Asian Journal of International Law (2021), **11**, 281–298
doi:10.1017/S2044251321000199

CAMBRIDGE
UNIVERSITY PRESS

ARTICLE

Free Access to and from the Ocean in the Convention on the Legal Status of the Caspian Sea: The Law of the Sea and the Caspian "Body of Water"

Alberto PECORARO*

Law and Development Research Group, University of Antwerp, Antwerp, Belgium
Corresponding author: Alberto PECORARO, email: alberto.pecoraro@uantwerpen.be

(Received 2 November 2020; revised 5 April 2021; accepted 23 April 2021; first published online 20 August 2021)

Abstract

Access to and from the sea for landlocked states has been a long-standing issue in the law of the sea. Such issue is also addressed by the Convention on the Legal Status of the Caspian Sea (or Aktau Convention), which foresees a right of free access to other seas for landlocked State Parties—Azerbaijan, Kazakhstan, and Turkmenistan—through the Russian Federation. At the same time, it upholds the transit state's sovereignty and right to protect its legitimate interests. Consequently, it is important to assess the limits of the transit state's discretion pursuant to the Aktau Convention. In this regard, that instrument has important linkages with UNCLOS and with general international law. These linkages introduce in the Aktau Convention various norms—such as due regard and reasonableness—that play an important role in its interpretation.

Keywords: Convention on the Legal Status of the Caspian Sea; landlocked states; UNCLOS

For their access to and from the sea, landlocked countries depend on the good will of transit states.[1] The granting of rights of passage for vessels and goods moving from or to landlocked states is frequently entangled with political considerations,[2] some legitimate and others less so. For instance, taking advantage of its favourable geographical situation, apartheid South Africa limited access to the sea as a form of retribution against neighbouring landlocked states that had espoused "adverse" political agendas.[3] Of course, transit states may also be motivated by more legitimate goals such as environmental protection. Such a case was at the heart of the *Iron Rhine* Arbitration, which dealt with the allocation of expenses to bring the transit of trains to and from Belgium in line

* Doctoral Fellow, Law and Development Research Group, University of Antwerp, Antwerp, Belgium.

[1] James L. KATEKA, "Landlocked Developing Countries and the Law of the Sea" in Isabelle BUFFARD, James CRAWFORD, Alain PELLET, and Stephan WITTICH, eds., *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Leiden: Martinus Nijhoff, 2008), 767 at 769.

[2] Tiyanjana MALUWA, "Southern African Land-locked States and Rights of Access under the New Law of the Sea" (1995) 10 International Journal of Marine and Coastal Law 529 at 530.

[3] South Africa virtually blockaded Lesotho to force the expulsion of ANC members from that landlocked state. See Erik VAN EES, "South Africa Lifts Blockade of Lesotho" *United Press International* (25 January 1986), online: United Press International <https://www.upi.com/Archives/1986/01/25/South-Africa-lifts-blockade-of-Lesotho/8160507013200/>.

with the Netherlands' environmental legislation. Both scenarios show that the relationship between landlocked and transit states is fraught with issues—the exercise of sovereignty by the latter will necessarily have consequences on the former.

Landlocked states in the Caspian region must rely on the willingness of a transit state—the Russian Federation—to allow access to the world's oceans.[4] From an international legal viewpoint, the application of the law of the sea to the Caspian would have entailed the existence of a right of transit to and from that body of water for landlocked riparian states. Unfortunately, previous agreements concluded by Iran and the Soviet Union in 1924 and in 1940 were silent on the status of the Caspian Sea.[5] Furthermore, the question of transit to Iran through the Soviet Union was addressed in the 1957 Agreement Concerning Transit Questions, but was limited to trade directed to Iran and fell short of granting a right of transit for Iranian-flagged vessels through Soviet territory.[6]

The demise of the USSR and the emergence of three new landlocked riparian states—Kazakhstan, Turkmenistan, and Azerbaijan—radically changed the situation and rendered obsolete the precedent regime devised by Iran and the USSR. Between 1991 and 2018, the three newly formed states negotiated with Iran and the Russian Federation to determine the international legal status of that body of water and solve various issues related to its use. Kazakhstan and Azerbaijan had demanded an unconditioned right to sail to the oceans through Russia's and Iran's territory[7] and Kazakhstan had defended the application to the Caspian Sea of the law of the sea rules codified by United Nations Convention on the Law of the Sea [UNCLOS].[8] This was somewhat paradoxical, given that Kazakhstan is not a party to that treaty. The result of these negotiations was the Convention on the Legal Status of the Caspian Sea (or Aktau Convention). As a sort of "Constitution for the Caspian Sea"[9] this instrument settles once and for all the Caspian's status, addresses the regulation of important activities in that body of water, and acts as a framework convention vis-à-vis specific treaties which it integrates and co-ordinates.[10]

The Aktau Convention designates the Caspian as being neither a sea nor a lake, but rather a "body of water".[11] It does not pronounce itself on the applicability of the law

[4] The Volga-Don canal is the only ingress for over-sized offshore drilling rigs and other support equipment for the Caspian Sea. During the 1995–96 war with Chechnya, the Russian government closed the Volga-Don canal to ships sailing under the Azerbaijani flag. However, Russia had indicated a willingness to sign documents with Azerbaijan over the "question of maintaining joint use of the Caspian Sea's water surface and water mass for purposes of ensuring freedom of navigation and compliance with uniform standards of fishing and environmental protection" (see Timothy L. THOMAS, "Russian National Interests and the Caspian Sea" (1999) 4Perceptions: Journal of International Affairs 75 at 75–96).

[5] Elena KARATAEVA, "The Convention on the Legal Status of the Caspian Sea: The Final Answer or an Interim Solution to the Caspian Question?" (2020) 35 International Journal of Marine and Coastal Law 232 at 243.

[6] *Agreement Concerning Transit Questions*, 25 April 1957, 672 U.N.T.S. 280 (entered into force 26 October 1962), art. 1:

> the Union of Soviet Socialist Republics shall grant to Iranian governmental organizations, trading companies and merchants the right of free transit through its territory of all goods destined for Iran, irrespective of the country of origin and of export of such goods. This right shall not extend to the conveyance in transit of weapons and war *matériel* from third countries.

[7] Pierre THÉVENIN, "The Caspian Sea Convention: New Status but Old Divisions?" (2019) 44 Review of Central and East European Law 437 at 445.

[8] Alexander A. KOVALEV, *Contemporary Issues of the Law of the Sea: Modern Russian Approaches* (The Hague: Eleven International Publishing, 2004) at 171.

[9] V.A. BATYR, "The Balanced Current Special Status of the Caspian Sea under International Law" (2019) 1 Lex Russica 51 at 61.

[10] *Ibid*., at 58.

