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The Transit Regime for Landlocked States

International Law and Development Perspectives

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Railway Traffic Case *(Poland v. Lithuania)* (PCIJ)

Right of Passage Case *(Portugal v. India)* (ICJ)

River Oder Case *(Great Britain, Czechoslovak Republic, Denmark, France, Germany and Sweden v. Poland)* (PCIJ)

Wimbledon Case *(France v. Germany)* (PCIJ)

Foreword

Landlocked States face major disadvantages. Their geographical location not only cuts them off from sea resources, it limits their access to seaborne and international trade. They have to rely on transit countries for access to ports and international markets. That may be one reason why, by and large, coastal regions tend to be more developed than inland ones.

In view of the above, the international community has paid special attention to the situation of landlocked States and the vulnerability that entails. The international community has recognized, and in part addressed, some of the constraints they face through a number of international legal instruments and a plethora of political and normative instruments. In the course of the last century, through the constructive and concerted efforts of both landlocked and transit States, there has been considerable improvement in the situation of landlocked States.

This study reviews the evolution of the regime of landlocked States, with special attention to the link between international law and development. The study provides a detailed historical account of the legal, and to some extent the political, relations of landlocked and transit countries and examines the difficulties all these countries have faced. It analyzes the three major facets of public international law (customary law, treaty law, and state practice) and goes into detail in the areas of both law and fact, in particular by reviewing a sample of the bilateral arrangements between landlocked and transit States.

The Legal Vice Presidency is pleased to offer this study in the hope that it will provide a useful understanding to those concerned with the transit regime of landlocked States, and more generally with the relationship of law and development.

Roberto Dañino
Senior Vice President and General Counsel
World Bank

April 2005

Abstract

This study traces the development of the international law related to the free access of landlocked States to and from the sea. Part I is a brief introduction to economic, institutional, and development-related challenges faced by landlocked States. Part II examines doctrines and theories that have influenced the evolution of the legal regime that applies to landlocked States.

Part III reviews the progress the international community has achieved over the decades in devising legal mechanisms to address the problems these States face. It discusses enforcement of the right of access, in particular, the administrative, institutional, and technical mechanisms used. The study further analyzes bilateral treaties and agreements dealing with the question of transit in different continents. These agreements aimed at facilitating transit between landlocked States and their transit neighbors provide for regimes that are tailored to the specific geopolitical and socioeconomic needs of the parties. The study also discusses the different international resolutions bearing on cooperation between landlocked States and the role of multilateral institutions.

Finally, Part IV concludes the study by highlighting positive achievements of the international community in working toward a regime that is satisfactory to all, and describes a multifaceted approach to solve the problems of access of landlocked States.

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Acronyms and Abbreviations

AFDI	Annuaire Français de Droit International
APA	Almaty Program of Action
ASEAN	Association of South-East Asian Nations
c.i.f.	cost, insurance, freight
COMESA	Common Market of Eastern and Southern Africa
ECA	Economic Commission for Africa
ECAFE	Economic Commission for Asia and the Far East
ECLAC	Economic Commission for Latin America and the Caribbean
ECO	Economic Cooperation Organization
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
EEZ	Exclusive Economic Zone
ESCAP	Economic and Social Commission for Asia and the Pacific
GATT	General Agreement on Tariffs and Trade
GDP	Gross domestic product
GDS	Geographically Disadvantaged States
GNI	Gross national income
GNP	Gross national product
HDI	Human development indicator
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ITO	International Trade Organization
LAFTA	Latin American Free Trade Association
Lao PDR	Lao People's Democratic Republic
LDC	Least developed country
LLDC	Landlocked developing country

LLS	Landlocked state
MERCOSUR	Southern Cone Common Market (Mercado Común del Sur)
MFN	Most favored nation
OCT	Organization of Communication and Transit
PCIJ	Permanent Court of International Justice
RCGS	Regional Customs Guarantee Scheme
RGDIP	Revue Générale de Droit International Public
SADC	Southern African Development Community
TEU	Ton equivalent unit
UN	United Nations
UNCLOS	UN Conference on the Law of the Sea
UNCTAD	UN Conference on Trade and Development
UNDP	United Nations Development Programme
WTO	World Trade Organization

PART ONE

General Overview

CHAPTER ONE

Introduction, Characteristics, and Scope

Today, due to globalization and the resulting economic integration, all countries of the world have become part of a "global village." This integration of world economies has proven to be a powerful means for countries to promote economic growth and development and to reduce poverty. The increasing importance of the World Trade Organization (WTO) and the concept of free trade it has endorsed mean that, in order to survive, all countries must be able to compete in the world market. Although not specifically stated in any instrument, from an equity standpoint this implies that if they are to become full-fledged partners in international free trade, all countries should be assured the same level of access to the international market, on the same terms. Yet not all countries have an equal level of privilege to enter the market; one reason, ironically, is geography.

Indeed, thirty-eight States are landlocked States (LLS), with no access to the sea.[1] Because they do not possess a coastline, they lack direct access to marine resources and suffer generally because their export trade cannot be competitive. For LLS, free access to the sea, the key to international trade, is linked to the question of transit: goods originating in LLS directed toward the coasts, or entering LLS from the sea, must traverse the territories of bordering countries. In other words, their geographical location means that the access of these states to the

[1] The LLS are Afghanistan, Bhutan, Lao People's Democratic Republic (Lao PDR), Mongolia, and Nepal in Asia; Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Ethiopia, Lesotho, Malawi, Mali, Niger, Rwanda, Swaziland, Uganda, Zambia, and Zimbabwe in Africa; Bolivia and Paraguay in Latin America; and Andorra, Armenia, Austria, Belarus, the Czech Republic, the Holy See (the Vatican), Hungary, the Kyrgyz Republic, Liechtenstein, Luxembourg, Macedonia, Moldova, San Marino, the Slovak Republic, Switzerland, and Tajikistan in Europe. For detail, *see The World Bank Atlas* (1999); *see also* generally Martin Ira Glassner, *Access to the Sea for the Developing Landlocked States* (Martinus Nijhoff Publishers 1970); for an excellent and detailed historical description of LLS, *see* Samuel Pyeatt Menefee, *"The Oar of Odysseus": Landlocked and "Geographically Disadvantaged" States in Historical Perspective,* 23 Cal. W. Intl. L. J. 1–65 (1992/93); for a comprehensive study, *see* Stephen Vasciannie, *Land-Locked & Geographically Disadvantaged States in the International Law of the Sea* (Clarendon 1990); Mpazi Sinjela, *Land-Locked States and the UNCLOS Regime* (Oceana Publications 1983). Much has been written on issues concerning LLS from all angles and in all areas. Those interested in carrying out more detailed analysis should use the excellent and most comprehensive *Bibliography of Landlocked States, Economic Development and International Law* (Martin Ira Glassner ed., 5th rev. ed., Sharpe 2000).

principal maritime ways is always indirect; they are obliged to rely on transit through the territory of other states.

1.1 The Notion of Landlocked States

To define what an LLS is, it is necessary to define the term "State" along with the phrase "without access to the sea."

A "State" is the essential and original subject of international law.[2] States "have juridical personality in international law; for example, they are apt to have rights and duties."[3] The term "State" designates a human grouping established permanently on a territory and having its own political organization, the political existence of which depends legally upon itself and is governed directly by international law.[4] A State is a territory or group of territories that has its own law of nationality.[5]

However broad and diverse the definitions may be, being a State is not sufficient to be assured a place in international relations. Inter-State relations require not only that the State exist but also that it be recognized by other States.[6] Accordingly, for the purpose of this study, membership of a State in the United Nations (UN) or any of its specialized institutions, or its adherence to the International Court of Justice (ICJ) statute, signifies that it is recognized by other States of the international community. All territorial collectivities fulfilling these conditions are therefore here considered States.[7] In this connection, it is appropriate to note that only three LLS are not members of the UN: Liechtenstein, San Marino,

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[2] *A Dictionary of International Law* (Progress Publishers 1982).

[3] *See* generally Paul Reuter, *Droit International Public* 153–154 (5th ed., PUF 1983); for a detailed analysis of statehood, *see* generally James Crawford, *The Creation of States in International Law* (Clarendon Press 1979).

[4] *Dictionary of the Terminology of International Law* 264 (Sirey 1960).

[5] *Words and Phrases Legally Defined* (John B. Saunders, ed., Butterworths 1970).

[6] *See supra* n. 2.

[7] This does not necessarily signify that non-States cannot be members. In 1919 the British dominions were members, as India was later. The UN also accepted, until recently, members that were not then independent States, like Ukraine and Byelorussia, which were members of a federation. Indeed, constitutionally they were not fully autonomous nor had they entered into direct diplomatic relations, except through the medium of the UN and a few international organizations. Their membership in the UN can be explained only in terms of the political exigencies of the time and as a special relationship that does not imply recognition of their statehood by other members outside the framework of the UN. *See* Philip Marshall Brown, *The Legal Effect of Recognition,* 44 Am. J. Int'l L. 617, 621 (1950). Some scholars view this as at best an unfortunate exception to the rule that only states can become members of the UN and believe that UN admission of necessity results in recognition of the statehood of all member states. *See* John Dugard, *Recognition and the United Nations* 54 (Cambridge 1987).

and the Holy See (the Vatican).[8] Although Switzerland was not a member of the UN until September 10, 2002, it had previously adhered to all its specialized institutions.[9]

Having no coast is the second element defining an LLS. Lack of a coast deprives a State of direct access to international maritime transport. This narrow definition of the term "without access" permits this study to exclude other geographically disadvantaged States, of which there are a large number. Among "States with limited access," for instance, are Azerbaijan, Bosnia-Herzegovina, Democratic Republic of Congo, Iraq, Jordan, Kazakhstan, Turkmenistan, and Uzbekistan, all of which have a small coast but only an extremely narrow maritime "corridor" that is not of much use for foreign trade. Indeed, these States are in many characteristics similar to those considered here, but for purposes of consistency, in this book, LLS refers only to a State that has no coast at all.[10]

In this context, it is important to distinguish States that are entirely surrounded by the territory of only one other State, which a scholar has defined as an "enclave."[11] Often there is confusion between the notions of landlocked States and enclaves. Switzerland and Austria, for instance, are LLS but are not enclaves because their boundaries touch upon several other States. On the other hand, the Vatican and San Marino, both within Italy, and the Kingdom of Lesotho, which is surrounded by South Africa, are enclaves. The problems of enclaves are even more delicate and serious than those of nonenclave LLS. Indeed, their mere economic existence, leading to political existence, may depend heavily upon the benevolence of their encircling neighbors. Although at present these two terms are often used interchangeably, this book tries to honor the distinction.[12]

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[8] Nevertheless, these LLS have links with the UN and its specialized institutions. Thus, the Vatican is a member of the International Atomic Energy Agency (IAEA) (which is not a specialized UN institution but holds special status), and Liechtenstein and San Marino have adhered to the ICJ Statute.

[9] Although it had also adhered to the ICJ Statute, Switzerland's non-membership in the UN was based not on the attitude of other States toward it but specifically on its neutrality. By an international act signed in Paris on November 20, 1815, Switzerland was acknowledged to be perpetually neutral. This neutrality was also confirmed by art. 435 of the Treaty of Versailles. The essential parts of Swiss neutrality are that: (1) Switzerland cannot participate in any war; (2) its territory is inviolable; and (3) it cannot allow even the passage of troops through its territory.

[10] However, there is a kind of convergence of interests among the categories of States without access, States with limited access, and States with a landlocked continental shelf that entails their joint action in the international context.

[11] Pierre Raton, *Les enclaves,* in *Annuaire Français de Droit International (AFDI)* 186 (1958).

[12] Some authors have provided the following definition: "Landlocked States are States which do not border upon enclosed or semi-enclosed seas." *See* L. B. Sohn & K. Gustafson, *The Law of the Sea in a Nutshell* 129 (West Publishing Co. 1984).

1.2 Historical Characteristics

With regard to the Western European LLS, some are ancient nations that have maintained a specific national identity throughout the centuries, like Switzerland, or have demonstrated their roots in feudal times, like Liechtenstein and Luxembourg; others were born only after the disappearance of the Austro-Hungarian Empire, like Czechoslovakia,[13] Austria, and Hungary. Generally speaking, however, all these LLS, which share a considerable degree of historical homogeneity, are among the developed States.

In contrast, the national history of most developing LLS differs depending on the continent in which they are situated, though there is one point of commonality: Most of them have suffered from colonialism. A primary consequence of this phenomenon can be observed, especially in Africa, in the purely arbitrary nature of their boundary demarcations, which tend to be based on the ancient administrative subdivisions of the colonial powers. They became States by mere chance when the major European colonial powers carved up continents for their own benefit.[14] In Latin America, for instance, Bolivia and Paraguay came into existence only after the collapse of the Spanish Empire; in Africa all LLS are former protectorates or colonies of European powers that gained independence only in the mid-twentieth century.

Each Asian LLS, however, has a distinct national history. Each has shown its ability to obtain or preserve independence, notably because of power rivalries within the region. Among the exceptions are the Central Asian landlocked republics of Tajikistan and the Kyrgyz Republic. As the disintegration of the Soviet Union unfolded, Tajikistan declared its independence on August 31, 1991, and the Kyrgyz Republic on September 9, 1991. Until then, both were integral parts of a closely knit political and economic union under a system of central planning covering the entire union economy. The breakup of the Soviet Union and the realization of independence by the constituent republics meant the end of centralized planning and the command economy. There thus emerged a need for continued cooperation among the individual republics in the areas in which their economies were heavily linked, and for a mechanism to support such cooperation and ensure their access to the sea. The new LLS had no choice but to turn toward neighbors like Turkey, Iran, and Pakistan for economic exchange.[15]

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[13] Czechoslovakia split into the Czech and Slovak Republics on January 1, 1993.

[14] *See* M. A. Sulaiman, *Free Access: The Problem of Land-locked States and the 1982 United Nations Convention on the Law of the Sea,* 10 S. Afr. Yrbk. Int'l L. 145 (1984); *see also* Anthony D'Amato, *International Law: Process and Prospects* v (Transnational Publishers 1987).

[15] *See* generally, Paul Tavernier, *Les nouveaux Etats sans littoral d'Europe et d'Asie et l'accès à la mer* in 97 Revue Générale de Droit International Public (RGDIP) 727 (1993).

1.3 Geopolitical Features

The LLS have few characteristics in common except the lack of maritime access. None can be considered geographically large; most are indeed quite small and their physical characteristics vary considerably. Mongolia, with an area of 1,567,000 square kilometers, is the largest; the smallest is San Marino, with an area of 60 square kilometers.[16]

The States with the easiest access to the sea are mostly in Europe,[17] where a maximum of 500 kilometers separates their capitals from the principal ports.[18] This relative proximity has facilitated the development of their communication networks. Also, most of the European LLS are linked to the sea by navigable rivers that have long been internationalized by bilateral or multilateral treaties.[19]

In Africa, only the Central African Republic benefits from relatively affordable river transportation, using the Bangui and the Congo rivers.[20] However, even this advantage is limited: Because the Congo is not navigable beyond Brazzaville, goods must be transported by rail from Brazzaville to Pointe-Noire on the Atlantic Ocean. In Asia, only the Lao PDR is blessed with navigable waterways that lead to the sea, and these will only be fully harnessed after the Mekong Project is completed.[21] Otherwise, in most LLS, river transportation is either nonexistent or cannot be used for geographical, financial, or technical reasons. Such is the case of the river networks in, for instance, Paraguay, Lao PDR, and Congo[22] (see table 1.1 for a list of LLS and their transshipping ports).

The consequences of geographical position are clear, although the impact varies by State, depending on whether they are more or less favorably located. In general, the developing LLS are situated far from international markets and at the extremity of transport networks. This increases the cost of all imported and exported goods; the wastage of time; the risk of loss, damage, or theft; the need for wagons, trucks, railways, or other means of transporting merchandise; and the cost of maintaining equipment and means of transportation.

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[16] *Little Data Book* (World Bank April 2003).

[17] *Atlas of Europe.*

[18] *See id.*

[19] *See infra* chapters 3 and 4.

[20] *Atlas of Africa.*

[21] *See infra* part 2.5.2.

[22] United Nations Conference on Trade and Development (UNCTAD), *Rapport du Groupe d'Experts des Problèmes Spéciaux que posent l'expansion des Echanges et le Développement des PVD sans Littoral* (Document TD/B/308), at 5.

TABLE 1.1

Landlocked Countries and Transshipping Points

LLS, due to their geography, are inaccessible by deep sea ocean vessels. Import and export goods must be transshipped through other countries by truck, rail, inland waterway (river, canal, or lake), or some combination of these.

Landlocked Country	Continent	Transship Seaport	Transship Country
Afghanistan	Asia	Karachi	Pakistan
Andorra	Europe	Barcelona	Spain
Armenia	Europe	Batumi	Georgia
		Mersin	Turkey
Austria	Europe	Antwerp	Belgium
		Hamburg	Germany
		Marseilles	France
		Rotterdam	Netherlands
Belarus (Byelorussia)	Asia	Gdansk	Poland
		Gdynia	Poland
		Odessa	Ukraine
		St. Petersburg	Russian Federation
Bhutan	Asia	Calcutta	India
Bolivia	South America	Arica	Chile
		Buenos Aires	Argentina
		Matarani	Peru
		Santo	Brazil
Botswana	Africa	Durban	South Africa
Burkina Faso (formerly Upper Volta)	Africa	Abidjan	Côte d'Ivoire
Burundi	Africa	Matadi	Congo, Dem. Rep. of
Central African Republic	Africa	Douala	Cameroon
		Matadi	Congo, Dem. Rep. of
		Pointe-Noire	Congo, Rep. of
Chad	Africa	Douala	Cameroon
Czech Republic	Europe	Gdansk	Poland
		Gdynia	Poland
		Hamburg	Germany
		Szczecin	Poland

TABLE 1.1 *(continued)*

Landlocked Country	Continent	Transship Seaport	Transship Country
Ethiopia	Africa	Djibouti	Djibouti
		Assab	Eritrea
		Massawa	Eritrea
Hungary	Europe	Antwerp	Belgium
		Hamburg	Germany
		Rotterdam	Netherlands
Lao People's Democratic Republic	Asia	Bangkok	Thailand
Lesotho	Africa	Durban	South Africa
Liechtenstein	Europe	Antwerp	Belgium
		Hamburg	Germany
		Marseilles	France
		Rotterdam	Netherlands
Luxembourg	Europe	Antwerp	Belgium
Macedonia, Former Yugoslav Republic	Europe	Varna	Bulgaria
Malawi	Africa	Nacala	Mozambique
Mali	Africa	Abidjan	Côte d'Ivoire
		Conakry	Guinea
		Dakar	Senegal
Moldova	Europe	Odessa	Ukraine
Mongolia	Asia	—	China
		—	Russian Federation
Nepal	Asia	Mumbai	India
		Calcutta	India
Niger	Africa	Cotonou	Benin
Paraguay	South America	—	Argentina
		—	Brazil
Rwanda	Africa	Dar es Salaam	Tanzania
		Mombassa	Kenya
San Marino	Europe	—	Italy

(Table continues on the following page.)

TABLE 1.1 *(continued)*

Landlocked Country	Continent	Transship Seaport	Transship Country
Slovak Republic	Europe	Gdansk	Poland
		Gdynia	Poland
		Szczecin	Poland
Swaziland	Africa	Durban	South Africa
Switzerland	Europe	Antwerp	Belgium
		Genoa	Italy
		Hamburg	Germany
		Le Havre	France
		Marseilles	France
		Rotterdam	Netherlands
Tajikistan	Asia	Karachi	Pakistan
Uganda	Africa	Mombassa	Kenya
		Tanga	Tanzania
The Vatican	Europe	—	Italy
Zambia	Africa	Dar es Salaam	Tanzania
Zimbabwe	Africa	Beira	Mozambique
		Durban	South Africa

Source: Adapted from World Bank World Development Reports *and* World Bank Atlases *of varied dates.*

From a strictly political governance viewpoint, there is no obvious uniformity within the group of LLS, though none is a nuclear power or a permanent member of the UN Security Council. In the international context, most may be considered States of secondary political importance.[23]

All but five LLS are republics. Liechtenstein, which is a principality, and Luxembourg, which is a dukedom, are vestiges of European feudalism.[24] In Asia, there are two kingdoms, Bhutan and Nepal.[25] In Africa, Lesotho is a kingdom. Burundi, which received independence as a kingdom, has now become

[23] *See* V. Ibler, *The Land-locked and Shelf-locked State and the Development of the Law of the Sea,* Annals of International Studies 4 (1973).

[24] *Encyclopedia Britannica*.

[25] *See id.*

a republic.[26] Similarly, the Central African Republic, after a brief spell as an empire, has again been transformed into a republic.[27]

Examination of the political situation in the LLS reveals a tendency for them to adopt the ideology of larger neighbors when their sociopolitical structures are similar. Such appears to be the case of Mongolia, which lies between China and the former USSR, and Hungary, which is amid four former socialist States and Austria.

Some LLS are, in political terms, nonaligned.[28] At the Fourth Conference of Heads of States or Governments of Nonaligned States of 1973 (September 5–9), 16 LLS from Africa and Asia were present,[29] though none of the Latin American and European LLS participated as members.[30] Bolivia was present as an observer and Austria as a special invitee.[31]

The other LLS can be classified as either aligned or neutral States. Three LLS were, until the 1990s, aligned with the former USSR—Hungary and Czechoslovakia in Europe and Mongolia in Asia. Paraguay and Bolivia in Latin America and Luxembourg in Europe have clearly indicated their affinity with the Western World.[32] Austria and Switzerland in Europe are neutral by tradition or by treaty; though Liechtenstein and San Marino are not militarily linked with any of the super powers, politically they belong to Western Europe.[33]

Nevertheless, despite significant ideological diversity, all LLS have common interests. All are conscious of their geostructural handicaps and realize that their needs[34] differ from those of their coastal neighbors. This general consensus is

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[26] *See id.*

[27] *See id.*

[28] The Nonaligned Movement (NAM) emerged after World War II. In the 1980s, the movement had more than 100 member countries, which declared their refusal to participate in any existing military alliances. Whilst the concept of "nonaligned" essentially refers to the foreign policy pursued by states, it also defines the legal status of a nonaligned state and brings with it specific obligations both for the state itself and for other countries. *See* generally, *International Law* 333 (G. I. Tunkin, ed., Progress Publishers 1986).

[29] Afghanistan, Bhutan, Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Lao PDR, Lesotho, Mali, Nepal, Niger, Rwanda, Swaziland, Uganda, and Zambia. *Speech and Declaration,* September 1973. Although in today's post-cold-war political context differentiating between aligned and nonaligned states does not make much sense, the few paragraphs in the text pertaining to it are useful for understanding the evolutionary aspect of the problem as well as for thoroughness of this study.

[30] *See id.*

[31] *See id.*

[32] *See* generally, *Geography of National Power* 40 (William W. Jeffries, ed., 4th ed., US Naval Institute 1967).

[33] *See id.* at 70.

[34] For unrestricted transit rights.

quite obvious; over the past few decades, in all international conferences they have participated in, the LLS have in common claimed special measures in their favor.[35] This is quite clear, for instance, in the fifth part of the Economic Declaration adopted by the 1973 Conference of Nonaligned States, which deals with special measures in favor of the least developed countries (LDCs), including LLS.[36] Interestingly, within the framework of the UN Seabed Committee, the constitution of different interest groups engendered some disintegration of regional groups. Bolivia and Paraguay, for instance, dissociated from their continental coastal neighbors to join LLS like Afghanistan and Nepal because they wanted to safeguard their specific economic and trade interests.[37] Yet, in this connection, it is not to the advantage of an LLS to undermine its relations with neighbors whose territory would be essential for the transit of its goods.

The extreme vulnerability of LLS to events occurring within neighboring coastal countries may be illustrated by an example recently provided in Côte d'Ivoire. After the insurgency of September 19, 2003, rebels took control of the ports in Côte d'Ivoire that were key to business in landlocked countries to the north, making them inaccessible.[38] Landlocked Mali, Burkina Faso, and Niger have had to do without access to Abidjan, Côte d'Ivoire's main port, and use more distant ports, such as Cotonou in Benin, Tema in Ghana, and Dakar in Senegal, landing companies with a huge increase in transport costs. In better times, 70 percent of Mali's imports and exports were transitted through Abidjan.[39] The new export routes could cost an extra €123 million (US$130 million). Burkina Faso, which has a southern border with Côte d'Ivoire, estimated that the unrest cost it nearly €30.4 million in revenues and customs duties between September and December 2003 alone.[40] Prices skyrocketed in these West African nations, placing essential commodities out of the reach of ordinary people in countries that are already among the poorest in the world.[41]

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[35] *See infra* chapters 3 and 5.

[36] *See supra* n. 29.

[37] *See* Ndioro Ndiyaye, *Background Paper,* International Ministerial Conference on Landlocked and Transit Countries and Donor Countries and International Financial and Development Institutions on Transit Transport Cooperation, International Organization for Migration 3 (Almaty, August 28–29, 2003).

[38] *See id.*

[39] *See id.*

[40] *See id.*

[41] *See id.* It may also be worth noting what Moshoeshoe II, then King of Lesotho, said in 1988: "Even now, South Africa denies overflight rights to nonscheduled flights to Lesotho from neighboring countries unless the pilot agrees to land first in South Africa. We are as vulnerable as Berlin was in 1948." *See* Int'l Herald Trib., July 7, 1988.

The Côte d'Ivoire example clearly illustrates the kinds of troubles beyond their country that the LLS have to face. This also explains why, on all global indexes, the economic and human development indicators for LLS are generally worse than for their maritime neighbors.[42] Indeed, although the relative impact may vary, the reliance of LLS on transit routes through other countries for access to overseas markets can be on transit infrastructure, on political relations with neighbors, on peace and stability within transit neighbors, and on administrative processes associated with transit.[43]

1.4 Economic and Developmental Challenges

Modern economic progress requires rapid, reliable, and cost-effective international trade. Freedom of transit is thus vital for LLS that are working to progress toward trade diversification and economic development but are obstructed by the distance to the sea and the resultant high cost of transportation. Transportation costs are not, however, the only problem these states face.

Consider that the internal regions of huge coastal States like Brazil, for instance, are also very far from the maritime coasts[44]—sometimes the distance between these regions and the sea is greater than between some LLS and a seacoast. But there is an important difference: While products originating in the internal regions of coastal States must only cross the territory of a single country, their own, the import or export trade of countries lacking direct access must cross territories of a foreign sovereign. The likely legal and administrative hurdles[45] lead to a series of economic and political problems. Doubly landlocked countries (those contiguous to other landlocked countries) are in a still worse situation, because their international relations may be complicated by having to deal with several transit countries at a time.[46]

A 1970s study by the UN Conference on Trade and Development (UNCTAD) noted that lack of access to the sea constitutes a major obstacle for economic and

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[42] Michael L. Faye *et al., The Challenges Facing Landlocked Developing Countries,* 5 J. Hum. Dev. 40 (2004).

[43] *See id.*

[44] *See* R. Makil, *Transit Right of Landlocked Countries: An Appraisal of International Conventions,* 4 J. World Trade L. 35 (1970); *see also* generally Mpazi Sinjela, *Freedom of Transit and the Right of Access for Land-locked States: The Evolution of Principles and Law,* 12 Ga. J. Int'l & Comp. L. 31 (1982); and Faye, *et al., supra* n. 42, at 2.

[45] *See* Makil *supra* n. 44, at 35; *see also* Faye *et al., supra* n. 42.

[46] The doubly landlocked country is Liechtenstein, which is surrounded by landlocked Switzerland and Austria.

social development.[47] Not surprisingly the majority of the LLS have some of the lowest growth rates in the world.[48] Because their productive activities are not sufficiently diversified, their export revenues depend on a limited number of products. Moreover, their lack of direct access to the sea entails additional expenses because of the costs of transporting goods through a transit State, resulting in a less than competitive international trade and causing delays or even interruptions in their development and economic growth. In this context, the 1970 study pointed out that because there was no uniform criterion for evaluating the additional transport costs,[49] comparisons are often based on a hypothetical difference, the term "additional" meaning that the evaluation concerns only the transport costs directly related to the fact that the state in question is deprived of a coastline[50]; the definition thus covers only those expenses relating directly to international exchange.[51]

As world trade continues to increase rapidly, so does the need for economically efficient and environmentally sound national and international transport. With increased competition in major markets forcing businesses to adapt to just-in-time production and management systems, the commercial success of any export-oriented industry in developing countries is bound to depend more and more on its ability to satisfy customer demand for speed, reliability, and flexibility in deliveries of goods: Speed, because the faster transport operations are carried out, the less time products—and therefore capital—are tied up; flexibility, because transport logistics must be able to adapt to variations in consumer demand and unforeseen circumstances; and reliability, because minimizing breakdowns in the supply or distribution of goods reduces the need for buffer stocks.

Transportation, which is critical in all economies, is doubly important in the economy of an LLS, whose foreign trade, and therefore its economic development,

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[47] *Study on the Establishment of a Fund in Favor of the Landlocked Developing Countries: Note by the Secretary General,* UN ESCOR UNCTAD, at 2, UN Doc. E/5501 (May 21, 1974) [hereinafter the UNCTAD Study]. In December 1976, the UN General Assembly adopted the Statute of the Special Fund for Landlocked Developing Countries, prepared by the UNCTAD Secretariat. *See History of UNCTAD, 1964–1984* 217 (United Nations 1985).

[48] *See* the UNCTAD Study, *id.* Generally, growth in the developed LLS is achieved by substituting local production, development of exports, and mobilization of capital for imports of goods and services.

[49] *See id.*

[50] *See id.* at 6.

[51] *See id.* at 6–7. UNCTAD deemed "additional transport costs" to be the costs of exporting and importing products between the boundaries of developing LLS and the sea (transit costs). The definition states precisely what may be included in the term: Excluded from the transport costs are all expenses of transportation (1) within the territory of an LLS, (2) relating to exchanges that do not use maritime ways, (3) encountered in the transit port (because all the coastal states have to bear similar expenses), and (4) from the transport of goods by air; included are charges for entry or exit over boundaries between LLS and transit states.

is contingent on its ability to access the sea. It is no accident that the majority of economically weak LLS are situated in regions that have only rudimentary transport networks. In most cases, their neighbors are also developing states, with similar deficiencies in transportation networks and economic structure. In general, the trade between LLS and their transit neighbors is rarely important because their economies do not complement each other. Rather, both groups often enter into competition with each other for international resources.[52] In the international market the handicap of being without access noticeably hinders the trade of LLS, although this is not easily measurable in economic terms. LLS also are burdened with increased costs arising from the necessity of warehousing stocks, delays in ports, expenditures in the change of routes (often indispensable), and losses on exchange rates when transport costs must be paid in convertible currencies.[53] Clearly, the LLS must depend heavily on the transport policies of transit States. As Jeffrey Sachs said, "A landlocked country is in the distant, distant periphery [of economic development]. Being landlocked is a major barrier to international trade because the costs are simply much higher." Sachs further noted: "Generally, coastal countries don't like to help their landlocked neighbors. The weaker the better is often the reasoning, from a military point of view. So they don't build the roads, they don't give access to the ports."[54]

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[52] Such is not, however, the case for Bhutan and Nepal, both heavily dependent on India, or of Lesotho, which is almost entirely dependent on South Africa.

[53] *See* generally UNCTAD, *Transport Strategy for Landlocked Developing States,* UN TDBOR, at 6, UN Doc. TD/B/453/Add.1, Rev.1 (July 20, 1973). Some economists have noted that the inherent weakness in the negotiating position of LLS is abetted by the fact that the transit partner is often economically dominant. The GNP (gross national product) per capita of both LLS and coastal developing countries varies greatly but on average it is considerably lower on average in the LLS. This imbalance in the level of development could create problems in balancing equitably the interests of LLS and their transit neighbors. *See Landlocked Developing Countries: Their Characteristics and Special Development Problems,* report prepared by David M. Nowlan, UNCTAD/ST/LDC/5 (July 11, 1985) at paragraphs 26–27. Also, though negotiations may be feasible in straight economic terms, there is a further obstacle to achieving a market-like solution to the problem of transit needs: Because the negotiating strength of the two states (LLS and coastal) is often unequal, the provision of transit facilities takes place in a *seller's market,* with the (coastal) seller able to accumulate a disproportionate share of the available net benefits. The fewer transit alternatives there are for an LLS, the weaker its negotiating position. *See id.*

[54] *See* Jeffrey Sachs, *Making Globalization Work* (JAMA Lecture, Elliott School of International Affairs, George Washington University, February 15, 2000), http://www.gwu.edu/~elliott/news/transcripts/sachs.html; *see also* Faye *et al., supra* n. 42, at 45 (noting that landlocked states depend on strong political relations with transit countries. If an LLS and its transit neighbor are in conflict, either military or diplomatic, the neighbor can easily block borders or adopt regulatory impediments to trade. Even when there is no direct conflict, LLS are extremely vulnerable to the political vagaries of their neighbors).

The transit costs are often so high that the export-products of developing LLS cannot compete with products from other developing states in the international market.[55] The UN Economic Commission for Africa (ECA) confirmed this in the early 1960s,[56] and a report prepared by a UNCTAD Expert Group[57] in the early 1970s noted that the average cost of access to the sea would be somewhere between 5 to 10 percent of the value of LLS imports and exports.[58] For the majority of these states, lack of access is exacerbated by the major obstacles encountered by all LDCs: With low revenue and productivity, they have weak institutions and a heavy dependence upon export of a limited variety of products. The result is generally a balance of payments deficit.[59]

Moreover, in many landlocked developing countries (LLDC), notably in Africa, inland transport accounts for more than half the total door-to-door transport time and cost of imports and exports.[60] For example, transporting goods from the port of Mombassa (Kenya) over a distance of 1,700 kilometers to Kigali (Rwanda), can take up to 30 days and costs between US$3,000 to US$4,000 per twenty ton equivalent unit (TEU) or container, yet a container delivered in Mombassa from Europe, more than 7,000 kilometers away, takes about 18 days at a shipping cost of US$1,500.[61]

There is indeed a clear correlation between this lack of direct access to major markets and economic underdevelopment. Countries whose populations are farther than 100 kilometers from the sea grow 0.6 percent slower per year than those in which the entire population is within 100 kilometers of the coast.[62] Recent studies show that shipping goods over one more kilometer of land costs as much as shipping them over seven extra kilometers of sea.[63] Land transportation is

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[55] Developing LLS like Botswana, Swaziland, Uganda, and Zambia that possess raw materials in high demand in the international market are among the few exceptions.

[56] Economic Commission on Africa (ECA), Transit Problems of African Landlocked States, UN Doc. E/CN.14/TRANS/29 (August 24, 1966).

[57] UNCTAD Group of Experts on the Transport Infrastructure for Land-Locked Developing Countries.

[58] *See* UNCTAD, Transport Strategy, *supra* n. 53. Although these documents are outdated, the situation has not substantially improved, and the problem remains serious. Indeed, lack of access to the sea is an obstacle to economic development. It is no coincidence that states without access are the poorest in the group of developing states, with a quasisystematic diminishing growth rate per capita.

[59] *See* generally, UNCTAD Study, *supra* n. 47.

[60] World Trade Organization, G/C/W/230, October 17, 2000, (00–4293), Council for Trade in Goods Original: English Trade Facilitation.

[61] *See id. See also Our Common Interest,* Report of the Commission of Africa 260 (March 2005).

[62] *See* Ndiyaye, *supra* n. 37, at 3.

[63] *See id.*

especially costly for landlocked countries whose products need to cross borders, a much more costly hurdle. As an illustration, studies on trade between U.S. states and Canadian provinces find that simply crossing the U.S.-Canadian border is equivalent to adding from 4,000 to 16,000 kilometers worth of transportation costs.[64] Little wonder, then, that the median LLS pays up to 50 percent more for transportation than the median coastal nation. In practical terms, these differences can be enormous: Shipping a standard container from, for instance, Baltimore to Côte d'Ivoire costs about US$3,000, while sending that same container from Baltimore to the landlocked Central African Republic costs US$13,000.[65]

The highest cost of international trade falls on Africa, which has 15 LLDC. In 1997, while freight costs averaged approximately 4 percent of c.i.f. import values of developed countries and 7.2 percent of c.i.f. import values of developing countries, for West Africa they were about 12.9 percent and for East Africa about 13.8 percent.[66] Within those regions, transport costs for LLS were of course higher than the average. Freight costs for Mali (West Africa), for example, were 29.6 percent and for Malawi (East Africa) 39.4 percent.[67] Excessively high transport costs inflate the consumer prices of imported goods in LLDC and undermine the competitiveness of their exports in foreign markets. They are thus a serious barrier to trade.

These problems, which can be generalized for all LLS except for a few in Europe, determine the posture LLS take in the international arena and explain why, for decades, some have formed a distinct group of nations (a political bloc) within the international system. The grouping was based on the commonality of problems their geographical position engendered in international law and relations and in trade and economic development.[68]

In an article published in 2004, the authors note:

> [I]n 1776, Adam Smith observed that the inland parts of Africa and Asia were the least economically developed areas of the world. Two hundred and twenty-six years later, the human development report 2003 still painted a stark picture for most of the world's landlocked countries. Nine of

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[64] *See id.*

[65] *See id.*

[66] *Statistical Book, African Transport* (2002).

[67] *See id.*

[68] For instance, at the United Nations Conference on the Law of the Sea (UNCLOS), various LLS formed an alliance with geographically disadvantaged counterparts in order to exercise influence over the proceedings of the conference. *See* Stephen Vasciannie, *Resource Entitlement in the Law of the Sea: Some Areas of Continuity and Change* in *The Reality of International Law: Essays in Honour of Ian Brownlie* 562 (Guy S. Goodwin-Gill & Stefan Talmon, eds., Clarendon Press 1999).

> the twelve countries with the lowest human development index scores are landlocked, thirteen landlocked countries are classified as low human development, and not one of the non-European landlocked countries is classified as high human development.[69]

The message deriving from that statement is clear. Developed LLS[70] are mostly to be found in Europe, where they are also surrounded by developed States, so they do not suffer from a lack of infrastructure and means of transport. An important portion of their foreign trade is within their own region. In addition, because Europe is a small continent, the distances to maritime ports are relatively small.

During its Seventh session, the Committee for Planning and Development, a consultative group of 18 independent experts, examined the question of identification of a new juridical category of developing LLS.[71] Using three principal indicators: gross domestic product (GDP) per capita, share of manufacturing industries in GDP, and literacy rate, it decided that countries with a GDP per capita of $100 or less, a share of manufacturing industries in GDP at or below 10 percent, and a literacy rate at or below 20 percent were to be considered LDCs.[72] By these criteria, the Committee concluded, 25 States could be classified as LDCs. Since then the number of LDCs has risen to 50,[73] of which 16 (one-third) are without maritime access.[74]

Overall, the LLS do worse than their maritime neighbors in each of the human development indicators (HDI). The average GDP per capita of LLS is approximately 57 percent that of their maritime neighbors.[75] The richest LLS in the world

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[69] *See* Faye *et al., supra* n. 42, at 32.

[70] The term "developed" as opposed to "developing" State often creates confusion, but no matter how they are defined, in all cases, the differentiation is based on GNP or GNI per capita. The World Bank, for instance, identifies States on the basis of their income: Low-income countries have per capita GNI of $745 or less; middle-income economies have per capita GNI of more than $746 but less than $9,205 (lower-middle-income would be $746–$2,975, and upper-middle-income $2,976–$9,205). Finally, the higher-income economies have per capita GNI of $9,206 or more. Lower-income and middle-income economies are considered developing economies. *See World Development Report* (World Bank 2003).

[71] Committee for Planning and Development Report, E/4990; *see also World Development Report* (World Bank 2004).

[72] *See* Committee for Planning and Development Report, E/4990.

[73] *See Least Developed Countries Report* (United Nations 2004).

[74] *See also* generally G. D. de Lacharriere, *Identifications et statut des pays moins développés* in *Annuaire Français de Droit International (AFDI)* 471 (1971); for a brief discussion on economic implications, *see* T. N. Srinivasan, *The Cost and Benefits of Being a Small, Remote, Island, Landlocked or Ministate Economy,* World Bank Research Observer, 205 (July 1996).

[75] *See* Faye *et al., supra* n. 42, at 33.

is Switzerland, which has a the highest gross national income (GNI) per capita of $38,330.[76] The poorest is Burundi, which has per capita GNI of $100.[77] While the majority of the developing LLS are among the poorest countries in the world, the most vulnerable are those that are least developed.

The LLDCs face additional transport bottlenecks in international trade. The distances from their principal towns to the main ports vary from 670 kilometers to 2,000 kilometers (see table 1.2). The international trade of these countries is dependent on the transit-transport infrastructures and services along the routes through their transit neighbors, over which they have little control. Furthermore, the ability of the transit countries to improve, from their own resources, transit-transport infrastructures and services in the ports and along the transit corridors is very limited because many of them are themselves developing countries. This increases the need for international support for improving the transit-transport systems in these developing countries.[78]

Transport costs (which include storage costs along the transit routes, insurance costs, costs due to extra documentation, and so forth) are in many cases quite significant because the facilities available are inadequate.[79] Because high transportation costs reduce export earnings and increase import costs, LLS must promote cooperative arrangements with their transit neighbors so as to make transit-transportation systems more efficient. The implications of being landlocked are severe because production, input use, consumption, and exportation are greatly influenced by the cost and reliability of transport to and from the outside world. There are indeed some LLS that are not technically LDCs, but their situation is not easy either.[80]

In general, then, the majority of LLS are among the poorest countries of the world. The absence of seacoast and their distance and isolation from international markets aggravate their economic situation and constitute the main reason for their underdevelopment.

The 1974 UNCTAD study concluded that "actual experience proves that the absence of access to the sea constitutes a major obstacle for economic and social development."[81] General growth in the developing LLS, the study found, is based on import substitution by local production and the development

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[76] *Little Data Book* (World Bank 2003).

[77] *See World Development Report* (World Bank 2004).

[78] UNCTAD, *The Least Developed Countries Report* ii (United Nations 1986).

[79] *See id.*

[80] *See* de Lacharriere, *supra* n. 74, at 472; *see also World Development Report* (World Bank 1987).

[81] *See* UNCTAD Study, *supra* n. 47, at 2.

TABLE 1.2
Main Access to the Sea for Least Developed Landlocked Countries
(Rd = road; Rl = rail; W = water)

Country	Distance (in kilometers)*	Means
Afghanistan	2,000–10,600	Rd, Rl
Bhutan	800	Rd, Rl
Burkina Faso	900–1,210	Rd
Burundi	1,455–1,850	Rd, W
Central African Republic	1,400–1,815	Rd, W
Chad	1,715–2,015	Rd, Rl
Ethiopia	781	Rl
Lao People's Democratic Republic	670	Rd, Rl, W
Lesotho	740–800	Rl
Malawi	560–700	Rl
Mali	1,170–1,289	Rd, Rl
Nepal	890	Rd, Rl
Niger	1,100–2,690	Rd, Rl
Rwanda	1,750	Rd, Rl, W
Uganda	1,450	Rd, Rl
Zambia	1,975	Rd, Rl, W

** Distance from principal towns to main ports. The range is for the shortest and the longest routes used. UNCTAD, LDC 1986, Report, UN, TD/B/1120, p. 51.*

Source: Adapted from: A Transport Strategy for Landlocked Developing Countries. Report of the Expert Group on the Transport Infrastructure for Landlocked Developing Countries, *TD/B/453/Add.l/Rev.l (UN Publications, updated by the UNCTAD Secretariat), and* Specific Action Related to the Particular Needs and Problems of Landlocked and Island Developing Countries: Issues and Considerations *(TD/279) (Part I), Annex I.*

of exports or mobilization of capital. Realizing this growth necessitates international transfer services, which often entail higher costs for LLS; without such services the development of the country is delayed, if not completely stopped.

Clearly, it is not just mere fate that developing LLS are the poorest in the group of developing States, with a quasisystematic diminishing growth rate per capita. Although some "privileged" developing LLS like Zambia and Uganda

TABLE 1.3
Intraregional Trade of Landlocked Developing Countries, 1998 and 1999; Proportion of Total Exports and Imports Whose Destinations and Sources Are Within the Same Region or Continent (in Percentages)

	Exports		Imports	
Country	**1998–1999**		**1998–1999**	
Afghanistan	36.0	54.9	56.1	55.8
Armenia	33.8	24.5	26.1	25.5
Bolivia	44.4	37.7	35.1	46.4
Burkina Faso	8.4	13.8	27.7	30.6
Burundi	2.8	2.0	17.6	19.7
Central African Republic	2.3	2.0	7.2	17.9
Chad	5.1	6.0	31.8	4.3
Ethiopia	9.2	14.5	2.7	2.4
Kyrgyz Republic	33.0	34.0	44.1	41.4
Lao People's Democratic Republic	5.8	21.5	84.9	86.9
Macedonia, Former Yugoslav Republic	8.8	8.6	11.5	12.7
Malawi	9.3	5.4	21.6	21.7
Mali	8.4	8.1	23.9	24.2
Mongolia	40.9	53.9	27.1	35.9
Nepal	36.5	31.4	79.4	73.7
Niger	31.9	32.8	28.3	33.2
Paraguay	63.6	65.9	52.4	54.6
Rwanda	2.2	4.1	24.2	24.9
Tajikistan	30.0	32.2	48.3	60.8
Uganda	2.3	8.6	38.5	41.5
Zambia	13.2	14.4	17.2	12.5
Zimbabwe	21.7	18.2	5.6	5.7

Source: IMF, Direction of Trade Statistics *(April 2001).*

Note: Data not available for Bhutan, Botswana, Lesotho, and Swaziland.

do possess raw materials for which there is high demand in the international market,[82] the relatively well-off developing LLS are so small a minority as to be negligible.

