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TRANSIT PASSAGE OF THE EURASIAN COUNTRIES WHICH DO NOT BORDER THE HIGH SEA

Dr. Abbas Karaağaçlı

When the rules of international law, practices and conventions are all studied, it becomes evident that there exist certain rules of international legislation which enable the countries not bordering the high seas to reach the open seas. However, differences in practice arise due to geographical conditions, balance of power and economic development. In order for the countries concerned to reach the open seas and benefit in transit from the territory of the neighbouring countries located by the high seas for trade and transportation, it is essential that the two countries should have good relations and that the country bordering the high seas should have good-intention. Because in Eurasian Geography, almost none of the countries in Central Asia and Caucasus do not border the open seas, they are in need of other countries for trade and transport. In this study, the focus is on this issue

**Açık Denizlere Kıyısı Bulunmayan Avrasya Devletlerinin
Transit Geçiş Hakkı**

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Abstract

When the rules of international law, practices and conventions are all studied, it becomes evident that there exist certain rules of international legislation which enable the countries not bordering the high seas to reach the open seas. However, differences in practice arise due to geographical conditions, balance of power and economic development. In order for the countries concerned to reach the open seas and benefit in transit from the territory of the neighboring countries located by the high seas for trade and transportation, it is essential that the two countries should have good relations and that the country bordering the high seas should have good-intention. Because in Eurasian Geography, almost none of the countries in Central Asia and Caucasus do not border the open seas, they are in need of other countries for trade and transport. In this study, the focus is on this issue.

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1. Introduction

95 percent of world trade takes place via sea transportation. Three fourth of the Earth is covered with seas and oceans. The sea transportation is preferred over other means of transportation and has become the dominant means of transportation because of its low costs. It has been an issue for countries with and without borders to sea that the majority of the world trade is carried out via sea transportation. The sea transportation has also become influential in the increase of world trade. According to the UNCTAD, "Those countries which do not border high seas rank as the poorest countries. The fact that these countries cannot reach high seas via land transportation has caused them to become isolated in the world market and constituted a major impediment for them in terms of economic development" (UN. Doc. TD/191, 1976, s.200).

After the collapse of the USSR, Kirgizstan, Kazakhstan, Tajikistan, Uzbekistan, Turkmenistan, Azerbaijan and Armenia emerged as countries with no borders to high seas. Even though Kazakhstan, Turkmenistan and Azerbaijan border the Caspian Sea, they are still considered as lacking a connection to high seas because the Caspian Sea has no link to international waters.

These Middle Asian and Caucasian countries without borders to high seas have some rights and entitlements as determined by the international law. Since the time of its independence in 1990s, the major heir of the USSR, Russia has aimed to make use of the opportunities that result from sea transportation. In achieving its aim, Russia negotiated and developed good relations with other countries in Europe, North America and Asia. While Kazakhstan, Azerbaijan and Turkmenistan make use of all the available means of transportation in carrying their natural resources to the world market, Uzbekistan has long experienced difficulties in transporting its agricultural products, mainly cotton to the purchasers around the world.

On the other hand, the other three countries, namely Kirgizstan, Tajikistan and Armenia could not go beyond the economic handicaps that are reminiscent of the USSR era for the reason that they could not produce substantial agricultural or industrial products. The fact that all these three countries have strong economic links to Russia is a proof of this condition. It is true that it was commercially beneficial for both Kirgizstan and Tajikistan to maintain a border relationship with China. Similarly Armenia, has been improving its diplomatic and economic relationship with Iran with the intention to have alternatives.

As regards the rights and entitlements of those countries which do not border high seas, Geneva Convention of 1958, international marital law of 1982, which was put together by the representatives from 150 countries as a result of 9 years of study, and the output of 3rd United Nations Convention constitute the major source of jurisprudence. These legal sources guarantee the right to transit, right to use the air field of the high seas, right to participate in the scientific and technological investigations and right to shipping for those who do not border the high seas.