[11] *Convention on the Legal Status of the Caspian Sea*, 12 August 2018, online: Official Internet Resources of the President of Russia <http://en.kremlin.ru/supplement/5328> [*Caspian Sea Convention*], art. 1(1).

https://doi.org/10.1017/S2044251321000199 Published online by Cambridge University Press

of the sea to the Caspian. However, this instrument borrows largely from UNCLOS in confirming that parties shall have the right of free access from the Caspian Sea to other seas and the ocean, and back.[12] Interestingly, it is unclear whether this right is limited only to the landlocked states or applies also to those parties, such as Iran, which already enjoy access to the ocean.[13] Nevertheless, the transit rights granted by the convention are especially important for the landlocked Central Asian states and apparently vindicate their position: this can be seen as part of a wider bargain whereby the Russian Federation agreed to grant transit rights in exchange for the Caspian Sea's closure to all third states and their nationals.[14] In spite of this possibly different scope, the law of the sea regime on landlocked states remains most relevant because it inspires the checks and balances imposed by the Aktau Convention on the exercise of those rights.

Indeed, the Aktau Convention sets far-reaching limitations to the exercise of that right. First, it subordinates the exercise of these transit rights to the terms and procedures agreed on in bilateral agreements or, lacking such agreements, to the transit party's own national legislation. In addition, it authorizes the transit state—in the exercise of its full sovereignty—to take all necessary measures to ensure that the transit rights at issue do not infringe upon its legitimate interests. There is a delicate balance to be struck between the "right of free access from the Caspian Sea to other seas and oceans, and back" and the sovereignty of the transit state. A given transit state is authorized to take all measures that are necessary to ensure that transit does not infringe upon its legitimate interests. The issue here is to define the content of this requirement of necessity, namely by identifying principles to be applied for solving the conflict between the right of transit guaranteed by the treaty and the regulatory powers of the transit state. Arguably, the Aktau Convention borrows from UNCLOS the principles of due regard and of reasonableness, whose effect is to afford procedural and substantive guarantees to the landlocked States Parties.

This paper focuses on the situation of those landlocked riparian states for which free access to the oceans and back is most crucial. We will start with a description of the international law on the issue of landlocked states, including the relevant provisions of UNCLOS. The paper will look beyond those stipulations and assess the general international law principles that pervade that convention. Having done this, we will analyze the Aktau Convention itself and enquire on the extent to which it integrates those general principles. Finally, those norms will be applied to the case at hand. Our conclusion would be that the Aktau Convention contains important guarantees against abuse by transit states.

I. Landlocked states in international law

Arguably, customary international law does not foresee a general right of access by landlocked states to the sea. Indeed, there is very scant evidence for such a rule: in the *Faber* case the German-Venezuela mixed claims commission disagreed on the existence of such a right, while in the International Court of Justice's [ICJ's] *Right of Passage* Judgment the ICJ founded its ruling on a local custom without referring to any general right of access to the sea.[15] On the other hand, there are a number of treaties relevant to this issue. Article V of

[12] Barbara JANUSZ-PAWLETTA, "Legal Framework for the Interstate Cooperation on Development and Transport of Fossil Natural Resources of the Caspian Sea" (2020) 13 Journal of World Energy Law and Business 169 at 182.

[13] Karataeva, *supra* note 5.

[14] *Caspian Sea Convention*, art. 3(11): "The Parties shall carry out their activities in the Caspian Sea in accordance with the following principles: ... Navigation in, entry to and exit from the Caspian Sea exclusively by ships flying the flag of one of the Parties."

[15] Robert R. CHURCHILL and Alan V. LOWE, *The Law of the Sea*, 3rd ed. (New York: Juris Publishing/Manchester: Manchester University Press, 1999) at 440.

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the General Agreement on Tariffs and Trade [GATT 1994] prohibits States Parties from precluding transit through their territory of traffic entering from any other member or to any other member via the routes most convenient for international transit.[16] Kazakhstan and the Russian Federation are members of the WTO, but that is not the case for Azerbaijan, Iran, and Turkmenistan.

The 1958 Geneva Convention on the High Seas deals specifically with the issue of access to the sea by landlocked states. Its third article stipulates that in order to enjoy the freedom of the seas on equal terms with coastal states, states having no sea coast "*should* have free access to the sea".[17] The use of the term "should" instead of "shall" is telling: it suggests that the negotiating parties did not settle on an unconditional right of access to the sea.[18] In addition, free transit was made subject to common agreement between the states concerned on a basis of reciprocity. Successively, Article 2 of the 1965 Convention on Transit Trade of Land-locked States, devoted specifically to the issue of landlocked countries, granted freedom of transit across a state lying between a landlocked state and the sea for goods travelling by road, rail, or river.[19] In doing so, it employed a language expressing the existence of a mandatory obligation: freedom of transit "shall be granted" rather than should. However, Articles 2(2) and (4) make it clear that the modalities of such transit must be agreed bilaterally, while Article 11 contains various exceptions to the convention on grounds of public health, security, and protection of intellectual property.[20] The exercise of such freedom of access is still submitted to further specific agreements and to the protection of the transit state's sovereignty.

Article 125(1) of UNCLOS reproduces the same tension between a right of access and the prerogatives of transit states. According to that provision:

> Land-locked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, land-locked States shall enjoy freedom of transit through the territory of transit States by all means of transport.[21]

The use of the wording "shall" together with "right" (as opposed to freedom) implies the existence of a right for vessels to cross the transit states in order to engage in such activities as those provided for in Article 87 of UNCLOS.[22] However, this seemingly broad right is severely limited:

[16] *Russia—Measures Concerning Traffic in Transit*, Report of the Panel, Decision of 5 April 2019, [2019] WT/DS512/R at 63, para. 7.174.

[17] *Convention on the High Seas*, 29 April 1958, 450 U.N.T.S. 11 (entered into force 30 September 1962), art. 3 (emphasis added).

[18] Helmut TUERK, "Forgotten Rights? Landlocked States and the Law of the Sea" in Rüdiger WOLFRUM, Maja SERŠIĆ, and Trpimir ŠOŠIĆ, eds., *Contemporary Developments in International Law: Essays in Honour of Budislav Vukas* (Leiden: Brill Nijhoff, 2016), 337 at 343.

[19] *Convention on Transit Trade of Land-locked States*, 8 July 1965, 597 U.N.T.S. 3 (entered into force 9 June 1967), art. 2.

[20] *Ibid*.

[21] *United Nations Convention on the Law of the Sea,* 10 December 1982, 1833 U.N.T.S. 3 (entered into force 16 November 1994) [*UNCLOS*], art. 125.

[22] *Ibid*., art. 87, these freedoms are: (a) freedom of navigation; (b) freedom of overflight; (c) freedom to lay submarine cables and pipelines, subject to Part VI; (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI; (e) freedom of fishing, subject to the conditions laid down in Section 2; and (f) freedom of scientific research, subject to Parts VI and XIII.