1.5 Thematic Concerns and Scope

Discussion of littoral States implies talking about the seas. Feared and loved, often deified, from time immemorial the sea has been part of man's consciousness. Over the millennia of man's use and abuse of the oceans and their resources, regulation became inevitable at the level of first the group or community, later the city, nation, and state, and finally, the world.[83] The sea has also been, time and again, considered a power base for nations, continents, and empires of old, the energy store of emergent and prospective world powers. With its vast lengths, limitless resources, and hidden secrets, it constitutes a reservoir and testimony of the sheer power that nature wields. It is this power that many a nation-state is blessed by, and enamored with, by sheer accident of geography. It is this power that defines the concept of a littoral State.

Because two-thirds of the earth's surface is water,[84] water is the most extensive mode of transport available. It is also the cheapest. For the 38 nations of the world that are landlocked, the littoral States are an invaluable link in the transportation chain. The littoral States therefore have the advantage of being able to exploit the opportunities of their positioning for economic gain and political leverage. The extent to which they have, or have not, done so is another matter—but it is hardly surprising that the world's major powers are littoral States.

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[82] Swaziland and Botswana are also exceptions: Botswana benefits enormously from its diamond trade, which utilizes air transport, thus overcoming the burdens of being landlocked, and Swaziland benefits from its close location to ports in both Mozambique and South Africa.

[83] *See* M. C. W. Pinto, *Emerging Concepts of the Law of the Sea: Some Social and Cultural Impacts,* in *Research, International Law and the Sea in Man's Future,* 33 IMPACT 335, at 336 (UNESCO 1983); *see also* Pierre Renouvin & Jean-Baptiste Duroselle, *Introduction to the History of International Relations* 11–15 (Praeger 1967), and James C. F. Wang, *Handbook on Ocean Politics & Law* 1–5 (Greenwood Press 1997).

[84] Indeed, about 70 percent of the earth is covered with water, 97 percent of it being salty oceans. Thus only a small portion of the earth's water is fresh water in rivers, lakes, and the ground (*see* http://www.windows.ucar.edu/tour/link=/earth/Water/overview.html, visited February 8, 2005); *see* also C. K. Chaturvedi, *Legal Control of Marine Pollution* 3 (Deep & Deep Publications 1981). Today more than 75 percent of the world's trade volume moves across the oceans; almost every product in the market has been transported by sea at some stage between its raw material source and final sale. Industrialized and developing countries alike depend on maritime transport for economic development. *See* Hans J. Peters, *The Maritime Transport Crisis,* World Bank Discussion Papers No. 220, v (World Bank 1993).

Traditionally, LLS have had to fight for the right of free access to the sea in order to participate in international trade. To that end, many multilateral and bilateral agreements have been signed guaranteeing the right of transit of LLS through neighboring territories. This has meant a change in the traditional role of the law of the sea, a *fait accompli* confirmed by R. J. Dupuy, who noted that "the classical law of the sea had only one basic dimension—the right of navigation on the surface—and it hardly knew the sub-marine milieu."[85] Indeed, today the "submarine milieu" has real bearing on LLS demands on maritime spaces.

Certainly, the oceans constituted, for classical jurists, the preferential support of *jus communicationis*.[86] But rapid technological development provoked a diversification of utilization of maritime spaces: Seas constitute not only a "means of communication" but also a source of food and an ample treasure of unexploited resources.[87] Humanity turns toward the sea for subsistence as our needs in food, fuel, and other resources intensify. As the utility of the sea has varied, its role also has evolved: from medium for communications to reservoir of wealth.[88] Dupuy justly emphasized that the biological resources presented the first aspect of the reservoir of wealth, but the most complete expression of this reality has been noticed only recently, with the exploitation of the mineral resources of the seabed.[89] Indeed, man now has a whole new relationship with the sea and its valuable resources.[90]

The growing exploitation of marine resources and the extension of demands of LLS upon marine spaces render coexistence between these two aspects more and more difficult. Free access to the sea, based on the freedom of sea passage,

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[85] René-Jean Dupuy, *Les contradictions du droit de la mer,* Revue Française de l'énergie 187 (1973); *see also* René-Jean Dupuy, *The Law of the Sea: Current Problems* 6 (Oceana Publications 1974).

[86] René-Jean Dupuy & A. Piquemal, *Les appropriations nationales des espaces maritimes,* Colloquium Montpellier, 113 (Pedone 1972); Mpazi Sinjela, *supra* n. 44, at 31; and Helmut Tuerk & Gerhard Hafner, *The Landlocked Countries and the United Nations Convention on the Law of the Sea,* in *Law of the Sea* 58 (Hugo Caminos ed., Ashgate 2001).

[87] *See* generally Eugen Seibold, *Marine Science at the Dawn of the Year 2000* in *Research, International Law and the Sea in Man's Future,* IMPACT, vol. XXXIII, No. 3/4, 255, 276 (UNESCO 1983); *see also* T. V. R. Pillay, *Return to the Sea—Not as Hunter but as Farmer* in *id.,* at 445.

[88] *See* Dupuy & Piquemal, *supra* n. 86, at 13; *see also* Harold K. Jacobson, *Network of Interdependence: International Organizations and Global Political System* 241 (2d ed., Knopf 1984).

[89] *See id.*

[90] *See* M. L. Sarin, *The Asian-African States and the Development of International Law,* in *The Future of International Law in a Multicultural World* 130 (René-Jean Dupuy, ed., Martinus Nijhoff Publishers 1983).

for many years constituted the principal claim of LLS. Today, in addition to the question of transit (support to communication), another problem preoccupies them: participation in and access to the resources of the sea on the same terms as coastal States (economic entitlement). However, the economic entitlement issue must be left to another study.

Certainly, though the transit problem has long been solved for European LLS, considerable problems remain for developing LLS in Africa, Asia, and Latin America. The urgency of solving the problem perhaps explains the selflessness of the developed LLS regarding the transit problems of developing LLS. Because historically the most important question for LLS has been freedom of access to the sea, their most important demand has always been recognition by the international community that law supporting the right of access is fundamental. This explains why their effort has been to obtain a universal treaty-regime on this matter.

Indeed, it is up to public international law, especially the law of the sea, to correct inequalities by establishing a specific legal regime based on equity and justice.[91] With that spirit in mind, and against the background of the numerous complex problems encountered by LLS in their quest to improve their status, a prime consideration in writing this book has been to review briefly the pattern of evolution, the solidarity, and the strategy of LLS to meet their transit objectives. Its purpose is to assess the strengths and limits of international law regarding the access of LLS to the sea. In particular, it attempts to determine whether international law as it stands satisfies the legitimate economic requirements of LLS. In this process, in parallel with discussing principles of international law that dominated the evolution of the rights of access to and from the sea, the book also reviews both general and specific conventions, along with restrictions on access to and from the sea, some of which are often challenged by LLS. The book highlights legal provisions relevant for LLS and critically analyzes the merits and demerits of the treaty regime from the perspective of LLS. In appreciation of the continual evolution of international law, this book also comments briefly on current initiatives and developments in international arenas and tries to simplify both the theoretical and the practical problems LLS face. How these developments lead to different legal instruments with normative value underscores both the evolutionary nature of international law and the perennial efforts associated with its evolution.

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[91] The law of the sea has often shown regard to geographical circumstances, treating them as legal factors—"*ratione materiae*." In the Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (the *Gulf of Maine Case* (*Canada v. USA*)), for instance, the Court noted: "Just as the criteria to which they must give effect are basically founded upon geography, the practical methods in question can likewise only be methods appropriate for use against a background of geography." *See* the *Gulf of Maine Case* (1984) (*Canada v. USA*), ICJ, Rep. 329 paragraph 199.

PART TWO

Theoretical Bases

CHAPTER TWO

Principles, Doctrines, and Theories Influencing the Right of Access to the Sea

Public international law is an evolving and dynamic, not a static, institution. The growing participation of developing countries in international activities further underscores its conflicting yet malleable nature. Whenever more or less coherent solutions are proposed to a particular problem, new questions arise, along with economic, political, and sociological data that complicate the discussions and keep the questions unresolved by positive law.[92]

Since the evolution of international law relating to access to and from the sea is based on a variety of concepts and practices, there exists a great disparity of doctrinal sources, and there has been much theoretical controversy over the nature and basis of international law as it applies to LLS. Simply put, however, the problem of free access to the sea rests at the juncture of two principles of law: sovereignty of a State and freedom of communication among people. Several interesting theories derived therefrom, all rooted in international law, provide the basis for laws relating to LLS. Before analyzing the positive law, therefore, a brief discussion of the doctrines seems appropriate.

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[92] In concurrence with this, Charles Rousseau noted that international rules need to be regularly reexamined: "En droit international comme dans toute autre discipline juridique des problèmes que l'on qualifie habituellement de classiques ont besoin d'être soumis à des réexamens périodiques." *See* Ruth Lapidoth, *Les Détroits en Droit International* 7 (Pedone 1972). Along the same lines, J.L. Brierly noted that international law was neither a myth on the one hand nor a panacea on the other but just one institution among others that we can use in building a better international order. *See* J. L. Brierly, *The Law of Nations,* v (Sir. Humphrey Waldock, ed., 6th ed., Oxford University Press 1963). Consistent with this view, therefore, to serve this purpose international law must be continuously developed by revision in content, expansion in scope, and improvement of the means of securing compliance, so that it is kept in accord with the changing needs of the international community. In times of rapid political, economic, and technological change, the development of law, both within and among states, tends to lag behind, its content becomes unstable and uncertain, and its effectiveness is minimized. *See International Law in a Changing World: Cases Documents and Readings* 424 (Edward Collins Jr., ed., Random House 1970). *See* generally Kishor Uprety, *Landlocked States and Access to the Sea: An Evolutionary Study of a Contested Right,* 12(3) Dick. J. Int'l. L. (1994); and Kishor Uprety, *Right of Access to the Sea of Land-Locked States: Retrospect and Prospect for Development,* 1 J. Int'l Legal Stud. 21 (1995).

2.1 Theory Based on the Freedom of Transit

The right of communication involves more than a right of entry and sojourn in a given state. Worldwide commerce also requires the transit of goods through states. The eminent French jurist P. Reuter noted that the problem of transit specifically concerns communication by land, mainly for countries that are geographically disadvantaged by lack of all or certain types of access to the sea.[93] The ECA emphasized that the problem of free access to the sea of countries deprived of coast was one of the aspects of important problems concerning freedom of transit which relate to the fundamental economic interests and comprise the juridical guarantees for the countries concerned.[94]

Views and opinions are divided about whether there is a general duty on the part of States to grant the right of transit through their national territory to neighboring States that suffer from an unfavorable geographic position. Those rejecting this idea defend their theory with the argument that freedom of transit is subordinated to the fundamental principle of State sovereignty. Transit cannot violate the sovereignty of the coastal State. According to them, the exercise of the transit right is subject to approval of the coastal State, which has sole authority to grant passage.

Leading international lawyers like McNair and Hyde believe that the transit right of LLS is not a principle recognized by international law but rather a right governed by agreements concluded with coastal States. This thesis, also defended by a number of transit States, argues that the transit right lies on the consent of the transit State. In an international conference in the 1950s, the Pakistani delegate declared that a State had no obligation at all to grant to others the privilege of transit upon its territory.[95]

Another school of thought suggests that the theory of the economic interdependence of States offers an important juridical basis for recognizing transit rights. The proponents of this theory argue that placing transit rights arbitrarily within the sovereignty of a State, allowing that State to block the passage of goods, is restricted by treaties in such a way that absolute denial of such rights seems obsolete. Jurists over the past six decades have definitely favored the view that States whose economic life and development depend on

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[93] *See* generally Reuter, *supra* n. 3, at 333; *see also* Ignaz Seidl-Hohenvelden, *International Economic Law* 107 (3d ed., Kluwer Law International 1999).

[94] Economic Commission for Africa, UN Doc. A/CN 14/Trans/28, at 3.

[95] *See* Declaration of the Delegate of Pakistan, in *Acts of the United Nations Conference on the Law of the Sea* (A/CONF 13/43, 1958).

transit can legitimately claim it. Such dependence is most evident in the case of LLS.[96]

Lauterpacht, too, confirmed that certain states may legitimately claim "the right of transit" when there exist two fundamental conditions. First, the State claiming the right of transit must be capable of proving the merits and necessity of the right. Second, the exercise of the right must not cause disturbance or prejudice to the transit State. Lauterpacht concludes that the Covenant of the League of Nations, the Barcelona Convention, and similar instruments recognize the principle of free transit. They require transit States "to negotiate and conclude, on reasonable bases, transit agreements."[97]

For Charles de Visscher, freedom of transit implies that a means of transport that is obliged to use foreign territory to traverse the distance separating its departure point from its destination should not encounter, within this obligatory crossing of an intermediary State, any obstacle, charge, or difficulty that would have been avoided if the travel were completed entirely within the same State.[98]

Freedom of transit through the territory of a "neighbor-State" may represent an advantage of convenience for a coastal State, but for the LLS it is a question not of convenience but of survival. Therefore, the LLS can legitimately demonstrate necessity and oblige the transit State to conclude an agreement.[99]

In light of the above, it may be argued that under certain conditions, the grant of transit freedom for LLS is an obligation of the State of passage, independent of all international agreements. Freedom of transit is thus not a "right" that any State can exercise in other transit States without their consent. To be eligible to claim this right, the demanding State must fulfill certain eligibility criteria. The criteria are considered fulfilled for LLS specifically due to their geographical position and economic dependence, which together create a presumption in their favor of a right of transit.

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[96] Daniel Patrick O'Connell, 1 *International Law* 613–15 (Oceania Publications, Inc. 1965).

[97] E. Lauterpacht, *Freedom of Transit in International Law,* 44 *Transactions of the Grotius Society* 332 (1958–59).

[98] C. de Visscher, *Droit International de Communications,* 11 Cours á l'Institut des Hautes Etudes Internationales de Paris (1921–1923) (Buyens and Rousseau 1924).

[99] This is the basis on which Nepal had asked India to conclude a transit agreement after the Treaty of 1960 expired. *See* Amrit Sarup, *Transit Trade of Land-Locked Nepal,* 2 Int'l & Comp. L. Q. 287 (1972).

2.2 Free Access and the Principle of Freedom of the Seas

A leading French authority on international law, George Scelles, wrote that the essential juridical norm related to freedom of the high seas is the principle of freedom of utilization—utilization comprising not only navigation and trade but also such accessory utilities as fishing, laying cables, and scientific research. Consequently, this view opposes the idea that a government should insist on reserving to itself the exclusive use of all or part of the ocean, or tolerate freedom of the seas only under certain conditions.[100] For Scelles, "the high sea—a public international domain—comes only under the jurisdiction of international law. The sea—*res communis*—is for the common use of all navigators of the international community. One of the consequences is that it is accessible for navigation, even for nationals of an enclave State."[101]

The legitimacy of the right of LLS to free access to the sea was also emphasized by M. Sibert, for whom the high seas are a property the use of which is common to all. The right to freely navigate must belong to all members of the international community, including those without a seacoast.[102] Later Pounds, affirming that access to the sea derives from the principle of freedom of the seas, noted: "If the ocean is open freely for all humanity (*res communis*), it is reasonable to suppose that each will have access to the shore of the ocean and the right to navigate and discharge the goods on all navigable rivers, since they are only but natural prolongation of the free high sea."[103]

Charles Cheney Hyde seems to share this view, but with a slight variation. For him, the principle of the international society calling for the territory of each of its members to be linked to the sea is sufficiently general to be applied to all relevant means of communication; it is in fact valid for overland transit modes as well as transit by water.[104] Recognizing as a parallel the validity of free access to the sea, Hyde believes that the principle derives not from general international law but from treaties.

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[100] *See* George Scelles, *Manuel de Droit International Public* 382 (Domat-Montchretien 1964).

[101] *See id*.

[102] M. Sibert, *Traité de Droit International Public,* vol. 1, 660 (Dalloz 1956).

[103] Norman J.G. Pounds, *A Free and Secure Access to the Sea,* 49 Annals Assoc. Amer. Geographers 257 (1959); *see also* Sinjela, *supra* n. 44, at 32.

[104] C. Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* vol. 1, 618 (Little Brown & Company 1945).

M. Thierry, representative of France to the International Conference on the Law of the Sea (1958), emphasized that LLS have, in accordance with the principle of equality of States, the same rights as others with regard to the use of the maritime public domain.[105]

A. H. Tabibi, member of the International Law Commission, emphasized a strict correlation between the rights of innocent passage on land and by sea, stating that "recognizing the right of innocent passage in favor of LLS is the only means to render the principle of the freedom of the seas effective for them."[106] Tabibi suggested extending the right to innocent passage on the territory of coastal States as a logical consequence of the principles of the freedom of seas and the equality of States. He quoted a number of texts to support this view but gave special emphasis to the doctrinal authority of Grotius, who he believed had already envisaged extension of the right of innocent passage in connection with the relations between neighboring properties based on the doctrine of necessity.[107] Tabibi concluded that, for LLS, the right of innocent passage on the sea and in the air is inviolable, and without it the principle of freedom of the sea would lose all significance.

To sum up, the high seas, as a public international domain, must be accessible to all. It is thus possible to conclude that the principle of free access to the sea derives from the principle of the freedom of the high seas. Without the right of access to the seas, freedom of the sea would be deprived of its universality. If the right of access of LLS were not initially guaranteed for them, freedom of the high seas would simply be meaningless.

2.3 Right of Access as an International Servitude

An international servitude is a right, based on an agreement between two or more States, by which the territory of one State is subjected to the permanent use of another State for a specified goal.[108] The servitude may be permissive or restrictive, but it does not entail a positive obligation to do something.[109] It simply

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[105] *See* discussion in the 1958 Convention Proceedings in Act of UNCLOS, *supra* n. 95.

[106] A. H. Tabibi, *Free Access to the Sea for Countries Without Sea-Coast: Position of Afghanistan on this Question* (Publisher unknown 1958).

[107] In addition to the Grotius doctrine on *mare liberum,* Tabibi quoted League of Nations Covenant art. 23(e); the Barcelona Convention, 7 U.N.T.S., at 35; G.A. Res. 1028, UN GAOR (11th Session, February 20, 1957); Chicago Convention of 1944, art. 5; and Final Act of the Convention of 1958 on Territorial Sea.

[108] *See* generally J. G. Starke, *Introduction to International Law* 239 (7th ed., Butterworths 1972).

[109] *See* Black's Law Dictionary.

establishes a permanent and legal relation between territories that cannot be affected by a change of sovereignty in one or the other territory. It can be terminated only by mutual agreement, by renunciation by the dominating State, or by consolidation of the affected territories under a single sovereign.[110]

Oppenheim defines servitude as "those exceptional restrictions made by treaty on the territorial supremacy of a State by which a part or the whole of its territory is in a limited way made perpetually to serve a certain purpose or interest of another State."[111] Similarly, an international servitude is a limitation on the internal or external sovereignty of a State, which is obliged, on behalf of another country, to accept an activity other than what it would normally carry out or halt something it would normally do. Most servitudes originate by convention, although some—for instance, emphasizing that a State must abstain from taking any measures likely to modify the natural course of a waterway that passes through several States—derive authority from general international law.

In view of the above characteristics, the theory of international servitude has been promoted by some scholars as a solution to the problem of LLS access to the sea. This view is controversial because it suggests that international law grants to LLS absolute passage over territories separating them from the sea, an argument that is difficult to reconcile with the notion of state sovereignty. Nonetheless, according to Labrousse, the doctrine of servitude should be extended to grant a permanent outlet to LLS, independent of any specific treaty or agreement. Labrousse emphasized that it would be useful to lay down the principle that any State that does not have any frontier contiguous to the ocean may obtain, *stricto jure* as an enclave State, access to the sea by establishing in its favor a servitude of passage, grafting its right onto the nation whose territory forms an obstacle to access.[112]

H. Dwight Reid notes that, with regard to overland transit, almost all requests for servitudes of passage are granted by agreements. Treaties would thus afford sufficient access if the provisions instituted for the benefit of the contracting State were only considered. But in practice, the provisions of such agreements are

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[110] H. Dwight Reid, *Les Servitudes Internationales,* in *Académie de Droit International, Recueil des Cours* vol. 45 (1933–III), 15 (Martinus Nijhoff Publishers 1933); *see also* Charles G. Fenwick, *International Law* 458–59 (Vakils, Feffer & Simons 1965). Although there may be doubt about whether servitude constitutes a distinct legal category in international law, there are examples of situations in municipal law that involve what would be termed servitude.

[111] *See Oppenheim's International Law,* vol. I, 670–71 (R. Jennings & A. Watts, eds., 9th ed., Longmans 1992). A corollary to this in domestic law is the easement of access, which is the "right of ingress and egress to and from the premises of a lot owner to a street appurtenant to the land of the lot owner." *See* Black's Law Dictionary.

[112] Pierre Labrousse, *Des Servitudes en Droit International* 316 (Publisher unknown 1911).

generalized either by the most favored nation (MFN) clause or by restricted usage. Such undefined privileges would be considered sufficient when the transit right is not essential, but the situation of LLS requires that the servitude be clearly established so as to guarantee that the right is permanent.[113] Nevertheless, many scholars share the view that the necessity creates a servitude of passage. Scelles considers free access to the sea to be a servitude of public law.[114] In municipal law, enclave properties legally have access to the means of communication.

Hence, according to this theory, because of its geographical position, a LLS must be considered a "dominant State" and the transit State a "servient State." The right of transit that would thus belong to the dominant State may be imposed on the servient State. This theory is advantageous for LLS because it grants them the right of passage throughout the territory of the coastal State independent of bilateral agreement. Unfortunately, in practice such a right has never been recognized by States, which always have required a specific agreement; consequently, the LLS are subject to the benevolence of neighboring States.

As already mentioned, the notion of international servitude is much contested. The Permanent Court of International Justice (PCIJ) in the Wimbledon case abstained from taking the part of either the party arguing for or that arguing against servitude. "The court is not called upon to take a definite attitude with regard to the question, which is moreover of a controversial nature, whether in the domain of international law, there really exist servitudes analogous to the servitudes of private law."[115] However, in the Right of Passage case,[116] the International Court of Justice (ICJ) concluded that, with regard to private persons, civil

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[113] *See* Dwight Reid, *supra* n. 110, at 51.

[114] *See* generally George Scelles, *Précis de Droit des Gens (Principes et Systématiques)* (Sirey 1932–1934; reprint: CNRS 1984); *see also* Scelles, *supra* n.100.

[115] SS Wimbledon Case (*France v. Germany*), 1923 P.C.I.J. (ser. A) No. 1, at 24.

[116] The Right of Passage over Indian Territory Case (*Portugal v. India*) 1957–1960 I.C.J. 266. The Portuguese Government had asked the ICJ to declare (1) that Portugal was the holder or beneficiary of a right of passage between its territory of Damâo (littoral Damâo) and its enclaves of Dadra and Nagar-Aveli and between the latter, and (2) that this right comprised the faculty of transit for persons and goods, including armed forces, without restrictions or difficulties and in the manner and to the extent required by the effective exercise of Portuguese sovereignty in the territories. Portugal argued that India had prevented and continued to prevent the exercise of this right, thus committing an offence to the detriment of Portuguese sovereignty over the enclaves and violating India's international obligations. It asked the Court to adjudge that India should put an immediate end to this situation by allowing Portugal to exercise the right of passage claimed. For the facts, *see* 24 ILR 840–870; for the merits, *see* 31 ILR 23–121; *see also* Shabtai Rosenne, *The World Court: What It Is and How It Works* 114–35 (Martinus Nijhoff Publishers 1995).

officials, and goods in general, there existed a practice allowing free passage between the enclaves and the littoral.[117]

Some scholars, refusing to recognize the notion of servitude, argue that there is no servitude of public law; its existence is impossible to be proven in international law. It is contrary to the requirements of the State. The theory has not provided an acceptable formula; it is absolutely superfluous.[118] For Glassner, the

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[117] India had contended that the right of passage claimed by Portugal was too vague and contradictory to enable the Court to pass judgment upon it. There was no doubt that the day-to-day exercise of the right might give rise to delicate questions of application but that was not, in the view of the Court, sufficient ground for holding that the right was not susceptible of judicial determination.

Portugal had relied on the Treaty of Poona of 1779 and on decrees issued by the Maratha ruler in 1783 and 1785 as having conferred on Portugal sovereignty over the enclaves with the right of passage to them; India had objected that what was alleged to be the Treaty of 1779 was not valid and never became in law a treaty binding upon the Marathas. The Court found that the Marathas had not at any time cast any doubt upon the validity or binding character of the treaty.

India had further contended that the treaty and the two decrees did not operate to transfer sovereignty over the assigned villages to Portugal but only conferred, with respect to the villages, a revenue grant. The Court was unable to conclude from an examination of the various texts of the Treaty of 1779 that the language employed therein was intended to transfer sovereignty; the expressions used in the two decrees, it said, established that what was granted to the Portuguese was only a revenue tenure, called a *jagir* or *saranjam,* and not a single instance had been brought to the notice of the Court in which such a grant had been construed as amounting to a cession of sovereignty. There could, therefore, be no question of any enclave or of any right of passage for the purpose of exercising sovereignty over enclaves.

The Court found, however, that the situation underwent a change when the British replaced the Marathas as sovereign of that part of the country: Portuguese sovereignty over the villages had been recognized by the British in fact and by implication and had subsequently been tacitly recognized by India. As a consequence, the villages had acquired the character of Portuguese enclaves within Indian territory and there had developed between the Portuguese and the territorial sovereign with regard to passage to the enclaves a practice upon which Portugal relied for the purpose of establishing the right of passage it claimed. India had objected that no local custom could be established between only two States, but the Court found it difficult to see why the number of States between which a local custom might be established on the basis of long practice must necessarily be larger than two.

The parties agreed that during the British and post-British periods the passage of private persons and civil officials had not been subject to any restrictions beyond routine control. Merchandise other than arms and ammunition had also passed freely, subject only, at certain times, to customs regulations and such regulation and control as were necessitated by considerations of security or revenue. The Court therefore concluded that, with regard to private persons, civil officials, and goods in general, there had existed a constant and uniform practice allowing free passage between Damão and the enclaves and that it was, in view of all the circumstances of the case, satisfied that that practice had been accepted as law by the parties and had given rise to a right and a correlative obligation.

[118] *See* generally G. Crusen, *Les servitudes internationales,* in *Académie de Droit International, Recueil des Cours* vol. 22 (1928–II) (Martinus Nijhoff Publishers 1928). Fenwick distinguishes positive servitudes from negative servitudes. *See* Fenwick, *supra* n. 110, 478–481.

concept of the right of access being based on servitude has no solid foundation in public law and actually is totally obsolete.[119]

Also, in this context, it is worth noting that an analogy has been drawn between the right of passage that the LLS enjoys on the territory of a transit State and the right of innocent passage on territorial seas. In some sense, the right of passage over the territory would be considered an extension of the right of maritime passage.[120] However, the analogy is not fully satisfactory because the rights claimed by the LLS are much more extended than those recognized traditionally on territorial seas.[121] This interpretation has been called "extreme" by some scholars.[122]

To sum up, the notion of servitude in international law is controversial. Today it does not have the same importance that it did in the beginning of the twentieth century. Nevertheless, it is not yet completely redundant.

2.4 Right Compensating for Geographical Inequalities

Unlike the doctrines already discussed, which emphasize considerations of "pure law," modern doctrines have taken less determinate, though more adaptable, approaches. They emphasize the economic repercussions resulting

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[119] *See* Glassner, *supra* n. 1, at 16.

[120] *See* Tavernier, *supra* n. 15, at 735.

[121] *See id*. This approach should be viewed in connection with the "land-mass theory," which regards the continental shelf as an extension of the land mass of the coastal nation. This argument may be made by littoral states to justify their exclusive control of their rights to continental shelf resources. But the LLS view it differently. For them, if the matter were to be examined purely in terms of geography, could it not be argued that the continental shelf off the coast of Mozambique is as much an extension of landlocked Malawi, Zambia, and Zimbabwe or the coast of India as the extension of landlocked Bhutan or Nepal? In fact, this argument formed the basis of the position advanced by several LLS as a group on the question of continental shelf entitlement at UNCLOSIII. *See* generally for this discussion Vasciannie, *supra* n. 68, at 546–547.

Also it should be recalled that in the North Sea Continental Shelf Cases (*Federal Republic of Germany v. Denmark/Netherlands*), 1969 I.C.J. 3 the ICJ emphasized the link between coastal areas and continental shelf rights. In the view of the majority, the most fundamental rule concerning the continental shelf was that coastal state rights over areas that constitute a natural prolongation of the land territory exist *ipso facto* and *ab initio,* by virtue of their sovereignty over the land and as an extension of it, and apply to an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources (1969 I.C.J. Rep. 3, 22). The ICJ further emphasized that shelf rights were exclusive to the coastal state; using the language of Article 2 of the Geneva Convention, it underlined the fact that coastal state entitlement is not a function of the capacity of any individual coastal state to exploit its shelf resources (1969 I.C.J. Rep. 3, 22). Clearly, the ICJ ruling altogether foreclosed the possibility for LLS claims to shelf entitlement.

[122] *See,* for instance, Milenko Milic, *Access of Landlocked States to and from the Sea,* 13 Case W. Res. J. Int'l L. 503 (1981); *see also* Sinjela, *supra* n. 44, at 34.

from the particular geographical position of LLS and try to bring about juridical solutions.

Professor R. J. Dupuy considered the law of the sea a "situationalist" law, the primary aim of which is to resolve particular cases and problems specific to a single State.[123] Though it is a universal law because it applies to all countries, it cannot be generalized because each case is governed and regulated separately.

In the period following World War II this concept made progress. According to its Charter, the UN is bound "with a view to the creation of conditions of stability and well-being, which are necessary for peaceful and friendly relations among nations" to promote the conditions for economic progress and the solutions to international problems.[124]

Resolution 1028 (XI) of the General Assembly concerning LLS and the expansion of international trade took the same direction. This resolution invites member States to recognize fully, in the area of transit trade, the needs of member States without access to the sea and to grant them proper facilities in law and in practice, taking into account future needs resulting from the economic development of LLS.

The first among the eight principles adopted by UNCTAD (considered later in the Preamble of the New York Convention) is more precise. It proclaims "the recognition of right to every LLS to free access to the sea constitutes a principle indispensable for the expansion of international trade and economic development."[125]

These provisions affect all LLS, developed and developing, but particular attention is paid in other resolutions to developing LLS. For instance, the basic spirit of the Charter of Economic Rights and Duties of States[126] is "the expansion of international trade for the interest of all nations and with due respect to the differences between the economic and social systems."[127] It defines conditions permitting a more advanced expansion of trade and the reinforcement of the economic independence of developing States. According to Guy Feuer, the general idea of the Charter, based on Articles 14 and 21, is that all States must cooperate with a view to eliminating obstacles to trade and must resolve in an equitable manner the trade problems of all States, particularly the developing ones.[128]

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[123] *See* René-Jean Dupuy, *The Law of the Sea: Current Problems* (Oceana Publications 1974).

[124] UN Charter, art. 55.

[125] *See infra* n. 225.

[126] *See* G.A.Res. 3281, XXIX (Charter of Rights and Duties of States), UN G.A.O.R., 2315th plenary meeting (1974).

[127] *See* G. Feuer, *Réflexions sur la charte des droits et devoirs économiques des Etats* in 79 Revue Générale de Droit International Public (RGDIP) 286 (1975).

[128] *See id*. at 295.

For LLS to benefit from these measures, they must have access to the sea without hindrance. The Charter refers specifically to LLS, stipulating that

> in furtherance of world economic development, the international community, especially its developed members, shall pay special attention to the particular needs and problems of the least developed among the developing countries, of land-locked developing countries . . . with a view to helping them to overcome their particular difficulties and thus contribute to their economic and social development.[129]

Several other international resolutions also take the particular economic and geographical positions of LLS into consideration and grant them an objectively preferential status, making their right of access to the sea a right compensating for their geographical inequality that is granted to reduce, if not eliminate, obstacles to their trade and development.

2.5 Freedom of River Navigation

With regard to the theories on river navigation, on the one hand some broad agreements, without dealing exclusively with the specific problems of LLS, do make provision for them; on the other hand some agreements deal specifically and almost exclusively with the problems of these countries. In general conventions, the right of access to the sea is envisaged within a broader framework, such as the right of river navigation, freedom of transit, or more generally regulation of the high seas.[130]

Although the law of rivers (fluvial law) was never originally intended to solve the problems of access to the sea for LLS *per se,* it was the first international attempt to deal with the question of access to the sea. According to de Visscher, the principle of right of access to the sea visibly inspired all the international acts that are critical to the modern law of rivers.[131] He describes the legal regime of international rivers as "the nucleus around which the modern law of communication was gradually constituted."[132]

At the outset, the law of rivers was inspired by the concept of "universalism." After the Vienna Congress,[133] the "particularism" of riparian States began to

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[129] UN Charter, art. 25.

[130] *See infra* chapter 3, "Evolution of International Law."

[131] *See* de Visscher, *supra* n. 98, at 9.

[132] *See id*. at 7.

[133] Held from September 1814 to June 1815, this was one of the most important international conferences in European history: It was called to remake Europe after the downfall of Napoleon I. It ended on June 9, 1815, with the signing of the Act of the Congress of Vienna. For the text of the Act, *see Fontes Historiae Iuris Gentium, Quellen zur Geschichte des Völkerrecht* vol. 3, 3–10 (Wilhelm G. Grewe, ed., W. de Gruyter 1992).

triumph, though the objective remained free access to the sea for upstream territories. The law of rivers continued its growth with the institution of central organizations to monitor application of treaties and ensure the exercise of freedom of navigation.[134]

From the Middle Ages until the end of the eighteenth century, navigation of rivers was under the jurisdiction of sovereigns.[135] Each local sovereign considered himself absolute master of the portion of the river passing through his territory; he reserved for his own subjects the exclusive privilege of navigation.[136]

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[134] It may be useful to clarify the term "international river." An international river basically is one that traverses the territories of two or more States, but the term is used to mean rivers that geographically and economically affect the territory and interests of those States. A treaty concerning an international river might relate to any of several questions: the extent to which an upper riparian State is restricted from using the waters in ways that would affect adversely the lower riparian State; allocation of fishing rights; or the right of navigation for a lower riparian State over an international river giving access to the sea. This last is a typical example of an international servitude involving an international river. *See,* for detail, Yimer Fisseha, *State Succession and the Legal Status of International Rivers,* in *The Legal Regime of International Rivers and Lakes* 185 (Ralph Zacklin & Lucius Caflisch, eds., Martinus Nijhoff Publishers 1981). For discussions of the several principles related to the law of rivers, *see* generally Stephen C. McCaffrey, *The Law of International Watercourses: Non-Navigational Uses* (Oxford University Press 2001).

[135] *See* McCaffrey, *id*.

[136] The evolution of principles and rules applying to LLS, particularly the navigational aspects, have a subtle parallel with the evolution of general principles applicable to rivers, whether for navigational or nonnavigational purposes. Toward the end of the nineteenth century and the beginning of the twentieth, there emerged four varying, and to some extent conflicting, principles for addressing the rights and obligations of riparian States over international rivers. The first principle, absolute territorial sovereignty (also known as the Harmon Doctrine), has been the most controversial. It grants full freedom to the State to dispose of the waters of an international river within its territory in any manner it deems fit, without concern for the adverse impact such use may have on other riparian States. The second principle, absolute territorial integrity, establishes the right of a riparian State to demand continuation of the natural flow of an international river into its territory from upper riparians but imposes a duty on it not to restrict such natural flow of waters to lower riparians. Similarly, the third principle, which combines principles of limited territorial sovereignty and limited territorial integrity, asserts that every riparian State has a right to use the waters of the international river but has a corresponding duty to ensure that its use does not significantly harm other riparians. In essence, this principle establishes the right of every riparian State over the shared river. The fourth principle, relying on the community of riparian States on an international river, reflects a belief in the economic union of the entire river basin; it either vests rights over the waters of the entire river in the collective body of the riparian States or allocates them by agreement or according to proportionality. For a detailed survey of the different principles, *see* McCaffrey, *supra* n. 134, at 112–174; Salman M. A. Salman & Kishor Uprety, *Conflict and Cooperation on South Asia's International Rivers* 11–16 (Kluwer Law International 2001); and Katak B. Malla, *The Legal Regime of International Watercourses: Progress and Paradigms Regarding Uses and Environmental Protection* 41–45, 323–376 (Stockholm University 2005).

Then, from the eighteenth century onward, jurists started to make claims for freedom of navigation[137]—in favor of such freedom, Grotius invoked the natural law of innocent passage[138]—but these voices were virtually unheard.

A century later, when the army of the First French Republic, victorious against the coalition formed by the powers of the *ancien regime,* had freed Belgium, it realized that the international rivers in its path (like the Scheldt and the Meuse) had remained closed to international trade for a century and a half.[139] On November 20, 1792, the Executive Council of the Convention decreed the liberalization of the Scheldt and the Meuse (*Arrêté du Conseil Exécutif de la France [liberté de navigation sur l'Escaut et la Meuse]*),[140] stating that the obstacles and hindrances to the navigation of and trade in Scheldt and Meuse are directly contrary to the fundamental principles of natural law that all Frenchmen promised to respect.[141] In 1804, the Paris Convention adopted the principle of freedom of navigation on the Rhine, the most important international river in Europe. It asked for co-administration of riparian access. The solution this Convention proposed was regional and particular in form.

Another treaty that emphasized communication between peoples, concluded in Paris on May 30, 1814, among England, Prussia, and Russia, restored the Bourbon line to the French throne and reduced France to its pre-1792 size. It convened a Congress in Vienna, with representatives from Austria, England, France, Prussia, Russia, and a number of smaller countries.[142] According to the Treaty of Paris of 1814 and the Final Act of the Congress of Vienna of June 8, 1815, the law of

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[137] *See* L. Oppenheim, *International Law: A Treatise* 583–584 (H. Lauterpacht, ed., 8th ed., Longmans 1955); *see also* Salman & Uprety, *id*.

[138] *See* generally Oppenheim, *id*. at 465.

[139] *See* The Treaty of Münster of 1648.

[140] *See* Oppenheim, *supra* n.137, at 466; *see also* generally Quoc-Dinh Nguyen, Patrick Dailler & Alain Pellet, *Droit International Public* 1031 (4th ed., Librairie Générale de Droit et de Jurisprudence 1992).

[141] The Executive Council declared in its Decree: "(1) Que les gênes et les entraves que jusqu'à présent la navigation et le commerce ont souffertes tant sur l'Escaut que sur la Meuse sont directement contraires aux principes fondamentaux du droit naturel que tous les Français ont juré de maintenir; (2) Que les cours des fleuves est la propriété commune et inaliénable de toutes les contrées arrosées par leurs eaux; qu'une nation ne saurait sans injustice prétendre d'occuper exclusivement le canal d'une rivière et d'empêcher que les peuples voisins, qui bordent les rivages supérieurs, ne jouissent du même avantage; qu'un tel droit est un reste des servitudes féodales ou du moins un monopole odieux qui n'a pu être établi que par la force, ni consenti que par l'impuissance; qu'il est conséquemment révocable dans tous les moments, et malgré toutes les conventions, parce que la nature ne reconnaît pas plus de peuples que d'individus privilégies." *See* Bela Vitanyi, *The International Regime of River Navigation* 31–32 (Sijthoff & Noordhoff 1979)

[142] *See* Oppenheim, *supra* n. 137, at 467.

rivers aimed at ensuring navigation of upstream countries for free access to the sea. Article 5 of the Paris Treaty on the Rhine (May 30, 1814) emphasized free access to the sea: "The navigation of the Rhine from the point it becomes navigable up to the sea and vice versa shall be free in such a way that it shall be prohibited to none."[143]

Articles 108 through 116 of the Final Act of Vienna, which dealt with river navigation, became the basis for all the nineteenth century treaties on navigation, yet interestingly, as de Visscher notes, "in the Vienna Congress the regime of navigable means of communication was envisaged mainly as a case which concerned only riparian States."[144] Despite the triumph of particularism in that Congress, the universal scope of the forms that were proposed could not be ignored. Besides, the Final Act also provided for freedom of navigation without discrimination in the tributaries of international rivers (Articles 1 and 2).[145]

It is appropriate to note that the United States invoked the decision of the Congress of Vienna to assure free navigation on the Saint Lawrence. Indeed, the triumph of this concept may be seen across the world: In the Americas, navigational freedom was proclaimed for the Amazon, Rio de la Plata, Rio Grande, and their tributaries; in Africa, navigational freedom was applied on the Congo and the Niger; in Asia, the Yan-tse-kiang was opened for foreign flags; while in Europe, many LLS born after the 1648 Treaty of Westphalia, which had divided central Europe into several States, became aware of new navigational problems.[146]

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[143] *See* Zacklin & Caflisch, eds., *supra* n. 134, at 209.

[144] *See* de Visscher, *supra* n. 98, at 71.

[145] In this context, it may be noted that the PCIJ confirmed this trend of liberalizing navigation in the Oder River Case, where it ruled that the jurisdiction of the International Commission for the Oder River extended to certain of its tributaries. *See* Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder (*Great Britain, Czechoslovak Republic, Denmark, France, Germany and Sweden v. Poland*), 1929 P.C.I.J. (ser. A) No. 16. The issue before the PCIJ was whether the jurisdiction of the International Commission of the Oder River extended, under the Treaty of Versailles, to sections of the Warthe and Netze, which were tributaries of the Oder that were situated in Poland. Poland maintained that the jurisdiction of the Commission did not apply to the sections of those tributaries that were in Polish territory, while the other six countries felt that the Commission should have jurisdiction over the navigable portions of those tributaries. The Court ruled against Poland. Along the same liberalizing lines, the PCIJ in the Oscar Chinn case (*Great Britain v. Belgium*), 1934 P.C.I.J. (ser A/B) No. 63, stated, five years after its decision in the River Oder case, that "freedom of navigation implies, as far as the business side of maritime or fluvial transport is concerned, freedom of commerce also." *See id*. at 83. *See also* Salman & Uprety, *supra* n. 136, at 10.

[146] *See* Agreement in 1648 ending the Thirty Year's War. The peace marked the end of the supremacy of the Holy Roman Empire and the emergence of France as a dominant power. It recognized the sovereignty of the German states, the Netherlands, and Switzerland; Calvinists, Lutherans, and Roman Catholics were given equal rights.

The problem of access to the sea was also partially solved by special conventions on rivers during the nineteenth century: the 1821 Convention of Elba for the Rhine, the Mayence Convention of 1831 and the Mannheim Convention of 1868 for the Scheldt, the Treaties of Paris of 1856, Berlin of 1878, and London of 1883 for the Danube.

Since the Congress of Vienna, the international law of rivers has indeed been ramified. In a series of conventions, specific modalities were applied to each waterway. The remarkable territorial changes that resulted in the dissolution of the Austro-Hungarian monarchy gave birth to several States, three of which (Austria, Czechoslovakia, and Hungary) were landlocked. These new States internationalized the Danube and several of its tributaries and subtributaries.

In this context, it is appropriate to take a closer look at the legal regime for four international rivers that are significant from the viewpoint of the rights of LLS to access to the sea.

2.5.1 The Danube

The Danube, an economic artery of Central Europe, is the largest river in the region. The legal regime for it is currently governed by the Convention of Belgrade, a multilateral convention signed by Austria, Czechoslovakia, and Hungary, three LLS riparian to the Danube. This Convention, dated August 18, 1948, was a successor to the Treaties of Paris 1856 and Berlin 1878; it recognized the principle of freedom of navigation and the equality of treatment of all nationals, commercial ships, and goods of the States.

It may be useful to recall that one of the original objectives of the law of rivers was to ensure freedom of navigation to the sea to both riparian and nonriparian States. This right of free access to the sea concerned not only LLS but also other States—the coastal States. Over the course of time, the law of rivers began regulating the right of free access to the sea by imposing certain duties upon riparian States and by placing central organs, vested with jurisdictional competences, in charge of formulating regulations, monitoring application of treaties, and enforcing rules and decisions made jointly.

The Paris Treaty of March 30, 1836 (Article 16), had established the European Danube Commission, the first international organization of its kind. It was composed of nonriparian as well as riparian States.[147] The Commission, for political reasons, was vested with exceptionally extensive power. It was charged with, *inter alia,* coordinating activities of riparian States, elaborating navigation rules

[147] Austria, France, Great Britain, Prussia, Russia, Sardinia, and Turkey were represented. For details, *see* Zacklin & Caflisch, eds., *supra* n. 134, at 213; *see also* Malla, *supra* n. 136, at 102–106.

and supervising their application, and settling disputes between riparian States. It is important to note that the Paris Treaty had also constituted a Danube Commission, from which nonriparian States were excluded, but this Commission never became fully operational.

A few decades later, in 1884, for the first time States riparian and nonriparian to the Rhine drafted a statute that applied to all navigable parts of this river. The statute expressed some principles of freedom of navigation and provided for institution of a commission to ensure the execution of the rules agreed between riparian governments, to deliberate on the position of these member governments, and to hear appeals on judgments relating to navigation of the Rhine rendered by the tribunal of first instance. Its representatives included riparian landlocked Switzerland and some nonriparian States, such as Belgium, Great Britain, and Italy.

2.5.2 The Mekong

The Mekong River, which originates in China, empties into the South China Sea. The principal riparian States are Cambodia, China, the Lao PDR, Myanmar, Thailand, and Vietnam. Though, curiously, China and Myanmar have not shown much interest in establishing a legal regime in connection with this river, such a regime was put in place through a treaty signed on December 29, 1954, by Cambodia, Lao PDR, and Vietnam.[148] This treaty recognized the principle of the freedom of navigation for all countries that recognized the contracting parties diplomatically.[149]

Three years later, in 1957, Cambodia, Lao PDR, Thailand, and Vietnam established a commission to examine and coordinate integrated development of the Mekong basin (the Mekong Commission).[150] In 1995, the same four countries concluded an agreement on cooperation for sustainable development of the Mekong river basin. The agreement reflects the determination of the signatories to cooperate and promote the use of Mekong waters for a variety of purposes, including navigation. Article 9 states that on the basis of equality of right, freedom of navigation is accorded throughout the mainstream of the Mekong River, without regard to territorial boundaries, for transportation and communication to promote regional cooperation and to satisfactorily implement projects under the agreement. The agreement also states that the Mekong River will be kept

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[148] For a detailed study, *see* Jean-Luc Ferret, *Le Régime Juridique du Mékong,* in Zacklin & Caflisch, eds., *supra* n. 134, at 75–96; *see also* Malla, *supra* n. 136, at 137–42.

