] (stating that Turkish Ministry of Foreign Affairs primary concerns for enactment of 1994 Turkish Regulations were safety of navigation and protection of environment).

28. See Bird, *supra* note 4, at 44 (reporting on Turkey's position as to purposes of enactment of 1994 Turkish Regulations and their consistency with international law).

### A. Overview of the Recent History of the Turkish Straits

Over the centuries, numerous fights over the domination of the Turkish Straits have marked the history of this important waterway.<sup>29</sup> The Turkish Straits have been controlled by Greeks, Persians, Romans, Byzantines, and Ottoman Turks.<sup>30</sup> On July 20, 1936, the Treaty of Montreux provided Turkey with sovereignty<sup>31</sup> over the Turkish Straits.<sup>32</sup> The Treaty of Montreux replaced the Protocol Relating to Certain Concessions Granted in the Ottoman Empire<sup>33</sup> ("Lausanne Treaty") signed on July 24, 1923, which regulated the Turkish Straits prior to the Treaty of Montreux.<sup>34</sup> Currently, the Turkish Straits are one of six key oil tanker routes in the world.<sup>35</sup> The Straits are also the riskiest of

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29. *See id.* (describing Turkish Straits as "the gateway to two worlds and three seas, they have been fought over for longer than any other waterway in history, in conflicts stretching as far back as the Trojan War in 1200 B.C.").

30. *Id.*; *see, e.g.*, S. Andrew Scharfenberg, Comment, *Regulating Traffic Flow in the Turkish Straits: A Test for Modern International Law*, 10 EMORY INT'L L. REV. 333, 339-43 (1996) (providing overview of Turkish Straits control schemes over past five centuries and discussing in detail Treaty of Montreux, 1994 Turkish Regulations, and UNCLOS's provisions regulating navigation through straits used for international navigation).

31. *See* Gunduz Aybay & Nylufer Oral, *Turkey's Authority to Regulate Passage of Vessels Through the Turkish Straits* (visited Jan. 18, 1999) <<http://www.mfa.gov.tr/genel/al-labout1.htm>> (on file with the *Fordham International Law Journal*) [hereinafter *Turkey's Authority*] (explaining that Treaty of Montreux gave complete control over Straits to Turkey, but guaranteed free passage through Straits in times of peace).

32. *See* Treaty of Montreux, *supra* note 8, art. 24, at 227 (conferring sovereignty and all regulatory rights over Turkish Straits upon Turkey); *see also* *Turkey's Authority*, *supra* note 31 (explaining that prior to Treaty of Montreux, Turkey did not have military sovereignty over Turkish Straits).

33. *See* Protocol Relating to Certain Concessions Granted in the Ottoman Empire, July 24, 1923, 28 L.N.T.S. 203 [hereinafter *Lausanne Treaty*]. The Protocol Relating to Certain Concessions Granted in the Ottoman Empire ("Lausanne Treaty") was signed by representatives of Turkey, the successor to Ottoman Empire, on one side and by the United Kingdom, France, Italy, Japan, Greece, Romania, and the Kingdom of Serbs, Croats, and Slovenes (Yugoslavia) on other side. *Id.*

34. *See* *Turkey's Authority*, *supra* note 31 (explaining that Lausanne Treaty did not give military sovereignty to Turkey over Straits prior to Treaty of Montreux). The signatories to the Treaty of Lausanne, except Italy, signed the Treaty of Montreux, which changed the status of the Turkish Straits by giving complete control over the Straits to Turkey, but guaranteeing free passage through the Straits in times of peace. *Id.* The Treaty of Montreux was originally intended to last for 20 years, but is still in effect. *Id.*

35. *See* Schweikart, *supra* note 19, at 33 (explaining that six of world's key oil tanker routes are Strait of Hormuz from Persian Gulf to Gulf of Oman and Arabian Sea, Strait of Malacca from northern Indian Ocean into South China Sea and Pacific Ocean, Bosphorus from Black Sea to Mediterranean Sea, Suez Canal from Red Sea to Mediterranean Sea, Rotterdam Harbor from North Sea to Rhine River, and Panama Canal from Pacific Ocean to Caribbean Sea).

these routes.<sup>36</sup>

In 1994, after a dramatic tanker accident in the Straits,<sup>37</sup> Turkey unilaterally adopted the 1994 Turkish Regulations.<sup>38</sup> This action, augmented by conflicting oil export interests of Russia and Turkey, triggered the dispute between these nations over the freedom of navigation through the Turkish Straits.<sup>39</sup> Russia and Turkey currently compete to control the movement of vast volumes of oil exported from Caspian sources to lucrative Western markets.<sup>40</sup> Turkey promotes the construction of a US\$2.9 billion pipeline through the Turkey's territory<sup>41</sup> ("Baku-Ceyhan pipeline").<sup>42</sup> The Azerbaijan International Operating Co.<sup>43</sup> ("AIOC"), however, may decide against constructing such a pipeline in the near future.<sup>44</sup> Instead, the AIOC will likely rely on a

36. See *id.* (noting that "[t]he U.S. Energy Information Administration rated the possibility of accidental oil supply disruptions greatest among major oil shipping lanes for supplies moving through the Bosphorus").

37. See *Accidents in the Bosphorus* (visited Jan. 18, 1999) <<http://www.mfa.gov.tr/GRUPF/default.asp?Param@grupf/caspian5.htm>> (on file with the *Fordham International Law Journal*) (explaining that in March 1994, Greek Cypriot tanker *Nassia* collided with another vessel, killing 30 seamen and spilling 20,000 tons of oil into Turkish Straits). The escaping oil burned on the waters of the Bosphorus for five days. *Id.*

38. See *Background Note*, *supra* note 27 (announcing introduction of 1994 Turkish Regulations and providing safety of navigation and environmental protection concerns justifying 1994 Turkish Regulations); see also Bird, *supra* note 4, at 44 (noting that Turkey unilaterally introduced 1994 Turkish Regulations, saying that such action was justified by safety and environmental concerns).

39. See Land, *supra* note 12, at \*5 (arguing that "a confrontation between Russia and Turkey which ostensibly concerns navigation rights, safety and traffic schedules in the Bosphorus and Dardanelles straits, is mainly about the two rivals jostling for position over access to the oil and gas reserves of the Caspian region").

40. See Bird, *supra* note 4, at 44 (describing Turkey's efforts to establish its presence in oil-rich Central Asia and use pipeline via Turkey to bring oil to Western markets).

41. See David Ivanovich & Hillary Durgin, *Long Pipeline Route Viable, Officials Say/Option Avoiding Iran, but Not Georgia, Likely*, HOUS. CHRON., Oct. 13, 1998, at 2 (describing oil pipeline project to construct 1240-mile-long pipeline from the Azerbaijani capital of Baku to Turkish port city of Ceyhan on Mediterranean Sea ("Baku-Ceyhan pipeline")).

42. See *id.* at 2 (explaining that "Turkey, concerned about a surge in tanker traffic through the narrow Bosphorus Straits if the Caspian becomes a major oil exporting region, has been pushing for the Ceyhan route"). Turkish President Suleyman Demirel stated: "Baku-Ceyhan will be definitely constructed. It is the safest route and has the backing of the United States." *Id.*

43. See *id.* (describing Azerbaijan International Operating Co. ("AIOC") as eleven member consortium developing three offshore oil fields in Azerbaijani-claimed sector of Caspian Sea).

44. See Letter from Julia Nanay, Director, The Petroleum Finance Company, Washington, D.C. (Jan. 13, 1999) (on file with the *Fordham International Law Journal*) (ex-

smaller, less-expensive line to the Georgian Black Sea port of Supsa that the AIOC is currently renovating.<sup>45</sup> The AIOC may also build a second line along that route.<sup>46</sup> A report issued in May 1998 by the Petroleum Finance Company, a Washington-based oil consulting company, stated that the Baku-Ceyhan pipeline is a less practicable option.<sup>47</sup> The report examined the feasibility of the Baku-Ceyhan pipeline and concluded that it did not represent an attractive choice, despite support from Turkey and the United States.<sup>48</sup> The author of the report, Lowell Bezanis, opined that Turkey used environmental justifications to impose limits on the use of the Turkish Straits for transporting up to forty-five million tons of crude oil annually by tankers from the

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plaining that AIOC's decision is not final yet and will be announced sometime in next few months). Ms. Nanay stated:

[AIOC] is supposedly leaning toward keeping the existing northern and western [oil pipeline] routes out of Azerbaijan. One goes through Dagestan and Chechnya with up to 100,000 barrels per day that can eventually be shipped and the other to Supsa (100,000 barrels per day initially, to be expanded to 250,000 barrels per day). Given the level of oil reserves and production projected in Azerbaijan over the next three to five years, this should be enough until (a) oil prices show signs of firming and (b) more oil becomes available. Current production is edging up toward 100,000 barrels per day this first quarter [of 1999].

*Id.*

45. See Ivanovich & Durgin, *supra* note 41, at 2 (stating that Julia Nanay explained that shorter pipeline to Supsa was "the best that could have been done, given the commercial circumstances").

46. *Id.*; see McDonald, *supra* note 11, at 10 (stating that the oil will be transported from Caspian to Black Sea ports by Novorossiysk oil pipeline that is almost ready, by planned Georgian line, and via planned oil terminal in Odessa, Ukraine).

47. See Lowell Bezanis, *Report: The Baku-Ceyhan Pipeline: Constraints to a US-backed Central Asian/Caucasian Exit Route*, Petroleum Finance Company, May 1998 (on file with the *Fordham International Law Journal*) (examining prospects for construction of Baku-Ceyhan pipeline and concluding that differing priorities of key Caspian countries make Baku-Ceyhan pipeline commercially not viable); see also PFC Report, *Baku-Ceyhan Pipeline Is Bad Choice*, *TURKISH DAILY NEWS*, May 19, 1998, 1998 WL 9591407 (noting that, according to report by Petroleum Finance Company, Baku-Ceyhan pipeline project is currently not viable).

48. See Bezanis, *supra* note 47, at 4 (explaining why Turkey promoted Baku-Ceyhan pipeline project). The project "[o]riginates with the initial, hyperactive and implicitly pan-Turkist phase of Turkey's involvement with the CIS." *Id.* The Baku-Ceyhan pipeline project

became the metaphor for a great geopolitical realignment which the Turks prematurely declared themselves to be winning. In reality, there was no prospect of Caspian oil volumes to be sufficient enough to fill a main export pipeline for more than a decade. And in making such an overt bid, Turkey put herself on a collision course with Moscow.

*Id.*

Novorossiysk and Supsa ports and to make the Baku-Ceyhan pipeline project more attractive.<sup>49</sup>

### B. *The Treaty of Montreux*

The Treaty of Montreux provides detailed rules for navigating the Turkish Straits<sup>50</sup> and guarantees complete freedom of passage and navigation of merchant vessels in the Straits.<sup>51</sup> Article 7 of the Treaty defines merchant vessels as all vessels other than warships.<sup>52</sup> In addition, Article 4 requires pilotage and towage to remain optional and prohibits Turkish authorities from imposing taxes or other charges on passing vessels.<sup>53</sup> The captains of passing vessels must declare to Turkish officials their vessel's name, nationality, tonnage, destination, and the last visited port.<sup>54</sup> All vessels must stop near the entrance to either strait for sanitary control,<sup>55</sup> after which the vessel may pass through the Straits without making any more stops throughout its passage.<sup>56</sup>

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49. *See id.* at 5 (arguing that environmental concerns that Turkey offered as justifications for enactment of 1994 Turkish Regulations represented Turkey's "thinly-veiled trump card"). "Turkey controls a life-line for Black Sea littoral states and can delay more than just oil-tanker traffic if it so chooses." *Id.*

50. *See* Schachte & Bernhardt, *supra* note 20, at 547 (explaining that, although Treaty of Montreux regulates passage through Straits, this regulation is less than right of transit passage and less than right of non-suspendable innocent passage). So far, however, the United States has not protested any of the provisions of the Treaty of Montreux. *Id.*

51. *See* Treaty of Montreux, *supra* note 8, art. 2, at 219 (guaranteeing freedom of navigation in Turkish Straits "in time of peace, by day and night and without any formalities for merchant vessels under any flag and with any kind of cargo"). Annex I, however, provides for charging merchant vessels for maintaining sanitary control stations, lighthouses, buoys, and life saving devices and guarantees the application of charges in a non-discriminatory manner. *Id.* annex I, at 233.

