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RIGHT OF ACCESS OF LAND-LOCKED STATES TO AND FROM THE SEA. FREEDOM OF TRANSIT

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Abstract. Land-locked States form a special group of states as they are not touched by the sea. These states without sea-coast, as a result, do not have their own territorial sea, contiguous zone, continental shelf and exclusive economic zone. The U.N. Convention on the Law of the Sea refers to these land-locked States. It is a multi-faceted Convention which represents a monument to international co-operation in the treaty-making process; it is also animated by the modern conceptions of right and equality. It sets terms and modalities that improve provisions of previous conventions, and secure a new legal regime which guarantees them equal rights with all other states.

Greece borders with FYROM, a land-locked state, and can easily become a transit state. It is also a near neighbour of other European land-locked states, which for the time being have easier access to the sea through other countries. However, there is no guarantee that they will not ask for exit through our country. For these above-mentioned reasons, the study of the legal status of land-locked states is important for Greece. It is also the only way to define our obligations towards a land-locked neighbour, and to protect at the same time, our legal rights.

1. RIGHT OF ACCESS

The Geneva Convention on the high seas in 1958¹ determined that no sea-coast states "should" have free access to the sea, without clarifying whether State Parties were legally obliged to allow access to neighbouring land-locked states, or this was just a moral obligation². The New York Convention that followed in 1965, is the first to refer to the right of access. This Convention, however, was not very effectual and did not manage to give a final solution to this issue³.

The U.N. Convention on the Law of the Sea wishing to solve this important matter, was not restricted to a simple declaration of the freedom of the high seas, or to inciting provisions, like the Geneva Convention. It went even further by supporting firmly land-locked states to enjoy the freedom of the high seas. At the same time, the way to exercise and enjoy their rights to the neighbouring exclusive economic zones and to the common heritage of mankind was also discovered. Access to the sea is described as a "right" and the term "shall" is used in such an imperative way, that does not leave any doubts that this right has been legally enforced since the first moment of its creation. However, we have to define exactly when was this right born? It was definitely not the enforcement of the Convention that animated it, as this is not the only condition for its existence. A few other factors must co-exist which, however, turn the right of access into a right of expectation.

The grant of access right of land-locked states as described in the Convention, aims to the exercise of all the rights provided for in it, including these related to the freedom of the high seas and the common heritage of mankind⁴. The provisions regarding satisfaction of access, have been composed following proposals of land-locked states, expressed repeatedly during the Conference⁵. This must be considered as an important success of these states.

Access of land-locked States to and from the sea can be satisfied by the freedom of transit through the grounds of the transit states. Therefore, the word "access" is tightly connected to the word "transit" through the territories of the intermediary states. One or even more coastal or inland transit states correspond to each land-locked state. This gives to a land-locked state alternative transits, depending on its geographical position. Although some states reacted to it, during the Conference, the actual Convention did not ban it. Its compulsory provisions bind equally all States Parties. Consequently, each state that can be used for transit from a land-locked state, is obliged to allow the exercise of this right under the terms laid by the Convention.

2. CONDITIONS FOR EXERCISING TRANSIT RIGHTS

Access right of land-locked states to and from the sea is compulsory following some terms and modalities. The definition of these conditions is subject to agreements between land-locked states and transit states. These agreements will result from bilateral, regional or sub-regional negotiations between the interested parties⁶. A reasonable question rises at this

point. Although these agreements are necessary for the exercise of the access right, what happens if the neighbouring states do not manage to agree in negotiations? During the Conference, some weak proposals were made to cover this possibility. But, they were all in vain, as none was recorded in any of the draft texts or even in the final text of the Convention which does not cover this extreme case⁷.

All above-mentioned lead to the conclusion that until these agreements are reached and in force, transit through the intermediate state is exercised according to its national legislation⁸. Freedom of transit cannot exist if the relevant terms and modalities are not defined. The interested states have a moral obligation not to delay settlement of pending issues that disrupt the exercise of such an important right for the land-locked states.

3. THE NATURE OF THE ACCESS RIGHT

The failure of land-locked states to exercise their right of access to and from the sea, when terms and modalities are not agreed, results to two theories. The first considers access right *jus imperfectum* which cannot be exercised without the consent of the transit state. The second and more popular, treats the relevant provision as a *pactum de contrahendo* obligation⁹.