[149] *See* Ferret, *id*. at 80.

[150] *See* Ferret, *id*. at 82. *See also infra* chapter 3, "Evolution of International Law," and chapter 5, "Soft Instruments and Specific Initiatives: Variations in Themes."

free from obstructions, measures, conduct, and actions that might directly or indirectly impair navigability, interfere with it, or permanently make it more difficult.[151]

2.5.3 The Niger

Nine States are riparian to the Niger, and four of them are LLS: Burkina Faso, Chad, Mali, and Niger. The legal regime for the Niger was established in 1885 by the Treaty of Berlin between 16 non-African powers.[152] The treaty endorses the principles of freedom of navigation and the complete equality of treatment of all nations. These principles were maintained in the Convention of Saint-Germain of September 10, 1919, which formally abrogated the previous treaty.

In 1963, new African States riparian to the Niger met in Niamey to abrogate the Statute of Saint-Germain. In October 1963, they signed the "Act concerning navigation and economic cooperation between the States of the Niger basin," which endorses the principles of freedom and equality of treatment. An agreement made on November 25, 1964, established the River Niger Commission, comprising only riparian States and with limited consultative jurisdiction.

2.5.4 The Rio de la Plata

At a conference held in Brasilia in April 1969, Argentina, Bolivia, Brazil, Paraguay, and Uruguay concluded a treaty on the Rio de la Plata basin in which they agreed to coordinate their efforts to promote the harmonious development of the River Plate Basin and of the territories directly affected by it.[153] The objectives of the treaty, signed on April 23, 1969, are to identify areas of common interest, conduct studies, carry out programs, install infrastructure, and draw up operational agreements and legislation for pursuing further initiatives involving assistance and facilities in matters of navigation; road, rail, and air links; electricity supplies and communications; and regional industrial links.[154]

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[151] This agreement replaced the earlier Statute of the Committee for Coordination or Investigations of the Lower Mekong Basin of 1957, the Declaration Concerning the Interim Committee for Coordination of Investigations of the Lower Mekong Basin of 1978, and all rules of procedures adopted under such arrangements.

[152] *See,* for detail, Fenwick, *supra* n. 110, at 462.

[153] *See* Vitanyi, *supra* n. 141, at 209; for the text of the treaty, *see* 8 I.L.M. 906–9 (July 1969); for an extensive analysis of the basin regime, *see* R. D. Hayton, *The Plata Basin,* in *The Law of International Drainage Basins* 298–442 (A. H. Garretson, R. D. Hayton & C. J. Olmstead, eds., Oceana Publications 1967); *see also* generally Claude Albert Colliard, *Droit International Fluvial* (Dalloz 1975).

[154] *See* generally art. 1 of the Treaty.

In conclusion, the creation of central organs to regulate navigation, ensure compliance with treaties, and provide guarantees of navigation, was a welcome innovation for ensuring freedom of transit through neighboring coastal territories. For these contributions, fluvial law is considered to be the first framework of systems to deal with the question of free access to the sea. There is clearly much similarity between the right of riparian navigation and the LLS right of access to and from the sea.[155]

[155] However, scholars have also noted, quite justly, that in the absence of evidence to the contrary, it must be assumed that the *opinio juris* concerning fluvial law cannot be applied to the broader question of transit by land. For instance, States like Switzerland and Austria have secure transit rights under existing fluvial regimes, but this is due to their position vis-à-vis a particular treaty rather than to their landlocked condition. *See,* for instance, Vasciannie, *supra* n. 1 (citing Caflisch), at 215.

PART THREE

Evolution of the Regime

CHAPTER THREE

Evolution of International Law

McDougal and Burke in the late 1950s recognized that "[t]he historic function of the international law of the sea has long been that of achieving an appropriate balance between the special exclusive demands of coastal States and other special claimants and the general inclusive demands of all other States in the world arena."[156] The balance flagged by McDougal and Burke has indeed been critical and is most relevant to this study.

For LLS, historically the most important and almost exclusive concern has been freedom of access to the sea. For that, they have demanded that the international community recognize a fundamental right of access and vouch for a universal convention on this matter.[157] Due to the contrasting views and claims associated with the issue, the evolution of positive law,[158] which essentially started with the Barcelona Convention[159] and continued with a series of international instruments both specific and general, has often been accompanied by controversies, challenges, and disappointment. That is not surprising. Public international law generates an environment of confusion because it is an evolving body of norms constantly undergoing change; each new question is likely to complicate the discussions and keep the issue unsettled by positive law.

For that reason, continuous attempts have been made to clarify and improve the shape of international law. During the twentieth century several international instruments were prepared, discussed, and aborted or adopted. Some treaties had general coverage, referring to the status and rights of LLS by implication; some dealt with the rights of LLS from a variety of technical perspectives; and some attempted to deal exclusively with the problems of LLS in a specific context.

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[156] *See* Myres S. McDougal & William T. Burke, *Crisis in the Law of the Sea: Community Perspectives Versus National Egoism,* 67 Yale L. J. 539 (1958).

[157] *See* Nguyen, *et al., supra* n. 140, at 1031.

[158] The term "positive law" is used in a narrow sense to mean a norm that has formal source in and derives existence from an act of creation. It is thus opposed to natural law. For a detailed discussion of the different views and evolution of legal positivism, *see* Roberto Ago, *Positivism,* in *Encyclopedia of Public International Law* vol. 3, 1072–80 (North Holland 1997).

[159] *See infra* n. 162.

3.1 Freedom of Transit for Trade: the Barcelona Statute

When the Treaty of Versailles was concluded, a provision about an eventual general regime of transit freedom on navigable waterways was inserted.[160]

The Covenant of the League of Nations required member States to make provisions to secure and maintain freedom of communication and transit.[161] The Covenant also imposed equitable treatment for trade on all members of the League. To bring this about, a conference was held in Barcelona under the auspices of the League. There, a new technical organ—the Organization of Communication and Transit (OCT)—was charged with proposing measures to ensure freedom of communication and transit. As a result of the OCT's work, the First General Conference on Communication and Transit (the Barcelona Conference) adopted a series of conventions. Among the legal instruments prepared by this conference was the Convention of 1921 (the Barcelona Convention) concerning navigable waterways. This Convention, while introducing the principle of freedom of access by assimilating riparian and nonriparian categories, substituted for the classical denomination "international river" the terminology "waterways of international concern." The second document was the Barcelona Statute of 1921, which related to freedom of transit.[162] Actually, the statute was adopted primarily to alter the economic consequences of the principle of nationalities, which had been adopted as *strictum jus* in the Versailles Treaty. It had become necessary to prepare an international regime of transit to guarantee communication among the European LLS that had emerged after the dismemberment of the Austro-Hungarian Empire.

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[160] *Treaty of Peace with Germany,* June 28, 1919; for the text of the treaty, *see Parry's Consolidated Treaty Series* 189 (Oceana 1981) (hereinafter *Treaty of Versailles*). The *Treaty of Versailles,* in art. 338, reads:

> The regime set out in Articles 332 to 337 above shall be superseded by one to be laid down in a General Convention drawn up by the Allied and Associated Powers, and approved by the League of Nations, relating to the waterways recognized in such Convention as having an international character. This Convention shall apply in particular to the whole or part of the above-mentioned river systems of the Elbe (Labe), the Oder (Odra), the Niemen (Rußstrom-Memel-Nijemen), and the Danube, and such other parts of these river systems as may be covered by a general definition. Germany undertakes, in accordance with the provisions of Article 379, to adhere to the said General Convention as well as to all projects prepared in accordance with Article 343 below for the revision of existing international agreements and regulations.

[161] *See* League of Nations Covenant, Article 23(e).

[162] Statute on Freedom of Transit adopted by the *Convention of Barcelona,* April 20, 1921, 7 L.N.T.S. 11 [hereinafter Barcelona Statute].

The Barcelona Statute provides a framework for agreements dealing with transit. It requires that all contracting states facilitate freedom of transit by rail or internal navigable waterways, including routes in use across territories under their jurisdiction that are convenient for international transit.[163] But a noteworthy aspect of the Barcelona Statute is that it concerns only water and rail transport; it does not apply to overland or air transport. The contracting states are permitted to apply reasonable tariffs on traffic in transit, regardless of its point of departure or destination,[164] but the tariffs must be fixed so as to facilitate international traffic.[165] Moreover, the taxes, facilities, or restrictions may not depend, directly or indirectly, on the nationality or ownership of the vessels or other means of transport used.[166]

Although the Barcelona Statute requires observance of the principle of freedom of transit by all possible means, signatories to the Barcelona Convention can depart from that principle. When serious events affect the security or vital interests of the transit country, for instance, it may disregard the Statute for a limited time.[167] A State may also refuse to allow transit of goods or passengers for public health or public security reasons, or under the authority of general international conventions, or pursuant to decisions of the League of Nations.[168]

The Barcelona Statute refers not to a "right" but only to "freedom" of access. It thus appears that the Statute tried, within the framework of a treaty, to establish equilibrium between the principles of freedom and sovereignty of states.[169] With regard to that, one scholar noted that this illustrated the contradictions of a fragile legal regime built in a protectionist context in which transit is presented as a privilege rather than a real right.[170]

The Barcelona Statute, which came into force on October 21, 1921, constitutes the basis of most of the trade agreements dealing with transit that were signed after the 1930s. Though not all these agreements refer specifically to the Barcelona Convention, in most the expressions "freedom of transit" and "free transit of goods" are considered to comply with the spirit of the Convention.

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[163] *See id.,* art. 2.

[164] *See id.,* art. 4.

[165] *See id*.

[166] *See id*.

[167] *See id.,* art. 19.

[168] *See id.,* art. 6 and 21.

[169] *See id.,* art. 1, for example.

[170] Loïc Marion, *Liberté de transit en droit international* (unpublished Ph.D. thesis, U. Rennes, France, 1974).

Soon after it was signed, several important agreements were added to the Barcelona Convention: the Convention on the regime of navigable waterways of April 20, 1921,[171] and the Conventions of Geneva of December 9, 1923, on the international regimes of rail and of maritime ports.[172] These conventions—in particular, the Geneva Convention on the international regime of maritime ports, which recognized that LLS had rights of access to the ports equal to those of coastal States—are important for LLS and were significantly influenced by the Barcelona Statute. In addition, the PCIJ, in an Advisory Opinion regarding the Railway Case,[173] had to consider some of the principles established by the Barcelona Convention (see section 3.2 below). In view of that, the Convention, despite its insufficiency, can be considered an important step for the international community toward the formation of a universal law as well as a set of minimum standards.

3.2 The Railway Case (Traffic between Lithuania and Poland)

3.2.1 The History

The Landwarow-Kaisiadorys railway sector (LKS), which formed part of the railway from Vilna to Libau, was destroyed in World War I; at the time, neither the State of Lithuania nor the State of Poland existed. After the two States were formed and during the hostile operations of Russia against Poland, the line was temporarily repaired from time to time for local traffic, but it was again destroyed after the Polish occupation of Vilna on October 9, 1920. After that, for more than ten years there was no change in the situation. Before World War I, when all these regions formed part of the Russian Empire, the railway from Vilna to Libau, including the LKS, had been crucial for traffic with the Russian naval port of Libau, the Russian commercial port of Riga, and the German commercial port of Königsberg.

After the war, the whole of this part of Europe was thrown into confusion by political events: Libau, the former Russian naval port, became a Latvian

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[171] For the text, *see* Grewe, *supra* n. 133 vol. 3, 1160.

[172] *See id.,* vol. 3, at 1236 on the regime of rail, and 1247 on maritime ports.

[173] *Railway Traffic Between Lithuania and Poland (Railway sector Landwarów-Kaisiadorys)* 1932 P.C.I.J. (ser. A/B), No. 42. The Advisory Opinion discusses the issues of transit by railway—Covenant of the League of Nations, art. 23(e); *Convention of Paris* concerning Memel of 1924, Annex III, art. 3; *Convention of Barcelona of 1921* On Transit: Statute, art. 2 and 7—Relations between Lithuania and Poland; and Resolutions of the Council of the League of Nations of December l0, 1927, and December 14, 1928. *See* P.C.I.J. Report 1933.

commercial port; frontiers were established between new and old States—Latvia, Lithuania, Poland, and Germany—where formerly German and Russian territory had been contiguous; events in Russia had ramifying political and economic consequences. Thus trade exchanges were profoundly modified with regard to both their importance and the routes they formerly followed.

Such was the situation when, on October 15, 1927, Lithuania brought the railways dispute before the Council of the League of Nations. As a result, the Council adopted a Resolution recognizing the dispute on December l0, 1927, with the concurrence of the two parties concerned.[174]

Negotiations between the Governments of Poland and Lithuania on the question of railway communication proved fruitless. On being so informed, the Council on December 14, 1928, adopted a Resolution noting that the two Governments

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[174] The Council's Resolution of December l0, 1927, reads as follows:

> The Council of the League of Nations Declares that a state of war between two Members of the League is incompatible with the spirit and the letter of the Covenant, by which Lithuania and Poland are bound;
>
> Takes note of the solemn declarations made by the Lithuanian representative that Lithuania does not consider herself in a state of war with Poland and that in consequence peace exists between their respective countries;
>
> Takes note of the solemn declarations of the Polish representative that the Polish Republic fully recognises and respects the political independence and territorial integrity of the Lithuanian Republic;
>
> Recommends the two Governments to enter into direct negotiations as soon as possible in order to establish such relations between the two neighbouring States as will ensure the good understanding between nations upon which peace depends;
>
> Places at the disposal of the two Parties the good offices of the League and of its technical organs should their assistance be desired in the negotiations, which it recommends;
>
> Decides that the Lithuanian Government's complaints regarding the treatment of persons of Lithuanian race or speech, referred to in its appeal, shall be examined by a Committee, consisting of the Acting President of the Council and two other members of the Council appointed by him. This Committee will report to the Council in due course;
>
> Decides that, in the event of a frontier incident or threat of an incident, the Secretary-General of the League of Nations may, at the request of one of the Parties, consult the Acting President of the Council and the Rapporteur, who shall then advise any steps they consider necessary to bring about a better state of feeling. The Council notes that both Parties have agreed to facilitate any enquiry by the League of Nations;
>
> Notes with satisfaction the Polish representative's declarations to the effect that the Polish nationals referred to in the Lithuanian Government's appeal will be authorised to return to Poland without hindrance. In case of unforeseen difficulties, the Rapporteur would place his good offices at the disposal of the Parties with a view to removing those difficulties.
>
> The Council declares that the present Resolution in no way affects questions on which the two Governments have differences of opinion.

had signed a provisional arrangement for according certain facilities for local traffic, and that they were agreed on the advisability of continuing the negotiations with a view to concluding an agreement regulating commercial exchanges between them. The Council also instructed the Secretary-General of the League of Nations to refer to the Advisory and Technical Committee for Communications and Transit the question of obstacles in the way of freedom of communications and transit.

On September 4, 1930, the Committee reported to the Council, recommending, among other things, re-establishment on the railway between Vilna and Kovno, via LKS, of a through service satisfying the requirements of international transit traffic. The Committee expressed the opinion that restoring international traffic on this line would enable the ports of Libau, Königsberg, and Memel to recover part of their previous traffic. When the report was rejected by the two Governments, the Council referred the question to the Court.

3.2.2 The Question

On January 24, 1931, through a Resolution, the Council of the League of Nations asked the PCIJ to give an advisory opinion substantially on whether the international engagements in force obliged Lithuania, and if so in what manner, to take measures to open the railway for all or certain categories of traffic.[175]

The representatives declared in court that Lithuania, given her present relations with Poland, did not intend to restore to use the parts of the LKS lying in her territory. She adopted this attitude as a form of pacific reprisal, believing herself to be entitled to persist in it until the question of the allocation of Vilna and the adjoining territory was settled by arbitration or by a decision of the Court. The Court, however, observed that the question of whether Lithuania was or was not entitled to exercise reprisal, *inter alia* by keeping the LKS out of use, arose only if it were shown that international engagements obliged Lithuania to open it for traffic. Should the Court conclude that Lithuania had no such international obligations, the argument based on her alleged right to

[175] The request was accompanied by the report on the basis of which the Council adopted the Resolution quoted *id.,* a previous report to the Council upon the matter, and a report of the Advisory and Technical Committee for Communications and Transit, prepared at the request of the Council. The minutes of the meetings leading up to the adoption of the Council's Resolution of January 24, 1931, were sent to the Court later. The Secretary-General of the League of Nations also forwarded to the Court a certified copy of the *Convention and Statute on Freedom of Transit,* signed in Barcelona on April 20, 1921, and of the Convention and transitory provision, with annexes, concerning Memel, signed in Paris on May 8, 1924.

engage in pacific reprisals would cease to be of any importance. The question put to the Court made no mention of any particular international engagement; it referred not to the application of rules of general international law but to contractual engagements in force that might create for Lithuania such an obligation.

According to the Advisory and Technical Committee, there was such an obligation. It was based on Article 23(e) of the Covenant of the League of Nations and the Convention of Paris of May 8, 1924, concerning the port of Memel. To these instruments, the Polish Government added the Resolution of the Council of the League of Nations of December 10, 1927.

3.2.3 The Court's Opinion

On the Effects of the Council's Resolution

The Council's Resolution had recommended that the two Governments "enter into direct negotiations as soon as possible in order to establish such relations between the two neighboring States as will ensure 'the good understanding between nations upon which peace depends.'" Poland's position before the Court was that Poland and Lithuania, in accepting this recommendation, undertook not only to negotiate but also to come to an agreement; it alleged that Lithuania had thus incurred an obligation to open the LKS to traffic.

Though the Court agreed that to conform to the Resolution, the two Governments not only had to enter into negotiations but had also to pursue them as far as possible, with a view to concluding agreements, it said that an obligation to negotiate did not imply an obligation to reach an agreement. Nor did it imply that Lithuania, by undertaking to negotiate, has assumed an engagement and was in consequence obliged to conclude the administrative and technical agreements indispensable for re-establishing traffic on the LKS. There was therefore no justification for maintaining that Lithuania had incurred an obligation to restore to use and open to traffic the railway sector in question.

On the Relevance of Article 23(e) of the Covenant

During 1928, relying on Article 23(e) of the Covenant and on the Resolution of the Assembly of the League of Nations of December 9, 1920, by which the Advisory and Technical Committee was instructed "to consider and propose measures calculated to ensure freedom of communications and transit at all times," the Council of the League decided to ask that Committee to report on practical steps that might be adopted, taking account of the international agreements in force.

The report the Committee submitted on September 4, 1930, expressed the opinion that the LKS should be restored so as to expedite the international transit of goods coming from or going to the districts of Grodno and Vilna and the ports of Königsberg, Memel, Libau, and Riga. Holding that interrupting goods in transit had the effect of completely stopping certain forms of transport, which could not use the ports owing to the heavy cost of sending the goods by a round-about route, the Committee, while making some recommendations,[176] stated that goods traffic between Poland and Lithuania other than transit traffic could continue to be carried on indirectly without any serious difficulty and that it is not advisable at the moment to resume passenger traffic.

However, the Committee stated that Lithuania was bound to open the LKS to international traffic under Article 23(e) of the Covenant: If it were once admitted that certain countries would be at liberty, because of political disagreements, to suppress international railway connections for long periods, the interests of third-party States, Members of the League, might suffer because they would no longer enjoy the benefits of freedom of transit and communication to which they are, in principle, entitled under Article 23(e) of the Covenant.

Before the Court the Polish Government contended that Article 23(e) of the Covenant constituted an international engagement, obliging the Lithuanian State to open the line. But the Court observed that Article 23(e) of the Covenant—whatever obligations arise from it for States Members of the League of Nations—does not imply any specific obligations for these States to open any *particular* lines of communication.[177]

The Court noted that specific obligations can therefore only arise from "international conventions existing or hereafter to be agreed upon," as is stated

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[176] The Committee made the following recommendations:

1. They should remove these obstacles to freedom of transit . . . in order to put an end to a situation, which seems contrary to the objects of Article 23(e) of the Covenant of the League of Nations and incompatible with the international engagements to which they have subscribed.
2. They should with this object proceed more especially: (a) to draw up regulations on timber-floating on the Niemen, in conformity with the provisions of Articles 332 to 337 of the *Treaty of Versailles;* and (b) to conclude administrative and technical agreements essential for re-establishing, on the railway through LKS, a continuous service which shall meet the requirements of international transit.

[177] The actual wording is as follows:

Article 23. Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League . . .

(e) will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League. . . .

in the Preamble to the Barcelona Convention on freedom of transit. If this interpretation is correct, it is impossible to deduce from the general rule in Article 23(e) of the Covenant an obligation for Lithuania to open the LKS for international traffic or for part of such traffic. Such an obligation could only result from a special agreement.

On the Applicability of the Memel Convention

Article 3 of Annex III of the Memel Convention provided that the Lithuanian Government ensure the freedom of transit by sea, water, or rail of traffic coming from or destined for the Memel territory or in transit through it, and conform in this respect with the rules laid down by the Barcelona Statute. The Statute provides, in Article 2, that contracting States "shall facilitate free transit, by rail or waterway, on routes in use convenient for international transit."

On the question whether the LKS was in use, the Court concluded that the very terms of the question clearly established that it was not; if it were, there would be no reason for discussing the possibility of reopening it. Moreover, it is impossible to conclude that the railway of which it forms part is in use as a whole.

The Court further noted that this railway or railway sector was scarcely convenient for international transit to or from Memel, since it afforded communication with Memel only by means of a detour or by reloading goods on to barges at Kovno. Neither the Memel Convention nor the Barcelona Statute, therefore, could be adduced to prove that the Lithuanian Government had an obligation to restore the LKS to use and to open it for international traffic.

Under the Memel Convention, the Lithuanian Government undertook "to permit and to grant all facilities for the traffic on the river to or from or in the port of Memel, and not to apply, in respect of such traffic, on the ground of the present political relations between Lithuania and Poland, the stipulations of Articles 7 and 8 of the Barcelona Statute and Article 13 of the Barcelona Recommendations relative to Ports placed under an International Regime." The Court noted that these were obviously circumstances calculated to promote freedom of transit via the port of Memel, but this clause in the Memel Convention applied solely to waterways.

Considering that the Memel Convention expressly forbids Lithuania to invoke Article 7 of the Barcelona Statute with reference to freedom of transit by waterway, the Court also noted that she might still avail herself of it with regard to railways of importance to the Memel territory. Accordingly, even if the LKS were in use and could serve Memel traffic, Lithuania would be entitled to invoke Article 7 as a ground for refusing to open this sector for traffic, in case of an emergency affecting her safety or vital interests. From this point of view also,

Lithuania did not have any obligation under the Memel Convention to restore and open for traffic the railway sector in question.

After examining the engagements invoked with regard to the reopening for traffic of the LKS, the Court concluded that the obligation alleged to be incumbent on Lithuania did not exist in the present circumstances. It was unanimously of the opinion that international engagements did not oblige Lithuania to take steps to open the LKS for all or certain categories of traffic.[178]

From the position of the Court in this case, it may be concluded that transit is not necessarily considered a right inherent to the geographic position of an LLS, but is only a freedom to be enjoyed upon the benevolence of the transit State, one that needs to be ensured through specific bilateral arrangements.

3.3 Freedom of Transit Strengthened: The Havana Charter and the GATT

Unlike the Covenant of the League of Nations, the UN Charter did not make specific provision for communication and transit, though Article 55 does deal with a broad range of economic and social questions in rather vague terms.[179] The vagueness and relative imprecision probably originated from the unstable political situation of Europe in the early forties. Indeed, when it was drafted, it seemed

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[178] There were also some dissents. While Judge Altamira declared himself unable to agree with the arguments concerning application in the case of the Memel Convention and art. 2 and art. 7 of the *Convention of Barcelona,* Judge Anzilotti thought that the reasons adopted, particularly those relating to art. 23(e) of the Covenant, did not adequately support the conclusion. In Judge Anzilotti's opinion, the real question before the Court was not whether Lithuania is bound to open for traffic a given railway line, it was whether Lithuania could refuse to have railway communications with Poland. Certainly all the railway communications directly connecting Lithuania with Poland were broken, and the sole reason why the Council's question was confined to the LKS line was that this line was the only one of considerable economic importance. That being so, Anzilotti was of the opinion that nothing but the "present circumstances" mentioned in the question, which, quite obviously, referred to existing political relations between the two countries, could justify an attitude on the part of Lithuania which in itself would be scarcely compatible with the duties of Members of the League of Nations and particularly with certain obligations which, in normal circumstances, would seem to result from art. 23(e) of the Covenant.

[179] With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the UN shall promote: (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation.

See UN Charter, art. 55.

hardly possible to draw, even in a general manner, a common line of conduct for the UN.[180]

Soon after the UN came into existence, the Economic and Social Council (ECOSOC), which is charged with coordinating economic and social cooperation activities of member States within the framework of the UN, held an international conference in London to consider creation of an international trade organization.[181] The London conference prepared a draft proposal to establish the UN International Trade Organization, which was submitted in August 1947 to another conference held in Geneva.[182] At a follow-up conference in Havana from November 21, 1947 to March 24, 1948, a definitive text was drafted. With 106 Articles, the Havana Charter was relatively detailed. The aim of the Charter[183] was to create an organization to supervise the world trade system largely on the basis of the principles of free competition and free enterprise. It set certain goals for signatory States; they had to agree to "favor the possibility of access on the basis of equality in the market, in the supply sources, and in the production facilities necessary for their prosperity and economic development."[184]

The Charter needed 27 instruments of ratification to come into force, but only 2 States ratified it. The International Trade Organization foreseen in the 1947 draft was therefore never realized.[185]

Given its merits, although it did not enter into force, the Havana Charter may well be considered as having constituted an additional step in the process of granting free and secure access to the sea because it laid the groundwork for adoption of the General Agreement on Tariffs and Trade (GATT). In contrast to the Havana Charter, the GATT, which was a simplified-form (self-executing) agreement not subject to ratification, came into force on January 1, 1948, in

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[180] *See* Marion, *supra* n. 170, at 382; *see also The History of UNCTAD 1964–1984* 53–56 (United Nations 1985).

[181] The conference was held in London during October and November 1946. The later conference that produced the Charter was the United Nations Conference on Trade and Employment.

[182] *See* D. Carreau *et al., Droit International Economique* 95 (Librairie Générale de Droit et Jurisprudence 1990).

[183] *See* Charter of the International Trade Organization, UN Conference on Trade and Employment, UN Doc. E/CONF.2/78 (1948) (hereinafter Havana Charter). Article 33 of the Charter contained detailed provisions on freedom of transit that were later borrowed by the GATT.

[184] *See id.,* art. 1.

[185] *See* UN Conference on Trade and Employment, UN Doc. E/CONF.2/78 (1948), at 95–96; *see also* Andreas F. Lowenfeld, *Public Controls on International Trade* 15–21 (Matthew Bender 1983).

conformity with the terms of the Protocol for Provisional Application dated October 30, 1947.[186]

Article V of the GATT deals with freedom of transit. In so doing, although not specifically dealing with LLS, it reaffirms the principles laid down by the Barcelona Statute. But Loïc Marion has noted one important difference between GATT and the Barcelona Statute: "The word sovereignty does not appear at all in the seven paragraphs of the Article, while at each moment, the Barcelona Statute recalls the sovereign right of states."[187] The UN Secretariat, in its study on "Question of free access to the sea of LLS," summarized the principal provisions of GATT Article V as related to LLS this way:

(a) Goods including baggage and also vessels and other means of transport shall be deemed to be in transit when the passage across the territory of one of the contracting parties constitutes only one portion of the complete itinerary starting and terminating beyond the borders of the said country.
(b) There shall be freedom of transit throughout the territories of contracting parties for goods going to or originating from the other contracting party. The principle of non-discrimination is clearly established.
(c) Although a declaration at the customs for goods in transit may be asked for, these properties shall be exempt from customs duties and all other

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[186] During the second session of the Preparatory Committee for the United Nations Conference on Trade and Employment (Geneva, April 10–October 30, 1947), which had drafted the Charter for the ITO, the participating States had simultaneously conducted multilateral trade negotiations for the reciprocal reduction of customs tariffs. At the end of the session, it was decided to put the part of the draft charter dealing with multilateral trade relations into operation separately and provisionally, to serve as the treaty basis for the agreed tariff concessions. The articles of that part of the draft charter, together with the schedules of the tariff concessions made by each State, were put into a separate treaty (the GATT) and attached to the Final Act of the session, which was signed by the participating States on October 30, 1947. On the same day the twenty-three signatories of the Final Act drew up a Protocol of Provisional Application of GATT, which was later accepted by the signatories of the Final Act and went into effect for those states on January 1, 1948, or after acceptance, if that came later. Thereafter, participation in GATT was effected in each case by accession to the Protocol of Provisional Application, which required the prior consent of two-thirds of the parties to the Protocol. However, the GATT itself was never ratified (or accepted) by the parties to the Protocol of Provisional Application, except Haiti. The binding force of GATT continued to remain with the Protocol (an anomaly in practice), but the effective application of GATT did not suffer from this formal imperfection. *See* for detail, Gunther Jaenicke, *General Agreement on Tariff and Trade (1947),* in *Encyclopedia of Public Law,* vol. 3, 502–503 (North-Holland 1997). On the transformation of the ITO into the GATT, *see* Raj Bhala, *International Trade Law: Theory and Practice* 127–128 (LexisNexis 2001).

[187] *See* Marion, *supra* n. 170, at 387.

transit rights or duties except the transportation charges corresponding to the administrative expenditures made by the transport or to the cost of services rendered.

(d) The duties and the regulation applied on transit traffic must be equitable.
(e) The contracting parties mutually guarantee MFN treatment on transit traffic and applicable tariffs.
(f) Without being applicable for aircraft in transit, the above mentioned rules shall be applicable for goods transiting by air including baggage.[188]

Factors that account for the high cost of trade to LLS—including inadequate infrastructure, imbalance of trade, inefficient transport, poor utilization of assets, and a proliferation of cumbersome government regulations in both landlocked and transit developing countries—clearly frustrate the objective of Article V, which stipulates that "there shall be freedom of transit through the territory of each contracting party via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties."

Note that Article 2 of the Barcelona Statute limited freedom of transit to railways and waterways, but Article V of the GATT also covered overland transport. It thus gave contracting States greater facilities than those provided by the Barcelona Statute. Article V did not include the transit of persons; the exclusion is justifiable due to the limited objectives of GATT and its priority, which was trade in general.[189]

The Barcelona Statute, the Havana Charter, and the GATT share the same objective: general regulation of transit. Among these three instruments, two have not only entered into force but also have obtained the status of customary law; their influence on the issue of free access to the sea, and thus on promoting international trade, is considerable.

3.4 Reciprocity to Right of Access: The Convention on the High Seas

The Committee of Industry and Commerce of the Economic Commission for Asia and the Far East (ECAFE) during its eighth session, January 24–31, 1956, examined the problem of its members without access (Afghanistan, Lao PDR,

[188] *See,* for detail, *Memorandum Concerning the Question of Free Access to the Sea of Landlocked Countries,* UN Doc. A/CONF.13/29 (1958).

[189] *See id*.

and Nepal). It adopted a resolution recommending "that the members recognize fully the needs of members deprived of access or easy access to the sea, with regard to the transit trade and grant to these countries necessary facilities in conformity with the international law and practices."[190]

During its twelfth session (in February 1956), ECAFE adopted the resolution of the Committee. Thus, for the first time an influential and reputable international organization gave special attention to the problems of LLS—although the text of the resolution emphasized not the rights but the needs of LLS. The Committee continued to examine the subject, and its Secretariat prepared a report on "Problems of Countries of Asia and the Far East Deprived of Access to the Sea," which made recommendations encouraging, *inter alia,*

- the adherence of member States to the Barcelona Statute on freedom of transit;
- the conclusion of bilateral agreements between States in conformity with the principles of Barcelona, the Havana Charter, and the GATT;
- the appointment of functionaries and agents in charge of different stages of transit traffic; and
- insertion in the economic development plans of States of projects for expanding transport and setting up new routes with a view to facilitating the trade and transit of LLS.

The recommendations of ECAFE, although modest in both substance and form, opened a track within the UN for considering a comprehensive and precise approach to the problem. Consequently, in a Resolution relating to LLS and expansion of international trade,[191] the UN General Assembly recommended that member States recognize the transit needs of LLS.

3.4.1 The Geneva Conference and the Problem of Access

The pressure of the delegates of a few LLS—particularly Afghanistan, Bolivia, and Czechoslovakia—was decisive. The General Assembly, in paragraph 3 of its Resolution proposing the meeting of the conference on the law of the sea,[192] recommended that the conference examine the question of free access to the sea as established by international practice and bilateral treaties. Shortly before the

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[190] UN Doc. E/CN, 11/425.

[191] UN General Assembly Resolution 1028 (XI): Landlocked Countries and the Expansion of International Trade, 656th plenary meeting, February 20, 1957.

[192] UN General Assembly Resolution 1105 (XI): International Conference of Plenipotentiaries to Examine the Law of the Sea, 658th plenary meeting, February 21, 1957.

Geneva Conference opened, a preliminary conference of thirteen LLS, held to prepare the proposal, prescribed a list of seven general principles (see n. 205 *infra*).

During its eleventh session, the UN General Assembly recommended to the Conference of Plenipotentiaries that a study be carried out on the problem of free access to the sea for LLS.[193] The Geneva Conference of 1958[194] established a committee for that purpose, the Fifth Committee. Confronted with several proposals from LLS asking for recognition of a "general law of access to the sea," the Conference asked the Fifth Committee to examine the regime of free access to the sea[195] and to draft a convention that might be part of a general codification of rules relating to the regime of the sea.[196]

This Committee had two documents on which to base its work. The first was a memorandum prepared by the UN Secretariat,[197] the first two chapters of which included the earlier deliberations of the UN on the questions of free access to the sea of LLS and the different theories about the right of access to the sea.[198] The last chapter listed bilateral and multilateral treaties dealing with problems of access to the sea faced by states deprived of a coastline.[199] The second document was an excerpt of the Final Act of the Economic Conference of the Organization of American States, held at Buenos Aires in September 1957, which described how American states stood on the question of access to the sea.[200]

The Chair of the Fifth Committee was Jaroslav Zourek, a delegate from Czechoslovakia.[201] The Bolivian representative was named Vice-President and

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[193] *See* Glassner, *supra* n. 1, at 29.

[194] The UN Conference on the Law of the Sea, held at Geneva from February 24 to April 27, 1958. It resulted in the Geneva Convention on the High Seas. *See Convention on the High Seas,* done at Geneva, April 29, 1958. 450 U.N.T.S. 82; T.I.A.S No. 5200; 13 U.S.T. 2312; 450 U.N.T.S. 82; 54 Am. J. Int'l L. 751 (1958).

[195] *See supra* n. 188.

[196] *See id*.

[197] *See supra* n. 192, at 54.

[198] *See Question of Free Access to the Sea of Land-locked Countries: Memorandum by the Secretariat,* UNCLOS 5th Comm., UN Doc. A/Conf.13/29 and Add.1 (1958).

[199] *Acts of the UN Conference on the Law of the Sea* (Preparatory Document, 1958), vol. 1 (hereinafter Acts of the Conference), 308.

[200] *See* generally, *Transportation and Economic Growth: The Plata River System,* Economic Conference of the Organization of American States, Buenos Aires, Argentina, Doc. July 11, 1957.

[201] M. R. Simmonet, *La Convention sur la Haute Mer* (Librairie Générale de Droit et de Jurisprudence 1966). Not surprisingly, this prompted discomfort among transit States. It was noted that "the Chairman of the Fifth Committee was both judge and party, which always is a hindrance for the well functioning of a Committee."

the representative from Afghanistan Rapporteur. Although they constituted a majority at the Conference, the littoral States were not represented in the Bureau of the Fifth Committee. This might explain the distrust transit States manifested with regard to the draft report presented later in the plenary session.[202] Indeed, the Fifth Committee asked that the draft report be opened for discussion and insisted the Rapporteur change several elements.[203]

The discussions of the Fifth Committee centered on two draft texts. The first, proposed by 19 states (11 of which were LLS), reconsidered the principles dealt with by the preliminary conference.[204] The LLS asserted that the seven principles proclaimed by the preliminary conference of LLS[205] had to be part of the future convention. While the second and the third principles specifically were admitted by transit States without protest to be positive law, the first and fifth principles were rejected *in toto.* Coastal States were not prepared to recognize a real right of access to the sea for LLS.

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[202] *See id*.

[203] *See id*.

[204] *See* for detail, Acts of The Conference, *supra* n. 199, at 84–85.

[205] These principles were the following:

(i) The right of access to the sea of LLS derives from the fundamental principle of freedom of the sea.
(ii) All LLS possess treatment equal to coastal States, including the right of flag of their vessels duly registered in a place of their own jurisdiction.
(iii) The vessels flying the flag of an LLS, in high seas benefit from a regime identical to that of the vessels of coastal States in the territorial and internal waters. They benefit from the regime identical to that of the vessels flying the flag of coastal States, other than territorial States.
(iv) Regarding access to maritime ports, all LLS have the right to MFN treatment and in no case to treatment less favorable than that granted to vessels of coastal States.
(v) The transit passage of persons and goods originating from an LLS toward the sea and vice versa through all means of communication and transport must, under special agreements and conventions in application, be freely granted. The traffic in transit shall not be subject to any customs duty nor any special tax excepting those perceived in remuneration of services rendered in particular.
(vi) The transit States, while conserving complete jurisdiction over the means of communications and all facilities agreed to, have the right to take necessary and indispensable measures so that the exercise of the right of free access to the sea does not violate their legitimate interests of any kind, especially security and public health.
(vii) Provisions codifying the principles governing the right of free access of LLS shall not abrogate any agreements in force between two or several contracting parties on the questions of the proposed codification, nor constitute an obstacle to the conclusion of such an agreement in future, provided that these latter do not introduce a regime less favorable and are not contrary to it.

The second text was proposed by three coastal States: Italy, the Netherlands, and the United Kingdom.[206] This text, which reflected the reluctance of coastal States to recognize a real right of access, made two suggestions. The first was to apply the Convention equally to both coastal and noncoastal States, thereby considering every State, even coastal States, to be without access. The second suggestion was that the Conference adopt a nonbinding resolution on the free access to the sea of LLS, rather than a binding convention.

3.4.2 Conflicting Theses: Moral Versus Juridical Rights

For the first time, there was a passionate confrontation between the LLS and transit States regarding the right of access. Soon after, in the Fifth Committee, instead of three classical regional groups, there emerged two groups, transit States and States deprived of access to the sea.

In practice, as in theory, the most serious obstacle to the recognition of the right of access appeared to be the territorial sovereignty of States. LLS thought the principle of free access was recognized by international law. Among transit States, while the large majority did not challenge the principle of free access, the principle of sovereignty overrode it.

The LLS maintained that free access to the sea is not a simple neighborly favor; it is a right recognized by international law and confirmed by international practice. This right derives from two principles: the juridical equality of States and freedom of the high seas.

The delegate of Paraguay to the Fifth Committee declared that free access to the sea, a right recognized by the law of nations, is a universal norm of international law.[207] The Hungarian delegate agreed; for him,

> free access to the sea is a right for LLS, no matter the category of codification it enters. A series of treaties have dealt with it. It was never contested. By denying it absolutely, the State shirks its international responsibility. It however does not prevent the Transit State from laying certain reasonable conditions.[208]

A few transit States also shared this view. The Argentinean delegate, for instance, recalled that Argentina had negotiated several treaties with Bolivia and Paraguay to facilitate their access to the sea. He concluded that the rights thus recognized were actually an integral part of international law.[209]

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[206] *See* Acts of the Conference, *supra* n. 199, at 84–85.

[207] Analytical statements of the sessions of the Fifth Committee, 1958.

[208] *See id*. at 38.

[209] *See id*. at 2.

The right of LLS access to the sea may have been accepted as an integral part of international law, but the LLS wished this principle to be sincerely respected by transit States. They admitted that crossing a country's territory requires bilateral agreement but also stressed that a State must not be allowed to force the LLS, merely as a matter of principle, to negotiate such an agreement. Correctly, indeed, the States deprived of maritime coast emphasized that the transit States must not use their geographical position, under the pretext of territorial sovereignty, to pressure the LLS.

In the discussions in the Fifth Committee on free access of LLS to the sea there was strong disagreement between transit States and LLS, especially on one fundamental point: whether the right of access must be considered a general rule of international law that applies independent of all agreements or whether it constitutes a strictly conventional right, subordinate to bilateral agreements.[210]

If it is a strictly conventional right, the principle of territorial sovereignty is invoked. Most transit States were of the opinion that the territorial sovereignty principle limits the right of access to the sea, which thus depends on the benevolence of the neighbors of LLS. The delegate from Thailand stated that assimilating the right of access to the right of innocent passage (as some LLS had argued) is not correct; the two rights differ. While the right of innocent passage may be exercised without the express agreement of concerned coastal States, the exercise of the transit right is subject to the authorization of the coastal State, which is the sole authority to grant such a passage. The LLS do not possess any natural right of transit throughout the neighboring States, which can only be granted by agreements between parties.[211]

Mr. Bhutto, the Pakistani delegate, went further. He expressed doubts about the existence of a right of access to the sea, saying "the Pakistani delegation explored each and every corner of international law without discovering the right or series of rights that the LLS claim to be endowed with." He also stressed that a State is not at all obliged to grant other States the privilege of transit upon its territory.[212] Mr. Bhutto stated that, against the principle of free access to the sea, there is a fundamental and universally recognized principle of sovereignty that transcends all other considerations.[213]

Mr. Sen from India held a similar view. He found a significant difference between freedom of the high seas and the right of access to the sea subordinated

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[210] *See id.*

[211] *See id.* at 26.

[212] *See id.* at 28.

[213] *See id*.

to transit. The first is indeed an established principle of international law, but the second is subordinate to the sovereignty of coastal States.[214]

Whatever the critics of the theory of sovereignty of States may say, and despite long and strong denunciations of the doctrine, it is undeniably still the very basis of international relations and accepted as one of the most sacred of principles.[215] It must therefore be factored into any debate related to interstate relations.

3.4.3 Article 3 of the Convention on the High Seas

The Fifth Committee soon arrived at an impasse. After an effort to integrate the texts into one, it chose to consider a draft compromise presented by Switzerland. The Swiss text (with several modifications in favor of coastal States) was adopted as the famous Article 3 of the Convention on the High Seas. It reads:

1. 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. To this end States situated between the sea and a State having no sea-coast shall have by common agreement with the latter and in conformity with existing international conventions accord:
   (a) To the State having no sea-coast, on a basis of reciprocity, free transit through their territory; and
   (b) To ships flying the flag of that State treatment equal to that accorded to their own ships, or to the ships of any other States, as regards access to seaports and the use of such ports.
2. States situated between the sea and a State having no sea-coast shall settle, by mutual agreement with the latter, and taking into account the rights of the coastal State or State of transit and the special conditions of the State having no sea-coast, all matters relating to freedom of transit and equal treatment in ports, in case such States are not already parties to existing international conventions.[216]

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[214] *See id*.

[215] R. P. Anand, *International Law and Developing Countries* 72 (Martinus Nijhoff Publishers 1987); *see also Oppenheim's International Law, supra* n. 111, at 124–25 (discussions of divisibility of sovereignty and the problem of sovereignty in the 20th century); on the several forms of debate on sovereignty issue, *see* an excellent study by Martii Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* 98–178 (Cambridge Univ. Press 2002); *see also* Rafaa Ben Achour, *La souveraineté des Etats: Harmonie et Contradictions,* in *Harmonie et Contradictions en Droit International* 97–124 (Pedone 1996).

[216] *See* art. 3, *Convention on the High Seas,* Geneva 1958, *supra* n. 194.

In Article 3, it has been noted, the Fifth Committee did not adopt the thesis of noncoastal States (the right of free access) but that of coastal States (possibility of access, or faculty of access). Indeed, the 1958 General Conference on the Law of the Sea failed to satisfy the demands of LLS for a general law of free access and, as a *pactum de contrahendo,* made transit rights dependent on the good will of coastal States.[217]

3.5 Free Access Versus Territorial Sovereignty and the New York Convention

The New York Convention is the only multilateral instrument attempting to prescribe solutions to the specific problems of LLS. The origin of the Convention[218] lies in an initiative sponsored by four Asian LLS—Afghanistan, Lao PDR, Mongolia, and Nepal—during the ECAFE Ministerial Conference on Economic Cooperation in Asia held in Manila in December 1963.[219] The Conference adopted a resolution supporting the need to recognize the right of LLS to free transit to the sea.[220] This was an achievement: It was the first time the word "right" of free transit was inserted into an international resolution concerning LLS; preceding resolutions had referred only to the "needs" of such states.[221]

ECAFE had adopted another resolution during a 1964 meeting in Tehran that preceded the first UNCTAD meeting. This resolution recommended that the problem of free access be favorably considered during subsequent UNCTAD

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[217] *See id*. It is important to add that the most important decision concerning maritime resources taken at the 1958 Conference was enshrined in the *Convention on the Continental Shelf,* which in fact nationalized the most valuable areas of the sea, to the detriment of States without long coastlines or with off-shore areas not offering any realistic possibility for exploitation in the foreseeable future. An important and irrevocable step was taken to distribute the mineral riches of the oceans among a relatively small number of States, completely disregarding the interests and needs the LLS might have in this respect. *See* Tuerk & Hafner, *supra* n. 86 at 60.

