EVALUATION OF CANAL ISTANBUL PROJECT IN THE CONTEXT OF THE MONTREUX STRAITS AGREEMENT

a. Introduction

Before starting to evaluate the Canal Istanbul project, it is necessary to briefly mention the treaties that have regulated the legal status of Bosphorus in order to better understand the status of the Bosphorus.

The Treaty of Sevres was signed between the Allied Powers and the Ottoman Empire after the First World War on 10 August 1920 in the Ceramic Museum (Musée National de Céramique) in the suburb of Sevr (Sèvres), 3 km west of Paris, France. In this treaty (articles 37-61) important arrangements regarding Istanbul and Çanakkale Straits are included. With this agreement, it was decided that the Bosphorus and the Dardanelles and the Marmara Sea should be disarmed and that the straits would be open to ships of all states during times of peace and war. In addition, the sea traffic in the Straits is managed by an international commission consisting of 10 countries; commission can call for help as required by the time the fleet of the Allied Powers according to the provisions which destroyed Turkey's decision-making freedom and sovereignty.

Subsequently, the transition of the Lausanne treaty to positive law was achieved. That is to say, the legal procedures required to end the Sevres treaty and replace it with the Lausanne treaty have been followed and implemented. Bosphorus With this treaty has been returned to Turkey. With the Treaty, it has been decided that the 15-20 km region on both sides of the straits will be purified from military activities and that trade ships will have the right to enjoy free use of the Straits in peace time and the passage of war ships will be limited.

The Montreux treaty was signed on 20 July 1936 and it was decided to terminate the provisions in the Lausanne treaty and enforce the provisions in this new treaty.

b. Historical Situation Of The Straits

Istanbul and Çanakkale Strait, known as the Turkish Straits, have provided geopolitical superiority to the countries that have preserved their importance and have control over the past. As a matter of fact, the Ottomans, who dominated the Straits after the conquest of Istanbul in 1453, soon dominated all the lands on the Black Sea coast and banned the entry of foreign flagged ships to the Black Sea. Although this transition ban was loosened for the merchant ships with capitulations in the following years, it was applied to warships without exception until the Küçük Kaynarca Treaty in 1774.

However, the Mondros Armistice Agreement was signed between the Ottoman State, one of the losers of the First World War, and the Entente States (England, France and Russia) on 30 October 1918. The treaty had provisions on the elimination of the war power of the Ottoman Empire, as well as the
occupation of the Dardanelles and the Straits of the Dardanelles by the Allied Powers, opening of the
Strait to the passage and free passage to the Black Sea. These arrangements were implemented in a
short time and the Ottoman Empire completely lost control over the Straits.

The Straits issue was one of the most important issues during the Lausanne Treaty negotiations.
Despite Turkey's insistence it was not possible to step back from the concessions given with the
Mondros Armistice Treaty to the Allies. The Straits issue is regulated by a separate agreement based
on the provision in article 23 of the Lausanne Treaty of 24 July 1923. This provision is:

“Bounded High Parties, as stipulated in the present-day Convention on the Straits regime, freedom of
passage and departure (transportation) in the Dardanelles, the Marmara Sea and the Black Sea Strait,
from the sea and air, as well as during peacetime. They reached a consensus in accepting and declaring
the principle. This contract shall be of the same power and value to the High Parties as if it were in this
Treaty.”

Article 23 of the Treaty of Lausanne did not recognize the authority Turkey on the traffic in the Straits
and the Marmara Sea in. The Lausanne Straits Convention envisaged in Article 23 of the Lausanne
Treaty is an agreement with 20 provisions which are aiming at the free passage through the Straits,
the establishment of the Straits Commission, and the guarantee of the League of Nations (the first
version of the United Nations). In Lausanne Straits Agreement the following three principles are
contained: (1) the Strait of demilitarization, (2) establishment of an authorized Straits Commission to
control the passage of ships through the Straits and provide information to the Nations (3) guarantee
of the League of Nations (especially Britain, France, Italy and Japan) to prevent the Military situations
that pose a risk to Turkey. These arrangements meant that Turkey cannot be dominated over the
Strait in its own territory.

Turkey, in those critical conditions (especially in the face of thorny issues such as the abolition of
capitulations) have agreed those arrangements to be bring them forward again in future and really
has continued its struggle in the diplomatic area and provided the acceptance of Montreux
Convention in 1936.

c. Montreux Straits Agreement

i. The key point of the Montreux contract: freedom of passage

Montreux Convention Regarding the Regime of the Straits, is an international treaty signed on July 20,
1936 in the town Switzerland's Montreux (Montreux) between the states France, Britain, Bulgaria,
Japan, the Soviet Union, Turkey, Greece, Romania and Yugoslavia states’ representatives and entered
into force. The provisions in the Lausanne treaty were terminated and the provisions in this new treaty
were enforced. Another big advantage of the Treaty of Montreux is the returning back the Tukey's
soverignty over the straits which were taken away from Turkey in Lausanne. The management of the
Strait treaty is passed back to Turkey.