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> 2. The terms and modalities for exercising freedom of transit shall be agreed between the land-locked States and transit States concerned through bilateral, sub regional or regional agreements.
>
> 3. Transit States, in the exercise of their *full sovereignty* over their territory, shall have the right to take all measures *necessary* to ensure that the rights and facilities provided for in this Part for land-locked States shall in no way infringe *their legitimate interests.*[23]

The right of access is explicitly limited to what is aimed at the enjoyment of rights granted by UNCLOS. It is furthermore made contingent to the conclusion of bilateral, sub-regional, or regional agreements between landlocked and transit states.[24] Arguably, the employment of the term "right of access" spells out that such agreements may not render transit impossible or unreasonably difficult. It is also clear that transit must respect the sovereignty of coastal states, which retain the right to take all measures necessary to protect their legitimate interests. Unfortunately, no definition is offered by Article 125 as to the exact nature of those legitimate interests. Perhaps some examples of what constitutes a legitimate interest might be gleaned from the context of Article 125, such as Articles 19 and 25 concerning passage in the territorial sea that is not innocent. Nevertheless, the territorial sea, where all states enjoy an immediate right of innocent passage, is not entirely comparable to the onshore areas where the transit of landlocked states is to be exercised.

Article 125 of UNCLOS lays down various limitations to the right of transit. Most importantly, transit states can limit this right with measures necessary to protect their legitimate interests. Anyhow, the use of language denoting the granting of a right is not easily reconciled with language asserting an equally immediate right for transit states to limit rights of access. Thus, one may be forgiven for thinking that the existing international legal regime has done little to solve the problems of landlocked states and that it is unlikely that this regime will be improved in the immediate future.[25] However, this does not spell out that state discretion is boundless. UNCLOS is an instrument that interacts with and, to a certain extent, incorporates general international law: numerous provisions are an entry point for other sources of law, and potentially provide tribunals with a justification for a more wide-ranging reasoning process.[26] In certain instances, treaty stipulations allow or even require the direct importation of rules of general international law which are then applied through the interpretation of those provisions. Various concepts borrowed from general international law allow for the accommodation of changing interests while serving to determine the permissibility of interference with a right or interest.[27] In this respect, Article 293 of UNCLOS seems to justify recourse to non-UNCLOS rules insofar as they are relevant to construing treaty provisions.[28]

Law of the sea tribunals have abundantly borrowed from general international law through the means of treaty interpretation. In some instances, the imported rules

[23] *Ibid.* (emphasis added).

[24] Tuerk, *supra* note 18 at 347.

[25] Kateka, *supra* note 1 at 780.

[26] Duncan FRENCH, "Treaty Interpretation and Incorporation of Extraneous Legal Rules" (2006) 55 International and Comparative Law Quarterly 281 at 295.

[27] James HARRISON, "Patrolling the Boundaries of Coastal State Enforcement Powers: The Interpretation and Application of UNCLOS Safeguards Relating to the Arrest of Foreign-flagged Ships" (2018) 42 l'Observateur des Nations Unies 117 at 121.

[28] *UNCLOS,* art. 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."

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constituted the legal ground upon which those tribunals found that a breach of international law had occurred.[29] This mechanism is illustrated well by the *Arctic Sunrise* and *Duzgit Integrity* Arbitrations. In the first case, the Tribunal ruled on whether the arrest of a Dutch-flagged vessel protesting petroleum extraction in Russia's continental shelf violated UNCLOS. Arguments concerned *inter alia* Article 78(2) of UNCLOS providing that "the exercise of the rights of the coastal state over the continental shelf must not infringe or result in any unjustifiable interference with navigation or other rights and freedoms of other states". Based on the wording of this provision, the Tribunal held that when exercising enforcement powers "[d]ue regard must be given to rights of other States, including the right to allow vessels flying their flag to protest".[30] In balancing this right with Russia's own sovereign prerogatives, the Tribunal referred explicitly to human rights law:

> The Tribunal considers that, if necessary, it may have regard to general international law in relation to human rights in order to determine whether law enforcement action such as the boarding, seizure, and detention of the Arctic Sunrise and the arrest and detention of those on board was reasonable and proportionate. This would be to interpret the relevant Convention provisions by reference to relevant context.[31]

And:

> In determining the claims by the Netherlands in relation to the interpretation and application of the Convention, the Tribunal may, therefore, pursuant to Article 293, have regard to the extent necessary to rules of customary international law, including international human rights standards, not incompatible with the Convention, in order to assist in the interpretation and application of the Convention's provisions that authorise the arrest or detention of a vessel and persons.[32]

Starting from the treaty's language, the Tribunal affirmed the necessity of balancing freedom of expression with the protection of sovereignty over the continental shelf. Subsequently, it referred to general international law in defining how this balance must be struck. In this way, the convention duty of reasonable or due regard served as an entry point for external norms insofar as they were relevant for interpreting a treaty provision.

The *Duzgit Integrity* Arbitration concerned the arrest and detention by São Tomé and Príncipe of a Maltese vessel after it attempted an unauthorized ship-to-ship transfer of cargo in the archipelagic waters. Malta grounded its claim on Article 49(3) of UNCLOS, under which state sovereignty over archipelagic waters is "exercised subject to this Part".[33] The Tribunal turned to general international law to clarify that provision's scant stipulations, arguing that:

[29] Alina MIRON, "The Archipelagic Status Reconsidered in Light of the South China Sea and Düzgit Integrity Awards" (2018) 15 Indonesian Journal of International Law 306 at 322.

[30] *Arctic Sunrise Case (Netherlands v. Russia),* Award of 14 August 2015, [2015] PCA Case No. 2014-02 at 82, para. 328.

[31] *Ibid*., at 46, para. 197.

[32] *Ibid*., at 46, para. 198.

[33] *UNCLOS*, art. 49.

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> In the case of some broadly worded or general provisions, it may also be necessary to rely on primary rules of international law other than the Convention in order to interpret and apply particular provisions of the Convention. Both arbitral tribunals and ITLOS have interpreted the Convention as allowing for the application of relevant rules of international law. Article 293 of the Convention makes this possible.[34]

On this basis, the Tribunal introduced the principle of reasonableness as a new limit to the exercise of sovereignty, since

> [t]he exercise of enforcement powers by a (coastal) State in situations where the State derives these powers from provisions of the Convention is also governed by certain rules and principles of general international law, in particular the principle of reasonableness.[35]

It added that this principle encompasses the standards of necessity and proportionality, without, however, attempting to distinguish them or to define their individual reach. Successively, the Tribunal compared the combined effect of the state's measures to the original wrong committed by the vessel, noting that the shipmaster was a first-time offender, and was willing to move its operations outside of São Tomé's waters if required by the authorities.[36] Hence, the penalties imposed by the respondent state were disproportionate to the original offence and the goal of ensuring respect for São Tomé's sovereignty.[37] It is remarkable that the Tribunal applied two criteria—necessity and proportionality—that were nowhere to be found in the plain wording of Article 49(3). That provision did not contain a reference either to general international law or to the principle of due regard.

These two decisions show that law of the sea tribunals have been willing to consider a range of non-UNCLOS rules constraining the exercise of state powers. Recourse to these external norms has given additional content to the convention's stipulations and created additional space for review by the relevant dispute settlement bodies. The same might be true for the Aktau Convention, even though the application of these rules will need to be adapted to its specific context as well as to its own object and purpose.