Kazakhstan and Turkmenistan from the Middle Asia and Azerbaijan from the Caucasus possess an abundance of natural gas and oil. Uzbekistan, on the other hand, is a strong economic actor in the gold market and has become one of the major economies in the region. Kazakhstan, with its economy which is promising in agricultural sector as much as in energy sector (uranium, iron and steel etc.) is an important producer not only in the region but also in the world. The other countries which do not have direct access to high seas experience handicaps and disadvantages in terms of their integration to international trade no matter how abundant their natural resources are.

2. The significance of Transportation and Transit Passage in High Seas

At the time of the USSR, the priority was given to the railroad. As a result, the distant regions in the country were linked to one another, including all the industrial bases, ports, mines and agricultural plantations. Not only the cities in the Middle Asia and the Caucasia linked to one another, but also cities like Moscow and St. Petersburg were linked to all of the ports by the Baltic Sea. With the collapse of the USSR in early 1990s, the existing railroad connection became a significant economic heritage for countries in Middle Asia and Caucasia.

In addition to the railroad network, existing train stations and locomotive manufacturers opened many doors for newly independent countries for their transportation of raw materials and products. As opposed to Tajikistan and Kirgizstan which have vast mountainous area with relatively poor railroad connection, Kazakhstan, Uzbekistan, Armenia and Azerbaijan gained an enormous positive impetus from the existing infrastructure following their independence. The major economic and political centers in Tajikistan and Kirgizstan were also connected to one another through railroad networks. Especially for Tajikistan, the major means of transportation, which is railroad transportation, connects the country to its neighboring countries such as Uzbekistan and Kirgizstan.

The landlocked countries feel the need to benefit from the available means of transportation in their neighboring countries when they import or export their raw material, energy sources, industrial sources and other commercial products. Any political disagreement or crisis with the neighboring country may result from in blockage of these channels. For example, a landlocked country such as Tajikistan pursues a strategy to build dams on its rivers in order to meet its energy demands. However, Tajikistan's dam projects threaten Uzbekistan's cotton production for the reason that the dams divert the water resources available to Uzbekistan used in the production of cotton. This is the reason why Uzbekistan often prevents the construction materials to be transported from Iran to Tajikistan. Because Tajikistan does not border high seas, it is obligated to benefit from Uzbekistan's railroad network. This interdependence caused many political upheavals between two countries. The fact that these countries do not possess alternative means of transportation makes the condition of interdependence and the problems related to it even more serious.

Another landlocked country, Afghanistan, has been experiencing many political problems with Pakistan, from which Afghan state feel the need to seek help for its transportation needs. In order to be able to reach out to the high seas, Afghanistan uses the Karachi port of Pakistan which is 950 km of railroad away from Afghanistan-Pakistan border. Also, Nepal and Bhutan need to transit India in order to be able to reach the Hint Ocean.

3. Transit Passage and Free Passage in Open Seas in International Law

The most common rules of international law are the ones related with the trade and sea transportation in open seas. It is not a proper conclusion in today's conditions that all sovereign countries in the world have the possibility to make sea transportation, flight, oil pipeline, intercontinental cables and similar applications freely in open seas. Actually, since the developed countries use open seas like their dominance area by using technological means as well, it may put even the countries which border open seas into trouble from time to time; as a matter of fact, the possibility of using these right by the countries which do not border open seas depends on the consent and confirmation of the bordering country. According to rules of the international law, when the right to go open seas by these landlocked countries is in question it emerges as a right intended to reduce the damages of these countries they are exposed due to negative geographical conditions (Helmut Terkand G. Hafner, 1985, p. 63).

There are defenders and objectors of the thesis of right to go open seas. Especially, the defenders of the theories of the countries which border open seas refer the sovereignty and dominance rights of their countries and assert the thesis that transit passage should be ensured with an official agreement. According to Prof. Duvar Zemberger who has researches on the issue: "International law do not give any natural right to go open seas" Landlocked countries depend on good will of the neighboring countries in order to benefit from a proper port and thus, they should make agreements in line with benefiting open seas possibilities to obtain this kind of lawful right" (Robert. K. Redden, 1990, p. 260).