[218] *Convention on Transit Trade of Landlocked States,* done at New York, July 8, 1965. *See* 597 UNT.S. 42–58 (hereinafter *New York Convention*).

[219] *See* T. M. Franck, M. E. Beradei & G. Aron., *The New Poor: Landlocked, Shelflocked and Other Geographically Disadvantaged States,* 7 N.Y.U. J. Int'l. L. & Pol. 53 (1974).

[220] *See* the Resolution on Asian Economic Cooperation adopted by the Ministerial Conference (December 3–6, Manila) in UN ECAFE Regional Economic Cooperation in Asia and the Far East. Report of the Ministerial Conference on Asian Economic Cooperation, E/CN 11/641 UN1964, at 2. The Conference also decided unanimously to request that the ECAFE Secretariat prepare a draft convention. Afghanistan, Lao PDR, and Nepal were appointed to prepare it. The draft convention was later cosponsored by eight African landlocked States (hereinafter referred to as the Afro-Asian Draft).

[221] *See,* for instance, ECOSOC Off. Doc., 22nd Sess. Supp. No. 2 E/2821, paragraph 270.

meetings.[222] In the UNCTAD meeting that followed, a draft Convention Relating to the Transit Trade of Landlocked Countries was presented by Afghanistan, Lao PDR, and Nepal and supported by eight African states. This draft was the basis of an effort to obtain guarantees from UNCTAD for freedom of access to the sea. Although the question was not completely apposite to UNCTAD's primary purpose, a subcommittee of forty members constituted within the framework of the Fifth Committee was charged with its study. During its meetings, the subcommittee was asked to deal with a number of drafts of the convention submitted by other countries. The LLS, particularly the developing ones, were pressing for a convention specifically dealing with their problem.[223] The transit States, on the other hand, were attempting to block that by stating that UNCTAD had neither legal experts nor enough information to be proposing such a convention.[224]

3.5.1 The 1964 Principles and the Ensuing Debate

As a compromise the subcommittee adopted eight principles that were later adopted first by the Fifth Committee and then by UNCTAD in its 1964 plenary session.[225] The principles were inspired by, and for the most part repeated, those

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[222] *See* generally UN ECAFE 20th Session (March 2–17, 1964), Tehran (E/CN 11/657) at 2.

[223] *See* generally the Proceedings of the Meetings of the Subcommittee. Also the first UNCTAD conference was termed a "forum of expression of discontent." Wielding a clear majority of voting power and then showing considerable solidarity and voting as a group, the developing countries assured adoption of a large number of resolutions favorable to their position. The effects of such resolutions, not predictable at the time, were considered problematic by some scholars. *See* Henry J. Steiner & Detlev F. Vagts, *Transnational Legal Problems Materials and Text* 1162 (Foundation Press 1976).

[224] *See id.,* Proceeding of the Meeting of the Sub-committee.

[225] The Principles Relating to Transit Trade of Landlocked Countries were the following:

Principle I
The recognition of the right of each land-locked State of free access to the sea is an essential principle for the expansion of international trade and economic development.

Principle II
In territorial and on internal waters, vessels flying the flag of land-locked countries should have identical rights, and enjoy treatment identical to that enjoyed by vessels flying the flag of coastal States other than the Territorial State.

Principle III
In order to enjoy the freedom of the seas on equal terms with coastal States, States having no seacoast should have free access to the sea. To this end, States situated between the sea and a State having no sea coast shall, by common agreement with the latter and in conformity with existing international conventions, accord to ships flying the flag of that State treatment equal to that accorded to their own ships or to the ships of any other State as regards access to sea ports and the use of such ports.

established by the preliminary conference of LLS in Geneva in 1958.[226] They contained only a few new ideas, essentially focusing on the problems of trade and economic development of LLS. However, there are two notable differences: The UNCTAD Resolution states that, in order to encourage the economic development of LLS, it is essential to give LLS facilities that allow them to mitigate the repercussions that their enclave position inflicts upon their trade. The sixth principle recommends a universal approach to solving the special problems of trade and development of LLS in different geographical regions by encouraging conclusion of regional and international agreements on transit.[227]

The text of the 1958 preliminary conference obligated a transit State to grant freedom of transit for the persons and goods of LLS. In contrast, the fourth principle of 1964 states that the right of free transit may be granted to LLS by all other States "on a reciprocal basis."[228] By subordinating the right of access to

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Principle IV
In order to promote fully the economic development of the land-locked countries, the said countries should be accorded by all States, on the basis of reciprocity, free and unrestricted transit in such a manner that they have free access to regional and international trade in all circumstances and for every type of goods. Goods in transit should not be subject to any customs duty. Means of transport in transit should not be subject to special taxes or charges higher than those levied for the use of means of transport of the transit country.

Principle V
The State of transit, while maintaining full sovereignty over its territory, shall have the right to take all indispensable measures to ensure that the exercise of the right of free and unrestricted transit shall in no way infringe its legitimate interests of any kind.

Principle VI
In order to accelerate the evolution of a universal approach to the solution of the special and particular problems of trade and development of land-locked countries in the different geographical areas the conclusion of regional and other international agreements in this regard should be encouraged by all States.

Principle VII
The facilities and special rights accorded to land-locked countries in view of their special geographical position are excluded from the operation of the Most Favored Nation clause.

Principle VIII
The principles which govern the right of access to the sea of the land-locked State shall in no way abrogate existing agreements between two or more contracting parties concerning the problems, nor shall they raise an obstacle as regards the conclusion of such agreements in future, provided that the latter do not establish a regime which is less favorable than or opposed to the above mentioned provisions.

See International Law of Development: Basic Documents vol. 2, 801–02 (A. P. Mutharika, ed., Oceana Publications 1978).

[226] *See supra* n. 205.

[227] *See* Principle VI, *supra* n. 225.

[228] *See* Principle IV, *supra* n. 225.

reciprocity, the principles laid down by UNCTAD are regressive compared to those adopted in 1958. Indeed, having the principles of free access and reciprocity in the same text is paradoxical. The right of free access is based on the particular geographical position of LLS, a position differing from that of its transit partners. In contrast, the principle of reciprocity can be established between equal partners only. In practice the subordination of the right of free access to the reciprocity clause results in de facto cancellation of the first right by the second.

To complicate the picture further, an interpretative note with a recommendation was added to the principles. The note stated that the principles were interdependent and that each was to be interpreted with due consideration of the other. The recommendation asked the UN Secretary General "to constitute a Committee of Twenty-Four members, chosen on the basis of equitable geographical distribution" to prepare a new draft convention on the transit trade of LLS.[229]

The Committee of Twenty-Four[230] was mandated to refer to the propositions presented to the 1964 UNCTAD Conference by the African and Asian LLS; the principles of international law, conventions, and agreements already in force; and the solutions proposed by individual governments. Finally, the recommendation invited the UN to organize a conference in 1965 to examine the draft prepared by the Committee of Twenty-Four and adopt a convention on the transit trade of LLS. This Committee, which met in October and November of 1964 in New York under the presidency of Paul Ruegger, the delegate from Switzerland, essentially based its work on the Afro-Asian draft,[231] transforming it into a draft Convention.

The Conference of Plenipotentiaries on Transit Trade of Landlocked Countries met in New York on June 7, 1965, and completed its work one month later. There were participants from 58 States, 23 of them LLS. During the conference, the discussions about the legal nature of the freedom of access were vigorous. Delegates discussed whether free access to the sea was a natural right of LLS, to be reaffirmed by the Transit Trade Conference, or whether the duty of the Conference was merely to solve their technical problems of transit transport. As in Geneva,

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[229] *See* Annex A VI.1 on Preparation of a Convention Relating to the Transit Trade of Landlocked Countries, in Proceedings of the UNCTAD, Geneva March 23-June 16, 1964, vol. I. Final Act and Report, UN Doc. E/CONF 46/39, E/CONF 46/141 Vol.1.

[230] This Committee, appointed by the UN Secretary General in response to a request from the 1964 UNCTAD Conference (UNCTAD I), comprised 24 members representing landlocked, transit, and other interested states. The Committee was mandated to prepare a new draft convention dealing with the transit trade of LLS. The members were: Afghanistan, Argentina, Austria, Bolivia, Burkina Faso (formerly Upper Volta), Chile, Côte d'Ivoire, Czechoslovakia, India, Japan, Liberia, Mali, Nepal, Netherlands, Niger, Nigeria, Pakistan, Paraguay, Senegal, Switzerland, USSR, UK, USA, and Yugoslavia.

[231] *See supra* n. 220 and accompanying text.

the LLS asked that an unrestricted right of free access be recognized and that this was necessary to comply with the principle of freedom on the high seas and so that LLS could benefit from the sea like coastal States. Instead, the New York Convention tried to establish equilibrium between the principles of freedom of the sea and territorial sovereignty. This happened probably because the New York Convention derived the tenet of free access from economic principles rather than general principles of international law.[232]

When the Afro-Asian draft was examined in the Committee of Twenty-Four, the representatives of Bolivia and Paraguay proposed to insert a new article in the draft to be submitted to the New York meeting.[233] The proposed insertion aimed at reaffirming the right of all LLS to free access to the sea and to "unrestricted" transit throughout the territory of States situated between the LLS and coasts.

In demanding that these principles be included either in the preamble or in the main body of the New York Convention, the Bolivian delegate declared that UNCTAD had clearly recognized the importance of these principles.[234] The delegate maintained that the LLS expected the principles to be incorporated into an international convention that would establish them as elements of positive law.[235] In support, some members of the Committee of Twenty-Four stated that these principles were already recognized by international law and had been codified in general international conventions, namely the Convention on the High Seas.[236] But other delegates, mostly from transit States, opposed inclusion of the phrase "as recognized principles of international law"; they held that these were only economic principles, not principles of international law. Moreover, for them, mere repetition of identical clauses in a number of treaties did not constitute a general rule of international law.[237]

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[232] Indeed, although the 1965 Convention is built upon the concept and content of earlier agreements, it reflects a special concern with economic development and with the particular development problems arising from the absence of ocean access. The Preamble to the Convention quotes the United Nations General Assembly Resolution 1028 (XI) on LLS, which recognized "the need of LLS for adequate transit facilities in promoting international trade" and the "future requirements resulting from the economic development of the LLS." *See also* Principle I, *supra* n. 225.

[233] Text of the amendment in *UNCTAD: Report of the Committee on the Preparation of a Draft Convention Relating to Transit Trade of Landlocked Countries* (March 12, 1965) UNGA Doc. A/5906, E/CONF. 46/AC 2/L, 7/Rev 1, at 18.

[234] *See id*.

[235] *See id*. at 19.

[236] *See* Report of the Committee, *supra* n. 233, at 20.

[237] *See* generally the Proceedings of the Meetings of the Committee of Twenty-Four in UNCLOS: Fifth Committee Report (Questions of Free Access to the Sea of Landlocked Countries) UN GAOR, Summary Records of Meeting and Annexes, Geneva, Doc. A/CONF.13/43, February 24, 1958 (hereinafter Fifth Committee Summary Records).

The opposition of transit States was relatively strong during both the 1958 and 1965 conferences. The Pakistani delegate went so far as to declare, in the Committee of Twenty-Four, that the draft presented by the two Latin American LLS was based on a fallacious hypothesis: "It invokes principles of international law which do not exist. It confuses the principles of economic cooperation with legal principles."[238] In the end, under pressure by the transit States, the LLS had to withdraw their claim that the right of free access was a recognized principle of international law.

The New York Transit Trade Conference adopted, *inter alia*, three instruments:

- A resolution recognizing that the Convention facilitating international maritime traffic (and its annex, adopted by the international conference in London in 1965) concerned the maritime trade of LLS,[239] by virtue of paragraph II, Article II, of the Convention
- A resolution inviting the Intergovernmental Maritime Consultative Organization to take measures to facilitate the transit traffic of LLS within the framework of the Convention
- Finally, the Convention on the Transit Trade of Landlocked States,[240] which entered into force on June 9, 1967.

3.5.2 Analysis of the New York Convention

The main purpose of the New York Convention was to incorporate into treaty law the rights and obligations of landlocked States and their transit neighbors with regard to the movements of goods in international transit, and then to generate universal acceptance of the Convention. To avoid undermining its "universality" objective, the Transit Trade Conference adopted the viewpoint of transit States, as expressed by the British delegate, who had proposed reaffirmation in the Convention preamble of the principles adopted by the Geneva Conference of 1958.[241] After discussions about the British proposal[242] the Conference adopted the Convention with the principles mentioned only in the preamble. The acceptance

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[238] *See* for detail, the proceedings of the UNCTAD, *supra* n. 233; *see also,* for the attitude of some coastal states, UNCLOS I Off. Rec. (UN Doc. A/CONF. 13/C 5 SR 1–25, 1958) at 1–63.

[239] *The Convention on Facilitation of International Maritime Traffic,* London, 1965. This Convention contained a clause allowing the adopted measure to be applied in the same manner to the government vessels of coastal or noncoastal States that were parties to the Convention. *See* Glassner, *supra* n. 1, at 35 and 215.

[240] Dated July 8, 1965.

[241] *See* Fifth Committee Summary Records, *supra* n. 237, at paragraph 40.

[242] *See id*. at para. 32.

of this solution by LLS was actually their second concession, the first being non-retention of the amendment presented by Bolivia and Paraguay. Certainly, placing these principles in the preamble, the force of which is substantially weaker than the articles of a convention, reduced their juridical value.

In spite of substantial concessions from LLS, the New York Convention attempted to proclaim freedom of access to the sea by reaffirming the principles of the 1964 Geneva Conference.[243] The first of these principles is that "the recognition of the right of each landlocked state of free access to the sea is an essential principle for the expansion of international trade and economic development."[244] This is enhanced in the fourth principle, which states that, to promote fully the economic development of land-locked countries, all States must grant LLS access to international and regional trade in all circumstances and for every type of goods on the basis of reciprocity and free and unrestricted transit.[245]

But the proclamation of these two principles, already weak in substance, is undermined by inclusion of a fifth principle—that a transit State, "while maintaining full sovereignty over its territory, shall have the right to take all indispensable measures to ensure that the exercise of the right of free and unrestricted access shall in no way infringe its legitimate interests of any kind."[246] It also stipulates that these principles are interdependent, and each must be interpreted with due consideration to the others.[247] As in the negotiation of the previous international instruments, the main obstacle in the New York Convention to recognition of the right of access resided in the territorial sovereignty of transit States. Simply, the right of access could be granted to neighbors only if the sovereignty of the transit States was guaranteed. To some extent, this explains the contradiction between the first and fifth principles of the New York Convention preamble. To counterbalance the first principle, which recognizes freedom of access, the fifth principle affirmed the sovereign rights of transit States by emphasizing that the principles were interdependent.

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[243] *See supra* n. 225 and accompanying text.

[244] *See* Principle I, *supra* n. 225.

[245] *See* Principle IV, *supra* n. 225.

[246] *See* Principle V, *supra* n. 225. Some scholars consider exclusive jurisdiction over national territory the most fundamental tenet of law among independent States. They refer to it as a "traditional rule" that each State has the legal right to exclude intrusion on or over its territory. These scholars conclude that no State has any right of transit over or through the territory of any other State, and therefore the right under the 1965 Convention is still imperfect. *See* J. H. Merryman & E. D. Ackerman, *International Law, Development and the Transit Trade of Landlocked States: The Case of Bolivia* 25 (Institut für Auswärtige Politik 1969).

[247] *See* generally, the Interpretative Note of the Principles Relating to Transit Trade of Landlocked Countries.

The 1965 New York Convention starts with a relatively long preamble that reproduces excerpts of the resolution of the 11th UN General Assembly,[248] the eight principles of the 1964 UNCTAD,[249] and Article 3 of the 1958 Convention on the High Seas.[250] Most of the clauses in fact derive from the Barcelona Statute and some are identical. What distinguishes the 1965 Convention from the Barcelona Statute is that application of the New York Convention is more specific. The Barcelona Statute deals with transit in general, without specifically referring to LLS;[251] the New York Convention deals with LLS access to and from the sea.[252]

The New York Convention applies only between LLS and maritime ports.[253] That is clear in the definition of "traffic in transit" as the passage of goods "throughout the territory of contracting states, between a LLS and the sea, when this passage is a portion of a complete journey comprising a sea transport which precedes or follows directly the passage."[254]

The most significant provision is in the first sentence of Article 2. It states that freedom of transit shall be granted in conformity with the provisions of the present convention for traffic in transit and the means of transports. Such traffic must be admitted by mutually acceptable means and must not be discriminatory.[255] However, it also mentions that the rules governing means of transport are to be established by common accord between concerned States, without ignoring international treaties to which the States are party.

Paragraph 3 of Article 2 deals with the passage of persons whose movement is essential for transport in transit. It accords respect for the laws of the contracting States. Traffic in transit through the territorial water of the transit State is authorized in conformity with the principles of customary international law, applicable international conventions, and internal regulations. According to Article 3 of the New York Convention, the transit State must not levy any customs duties or other taxes on transit traffic except dues corresponding to the expenses for supervision and administration necessitated by the traffic in transit.[256] To protect LLS, Article 4 obliges transit States to provide the means of transport so that traffic in transit

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[248] *See* United Nations General Assembly Resolution 1028, *supra* n. 191.

[249] *See supra* n. 225.

[250] *See supra* n. 194.

[251] *See* the Barcelona Statute, *supra* n. 162.

[252] *See* the *Convention on Transit Trade of Landlocked States, supra* n. 218.

[253] *See* art. 1 of the Convention, *supra* n. 218.

[254] *See id*.

[255] *See* art. 2(1) of the Convention, *supra* n. 218.

[256] *See* art. 3 of the Convention, *supra* n. 218.

may be effectuated without unjustified delays.[257] It also requires that the tariff for such facilities be equitable.[258]

The New York Convention includes technical elements originally proposed in the Afro-Asian Draft. For instance, the transit States must use simplified documentation and special procedures with regard to traffic in transit;[259] they must provide warehousing facilities;[260] and by agreement with LLS, they may grant free zones or similar facilities.[261] The New York Convention, however, also sets out situations in which transit States may prohibit access to LLS. Prohibition may be triggered by specific reasons related to public order,[262] the protection of essential security interests of the transit State,[263] occurrence of some serious event (defined as a situation endangering the political existence and the safety of a contracting State),[264] war, or obligations deriving from international or regional treaties to which the transit State is a party.[265]

The New York Convention has the merit of being the first multilateral agreement that deals exclusively in a single instrument with the specific problems of transit trade.[266] It does not, however, contain any significant innovation, and the influence of former international conventions is evident. Hakim Tabibi, a contributor to the New York Convention, wrote that "in the view of LLS, the legal recognition of their rights on a universal level presents a victory they searched for during forty years."[267] Tabibi added that the New York Convention created not only an atmosphere of cooperation between LLS and their transit neighbors but also stimulated the foreign trade of LLS, the majority of which are situated in Africa and Asia.[268]

R. Makil noted that the New York Convention was the first international agreement to recognize the special position of LLS.[269] Commenting that "the recognition of a special status for LLS derives from Article 10 of the New York Convention in so far as the exclusion of special rights from the scope of

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[257] *See* art. 4 of the Convention, *supra* n. 218.

[258] *See id*.

[259] *See* art. 5.

[260] *See* art. 6.

[261] *See* art. 8.

[262] *See* art. 11.

[263] *See* art. 11, paragraph 4.

[264] *See* art. 12.

[265] *See* art. 13.

[266] *See* generally Franck, Baradei & Aron, *supra* n. 219, at 55.

[267] A. H. Tabibi, *The Right of Free Access to the Sea* 19 (Publisher unknown 1966).

[268] *See id*.

[269] *See* Makil, *supra* n. 44, at 46.

application of MFN clauses granted by it is concerned,"[270] Makil added that the international regulations on the rights of LLS, dispersed in a number of bilateral and multilateral agreements, here definitively acquired legal status, being now incorporated into a single convention.[271]

C. Palazzoli's reaction was more subdued. Comparing the New York Convention with the Barcelona Statute, he concluded that the former represents simultaneously progress, stagnation, and regression.[272] Ravan Fahardi was more critical. Fahardi said the New York Convention satisfied mostly the transit States and effectively ended further debate on issues of importance to LLS. The LLS were not likely to reopen the issue, either. However, the New York Convention retained its juridical importance as a legal document, even if not signed by a number of States.[273]

To sum up, even though it has a few weak elements as a result of the intransigence of transit States, the New York Convention does attempt to deal specifically with the transit problems of States deprived of access to the sea. Although it has been criticized, the New York Convention has two clear advantages: (1) It shows that enforceable rules for transit rights of LLS can indeed be formulated in the framework of a multilateral convention intended to be universal in scope. (2) It served as a basis for negotiations on the question of the transit of LLS in UNCLOS III.[274]

3.6 Right to Secure Access Under UNCLOS III

Although the right of states deprived of maritime coasts to access the sea had been acknowledged by a majority of States in earlier treaties and conventions, its status as internationally binding law, particularly in terms of practicality of enforcement, still needed improvement.[275] The LLS therefore continued to demand a formulation that was more valid, objective, and universal. Reformation of the status of the right of access was attempted by the Third United Nations

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[270] *See id*.

[271] *See id.* at 46.

[272] C. Palazzoli, *De quelques développements récents du droit des gens en matière d'accès à la mer des pays dépourvus de littoral*, Revue Générale de Droit International Public 734 (1966).

[273] R. Fahardi, Interview, July 5, 1967, cited by Glassner, *supra* n. 1, at 16.

[274] *See* L. C. Caflisch, *Land-locked States and their Access to and from the Sea*, 49 Brit. Yb. Int'l L. 85 (1978); *see also* Tuerk & Hafner, *supra* n. 86, at 61. In view of the relatively small number of ratifications and accessions, Tuerk and Hafner considered the Convention as remaining a "dead letter." *See id*. at 61.

[275] For instance, *see* Janusz Symonides, *Geographically Disadvantaged States Under the 1982 Convention on the Law of the Sea,* in *Académie de Droit International, Recueil des Cours,* vol. 208 (1988–I), 374 n. 129 (Martinus Nijhoff Publishers 1988).

Convention on the Law of the Sea (UNCLOS III), signed at Montego Bay in 1982.[276]

3.6.1 Genesis of UNCLOS III

Preparation of a new international law of the sea was triggered by an apparently limited initiative that emanated from the representative of Malta to the UN, Ambassador Arvid Pardo. Through a *nota verbale* on August 17, 1967, the Ambassador asked to put on the agenda of the General Assembly a question entitled "Declaration and Treaty Relating to the Exclusive Utilization for Peaceful Purpose of the Seabed and Ocean Floor Beyond the Limit of Actual National Jurisdiction and for the Exploitation of Their Resources for the Interest of the Mankind."[277]

The idea was not totally new. On July 13, 1966, U.S. President Lyndon B. Johnson had declared that "we must ensure that the deep seas and the ocean bottoms are, and remain, the legacy of all human beings."[278] Later, this precept met with unchallengeable success, but Arvid Pardo should get the credit for having switched on the UN mechanism.[279]

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[276] For detail on the genesis, peculiarity, and organization of different sessions of the Conference, *see* United Nations Law of the Sea, Rights of Access of Land-locked States to and from the Sea and Freedom of Transit, Legislative History of Part X, Articles 124 to 132 of the *United Nations Convention on the Law of the Sea*. New York, 1987 (hereinafter UN Law of the Sea); *see also The Work of the International Law Commission,* 39–45 (4th ed., United Nations 1988); for a more general account, *see* B. E. Carter & P. R. Trimble, *International Law* 925–26 (Little Brown & Company 1991); J. M. Sweeney *et al., The International Legal System: Cases and Materials* 157–79 (3d ed., Foundation Press 1988); *see also,* for detail on the Seventh Session, B. H. Oxman, *The Third UN Conference on the Law of the Sea: The Seventh Session (1978)*, 73 Am. J. Int'l L. (1979); *see also* B. H. Oxman, *Summary of the Law of the Sea Convention* in *International Law: A Contemporary Perspective* 559–70 (R. Falk, F. Kratochwil, & S. H. Mendlovitz, eds., Westview Press 1984); J. G. Starke, *Introduction to International Law* 233–52 (Butterworths 1984); René-Jean Dupuy & Daniel Vignes, *A Handbook on the New Law of the Sea* (Martinus Nijhoff Publishers 1991); and Wang, *supra* n. 83, at 27–37.

[277] *Nota verbale* dated August 17, 1967, from the permanent mission of Malta to the UN, addressed to the Secretary General, UN Doc. A 6696; *See also* Mark W. Janis, *An Introduction to International Law* 132 (Aditya Books 1989); T. Scovazzi, *Evolution of International Law of the Sea*, in *Académie de Droit International, Recueil des Cours,* vol. 286, 118 (Martinus Nijhoff Publishers 2000).

[278] *See* La Convention des Nations Unies sur le Droit de la Mer, Notes et Etudes Documentaires, La Documentation Française, No. 4703–4704, 12 (January 28, 1983).

[279] In this context, O'Connell noted that aspects of Pardo's initiatives were built on other proposals already current within the UN system, *see* Daniel Patrick O'Connell, *The International Law of the Sea*, vol. 1, 459 (I. A. Shearer, ed., Clarendon Press 1982). Also, Jonathan Charney notes that the Conference had its origin in the efforts of the United States and the Soviet Union in the early 1960s to protect their strategic interests in transiting oceans. *See* Jonathan I. Charney, *Law of the Sea: Breaking the Deadlock* in 3 Foreign Affairs 598 (April 1977).

The UN General Assembly created an ad hoc Special Committee[280] to examine peaceful uses of the seabed and ocean floor beyond the limits of national jurisdiction and asked it to prepare a report. On the basis of the report the Committee presented at the following session, the General Assembly decided through Resolution 2467 (XXIII) of December 21, 1968, to create a permanent organ composed of 42 States. The Committee for the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction was to study elaboration of principles and juridical norms likely to favor international cooperation in the field. This Committee (the UN Seabed Committee) was enlarged to 86 members by Resolution 2750 C (XXV) of December 17, 1970, and was vested with the new task of elaborating a draft article on the entire law of the sea, to be submitted to a conference to be convened in 1973. The number of States in the Committee was increased to 91 by Resolution 2881 (XXVI) in December 21, 1971.

In conformity with Pardo's original initiative, the Seabed Committee first examined the question of the use of the seabed beyond the limits of national jurisdiction. While the Committee was working, and under its influence, the General Assembly adopted two important resolutions based on the idea that the seabed was to be considered a "common heritage of mankind": Through Resolution 2574 (XXlV)[281] (the Moratorium Resolution) adopted on December 15, 1969, the General Assembly declared that until the creation of an international regime, States and persons (physical or corporate) were to abstain from organizing any activity for exploitation of seabed resources, and that no demand relating to a part of this zone or its resources was to be admitted. None of the industrial States voted in favor of this resolution, but they welcomed Resolution 2749 (XXV),[282] which was a declaration of principles governing the seabed and ocean floor and its subsoil beyond the limits of national jurisdiction. Adopted on

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[280] Composed of 35 members under Resolution 2340 (XXII) of December 18, 1967. It is interesting to note that the Conference favored direct participation of countries throughout the process. The countries did not want the negotiations of the Convention to be preceded by a technical phase managed, as in the 1950s, by the International Law Commission, which would draft the articles. The countries wanted to confront the issue in "first person." *See* Tullion Treves, *La codification du droit international: L'expérience du droit de la mer,* in *La Codification du Droit International*, Colloque d'Aix-en-Provence 310 (Pedone 1999).

[281] UN General Assembly Resolution 2574 (XXIV): Question of the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Underlying the High Seas Beyond the Limits of Present National Jurisdiction, and the Use of Their Resources in the Interests of Mankind, (1833rd plenary meeting, December 15, 1969).

[282] UN General Assembly Resolution 2749 (XXV): Declaration of Principles Governing the Sea-Bed and the Ocean-Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction (1933rd plenary meeting, December 17, 1970).

December 17, 1970, the text spelled out the character of "common heritage of mankind," specified that it was not to be expropriated by States or persons, and set out other rules.

The Seabed Committee came to realize that the question of the limits of national jurisdiction was inseparable from the entire law of the sea. For one thing, because there were precise rules permitting the establishment of national jurisdiction of States, it was necessary to demarcate the jurisdiction of States over marine spaces, which necessarily implied re-examination of classical notions of the law of the sea.

Most States considered this re-examination an occasion to increase their hold upon the seas. It was a time for "maximalists": States wanted to draw the limits of their maritime spaces as far as possible. While enlargement of the territorial sea, contiguous zone, and continental shelf was being discussed, the concept of the economic zone reserved to coastal States was also put forth, with the aim of strengthening the growing hold of each coastal State on the sea. In this climate, establishing a proper regime for the seabed put at issue most concepts of the international law of the sea.

The General Assembly had been conscious of this fact since 1969. In Resolution 2574 (XXIV)[283] it had asked the Secretary-General to collect views from members on the possibility of convening a conference on the law of the sea, mainly to reach a clear and precise definition that would be accepted internationally. The General Assembly decided the following year, in Resolution 2750 C (XXV),[284] to organize a conference in 1973. For this purpose, the Seabed Committee was asked (1) to elaborate draft articles of a treaty dealing with the international regime of the seabed and its mechanism, (2) to compile a complete list of questions about the law of the sea to be dealt with by the conference, and (3) to draft articles on this question.

Once the Seabed Committee had accomplished its task, and after a few intermediary procedural phases, the Third UN Conference on the Law of the Sea (UNCLOS III) was officially convened by Resolution 3067 (XXVIII)[285] of the

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[283] *See supra* n. 281.

[284] UN General Assembly Resolution 2750 (XXV): Question of the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Underlying the High Seas Beyond the Limits of Present National Jurisdiction and the Use of Their Resources in the Interest of Mankind (1933rd plenary meeting, December 17, 1970).

[285] UN General Assembly Resolution 3067 (XXVII). Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Underlying the High Seas Beyond the Limits of Present National Jurisdiction and the Use of Their Resources in the Interest of Mankind, and Convening of a Conference on the Law of the Sea.

General Assembly on November 16, 1973. Its first session was to begin December 3. The conference was mandated to adopt a convention dealing with all questions relating to the law of the sea. That would include questions relating to LLS.

3.6.2 Organization of UNCLOS III

UNCLOS III is remarkable for its coverage and extent. Participating in the deliberations were 165 States (plus Namibia), three Territories, eight National Liberation Movements, 26 Specialized Institutions and other intergovernmental organizations, and 57 nongovernmental organizations (NGOs).[286] It was the largest diplomatic conference ever convened. The duration of the Conference is also noteworthy: It lasted 9 years, in which there were 11 formal sessions totaling some 88 weeks of continuous negotiations, as well as numerous unofficial intersessions. The length of the Conference should not be a surprise. The work to be accomplished was great.

The work of UNCLOS III was not only to create an entirely new regime for the seabed and to institute mechanisms of management but also to remodel the classical rules establishing the jurisdiction of coastal States, taking into account the problems of fisheries, pollution, scientific research, and so forth. Diverging economic interests, opposite strategic imperatives, and different evolving technical factors all had to be taken into account. While the participant States strove to make the rules favoring their own positions more acceptable, negotiations were often disrupted by specific demands. Special regimes were claimed by different archipelagic States, other groups of countries with specific geographic characteristics, and the LLS.

The opposition between industrial and developing States was, not surprisingly, apparent during the negotiations, but the cleavage was not limited to these interests. Groups of coastal States, LLS, or other geographically disadvantaged States (GDS) all showed rigid and steadfast unity. In a Conference marked by this extreme heterogeneity of interests, moreover, there was no single document that could serve as a reference for discussion. In 1958, the first conference had discussed texts already elaborated by the International Law Commission; here the questions were much too complex: The States had to modify the law of the Sea; in 1958, they had merely codified it.

The material at the disposal of the conference consisted of draft articles and a list of subjects elaborated by the Seabed Committee, draft articles presented by States or groups of States, and studies prepared for the Committee by the UN Secretariat. The Conference could also take into account the Declarations of 1970 concerning the seabed, the four conventions of 1958, and recent international cases.

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[286] The last four categories had the status of observers.

It was decided to hold the First Session in December 1973 in New York. It dealt exclusively with questions of organization; another session in the fall of 1974 in Caracas would deal with substance. The Delegate of Sri Lanka, Hamilton Shirley Amarasinghe, was elected President, and the Conference created a number of organs.

The first difficulty arose during the discussion on rules of procedure: How would the Conference make decisions, on the basis of voting or of consensus? The Group of 77 (which included 120 States) wanted a voting system, but the industrialized States were in favor of consensus, a procedure that would secure them the power of blockade, a sort of veto power. The decision was important because it reflected the spirit in which negotiations would be initiated: willingness to compromise or domination by industrialized States.

The problem was solved only at the beginning of the Caracas session. After considerable deliberation, the conference adopted rules of procedure that were a compromise.[287] For example, the rules on decision-making required that the Conference decide that it had exhausted all efforts to reach consensus before any voting on questions of substance could take place. To ensure that this decision was not taken lightly, the rules allowed various deferment—cooling-off—periods before actual voting began. The notion of compromise was also embodied in the declaration incorporating the gentlemen's agreement appended to the rules of procedure, and provided the context in which the rules themselves were framed.[288] Besides consensus, the Conference also adopted the technique of the package deal.[289] Because negotiations were being held simultaneously on different matters, this was extremely important if the Conference was to progress.

3.6.3 Informal Texts

Although the delegates presented their official positions through speeches and declarations in the plenary session, the basic discussions in the Caracas session took place within three main committees. They had a difficult task. The First Committee had a draft elaborated by the Seabed Committee but the different articles had not received unanimous adherence. The two other Committees

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[287] *See* A/CONF 62/30/Rev. 3. *See also* generally, Wang, *supra* n. 83, at 30–7.

[288] By delaying the vote as long as possible, it was hoped that the divergent position might be reconciled, thus obviating the need to vote at all.

[289] A compromise ("gentleman's agreement") reached by the parties to the talks was to accept a solution involving two or more yet unsettled issues in their inalienable totality. For an interesting analysis, *see* generally, G. I. de Lacharriere, *Aspects Juridiques de la Négociation sur un "pakage deal" à la conférence des Nations Unies sur le droit de la Mer,* in *Essays in Honor of Eric Castren* (E. J. Manner, B. Brooms, K. Lagus & K. Hakapaa, eds., IBA 1979); *see also* Charney, *supra* n. 279, at 599.

worked on a great number of partial drafts submitted by States. It was essential to arrange these documents in order, so as to discern at least an outline of the negotiation to be undertaken. The attempt at reduction also continued within informal working groups created to deal with particularly delicate points.

The personality of the Presidents of the three Committees was important because they had to create conditions propitious for compromise by directing the work and, in case of breakdown, by creating small informal groups, as in other international conferences. Negotiation was based on segmentation of the discussions by isolating delicate points and provisionally outlining them one by one. Still, the negotiation lacked a global document for reference. President Amarasinghe took the initiative of asking the presidents to base the draft articles discussed in their Committees on a single document.

As requested by the Conference, on April 18, 1975, during the Third Session, the three presidents handed over one text each, which President Amarasinghe combined into the Single Text of Informal Negotiation dated May 7, 1975.[290] In a preliminary note, the President emphasized the limitations of the document: It was simply a text for negotiation—not a negotiated text. However, it was highly attractive. From session to session, it incorporated the results of the work of the main committees. The first document contained not only the texts from the three Committee Presidents but also a fourth section on dispute settlement prepared by President Amarasinghe himself.[291]

The Fourth Session of the conference saw the creation of a revised single text for negotiation.[292] At the Sixth Session, the Informal Composite Negotiating Text, compiled by the presidential group led by President Amarasinghe, was presented. The Seventh Session consisted of seven groups of negotiations, each dealing with a different matter:

- The regime of exploration and exploitation of the resource
- Financial arrangements
- Organization of the Seabed Authority
- Right of access to the sea of LLS and GDS
- Settlement of disputes
- Defining the external limits of the continental shelf
- Maritime boundaries.[293]

During the Eighth Session in 1979, the Drafting Committee published its recommendations for harmonizing the texts and intensive examination of final

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[290] A/CONF 62/W P.8.

[291] A/CONF 62/W P.9 of July 21, 1975.

[292] A/CONF 62/W P.8/Rev. 1, May 6, 1976.

[293] *See id*.

clauses began. Most useful was the Ninth Session, where Informal Composite Negotiation Text Rev. 2, which became the Draft Convention on the Law of the Sea (informal text), was presented.

Agreement approached, but the Tenth Session stumbled into crises. First, President Amarasinghe died (December 4, 1980). He was replaced by Tommy T. B. Koh, the delegate of Singapore (March 13, 1981).[294] Meanwhile, the United States, having elected a new President, expressed a desire to re-examine the entire question. The chilling effect created by the U.S. attitude was eventually overcome by an intersession that met in New York starting on March 24, 1982. Though the U.S. Government presented a document with its position and asked for a few amendments, the developing States refused to renegotiate.[295]

In March 1982, during the Plenary (Eleventh) Session of the conference, the U.S. amendments were presented formally, though informal negotiations continued. Starting April 23, 1982, the amendments were voted on, and rejected; finally, on April 30, the entire draft was put to a vote. The UN Convention on the Law of the Sea was adopted by 130 votes against 4 (USA, Israel, Turkey, and Venezuela), with 17 abstentions. The Final Act of the Conference contains a number of resolutions completing the text of the Convention;[296] the four most important resolutions form Annex 1 of the Final Act, an integral part of the convention. During the ceremony for signing at Montego Bay, Jamaica, December 7–11, 1982, 117 States affixed their signatures on the Convention.[297] The Final Act of the Conference, which contains resolutions completing the text of the Convention, was adopted.[298]

3.6.4 Group Within a Group: LLS Versus Transit States

During the Seventh Session,[299] the Second Committee (later commonly referred to as a voting bloc) was tasked to negotiate LLS rights of access to the

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[294] *See* A/CONF 62/S 143.

[295] The principal grounds of dissatisfaction stated by the Reagan Administration are dealt with in *The Guide to American Law* (West Publishing Company 1985); *see also* generally, for more detail, Steven R. Davis & Peter Digeser, *The United States and the Law of the Sea Treaty*, Foreign Policy Institute Case Study No. 14 (Johns Hopkins University 1989); and Sweeney *et al., supra* n. 276, at 163.

[296] *See* La Convention des Nations Unies sur le Droit de la Mer, *supra* n. 278, at 22.

[297] The United States, Great Britain, the Federal Republic of Germany, Italy, Belgium, and Luxembourg did not sign. The fact that the U.S. did not become a signatory had preoccupied some. *See* Treves, *supra* n. 280, at 309. *See also*, for details about the different steps before arriving at the conclusion of the Convention, Wang, *supra* n. 83, at 27–37.

[298] *See* La Convention des Nations Unies sur le Droit de la Mer, *supra* n. 278, at 22.

[299] *See supra* n. 293 and accompanying text.

sea. This section deals succinctly with the evolution within this particular group.[300]

In the Committee discussions, the main issue was recognition of the right of access of LLS as a principle of international law. Some transit States were in favor of access: The representative of the USSR proposed that the right of free access be recognized as a general principle of international law, especially because the economic situation of LLS was compounded by their lack of access to the sea.[301] The representative of the German Democratic Republic agreed, saying the right of LLS to free access to the sea and the seabed should be a generally recognized principle of international law embodied in the Convention.[302]

While some transit States were sympathetic to the LLS during the discussions on the New York Convention, many opposed accepting the right of access as a principle of international law. The Iranian delegate said vividly that the 1965 Convention on Transit Trade of Landlocked Countries recognized that those countries should have free access to the sea—within the framework of bilateral agreements. He further added that, although Iran could not be considered a transit State, it had accorded its landlocked neighbors transit facilities to the Persian Gulf and the Sea of Oman. For the Iranian delegation, while it was necessary at all times to observe the principle of reciprocity of the right of transit, no State could grant privileges that might be construed as a sort of servitude prejudicial to its territorial sovereignty.[303]

The remarks of the Pakistani delegate were along the same lines. As a developing country, Pakistan appreciated the aspirations of developing LLS to improve the life of their peoples and had always extended full transit facilities to neighboring LLS under bilateral agreements. However, its delegation saw no justification for making transit facilities independent of agreements between the parties concerned. The right of transit was subject to the principle of reciprocity as laid down in the 1965 Convention.[304]

The representative of Indonesia, although recognizing the vital interests of LLS in having access to the sea, preferred that modalities for access be negotiated with transit States, since it was only by their cooperation that those rights could be effectively exercised.[305]

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[300] *See* UN Law of the Sea, *supra* n. 276, at 34; *see also* generally, Vasciannie, *supra* n. 1. The LLS, along with the other GDSs, were initially viewed as a potential source of pressure to maintain high seas freedom because they had little or nothing to gain by increased zones of coastal state jurisdiction. *See* Charney, *supra* n. 279, at 608.

[301] *See* UN Law of the Sea, *id.,* at 37.

[302] *See id*.

[303] *See id*.

[304] *See id.* at 43.

[305] *See id.* at 46.

The LLS were on the defensive. The Czechoslovakian delegation stated that it was necessary that the right of free access to the sea be affirmed as a legally binding principle in the Convention.[306] The Zambian delegation considered it vitally important for landlocked states to have a guaranteed right of transit and access to the sea;[307] the delegate added that, although that right had been incorporated into international conventions and bilateral and regional agreements and therefore qualified as part of positive international law, it was essential to embody it in any convention resulting from the Conference.[308]

The representative of Lesotho pointed out that his country was perhaps in the most difficult position because it was completely surrounded by the Republic of South Africa.[309] Lesotho attached great importance to the right of free access to the sea, which entailed the right of transit. Both were basic to the very survival of Lesotho as an independent sovereign state, and their exercise should not be subject to the unilateral discretion of a transit State.

The Third through the Eleventh Sessions discussed primarily terminology in the draft, including definitions of transit passage and transit State, although it dealt to some extent with other questions, such as reciprocity and right of access versus freedom of access to the sea.[310]

During this evolutionary process, as early as the spring of 1974, the group of LLS, along with the GDS group with which they had formed an alliance, formulated some basic negotiating positions at Kampala. The Kampala Declaration presented nine principles representing the essential rights and interests of the combined group:

1. The right of LLS to free and unrestricted access to and from the sea
2. The right of GDS to free and unrestricted access to and from the high sea
3. The right of LLS to transit rights and facilities from the transit States
4. The right of LLS/GDS to free access to and from the seabed
5. The right of LLS to use, on an equal basis, facilities, equipment, and all other installations in ports
6. The right to be exempt from duties or taxes while in transit, except service charges in connection with traffic in transit
7. The right of LLS/GDS representation in the organs of international seabed machinery, the decisions of which were to be made with due regard to their special needs and problems

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[306] *See id*. at 40.

[307] *See id*.

[308] *See id*. at 41.

[309] *See id*.

[310] *See id*.

8. The right of LLS/GDS to deep seabed resources, and to governance of the exploitation of such resources by the concept of common heritage
9. The equal rights of LLS/GDS with other states in the exercise of jurisdiction over resources in areas adjacent to the territorial sea.[311]

The Declaration of the principles of Kampala was endorsed by 17 LLS (Afghanistan, Bhutan, Bolivia, Botswana, Burkina Faso [formerly Upper Volta], Burundi, Czechoslovakia, Hungary, Lao PDR, Lesotho, Mali, Mongolia, Nepal, Paraguay, Swaziland, Uganda, and Zambia). It made a significantly useful contribution to the process of concluding negotiations of the text of the Convention.

In UNCLOS III, the clarity of the difference between the views of transit States and LLS largely depended on how much weight was placed on functional aspects in defining access. The transit State view was predicated on established rules, such as territorial sovereignty or security interests. The opposite view tended to minimize these in favor of freedom of the high seas, trade, or correction of geographical inequality.

3.6.5 Transit and Ancillary Rights

UNCLOS III has a general and universal orientation; it regulates all parts and virtually all uses of the oceans.[312] It is a comprehensive and complex document that covers issues ranging from a state's rights over foreign ships in its territorial waters to who controls minerals at the bottom of the ocean.[313] It deals with LLS only briefly:[314] While rights of access to the sea are outlined in detail in Part X of

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[311] The Kampala Declaration, Doc. A/CONF.62/23 (Original English, May 2, 1974), Conference for Developing Landlocked and Geographically Disadvantaged States, Meeting, Kampala, March 20–22, 1974.

[312] Carter & Trimble, *supra* n. 276, at 923; *see also* René-Jean Dupuy, *The Convention on the Law of the Sea and the New International Economic Order, Research, International Law and the Sea in Man's Future,* in Impact of Science on Society, N03/4 (UNESCO 1983). There is no doubt that, as confirmed in the preamble itself, the Convention is evidence of the progressive development of international law. But scholars like Treves like to add that the codification effectuated by UNCLOS III is an example of the "tripartition" of the effects of codification, in broad sense, deriving from the ICJ ruling on the North Sea Continental Shelf, *inter alia:* the distinction between the declaratory effects of an existing custom (codification *stricto sensu*), effects crystallizing an emerging custom, and effects generating a new custom. *See* Treves, *supra* n. 280, at 313.

[313] *See id*. Note that according to Treves, *supra* n. 280, the codification of the law of the sea with the resulting UNCLOS III has been a unique experience in the history of the codification of international law. It is an extreme example of intensive codification, touching upon not only all the aspects of the law of the sea but also taking a position on several other aspects of international law in general. *See* Treves, *supra* n. 280, at 309–10.

[314] Art. 125, paragraph 1, Part X, UNCLOS III.

the Convention,[315] it has few other provisions that could be implicitly linked with the right of access. It is beyond the scope of this study to examine in detail rights of LLS other than access to and from the sea, but other rights will be touched upon to the extent that they facilitate the comparative and evolutionary aspect of this study, as well as in assessing the weaknesses of the Convention from the perspective of the LLS right to access the sea.

General Transit Rights

As it relates to transit rights, Article 125(1) of the UNCLOS III is clear and self-explanatory:

> 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.