II. Transit rights in the Aktau Convention: the law of the sea and general international law

The Aktau Convention must not be read in isolation from other relevant treaties or from rules of general international law. Indeed, the Aktau Convention is replete with references and borrowings from external international legal sources. Some of its provisions explicitly make a *renvoi* to external primary norms, while others mandate balancing tests which echo law of the sea rules. For instance, Article 4 subordinates the conduct of activities in the Caspian Sea to "other agreements between the parties consistent with this Convention". At the same time, Article 12(3) on coastal state jurisdiction over fishing activities[38] subordinates the implementation of enforcement measures to criteria of

[34] *Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe),* Award of 5 September 2016, [2016] PCA Case No. 2014-07 [*Duzgit Integrity*] at 54, para. 208.

[35] *Ibid*., at 54, para. 209.

[36] *Ibid*., at 69–70, para. 256.

[37] *Ibid*., at 70–1, para. 260.

[38] *Caspian Sea Convention*, art. 12(3):

> Each Party, in the exercise of its sovereignty, sovereign rights to the subsoil exploitation and other legitimate economic activities related to the development of resources of the seabed and subsoil, and exclusive

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necessity that echo the dictates of Article 73 of UNCLOS.[39] Besides, Article 8(4) provides that, in exercising sovereign powers over their seabed, coastal states must not infringe upon the rights and freedoms of other parties stipulated in this convention. Such a formulation is not dissimilar from Article 78(2) of UNCLOS,[40] which has been held to express a duty of due regard.[41] Finally, Article 15(4) on environmental protection makes the parties liable "under the norms of international law" for any damage caused to the biological system of the Caspian Sea.[42] It is unclear whether this reference is limited to rules on state responsibility or encompasses other primary norms of international environmental law.

In any case, the text of the Aktau Convention is replete with references and loans from UNCLOS and from general international law. The striking similarities between these formulations and law of the sea rules are not accidental and translate the will of the signatories to bring the convention in line with general international law. It is worth remembering that the applicability of UNCLOS to the Caspian Sea had been advanced by certain states during the negotiations. In addition, international tribunals have not hesitated to incorporate general international law standards into treaties where the wording of such instruments was sufficiently open-ended.[43] In the present context, the language employed is not just open-ended but mirrors that of UNCLOS. Arguably, such formulations can be appraised as constituting actual *renvois* thereto. Presumably, the use of terms and concepts like those already comprised in UNCLOS is an important element in construing the provisions of the Aktau Convention. However, attention must also be given to the specific context of the Aktau Convention, whose material scope differs from that of UNCLOS. In this respect, the application of even the same rules in different treaties might be different owing to the "differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*".[44] If the context, including the normative environment, is different, then even identical provisions may operate differently.[45]

rights to harvest aquatic biological resources as well as for the purposes of conserving and managing such resources in its fishery zone, may take measures in respect of ships of other Parties, including boarding, inspection, hot pursuit, detention, arrest and judicial proceedings, as may be necessary to ensure compliance with its laws and regulations.

[39] *UNCLOS*, art. 73(1):

> The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.

[40] *UNCLOS*, art. 78(2): "The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention."

[41] *Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar),* Judgment of 14 March 2012, [2012] ITLOS Case No. 16 [*Bay of Bengal Case*] at 121, para. 475.

[42] *Caspian Sea Convention*, art. 15(4): "[t]he Parties shall be liable under the norms of international law for any damage caused to the ecological system of the Caspian Sea."

[43] See *Case Concerning Gabčíkovo-Nagymaros Project (Hungary v. Slovakia),* Decision of 25 September 1997, [1997] I.C.J. Rep. 7 at 67–8, "[b]y inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law."

[44] *MOX Plant Case, Request for Provisional Measures Order (Ireland v. United Kingdom)*, Decision of 3 December 2001, [2001] ITLOS Case No. 10 at 106, para. 51.

[45] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission (ILC), finalized by Martti KOSKENNIEMI, UN Doc. A/CN.4/L/682 (2006), at 13.

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The Aktau Convention borrows largely from UNCLOS in confirming that parties shall have the right of free access from the Caspian Sea to other seas and the ocean, and back. The new treaty may differ from UNCLOS in that, instead of being limited to landlocked States Parties, its provisions are addressed to all the "relevant parties" and to the "parties".[46] This said, the new treaty on the Caspian Sea submits this transit right to far-reaching limitations aimed at preserving the sovereignty of transit states. In doing so, it replicates to a certain extent the balance struck in Article 125 of UNCLOS between the rights of landlocked and transit states. A first mention of access to other seas by the Caspian landlocked riparian states is contained in Article 3(10) of the Aktau Convention. This provision mentions among the general principles which are to guide the parties:

> The right to free access from the Caspian Sea to other seas and the Ocean, and back in accordance with the *generally recognized principles and norms of international law and agreements between the relevant Parties*, with *due regard* to *legitimate interests* of the transit Party, with a view to promoting international trade and economic development.[47]

Article 3(10) refers to a right for the State Parties while subjecting this right to certain rules sourced outside the Aktau Convention. The reference to "generally recognized principles and norms of international law" is unlikely to indicate a general right of transit customary international law. Rather, this phrase brings into the convention's field norms rooted in UNCLOS—the principle of due regard[48]—as well as general principles of law such as reasonableness[49] and good faith.[50] All this is confirmed by Article 10(4) of the Aktau Convention, pursuant to which:

> The Parties shall have the right to free access from the Caspian Sea to other seas and the Ocean, and back. To that end, the Parties shall enjoy the *freedom of transit* for all their means of transport through the territories of transit Parties.
>
> Terms and procedures for such access shall be determined by bilateral agreements between the Parties concerned and transit Parties or, in the absence of such agreements, on the basis of the national legislation of the transit Party.
>
> In the exercise of their *full sovereignty* over their territories, the transit Parties shall be entitled *to take all necessary measures* to ensure that the rights and facilities of the Parties provided for in this paragraph in no way infringe upon *legitimate interests* of the transit Party.[51]

The use of the terminology "shall" and "right to free access" gives the impression that landlocked States Parties enjoy a right for their vessels and goods to cross the territory of states lying between them and the sea. However, the terms and procedures for

[46] *Caspian Sea Convention*, arts. 3(10), 10(4).

[47] *Ibid*., art. 3(10) (emphasis added).

[48] *UNCLOS*; see for example arts. 58(3), 79(5), 87.

[49] *Filleting within the Gulf of St. Lawrence between Canada and France (France v. Canada)*, Award of 17 July 1986, [1986] XIX Reports of International Arbitral Awards 225 [*Filleting within the Gulf of St. Laurence Arbitration*] at 258–9, para. 54: "like the exercise of any authority the exercise of regulatory authority is always subject to the rule of reasonableness."

[50] *Affaire du Lac Lanoux (Spain v. France)*, Decision of 16 November 1957, [1957] XII Reports of International Arbitral Awards 281 [*Lake Lanoux Arbitration*] at 315.

