CHAPTER 10

Definition, Qualification and Implementation of Transit

Having explained above the concept of “conditional right” and the legal status of transit as a conditional right that belongs to customary international law, this section elucidates the qualification of the right of transit: (1) the characteristics of the entire concept of “right of transit,” (2) under which conditions it may be limited and (3) its implementation. These three points clarify in depth the mentioned legal status of transit.

The right of transit is defined in Chapter 8 of the fourth part of the thesis as “a legal claim that a State will do or will not do concerning the act of moving through the territory of other States with the purpose of transporting goods; a recognized and protected interest (the need to pass across the territory of another State with the purpose of transporting goods) the violation of which is a wrong in international law.” However, taking into account the freedom of transit and its legal status, this definition would read as follows: “Legal claim of customary international law that a State will do or will not do concerning the act of moving through the territory of other State without unnecessary restrictions (freedom of transit) when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the state across whose territory the traffic passes with the purpose of transporting goods, the violation of which is a wrong in international law.”

However, based on the analysis of this research and taking into consideration Art. V GATT 1994, the qualification of the entire concept of transit, independently of the field of law, involves more elements:

- General rules and obligations:

  The object of the right of transit is “traffic in transit,” which entails goods, including baggage, and energy materials and products, and also vessels and other means of transport, such as fixed infrastructure. It establishes the freedom of transit, which exists independently of states’ will and must respect the sovereignty of the transit state. It also includes the principle of nondiscrimination on the basis of a vessel’s flag, the place of origin, departure, entry, exit or destination, or on any circumstances relating
to the ownership of goods, of vessels or of other means of transport. Concerning lawful charges, traffic in transit may only be subject to charges for transportation or administrative expenses entailed by transit or with the cost of services rendered. In other words, transit per se cannot be a source of revenue. At the same time, all charges and regulations imposed on transit must be reasonable. And finally, the Most-Favoured-Nation Treatment applies.

- Prohibitions:

Transit must not be subject to any unnecessary delays or restrictions and must be exempt from customs duties and from all transit duties or other charges imposed in respect of transit. This is a direct consequence of the freedom of transit. Furthermore, transit does not apply to the operation of aircraft in transit, but does apply to air transit of goods (including baggage). This is because the ICAO deals with aircraft in transit in a specific way.

- Limitations:

As exposed above, transit is a conditional right because it is subject to legitimate restrictions. Nevertheless, such limitations do not relate only to transit from the perspective of the transit-dependent state, but there are also limitations from the perspective of the transit state. Hence, transit must respect the principle of sovereignty of the involved parties, which is shown in the following features of transit:

a. The right of transit is subject to three general conditions:
   - The right of transit must respect the principle of sovereignty and territorial integrity of the transit state and the transit-dependent state.
   - The right of transit must not be intended specifically to limit the freedom of transit.
   - The time set for application of the right of transit (normally it is established in contracts or implementing agreements) must be sufficient to ensure that the freedom of transit is effective. This can be observed in energy law in the contractual mismatch problem, which is related to the guarantee for the supplier

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1243 See Chapter 3, section VI.B.iv.2 of the Second Part of the thesis.