52. *Id.* art. 7, at 221. In addition, Annex II of the Treaty of Montreux defines merchant vessel as any surface vessel not exceeding standard displacement of 100 tons, or displacing more than 100 tons but not functioning in fleet or serving as a troop transport. *Id.* annex II, at 235. Merchant vessels are those that do not have such characteristics as: (1) gun caliber greater than 155 mm; (2) more than eight guns with caliber exceeding 76 mm; (3) capability to launch torpedoes; (4) armor plating protection; (5) capability of greater than twenty-eight knots speed; or (6) more than two aircraft-launching apparatus. *Id.* annex II, at 235.

53. *Id.* art. 4, at 219.

54. *Id.* art. 2, at 219.

55. *See id.* art. 3, at 219 (explaining that sanitary control must be carried out with all possible speed).

56. *See id.* (guaranteeing that vessel may not be asked to make any stops throughout its passage through Straits after stopping at entrance to either strait for sanitary control).

The parties<sup>57</sup> to the Treaty of Montreux could have amended the Treaty five years from the day that it entered into force and, thereafter, at the end of each successive five-year period.<sup>58</sup> Signatories can modify the Treaty of Montreux at any time through diplomatic channels or pursuant to a new conference.<sup>59</sup> Any party can terminate the Treaty of Montreux by denouncing the Treaty.<sup>60</sup> Any denunciation, however, will not affect the principle of free and unhampered transit through the Straits because Article 28 guarantees that the regime of free transit will govern indefinitely.<sup>61</sup> Although the parties to the

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57. *See id.*, art. 3, n. 2, at 215 (identifying U.S.S.R., Great Britain, Australia, Bulgaria, France, Greece, Japan, Rumania, Turkey, and Yugoslavia as parties to Treaty of Montreux).

58. *See id.* art. 29, at 231 (defining procedure of amendment of Treaty of Montreux by request of any party for revision). All requests for revision stating details and reasons of proposed amendments must be given to all parties of the Treaty of Montreux three months before end of current five year period. *Id.* At least one other signatory state must support an amendment if it concerns the transit of warships, which Articles 14 and 18 cover. *Id.* At least two other signatory states must support an amendment if it concerns all other articles. *Id.*

59. *See id.* (providing that, while only three-quarters majority, which includes three-quarters of Black Sea states parties vote, may amend Articles 14 and 18 of Treaty of Montreux, the vote must be unanimous to amend all other articles).

60. *Id.* art. 28, at 229; *see* Scharfenberg, *supra* note 30, at 392 (discussing that more tenable method for Turkey to terminate Treaty of Montreux would be to claim *rebus sic stantibus*). *Rebus sic stantibus* is a mechanism of declaring the significant change in material circumstances warranting to ignore the prior treaty. Scharfenberg, *supra* note 30, at 392. Turkey has successfully invoked *rebus sic stantibus* before to dispense of the Lausanne Treaty, the immediate predecessor of the Treaty of Montreux. *Id.* Scharfenberg argues that Turkey may invoke *rebus sic stantibus* because of the change in the size and number of vessels passing through the Straits since the signing of the Treaty of Montreux in 1936. *Id.* at 393. Such change was not foreseeable and the absence of heavy traffic through the Straits may have played a significant role for Turkish acceptance of the agreement. *Id.* Now, in light of the changed circumstances, Turkey could argue that it needs authority to regulate the traffic in the Straits in such way as to ensure safety and to protect the environment in the Straits. *Id.*; *see* Vienna Convention on the Law of Treaties, art. 62, U.N. Doc. A/CONF. 39/27, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (stating in Article 62 of Vienna Convention on the Law of Treaties that to invoke *rebus sic stantibus*, party must show three following conditions: (1) fundamental change of circumstances that was not foreseen by parties when they entered into treaty; (2) existence of those circumstances was essential basis for parties consent to be bound by treaty; and (3) effect of change is to transform radically extent of obligations still to be performed under treaty); *see also* Scharfenberg, *supra* note 30, at 381-82 (suggesting that Treaty of Montreux is "extremely inadequate to deal with specific problems of the coastal and marine environment").

61. *See* Treaty of Montreux, *supra* note 8, art. 28, at 229 (guaranteeing indefinite regime of free transit through Turkish Straits); *see also* Scharfenberg, *supra* note 30, at 355 (explaining that default regime of free transit may be either absolute free passage or general freedom of navigation limited by needs of Turkey and other Black Sea

Treaty of Montreux initially intended it to govern for twenty years, they provided that it will continue to remain in force until it is formally denounced.<sup>62</sup> Should any party denounce the Treaty of Montreux, Article 28 of the Treaty of Montreux requires signatories to agree upon and sign a new treaty that will regulate navigation in the Turkish Straits.<sup>63</sup>

*C. The Maritime Traffic Regulation for the Turkish Straits and Marmara Region*

In addition to the Treaty of Montreux rules of passage for the Turkish Straits, Turkey introduced fifty-nine modifications to the rules of passage of the Treaty of Montreux in their 1994 Turkish Regulations.<sup>64</sup> Turkey explained that these modifications were vital for maintaining orderly maritime traffic in the Straits to reduce the likelihood of future accidents.<sup>65</sup> The 1994 Turkish Regulations apply to all ships navigating the Turkish

states). Scharfenberg concludes that in case of return of the default regime of free transit in the Turkish Straits, Turkey would be back to the problem of conflicting interpretation of the 1994 Turkish Regulations, similar to those it encountered with reading the 1994 Turkish Regulations in light of the Treaty of Montreux. *Id.*

62. Treaty of Montreux, *supra* note 8, art. 28, at 229.

63. *Id.*

64. See Bird, *supra* note 4, at 44 (discussing new transit passage requirements of 1994 Turkish Regulations).

65. See *Navigational and Environmental Safety in the Turkish Straits* (visited Jan.18, 1999) <<http://www.mfa.gov.tr/GRUPF/default.asp?Param@GRUPF/Strait1.HTM>> (on file with the *Fordham International Law Journal*) [hereinafter *Safety in the Turkish Straits*] (stressing safety and environmental concerns and providing data on maritime traffic increase and vessel accidents in Turkish Straits). Dangers of heavy maritime traffic are as follows:

The nature, volume and frequency of vessel traffic, the increase in the size and tonnages of the vessels and the nature of cargoes transported have sharply increased the risks of maritime accidents which could have grave consequences in terms of ecological, environmental and physical disasters of an unprecedented nature and scale.

Dense maritime traffic and associated risks and dangers in the straits pose a serious threat to the physical and environmental security of Istanbul and to the lives of its 10 million population.

A collision or an environmental disaster will force the closure of the Straits for unpredictable periods. This force majeure situation will have the practical effect of denying, impairing and impeding the exercise of the right of navigation.

*Id.*; see Bird, *supra* note 4, at 44 (reporting reasons given by Turkey to explain necessity of 1994 Turkish Regulations); see also 1994 TURKISH REGULATIONS, *supra* note 3, art. 1 (defining purpose of 1994 Turkish Regulations). Article 1 states that "[t]he purpose of the Regulations which shall apply to all ships navigating in the Straits and the Sea of

Straits.<sup>66</sup> Under the 1994 Turkish Regulations, the captains of all merchant vessels must ensure that their vessels technically conform to the requirements in Article 6(B)(a)-(m).<sup>67</sup> Vessel captains must also report to the Turkish authorities the vessel's name, flag, tonnage, port of departure, port of destination, and any deficiencies of the vessel that may affect the safety of navigation.<sup>68</sup>

Part III of the 1994 Turkish Regulations provides the procedure for transit through the Straits.<sup>69</sup> This part's key requirements for the vessels passing through the Straits include navigation within the designated traffic lanes,<sup>70</sup> a ban of automatic pilot use,<sup>71</sup> and the maintenance of a specified speed.<sup>72</sup> In order to navigate through the Straits, Turkish vessels in excess of 150

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Marmara is to regulate the maritime traffic scheme in order to ensure the safety of navigation, life and property and to protect the environment in the region." *Id.*

66. *See* 1994 TURKISH REGULATIONS, *supra* note 3, art. 1 (stating that 1994 Turkish Regulations "shall apply to all ships navigating in the Straits and the Sea of Marmara"). *Id.*

67. *See id.* art. 6 (describing technical requirements for vessel's mechanisms, accessories, and navigational gauges and requiring that "[a]ll vessels that shall pass through the Strait of Istanbul and the Strait of Canakkale shall be seaworthy in accordance with international rules and the legislation of the State whose flag they fly").

68. *See id.* arts. 7-8 (requiring that information about vessel be given 24 hours before entrance of Straits from Black Sea region and six hours before departure from Marmara Sea region). Article 7 requires that: "Sailing Plan I, to be given to Traffic Control Centre shall contain the following information: name of the vessel, flag of the vessel, call sign, tonnage, port of departure, port of arrival of cargo, whether pilot is requested, deficiencies of the vessel which affect navigation adversely, other information." *Id.* art. 7.

Article 8 reads in relevant part that:

Sailing Plan II which shall be given by VHF to the Traffic Control Centre should contain the following information: name of the vessel, flag of the vessel, call sign, position of the vessel, estimated arrival time to the entrance of the Strait, whether a pilot is requested, inabilities of the vessel affecting sailing adversely, other information.

*Id.* art. 8.

69. *See id.* arts. 15-28 (regulating speed, overtaking, towing, interruption of transit, traffic separation schemes, and anchorage while passing Straits).

70. *See id.* art. 25 (providing for fines to vessels crossing traffic separation lanes). Article 25 obligates vessels to navigate "within the designated traffic lanes. Vessels which cross the lanes may be fined according to Article 11 of Law No. 618 on the Ports, as well as be brought to the attention of IMO and the flag state." *Id.*

71. *See id.* art. 15 (requiring manual control of steering). "The emergency steering gear will also be kept ready for immediate use with personnel on duty to use it." *Id.*

72. *See id.* art. 17 (designating speed as 10 nautical miles per hour). Such speed can be exceeded for maintaining the steering control of the vessel, or reduced by first informing the vessels proceeding behind. *Id.* art. 18.

meters in length must employ a pilot,<sup>73</sup> while foreign vessels are only advised to take a pilot for safety of navigation.<sup>74</sup> Part III also gives the Undersecretariat for Maritime Affairs of Turkey<sup>75</sup> (“Undersecretariat”) the power to stop all maritime traffic in the Turkish Straits temporarily for construction work, including underwater work, drilling, fire extinguishing, scientific and sports activities, salvage and rescue operations, prevention of pollution, pursuit of criminals, and other similar purposes.<sup>76</sup>

The 1994 Turkish Regulations prohibit the discharge of any pollutants, such as refuse, bilge water, and oil into the Sea of Marmara or the Turkish Straits.<sup>77</sup> Article 42 of the 1994 Turkish Regulations prohibits large vessels<sup>78</sup> carrying hazardous cargo<sup>79</sup> from entering the Straits when another such vessel is in process

73. *See id.* art. 31 (stating that requirement to employ a pilot is for “safety of navigation, life, property and the environment”). Article 31 requires:

Turkish vessels 150 metres or more in length passing through the Straits shall take a pilot for the safety of navigation, life, property and the environment. Foreign vessels are advised for safety purposes to take a pilot. The Administration may establish compulsory pilotage requirements in certain areas in the Straits and Marmara region for vessels other than transiting vessels.

*Id.*

74. *Id.*

75. *See id.* art. 2(a) (empowering Undersecretariat for Maritime Affairs of Turkey (“Undersecretariat”) to administer 1994 Turkish Regulations).

76. *See id.* art. 24 (explaining that Turkish port authority and traffic control stations will announce closings and openings of Turkish Straits to all vessels). Article 24 requires:

Maritime traffic in the Straits may be temporarily halted by the Administration due to construction work including underwater work, drilling, fire extinguishing, scientific and sports activities, salvage and rescue operations, prevention and eradication of maritime pollution; pursuing criminals, accidents and similar cases. The halting and opening of traffic will be announced by the relevant port authority and traffic control stations to vessels and persons involved. After the reopening of the Straits to traffic following a temporary closure, the order in which waiting vessels will enter the Straits will be determined by the traffic control stations and will be announced to the vessels.