[51] *Caspian Sea Convention*, art. 10 (emphasis added).

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exercising this right (as opposed to the right itself) are subject to either bilateral or unilateral arrangements. Further, the use of the terminology "or, in the absence of such agreements" suggests that States Parties have at least a duty to consult in good faith before imposing unilaterally their legislation on transit. These provisions reflect a delicate balance of interests between the transit states and the landlocked states.

The Aktau Convention affirms explicitly that the transit state exercises full sovereignty over the territory through which the right of transit is exercised by other riparian states. Yet, Article 10(4) makes it clear that the discretion of the transit state is not boundless. All measures, but only those measures, which are "necessary" are allowed. Arguably, this standard of necessity is informed by the general principles listed in Article 3(10). That provision lays down rules that guide the interpretation of the requirement of "necessity" set forth in Article 10(4). Those rules derive from UNCLOS and from general international law, are very much related to each other, and have been applied by international tribunals when reviewing the legality of state action.

A. Exercise of rights with due regard to the legitimate interests of the transit party

First, it is stipulated explicitly that the rights at issue shall be exercised with "with *due regard* to *legitimate interests* of the transit Party". According to the ICJ in the 1974 *Fisheries Jurisdiction* case, the principle of due regard obliges states to take full account of each other's rights on the sea, and to reconcile different sets of rights so that they can co-exist.[52] This implies that there is no hierarchy between conflicting, concurrent, or overlapping interests: instead, the principle of due regard is based on the assumption that all those interests need to be respected, and that as a result there is a need to balance them in order to individuate the best possible protection of each interest at play.[53] A more precise description of this obligation was set forth by the Arbitral Tribunal in the *Chagos MPA* Award:

> The Convention does not impose a uniform obligation to avoid any impairment of Mauritius' rights; nor does it uniformly permit the United Kingdom to proceed as it wishes, merely noting such rights. Rather, the extent of the regard required by the Convention will depend upon the nature of the rights held by Mauritius, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the United Kingdom, and the availability of alternative approaches.[54]

The same Tribunal affirmed that, in most cases, this assessment will involve at least some consultation with the rights-holding state.[55] Such consultation must be conducted in a timely manner, provide the other party with information, and show some willingness to provide assurances and suggest compromises.[56]

The obligation of due regard is present in various provisions of UNCLOS, including Articles 56(2), 58(3), and 87(2). Moreover, law of the sea tribunals made use of that rule

[52] *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*, Judgment of 25 July 1974, [1974] I.C.J. Rep. 3 at 31, para. 72.

[53] Mathias FORTEAU, "The Legal Nature and Content of 'Due Regard' Obligations in Recent International Case Law" (2019) 34 International Journal of Marine and Coastal Law 25 at 29.

[54] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, [2015] PCA Case No. 2011-03 [*Chagos MPA Arbitration*] at 202, para. 519.

[55] *Ibid*.

[56] Tullio TREVES, "'Due Regard' Obligations under the 1982 UN Convention on the Law of the Sea: The Laying of Cables and Activities in the Area" (2019) 34 International Journal of Marine and Coastal Law 167 at 178.

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in the context of treaty obligations which did not mention it explicitly. In the *Bay of Bengal (Bangladesh v. Myanmar)* case, the International Tribunal for the Law of the Sea [ITLOS] applied this principle to maritime areas where there is an overlap between a state's continental shelf and another state's Exclusive Economic Zone [EEZ].[57] According to the Tribunal:

> pursuant to the principle *reflected* in the provisions of articles 56, 58, 78 and 79 and in other provisions of the Convention, each coastal State must exercise its rights and perform its duties with due regard to the rights and duties of the other.[58]

Successively, in its 2015 Advisory Opinion, ITLOS affirmed that the duty of due regard flowed not only from Articles 56 and 58 of UNCLOS but also from the general "obligation to protect and preserve the marine environment".[59]

An argument can be made that due regard, or at least some of its elements, is part of general international law. After all, it is narrowly related to the obligation to negotiate and to the general principle of good faith. The formulation used by the Tribunal in the *Lake Lanoux* Arbitration illustrates the similarity and relatedness of these different norms:

> The Tribunal is of the opinion that, according to the *rules of good faith*, the upstream State is under the obligation to take into consideration the various interests involved, to *seek to give them every satisfaction compatible with the pursuit of its own interests*, and to show that in this regard it is genuinely concerned to *reconcile the interests of the other riparian State with its own.*[60]

Here, the Tribunal formulates an obligation not too different from the duty of due regard while referring uniquely to the general principle of good faith. Interestingly, the *Chagos MPA* Tribunal has found the requirement under Article 2(3) of UNCLOS "to exercise good faith with respect to Mauritius' rights in the territorial sea" and the obligation under Article 56(2) to "have due regard for Mauritius' rights in the EEZ" to be "for all intents and purposes, equivalent".[61]

B. In accordance with generally recognized principles and norms of international law

Article 3(10) does more than just referring to due regard for the legitimate interests of the transit party. That provision stipulates that the right to free access from and to the Caspian Sea must be in accordance with "generally recognized principles and norms of international law". Consequently, the transit state's exercise of sovereignty for the protection of its legitimate interests must respect these "generally recognized principles and norms of international law". This reference is not merely descriptive, and entails the imposition of a legal obligation. Such interpretation is consistent with object and purpose of the Aktau Convention, whose Preamble grounds the convention's provisions on the "principles and norms" of the UN Charter and of international law. Further, Article 3 refers separately to "using the Caspian Sea for peaceful purposes, making it a zone of peace, good-neighbourliness, friendship and cooperation, and *solving all issues* related to the Caspian Sea through peaceful means".[62]

[57] Forteau, *supra* note 53 at 34.

[58] *Bay of Bengal Case*, *supra* note 41 at 121, paras. 475–6.

[59] *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission,* Advisory Opinion of 2 April 2015, [2015] ITLOS Case No. 21 at 68.

[60] *Lake Lanoux Arbitration*, *supra* note 50 (emphasis added).

[61] *Chagos MPA Arbitration*, *supra* note 54 at 203, para. 520.

[62] *Caspian Sea Convention*, preamble and art. 3 (emphasis added).

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These provisions encourage an expansive reading of Article 3(10)'s reference to other rules of international law, whereby certain external rules are incorporated in the Aktau Convention. A similar conclusion was reached by the *Chagos MPA* Tribunal, which held that a reference to "other rules of international law" in Article 2(3) of UNCLOS bound states to exercise sovereignty in accordance with the general rules of international law. The Tribunal looked *inter alia* at the Preamble of UNCLOS, which hinted at the:

> "desirability of establishing through this Convention ... a legal order for the seas and oceans." In the Tribunal's view, these objectives—as well as the need for coherence in interpreting Article 2(3) within the context of the provisions for other maritime zones—are more readily achieved by viewing Article 2(3) as a source of obligation.[63]

Just as in UNCLOS, the language employed in the Aktau Convention's Preamble expresses an objective to create a complete legal order for that body of water. Equally, the many references to international law in different stipulations, applying to the various zones of the Caspian Sea, encourage the view that such references are sources of obligations. Article 3(10) imports rules of general international law when construing the right to transit granted by the treaty, but it is not altogether clear which are those general rules or principles. Here, Article 10(4) of the Aktau Convention is particularly relevant, stating as it does that "the transit Parties shall be entitled to take all *necessary* measures to ensure that the rights and facilities of the Parties provided for in this paragraph *in no way infringe upon legitimate interests* of the transit Party".[64] The text of Article 10 explicitly mentions a requirement of necessity which is to predicate the pursuance of legitimate interests by the transit state. From a reading of Articles 3(10) and 10(4) it can be concluded that general rules of international law can be applied to interpret the twin requirements of necessity and legitimate purposes.