In the meeting in 1982 that United Nations' seas convention came to final decision stage, countries which border open seas have evaluated the issue of passage privilege granting to the countries in a landlocked status within the framework of a security perception regarding their countries. As a matter of fact, in the 3rd Conference of United Nations' seas law convention in Karakas in 1971 before this as well, the representative of Kenyan country who explains the ideas of the group consisting of the said countries in the following way: "No country has the obligation to assign its own land to another country for transit passage other than the framework of mutual and regional agreements. In case situations other than this occur and law of transit passage is enforced it puts the security of life and property of their countries' citizens into jeopardy and harms the sovereignty ensured by the law (Conf. 62/C. 3/SR. (1974), p. 253).

The countries which border open seas demand the possibilities that should be granted to them in exchange of transit passage. According to them, landlocked countries should grant them commercial and economical rights in exchange of transit passage. And landlocked countries assert the thesis that transit passage is their natural right and transit passage is the right of all countries for trade, visit and transportation. According to the Prof. Grosios who asserts this thesis: "Lands, rivers and seas which are under the dominance of another nation should be open to usage of the ones who need to make transit passage from there due to legitimate reasons" (Redden, 253).

According to the rules of unwritten law of nations, there are two basic conditions to use transit passage.

- The country who demands transit passage should prove the imperativeness and necessity of this demand.

- It should not give any harm to the country over where transit passage is done during the usage of this right.

Even if the necessity of this situation is proved, political crises between the countries sometimes make transit passage impossible. As a matter of fact, Pakistan has closed its territories for the usage of transit passage of Afghanistan between 1949-1953. Again in 1970s, India has closed its territories for the usage of transit passage of Nepal. Today, due to the problems with Azerbaijan, Republic of Armenia does not let Azerbaijan use its own lands for its transit passage to the Nakhchivan Autonomous Republic which is affiliated land of Azerbaijan. The transit passage between Nakhchivan and mainland Azerbaijan are being carried out over Iranian territories nowadays.

Again, when USA takes aim to the Pakistani civilian residential places with unmanned aerial war vehicles and kills the civilian villagers, Pakistani government closes the USA's transit passage used for transportation of the needs of NATO military units in Afghanistan due to backlashes coming from its public. By this way, USA has difficulty to meet special needs and especially fuel needs of its military units in Afghanistan and uses Kirgizstan and Uzbekistan alternatively and because this transportation is made by air, it increases the cost extremely. Generally, economic interests are in question in the usages of transit passage of landlocked countries as of 18th century. However, necessity and business come to forefront as the most important grounds of free transit in 21st century. (Martin Glassner, 1970)

International maritime law appears for the first time as the article granting the free right of transportation and transit passage to every nation in paragraph H of article 23 in the foundation declaration of United Nations. Before this, these rights have been mentioned in the agreements that European Countries have made bilaterally and multilaterally among themselves. For instance, sea and transit rights have been mentioned in transit passage rights inked in Barcelona in 1921, and again Geneva Convention in 1923, 1921 Paris Convention, 1923 Belgrade Convention and 1922 Lausanne Treaty about ports. 1921 Barcelona Convention avoided putting a definite opinion on the issue of transit right and did not mention rights of shipping of landlocked countries in open seas. General Agreement on Tariffs and Trade (GATT) also did not make any clear definition on the issue of landlocked countries' law.

The convention which gathered in Havana, capital city of Cuba in 1947 for creating World Trade Organization (WTO) has gone further in transit rights compared to GATT's rights and brought the rights of the countries which do not border open seas into the agenda for the first time. In the 11th summit meeting of General Assembly of United Nations in 1957, a decision was taken for gathering an international meeting on the issue of sea rights. The said conference gathered in Geneva of Switzerland. As a result of the meeting, rights called as Magna Carta with seven (First Conference on the Law of the Sea, p.78-79). The rights granting to landlocked countries were determined as follows;

- Accession right to open seas
- Ship usage right in open seas
- Right of flying flag in the ships
- Lawful status of ports
- Free transit passage
- Rights of transit countries

- Issues on trade, transportation and insurance

After these works, the status related with open seas was determined in 3rd article of 1958 Geneva Convention as follows;

1. Landlocked countries should have the ability to go open seas freely in order to have equal conditions with the countries which border the open seas. In this direction, the privileges below should be granted among the bordering and landlocked countries according to international conventions.