*Id.*

77. *See id.* art. 33 (banning environmental pollution by vessels). Article 33 requires: “No refuse, landfill, bilge water, domestic and industrial waste, ecologically harmful or unsanitary material, oil and other pollutants can be dumped or discharged into the sea in the Straits and Marmara region. Vessels in the Straits and Marmara region must take every measure not to create air pollution.” *Id.*

78. *See id.* art. 2(j) (defining “large vessel” as one of 150 meters or more in length).

79. *See id.* art. 2(h) (defining vessels with “hazardous cargo” as those including nuclear-powered vessel (except military vessels), vessels carrying petroleum and its derivatives, vessels carrying nuclear, dangerous and noxious wastes as defined in international conventions and Turkish legislation).

of passing through the Straits.<sup>80</sup> Article 29 limits the access of certain types of vessels to the Straits<sup>81</sup> by requiring the owner or manager of a large vessel to provide information about the vessel to the Undersecretariat at the planning stage of the passage.<sup>82</sup> It further provides that the Undersecretariat will inform the owner or manager of a large vessel of the outcome of its review.<sup>83</sup> Article 30 of these regulations sets forth a similar procedure for nuclear-powered vessels and vessels carrying nuclear, dangerous or noxious cargo, or waste seeking to obtain permission to pass through the Straits.<sup>84</sup> According to one commentator,<sup>85</sup> Articles 29 and 30 imply that Turkey has the discretion to prohibit such vessels from passing through the Straits.<sup>86</sup>

D. *Relevant Provisions of UNCLOS Regulating Straits Used for International Navigation*

Although UNCLOS currently does not regulate navigation in the Turkish Straits,<sup>87</sup> it does set forth the law of transit passage through straits used for international navigation,<sup>88</sup> or the customary international law.<sup>89</sup> UNCLOS is the comprehensive,

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80. *See id.* art. 42 (stating that “[w]hen a large vessel with hazardous cargo enters the Strait, a similar vessel may not enter the Strait until the previous vessel has exited”).

81. *See id.* art. 29 (applying only to “large vessels” defined as those exceeding 150 meters in length).

82. *See id.* (requiring such information as its cargo, vessel’s dimensions, and maneuverability).

83. *See id.* (stating that Undersecretariat, “taking into consideration the morphological and physical structure of the Straits, the vessel’s dimensions and manoeuvre capability, the safety of life, property and the environment, and maritime traffic conditions, shall inform the applicants of the outcome of its review”).

84. *See id.* art. 30 (requiring vessels carrying dangerous or noxious waste to obtain permission from Turkish Ministry for Environment in accordance with relevant regulations of Undersecretariat at planning stage of passage).

85. *See* Scharfenberg, *supra* note 30, at 355-56 (analyzing meaning of Articles 29 and 30 of 1994 Turkish Regulations).

86. *See id.* (explaining that text of Articles 29 and 30 of 1994 Turkish Regulations implicitly empowers Turkey to disallow certain vessels to pass Turkish Straits).

87. *See* UNCLOS, *supra* note 21, art. 35(c), at 1276 (providing that UNCLOS does not affect legal regime in straits regulated by prior international treaty still in force).

88. *See id.* pt. III, arts. 34-45, at 1276-78 (defining legal status of waters forming straits used for international navigation and providing rules of passage through such straits). The United States unequivocal position is that the transit passage provisions of UNCLOS reflect customary international law. Schachte & Bernhardt, *supra* note 20, at 537.

89. *See* Schachte & Bernhardt, *supra* note 20, at 530-32 (explaining that UNCLOS codified customary international law of innocent passage and transit passage that existed prior to UNCLOS). Currently, Articles 19 and 21 of UNCLOS represent the inter-

modern, and internationally-recognized law of the sea.<sup>90</sup> It is the product of the extensive negotiations among experts of maritime law.<sup>91</sup>

Part III of UNCLOS regulates transit passage in straits used for international navigation.<sup>92</sup> UNCLOS recognizes that one

national law concerning navigation within the coastal states' territorial seas. *Id.* Article 19(1) of UNCLOS defines meaning of innocent passage as follows: "[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law." UNCLOS, *supra* note 21, art. 19, at 1274. Article 21 of UNCLOS empowers the coastal State to adopt laws and regulations relating to innocent passage, stating that:

1. The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:
  - (a) the safety of navigation and the regulation of maritime traffic;
  - (b) the protection of navigational aids and facilities and other facilities or installations;
  - (c) the protection of cables and pipelines;
  - (d) the conservation of the living resources of the sea;
  - (e) the prevention of infringement of the fisheries laws and regulations of the coastal State;
  - (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;
  - (g) marine scientific research and hydrographic surveys;
  - (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.
2. Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.
3. The coastal State shall give due publicity to all such laws and regulations.
4. Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.

*Id.* art. 21, at 1274. Article 44 of UNCLOS sets out the law of transit passage, providing that it cannot be hampered or suspended by states bordering straits. *Id.* art. 44, at 1278.

90. See Schachte & Bernhardt, *supra* note 20, at 527 (explaining that UNCLOS is contemporary product of work of maritime experts that provides strong framework of rules to deal with all kinds of complexities and to resolve ambiguities of international disputes).

91. See *id.* at 527 (explaining that UNCLOS is comprehensive, responsive, soundly conceived, and up-to-date body of law for contemporary international maritime relations). UNCLOS provides the logical framework to ensure resolution of complex factual situations and offers the analytical tools to resolve difficult navigational disputes equitably and consistently. *Id.*

92. See UNCLOS, *supra* note 21, pt III, arts. 34-45, at 1276-81 (setting out legal status of waters forming straits used for international navigation, rules of transit passage, and rules of innocent passage through straits used for international navigation). Article 44 states that "[s]tates bordering straits shall not hamper transit passage and

fundamental international commerce and security interest is open access through international straits.<sup>93</sup> Part III of UNCLOS distinguishes between the regimes of normal straits,<sup>94</sup> the regime of dead-end straits,<sup>95</sup> and the regime of straits governed by prior international treaties.<sup>96</sup> Article 37 defines a normal international strait as a strait that connects one part of the high seas,<sup>97</sup> or an exclusive economic zone,<sup>98</sup> with another.<sup>99</sup> Under Article 44 of UNCLOS, the state bordering a normal strait may not hamper or suspend transit passage.<sup>100</sup>

Article 45(1)(b) and (2) governs navigation in dead-end straits.<sup>101</sup> Article 45(2) prohibits the suspension of innocent pas-

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shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage." *Id.* art. 44, 21 I.L.M. at 1278.

93. See Schachte & Bernhardt, *supra* note 20, at 531 (defining rationale behind transit passage term of UNCLOS). Schachte & Bernhardt state that a regime of the transit passage is also very important for keeping peace and order: the strait states are relieved from the role of the "gatekeeper" and thus are less likely to be forced in international conflicts. *Id.*

94. See UNCLOS, *supra* note 21, art. 37, at 1276 (defining "normal" straits as "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"); see also Schachte & Bernhardt, *supra* note 20, at 538-39 (explaining that Strait of Gibraltar is example of "normal" strait governed by Article 38 of UNCLOS).

95. See Schachte & Bernhardt, *supra* note 20, at 529 (explaining that dead-end straits are straits that connect part of high seas or exclusive economic zone and territorial sea of another state).

96. UNCLOS, *supra* note 21, art. 35(c), at 1276.

97. See *id.* art. 86, at 1286 (defining high seas as "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State").

98. See *id.* art. 55, at 1279 (defining exclusive economic zone as "an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part [V], under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of [UNCLOS]").

99. *Id.* art. 37, at 1276.

100. *Id.* art. 44, at 1278; see Schachte & Bernhardt, *supra* note 20, at 540 (explaining that provision prohibiting hampering or stopping transit passage is substantially greater navigational right than the right of innocent passage under Article 25(3) of UNCLOS). Under the Article 25(3) right of innocent passage, the strait state can temporarily suspend the innocent passage of foreign vessels if that suspension is essential for the protection of security of that state. *Id.*

101. See UNCLOS, *supra* note 21, art. 45(1)(b), at 1278 (stating that regime of innocent passage shall apply in straits used for international navigation that connect "a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State").

sage in such straits.<sup>102</sup> Because the regime of innocent passage that can be suspended under Article 25(3)<sup>103</sup> is not sufficient for this type of strait, which can be effectively land-locked, maritime traffic in the dead-end straits cannot be suspended.<sup>104</sup>

Finally, Article 35(c) governs straits that are governed in whole or in part by prior international treaties.<sup>105</sup> For instance, the Turkish Straits are regulated by the Treaty of Montreux.<sup>106</sup> Consequently, Article 35(c) applies to the Turkish Straits and recognizes the Treaty of Montreux as the governing regime of the Turkish Straits.<sup>107</sup>

Part III of UNCLOS also provides rules of safe passage, including the designation of sea lanes and traffic separation schemes to ensure safe passage through all straits, except the Article 35(c) straits.<sup>108</sup> Article 42 empowers the states bordering straits to enact rules to further safe navigation and orderly mari-

102. *See id.* art. 45(2), at 1278 (stating that “[t]here shall be no suspension of innocent passage through such straits”).

103. *See id.* art. 25(3), at 1275 (setting forth rights of protection of coastal state including temporary suspension of innocent passage). Article 25(3) of UNCLOS reads:

The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.

*Id.*; *see id.* art. 19(1), at 1274 (defining meaning of innocent passage as “that is not prejudicial to the peace, good order or security of the coastal State”); *see also* Schachte & Bernhardt, *supra* note 20, at 530-32 (defining innocent passage as passage through coastal state’s territorial sea and through straits that are used for international navigation without entering internal waters, or proceeding to or from internal waters).

104. *See* Schachte & Bernhardt, *supra* note 20, at 541 (explaining that right of innocent passage provided in Article 25(3) of UNCLOS is not sufficient to meet interests of state that is separated by strait from high seas). “Without the right of non-suspendable innocent passage, the state at the end of the cul-de-sac would effectively be “land-locked” with a territorial sea leading nowhere.” *Id.* at 534-35.

105. *See* UNCLOS, *supra* note 21, art. 35(c), at 1276 (providing that UNCLOS does not affect “the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits”).

106. *See* Schachte & Bernhardt, *supra* note 20, at 546 (explaining that Danish Straits, Turkish Straits, Aaland Island Strait, and Strait of Magellan are examples of Article 35(c) straits).

107. UNCLOS, *supra* note 21, art. 35(c), at 1276.

108. *See id.* art. 38, at 1277 (granting all ships and aircraft’s right of transit passage through straits used for international navigation). Article 38 of UNCLOS provides:

1. In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the

time traffic, prevention and reduction of pollution, enforcement of sanitary laws, customs, and immigration regulations of the coastal state.<sup>109</sup> All vessels passing through the straits must follow these rules.<sup>110</sup>

To enable states to adopt these maritime rules, UNCLOS was open for signature by all states<sup>111</sup> from December 10, 1982 to December 9, 1984.<sup>112</sup> Further, UNCLOS was subject to ratification by its signatories.<sup>113</sup> For all other states, UNCLOS remains

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high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.

2. Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.

*Id.* art. 38(1), (2), at 1277.

109. *See id.* art. 42(1), at 1277 (providing that states bordering straits may adopt laws and regulations relating to transit passage through straits). Such laws and regulations may be adopted in respect of all or any of the following:

(a) the safety of navigation and the regulation of maritime traffic, as provided in article 41;

(b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait;

(c) with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear;

(d) the loading or unloading of any commodity, currency or person in contravention of the custom, fiscal, immigration or sanitary laws and regulations of States bordering straits.

*Id.*

110. *Id.* art. 42(4), at 1278.

111. *See id.* art. 305(1)(a), at 1326 (providing that UNCLOS is open for signature by all states).

112. *See id.* art. 305(2), at 1326 (providing that UNCLOS "shall remain open for signature until 9 December 1984 at the Ministry of Foreign Affairs of Jamaica and also, from 1 July 1983 until 9 December 1984, at United Nations Headquarters in New York.").