Determination of access terms and modalities is absolutely necessary for the smooth operation of freedom of transit, and for the protection of legal interests of transit states. Therefore, provisions related to the access of land-locked states to and from the sea, should not be considered imperfect because they simply set the necessary conditions for its normal and without implications function. For this reason only, we believe that the right of access as it was registered in the Convention, cannot be considered *jus imperfectum*.

The second view seems to be more correct and it does not contradict our conclusion that access right as described in the Convention is actually a "right of expectation". *Pactum de contrahendo* means responsibility to reach an obligatory agreement, after the necessary preparatory negotiations. What happens though if these preparatory negotiations fail? According to the Permanent Court of International Justice, the obligation of negotiations does not presuppose obligation of a final agreement. The obligation of the parties is fulfilled only through their good faith efforts once of course, all aspects have been examined. This interpretation though does not seem to keep up with the spirit of the Convention. At this point, however, the pressing need of the access right and the obligation to agree on terms and modalities, are taken for granted. If parties are moving within the legal frameworks and their negotiations are inspired by good faith, success is guaranteed.

4. FREEDOM OF TRANSIT

The phrasing of article 125.1 of the Law of the Sea Convention presents some interpretative difficulties. More precisely, while the first sentence refers clearly to "right" of access of land-locked states, the second refers to the right to enjoy "freedom of transit through the

territory of transit States". This variety in phrasing was considered to undermine the legal status of the land-locked states. The view also that their position would be more stable legally, if the second paragraph was referring to "right of freedom of transit through the territory of transit States"¹⁰ was expressed. The use of the term "freedom" secures an enforceable right of land-locked states. We should not forget that in international law, terms like "freedom of fishing" or "freedom of overflight" have traditionally been used to describe recognised rights and obligations¹¹.

Freedom of transit was not restricted by the protective provision 3 of article 125 referring to transit states. The measures taken by transit state in order to protect their legal interests should not restrict the exercise of the access of land-locked states to and from the sea, or affects facilities related to it. This is the reason, reference was made only to "legitimate interests"¹². Smuggling, breaking of sanitary and security rules, gun-running are some examples of violation of the legal rights of transit state.

Terms and modalities for the exercise of free transit are subject to compulsory agreement between the interested states¹³. This provision of the Convention is an extra safety valve, which should absolutely not be considered as a restriction of the freedom of transit. Both, access right and freedom of transit can be exercised immediately after the enforcement of these agreement. On the other hand, these agreements can not be considered restrictive, as their aim is to create a regime that will secure the smooth and successful operation of transit, in favour of land-locked states.

5. MEANS OF TRANSPORT

Convention refers to the freedom of transit "by all means of transport"¹⁴. However, this does not mean that any mean can be used for traffic in transit. Only the means mentioned in the Convention can be used. The use of anything else is subject to agreement between land-locked and transit states¹⁵.

The means of transport determined in the Convention¹⁶ can be divided into two groups. Vehicles and railway rolling stock belong to the first group, as well as all land means of transport, such as porters, pack animals that may be used depending on the local condition. The second group refers to sea, lakes and rivers crafts.

As stated in the Convention¹⁷, the aim of the right of access to and from the sea, is to enjoy the freedom of the high seas. The freedom of the high seas, though, comprises *inter alia* the freedom of overflight¹⁸. Land-locked states must secure overflight rights through the air space of the transit states, in order to be able to access to and from international air space, and enjoy this freedom. However, the means of transport as listed in the Convention, do not include air crafts or any other kind of flying machine.

The assumption that a Convention on the Law of the Sea has no relation to air transports, and consequently no relevant reference should be made, is not correct. The "law of the air" has its sources in the law of the sea. The fact that air means were not included in the Convention on the Law of the Sea, proves clearly that the aim of the Convention was simply to draft a regime, not compulsorily imposed to air transports. This belief is also supported

by a selective reference to overflights, air space and air means¹⁹. Overflight rights are usually guaranteed by other agreements related to Civil Aviation²⁰. The Convention does not abolish or forbid further facilities than these foreseen in it²¹.