In the 1st Article of the Treaty, the following statements are stated: “They accept and confirm the
principle of freedom of passage and departure (transportation) from the sea in the Straits.” In other
words, it is stated that the agreement with this first article is only related to the Bosphorus crossings.
According to the Montreux Convention, the term “Strait” means the Dardanelles, the Marmara Sea
and the Bosporus in terms of transportation. The channel will create an option only for the Bosphorus.
The passage regime of the ships through the Dardanelles and the Marmara Sea will remain the same under the Montreux Convention.

According to the Montreux Convention, the principle of "freedom of passage and transportation of ships" through the Straits has been adopted. In this context, countries have been subject to many restrictions and rules regarding the warships in peace and war regime as well as setting certain limits and rules such as tonnage, time and passage according to having coast in the Black Sea or not. Also, the provisions varies for coastal and non-coastal states for the situations which either Turkey itself as a state of war or a war danger is so close to it. Crossing the Bosphorus is not as easy as it seems, it is not possible to stop the ships for an indefinite period in the Bosporus, as well as the permission to carry a different number of ships and tonnages, especially for warships or at any time of the war.

The most sensitive and strategically important part of the Contracting Parties are the provisions on warships. Closure of Istanbul Strait, and forcing of ships wishing to transfer to pass through the canal would be contrary to the Montreux Convention, therefore the actual strategy of the effort required is to make the ships themselves wish to pass through the channel of the country. Here in Turkey, it is important how to encourage ships to pass from the channel. The amount of the passage fee will be important to increase the optional passages. However, considering the importance of delivery times in commercial contracts and penal terms, paying high fees will sometimes be more advantageous than paying the penal terms set out in the contract. It is known that commercial ships lose a lot of time in the strait due to long waiting times in Istanbul strait. So the using of channel can or cannot be advantageous is arguable before the channel Istanbul project is implemented.

ii. The Duration and Validity of the Montreux Straits Convention

The term of freedom of passage and round-trip (transportation) of merchant ships in peacetime, referred to in Article 1 of the Convention, is endless. The remaining period of the remaining articles of the contract, starting from the effective date, is twenty years, but this period is extended unless any new regulations are made.

iii. Can the Montreux Straits Convention be Changed?

Montreux Convention Regarding the Regime of the Straits, which Turkey is a party and approved by an international treaty. It cannot be eliminated unilaterally. The abolition or amendment of the contract is only possible with the decision of the parties signing the contract to come together. The contract remains in force until two years have passed since one or more of the parties submitted a preliminary notification to the French Government. This preliminary notification is communicated to the States parties by the French Government and, if the Convention is terminated as appropriate, the parties agree to convene and attend a conference to determine the provisions of a new Convention or to amend the articles of the existing convention. After learning the details about the CANAL Istanbul project, we will discuss the possibility of changing the Montreux Treaty with the CANAL Istanbul project and its consequences.

iv. Analysis of the Possibility of Changing the Montreux Treaty for CANAL Istanbul

The possibility of change has been regulated since the establishment of the Treaty. According to Article 29 of the Treaty, "Each of the Linked High Parties may attempt to propose amendment of one or more provisions of this Agreement, starting from the entry into force of this Agreement, at the end of each five-year period." The specified procedure is not simple and conditions are difficult
to fulfil. Namely, the countries that have signed the contract and the countries bordering the Bosphorus have to be approved at the ratio of ¾.

Also, Turkey is not party to Montego Bay which finds application since 1994. The Montego Bay treaty sets out freedom of travel and transportation across the international straits and associated obligations. In other words, it does not seem possible to legally attack the restrictions arising from the application of the Montreux treaty or other practices, as an excuse to oppose Montego Bay. The Montego Bay Convention sets a set of rules for free communication and movement between countries, peaceful use of the seas, fair and efficient use of resources, and protection of the seas. It borders the Coastal states, islands and peninsulas, states and different neighbouring sea areas. These restrictions restructure and rationalize the sea area so that each defined sea "slice" follows the flag of the coastal state, a specific legal regime in which foreign ships have certain rights and obligations to flying ships.

Foreign policy under the Trump administration causes many border countries to feel the distance to re-evaluate the treaty. Trump has kept a distance from many alliances that existed before. It seems impossible for Romania, Bulgaria or Ukraine to ask for a renegotiation of the treaty in this case. It seems most correct for these countries to remain silent and do not cause the US existence to be discussed again in the Black Sea. Likewise, while the current situation is in favor of Russia, it will have no interest in asking for its change.

d. Briefly Channel Istanbul Project

i. History of the Project

Although the Canal Istanbul project is currently on the agenda and creates debates, this project is actually an old project. On April 27, 2011, Recep Tayyip Erdoğan, then prime minister, announced this project to the public at a conference held in Istanbul.