113. *See id.* art. 306, 21 I.L.M. at 1326 (setting out procedures of ratification and formal confirmation of UNCLOS). Article 306 provides:

This Convention is subject to ratification by States and the other entities referred to in article 305, paragraph 1(b), (c), (d) and (e), and to formal confirmation, in accordance with Annex IX, by the entities referred to in article 305, paragraph 1(f). The instruments of ratification and of formal confirmation shall be deposited with the Secretary-General of the United Nations.

*Id.*

open for accession in accordance with Article 307.<sup>114</sup> Once in force, UNCLOS does not alter the rights and obligations of signatories in relation to other conventions and international agreements that are compatible with the convention.<sup>115</sup>

As to the states bordering the Black Sea ("Black Sea states"), the Russian Federation, Bulgaria, and Romania have signed and later ratified UNCLOS.<sup>116</sup> Georgia has not signed UNCLOS but adopted it by accession.<sup>117</sup> The Ukraine has signed, but has neither ratified nor acceded to UNCLOS.<sup>118</sup> Turkey is the only

114. *See id.* art. 307, at 1326 (providing for accession where instruments of accession shall be deposited with Secretary-General of United Nations). UNCLOS "shall enter into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession." *Id.* art. 308(1), at 1327. After the deposit of the sixtieth instrument of ratification or accession, for each state ratifying or acceding to UNCLOS, it "shall enter into force on the thirtieth day following the deposit of its instrument of ratification or accession." *Id.* art. 308(2), at 1327.

115. *See id.* art. 311(2), (3), at 1327 (setting out rights of parties in relation to other conventions and international agreements that are compatible with UNCLOS). Article 311(2), (3) states:

2. This Convention shall not alter the rights and obligations of States Parties which arise from other agreement's compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

3. Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

*Id.* art. 311(2), (3), at 1327. Article 310 authorizes the parties to make the following declarations:

Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.

*Id.* art. 310, at 1327.

116. *See* MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL, *supra* note 22, at 799-801 (reporting that Russian Federation ratified UNCLOS on March 12, 1997, Bulgaria ratified UNCLOS on May 15, 1996, and Romania ratified UNCLOS on December 17, 1996).

117. *See id.* at 800 (reporting that Georgia adopted UNCLOS by accession on March 21, 1996).

118. *Id.* at 801.

Black Sea state that has neither signed nor adopted UNCLOS.<sup>119</sup>

Part XV of UNCLOS sets out the dispute resolution procedure for parties to UNCLOS.<sup>120</sup> Section 1 of Part XV requires the parties in disputes concerning the interpretation or application of the convention to make an effort to settle by peaceful means of their own choice.<sup>121</sup> The parties may also submit their dispute to conciliation.<sup>122</sup> In addition, any party to a dispute can

119. *See id.* at 799-801 (listing all nations that signed UNCLOS, signed and ratified UNCLOS, signed and acceded to UNCLOS, and did not sign but acceded or succeeded to UNCLOS; nations that have neither signed nor acceded to UNCLOS are not listed).

120. *See UNCLOS, supra* note 21, pt. XV, arts. 279-99, at 1322-25 (setting out procedure of dispute settlement, and defining jurisdiction and applicable law of dispute settlement procedures).

121. *See id.* pt. XV, § 1, arts. 279-85, at 1322-22 (setting out procedure of dispute resolution prior to submission of dispute to court for binding decision). Article 279 sets out an obligation of the parties to "settle any dispute between them concerning the interpretation or application of this Convention by peaceful means." *Id.* art. 279, at 1322. Article 280 provides that UNCLOS does not impair "the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice." *Id.* art. 280, at 1322. If states have obligations under general, regional or bilateral agreements to submit, at the request of any party to the dispute, "to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree." *Id.* art. 282, at 1322. Article 283 obliges the parties to exchange their views.

1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

*Id.* art. 283, at 1322.

122. *See id.* art. 284, at 1322 (providing that "a party to a dispute concerning the interpretation or application of this Convention may invite the other party or parties to submit the dispute to conciliation in accordance with the procedure under Annex V, Section 1, or another conciliation procedure"). Article 284 further provides:

2. If the invitation is accepted and if the parties agree upon the conciliation procedure to be applied, any party may submit the dispute to that procedure.

3. If the invitation is not accepted or the parties do not agree upon the procedure, the conciliation proceedings shall be deemed to be terminated.

4. Unless the parties otherwise agree, when a dispute has been submitted to conciliation, the proceedings may be terminated only in accordance with the agreed conciliation procedure.

*Id.* art. 284(2)-(4), at 1322.

seek binding decision<sup>123</sup> by the court that has jurisdiction<sup>124</sup> under Section 2 of Part XV<sup>125</sup> of UNCLOS if the parties fail to settle their dispute by the means provided in Section 1 of Part XV.<sup>126</sup> The International Tribunal on the Law of the Sea, a permanent institution established by and linked to UNCLOS, resolves disputes concerning the application and interpretation of UNCLOS provisions.<sup>127</sup> In addition to the International Tribu-

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123. *See id.* art. 296, at 1324 (stating that “[a]ny decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute” and that “[a]ny such decision shall have no binding force except between the parties and in respect of that particular dispute”).

124. *See id.* art. 288, at 1323 (conferring jurisdiction to courts or tribunal referred to in Article 287 (International Tribunal for the Law of the Sea, International Court of Justice, arbitral tribunal, or special arbitral tribunal) “over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part”). In addition, Article 288 provides: “A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.” *Id.* art. 288(2), at 1323. “In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.” *Id.* art. 288(4), at 1323. Applicable law for such binding dispute resolution proceedings is defined in Article 293: “A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.” *Id.* art. 293, 21 I.L.M. at 1324.

125. *See id.* pt. XV, § 2, arts. 286-96, at 1322-24 (providing compulsory procedures entailing binding decisions).

126. *See id.* art. 286, at 1322 (providing that “any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section”).

127. *See id.* art. 287(1), at 1322 (providing parties in dispute with choice of means for the settlement of disputes). Article 287(1) states:

When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

- (a) the international Tribunal for the Law of the Sea established in accordance with Annex VI;
- (b) the International Court of Justice;
- (c) an arbitral tribunal constituted in accordance with Annex VII;
- (d) a special arbitral tribunal constituted in accordance with Annex VIII

for one or more of the categories of disputes specified therein.

*Id.* art. 287(1), at 1322; *see Statement of the Panel on the Law of Ocean Uses, Under the Chairmanship of Louis Henkin, adopted a statement on U.S. Policy on the Settlement of Disputes in the Law of the Sea*, 81 AM. J. INT'L L. 438, 441 (1987) [hereinafter *Statement of the Panel*] (discussing UNCLOS dispute resolution mechanism and expressing opinion that UNCLOS provides highly flexible means of dispute resolution). Article 297(1)(a) explains that “[d]isputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided

nal on the Law of the Sea, UNCLOS provides the parties with options including arbitration and the International Court of Justice.<sup>128</sup>

## II. REVIEW OF THE CONTROVERSY BETWEEN SEVERAL COUNTRIES OVER THE 1994 TURKISH REGULATIONS

When Turkey enacted the 1994 Turkish Regulations, Greece, Russia, and several other states that depend on the Turkish Straits for shipping to and from Black Sea ports<sup>129</sup> objected.<sup>130</sup> These countries claimed that the 1994 Turkish Regulations violated the Treaty of Montreux's grant of free commercial vessel transit through the Straits.<sup>131</sup> They maintained that Turkey had introduced the 1994 Turkish Regulations to block an increase in oil tanker traffic and to lobby for construction of

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for in this Convention shall be subject to the procedures provided for in section 2" when it is claimed that "a coastal State has acted in contravention of the provisions of this Convention in regard to the freedom and rights of navigation . . . ." UNCLOS, *supra* note 21, art. 297(1)(a), at 1324.

128. UNCLOS, *supra* note 21, art. 287(1)(b)-(c), at 1322; see *Statement of the Panel*, *supra* note 127, at 441 (explaining that UNCLOS's mechanism of dispute resolution is beneficial to the parties to UNCLOS). The UNCLOS's compulsory and binding system of settlement of disputes is beneficial for the following reasons:

The accommodations between coastal and maritime interests regarding navigation, overflight and environmental protection, reflected in various provisions of the Convention, will be subject to continuing pressures. Sometimes there will be confrontation; sometimes there will be acquiescence, as states grow reluctant to expend political, economic or military capital to protect their interests and the balance achieved in the Convention from corrosive precedents. A compulsory and binding system of third-party settlement of disputes provides a "third option." Such an arrangement will induce greater self-restraint, encourage officials to seek legal advice before acting, and will impel lawyers to be cautious in their advice. Dispute settlement arrangements also provide a state that has acted in violation of the rules with a graceful retreat: it need not yield to pressure from another state, only to the rule of law as embodied in the binding judgment of a disinterested tribunal. A dispute settlement arrangement permits a state confident that it is acting within its rights to seek judgment confirming and vindicating its actions.

*Statement of the Panel*, *supra* note 127, at 440-41.

129. See Bird, *supra* note 4, at 44 (naming nations that depend on Black Sea shipping); see also Janet Porter, *Russia and Turkey Continue Battle over Legality of Bosphorus Rules*, J. COM., Mar. 20, 1995, at 1B (explaining that Turkish Straits are "the only water link to the open seas for countries around the Black Sea such as Russia, Romania, Bulgaria and Ukraine").

130. See Bird, *supra* note 4, at 44 (noting that Russia was especially sensitive to Turkey's implementation of 1994 Turkish Regulations).

131. See *Safety Rules Revamp for Turkish Straits*, *supra* note 9, at 3 (commenting on Russia's objection to 1994 Turkish Regulations as infringement of Treaty of Montreux).

an oil pipeline through Turkey<sup>132</sup> that would replace tankers and bring oil from the Caspian oil shelf through Turkey to lucrative Western markets.<sup>133</sup> In opposition to these accusations, Turkey claimed that it established the 1994 Turkish Regulations solely for the purposes of facilitating navigational safety and environmental protection.<sup>134</sup> Turkey maintained that it did not intend to affect or to prejudice the rights of the ships using the Turkish Straits under the Treaty of Montreux.<sup>135</sup>

The international dispute between Turkey and Russia over the legality of the 1994 Turkish Regulation remains unresolved.<sup>136</sup> While Turkey claims to pursue safety of navigation and environmental concerns, Russia accuses Turkey of attempting to obtain oil money and more power in the region by making all of the surrounding states dependent on Turkey for maritime shipping through the Straits.<sup>137</sup> Commentators conclude that the confrontation between two sides will decide Europe's access to the enormous estimated oil reserves that could generate up to US\$100 billion of revenues over the next thirty years.<sup>138</sup>

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132. See Jonathan Ewing, *Tangled Straits*, J. Com., Sept. 6, 1996, at 1A (explaining that Russia, one of most frequent users of Turkish Straits, accused Turkey of using 1994 Turkish Regulations to limit traffic through Turkish Straits in order to advance its case for Baku-Ceyhan pipeline). Leonid Manjosin, consul general of the Russian Federation in Istanbul, stated: "We are very sympathetic to the Turkish concern for the safety of their tankers and for the safety of the millions of residents living on the shore of the straits of Istanbul. Still, their problem is domestic and they can't be allowed to violate international law." *Id.*

133. See *id.* (reporting on Russia's claim that Turkey stands to gain more economically from this pipeline with much less ecological risk).

134. See Bird, *supra* note 4, at 44 (quoting Resat Ozkan, former Turkish Undersecretary for Maritime Affairs, who stated: "We want a safer environment in the Turkish Straits, to ensure the health of the ecosystem and the historical heritage of the region").

135. See Akbay, *supra* note 11, at \*3 (noting that Turkish Undersecretary for Maritime Affairs Resat Ozkan stated that 1994 Turkish Regulations "are not a political decision and they certainly do not violate the Montreux convention, as some people claim"); see also Scharfenberg, *supra* note 30, at 360 (noting that, while Turkey has always maintained that it is not violating Treaty of Montreux, Turkey has contradicted itself when Turkey admitted that it is challenging the Treaty by claiming that control over the Turkish Straits is within Turkey's internal jurisdiction).