While the 1958 Convention proclaimed a "moral right" in favor of the LLS, the 1982 UNCLOS III Convention ostensibly recognizes a "real juridical right" in Article 125(1).[316] However, the force of this seemingly straightforward paragraph is substantially reduced by Article 125(2), which specifically emphasizes that the terms and modalities for exercising freedom of transit are to be agreed upon by the LLS and the transit States concerned through bilateral, subregional, or regional agreements.

Some scholars confirm that Article 125(2) provides for a *pactum de contrahendo,* but what is the scope of the obligations of the transit States? It is possible to impose an obligation to negotiate, but can one impose an obligation to conclude? This is one of the thorniest issues in international law. Also, what happens if an LLS and a transit State cannot reach agreement? The Convention remains silent. It may be recalled that the Federal Republic of Germany, during the conference, had maintained that, absent such an agreement, the national law should apply, particularly where the means of transport are concerned.[317] If that were to happen, it would implicitly impair the superiority of international law over municipal law.

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[315] *See* art. 124–132, Part X, UNCLOS III.

[316] The term "moral right" in this context is used in a broad sense to encompass the moral standards that most countries acknowledge but that are not codified into law. This concept is largely derived from the interpretations of moral rights by Immanuel Kant, who maintained that each of us [thus each country] has a worth or a dignity that must be respected. On the other hand, the real juridical rights are codified rights.

[317] *See* generally Tavernier, *supra* n. 15, at 739.

The principle of state sovereignty dominates the rest of the article. Article 125(3) says that transit States, in the exercise of full sovereignty over their territory, have the right to take all measures necessary to ensure that the rights and facilities provided to LLS in no way infringe on the legitimate interests of the transit States.[318] Thus Article 125 does not grant any new rights to LLS.[319]

Unlike the notion of *jus cogens* on which LLS wanted to anchor their rights of access, the Montego Bay Conference attached the right of access and freedom of transit to "freedom of the high seas" and "the common heritage of mankind," two principles of international law that have different legal status. Freedom of the high seas is unquestionably a principle of positive law, based on customary law, as seen in Article 87 of the 1982 Convention. On the other hand, the principle of the common heritage of mankind, proclaimed in Article 136, has been the subject of much controversy between developed and developing countries. The former do not believe that Part XI of the Convention on the Exclusive Economic Zone (EEZ) codifies existing law; the latter believe that the principle of common heritage of mankind derives from *jus cogens*.[320]

"Transit state" is defined as a State, with or without a seacoast, situated between a landlocked State and the sea, through whose territory traffic in transit passes.[321] Similarly, "traffic in transit" is defined as the transit of persons, baggage, goods, and means of transport across the territory of transit States, with or without transshipment, warehousing, breaking bulk, or change in the mode of transport, where only a portion of a journey begins or terminates within the territory of the LLS.[322] As in the past, the "means of transport" means rolling railway stock; sea, lake, and river craft; road vehicles; and, where local conditions so require, porters and pack animals.[323] This paragraph is relatively flexible because LLS and transit States may, by agreement between themselves, consider as means

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[318] For the effectiveness of this article, *see* Starke, *supra* n. 276, at 272–73; *see also* L. C. Caflisch, *Land-Locked and Geographically Disadvantaged States,* in *Encyclopedia of Public International Law* 169–74 (1989).

[319] This article constitutes, indeed, a clear recognition of the principle. In practice, however, the modalities called for in paragraphs (2) and (3) must involve substantial qualifications. *See* I. Brownlie, *Principles of Public International Law* 216 (4th ed., Clarendon Press 1990).

[320] *See* Tavernier, *supra* n. 15, at 736–37; *see also* generally, Maurizio Ragazzi, *Norms of Jus Cogens and Obligations Erga Omnes: A Revival of the Natural Law Tradition in International Law?* Paper presented at the 9th Annual Meeting—Society of Catholic Social Scientists, Ave Maria School of Law, Ann Arbor, Michigan (October 26–27, 2001).

[321] *See* art. 124(b), UNCLOS III.

[322] *See id.,* art. 124(c).

[323] *See id.,* art. 124(d).

of transport pipelines and gas lines and in general means other than those named. Furthermore, UNCLOS III says that where transit States have no means of transport to give effect to freedom of transit or where the existing means (including port installations and equipment) are inadequate, the transit States and LLS concerned may cooperate in constructing or improving the means of transport.[324]

As with previous inadequate conventions, the transit States are not obligated to ensure transit for LLS. The definition underscores that the right to access raises obligations for at least two states, one landlocked and one the transit State through which the right of access can be enjoyed. In other words, there must be equilibrium between the rights and interests of the two categories of states.[325] Essentially, therefore, in practice a transit State may at any time refuse a convenient transit for an LLS.

Preferential Rights and Participation in EEZ

It is interesting to recall that the LLS had joined forces with other GDS (such as those with short or shelf-locked coastlines) to form a distinct negotiating group at the UNCLOS III.[326] Unlike the past, when the LLS were preoccupied only with questions of access to the high seas and transit across neighboring territories, their aims at UNCLOS III were more far-reaching.[327] They wanted to secure for all GDS (particularly developing countries) preferential rights in neighboring economic zones and "equitable" treatment in the sharing of the resources of the international seabed.[328]

Thus, over the course of time, not only did the number of demands grow but the pattern of the demands changed. The LLS had become more articulate and more ambitious in their demands that transit rights be considered international law. These States attempted to secure a right to share in both the nonliving and the living resources of neighboring economic zones.[329] Such a right, it might be

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[324] *See id.,* art. 129.

[325] *See* Tavernier, *supra* n. 15, at 732.

[326] *See* O'Connell, *supra* n. 279, at 380; *see also* Caflisch, *supra* n. 274, and Vasciannie, *supra* n. 68, at 562.

[327] *See* O'Connell, *id*.

[328] *See id*.

[329] *See id*. Pakistan had submitted draft articles on LLS that proclaimed that each LLS should enjoy free access to and from the sea. Because Pakistan was concerned with the exploitation of the economic zone resources of neighboring coastal States, the draft provided that coastal States could enter into bilateral or regional arrangements with neighboring LLS to enable the nationals of such States to participate in the exploitation of the living resources. There was no indication as to its position on LLS sharing nonliving resources in EEZ of neighboring coastal States. However, the delegate from Pakistan

argued, rests in part on a conception of the continental shelf as a natural extension not merely of the coastal State but of the landmass as a whole, including countries fated by history to occupy the hinterland. Attempts to clarify this right were defeated in the UNCLOS III debates.[330]

Landlocked States in theory, then, also have the right to participate, on an equitable basis, in the surplus of the living resources of the EEZs of coastal States in the same subregion or region, taking into account the economic and geographic circumstances of all the States.[331] The terms of such participation were to be established by the States concerned through bilateral, subregional, or regional agreements, taking into account, *inter alia,*

1. The need to avoid effects detrimental to fishing communities or fishing industries of the coastal State
2. The extent to which a landlocked State, in accordance with Article 69, is participating or is entitled to participate under bilateral, subregional, or regional agreements in the exploitation of living resources of the EEZs of coastal States
3. The extent to which other LLS and GDS are participating in the exploitation of the living resources of the coastal State EEZ and the consequent need to avoid a particular burden on any single coastal State or a part of it
4. The nutritional needs of the population of the respective States.[332]

The right of landlocked States to participate on an equitable basis in the exploitation of the living resources of a coastal State EEZ in the same region or subregion was recognized subject to two main qualifications: (1) the right exists only in respect of "an appropriate part of the surplus," and (2) the economic and geographic circumstances of all States concerned must be taken into account, along with the criteria that generally govern conservation and utilization of the living resources of an EEZ.[333]

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declared at the Geneva session that no State had the right to share in resources that under existing law belonged to a coastal State. Therefore, nonliving resources in EEZ were regarded as nonnegotiable. Given a spirit of goodwill, however, living resources over which coastal States had not previously exercised sovereign rights might be shared, predicated upon appropriate arrangements. *See* Milic, *supra* n. 122.

[330] *See id*.

[331] UNCLOS III, art. 69.1.

[332] *See id*., art. 69.2.

[333] *See id. See also,* for detail, D. J. Attard, *The Exclusive Economic Zone in International Law* 192–208 (Clarendon Press 1987).

Moreover, according to UNCLOS III, when a coastal State is capable of harvesting the entire allowable catch of the living resources in its EEZ, the coastal State and other concerned States should cooperate in establishing equitable arrangements,[334] which might be bilateral, subregional, or regional,[335] that would allow for developing LLS to participate in exploitation of the living resources.[336] Again, such arrangements were to be adapted to the circumstances of and be on terms satisfactory to all parties.[337]

In the course of debate, opinion was divided as to whether or not the access of LLS to living resources in the EEZ should be deemed a "right to participate." The LLS strongly defended their right of access to living resources, while the coastal States demanded that their capacity to harvest the living resources be maintained. Many LLS proposed provisions that would more effectively guarantee their rights. Conversely, many coastal States were concerned that the Convention would severely limit their rights to their offshore waters.[338]

In this context, the LLS had the view that their rights needed adequate guarantee with appropriate instruments within the UNCLOS III system for the settlement of disputes, which could be done through the jurisdiction of judicial or other organs whose decisions would be binding. However, they did not succeed in incorporating their views into the Convention. While Article 254 is clearly subject to both obligations, though it subsumes the transit provisions embodied in the Convention, rights to participation in the EEZ can, to a certain extent, only be asserted by resort to a conciliation committee. Thus most of the system of the EEZ is in practice to be implemented by the coastal States, leaving the LLS no option for invoking their rights before an international forum. Moreover, even where such recourse is possible, the Convention dispute system requires the claiming State to prove that its claims are well-founded, an additional burden on the LLS in particular.

It is clear that UNCLOS III distinguished the industrial from the developing LLS. Industrialized LLS are entitled to participate in the exploitation of living resources only in the EEZs of industrial coastal States of the same subregion or region,[339] and only to the extent that the coastal State, in giving access to the living

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[334] UNCLOS III, art. 69.3.

[335] *See id*.

[336] *See id*.

[337] *See id*.

[338] *See* Milic, *supra* n. 122, at 514. *See also* Jose Antonio Pastor Ridruejo, *Le droit international. A la veille du vingt et unième siècle: Normes, Faits et Valeurs,* in *Académie de Droit International, Recueil des Cours,* vol. 274, 248 (Martinus Nijhoff Publishers 1998).

[339] UNCLOS III, art. 69.4.

resources of its EEZ, minimizes detrimental effects on fishing communities in States whose nationals have habitually fished in the zone.[340] The "right to participate" applies only to an "appropriate part of the surplus of living resources."[341] It is well known that the living resources of the sea are negligible compared with its mineral resources, for which UNCLOS III gives no right at all. Moreover, only an imperfect right is ensured when the priorities are defined in relation to an elusive "equitable basis" and in respect of a remnant of resources, the very nature of which is dependent upon crucial decisions of the coastal State.[342]

Common Heritage of Mankind

A related and important feature of UNCLOS III is the concept of a common heritage of mankind, a term that reflects the belief that resources in certain areas, beyond national sovereignty or jurisdiction, should not be exploited only by those few States whose commercial enterprises or geographical proximity enables them to do so. Rather, such resources constitute the common holding of mankind, to be used for the benefit of all States. Although application of the term and aspects of its substantive content to any particular area requires elaboration by individual treaties, the Convention provides for exploitation of the resources of the seabed by private enterprises as well as member States. The benefits are to be shared equally among all States, whether coastal or landlocked.[343] To regulate this aspect, it envisaged an international seabed authority.

Article 137 of UNCLOS III states that no State shall claim sovereign rights over any part of the deep ocean or its resources, nor shall any State or natural or juridical person appropriate any part thereof.[344] The content of the article has to a large extent helped to assert the right of LLS to access to and from the sea.

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[340] *See id*.

[341] *See id*.

[342] *See* Oppenheim, *supra* n. 111, at 799; *see also* I. J. Wani, *An Evaluation of the Convention on the Law of the Sea from the Perspective of the Landlocked States,* 22 Va. J. Int'l. L. 649 (1982).

[343] *See* generally art. 136, UNCLOS III. In this context, as noted by Seidl-Hohenvelden, these solutions appeared too dirigistic to most OECD countries, who feared that these provisions could be used as a lever to introduce economic planning on a world-wide scale. *See* Seidl-Hohenvelden, *supra* n. 93, at 50.

[344] *See* UNCLOS III, art. 137. This concept presupposes a third kind of regime, different from both the concept of sovereignty that applies in the territorial sea and the EEZ and the concept of freedom that applies on the high seas. *See* Scovazzi, *supra* n. 277, at 117. It should be noted that the concept of benefit to mankind is so vague, however, that it is extremely difficult to derive any clear-cut regime for the deep ocean floor, although it does seek to set forth an unchallengeable principle that no part of the deep ocean floor should be appropriated by any State. Thus, no State may claim or exercise sovereign rights

Indeed, to characterize the resources in an area of the ocean floor that lies beyond the limits of national jurisdiction as the common heritage of mankind and yet deny landlocked and other geographically disadvantaged States a share in them by restricting their access is to preach one thing and practice the opposite.[345] Yet the rights offered are largely theoretical; the majority of the LLS cannot effectively participate in this common heritage.

In this context, the eminent scholar Mohamed Bedjaoui in 1979 warned that

> The idea of common heritage of mankind seems to be fundamental to the development of a new international economic and legal order. But once again we must remember how dangerous is the ideology which puts itself at the service of those very interests which, having once built up their wealth on the depredation and wastage of the planet's resources, now claim a monopoly or oligopoly on the new sources of energy, the exploitation of the seabed, and in a general way, the new fields being opened up to human endeavor by scientific progress.[346]

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over any part of this area, nor may any part of the area be subjected to national appropriation by a claim of sovereignty, by use or occupation, or by any other means. The principle of non-appropriation of the deep ocean floor does not generally lead to the conclusion that exploration and exploitation of this area should come to a halt.

The proclamation of the common heritage of mankind has also made some authors ask whether a new form of territorial regime has been created. *See* for instance, generally, A. Cassesse, *International Law in a Divided World* Ch. 14 (Oxford 1986). In connection with the common heritage, it may be noted that a similar concept was incorporated into the 1979 *Moon Treaty,* which emphasized that the moon and its natural resources are the common heritage of mankind and thus incapable of national appropriation and subjection to a particular regime of exploitation (Article XI). More radically, some scholars have also raised questions as to whether the global climate could be regarded as part of the common heritage of mankind. However abstract the perception behind this proposal, it is important to note that international environmental treaties have not yet used such terminology. Rather, they have used the phrase *common concern of mankind,* which appears weaker and more ambiguous. *See* A. Boyle, *International Law and the Protection of the Global Atmosphere,* in *International Law and Global Climate Change* Ch. 1 (D. Freestone & R. Churchill, eds., Kluwer Law International 1991).

[345] *See* V. C. Govindaraj, *Geographically Disadvantaged States and the Law of the Sea,* in *Law of the Sea: Caracas and Beyond: Development in International Law* 3 (R. P. Anand, ed., Martinus Nijhoff Publishers 1978); *see also* Vasciannie, *supra* n. 68, at 539–64.

[346] *See* Mohammed Bedjaoui, *Towards a New International Economic Order* 239 (UNESCO 1979); *see also* Vasciannie, *supra* n. 68, at 541, who, while confirming that some of the new approaches proposed by developing States in UNCLOS III were supported by industrialized States expressly on the basis of their potential to assist in the development process, also notes that in the UNCLOS III deliberations, industrialized countries supported rules on resource exploitation that suited their own economic interests, whether or not these rules promised advantages for developing countries; *see also* Pinto, *supra* n. 83, at 399–41.

3.6.6 Absence of New Rights and Guarantees

UNCLOS III has been referred to as "a triumph of the conscience of mankind in the field of international law" and as "a historic milestone in the progressive development of international law."[347] In the past, the rules of international law to be observed by all the nations of the world were framed and dictated by only a few countries, the major powers. For the first time in the history of the international law, a Convention presented a set of rules formulated by the combined will of the great majority of States (130 votes for, 4 against, and 17 abstentions), regardless of size or power, in an assembly where equality and freedom in decision making prevailed as a guiding principle.[348]

Some scholars consider UNCLOS III "not a mere codification of established principles or a compilation of the contents of various documents" but

> one of the most important innovations in contemporary international law, which is now at a stage of comprehensive regime with its objective of guaranteeing the interests of all people, in accordance with the principles of justice, equity and protection of the economic conditions of all states, especially the developing countries and those in special circumstances.[349]

In essence, UNCLOS III codifies modern customary international law; it reflects the law of the sea in written form.[350] Similarly, it implies the requirement that the transit States cooperate with LLS. Most provisions of UNCLOS III contemplate regulation between the LLS and transit States.[351]

Some articles provide expressly for cooperation. Article 129 foresees cooperation between transit States and LLS in constructing means of transport to give effect to the freedom of transit of LLS.[352] Article 130 requires such cooperation in the expeditious elimination of delays or other technical difficulties of traffic in transit.[353] However, pragmatic analysis of the provisions of UNCLOS III shows

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[347] Milan Bulajic, *Principles of International Development Law* 310 (Martinus Nijhoff Publishers 1986).

[348] *See id*. On implementation, *see also* generally, Allan G. Kirton & Stephen C. Vasciannie, *Deep Seabed Mining Under the Law of the Sea Convention and the Implementation Agreement: Developing Country Perspective,* 51 Social and Economic Studies 63–115 (2002).

[349] *See,* Bulajic, *supra* n. 347, at 311.

[350] *See* Janis, *supra* n. 277, at 153.

[351] *See* arts. 124(2), 125(2) and 128 of the Convention.

[352] UNCLOS III, art. 129.

[353] *See* M. C. W. Pinto, *The Duty of Cooperation and the United Nations Convention on the Law of the Sea* in *Realism In Law-Making* 140 (A. Bos & H. Siblesz, eds., Martinus Nijhoff Publishers 1986).

that most of the rules set by the Convention could already be found in the earlier Conventions (the Barcelona Convention, the GATT, the Geneva Convention, or the New York Convention). Such is the case, for instance, of the exclusion of application of the MFN clause;[354] exemption from custom duties, taxes, or other charges[355]; equal treatment in maritime ports;[356] the grant of greater warehousing facilities;[357] and assignment of the free zones or other customs facilities to bilateral agreements.[358]

In some respect, LLS lost ground with UNCLOS III. The 1958 Convention gave to the ships flying the flag of an LLS MFN or national treatment, whichever was more advantageous,[359] but Article 131 of UNCLOS III only gives "equal treatment." The interpretation of Article 131, which specifies that "ships flying the flag of landlocked states shall enjoy treatment equal to that accorded to other foreign ships in maritime ports," can easily be used to give *least* favored treatment to LLS. It should have said "either most favored nation treatment or national treatment, whichever is more favorable."[360]

The contested rules laid down in previous Conventions were not reformulated; thus there is still potential for conflict, primarily with regard to means of transport and the other legitimate interests of transit States. The problem of interpretation had been raised by the Pakistani delegation: "Another area that causes us concern is the possible interpretation of the question of access to the sea, which we believe is only a notional right and will be governed by bilateral agreements regarding transit."[361]

Views about UNCLOS III are mixed, particularly in connection with the right of access to the sea of LLS. J. Monnier thinks it is positive because for him, "the recognition of the right to access to and from the sea . . . has corrected, from a juridical angle, a factual inequality that subsisted for a long period of time in the positive international law."[362] For L. Lucchini and M. Voelckel, "The Convention, although not fulfilling all the demands of the landlocked States, is certainly an improved compromise."[363]

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[354] UNCLOS III, art. 126.

[355] *See id.,* art. 127.

[356] *See id.,* art. 131.

[357] *See id.,* art. 132.

[358] *See id.,* art. 128.

[359] *See* art. 3(2) of the *Geneva Convention on the Law of the Sea, supra* n. 194.

[360] *See* for detail, Caflisch, *supra* n. 318.

[361] *See id.*

[362] Quoted in Tavernier, *supra* n. 15, at 741.

[363] *See id*.

Most LLS viewed the achievements of UNCLOS III negatively. The representative of Lesotho said of the draft that there was still room for improvement.[364] The delegate of Zimbabwe seemed unhappy about the provisions dealing with access to the sea and the delimitation of the EEZ.[365] Similarly, for the representative of Paraguay, even after eight intensive negotiations, the text of UNCLOS III satisfied the expectations of LLS only in part,[366] though he agreed it reflected a great advance over former documents.[367] A more or less similar opinion was expressed by Mongolia:[368] The provisions relating directly to the rights and benefits of LLS were not entirely satisfactory, but Mongolia was prepared to accommodate its own interests to those of the international community as a whole.[369]

Czechoslovakia was one of the few LLS to express a positive view of UNCLOS III.[370] Its delegate said that for LLS the Convention

> . . . clearly grants the right of access to the sea through the territory of transit States. Despite the fact that the granting of this right is largely of a symbolic nature, it is the end-result of 50 years of efforts to codify the law in a universal international convention, and as such, is of great political and moral significance for the entire group of 30 landlocked states.[371]

Whatever may be the views of the delegates, satisfied and dissatisfied, in international forums, UNCLOS III offers little that is new for the transit rights of LLS. As many authors have already noted, UNCLOS III failed in particular to clarify the status of LLS; they are still to be considered losers in the context of UNCLOS III. They went through a long and difficult period of negotiation merely for a renewal of previously recognized rights. This explains why the representatives of a number of developing countries have criticized part of the UN Convention on the Law of the Sea because it gives "some states much too much and others little or nothing at all."[372] More precisely, and from the viewpoint of redistribution of oceanic resources, the biggest losers are noncoastal developing countries.[373]

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[364] *See* for detail, UN Law of the Sea, *supra* n. 276, at 94.

[365] *See id*.

[366] *See id*. at 96.

[367] *See id*.

[368] *See id*. at 94.

[369] *See id*.

[370] *See id*. at 96.

[371] *See id*.

[372] *See* Bulajic, *supra* n. 347, at 310.

[373] *See* for detail, Magus Wijkman, *UNCLOS and Redistribution of Ocean Wealth*, in *International Law: A Contemporary Perspective* (R. Falk, F. Kratochwil & S. H. Mendlovitz, eds., Westview 1985); *see also* Wani, *supra* n. 342, at 651.

Possibly UNCLOS III may be advantageous for some LLS that are also transit States,[374] but for most of the LLS in Africa, Asia, and South America, it is a disappointment. In general, the LLS had a vital interest in the attempt of UNCLOS III to improve their transit position, but their hopes were in vain.[375]

Finally, UNCLOS III cannot be viewed in isolation. It came into force on November 16, 1994, one year after the 60th ratification but 12 years after it was concluded.[376] As of February 2005, only 148 countries have ratified or acceded to the Convention.[377] It may well require changes before it is fully accepted by all the States.[378]

3.7 Enforcement of the Right of Access Under International Instruments

"[P]erhaps the element of municipal law most conspicuously lacking in the international system is effective machinery for enforcing the law."[379] Indeed, international law is typically enforced by self-help. As the discussions in earlier chapters confirm, landlocked States have continuously tried to have the rules and advantages granted to them applied, and at times their demands have been unduly rejected. The application of LLS rights of access to the sea can be reviewed in two parts: the promotion of access to the sea and restrictions on the right of access.

3.7.1 Access to the Sea Promoted

To ensure access to the sea for LLS, it is necessary to guarantee that their right to access is applied. Similarly, to ensure continuity and efficiency in transit traffic,

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[374] For instance, Austria and Switzerland are also important transit States. Though they are interested in securing guaranteed rights of transit across the State whose territory separates them from the sea, at the same time they are transit countries for each other and for landlocked Liechtenstein.

[375] For a dimmer view of the real achievement of the Conference in general, *see* Arvid Pardo, *The Convention of the Law of the Sea: A Preliminary Appraisal,* in *Third World Attitudes Toward International Law: An Introduction* 737–49 (F. E. Snyder & S. Sathirathai, eds., Martinus Nijhoff 1987). *See also* Tuerk & Hafner, *supra* n. 86, at 67, who also note that: "[T]he fruit of the intense negotiating effort at the UNCLOS III, by far cannot be regarded as a set of legal regulations which wholly satisfy the interests and needs of the LLS. The Convention constituted, however, the only solution on which agreement with the coastal states was possible and which also reflects to a certain—albeit minimal—extent the rights and interests of LLS."

[376] Article 308 of the Convention.

[377] UNCLOS Website, http://www.un.org/Depts/los/index.htm (visited March, 2005)

[378] *See* Carter & Trimble, *supra* n. 276, at 923.

[379] J. G. Merrills, *Anatomy of International Law* 32 (Sweet & Maxwell 1981).

they must have access to all facilities without which the exercise of the right of access would be hindered. Though the delegates to the 1965 New York Conference seemed to be mindful of this problem, the delegates to UNCLOS III appear not to have made any extra effort to clarify the issues. Nonetheless, the different conventions, each in its own way, have attempted to give LLS particular facilities.

Ensuring Access Through Convenient Routes

An LLS is different from other countries because it can approach the international market only indirectly (by transporting goods through a foreign State). In the case of developing LLS, this handicap is more serious; it significantly hinders their economic development. Consequently, the coastal States—among them, the neighbors of LLS—must provide certain concessions in order to let the goods of LLS pass easily to the sea. Article 2 of the Barcelona Statute stated that traffic in transit by rail or waterway should be organized on routes in use convenient for international transit. The GATT ensured freedom of transit throughout the territory of contracting parties for traffic in transit to or from the territory of other contracting parties via the routes most convenient for international transit.[380] The New York Convention appeared less demanding than the Barcelona Statute; it stated that the contracting States should facilitate transit traffic on routes in use mutually acceptable for transit.[381] This leaves the LLS without any right to claim particular means of communication to support their traffic in transit.[382]

Moreover, these conventions leave unresolved the issue of securing specialized means of communication; when it is a matter of providing for the most appropriate and mutually acceptable communication routes, the issue is likely to be resolved in ways that are compatible with the sovereignty concerns of transit States. In fact, transit States always propose and determine the means, and for political or economic reasons, they do not always authorize use of the easiest means of transport.[383]

The New York Convention compromised between LLS that favored the inclusion of all means of transport necessary for their transit trade and transit States that opposed these demands. Article 1(d) of the New York Convention enumerates, in a restrictive manner, specific means of transport available to LLS,

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[380] *See* GATT, Article 5(2).

[381] *See New York Convention,* art. 2(1).

[382] *See* the Advisory Opinion delivered by the PCIJ in the case of railway traffic between Lithuania and Poland, *supra* n. 173 and the accompanying text.

[383] Such has been, for instance, the case of India vis-à-vis Nepal. For illustration, *see* Amrit Sarup, *supra* n. 99; and Sachs, *supra* n. 54.

including railway stock, seagoing and river vessels, road vehicles, and porters and pack animals when the local situation requires them.[384] UNCLOS III took a similar approach. In spite of its relatively contemporaneous adoption, it failed to include contemporary rights, such as the right of passage of electricity grids, for instance.

The LLS had a preference for regulating technical issues through multilateral means but the transit States preferred to leave regulation of technical aspects of transit to bilateral agreements. Both the New York Convention and UNCLOS III retained the intermediary solution of a general evocation: Transit States were invited to find juridical solutions to common regulations on technical facilities through bilateral agreements with neighboring LLS. Many bilateral treaties on different continents have been executed in this spirit.[385]

Ensuring Access Through Ports and Administrative and Customs Facilities

In the maritime ports, two methods of facilitating access are most common. The first is the institution of free zones. The second is providing material facilities to support transit operations, an option often managed by bilateral treaties.

The Barcelona Statute, reflecting the refusal of transit States to relinquish their privilege of territorial sovereignty, made no provision for creation of free zones.[386] Neither did the Convention on the Regime of Navigable Waterways of International Concern, also signed at Barcelona in 1921,[387] or the Statute on the International Regime of Maritime Ports, adopted in Geneva in 1923.[388] The New York Convention and later UNCLOS III appear to be the result of a compromise between the requirements of LLS and the position of transit States. In fact, the willingness of a transit State determines whether a zone will be created. Despite the lack of

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[384] *See New York Convention,* art. 1(d).

[385] The Agreements of April 7, 1964, between the United Kingdom and Portugal, or of March 2, 1965, between Afghanistan and Pakistan are prime examples. *See* United Kingdom of Great Britain and Northern Ireland and Portugal, Convention relative to the construction of connecting railways between Swaziland and Mozambique, signed at Lisbon. Text in 537 UNT.S. 167; Agreement between the Government of the Kingdom of Afghanistan and the Islamic Republic of Pakistan on Regulation of Traffic in Transit. For the text, *see* R. Gopalakrishnan, *The Geography and Politics of Afghanistan* 238–241 (Prometheus Books 1983); for a very comprehensive study, *see* generally, Jean Grosdidier de Matons, *Droit, Economie, Finances Portuaires* (Presse de l'École Nationale des Ponts et Chausées 1999).

[386] *See* the Barcelona Statute, *supra* n. 162.

[387] For the text, *see,* 7 U.N.T.S., at 35.

[388] *See* for the text, Martens' Treaty Series, N.R.G., 3rd series, vol. 19, 250.

support in international agreements, several bilateral treaties provide for the creation of free zones, most using similar rules for determining a general regime.[389]

The New York Convention deals with the modalities for goods in transit, transport facilities, and installations in relatively general terms.[390] It states that the entry point, exit point, and intermediary stages of transit may be fixed by agreement between parties,[391] transit States are to grant warehousing conditions to other States that are at least as favorable as those granted to goods of their own country, and tariffs and transit charges are to conform with Article 4 of the Convention. According to Article 4(1), the contracting States undertake to provide, in entry and exit points and as needed at points of transshipment, adequate means of transport and sufficient handling equipment to effectuate transit without unnecessary delay.

The Barcelona Statute laid down a simpler precept: All measures for regulating and forwarding traffic across territory imposed under the transit State's sovereign power and authority must facilitate free transit[392] by rail or waterway, on routes in use that are convenient for international transit.

Article 5 of the GATT is more progressive. It requires that traffic in transit not be subjected to unnecessary delays and restrictions.[393] Contracting parties must grant treatment no less favorable than that given to transit traffic with any third country with respect to all charges, regulations, and formalities in connection with transit to or from the territory of any other contracting party.[394] This deliberate imprecision results from the fact that transit States, unwilling to make concessions, intended to reserve the right to regulate all foreign activities in their territory.

The New York Convention, respecting the territorial sovereignty of transit States, did not adopt the broad proposals of the LLS included in Article 12 of the Afro-Asian Draft[395] concerning simplified documentation and methods of expediting customs and other transit administrative procedures.[396] The representative of Afghanistan, during discussions in the Committee of Twenty-Four, emphasized the difficulties faced by LLS because of the absence of simple and efficient methods of administration, which often caused inexcusable delays. To remedy such

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[389] For detail, *see* generally UNCTAD Transport Strategy, *supra* n. 53.

[390] *New York Convention,* art. 6.

[391] *See id*.

[392] *New York Convention,* art. 2.1.

[393] GATT, *supra* n. 186, and accompanying text (art. 5, para. 3)

[394] *See id.,* art. 5, paragraph. 5.

[395] *See* the Afro-Asian Draft, *supra* n. 220.

[396] *See id.,* art. 12.

situations, LLS insisted that Article 12 mention clearly the principles to be applied in such cases.[397] Some transit States proposed to delete Article 12 entirely because the administrative formalities were so detailed.[398] In their opinion, it was not necessary to include them in a convention dealing mainly with general principles;[399] the details could be appropriately regulated through bilateral agreements.

Given the opposition of transit States, a new text was presented by a working group of the Committee of Twenty-four to make Article 12 of the Afro-Asian draft less objectionable.[400] This text introduced several sensible modifications and said that, as a general rule, examination of goods in transit should be confined to summary examination and test checks.[401] Choosing not to adopt any single text, the Committee of Twenty-four instead forwarded both the working group and the Afro-Asian drafts to the several governments and the Conference of Plenipotentiaries. The New York Conference, while adopting the propositions of transit States, retained neither.

The method specified in the first paragraph of Article 5 of the New York Convention was still imprecise: The contracting States agreed to apply only those administrative and customs measures that permitted free and uninterrupted traffic in transit. If necessary, they would negotiate measures to ensure and facilitate transit.[402] The second paragraph was slightly more explicit: The States concerned were to use simplified documentation and expeditious customs, transport, and other administrative procedures relating to traffic in transit for the entire journey on their territory.[403]

Today, many bilateral treaties refer to administrative formalities. In the Nepal-Pakistan Treaty, for example, the two governments agreed to reduce to a minimum all transit formalities.[404] Similarly, the Afghan-Soviet Agreement provided

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[397] *See* Report of the Committee, *supra* n. 233.

[398] *See* discussions by the representatives of India, Czechoslovakia, and Switzerland. Report of the Committee, *supra* n. 233, at 57–62.

[399] *See id.*

[400] *See id.* at 60.

[401] *See id.*

[402] *New York Convention,* art. 5(1).

[403] *New York Convention,* art. 5(2).

[404] The Nepal-Pakistan Agreement on the Regulation of Traffic in Transit, January 28, 1963. *See Study on the Question of Free Access to the Sea of Landlocked Countries and of the Special Problems of Landlocked Countries Relating to the Exploration and Exploitation of the Resources of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction: Report of the Secretary General* 41(UN Doc. 138/37, June 11, 1971).

that customs formalities in the territories of the parties would be minimized for goods in transit.[405]

Ensuring Access Through Tariff Simplification

Undoubtedly the most serious obstacle to freedom of access to the sea is the cost of customs duties and other taxes while goods are in transit; it is essential to remove the financial barriers if LLS are to enjoy freedom of transit. During the Barcelona Conference, the Romanian delegate called transit an economic weapon, the weapon of protectionism.[406] H.O. Mange, the British technical counselor to the Barcelona Conference, countered that freedom of transit did not imply the right to enter a State but only to cross its territory.[407] Every State remains a master at home, but it abstains from abusing its geographical position by refusing to grant, or by granting only under costly conditions, the right of passage for the normal obligatory traffic crossing its territory.[408]

Actually, international law has evolved along the lines suggested by Mange. States have abandoned the practice of subjugating the goods of LLS in transit to customs duties or other taxes. Although there is no specific formula, most international agreements respect the principles of exemption of special duties for transports in transit and of nondiscrimination. Goods in transit are neither imports nor exports; it is quite normal to exempt them from all customs duties. The objective of the New York Convention was to prohibit transit States from taking advantage of their geographical position by assessing duties and taxes on goods in transit.[409] This rule, one of the essential bases of the legal regime of freedom of transit, was established even before the New York Convention. The Barcelona Statute said that traffic in transit is not to be subject to any special dues,[410] and the GATT affirmed that traffic in transit is to be exempted from customs duties.[411]

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[405] *See* particularly art. 7, Agreement between the Government of the USSR and the Government of the Kingdom of Afghanistan Concerning Transit Questions, Moscow of June 28, 1955, U.N.T.S. 240 at 260–64.

[406] First session of the Plenary Commission Document C662M, 265. On the discussions on the concept of economic weapon (war), *see* Seidl-Hohenvelden, *supra* n. 93, at 159–67.

[407] *See* generally First Session of the Plenary Commission Document C662M, 265.

[408] *L'Œuvre de Barcelone, Exposé Par Quelques Uns de Ses Auteurs* (Payot 1922).

[409] *See* generally *New York Convention,* art. 3.

[410] *See* Barcelona Statute, art. 3.

[411] *See* GATT, art. 5, para. 3.

Article 3 of the New York Convention, which deals with transit tariffs, is based on established international practice.[412] This article, reconsidering Article 3 of the Barcelona Statute, affirms that goods in transit are not to be subjected to customs duties or taxes chargeable by reason of importation or exportation, nor to any special dues in respect of transit.[413] All treaties relating to LLS access to the sea contain such provisions. Long before UNCLOS III, for example, the Afghan-Iranian treaty of February 1962[414] provided that goods in transit were not to be subjected to any customs duty or tax or dues levied by national, provincial, or municipal authorities.

The principle of exemption from customs duties and transit taxes has an exception: remunerative dues, those deriving from the cost of services rendered. All international agreements relating to transit authorize imposition of charges for the expenses borne by the transit State for all traffic in transit. As a matter of principle, then, an LLS must share the expenses incurred by its coastal neighbor in facilitating the passage of its goods. Article 127 of UNCLOS III and Article 3 of the New York Convention allow transit States to levy dues on traffic in transit only with the objective of defraying the expenses of traffic supervision and administration.[415] The rules laid down by these two conventions are based on a generally established and uncontested practice; similar provisions were made by the Barcelona Statute,[416] the GATT,[417] and the 1958 Geneva Convention.[418]

That a transit State receives remuneration for services rendered is legitimate, but there is the danger that States may abuse this right and apply excessively high tariffs in an effort to recover lost customs duties. This must be carefully monitored. The question of transport costs is one of the most complicated and important of all the questions concerning application of the right of access. Above all, the problem is how to prevent transit States from changing these remunerative charges into a real transit tax by deliberately maneuvered discrimination so as to favor their national trade, which would have a detrimental effect on the trade of neighboring LLS. That is why the draft prepared for the Barcelona Convention by the Committee for the Study on the Freedom of Communication and Transit[419] provided that

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[412] *See id*.

[413] *See id.*

[414] Afghan-Iranian Treaty (General Transport), Text of Treaty in OIRTB2.

[415] *See supra* n. 409.

[416] Barcelona Statute, Article 3.

[417] *See supra,* n. 411.

[418] Art. 18.

[419] This was a provisional Committee of the League of Nations. Its role was to prepare a draft proposal for a general international convention on transit.

the contracting States would prohibit the use of the transit tariff as "an instrument for international economic struggle." This text was not retained in the Convention.

Ensuring Access Through National or Most-Favored-Nation Treatment

During the Barcelona Conference, the LLS had recommended insertion of the principle of national treatment[420] in the Barcelona Statute. However, the Conference retained the principle of nondiscrimination between transit States themselves.[421] The question was discussed at length in the Conference of New York, but as in Barcelona the discussion was limited to the principle of national treatment and did not deal with tariff nondiscrimination. The Afro-Asian Draft provided that charges applicable to transports in transit should not be greater than those applicable to internal transport.[422] The proposed text would have bound a transit State to treat the traffic in transit of an LLS equally in imposition of costs not only with a third State but also with its own nationals.

The New York Conference of 1965, however, did not adopt the position of the LLS. Though more detailed, the text of the New York Convention in substance does not show any progress from Article 4 of the Barcelona Statute: Article 4(2) of the New York Convention limits tariffs and charges on traffic in transit to those that are reasonable in their rates and in the method of their application.[423] It states that tariffs should be so established as to facilitate traffic in transit.[424] Avoiding the principle of national treatment, it instead uses an imprecise formula according to which tariffs should not be greater than those applied by the contracting States on transports throughout their territory of the goods of coastal States.[425] Finally, the Convention stipulates that the measures apply to traffic in transit using facilities operated or administered by either the State or firms and individuals,[426] with tariffs or charges fixed by the transit State.[427] This imprecision is due to the compromise between the opposing views of coastal States and LLS.

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[420] National treatment is a feature of many international agreements: The parties agree to treat the citizens, commodities, products, ships, etc. of the other parties in the same manner as they treat their own. James R. Fox, *Dictionary of International and Comparative Law* 296 (Oceana 1992) (defining national clause).

[421] *See* generally Barcelona Statute, art. 2 and 3.

[422] *See* Afro-Asian Draft, art. 4.

[423] *See New York Convention,* art. 4(2).

[424] *See id*.

[425] *See id.* Normally, under a national treatment clause, foreigners are accorded the same rights as those accorded to nationals. *See Black's Law Dictionary.*

[426] *See id*.

[427] *See id*.

If the principle of national treatment does not appear in the text of the New York Convention, it can still be found in several bilateral treaties. Some of these also contain provisions analogous to the New York Convention and authorize imposition of dues corresponding to services rendered, so long as the impositions are not discriminatory.[428]

Finally, in the same vein, promotion of access to the sea does not affect the MFN rights[429] of third parties. The right of access to the sea deriving from the principle of freedom of the seas constitutes a specific right for LLS that is linked to geographical position. Therefore, a transit State that grants special advantages in support of free access to the sea is not obliged to grant the same concessions to a third state by virtue of MFN treatment. The affirmation in Article 10 of the New York Convention that MFN treatment does not apply reinforces the specific nature of the right of free access.[430]

The first paragraph of Article 10, which in fact develops the seventh principle of the preamble,[431] states that the contracting States agree to exclude from MFN treatment the facilities and special rights granted to LLS in accordance with the Convention.[432] This provision, which strengthens the scope of the right of access, was not in the Barcelona Statute. On the other hand, the GATT, which is centered primarily on the premise of MFN treatment, had already accepted certain derogation of the premise with regard to regional integration, participation of socialist states in international trade, and emergence of developing States.

In this context, the LLS clearly lost ground with UNCLOS III. The 1958 Convention gave to ships flying the flag of an LLS MFN treatment or national treatment, whichever was more advantageous, but Article 131 of UNCLOS III only guarantees "equal treatment."[433]

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[428] *See,* for instance, Agreement between Nepal and Pakistan on the Regulation of Traffic in Transit, and Agreement between Lao PDR and Cambodia dated October 10, 1959, in UN Doc. 138/37, *supra* n. 404.

[429] MFN treatment means treatment no less favorable than that extended by the granting State to any third State or to persons or things in the same relationship with that third State. It emanates from a treaty provision under which a (granting) State undertakes the obligation towards another (beneficiary) State to accord to it or to persons or things in a determined relationship with it MFN treatment in an agreed sphere of relations. *See* for detail, Endre Ustor, *Most-Favored-Nation Clause,* in *Encyclopedia of International Law,* vol. 3, 468 (North-Holland 1997).

[430] *New York Convention,* art. 10.

[431] *See* Principle VII, *supra* n. 225.

[432] *See* art. 10, para. 1 of the *New York Convention.*

[433] *See supra* n. 360 and accompanying text.

3.7.2 Access to the Sea Restricted

The different conventions have been concerned to establish equilibrium between the principles of free access to the sea and of territorial sovereignty. For instance, the preamble of the New York Convention proclaims that "the State of transit, while maintaining full sovereignty on its territory, shall have the right to take all indispensable measures to ensure that the exercise of the right of free and unrestricted transit shall in no way infringe its legitimate interests of any kind."[434] The terms of the preamble illustrate contradictions within a particularly fragile juridical regime. The concept of "legitimate interests of any kind" contradicts the notion of a "right of free and unrestricted transit," rendering the text ambiguous and leaving few options to resolve disputes. This shortcoming is not specific to the New York Convention; it recurs in most international agreements relating to transit.

This ambiguity within treaty provisions requires us to take stock of restrictions, general and specific, on the right of access. Certain restrictions arising from delineation of the scope of the right of access cannot be challenged in principle and thus constitute general limitations, but restrictions related to more specific issues have been disputed.

Tolerated Restrictions

There are a few types of restrictions, general and specific, that the LLS have viewed as somewhat legitimate. Access to the sea constitutes a special right within the more general category of right of transit. In order to ensure application of the right, simple general measures concerning transit are insufficient. Promotional measures to assure access to the sea must be conceded to LLS. As a result, the transit States require an assurance that these facilities shall remain limited to LLS and that any "profit sharing" with others will be prohibited. It is thus within reason that the scope of the right of access to the sea may be circumscribed in certain situations.

Issue of Transit Traffic The first issue concerns the definition of traffic in transit. Article 1 of the New York Convention[435] defines it as the passage of goods throughout the territory of a contracting state, between a State without a coast and the sea, provided that this passage is a portion of a journey that begins or terminates within the LLS and that it includes sea transport directly preceding or following such passage.[436] This contains an important restriction: It envisages the right as an exercise of maritime rights only[437] and limits the right to passage of

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[434] *See* Principle V, *supra* n. 225.

[435] *See New York Convention,* art. 1.

[436] *New York Convention,* art. 1(b).

[437] *See id*.

goods between LLS and the sea, thus excluding all transports that were not maritime transport. This is harmful for those LLS a considerable portion of whose trade takes place within their own region.[438]

This problem does not arise in the Barcelona Statute,[439] which deals with the problem of transit by looking at the relationship between the coastal States and LLS. Later, UNCLOS III corrected this lacuna by including in the definition of traffic in transit the transit of persons and by broadening the notion of transit to include all territory of one or more transit States (not just those between an LLS and the sea, as in the New York Convention).

Issue of Sovereignty and Territorial Integrity State sovereignty is an important principle of general international law.[440] States mutually acknowledge one another as sovereign within their boundaries. Accordingly, the fifth principle of the Geneva Convention 1958 asserts that transit States retain full sovereignty on their territory.[441] In addition, the conventions already reviewed refer to three main situations that trigger protection of the interests of transit States—security and health, exceptional circumstances, and superior conventions—and restrict the right of access.

First, transit States may enact measures to protect their territorial integrity and legitimate interests against all foreign risks. In view of the importance of this right, the fifth principle of the preamble of the New York Convention declares that the transit State has the right to take all necessary measures to ensure that the right of free transit does not violate its legitimate interests.[442] Moreover, that Convention authorizes each contracting State to take any action necessary to protect

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[438] For example, Afghanistan, Bhutan, Lesotho, and Nepal, whose main trading partners are their neighbors.

[439] *See* generally, the Barcelona Statute, *supra* n. 162.

[440] For detail on the principle, *see* Helmut Steinberger, *Sovereignty,* in *Encyclopedia of Public International Law* vol. 10, 397–418 (North-Holland 1997); *see also* generally, F. H. Hinsley, *Sovereignty* (2d ed. Cambridge University Press 1966); *see also* N. A. Ushakov, *International Law and Sovereignty* in *Contemporary International Law* 97–117 (G. Tunkin, ed., Progress Publishers 1969); and Abram Chayes & Antonia Handler Chayes, *The New Sovereignty; Compliance With International Regulatory Agreements* (Harvard University Press 1995).