A state is obviously entitled to determine the most appropriate standard of protection for its public policy requirements.[65] However, there must be limits to avoid unchecked discretion which would defeat the competing rights and interests of landlocked States Parties. In this regard, international tribunals have recognized that a state must exercise its regulatory authority in a reasonable manner. Such a requirement extends equally to state regulation *in abstracto* and to its implementation in specific cases. For instance, the Arbitral Tribunal in *Filleting within the Gulf of St. Lawrence between Canada and France (France v. Canada)* stated categorically that "like the exercise of any authority the exercise of regulatory authority is always subject to the rule of reasonableness".[66] ITLOS has also applied this principle to enforcement actions undertaken by coastal states: when interpreting Article 73 UNCLOS on the right to take "necessary" enforcement measures in the EEZ, ITLOS held that a "principle of reasonableness" generally applies to all enforcement measures under that provision.[67]

Reasonableness is generally understood as demanding that decisions are based upon clear reasons, taking into account all relevant considerations and ignoring irrelevant considerations.[68] The international case-law has consistently associated this requirement of

[63] *Chagos MPA Arbitration, supra* note 54 at 198, para. 504.

[64] *Caspian Sea Convention*, art. 10 (emphasis added).

[65] Enzo CANNIZZARO, "Proportionality and Margin of Appreciation in the Whaling Case: Reconciling Antithetical Doctrines?" (2017) 27 European Journal of International Law 1061 at 1068.

[66] *Filleting within the Gulf of St. Laurence Arbitration, supra* note 49.

[67] *M/V "Virginia G" Case (Panama v. Guinea-Bissau)*, Judgment of 14 April 2014, [2014] ITLOS Case No. 19 [*M/V "Virginia G"*] at 81, para. 270.

[68] James HARRISON, "Checks and Balances on the Regulatory Powers of the International Seabed Authority" (unpublished), quoting Olivier CORTEN, "Reasonableness in International Law" in Rüdiger WOLFRUM, vol. VIII, ed., *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2013), 645 at para. 15.

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reasonableness to the principles of necessity and proportionality. A good formulation of reasonableness and its implications was made by the Arbitral Tribunal in *Duzgit Integrity (Malta v. São Tomé and Príncipe)*:

> The exercise of enforcement powers by a (coastal) State in situations where the State derives these powers from provisions of the Convention is also governed by certain rules and *principles of general international law*, in particular the principle of reasonableness. *This principle encompasses the principles of necessity and proportionality.* These principles do not only apply in cases where States resort to force, but to all measures of law enforcement. Article 293(1) requires the application of these principles. They are not incompatible with the Convention.[69]

Outside the framework of UNCLOS, the Arbitral Tribunal in *Filleting within the Gulf of St. Laurence (France v. Canada)* considered that "cette règle commande à l'Etat de proportionner son comportement au but légalement poursuivi et en tenant dûment compte des droits et libertés concédés à un autre Etat".[70]

Remarkably, international tribunals have applied the standard of reasonableness without explicit textual habilitation. The *Duzgit Integrity* Tribunal made use of these principles in the context of Article 49(3) of UNCLOS, which merely provided that state sovereignty over archipelagic waters had to be exercised subject to "this Part" of UNCLOS. Also, the ICJ, in its *Whaling in the Antarctic (Australia v. Japan)* Judgment had recourse to that principle as a standard of review even though Article VIII of the International Convention for the Regulation of Whaling [ICRW] did not phrase that criterion explicitly.[71]

Principles of reasonableness were not employed exclusively in law of the sea matters and have been invoked in the context of concurring rights exercised onshore. In the *Iron Rhine* Arbitration, both Belgium and the Netherlands seemed to accept that a principle of reasonableness governed the exercise of transit rights by rail in Dutch territory. Belgium argued that limitations over the Netherlands' sovereignty flowed from "generally accepted principles of good faith and reasonableness" so that the Netherlands was to apply its legislation "in the way least unfavorable to Belgium".[72] The Netherlands argued that it acted reasonably because its actions did not constitute an abuse of rights and were not arbitrary or discriminatory.[73] Also, the Tribunal framed some of its conclusions in terms of reasonableness, finding as it did that the environmental protection measures envisaged by the Netherlands could not be per se regarded as rendering unreasonably difficult Belgium's exercise of its transit rights.[74]

[69] *Duzgit Integrity*, *supra* note 34 at 54, para. 209 (emphasis added).

[70] *Affaire concernant le filetage à l'intérieur du golfe du Saint-Laurent entre le Canada et la France*: "this rule requires that a state proportionates its behaviour to the legally pursued goal taking into account the rights and freedoms conceded to other states."

[71] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment of 31 March 2014, [2014] I.C.J. Rep. 226 [*Whaling in the Antarctic*]. This was a reason cited by Judge Yusuf in his dissent (at 386, para. 12), when stating that:

> The Court does not, however, use that applicable law to evaluate whether the special permits issued by Japan for JARPA II are for purposes of scientific research. Instead of using those parameters, the Court comes up with a standard of review that is extraneous to the Convention.

[72] *Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Decision of 24 May 2005, [2005] XXVII Reports of International Arbitral Awards 35 at 100, para. 163, and at 111, para. 202.

[73] *Ibid*., at 111, para. 203.

[74] *Ibid*., at 111, para. 205.

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In general, it is suggested that the principles of reasonableness, necessity, and proportionality are well established in international law, having been applied in the absence of explicit textual habilitation in specific treaties. Accordingly, the transit state has the duty to *reasonably* regulate passage by the vessels of landlocked states in its territory. Criteria of necessity and of proportionality are part of the reasonableness principle and will involve both procedural and substantive guarantees.