136. See George, *supra* note 13, at 8 (describing rising tensions between parties to controversy over Turkish Straits).

137. *Id.*

138. See Land, *supra* note 12, at \*5 (explaining that confrontation is over share of economic and political advantage to be gained from traffic of enormous oil reserves of Caspian Region).

A. *Position of the Republic of Turkey as to the Appropriateness of the 1994 Turkish Regulations*

Turkey asserts that it has legitimate and increasingly important reasons to take a strong position regarding the 1994 Turkish Regulations.<sup>139</sup> The Ministry of Foreign Affairs of Turkey<sup>140</sup> argues that the increasing size and number of ships passing through the Straits raises the risk of accidents.<sup>141</sup> In support of this argument, Turkey recalls that the International Maritime Organization<sup>142</sup> ("IMO") warned in 1994 of an increased potential risk of heavy maritime traffic in the Turkish Straits.<sup>143</sup> The Ministry of Foreign Affairs of Turkey also points out that the Straits are severely overloaded by heavy traffic.<sup>144</sup> Each year, 45,000 large vessels use the Straits,<sup>145</sup> and an additional 1,000 local vessels cross the Straits daily.<sup>146</sup> The health and lives of

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139. See *Background Note, supra* note 27 (explaining that present situation of heavy maritime traffic through Turkish Straits compels tighter regulation of navigation in Turkish Straits).

140. See *Turkish Ministry of Foreign Affairs Structure and Organization* (visited Jan. 18, 1999) <<http://www.mfa.gov.tr/GRUPF/default.asp?Param@GRUPF/Table.HTM>> (on file with the *Fordham International Law Journal*) (describing Turkish Ministry of Foreign Affairs structure and organization); see also *The Goals and Principles of Turkish Foreign Policy* (visited Jan. 18, 1999) <<http://www.mfa.gov.tr/GRUPF/default.asp?Param@GRUPF/princip.htm>> (on file with the *Fordham International Law Journal*) (providing Turkish Ministry's of Foreign Affairs official statement identifying principles and goals of Turkish foreign policy).

141. See *Background Note, supra* note 27 (illustrating substantial increase of vessel accidents in Turkish Straits).

142. See 6 THE NEW ENCYCLOPAEDIA BRITANNICA, *supra* note 6, at 351 (noting that International Maritime Organization ("IMO"), formerly (1948-1982) Inter-Governmental Maritime Consultative Organization, is specialized agency created by United Nations as instrumentality for cooperation in establishing technical regulations and practices in international shipping, encouraging adoption of highest standards for maritime safety and navigation, and discouraging discriminatory and restrictive practices in international trade and unfair practices by shipping concerns). The IMO was established in 1948 by an international convention prepared by the United Nations Maritime Conference. *Id.* The first assembly was held in January 1959. *Id.* "The Assembly is the policy-making body that meets every two years; the Council, consisting of 24 member states, meets twice a year and is responsible for governing between Assembly sessions." *Id.*

143. See *The Bosphorus: A Waterway at Risk* (visited Jan. 18, 1999) <<http://www.mfa.gov.tr/GRUPF/default.asp?Param@grupf/caspian3.htm>> (on file with the *Fordham International Law Journal*) (explaining that IMO's warning about safety in Turkish Straits was issued because Straits are "one of the busiest, overloaded trading routes in the world").

144. See *id.* (explaining that traffic overload not only threatens safety of navigation in Turkish Straits, but also affects residents of Istanbul).

145. *Id.*

146. *Id.*

twelve million Istanbul residents are in potential danger from any disaster in the Straits involving fire, explosion, or toxic material emission.<sup>147</sup> Turkey also justifies the 1994 Turkish Regulations by stressing that heavy maritime traffic endangers the Black Sea's ecosystem.<sup>148</sup>

Turkey has taken the position that the Straits cannot become an oil transportation route<sup>149</sup> and has threatened not to let oil tankers pass through the Straits.<sup>150</sup> The powerful lobby of

147. See *id.* (noting that tanker "Nassia" disaster in 1994 "would have been major urban disaster if it had been a few miles to the south."). The high risk of collision is present because these nineteen mile channels are very narrow, with twelve abrupt angular windings and four totally blind curves that are less than half a mile wide at one point in the Straits. *The Dangers of the Bosphorus* (visited Jan. 18, 1999) <<http://www.mfa.gov.tr/GRUPF/default.asp?Param@grupf/caspian4.htm>> (on file with the *Fordham International Law Journal*). Two ships coming from opposite directions often cannot see each other. *Id.* In addition, there are powerful and rapid currents, variable counter currents, and submerged eddies which are capable of dragging vessels off course and off anchor. *Id.* The high risk of collision is also heightened by the substantial growth of traffic in the Straits. *Id.* Since 1960, the number of foreign ships passing through the Straits has risen by over 150%. *Id.* Vessels are also getting larger, and tonnage has increased by over 400%. *Id.*

148. See *The Bosphorus: A Waterway at Risk*, *supra* note 143 (explaining that Turkish Straits are "a biological corridor for all marine wildlife traveling in and out of Black Sea" and that shipping pollution has prevented regular migrations of marine wildlife and decreased fishing levels). "Increased levels of pollution threaten endangered species such as the *Monachus monachus* (monk seal) and the *Ziphius cavirostris* (Bottle-nosed dolphin)." *Id.* All ships contribute to pollution by regularly leaking oil, but the greatest fear is the risk of potential collisions of oil tankers, which could release thousands of tons of oil into the sea. *Id.*

149. See *Background Note*, *supra* note 27 (stating that "due to the nature of the Straits and the existing grave situation created by dense traffic congestion, the Turkish Straits cannot be considered as an oil transportation route"). "The Straits cannot carry the additional burden which will be brought by large amounts of oil shipments." *Id.*

150. See George, *supra* note 13, at 8 (predicting that Turkish Straits issue "may prove to be a flashpoint between two countries in the not so distant future"). One Turkish official stated: "We will not, however, let the Russians move the oil through the Straits. They may as well drink it for all we care." *Id.* Turkish Ministry of Foreign Affairs stated:

This unbearable burden cannot be tolerated without endangering the city of Istanbul itself, its population of 10 million, its unique historical heritage and the precarious environment.

Given that alternative projects such as the building of oil pipelines over Turkish territory to the Mediterranean Sea are economically and technically feasible, environmentally much safer, and more secure and logical in every sense, then, relying on the Straits to be a mock "oil pipeline" for the large-scale transportation of crude oil and other dangerous cargo appears ill-advised, and a self-defeating notion in the long run. It is not a viable and practical option for crude exports.

*Background Note*, *supra* note 27.

Turkish industrial and environmental groups and the Turkish Chamber of Shipping<sup>151</sup> (the "Lobby") reinforced this threat by stating that it will do more than just issue declarations, asking the government and international organizations to act, and hinting that it may block the waterway to press its demands.<sup>152</sup> The Lobby demands significant restrictions on traffic through the Bosphorus, such as restrictions on the size of vessels allowed to transit the Straits.<sup>153</sup> In addition, the Lobby demands a gradual decrease in the amount of hazardous materials carried through the Straits, including banning tankers with a load capacity above 20,000 tons and a length of more than 150 meters.<sup>154</sup>

One commentator<sup>155</sup> analyzed Turkey's justification for its unilateral action of imposing the 1994 Turkish Regulations,<sup>156</sup> arguing that the 1994 Turkish Regulations are legitimate and should not be interpreted as impeding navigation in violation of the Treaty of Montreux because the heavy increase of maritime traffic has created a danger of collisions and pollution.<sup>157</sup> The commentator concludes that the 1994 Turkish Regulations are a reasonable effort to prevent collisions and to ensure orderly navigation in the Turkish Straits, which is fundamentally consistent with the provisions of the Treaty of Montreux.<sup>158</sup> Furthermore, the commentator analyzed several alternative actions that Turkey could take if it continues to enforce the 1994 Turkish Regulations and no longer attempts to work within the framework of the Treaty of Montreux.<sup>159</sup> Turkey may influence maritime in-

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151. See *Turkish Lobby Demands Limits on Traffic, Hazardous Loads Carried Through Bosphorus*, INT'L ENV'T REP., June 11, 1997, at 585 (describing role of Turkish environmental lobby ("Lobby") in Turkish Straits traffic regulation).

152. See *id.* (discussing Lobby's demands concerning Turkish Straits traffic regulation).

153. *Id.*

154. *Id.*

155. Scharfenberg, *supra* note 30, at 333.

156. See *id.* at 395 (maintaining that, although 1994 Turkish Regulations "have aroused a great deal of opposition from other states, . . . they are Turkey's best hope for mitigating dangers in the Straits").

157. See *id.* (arguing that "free passage through the Straits does not mean unregulated passage").

158. See *id.* (contending that Treaty of Montreux implicitly authorizes Turkey to implement unilateral regulatory scheme for Turkish Straits).

159. See *id.* at 388-94 (exploring Turkey's options of dealing with current situation in Turkish Straits if Russia and other nations continue challenging 1994 Turkish Regulations, and examining possible legal regimes that could apply if Turkey decided to terminate the Treaty of Montreux). The possible legal regimes of the Turkish Straits

insurance companies to make the use of a pilot for transit through the Straits a precondition for insurance coverage.<sup>160</sup> Turkey can also encourage its shipping companies to reduce vessel crowding and pollution by entering into bilateral agreements.<sup>161</sup> The commentator further argues that a superior alternative for Turkey would be to attempt to renegotiate the Treaty of Montreux at a conference convened by the original parties to the Treaty and all third parties interested in the Turkish Straits.<sup>162</sup> The commentator concedes, however, that Turkey may have reasons not to do so<sup>163</sup> in order to affirm its control over the Turkish Straits navigation.<sup>164</sup>

### B. *Position of the Parties Challenging the 1994 Turkish Regulations*

Russia, Greece, Bulgaria, and other nations that depend on Black Sea shipping challenge the 1994 Turkish Regulations because they affect the interests of these nations.<sup>165</sup> The traffic in the Turkish Straits delays deliveries and inflicts million-dollar losses and high price increases on shippers.<sup>166</sup> Russia complains

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after termination of the Treaty of Montreux may be the custom of navigation as it became customary during the years governed by the Treaty of Montreux or a new treaty if Turkey attempts to re-negotiate Treaty of Montreux. *Id.* at 389-90, 393-94.

160. *See id.* at 395 (describing possible "private sector solution" of placing pressure on maritime insurers to require employment of pilot for transit through Turkish Straits as precondition for insurance coverage).

161. *See id.* at 394 (explaining that similar approaches have been undertaken by ship owners in Greece and Turkey with moderate success). Such actions may be "partial solutions to a problem rooted in an out-of-date strait regime," but would not eliminate the problems in the Turkish Straits. *Id.*

162. *See id.* at 393-94 (explaining that Turkey may request new conference to renegotiate Treaty of Montreux). The benefit of such action would be that a new Turkish Straits discussion would decrease the international tension and confusion caused by the out-dated Treaty of Montreux. *Id.* at 394.

163. *See id.* at 394 (analyzing possible Turkish interest to avoid re-negotiation of Treaty of Montreux because none of parties to the Treaty of Montreux called for a new convention).

164. *See id.* (arguing that limited interference from other states "is the best way to maintain tight control over navigation policy in the Straits").

165. *See Bird, supra* note 4, at 44 (discussing negative impact of 1994 Turkish Regulations on interests of Greece, Russia, Romania, Bulgaria, and Ukraine in shipping through Turkish Straits).