- According to the mutual agreement, free transit passage should be granted to transit country.
- Equal treatment should be made against the landlocked countries in the usage of ports

2. Transit problems should be solved by making agreements with 3rd countries where stand between landlocked country and country which borders the open sea under the principle of equality.

As is seen, landlocked countries have been relatively successful in this conference and strengthened their positions for the forthcoming meetings. However, the said countries were still at the beginning of the work and will have to make lots of efforts to push their transit rights on other countries.

In the New York Convention held with the participation of 23 landlocked countries with the leadership of UNCTAD in 1965, transit right and its problems were put on the table and with this meeting, the position of 3rd party countries and bordering countries was brought to the world agenda by forming main base of an international meeting for the first time (John. H. Fried, 1965, p. 28-30). However, 1965 convention was not supported much. Afterwards, transit right was mentioned in various international meetings. The subject was evaluated in detail in 1958 convention and other meetings. Reciprocity principle on the subject of transit passage has been occupying the agenda as a thesis which is far away from solving the problems. As a matter of fact, this article was removed from the agenda in 1982. Also, according to the law experts "There was no lawful foundation and realism for this. Because, in terms of physical conditions as well, it is not in question that transit country reciprocates to bordering country in this way" (Locic, C. Caflish, 1978, p. 98).

Ship transport granting to landlocked countries in open seas and the flag used in those ships have continuously been a controversial issue. 1982 convention is different than 1923 and 1958 conventions. Article 131 of this convention gives equal rights bordering and landlocked countries on the issue of open sea ship transport and usage of ports. According to this article: "All ships having the landlocked country's flag and other foreign ships should be treated equally in the ports." (United Nations Convention on the Law of the Sea, 1982)".

4. The Situation of Central Asian and Caucasian Countries

Central Asian Republics and Caucasia are the regions that have generally lived in seclusion throughout the history and remote as geographically. Even if Central Asian region has gained importance and showed development with the prominence of trade with the arrival of Islam to the region as of 8th century and with the development of Silk Road and Spice Road between China, India and Europe, it has lost this importance with the emergence of Genghis

Khan. In those years, the products going to Westerns markets over China, India and Iran and in exchange of them, the goods coming from West have invigorated commercial and economical life of the region; with the roads whose security is ensured and by building up caravansaries, the transit shipping of the goods has been made easier.

During the Soviet era, since the communication of region's countries with neighboring countries was carried out over Moscow the said countries were in a closed situation. Upon the dissolution of Soviet Union in 1990, these countries have established free market economy in a different stages and set aim to integrate themselves into the international system by forming economical, commercial and political relationships with other countries. While developing their relationships with the neighboring countries, they also started to establish mutual relationships with each other as an autonomous country. Actually, this relationship has been done thanks to sea, air and railway transportation partnership inherited from Soviet Union and especially railways puts itself forward in terms of development and extensiveness of its networks.

Railway administrations in Central Asia and Caucasia which were a part of Soviet railway network in the past serve today as a fundamental transportation and economical tool affiliated to the governments. For example; today, railways of Uzbekistan has an important share in Uzbekistan economy as an institution in the hand of government being affiliated to deputy prime minister. 3500 kilometer of railway network which is 6600 km in total is used in general purpose and the remaining part only in industrial transportation (Uzbekistan, Institute for Political and International Studies (IPIS), 2009, Tehran, pp. 96-97). Highway length of this country is 115000 kilometers. And in Kyrgyzstan, there is a railway that connects southern cities of Osh and Jalal-Abad to capital city of Bishkek and Uzbek capital city of Tashkent. Because the country is mountainous, 95% of transportation is carried out via trucks. The length of highways is around 40000 km. (Kyrgyzstan, Institute for Political and International Studies (IPIS), 2008 Tehran, p. 122).