6. TERMS FOR THE SATISFACTION OF THE ACCESS RIGHT

Access of land-locked states to and from the sea is granted under certain "terms". These terms aim to secure the normal functioning of the access procedures of land-locked states to and from the sea, without affecting the sovereign rights or the legal interests of the interested countries. However, no direct reference was made to these either in the draft text or in the Convention. They were revealed only by studying the relevant articles.

a. Maintenance of greater existing transit facilities

During the Conference, many land-locked states had already obtained access to and from the sea. In many cases the existing access facilities were more favourable than these provided for in the Convention. The 3rd Conference tried to keep them in force, without excluding the possibility of granting more generous ones in future²². As a result, land-locked states are favoured and new negotiations for issues already solved, are avoided.

b. "Executive" agreements related to the Convention

As previous Conventions²³, this one also included some non self-executing provisions²⁴. Special agreements settling details relevant to the satisfaction of the access right within the framework of the Convention, are required. There are two types of agreements involved: compulsory and optional.

(1). Compulsory agreements: Executive compulsory agreements are these determining terms and modalities for the exercise of the freedom of transit. As already mentioned their existence is absolutely necessary for the exercise of the access right of land-locked states to/from the sea. This aspect alone is more than enough to make these agreements obligatory. Why though the Convention requires this type of agreements? Why terms and modalities for the exercise of free transit through transit states are not defined by the Convention? Reply is simply. Geographical conditions vary enormously from place to place. It is not possible to cover such variable issues, only in a few rules and through one Convention. Recent developments have proved that even if the Convention had solved all issues arisen during the Conference, nowadays we would have to face the new ones caused by the increase of population in land-locked states²⁵. Even, if during the Conference all particularities related to the freedom of transit had been examined, nobody would be able to foresee these arising, in action²⁶.

The Convention determines that these agreements can be bilateral, subregional or regional²⁷. These types of agreement are related to the way of negotiations and they do not substitute the state will, or the will of any subregional or regional organisation.

Another point that has to be interpreted, is related to the issue involved in compulsory agreements, and more precisely to the phrase "terms and modalities for exercising freedom of transit". The field of interpretation is very wide. Terms can be related to reciprocity or to security of the transit state, even to dangers deriving from the type of merchandise or to anything else. These terms can be effected also by various other factors such as the way of transports of persons and goods etc. However, the most important issue is to record the access routes to the sea through the territories of the intermediate state and vice versa. The aim of this is to secure the legal rights of the transit states, especially these related to security.

(2). optional agreements: The Convention mentions some of the most important non-compulsory agreements. These refer to establishment of free zones, or other custom facilities, to means of transport, to cooperation for improving the existing ones, or the port installations and their equipment²⁸.

7. THE NON-COMPULSORY ASPECT OF RECIPROCITY

The 1958 Geneva Convention based the agreement on the freedom of transit between land-locked and transit states on reciprocity²⁹. The 1965 New York Convention was stricter and reciprocity was extended to all its provisions³⁰. The Convention on the Law of the Sea does not refer to reciprocity at all. This "particularity" is an important feature of the Convention and must be examined thoroughly.

Reciprocity was discussed extensively during the 3rd Conference and caused strong reactions: some participants were favourable, some others against it. But, at the end, its enforcement was trusted to state initiative and discretion.

This optional enforcement granted by the Convention does not mean that reciprocity is banned, either from the access right or from all other facilities foreseen in its framework. Convention does not forbid interested states to enforce reciprocity to their in-between agreements.

It seems though that reciprocity will continue to play an important role to bilateral relations³¹ in favour of transit states³². On the other hand, it is expected that most, if not all, land-locked states will accept demands of transit states based on reciprocity³³.

8. RESPECT OF SOVEREIGNTY OF THE TRANSIT STATE

The right of access of land-locked states to and from the sea is valid only for states parties that have committed themselves to the obligations arising from the Convention.

Consequently, the exercise of the access right does not restrict the sovereignty of the transit state. Moreover, the Convention reassures respect of sovereignty through a double "safety-valve". The first operates with private agreements that satisfy and facilitate the access right, and the second recognises to the transit states the right to take measures in order to protect their legitimate interests. It is worth mentioning that even land-locked states expressed their respect to this provision over the negotiation period³⁴.

9. EXCLUSION OF APPLICATION OF THE MOST-FAVOURED-NATION CLAUSE

Convention excludes from the application of the most-favoured-nation clause all its provisions, as well as all special agreements related to access of land-locked states to and from the sea. The expediency of this rule is obvious through the relevant article³⁵. Access is a special right of land-locked states and its recognition is related to geographical conditions. For this reason, the application of this right to other states could not be legally supported by the most-favoured-nation clause. This exclusion operates more in favour of the transit state which, otherwise, would be obliged to grant an equally favourable status to any other state invoking this clause³⁶.