166. *See id.* (noting that Black Sea dependent shipowners of Greece, Russia, Romania, Bulgaria, and Ukraine are affected by delays in Turkish Straits, causing multi-million U.S. dollar losses); *see also* Geoff Winestock, *IMO Vote on Turkish Straits Safety Seen Differently in Moscow, Ankara*, J. COM., Dec. 28, 1995, at 6B (reporting claim of Mikhail Demurin, a Russian foreign-affairs spokesman, that 1994 Turkish Regulations resulted in delays that cost Russian shipowners over one million U.S. dollars). The Novorossisk

that Turkey unreasonably causes hundreds of Russian vessels to wait at the entrance to the Straits for lengthy periods of time, thereby causing significant economic damage to the shipowners.<sup>167</sup> For example, Novorossiysk Shipping Co. claimed that it had lost more than US\$1 million in the second half of 1995 while its vessels waited for permission from the Turkish authorities to enter the Straits.<sup>168</sup>

Since the introduction of the 1994 Turkish Regulations, Russia has maintained that the 1994 Turkish Regulations do not comply with the Treaty of Montreux or the IMO's Rules and Recommendations on Navigation Through the Strait of Istanbul, the Strait of Canakkale and Marmara ("IMO Rules and Recommendations").<sup>169</sup> For instance, Russia firmly holds on to the position that Articles 40, 41, 50, and 51 of the 1994 Turkish Regulations, which restrict maritime traffic during poor visibility and unsatisfactory currents,<sup>170</sup> contradict the Treaty of Montreux

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Shipping Co., one of the world's biggest tanker fleets, complained that Turkish port authorities did not explain what caused delays and "applied traffic rules in an inconsistent and incomprehensible way." *Id.* at 6B. The company further claimed that its vessels are disadvantaged "by a system that reduces delays for ships that take on expensive Turkish pilots, even though Russian captains have equal experience in the waters of the straits." *Id.* Nikolai Slavov, chairman of the Black Sea Shipowners Association, Ukraine, explained that delays caused by the 1994 Turkish Regulations are shared by shipowners of his membership, and that companies with larger tankers were most affected. *Id.* Slavov further stated that the 1994 Turkish Regulations resulted in one-way traffic for bigger vessels, the system that "would be unnecessary if Turkey introduced modern traffic-control systems and rules." *Id.*

167. See Land, *supra* note 12, at \*5 (explaining that hundreds of Russian vessels must wait for thousands of hours before they can pass through Straits, suffering significant economic damage in lost contracts and commercial advantages).

168. See Porter, *supra* note 129, at 1B (quoting Gennadiy Fedchenko, vice president of Novorossiysk Shipping Co.).

169. *Rules and Recommendations on Navigation Through the Strait of Istanbul*, the Strait of Canakkale and Marmara Sea, Maritime Safety Council of the IMO, Sess. 63, June 15, 1994 (visited Nov. 15, 1998) <<http://inter.mfa.gov.tr:80/grupf/navigate.htm>> (on file with the *Fordham International Law Journal*) [hereinafter *IMO Rules and Recommendations*]; see Schweikart, *supra* note 19, at 47 (stating that Turkey, in protecting its interests in Turkish Straits, acted unilaterally, in contravention of *Rules and Recommendations on Navigation Through the Strait of Istanbul* ("IMO Rules and Recommendations")).

170. See 1994 TURKISH REGULATIONS, *supra* note 3, arts. 40, 41, 50, and 51 (requiring large vessels with dangerous cargoes to wait until poor visibility and unsatisfactory currents have stopped). Article 40 of 1994 Turkish Regulations states in relevant part:

- a) When the main surface current speed in the Strait of Istanbul exceeds 4 NM/hr or when northerly surface currents are caused by southerly winds, then, large vessels, deep draught vessels and hazardous cargo carrying vessels with a speed of 10 NM/hr or less will not enter the Straits and will wait until current speeds are 4 NM/hr or less.

and UNCLOS<sup>171</sup> because Article 44 of UNCLOS prohibits suspension of transit passage<sup>172</sup> and Article 42(2) prohibits states bordering the Straits to administer their law and regulations in such a way as to affect or deny free transit passage.<sup>173</sup> In addition, Russia claims that Article 25 of the 1994 Turkish Regulations, which imposes penalties on vessels that cross the designated traffic lanes,<sup>174</sup> contradicts IMO Rules 1.2 and 1.3<sup>175</sup> that

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When the main surface current in the Strait exceeds 6 NM/hr or when strong northerly flows are caused by southerly winds, then large vessels, deep draught vessels and hazardous cargo carrying vessels—whatever their speed—will not enter the Strait and will wait until current speeds are less than 6 NM/hr, or the strong northerly flows have stopped.

*Id.* art. 40. Article 41 provides for the following limitations in the Strait of Bosphorus during poor visibility:

Whenever visibility is 2 NM or less in any part of the Strait, vessels passing through the Strait will keep their radar turned on constantly to provide radar readings. On vessels with two radars, one of them will be assigned to the pilot's usage.

When visibility is 1.5 NM or less in any part of the Strait, vessels whose radar does not provide a complete display ability shall not enter the Strait.

When visibility in the Strait is 1 NM or less, vessels carrying hazardous cargo and large vessels shall not enter into the Straits.

When visibility in any part of the Straits is 0.5 NM, maritime traffic shall be open in the appropriate direction and closed in the opposite. In such situations only vessels less than 100 meters in length and which do not carry hazardous cargo can navigate in the direction open to traffic.

When visibility in any part of the Strait is less than 0.5 NM, the traffic flow in the Strait shall be closed in both directions.

When visibility in the Strait is suitable for navigation, the arrangement and order of entering the Strait shall be determined and notified to the waiting vessels and persons concerned by the Traffic Control Centre.

*Id.* art. 41. Article 50 imposes analogous to Article 40 limitations on vessels in the Strait of Dardanelles during unfavorable currents. *Id.* art. 50. Article 51 imposes analogous to Article 41 limitations on vessels in the Strait of Dardanelles during poor visibility. *Id.* art. 51.

171. See Schweikart, *supra* note 19, at 46-47 (providing overview of Russia's claims of non-compliance of 1994 Turkish Regulations to international law, Treaty of Montreux, and IMO Rules and Recommendations).

172. See UNCLOS, *supra* note 21, art. 44, at 1278 (defining duties of states bordering straits). Article 44 of UNCLOS provides that "there shall be no suspension of transit passage." *Id.* Article 24 of 1994 Turkish Regulations authorizes Turkey to close the Straits temporarily for maintenance purposes. 1994 TURKISH REGULATIONS, *supra* note 3, art. 24.

173. See UNCLOS, *supra* note 21, art. 42(2), at 1277 (providing that application of law and regulations of states bordering straits shall not have "practical effect of denying, hampering, or impairing the right of transit passage").

174. See 1994 TURKISH REGULATIONS, *supra* note 3, art. 25 (providing that "[v]essels must proceed within the designated traffic lanes. Vessels which cross the lanes may be fined").

175. See *IMO's Rules and Recommendations*, *supra* note 169, rule 1.2 (providing for

address circumstances where a vessel is unable to comply with the traffic separation schemes and authorize temporary suspension of traffic separation schemes and two way traffic.<sup>176</sup>

C. *Position of the International Maritime Organization Concerning the Appropriateness of the 1994 Turkish Regulations*

The IMO assumed responsibility for working out maritime regulations of shipping in the Turkish Straits that would satisfy the changed conditions.<sup>177</sup> In May 1994, the IMO's Maritime Safety Committee<sup>178</sup> met to discuss the 1994 Turkish Regulations.<sup>179</sup> At this meeting, all Black Sea states, which are members of the IMO, as well as Greece and Cyprus, accused Turkey of violating the Treaty of Montreux.<sup>180</sup> The Maritime Safety Committee discussed proposed amendments and modifications to the 1994 Turkish Regulations and recommended less restrictive rules of passage through the Turkish Straits.<sup>181</sup> The Maritime Safety Committee requested that Turkey follow these recommendations.<sup>182</sup>

On the basis of the Maritime Safety Committee's findings, the IMO issued the IMO Rules and Recommendations.<sup>183</sup> The IMO Rules and Recommendations differ from the 1994 Turkish

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temporary suspension of traffic separation schemes); *see also id.* rule 1.3 (providing for temporary suspension of two way traffic).

176. *IMO's Rules and Recommendations, supra* note 169, rules 1.2-1.3.

177. *See id.* at 30 (stressing importance of having peaceful process of working out compromise solution between parties to dispute over free transit through Turkish Straits).

178. *See* 6 THE NEW ENCYCLOPAEDIA BRITANNICA, *supra* note 6, at 351 (discussing Maritime Safety Committee function of reviewing safety proposals on its annual meetings). The 16-member Maritime Safety Committee Safety meets annually and submits safety proposals to the Assembly. *Id.* Several subcommittees work on specific maritime issues, "such as the carriage of dangerous goods, radio-communications, fire protection, ship design and equipment, lifesaving appliances, and cargoes and containers." *Id.*

179. *See Background Note, supra* note 27 (explaining that Turkey, following international practice, brought to IMO its traffic separation schemes, which form important part of 1994 Turkish Regulations).

180. *See* Scharfenberg, *supra* note 30, at 361 (discussing IMO's response calling for less restrictive measures than those instituted in 1994 Turkish Regulations).

181. *Id.*

182. *Id.*

183. *IMO Rules and Recommendations, supra* note 169; *see* Scharfenberg, *supra* note 30, at 361, 362 (describing IMO Rules and Recommendations as less restrictive than 1994 Turkish Regulations). Unlike the 1994 Turkish Regulations, the IMO Rules and Recommendations provision that vessels navigating through the Straits exercise diligence and regard for the traffic separation schemes utilized in Straits, does not require

Regulations because they merely strongly recommend,<sup>184</sup> rather than expressly require, participation in the reporting system set up by Turkey.<sup>185</sup> Likewise, the IMO Rules and Recommendations strongly recommend, but do not require, having a Turkish pilot on board Turkish flag vessels to aid in navigation through the Straits.<sup>186</sup> The IMO Rules and Recommendations further recommend daylight navigation of the vessels with a draught<sup>187</sup> greater than fifteen meters and vessels over 200 meters in length.<sup>188</sup> Unlike the 1994 Turkish Regulations that authorize Turkey to prohibit a vessel that does not comply with the traffic separation scheme from passing through the Straits,<sup>189</sup> Rule 1.2 of the IMO Rules and Recommendations suggests that the non-compliant vessel inform the Turkish authorities in advance that it cannot comply, thus enabling Turkey to accommodate it by temporarily suspending that particular aspect of the traffic separation scheme.<sup>190</sup>

In essence, the IMO Rules and Recommendations attempt

strict obedience to the separation schemes and does not provide for any forms of punishment. *Id.* at 362.

184. See *IMO Rules and Recommendations*, *supra* note 169, rules 2.1, 2.2 (providing "strong recommendations" but not require captains of vessels passing through Turkish Straits to participate in Turkey's reporting system).

185. See *id.* (strongly advising captains of passing vessels to give information on size, ballast, or cargo of vessel, and whether it has any hazardous or noxious cargo on board).

186. See *id.* rule 3.1 (providing that "[m]asters of vessels passing through the Straits are strongly recommended to avail themselves of the services of a qualified pilot in connection with the requirements of safe navigation").

187. See *THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE* 433 (1967) (defining vessel's draught (chiefly British, variant of draft) as depth to which vessel is immersed when bearing given load).

188. See *IMO Rules and Recommendations*, *supra* note 169, rule 4.1 (recommending vessels with "a maximum draught of 15 m[eters] or more and vessels over 200 m[eters] in overall length are advised to navigate the straits in daylight.").

189. See 1994 *TURKISH REGULATIONS*, *supra* note 3, art. 29 (limiting access of certain types of vessels to Straits). Article 29 of 1994 Turkish Regulations allows the Turkish authorities to decide whether to allow a vessel into the Straits on the basis of considerations such as the morphological and physical structure of the Straits, the vessel's dimensions and maneuverability, the safety of life, property, and the environment, and maritime traffic conditions. *Id.*

190. See *IMO Rules and Recommendations*, *supra* note 169, rule 1.2 (providing that vessels, unable to comply with traffic separation schemes "shall inform the traffic control station well in advance. In such circumstances, the competent authority may temporarily suspend the particular TSS, or section[s] of it"). In addition, Rule 1.3 suggests that to ensure safe transit of the non-compliant vessel, Turkey may temporarily suspend two-way traffic and regulate one-way traffic to maintain a safe distance between vessels. *Id.* rule 1.3.

to address safety concerns of navigation in the Straits raised by Turkey, but in a manner consistent with the Treaty of Montreux.<sup>191</sup> After recommending in 1994 some important changes for the 1994 Turkish Regulations to make them acceptable among the international community,<sup>192</sup> a Working Group of the IMO's Maritime Safety Committee issued a 1997 report that reviewed the 1994 Turkish Regulations, offered possible amendments, and revised recommendations addressed to the Government of Turkey.<sup>193</sup> Turkey, however, neither accepted the IMO recommendations in 1994,<sup>194</sup> nor approved the 1997 Working Group's report<sup>195</sup> and insisted on its right to regulate the Turkish Straits unilaterally.<sup>196</sup>

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191. See Scharfenberg, *supra* note 30, at 364 (characterizing method of application of IMO Rules and Regulations as such that all courses of action left unstated in IMO Rules and Regulations should be considered inappropriate for proper administration of transit passage in Turkish Straits).