The most important transportation and freight means of Turkmenistan is railways. The railway length of this country is 2440 kilometers. And highways are around 19400 km (Turkmenistan, Institute for Political and International Studies (IPIS), 2009 Tehran, pp. 68-69). As for Kazakhstan, it is a bigger country than the total area of Central Asian and Caucasian countries with its $2.724.900 \text{ km}^2$. This country is paved with double-lane railway network. Railway network is 15.082 km and highways are around 93000 km. With renewal of its railways continuously and using state-of-art possibilities, the railways in Kazakhstan is the most important transportation and freight means of the country (Kazakhstan, Institute for Political and International Studies (IPIS), 2007 Tehran, p. 136). Tajikistan, as a country which is mountainous and the smallest in Central Asia, has around 1500 km of railway and 30000 km of highways (Tajikistan, Institute for Political and International Studies (IPIS), 2010, Tehran, s. 59). Because Caucasian Region is very mountainous and rugged, its railway networks are not as developed as the ones in Central Asia. In Republic of Armenia, there is around 900 km of railway and 12000 km of highways (Central Asian, 2005 Tehran, p. 216). And the highways of Azerbaijan are around 25000 km and its railways are around 2120 km.

New countries which gained their independence have given importance in developing their transportation ways as in the case of all fields according to their economic development situations, revenues, social and political conditions. For example, Uzbekistan has ensured the cotton produced in Fergana Valley to be transported to capital by transforming Tashkent-

Andijan highway which connects capital Tashkent to the cities of Andijan, Nemengan and Fergana and was not suitable for the passing of trucks and buses previously due to high mountains in Hokant into a double-lane highway after spending very significant resource. Kazakhstan has made all highways connecting the country from top to bottom, from east to west, from north to south, suitable for international standards while renewing its railways.

Especially, the highway connecting old capital Almaty to new capital Astana in the north attracts attention with its highway width and quality. Moreover, railway connecting the most western part of the country to the eastern city of Alatasanko in Chinese border has an importance in energy transportation (Eastern Europe and the Commonwealth of Independent States, 1994). In spite of its limited resources, by making restoration of highway and its tunnels connection capital Bishkek to southern city of Osh and passing over high Tien Shan Mountain Range, Kyrgyzstan has put into service a highway that will make great contribution into the unity of the country.

On top of that, with the Özgen highway it connected the cities of Osh and Jalal-Abad whose transportation to each other has been carried out over Uzbekistan previously. Turkmenistan restored the highways connecting the cities of Çarju, Merv (Mari) and capital Ashgabat to each other and to Turkmenbashi port at the shore of Caspian Sea and gained it to the economy. And Tajikistan has provided great contribution to the country unity by restoring the highways that connect capital Dushanbe to Murğab which is the center of Bedaxşan mountainous autonomous republic and connect again these two centers to Hocent (Lenin Abat). There is an important obstacle against the integration of developed railway networks inherited from Soviet Union era into the railway networks in Europe and Asia. Because Soviet Union has made its rails around 30 cm larger than international standards and kept its wagons wider in order to prevent the enemy's wagons from using railway network in its country during a possible world war. Thus, it made impossible for any locomotive coming from outside of Soviet territory to use railway rails.

5. Instead of Conclusion

Even if Central Asian and Caucasian countries have very developed railway and highway networks, they need 2nd or 3rd country in order to carry out their import and export. There are various alternatives in front of them to reach open seas. These options are

- Alternative of Black Sea and Baltic Sea over Russian Federation
- Alternative of Turkey and Black Sea over Georgia
- Alternative of Persian Gulf and Arabian Sean over Iran
- Alternative of Indian Ocean over Afghanistan and Pakistan
- Alternative of China Sea and Pacific Ocean over People's Republic of China

When we look at the Russian alternative, since Central Asian countries are away from eastern ports of Russia at a distance of 10.000 km, 8.000 km from eastern ports of Europe and 6.000 km from ports of Black Sea, there is also time lost in addition to very high cost. This alternative used to be employed in the past and even if it is now used occasionally, it is not an economic alternative. On top of it, busy bureaucratic procedures, bribes and slow work process prevailing to Russian Federation increase the negativity. While short distance in Caucasian countries is a positive factor in terms of this alternative, the problem of security

and stability in North Caucasus, especially in Chechnya and Dagestan affects this alternative very negatively.