The current project of the CANAL Istanbul project is as follows: the project will be implemented on the European Side of Istanbul. It is aimed to establish an artificial alternative to the Bosphorus by building an artificial waterway between the Black Sea and the Marmara Sea in order to relieve the traffic of the ship in the Bosphorus, which is the only gateway between the Black Sea and the Mediterranean. At the point where the canal meets the Sea of Marmara, one of the two new cities planned to be established by 2023 will be established.

While promoting the project, Erdogan said, "We are covering our hands for one of the greatest projects of the century that will not even accept comparison with the Panama Canal, the Suez Canal and the Corinth Canal in Greece," and stated that the project will be covered entirely from national sources.

UNCLOS (United Nations Convention on the Law of the Sea) Article 34 covers the International Straits Open to International Navigation between Part 34 and 45 of Chapter III. The concept of "Strait" is geographically defined as "natural narrow waterway that connects the two seas". Accordingly, the narrow waterway Straits should also be "natural". For this reason; Suez and Panama water passages are not “Straits” but “canals”. Likewise, if the channel Istanbul project is realized, even if it has a narrow waterway, it cannot be defined as a strait because it is not natural and should be described as a channel.

ii. Current Information of the Project
Canal Istanbul, which is intended to be built with the aim of reducing ship traffic and minimizing the risk of accidents, is planned to be 40 km long, 150 meters wide and 25 meters deep. With this channel, the Bosphorus will be closed to tanker traffic completely, two new peninsulas and a new island will be created in Istanbul.

Canal Istanbul constitutes 30 million square meters of the New City, which is planned to be built on 453 million square meters. Other areas are divided into airports with 78 million square meters, Isparta tower and Garden city with 33 million square meters, roads with 108 million square meters, zoning parcels with 167 million square meters, and common green areas with 37 million square meters. It has been announced to the public that the study of the project will take two years. It is also given that the extracted soils will be used in the construction of a large airport and port, and that it will be used to fill the quarries and the mines.

iii. Canal Istanbul Being a Water Passage and Its Evaluation with Montreux Contract

The difference between the water passage and the Straits is due to whether the passage is natural or not. Binali Yıldırım said: "Montreux concerns the straits. The passage in the straits is an agreement that regulates the ship traffic regime. An agreement that was made in 1936 and covering the entrances, exits, merchant ships and other ships in all the straits. Channel Istanbul is a waterway to be reconstructed artificially. Therefore, this place cannot be associated with Montreux. Turkey within its sovereign rights, can make the channel here or elsewhere and may direct maritime traffic from these channels. This is clear. This place cannot be associated with any form of Montreux".

As will be revealed in this study, Binali Yıldırım’s interpretation is correct as a word. The Montreux treaty concerns only the straits, and since it is not a natural passage, channel Istanbul will be a channel / waterway, not a strait. If the Treaty is interpreted in accordance with the purpose of the Treaty, considering the purpose of providing peace and security to the surrounding countries, if some restrictions are not applied to the channel, we will have some kind of cheat in the Montreux treaty and we will have lost our rights which have protective qualities for our country with Montreux. For this reason, it is essential to consider some key points very carefully.

There is a common point in all of the government’s statements, all of them stated that Montreux will remain valid and channel Istanbul is independent from this treaty, but for which ships this channel will be opened, etc. There is no clear explanation on these issues.

iv. The Importance of Business Model of Canal Istanbul Project

It is talked that Canal Istanbul will be built in a build-operate-transfer model, and even written by some journalists that it is foreseen to choose Chinese companies.

In this context, the CHP requested the cancellation of the legal regulation for the inclusion of the Canal Istanbul project and similar waterway projects under the Build-Operate-Transfer model, but the Constitutional Court rejected this request unanimously.

In addition, when Recep Tayyip Erdoğan meets with the prominent businessmen of the Republic of South Africa at dinner at the Hyatt Regency Hotel in 2018 stated that “We are making preparations for the realization of Canal Istanbul, a highly strategic project that will match the Bosphorus. I invite the entrepreneurs of South Africa to our country in this regard.” He has also
invited African entrepreneurs with his speech. For now, it is not clear whether the terms of the tender or the Turkish companies will have the power to participate in this tender, since there is only a project in question and the tender has not yet been opened. However, according to the scope and experience required by the project, it will not be a speculation and a realistic approach to say that a foreign company or a companies consortium will do this project.

e. Legal Analysis

The Montreux Straits Convention guarantees the passage of merchant ships, while putting restrictions on the passage of warships, likewise previous agreements. In order to ensure the security of the Black Sea countries, the total weight of the warships of foreign countries has been limited to 15 thousand tons, the duration of their stay in the Black Sea for 21 days and the total tonnage of 45 in the Black Sea. The passage of all aircraft carriers is prohibited. On the other hand, the passage of submarine ships of countries with a coast to the Black Sea is prohibited, with some exceptions (transition for purchase and repair purposes). In addition, it is required for the Black Sea countries to obtain clearances in diplomatic means from Turkey before 8 days, and for other countries before 15 days before the passage.