192. See Schweikart, *supra* note 19, at 35-38 (discussing IMO Maritime Safety Committee resolutions concerning safety measures in Turkish Straits).

193. See *TSS in Strait of Istanbul, Strait of Cannakale and Sea of Marmara Discussed* (visited Jan. 18, 1999) <<http://www.imo.org/imo/news/297/nav432.htm>> (on file with the *Fordham International Law Journal*) [hereinafter *TSS in Strait of Istanbul*] (reporting on IMO Maritime Safety Committee's discussion of proposed amendments and modifications to Traffic Separation Schemes that were established in Turkish Straits in 1994). The IMO web site informs that a Working Group on ship's routing issued a report that offered (1) "Ships' Routing Measures in the Straits of Istanbul, the Strait of Cannakale, and the Sea of Marmara" with possible amendments, (2) a draft of revised "Rules and Recommendations on Navigation through the Straits of Istanbul, the Strait of Cannakale, and the Sea of Marmara," (3) draft recommendations addressed to the Government of Turkey, and (4) report to the Assembly. *Id.*

194. See Rank, *supra* note 4 (reporting on Turkey's reasons of rejecting IMO report on safety). Mithat Rende, Turkish representative at the IMO, said that the IMO report "doesn't deal proportionately with safety" and puts too much stress on speeding up traffic. *Id.* Joe Atkinson, a partner in the marine casualty department of London law firm Sinclair, Roche & Temperley, commented that "Turkey wants to impose its own solution and the international shipping community is very fearful" and that "Turkey was a little unreasonable in rejecting out of hand the IMO proposals." *Id.*; see Schweikart, *supra* note 19, at 47 (explaining that, although IMO issued IMO Rules and Recommendations in May 1994, Turkey unilaterally implemented 1994 Turkish Regulations in July of 1994 in contravention of IMO Rules and Regulations.)

195. See *TSS in Strait of Istanbul*, *supra* note 193 (explaining that Turkey did not approve Working Group's report despite its approval by Sub-Committee); see also Warren, *supra* note 23, at \*12 (reporting that Turkish delegation refused to participate at June 1997 meeting of IMO's Maritime Safety Committee discussing 1994 Turkish Regulation and left in protest).

196. See Bird, *supra* note 4, at 44 (quoting Resat Ozkan, former Turkish Undersecretary for Maritime Affairs, who said: "We are not prepared to discuss the legislation of the regulations with anyone. These rules are an internal matter."); see also Schweikart,

According to one commentator,<sup>197</sup> the IMO averted the use of force in the dispute because it provided sovereigns, businesses, and environmental organizations with a forum for international debate on the Turkish Straits problem.<sup>198</sup> To keep the current controversy under control, this commentator recommends that the IMO's Maritime Safety Committee should adopt temporary procedures to handle pressing maritime matters.<sup>199</sup> Such procedures would assure prompt consideration of Turkey's concerns as well as buy the IMO some time to further evaluate the situation and determine the best resolution of the issue.<sup>200</sup> Such procedures would also prevent Russia from repeatedly raising the Straits problem during the interim period and compel Turkey and Russia to interact within an international forum.<sup>201</sup> The commentator concludes that further efforts to improve efficiency in the IMO's processes would help find a solution to the issue of regulation in the Turkish Straits based on merit, rather than on oil interest.<sup>202</sup>

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*supra* note 19, at 44-45 (pointing out that the IMO process lack of progress caused Turkey to call it "exercise in futility").

197. Schweikart, *supra* note 19, at 20.

198. *See id.* at 42-43 (praising IMO process as forum for informed debate advancing peaceful evolution of maritime regulation in Turkish Straits). This debate is very important, considering that the first wars of the post-Cold War era, the Gulf War and Russia's battle for pipelines in Chechnya, revolved around oil. *Id.* There was a lot of pressure from Russia on Azerbaijan for a stake in its oil consortium. *Id.* Such pressure was evidenced in Russian support of Azerbaijan's enemy Armenia and in arrangement of coups within Azerbaijan. *Id.* Violent clashes for control over the oil resources have already begun in Central Asia. *Id.* at 42. Attempted assassination of Eduard Shevardnadze, President of Georgia, could be viewed as Russian-inspired warning intended to eliminate his support for oil pipeline through Georgia. *Id.*; *see* Walker, *supra* note 19, at T6 (noting that Shevardnadze is convinced that car bomb that wounded him in August was warning ordered from Moscow). In view of these facts, Schweikart concludes, the danger of the forceful attempt to solve the controversy between Russia and Turkey is quite real. Schweikart, *supra* note 19, at 43.

199. *See* Schweikart, *supra* note 19, at 49 (arguing that submission of Turkish Straits question to working group of signatories of Treaty of Montreux could improve compliance with IMO Rules and Regulations).

200. *Id.*

201. *Id.*

202. *Id.* at 50. Schweikart concedes, however, that the problem did not disappear and that the question of whether the 1994 Turkish Regulations comply with international law, the IMO Rules and Recommendations, and the Treaty of Montreux remains open. *Id.* at 46-47. Turkey, in protecting its interests in the Turkish Straits, acted unilaterally, in contravention of the IMO Rules and Recommendations. *Id.*; *see* Warren, *supra* note 23, at \*12 (explaining that IMO has purely consultative character and decisions of IMO or any of its committees are not mandatory). Turkey's submission of its draft of the 1994 Turkish Regulations to IMO fulfilled Turkey's obligations as a party to

III. *BECAUSE RUSSIA WILL MOST LIKELY CONTINUE TO CHALLENGE THE 1994 TURKISH REGULATIONS, AND BECAUSE THE IMO'S RESOLUTIONS AND RECOMMENDATIONS BIND NEITHER TURKEY NOR RUSSIA, TURKEY SHOULD ADOPT UNCLOS AS THE BINDING INTERNATIONAL LEGAL REGIME OF THE TURKISH STRAITS*

The conflict in the Turkish Straits creates a potentially dangerous situation in the Black Sea region. The international dispute primarily between Turkey and Russia over the legality of the 1994 Turkish Regulation has intensified.<sup>203</sup> Turkey claims the right to regulate navigation in the Turkish Straits because of legitimate environmental concerns.<sup>204</sup> Russia claims that Turkey restricts traffic through the Straits to generate oil money and more power in the region.<sup>205</sup> Because each side views its interests as critical, it is very difficult to find a compromise that will satisfy both countries.<sup>206</sup> Time is running out, however, as the start of the Caspian oil shipments may trigger a full scale international conflict and, possibly, the use of force.<sup>207</sup> Failure to prevent this conflict through compromise will jeopardize the environment, the safety of navigation in the Turkish Straits, and, most importantly, the safety of the twelve million residents of Istanbul.<sup>208</sup> Because of Turkey's insistence on the legitimacy of the 1994 Turkish Regulations and the international community's reliance on the IMO's processes that have not resolved the Turkish Straits problem, Turkey should adopt UNCLOS as the bind-

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IMO. *Id.* Some IMO member states "have attempted to use IMO as a political platform against Turkey, despite IMO's expressly stated non-political character." *Id.*

203. *See supra* notes 4-19, 131-38, 150, and accompanying text (discussing raising tensions in Turkey-Russia dispute revolving around 1994 Turkish Regulations, right of free transit through Turkish Straits, and export route of Caspian oil).

204. *See supra* notes 139-49 and accompanying text (discussing Turkey's concerns about safety of navigation and environment in Turkish Straits).

205. *See supra* notes 17, 132-33, and accompanying text (discussing Russia's claim that 1994 Turkish Regulations are used by Turkey to force construction of Baku-Ceyhan pipeline).

206. *See supra* notes 19, 132-38 and accompanying text (discussing conflicting interests of Russia and Turkey concerning transportation route of Caspian oil).

207. *See supra* notes 18-19, 136-38, and accompanying text (discussing possibility of confrontation that may decide Europe's access to enormous estimated oil reserves that can generate US\$100 billion of revenues over next 30 years).

208. *See supra* notes 141-48 and accompanying text (discussing concerns of Turkey over safety of Istanbul in connection with possible oil tanker disaster).

ing legal regime that would provide internationally-accepted navigational rules and address the safety of navigation and environmental concerns.

*A. Turkey's Insistence on the Legitimacy of the 1994 Turkish Regulations and the International Community's Reliance on the International Maritime Organization's Processes for Resolving the Controversy over the Turkish Straits Are Futile*

Neither the insistence that the 1994 Turkish Regulations are legitimate and consistent with the Treaty of Montreux<sup>209</sup> nor the reliance on the IMO's processes<sup>210</sup> are likely to help in finding an adequate resolution to the Turkish Straits problem. The IMO provided Russia and Turkey with means for a peaceful dialog about the Turkish Straits controversy.<sup>211</sup> This dialog has been the main instrument for balancing the Turkish Straits situation.<sup>212</sup> The conflict, however, remains unresolved and may now escalate to a more dangerous level.<sup>213</sup> The IMO did not accept Turkey's position and only supported a compromise solution.<sup>214</sup> The IMO Rules and Recommendations, however, bind neither Turkey nor Russia.<sup>215</sup> Thus, IMO processes are ineffective for resolving the Turkish Straits controversy because it lacks binding

209. See *supra* notes 10, 28, 135, 156-64, and accompanying text (noting Turkey's position that 1994 Turkish Regulations do not affect or prejudice rights of other nations' ships passing through Turkish Straits under Treaty of Montreux, and reviewing Scharfenberg's arguments that 1994 Turkish Regulations are consistent with Treaty of Montreux).

210. See *supra* notes 177-202 and accompanying text (discussing IMO's process of resolution of controversy over Turkish Straits and Schweikart's proposition to rely on expedited interim procedure that would allow IMO's Maritime Safety Committee to handle imminent maritime issues and to compel Turkey and Russia maintain peaceful dialog).

211. See *supra* notes 179-82 and accompanying text (discussing IMO process as providing forum for dialog between Turkey and Russia on Turkish Straits problem).

212. See *supra* notes 191-93 and accompanying text (discussing IMO's measures to reconcile 1994 Turkish Regulations with Treaty of Montreux).

213. See *supra* notes 18-19, 149-50, and accompanying text (discussing conflicting interests of Russia and Turkey in Turkish Straits and commentator's prediction of confrontation over Caspian oil export route).

214. See *supra* note 194 (noting that, although IMO issued IMO Rules and Recommendations in May 1994, Turkey unilaterally implemented 1994 Turkish Regulations in July of 1994.)

215. See *supra* notes 184-90 and accompanying text (noting that IMO Rules and Recommendations merely recommend or strongly advise but do not require captains to follow its safety rules).

force.<sup>216</sup>

Turkey's insistence on the legality of the 1994 Turkish Regulations, however, is not reasonable considering their unilateral nature and their negative effect on the Black Sea states' shipping industry.<sup>217</sup> In addition, Turkey cannot disregard the probability that tension in the Turkish Straits may escalate as the number of large ships, mainly tankers, passing through the Straits increases.<sup>218</sup> In all likelihood, the AIOC will not build the Baku-Ceyhan pipeline through Turkey in the foreseeable future,<sup>219</sup> and will instead transport the Caspian oil by tankers through the Turkish Straits.<sup>220</sup> Thus, regardless of Turkish protests, very soon an armada of tankers<sup>221</sup> carrying thousands of tons of oil<sup>222</sup> will arrive at the northern entrance of Bosphorus requesting free passage.