The alternative of Turkey over Georgia and reaching open seas from there through Black Sea seems the most economic and rational alternative for Caucasian countries, that is to say, Armenia and Azerbaijan. As a matter of fact, Azerbaijani oil is still carried to world markets via Baku-Tbilisi-Ceyhan pipeline. On the other hand, when the pipeline that will carry Azerbaijani natural gas to Europe within the framework of Tanap project is realized it will make great economic contributions.

Kars-Tbilisi-Baku train railway line will also connect Azerbaijan to our country; moreover, it will emerge as an important alternative in railway transportation. Due to the political problems we have with Armenia, alternatives that will connect this country to Trabzon at Black Sea and ports at Mediterranean Sea over very short route are not utilized. Central Asian countries' accession to Black Sea and Mediterranean Sea is related with passing Caspian Sea. Kazakhstan and Turkmenistan make use of this alternative.

One another alternative of Central Asian and Caucasian countries for reaching open seas is to get down Persian Gulf or Arabian Sea over Iran. Iran railway networks are connected to Central Asia through the Mashhad-Ashgabat destination. Iran's ports in Persian Gulf such as Bender Abbas and Bender Bushehr are connected to Caspian Sea through railway and highway. Central Asian and Caucasian countries can reach open seas by using this alternative. Even if this alternative is the most economical option, utilizing this alternative has some troubles because Iran is on the target board of the West and exposed to embargos and sanctions due to the problem it has with West, especially with USA. These troubles are such that Turkmenistan is prevented by USA to deliver raw oil or natural gas to Iran on the border and make natural gas or raw oil shipping in the same amount on behalf itself from the ports in south.

Another alternative is to reach Indian Ocean over Afghanistan and Pakistan. Under normal conditions, this alternative is economical and rational options. The unrest happening in Afghanistan in today's conditions and dominance areas formed by terror organizations such as Taliban and El Kaide in the region at the border of Afghanistan-Pakistan where the Pashtun lives appear in front of us as an important problem of security and stability. Therefore, this situation makes the usage of this destination difficult.

And reaching open seas over China is not a rational alternative due to long distance and geographical conditions. However, signing important highway and railway construction agreements by People's Republic of China and Central Asian countries especially Tajikistan are the developments that will gain validity to this option. Moreover, the possibility of cooperation of Central Asian countries and People's Republic of China in Shanghai Organization continues increasingly day by day.

When we look at the situations of the landlocked countries in the Central Asia and Caucasia which form two most important regions in Eurasia geography, that is to say, Kazakhstan, Kyrgyzstan, Uzbekistan, Turkmenistan, Tajikistan, Azerbaijan and Armenia, the alternatives of making sea transport in open sea, having flag in their ships and making use of other countries' ports seem very unlikely for now. These countries still carry out their imports and

exports by means of giant companies which make sea international transport. However, their flourishing economies and growing markets make absolutely feel this need in the forthcoming periods and it will push to find new searches on this issue. From this day forth, this situation's infrastructure, legal legislation and feasibility should be done.

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Dilarə Əliyeva, 115
Bakı, Azərbaycan
Tel: (99412) 4975684/5970691
Fax: (99412) 4975684
E-mail: info@cesd.az
<http://www.cesd.az>

115, Dilarə Əliyeva str
Bakı, Azerbaijan
Tel: (99412) 4975684/5970691
Fax: (99412) 4975684
E-mail: info@cesd.az
<http://www.cesd.az>