The characteristics of the law *in abstracto* constitute a first aspect in which the principle of reasonableness comes to play. In this regard, the related standards of reasonableness, necessity, and proportionality contemplate a comparison between the legitimate purpose protected by state action and repercussions suffered by the affected parties. In its *Whaling in the Antarctic* Judgment, the ICJ considered Japan's research programme on whales [JARPA] to determine whether its characteristics were commensurate to, or consistent with, the stated purposes of JARPA II. Japan argued that its extensive whaling activities were "for purposes of scientific research" and thus justified under Article VIII of ICRW.[75] The plain wording of that provision did not lay forth any principle of reasonableness, but the parties to the dispute agreed that the applicable test was whether "a State's decision is objectively reasonable".[76] The ICJ allowed a large degree of deference to the importance of the objectives pursued by Japan while engaging in a punctilious interpretation of the term "for the purpose of". On one side, the court stated:

> The stated research objectives of a programme [Japan's JARPA II] are the foundation of a programme's design, but the Court need not pass judgment on the scientific merit or importance of those objectives in order to assess the purpose of the killing of whales under such a programme. Nor is it for the Court to decide whether the design and implementation of a programme are the best possible means of achieving its stated objectives.[77]

On the other hand, it affirmed that:

> In order to ascertain whether a programme's use of lethal methods is for purposes of scientific research, the Court will consider whether the elements of a programme's design and implementation *are reasonable in relation to its stated scientific objectives* ... such elements may include: decisions regarding the use of lethal methods; the scale of the programme's use of lethal sampling; the methodology used to select sample sizes; a comparison of the target sample sizes and the actual take; the time frame associated with a programme; the programme's scientific output; and the degree to which a programme co-ordinates its activities with related research projects.[78]

The ICJ's assessment of reasonableness of the programme's design and implementation required a detailed consideration of numerous elements. For instance, the fact that the

[75] *International Convention for the Regulation of Whaling*, 2 December 1946, 161 U.N.T.S. 72 (entered into force 10 November 1948), art. VIII:

> Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit.

[76] Nicola STRAIN, "Regulating Collective Resources under Multilateral Treaties: The Decision in Whaling in the Antarctic (Australia v Japan)" (2019) 20 Melbourne Journal of International Law 572 at 588–9.

[77] *Whaling in the Antarctic*, *supra* note 71 at 258, para. 88.

[78] *Ibid*. (emphasis added).

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Research Plan included no analysis of the feasibility of non-lethal methods to reduce the planned scale of lethal catches was an important element indicating that the research programme was not reasonable in the light of its stated goals.[79] Furthermore, the current research programme's planned catches were approximately double the previous one, while its subjects, objectives, and methods overlapped to a considerable extent with its predecessor's.[80] Hence, while exercising considerable deference to Japan's goals, the ICJ engaged in a detailed analysis of whether Japan's measures adhered to their objectives. The standard adopted here is arguably comparable to the strict standard of proportionality.[81]

In its *M/V Virginia G* ruling, the ITLOS acted similarly by assessing the characteristics of the legislation promulgated by Guinea Bissau against the obligations laid down in UNCLOS.[82] The Tribunal assessed the applicable legislation *in abstracto*. It inquired on whether the national law imposed confiscation "irrespective of the severity of the violation and without possible recourse to judicial means".[83] In the view of the Tribunal, it mattered that national legislation afforded sufficient flexibility to state authorities when punishing violations of fishing laws, while also affording numerous possibilities for the applicant to mount a legal challenge to confiscation.[84] To put it another way, two aspects were considered important: the existence of a flexibility sufficient to proportionate sanctions to a specific behaviour, and the presence of legal remedies.

UNCLOS tribunals have equally affirmed that it was within their competence "to establish ... whether the measures taken in implementing this [coastal state] legislation are necessary".[85] In this context, the jurisprudence articulates substantive requirements on the correlation between state action and the pursued legitimate purpose, as well as guarantees of due process for the affected parties. Concerning this latter point, the ITLOS in *M/V Virginia G* considered that the confiscation of a fishing vessel by a coastal state must not be implemented in a way which denies to the ship owner the remedies afforded by national law, and must follow international standards of due process of law.[86] Consistent with the foregoing jurisprudence, also in *Duzgit Integrity*, the Arbitral Tribunal considered issues of due process when assessing Malta's arguments on breaches of the reasonableness standard. It found that, when fining the offending vessel, "the authorities provided reasoning for the components of the fine to the agent of the vessels".[87]

However, the control of international jurisdictions is not limited to procedural safeguards, but encompasses more substantive aspects. In *Duzgit Integrity*, the Tribunal initially took into account the gravity of the violation and the fact that the ship's master should have known of the authorization requirements on ship-to-ship cargo transfers imposed by local laws to determine that São Tomé's sovereignty over its archipelagic waters authorized it to act and punish the transgressing vessel.[88] Successively, the Tribunal compared the state measures' combined effect to the original wrong committed by the vessel, noting that the ship's master was a first-time offender, and was willing to

[79] *Ibid*., at 270–1, para. 140.
[80] *Ibid*., at 274, para. 155.
[81] Cannizzaro, *supra* note 65 at 1063.
[82] *M/V "Virginia G"*, *supra* note 67 at 77, para. 254, quoting *Tomimaru (Japan v. Russian Federation)*, Prompt Release, Judgment of 6 August 2007, [2007] ITLOS Case No. 15 at 96, paras. 75–6.
[83] *Ibid*., at 78, para. 257.
[84] *Ibid*.
[85] *Ibid*., at 78, para. 256.
[86] *Ibid*., at 77, para. 254.
[87] *Duzgit Integrity*, *supra* note 34 at 69, para. 255.
[88] *Ibid*., at 62, para. 235.

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move its operations outside Sao Tomé's waters if required by the authorities.[89] Hence, the penalties imposed by the state were disproportionate to the original offence and the goal of ensuring respect for its sovereignty.[90] It is worth noting that the Tribunal also took into account the specific behaviour of the affected party, as well as the clarity with which state authorities acted.

III. Due regard and reasonableness in the context of the Caspian "body of water"

The text of the Aktau Convention refers to "due regard" and "necessity" as standards that must guide transit state regulation over the right of passage enjoyed by landlocked states to and from the Caspian Sea. Due regard and necessity are very much related and converge in certain instances. Criteria of reasonableness were extensively referred to by the negotiators of the convention when drafting the articles containing a requirement of due regard.[91] Also, various elements of the due regard principle, such as the duty of consulting the other party, will be relevant to an analysis of necessity. It will be arduous to affirm that unilateral intervention was necessary where no effort was made to consult or at least inform the other party.

Reasonableness and due regard have been used in the interpretation and application of a wide array of treaties, applicable to diverse contexts, and disciplining state action both offshore and onshore. Their application has been quite consistent, at least in terms of the criteria that were considered relevant. That being said, the Aktau Convention has its own object and purpose distinct from UNCLOS or from any other treaty. In this regard, the object and purpose of the Aktau Convention, as shown in its Preamble, combine goals of economic development and environmental protection with the preservation of state sovereignty. The explicit treaty recognition of these purposes will have an impact on the analysis of necessity, particularly concerning the legitimacy of the objectives pursued by state action. For example, considerations of environmental protection and sustainable development have been promoted and recognized internationally.[92] And in the *Iron Rhine* Arbitration, the allocation of costs made by the Tribunal was based on the principle that environmental costs must be part of the financing of a project.[93] Consequently, it is to be expected that non-discriminatory measures having a general scope, and affecting transit pursuant to environmental objectives, will be justifiable under the Aktau Convention.