Turkey stands unequivocally determined to prevent oil shipment by tankers through the Turkish Straits.<sup>223</sup> The powerful Turkish industrial lobby and environmental groups support this position.<sup>224</sup> In view of the recent economic crisis in Russia and

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216. *See supra* note 196 (noting that Turkey called IMO process "exercise in futility" because IMO's efforts to reconcile safety and environmental concerns raised by 1994 Turkish Regulations with concerns of freedom of navigation through Turkish Straits have failed).

217. *See supra* notes 16, 165-68, and accompanying text (noting that Greek, Russian, Romanian, Bulgarian, and Ukrainian shipowners are affected by delays causing multi-million U.S. dollar losses and discussing Russia's claim that Turkey is unreasonably making hundreds of Russian vessels waiting to enter Straits).

218. *See supra* note 11 and accompanying text (discussing prospects of future increase of number of vessels passing through Turkish Straits, especially due to high volumes of future shipment of Caspian oil by tankers that would need to pass through Turkish Straits).

219. *See supra* notes 44-48 and accompanying text (discussing opinions that Baku-Ceyhan pipeline project is currently not viable).

220. *See supra* notes 45-46 and accompanying text (discussing oil transportation schemes from Caspian to Black Sea ports by Novorossiysk oil pipeline, Georgian line to Supsa, and planned oil terminal in Odessa, Ukraine).

221. *See supra* note 11 and accompanying text (noting that Turkey is concerned about prospect of additional 150 supertankers a year transporting oil from Caspian Sea to Mediterranean through Turkish Straits).

222. *See supra* note 14 and accompanying text (discussing that without trans-Turkey pipeline for transporting oil, current number of vessels transiting Turkish Straits will double and may result in gridlock, environmental disaster, or both because about 45 million tons of crude oil and 13 billion square meters of gas will have to be transported annually by tankers through Turkish Straits).

223. *See supra* notes 12-13 and accompanying text (reporting Turkish threat to disallow oil tankers to pass through Turkish Straits).

224. *See supra* notes 151-54 and accompanying text (discussing Turkish Lobby's

surrounding countries, however, it is highly unlikely that Russia would concede to the legality of the 1994 Turkish Regulations limiting tanker passage through the Straits and thus lose billions of U.S. dollars of revenues from the export of oil resources.<sup>225</sup> So far, no efforts have succeeded in reconciling the two countries' positions.<sup>226</sup>

B. *To Promote a Peaceful Resolution of the Turkish Straits Problem, Turkey Should Adopt UNCLOS as the Binding Legal Regime for the Straits*

In order to promote the peaceful resolution of the Turkish Straits problem, Turkey should adopt UNCLOS as the binding regulatory scheme for the Turkish Straits. The international community must be able to rely on an unambiguous legal regime for the governance of passage through the Turkish Straits. Such a regime should provide an authoritative international forum that would serve as an impartial arbitrator in settling parties' disputes. This forum's decisions should be legally binding, unlike those of the IMO.<sup>227</sup>

To establish such a regime, it would be viable to terminate the Treaty of Montreux<sup>228</sup> and to declare UNCLOS the binding legal regime for the Turkish Straits<sup>229</sup> because this action would

threats to block Turkish Straits to press its demands). The demands include significant restrictions on traffic through Bosphorus, such as restrictions on the size of vessels allowed to transit the Straits and a gradual decrease in the amount of hazardous load carried involving banning tankers with a load capacity above 20,000 tons and a length of more than 150 meters. *Id.*

225. *See supra* note 18 and accompanying text (describing expected revenues from Caspian oil export).

226. *See supra* notes 194-96 (describing futility of IMO's efforts to reconcile safety and environmental concerns raised by 1994 Turkish Regulations with concerns of freedom of navigation through Turkish Straits).

227. *See supra* notes 184-88 and accompanying text (discussing purely advisory character of IMO Rules and Recommendations and IMO's decisions).

228. *See supra* notes 60-61 and accompanying text (discussing that Treaty of Montreux authorizes any party to terminate it at any time by declaring party's withdrawal from Treaty or by declaring *rebus sic stantibus*).

229. *See supra* notes 106-07 and accompanying text (noting that UNCLOS does not presently apply to Turkish Straits because of Article 35(c) of UNCLOS); *see also* Scharfenberg, *supra* note 30, at 390-92 (suggesting that it may be to Turkey's advantage to denounce Treaty of Montreux and argue that UNCLOS applies as legal regime of Turkish Straits). The advantage would be because UNCLOS authorizes Turkey to use traffic separation schemes and other rules in such way as to further safe navigation and environmental protection. *Id.* at 391. UNCLOS may also become the legal regime of the Turkish Straits as customary international law provided that all interested parties

avoid a long and complicated process of calling a new international conference and negotiating new terms for passage through the Straits.<sup>230</sup> Upon termination of the Treaty of Montreux, Turkey should immediately adopt the new legal regime for the Turkish Straits. Otherwise, the custom of free navigation in the Straits that governed before the Treaty of Montreux would apply,<sup>231</sup> and Turkey would face the same problems as it does now.<sup>232</sup> To avoid these problems, Turkey should denounce the Treaty of Montreux and accede to UNCLOS,<sup>233</sup> thereby adopting UNCLOS's rules of transit passage in straits used for international navigation<sup>234</sup> as the binding legal regime for the Turkish Straits.<sup>235</sup>

This course of action would benefit Turkey for a number of reasons. First, Turkey needs a sound and internationally-recognized legal foundation to assert its right to regulate maritime traffic to ensure safety and to protect the environment in the Straits. The Treaty of Montreux fails to accomplish these purposes because it is outdated<sup>236</sup> and hard to reconcile with the

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accept it. *Id.* at 392. If UNCLOS were to replace the Treaty of Montreux, it would likely do so in its capacity as customary international law because Turkey did not sign UNCLOS when the document was released for signature. *Id.* at 393. Scharfenberg concedes, however, that "the rules pertaining to the legitimacy of customary international law would be stretched to the limit" if UNCLOS became the legal regime of the Turkish Straits as customary international law over Turkey's objections. *Id.* Scharfenberg concludes that Turkey is justified in taking the unilateral action in establishing 1994 Turkish Regulations that are consistent with international law and the Treaty of Montreux. *Id.* at 395.

230. *See supra* notes 57-59 and accompanying text (reviewing procedure of amending Treaty of Montreux under Article 29 of Treaty of Montreux and vote requirements in order to adopt such amendments).

231. *See supra* note 63 and accompanying text (explaining that, in case of Treaty of Montreux termination, Turkish Straits' default regime of free transit may be either absolute free passage or general freedom of navigation limited by needs of Turkey and other Black Sea states).

232. *See id.* (noting that default regime of free transit in Turkish Straits would pose similar problem of reconciliation of 1994 Turkish Regulations with principle of free transit as one of reconciliation of 1994 Turkish Regulations with Treaty of Montreux).

233. *See supra* note 114 and accompanying text (discussing UNCLOS provision that any state can adopt UNCLOS by accession).

234. *See supra* notes 108-10 and accompanying text (discussing UNCLOS regulation of straits used for international navigation).

235. *See supra* notes 116-19 and accompanying text (noting that, among Black Sea States, only Turkey has neither signed nor acceded to UNCLOS).

236. *See supra* note 162 and accompanying text (noting that outdated Treaty of Montreux caused international tension and confusion).

1994 Turkish Regulations.<sup>237</sup> Second, the termination of the Treaty of Montreux would be more efficient than renegotiating the Treaty of Montreux. Because the 1994 Turkish Regulations infringed interests of Russia and other parties<sup>238</sup> who are also members of the Treaty of Montreux,<sup>239</sup> Russia and other parties will probably oppose the changes that Turkey needs. Yet, the 1994 Turkish Regulations are largely consistent with UNCLOS provisions regulating transit passage through the straits used for international navigation.<sup>240</sup> Finally, UNCLOS is a modern, effective, and globally-recognized<sup>241</sup> body of international law. Thus, Black Sea shipping dependent nations such as Russia, Bulgaria, Greece, Romania, and Georgia who are already parties to UNCLOS<sup>242</sup> would not be able to claim that UNCLOS's regulations of the Turkish Straits are arbitrary or illegal.

The only trade-off for Turkey would be that UNCLOS's provisions do not authorize the coastal state to close navigation through a strait for maintenance purposes,<sup>243</sup> as the 1994 Turkish Regulations provide.<sup>244</sup> Turkey can use this trade-off, however, as powerful leverage when it enforces its regulations of traffic in such a manner as to minimize the risk of collisions and to protect the environment of the Straits. Although such enforcement may impose some extra requirements on the vessels pass-

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237. *See supra* note 60 and accompanying text (discussing opinion that Treaty of Montreux is inadequate to deal with environmental problems of Turkish Straits).

238. *See supra* notes 165-68 and accompanying text (discussing Greek, Russian, Romanian, Bulgarian, and Ukrainian interests in shipping through Turkish Straits and noting that shipowners from these nations are affected by delays causing multi-million U.S. dollar losses).

239. *See supra* note 8 and accompanying text (naming such Black Sea nations as Russia, Bulgaria, and Romania, which are parties to Treaty of Montreux).

240. *See supra* notes 109-10 and accompanying text (explaining that, under UNCLOS, states bordering straits may adopt laws and regulations relating to transit passage through straits with respect to safety of navigation and regulation of maritime traffic; prevention, reduction, and control of pollution; fishing vessels; and, enforcement of fiscal, customs, immigration, or sanitary laws of state).

241. *See supra* note 22 and accompanying text (stating number of signatories and parties of UNCLOS).

242. *See supra* notes 116-19 and accompanying text (noting that Russia, Bulgaria, Romania, and Greece ratified UNCLOS; Georgia adopted UNCLOS by accession; Ukraine signed but has not ratified UNCLOS).

243. *See supra* notes 92, 100, and accompanying text (explaining that Article 44 of UNCLOS provides that "there shall be no suspension of transit passage").

244. *See supra* note 172 and accompanying text (explaining that Article 24 of 1994 Turkish Regulations authorizes Turkey to close the Straits temporarily for maintenance purposes, while Article 44 of UNCLOS does not allow suspension of transit passage).

ing the Straits, the regulations would still be consistent with UNCLOS provisions regulating transit passage in straits used for international navigation.<sup>245</sup>

Another advantage of adopting UNCLOS as the legal regime of the Turkish Straits is that UNCLOS is better suited to deal with disputes than the Treaty of Montreux. UNCLOS provides an authoritative international court to which the parties can turn to resolve their differences.<sup>246</sup> The International Tribunal on the Law of the Sea is a permanent institution established by and linked to UNCLOS.<sup>247</sup> In addition to the International Tribunal on the Law of the Sea, UNCLOS provides parties with the highly flexible means of dispute resolution and offers the parties such options as arbitration and use of the International Court of Justice.<sup>248</sup>

### CONCLUSION

UNCLOS rules of transit passage provide a viable alternative to the 1994 Turkish Regulations. Although Turkey is not a party to UNCLOS, adopting UNCLOS as a new legal regime of the Turkish Straits at this time will probably benefit Turkey because not only is navigational and environmental safety in the Turkish Straits at stake, but also the safety of the twelve million residents of Istanbul. UNCLOS provides the modern, comprehensive, and widely-recognized regulatory scheme for straits used for international navigation. Its authoritative international tribunals provide the means for peaceful dispute resolution. In sum, adopting UNCLOS as the new legal regime of the Turkish Straits should prevent confrontation in the region by providing the internationally-accepted rules of transit for the Turkish Straits and by establishing the legal foundation for the implementation of maritime traffic rules that address the safety of navigation and environmental concerns raised in the 1994 Turkish Regulations.

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245. See *supra* notes 109-10 and accompanying text (describing UNCLOS's Part III provisions promoting safety of navigation and prevention, reduction, and control of pollution).

246. See *supra* notes 120-28 and accompanying text (discussing UNCLOS's procedure of binding dispute resolution mechanism).

247. See *supra* notes 122-28 and accompanying text (discussing UNCLOS's available tribunals that deal with parties' disputes concerning interpretation or application of UNCLOS's provisions).

248. See *supra* notes 123-28 and accompanying text (explaining that judgments of these tribunals are binding on parties to UNCLOS).