[441] *See* Principle V, *supra* n. 205.

[442] Principle V reads: "The State of transit, while maintaining full sovereignty over its territory, shall have the right to take all indispensable measures to ensure that the exercise of the right of free and unrestricted transit shall in no way infringe its legitimate interests of any kind."

its essential security interests.[443] A similar approach was taken in UNCLOS III. These provisions are ambiguous enough to allow transit States to restrict or suspend freedom of access on the pretext of protecting their legitimate interests; thus they ignore the problem of access without posing an efficient solution. It is normal and legitimate for transit States to take measures to avoid abuse of the freedom of access but the restrictions should be applied only in exceptional circumstances and must be formulated in precise terms.

In fact, the New York Convention moves in this direction.[444] Under Article 11, the contracting States may take the precautions and measures necessary to ensure that persons and goods, especially goods subjected to monopoly, are really in transit.[445] Contracting States are also authorized to ensure that the means of transport are really used for the passage of the stated goods. Paragraph 2 authorizes measures to ensure the safety of the routes and means of communication as well.[446] However, paragraph 1, which is less specific,[447] allows each contracting State to prohibit the admission of a category of goods or persons, either for reasons of public morals, health, and security or as a precaution against pests and plant and animal diseases. This clause is ambiguous with regard to, *inter alia,* the transport of arms,[448] but if paragraphs 1 and 4 of Article 11 are read in combination, the transit State can oppose the passage of armaments.[449]

During preparation of Article 11 of the New York Convention, India asked for a specific clause concerning armaments, munitions, and military supplies in the list of categories of goods to which the transit State would not be obliged to grant freedom of transit.[450] The developing LLS opposed this.[451] They contended that rights to import armaments for their defense and national security are universally recognized, and that they would not accept any amendment tending to restrict their sovereign rights.[452] The New York Convention integrates these two opposite

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[443] *New York Convention,* art. 11, para. 4.

[444] *See New York Convention,* art. 11.

[445] *See id.* at para. 2.

[446] *See id.*

[447] *See id.* at para. 1.

[448] *See id.*

[449] *See supra* n. 444, at para. 4; *see also* Right of Passage Case, *supra* n. 116.

[450] *See* Fifth Committee Summary Records, *supra* n. 237.

[451] *See* generally the discussions in the Committee of Twenty-Four, Fifth Committee Summary Records, *supra* n. 237.

[452] *See id*.

stands.[453] The Convention indeed allows for transport of arms but grants a discretionary power to the transit State.

It is worth noting that the ICJ confirmed this discretionary power in the Right of Passage over Indian Territory case,[454] in which it took a position completely

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[453] *See supra* n. 444, at paras. 1 and 4.

[454] Right of Passage over Indian Territory (*Portugal v. India*), *supra* n. 116. The Application expressly referred to Article 36 of the Statute and to the Declarations by which Portugal and India had accepted the compulsory jurisdiction of the Court. India raised a number of preliminary objections to the jurisdiction of the Court:

India argued that a condition in the Portuguese Declaration of December 19, 1955, accepting the jurisdiction of the Court, reserved for that Government "the right to exclude from the scope of the present Declaration at any time during its validity any given category or categories of disputes by notifying the Secretary-General of the United Nations and with effect from the moment of such notification" and that the Declaration of Acceptance was therefore invalid. The Court responded that the words used in the condition, construed in their ordinary sense, meant simply that a notification under that condition applied only to disputes brought before the Court *after* the date of the notification. No retroactive effect could thus be imputed to such a notification. The Court also referred to the principle it had laid down in the Nottebohm case in the following words: "An extrinsic fact such as the lapse of the Declaration by reason of the expiry of the period or of denunciation cannot deprive the Court of the jurisdiction already established." *See* Nottebohm Case (*Liechtenstein v. Guatemala*) (1951–1955; Judgment, April 1955). The Court added that this principle applied to both total and partial denunciation as contemplated in the impugned condition of the Portuguese Declaration.

India also contended that this condition had introduced into the Declaration a degree of uncertainty as to reciprocal rights and obligations that deprived the acceptance of the compulsory jurisdiction of the Court of all practical value. On that, the Court held that, when a case was submitted to the Court, it was always possible to ascertain what were, at that moment, the reciprocal obligations of the Parties. Although it was true that during the interval between the date of the notification to the Secretary-General and its receipt by the Parties to the Statute there might be some uncertainty, uncertainty was inherent in the operation of the system and did not affect the validity of the condition in the Portuguese Declaration.

On another objection, based on the absence of diplomatic negotiations, which would have made it possible to define the subject matter of the claim, the Court held that a substantial part of the exchanges of views between the Parties before the Application was filed was devoted to the question of access to the enclaves, that the correspondence and notes laid before the Court revealed the repeated complaints of Portugal on account of denial of transit facilities, and that the correspondence showed that negotiations had reached a deadlock. Assuming that the Statute, by referring to legal disputes, did require a definition of the dispute through negotiations, the condition had been complied with.

Another objection was based on the reservation in the Indian Declaration of Acceptance that excludes from the jurisdiction of the Court disputes in regard to questions which by international law fall exclusively within the jurisdiction of India. India asserted that the facts and the legal considerations adduced before the Court did not permit the conclusion

different from its decision regarding the transit of persons.[455] The ICJ was of the view that no right of passage in favor of Portugal involving a correlative

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that there was a reasonably arguable case for the contention that the subject matter of the dispute was outside its domestic jurisdiction.

The Court responded that the facts on which the submissions of India were based were not admitted by Portugal and that elucidation of those facts and their legal consequences would involve an examination of the practice of the British, Indian, and Portuguese authorities in the matter of the right of passage, in particular to determine whether this practice showed that the Parties had envisaged this right as a question that according to international law was exclusively within the jurisdiction of the territorial sovereign. All these and similar questions could not be examined at this preliminary stage without prejudging the merits.

India also contended that the Court was without jurisdiction on the ground that India's Declaration of Acceptance was limited to "disputes arising after February 5th, 1930 with regard to situations or facts subsequent to the same date." India argued, first, that the dispute submitted to the Court by Portugal did not arise after February 5, 1930, and, second, that in any case, it was a dispute with regard to situations and facts prior to that date. In that connection, based on the reservation *ratione temporis,* the Court noted that to ascertain the date on which the dispute had arisen it was necessary to examine whether or not the dispute was a continuation of a dispute on the right of passage that had arisen before 1930. The Court having heard conflicting arguments about the nature of the passage formerly exercised was not in a position to determine the two questions, nor did the Court have sufficient evidence to enable it to pronounce on the question whether the dispute concerned situations or facts prior to 1930. This objection related to a limitation in the Declaration of February 28, 1940. India, which had accepted the jurisdiction of the Court "over all disputes arising after February 5th, 1930, with regard to situations or facts subsequent to the same date," contended that the dispute did not satisfy either of these two conditions. As to the first condition, the Court pointed out that the dispute could not have arisen until all its constituent elements had come into existence; among these were the obstacles India was alleged to have placed in the way of exercise of passage by Portugal in 1954; even if only that part of the dispute relating to the Portuguese claim to a right of passage were to be considered, certain incidents had occurred before 1954, but they had not led the Parties to adopt clearly defined legal positions against each other; accordingly, there was no justification for saying that the dispute arose before 1954. As to the second condition, the PCIJ had in 1938 drawn a distinction between the situations or facts that constituted the source of the rights claimed by one of the Parties, and the situations or facts that were the source of the dispute. *See* the PCIJ Judgment of June 14, 1938, Phosphates of Morocco Case (*Italy v. France*), 1970 P.C.I.J. (ser. A/B) No. 74, at 22, which provides an interpretation of the reservation of "past disputes." Also in the case concerning the Electricity Company of Sofia (*Belgium v. Bulgaria*), the Court provided an interpretation on a similar issue.

The dispute submitted to the Court had to do with (1) the situation of the enclaves, which had given rise to Portugal's claim to a right of passage and, at the same time, (2) the facts of 1954 that Portugal advanced as infringements of that right; it was from all of this that the dispute arose, and this whole, whatever may have been the earlier origin of one of its parts, came into existence only after February 5, 1930. The Court had not been asked for any finding whatsoever with regard to the past before that date and, therefore, the objection was not upheld (Judgment of November 26, 1957).

[455] *See supra* n. 117.

obligation on India had been established in respect of armed forces, armed police, and arms and ammunition.[456]

Having found that Portugal had, in 1954, a right of passage for private persons, civil officials, and goods in general, the Court proceeded to consider whether India had acted contrary to its obligation for Portugal's right of passage. Portugal had not contended that India had acted contrary to that obligation before July 1954, but it complained that passage was thereafter denied to Portuguese nationals of European origin, to native Indian Portuguese in the employ of the Portuguese Government, and to a delegation that the Governor of Daman proposed, in July 1954, to send to Nagar-Aveli and Dadra. The Court found that events in Dadra on July 21–22, 1954, causing the overthrow of Portuguese authority in that enclave, had created tension in the surrounding Indian district. Given the tension, the Court was of the view that India's refusal of passage was covered by its power of regulation and control of Portugal's right of passage.

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[456] The Court noted that it appeared that, during the British and post-British periods, Portuguese armed forces and armed police had not passed between Daman and the enclaves as of right, and that after 1878 such passage could only take place with previous authorization by the British and later by India, accorded either under a reciprocal arrangement already agreed to, or in individual cases: It had been argued that that permission was always granted, but there was nothing in the record to show that grant of permission was incumbent on the British or on India as an obligation.

A treaty of December 26, 1878, between Great Britain and Portugal had laid down that the armed forces of either Government should not enter the Indian dominions of the other, except in specified cases or in consequence of a formal request made by the party desiring such entry. Subsequent correspondence showed that this provision applied to passage between Daman and the enclaves: It had been argued on behalf of Portugal that on 23 occasions armed forces crossed British territory between Daman and the enclaves without obtaining permission, but in 1890 the Government of Bombay had forwarded a complaint to the effect that armed men in the service of the Portuguese Government were in the habit of passing without formal request through a portion of British territory en route from Daman to Nagar-Aveli, which would appear to constitute a breach of the treaty; on December 22 , the Governor-General of Portuguese India had replied: "Portuguese troops never cross British territory without previous permission," and the Secretary-General of the Government of Portuguese India stated on May 1, 1891: "On the part of this Government injunctions will be given for the strictest observance of . . . . the Treaty." The requirement of a formal request before passage of armed forces could take place was repeated in an agreement of 1913. With regard to armed police, the Treaty of 1878 and the Agreement of 1913 had regulated passage on the basis of reciprocity, and an agreement of 1920 had provided that armed police below a certain rank should not enter the territory of the other party without previous consent; finally, an agreement of 1940 concerning passage of Portuguese armed police over the road from Daman to Nagar-Aveli had provided that, if the party did not exceed 10 in number, intimation of its passage should be given to the British authorities within 24 hours, but that, in other cases, "the existing practice should be followed and concurrence of the British authorities should be obtained by prior notice as heretofore."

For some scholars, the ICJ's confirmation is essentially based on a local, not a universal, custom. Also the existence of a customary rule obligating a State to grant LLS free access to the sea was noted in the context of Resolution 3314 of the UN General Assembly, in connection with the definition of "aggression" but in a specific context which cannot be generalized.[457]

Second, the exercise of freedom of access to the sea must not hamper the vital interests of transit States. All international agreements dealing with transit limit the exercise of this freedom in cases of disturbance to the internal public order of the transit State. Under exceptional circumstances, a transit State may, for a limited time, restrict the right of access to the sea, but only in periods of domestic social unrest and in time of war.

Article 7 of the Barcelona Statute permits States to derogate from the agreement temporarily in case of exceptional serious events affecting the safety or vital interests of the State or the public.[458] These provisions were reconsidered in Article 7 of the Afro-Asian Draft.[459] During discussions of this article in the Committee of Twenty-Four, the representatives of some LLS proposed to define cases in which the measures would apply.[460] Slight modifications were brought in by Article 12 of the New York Convention. Thus the text was an improvement relative to Article 7 of the Barcelona Statute; the measures were made applicable "in case of emergency endangering the political existence or the security of the

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With regard to arms and ammunition, the Treaty of 1878 and rules framed under the Indian Arms Act of 1878 prohibited the importation of arms, ammunition, or military stores from Portuguese India and their export to Portuguese India without a special license. Subsequent practice showed that this provision applied to transit between Daman and the enclaves.

The finding of the Court that the practice between the Parties had required, for the passage of armed forces, armed police, and arms and ammunition, the permission of the British or Indian authorities rendered it unnecessary for the Court to determine whether or not, absent the practice that prevailed, general international custom or general principles of law recognized by civilized nations, which had also been invoked by Portugal, could support Portugal's claim to a right of passage in respect of these categories. The Court was dealing with a concrete case with special features: historically the case went back to a period when, and related to a region in which, the relations between neighboring States were not regulated by precisely formulated rules but were governed largely by practice: finding a practice clearly established between two States, which was accepted by the Parties as governing the relations between them, the Court must attribute decisive effect to it.

[457] *See* Nguyen *et al., supra* n. 140, at 420.

[458] *See* the Barcelona Statute, *supra* n. 162.

[459] *See* the Afro-Asian Draft, *supra* n. 220.

[460] *See* discussion in UNCTAD, Report of the Committee on the Preparation of a Draft Convention relating to Transit Trade of Landlocked Countries, *supra* n. 233.

Transit State."[461] But the New York text also omitted the words "vital interests" and "in exceptional circumstances, in the time of crisis or for public security reasons."[462] Article 125(3) of UNCLOS III gave transit States the right to take all measures necessary to ensure that rights and facilities provided for LLS do not infringe on their own legitimate interests.

To sum up, Article 125 of UNCLOS III, Article 12 of the New York Convention, and Article 7 of the Barcelona Statute introduce two restrictions on the rights of transit States: Derogation of the rights of LLS to access must be exceptional and temporary, and freedom of transit can never be totally suspended. Even during a period of derogation, free transit must be maintained by all possible means. Enforcing this provision seems difficult, however, because international law does not provide any clear and precise definition of an international crisis necessitating suspension of a State's international obligations.[463]

Issue of Hierarchically Superior Treaties When hierarchically superior treaties so require, transit States may impose restrictions. The Barcelona Statute[464] and the New York Convention[465] do not impose upon any contracting State any obligation that could be inconsistent with their rights and duties as a member of the League of Nations or the United Nations. The UN Charter indicates that obligations arising under it must prevail over particular obligations established by the States.[466] Similarly, Article 5 of the Barcelona Statute and Article 11 of the New York Convention provide for exceptions that transit States can introduce with regard to their application by virtue of certain international agreements. Thus, a hierarchy of norms is established that clearly responds to the superiority of certain rules of universal concern as an expression of an

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[461] *See New York Convention,* art. 12, *supra* n. 218.

[462] For comparison, *see* Barcelona Statute, art. 7.

[463] *See* art. 8 of the Barcelona Statute and art. 13 of the *New York Convention, supra* n. 218. It may be useful to recollect that the conventions relating to freedom of transit concluded under the auspices of international organizations generally contain an article on the application of the convention in time of war. For instance, art. 13 of the *New York Convention,* reconsidering art. 8 of the Barcelona Statute, mentions that it does not fix the rights and duties of belligerent and neutral states in time of war. Despite this precaution, the *New York Convention* leaves several questions unanswered. Fortunately, such a provision is not included in UNCLOS III.

[464] In Barcelona Statute, art. 9, *supra* n. 162.

[465] In *New York Convention,* art. 14, *supra* n. 218.

[466] Art. 103 reads: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

international public order.[467] This hierarchy, another means by which the right of access of LLS risks being foreclosed, does not exist in UNCOLS III.

Disputed Restrictions

The LLS have disputed some of the restrictions imposed by international conventions.

Disputing State Voluntarism The first such restriction is related to the voluntarism of transit States. Most provisions concerning the right of access of LLS originate in bilateral agreements concluded voluntarily between LLS and transit States. These commonly reflect a compromise that is often disadvantageous to LLS, which are in practice in the position of petitioners. Because from a purely formalistic viewpoint, the process of bilateral negotiations favors the transit States, the rights recognized in a framework often tend to appear like a generous gesture rather than a provision negotiated by equals.

Also, from the viewpoint of general principles of international law, it is wrong to make the status of a country subject to, and conditional upon, the benevolence (or malevolence) of another State. Access to the sea and its multiple economic benefits constitutes a rule of international public order, the content of which should not be infringed by bilateral treaties. The issue of free access comes under general international law. It constitutes *jus cogens*.[468] Nonetheless, according to some treaty provisions, most of the transit facilities granted from the coastal States to LLS are subject to mutual accord.

Article 2 of the New York Convention contains the most significant provision in this regard. It reads:

> The freedom of transit shall be granted under the terms of this convention for traffic in transit and means of transport . . . [t]he measures taken by contracting states for regulating and forwarding traffic across their territory

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[467] The notion of international public order has generally been used to designate those principles and rules of international law that may be regarded as the fundamental basis of the international legal system. This book uses the term in a broad sense, with intent to encompass the entire legal framework within which decisions with international effect are taken on the global, regional, and national levels. For more on the concept of International Public Order, *see* Gunther Jaenick, *International Public Order,* in *Encyclopedia of Public International Law,* vol. 10, 314–18 (North-Holland 1997).

[468] For detail on what really constitutes *jus cogens, see* Jochen Abr. Frowein, *Jus Cogens* in *Encyclopedia of Public International Law,* vol. 3, 65–68 (North-Holland 1997); *see also* generally, Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* 43–79 (Clarendon Press 1997).

> shall facilitate traffic in transit on routes in use mutually acceptable for transit to the contracting states concerned.[469]

Thus, the itinerary by which transit traffic must be facilitated should be mutually acceptable. The sixth principle adopted by UNCTAD also stipulates that, with a view to arriving at a universal solution of the particular problems of LLS, all States must favor the conclusion of regional or other international agreements.[470] Given the peculiar nature of freedom of transit, a note of the UN Secretary-General concerning some provisions of the Barcelona Statute and the GATT is significant. The Secretary-General noted during the 1958 Conference on the Law of the Sea that these two texts considered freedom of transit more as a subject for international treaties than as a rule of customary international law. This remark remains valid for the New York Convention, where the right of access depends essentially on the consent of States and is granted by means of bilateral treaties.[471] However, one may conclude that the right of free access is recognized in order to allow LLS to enjoy the freedom of the seas and to participate in the exploration and exploitation of the seabed and its resources. The coastal States still have an obligation to grant free transit to and from the sea, independent of specific agreement.

On this issue, UNCLOS III seems to have attempted to react to LLS demands, since it opted to spell out that "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." It further added that "to this end, land-locked states shall enjoy freedom of transit through the territory of transit States by all means of transport." As discussed earlier, however, the force of this seemingly straightforward paragraph is substantially reduced by Article 125(2), which emphasizes that the terms and modalities for exercising freedom of transit are to be agreed upon by the LLS and transit States through bilateral, subregional, or regional agreements.

Disputing Reciprocity The second disputed restriction is related to the element of reciprocity emanating from the New York Convention. This Convention, restating provisions in the 1958 Geneva Conference on the High Seas[472] and the 1964 UNCTAD,[473] guarantees to LLS freedom of access to the sea on the basis

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[469] *See New York Convention,* art. 2, *supra* n. 218.

[470] *See* Principle VI, *supra* n. 225.

[471] *See New York Convention,* art. 3, *supra* n. 218.

[472] *See* art. 3, para. 1, *supra* n. 194.

[473] *See* Principle IV, *supra* n. 225.

of reciprocity. Neither the Afro-Asian Draft nor the Barcelona Statute contained such a provision.[474]

During discussions in the Committee of Twenty-Four, the representatives of certain transit States proposed a clause for the convention draft providing that contracting States grant facilities to traffic in transit across their territory on a reciprocal basis.[475] LLS responded by stating that such a proposal could not be reconciled with the very principles that granted the rights. In the end, the transit States prevailed; Article 15 of the New York Convention required that the provisions be reciprocal.[476]

Reciprocity can be just only when there is a minimum of equality and a similarity of situation between the parties.[477] No doubt geography is one important cause of the extreme underdevelopment of several of the LLS, which engenders inequality even within the same region between these States and their neighbors. Transit and access for LLS are vital. For LLS, treaty provisions linking freedom of access to the rule of reciprocity are based on the erroneous hypothesis that LLS and transit States are in comparable positions and have identical transit needs.

The principle of freedom of transit for LLS was meant precisely to allow these States to exercise their right of access to the sea. The principle of reciprocity should not have earned a place in the New York Convention, which was meant to solve the transit problems of LLS. By requiring reciprocity, the New York Convention failed to distinguish those transit facilities needed by LLS because of their geographical position from those traffic and communication facilities granted to all States as a matter of course. The reciprocity requirement effectively acts as a restriction upon the right of access to the sea. Fortunately for LLS, this notion of reciprocity, which remained sacrosanct for decades, was eliminated by UNCLOS III.

Disputing Limitations on Means of Transport The third element that has been disputed is the definition of "means of transport." The definition in the New York Convention is limited,[478] though apparently broader than in the

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[474] On the other hand, the Statute relating to the International Regime of Maritime Ports, adopted at Geneva in 1923, mentioned that the right of access to the ports and the equality of national treatment must be granted by all contracting States on the basis of reciprocity. *See* art. 2 of the *Convention on the International Regime of Maritime Ports,* Geneva (December 9, 1923). Text I LVIII LNTS 301.

[475] *See* generally the Fifth Committee Summary Records, *supra* n. 237.

[476] *See New York Convention,* art. 15. *See also* Symonides, *supra* n. 275, at 376.

[477] *See* M. Virally, *Le principe de réciprocité dans le droit international contemporain,* in *Académie de Droit International, Recueil des Cours,* vol. 122 (1967–III) (Martinus Nijhoff Publishers 1967).

[478] *See New York Convention,* art. 1(d).

Barcelona Statute. According to Article 1(d) of the New York Convention, means of transport includes: (i) any railway stock, seagoing and river vessels, and overland vehicles; (ii) where the local situation so requires, porters and pack animals; and (iii) if agreed upon by the contracting States, other means of transport and pipelines and gas lines, when they are used for traffic in transit.[479] The Barcelona Statute had a broader scope;[480] it enumerated vessels, ships, vehicles, wagons, and other means of transport.

The New York Convention retained the expression "other means of transport" but only in the context of agreements between States. It exhaustively enumerated the means of transport within its purview. It then relegated "other means of transport" to bilateral agreements—a noteworthy feature, since for the first time a multilateral agreement concerning transit mentioned pipelines and gas lines. On the other hand, the New York Convention did not mention aircraft. Given the detail in Article 1(d), this category of transport would seem to have been intentionally excluded.

Finally, Article 2(1) of the New York Convention concerning means of communication[481] requires that the measures for regulating and forwarding traffic taken by contracting States should have the aim of facilitating transit traffic on mutually acceptable routes.

Disputing Exclusion of Persons An additional interesting feature of the New York Convention is that it excludes persons: Traffic in transit covers only the passage of goods, including unaccompanied baggage.[482] The Afro-Asian Draft, which reproduced Article 1 of the Barcelona Statute, did not contain this limitation.[483] The delegates of transit States participating in the Committee of Twenty-Four had generally agreed to exclude persons from the definition because the main aim of the New York Convention was to regulate transit trade of LLS *stricto sensu*. Naturally, the LLS did not share this viewpoint, but the Committee found a compromise: It adopted a proposal from India to authorize the passage of persons whose movements are necessary for traffic in transit, in conformity with the laws of transit States.

The transit States failed, however, to give the LLS a satisfactory explanation for the exclusion of persons from the New York Convention's definition of "traffic in transit." The LLS continued to claim that "traffic in transit" refers not

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[479] *See id.*

[480] *See* generally the Barcelona Statute, *supra* n. 162.

[481] *See New York Convention,* art. 2(1).

[482] *See New York Convention,* art. 1(b).

[483] *See* generally, the Afro-Asian Draft, *supra* n. 220.

only to baggage, property, and means of transport through the territory of one or several transit States but also to transit of persons, as in the Barcelona Statute. UNCLOS III, on the other hand, handled "traffic in transit" as the transit of persons, baggage, goods, and means of transport across the territory of transit States, with or without transshipment, warehousing, breaking bulk, or change in the mode of transport where only a portion of a journey begins or terminates within the territory of the landlocked state. It also included in "means of transport" rolling railway stock, sea, lake, and river craft, road vehicles, and, where local conditions require, porters and pack animals.

UNCLOS III is relatively flexible because landlocked and transit States may, by agreement, include as means of transport pipelines, gas lines, and means of transport other than those listed. Furthermore, in UNCLOS III, where there are no means of transport in transit States to give effect to freedom of transit or where the existing means are inadequate, the transit States and LLS concerned may cooperate in constructing or improving the means of transport.

Final Observation

The habit of making decisions on the basis of compromise rather than the good-faith negotiation and proactive understanding that has always prevailed in international forums explains the regularly less than satisfactory outcome of international resolutions, and the recurrent disadvantages to certain groups of states. By and large, this has been the case of LLS with regard to access to the sea. The attempt to resolve problems of access through conventions was only partially successful, mainly because of significant differences of attitude between state groups. Not only were the groups split on the question of the substantive content of the law, they also differed on the nature of the international system and the proper means of negotiating laws.

It is important to note, too, that, although the 1982 Convention has entered into force, the previous instruments have not been abrogated. As a result, the status of LLS is governed by a series of complex instruments, universal as well as regional or bilateral in scope, whose coexistence often creates confusion, difficulties, and incoherence. A sort of sedimentation of successive layers of 1921, 1958, 1965, and 1982 legal regimes can be noticed, which leaves jurists and researchers in a confusing situation.[484]

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[484] *See* generally, Tavernier, *supra* n. 15, at 731.

CHAPTER FOUR

Influence of International Law on State Practice

For decades, LLS on different continents concluded bilateral treaties dealing with the question of access to the sea and transit. This chapter attempts briefly to describe how the regime relating to LLS evolved and to assess the influence of multilateral conventions on a variety of bilateral relations.

4.1 Treaties Concluded in Europe

Before World War I, Switzerland, feeling the great disadvantage of not having ships under its own flag to safeguard supplies for its population, was the first LLS to ask for the right to have a maritime flag.[485] Previously, also for the first time, through a treaty on March 16, 1816, it had tried to solve its transit problem with the kingdom of Sardinia, then its neighbor.[486] From World War I onward, the number of treaties in Europe grew significantly, mainly because so many States without maritime access emerged from the dismemberment of the Austro-Hungarian Empire.

On April 21, 1921, Germany, Poland, and the Free City of Danzig signed a Convention on transit freedom between Eastern Prussia and the rest of Germany.[487] The "corridor of Danzig," which allowed Poland and Danzig to freely approach the sea, separated East Prussia from the rest of Germany, making East Prussia a German enclave within a foreign territory. On its side, Germany granted to Poland and to Danzig the same transit freedom throughout its territory.

Article 2 of the agreement exempted all goods in transit from all customs or similar duties. Trains containing goods traveled under seal (Article 9), and persons in transit, along with their baggage, were exempted from all customs duties.

Poland had also concluded, on November 9, 1920, an Agreement with the Free City of Danzig.[488] According to that Agreement, Poland was authorized to establish in Danzig Polish administrative services for the inspection of the condition of navigability of Polish vessels (Article 8). Danzig granted to Polish vessels the

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[485] *See* Tuerk & Hafner, *supra* n. 86, at 58.

[486] *See id*.

[487] Treaty Series, League of Nations, Vol. XII (1922), at 308.

[488] For the text, *see* Grewe, ed., *supra* n. 133, at 848.

same treatment as it granted to its own (Article 10). It also agreed to grant a free zone in port (Article 18).

In fact, this zone had existed before the agreement. Its maintenance was placed under the Jurisdiction of the Council of Ports and Waterways of Danzig (Article 19). The Council was in charge of ensuring Poland "free use, service, and means of communication" (Article 29). The means of communication covered by the agreement were waterways and railways.[489]

A legal instrument granting facilities to a State without access to a port in a transit State was the Agreement dated March 23, 1921, between Czechoslovakia and Italy that related to concessions and facilities granted by Italy in the port of Trieste.[490] This Agreement aimed at facilitating transit between the two States. Czechoslovakia obtained the right to install its own customs office in the port of Trieste, and the Italian administration authorized the transit of Czech vehicles originating at the port through Italian territory. Czechoslovakia also obtained the right to use a hangar to facilitate loading and unloading of goods through the railways. Interestingly, another Convention dated March 8, 1923, between Czechoslovakia and Hungary, two LLS sharing the same kind of difficulties regarding free access to the sea, guarantees similar facilities.[491]

These agreements demonstrate a relatively liberal attitude on the part of transit States. This evolution in the direction of further liberalization of transit continued on the European continent. In the period after World War II, the contribution of the Economic Commission for Europe (ECE) became determinative. Its Committee of Internal Transport facilitated the adoption of two Conventions concerning overland and railway transit.

The two Conventions signed on January 10, 1952, each had a specific ambit: one to exempt from taxes and duties at the frontiers goods transported by railway; and the other to facilitate transit of passengers and baggage on railways at the frontiers. These conventions entered into force on April 1, 1953. The ECE also took into consideration overland transport: It prepared a draft convention relating to international transport of goods covered under TIR (Transport International Routiers) Carnets. Commonly known as the TIR Convention, it was signed in Geneva on January 15, 1959, and entered into force on January 7, 1960.[492]

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[489] This agreement was signed in a special context after World War I: the defeat of Germany and creation of the Danzig corridor. The facilities were granted not exclusively because of a benevolent willingness to apply international law and facilitate the access to the sea of neighbors deprived of direct access but also because of the psychosis that prevailed in the aftermath of a devastating war.

[490] Treaty Series, League of Nations, Vol. XXXII (1925).

[491] 48 L.T.S. 257.

[492] 348 U.N.T.S., 14.

The TIR regime, which concerns transport of goods in overland vehicles or containers loaded on such vehicles, is the simplest system for customs and police formalities.[493] Transit States party to this Convention agreed to introduce simplification through their own legislation. In view of its innovative approaches, the TIR Convention played a considerable role in stimulating overland transport in European States, which led Marion to emphasize that "without TIR, life would be impossible in Europe."[494]

Most European States, among them six LLS, adhered to the TIR Convention, which is an example of a multilateral solution to the transit problems of a continent. It facilitated and liberalized international transport among European States without creating any obstacle to the conclusion of agreements on, for instance, customs unions or economic zones. After the TIR Convention was adopted, many other international legal instruments dealing with specific issues were signed in Europe, each increasingly more liberal.

Here it is appropriate to mention that there are in Europe several economic organizations facilitating free exchange between member States. All European LLS belong to one or several of these. For instance, Luxembourg is a member of BENELUX, which is itself integrated into the European Union (EU); Switzerland is a member of the European Free Trade Association (EFTA), as was Austria until 1995; Hungary and Czechoslovakia were long members of the Council of Mutual Economic Assistance (CMEA) and have joined the EU. All these organizations, which are highly integrated, create a particularly advantageous position for European LLS compared to those on other continents.

4.2 Treaties Concluded in Africa

Almost all of sub-Saharan Africa became independent after 1956; until then, only Liberia and Ethiopia were independent. Until 1956, most bilateral agreements were between colonial powers seeking free access to the sea for their colonies; for instance, a Treaty signed between Great Britain and Portugal on November 14, 1890,

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[493] In the same time period, under the auspices of the Customs Coordination Council and with the help of the International Bureau of Chamber of Commerce, the ATA Convention was concluded on July 6, 1961. This Convention, which entered into force in 1963, established a carnet system to facilitate procedures for temporary duty-free imports of goods. *See* for a brief introduction, Kishor Uprety, *ATA: An International Convention for Temporary Export,* 45 Law Bulletin 42–50 (Nepal Law Society 1991).

[494] Marion, *supra* n. 170, at 465. This Convention was revised in 1975 to take into account practical experience in operating the system and to give effect to technical advances and changing customs and transportation requirements. *See* generally, *The TIR Transit System,* ECE/Trans/TIR2 UN, 2 (United Nations 1991).

guaranteed free navigation on the Zambezi.[495] In Article 3 of this Agreement, the King of Portugal agreed to improve the means of communication between Portuguese ports and territories that were in the British zone of influence. A similar example is the Treaty of March 15, 1921, between Great Britain and Belgium,[496] dealing with the measures taken to facilitate Belgian trade in the East African territories by allowing access to British ports on the Indian Ocean.

Ethiopia, at the time the only independent African LLS, concluded an agreement with Italy on August 2, 1929,[497] that dealt with construction of a route linking Assab to Dessia. Italy granted Ethiopia a free zone in the port of Assab where Ethiopia could construct warehouses. Another agreement, signed on May 15, 1902, in Addis Ababa and concerning the demarcation of boundaries between Ethiopia and Sudan,[498] had already granted Great Britain the right to construct a railway through Ethiopian territory to link Sudan and Uganda.

The convention of June 17, 1950, between Great Britain and the Republic of Portugal concerned the port of Beira (now in Mozambique).[499] This agreement ensured access to the sea for the British colonies of Northern Rhodesia (Zambia), Bechuanaland (Botswana), Swaziland, and Basutoland (Lesotho). The contracting States also agreed to avoid any discrimination in applying railway tariffs within these territories.

After decolonization began, the African LLS began signing their own bilateral agreements with transit neighbors. A great number of these concerned overland public transport[500] and applied to transport of both goods and passengers.

With regard to port installations, Mali and Senegal[501] on June 8, 1963, signed an agreement that seems to be highly significant. It stated that the port installations

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[495] Agreement between Great Britain and Portugal, recording a *modus vivendi* Respecting the Spheres of Action of the two Countries in Africa. For the text, *see* Edward Hertslet, *The Map of Africa by Treaty* vol. 3, 1014–16 (Harrison and Sons 1909).

[496] 5 L.T.S. 319.

[497] *See* The Report of the Secretariat of the ECE, Problems of Transit of East African LLS, Document E/CN 14/INR/44, at 12; *see also* for a detailed discussion of several agreements, Jean Grosdidier de Matons, *Facilitation of Transport and Trade in Sub-Saharan Africa: A Review of International Legal Instruments* (The World Bank 2004).

[498] *See* Article V, Treaties Between Great Britain and Ethiopia and Between Great Britain, Italy and Ethiopia, Relative to the Frontiers Between the Sudan, Ethiopia and Eritrea, signed at Addis Ababa on May 15, 1902. For the text, *see* I. Brownlie, *African Boundaries. A Legal and Diplomatic Encyclopaedia* 866–67 (C. Hurst & Company 1979).

[499] 537 U.N.T.S. 167.

[500] Agreement of July 26, 1968 Between Mali and Upper Volta; Agreement of October 10, 1966 Between Niger and Upper Volta *See* Document UNO A/AC 138/37, June 11, 1971. *Note:* Upper Volta officially changed its name to Burkina Faso on August 4, 1984.

[501] U.N. Doc., A/AC, 138/37, 1971.

of Dakar and Kaolack for transit of goods to or from Mali form distinct free zones within these ports, with the customs authorities of both states supervising entry and exit. By creating a free zone for an LLS in the port of a transit State, the agreement seems more generous than the bilateral agreements that merely provide warehousing facilities. A more recent example is the Protocol between Rwanda and Kenya regarding warehousing facilities at Maritini (Mombasa).[502]

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[502] *See* Agreement dated February 26, 1992, between the Rwandese Republic and the Republic of Kenya, Rwanda Gazette Officielle (1994). An interesting example of constructive cooperation in Africa relates to a petroleum development and pipeline project for Chad and Cameroon. In order to develop the oil fields at Doba in southern Chad, including construction of a 1,070-kilometer pipeline to offshore oil-loading facilities on Cameroon's Atlantic coast, Chad (landlocked) and Cameroon (transit) entered into a bilateral treaty in 1996 (Accord entre le Gouvernement de la République du Tchad et le Gouvernement de la République du Cameroun Relatif à la Construction et à l'exploitation d'un Système de Transport des Hydrocarbures par Pipeline) (Treaty on file with author). This Treaty, signed on February 8, 1996, made clear and unambiguous references in its preamble to the GATT, the spirit of the 1965 Convention on Transit Trade of Landlocked States, and UNCLOS III.

The recitals in its preamble are clear.

> «Rappelant les dispositions pertinentes de 1'Accord Général sur les Tarifs Douaniers et le Commerce du 30 octobre 1947 et de 1'Accord Général sur les Tarifs Douaniers et le Commerce annexe à 1'Accord du 15 avril 1994 instituant l'Organisation Mondiale du Commerce;»
>
> «Ayant présentes a 1'esprit les dispositions de la Convention de New York du 8 juillet 1965 relative au commerce en transit des Etats sans littoral;»
>
> «Rappelant également les dispositions pertinentes de la Convention des Nations Unies sur le Droit de la Mer du 10 décembre 1982, en particulier sa partie X portant d'une part, sur le droit d'accès des Etats sans littoral à la mer et depuis la mer et en liberté de transit, et d'autre part le droit des Etats de transit dans l'exercice de leur pleine souveraineté, de préserver leurs intérêts légitimes (see the recitals of the preamble);»

Furthermore, Chapter 3 deals with the right of access to the sea and the freedom of transit. Its Article 3 reads:

> «1. La République du Cameroun reconnaît et octroie à la République du Tchad, Etat sans littoral, un droit d'accès à la mer et une liberté de transit pour l'exportation par pipeline des hydrocarbures produits sur son territoire, conformément aux dispositions pertinentes de la Convention des Nations Unies sur le Droit de la Mer du 10 décembre 1982.»
>
> «2. Les Expéditeurs des hydrocarbures produits en République du Tchad bénéficient également du droit d'accès à la mer de la République du Tchad spécifie a l'alinéa 1) ci-dessus.»

In the same vein, Article 4 of the Treaty reads:

> «La République du Cameroun pour l'exercice du droit d'accès à la mer et de la liberté de transit reconnus et octroyés à la République du Tchad à l'article 3 ci-dessus s'engage à prendre les mesures relevant de sa compétence afin d'éviter les retards et les difficultés, notamment à caractère technique ou administratif, dans la conception, la construction, l'exploitation et l'entretien du Système de Transport et l'acheminement du trafic en transit. Les Etats Contractants coopèrent le cas échéant afin d'éliminer dans les meilleurs délais toute cause de retard ou de difficultés.»

Besides bilateral agreements, a number of international organizations, generally regional or subregional, facilitate exchange between African States. Most of these were created as instruments of economic cooperation among States in the area. Within these institutions have been created organizations facilitating transit among member States. Such African organizations have been perceived as less efficient than the European ones, perhaps simply because they are of more recent origin.

4.3 Treaties Concluded in Latin America

Both the LLS in South America, Bolivia and Paraguay, have established special relations with their neighbors through agreements.

Bolivia, which in former times was part of the Inca Empire, was attached to the Vice Royalty of Peru during the Spanish dominion from the sixteenth century to the beginning of the nineteenth. It acquired its independence in 1824.[503] After Bolivia lost its war with Chile in October 1904, the two countries signed a treaty on peace, friendship, and trade.[504] The treaty granted Chile permanent possession

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In addition, its article 5 reads:

> «Dans l'exercice de sa pleine souveraineté sur son territoire, la République du Cameroun peut, en conformité avec les traités et les principes de droit international, prendre toute mesure apte à protéger ses intérêts légitimes conformément aux dispositions pertinentes de la Convention des Nations Unies sur le Droit de la Mer du 10 décembre 1982. L'application des mesures nécessaires ne peut dans tous les cas avoir pour effet que de limiter ou de suspendre le transit des hydrocarbures par pipeline jusqu'à la disparition des causes de la limitation ou de la suspension.»

[503] Bolivia's transit problem became an issue after the Pacific War (1879–83). Before that time, the fact that the American Republics were new, lightly populated, and enormously extended States meant that boundaries were not well defined. However, the legal principle of the *uti possidetis* ruled the boundaries of the American countries after their independence; it maintained the limits they had while ruled by Spain. Since all the territories belonged to the Spanish Crown, there were no problems even if the boundaries were not clear, and Spanish law was at times contradictory in defining them. In accordance with Law No. 5 of Book 11 of Title XV of the 1680 Spanish recompilation of Indian Laws, Chile and Peru were neighboring countries sharing the Pacific coast, while Bolivia had no access to the sea. A number of Peruvian and Chilean administrative acts throughout the centuries had affirmed the law. After independence, Bolivia questioned the interpretation of the Spanish law, but with its defeat in the Pacific War, Bolivia's access to the sea was cut off. (The author is grateful for the valuable comments provided by Mr. R. Vargas-Hidalgo on this subsection on Latin America.)

[504] For the text of the Treaty of October 20, 1904, *see* 2 C.H.I.T. 111. This treaty, ratified by the congresses of both countries, also had the effect of legalizing Chile's annexation of Bolivia's nitrate-rich coastal province of Antofagasta, while Bolivia lost its coasts. Even after a century, this has been contentious; Bolivia claims the treaty is unjust; Chile insists that there is no dispute at all. *See The Inalienable Right to a Beach,* The Economist, vol. 369, at 54 (December 6, 2003).

of Bolivia's coastline. In compensation, Chile undertook to build a railway from the port of Arica to La Paz, and granted Bolivia "in perpetuity, the most extensive and unrestricted right of commercial transit across its territory to its Pacific ports" (Articles 6 and 7). The treaty also allowed Bolivia to maintain customs offices in Arica and Antofagasta, and in other ports to be named later.

An agreement signed in 1912 specified rights of free transit across Bolivia, regulated traffic, and granted greater authority to the Bolivian customs authorities in Chilean ports.[505] After the Chaco war, in which attempts were made to restrict the passage of provisions for Bolivia through Chilean ports, Bolivian transit rights were strengthened by the Convention of August 16, 1937, which guaranteed full and free transit for any type of merchandise at any time.[506] This Convention also stipulated procedures for the receipt, handling, and transportation of goods, introducing slight variations to the measures previously in use.

Under the Integrated Transport System (ITS) introduced in 1975, changes were made to the procedures used at Arica and Antofagasta. The system allows Bolivia to administer exclusively the automatic transfer of goods from vessels for transportation, without the intervention of customs agents or the need to report shipping details.

Similar agreements with other neighboring countries granted Bolivia free transit across their territories, without imposing any compensation. In the nineteenth century, on July 9, 1868, Bolivia had concluded with Argentina, its southern neighbor with an Atlantic coastline, the "Treaty of Friendship, Commerce and Navigation,"[507] which provided for a degree of transit freedom. It stated that the two contracting States clearly recognized freedom of transit for national and foreign trade in maritime or river ports. Goods in transit are subject only to warehousing duty and minimal tolls. Moreover, the two States recognized a mutual right of free navigation on the Rio de la Plata and several of its tributaries.

In the Convention of November 19, 1937, Argentina agreed that petrol and derived products belonging to Bolivia and transiting through Argentinean territory would not be assessed any national, provincial, or municipal transit or fiscal duty.[508]

With its eastern neighbor, Brazil, Bolivia as early as March 27, 1867, signed the Treaty of Friendship, Navigation, Trade, and Extradition under which the Republic of Bolivia and the Emperor of Brazil declared communications between

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[505] 2 C.H.I.T. 155

[506] 2 C.H.I.T. 172.

[507] The text of the treaty is reprinted in 4 *Colección de Tratados Vigentes de la Republica de Bolivia* 35.

[508] 0ARIF0.

the two States to be free. Transit across the frontier by passengers or luggage was exempted from all national or municipal taxes and was subject only to the police and fiscal regulations enacted by each country. In Article 7, Brazil granted Bolivian trade and vessels freedom of navigation on its waterways.

Brazil and Bolivia signed another treaty relating to river navigation in August 1910 to complete bilateral arrangements they had made earlier in the Treaty of November 17, 1903. In that Treaty they had agreed to grant each other all possible facilities and guaranteed the most complete application of the principle of freedom of overland and river transit.

Bolivia signed a number of similar treaties with Peru, among them the Treaty of Peace and Friendship of November 5, 1863; the Treaty of Commerce and Customs of 1905; and the Convention relating to the trade traffic via Mollendo dated January 21, 1917. In all of them the States recognized, on a reciprocal basis, "the freedom of transit trade for all natural, industrial, as well as imported products."

The position of Paraguay is more privileged than that of Bolivia because it has free access to the sea by the Panama and Paraguay Rivers as well as the railway between Asunción and Buenos Aires. The Treaty concluded between Paraguay and Argentina[509] on January 23, 1967, including the exchange of notes, states that navigation on the Paraguay, Paraná, and Rio de la Plata rivers is free for Argentinean and Paraguayan vessels. Each State agrees to grant to flagged vessels of the other State treatment identical to that granted to its own vessels for all matters concerning navigation. The Treaty further provides for creation of a Joint Commission of Representatives for dispute settlement purposes.

In 1943, Paraguay and Argentina signed the first treaty under which Argentina ceded Paraguay free zones in the ports of Buenos Aires and Rosario.[510] In 1944 the Paraguayan Government signed a similar treaty with Brazil establishing a free zone in Concepción,[511] followed by another in the Paranagua in 1956; the latter was updated in 1961 to specify handling procedures for goods in transit.[512] It permitted Paraguay to appoint one or more officials to represent the recipients of goods. The goods are subject to port tariffs and customs service taxes.

Paraguay signed similar agreements with other bordering countries, including one on March 25, 1976, with Uruguay concerning use of grain silos, a transit warehouse, and a free zone at Nueva Palmira. On November 12, 1976, Paraguay's navigation and ports authority took possession of a free zone in the port of Montevideo for storage and distribution of Paraguayan imports and exports.

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[509] 634 U.N.T.S. 9060.

[510] 0ARIF0.

[511] 66 U.N.T.S. 303.

[512] 0BRIF0.

On November 29, 1979, an agreement with Argentina gave Paraguay the use of a wharf at Rosario for the receipt of duty-free imports and exports. Paraguay also succeeded in appointing a customs representative for the free zone so as to control the flow of merchandise and administer Argentine customs requirements.