10. OBLIGATIONS OF TRANSIT STATES

a. Satisfaction of access right of land-locked states

The main obligation of the states parties of the Convention is to guarantee freedom of transit to their neighbouring land-locked states through their territory³⁷. As already mentioned, freedom of transit is exercised after defining terms and modalities by special agreements between land-locked and transit states. Consequently, freedom of transit does not depend only on the transit state.

b. Measures to avoid or eliminate delays or other difficulties of a technical nature in traffic in transit

The fullness of special agreements determining terms and modalities, modes of freedom of transit, availability of means of transports and all other kinds of facilities, will guarantee up to a certain point their smooth function. However, difficulties of technical nature will arise. These difficulties should not be related to the above-mentioned agreements and provoke their redefinition, but to their realization as described in them. In these cases, the competent authorities of the transit state are obliged to co-operate with the authorities of the interested land-locked state for their elimination³⁸.

c. Exemption of land-locked states from custom duties, taxes and other charges

According to article 127.1 of the Convention, traffic in transit e.g. persons, baggage, goods and means of transport, through one or more transit states is not subject to any custom duties, taxes or other charges. This is also valid in cases of transshipments, warehousing, breaking bulk or even changes in the mode of transport³⁹.

However, these exemptions are not valid when traffic in transit begins or terminates within the territory of the land-locked states, but is not related to the sea access. Exemptions are related only to the act of transit and not to the services provided from the transit state, such as payments of pilots, warehousing fees, tolls etc. The second paragraph of the above-mentioned articles forbids to the transit state to impose taxes or charges higher than those imposed to its citizens in similar occasions.

10. PROTECTION OF TRANSIT STATE

As already mentioned, the respect of sovereignty of the transit state during transit in traffic consists one of the main terms of the Convention. Article 125.3 of the Convention recognises the right of transit states to take all measures necessary to ensure their legitimate interests.

The relevant provision is fully justified. It is not possible to open the borders of a country in order to facilitate transit right of a land-locked state, without being able to protect it against abuse. Thus, this provision was easily included in the Convention without causing any reaction.

CONCLUSION

The mammoth task of this Convention to elaborate a new regime "dealing with all matters relating to the law of the sea..." began in 1967. In late 1973, the Third UN Conference on the Law of the Sea was convened and set about its task. After 9 years, on 10 December 1982, the final version of the Convention was opened for signature in Jamaica.

This Convention was a new contribution, an attempt at rapprochement and an expression of the determination of States to find formulas of collective agreement designed to bring about the peaceful uses of the seas. It also contained generally acceptable solutions with respect to the maritime spaces under the sovereignty and jurisdiction of States. However, it was not restricted only to sea-coast states. Its spirit of equality and justice brought attention and concern to land-locked states and their rights.

The fact that the access right of land-locked states to and from the sea was fully guaranteed and compulsory exercised following certain terms and modalities defined by private agreements between the interested states, was a major achievement. At the same time, the jurisdiction of the transit state were recognised. The Convention, contrary to previous ones, did not impose the reciprocity clause or ban it. It also respected the sovereignty of

the transit state, as the access right to and from the sea is valid only for the states parties committed to the obligations deriving from the Convention.

Up to now, more precisely up to 24 January 2001, 135 states from a total of 158, have ratified this Convention, with the hope to bring a fresh breeze in international co-operation and world problems.