The passage of ships cannot be prohibited in war and peace times according to international law, however Montreux gave Turkey right to close passage provided that it feels itself under the threat of war.

In this context, the 1982 United Nations Convention on the Law of the Sea (BMDHS), which was signed in Caracas, the capital of Venezuela, on 10 December 1982 and entered into force on 16 November 1994 should be taken into consideration. UNCLOS is the most important international legal regulation of today in the context of codification of the law of the sea. It is important for UNCLOS’ application primarily by party states (Article 311 UNCLOS), as well as non-party states like Turkey due to being a custom law.

Because the UNCLOS decides that all ships should be free to cross the international straits, and while the transit regime excludes the straits determined by agreements for many years, it is stated that the transitions will be made according to the agreement they are subject to (Article 35-c). In this context, since the Montreux Convention is a continuation of the previous agreements, it has been confirmed by an international agreement (UNCLOS), where the transition regime put forward by the Montreux Convention has been the rules of customary law for many years. Thus, according to UNCLOS Turkey should not violate the Montreux Straits Convention.

However, it should be noted that; In the forefront of the Montreux Convention, The strait is defined as the Bosphorus, the Marmara Sea and the Dardanelles are the Turkish Straits. Therefore, even in the scenario where it is accepted to not to violate the Montreux Straits Convention, the opening to anew channel does not contradict the contract. Because, as explained in the preface of Montreux, the Turkish Straits are determined as Istanbul-Marmara-Çanakkale. The comment based on the word will be possible to made. In this case, the Canal Istanbul project does not constitute a violation of the contract in any way, since it is outside the scope of the Montreux Straits Convention.

This view can be supported by the following explanations:
In international law, the transit regime of ships through international straits and the regime of passing through man-made canals are kept separate. Water channels are considered as the inland waters of the countries. **Therefore, the right to 'harmless passage' of ships, valid for international straits, does not include man-made channels.** According to the United Nations Convention on the Law of the Sea (UNCLOS), the definition of the Right to Harmless and contradictory situations are as follows;

“**Article 19 Meaning of innocent passage**

1. Passage 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.

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

   (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

   (b) any exercise or practice with weapons of any kind;

   (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;

   (d) any act of propaganda aimed at affecting the defence or security of the coastal State;

   (e) the launching, landing or taking on board of any aircraft;

   (f) the launching, landing or taking on board of any military device;

   (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;

   (h) any act of wilful and serious pollution contrary to this Convention;

   (i) any fishing activities;

   (j) the carrying out of research or survey activities;

   (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;

   (l) any other activity not having a direct bearing on passage.”

“**Article 21 Laws and regulations of the coastal State relating to innocent passage**

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.”

The counter argument for this situation may be the Suez Canal and the Panama Canal. Because it has been governed by international agreements for many years. Therefore, the transitional regime of these channels has become the customary rule of law over time, and the channels have gained 'international channel' feature. However, if there is no international agreement, man-made channels are called "national channels". In international law, there are no rules that determine the transit regime of foreign ships passing through such national channels. The regulation of the ship's pass is left to the domestic law of the country concerned. If the channel is the border of the two countries, the transit regime should be determined with an agreement to be signed between the two countries. As an example, the transits through the Corinth Canal, which connects the Gulf of Corinth and the Aegean Sea, which are located within the borders of Greece, are made according to the rules of Greece’s internal law. Another example is the Kiel Channel. The canal is completely within the borders of Germany. It is governed by the waterways and ship management (Wasserstraßen- und Schifffahrtverwaltung des Bundes) according to German domestic law. Merchant ships pass the fee according to the rules set by the ship's administration. The warships of foreign countries are subjected to diplomatic permission from the German Ministry of Foreign Affairs.

f. Conclusion

As a result, particularly when the last section is read carefully with the examples of other countries it will be seen that Canal Istanbul is entirely a man-made channel located within the borders of Turkey. Also, it should be underlined once again that it is not among the straits listed in the preface of the Montreux Straits Convention. When these two issues are evaluated together, it can be clearly seen that; with the Canal Istanbul project, our country now has a new source of income where it can independently set a transition regime and establish rules for the channel - whether ships will pay fees,
whether warships will pass, and many other arrangements. There is no "legal" reason that can be addressed by international law or contracts which can prevent this project.