Because of all these successful negotiations with its neighbors, Paraguay has established the National Navigation and Ports Authority (*Administración Nacional de Navegación y Puertos* or ANNP), which administers the national warehouses and free zones at Río Grande do Sul, Paranagua, Santos, Buenos Aires, Rosario, Montevideo, Nueva Palmira, and Antofagasta.

In Latin America, as in Europe and Africa, regional organizations for economic cooperation play a vital role. Bolivia and Paraguay were both members of the Latin American Association of Free Trade (LAFTA), with the help of which they ensured their access to the international market. The Treaty creating this organization, signed on February 18, 1960, at Montevideo, speaks of the progressive abolition of customs duties and quantitative restrictions among Member States within twelve years. The union, however, appeared to be most advantageous for Argentina, Brazil, and Mexico because they were relatively more industrialized than the other members. As a consequence, some members of LAFTA decided to create a more homogeneous and restrictive organization, the "Andean Group," comprised of Chile, Peru, Colombia, Ecuador, and landlocked Bolivia.[513]

4.4 Treaties Concluded in Asia

The first LLS in Asia to conclude a bilateral agreement with a view to facilitating its transit trade was Afghanistan, which signed a Treaty with its southern neighbor, British India, on November 22, 1921.[514] It dealt not only with trade and transit but also with other aspects of relations between the States.

Article 6 was of particular interest. In it, Great Britain granted Afghanistan the right to freely import, from British islands, ports, and British India to its own

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[513] LAFTA was formed in 1960 as the basis of a common market on the EC model. Initially seven countries—Argentina, Brazil, Chile, Mexico, Paraguay, Peru, and Uruguay—participated; later Bolivia, Colombia, Ecuador, and Venezuela also joined. While internal import tariffs were reduced, there was little progress in establishing a common external tariff. In 1969, Chile and Peru joined with Bolivia, Colombia, and Ecuador to form a new economic group under the Andean Pact. LAFTA ended in August 1980; it was replaced by the Latin American Integration Association, founded in August 1980 by a Treaty signed at Montevideo by 11 countries: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay, and Venezuela.

[514] The Anglo-Afghan Treaty entered into force on 1922. *See* Document ECAFE/1 and F/T/Sub 4/2. The spirit of granting free navigational rights was also present in the Asian region: Although not necessarily related to the navigation of an particular LLS, on March 13, 1843, the Governor General of India had declared the navigation of the Indus free for the vessels of all nations. *See* Vitanyi, *supra* n. 141, at 99.

territories, all materials necessary for the its power and well being. Afghanistan in turn was allowed to freely purchase and export to India all kinds of goods. The Treaty stated that no clearing duty would be levied in the Indian ports on goods exported by Afghanistan; any customs duties levied from Afghanistan would be reimbursed. The Anglo-Afghan Convention on Trade dated June 5, 1923, completed the Treaty of 1921.[515] It specified measures to attain the objectives fixed by the treaty and filled in some lacunae.

After the transfer of sovereignty resulting from the emergence of Pakistan, similar questions concerned the governments of Pakistan and Afghanistan, which signed a Treaty on March 2, 1965.[516] Through it each State grants to the other freedom of transit for traffic to or from the territory of the other. It contains most of the classic provisions, such as exemption of all duties, taxes, and clauses concerning the means of transport and warehouse, which recur in such agreements.

Similar agreements were concluded by other Asian LLS. For instance, in order to facilitate their transit trade, Lao PDR and Thailand signed an agreement[517] that guarantees freedom of transit or goods throughout both countries. The goods benefited from the rights and privileges of transit according to the principles and exceptions provided by the Barcelona Statute. Lao PDR concluded two other treaties with transit neighbors Cambodia and Vietnam[518] that contain similar provisions.

The first treaty between Nepal and India dealing with trade and transit was signed on July 31, 1950. It recognized without reservation the right of free transit of goods through the territory and the ports of India.[519] The treaty was renegotiated in 1960, 1971, and 1978.[520] In the beginning of 1989, the Nepalese and Indian governments held discussions and decided that the 1978 treaties would be

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[515] *See id*.

[516] *See* for the text, Gopalakrishnan, *supra* n. 385.

[517] *See* the Agreement Facilitating Transit of Goods, in UN Treaty Series, vols. 200 and 216.

[518] *See* Document E/CONF 46/AC 2/5, Annexes 9 and 10.

[519] *See* generally Kishor Uprety, *Le Népal. Economie et Relations Internationales* (Harmattan 1985).

[520] Although the treaty seems liberal, most of its clauses have remained purely theoretical. Several books dealing with this problem have been published in Nepal and India. *See,* in particular, N. P. Banskota, *Indo-Nepal Trade and Economic Relations* (B. R. Publishing Cy 1981); *see also* generally Uprety, *supra* n. Nepal's demand for separate treaties for trade and transit was accepted by the Indian side in 1978. The Indo-Nepal Trade Treaty mainly dealt with the free flow of goods between the two countries. Its objectives were to promote, facilitate, expand, and diversify trade between the two countries. For those purposes, Nepal and India granted each other, unconditionally, treatment no less favorable than that accorded to third countries regarding customs charges and duties on export and export and import regulations. In addition, certain primary products were exempted on a reciprocal basis from basic customs duties and quantitative restrictions.

renewed when they expired on March 31, 1989, but in March, due to some thorny political issues that had surfaced between the two countries, renewal was postponed.[521] It was two years later, after the formation of a completely new Nepalese government in 1991, that the Indo-Nepal treaties were signed.[522] In general, they are similar to the earlier treaties: On a reciprocal basis, both countries agree to exempt primary products of the other from basic customs duty and from quantitative restrictions on imports. Both accord each other no less favorable treatment

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Under the treaty the Nepalese government used its best efforts to exempt imports of Indian goods from customs duties and quantitative import restrictions "to the maximum extent compatible with their development needs and protection of their industries." Moreover, to foster the industrial development of Nepal, the Treaty provided for additional preferential customs treatment by India wherever the cost of production of exportable goods manufactured in Nepal with a Nepalese added value of 80 percent is higher than the cost of production in India. This treaty came into force on March 25, 1978, for a five-year period. After renewal it expired on March 31, 1989.

The Treaty of Transit also came into force on March 25, 1978, but it was for a seven-year term. The Treaty notably recognized Nepal's need as an LLS for access to and from the sea to promote its international trade, and the need to facilitate traffic in transit through the territories of the contracting parties. Traffic in transit as defined by Article III of the treaty was granted freedom of movement across Nepal and India through agreed routes. Goods in transit were exempted from customs duties and other charges, except transport costs. The protocol to the Treaty named fifteen agreed points of entry at the Indo-Nepalese border for goods in transit and laid down transit procedures. The number of entry points could be extended by mutual agreement. Calcutta was designated as the seaport. Land for the required storage facilities at Calcutta was leased for 25 years by the Trustee of the Port of Calcutta to the Nepal Transit and Warehousing Company Ltd. (NTWC), which had been established on September 15, 1971, as a wholly owned company of the Nepalese government that reports to the Ministry of Commerce of Nepal (Bulletin published by NTWC, 1974).

Under the Indo-Nepal Transit Treaty, Nepal could use both railway and road to transport goods from and to Nepal. It was allowed to use Haldia as well as Calcutta as a port. India agreed to provide Nepal with warehouses, sheds and open space for the storage of transit cargo. This Agreement also expired on March 31, 1989.

[521] India's decision not to renew the treaties appeared to be related primarily to a decision of the Nepalese government to import armaments from the People's Republic of China that India considered should have been bought from India. For detail *see* K. Uprety & K. Dahal, *Nepal: Evolutionary Features of its Economic Relations: With Specific Reference to Some Bilateral Treaties,* paper submitted at the Seminar on International Law and National Development, Law Society, Kathmandu 1991.

[522] India signed two treaties with Nepal in 1991. The Trade Treaty, valid for five years, was revised and renewed through an exchange of letter on December 3, 1996. India agreed to provide access, free of customs duties and quantitative restrictions, to all articles manufactured in Nepal except for alcohol, tobacco, and cosmetics. It was also agreed that Nepalese products manufactured in small-scale units would be extended parity equal to the treatment provided in the levy of effective excise duty on similar Indian products. The Indo-Nepal Treaty of Transit provides for port facilities for Nepal at Calcutta and specifies 15 transit routes between Calcutta and the India-Nepal border, and 22 entry/exit

than that accorded to any third country with respect to customs duties and other charges. Traffic in transit is exempt from customs duties and from all transit duties except reasonable charges for transportation. India agreed to provide warehouses, sheds, and open space in the port of Calcutta for the storage of transit cargo from and to Nepal through India. Nepal may use road or railway for transit. This treaty, renewed in 1999, is to remain in force until 2006.

All the bilateral treaties discussed above—a small sample of the hundreds in the field—show clear parallels with the multilateral instruments so far as defining the regime for LLS is concerned. Imbued in those instruments are patterns that more or less reinforce the reciprocity principle. Interestingly, if the bilateral have been influenced by the multilateral agreements, it is also true that some bilateral agreements are more generous to LLS neighbors and provide more than multilateral treaties do. One weakness in all these treaties, however, is the lack of efficient mechanisms to settle disputes.

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points along the border for mutual trade. Nepal-Nepal transit is also provided for. A renewed Transit Treaty signed on January 5, 1999, in Kathmandu liberalizes procedures for the transit of Nepalese goods. A Nepalese request for automatic renewal of the Treaty for further seven-year periods was accepted, but the Protocol and Memorandum to the Treaty, containing modalities and other points, would be subject to review and modification every seven years, or earlier if warranted. The Nepalese request for an additional transit route to Bangladesh via Phulbari was accepted in June 1997. Operating modalities for the transit were worked out, and the route was opened on September 1, 1997. A review of the working of the route in March 1998 at Commerce Secretary-level talks in Delhi brought agreement on several relaxations of the operating modalities that had been requested by Nepal. These included the Nepalese request to keep the route open on all days of the week.

CHAPTER FIVE

"Soft" Instruments and Specific Initiatives: Variation in Themes

Even after UNCLOS III was adopted, LLS continued to work to improve their status, to secure access to the sea, and to facilitate international trade. Their efforts to obtain the right to trade by ensuring access to the sea and by eliminating the numerous administrative and physical obstacles to access stayed on the agenda for numerous international meetings, but in recent times they have pushed their agenda not alone but in conjunction with other GDS and less developed countries. With them, the LLS continue to claim their right of access to the sea and consequently to international trade and to strive to obtain different facilities from transit countries. Such efforts, both regional and global, have resulted in many international normative and soft instruments.[523]

5.1 International "Soft Law" Mechanisms

The complexity of the development problems faced by LLS, in particular developing LLS, increasingly requires a comprehensive approach to resolving them, whether by creating special groups for coordination, devising special actions, or introducing new trade facilitation measures. What is interesting in the numerous international resolutions that have made recommendations on these topics is that they systematically attempt, not always with success, to strike a balance between the LLS right of access to the sea and the legitimate interests of the transit countries—while simultaneously recognizing the importance of free and

[523] Although several scholars question the value of soft instruments, particularly because they are not binding, they are quite useful in the evolutionary phase of a legal regime on specific issues. These international understandings, not concluded as treaties, which Professor Carreau calls "droit flexible" (*see* Dominique Carreau, *Droit International* 218 (Les Cours de Droit 1980)), indeed play an important role in international relations. Non-treaty obligations also provide a simpler, more flexible foundation for future relations among states. They mainly result from the countries' wish to model their relationship in a way that excludes the application of treaty or customary law to a breach of obligations. These soft instruments are often a precursor to new concepts in law and the emergence of principles that eventually become customary international law. For a discussion of soft laws, *see* Hartmut Hillgenberg, *A Fresh Look at Soft Law,* 10 European J. Int'l L. 499–515 (1999).

unrestricted access in international trade. This chapter briefly discusses several international attempts to address the development problem.

5.1.1 Strengthening Coordination: The ECOSOC Resolution

ECOSOC acknowledged the importance of LLS access to the sea for trade purposes in the context of the Asian and Pacific countries in a Resolution on Restructuring the Conference Structure of the Economic and Social Commission for Asia and the Pacific (ESCAP), adopted during its 34th plenary meeting on July 18, 1997.[524] Through the resolution it decided to retain and invigorate a special body that had been created earlier to act as the focal point on LLS issues.[525]

In accordance with the terms of reference,[526] this Special Body is to provide a forum for addressing the special problems facing the least developed and landlocked developing countries in the spirit of regional cooperation. It has the responsibility to review and analyze economic and social progress in these countries and study the economic, social, and environmental constraints on their development.[527] It is also expected to mobilize ideas and be a catalyst for action to identify and promote new international policy options for removing constraints on the economic and social development of these countries, emphasizing adoption of measures for increased mobilization of domestic and foreign resources, trade and private sector development, or public sector reform. It will also act, on request, as economic advisor to governments with limited internal capacity.[528] Responsible for enhancing the national capacities of LLS, particularly in formulating development strategies and strengthening intercountry cooperation, the Special Body, if necessary, can analyze the transit trade and transport problems of Asian landlocked developing countries, recommend measures for solving these problems within international legal regimes, and encourage these countries and their transit neighbors to cooperate bilaterally in dealing with problems.[529] Finally, it is responsible for coordinating with development agencies, the private

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[524] ECOSOC Resolution 1997/4.

[525] The Special Body on Least Developed and Landlocked Developing Countries had already been established for the LLS. The decision to reinvigorate it is noteworthy because it reflects an understanding of the problems of LLS by the international community. *See* paragraph 2 of ECOSOC Resolution 1997/4.

[526] *See* Annex VII of ECOSOC Resolution 1997/4.

[527] *See id*.

[528] *See id*.

[529] *See id*.

sector, and NGOs on activities for the benefit of the least developed and landlocked developing countries.[530]

5.1.2 Devising Specific Actions: General Assembly Resolutions

Similarly, in 1997 the UN General Assembly adopted a Resolution on Specific Actions Related to the Particular Needs and Problems of Landlocked Developing Countries.[531] Recalling several earlier resolutions,[532] this Resolution noted that measures to deal with the transit problems of landlocked developing countries required closer and even more effective cooperation and collaboration between LLS and their transit neighbors. Interestingly, it confirmed the rights of access of landlocked countries to and from the sea and of freedom of transit through the territory of transit States by all means of transport in accordance with international law. It also reaffirmed that transit developing countries, in exercising full sovereignty over their territory, have the right to take all measures necessary to ensure that the rights and facilities they provide for landlocked developing countries in no way infringe upon their legitimate interests.

While retaining a theoretical neutrality on issues of substance (defining rights and duties), the Resolution called upon both the landlocked developing countries and their transit neighbors to implement measures to further their cooperative and collaborative efforts on transit issues by, *inter alia,* improving the transit transport infrastructure, signing bilateral and subregional agreements to govern transit transport operations, developing joint ventures, strengthening institutions and human resources for dealing with transit transport, and promoting South-South cooperation.

The Resolution also recommended that all States and international organizations make it an urgent priority to implement specific actions related to the particular needs and problems of landlocked developing countries as agreed in resolutions and declarations adopted by the General Assembly and by the major relevant UN conferences. Finally, the Resolution invited donor countries and multilateral institutions to provide landlocked and transit developing countries with assistance in constructing, maintaining, and improving transport, storage, and other transit-related facilities, including alternative routes and improved

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[530] *See id*.

[531] UN General Assembly Resolution 52/183, adopted on December 18, 1997, in UN Doc. A/52/626/Add.2.

[532] In particular Resolutions 44/214 of December 22, 1989, 46/212 of December 20, 1991, 48/169 of December 21, 1993, and 50/97 of December 20, 1995.

communications, and in promoting subregional, regional, and interregional programs.[533]

This certainly was not the first time the international community had made pronouncements in favor of international cooperation. During its 86th plenary meeting on December 16, 1996, the General Assembly adopted a Resolution on Central Asian countries that highlighted the importance of cooperation for developing trade and access,[534] and on December 15, 1998, it passed another Resolution[535] that focused particularly on LLS trade problems.

In these Resolutions, the General Assembly recognized that the socioeconomic development efforts of newly independent and developing LLS, seeking to enter world markets through a multicountry transit system, are impeded by both lack of territorial access to the sea and their remoteness and isolation from world markets. The Resolutions stated that the problems of transit transport facing the Central Asian region needed to be seen against the backdrop of economic change and the accompanying challenges, especially how such change affected their international and intraregional trade. To be effective, therefore, a transit transport strategy for such countries should incorporate actions that address both the problems inhering in the use of existing transit routes and the early development and smooth functioning of new alternative routes.

The Resolutions also invited the Secretary General of UNCTAD and the governments concerned to elaborate a program for improving the efficiency of the transit environment in the newly independent and developing landlocked States in Central Asia and their transit neighbors, and the community of donors,

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[533] A Special Fund for Landlocked Developing Countries was created in late 1976. *See* UN General Assembly Resolution 31/177 (December 21, 1976), UN Doc. A/31/335/Add.1. Although the responsibility for defining and executing projects is to be shared with UNCTAD, the fund was put under the supervision of UNDP. Voluntary contributions were pledged in conjunction with the UN Pledging Conference for Development Activities. By the end of 1981 cumulative contributions were approximately $1 million, with over half of this from a single donor (UNDP 1982). From 1982 to 1984 contributions averaged $70,000 per year, making the Special Fund insignificant in development terms. *See* UNDP 1985. In view of the very limited resources available, the main function of the fund was to conduct studies and provide small-scale assistance, primarily in areas of transportation and trade relevant to landlocked developing countries. The repeated refusal of the major donors to contribute to the Special Fund reflected their belief that groups of developing countries should not be singled out for special treatment; this made it difficult to carry out the initiative effectively. *See* UNDP 1985.

[534] UN General Assembly Resolution 51/168, dated December 16, 1996. Resolution on Transit Environment in the Landlocked States in Central Asia and Their Transit Developing Neighbors, in UN Doc. A/Res/51/168 (February 21, 1997).

[535] UN General Assembly Resolution 53/171, dated December 15, 1998, bore the same title as Resolution 51/168, *id. See* UN Doc. A/Res/53/171 (January 15, 1999).

within their mandates, to give such countries assistance in improving the transit environment.[536]

While emphasizing the need for access to the sea, Resolution 53/171 also reaffirmed that transit countries, in the exercise of full sovereignty over their territory, have the right to take all measures necessary to ensure that the rights and facilities provided for landlocked countries in no way infringe upon their legitimate interests.[537]

It may therefore be concluded that the soft instruments unequivocally recognize the difficulties of enforcing, in practical terms, the LLS right of access to and from the sea on which their participation in international trade and economic development activities depends. Indeed, although recognized by different international instruments, access to the sea still remains theoretical for many LLS; in practice they have to rely heavily on the decisions of their transit neighbors, who first consider their own sovereignty and strategic interests, not necessarily the interests of the LLS.

5.2 Specific Initiatives for Resource Allocation

The turn of the twenty-first century augured well for innovative approaches to addressing the concerns of LLS. Although the LLS continued their struggles in international forums, increasingly they have engaged in coordinated and collaborative action with the LDCs.

5.2.1 Seeking Equality in Inequality: The Almaty Initiative

In 2003, on August 28–29, the City of Almaty hosted 83 countries and 23 NGOs at the international Ministerial Conference of Landlocked and Transit Developing Countries and Donor Countries and International Financial and Development Institutions on Transit Transport Cooperation (the Almaty Ministerial Conference).

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[536] *See* paragraph 3 of Resolution 51/168, *supra* n. 534, and Preamble to the Resolution 53/171, *supra* n. 535.

[537] *See* Preamble to the Resolution. There have been a number of important subregional and regional developments, including the signing of a transit transport framework agreement among member States of the Economic Cooperation Organization at Almaty, Kazakhstan, on May 9, 1998; the signing on March 26, 1998, by the heads of State of Kazakhstan, Kyrgyz Republic, Tajikistan, and Uzbekistan, the Economic Commission for Europe, and the Economic and Social Commission for Asia and the Pacific, of the Tashkent Declaration on the UN special program for the economies of Central Asia; implementation of the expanded Transport Corridor-Europe-Caucasus-Asia program; and the signing of the Baku Declaration on September 8, 1998. *See* Preamble to Resolution 53/171, *supra* n. 535.

The agenda for the meeting was compact and action-oriented.[538] At the meeting, the landlocked, transit, and donor countries, joined by UN agencies and representatives from civil society and the private sector, approved the Almaty Program of Action (APA),[539] which was intended to cut the red tape involved in sending exports to seaports; reduce travel time and costs; improve rail, road, air, and pipeline infrastructure; and enhance access to international markets.

The Conference, which was coordinated by Anwarul Karim Chowdhury, UN High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, was an important step forward. Until then, these countries had no UN document supporting their cause. Now, for the first time, this doubly disadvantaged group of countries had a UN-mandated declaration and program of action.

Ensuring Easy Access

The main theme dominating the Conference was that, if they are to succeed, landlocked developing countries must be able to compete on a "level playing field," which meant preferential access to ports and world markets for their exports.[540] Their transit neighbors must be willing to improve their access to seaports. However, this situation could be problematic, considering that the transit countries themselves are usually developing and need to increase their own exports.

At the beginning of the Conference, transit countries asked: "How can we provide infrastructure and support to landlocked countries when we need assistance ourselves?" Indeed, these coastal countries need support from donor countries if they are to help the landlocked ones. If the railroads, roads, ports, waterway systems, and airports are improved in transit countries, landlocked countries will benefit.[541] That is perhaps why the donor community, especially the United States, the European Union, and Japan, were strongly supportive of the opportunities the Almaty Conference provided.

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[538] *See* generally, Jonas Hagen, *Trade Routes for Landlocked Countries,* Conference Room Paper, UN Chronicle, December 2003.

[539] Almaty Program of Action: Addressing the Special Needs of Landlocked Developing Countries within a new Global Framework for Transit Transport Cooperation for Landlocked and Transit Developing Countries. Adopted by the International Ministerial Conference of Landlocked and Transit Developing Countries and Donor Countries and International Financial and Development Institutions on Transit Transport Cooperation in Almaty on August 28–29, 2003; *see also* Antoine Blua, *Kazakhstan: Almaty Conference Adopts Access Plan for Landlocked Countries,* available at http://www.rferl.org/features/2003/08/29082003161207.asp (visited December 20, 2004).

[540] This is, interestingly, in consonance with the principle of "right compensating for geographical inequalities," discussed previously; *see supra,* chapter 2.

[541] Almaty Program of Action, *supra* n. 539.

An important feature of the Conference was that landlocked countries decided to press their case not only for preferential access to markets but also for inclusion in the WTO. Donor countries supported such initiatives because they would result in increased economic activity for the landlocked countries, which, in turn, would benefit the transit countries, who would see a pickup in business, more port charges, and infrastructure improvements. In fact, a number of countries have already started work on agreements: Mongolia has entered into talks with the Russian Federation and China; East African LLS and their transit neighbors have begun work on a common market and customs organization.

Similarly, Bangladesh, a coastal country, has seen benefits from improving access to seaports for landlocked countries. Although its main port is Chitagong, the country's two landlocked neighbors, Bhutan and Nepal, have created jobs for Bangladeshis in the Mongla port by sending their exports there.[542]

Comprehensive Program of Action

The APA has five main elements:

- Policy improvements to reduce customs bureaucracy and fees, designed to cut costs and travel time for the exports of landlocked countries
- Improvement of the rail, road, air, and pipeline infrastructure, depending on the local transport mode (in Africa, transit is mainly by road; in South Asia, rail transit is more common)
- International trade measures to give preferential treatment to landlocked countries' goods, thus making them more competitive
- International assistance from donor countries
- Monitoring and follow-up on agreements, and measurable criteria, such as travel time and costs.

The APA for the first time established broad agreement in principle on the need to compensate landlocked countries for their geographical handicaps by improving market access and facilitating trade.

The APA is to be evaluated in terms of measurable criteria, such as reductions in the cost and time of transport to seaports. Subregional organizations, such as the Association of South-East Asian Nations, the Southern African Development Community, the Economic Community of West African States, and the South Asian Association for Regional Cooperation should be most effective in implementing the Almaty agenda. To give a clear measure of progress an annual review before the General Assembly would examine what actions have been taken.

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[542] *See id*.

Promoting a Global Framework

Along with the Program of Action, the Almaty Conference also adopted a Declaration[543] to address the special needs of landlocked developing countries and to establish a new global framework for transit transport cooperation for landlocked and transit developing countries.

Recalling the UN Millennium Declaration,[544] which recognized the special needs and problems of the landlocked developing countries, the participants in the Conference were eager to create an environment, national and global, that is conducive to development and to the elimination of poverty.[545] The participants believed that increased trade is essential for economic growth and sustainable development but realized that the participation of landlocked and transit developing countries in international trade is not as significant as it could be, because high trade transaction costs lead to marginalization of landlocked developing countries in the global trading system. They therefore agreed to work to minimize marginalization and enhance the beneficial integration of landlocked developing countries into the global economy. To this end, they committed themselves to establishing efficient transit transport systems in both landlocked and transit developing countries.

The Declaration reaffirmed the rights of access of landlocked countries to and from the sea and of freedom of transit through transit countries by all means of transport in accordance with rules of international law, but it also reaffirmed that transit countries, in the exercise of their full sovereignty, have the right to take all measures necessary to ensure that the rights and facilities provided for landlocked countries in no way infringe upon their legitimate interests. It also confirmed that the primary responsibility for establishing effective transit systems rests with the countries concerned. Therefore, both landlocked and transit developing countries were encouraged to implement measures to strengthen cooperative and collaborative efforts to address transit transport issues by improving both the physical infrastructure and the nonphysical aspects of transit transport systems. In this respect, they were urged to enhance South-South cooperation.

In the same spirit, the Declaration emphasized the need for a substantial increase in resources. Donor countries and multilateral institutions were asked to continue their efforts to ensure effective implementation of the commitments reached in the Monterrey Consensus of the International Conference on Financing

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[543] *See* Almaty Declaration, A/CONF.202/3, Annex II.

[544] UN General Assembly Resolution 55/2.

[545] *See id*.

for Development,[546] because landlocked and transit developing countries need assistance on the best terms possible if they are to address the needs identified in the APA. Here, the private sector was recognized as a service provider, a user of transit services, an important stakeholder in society, and a main contributor to building the infrastructure and productive capacity in both landlocked and transit developing countries.

The Declaration further recognized the importance of simplification, streamlining, and standardization of transit procedures and documentation and the application of information technologies in enhancing the efficiency of transit systems. It called upon entities of the UN and other international organizations, including the World Bank, the regional commissions, UNCTAD, and the World Customs Organization, as well as regional economic integration organizations, to continue to help landlocked and transit developing countries make their transit systems more efficient.

The Declaration adopted at the Fourth Ministerial Conference of the WTO had recognized the case for expediting the movement, release, and clearance of goods, including goods in transit; the importance of enhanced technical assistance and capacity-building in this area; and the need to fully integrate small, vulnerable economies into the multilateral trading system. Hence, the Almaty Declaration highlighted the importance of enhanced and predictable access to all markets for the exports of developing countries, landlocked or transit. In accordance with the commitments in the Doha Ministerial Declaration[547] and the rules of the WTO, it also called for full attention to the needs and interests of all developing countries.

Finally, the Declaration reaffirmed the participants' commitment to facilitate efficiency in transit transport systems and the integration of landlocked developing countries into the global economy through genuine partnerships with transit developing countries and their development partners at the national, bilateral, subregional, regional, and global levels.

5.2.2 Correcting Inequality: The Asunción Initiative

International attempts to introduce soft laws have not been confined to Central Asia. A Latin American Regional Meeting of Landlocked and Transit Developing Countries Preparatory to the International Ministerial Conference of Landlocked and Transit Developing Countries and Donor Countries and International

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[546] *See,* for example, Report of the International Conference on Financing for Development, Monterrey, Mexico, March 18–22, 2002 (UN publication, Sales No. E.02.II.A.7), Ch. I, R1, Annex. 3,A/C.2/56/7, Annex.

[547] *See* Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.

Financial and Development Institutions on Transit Transport Cooperation was held in Asunción, Paraguay, on March 12–13, 2003. The meeting, convened by the Government of Paraguay pursuant to UN General Assembly Resolutions 56/180 and 57/242, and organized in collaboration with the Economic Commission for Latin America and the Caribbean (ECLAC) and the Office of the UN High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States,[548] adopted its own Program of Action on March 13, 2003.[549]

Materials setting the context for the meeting in Paraguay were the Millennium Declaration; Article V of the 1994 GATT; decisions adopted at the Fourth Ministerial Conference of the WTO in Doha, Qatar (the Doha Conference); the Program of Work the Doha Conference adopted; and the results of successive meetings of the Council for Trade in Goods. Within this framework of trade facilitation and work on small economies, the Latin American Regional Meeting emphasized the importance of strengthening cooperation between landlocked and transit developing countries under international conventions, in particular UNCLOS III and bilateral, subregional, and regional agreements.

This meeting, too, recognized clearly that the high transport costs faced by landlocked developing countries undermine their economic and social development, their economic growth, their competitiveness in international trade, and their capacity to attract foreign direct investment. It noted that the high costs can be reduced by improving the quality of transport infrastructure in LLS and transit countries and by facilitating border crossing. Also, it reaffirmed the role of international conventions and bilateral, subregional, and regional agreements as the principal means by which rules and procedures applied in landlocked and transit countries can be harmonized and simplified.

In an attempt to remedy the constraints, the Latin American Regional Meeting proposed a multifaceted program of action:

- Formulate and implement a policy for enhancing and integrating regional transport infrastructure.
- Upgrade transit transport infrastructure, particularly road maintenance and construction, improvement of telecommunications, and projects for transport by pipeline, multimodal transport, waterways, and ports.

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[548] Report of the Latin American Regional Meeting of Landlocked and Transit Developing Countries Preparatory to the International Ministerial Conference of Landlocked and Transit Developing Countries and Donor Countries and International Financial and Development Institutions on Transit Transport Cooperation (Asunción, Paraguay, March 12–13, 2003). UN Doc. LC/L.1915, May 22, 2003.

[549] *See id*.

- Continue dredging and setting out buoys in the Paraguay-Paraná waterway, with appropriate measures to protect the environment.
- Foster and implement regional trade facilitation initiatives linked to the development of transit transport systems.
- Identify mechanisms for increasing investments, and improve dialogue between transit operators in the public and private sectors.
- Urge multilateral institutions to provide more funding for improving the transit transport infrastructure and to give priority to requests for assistance to supplement national and regional efforts to promote efficient use of existing transit facilities.[550]

As is discernible from the foregoing list, although similar to the Almaty Declaration, the Latin American program of action was much more focused. It attempted to give the LLS more advantages and thus to further enhance equality among countries.

5.3 Pluridimensionality in Facilitating Access

Clearly, for LLS the existence of the right of access is circumscribed not only by the limitations of international law but also by the absence of adequate transport facilities. In the context of facilitating their transit trade, therefore, international efforts have been not only continual but also multidimensional. These efforts have concerned not only sovereign countries and governments but also subsovereign entities, the private sector, and NGOs. The efforts have been directed to both establishing rights and defining obligations.

5.3.1 Cooperative Globalism

One effort—establishment of the Group of Governmental Experts from Landlocked and Transit Developing Countries and Representatives of Donor Countries and Financial and Development Institutions—is particularly noteworthy. This group, which meets once every two years, is an intergovernmental forum for analysis and consensus-building on issues related to transit transport. The reports of its meetings, which are submitted to the UN General Assembly for review and discussion (possibly to be formalized later), have catalyzed bilateral and multilateral assistance to landlocked developing countries and their transit neighbors, triggering a global alliance for cooperation.

To facilitate transit of LLS for international trade, in the aftermath of UNCLOS III, a series of meetings was held with representatives from developing

[550] *See id*.

transit countries, LLS, and industrialized countries.[551] These triangular meetings, the first of which convened in 1993, attempt to bring together all the parties whose joint undertakings are indispensable for promoting cooperative efforts. The second meeting, held in 1995, resulted in adoption of the Global Framework for Transit Transport Cooperation between Landlocked and Transit Developing Countries and the Donor Community (the Global Framework).[552] The third, held in New York in June 1997, reviewed the progress made on transit systems in the landlocked and transit developing countries and explored the possibility of formulating specific action-oriented measures.

A study carried out by UNCTAD on what the globalization and liberalization of the world economy implied for the development prospects of landlocked developing countries was also discussed at the June 1997 meeting.[553] During that meeting ways to accelerate further the Global Framework implementation were also identified: While cost-effective and efficient transit systems are of crucial importance for landlocked developing countries, only a few cooperative programs to reduce the physical and administrative barriers for transit transportation have been instituted by such countries and their transit neighbors. Effective implementation of the Global Framework would make a tangible practical

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[551] The group of landlocked developing countries was established in 1995 and is based in New York. It has the duty to follow international meetings that consider issues concerning landlocked countries. The group now has thirty countries as members. *See Embassy of the Lao People's Democratic Republic, News Bulletin,* March/April 1999, at 9.

[552] The Global Framework endorsed by the General Assembly at its 50th session is the most comprehensive document aimed at fostering international and national cooperation on transit transport systems in landlocked and transit developing countries. The Global Framework Recommendations cover fundamental transit transport policy issues, sectoral issues, and the role of the international community. For instance, it contains specific provisions on developing physical transit transport infrastructure, liberalizing transit services, strengthening bilateral and subregional cooperative arrangements, developing alternative routes, establishing institutional mechanisms to monitor the implementation of agreed transit rules and procedures, encouraging regional and subregional trade, improving training facilities, and preventing environmental degradation. With regard to sectoral issues, the Global Framework emphasized the need to encourage more efficient management of all modes of transportation to ensure the commercial viability of transit traffic operations, promote privatization in the transit sector, and involve the private sector in formulating transit traffic policies. *See* UN Doc. TD/B/42(1)11-TD/B/LDC/AC.1/7.Annex I.

[553] UNCTAD has studied ways to help LLS overcome high transit costs. UN research showed that in 1994 (the latest year for which comparable data are available) freight costs averaged 14.7 percent of c.i.f. import values for landlocked countries. For developing countries as a whole the average is 7.2 percent, and for developed countries it is about 4 percent. Transport costs absorb nearly 18 percent of the export earnings of landlocked developing countries—nearly double the percentage for developing countries as a whole.

contribution; it would not only improve the situation of landlocked countries, it would also open up global trading possibilities for all the countries in the world.

Implementing the Global Framework must also be seen from the perspective of the WTO, which aims at integrating the world economy by eliminating barriers to trade and investment; it would accentuate economic growth and provide impetus for competitive activities. Transit—including access to the sea—remains crucial for LLS. Introducing international norms in transit facilitation, cargo clearance, and simplification of document processing, and adopting integrated transit systems and automated systems of customs data, would all help facilitate the international trading activities of LLS.

5.3.2 Informed Bilateralism

Since access to the sea can only be practically guaranteed through agreements between LLS and transit countries, it is in the interests of the LLS to enter into such agreements, after careful analysis of their access corridors and the generalized costs that would be incurred in using each.[554] New ways to simplify customs clearances and mechanisms to avoid trucking delays at roadblocks and borders are also important. It is therefore crucial to determine transit times from origin of goods to destination, especially the "dwell time" at ports, customs borders, and transfer terminals. Every single day wasted in transit inflates inventory costs and thus reduces the competitiveness of LLS in international markets.[555] Many transit transport agreements between LLS and transit States have already set examples of modalities to ensure that the necessary facilities are granted by transit States. Indeed, every region has its own priorities and has worked to ensure a productive bilateralism.

To alleviate their problems, it may also be worthwhile for LLS to explore the *flag of convenience* approach.[556] Although not necessarily a panacea, the approach may give them additional options for getting a better deal on imports or exports of

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[554] That is, the overall economic cost: transport cost, loss and damage, inventory costs due to delays in transit, and the shipping costs to the ports of exit/entry that are incurred when there is an important rate differential between the ports serving each route.

[555] Since the goods are already paid for, the consignee (the person to whom the goods are destined) is either out of stock or could have been earning interest with the money invested in the goods that are en route. *See also* Jorge Rebelo, *Landlocked Countries: Evaluating Alternative Routes to the Sea,* Infrastructure Notes, Transport No. OT-2 (World Bank 1992).

[556] This approach, borrowed from maritime law, would mean an LLS could own a ship and register it in a particular country that grants flags of convenience. There are LLS that own sizable fleets, but the flag of convenience approach, which has an inherent low cost, may be more efficient for LLS that are extremely poor. Though the legal regime supporting flag of convenience in these types of cases may also be fragile and may need improvement, the approach is certainly worth exploring.

goods—in other words, for increasing their bargaining strength and compensating for lost revenues.

5.3.3 Proactive Regionalism

The international community has done significant amounts of work to ease the plight of LLS, LDC, and transit countries. In many developing countries in Africa, Asia, and Latin America, and more recently in economies in transition in Asia and Europe, the work has been carried out in close cooperation with regional organizations of developing countries. Noteworthy success stories are, in Africa, the Common Market of Eastern and Southern Africa (COMESA), the Economic Community of West African States (ECOWAS), and the Southern African Development Community (SADC); in Asia, the Association of South-East Asian Nations (ASEAN) and the Economic Co-operation Organization (ECO); and in Latin America, the Southern Cone Common Market (MERCOSUR).

International organizations have worked with regional organizations to ensure intergovernmental support to programs; to reduce transaction costs by using local experts and administrative support; and to ensure that new programs are sustainable. As a result of their concerted efforts, a variety of transport instruments are now being implemented in Africa, Asia, and Latin America.

In Africa, two success stories are COMESA and SADC. Both have launched programs aimed at establishing a regional customs transit system, consolidating and extending computerized customs procedures and transport information systems, and setting up joint border inspection posts. Similarly, under the auspices of COMESA, Eastern and Southern African countries have harmonized road transit charges[557] to remove discriminatory practices, such as entry fees and fuel surcharges on foreign vehicles, and facilitate forward planning by transport operators.[558]

The landlocked developing countries and their transit neighbors in Southern Africa have also made significant progress in facilitating transit, through such measures as harmonizing axle load limits, adopting regional carrier licensing, and applying a regional third-party motor insurance scheme. Activities planned to further strengthen cooperation include the region-wide use of the COMESA/SADC single administrative document, and implementation of the Regional Customs Guarantee Scheme (RCGS), both necessary to a harmonized customs transit system. The system is to be supported by additional transit transport

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[557] A flat rate of US$8 per 100 kilometers on trunk road traversed.

[558] *See Cargo Info, Freight & Trading Weekly* (September 3, 1999), http://www.cargoinfo.co.za/ftw; *see also* for further discussion, Commission of Africa Report, *supra* n. 61, at 259–70.

facilitation measures, such as a "one-stop border post system," with the aim of speeding up transit procedures and reducing delays.[559]

In West Africa, early steps to facilitate transit transport came from the ECOWAS Treaty in 1975, which committed member States to evolve common transport policies and formulate plans for improving and reorganizing their transport infrastructure. The ECOWAS Treaty was supplemented by two transport conventions adopted in 1982. The first, the Convention Relating to Inter-State Road Transportation, established the ECOWAS road transport network and technical standards. The second, the Convention Relating to Interstate Road Transit of Goods, sought to establish an international customs transit system. Other important regional legal instruments relate, *inter alia,* to a region-wide third-party motor insurance scheme, agreement on harmonization of highway legislation, temporary importation of passenger vehicles, and free movement of persons.

Unlike the African continent, where subregional legal instruments are dominant, transit facilitation in Central Asia is being carried out mainly through accession to international conventions. The countries there have in a relatively short time succeeded in acceding to several instruments, including, *inter alia*: (a) the Convention on Road Traffic, 1968; (b) the Convention on Road Signs and Signals, 1968; (c) the Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention), 1975; (d) the Customs Convention on the Temporary Importation of Commercial Road Vehicles, 1956; (e) the Customs Convention on Containers, 1972; (f) the International Convention on the Harmonization of Frontier Control of Goods, 1982; and (g) the Convention on the Contract for the International Carriage of Goods by Road (CMR), 1956.[560]

In the Asian context, from an LLS perspective the Mekong Basin development plan, adopted in 2002, is noteworthy. The plan, agreed by the Mekong riparian States, calls for investments in infrastructure and technology; it is intended to bridge growth gaps among countries of the Mekong Basin as regional markets become more accessible. Tailored to basic infrastructure and skills enhancement in the hope of reducing physical trade barriers and exploiting shared resources, the initiative may also be conducive to improving the transport and

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[559] Border crossing delays are at present considered to be excessive. It has been reported that the economic cost to the SADC region in terms of reduced truck productivity in 1996 was about US$50 million. For an interesting study on SADC and sharing of international rivers, *see* generally Salman M. A. Salman, *Shared Watercourse in the Southern Africa Development Community: Challenges and Opportunities,* 6 Water Pol. 25 (2003); *see also* Salman M. A. Salman, *Legal Regime for Use and Protection of International Watercourse in the Southern African Region: Evolution and Context,* 41 Nat. Res. J. 981 (2001).

[560] ESCAP Resolution 48/11 of April 23, 1992, recommended that members make efforts to adhere to these instruments.

river navigation network, which will be of particular help to LLS like Lao PDR.[561] Similarly, 23 Asian countries signed a Treaty to develop a pan-Asian highway and ferry system to connect Tokyo with Istanbul,[562] under the aegis of the UN ESCAP in Shanghai. This Treaty, envisaging a 140,000-kilometer network of roads passing through North and South Korea, China, and Southeast, Central, and South Asia, lists roads that need to be built and upgraded and establishes a unified standard for the highway. The agreement has the potential to significantly bolster trade and economic integration across the region; it should also help landlocked countries gain new routes to seaports.[563]

Clearly, the LLS in recent years have taken significant strides toward resolving issues related to their handicaps. Their multipronged, multifaceted approach appears to have served them well.

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[561] *See,* for detail, Oxford Analytica Brief http://www.oxweb.com, July 30, 1999, and November 27, 2002.

[562] On April 27, 2004; *see also* Bishwambher Pyakuryal, *Integration of Industrial Activities of Disadvantaged Groups of Countries to the Regional and Global Levels: Prospect and Challenges in an Era of Globalization and Liberalization,* report prepared for the Expert's Group's Meeting March 14–16, 2001 (ESCAP, Bangkok); *see also* Bishwambher Pyakuryal, *Trade Facilitation: Assessing Nepal's Status* in *Current International Trade Practices,* in *WTO and South Asia, Post-Cancun Agenda* 137–151 (Navin Dahal & Bhaskar Sharma, eds., SAWTEE 2004).

[563] *See Accord on Asian Highway Signed,* DAWN (April 27, 2004). DAWN also notes that, for LLS, the highway portends a revival of the cross-continent access that the Silk Route provided early in the first millennium. *See also* generally, Grande Question Concernant les Transports, les Communications, le Tourisme et le Développement Infrastructurel: Intégration et Facilitation des Transports dans la Région de la CESAP. E/ESCAP/CTCTID(4)/4 (October 29, 2002, ECOSOC).

PART FOUR

Conclusion

CHAPTER SIX

A Better Future for All

Most landlocked countries over many decades have been overwhelmed by problems resulting from their inability to secure access to seaports. The problems have undermined their development, and in many cases led to their acute poverty. To ease their sufferings—which are essentially due to the fragile, even ambiguous, international regime applied to them—States without access to the sea have sought successive legal innovations to reestablish, if not reclaim, their right of access. In response, there has been a clear general trend among the countries concerned, *lato sensu,* to deal with their problems almost mechanically through soft law means. In addition to the above general observations, the study allows us to draw a few general conclusions.

6.1 Customary Law in Existence

Not all countries are signatories to all the universal instruments that address the issue of right of LLS access to and from the sea: 32 countries acceded to or ratified the Barcelona Statute, 62 ratified the Geneva Convention of 1958, 37 ratified the 1965 New York Convention, and 145 ratified UNCLOS III.[564] In the meantime, a variety of soft instruments and practices to respond to the access problem have evolved in parallel, in different continents, countries, and political blocs. A positivist analysis would therefore call for questioning, and eventually even rejecting, the existence of real juridical value for the right of access. Yet there has been a proliferation of instruments in different continents, regions, or subregions that attempt to address the issue of LLS rights, whether to facilitate access or enforce access rights. In studying the process of finalizing these instruments—universal resolution, regionally focused declaration, or simple bilateral transit arrangement—it becomes clear that all countries have been supporting the same concept: that LLS have unequivocal rights of access to and from the sea. This involvement of a vast range of countries in bundles of different instruments that still all support the LLS unrestricted right to access to and from the sea is

[564] *See* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partII/treaty-16.asp; http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXI/treaty2.asp; http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterX/treaty10.asp; and http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXI/treaty6.asp respectively.

undoubtedly evidence that the right of access has in fact already become an international customary law.[565]

6.2 Relativism in Progress

Although the different innovations reviewed in this study, in the form of conventions, resolutions, and declarations, acknowledged the rights of each LLS to trade and economic security, in practice establishing that these countries were truly independent took much time, and enforcing the real "acquired" rights, theoretical as well as practical, is still difficult. Nonetheless, the multilateral conventions, as well as the different soft and hard law instruments, have been useful. They have generally been successful in helping LLS to better define their problems, and they have opened the possibility for LLS to resolve their unique difficulties in a relatively coherent way.

The liberal—in some cases excessive—interpretations of international law by the LLS, and the misunderstanding, or contrasting understanding, of the transit countries due to perceptional differences over issues, have caused much confusion. But over the decades, there have been many and highly varied attempts to reduce these confusions. Certainly, thanks essentially to their relative economic and political homogeneity, the problem of transit for European LLS has long been solved, though considerable problems remain for developing LLS in Africa, Asia, and South America. The latter clearly suffer systematically from unilateral decisions made by transit States. The realization of this inherent inequality perhaps explains the selflessness of the developed LLS, as well as many transit countries, in favoring measures to relieve the transit problems of developing LLS as the regime evolves.