Article 3(1) of the Aktau Convention lists among the treaty's guiding general principles: "respect for the sovereignty, territorial integrity, independence and sovereign equality of States, non-use of force or the threat of force, mutual respect, cooperation and non-interference into the internal affairs of each other."[94] The right of passage foreseen by Article 10(4) is exercised in the internal territory of a state, a space that has characteristics differing from such maritime spaces as the EEZ or archipelagic waters. Thus, the interpretation of that provision will have to keep in mind that Kazakhstan's right of access would be exercised over a territory lying at the "core" of state sovereignty.

[89] *Ibid*., at 69–70, para. 256.

[90] *Ibid*., at 70–1, para. 260.

[91] Shotaro HAMAMOTO, "The Genesis of the 'Due Regard' Obligations in the United Nations Convention on the Law of the Sea" (2019) 34 International Journal of Marine and Coastal Law 7 at 13.

[92] *Rio Declaration on Environment and Development*, United Nations Conference on Environment and Development, UN Doc. A/CONF.151/26 (1992), Vol. I, Principle 4: "environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."

[93] Christian DOMINICÉ, "The Iron Rhine Arbitration and the Emergence of a Principle of General International Law" in Tafsir Malick NDIAYE and Rüdiger WOLFRUM, *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Leiden: Martinus Nijhoff, 2007), 1067 at 1070.

[94] *Caspian Sea Convention*, art. 3.

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At the same time, this is bound to have an impact over an analysis pursuant to the principle of due regard, as the convention stresses the importance of the transit state's sovereignty, strengthening its weight in the balance to be struck between the interests at play. The same would apply to the necessity analysis mandated by Article 10(4) and by the general rule of reasonableness.

The explicit protection accorded by the Aktau Convention to state sovereignty will also affect the comparison between the goals pursued by a given measure at issue and its restrictive impact. Differing standards of review can be adopted in the course of an analysis of necessity or proportionality, ranging from complete deference to the government's decision to re-examining the issue at hand *de novo*.[95] Such was the disagreement between the majority and the dissenting judges in *M/V Virginia G* and *Duzgit Integrity*. Dissenting judges emphasized that the terms of the relevant UNCLOS provision referred to the coastal state's "sovereign rights" on living marine resources in the EEZ, which necessarily implied that a degree of deference should be granted to coastal states.[96] They also stressed the gravity of the offences at issue and the difficulty for developing coastal states to detect and punish those offences.[97] It can be argued a fortiori that the full sovereignty enjoyed by the transit state over its onshore territory—which is also emphasized by the convention itself—must result in the recognition that the transit state enjoys a wide margin of appreciation in designing and implementing its policies. This will have some bearing on the analysis of necessity, for example by determining that state authorities are not required to demonstrate the lack of less drastic alternatives to their course of action.

Nevertheless, it would be a mistake to conclude that the transit state is afforded boundless discretion: no doctrine of margin of appreciation may justify measures which are in bad faith, arbitrary, or discriminatory. For instance, the transit state may not justifiably restrict action by other states when it has been engaging in similar behaviour. Thus, in the *River Meuse* case, the Permanent Court of International Justice held that "the Court finds it difficult to admit that the Netherlands are now warranted in complaining of the construction and operation of a lock of which they themselves set an example in the past".[98] Possibly, this may encompass situations where the transit state uses environmental legislation to limit passage by foreign vessels while failing to police similar behaviour by its own nationals. Equally, one cannot regard as "necessary" regulation which imposes harsh penalties while giving judges no discretion to adjust its application to the concrete case before them. The same would apply to judicial proceedings that violate the standards of due process. In this latter case, international human rights may come to play an important role: the right to a fair trial is central in Article 14 of the International Covenant on Civil and Political Rights, and the Human Rights Committee has extensively interpreted that provision.[99]

IV. Some conclusions

This paper has attempted to sketch some criteria from the Aktau Convention which limit the discretion of states of transit over passage through their territory. While that treaty

[95] S.W. SCHILL and V. DJANIĆ, "Wherefore Art Thou? Towards a Public Interest-based Justification of International Investment Law" (2018) 33 ICSID Review 29 at 47.

[96] *M/V "Virginia G"*, *supra* note 67, Joint Dissenting Opinion of Vice-President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao, and Bouguetaia at 225, para. 49.

[97] *Ibid*., at 229, para. 60; *Duzgit Integrity*, *supra* note 34, Dissenting Opinion of Judge Kateka at 5–6, para. 12.

[98] *Diversion of Water from Meuse (Netherlands v. Belgium)*, Judgment of 28 June 1937, [1937] P.C.I.J. Series A/B No. 70 at 25, para. 84.

[99] *General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, UN Human Rights Committee, UN Doc. CCPR/C/GC/32 (2007).

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upholds state sovereignty, it also seeks to prevent the arbitrary and discriminatory exercise of regulatory powers. In this regard, the wording of Articles 3(10) and 10(4) incorporate within the convention various international legal norms deriving from UNCLOS and general international law. Also, as shown by numerous examples, the limitations of state powers defined by the Aktau Convention borrow from the requirements of the law of the sea. Hence, even though the Caspian Sea is not a sea in the legal sense of the term, the international law of the sea plays a major role in construing its terms. In this regard, principles of due regard and reasonableness—which encompasses the standards of necessity and proportionality—have been largely interpreted and applied by UNCLOS tribunals and other international dispute settlement bodies.

Requirements of due diligence grant to State Parties procedural guarantees entailing a duty of meaningful consultation. In addition, reasonableness—with its criteria of necessity and proportionality—aims to discipline state behaviour both when regulating and when enforcing its laws. This said, the context and object and purpose of the Aktau Convention suggest that states must be granted a wide margin of appreciation when exercising regulatory powers. Regulation which limits passage but nevertheless pursues a legitimate purpose and is non-discriminatory is likely to be allowed. Of course, the application of these criteria will depend on the specific facts of a given case.

In addition, it is difficult to foresee how these will actually be applied: this is because the Aktau Convention does not foresee impartial dispute settlement by an international tribunal.[100] In this respect, it might be advisable for the region's landlocked states to ratify UNCLOS. That other instrument contains rights for landlocked states that are broadly similar to those in the Aktau Convention, and has the advantage of possessing a more robust dispute settlement framework based on a binding process of international adjudication. However, the weakness of the Aktau Convention's dispute settlement regime does not detract from the importance of the substantive rights which it, explicitly or implicitly, grants to landlocked states.

[100] *Caspian Sea Convention*, art. 21(2):

> Any dispute between the Parties regarding the interpretation or application of this Convention which cannot be settled in accordance with paragraph 1 of this Article may be referred, at the discretion of the Parties, for settlement through other peaceful means provided for by international law.

Cite this article: PECORARO A (2021). Free Access to and from the Ocean in the Convention on the Legal Status of the Caspian Sea: The Law of the Sea and the Caspian "Body of Water". *Asian Journal of International Law* **11**, 281–298. https://doi.org/10.1017/S2044251321000199