ENDNOTES

1. Geneva Convention on the high seas, art. 3.
2. Cf. VACANNIE, S. C., Land-locked and Geographically Disadvantaged States in the International Law of the Sea, p. 187.
3. POLITIS, S., The Legal Regime of Land-Locked States according to the Convention on the Law of the Sea, page 27 et seq.
4. Convention on the Law of the Sea, art. 125.1.
5. Article II of the Draft-Articles for the land-locked states which was submitted by Afghanistan, Bolivia, Czechoslovakia, Hungary, Mali, Nepal and Zambia. See also explanatory note of articles from the 17 land-locked states. See POLITIS, op.cit., supra, endnote 3, pp. 251 & 260.
6. Convention on the Law of the Sea, art. 125.2.
7. Zambia, Botswana, Lesotho, Official Records of the Third United Nations Conference, vol. i, p. 131, vol. ii p. 245, vol. ii 246-7 respectively.
8. This remark was made by the Federal Republic of Germany during the Conference, while negotiations were completed and the text of the Convention was finalised. Official Records of the Third United Nations Conference, vol. xiv, p. 12-81 and 159, document A/CONF. 62/WS. 16.
9. Cf. VASCANNIE, S.C., op. cit, supra endnote 2 pp. 188-190, and WANI, I.J., A Evaluation of the Convention on the Law of the Sea from the Perspective of the Land Locked States, Virginia Journal of International Law, vol. 22, pp. 641-3
10. See correspondence submitted by the Group of Land-locked and Geographically disadvantaged States, dated 28 June 1977. PLATZODER, R., Third U.N. Conference on the Law of the Sea, Documents Compiled and Edited by Renate Platzoder, vol. iv, p. 386.
11. Eg. Geneva Convention on the high seas, art. 2 and Convention on the Law of the Sea, art. 87
12. Cf. NANDAN S., ROSENNE S., United Nations Convention on the Law of the Sea 1982. A Commentary, vol. III pp. 421-2
13. Convention on the Law of the Sea, art. 125.2.
14. Convention on the Law of the Sea., art. 125.1.
15. Convention on the Law of the Sea, art. 124.2.
16. Convention on the Law of the Sea, art. 124.1 (d).
17. Convention on the Law of the Sea, art. 125.1.
18. Convention on the Law of the Sea, art. 87.1
19. Relevant articles: 1 (1) (5) (a), 1 (1)(5)(b)(i), 2 (2), 34 (1), 38 (1), 39 (1), 39(3), 39(3)(a), 42(5), 49(2), 49(4), 53(1), 53(2), 53(4), 53(5), 53(12), 54, 58(1), 78(1), 101, 102, 103, 104, 105, 106, 107, 110(4), 110(5), 111(5), 11(6), 135, 155(2), 212(1), 216(1)(b), 222, 224, 236, 298(1)(b)

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20. Cf. Chicago Agreement on International Air Transport of 7 December 1944, Chicago Convention on International Civil Aviation of 7 December 1944 and Paris Convention on Air Navigation of 13 October 1919. Greece has ratified the Paris Convention by law 2569/19-26 April 1921 (Government Gazette A'68) and the Chicago Convention by law 211 of 28 February 1947 (Government A'35).
21. Convention on the Law of the Sea, art. 132.
22. Relative to Article 132 of the Convention.
23. e.g. Article 3 of the Geneva Convention on the high seas of 1958 and the second paragraph of Article 2 of the New York Convention refer to commercial transit of land-locked states, which is settled by further agreements.
24. e.g. Convention on the Law of the Sea, art. 125.2, 128, 129 and 124.2.
25. POLITIS, S., *op. cit.*, supra endnote 3, pp. 16-7.
26. Pakistan and Peru were supporting these positions. Official Records of the Third United Nations Conference, vol. ii, pp. 250-1.
27. Convention on the Law of the Sea, art. 125.2. See also POLITIS, S., *op. cit.*, supra endnote 3, pp. 164-5.
28. See Convention on the Law of the Sea, art. 124.2, 128 and 129.
29. Geneva Convention on the high seas, art. 3 .1 (a).
30. New York Convention on Transit Trade of Land-locked states, art. 15.
31. Iran stated recently that it believes to the existence of the reciprocity term. See Law of the Sea Bulletin, No. 25, June 1994, pp. 29-30. Cf. NANDAN, ROSENNE S., *op. cit.*, supra endnote 12, vol. iii, p. 421.
32. The Hellenic Constitution is very sensitive re. reciprocity and special reference is made in art. 28.1 and 28.3.
33. See Agreement between Greece and FYROM of 13 September 1995, art. 13 and 14.
34. e.g. Mali, Official Records of the Third U.N. Conference, vol. ii, p. 254.
35. Convention on the Law of the Sea, art. 126.
36. Cf. NANDAN, S., ROSENNE, S., *op. cit.*, supra endnote 12, vol. III, p. 428-9.
37. Convention on the Law of the Sea, article 125.1.
38. Convention on the Law of the Sea, art. 130.
39. Convention on the Law of the Sea, art. 127.

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