While previous conventions and treaties have contributed, if only moderately, to this evolutionary process, the signing of the 1982 UNCLOS III Convention evidences completion of an important phase of international negotiations. Equally important is the fact that notwithstanding the deficiencies of, and objections to, some of its provisions, the Convention cannot be ignored by States in either their current or future international relations.[566] States must apply it, both

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[565] This argument builds on the understanding that any lacunae in the international legal regime can be filled by reference to customary international law, which consists of those rules that, though not formalized by international agreements, States follow from a sense of legal obligation. *See also* Statute of the International Court of Justice, art. 38(1).

[566] On this Convention, though in a broader context, the ICJ, in the case concerning the Continental Shelf (*Libya v. Malta*) (Judgment of June 3, 1985), noted: "Nevertheless, it cannot be denied that the 1982 Convention is of major importance, having been adopted by an overwhelming majority of states, hence it is clearly the duty of the Court even independently of the reference made to the Convention by the parties, to consider in what degree any of its relevant provisions are binding upon the parties as a rule of customary international law." Paragraph 27 of the Majority Judgment, ICJ Reports (1985).

in substance and spirit, in such a way that it does not become a source of discord and is instead an instrument that fosters harmony between States. That can only be achieved if the particular situation of LLS is properly taken into account.[567]

The crucial next phase, however—the application or execution of the novel legal concepts introduced by the Convention and correction of its many incomplete and confusing features—has yet to be completed. It would also entail improvement of trade facilitation measures, as well as recognition that approaches and decision-making must take myriad forms.

6.3 Pragmatism in Decision-Making

The last half-century has undoubtedly witnessed greater impetus to the development of international law and soft law initiatives in relation to LLS than any previous stage in history. Like all living law, international law is not static. Some scholars believe, correctly, that it gathers dynamism as it mends itself to the needs of the day.[568] The evolution of the regime related to LLS verifies this.

Yet this positive evolution is not only a natural result of the growing economic and political interdependence of states, the inherent self-correcting mechanisms of law, or the effects of the free market, as many have suggested; it is also a result of the fact that like-minded countries have come forward with a common agenda and become a force not easy to reckon with. Strengthened unity among countries belonging to different categories (LLS, transit, LDC, and so forth) and a focus on pragmatic decision-making have became increasingly clear in recent years.

Certainly, too, the many resolutions and declarations of the1990s emanating from international meetings organized by UN affiliates have helped the LLS improve their access to the sea and thus bolster their international trade. In fact, the fact that States are enmeshed in international organizations and through these in a variety of universal and regional forums, not to mention the web of networks of international organizations, has facilitated improvement of the legal regime for LLS.

Nonetheless, problems are still numerous. Many more negotiations, both pragmatic and tactful, must be conducted and new operational mechanisms devised before the LLS can obtain, through hard as well as soft law, the transit rights they badly need to improve their trade performance. Only then will they become full-fledged citizens of the global village.

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[567] *See* Tuerk & Hafner, *supra* n. 86, at 70.

[568] S. K. Kapoor, *International Law and Human Rights* 20 (Central Law Agency 2003).

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APPENDIX ONE

Convention and Statute on the Regime of Navigable Waterways of International Concern

[footnote omitted]

Barcelona, April 20, 1921

[footnote omitted] Albania, Austria, Belgium, Bolivia, Brazil, Bulgaria, Chile, China, Colombia, Costa Rica, Cuba, Denmark, the British Empire (with New Zealand and India), Spain, Estonia, Finland, France, Greece, Guatemala, Haiti, Honduras, Italy, Japan, Latvia, Lithuania, Luxembourg, Norway, Panama, Paraguay, the Netherlands, Persia, Poland, Portugal, Romania, the Serb-Croat-Slovene State, Sweden, Switzerland, Czechoslovakia, Uruguay, and Venezuela:

Desirous of carrying further the development as regards the international regime of navigation on internal waterways, which began more than a century ago, and which has been solemnly affirmed in numerous treaties,

Considering that General Conventions to which other Powers may accede at a later date constitute the best method of realising the purpose of Article 23(*e*) of the Covenant of the League of Nations,

Recognising in particular that a fresh confirmation of the principle of Freedom of Navigation in a Statute elaborated by forty-one States belonging to the different portions of the world constitutes a new and significant stage towards the establishment of co-operation among States, without in any way prejudicing their rights of sovereignty or authority,

Having accepted the invitation of the League of Nations to take part in a Conference at Barcelona which met on March 10th, 1921, and having taken note of the Final Act of such Conference,

Anxious to bring into force forthwith the provisions of the Statute relating to the Regime of Navigable Waterways of International Concern which has there been adopted,

Wishing to conclude a Convention for this purpose, the HIGH CONTRACTING PARTIES have appointed as their plenipotentiaries:

[. . .]:

Who, after communicating their full powers found in good and due form, have agreed as follows:

Article 1

The High Contracting Parties declare that they accept the Statute on the Regime of Navigable Waterways of International Concern annexed hereto, adopted by the Barcelona Conference on April 19th, 1921.

This Statute will be deemed to constitute an integral part of the present Convention. Consequently, they hereby declare that they accept the obligations and undertakings of the said Statute in conformity with the terms and in accordance with the conditions set out therein.

Article 2

The present Convention does not in any way affect the rights and obligations arising out of the provisions of the Treaty of Peace signed at Versailles on June 28th, 1919, or out of the provisions of the other corresponding Treaties, in so far as they concern the Powers which have signed, or which benefit by, such Treaties.

Article 3

The present Convention, of which the French and English texts are both authentic, shall bear this day's date and shall be open for signature until December 1st, 1921.

Article 4

The present Convention is subject to ratification. The instruments of ratification shall be transmitted to the Secretary-General of the League of Nations, who will notify the receipt of them to the other Members of the League and to States admitted to sign the Convention. The instruments of ratification shall be deposited in the archives of the Secretariat.

In order to comply with the provisions of Article 18 of the Convention of the League of Nations, the Secretary-General will register the present Convention upon the deposit of the first ratification.

Article 5

Members of the League of Nations which have not signed the present Convention before December 1st, 1921, may accede to it.

The same applies to States not Members of the League to which the Council of the League may decide officially to communicate the present Convention.

Accession will be notified to the Secretary-General of the League, who will inform all Powers concerned of the accession and of the date on which it was notified.

Article 6

The present Convention will not come into force until it has been ratified by five Powers. The date of its coming into force shall be the ninetieth day after the receipt by the Secretary-General of the League of Nations of the fifth ratification. Thereafter the present Convention will take effect in the case of each Party ninety days after the receipt of its ratification or of the notification of its accession.

Upon the coming into force of the present Convention, the Secretary-General will address a certified copy of it to the Powers not Members of the League which are bound under the Treaties of Peace to accede to it.

Article 7

A special record shall be kept by the Secretary-General of the League of Nations, showing which of the parties have signed, ratified, acceded to or denounced the present Convention. This record shall be open to the Members of the League at all times; it shall be published as often as possible in accordance with the directions of the council.

Article 8

Subject to the provisions of Article 2 of the present Convention, the latter may be denounced by any Party thereto after the expiration of five years from the date when it came into force in respect of that Party. Denunciation shall be effected by notification in writing addressed to the Secretary-General of the League of Nations. Copies of such notification shall be transmitted forthwith by him to all the other Parties, informing them of the date on which it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General, and shall operate only in respect of the notifying Power. It shall not, in the absence of an agreement to the contrary, prejudice engagements entered into before the denunciation relating to a program of works.

Article 9

A request for the revision of the present Convention may be made at any time by one-third of the High Contracting Parties.

In faith whereof the above-named Plenipotentiaries have signed the present Convention.

Done at Barcelona the twentieth day of April one thousand nine hundred and twenty-one, in a single copy which shall remain deposited in the archives of the League of Nations *[footnote omitted]*.

Statute on the Regime of Navigable Waterways of International Concern

Article 1

In the application of the Statute, the following are declared to be navigable waterways of international concern:

1. All parts which are naturally navigable to and from the sea of a waterway which in its course, naturally navigable to and from the sea, separates or traverses different States, and also any part of any other waterway naturally navigable to and from the sea, which connects with the sea a waterway naturally navigable which separates or traverses different States.

It is understood that:

(*a*) Transhipment from one vessel to another is not excluded by the words "navigable to and from the sea";

(*b*) Any natural waterway or part of a natural waterway is termed "naturally navigable" if now used for ordinary commercial navigation, or capable by reason of its natural conditions of being so used; by "ordinary commercial navigation" is to be understood navigation which, in view of the economic condition of the riparian countries, is commercial and normally practicable;

(*c*) Tributaries are to be considered as separate waterways;

(*d*) Lateral canals constructed in order to remedy the defects of a waterway included in the above definition are assimilated thereto;

(*e*) The different States separated or traversed by a navigable waterway of international concern, including its tributaries of international concern, are deemed to be "riparian States".

2. Waterways, or parts of waterways, whether natural or artificial, expressly declared to be placed under the regime of the General Convention regarding navigable waterways of international concern either in unilateral Acts of the States under whose sovereignty or authority these waterways or parts of waterways are situated, or in agreements made with the consent, in particular, of such States.

Article 2

For the purpose of Articles 5, 10, 12 and 14 of this Statute, the following shall form a special category of navigable waterways of international concern:

(*a*) Navigable waterways for which there are international Commissions upon which non-riparian States are represented;
(*b*) Navigable waterways which may hereafter be placed in this category, either in pursuance of unilateral Acts of the States under whose sovereignty or authority they are situated, or in pursuance of agreements made with the consent, in particular, of such States.

Article 3

Subject to the provisions contained in Articles 5 and 17, each of the Contracting States shall accord free exercise of navigation to the vessels flying the flag of any one of the other Contracting States on those parts of navigable waterways specified above which may be situated under its sovereignty or authority.

Article 4

In the exercise of navigation referred to above, the nations, property and flags of all Contracting States shall be treated in all respects on a footing of perfect equality. No distinction shall be made between the nationals, the property and the flags of the different riparian States, including the riparian State exercising sovereignty or authority over the portion of the navigable waterway in question: similarly, no distinction shall be made between the nationals, the property and the flags of riparian and non-riparian States. It is understood, in consequence, that no exclusive right of navigation shall be accorded on such navigable waterways to companies or to private persons.

No distinctions shall be made in the said exercise, by reason of the point of departure, of destination, or of the direction of the traffic.

Article 5

As an exception to the two preceding Articles, and in the absence of any Convention or obligation to the contrary:

1. A riparian State has the right of reserving for its own flag the transport of passengers and goods loaded at one port situated under its sovereignty or authority and unloaded at another port also situated under its sovereignty or authority. A State which does not reserve the above-mentioned transport to its own flag may, nevertheless, refuse the benefit of equality of treatment with regard to such transport to a co-riparian which does reserve it.

   On the navigable waterways referred to in Article 2, the Act of Navigation shall only allow to riparian States the right of reserving the local transport of passengers or of goods which are of national origin or are nationalised.

In every case, however, in which greater freedom of navigation may have been already established, in a previous Act of Navigation, this freedom shall not be reduced.

2. When a natural system of navigable waterways of international concern which does not include waterways of the kind referred to in Article 2 separates or traverses two States only, the latter have the right to reserve to their flags by mutual agreement the transport of passengers and goods loaded at one port of this system and unloaded at another port of the same system, unless this transport takes place between two ports which are not situated under the sovereignty or authority of the same State in the course of a voyage, effected without transhipment on the territory of either of the said States, involving a sea-passage over a navigable waterway of international concern which does not belong to the said system.

Article 6

Each of the Contracting States maintains its existing right, on the navigable waterways or parts of navigable waterways referred to in Article 1 and situated under its sovereignty or authority, to enact the stipulations and to take the measures necessary for policing the territory and for applying the laws and regulations relating to customs, public health, precautions against the diseases of animals and plants, emigration or immigration, and to the import or export of prohibited goods, it being understood that such stipulations and measures must be reasonable, must be applied on a footing of absolute equality between the nationals, property and flags of any one of the Contracting States, including the State which is their author, and must not without good reason impede the freedom of navigation.

Article 7

No dues of any kind may be levied anywhere on the course or at the mouth of a navigable waterway of international concern, other than dues in the nature of payment for services rendered and intended solely to cover in an equitable manner the expenses of maintaining and improving the navigability of the waterway and its approaches, or to meet expenditure incurred in the interest of navigation. These dues shall be fixed in accordance with such expenses, and the tariff of dues shall be posted in the ports. These dues shall be levied in such a manner as to render unnecessary a detailed examination of the cargo, except in cases of suspected fraud or infringement of regulations, and so as to facilitate international traffic as much as possible, both as regards their rates and the method of their application.

Article 8

The transit of vessels and of passengers and goods on navigable waterways of international concern shall, so far as customs formalities are concerned, be governed by the conditions laid down in the Statute of Barcelona on Freedom of Transit. Whenever transit takes place without transhipment the following additional provisions shall be applicable:

(*a*) When both banks of a waterway of international concern are within one and the same State, the customs formalities imposed on goods in transit after they have been declared and subjected to a summary inspection shall be limited to placing them under seal or padlock or in the custody of customs officers;
(*b*) When a navigable waterway of international concern forms the frontier between two States, vessels, passengers and goods in transit shall while "en route" be exempt from any customs formality, except in cases in which there are valid reasons of a practical character for carrying out customs formalities at a place on the part of the river which forms the frontier, and this can be done without interfering with navigation facilities.

The transit of vessels and passengers, as well as the transit of goods without transhipment, on navigable waterways of international concern, must not give rise to the levying of any duties whatsoever, whether prohibited by the Statute of Barcelona on Freedom of Transit or authorised by Article 3 of that Statute. It is nevertheless understood that vessels in transit may be made responsible for the board and lodging of any customs officers who are strictly required for supervision.

Article 9

Subject to the provisions of Articles 5 and 17, the nationals, property and flags of all the Contracting States shall, in all ports situated on a navigable waterway of international concern, enjoy, in all that concerns the use of the port, including port dues and charges, a treatment equal to that accorded to the nationals, property and flag of the riparian State under whose sovereignty or authority the port is situated. It is understood that the property to which the present paragraph relates is property originating in, coming from or destined for, one or other of the Contracting States.

The equipment of ports situated on a navigable waterway of international concern and the facilities afforded in these ports to navigation, must not be withheld from public use to an extent beyond what is reasonable and fully compatible with the free exercise of navigation.

In the application of customs or other analogous duties, local octroi or consumption duties, or incidental charges, levied on the occasion of the importation or exportation of goods through the aforesaid ports, no difference shall be made by reason of the flag of the vessel on which the transport has been or is to be accomplished, whether this flag be the national flag or that of any of the Contracting States.

The State under whose sovereignty or authority a port is situated may withdraw the benefits of the preceding paragraph from any vessel if it is proved that the owner of the vessel discriminates systematically against the nationals of that State, including companies controlled by such nationals.

In the absence of special circumstances justifying an exception on the ground of economic necessities, the customs duties must not be higher than those levied on the other customs frontiers of the State interested, on goods of the same kind, source and destination. All facilities accorded by the Contracting States to the importation or exportation of goods by other land or water routes, or in other ports, shall be equally accorded to importation or exportation under the same conditions over the navigable waterway and through the ports referred to above.

Article 10

1. Each riparian State is bound, on the one hand, to refrain from all measures likely to prejudice the navigability of the waterway, or to reduce the facilities for navigation, and, on the other hand, to take as rapidly as possible all necessary steps for removing any obstacles and dangers which may occur to navigation.
2. If such navigation necessitates regular upkeep of the waterway, each of the riparian States is bound as towards the others to take such steps and to execute such works on its territory as are necessary for the purpose as quickly as possible, taking account at all times of the conditions of navigation, as well as of the economic state of the regions served by the navigable waterway.

   In the absence of an agreement to the contrary, any riparian State will have the right, on valid reason being shown, to demand from the other riparians a reasonable contribution towards the cost of upkeep.
3. In the absence of legitimate grounds for opposition by one of the riparian States, including the State territorially interested, based either on the actual conditions of navigability in its territory, or on other interests such as, *inter alia,* the maintenance of the normal water-conditions, requirements for irrigation, the use of water-power, or the necessity for constructing other and more advantageous ways of communication, a riparian State may not refuse to carry out works necessary for the improvement of the navigability which are asked

for by another riparian State, if the latter State offers to pay the cost of the works and a fair share of the additional cost of upkeep. It is understood, however, that such works cannot be undertaken so long as the State of the territory on which they are to be carried out objects on the ground of vital interests.

4. In the absence of any agreement to the contrary, a State which is obliged to carry out works of upkeep is entitled to free itself from the obligation, if, with the consent of all the co-riparian States, one or more of them agree to carry out the works instead of it; as regards works for improvement, a State which is obliged to carry them out shall be freed from the obligation, if it authorises the State which made the request to carry them out instead of it. The carrying out of works by States other than the State territorially interested, or the sharing by such States in the cost of works, shall be so arranged as not to prejudice the rights of the State territorially interested as regards the supervision and administrative control over the works, or its sovereignty and authority over the navigable waterway.
5. On the waterways referred to in Article 2, the provisions of the present Article are to be applied subject to the terms of the Treaties, Conventions, or Navigation Acts which determine the powers and responsibilities of the International Commission in respect of works.

   Subject to any special provisions in the said Treaties, Conventions, or Navigation Acts, which exist or may be concluded:

   (*a*) Decisions in regard to works will be made by the Commission;

   (*b*) The settlement, under the conditions laid down in Article 22 below, of any dispute which may arise as a result of these decisions, may always be demanded on the grounds that these decisions are *ultra vires,* or that they infringe international conventions governing navigable waterways. A request for a settlement under the aforesaid conditions based on any other grounds can only be put forward by the State which is territorially interested.

   The decisions of this Commission shall be in conformity with the provisions of the present Article.
6. Notwithstanding the provisions of paragraph 1 of this Article, a riparian State may, in the absence of any agreement to the contrary, close a waterway wholly or in part to navigation, with the consent of all the riparian States or of all the States represented on the International Commission in the case of navigable waterways referred to in Article 2.

   As an exceptional case one of the riparian States of a navigable waterway of international concern not referred to in Article 2 may close the waterway to navigation, if the navigation on it is of very small importance, and if the State in question can justify its action on the ground of an economic interest clearly greater than that of navigation. In this case the

closing to navigation may only take place after a year's notice and subject to an appeal on the part of any other riparian State under the conditions laid down in Article 22. If necessary, the judgement shall prescribe the conditions under which the closing to navigation may be carried into effect.

7. Should access to the sea be afforded by a navigable waterway of international interest through several branches, all of which are situated in the territory of one and the same State, the provisions of paragraphs 1, 2 and 3 of this Article shall apply only to the principal branches deemed necessary for providing free access to the sea.

Article 11

If on a waterway of international concern one or more of the riparian States are not parties to this Statute, the financial obligations undertaken by each of the Contracting States in pursuance of Article 10 shall not exceed those to which they would have been subject if all the riparian States had been Parties.

Article 12

In the absence of contrary stipulations contained in a special agreement or treaty, for example, existing Conventions concerning customs and police measures and sanitary precautions, the administration of navigable waterways of international concern is exercised by each of the riparian States under whose sovereignty or authority the navigable waterway is situated. Each of such riparian States has, *inter alia,* the power and duty of publishing regulations for the navigation of such waterway and of seeing to their execution. These regulations must be framed and applied in such a way as to facilitate the free exercise of navigation under the conditions laid down in this Statute.

The rules of procedure dealing with such matters as ascertaining, prosecuting and punishing navigation offences must be such as to promote as speedy a settlement as possible.

Nevertheless, the Contracting States recognise that it is highly desirable that the riparian States should come to an understanding with regard to the administration of the navigable waterway and, in particular, with regard to the adoption of navigation regulations of as uniform a character throughout the whole course of such navigable waterway as the diversity of local circumstances permits.

Public services of towage or other means of haulage may be established in the form of monopolies for the purpose of facilitating the exercise of navigation, subject to the unanimous agreement of the riparian States or the States represented on the International Commission in the case of navigable waterways referred to in Article 2.

Article 13

Treaties, conventions or agreements in force relating to navigable waterways, concluded by the Contracting States before the coming into force of this Statute, are not, as a consequence of its coming into force, abrogated so far as concerns the States signatories to those treaties.

Nevertheless, the Contracting States undertake not to apply among themselves any provisions of such treaties, conventions or agreements which may conflict with the rules of the present Statute.

Article 14

If any of the special agreements or treaties referred to in Article 12 has entrusted or shall hereafter entrust certain functions to an international Commission which includes representatives of States other than the riparian States, it shall be the duty of such Commission, subject to the provisions of Article 10, to have exclusive regard to the interests of navigation, and it shall be deemed to be one of the organisations referred to in Article 24 of the Covenant of the League of Nations. Consequently, it will exchange all useful information directly with the League and its organisations, and will submit an annual report to the League.

The powers and duties of the Commission referred to in the preceding paragraph shall be laid down in the Act of Navigation of each navigable waterway and shall at least include the following:

(*a*) The Commission shall be entitled to draw up such navigation regulations as it thinks necessary itself to draw up, and all other navigation regulations shall be communicated to it;
(*b*) It shall indicate to the riparian States the action advisable for the upkeep of works and the maintenance of navigability;
(*c*) It shall be furnished by each of the riparian States with official information as to all schemes for the improvement of the waterway;
(*d*) It shall be entitled, in cases in which the Act of Navigation does not include a special regulation with regard to the levying of dues, to approve of the levying of such dues and charges in accordance with the provisions of Article 7 of this Statute.

Article 15

This Statute does not prescribe the rights and duties of belligerents and neutrals in time of war. The Statute shall, however, continue in force in time of war so far as such rights and duties permit.

Article 16

This Statute does not impose upon a Contracting State any obligation conflicting with its rights and duties as a Member of the League of Nations.

Article 17

In the absence of any agreement to the contrary to which the State territorially interested is or may be a party, this Statute has no reference to the navigation of vessels of war or of vessels performing police or administrative functions, or, in general, exercising any kind of public authority.

Article 18

Each of the Contracting States undertakes not to grant, either by agreement or in any other way, to a non-Contracting State treatment with regard to navigation over a navigable waterway of international concern which, as between Contracting States, would be contrary to the provisions of this Statute.

Article 19

The measures of a general or particular character which a Contracting State is obliged to take in case of an emergency affecting the safety of the State or the vital interests of the country may, in exceptional cases and for a period as short as possible, involve a deviation from the provisions of the above Articles; it being understood that the principle of the freedom of navigation, and especially communication between the riparian States and the sea, must be maintained to the utmost possible extent.

Article 20

This Statute does not entail in any way the withdrawal of existing greater facilities granted to the free exercise of navigation on any navigable waterway of international concern, under conditions consistent with the principle of equality laid down in this Statute, as regards the nationals, the goods and the flags of all the Contracting States; nor does it entail the prohibition of such grant of greater facilities in the future.

Article 21

In conformity with Article 23(*e*) of the Covenant of the League of Nations, any Contracting State which can establish a good case against the application of any provisions of this Statute in some or all of its territory on the ground of

the grave economic situation arising out of the acts of devastation perpetrated on its soil during the war 1914–1918, shall be deemed to be relieved temporarily of the obligations arising from the application of such provision, it being understood that the principle of freedom of navigation must be observed as far as possible.

Article 22

Without prejudice to the provisions of paragraph 5 of Article 10, any dispute between States as to the interpretation or application of this Statute which is not settled directly between them shall be brought before the Permanent Court of International Justice, unless under a special agreement or a general arbitration provision steps are taken for the settlement of the dispute by arbitration or some other means.

Proceedings are opened in the manner laid down in Article 40 of the Statute of the Permanent Court of International Justice.

In order to settle such disputes, however, in a friendly way as far as possible, the Contracting States undertake before resorting to any judicial proceedings and without prejudice to the powers and right of action of the Council and of the Assembly to submit such disputes for an opinion to any body established by the League of Nations as the advisory and technical organisation of the Members of the League in matters of communications and transit. In urgent cases a preliminary opinion may recommend temporary measures intended in particular to restore the facilities for free navigation which existed before the act or occurrence which gave rise to the dispute.

Article 23

A navigable waterway shall not be considered as of international concern on the sole ground that it traverses or delimits zones or enclaves, the extent and population of which are small as compared with those of the territories which it traverses, and which form detached portions or establishments belonging to a State other than that to which the said river belongs, with this exception, throughout its navigable course.

Article 24

This Statute shall not be applicable to a navigable waterway of international concern which has only two riparian States, and which separated for a considerable distance, a Contracting State from a non-Contracting State whose Government is not recognized by the former at the time of the signing of this Statute, until an

agreement has been concluded between them establishing, for the waterway in question, an administrative and customs regime which affords suitable safeguards to the Contracting State.

Article 25

It is understood that this Statute must not be interpreted as regulating in any way rights and obligations *inter se* of territories forming part, or placed under the protection, of the same sovereign State, whether or not these territories are individually Members of the League of Nations.

Additional Protocol to the Convention on the Regime of Navigable Waterways of International Concern

[footnote omitted]

Barcelona, April 20, 1921

1. The States signatories of the Convention on the Regime of Navigable Waterways of International Concern, signed at Barcelona on 20 April 1921, whose duly authorised representatives have affixed their signatures to the present Protocol, hereby declare that, in addition to the Freedom of Communications which they have conceded by virtue of the Convention on Navigable Waterways considered as of international concern, they further concede, on condition of reciprocity, without prejudice to their rights of sovereignty, and in time of peace:

(*a*) on all navigable waterways;

(*b*) on all naturally navigable waterways;

which are placed under their sovereignty or authority, and which, not being considered as of international concern, are accessible to ordinary commercial navigation to and from the sea, and also in all the ports situated on these waterways, perfect equality of treatment for the flags of any State signatory of this Protocol as regards the transport of imports and exports without transhipment.

At the time of signing, the signatory States must declare whether they accept the obligation to the full extent indicated under paragraph (*a*) above, or only to the more limited extent defined by paragraph (*b*).

It is understood that States which have accepted paragraph (*a*) are not bound as regards those which have accepted paragraph (*b*), except under the conditions resulting from the latter paragraph.

It is also understood that those States which possess a large number of ports (situated on navigable waterways) which have hitherto remained closed to international commerce, may, at the time of the signing of the present Protocol, exclude from its application one or more of the navigable waterways referred to above.

The signatory States may declare that their acceptance of the present Protocol does not include any or all of the colonies, overseas possessions or protectorates under their sovereignty or authority, and they may subsequently adhere separately on behalf of any colony, overseas possession or protectorate so excluded

in their declaration. They may also denounce the Protocol separately in accordance with its provisions, in respect of any colony, overseas possession or protectorate under their sovereignty or authority.

The present Protocol shall be ratified. Each Power shall send its ratification to the Secretary-General of the League of Nations, who shall cause notice of such ratification to be given to all the other signatory Powers; these ratifications shall be deposited in the archives of the Secretariat of the League of Nations.

The present Protocol shall remain open for the signature or adherence of the States which have signed the above-mentioned Convention or have given their adherence to it.

It shall come into force after the Secretary-General of the League of Nations has received the ratification of two States; provided, however, that the said Convention has come into force by that time.

It may be denounced at any time after the expiration of a period of two years dating from the time of the reception by the Secretary-General of the League of Nations of the ratification of the denouncing State. The denunciation shall not take effect until one year after it has been received by the Secretary-General of the League of Nations. A denunciation of the Convention on the Regime of Navigable Waterways of International Concern shall be considered as including a denunciation of the present Protocol.

Done at Barcelona, the twentieth day of April, nineteen hundred and twenty-one, in single copy, of which the French and English texts shall be authentic *[footnote omitted]*.

APPENDIX TWO

United Nations Conference on Transit Trade of Land-Locked Countries

Convention[1] on Transit Trade of Land-Locked States. Done at New York, on 8 July 1965

PREAMBLE

The States Parties to the present Convention,

Recalling that Article 55 of its charter requires the United Nations to promote conditions of economic progress and solutions of international economic problems,

Noting General Assembly resolution 1028 (XI) *[footnote omitted]* on the land-locked countries and the expansion of international trade which, "recognizing the need of land-locked countries for adequate transit facilities in promoting international trade," invited "the Governments of Member States to give full recognition to the needs of land-locked Member States in the matter of transit trade and, therefore, to accord them adequate facilities in terms of international law and practice in this regard, bearing in mind the future requirements resulting from the economic development of the land-locked countries,"

Recalling article 2 of the Convention on the High Seas which states that the high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty and article 3 of the said Convention which states:

"1. 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. To this end States situated between the sea and a State having no sea-coast shall by common agreement with the latter and in conformity with existing international conventions accord:

"(*a*) To the State having no sea-coast, on a basis of reciprocity, free transit through their territory; and

"(*b*) To ships flying the flag of that State treatment equal to that accorded to their own ships, or to the ships of any other States, as regards access to seaports and the use of such ports.

---

[1] *[footnote omitted]*

"2. States situated between the sea and a State haying no sea-coast shall settle, by mutual agreement with the latter, and taking into account the rights of the coastal State or State of transit and the special conditions of the State having no sea-coast, all matters relating to freedom of transit and equal treatment in ports, in case such States are not already parties to existing international conventions."

Reaffirming the following principles adopted by the United Nations Conference on Trade and Development with the understanding that these principles art interrelated and each principle should be construed in the context of the other principles:

Principle I

The recognition of the right of each land-locked State of free access to the sea is an essential principle for the expansion of international trade and economic development.

Principle II

In territorial and on internal waters, vessels flying the flag of land-locked countries should have identical rights and enjoy treatment identical to that enjoyed by vessels flying the flag of coastal States other than the territorial State.

Principle III

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. To this end States situated between the sea and a State having no sea-coast shall by common agreement with the latter and in conformity with existing international conventions accord to ships flying the flag of that State treatment equal to that accorded to their own ships or to the ships of any other State as regards access to seaports and the use of such ports.

Principle IV

In order to promote fully the economic development of the land-locked countries, the said countries should be afforded by all States, on the basis of reciprocity, free and unrestricted transit, in such a manner that they have free access to regional and international trade in all circumstances and for every type of goods.

Goods in transit should not be subject to any customs duty.

Means of transport in transit should not be subject to special taxes or charges higher than those levied for the use of means of transport of the transit country.

Principle V

The State of transit, while maintaining full sovereignty over its territory, shall have the right to take all indispensable measures to ensure that the exercise of the right of free and unrestricted transit shall in no way infringe its legitimate interests of any kind.

Principle VI

In order to accelerate the evolution of a universal approach to the solution of the special and particular problems of trade and development of land-locked countries in the different geographical areas, the conclusion of regional and other international agreements in this regard should be encouraged by all States.

Principle VII

The facilities and special rights accorded to land-locked countries in view of their special geographical position are excluded from the operation of the most-favoured-nation clause.

Principle VIII

The principles which govern the right of free access to the yea of the land-locked State shall in no way abrogate existing agreements between two or more contracting parties concerning the problems, nor shall they raise an obstacle as regards the conclusions of such agreements in the future, provided that the latter do not establish a regime which is less favourable than or opposed to the above-mentioned provisions.

Have agreed as follows:

Article 1

DEFINITIONS

For the purpose of this Convention,

(*a*) the term "land-locked State" means any Contracting State which has no sea-coast;

(*b*) the term "traffic in transit" means the passage of goods including unaccompanied baggage across the territory of a Contracting State between a land-locked State and the sea when the passage is a portion of a complete

journey which begins or terminates within the territory of that land-locked State and which includes sea transport directly preceding or following such passage. The trans-shipment, warehousing, breaking bulk, and change in the mode of transport of such goods as well as the assembly, disassembly or reassembly of machinery and bulky goods shall not render the passage of goods outside the definition of "traffic in transit" provided that any such operation is undertaken solely for the convenience of transportation. Nothing in this paragraph shall be construed as imposing an obligation on any Contracting State to establish or permit the establishment of permanent facilities on its territory for such assembly, disassembly or reassembly;

(*c*) the term "transit State" means any Contracting State with or without a sea-coast, situated between a land-locked State and the sea, through whose territory "traffic in transit" passes;

(*d*) the term "means of transport" includes:

(i) any railway stock, seagoing and river vessels and road vehicles;

(ii) where the local situation so requires porters and pack animals;

(iii) if agreed upon by the Contracting States concerned, other means of transport and pipelines and gas lines when they are used for traffic in transit within the meaning of this article.

Article 2

FREEDOM OF TRANSIT

1. Freedom of transit shall be granted under the terms of this Convention for traffic in transit and means of transport. Subject to the other provisions of this Convention, the measures taken by Contracting States for regulating and forwarding traffic across their territory shall facilitate traffic in transit on routes in use mutually acceptable for transit to the Contracting States concerned. Consistent with the terms of this Convention, no discrimination shall be exercised which is based on the place of origin, departure, entry, exit or destination or on any circumstances relating to the ownership of the goods or the ownership, place of registration or flag of vessels, land vehicles or other means of transport used.
2. The rules governing the use of means of transport, when they pass across part or the whole of the territory of another Contracting State, shall be established by common agreement among the Contracting States concerned, with due regard to the multilateral international conventions to which these States are parties.
3. Each Contracting State shall authorize, in accordance with its laws, rules and regulations, the passage across or access to its territory of persons whose movement is necessary for traffic in transit.

4. The Contracting States shall permit the passage of traffic in transit across their territorial waters in accordance with the principles of customary international law or applicable international conventions and with their internal regulations.

Article 3

CUSTOMS DUTIES AND SPECIAL TRANSIT DUES

Traffic in transit shall not be subjected by any authority within the transit State to customs duties or taxes chargeable by reason of importation or exportation nor to any special dues in respect of transit. Nevertheless on such traffic in transit there may be levied charges intended solely to defray expenses of supervision and administration entailed by such transit. The rate of any such charges must correspond as nearly as possible with the expenses they are intended to cover and, subject to that condition, the charges must be imposed in conformity with the requirement of non-discrimination laid down in article 2, paragraph 1.

Article 4

MEANS OF TRANSPORT AND TARIFFS

1. The Contracting States undertake to provide, subject to availability, at the points of entry and exit, and as required at points of trans-shipment, adequate means of transport and handling equipment for the movement of traffic in transit without unnecessary delay.
2. The Contracting States undertake to apply to traffic in transit, using facilities operated or administered by the State, tariffs or charges which, having regard to the conditions of the traffic and to considerations of commercial competition, are reasonable as regards both their rates and the method of their application. These tariffs or charges shall be so fixed as to facilitate traffic in transit as much as possible, and shall not be higher than the tariffs or charges applied by Contracting States for the transport through their territory of goods of countries with access to the sea. The provisions of this paragraph shall also extend to the tariffs and charges applicable to traffic in transit using facilities operated or administered by firms or individuals, in cases in which the tariffs or charges are fixed or subject to control by the Contracting State. The term "facilities" used in this paragraph shall comprise means of transport, port installations and routes for the use of which tariffs or charges are levied.
3. Any haulage service established as a monopoly on waterways used for transit must be so organized as not to hinder the transit of vessels.
4. The provisions of this article must be applied under the conditions of non-discrimination laid down in article 2, paragraph 1.

Article 5

Methods and Documentation in Regard to Customs, Transport, etc.

1. The Contracting States shall apply administrative and customs measures permitting the carrying out of free, uninterrupted and continuous traffic in transit. When necessary, they should undertake negotiations to agree on measures that ensure and facilitate the said transit.
2. The Contracting States undertake to use simplified documentation and expeditious methods in regard to customs, transport and other administrative procedures relating to traffic in transit for the whole transit journey on their territory, including any trans-shipment, warehousing, breaking bulk, and changes in the mode of transport as may take place in the course of such journey.

Article 6

Storage of Goods in Transit

1. The conditions of storage of goods in transit at the point of entry and exit, and at intermediate stages in the transit State may be established by agreement between the States concerned. The transit States shall grant conditions of storage at least as favourable as those granted to goods coming from or going to their own countries.
2. The tariffs and charges shall be established in accordance with article 4.

Article 7

Delays or Difficulties in Traffic in Transit

1. Except in cases of *force majeure* all measures shall be taken by Contracting States to avoid delays in or restrictions on traffic in transit.
2. Should delays or other difficulties occur in traffic in transit, the competent authorities of the transit State or States and of the land-locked State shall co-operate towards their expeditious elimination.

Article 8

Free Zones or Other Customs Facilities

1. For convenience of traffic in transit, free zones or other customs facilities may be provided at the ports of entry and exit in the transit States, by agreement between those States and the land-locked States.
2. Facilities of this nature may also be provided for the benefit of land-locked States in other transit States which have no sea-coast or seaports.

Article 9

PROVISION OF GREATER FACILITIES

This Convention does not entail in any way the withdrawal of transit facilities which are greater than those provided for in the Convention and which under conditions consistent with its principles, are agreed between Contracting States or granted by a Contracting State. The Convention also does not preclude such grant of greater facilities in the future.

Article 10

RELATION TO MOST-FAVOURED-NATION CLAUSE

1. The Contracting States agree that the facilities and special rights accorded by this Convention to land-locked States in view of their special geographical position are excluded from the operation of the most-favoured-nation clause. A land-locked State which is not a Party to this Convention may claim the facilities and special rights accorded to land-locked States under this Convention only on the basis of the most-favoured-nation clause of a treaty between that land-locked State and the Contracting State granting such facilities and special rights.
2. If a Contracting State grants to a land-locked State facilities or special rights greater than those provided for in this Convention, such facilities or special rights may be limited to that land-locked State, except in so far as the withholding of such greater facilities or special rights from any other land-locked State contravenes the most-favoured-nation provision of a treaty between such other land-locked State and the Contracting State granting such facilities or special rights.

Article 11

EXCEPTIONS TO CONVENTION ON GROUNDS OF PUBLIC HEALTH, SECURITY, AND PROTECTION OF INTELLECTUAL PROPERTY

1. No Contracting State shall be bound by this Convention to afford transit to persons whose admission into its territory is forbidden, or for goods of a kind of which the importation is prohibited, either on grounds of public morals, public health or security, or as a precaution against diseases of animals or plants or against pests.
2. Each Contracting State shall be entitled to take reasonable precautions and measures to ensure that persons and goods, particularly goods which are the subject of a monopoly, are really in transit, and that the means of transport

are really used for the passage of such goods, as well as to protect the safety of the routes and means of communication.

3. Nothing in this Convention shall affect the measures which a Contracting State may be called upon to take in pursuance of provisions in a general international convention, whether of a world-wide or regional character, to which it is a party, whether such convention was already concluded on the date of this Convention or is concluded later, when such provisions relate:
   (*a*) to export or import or transit of particular kinds of articles such as narcotics, or other dangerous drugs, or arms; or
   (*b*) to protection of industrial, literary or artistic property, or protection of trade names, and indications of source or appellations of origin, and the suppression of unfair competition.
4. Nothing in this Convention shall prevent any Contracting State from taking any action necessary for the protection of its essential security interests.

Article 12

EXCEPTIONS IN CASE OF EMERGENCY

The measures of a general or particular character which a Contracting State is obliged to take in case of an emergency endangering its political existence or its safety may, in exceptional cases and for as short a period as possible, involve a deviation from the provisions of this Convention on the understanding that the principle of freedom of transit shall be observed to the utmost possible extent during such a period.

Article 13

APPLICATION OF THE CONVENTION IN TIME OF WAR

This Convention does not prescribe the rights and duties of belligerents and neutrals in time of war. The Convention shall, however, continue in force in time of war so far as such rights and duties permit.

Article 14

OBLIGATIONS UNDER THE CONVENTION AND RIGHTS AND DUTIES OF UNITED NATIONS MEMBERS

This Convention does not impose upon a Contracting State any obligation conflicting with its rights and duties as a Member of the United Nations.

Article 15

RECIPROCITY

The provisions of this Convention shall be applied on a basis of reciprocity.

Article 16

SETTLEMENT OF DISPUTES

1. Any dispute which may arise with respect to the interpretation or application of the provisions of this Convention which is not settled by negotiation or by other peaceful means of settlement within a period of nine months shall, at the request of either party, be settled by arbitration. The arbitration commission shall be composed of three members. Each party to the dispute shall appoint one member to the commission, while the third member, who shall be the Chairman, shall be chosen in common agreement between the parties. If the parties fail to agree on the designation of the third member within a period of three months, the third member shall be appointed by the President of the International Court of Justice. In case any of the parties fail to make an appointment within a period of three months the President of the International Court of Justice shall fill the remaining vacancy or vacancies.
2. The arbitration commission shall decide on the matters placed before it by simple majority and its decisions shall be binding on the parties.
3. Arbitration commissions or other international bodies charged with settlement of disputes under this Convention shall inform, through the Secretary-General of the United Nations, the other Contracting States of the existence and nature of disputes and of the terms of their settlement.

Article 17

SIGNATURE

The present Convention shall be open until 31 December 1965 for signature by all States Members of the United Nations or of any of the specialized agencies or Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention.

Article 18

RATIFICATION

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 19

ACCESSION

The present Convention shall remain open for accession by any State belonging to any of the four categories mentioned in article 17. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 20

ENTRY INTO FORCE

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the instruments of ratification or accession of at least two land-locked States and two transit States having a sea coast.
2. For each State ratifying or acceding to the Convention after the deposit of the instruments of ratification or accession necessary for the entry into force of this Convention in accordance with paragraph 1 of this article, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Article 21

REVISION

At the request of one third of the Contracting States, and with the concurrence of the majority of the Contracting States, the Secretary-General of the United Nations shall convene a Conference with a view to the revision of this Convention.

Article 22

NOTIFICATIONS BY THE SECRETARY-GENERAL

The Secretary-General of the United Nation shall inform all States belonging to any of the four categories mentioned in article 17:

(*a*) of signatures to the present Convention and of the deposit of instruments of ratification or accession, in accordance with articles 17, 18 and 19;
(*b*) of the date on which the present Convention will enter into force in accordance with article 20;
(*c*) of requests for revision, in accordance with article 21.

Article 23

AUTHENTIC TEXTS

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States belonging to any of the four categories mentioned in article 17.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at the Headquaters of the United Nations, New York, this eighth day of July, one thousand nine hundred and sixty-five.

APPENDIX THREE

United Nations Convention on the Law of the Sea (UNCLOS III)

Part X
Right of Access of Land-Locked States to and from the Sea and Freedom of Transit

Article 124

USE OF TERMS

1. For the purposes of this Convention:
   (*a*) "land-locked State" means a State which has no sea-coast;
   (*b*) "transit State" means a State, with or without a sea-coast, situated between a land-locked State and the sea, through whose territory traffic in transit passes;
   (*c*) "traffic in transit" means transit of persons, baggage, goods and means of transport across the territory of one or more transit States, 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 which begins or terminates within the territory of the land-locked State;
   (*d*) "means of transport" means:
      i) railway rolling stock, sea, lake and river craft and road vehicles;
      ii) where local conditions so require, porters and pack animals.
2. Land-locked States and transit States may, by agreement between them, include as means of transport pipelines and gas lines and means of transport other than those included in paragraph 1.

Article 125

RIGHT OF ACCESS TO AND FROM THE SEA AND FREEDOM OF TRANSIT

1. 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.
2. The terms and modalities for exercising freedom of transit shall be agreed between the land-locked States and transit States concerned through bilateral, subregional 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.

Article 126

EXCLUSION OF APPLICATION OF THE MOST-FAVOURED-NATION CLAUSE

The provisions of this Convention, as well as special agreements relating to the exercise of the right of access to and from the sea, establishing rights and facilities on account of the special geographical position of land-locked States, are excluded from the application of the most-favoured-nation clause.

Article 127

CUSTOMS DUTIES, TAXES AND OTHER CHARGES

1. Traffic in transit shall not be subject to any customs duties, taxes or other charges except charges levied for specific services rendered in connection with such traffic.
2. Means of transport in transit and other facilities provided for and used by land-locked States shall not be subject to taxes or charges higher than those levied for the use of means of transport of the transit State.

Article 128

FREE ZONES AND OTHER CUSTOMS FACILITIES

For the convenience of traffic in transit, free zones or other customs facilities may be provided at the ports of entry and exit in the transit States, by agreement between those States and the land-locked States.

Article 129

COOPERATION IN THE CONSTRUCTION AND IMPROVEMENT OF MEANS OF TRANSPORT

Where there are no means of transport in transit States to give effect to the freedom of transit or where the existing means, including the port installations and

equipment, are inadequate in any respect, the transit States and land-locked States concerned may cooperate in constructing or improving them.

Article 130

Measures to Avoid or Eliminate Delays or Other Difficulties of a Technical Nature in Traffic in Transit

1. Transit States shall take all appropriate measures to avoid delays or other difficulties of a technical nature in traffic in transit.
2. Should such delays or difficulties occur, the competent authorities of the transit States and land-locked States concerned shall cooperate towards their expeditious elimination.

Article 131

Equal Treatment in Maritime Ports

Ships flying the flag of land-locked States shall enjoy treatment equal to that accorded to other foreign ships in maritime ports.

Article 132

Grant of Greater Transit Facilities

This Convention does not entail in any way the withdrawal of transit facilities which are greater than those provided for in this Convention and which are agreed between States Parties to this Convention or granted by a State Party. This Convention also does not preclude such grant of greater facilities in the future.

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The Transit Regime for Landlocked States: International Law and Development Perspectives assesses the strengths and limits of existing international law related to the free access of landlocked states to and from the sea. The book analyzes whether the provisions of international law satisfy the economic demands of landlocked states, the majority of which are among the world's poorest nations. The book reviews the several principles of international law that dominated the evolution of the rights of access. It discusses both general and specific conventions, as well as treaty regimes emanating therefrom, and examines some restrictions imposed by some of those conventions, part of which are challenged by landlocked states. The book briefly comments on the ongoing international initiatives and developments aimed at addressing the theoretical as well as practical problems faced by landlocked states. These developments, which have led to the creation of legal instruments with normative value, underscore the evolutionary nature of international law as well as the perennial efforts associated with its development.

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